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# BREXIT: LEGAL RAMIFICATIONS OF INITIATING ARTICLE 50 TEU FOR COMPANY ESTABLISHMENT IN THE EU

Bachelor thesis

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other
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Tallinn 26th of April 2017

Tommi Keränen

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## List of Abbreviations

AFMP – Agreement on Free Movement of Persons between EU and Switzerland

Brexit – British exit from the EU

EEA – European Economic Area

EFTA – European Free Trade Association

EFTA-EEA – Term to separate the EFTA states that are part of the European Economic Area from the EU states that are in the EEA, and Switzerland (EFTA state that is not part of the EEA)

EC – The European Community; The predecessor of the European Union

EU – The European Union

EU-EEA – Term to separate EU states from the EFTA states that are part of the EEA

MS – Member State

NPU – The Nordic Passport Union

Swiss Model – The way Switzerland has engaged in bilateral treaties with the European Union

TEU – Treaty of the European Union

UK – The United Kingdom, consisting of England, Wales, Scotland, and Northern Ireland

## Introduction

The Brexit, abbreviation from British Exit,[1] referendum on the 23 June 2016 was a controversial one as it was the first of its kind within the European Union (EU). The outcome came as a surprise to the EU as well as the United Kingdom (UK) and caused the prime minister of the UK to resign. For a while a disarray was shown in the aftermath of the referendum as the political leader in the UK did not want to take on the responsibility on leading the Brexit (as shown from the resignation of the Prime Minister David Cameron) and this showed how complex the issue is. The Brexit negotiations have been going on in the UK and with the EU for multiple months but even the decision of triggering the Article 50 of the Treaty of European Union (TEU) is under dispute as the Brexit affects legal policies of almost all areas of law and no consensus is made on what type the Brexit ought to be done. Even the legal right to trigger Article 50 TEU by the government was put under question and resulted in court hearings all the way up to the Supreme Court of the UK.

The Brexit is an unprecedented case in triggering the Article 50 TEU as no member state has left the EU before. Issues on how exactly the Brexit should be executed and what legal ramifications the potential options have not only cause legal uncertainty, but also economic instability. The Brexit is a broad topic and, as such, too broad to be analysed in a bachelor thesis. Therefore, the focus of this research paper will be limited to the legal consequences of the Brexit for company establishment and, by extension, freedom of establishment. The analysis of the best possible outcomes and their advantages in comparison to each other are essential as the article 50 TEU is available for any EU member state. Thus, the options reviewed in this research paper are possibilities to other member states; should they wish to leave the EU and pursue other means of co-operation with it. Fundamentally, this paper analyses the possible outcomes that any member state triggering article 50 TEU has to weight in while making the decision of exit.

During the Brexit process the UK has various options to negotiate with the EU on what they would want to keep from the *acquis communautaire* in their co-operation between the parties. The Author sees three potential options on how this will end: First, the UK may opt to

[1] The term British exit, or Brexit, as such is an incorrect term is incorrect as the Great Britain (or Britain) only includes England, Scotland and Wales. The correct way would be to discuss about the exit of United Kingdom as the exit also includes the Northern Ireland. Nevertheless, to ease the discussion the Author will continue to use the coined term Brexit.

reverting into the European Free Trade Association (EFTA) and through it to the European Economic Area (EEA), i.e. joining the EEA agreement instead of staying in the EU. Secondly, the UK may opt in following the 'Swiss model' and engage in various bilateral treaties with the EU on separate legal areas. Third, the UK may sever their ties completely to the EU; opting not to negotiate and instead cease the applicability of any EU law in the UK completely. The Author believes that the third option is highly unlikely as it would sever any gains that the UK previously has had with it most important market area, the internal market, and even though The British Isles are separated from rest of the European continent by sea; all the neighbouring countries to the UK are part of the EEA and the internal market. Therefore, the focus will be in the first two options. Both of the options have different outcomes and differing legal ramifications and thus, it is essential to analyse which option would be more advantageous for both the UK and the EU in the point of company establishment. It is the aim of this paper to find out the arising difficulties in company establishment and the possible actions to minimise said difficulties caused by Brexit in order to increase the legal certainty and therefore encourage international company establishment.

It is important to notice that due to historical context in multiple instances the Author refers to the European Union (EU) as its predecessor, the European Community (EC). This is commonly due to the fact that some of the actions explained throughout the paper were done by the EC and they are continued, after the name change by the EU. Of the EFTA-EEA model the author will focus on the Norway model in the light of the economic impact and size of the country can be seen as somewhat similar to the UK especially in comparison to the other EFTA states. The reason on Norway being an EFTA-EEA state instead of an EU member state can be seen in the Norwegian governments' desire to participate in European integration even though the notion of the membership has been rejected in two referendums.[2]

The thesis is divided into four chapters. The first chapter will focus on the current freedom of establishment and in the Article 50 TEU. The second chapter focuses in the EFTA and the EEA and it will try to answer the first research question '**how does the Brexit with a view to EFTA and EEA affect company establishment to In the EU?'** The third chapter will be focusing in the Swiss model of treaty forming and it aims to answer the second research question '**how does the Brexit with a view to Swiss model affect company establishment in the EU?'** In this chapter the author will also focus and analyse, with comparison to the

[2] Eliassen, K. Sitter, N. Ever Closer Cooperation? The Limits of the 'Norwegian Method' of European Integration. Scandinavian Political Studies 2003, 26(2), pp 125-144, p 127.

current Swiss model, the relevant parts of the UK's white paper[3] on the Brexit. The white paper shows the Government's view on what they want to accomplish in the negotiations. The third research question is '**What kind of actions can be made to ease company establishment caused by either Brexit option?'** and this will be analysed in the fourth chapter of the research paper. The aim of the paper is to confirm the hypothesis which is as follows:

'**Triggering Article 50 TEU and leaving the EU in the form of the Brexit in which the UK would stay in the European Economic Area similar to EFTA countries is the most innocuous option for both the UK and the EU. Reason for this is that it would cause most of the EU legislation on company establishment to be applied in order to keep the EEA functioning as seamlessly as possible and, therefore, no changes to the law and no new legal requirements to companies established to UK from the EU and vice versa is required.**'

The research method for this paper is mainly qualitative with comparing academic articles and relevant legislation while taking into account relations between the EU and EFTA-EEA countries, and the EU and Switzerland. There is also focus in the relevant case law of the CJEU and the EFTA court to clarify the similarities and differences between the different agreements on company establishment.

[3] The United Kingdom's exit from and new partnership with the European Union White Paper.

# 1. Freedom of Establishment and Article 50 TEU

## 1.1. Freedom of Establishment

### 1.1.1. Legislation of United Kingdom on Freedom of Establishment

To begin with identifying and analysing the Brexit and its potential impacts it is of great importance to first identify what it actually is that the paper is focusing on. Therefore, the author will start the research paper with briefly identifying the legislation of European Union in relation to the company establishment and seeing how it is assimilated to the legal system of the United Kingdom. It is also essential to see what the article 50 TEU actually is and how it can be triggered.

The United Kingdom is currently still part of the European Union and the legislation of the EU is connected to the UK legal system with the 1972 European Communities Act. The section 2(2) of this act enables the government ministers to implement the required changes of the EU legislation via statutory instruments. The 1972 European Communities Act has been amended in accordance of signing and ratifying the later treaties of the European Union, the last amendment being the 2008 European Union (amendment) Act, which gives effect in the law of the UK to the Lisbon Treaty (2007). The UK, however, enjoys a differentiated relationship with the EU in comparison to all other member states. Although not related to the freedom of establishment *per se* the UK has a permanent opt-out from the euro, the Schengen area, and aspects of Justice and Home Affairs and the Charter of Fundamental Rights.[4] The relevance of not belonging to the euro and the Schengen area are the most important in relation to company establishment as there are already some hindrance to movement of persons and capital.[5]

In a case of legal actions against companies the UK follows the incorporation theory, i.e. the company law of the country where the company is incorporated and registered is applied.[6] So in order to fall within the scope of the UK legislation; the company needs to be registered in

[4] Cardwell P. The 'hokey cokey' approach to EU membership: legal options for the UK and EU. Journal of European Public Policy 2016, 23(9), pp.1285-1293, p 1286, dx.doi.org/10.1080/13501763.2016.1174528 (08.10.2016).

[5] Not belonging to the Euro causes transactional cost already just when changing the currency. The Schengen area bases its ideas on free movement without border checks. When moving to the UK from EU and vice versa, border checks are active.

