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UK returning to EFTA : Divorce at 40 and going back to Mom and Dad?

Summary

Our objective is to assess the proposal that the United Kingdom (UK) leave the European Union and return to the European Free Trade Association (EFTA) in order to get deals such as the European Economic Area (EEA) or even simple bilateral agreements such as Switzerland enjoys for a couple of years.

In the first part, we analyse the relationship between EFTA states and the EU through the EEA. This mechanism is based on a certain number of complex features that offer a high level of integration to three EFTA countries.

Second, we address the Swiss case, an active member in EFTA, who maintains close relations with the EU despite its rejection of EEA membership. *Prima facie*, the example of Switzerland supports many British eurosceptics because it provides an example of flexible arrangement.

Third, we assess the likelihood of the UK joining either the EEA/EFTA or instead adopting the EFTA/Switzerland approach as a sustainable and realistic choice.

Biography

René Schwok is professor of political science at the University of Geneva, specializing in European integration.

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He has published 20 books and authored many journal articles and book chapters. They are available at <http://unige.academia.edu/RenéSCHWOK/>

René Schwok was born in Geneva and is Swiss. He has been a consultant for various Swiss and European agencies and governments, comments frequently on European issues for the media and speaks regularly at conferences.

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Introduction

1. There has been increased domestic pressure demanding that the United Kingdom (UK) leave the European Union.
2. Some of them also propose to return to the European Free Trade Association (EFTA) and to get a "more advantageous integration" through deals such as the European Economic Area (EEA) or even simple bilateral agreements such as Switzerland enjoys for a couple of years.¹
3. Advocates of this EFTA option expect major positive effects following a UK withdrawal from the EU.
4. Economically, they foresee greater prosperity and growth due to the removal of the British contribution to the EU budget, the phasing out of the common agricultural and fishery policy, a lowering of VAT, a reduction of European workers from Eastern Europe, a decrease of bureaucratic norms that constitute barriers to trade and the possibility of concluding independently free trade agreements with other countries in the rest of the world.
5. They also argue that EFTA states (especially Norway and Switzerland which are the two biggest members) are more prospering economically than the EU countries and, consequently, that their levels of unemployment and debts are much lower.² Note also that the combined GDP of Norway and Switzerland is nearly half of the UK!³
6. They also anticipate political benefits including greater independence and increased democracy. In addition, it is argued that by abandoning the EU's foreign, security and defence policy, the UK will benefit from a rapprochement to United States' external policies.
7. On the other hand, advocates of maintaining UK membership to the EU do not take into serious consideration the EFTA option, which they consider as a regressive proposal, comparing this to divorcing at 40 and "going back to mom and dad".
8. Overall, the objective of this paper is to consider the essence of EFTA and to try to analyse it as objectively as possible.
9. In the first part, we analyse the relation between EFTA states and the EU through the EEA. This mechanism is based on a certain number of complex features that offer a high level of integration to three EFTA countries.

¹ Van Randwyck, H. (2011) "EFTA or The EU?", *The Bruges Group*, 21 March. Available at: <<http://www.brugesgroup.com/EFTAorTheEU.pdf>>. Ould, R. (2011) "Time To Leave The EU And Stop Exporting British Jobs Abroad", *Public Service Europe*, 17 November. Available at: <<http://www.publicserviceeurope.com/article/1139/time-to-leave-the-eu-and-stop-exporting-british-jobs-abroad>>; Pickles, A. (2011) "Britain Isolated, Like the Swiss. If only", *The Commentator*, 12 December. Available at: <http://www.thecommentator.com/article/725/_britain_isolated_like_the_Swiss_if_only>.

² See for instance Van Randwyck, H. (2011), op. cit., pp. 5.

