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SPEECH BY THE RT HON LORD OWEN TO THE OXFORD UNIVERISTY INTERNATIONAL RELATIONS SOCIETY, WEDNESDAY 17 MAY 2017

My main message is Brexit does not belong to the Conservative Party. It belongs to us all whether in different parties or people who voted Leave or Remain in the referendum. I hope today to dispel some myths and establish some facts about the European Economic Area Agreement, EEAA and why it is a potential vehicle for the 'implementation period' that should follow exiting the EU and which we will leave once we have an EU/UK trade agreement or conclude the EU is too dysfunctional to offer an agreement of mutual advantage.

What this existing EEAA transitional mechanism provides is a framework which we leave when we want to after having left the EU after two years with a further three years maximum for agreeing a trade agreement. There is no cliff edge. No point where we negotiate in good faith and find the design of Article 50 precipitates a crisis choice "accept or chaos" under this existing legal structure. David Cameron told the country before the referendum that we would invoke Article 50 while ignoring the fact that it is designed in a way that is a deterrent to leaving because of its in-built cliff edge. The design is deliberate so that in some circumstances we could be left with a 'take it' or 'leave it' offer with little time to adapt.

It was not foolish for the government to say that faced by a bad offer from the EU, which we are not allowed to change, we would leave. It would have been irresponsible to declare any other position. But it would also be irresponsible not to assert our right to remain a Contracting Party to the EEAA after we have left the EU, and if necessary to exercise our right to use the Vienna Convention on the Law of Treaties, VCLT, dispute procedure to establish in law that right.

The EEA Agreement is binding upon the Contracting Parties, one of which is the UK. It is a *multilateral* international treaty. It is not a bilateral agreement between the EU and EFTA as is sometimes supposed.

Decision-making autonomy in respect of treaties is, of course, constrained for EU Member States, *but by the EC/EU Treaties, not by the EEAA*. NEU states, as the UK will be after leaving in March 2019, retain their unconstrained treaty-making powers outside the ECJ. A major difference between the entailments of the EC/EU Treaties and of the EEAA.

As a member of EEAA during the 'implementation period' we would hope to

conclude a EU/UK trade agreement during no more than three years before the 2022 General Election. We could introduce some aspects of a UK immigration policy after leaving the EU when we know we will want to leave employers the greatest flexibility to adjust. Full immigration controls would come after giving a year's notice to leave the EEAA.

Norway makes voluntary payments to the EEA and these could provide a precedent for the UK making payments during the implementation period without being an exit fee. We could pay for three years from 2019 to 2022 based on what payment we would have been making to the EU were we still a member.

The EEA offers an existing pathway for the UK and the EU to move seamlessly through an early exit from the EU and to complete an EU/UK trade agreement in 4-5 years before the next General Election.

In the EEA Agreement text relating to Contracting Parties they are divided into two sub-lists. The first sub-list comprises EC Member States plus the EC itself[1]. The second sub-list now comprises Iceland, Liechtenstein and Norway, but it originally also contained Austria, Finland and Sweden. These three countries were moved from the second to the first sub-list when they joined the EU at the beginning of 1995. EFTA does not appear in either sub-list and it is not a Contracting Party. For Iceland, Liechtenstein and Norway: in each case it is the country's own government and parliament that is responsible for ensuring that obligations are fulfilled.

The consistent use of the label 'EFTA' throughout the Agreement is a misleading label. Iceland, Liechtenstein and Norway are the NEU (non-EU) states.

The EEA Agreement starts with Objectives and principles (Part I, Articles 1 to 7)

The primary objective (Article 1(1))

"The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA."

The EEA Agreement aims, unlike the aims of the EU Treaties, are unambiguously economic in nature, although it goes beyond free trade agreements (FTAs) in two respects. First, the scope of its coverage is broader, as indicated for example by the reference to *"equal conditions of competition"*. Second, the provisions go deeper, as

[1] The EC appears in the list of Contracting Parties because of the 'shared competence' arrangements established by the EC/EU Treaties for EC/EU Member States. For some EEAA matters the EC/EU is the responsible party (see, for example, the Safeguard Measures provisions at Article 113(3) and the two-pillar EEAA governance structure.

indicated by *"respect of the same rules"*.