[6] Wooldridge, F. Uberseering: Freedom of Establishment of Companies Affirmed. European Business Law Review 2003, 14(3), pp 227-236, p 229.

the UK.[7] More specifically this means registration in England, Wales, Scotland, or Northern Ireland as they are treated as separate entities within the UK. Some, but not all, countries in the EU instead follow the Real seat theory. This means that the legislation of the country, where the actual seat (or headquarters) of the company is located, is applied.[8]

### 1.1.2. Freedom of Establishment in the EU Primary legislation

#### *1.1.2.1. Article 49 TFEU*

Freedom of establishment is right that can be found in Articles 49-54 of the Treaty of Functioning of the European Union (TFEU) and the main article for Freedom of Establishment is the article 49 TFEU:

*"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*

*Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."*

To analyse the article 49; the first paragraph sets a prohibition to restrict the freedom of establishment of nationals of another MS. This is also known as Primary Freedom of establishment, i.e. establishing a new company all together. This prohibition on restrictions is applied likewise in the setting-up of agencies, branches or subsidiaries. Such establishment is Secondary Freedom of establishment. The prohibition does not, therefore, apply on restrictions on nationals outside the Member States.

[7] Gerner-Beuerle, C., Schillig, M. The Mysteries of Freedom of Establishment After Cartesio. International & Comparative Law Quarterly 2010, 59(2), pp 303-323, p 314.
[8] Wooldridge, F. (2003), *Supra* Nota 6, p 228.

The second paragraph focuses on the equal treatment of nationals of MS and nationals of another MS, i.e. the rules on taking up and pursuing activities as self-employed persons are the same to nationals of any member state (principle of national treatment). The article 49 applies to natural and legal persons alike (with the reference to article 54). Therefore, a company that has been established in a MS, or which has a genuine economic link to a MS (e.g. a subsidiary), has the right to rely on the freedom of establishment when planning to relocate headquarters or establish a secondary establishment in another MS.[9] The prohibition set by the article 49 is not absolute, but rather common rule, and restrictions that go against the prohibition must be justified. [10]

*1.1.2.2. Differentiation from the freedom to provide services*

Another relatively similar freedom to free movement of establishment is the Freedom to provide services which are regulated in the articles 56-62 TFEU. The Freedom of establishment ought to be distinguished from Freedom to provide services as different laws are applied to them. Commonly the Gebhard test, from the Case C-55/94, is used to distinguish provisions of services from establishments:

*"25 The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom"*

*"The temporary nature of the provision of services […] is to be determined in the light of its duration, regularity, periodicity and continuity.[…] [T]he provider of services […] may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question"*[11]

[9] Craig, P., De Búrca, G. EU Law text, cases, and materials. 6th ed. New York: Oxford University press 2015, p 810.

[10] Justifications to restrict the freedom of establishment are set in article 52 TFEU, whereas the freedom of establishment may be restricted in certain cases on the grounds of public policy, public security or public health. This does not however allow a member state to exclude an entire economic sector from applying the principles of freedom of establishment (Case C-496/01 *Commission v France* [2004]).

[11] Case C-55/94 - *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995], paragraphs 25 & 39.

The Freedom of Establishment's crucial features are the 'stable and continuous basis' in which professional or economic activity is carried on and they have established within the host member state. In the case of Freedom to provide services the temporary nature of the activity is of essential in the evaluation of difference. This temporality is evaluated via its 'regularity, periodicity and continuity' and there is no establishment in the host member state, even if there may be some infrastructure established to complete the provision of services.[12]

#### 1.1.3. Direct applicability and supremacy of EU primary legislation

The primary legislation of the European Union (EU) is regarded as directly applicable to member states as asserted by the doctrine of direct effect in the case *Van Gend en Loos*.[13] Additionally, the primary legislation enjoys supremacy over national law; it was held in the *Costa v ENEL* case that Community law 'could not be overridden by domestic provisions, however framed'.[14] In the section 2(4) of the 1972 European Communities Act it is also stipulated that all UK legislation shall have effect 'subject to' directly applicable EU Law, which in essence confirms the CJEU doctrine of direct applicability in the national legislation of the UK.[15]

### 1.2. Triggering article 50 of the Treaty of European Union

#### 1.2.1. How can the UK trigger the article 50 TEU

After the positive UK referendum for leaving the EU; the next step for the government is to invoke the article 50 Treaty of European Union (TEU), which provides that '[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional

[12] Craig, P., De Búrca, G. EU Law text, cases, and materials, 6th ed. New York: Oxford University press 2015, p 797.
[13] Case 26/62 *NV Algemene Transport – en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963].
[14] Case 6/64 *Flaminio Costa v. ENEL* [1964].
[15] Burke C., Hannesson Ó., Bangsund K. Life on the Edge: EFTA and the EEA as a Future for the UK in Europe. European Public Law 2016, 22(1), pp 69-96, p 71.

requirements'.[16] Additionally, it is important to notice the decision of the Supreme Court ([2017] UKSC 5), given on 24 January 2017, which in its ruling stated that the government cannot trigger the Article 50 TEU without an act of parliament authorising it first in any form of legislation of the parliament's choosing.[17] The Court's decision still held that even if no legislation is made, politically the referendum had political effect and thus there is a risk of political deficiency if no act is made.[18] Due to this the European Union (Notification of Withdrawal) Bill 2016-17, or the Brexit bill, was under parliamentary consideration. On February 8th, The House of Commons voted 494 to 122 for the passing of the bill in the third hearing.[19] The Brexit bill received royal assent on 16 March and this led to the UK's Prime Minister Theresa May to sign and hand the letter triggering article 50 TEU to the EU Council President Donald Tusk on 29 May.

When deciding to exit the EU the member state in question is urged to negotiate an agreement with the European Council.[20] During the negotiations the withdrawal is arranged with any frameworks on future relationship with the Union taken into account.[21] The EU legislation would apply until the withdrawal agreement enters into force, or alternatively, until two years ensuing the notification of intention to leave has passed, unless the European Council unanimously decide to extend the period together with the UK.[22]

### 1.2.2. Options after triggering Article 50 TEU

The Brexit leaves the UK with two potential options after triggering the Article 50: First option would be for UK to aim for returning into the EFTA, and consequently EFTA-EEA, and aim to replace the 1972 Act with an Act implementing the EEA Agreement.[23] The second

[16] Butler, G., Dagnis Jensen, M., Snaith, H. 'Slow change may pull us apart': debating a British exit from the European Union. Journal of European Public Policy 2016, 23(9), pp 1278-1284, p 1279-1280.
[17] [2017] UKSC 5, paragraphs 121, 122.
[18] [2017] UKSC 5, paragraph 124.
[19] The House of Commons' transcript of the 3rd reading: hansard.parliament.uk/Commons/2017-02-08/debates/B9545C0C-B593-43E4-A12E-2AD5D47DEFE4/EuropeanUnion(NotificationOfWithdrawal)Bill (22.02.2017).
[20] Burke C., Hannesson Ó., Bangsund K. (2016), *Supra* Nota 15, p 75.
[21] *Ibid*, p 75.
[22] Łazowski, A. Unilateral withdrawal from the EU: realistic scenario or a folly? Journal of European Public Policy 2016, 23(9), pp 1294-1301, p 1296-1297, dx.doi.org/10.1080/13501763.2016.1174529 (08.10.2016).
[23] Burke C., Hannesson Ó., Bangsund K. (2016), *Supra* Nota 15, p 76.

option would be to aim for a 'Swiss model' with the EU, i.e. bilateral treaties on legal areas of interest.[24]

As stated in the introduction; there is a third option within the article 50 TEU (specifically in paragraph 3) which sets into action if the two years have passed and no decision is made to extend the period. This is seen as a unilateral withdrawal from the union. The reason why the author sees the two former options as the best potential options is because the author agrees on Adam Łazowski's view that unilateral withdrawal (option three) in reality creates legal and economic uncertainty and a legal vacuum with its neighbouring countries (EU and its MS) and with any country the EU has concluded an international agreement with.[25] This third option would put the companies established in the UK, or wishing to establish into the UK from an EU MS, in a situation where the legal parameters of their rights and obligations would be more or less *terra incognita* as the legislation on freedom of establishment would not apply. Most likely the UK companies wishing to establish to the EU would be considered as any other 3rd country company in the eyes of the EU and treated as such, but what is the point of view towards UK companies which are already established in the EU MS and vice versa? It is argued that EU citizenship would deteriorate to that of a 3rd country national, but simultaneously already acquired rights ought to be protected.[26]

In summary, the freedom of establishment is thoroughly protected within the EU and consequently in the legislation of UK. The economic interests of the country would result in the possible will to stay as a part of the internal market due to the gains of obstruction free trade within the internal market, but this is not necessarily what will happen. Unless the UK and the EU will reach to conclusion on what the exit agreement will include; the Brexit would cause major legislative reforms. These reforms would cause previous EU legislation to be repealed and would require to be replaced with new, separate legislation by the UK which may radically differ from the previous. The two best possibilities for this departure from the EU would be that either the UK will become a part of the EEA treaty and follow the rules of the treaty, while being able to remove the previous EU legislation which is not part of the EEA from its legislation, or the UK could negotiate for separate bilateral treaties with the EU and only keep the legislation from the agreed areas of the treaties.

[24] *Ibid*, p 76.
[25] Łazowski, A. (2016), *Supra* Nota 22, p 1294.
[26] Łazowski, A. (2016), *Supra* Nota 22, p 1300.

