

Between Brussels, Brexit, and Bern:

The European Commission's Power and Interests in Transforming EU Relations with Non-Member European States

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Panel: Europe's Trade Deals: New Regimes or Old Problems?

Saturday May 6, 2017 10:15am-11:45pm

European Union Studies Association

2017 Biennial Conference

Miami, Florida

Abstract

The issue of British exit (Brexit, as it is colloquially called) from the European Union (EU) has spawned innumerable theories as to of what, if or when Brexit occurs, the future relationship of British-Union relations will consist? Many policymakers and policy pundits point to the relations between the EU and Switzerland, Iceland, or Norway as possibilities. However, while these relations are being touted by pro-exit crowds, the current status of these relationships with the Union are quite frequently criticized and often labeled as in need of serious replacement or reform by the institutions and actors of the EU. The Swiss-EU Bilateral relationship has been strained by both immigration and taxation issues over the past few years but these are emblematic of wider discontent between the Union and the system of bilateral agreements that encompass the Swiss-EU relationship. Only with a last minute agreement reached in late 2016 was the bilateral system sustained without serious impediment. Ironically, the Brexit vote of 2016 helped create conditions by which the Commission was far more amenable to a compromise with the Swiss than they had been just several months earlier. While some observers saw the compromise as a Swiss “blink”, the EU could have pressed the case further on the immigration, taxation, and other issues but ultimately did not so choose (*The Guardian* 22 September 2016). The cloud of Brexit seems to have forced the Commission to deprioritize the Swiss immigration dispute and consider a compromise that seemed almost like a concession. Nonetheless, the Union’s official position, dominantly emerging from the Commission rather than other institutions or from the member states, is one that has increasingly seem the bilateral Swiss-EU system as one **not** to be replicated with other European non-member states. Hence, while Brexiters may fancy the Swiss model as an option, this would be one of the least preferred options for the future relationship between the Union and UK. Further, the European Economic Area (EEA) between the EU and Norway, Liechtenstein, and Iceland, also often touted as a possible model for post-Brexit EU-UK relations, has also been under a microscope by the Commission which has increasingly criticized the system for being too slow to implement and codify new EU law and policy.

Critical here is the effort by the Commission over the past fifteen years to strenuously erode the currency of the existing Bilateral and EEA agreements for their lack of enforceability

or efficiency in adoption and implementation of EU law and directives. These must be individually bargained in the Swiss bilateral case but are also argued to be slowly and more haphazardly codified and enforced even under EEA. This case highlights the power of the Commission in dominating EU policy with the non-EU European states like Iceland, Norway, and Switzerland. This research shall demonstrate not only are the Bilateral and EEA systems in peril from increasing pressure and criticism by the EU, but that in this and similar areas the pressure for changes and reforms is mostly being generated from the Commission which is responsible for ensuring adoption, implementation, and enforcement of EU law and directives. Hence it is institutionally interested in more legally binding EU treaties and regimes with non-member states – especially in Europe. This has intriguing consequences for UK-EU negotiations in regards to Brexit and the future of their relationship. While the UK, due to its importance and sheer size in the European and global economy, is not perfectly interchangeable with the Swiss, Norwegian, or certainly Icelandic cases, there are similarities. Much like Switzerland, issues of migration, financial services, insurance, banking, and taxation would seem likely to be central to any EU-UK negotiations on the future of their relationship.

Introduction

The British referendum on leaving the European Union held in June 2016 was, even before the election results were final, a forum for extraordinary discussion about the relationships between the European Union and non-member states in Europe. Many pro-Brexit pundits and policymakers suggested that the future of the United Kingdom's relationship with the EU would be one perhaps similar to that shared by Switzerland or Norway. Even as the May government activated the Article 50 procedures to officially begin the withdrawal process – the question of what could replace the existing membership arrangement is incredibly salient and timely.

However, despite the vigor in which the pro-Brexit crowd assuages British citizens and firms with promises of Swiss or Norwegian-style agreements, one of the often overlooked trends has been efforts by the EU to criticize and even replace the existing bilateral (Swiss) and EEA (Norway, Iceland, and Liechtenstein) agreements with new arrangements that ensure

greater codification and standardization with EU laws and adjudication processes. Further, the sort of “a la carte” relationships that the EU has previously agreed to with Switzerland, EEA, EFTA, and the microstates and autonomous territories of Europe has been seriously criticized within the Commission and Council for well over the past decade. The Commission and Council reports suggest a far less accommodating future for states in Europe seeking access to the markets of the EU. Hence while Brexit appeals to a Swiss or Norwegian future, those Swiss, Norwegian, and other cases are increasingly less tolerated by the EU itself as it attempts to harmonize and Europeanize across the non-member states of Europe. Recent arguments for a multi-speed Europe encompassing many differentiated levels of integration could certainly open up some of these options in the future, though these currently seem highly antithetical to current Commission interests.

Another dimension of EU relations with Switzerland and EEA states like Norway is that the level European integration and subordination to EU-level directive is actually quite robust and consistent. Under EEA, Norway and others are already under jurisdiction of European law and requires adoption of all new directives and laws promptly. The EEA is a comprehensive, binding, and dynamic relationship between the EU and EEA states and would be one that does not seem to mesh well with Brexit expectations of the new UK-EU future. The supranational characteristics of the EEA are quite antithetical to many of the preferences espoused by Brexit supporters. (Eriksen and Fossum, 11) But even the Swiss bilateral relationship is one that while seemingly less hierarchical, less supranational, but more flexible is one that exhibits a strong level of EU hegemony and dominance that has been even more greatly demonstrated in recent negotiations since 2014. (Eriksen and Fossum, 11-12; Vahl and Grolimund, 2006)