The entailments (Article 1(2))

The second paragraph of Article 1 goes straight to what has become the most fundamental issues of relevance for Brexit.

"In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement: (a) the free movement of goods; (b) the free movement of persons; (c) the free movement of services; (d) the free movement of capital; (e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as (f) closer cooperation in other fields, such as research and development, the environment, education and social policy."

The first four entailments are, of course, the infamous four freedoms, which first appeared over six decades ago in the Treaty of Rome, and it is the second, *free movement of persons*, that is much the most contentious. When first introduced it was felt by many that the four freedoms were objectives or aspirations to be worked towards. Liechtenstein, a Contracting Party to the EEAA, has enforced strict limitations on immigration throughout the whole period of its participation, i.e. not just on a temporary or emergency basis.The textual content of the EEAA points to the same conclusion concerning the status of the four freedoms. They appear at the outset in the EEAA's text in Article 1 of Part I of the Agreement. Part I is headed "Objectives and Principles". The more specific *obligations* entailed by the EEAA follow in later Parts of the Agreement. They are not afforded a separate Article of their own.

The words *"in order to attain"* in Article 1(2) imply that, considered as objectives, the four freedoms are sub-ordinate or secondary to the primary aim set out in Article 1(1). If that is ambiguous then resolution of ambiguities in the EEAA, where the ECJ has no locus, calls for interpretation of the Agreement and, at least for major issues, which cannot be dealt with by conciliation procedures, the most appropriate interpretative principles are those set out in the Vienna Convention on the Law of Treaties (VCLT) Article 31(1) of which states: '*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

It is therefore very important to stress that the EEAA is a document directed toward *a very clear commercial policy object or purpose* and that interpretation of the Agreement's implications and entailments should necessarily give a high weight to that fact, consistent with the principles enunciated in the VCLT.

For example, low barriers to capital flows ("free movement of capital") may help in promoting *"a continuous and balanced strengthening of trade and cooperation"*, but there are circumstances nevertheless in which low barriers to capital movements

could facilitate the transmission and amplification of economic disturbances and imbalances. Similarly, free movement of persons might in some circumstances lead to de-population of whole regions or countries or to imbalances in the skills mix in regional/ national labour forces in areas subject to out-migration. In the *"ordinary meaning of terms"* (VCLT language), such effects can reasonably be said to hinder, not assist, achievement of the primary purpose of the EEAA (which refers to "*balanced* strengthening" of trade and economic cooperation).

The text of the EEAA indicates that its drafters and signatories were fully aware of these issues. The Agreement explicitly recognises that obligations are, to at least some extent, contingent on circumstances. When it comes to giving greater specificity to the obligations of the Contracting Parties, the Agreement consistently allows limits to be placed on free movement, provided that those limitations are "justified".

On VCLT principles, any proposed limitation on free movement can be said to be justified if it positively contributes to the Article 1(1) purposes, rather than hinders them.

The text of the EEAA makes it clear that a limitation is allowable if it serves an identified public purpose (other than the Article 1(1) aim).

It is reasonable to conclude that:

- The EEAA seeks a *lesser* degree of freedom of movement than do the EU Treaties: put the other way around, it is less constraining on the ability of national governments to intervene. This can be most easily seen by observing that the Agreement does not establish a customs union. It therefore allows for the existence of customs controls at borders between EU Contracting Party Sweden and the NEU Contracting Party, Norway. These controls signify acceptance of greater limitations on the free movement of *goods* than is allowed by the EU Treaties themselves.
- In relation to free movement of persons, eversince the Maastricht Treaty the concept of EU citizenship along with the free movement Article of the Universal Declaration of Human Rights implies the right of a person to move around within a territory that is shared with fellow citizens, unhindered by public authority. Who could disagree with that for all citiziens of the UK. The problem is that citizens as a word in the Maastricht Treaty goes beyond the UK to embrace a continent. In effect, the notion of EU citizenship has served to enhance the status of the free movement of persons entailment *in the application of the EU Treaties*. Such movement has become something close to a constitutional right in EU Member States.[2] In contrast – and this is an essential point - the EEAA does not provide for Non EU members common citizenship and free movement of persons. It remains a sub-objective,