# 2. European Free Trade Association & European Economic Area

## 2.1. History

### 2.1.1. What is the EFTA and the EEA

In this chapter, the focus is in identifying the EFTA and consequently the EEA. After the identification of EFTA and EEA the paper will focus in the possibilities and current problems of the EEA in the point of view of the company establishment. Brief examination of the requirements of joining both subsequent agreements and the possible issues on their parts are also included to this chapter.

The European Free Trade Association (also known as EFTA) was established by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and United Kingdom via signing the Stockholm Convention in 1960.[27] Finland, Lichtenstein and Iceland became members of the EFTA later.[28] The current EFTA countries are Iceland, Lichtenstein, Norway and Switzerland as the other countries, Austria, Denmark, Finland, Portugal, Sweden, and UK, decided to accede to the EC (which later became EU).

Three of the four current EFTA countries are part of the European Economic Area (EEA) via the EEA agreement and therefore they are required to follow the legislation that is imperative to the smooth and unobstructed free trade within the EEA.[29] It is important to notice, that Switzerland rejected the participation in the EEA[30] by referendum and instead it has opted to sign several bilateral treaties with the EU. This is also known as the Swiss model.[31] The agreement was originally signed on 2 May 1992 in Oporto between the ministers of 19 European Community (EC) and EFTA member states and the EC Commission in order to create the EEA.[32] On the same day, the ministers EFTA states also signed two agreements on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement) and on a standing committee of the EFTA states, through of which the EFTA

[27] Gundersen, F. The Right of Establishment within EFTA: A Comparison with the EEC. Scandinavian Studies in Law 1971, 15, pp 75-106, p 77.
[28] *Ibid*, p 77.
[29] Egeberg, M., Trondal, J. Differentiated Integration in Europe: The Case of EEA Country, Norway. Journal on Common Market Studies 1999, 37(1), pp.133-142, p 133.
[30] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 126.
[31] Cooper B., See EU later: Brexit and us. Governance Directions 2016, 68(7), pp 414-417, p 415.
[32] Norberg, S. The Agreement on a European Economic Area. Common Market Law Review 1992, 29(6), pp 1171-1198, p 1171.

states were able to create among themselves the necessary institutions and structures required to by the EEA.[33]

### 2.1.2. EU legislation within the context of the EEA

The legislation of the EEA is the relevant *acquis communautaire* related to the internal Market, namely to the four freedoms and competition law.[34] Additionally, the areas of co-operation are also extended to the areas of education, research, environmental protection, social policy, statistics, and consumer protection.[35] The reasoning behind this extension is that these fields of legislation complement the single market.[36] Agricultural and fisheries policies, with exception to veterinary affairs, are excluded from the agreement.[37] The agricultural sector is not included due to differential views on subsidies and protectionism and on the fisheries policies; the main issues are related to access to waters, management of fish stocks, subsidies, and trade barriers against refined fish products.[38]

The agreement between the EU and the EFTA implies that the internal market legislation has to be adopted by the EEA countries on a continuous basis.[39] Adoption of new EU legislation is done via EEA joint committee decisions whereas the new legislation is added to the EEA agreement as an Annex or Protocol. Additionally, unlike in the EU; the EEA agreement requires even the regulations must be implemented directly to the national law in order to become applicable.[40] There is a possibility for the EFTA countries to veto new EU legislation from being incorporated of the EEA agreement, but such act may cause EU to suspend the relevant part of the agreement.[41] The reason for this is that the legislation presented to the EEA council for implementation is already agreed upon among the EU member states in the Council of Ministers and presented as 'take it or leave it' choice.[42] Therefore, the veto right is

[33] *Ibid*, p 1171.
[34] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 133.
[35] Egeberg, M., Trondal, J. (1999), *Supra* Nota 29, p 133.
[36] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 134.
[37] Egeberg, M., Trondal, J. (1999), *Supra* Nota 29, p 133.
[38] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 134.
[39] Egeberg, M., Trondal, J. (1999), *Supra* Nota 29, p 133.
[40] Burke C., Hannesson Ó., Bangsund K. (2016), *Supra* Nota 15, p 79.
[41] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 139.
[42] Kux, S., Sverdrup, U. Fuzzy borders and adaptive outsiders: Norway, Switzerland and the EU. Journal of European Integration 2000, 22(3), pp 237-270, p 242.

much of an empty threat and more of a formality than an actually effective method. The EEA agreement is combination of best of two worlds; it extends to the Single Market to the agreeing EFTA states, but it restricts the same states from the decision-making system. Thus there is no danger that the prospect of acceding to EU would be unfavourable.[43]

## 2.2. Joining EFTA and EEA

### 2.2.1. Joining the EFTA

Opting in joining the EFTA and EEA would be a great opportunity in the legislative point of view as most of the required legislation would already be the same, i.e. the EEA law covers virtually no areas which EU law does not; and the accession to the EFTA and EEA would be comparatively simple.[44] Additionally, the UK would basically already fulfil the (mainly economic) criterion for joining the EFTA.[45] To re-join the EFTA the UK will have to ratify the EFTA Convention[46] in a similar manner as any international treaty. Of course this re-joining would require the assent from the current EFTA state's governments, i.e. Iceland, Norway, Switzerland and Lichtenstein.[47]

### 2.2.2. Joining the EEA

After joining the EFTA the UK would have a possibility to accede to the EEA Agreement as the current requirement for acceding is to be a member state to either EU or EFTA (Article 128 EEA Agreement).[48] According to the rules of accession in Article 128 of the EEA agreement "any European State becoming a member […] of EFTA may apply to become a party to this Agreement. It shall address its application to the EEA Council". The UK basically then, as implied by the article, has to make an application to become a member of the EEA. If the UK would wish to become an EEA member state without joining the EFTA

[43] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 129.
[44] Burke C., Hannesson Ó., Bangsund K. (2016), *Supra* Nota 15, p 77.
[45] Burke C., Hannesson Ó., Bangsund K. (2016), *Supra* Nota 15, p 77.
[46] More accurately: *Convention establishing the European Free Trade Association*, formed at Stockholm on 4 Jan. 1960, amended at Vaduz on 21 Jun. 2001.
[47] Burke C., Hannesson Ó., Bangsund K. (2016), *Supra* Nota 15, p 77.
[48] Łazowski, A. (2016), *Supra* Nota 22, p 1297-1298.

amendments to Article 128 EEA would be required to facilitate membership to states not part of the EU or EFTA.[49] The next step is more complicated because instead of only getting the assent from the EFTA-EEA states[50]; consent is also required from the EU-EEA states.[51]

Gaining the consent from all EEA MS is a difficult situation as, on the one hand, there is reasoning that EU states would agree to such suggestion so that many valuable aspects of the UK-EU trade relationships would be preserved – including the four freedoms with exclusion of Common Agricultural Policy and Common Fisheries Policy.[52] On the other hand, there may be opposition to this due to earlier concerns during the formation of EEA agreement from EU member states where they were perplexed with possible dilution of the process of integration.[53] Therefore, at the time of conclusion the EEA was qualified by some people as a poor substitute for accessio, with a deterring influence on possible future members.[54]

This concern of dilution when choosing to opt to EFTA-EEA instead of EU-EEA may arise again in the post-Brexit world due to Brexit showing a possible precedent to transition into EFTA-EEA from EU-EEA. This would in a sense give a possibility to 'cherry pick' the policies best fitting to a state while avoiding certain policy areas and cause EU member states to worry that other MS would follow in UK's footsteps. The worry of dilution was prevented during the formation of EEA Agreement with the principle parameter whereas the EFTA-EEA states do not have any decision making powers within the EEA.[55] The EFTA-EEA countries are, however, allowed into the institutions and therefore, they are able to influence the decision shaping process and consult on matters.[56] Norway, for example, has contributed to the EU with participating in multiple EU programmes and taking part in EU agencies.[57] Additionally, Norway has gone beyond what EEA has to offer and associated with EU in joining in, for example, the Schengen agreement.[58] Therefore, there is a possibility to extend the areas of co-operation beyond of what the EEA provides but the possibility to opt out of already agreed policies of the EEA is unlikely. In the end, there is no real way of telling how

[49] *Ibid*, p 1297-1298.
[50] i.e. Norway, Iceland, Lichtenstein.
[51] Burke C., Hannesson Ó., Bangsund K. (2016), *Supra* Nota 15, p 77.
[52] Burke C., Hannesson Ó., Bangsund K. (2016), *Supra* Nota 15, p 77-78.
[53] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 129.
[54] Toledano Laredo, A. The EEA Agreement: An Overall View. Common Market Law Review 1992, 29(6), pp. 1199–1213, p 1203.
[55] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 130.
[56] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 139.
[57] Hillion, C. Integrating an Outsider: An EU Perspective on Relations with Norway. European Foreign Affairs Review 2011, 16(4), pp 489-520, p 496.
[58] *Ibid*, p 504.

the EU member states will react when the situation arises but there are significant advantages for both the EU and the UK if the UK were to join the EEA. Many important aspects of the earlier relationship between the UK and the EU would be preserved and the deal would be easier for EU MS to accept due to the UK not getting a tailored 'parachute' deal with the EU, but instead has to agree to already premade EEA agreement.[59]

### 2.3. Effects of joining the EFTA-EEA

2.3.1. Similar legislation and uniform interpretation

*2.3.1.1. Legislation and EFTA Court*

As previously stated, the UK joining in the EFTA and EEA would reduce the areas of law that would be influenced by the *acquis communautaire* only to areas related to the internal market. Even within the internal market legislation, however, some areas are not included into the EEA agreement. Such areas like taxation rules[60] and agricultural and fisheries policies are not included into the EEA agreement.[61] In relation to the research matter of this article the fundamental freedoms of the EU are almost exactly similar to the EEA agreement.[62] The EEA agreement is strongly different from the EU treaties as it essentially only creates rights and obligations between the contracting parties, but unlike the EU treaties, there is no transfer of sovereign rights.[63] This is ideal for the UK as one of the key arguments for Brexit was to regain sovereignty.