The Role of the Commission

The driving force of the changes in EU priorities and language towards Switzerland, EEA, and the other non-member states and territories has decisively been from the Commission. As my interview of the Swiss Ambassador to the European Union illuminated, policy and proclamation often appear to come from the Council but are ultimately originated in the Commission which is the source for all major efforts to reduce binding legal and harmonization

barriers between the EU and its non-member European neighbors. The Commission's role has been to administer and enforce the laws and policies that uphold the single market as well as to monitor and maintain the EU relations with Switzerland, EEA, and other non-member states. The Lisbon Treaty of 2007 was at first viewed as a likely reduction the power of the Commission in the area of external affairs. The influence over external relations was to be increasingly shared by the European Council, the new European External Action Service (EEAS), and the new Vice President/High Representative (VP/HR) responsible for foreign affairs and external relations (Corbett, Peterson, and Kenealy, 53-54). The EEAS and new VP/HR would essentially report to both the Commission and the Council further suggesting a weakening of Commission influence in favor of the Council. (Nugent and Rhinard, 357; Corbett, Peterson, and Kenealy, 53-54) However, as Nugent and Rhinard argue, this reduction was to some extent exaggerated as the Commission still maintained strong influence and even power over critical features of EU external relations including trade negotiating trade agreements and day to day management and monitoring of trade policies (Nugent and Rhinard, 357-358). While relations with Switzerland, other states, and the EEA technically seem like areas of foreign policy where the Council or other institutions might have more influence – the Swiss bilaterals, other agreements, and EEA are interpreted by the Commission to be part of the management and monitoring of day to day trade policies as well as extensions of the single market and hence enforcement of those treaties and efforts to better integrate markets are a priority of the Commission. Further, the Commission's authority to refer cases of non-compliance to the European Court of Justice if needed also expands its interests to areas of EEA and the Swiss bilaterals in terms of ensuring that they fall under the jurisdiction of the ECJ. The EEA does technically have non-state members under ECJ jurisdiction but there have been numerous instances where that jurisdiction has not been effective or applied. In the Swiss Bilaterals case, the ECJ, does not have strong jurisdiction in any meaningful way as EU law can be selectively adopted by Switzerland and hence avoid such jurisdictional supranationalism.

The powers and authority of the Commission are wide and important ones in many areas and despite changes stemming from the Lisbon Treaty and other revisions, it remains a driving force of European integration within the member states and in the external relations of

the EU especially with those non-members in Europe. While the external affairs duties were seemingly being redistributed by the Lisbon Treaty and new European institutions, the Commissions fundamental executive duties not only remained intact but were in many ways expanded. Since the financial and economic crises of 2007-2008, the Commission has seen an “increasing range of direct surveillance, monitoring, and implementation responsibilities” not only within the Eurozone and fiscal policy areas but also in latitude in dealing with the external relations of the non-member European states such as Switzerland, Norway, Iceland, and the microstates and territories. (Nugent and Rhinard, 17)

Changing Priorities of the EU’s Relations with Non-Member Western European States

The evidence that supports the argument that the EU (and specifically the Commission) has been altering its priorities in the area of relations with non-member states of Western Europe is a trail of documentation, data, and negotiations stretching back well over a decade. Thankfully, the EU fastidiously and conveniently makes such reports, statements, findings, analysis, and conclusions available through a variety of their information and press services. Below is a chronological summarization of key documents and developments that catalog and support the changing prioritization of interests with Switzerland, EEA, and the other non-member states of Western Europe. Overall, there is a clear, unambiguous, and identifiable pattern of increasing EU interest in and demand of an extension of the single market model of adoption and implementation of EU law as well as a formalized process of adjudication, through EEA and other institutions, to Switzerland, and the other non-member states of Western Europe.

Part of the complexity of EU-Swiss relations is that the very intergovernmental nature of the existing regime, including the 1972 agreement and the two Bilateral agreements, requires that when disputes and issues arise they must, be rule and treaty, essentially be opened up to negotiation between the two actors. This essentially requires a tedious process of negotiation and renegotiation of each and every issue in light of the language and interpretation of the treaties. This is unlike the system within the EU or even in the EEA whereby disputes and adjudication take place within the institutional processes and organizations of the EU bureaucracy, Commission, and, if needed, the European Court of Justice. Indicative of this

dilemma, and perhaps one of the many issues that has reprioritized the EU's position vis-à-vis Switzerland, was the 2007 dispute between the EU and Switzerland over the incompatibility of various cantonal tax regimes and how their differential impact on Swiss and EU firms doing business in the confederation. If Switzerland were an EU or EEA member, EU law and institutions would essentially have the power to analyze and adjudicate this dispute under the many treaties, directives, and the constitution of the union and the EEA. However, due to the construct of the Swiss-EU 1972 and bilateral treaties, the process was one of excruciating back and forth assessments, interrogatories, and arguments that the EU ultimately felt required Switzerland to force two cantons to amend their tax codes. The very process itself dragged on for over two years before the EU was able to render a final commission decision. (Commission Decision of 13 February 2007 on the Incompatibility of Certain Swiss Company Tax Regimes with the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972) Ultimately, this specific case, and others like it, created the sense amongst the members of the Union, the Commission, and the Council that the intergovernmental arrangements with Switzerland had become far too complex, time-consuming, and problematic to sustain in this manner.

In 2008, the Council conclusion on EU relations with EFTA countries further suggested that the nature of Swiss-EU relations was in need of reconsideration. While the general language of the conclusion was one that highlighted the "wide-ranging and productive cooperation" of the union and confederation relations based on the 1972 agreement and the 1999 and 2004 bilaterals, it also highlighted a number of issues that would become the basis for a change of priorities in EU considerations of Swiss relations. The conclusions emphasized that Switzerland had failed to fully incorporate the *acquis* of both Schengen and the Agreement on Free Movement, leading to a situation which "jeopardizes the proper functioning of this agreement to the detriment of EU citizens and companies". While the document suggests that the 1972 agreement had been a "useful tool to foster economic integration", the cantonal tax issue was again raised as "incompatible to the agreement" and one that Switzerland needed to legislatively correct so as to end the effect of "distorting competition between EU border regions and Switzerland". Most importantly, the conclusions from the council illustrate the

growing EU argument that the system of agreements and bilaterals fall short on many fronts. In section 29, the council argues that since the EEA judicial framework does not apply to Switzerland, the EU Council is “concerned with an inconsistent application of agreements concluded between the EU and Switzerland” and demands that the Swiss “fully implement those agreements”. In sections 30 through 34, the council states drives home an argument that adoption of the *acquis* and the EEA are the highest priority for governing EU relations with non-member states in Western Europe.