[2] See Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram B. Wolff, "Europe after Brexit: A proposal for a continental partnership", August 2016, for a discussion of what the authors call "functional" and "constitutional" approaches to the Single Market.

subservient to the overarching *economic* purpose set out in Article 1(1). The implications of this for judicial interpretation of the entailments of the *free movement of persons sub-objective* were explicitly recognised at the time of an EEA Joint Committee decision in 2007 incorporating the EU's Freedom of Movement Directive (2004/38/EC) into the EEA Agreement (see the Annex to this paper). In a nutshell, the EEA Joint Committee recognized in 2007, very explicitly, that free movement of persons is to be interpreted differently in EU contexts and in EEAA contexts. [See Annex A] As indicated, such differentiation in interpretation had already been explicitly recognised in relation to free movement of *goods*.

- In the EEAA context, free movement of persons does not preclude the application of strict limitations on aggregate migration flows by a national government.

Crucially, for NEU states the EEAA puts the matter in the hands of national governments. The EU Contracting Parties may later question and challenge the compatibility with the EEAA of any measures adopted, but the EEAA affords the EU no authority to prevent their adoption. Liechtenstein's immigration policy is a factual illustration of this reality.

Well before the UK leaves the EU, now increasingly likely to be the end of March 2019, the UK must establish our right to continue as a Contracting Party to the EEAA. Minimalist adjustments to the text of the EEAA would be added to the list at 2(b) just as Austria, Finland and Sweden were taken off when these states acceded to the EU. There are no ambiguities to be resolved for NEU states since national governments and parliaments are fully responsible for EEAA affairs. There are no shared competence issues to address either. When the EEAA was established the UK did not join as part of an EU decision. Each EU member state made its own singular application. A demonstration that membership was made as an individual state. This separation was further confirmed by the fact that Croatia acceded to the EU significantly in advance of becoming a member of the EEA.

The EEA Agreement does not establish a customs union among the Contracting Parties: each NEU state can independently determine its own commercial policies in relation to states that are not Contracting Parties (and can also, if it so wishes, unilaterally choose to negotiate membership of the EU customs union).

In the list of commodities covered by the EEAA, the most significant exclusions are food products since the EEA Agreement does not entail participation in the common agricultural or common fisheries policies of the EU.

Article 28 of the EEAA, which covers free movement of *workers* (not persons) lies at the heart of current Brexit issues. It first specifies that freedom of movement entails that there be no discrimination based on EEA nationality in relation to employment, pay, and other conditions of work and employment (Article 28(2)). More specifically,

Article 28(3) entails rights of workers: to accept offers of employment made; to move freely within the EEA for that purpose and stay in an EEA state for employment purposes; and to remain in an EEA State after being employed there. These entailments are then immediately limited (in Article 28(4)) by dis-applying them to employment in public service. Clearly, the EEAA's signatories thought that free movement of workers could be 'too free'.

This last point is confirmed by a more general limitation on the scope of the specific entailments of Article 28(3). The entailments just listed are prefaced, at the opening of the paragraph, by:

"It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: …"

Public policy is a very broad ground for limiting the free movement of workers since governments pursue a wide range of economic and social policies.

Article 29 is the other major provision in relation to free movement of persons/workers. It provides for employees from another EEA state to have access to the social security system of the host state. Social security policy itself is a matter for individual states, but Annex VI of the EEAA, which is explicitly referenced in Article 29, contains provisions based on an EC Regulation (883/2004/EC) that seek greater social security co-ordination.

Horizontal provisions relating to the four freedoms (Part V, Articles 66 to 77)

Notwithstanding the reference to the four freedoms in its title, this part of the EEAA is concerned with the more mundane task of promoting harmonisation of market rules. The EEAA market is a set of rules that is collectively shared by participants and the overarching purpose of such rules is to facilitate exchange transactions and, for example, reduce the costs of trading.