Instead of preliminary ruling in the CJEU; the EEA agreement has another judicial body: the EFTA court. The EFTA court and CJEU both interpret the EEA rules independently on international level as the ECJ refused to approve the original plan for a joint EEA court in 1991.[64] Even though the EFTA court is an independent court, it is obliged by Article 6 EEA to conform with the CJEU case-law prior to signature of EEA agreement (1 May 1992).[65] Additionally, in the Article 3(2) Surveillance and Court Agreement the EFTA court is obliged

[59] Burke C., Hannesson Ó., Bangsund K. (2016), *Supra* Nota 15, p 78.
[60] Fredriksen, H. The EFTA Court 15 Years On. International and Comparative Law Quarterly 2010, 59(3), pp. 731-760, p 740 dx.doi.org/10.1017/S002058931000028X (08.10.2016).
[61] Egeberg, M., Trondal, J. (1999), *Supra* Nota 29, p 133.
[62] Fredriksen, H. (2010), *Supra* Nota 60, p 745.
[63] *Ibid*, p 735.
[64] Forman, J. The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and Its Implementation by the Two EEA Courts. Common Market Law Review 1999, 36(4), pp 751-782, p 752.
[65] Fredriksen, H. (2010), *Supra* Nota 60, p 733.

to '*pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement*'. The CJEU, on the other hand, has no corresponding obligation in the EEA agreement to give consideration to EFTA court case-law.[66] This obligation to follow case-law in the EEA culminates in the *Ospelt* case with the principle of uniform interpretation, whereas the ECJ stated that:

*'[O]ne of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, […] [i]t is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly within the Member States.*'[67]

The EFTA court works in a similar way as the CJEU in giving the EFTA-EEA states rulings on issues in the form of advisory opinion.[68] While hearing parties and giving judgements the EFTA court pursues maintaining a homogenous EEA through dynamic interpretation of the Agreement.[69] It is argued that the homogeneity between EEA law and EU law is a *conditio sine qua non* for the object of extending the internal market to the EFTA-EEA states.[70]

*2.3.1.2. The court and the four freedoms*

The EFTA court has major importance in protecting the four freedoms and creating legal certainty for natural and legal persons alike. In its first case, *Restamark*,[71] it was declared that there is no direct effect of EEA legislation as such, but that individuals could claim, on national level, any rights that could be derived from implemented provisions of the EEA Agreement provided they are unconditional and sufficiently precise.[72] In *Einarsson* case,[73] the EFTA court created primacy of the EEA legislation via obliging EFTA states to adopt

[66] Fredriksen, H. (2010), *Supra* Nota 60, p 733.
[67] Case C-452/01 *Ospelt* [2003], paragraph 29.
[68] Forman, J. (1999), *Supra* Nota 64, p 780.
[69] Fredriksen, H. Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area. European Law Journal 2012, 18(6), pp 868-886, p 869-870.
[70] *Ibid*, p 883.
[71] Case E-1/94 - *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994].
[72] Fredriksen, H. (2010), *Supra* Nota 60, p 736.
[73] Case E-01/01 - *Hörður Einarsson v The Icelandic State* [2002].

special statutory provision which would ensure the primacy of implemented EEA legislation over other rules of law.[74] This rule was also confirmed in the Protocol 35, which is an integral part of the agreement.[75] What this means in the view of company establishment is that the rights of freedom of establishment, which are conferred to EU citizens via the TFEU, are virtually the same as the rights of freedom of establishment for citizens of EEA states.

As previously stated, there rights of individuals are protected in implemented legislation, but there is no direct effect within the EEA provisions. Therefore, there is no protection of rights of provisions that are not implemented within the national legislation. The reasoning for this is the fact that instead of an intergovernmental system with separate sovereign powers the EEA agreement is an international agreement and the legislation within must be implemented for it to enter force. This is an issue for legal certainty as individuals could not rely on their right in cases of lack of implementation or incorrect implementation. To counter this the EFTA court has ruled for a principle of state liability in a case where a member state has breached EEA obligations.[76] This state liability was in the conclusion of the controversial *Sveinbjörnsdóttir* case where the case was about incorrect implementation of a directive integrated in the EEA agreement. The court ruled that regardless of no actual state liability stated in the provisions of the EEA agreement in light of the homogeneity objective, right of equal treatment and equal opportunities objective, and the obligation stated in Article 3 EEA oblige the contracting parties to provide compensation for loss or damage resulting from incorrect implementation of the directives.[77]

### 2.3.2. Discrepancies in homogeneity

#### *2.3.2.1. The EEA agreement and Treaties of EU*

There are also some issues in relation to the EEA agreement with the EU treaties. There has grown a gap within the treaties of the EU and the EEA agreement. The EEA agreement was negotiated between 1990 and 1992 and therefore, it reflects the substantive parts of the main

[74] Fredriksen, H. (2010), *Supra* Nota 60, p 737.
[75] Toledano Laredo, A. (1992), *Supra* Nota 54, p 1206.
[76] Harbo, T. The European Economic Area Agreement: A Case of Legal Pluralism. Nordic Journal of International Law 2009, 78(2), pp 201-224, p 204.
[77] Case E-09/97 - *Erla María Sveinbjörnsdóttir v Iceland* [1998], paragraphs 60-63.

part of the EEA agreement still mirror those of the EC Treaty of that time.[78] After 1992 there have been various amendments to the EU primary law through Treaties of Maastricht (1992), Amsterdam (1997), Nice (2001), and Lisbon (2007) which are not reflected and added to the main part of the EEA Agreement.[79] To fix this by updating the agreement assent from all contracting parties are required, and regardless of the enquiry made by the EEA EFTA states in 2001 for the possibility of such update it has yet to happen as the EU rejected it on grounds of capacity[80].[81] Fortunately the changes made by the treaties to the primary law, in relation to the internal market, are rather limited but it may, however, cause difficulties in the interpretation of the provisions of the treaties as the political context and the objective of the treaties differed.[82]

*2.3.2.2. EFTA and CJEU Courts fixing the gap*

Since the *Ospelt* case[83] the CJEU has given various judgements, where the provisions of EEA agreement concerning the four freedoms must be interpreted in conformity with their models in EU primary law.[84] Freedom of Establishment and free movement of workers in cases *Keller Holding* (2006)[85], *Commission v Portugal* (2006)[86], as well as *Commission v Sweden* (2007)[87] whereas the CJEU assumed that the provisions of the EEA Agreement on the free movement of workers and freedom of establishment in Articles 28 and 31 must be interpreted in conformity with Articles 39 and 43 EC (now 45 and 49 TFEU).[88] The EFTA court also minimised the importance of context and purpose of the treaties, e.g. in *Rainford-Towing* case. [89] Freedom of establishment is in the Article 31 of the EEA agreement has corresponding provision in the Article 43 EC (Now 49 TFEU),[90] and the elimination on restrictions is followed in a homogenous way to the EU regardless of Lichtenstein

[78] Fredriksen, H. ( 2012), *Supra* Nota 69, p 870.
[79] *Ibid*, p 870.
[80] *Ibid*, p 870.
[81] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 130.
[82] Fredriksen, H. ( 2012), *Supra* Nota 69, p 870.
[83] Case C-452/01 *Ospelt* [2003].
[84] Fredriksen, H. ( 2012), *Supra* Nota 69, p 873.
[85] C-471/04, *Finanzamt Offenbach am Main-Land v Keller Holding* [2006], paragraphs 48–49.
[86] C-345/05, *Commisson v Portugal* [2006], paragraphs 40–41.
[87] C-104/06, *Commisson v Sweden* [2007], paragraphs 32–33.
[88] Fredriksen, H. ( 2012), *Supra* Nota 69, p 873-874.
[89] Fredriksen, H. (2010), *Supra* Nota 60, p 741.
[90] Fredriksen, H. ( 2012), *Supra* Nota 69, p 874.

government's arguments to contrary due to different scope and objective in the EEA during the *Rainford-Towning* case.[91]