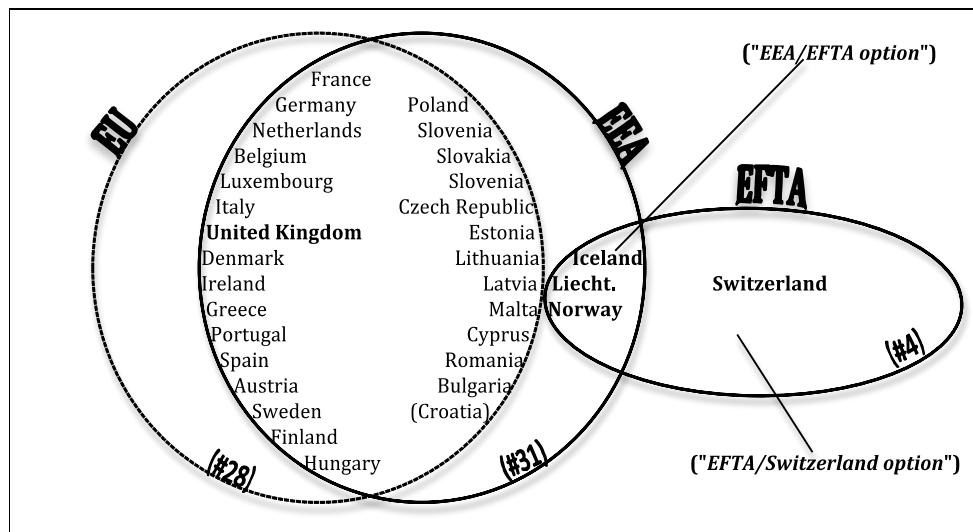
³ GDP of Norway = billions 480 \$, GDP of Switzerland = billions 666 \$. Total = billions 1,146 \$.
GDP of the UK= billions 2,481 \$. Source: IMF. GDP at current prices in USD (2011). Available at: <<http://www.imf.org/external/pubs/ft/weo/2011/02/>>.

10. Second, we address the Swiss case, an active member in EFTA, who maintains close relations with the EU despite its rejection of EEA membership. *Prima facie*, the example of Switzerland supports many British eurosceptics because it provides us with an example of flexible arrangement.
11. Third, we will assess the likelihood of the UK of joining either the EEA/EFTA or instead adopting the EFTA/Switzerland approach as a sustainable and realistic choice.

A- The EFTA/EEA model

12. The European Economic Area was established on 1 January 1994 following an agreement between the European Union and the member States of the European Free Trade Association.
13. By July 2013, its total membership could reach 31 states included in two pillars: the 28 EU member states (including Croatia) as well as 3 EFTA countries (Norway, Iceland, Liechtenstein).

Figure 1: the three circles



14. Materially, the EEA is an association based on primary EU law and treaties, in addition to secondary law such as regulations and directives commonly referred to as the *acquis communautaire*. It mainly contains the so-called EU “four freedoms”: free-circulation of persons, goods, services and capital.
15. The EEA agreement also include issues pertaining to several horizontal provisions relevant to the four freedoms, such as competition law (i.e. the abuse of dominant position, cartels, merger control, state aid and state monopolies), minimum social standards as well as consumer and environmental protection.

16. The EEA does not eliminate however border controls for rules of origins and indirect taxation. Indeed, the free movement of goods is only established in respect of products originating from the contracting parties. Otherwise put, this agreement does not establish a customs union as it is the case in the EU.
17. Consequently, EEA/EFTA countries retain their full sovereignty over their trade policies in addition to the capacity of establishing their own different level of value added tax (VAT).
18. Similarly, the EEA is not related to the Economic and Monetary Union (EMU), the Common Agriculture Policy (CAP), the Common Foreign and Security Policy (CFSP) as well as the Justice and Home Affairs policies.
19. Finally, the EEA agreement provides a cooperation framework between EU and EEA/EFTA states in matters concerning research, development, tourism and civil protection.

EEA institutions

20. In exchange for internal market access, the European Commission imposed from the beginning a rigid institutional arrangement with the concept of the European Economic Area based on two pillars: EC and EFTA.
21. As a result, the Oporto agreement established four different institutions: the EEA Council, the EEA Joint Committee, the EFTA surveillance authority and the EFTA court. Let us briefly introduce them hereafter.
22. The *EEA Council* is composed of members of the Council of the EU, members of the EU Commission and of one of the government members of the participating EFTA states. According to Article 89 of the treaty, it “is responsible for giving the political impetus in the implementation” of the agreement. Furthermore, it may decide to amend the agreement.
23. Daily tasks are left over to the *EEA Joint Committee*. This body ensures that, “the implementation and operation” of the agreement is carried out on a monthly basis. In practice, it is responsible for adopting the decisions extending the evolution of the *acquis* to the EEA/EFTA members.
24. Taking a step back the Committee’s composition and functioning appear to be quite interesting as well. Since the EU is represented by the Commission and faces EEA/EFTA states representatives, it can be argued that this committee is an interesting example of both a supranational/intergovernmental mixed institution.
25. The *EFTA surveillance authority*, which is a technical and supranational institution by nature, ensures that the EEA/EFTA member states respect their legal obligations. Hence, as the EU Commission, it may initiate proceedings against one of these states (for instance in case of development of unlawful burdens on commercial activity).
26. *Parliamentary cooperation* is also provided through the EEA Joint Parliamentary Committee. Interestingly enough, this institution has a special composition, as it

includes members of the EU Parliament and of the EFTA states. However, it does not carry out important political tasks.