Here as elsewhere the fine detail is contained in Annexes to the EEAA, which typically contain lists of relevant EC/EU Directives and Regulations and the modifications to them required for EEA purposes. Directives tend to be of general nature and are not directly applicable at EU Member State level and definitely not at NEU state level: national legislation is required to reflect their principles. Since general principles tend to command support more easily than the finer detail of legislation, straightforward acceptance of a Directive is usually unproblematic, provided only that it is deemed 'EEA-relevant'. Adaptations can be made at the national level, subject to normal, national processes of parliamentary scrutiny.

EU Regulations are more likely than Directives to be subject to significant amendment at the EEAA incorporation stage, as indicated in the Annexes to the Agreement. Pre-knowledge of the later, 'NUE acceptability' constraints itself has influence on the earlier drafting of EU Regulations. Of course, there will be some aspects which the UK would prefer not to apply but this will only be for the

'implementation period' likely to be at the most three years and once we leave after one year's notice the UK will be free of these too.

Cooperation outside the four freedoms (Part VI, Articles 78 to 88).

Part VI of the Agreement is concerned with strengthening cooperation among the Contracting Parties across a range of policy areas that have more indirect implications for the functioning of the Single Market. The areas explicitly mentioned (at Article 78) are: research and technological development; information services; the environment; education, training and youth; social policy; consumer protection; small and medium-sized enterprises; tourism; the audiovisual sector; and civil protection. These are also areas covered by Article 8 about good neighbourliness and will therefore be part of our longer term involvement with the EU as part of a wider Europe.

Institutional provisions (Part VII, Articles 89 to 114)

The Institutional Provisions Part of the Agreement is of considerable importance for the EEAA's operation and it is another frequently misunderstood aspect of the arrangements. In relation to the EEA Agreement, the NEU states were, at the outset, unwilling to accept the authority of the EU supra-national bodies (i.e. of the European Commission and the European Court of Justice) and hence the Agreement establishes a two-pillar governance structure with different Courts, different and joint Parliamentary scrutiny and a joint EEA Council and a joint EEA Committee for links with the EEAS.

In Part VII of the EEAA:

- The NEU institutional pillar operates on a consensual basis. Under the provisions of the Agreement the NEU states must "speak with one voice" (Article 93(2)). There is therefore no equivalent to the majority voting arrangements embodied in the EU Treaty. For an individual NEU state this provision is a potential source of 'hold-out' power, which mitigates unwanted effects that might arise for want of voting rights when Directives and Regulations are adopted by the EU, for its own purposes.
- The NEU states participate in the preparation of new EU legislation that may be of 'EEA relevance', i.e. that may affect the functioning of the Agreement. As indicated earlier, most EU regulations are not 'EEA relevant', because the overarching aims of the EEAA are much narrower than those of the EU Treaties.
- If any NEU suggestions concerning the shape of a new EU Regulation in its preparatory stage are rejected, the same Regulation still must be considered again before it can be incorporated into the EEA Agreement. In the first instance, this is a matter for the EEA Joint Committee and Council, but ultimately it is a matter for NEU state parliaments (since there is no 'direct effect'). Of necessity, new rules must be acceptable in both pillars of the

governance structure.

- In the event of a failure to agree about the form of amendments to the EEAA – which principally take the form of amendments to the Annexes that incorporate Directives and Regulations – the EEAA makes specific reference to the possibility of recourse to the notion of *equivalence* (Article 102(4)). Equivalence is a concept that has come to play an increasingly important role in international commercial agreements at the global level, including in sectors such as food and financial services. In effect, it amounts to mutual recognition of the differing rule-books of different parties when those alternative sets of rules are sufficiently similar in their purposes and effects for each rule-book to be acceptable to the other party or parties.

Article 112 states that a Contracting Party may "*unilaterally"* take appropriate measures to address *"serious economic, societal or environmental difficulties of a sectoral or regional nature"* that arise and are considered liable to persist. However, Article 113(3), which is concerned with procedural matters, goes on to say that *"For the Community, the safeguard measures shall be taken by the European Commission"*.