30. In assessing the balance of interests in concluding additional agreements, the Council will have in mind the need to ensure parallel progress in all areas of cooperation, including those areas already mentioned as causing difficulties for EU companies and citizens.

31. The Council looks forward to deepening its partnership with Switzerland in several sectors but recalls however that taking part in the internal market requires a homogenous and simultaneous application and interpretation of the constantly evolving *acquis*. This indispensable prerequisite for a functioning internal market has - as is the case in the EEA - to be reflected in all the agreements currently being negotiated with Switzerland (customs security, liberalisation of the electricity market, free trade in agricultural products, public health and consumer protection).

32. The Council welcomes the announcement of discussions in the Swiss Parliament in favour of a framework agreement. Such an agreement should also include the incorporation of the *acquis* for all the agreements, and a mechanism for regular updating and homogenous interpretation of them.

34. In the past, the Swiss people have expressed their solidarity with the EU through a contribution to the Union in favour of the new Member States. The EU believes that such support contributes to enriching overall relations between the parties and reinforces mutual solidarity. The Council is therefore confident that Switzerland will show strong solidarity also in future. (Draft Council Conclusions on EU Relations with EFTA Countries, 2008)

In 2010, the Council reiterated and expanded its concerns over the Swiss intergovernmental and bilateral system. In fact, this was the first time that the Council explicitly suggested that the system was unsustainable. While the Council conclusions began with the normal pleasantries in the first section:

1. The Council has assessed the development of relations between the EU and the four Member States of the European Free Trade Association (EFTA) since the adoption of its last conclusions on the subject in December 2008. Generally, EU relations with the EFTA countries, which were already considered to be very good and close in 2008, have further intensified in the past two years (details on developments are set out below in country specific paragraphs). The Council is looking forward to continue the positive relationship with the EFTA countries and to deepen it in the future. It will reassess the state of relations between the EU and the EFTA countries in two years.

The tone was dramatically changed by sections 6 through 8 which explicitly calls for a major reassessment of Swiss-EU treaties and arrangements:

6. Since Switzerland is not a member of the European Economic Area, it has chosen to take a sector-based approach to its agreements in view of a possible long-term rapprochement with the EU. In full respect of the Swiss sovereignty and choices, **the Council has come to the conclusion that while the present system of bilateral agreements has worked well in the past, the challenge of the coming years will be to go beyond this complex system, which is creating legal uncertainty and has become unwieldy to manage and**

has clearly reached its limits. In order to create a sound basis for future relations, mutually acceptable solutions to a number of horizontal issues, set out below, will need to be found.

7. Though EU relations with the EFTA countries were extended over the years to many areas not covered by the internal market, these relations are mainly based on the progressive integration of the EFTA countries' economies into the EU internal market. **In view of the need for a level playing field for all economic operators of the parties concerned and the continued development of internal market relevant acquis, the EU and the EFTA States should ensure homogeneity in the implementation of the acquis and the good functioning of the institutions.**

8. A similar assessment should also be undertaken concerning the relations of the EU with the European countries of small territorial dimension, and more in particular the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Their current relations with the EU are extended but fragmented, with large parts of the acquis related to the internal market not introduced in their legislation and therefore not applicable.

The change is remarkable from the previous Council conclusions of just two years prior and explicitly suggests the need to find new arrangements that would ensure adoption of the acquis, which was even still of concern with EEA members like Norway and Iceland, but the extension and implementation of a single market. This suggests that for Switzerland, and the microstates such as Andorra, San Marino, and Monaco, that the “fragmented” arrangements and agreements were no longer going to be tolerated as they were in the past. While the pursuit of broad multilateral and binding agreements with the non-member states of Western Europe had always been an interest of the union it has been historically deprioritized in lieu of pragmatic intergovernmental and bilateral arrangements that came to dominate the relationships between the EU and such states.

The question is why did the EU wait until 2010 to reemphasize such interests and in such a manner? This research speculates that there are several variables at play. First the enormous strain of the currency, economic, banking, and fiscal crises that were swamping the union and its member states meant that there was far less willingness and ability to continue to operate “business as usual” with the non-member states. The types of negotiation, renegotiation, and bargaining required to deal with the complexity of issues, especially with the Swiss, was just not perceived as possible nor preferred given the scope, scale, and number of other critical issues. The cantonal tax issue was also still not completely resolved and to some extent becomes the exemplar of why the existent system of intergovernmental and bilateral arrangements was just too tedious and time-consuming to sustain.

Interestingly, in the same 2010 conclusions, the council also casts light on the EEA and reforming its operations and effectiveness as a tool of integration:

34. The Council notes with interest the Norwegian government's decision to establish a Committee with the mandate to undertake a thorough review of the functioning of the EEA Agreement. This Committee is due to report in 2011. The Council also notes a similar approach in Liechtenstein on its European integration policy. The Council encourages a parallel process on the EU side, with a review of the functioning of the EEA Agreement, taking into account that EU-EEA EFTA relations have developed over the past 15 years in depth and in scope both within the framework of the EEA Agreement and beyond.

35. Furthermore, it should be examined whether the EU interest is properly served by the existing framework of relations or alternatively by a more comprehensive approach, encompassing all fields of cooperation and ensuring a horizontal coherence. The EU review should also take into account possible developments in the membership of the EEA.

36. Specifically in relation to the EEA, the continued homogeneity of the applicable legislation throughout the European Economic Area must be ensured, with particular emphasis in avoiding gaps in the *acquis* across the EEA. With regard to the "technical" functioning of the Agreement, the possibility of updating and simplifying some of the procedures, which were established when the EEA Agreement was first conceived, should be explored, taking into account notably the massive technological development which now could be of benefit in the general functioning of the EEA Agreement.

