UNDER EMBARGO UNTIL NOON ON 14 JUNE 2017

The Brexit process

The fact that the General Election of 2017 ended with a 'hung' Parliament could militate against a successful Brexit. On the other hand it could create a climate of party cooperation that will make for a highly successful Brexit as judged by the national interest. No one can be sure how all this will play out.

The manifestoes of both the Conservative and Labour parties came much closer to each other on leaving the EU than most people expected: even to acknowledging that we cannot remain in the EU Single Market since the 27 other EU members will not forego the founding fathers' principled position on the free movement of people and labour. There was much talk of the difference between a 'hard' and 'soft ' Brexit but without a lot of clarity or precision on what either political party wanted, let alone on individual detailed points of great concern to business, commerce or financial services.
If we are truthful none can be sure now of when the next election will come. It could be months or a couple of years but it is most unlikely to go the full five years of a fixed term Parliament.

In the period until then the electorate will be watching for any sign of political parties putting their own interests before those of the UK as a whole and woe betide anyone found wanting on this score. Voters have already shown an independence of judgement and little enthusiasm for defying referendum results, as shown in only four extra seats won by the Liberal Democrats and the large reduction in SNP seats.

A lot will depend on cross-party cooperation on shaping our UK position for an implementation period of say three years after we have left the EU and before we have nailed down all the details of an EU/UK Trade Agreement. The argument for being a Non-EU Contracting Party to the European Economic Area Agreement for this transition I spelt out in an Oxford University meeting during the election. The political case has been greatly strengthened by the realities surrounding this Parliament. Here the chapter and verse of the legal and practical case are spelt out in detail. But before doing that it is worth looking at the economic background to Brexit and Brexit risks.

Economic background to Brexit

The underlying UK strategic commercial position has both positive and negative features. The chief positive is its flexibility: it has high adaptive capabilities, and those things are particularly valuable in a period of uncertainty and change. Brexit will potentially augment those capabilities, although whether that will occur or not depends crucially on the future conduct of economic policy.

The chief negative is that there are major economic imbalances in the economy: witnessed by the trade balance and the extraordinarily high levels of credit, coupled with an extraordinarily low price of credit. These will need to be corrected one way or another, irrespective of Brexit.

The financial imbalances were chiefly caused by flawed financial regulation and since 2009 are being corrected by better regulation. The 'real economy' imbalances are more longstanding and stubborn in nature, and are connected with such things as low

investment and productivity. A surge in productive investment would be a good economic policy to pursue.

The chief problem for Brexit is uncertainty. UK businesses are generally good at adapting to change and uncertainty, but the one type of uncertainty that businesses worldwide have difficulty coping with is political uncertainty. Capital markets hate it.

The problem is almost entirely attributable to the potential scale of the downside risks associated with political uncertainty. All investment projects have a risk profile and nothing is guaranteed, but political uncertainty tends to have particularly large, proportionate effect.

Brexit risks

If major Brexit risks are associated with its effects on political uncertainty, leaving the EU was always going to increase those risks. It was a valid argument about potential economic harm, but what really matters is the quantum of harm. It could be relatively modest and abate quickly, or it could be high and protracted, or be somewhere in between.

A lot will now depend on our Brexit strategy. From a market perspective, there are worrying signs that political uncertainty is going to continue. Investors are very, very good at reading information signals, particularly financial investors who prosper or perish according to their capacity to do just that. Here are some of the signals that are troublesome:

1. HMG says that it will be a leader in seeking out mutually beneficial trade deals, including with the EU, but what has become clear is that an EU/UK trade agreement will not be agreed before we exit the EU in March 2019 and there will need to be an implementation period for any Treaty.
2. The EEA Agreement (EEAA) is the obvious place for the non-EU UK to remain in during the implementation period. Yet the UK government up until now has not said this, indeed they have given no detail, about an implementation period.
3. Whilst it might be claimed that the intention is to keep uncertainty low, not engaging with the EEAA option for the implementation period has allowed myths and distortions to continue about the EEAA.
4. HMG says that it will be a good partner on the global stage, that needs filling out by speaking openly about Article 8 which deals with good neighbourliness and making sure that Iceland and Norway are fully engaged in our strategy since the UK is their major export market.

Reducing uncertainty is part of reforming the Eurozone – an EU priority. Reducing uncertainty is part of increasing investment and managing sterling – a UK priority. Neither the EU nor the UK know what is going to happen in the world economy over the next four to five years and ensuring that the euro and sterling are solid currencies must be a vital joint objective as well as good relations between the ECB and Bank of England.