The relevant programmes and financing are agreed and operated collectively by the NEU states, consistent with the consensual, 'one voice' provisions of Part VII of the EEAA. Norway wished, of its own volition, to provide greater financial support for this type of programme. As well as the EEA payments, therefore, it has made additional 'Norway payments' on a unilateral basis. This precedent would allow the UK to pay some money to the EU if it was thought reasonable by the UK during the 'implementation period' and it should be our alternative offer not going along with the EU demand for an 'exit fee' which has no precedent and no basis in international law or in EU Treaty language, but is an expensive 'try on'. The payment would run for no more than it takes to reach an EU/UK trade agreement and could be justified on the basis we were benefiting from some aspects of the Single Market EEAA as a non EU NEU member. This is not an 'exit fee' but a more accurate description would be an 'implementation fee' during which the UK benefits from the EU Single Market and it would not be unreasonable to make a net payment of what we would have expected to pay in the years from March 2019 to March 2022 which would be the latest time we would be leaving the EEAA prior to the next General Election which would have to take place in May 2022.

Article 118 of the EEAA

Article 118 provides for the possibility of developing the EEAA to incorporate provisions of a more political nature, which is a direction of travel consistently sought by the EU and consistently resisted by the NEU states. Since the unanimous consent of the NEU states is required for this to occur, these states unambiguously hold the decisive cards in this arena.

Article 126

Article 126 addresses issues raised by special Member State territories like the Isle of Man and Channel Islands. The first (short) paragraph of Article 126 refers simply to the Agreement applying to territories to which the EC/EU Treaty applies, and "*under the conditions applied in those Treaties"*. Some lawyers, taking the text out of context, have interpreted this to mean that Article 126 is determinative of Contracting Party status, but that was not the original intention in the drafting of the Agreement and neither the textual context (e.g. over 80% of the text in Article 126 is concerned with the Åland Islands, which lie in the Baltic Sea) nor the object and purposes of the EEAA support that interpretation, which runs counter to the VCLT's principles. The loss of Contracting Party status by the UK would manifestly harm, not promote, the strengthening of trade (the Article 1(1) purpose), not only with the EU and its Member States, but also with Iceland, Liechtenstein and Norway and any ambiguities should properly be resolved purposively, to promote, not undermine, the stated aims (and original intentions) of the Agreement. A narrow interpretation would, in effect, seek to exploit a potential ambiguity to create a 'backdoor' means of withdrawal from the EEAA – one that would shut the existing NEU states out of the process and would, in effect, be an abdication of responsibilities to these states.

Some have argued that, post Brexit, the UK would remain a Contracting Party, but that such status would be an "empty vessel" because the EEAA would no longer apply to UK territories. It is obviously true that, post Brexit, an un-amended Article 126(1) would not specifically mention UK territories, but, as a Contracting Party to the EEAA, Article 29 of the VCLT (see above) would still apply. That is, there is a burden of proof to be discharged in order to claim that the EEAA would not apply to the territories of one of its own Contracting Parties (which, on the face of it, is a very odd claim to make): 'emptiness' cannot simply be assumed.

The simple fact is that the change in circumstances caused by Brexit calls for a simple technical, textual amendment to reflect that the UK is not an EU Contracting Party but has become an NEU Contracting Party. To resist such a minor drafting change in the Article 50 process would itself be a breach of good faith and the understanding of what the EEA Agreement is about. It would I believe also be judged a violation of the VCLT – as being contrary to the EEAA's Article 1(1) aim (trade between Contracting Parties would be harmed), would possibly be in breach of Article 3 of the EEAA, and would be in flat contradiction to the pragmatic, expedient approaches taken to the similarly simple textual amendments required when Austria, Finland and Sweden acceded to the EU or when the EEC became the EC for EEAA purposes. For these reasons, resistance to making a drafting change would be most unwise for the EU to adopt. If they did adopt such a posture the UK must be ready to use the Vienna Convention.