Even though the other freedoms are not as important to this article as the freedom of establishment; they are still linked in the working of an establishment and therefore briefly analysed. For the Free movement of goods it was the *Bellio F.lli* case.[92] This concerned the right to apply restrictions to free movement of goods (Article 13 EEA) and as it was materially identical to Article 30 EC (now 36 TFEU); CJEU ruled that it must be interpreted in conformity.[93] The Free movement of services received a corresponding statement (Article 36 EEA corresponds with Article 49EC/56 TFEU) in the judgement in *Commission v Belgium* [94](2007).[95] Finally, the freedom of capital was ruled in the cases like *Commission v Netherlands*[96] (2009) and *Commission v Austria*[97] (2011).[98]

When treaty of Lisbon set into force the legal context of the said treaty can be argued to differ from earlier and cause possible impacts on the internal market. These differences can be seen, *inter alia*, in the amendments to the Union's values and aims (Articles 2 & 3 TEU), the binding nature of the Charter of Fundamental rights (Article 6 TEU), further development of the rules of citizenship of the Union (Articles 20 *et seq.* TFEU), and in the area of freedom, security and justice (Articles 67 *et seq.* TFEU).[99]

Even though the substantively similar EU and EEA legislation are interpreted uniformly, this is issue with the widening gap between EU primary legislation and EEA agreement cause concerns that can be seen especially in the free movement of capital. A string of CJEU cases starting from *Commission v Italy* (2009)[100] have given grounds for some doubt in relying the courts to be able remedy the failure to update the main part of EEA agreement via dynamic interpretation.[101] The issue in the case arose on the matter that the legal context of the EU treaty's free movement of capital differed from that of the free movement of capital in the

[91] Case E-03/98, *Herbert Rainford-Towning* [1998], paragraph 21.
[92] Case C-286/02, *Bellio F.lli v Prefettura di Treviso* [2004], paragraph 34.
[93] Baudenbacher, C. The EFTA Court: An Actor in the European Judicial Dialogue. Fordham International Law Journal 2005, 28(2), pp 353-391, p 382.
[94] C-522/04, *Commisson v Belgium* [2007], paragraphs 44–45.
[95] Fredriksen, H. ( 2012), *Supra* Nota 69, p 874.
[96] C-521/07, *Commission v Netherlands* [2009], paragraph 33.
[97] C-10/10, *Commission v Austria* [2011], paragraph 42.
[98] Fredriksen, H. ( 2012), *Supra* Nota 69, p 874.
[99] Fredriksen, H. ( 2012), *Supra* Nota 69, p 870.
[100] Case C-540/07, *Commission v Italy* [2009], which was followed by cases like C-72/09 and C-267/09.
[101] Fredriksen, H. ( 2012), *Supra* Nota 69, p 874.

EEA agreement and thus, the homogeneity was unattainable.[102] The CJEU held that as there were no legally binding rules in the EEA agreement, similar to Directive 77/799/EEC, for the exchange of relevant (tax) information between Italy. Therefore, the less favourable dividend payment to companies in EFTA-EEA countries to what is paid to companies resident in Italy was not in violation of the EEA agreement.[103] This shows that there is a possibility of discrimination in payment of dividends to EFTA states that would not exist between EU member states and in a way would cause companies EFTA states in a worse position that of the EU equivalents even if the establishment of those companies would be equal. In conclusion, even though the fundamental rules on the four freedoms in the main part of the EEA agreement are interpreted in conformity with their models in the EU primary legislation, but application of those rules in actual cases may differ due to the differences of legal context.[104]

To summarise, the current EEA system is not perfect as complications may arise especially within the dividend payments that may dissuade potential investors. The agreement still provides a framework for the company establishment that is similar in substance to that provided within the EU. Should the UK join the EEA; it would be required to follow a fixed amount of policy areas and these areas are most likely non-negotiable. The UK would be required keep the legislation implemented from the EU intact in the related areas, but in doing so the UK would secure legal certainty that it could not necessarily provide in other means as homogeneous interpretation and enforcement of legislation are the cornerstones of the EEA agreement.[105] There are still issues with the gap between the EEA treaty and EU treaties, but the author will further analyse this in chapter 4. The strengths of the EEA agreement are in the fact that it is an already made agreement which has its own set supervisory bodies to ensure the upkeep the agreement. Accession to the agreement is fairly simple and as the terms are already set the assent of the member states can be considered fairly easy to obtain. The EEA agreement has strong protection to the four freedoms, which is almost similar to the EU protection and this gives strong legal certainty and procedural familiarity for persons who wish to establish companies to EU from EFTA-EEA countries and vice versa.

[102] Fredriksen, H. ( 2012), *Supra* Nota 69, p 874.
[103] Fredriksen, H. ( 2012), *Supra* Nota 69, p 875.
[104] Fredriksen, H. ( 2012), *Supra* Nota 69, p 875.
[105] Kux, S., Sverdrup, U. (2000), *Supra* Nota 42, p 241.

# 3. The Swiss Model

## 3.1. The Swiss Bilateral treaties

### 3.1.1. Formation of the treaties

One of the two options for the UK was to join the EEA through the EFTA, but as stated earlier, UK has an alternative. Regardless of not joining the EEA the UK could still opt in joining to EFTA, or it could stay just as a World Trade Organisation (WTO) contracting state and negotiate the separate agreements with the EU. Instead in joining the EEA, Switzerland stayed as an EFTA country and concluded number of agreements where it approximated its legislation to that of the EU in the specific areas of the internal market that Switzerland wanted to be a part of.[106] This model, also known as the 'Swiss model', would also be possible for the UK, but to achieve this, the UK and the EU need to negotiate an agreement that both the UK and all the EU member states would agree to.

To understand the reasons why Switzerland took this route of integration, one must understand the backgrounds of the country. Switzerland has a strong consensus towards direct democracy and federalism, together with its historically grown identity of neutrality.[107] The federalism and direct democracy have been institutionalised within the Federal Constitution of 1848 but it has older roots.[108] The neutrality of Switzerland was formally recognised by the European great powers in the Peace congress of Vienna and Paris in 1815.[109] Due to this neutrality status Switzerland avoids any obligations during peacetime that may prevent it from following the rules of neutrality law in the case of war.[110]

The original bilateral Free Trade Agreement with the EC in 1972 was to facilitate the EFTA country's access to the most important markets and this agreement had broad popular support in Switzerland.[111] The agreement, however, only covered trade in goods and trade in services and free movement of capital was not part of this free trade agreement which led to increasing pressure with the internal market project, the EEA agreement.[112] During the EEA

[106] Dodini, M., Fantini, M. The EU Neighbourhood Policy: Implications for Economic Growth and Stability. JCMS: Journal of Common Market Studies 2006, 44(3), pp 507–532, p 511.
[107] Gstöhl, S. Scandinavia and Switzerland: small, successful and stubborn towards the EU. Journal of European Public Policy 2002, 9(4), pp 529-549, p 541.
[108] *Ibid*, p 541.
[109] *Ibid*, p 542.
[110] *Ibid*, p 541-542.
[111] Kux, S., Sverdrup, U. (2000), *Supra* Nota 42, p 248.
[112] Kux, S., Sverdrup, U. (2000), *Supra* Nota 42, p 248.

negotiations the Swiss government strongly supported the EEA membership as part of the negotiations allowed the direct democracy and federalism to be kept with only necessary changes of isolated nature.[113] However regardless of the government's support to the membership the voters rejected the proposal by referendum and Switzerland was left with existing bilateral agreement between EU and EFTA.[114]

In order to overcome the deadlock of the *status quo ante* for no gradual integration with the EC; in the summer of 1993 the Federal Council submitted a list of sixteen[115] policy areas it wanted to negotiate with the EC.[116] When countries in Europe do not belong within the EEA, their citizens and firms feel the effects of tariffs and quotas.[117] These negative effects are most undesired and one of major reasons why Switzerland wanted to begin treaty negotiations. The General Affairs Council of the EC, however, picked only five of the suggested policy areas (public procurement, technical barriers to trade, research, road transportation and air transportation) and added two other issues of particular interest to some MS (agriculture and free movement of persons), together forming seven areas that the EC was ready to talk about.[118] In addition, the EC insisted that these seven areas of discussion were to be negotiated jointly and in parallel and so the EC introduced the principle of 'appropriate parallelism', i.e. that various sector agreements were regarded as an intact package and they only take effect together and at the same time.[119] One of the major reasons for the EC to act in such way was because of fear that Switzerland would use the bilateral talks in a way that they could 'have cake and eat it too' and therefore, the EC made clear from the outset that a piecemeal approach would be refused.[120] A significant drawback of the bilateral agreements in comparison to the EEA is also the fact that the agreements are static and therefore, will not be automatically updated with the integration steps performed by the EC and now by the EU.[121]

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[113] Goetschel, L. Switzerland and European Integration: Change through Distance. European Foreign Affairs Review 2003, 8(3), pp 313-330, p 321.
[114] Kux, S., Sverdrup, U. (2000), *Supra* Nota 42, p 243.
[115] Note, that in Dupont, C., Sciarini, P. (2001) *infra nota* 118; the authors state 15 areas of discussion instead of 16. What is important is that both authors agree that only 7 areas were discussed in the end and the areas discussed are the same.
[116] Kux, S., Sverdrup, U. (2000), *Supra* Nota 42, p 249.
[117] Tudor, J. A Comparison of the Jurisprudence of the ECJ and the EFTA Court on the Free Movement of Goods in the EEA: Is There an Intolerable Separation of Article 34 of the TFEU and Article 11 of the EEA? San Diego International Law Journal 2015, 17(1), pp 75-124, p 79.
[118] Dupont, C., Sciarini, P. Switzerland and the European integration process: Engagement without marriage. West European Politics 2001, 24(2), pp 211-232, p 225.
[119] Goetschel, L. (2003), *Supra* Nota 113, p 324-325.
[120] Dupont, C., Sciarini, P. (2001), *Supra* Nota 118, p 225.
[121] *Ibid*, p 226.

