

# Free movement of persons in the EU vs. in the EEA

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# Introduction (1)



## EEA law: part of EU association law

- Main aim of the EEA Agreement:  
Extension of the EU internal market to the participating EFTA States  
Iceland, Norway and Liechtenstein.
- Terminology:
  - I, N and FL = **EEA/EFTA States** ...
  - ... in order to distinguish them from the fourth EFTA State that does not participate in the EEA, namely Switzerland (CH).
- I, N and FL are "**associated**" to the EU (Art. 217 TFEU), i.e. they participate to a certain degree in the EU legal system.

# Introduction (2)

## Association includes the free movement of persons

- 1992 (signing of the EEA Agreement):
  - EEA law in the field of the free movement of persons = EU law in that field.
  - See Arts. 28 et seq. EEA and the original versions of the relevant Annexes.
- Since then important developments under EU law, including e.g.:
  - Introduction of Union citizenship on the Treaty level in 1992/1993 (Maastricht Treaty Revision).
  - Creation of Directive 2004/38: partially Union citizenship elements, partially further development of former free movement rules.
- **Consequences for the EEA and for the meaning of free movement?**

# Introduction (3)

## Overview

- General information on the mechanism of updating EEA law.
- The example of **Directive 2004/38**.
- Case law (EFTA Court) on this Directive and consequences for the meaning of free movement under EEA law as compared to EU law - note: market access rules remain the same.
- Broader relevance of the issue:
  - For other association regimes, e.g. with CH or with the AMS States.
  - Also in the context of **Brexit** – though depending on the direction of the negotiations.

# Updating EU association law

## Static vs. dynamic systems

- Homogeneity requires the updating of the association law in view of the dynamic development of EU law.
- **Static system**, e.g. Agreement on the free movement of persons EU-CH: can be adapted, but no obligation (i.e. no legal consequences where one party refuses updating).
- **Dynamic system**, e.g. EEA Agreement, Art. 102 et seq.:
  - EEA Joint Committee adapts/updates the Annexes.
  - Where one party refuses, the ultimate consequence is that the relevant part of the EEA Agreement is suspended.

# Updating EEA law (1)

## Practical steps towards updating

- EU:
  - EU Commission drafts new EU legislation.
  - Identifies it as "EEA relevant".
  - EEA/EFTA States enjoy decision shaping rights (but not decision making rights).
- EEA:
  - EEA Joint Committee discusses incorporation.
  - EEA Joint Committee decides.
- EEA/EFTA States:  
Adapt their national law, where necessary.



The European Economic Area



Iceland, Liechtenstein and Norway



# Updating EEA law (2)

30.4.2004

EN

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**DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT  
AND OF THE COUNCIL  
of 29 April 2004**

on the right of citizens of the Union and their family members  
to move and reside freely within the territory of the Member States  
amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC,  
68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC,  
90/364/EEC, 90/365/EEC and 93/96/EEC

(Text with EEA relevance)

# Updating EEA law (3)

## Directive 2004/38

- Certain EEA/EFTA States did not like the idea of incorporation, since **Union citizenship is not part of EEA law.**



- Suggestion:  
Partial incorporation, i.e. Directive minus citizenship provisions.
- EU does not agree.
- Therefore compromise.



# Updating EEA law (3)

## The compromise

- EEA Joint Commission Decision 158/2007.
- Incorporation of the **full text** of the Directive, with the usual adaptations (e.g. "The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States"), ...
- ... but with a **reservation** in the form of a Declaration:  
"The concept of Union Citizenship as introduced by the Treaty of Maastricht [...] has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be **without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship**. The EEA Agreement does not provide a legal basis for political rights of EEA nationals."

# Meaning of the reservation (1)

## The EFTA Court's *obiter dictum*

- *Wahl* (2013): a first hint, independent of the facts of the case.
- Para. 74 et seq.:

“According to the Decision, the concept of ‘Union Citizenship’ and immigration policy are not included in the Agreement. That is further stipulated in the accompanying Joint Declaration by the Contracting Parties (“the Declaration”). [...] [T]he impact of the exclusions must be assessed on a case-by-case basis and may vary accordingly. In this regard, it must be noted that, as is apparent from Article 1(a) and recital 3 in its preamble, the Directive aims in particular to strengthen the right of free movement and residence of EEA nationals [...]. To this end, it lays down the conditions governing the exercise of the right of free movement and residence with in the territory of the EEA. **The impact of the exclusion of the concept of citizenship has to be determined, in particular, in cases concerning Article 24 of the Directive** which essentially deals with the equal treatment of family members who are not nationals of a Member State and who have the right of residence or permanent residence. [...]”.

# Meaning of the reservation (2)

## So?

- Commentators note that much remained unclear following *Wahl*.
- Other case law of the EFTA Court does not help – no further explanation with respect to the **reservation**.
- But:  
Suspicion of some commentators, that in other cases the EFTA Court implicitly incorporates Union citizenship elements.
- **Union citizenship through the backdoor?**

# Interpreting EEA law

## General background

- Homogeneity principle, Arts. 6 and 105 et seq. EEA, with time line.
- Art. 6 EEA:  
"Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be **interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.**"
- Note: sometimes, there is no CJEU case law; EFTA Court goes first.

# *Clauder* (1)

## Unproblematic according to your speaker

- Concerns family reunification under Art. 16 of Directive 2004/38.
- Art. 16(1) and (2), on permanent residence:

"1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to **family members who are not nationals of a Member State** and have legally resided with the Union citizen in the host Member State for a continuous period of five years."

- And what about family members who are EU nationals? – Gap!  
And no CJEU case law yet.

# *Clauder* (2)

## ***Clauder* - continued**

- German Mr Clauder lives in FL, gets married and wants to bring his German wife from FRG to FL, permanently.
- He is refused based on the argument that he does not have sufficient financial resources for himself and his wife without having recourse to social welfare benefits in FL.
- EFTA Court fills the gap, holding that no conditions apply in such a case.
- Note: not based on CJEU Union citizenship case law dating from after the Declaration; unproblematic also otherwise.

# More difficult: *Gunnarsson, Jabbi*

## Reservation or other issues?

- Again, no formal reliance on the reservation. Instead:
  - On certain points deliberately a different (broader) interpretation of Directive 2004/38 than the CJEU.
  - Reasoning: necessary in order to achieve the same level of protection.
  - I.e.: rather than formal homogeneity, "effect-related homogeneity".
- Carl Baudenbacher:  
"The goal of homogeneous interpretation of the law in the European Economic Area. Two courts and **two separate legal orders, but law that is essentially identical in substance**".



# A glimpse of the EFTA Court's approach (1)

## Interpreting Art. 7 of Directive 2004/38

- Art. 7: right of residence for more than three months.
- CJEU in *O. and B.*:
  - Concerns residence in other Member States, not the home state.
  - More specifically: does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.
  - Instead Art. 21 TFEU, including a prohibition of restrictions.
- EFTA Court in *Gunnarsson and Jabbi*:  
**Includes a right of exit and a prohibition of restrictions in that respect.**



# The EFTA Court's approach (2)

## Facts

- *Gunnarsson* – income taxation:  
Icelandic couple whose income is taxed in Iceland. Mr Gunnarsson is refused the use his wife's personal tax credit in respect of his income for the time of residence in Denmark, because the transfer of a personal tax credit is only possible between taxpayers with unlimited tax liability in Iceland (essentially resident taxpayers) or where both spouses are in receipt of an Icelandic pension.
- *Jabbi* – family reunification upon return:  
Mr Jabbi, a Gambian national, married his Norwegian wife when she lived in Spain as an economically not active person. From there they later returned to Norway, where Mr Jabbi's application for residence is refused because his wife was not self-supporting.