Article 127

These points are reinforced by the fact that the EEAA contains explicit, unambiguous provisions regarding the attainment and forfeiture of Contracting Party status. In relation to withdrawal, Article 29 of the VCLT says that: *"The termination of a treaty or the withdrawal of a party make take place: (a) In conformity with the provisions of the treaty; of (b) At any time by consent of all the parties after consultation with the other contracting States."* Article 127 of the EEAA is an explicit provision for withdrawal of a Contracting Party from the Agreement. It establishes an expedient means of withdrawal as an alternative to seeking the consent of all the parties, which in the case of the EEAA means Iceland, Liechtenstein and Norway, as well as the EU and its Member States. The high importance of the UK market for Icelandic and Norwegian interests means that irrespective of questions about legality, well before we exit the EEAA during the 'implementation period', the UK needs and wants a trading agreement with Norway, Iceland and Liechtenstein.

Article 128

Article 128 deals with issues of accession to the Agreement. Some commentators have interpreted it to mean that, having left the EU, the UK would have to become a member of EFTA to accede to the Agreement, but the UK is already a Contracting Party to the EEAA. Only if the UK first withdrew from the EEAA and only would intend to continue during the 'implementation period'.

Article 128 explains how a new Member State of the EU becomes a Contracting Party to the EEA: It *"... shall ... apply to become a party to this Agreement. It shall address its application to the EEA Council"* (Article 128(1)) and *"The terms and conditions for such participation shall be the subject of an agreement between the Contracting Parties and the applicant State. That agreement shall be submitted for ratification or approval by all Contracting Parties in accordance with their own procedures"* (Article 128(2)). This means sensibly that Iceland, Liechtenstein and Norway therefore need to give their consent, as well as the EU and its Member States.

Conclusion

The UK, in conclusion, is a Contracting Party to the EEA Agreement and there is nothing in the Agreement's provisions that convincingly serves to establish that the UK will cease to be so on withdrawal from the Treaty of Lisbon and leaving the EU. The significance of this fact is difficult to overstate in avoiding any cliff edge which the EU negotiators might force upon us in ways damaging to UK interests. The EEA Agreement does not just confer rights on the Contracting Parties, it also establishes good faith obligations.

The impending choice for the UK Government is either to:

- Give under Article 127 the one year's notice in March 2018 to withdraw from the EEAA at the time of leaving the EU in March 2019; or
- Continue as a Contracting Party through 2018 and 2019 into the 'implementation period' during which trade treaties could be agreed by the UK with the EU, and with Norway, Liechtenstein and Iceland as well as with the US and Canada and other countries.

These choices are because the notice period for Article 127 indicates that this is a decision required not later than one year after the date of Article 50 Notification of Withdrawal from the EU Treaties. If the latter option is selected, good faith requires that the UK should clarify its intentions to other Contracting Parties.

The specific, free movement of persons entailments of the EEAA are different in the EU Treaties and the EEA Agreement and were highlighted in the EEA Joint Committee Declaration set out in Annex A. Perhaps the most serious misunderstanding is to believe that the EEAA would, somehow or other, allow the EU to determine what the UK can and can't do in the field of immigration policy. It doesn't do that: post Brexit, the EEAA would provide neither the European Commission nor the ECJ with any such authority. Nor does the EEAA simply re-establish that authority within its NEU governance pillar. The NEU pillar operates with rather different principles and procedures which, by conscious design, are deferential to considerations of national sovereignty. But the UK would need discussion and agreement with Norway, Iceland and Liechtenstein and sooner they get underway the better.

After leaving the EU, EEAA Contracting Party status would be consistent with negotiating an EU/UK trade agreement during an 'implementation period'. Initially some believed the UK could negotiate an EU/UK trade agreement in two years using language and procedures under which both had been operating. However, it became clear that that timescale was not realistic, so it is necessary to adjust to an implementation period that could take up to three years and that is why in a nutshell the UK's Contracting Party status is worth continuing and in the interests of both the EU and the UK.

Note

This lecture owes a huge debt to the paper by Catherine Yarrow and George Yarrow on the EEAA originally published by the Regulatory Policy Institute in March 2017.

Annex A

DECISION OF THE EEA JOINT

COMMITTEE No 158/2007

of 7 December 2007

amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement

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Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement