

<https://www.efta-studies.org/blog/norway-or-common-market-2-0-the-problems-are-not-where-they-seem-to-be>

'Norway+' or 'Common Market 2.0': The problems are not where they seem to be

Blog | 21 May 2019

Dr Georges Baur
Research Fellow Law Liechtenstein-Institut
georges.baur@liechtenstein-institut.li

From the very beginning of the Brexit process, indeed already before the referendum, all kinds of 'models' for future UK-EU relationships had been discussed. However, after the referendum and in the beginning of negotiations on the withdrawal agreement, many 'red lines' were drawn by H.M. Government and thus many of those 'models' excluded. Still, one model was repeatedly brought up in the discussion and lobbied for, namely the so called 'Norway' model. 'Norway' was the political catch word for membership in the European Economic Area (EEA). The aim was to grant the UK participation in the EU's internal market post Brexit, most importantly with regard to all kinds of regulatory matters that are paramount for industrial trade.

Then a new element was added to 'Norway' after the so called 'Ireland Protocol' was published as part of the Withdrawal Agreement (WA), and even more so since the House of Commons' vote of 15 January on the WA. Now, the discussion increasingly focused on the so called 'backstop'. The backstop is described as not one, but several measures 'to address the unique circumstances on the island of Ireland, maintain the necessary conditions for continued North-South cooperation, avoid a hard border'. The backstop was the main stumbling block on the way to get the House of Commons' agreement to the WA. In view of this problem, the promoters of the 'Norway' model now suggested 'Norway+', more recently termed 'Common Market 2.0'. The idea was to simply add to 'Norway', which would secure the UK's continued participation in the EU's internal market after Brexit, some form of participation in the EU's customs union, and formally do away with the backstop post Brexit.

How would this enhanced model work? With respect to the 'Norway' part, i.e. EEA membership, Art. 128(1) EEA states that precondition to participate in the EEA is being a member of either the EU or

of the European Free Trade association (EFTA). The UK would therefore, upon leaving the EU, first have to apply for membership in EFTA. The respective decision would be taken by unanimity by the current members Iceland, Liechtenstein, Norway and Switzerland.

EFTA and Customs Union: impossible combination?

EFTA is a basis for (1) intra-EFTA relations, (2) respective relations with the EU and (3) third country relations, i.e. Free Trade Agreements. Indeed, with regard to the aim to after exiting the EU being able to conduct an independent foreign trade policy, this might be a suitable basis. Here, however, we already encounter our first problem, namely the combination of the EEA model and the customs union. This is much criticised based on political considerations. In contrast, legal arguments are hardly ever used. Wikipedia is – perhaps surprisingly – an exception. There it is argued that both cannot be had: ‘it is not possible for an EFTA member state to be in a customs union with non-EFTA countries, because EFTA is itself a trade association outside of the EU's customs union. According to this view, as an EFTA member the UK would therefore not be able to enter into a separate customs union with the EU, rendering a proposal to join both EFTA and a customs union with the EU (the "plus" part of the proposal) impossible under the EFTA Convention.’

To support their argument the Wikipedia authors refer to Article 56(3) of the EFTA Convention and the EFTA website. According to Article 56(3) EFTA, a new EFTA member state ‘shall apply to become a party to the free trade agreements between the Member States on the one hand and third states, unions of states or international organisations on the other.’ From this the EFTA Secretariat concludes that, ‘as a member of a customs union [with the EU], a country acceding to EFTA could not comply with this obligation.’