In essence, the Council was also suggesting the while EEA was preferable to other bilateral or intergovernmental arrangements like those with Switzerland, even EEA was perhaps in need of reassessment in its ability to fulfil integration, *acquis*, and single market efforts. However, the language does suggest that the EEA, if updated and expanded – such as with new members from Western Europe including Switzerland and the microstates – this would be a good middle-term solution to EU interests and demands. Later in the document, the Council conclusions specific to Switzerland indicate a much longer and detailed litany of issues and concerns:

41. Following Switzerland's rejection of the EEA in 1992, the EU and Switzerland decided to deepen their relations through the conclusion of agreements in chosen sectors. The Council takes note of the European Policy Report of the Swiss Federal Council of September 2010, reaffirming this choice.

42. The Council notes that **this sectorial approach has allowed closer cooperation in a few areas of mutual interest but has turned in the course of the years into a highly complex set of multiple agreements. Due to a lack of efficient arrangements for the take-over of new EU *acquis* including ECJ case-law, and for ensuring the supervision and enforcement of the existing agreements, this approach does not ensure the necessary homogeneity in the parts of the internal market and of the EU policies in which Switzerland participates. This has resulted in legal uncertainty for authorities, operators and individual citizens.**

43. In this context, the Council is concerned by an incoherent application of certain agreements and the introduction by Switzerland of subsequent legislative measures and practices incompatible with those agreements, in particular the Agreement on the Free Movement of Persons. The Council calls upon Switzerland to abrogate such restrictions (for instance, the obligation in force in Switzerland to provide prior notification with an 8-day waiting period) and to refrain from adopting new measures incompatible with the Agreement.

44. The Council remains very concerned regarding certain cantonal company tax regimes of Switzerland creating an unacceptable distortion of competition, and reaffirms its position on this matter. It regrets that the lengthy dialogue on this issue has not yet led to an abolition of the state aid aspects of these regimes. The Council reiterates its call on Switzerland to abolish these tax incentives and to avoid taking internal measures, such as certain aspects of the New Swiss Regional Policy, which would be incompatible with the Agreement and may have the effect of distorting competition between EU border regions and Switzerland. Other difficulties in the implementation of Protocol II of the Free Trade Agreement and in the application of the Agreement on Trade in Agricultural Products remain a matter of concern.

48. **In full respect of the Swiss sovereignty and choices, the Council has come to the conclusion that while the present system of bilateral agreements has worked well in the past, the key challenge for the coming years will be to go beyond that system, which has become complex and unwieldy to manage and has clearly reached its limits. As a consequence, horizontal issues related to the dynamic adaptation of**

agreements to the evolving acquis, the homogeneous interpretation of the agreements, an independent surveillance and judicial enforcement mechanisms and a dispute settlement mechanism need to be reflected in EU-Switzerland agreements.

49. In addition to making the existing agreements more efficient and solving the outstanding problems in their implementation, the Council recognises that cooperation should be developed in certain areas of mutual interest. However, as regards agreements providing for Switzerland's participation in individual sectors of the internal market and policies of the EU (a status normally only granted to members of the European Economic Area (EEA)), the Council recalls its conclusions of 2008, that the requirement of a homogeneous and simultaneous application and interpretation of the evolving acquis - an indispensable prerequisite for a functioning internal market - has to be ensured as well as supervision, enforcement and conflict resolution mechanisms. In this context, the Council welcomes the setting-up of an informal Working Group of the Commission and Swiss authorities.

Clearly the Council and other interests in Brussels had taken dead aim at Switzerland as emblematic of the inability to effectively extend the single market and the acquis to the non-member states of Western Europe but also saw that the maintenance of the intergovernmental bilateral system as one of inherent flaws and inefficiency that could not be sustained. This was bolstered by an increasing list of policy specific problems including cantonal tax code, fraud and transparency issues, and especially limits to free movement of workers. Swiss decisions to limit migration and workers from several Eastern European EU members was a direct violation of key elements of Schengen and preexisting agreements between the EU and Switzerland from 1972, 1999, and 2001. With greater scrutiny from even more EU member states, the prioritization to push EEA and other more supranational and binding arrangements on the Swiss found a much larger audience in the Council. (Council Conclusions on EU relations with EFTA Countries, 2010)

2012 was an extraordinarily active year in the EU reassessment of relations with Switzerland and the other non-member states of Western Europe. In November 2012, the European Commission finalized a communication with recommendations to the other entities of the EU regarding EU relations with Andorra, Monaco, and San Marino and how to improve integration. While explicitly regarding the microstates, the implicit findings also suggested a broader effort likely to include Switzerland and any other European non-member states. The most critical findings and suggestion were in the area of how to more formally and bindingly integrate the small states into the EU with the highest prioritization being that of minimizing sectoral and intergovernmental bilateral approaches and providing consistent and universal methods of integration, adoption of the acquis, and adjudication. One critical passage seemed to explicitly detail the priorities of integrating non-member states as the Commission argued that the demand for greater formalization was needed to:

“ensure the homogeneity of the internal market and legal certainty for economic operators and citizens, any agreement with the small-sized countries would need to address **four horizontal issues** related to: (i) the dynamic adaptation of the agreement to the evolving *acquis*; (ii) the homogeneous interpretation of the agreements; (iii) independent surveillance and judicial enforcement; (iv) and dispute settlement. In this respect, the EU could draw on the successful experience of the EEA Agreement in this respect.”

The Commission suggested that five options were available in dealing with the small non-members states of Western Europe; 1) status quo, 2) sectoral approach, 3) Framework Association Agreement, 4) EEA membership, and 5) EU membership. The Commission quickly discarded options 1 and 5, but also quickly dismissed option 2, the sectoral approach that is essentially the basis of the Swiss-EU relationship. In fact, the Commission made a highly undisguised criticism of that approach and the declining Swiss-EU situation stating that “The EU’s experience of the sectoral approach has conclusively demonstrated its drawbacks.”