Why being a non EU (NEU) Contracting Party to the European Economic Area Agreement makes sense for the UK during the implementation period

The Contracting Parties

The EEA Agreement opens with a list of the Contracting Parties, who currently number thirty-two. Like any such Agreement it 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 EC and EFTA as is sometimes supposed. In the text the Contracting Parties 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. Other consequential textual amendments of a similarly technical nature were made to the EEEA at the same time, including to Article 126 (which is a highly significant Article for Brexit issues, see later). 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. It would be the same for the UK during a transition period. EFTA plays no role equivalent to that of the EC/EU. While references to EFTA occur well over 100 times in a short document, whereas the meaning of the words 'EFTA states' for the purposes of the Agreement is defined only once, very briefly, in Article 2 as "Iceland, the Principality of Liechtenstein and the Kingdom of Norway".

The consistent use of the label 'EFTA' throughout the Agreement to refer to the states of Iceland, Liechtenstein and Norway was likely of great convenience to the drafters of the EEAA: all three countries were members of EFTA and, if Switzerland had become a Contracting Party as originally intended, all the then members of EFTA would have been included. It is, however, a misleading label nonetheless. The body called the European Free Trade Association (EFTA) is not a key player in the EEAA. In what follows reference is made to Iceland, Liechtenstein and Norway as the NEU (non-EU) states. This will be the UK position during the transition and need not even be within EFTA formally and thereby not challenging Norway's role.

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 retain their unconstrained treaty-making powers. The EEAA does not preclude a NEU state from joining the EU Customs Union though none have done so on a negotiated basis, either temporarily or for a longer duration. It is therefore up to the UK whether it stays part of a Customs Union during an implementation period or withdraws. We therefore see here a first major difference between the entailments of the EC/EU Treaties and of the EEAA.

Another major difference is over the resolution of ambiguities in the EEAA, where the ECJ has no locus. For major issues which cannot be dealt with by conciliation

[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.

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 difficult to overemphasise the point 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.

The entailments (Article 1(2))

The second paragraph of Article 1 takes us straight to what are probably the most fundamental issues of relevance for Brexit. It reads:

"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 the 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 in the Treaty of Rome it was felt by many that the four freedoms were objectives or aspirations, i.e. things to be worked toward. It is also a matter of simple observation that 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.

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 difficult issues occur when a policy measure – which *ex hypothesi* limits free movement – either has no effect on Article 1(1) purposes or positively harms their pursuit. The question is: would such a measure be in breach of the EEAA?
The broad answer given in the EEAA's Articles is 'not necessarily: it depends on whether or not certain other conditions are satisfied'. 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), but that alone may not be sufficient justification.

A second condition is that any limitation on free movement be such that, among feasibly available policy options, it causes least disturbance to the functioning of the Agreement in achieving the Article 1(1) purposes and does not go wider than is necessary to meet the other policy objectives that motivate it.

- In relation to free movement of persons, the Maastricht Treaty led to a bifurcation, between the EU Treaties on the one hand and the EEAA on the other in the justifiable limitations on such movements that a national

government can apply. The source of the bifurcation was the introduction (by the Maastricht Treaty) of the concept of EU citizenship. In its ordinary meaning citizenship might, in line with the free movement Article of the Universal Declaration of Human Rights (which very few people in the UK would disagree with), be expected to imply the right of a person to move around within a territory that is shared with fellow citizens, unhindered by public authority. 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. In contrast, the EEAA does not provide for a common citizenship and free movement of persons remains a sub-objective, 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 Annex A to this paper). In a nutshell, the EEA Joint Committee recognised, very explicitly, that free movement of persons is to be interpreted differently in EU contexts and in EEAA contexts. 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. Rather, the Agreement seeks to restrict the ways in which such an outcome is achieved (see the discussion of the necessity criterion above). Thus, governmental controls on cross- border movements might become problematic when the controls are exercised by *administrative* methods that call for state involvement in *individual* decisions (i.e. a process that is unnecessarily restrictive of economic freedom in its general sense).

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

The Agreement sets out in Article 82 the rules for the determination of hypothecated budget contributions to the various co-operative activities, which are based on the GDPs of the participating states. There can be a certain degree of confusion about these arrangements in public debate: the notion of 'budget contributions' can convey the impression that NEU states pay over sums of money to the EU which the latter can then allocate as it wishes. The position is rather that the parliaments of the NEU states decide whether or not to join a programme, following their own evaluations of the perceived benefits and costs of participation. The funding contributions are determined formulaically in ways that are specified in Protocol 32 of the EEAA. As is true more generally, NEU states do not surrender unfettered discretions on budgetary matters in the ways that EU Member States are required to do.

Institutional provisions (Part VII, Articles 89 to 114) Two pillar governance structure

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.