### 3.1.2. The agreement on free movement of persons

For this paper the most relevant agreement of the seven is the Agreement on the Free Movement of Persons (later AFMP)[122]. Therefore, the author will analyse it thoroughly in this part of the paper. During the negotiations, the EC repeatedly insisted that the final agreement between the EC and Switzerland ought to include provisions for the complete freedom of movement of persons.[123] The free movement of persons is a cornerstone of *acquis communautaire* and the addition of it was major objective for the EC to include in the negotiations.[124] The Swiss authorities opposed any 'automatic' introduction of the free movement of person arguing that it would lead rejection in popular vote.[125] After several rounds of bargaining the Swiss gained a long transitory period and various kinds of safeguard clauses with the option to terminate the agreement after seven years; and the EC gained free movement of persons with trial period from 2007 and without restrictions after 2014.[126]

The AFMP is of key interest to the author and this paper due to the fact that the free movement of persons not only includes workers, but also self-employed persons along with freedom of establishment.[127] The rights of movement of self-employed persons (and self-employed frontier workers) are clarified in Annex I, chapter III (Self-employed persons) Articles 12-15 of AFMP where the rights provided gives the person the right to reside freely in the host state as long as the permit is valid (Article 12); the permit holder is also allowed to change the occupation from self-employed to employed status and has the right to change the place of work and residence (Article 14) and; additionally, the holder of the permit are to be treated equally to nationals of the host country (Article 15).

The paper has established that the AFMP gives the right of free movement for self-employed persons, but what is interesting is the fact that this right of establishment and free movement is extended only to natural persons. Legal persons are not included to the scope of AFMP due

[122] The whole name of the agreement is as follows: Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons.
[123] Dupont, C., Sciarini, P. (2001), *Supra* Nota 118, p 225.
[124] Sciarini, P., Fischer, A., Nicolet, S. How Europe hits home: evidence from the Swiss case. Journal of European Public Policy 2004, 11(3), p 353-378, p 360.
[125] Dupont, C., Sciarini, P. (2001), *Supra* Nota 118, p 225.
[126] Sciarini, P., Fischer, A., Nicolet, S. How Europe hits home: evidence from the Swiss case. Journal of European Public Policy 2004, 11(3), p 353-378, p 360.
[127] Article 1 (a) AFMP.

to the CJEU court *Grimme Case*.[128] When the case was referred to preliminary ruling, the referring court asked whether or not the agreement in question and the scope of the freedom of establishment to natural persons can be extended to legal persons as well. In the paragraphs 33-39 the CJEU stated that the objective of the agreement was for the benefit of natural persons and only exception was the right for companies to provide services[129] within the territories. The court stated that the article 1 (a) of the agreement explicitly grants natural persons the right of establishment on a self-employed basis and therefore, the court held that legal persons cannot be granted the same right of establishment as natural persons are under the agreement.

The rights of company establishment for legal persons are not, however, so straight cut. Some of the other agreements allow companies to set up agencies and branches for undertakings that are situated in the territory of the contracting parties.[130] Such agreements are, for example, the Agreement on direct insurance of 1989 which allows agencies and branches to be established in related area other than life assurance, and the Air Transport Agreement of 1999 which allows establishment of agencies, branches, and subsidiaries in the related field.[131] There are some difficulties within the company establishment as for example the free movement of capital is not included in the agreements, thus hindering the movement of investments and other transactions.[132]

### 3.2. UK and the white paper on Brexit

#### 3.2.1. The views presented in the white paper

Now that the paper has discussed about what the Swiss model actually is and how it works in the point of view of company establishment. The next step is to analyse it and compare it on the future possibility of Brexit. The Brexit negotiations as such are a controversial situation, as commonly many of the agreements between EU and European third countries have been

[128] Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse.*
[129] Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, paragraph 43: Limit to provide cross-border services is not to exceed 90 days of actual work in a calendar year.
[130] Tobler, C., Hardenbol, J., Mellar, B. Internal Market beyond the EU: EEA and Switzerland. Briefing paper commissioned by the European Parliament's Committee on Internal Market and Consumer Protection (2010), p 16, www.europarl.europa.eu/RegData/etudes/note/join/2010/429993/IPOL-IMCO_NT(2010)429993_EN.pdf (27.02.2017).
[131] *Ibid*, p 16.
[132] Hillion, C. (2011), *Supra* Nota 57, p 499.

intended as stepping stones for full ascension to membership (e.g. Ankara agreement with Turkey [1963] and Association agreement with Greece [1961]).[133] Now the situation is opposite as UK is leaving the EU, but wishing to stay as part to some of the policies.

On 2 February 2017 the Prime Minister of the UK published and presented to the Parliament the white paper 'The United Kingdom's exit from and new partnership with the European Union White Paper'.[134] In the white paper the PM represented the aims of the Government on Brexit and what they wish to achieve. The paper will focus on chapters 1, 2, 4, 5, 6, and 8 as they have most relevance to company establishment.

The first chapter provides the current aim for the UK to introduce a 'Great Repeal Bill' which will, *inter alia*, remove the 1972 European Communities Act and convert the current *acquis*, which the UK wishes to keep due to practical reasons, into domestic law. The Government emphasises on this method so that no sudden changes to rights and obligations would happen and maximal legal certainty could be sustained.[135] The first chapter is more of an introductory chapter, but it shows the governmental insight on trying to protect legal certainty for businesses in the UK and the EU.

In the second chapter the government raises their aim that after the implementation of Great Repeal Bill no legislation will be made outside of UK. Additionally, they state that the Bill will also end the CJEU's jurisdiction in the UK.[136] Instead of being under the jurisdiction of the CJEU, the UK suggests that in the future negotiation agreement the dispute resolution would follow the example of other EU bilateral agreements like the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Free Trade Agreement with South Korea.[137] What this would actually mean, is to replace the CJEU with creating a joint committee which would supervise the implementation and application of the agreement, and the committee would also give binding interpretations of the provisions of the agreement. Additionally, there would be possibility to use *ad hoc* arbitration panels where necessary.[138]

Chapters four, five and six are mostly focussed in free movement of people. In chapter four the focus is there is a high inclination in preserving the border as is between Ireland and

[133] Hillion, C. (2011), *Supra* Nota 57, p 497-498.
[134] The United Kingdom's exit from and new partnership with the European Union White Paper: www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf (22.02.2017).
[135] The United Kingdom's exit from and new partnership with the European Union White Paper, p 9.
[136] *Ibid*, p 13.
[137] *Ibid*, p 14.
[138] *Ibid*, p 14.

Northern Ireland. Economic ties between the UK and Ireland are deeply integrated and having a border that is as seamless and frictionless as possible is preferential aim.[139] However, this is view of open border contradictory to the aim of chapter 5 where the paper states that it is impossible to control overall immigration when there is unlimited free movement of people. Thus, the government aims to cease the application of the free movement directive and the right within the primary legislation, and instead set limitations to all kind of immigration.[140] In chapter six, the paper suggests that EU nationals already living in the UK and vice versa ought to be given the right to permanently reside in the country, provided that they have lived in there continuously and lawfully for at least five years. This right ought, in the opinion of the paper, to be given via agreements between the EU MS and not through the EU Free Movement Directive (Article 16 of 2004/38/EC).[141]

The chapter eight focuses on what the UK aims to preserve of the internal market. The paper expresses the tariff-free trade in goods, which is currently in the internal market and the aim of the government to preserve this free movement of goods as intact as possible.[142] Additionally, like in the 'Swiss model' the aim to keep free movement of services as a part of the agreement is also expressed.[143] However the freedom of establishment is not mentioned in this chapter and the previous statement of limiting the free movement of persons clearly shows the wish to limit this option. The paper also shows the wish to leave the customs union of the EU so that the UK can negotiate its own preferential trade agreements around the world.[144]

### 3.2.2. Issues arising within the white paper

The white paper sets quite an ambitious set of aims to be achieved in relation to the internal market. To sum up, the aims include *inter alia* to remove the jurisdiction of the CJEU from the UK, to keep the free movement of goods and free movement of services as intact as possible, to keep the Irish border with Northern-Ireland as unobstructed as possible, to

[139] *Ibid*, p 21.
[140] *Ibid*, p 25-27.
[141] *Ibid*, p 30.
[142] *Ibid*, p 40.
[143] *Ibid*, p 42.
[144] *Ibid*, p 46.

remove unlimited free movement of persons, i.e. set limitations and quotas to immigration, and to remove the UK from the customs union.