27. Finally, a *Court of Justice*, also referred to as the “EFTA Court”, has been created in order to ensure a single interpretation of the treaty. Generally, this Court aims at ensuring a strict homogeneity of interpretation with the Court of Justice of the EU (CJEU). That being said, it has no legal monopoly as rulings of the CJEU falling within the EEA scope are also bound to produce effects for EEA/EFTA participants.

The EEA as an asymmetric market-association

28. Despite this seemingly balanced institutional architecture, the EEA agreement prevents significant political participation of EEA/EFTA member states in the EU decision-making process.
29. As we have seen, these States must comply with the obligations imposed by most of the *acquis*, in addition to the adoption of Community law and the interpretations made by the ECJ existing prior to their EEA accession.
30. Although, they have been granted a right of consultation and association during the early stage of the legislative procedure, the so-called “decision shaping”, no possibilities of participation to the voting procedure in the EU Council or the European Parliament are provided.
31. Admittedly, an opting-out instrument exists but it is politically unusable and has never been used until now. Like in the case of the decision shaping clause, this opt-out instrument has to be agreed upon by the entirety of the EEA/EFTA pillar members.
32. In principle, any of these three countries may refuse to take on new EU legislation. However, this would drag into the same opt-out position the other EEA/EFTA countries, regardless of their particular position on the matter. Indeed, the EEA agreement clearly stipulates that EFTA participants are not entitled to take the decision to adopt EU legislation on an individual basis (see art. 93).
33. An additional deterrent is also the understanding that failure to adopt an act after the end of the time-limit, may lead to the partial or even total suspension of the EEA agreement (see art. 102). Consequently, these conditions make any rejection less likely to occur.

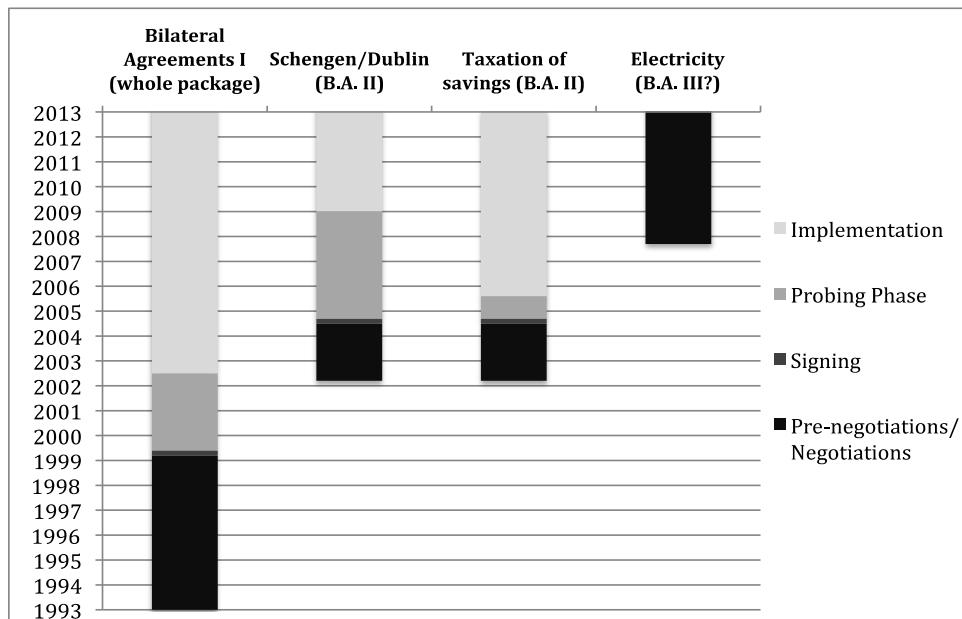
B- The EFTA/Switzerland's model

34. Following the rejection of the EEA agreement in a popular referendum on 6 December 1992, the Swiss Federal Council engaged in long negotiations which led to the conclusion of a first package of bilateral agreements, hereafter “Bilateral Agreements I”. Signed on June 21, 1999 in Luxembourg, these agreements were

adopted by the Swiss electorate on May 21, 2000 and entered into force on June 1, 2002.⁴