- 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, e.g. the EEAA does not encompass the Common Agricultural and Fisheries Policies or a Common Citizenship.
- The NEU states have not, in becoming Contracting Parties, transferred any legislative competences to the joint EEAA bodies or *a fortiori* to the EU institutions. Thus, for example, if 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.

Fax diplomacy

Given these points it is apparent that what some Norwegians have called 'fax diplomacy' – a process characterised by mechanistic transcription of EU legislation into the EEA Agreement, without influence on that legislation – is by no means intended by, or *de facto* inherent in, the EEAA itself: the Agreement creates a capacity for significant rule-making influence and power to be exercised by NEU states. This capacity has at least three dimensions:

- Participation in the preparation of 'EEA-relevant' EU legislation.

- The hold-out power conferred by the 'one voice' aspect of the governance structure, ultimately underpinned by the ability of sovereign parliaments to reject any proposed EEA legislation.
- Where Regulations are concerned with rule-harmonisation in a particular field of activity in which a global institution is also at work, NEU states have the advantage of possessing an individual/national seat at both (EEA and global) tables. They can therefore influence EEA rule-making indirectly, via their individual voice at the global table, since global rule-making itself affects EU rules, arguably to an increasing extent.

Safeguard measures

The position then is that each of the NEU states can act unilaterally, as can the European Commission, but individual Member States of the EU cannot. Thus, unilateral resort to such measures is not possible whilst the UK is an 'EU member' of the EEAA, but it would become possible as a 'NEU member'. For example, had the UK been a NEU member of the Single Market and had he so wished, Prime Minister Cameron would have been able unilaterally to impose an emergency brake on immigration: there would have been no need to seek prior agreement from other EU leaders.

That said, it is clear from the text of the EEAA that the Safeguard Measures are intended as a temporary form of flexibility: they are hedged around with checks and balances to discourage over-easy resort to them. As discussed above, flexibility is built into earlier sections of the Agreement, for example in the form of limitations on the free movement entailments of the Agreement that can be justified on grounds of public policy. The checks and balances in the Safeguard Measures section of the EEAA are focused on problems to which some urgent and immediate response may be appropriate. In such circumstances, the risks of ill-considered responses tend to be higher. Roughly speaking, the EEEA's message to NEU Contracting Parties and (and to the European Commission) might be read as saying "don't use the Safeguard Measures option as a politically expedient substitute for better-developed policies that could address the underlying policy problems."

Financial Mechanism (Part VIII, Articles 115-117) relevant, if the UK wishes, during the implementation period to make a voluntary financial contribution to the EU Budget

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. However, 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.

These points are relevant to discussion of the 'Norway Option' in public debates about Brexit, where Norwegian 'budget contributions' have been used as a benchmark in assessing the financial entailments of UK membership of the EEAA post Brexit. It is important to note, therefore, that the Norwegian numbers comprise four elements:

- Payments associated with NEU state participation in specific European *programmes* and projects, financed by ear-marked contributions and decided in the light of the perceived, consequential benefits and costs of participation. An

oft cited example, because of its scale (and possibly because the UK is a major beneficiary), is Horizon 2020, a collective research and innovation programme aimed at improving Europe's competitiveness in international markets.

- Expenditures associated with programmes run by the NEU states themselves (not by the EU) to promote economic and social development in less prosperous EEA states, in compliance with the Financial Mechanism provisions of the Agreement.
- The voluntary Norway payments, which currently account for around 45% of all Financial Mechanism payments made by that country.
- Payments for the administrative functions undertaken by the EFTA secretariat in relation to the operation of the EEAA – and it is at this administrative- support level that the European Free Trade Association is, as an organisation, relied upon by the NEU states – and as *pro rata* contributions to administrative costs incurred by the European Commission for EEAA purposes, covering such things as provision of office space, meeting costs, etc.

The last of these elements is very small relative to the others.

Article 126 and Article 127 are not determinative of Contracting Party status and there is no automatic legal linkage between EU membership and EEAA Contracting Party status

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 Vienna Convention on the Law of Treaties', 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.

Others have argued that after leaving the EU the UK would remain a Contracting Party, but that such status would be a "legal empty vessel" – a term used by David Davis in the House of Commons on 2 February - 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 of the matter is that the change in circumstances caused by leaving the EU calls for a technical, textual amendment to reflect new realities. For the EU Commission to resist such a minor drafting change would itself be a breach of good faith participation in the EEAA (i.e. be in violation of the VCLT) – it would be 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 Commission to adopt. If they did resist the UK would have to use the VCLT and the Law on Succession of States 1978 sooner rather than later.

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.

