

How Article 127 of the EEA Agreement could keep the UK in the single market

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Much of the discussion around Brexit has focused on when the UK will formally trigger Article 50 of the Lisbon Treaty and begin the process for leaving the EU. As [Gavin Barrett](#) writes, however, the procedure for leaving the single market is potentially more complex due to the UK's participation in the European Economic Area, which has its own process for withdrawal.



How many international organisations has it taken to create Europe's single market? Just one? Answer: no, Europe's single market is the product of *two* organisations and their rules. Arguments are now raging first as to what rules the UK leaves behind if Brexit happens. One set of single market rules? Or both? And secondly, as to whether UK voters said anything in any case about single markets in the June referendum.

Let's explain. On the one hand, there are the rules of the European Union (EU), signed up to by 28 member states. These rules created not just a single market, but a customs union, a common agricultural policy, a common fisheries policy and much more besides.

On the other hand, there are the rules of the European Economic Area (EEA), signed up to, once again, by 28 EU member states – but this time also by Norway, Liechtenstein and Iceland. Thanks to the EEA Agreement, these three states share Europe's single market with the 28 EU states. But little else. The EEA involves no customs union, or common agriculture or fisheries policies.

The EEA owes its 1994 creation to erstwhile Commission President Jacques Delors. His idea was that the EEA

would be a kind of economic space absorbing European states into the single market, but without allowing them into what is now the EU – thereby allowing the 12 members in the then ‘Community’ (now EU) to continue with EMU, and internal market reform.

The EEA worked out, but somewhat differently than anticipated. First, we have been left with only three non-EU participant states rather than the large number Delors envisaged. Some other potential non-EU members (Finland, Austria and Sweden) ended up joining the EU itself. One, Switzerland, opted out of the EEA entirely.

Secondly, the EEA has effectively become a ‘fax union’ as far as the non-EU participants are concerned. Norway, Liechtenstein and Iceland (although they are consulted under decision-shaping processes) basically sit at the end of a fax machine waiting for the EU to send them single market rules to implement.

So what did UK voters say about these sets of single market rules in the June referendum? Awkwardly, the UK electorate were not asked if they wanted to reject the single market, but merely the EU. A 52 per cent majority voted to leave that. Before the referendum, many Brexiters (including Nigel Farage) extolled Norway’s EEA-based status. Now, however, many assert that respect for the June vote requires rejecting all single market codes (including EEA rules). They say voters sought to end contributions, restrict migration, and avoid the application of Court of Justice decisions and that these aims would be frustrated by staying in the EEA.

Single market Remainers counter that there was no majority to leave the single market: many reasons for voting for Brexit had nothing to do with the single market (such as a belief that money would be saved, or opposition by farmers to the CAP or fishermen to fisheries policy) or even Labour voter opposition to austerity. They note future UK contributions will be required in any case to gain market access (as Brexit minister David Davies has now conceded), and that restrictions on migration (albeit admittedly limited ones) are possible under Article 112 of the EEA Treaty.

What does the law say will happen if the UK leaves the EU? This is unclear. The UK Government asserts that the UK is party to the EEA Agreement only in its capacity as an EU member state. Thus once the UK leaves the EU, it will automatically cease to be a member of the EEA. The point is arguable. Article 126 of the EEA Agreement, for example, does say the agreement shall apply to the territories of the now EU as well as Iceland, Liechtenstein and Norway. Provisions like that could be argued to bring in Article 62 of the Vienna Convention in the event of Brexit (which allows unforeseen “fundamental changes of circumstances” as grounds for terminating a treaty) or perhaps Article 60, (which allows “material breaches” to justify terminating the EEA Treaty’s application to the UK).

The point is not clear though – because Article 127 of the EEA Agreement expressly provides only one way of withdrawing – by giving 12 months’ notice to other parties. If that provision applies, then just quitting the EU won’t be enough for the UK to leave the EEA’s single market. The UK will have to give express notice to leave the EEA as well.

We may soon find out. Think-tank British Influence plans to seek judicial review of the Government’s EEA position. The question could even end up being referred to the European Court of Justice. There are UK law issues here, too. And political issues. As we all know, the Supreme Court decision in [Miller](#) will determine if parliament’s consent is needed under UK law to trigger Brexit.

If the Supreme Court say ‘no’, then parliamentary consent will not be needed to trigger Article 127 either. That would be the end of the Article 127 story. The Government will simply give the Article 127 notice: it would then be farewell to the EEA. If the Supreme Court say ‘yes’, then parliament’s consent will be needed for EEA exit too. But here is the catch: parliamentarians may not give it, claiming there has been no referendum on that.

Getting thus ‘stuck’ in the EEA either temporarily or even permanently would be great news for British business – much preferable to the mere customs union, or worse, WTO rules they will be left with if Britain leaves the single market. The Courts, and potentially parliament too, thus have crucial decisions ahead of them – decisions which

could affect British economic wellbeing for generations.

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Note: This article gives the views of the author, and not the position of EUROPP – European Politics and Policy, nor of the London School of Economics.

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