Explicitly, the Commission suggested that options three and four were the most preferred:

5.3. Option Three: Framework Association Agreement

A Framework Association Agreement could offer the small-sized countries a high degree of integration, including partial or full access to the EU’s internal market, its flanking measures and horizontal policies. It could also provide for participation in other areas of EU activity. The Association Agreement would set out the underlying values, principles and institutional foundations of the relationship. The Agreement could be a single multilateral agreement between the EU and the three small-sized countries, possibly following the **European Economic Area (EEA)** model. The conclusion of a bilateral treaty with each small-sized country would theoretically be possible but not desirable due to the added complexity and tendency for unnecessary differentiation, as mentioned in sub-section 5.2. above. This option would offer the additional advantage to the three small-sized countries of regulating their mutual relations. It would be necessary to draw up an appropriate **institutional framework** for this option. If feasible, a solution that built on the credibility and efficiency of existing structures would be preferable. Special governance arrangements could be defined, which might include, for example, mechanisms for the consultation of the small-sized countries on proposals for EU legislation that were of particular relevance for them (“decision-shaping”) as well as their participation as observers in EU programmes and agencies. In any case, for a Framework Association Agreement to be viable, a satisfactory solution would have to be found to ensure that the relevant parts of the *acquis* are made applicable in those countries, that the *acquis* is actually implemented and enforced by the small-sized countries or authorities entrusted by them with that task, and that the application of the *acquis* is monitored and, as the case may be, enforced vis-à-vis those countries. Overall, if a suitable institutional framework can be worked out, this is a **viable option** that should be explored further.

5.4. Option Four: Participation in the European Economic Area

This option would provide for full integration into the internal market on the same basis as the current non-EU countries of the European Economic Area (EEA). It has **several advantages**, including the straightforwardness and reliability of using an existing and proven treaty and institutional framework. However, given that the European Economic Area Agreement was concluded between two pre-existing trade and economic areas (the EU and EFTA), it would in principle be necessary for the small-sized countries first to become a member of either one in order to join the EEA. Membership of the EU is considered below, which leaves accession via EFTA. The EU would need to discuss with the existing members Iceland, Liechtenstein, Norway and Switzerland, the possibility of enlarging EFTA to the small-sized countries. This option would have the added advantage of boosting the EFTA-EEA membership, which would dwindle to only two countries (Norway and Liechtenstein) if Iceland were to join the EU. The enlargement of the EEA would involve re-negotiating the EEA Agreement, not least to provide for an adaptation of the EEA- EFTA institutions. The precise legal construction would need to be examined in more detail if this option were retained. Overall, this is a **viable option** that should be explored further.

In December 2012, the European Commission issued an additional document that reviewed the functioning of the European Economic Area (EEA). The document was a fairly robust assessment of the EEA and relations with the non-member states of Western Europe and many overlapping and state-specific issues. But the underlying argument was that EEA should probably be revised and updated to make it more consistent and supranational in its implementation and adjudication of EU law and the *acquis* but that it both could, and perhaps should, be used a conduit to address the issues of the small non-member states like Switzerland and the microstates. As stated in a latter portion of the document:

Switzerland is part of EFTA but, following a referendum in 1992, rejected participation in the EEA. The Swiss position has not changed in the meantime. However, in view of Switzerland's increasing wish to participate in certain areas of the internal market and in EU activities in several cooperation fields, for which the EEA could offer an appropriate framework, this position should be re-evaluated. Indeed, in accordance with its Article 128, Switzerland can become a party to the EEA Agreement by an agreement with the other EEA partners, which lays down the terms and conditions for such participation. (A Review of the Functioning of the European Economic Area, 2012)

Just thirteen days later, the Council of the European Union issued its biennial conclusions of its relations with EFTA countries and reiterated many of the points made in 2010 and in the recently issued Commission review of EEA. Importantly, the Council strongly viewed EEA as a strategic and preferable option for the non-members states of Western Europe but also arguing for the need for faster and more efficient adoption of the *acquis* and adjudication of disputes:

The Council notes that overall, the EEA Agreement has continued to function in a satisfactory manner. The Council welcomes the substantial efforts made by the three EEA EFTA countries (Iceland, Liechtenstein and Norway) in the course of the past year to reduce the number of outstanding legal acts still to be incorporated into the EEA Agreement. The Council draws the attention to the importance of addressing, as a matter of priority, the remaining large number of legal acts, for which the compliance date in the EU has passed, but which have not entered into force in the EEA EFTA countries as their incorporation into the EEA Agreement has been delayed. In this regard, the Council underlines that the principles of homogeneity and legal certainty guarantee the efficiency, sustainability and ultimately the credibility of the single market and must therefore continue to guide the action of all parties in relation to the functioning of the EEA Agreement.

When addressing issues directly relating to Switzerland, the Council conclusions were once again significant in detail and length – actually taking up over one third of the entire report – and increasingly critical and far less than cordial than even two years prior. Most importantly, the council, for the first time, explicitly argues that the future of EU-Swiss relations are either in EEA or another institutional framework that is multilateral, binding, and not sectoral. The

conclusions also reemphasize many nagging issues that remained unfinished including the cantonal tax subsidy and limitations on the free movement of peoples between the EU and Switzerland. Overall, it was the sharpest critique leveled by Brussels at Bern over the history of European integration and was the most explicit at not only attacking the intergovernmental and bilateral system of relations but also proposing that the future must lay in a far more institutionalized, supranational, and legally-binding association with the EU either through EEA or a separate Association Framework Agreement.

30. The Council notes that in the last years, negotiations as regards Switzerland's further participation in parts of the Internal Market have been marked by a **stalemate, partly due to unresolved institutional issues**. While the Council welcomes the continuation of intensive and close cooperation with Switzerland in many areas, it is of the view that the conclusion of **any negotiation regarding the participation of Switzerland in the Internal market is, in particular, dependent on solving the institutional issues outlined in the Council conclusions of 2008 and 2010**.