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 that matter is moot since the UK is already a Contracting Party to the EEAA. Only if the UK first withdrew from the EEAA, via Article 127, and then reapplied to become a Contracting Party would any ambiguities in the interpretation of Article 128 need to be addressed. If that chain of events did eventuate, it would then simply be a matter of the UK applying for readmission and 'black letter' legal interpretation would almost certainly not be a constraining factor in any decision (here past consideration of membership for Turkey and for Central and East European states is relevant).

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)). Iceland, Liechtenstein and Norway therefore need to give their consent, as well as the EU and its Member States.

There is clearly no automatic, legal linkage here between EU membership and EEAA Contracting Party status on accession to the EU and, for example, Croatia acceded to the EU significantly in advance of becoming a member of the EEA. Given that international law does its best to try to support and maintain existing international

agreements – which can be precious things in a fissiparous world – *a fortiori* there is no reason to suppose that a legally automatic, consequence-free withdrawal processes is available to the UK Government.

The UK should remain in the EEAA during an implementation period

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.

Opportunistic attempts to evade proper process on the basis of specious interpretations of text stripped from context would amount to a dereliction of these obligations. The UK Government should therefore:

- Not give Article 127 notice to withdraw from the EEAA on leaving the EU.
- Continue as a Contracting Party for a period no longer than March 2022.

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 when that decision is taken, not least to allow time for discussions to proceed on technical amendments required to bring the EEAA's text into alignment with the new circumstances, ready for the day after leaving the EU, and, more substantively, to address the governance issues arising from a shift of the UK to non-EU status.

Misinterpretations of the EEAA serve to give rise to and/or to sustain a false dichotomy: they suggest that there is a necessary choice between EEAA membership *or* acquisition of capacities to pursue free trade agreements on a global basis and to limit/control inward migration flows. Being a Contracting Party to the EEAA is consistent with the existence and exercise of the latter two capacities. It is abundantly clear, for example, that the EEAA does not preclude UK pursuit of a global commercial agenda. The Agreement even goes so far as to highlight that point in its Recitals, even before the beginning of the substantive Articles themselves.

The specific, free movement of persons entailments of the EEAA are in plain sight, and differences between the EU Treaties and the EEAA were highlighted in the EEA Joint Committee Declaration of 7 December 2007 (see 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 cannot do in the field of immigration policy. It doesn't do that: after leaving the EU, 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 that, by conscious design, are deferential to considerations of national sovereignty.

After leaving the EU, EEAA Contracting Party status would be consistent with negotiating outcomes that would meet all the major concerns of most of those who

voted Leave in the Referendum. Those outcomes may take a few years and that is why Contracting Party status is the best option for the transition period while negotiations continue. The UK could give one year's notice whenever appropriate to do so.

Overall strategy

We should exit the Lisbon Treaty in March 2019 as the first step, continue as a non-EU Contracting Party to the EEAA as a second step and transition to negotiated trading agreements with the EU and with Norway, Iceland and Liechtenstein as the third step and leave the EEAA by say March 2022.

During that transition we would implement a new EU/UK trade agreement. If there is goodwill it can be agreed. If not, we can leave the EEAA at a time of our choosing on giving one year's notice. Once that UK strategy is made known uncertainty will not disappear but it will be much less and manageable. There will be no 'cliff edge', no point where we negotiate in good faith but suddenly find that we are faced, because of the design of Article 50, with a crisis choice in late 2018 of 'accept or chaos'. We will have, as we must have, time to adapt.

In conclusion

Dampening uncertainty by revealing these UK overall objectives will help market confidence in the EU and the UK. Firming up remaining in the EEAA for the implementation period as a non EU member from March 2019 to probably March 2022 as the UK's preferred option, could be expected to have strongly positive economic effects over the next four to five years and pave the way for leaving the EEAA and operating under the WTO. To pave the way for this preferably at the same time as the UK's initial statement to M. Barnier this month the UK should send separate notices to all Contracting Parties to the EEAA stating that, in respect of the UK's status under that Agreement, we are currently examining the principles and implications of the Vienna Conventions on the Law of Treaties and on Succession of States, to which we naturally consider ourselves bound (as we presume is the case for all Contracting Parties).

DAVID OWEN

14 June 2017

Note to Editors

A more detailed paper on the interpretation of the EEAA can be viewed and downloaded from Lord Owen's website: www.lorddavidowen.co.uk. Lord Owen owes a great debt in assembling this detailed factual assessment of the EEA as distinct from his political interpretation of his own to the writing of 'Studies in Regulation. The European Economic Area Agreement: A short introduction ' by Catherine Yarrow and George Yarrow published by the Regulatory Policy Institute (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.