The first issue the author will tackle is the Irish border, as there is a tangible example from the past with the Norway, Nordic Passport Union and Schengen. Norway has had a passport union with other Nordic countries before the Schengen agreement was introduced in the EU, and this new Schengen agreement with the idea of removing barriers to travel between MS made the Nordic Passport Union impossible to maintain.[145] The Nordic states, however, were keen to maintain the union and led to Norway and Iceland to join Schengen. The condition for non-EU states like Norway and Iceland to join was to not have any decision making power, but being still able to participate in discussions.[146] This showed that the previous *status quo* of the NPU was not possible and joining Schengen was the best option to maintain it. The UK has comparably similar system currently with Ireland, the Isle of Man and Channel Islands through the Common Travel Area,[147] and it can be argued that UK's exit from the EU causes a similar dilemma as the NPU had at its time.

Secondly the paper will analyse issue with the four freedoms. As with the Swiss model, it is highly likely that the EU is willing continue with the free movement of goods and services as is, provided that the UK will continue to follow the relevant rules and regulations, but the limitation of free movement of persons may cause issues. As shown in the 3rd chapter (3.1.1.), during the treaty negotiations with Switzerland the EU insisted that free movement of persons ought to be part of the negotiations and principle of appropriate parallelism was applied, i.e. the validity of all the bilateral agreements were dependant of accepting each agreement. The EU's view on accepting this one cornerstone of the Union may be expressly required for any negotiations to happen.

Thirdly, the exit of customs union is probably quite agreeable, but for the free movement of goods to be operable the UK and EU has to negotiate a way of securing that this UK market, which is outside of the customs union, is not a loophole for goods to enter the EU market. The quality of the goods is also an area of negotiation. The Free movement of Goods as such is not a company establishment issue, but if such issues are left unsolved, they will create legal uncertainty to companies and company establishment.

[145] Eliassen, K., Sitter, N. (2003), *Supra* Nota 2, p 136.
[146] *Ibid.*
[147] *Supra Nota* 134, p 22.

Finally the author analyses the issue with court jurisdiction: In the white paper, the Government acknowledges the power of CJEU as the strongest supranational court with the principles of primacy and direct effect, and suggests an weaker alternative to it in the form of committees and panels and it even states itself that in international agreements where dispute resolution mechanisms are applied: 'Unlike decisions made by the CJEU, dispute resolution in these agreement does not have direct effect in UK law'.[148] The alternative dispute resolution methods in the CETA and the South Korean agreement are quite favourable in the independent agreements, but it is important to see the context of these agreements. Both of the suggested agreements are between countries that have not had any previous free trade agreement as extensive as are proposed. The UK, however, wishing to leave the CJEU, but to be able to keep following the free movement of goods and services may cause the EU MS to object such arrangement.

Bilateral treaties commonly require a *quid pro quo* attitude, as both parties have to be able to compromise so that both parties gain equally and therefore both parties are willing to accept the requests of the other party even though there are multiple things that both parties are more likely to agree as both parties achieve gains, like in the case of the free movement of goods and free movement of services. Like with the Swiss model, continuing bilateralism commonly requires to follow the lowest common denominator at which political forces can agree.[149] The aims of the UK, therefore, may not find this common denominator as the EU may fear that accepting these aims allows so called 'cherry picking'. A good example of this clash is the will of the UK to keep the movement of goods and services as smooth and unhindered as possible, but at the same time not to allow an already established courts (CJEU) to supervise the process and rather have an alternative dispute method. The CJEU has shown to be a competent dispute resolution platform and therefore it can be argued that EU may require the UK to follow the rulings of the CJEU on relevant matters and be under the jurisdiction of the CJEU in these matters.

In conclusion, the Swiss model is highly risky in comparison to the EEA as all the fields of agreements have to be agreed to separately. Both parties have their own agendas and what they wish to discuss and commonly only the areas where both parties find a common ground can be negotiated upon. Even when the agreeable areas of negotiation are found, there needs to be found the lowest common denominator that both parties are willing to accept and this

[148] *Ibid*, p 14.
[149] Goetschel, L. (2003), *Supra* Nota 113, p 328.

process may take a long period of time. Already established rights and obligations have to be renegotiated and the process may be gradual, thus endangering the current legal certainty. Some of the agendas that the UK is currently pushing are in conflict with each other and require precise regulations for them to work simultaneously and there is no guarantee that EU is willing to accept all the conditions. On the other hand, there are areas that EU has previously regarded as essential and EU may not start any negotiations if the UK is not willing yield and agree in these areas (e.g. free movement of persons – see chapter 3.1.2. first paragraph).

# 4. Possible actions to improve the Freedom of Establishment

## 4.1. EFTA-EEA Option

Now that the paper has analysed the two possible options for the UK to aim for after the exit of the EU; one should also analyse the weaknesses of those options and possible ways to improve them so that the company establishment between the EU would be as easy as possible. The author will also compare the two options to resolve the best possible option for between UK and EU for establishing an ease of company establishment that already exists in the EU.

The EFTA-EEA option has strong compatibility with the already functioning EU legal system that is in force in EU member states in the point of view of company establishment. As previously mentioned in chapter 2.3.1. the EEA system protects the four freedoms in substantially similar way via co-operation between the EFTA court and CJEU. The chapter 2.3.2.2. shows that the CJEU has given various judgements that show conformity between the EU law and EEA agreement; and that the company establishment aspects within both systems are substantially similar. Thus, regardless of discrepancies between the EEA agreement and the EU treaties the major aspects of company establishment in the EU and in the EEA are virtually the same due to the contributions of the CJEU and EFTA court.

The option of courts fixing the gap between the treaties however has its limits as shown in the chapter 2.3.2.2. (and the cases starting from *Commission v Italy* (2009)) which cannot be overcome simply through interpretation by the courts. Alternative solutions have to be made in order to fix this. One option for bridging the gap would be for the Joint committee of the EEA to establish decisions that compensate for the discrepancies between EEA agreement and EEA-relevant EU primary law.[150] Fredriksen, H. in his article states that the repercussions of the *Commission v Italy* and the following cases could be remedied by adopting legally binding rules for the exchange of information between EU MS and EEA EFTA states via mirroring the rules of Directive 77/799/EEC.[151] Fredriksen also points alternative solution that the Joint Committee's competence to amend the agreement's annex via the competence given in Article 98 EEA. This competence could be used to revise the integral part of the agreement, as annexes are also integral part (see Article 119 EEA), but it

[150] Fredriksen, H. ( 2012), *Supra* Nota 69, p 884.
[151] *Ibid*, p 884.

would most likely be opposed by the EU MS as this approach would cause the EU MS to lose direct control over the EEA Agreement.[152] The issue, therefore in both cases, is that the joint committee could exceed its competence if it will implement rules similar to the directive or to issue rules to fulfil the gap between the EEA agreement and EU treaties into the annexes of the EEA agreement.

The most optimal way for fixing the gap is the revision of the agreement by the contracting parties and, as previously mentioned, it has not happened due to EU having other procedures occupying it. Now that there is a situation where an EU MS is leaving the EU and one of the possible options for further co-operation is EEA; the interest of the EU would allow to start renegotiating the agreement in a way that the gap could be filled together with the consideration of member states giving their assent to the UK's accession into the EEA agreement.

### 4.2. Swiss Model Option

To simplify the process; the Swiss model is merely a multitude of bilateral treaties between Switzerland and the EC (now the EU). Therefore, the simple solution to ease company establishment between the UK and the EU is just to include freedom of establishment as one of the areas of negotiation when discussing the conditions of the Brexit negotiations. This basic idea, however, has various issues within. The major issue is shown in the earlier negotiations between Switzerland and the EC in chapter 3.1.1. where the Swiss government listed 16 areas of interest of which the government wanted to discuss. The EC's response was to discuss only on five areas and to add two more areas. Additionally, the EC applied appropriate parallelism between the separate areas. It is highly likely that the EU will apply similar conditions to the EU – UK negotiations and unless a consensus is made on the areas of negotiation there is a risk of the UK leaving the negotiation table empty handed.

The freedom of establishment is linked to the free movement of people and as limiting the latter is one of the aims of the UK; there is a risk that freedom of establishment is not attainable as such. Also, as previously spoken in the chapter 3.1.1., the free movement of

[152] Fredriksen, H. ( 2012), *Supra* Nota 69, p 884.

people is an area of interest that the EC (and EU) considers as one of the cornerstones of the union and therefore, will most likely try to establish as one of the topics during the exit negotiations.

The UK government in their white paper aimed to not to be under the jurisdiction of the CJEU, as discussed in chapter 3.2.1., but rather solve issues with joint panel which would give interpretation to the agreement and *ad hoc* arbitration panel to resolve disputes. In order to maximise the legal certainty in the following agreements between the UK and the EU; instead of considering of holding *ad hoc* arbitration panels to solve issues; the contracting parties ought to aim for a permanent body which will supervise the interpretation and judgements of the treaty areas. This body can be a court like the CJEU or the EFTA court, or permanent arbitration tribunal, but this permanence would ensure consistent interpretation and decision making in relation to the bilateral agreements.