31. Recalling its conclusions of 2010, the Council reaffirms that the approach taken by **Switzerland to participate in EU policies and programmes through sectoral agreements in more and more areas in the absence of any horizontal institutional framework, has reached its limits and needs to be reconsidered**. **Any further development of the complex system of agreements would put at stake the homogeneity of the Internal Market and increase legal insecurity as well as make it more difficult to manage such an extensive and heterogeneous system of agreements. In the light of the high level of integration of Switzerland with the EU, any further extension of this system would in addition bear the risk of undermining the EU's relations with the EEA EFTA partners**.

32. The Council welcomes the efforts made by Switzerland to formalize proposals on these institutional issues, as submitted in June 2012. In particular, the Council notes with satisfaction that Switzerland recognizes that the principle of homogeneity, a principle requiring in particular a dynamic adaptation to the evolving EU *acquis*, should be at the core of the EU-Switzerland relationship.

33. However, the Council considers that further steps are necessary in order to ensure the homogeneous interpretation and application of the Internal Market rules. In particular, the **Council deems it necessary to establish a suitable framework applicable to all existing and future agreements. This framework should, inter alia, provide for a legally binding mechanism as regards the adaptation of the agreements to the evolving EU *acquis*. Furthermore, it should include international mechanisms for surveillance and judicial control. In this context, the Council notes that by participating in parts of the EU internal market and policies, Switzerland is not only engaging in a bilateral relation but becomes a participant in a multilateral project. All in all, this institutional framework should present a level of legal certainty and independence equivalent to the mechanisms created under the EEA Agreement**.

34. The Council underlines that it attaches great importance to the continuation of a dialogue with Switzerland on possible solutions to the institutional issues as set out in previous paragraphs. The Council invites the Commission to report on the progress in the exploratory discussions and, in the light of such progress, to consider the possibility of presenting a recommendation for the opening of negotiations with Switzerland.

35. The Council welcomes the mobility of citizens between the EU and Switzerland, based on the Agreement on the Free Movement of Persons and enhanced by other Agreements, such as those on the participation of Switzerland in the Life Long Learning and Youth in Action Programmes and on Switzerland's association to the Research Framework Programme of the EU. However, the Council notes with regret that Switzerland has taken a number of measures, which are not compatible with the provisions and the spirit of the Agreement on the Free Movement of Persons and undermine its implementation. In particular, the Council deeply regrets that Switzerland has unilaterally re-introduced quotas for certain categories of residence

permits for citizens of 8 EU Member States. The Council considers this step to be discriminatory and clearly in breach of the Agreement, and strongly urges Switzerland to reverse its decision and to respect the agreed provisions. Furthermore, the Council regrets that Switzerland has not yet abolished certain unilaterally introduced flanking measures to the Agreement (such as the obligation to provide prior notification with an 8-day waiting period), which restrict the provision of services under the Agreement and are particularly burdensome for SMEs wishing to provide services in Switzerland. The Council reiterates its call on Switzerland to abrogate these measures as soon as possible and to refrain from adopting any new measure incompatible with the Agreement.

36. The Council welcomes the ongoing discussions in Switzerland regarding the abolition of certain Swiss cantonal company tax regimes, which create an unacceptable distortion of competition between the EU and Switzerland and present characteristics of state aid. The Council remains deeply concerned regarding these regimes and calls on Switzerland to rapidly conclude internal discussions with the aim of abolishing these tax incentives in the near future, and to avoid taking new internal measures, which might again distort competition. In addition, the Council welcomes the ongoing technical discussions between the European Commission and the Swiss authorities regarding the New Regional Policy of Switzerland and calls for an alignment of Switzerland with EU State aid rules applicable to regional policy. (Council Conclusions on EU Relations with EFTA Countries, 2012)

The 2012 council conclusions were the most direct assault on the Swiss-EU intergovernmental relationship and set the tone for most negotiations between the two since. The issues were taken up in May 2013 by a Joint Parliamentary Committee of the European Economic Area organized by the Norwegian and European parliaments. While generally reviewing the relationship between EEA and the EU along with issues relevant to Switzerland and other non-member states in Western Europe, it also provided some more nuanced enquires and discussions into the process by the EEA could remain a “durable instrument” and better address EU concerns over adoption of EU law. Importantly, especially from the EEA and EFTA states, was the response that perhaps such states need to have more input or voice in the policymaking process if the EU wishes to have quicker and fuller implementation and adoption of the *acquis*. To some extent this was a fairly constructive set of responses by EFTA and EEA states to increasing EU pressures and demands. Nonetheless, while it provided some structure and context for negotiations between the EEA and EFTA countries with the EU, the underlying position of the union regarding Switzerland seemed to harden. Following the Swiss immigration referendum in February 2014, the EU position would garden even further.

The council conclusions of December 2014 were an even stronger proposition by the EU in terms of pushing for a decidedly more supranational and binding set of agreements and arrangements with the non-member states of Western Europe and the need to extend and strengthen efforts to solidify and standardize the “single market”. Even the title of the biennial document was altered and explicitly suggests what the overarching priority of the EU should be

towards these states. Whereas the previous biennial conclusions were entitled “Council Conclusions on EU relations with EFTA Countries “ the new title, “Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries” more than clearly illustrated the new “homogeneous” preferences of the union. The document emphasizes the need for homogeneity, integration, consistency, adjudication, and scrutiny in the relationship between the EU and these states that entirely rests upon the ending of intergovernmental and bilateral arrangements in favor of EEA or EEA-like association agreements which formalize and institutionalize such treaties with Brussels-based institutions and procedures.

The Council emphasizes that the EU should have a consistent approach towards non-EU partners that participate in the extended Single Market, and are equated with EU Member States for the purposes of this participation. It notes that it is the responsibility of all the States, which participate in the extended Single Market to ensure its integrity and homogeneity, and that their citizens and businesses enjoy fully and equally their rights within it.

But even here the EU was critical of EEA and the backlog of adoption of EU law and the *acquis*. In essence, while the EU was suggesting that non-members like Switzerland and the microstates join EEA it was also simultaneously criticizing and called for major reassessment of EEA to better address EU demands for adoption of EU law and greater supranationalism.