We would, however, suggest that Article 56 EFTA is more flexible than the Wikipedia authors would suggest. Take paras. 1 and 2, which deal with accession to the EFTA. They do not define any clear criteria in this respect. In practice, conditions for membership are decided by the currently four EFTA States on predominantly political grounds. Hereby they enjoy, unlike in the more legally structured case of the EU, a vast discretion. Indeed, there are examples where a large amount of flexibility was shown, as in the case of Finland which – formally – only became an ‘associate EFTA member’ in order to accommodate its particularly sensitive relations with the then Soviet Union during the cold war era. Similarly, para. 3 on free trade agreements offers flexibility. Already its wording (“shall *apply* to become”) indicates the possibility that an acceding country may ultimately, for whatever reason, not accede to EFTA’s free trade agreements (FTAs). It could, for instance, also happen that a third country refuses to negotiate the inclusion of a new EFTA member into an existing FTA. This interpretation is confirmed by the fact that EFTA’s website clearly states that ‘EFTA membership does not preclude from entering into a customs arrangement with the EU’. Hence, if the current EFTA states agree and waive the ‘obligation’ of Article 56(3) EFTA, having a customs arrangement with the EU needs not stand in the way of the UK’s EFTA membership.

The first lesson therefore is: Don't believe everything you read.

However, what sort of 'negotiated customs arrangement' are we talking about? On the details of this, 'Common Market 2.0' remains astonishingly silent. It only states: 'Under Common Market 2.0 the UK would be in the Single Market and therefore all regulations would apply to the UK in the same way as they apply to the Republic of Ireland with customs arrangements, at least initially, applying as they do currently. Therefore, there would be no reason for the backstop to be activated.'

But who will be called to decide?

From 'as they do currently' we can conclude that no 'Turkey style' arrangement (i.e. an arrangement with limited coverage and physical customs checks) is intended but rather continuing the current EU customs union. It is therefore conceded to the more critical Brexiters that this would be 'a comprehensive customs arrangement, with the EU, including the common external tariff unless and until alternative arrangements to secure frictionless trade and avoid a hard border in Ireland can be agreed'. However, from a realistic point of view, such alternative arrangements will not be found. As so often it is not the perceived political problems that might kill a proposal, but rather the institutional and technical ones which tend to be overlooked. The concept of 'Common Market 2.0' among other features prides itself of allowing the UK to get away from the CJEU's jurisdiction. If one takes a closer look, it would, however, *a priori* lead to mixed competences of courts: the EFTA Court for the internal market part and the CJEU for the customs union part. The Customs Union is, institutionally, governed by the EU Commission and it will be the CJEU which will be called upon to decide Custom Union matters. Given the insistence of the CJEU on the autonomy of the Union legal order and on its own role in guaranteeing it, it will also insist on keeping its competence if a (future) third country is involved. This is already the case in the (rather special) customs agreements with Andorra, San Marino and Turkey.

Could the EFTA Court be an alternative? Even if one considers that over the last 25 years the EFTA Court has assumed responsibility with regard to interpreting internal market law, here the case is a different one. The customs union is not covered by the scope of the EEA. A respective competence would therefore need to be expressly waived by the CJEU. This is highly unlikely. And forget any dispute settlement according to CETA or the like. Any tinkering with the customs union always means dealing with EU law. Hence it is within the *chasse gardée* of the CJEU and therefore off limits to any other court or court-like institution.

The second lesson therefore must be: Never underestimate the institutional aspect!

Technically – and merely from a legal perspective – the concept advocated by 'Common Market 2.0' could work. It would, indeed, solve the 'backstop problem' as the UK would remain in both the Internal Market and the Customs Union. This would, however, create a substantial institutional challenge. The main predicament throughout the Brexit process therefore remains: solve one problem and get a new one in return.

To cite this article

Baur, Georges (2019): 'Norway+' or 'Common Market 2.0': the problems are not where they seem to be. Blog. [EFTA-Studies.org](https://www.efta-studies.org).

EFTA-Studies.org provides in-depth analyses of the institutions and processes that link the EFTA states to the EU. An independent academic blog addresses developments in the EFTA states from a political and legal perspective, thus providing up to date information on the EFTA states' relations with the EU.

Liechtenstein-Institut | info@liechtenstein-institut.li | www.liechtenstein-institut.li