# The EFTA Court's approach (3)

## Legal issues

- National court in *Gunnarsson*:  
Are Art. 28 EEA and/or Art. 7 of Directive 2004/38 breached? In this context, is it of any significance that the EEA Agreement does not contain a provision corresponding to Article 21 TFEU, on the free right to movement of Union citizens?
- National court in *Jabbi*:  
Does Art. 7 of Directive 2004/38 confer derived rights of residence on a third country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen?

# The EFTA Court's approach (4)

## The EFTA Court's reasoning in *Gunnarsson*

- The incorporation of Directive 2004/38 cannot introduce rights in to the EEA Agreement based on the concept of Union Citizenship, but individuals cannot be deprived of rights that they had under the EEA Agreement before the introduction of Union Citizenship in the EU.
- The former legislation on the right of residence for the non economically active **implied (but did not state explicitly) a right of exit.**
- There is **nothing to suggest that Art. 7 of Directive 2004/38 must be interpreted more narrowly than Art. 1 of Directive 90/365 with regard to the right to move from the home State**, on the contrary – Directive 2004/38 aims to strengthen the right of free movement and residence.

# The EFTA Court's approach (5)

## The EFTA Court's finding in *Gunnarsson*

- Finding, para. 82:

“Article 1(1) of Directive 90/365 and Article 7(1)(b) of Directive 2004/38 must be interpreted such that confer on a pensioner who receives a pension due to a former employment relationship, but who has not carried out any economic activity in another EEA State during his working life, not only a right of residence in relation to the host EEA State, but **also a right to move freely from the home EEA State**. The latter right **prohibits the home State from hindering such a person from moving to another EEA State**. A **less favourable treatment of persons exercising the right to move than those who remain resident amounts to such a hindrance**. Furthermore, a spouse of such a pensioner has similar derived rights, cf. Article 1(2) of Directive 90/365 and Article 7(1)(d) of Directive 2004/38, respectively.”
- I.e.: restriction approach as under Art. 21 TFEU, but only partially ...

# The EFTA Court's approach (6)

## The EFTA Court's reasoning in *Jabbi*

- If the Court ensures **the same level of protection in the EEA**, it must explain why the ECJ's statement in *O. and B.* regarding the Directive cannot decide the matter.
- EU law protects the right to return. *Eind*, in particular, recognises that an EU migrant worker may rely on EU law upon returning as an economically inactive person to his home State with a family member from a third country, provided he previously exercised his EU rights.
- This reasoning is equally relevant when the person returning is not a former migrant worker, but rather an inactive person who has exercised the right to free movement under Art. 7(1)(b) of the Directive.

# The EFTA Court's approach (7)

## The EFTA Court's finding in *Jabbi*

- Finding, para. 77:  
“When a EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the EEA national’s home State. Accordingly, when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State” (*Jabbi*, para. 77).
- I.e. again: restriction approach as under Art. 21 TFEU.

# The EFTA Court's approach (8)

## A new version of the Polydor principle?

- The classic version:  
Different contexts may lead to different interpretations of identical provisions in EU law and in EU external agreements.
- Here: a new version of the principle created by the EFTA Court?  
Your speaker in her draft paper:

"It is submitted that the Court's approach could be seen as reflecting a new, EFTA Court version of the Polydor principle: different contexts of the same provision must lead to **different interpretations, where that is necessary in order to achieve the same overall result in terms of the level of peoples' protection.**"

# Consequences for others (1)

## The example of the AMS States

- Full internal market association is under negotiation, but like the EEA without Union citizenship.
- How to contain the effects of Union citizenship within its proper realm?
- EEA approach so far may not be to the taste of the AMS States ...
- More explicit limitations?
- [Plus: limits to residence, like in the case of FL?]