While welcoming efforts made by the EEA EFTA States over the last years to step up the pace of incorporation, the Council regrets that these efforts were still insufficient to effectively and comprehensively address the existing problems. It notes in particular that the questioning of the EEA relevance of EU legislation by the EEA EFTA states, the extensive use made of the possibility under the Agreement to request adaptations and exceptions, as well as delays in the clearance of constitutional requirements and in the implementation and enforcement of already adopted EEA legislation in the EEA EFTA states contribute to a fragmentation of the internal market and to asymmetric rights and obligations for economic operators. The Council encourages the EEA EFTA states to actively work towards a sustainable and streamlined incorporation and application of EEA relevant legislation as this is paramount to safeguard the overall competitiveness of the European Economic Area.

The section on relations with Switzerland was, as it was in 2010 and 2012, incredibly critical of the stability and sustainability of the intergovernmental and bilateral arrangements which had shaped Swiss-EU relations for the previous seventy years. But with the Swiss immigration referendum of February 2014 adding a new layer of controversy and complexity, the EU position was made even starker and more akin to an ultimatum.

44. The Council reaffirms that by participating in parts of the EU's internal market and policies, ***Switzerland is not only engaging in a bilateral relation but becomes a participant in a multilateral project. It has taken note of the reconfirmation by the Swiss Federal Government in December 2013 of its attachment to a***

sectoral approach. The EU believes that an ambitious and comprehensive restructuring of the existing system of sectoral agreements would be beneficial to both the EU and Switzerland. A precondition for further developing a bilateral approach remains the establishment of a common institutional framework for existing and future agreements through which Switzerland participates in the EU's internal market, in order to ensure homogeneity and legal certainty in the internal market. The Council welcomes the opening of negotiations on such a framework in May 2014, expects further efforts in order to progress with these negotiations and reiterates **that without such a framework no further agreements on Swiss participation in the internal market will be concluded.** Furthermore, before deciding on the conclusion of these institutional negotiations, as well as of any other negotiations related to the access of Switzerland to the single market, **the Council will carry out a comprehensive assessment of EU-Swiss relations. Agreements in other areas will be considered carefully, and the EU will appraise the balance of interest on a case-by-case basis.**

In this section the EU essentially and clearly argues that any reform or restricting of the bilateral sectoral approach that Switzerland prefers could only come after the creation of a more formal and binding institutional framework. Further, that until completed there will be “no further agreements” on Swiss participation in European internal market programs and operations.

45. The Council has taken note of the outcome of the vote in Switzerland on a popular initiative "Against Mass Immigration" on 9 February 2014, as well as of the implementation concept presented by the Swiss Government in June 2014. While fully respecting the internal democratic procedures of Switzerland, the Council reconfirms the negative reply in July 2014 to the Swiss request to renegotiate the Agreement. It considers that the free movement of persons is a fundamental pillar of EU policy and that the internal market and its four freedoms are indivisible. The Council confirms its view that the planned implementation of the result of the vote threatens to undermine the core of EU-Switzerland relations, namely the so-called "bilateral I agreements", and casts doubt on the association of Switzerland to the Schengen and Dublin acquis and the participation of Switzerland in certain EU programmes. The Council also takes note of the resounding rejection of very strict limits to immigration as foreseen by the so-called "Ecopop" initiative of 30 November.

46. The EU expects Switzerland to honour its obligations arising from the Agreement on the free movement of persons and the other agreements concluded with the EU. Furthermore, the Council expects Switzerland to fully ensure that EU citizens working or living on its territory, regardless of the moment of settlement and taking up employment in Switzerland, can exercise or continue to exercise their acquired rights without any restriction, and with the guarantee that the outcome of the popular initiative would not have a negative impact on them. In case of infringements of the above principles, the Council reserves its right to put an end to the abovementioned institutional negotiations and other internal market related negotiations.

47. The Council strongly regrets that following the popular vote of 9 February, Switzerland was no longer in a position to sign the Protocol extending the Agreement on the Free Movement of Persons to Croatia. The Council has taken note that Switzerland has unilaterally introduced measures to avoid discrimination of Croatian citizens. However, the Council remarks that Croatian nationals working or living in Switzerland are discriminated, as these unilateral measures fall short of the provisions of the Protocol and, contrary to citizens from other Member States, Croatian nationals cannot rely on an international agreement. The Council reaffirms that the principle of non-discrimination, including equal treatment of all EU Member States, the right to exercise an economic activity and reside on the territory of the other party, as well as the standstill clause, constitute the essential basis of the EU's consent to be bound by the Agreement on the free movement of persons.

In this section the EU takes aim at not only the recent immigration referendum and its impact on the free movement of peoples but the ongoing problems that Switzerland has had with these principles over the past decade. The immigration referendum becomes

one of the most critical points as that without renegotiation the entire bilateral system would be in jeopardy, but the EU has essentially said that it would not negotiate or renegotiate any elements of the agreements without the existence of a more overarching binding agreement in place. And finally, continuing problems with taxes, transparency, and financial account cooperation round out the growing litany of EU issues with lack of Swiss compliance and slowness in response.

48. The Council recalls the conclusions of the European Council on 20-21 March 2014 inviting Switzerland to commit fully to implementing the new single global standard for automatic exchange of financial account information developed by the OECD and endorsed by the G20. In this context, the Council welcomes the commitment of Switzerland to adopt the OECD Global Standard on Automatic exchange of financial account information and the approval by the Federal Council on 19 November 2014 of the declaration on the signature of the Multilateral Competent Authority Agreement.

49. The Council notes with satisfaction that the on-going negotiations on the revision of the savings taxation agreement are based on the automatic exchange of financial account information, reflecting the evolution of the corresponding EU acquis and the recent international developments. Recalling the European Council conclusions of 20-21 March 2014 calling on the Commission to carry forth the negotiations with a view to concluding them by the end of the year, the Council emphasizes the importance of a swift conclusion of these negotiations for a revised agreement, in order to ensure consistency with the updated EU acquis and the international developments, in particular the new single Global Standard for automatic exchange of financial account information developed by the OECD.