### 4.3. Comparison of the options

In conclusion to this chapter, the paper will analyse the two options against each other by their merits and disadvantages which were discussed in the previous chapters. First area of comparison is the agreement parties themselves. In the EEA option the negotiations are between the UK, the EU, and the EFTA countries that are in the EEA. The Swiss model option is between only the UK and the EU. So the EEA option has more parties that require consent.

The amount of contracting parties, however, cannot be simplified as such because one has to analyse the second area: the agreements themselves. The EEA agreement at its simplest form requires only the assent for accession from all of the contracting parties as the agreement itself is already made with all the rules, rights, and obligations. The Swiss model, on the other hand, requires that all policy areas have to be separately negotiated and agreed upon. This option logically takes much more time than the former option. The EEA model can have negotiations on current or new policy areas and inclusion of new treaties but even so the majority of the treaty is already confirmed.

The third area is the supervision and judicial bodies of the treaty. The EEA model has a joint committee which supervises the enforcement of the treaty and also has the competence to amend the treaty annexes so that new EU secondary legislation related to the EEA may be implemented to the treaty. On top of this the national courts may refer cases to the CJEU and the EFTA court which both, in their respective jurisdictions, give judgements in the interpretation of the EEA agreement and sees that the rights and obligations are followed. The Swiss model as such has no supervisory or judicial bodies embedded. This would mean that the treaty would be interpreted in the national courts only, and in the case of the EU; the CJEU would give judgements under preliminary ruling procedure (Article 288 TFEU). The lack of judicial body which supervises the treaty interpretation may present complications as the Supreme Court in the UK may end up in different conclusion than the CJEU and as such there may be a lack of conformity which then creates legal uncertainty towards the bilateral agreements. The Swiss model has, of course, the option to include some kind of judicial and/or supervisory body to the agreements. This, however, requires thorough planning on the rights, obligations, and jurisdiction of the said bodies. There is also the question on how binding the decisions of said bodies are.

## Conclusion

The Brexit is currently ongoing process and the outcome at this current point is still impossible to decipher due to the complexity of the following exit negotiations. However deciphering the solution was never the aim of this research paper but rather to present options for the exiting country in order to find best possible options for co-operation after the exit in order to keep the company establishment as fluent as possible. The two options analysed in this article was the EFTA-EEA option and the Swiss model option.

The EFTA-EEA option would allow a legal or a natural person within the EU to establish a company in any EEA contracting state with similar ease than it would in establishing into the country of origin and vice versa. This is due to the four freedoms of the EU treaties and EEA agreement being substantially the same and, therefore, the CJEU and EFTA court interpret them in conformity. The EEA agreement has an advanced supervisory and judicial system comprising of the joint committee, supervisory authority, and judicial body comprising of the EFTA court and CJEU. This system ensures that the rules, rights, and obligations of the EEA agreement are implemented, interpreted, and followed by the contracting states in conformity to the standards of the internal market. This will consequently ensure the legal certainty required by people and companies in order to establish new companies and run them efficiently.

The EEA agreement is a premade agreement with all the rules, rights, and obligations that bind the parties. For the UK to accede to the agreement it simply requires the assent of all the contracting parties. No negotiation of the terms of the agreement would need to be discussed and therefore the EU does not have to worry about giving a ‘parachute deal’ to the UK in order to continue co-operation with the UK. The EFTA-EEA option, therefore, allows for a swift and straightforward option for both the UK and the EU and would result in a solution which would be almost equivalent to the current situation in the point of view of company establishment. This would ensure that the rules for company establishment would be substantially the same but other aspects of the current EU treaty, which have no direct relevance towards the internal market, would no longer apply to the UK. The EFTA-EEA model would also restore some of the sovereignty that the UK has aimed for.

The Swiss model option, on the other hand, would provide the UK and the EU to negotiate a completely personalised set of bilateral treaties where the topics of discussion could be agreed upon between the parties. This would allow the UK and the EU to focus only in certain areas which both parties want to continue after the exit, e.g. free movement of goods or freedom of establishment. Such focus would allow to exclude other areas from the mix that are not important for these aims but which one of the parties does not want to be part of anymore.

Issue in this model option can be seen in the earlier bilateral agreements between Switzerland and the EU. The predecessor of the EU, the EC, demanded to bring certain topics to the negotiation table and later introduced appropriate parallelism on the separate agreements of each topic. Another notable issue is the fact that all negotiations consist of compromises and finding the lowest denominator between parties whereas in the end finding such a denominator that would benefit both parties may end up impossible or redundant to the aims of the negotiating parties. The results of these negotiations are unknown and any guesses on the final agreements are too vague and complex for a bachelor thesis to analyse further at this point of negotiations.

The UK's aims, which were presented in their white paper, show motives to restrict certain policies such as the free movement of persons. Earlier discussions between the EU and Switzerland shows that the EU wishes to keep the free movement of persons as wide as possible and limitations to this freedom, and derivatively to the free movement of self-employed persons, are against the aims of the EU. The UK's aim therefore would diminish the freedom of establishment should they wish to pursue this path. The issue arising is that the EU may not be willing to negotiate on any areas of co-operation as free movement of persons was a key policy area during the negotiations between the Swiss and the EU.

The Swiss model has no supervisory or judicial body as such unless it is negotiated to the agreement. This would mean that in the UK the highest national judicial body, the Supreme Court, would have final say on the interpretation in the agreement. In the EU the CJEU would still give preliminary rulings to the EU MS. The CJEU would no longer have jurisdiction in the UK, unless provided in their bilateral agreements, and therefore there is a risk of divergent interpretations on the agreements between the CJEU and the UK Supreme Court. The UK in the white paper emphasised on the aim not to be under the jurisdiction of the CJEU and suggested alternative dispute resolution via ad hoc arbitration panels and joint

committees which would provide interpretation on the treaties. Issue with such ad hoc arbitration panels is the consistency of judgements in comparison to if judgements would be given by a permanent judicial body which would administer the interpretation and judgement of the whole agreement in similar fashion as the CJEU or EFTA court does in the EEA agreement.

The EFTA-EEA model provides quite a wide ranged and stable option to follow after leaving the EU where the rules on company establishment is substantially almost the same. Only issue is with the gap between the EU treaties and the EEA agreement. This is because the EEA agreement was signed in 1992 and the EU treaties have been renegotiated after the signing. The gap causes different interpretation on the objectives of the treaties and this may cause the judgements on the four freedoms in less advantageous light in certain cases. The simplest solution would be to include negotiations on implementation of the current treaties to the EEA agreement simultaneously with the discussion of giving assent to the UK to accede to the EEA agreement. Such negotiations would make the accession of the UK into the EEA more complex, but it is much faster than starting the negotiations from scratch like in the case of the Swiss model.

Recommendations on how to improve the Swiss model is a harder area of discussion as the possibilities on how the negotiations will go are almost limitless. Nevertheless there are two key areas to concentrate in the negotiations in the point of view of the company establishment. The first and foremost is to focus that any policy areas in relation to the freedom of establishment are held as open and free between the UK and the EU as they are currently within the EU. This would mean that the UK would have to make compromises in their aims, such as limiting the free movement of persons, in order for this to happen. The second area of focus is to include a supervisory and/or judicial body to the agreements that would have jurisdiction to decide on matters relating to the agreement. This permanent body would ensure that judgements and interpretation on the agreements would remain consistent and this, therefore, would increase the legal certainty in the area of international company establishment between the EU and the UK.

The two options presented in this research paper are both viable options with their own strengths and weaknesses as presented before. The EFTA-EEA option will provide a premade agreement and as such both parties can be certain on what the outcome will be as it already in effect in several countries. The negative side is that since it is a premade agreement; the UK

would have virtually no possibility to determine what policy areas it will want to be part of and what it would want to exclude. The Swiss model option would, on the other hand, provide the possibility to negotiate a tailored agreement between the UK and the EU and this would allow excluding certain unwished policy areas that are in the EEA agreement. The con of such option is the uncertainty that comes with this freedom and may result in a legally uncertain option in comparison to the EFTA-EEA option.

The analysis and argumentation given in this paper would support the hypothesis and as such the EFTA-EEA option would be more certain option to ensure that the company establishment between the UK and the EU would be as fluent and easy as possible after the exit as it currently is within the EU. This research paper, therefore, reaches into the conclusion stated in the end of the introduction, which is as follows:

'**Triggering Article 50 TEU and leaving the EU in the form of the Brexit in which the UK would stay in the European Economic Area similar to EFTA countries is the most innocuous option for both the UK and the EU. Reason for this is that it would cause most of the EU legislation on company establishment to be applied in order to keep the EEA functioning as seamlessly as possible and, therefore, no changes to the law and no new legal requirements to companies established to UK from the EU and vice versa is required.**'

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