# Consequences for others (2)

## The example of Switzerland

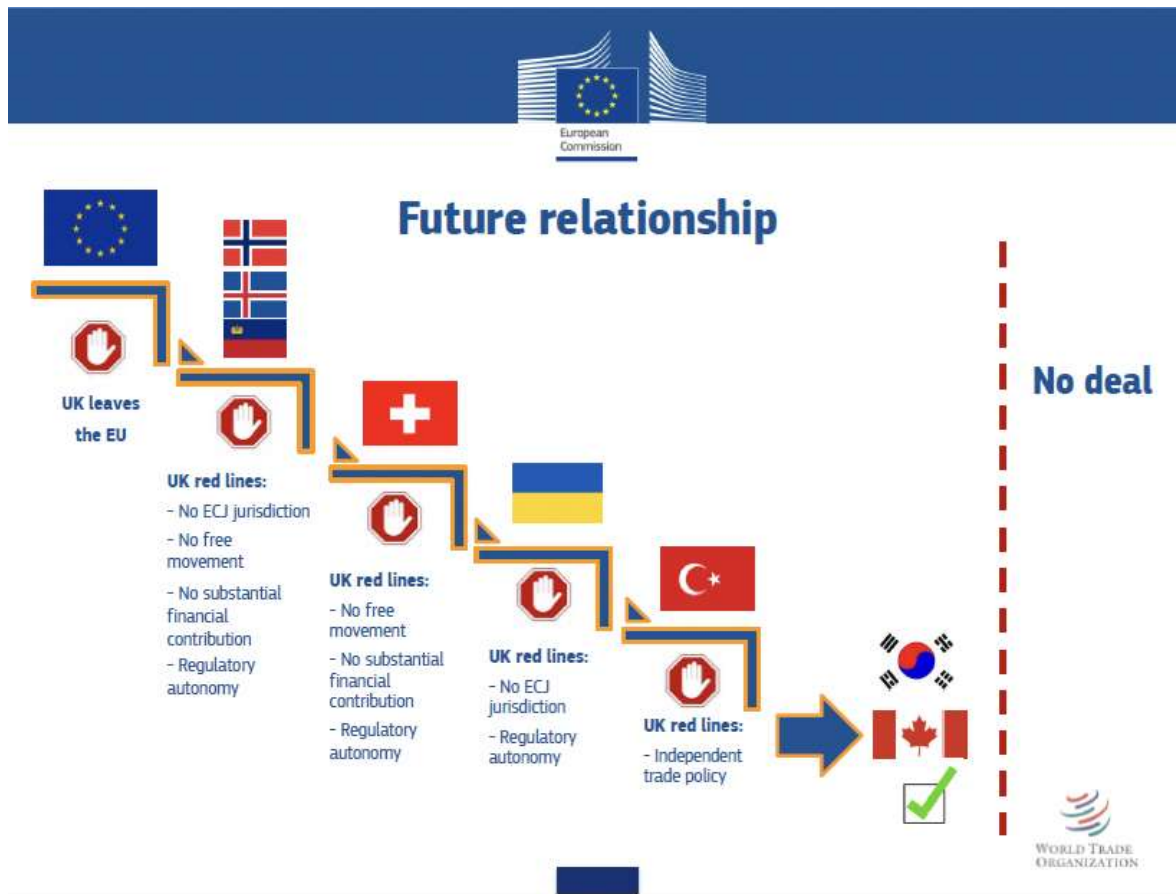
- CH so far refused including Directive 2004/38 into the bilateral law.
- Negotiations on a renewed institutional framework for five existing market access agreements (plus future agreements), including in particular the free movement of persons.



- Planned: dynamic system of updating:
  - EU wishes to (finally) include Directive 2004/38.
  - CH says that there will be no agreement if, among other issues, the Directive as a whole is included.

# Consequences for others (3)

## The example of Brexit



Source:  
Slide presented by Michel Barnier, European Commission Chief Negotiator, to the Heads of State and Government at the European Council (Article 50) on 15.12.2017

# Thank you for your attention!

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