50. With regard to the dialogue on tax measures which constitute harmful tax competition, the Council welcomes the signature of a joint Statement between EU Member States and Switzerland on company tax issues and strongly encourages Switzerland to effectively and swiftly remove the five tax regimes concerned.

The 2016 Council Conclusions on a Homogeneous Extended Single Market and EU Relations with Non-EU Western European Countries continues in the mode towards the need for significant reform of relations between the Union and non-member states but does seem to alleviate some of the more aggressive language. The possibility that Brexit has influences both the Commission and Council towards a less aggressive posture towards Switzerland, the EEA, and the microstates is certainly possible. Added to the continuing economic and political uncertainties in a year of Dutch, French, and German elections, the Commission and Council may be seeking to stabilize the relations with the non-member European states or at least deprioritizing the effort to put this issues at the top of the agenda. In the area of microstates, the findings state:

The Council reiterates that the strength of our economic integration depends on full respect for the four freedoms of the Single Market. It is therefore the responsibility of all the States which already participate or wish to increase their level of participation in the extended Single Market to ensure its integrity and homogeneity, as well as full respect for equal rights and obligations for both citizens and businesses. The Council welcomes the launch of negotiations with Andorra, Monaco and San Marino to develop closer relations with the EU, in particular with regard to their participation in the Single Market

The Council considers that the future Agreement(s) should be based on a number of fundamental principles, such as maintaining the good functioning and homogeneity of the Single Market and legal certainty, while at the same time taking into account the specificities of each country as well as their particular situations in line with the Declaration on Article 8 of the Treaty on European Union. In this context, the Council stresses the need for all parties to continue to make steady and concrete progress towards the finalisation of these negotiations.

In comparison to past statements, the Council's remarks are far more flexible and accommodating than they have been in the last decade. The balance between the single market and allowing "specificities" of particular situations is rather notable. In regards to the relations with the EEA, the statement posits:

The Council notes that the EEA Agreement has continued to function in a satisfactory manner in the last two years, maintaining its key role in advancing economic relations and Single Market integration between the EU and the EEA EFTA States.

The Council notes that, despite all efforts, there is still an important number of legal acts for which the compliance date in the EU has passed but which have not entered into force in the EEA EFTA States as their incorporation into the EEA Agreement has been delayed. The Council stresses the need for the EEA EFTA States to continue their efforts towards a streamlined incorporation and application of EEA relevant legislation, in order to reduce the number of pending acts for incorporation and to ensure legal certainty and homogeneity in the EEA.

Compared to past statements, this is by far the least aggressive language adopted in over a decade. There was also remarkable conciliatory language in the recent 2017 Council conclusions on EU relations with the Swiss Confederation in that it not only accepted the compromise over the free movement of peoples adopted by the Swiss legislature in December 2016 (averting a serious crisis between the actors), but also seemingly relieving some of the harshest criticism of the Bilateral agreements that had existed in past remarks. While still calling for institutional reform, the tenor and content was notably less stringent and less specific in terms of future deadlines:

The Council takes note of the reconfirmation by Switzerland of its attachment to the sectoral approach. However, the Council recalls that a precondition for further developing the sectoral approach remains the establishment of a common institutional framework for existing and future agreements through which Switzerland participates in the EU's Single Market, in order to ensure homogeneity and legal certainty for citizens and businesses. The Council stresses the common understanding between the EU and Switzerland about the need to finalise the negotiations on the institutional framework agreement as soon as possible. Its conclusion will allow the EU-Swiss comprehensive partnership to develop to its full potential.

Nonetheless, the ongoing failure to normalize cantonal tax policies and other issues was also noted:

The Council takes note of the negative outcome on 12 February 2017, of the vote on the Swiss legislation aiming to replace with a new set of measures certain preferential tax regimes and practices that constitute harmful tax competition. The Council stresses the need for fair tax competition and strongly encourages Switzerland to adhere to its international commitments and look for alternative solutions to effectively and swiftly remove the five tax regimes concerned, in line with the 2014 Joint Statement between EU Member States and Switzerland on company tax issues. The Council will continue to follow the matter closely.

Conclusion

The argument that the UK could find a Norwegian or Swiss-style agreement with the EU as a non-member does present some challenges given the tenuous nature of those relationships in their current form. The UK is of course a larger and more complex case but in fact does share parallels with Switzerland in many ways especially in terms of trade in financial services, banking, insurance, and other non-goods services which are critical features of the Swiss and British economies. British services have access to European markets while they are more limited in the Swiss case. If the UK were to try and forge a Swiss-style agreement with the EU that included such financial, banking, and insurance services, it would give the EU more leverage to demand free movement of persons and immigration which was of course an integral part of the Brexit vote in the UK. Swiss efforts to curb immigration from the EU have taken the Swiss-EU relationship to the brink of dissolution and it would be hard to imagine the EU willingly securing an agreement with the UK as a non-member without some critical demands for immigration and free movement. As Erikson and Fossum suggest, if the UK are to exit the Union and renegotiate their relationship, there are many ways to do so and the Swiss and EEA cases show many options. It is also difficult to extrapolate the case of the UK out of the Swiss, Norwegian, and other cases due to asymmetries and structural dissimilarities of economies, exogenous conditions, and other variables. (Erikson and Fossum, 5) However, the Swiss and EEA cases demonstrate that the options that are regularly touted by pro-Brexit policymakers are less than ideal given their political demands and the tenor of the British Brexit electorate.

While this research argues vehemently that the Swiss and EEA cases would not be likely replicated in UK-EU relations, it should be noted that the Brexit process itself has changed the priorities and considerations of the Commission, Council, and Member States. As John Peet recently argued in *The Economist*, the current Brexit-Economic-Populist-Political maelstrom in Europe may create conditions for a more multi-speed, flexible, and heterogeneous set of integration agreements and institutions in the future. If the Union becomes more tolerant of the less institutional and binding bilateral and EEA formulas then maybe Brexiters are not as wrong as this research suggests. The irony is of course that the Brexit process itself was the

impetus for much of this change of priorities and willingness to consider a multi-speed, multi-tier future.

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