Brexit and the Single Market: You say Article 50, we say Article 127?

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Tobias Lock Mo 12 Dez 2016

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Hard on the heels of the Article 50 case heard last week by the UK Supreme Court, comes the announcement of another challenge to the UK Government's Brexit plans, this time based on Article 127 of the EEA agreement. Much like Article 50 TEU, that provision allows contracting parties to the EEA agreement to withdraw from it. As an EU Member State the UK is also a party to the European Economic Area (EEA), which – in a nutshell – extends the EU's single market to three further countries – Norway, Iceland, and Liechtenstein. All three are members of the European Free Trade Association (EFTA).

The claimants in the Article 127 challenge contend that withdrawal from the EU under Article 50 will not lead to withdrawal from the EEA, given that with Article 127 the EEA agreement contains its own termination clause. Hence their argument goes that unless the Government also triggers Article 127, the UK will stay in the EEA even after Brexit; and that would mean that the UK would remain in the single market.

Much like the Article 50 case, the impending court case therefore seeks a declaration by the High Court that the Government cannot trigger Article 127 without prior approval of Parliament. The claimants' hope is that while Parliament may feel politically bound by the EU referendum result to allow the Government to leave the EU, it may not vote in favour of leaving the EEA, viz. the single market, as this was not a question on the ballot paper.

It is the aim of this blogpost to identify the three main hurdles the claimants are likely to be facing and discuss whether these can be overcome.

The **first hurdle** will be to convince the High Court that the UK would formally remain a member of the EEA even after withdrawal from the EU. The main issue in this regard is that the EEA agreement is really an agreement between the EU and EFTA states. It is only open to members of either organisation and not to third countries. This is clear from Article 128, which lays down the rules for joining the EEA: any EU Member State shall be a member and any EFTA member can be a member. One could therefore argue – as the UK government probably will – that when an EU Member State leaves the EU and does not join EFTA at the same time, it automatically leaves the EEA agreement. At the same time, given that the EEA agreement contains its own termination clause, the opposite could equally be true. The answer is not clear.

Interestingly, this question might end up being decided in Luxembourg and not in London. Given that the EEA agreement is an EU agreement, the European Court of Justice is competent to interpret it and the High Court might well ask it for a preliminary ruling on this question.

Assuming that the answer to the previous question is that Article 127 needs to be triggered separately from Article 50, the **second hurdle** would be to convince the High Court that this cannot be done by the Government in exercise of the royal prerogative, but that it requires authorisation by an Act of Parliament. Much will of course depend on the decision by the Supreme Court on Article 50, but even assuming that the Supreme Court upholds the decision of the High Court in that case, the outcome might not be the same.

The High Court argued that the European Communities Act 1972 conferred three categories of rights, all of which would be removed if the Government were allowed to press ahead without parliamentary approval: i) EU rights that can be replicated at the domestic level, such as workers' rights; ii) rights that UK citizens enjoy in other Member States of the EU, such as free movement rights; iii) rights that could not be replicated at the domestic level, e.g. the right to stand for election to the European Parliament.

The main category of rights relevant in the context of the Article 127 challenge are probably those in the second category: free movement rights, which are also guaranteed under the EEA agreement. The High Court

(controversially) ruled that only the enactment of the European Communities Act 1972 enabled the UK to ratify the EU's treaties and therefore the Act is the foundation of the free movement rights enjoyed by UK citizens in other jurisdictions.

What about EEA rights, then? The right of a UK citizen to live and work in Norway, say, is based on Article 28 EEA Agreement. There is a key difference between the EEA Agreement and the nearly identically worded right to work in another EU Member State under Article 45 of the Treaty on the Functioning of the EU: EU rights are directly effective, i.e. they apply even if they have not been transposed into domestic law. Direct effect (hand in hand with the primacy of EU law) is what makes the EU treaties so special: they themselves confer rights on individuals. The EEA agreement by contrast does not have direct effect in the EFTA countries, which could be used as an argument to distinguish the Article 50 decision from the Article 127 challenge.

There is a counter-argument, however, and that is the effect the EEA agreement has in the EU Member States. The following question demonstrates this: Given that the UK would be outside the EU, but in the EEA, could a UK national rely on her EEA rights to work in Germany? Interestingly, there is ample jurisprudence from the Court of Justice of the EU that for the EU Member States, the EEA agreement is directly effective (see e.g. Opel Austria), so that the claimants could be successful by repeating the argument made in the Article 50 case.

The **third and final hurdle** is the most important one, however. Even assuming that the High Court comes to the conclusion that the royal prerogative cannot be used to trigger Article 127 and that a vote in Parliament is needed, can the claimants achieve what they want? In other words, if Parliament did not authorise withdrawal from the EEA agreement, would the UK remain in the single market?

There are good arguments to assume that it would not. This is because – as mentioned above – the EEA agreement is constructed as a bilateral agreement between on the one side the EU and its Member States, and the EFTA states on the other. Not only is it not open to third countries, but it cannot be made to work for them, unless they join EFTA or the EU.

This is best demonstrated by looking at the institutional structure of the agreement, which ensures the implementation of new EU legislation; the interpretation of the rules of the EEA by courts; and the enforcement of EEA rules against the member states.

The EEA agreement is a dynamic agreement which allows for the incorporation of new EU legislation by allowing the EEA Joint Committee to amend the annex of the EEA agreement. The Joint Committee consists of all the contracting parties and, crucially, 'shall take decisions by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other' (Article 93 EEA Agreement). There is evidently no room for third countries. The same goes for the interpretation and enforcement of the agreement: for EU Member States this happens through the EU institutions, i.e. the European Court of Justice interprets; and the EU Commission enforces under EU law. For the three EFTA states this is done by a separate EFTA court and the EFTA Surveillance Authority. Again, there is no room for third countries.

What is more, even the substantive rules in the agreement contain express requirements that the parties to the agreement are either in the EU or in EFTA. Take for example the free movement of workers laid down in Article 28:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

This means that even if the UK remained a formal party to the EEA agreement after leaving the EU, unless it joined EFTA, it would not remain in the single market.

In light of these three hurdles, the Article 127 challenge in the High Court has probably got small chances of success. And even if it is successful, the last hurdle might mean that there would be no compelling argument for MPs and Lords to vote against triggering Article 127.

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