35. Five of the agreements posed no difficulty and concerned relatively secondary matters. The most important two – free movement of persons and overland transport – on the contrary, were the object of intense debate.
36. The EU and Switzerland also signed a second series of Bilateral Agreements (BA II) on October 26, 2004. These agreements cover nine dossiers each of which took effect on different dates. The most important concern the participation of Switzerland into the Schengen area and a withholding tax on taxation of savings in place of the lifting of bank secrecy originally demanded by the European Union.
37. From a legal perspective, these agreements are not interlinked, unlike the Bilateral Agreements I, and thus do not include a “guillotine clause”. Switzerland could have rejected any one of them without the others being called into question.
38. Seven of these agreements posed no problems and concerned secondary issues. Once again, the two most important ones, Schengen/Dublin and the taxation of savings, were the subject of a heated internal debate. As a result, the Agreement on Schengen/Dublin was subject to a referendum in June 2005 but was accepted by about 54.5%.

Figure 2: The Swiss-EU Bilateral Agreements or a time-consuming process



Differences between the Bilateral Agreements and the EEA

⁴ More details on the Bilateral Agreement I and II in Schwok, R. (2009) *Switzerland-European Union. An Impossible Membership?*, Brussels, PIE Peter Lang, pp. 37-78.

39. In comparison with the EEA, the Bilateral Agreements enable a third-party country (in this case Switzerland) to negotiate on an individual basis.

40. This freedom of action is in part limited by the multilateral structure of the EEA, which obliges EFTA countries to speak with a single voice. Here, Switzerland has never been obliged to harmonise its position with its EFTA partners before or during its dealings with the European Union.

Differences in terms of structures

41. The structure of the Bilateral Agreements I and II is light and does not create any new institutions. This distinguishes it from the EEA which was more unwieldy and based on a two-pillar system relying on a galaxy of institutions.

42. In principle, the Bilateral Agreements I and II do not function through a literal and all-inclusive application of Community law as is the case in the EEA: they are not governed by a Community or para-Community justice mechanism akin to the European Communities Court of Justice or the EEA/EFTA Court, but rather by a political mechanism (the Joint Committees).

43. The Bilateral Agreements I and II, therefore, radically differ from the EEA agreement, under which the EFTA-pillar states were obliged to adopt the relevant Community law together with its interpretations by the European Communities' Court of Justice pre-existent to the date of the signature of the agreement.

No automatic acceptance of new relevant Community legislations

44. The Bilateral Agreements I and II do not include an automatic adoption of new relevant Community legislations but instead, allow for the renegotiation on a case-by-case basis. There are, however, exceptions concerning Schengen legislation and air transport competition.

45. Thus, these Bilateral Agreements I and II differ from the EEA, where the EEA/EFTA countries are almost obliged to integrate developments of the relevant *acquis*.

46. Nonetheless, the Bilateral Agreements should not be over idealized. Switzerland is not immune to outside developments and the processes of "EU-isation". Since 1988, with every new federal legislation considered, it is mandatory for the Swiss parliament to include a paragraph summarising the EU position on the relevant matter. As a result, this has led to indirect adaptation in that Switzerland adopts numerous legislation of the European Union without conducting formal agreements.

Differences in terms of content

47. The EEA includes important sectors not covered by the Bilateral Agreements I and II, mainly concerning the free movement of services (i.e. financial, telecommunications and postal services), the free movement of capital, company law and intellectual property.

48. Additionally, the EU rules of competition for the four types of free movement were transposed into the EEA treaty. Regarding the monitoring of competition rule compliance is carried out, on the one hand, by the European Commission and, on the other hand, by the EFTA Surveillance Authority.

49. Conversely, the Bilateral Agreements I and II do not make provision for rules of competition. The only exception is in the domain of air transport where the European Commission and the European Community Court of Justice obtained exclusive jurisdiction over compliance with competition rules provided for in the agreement.

Differences in terms of horizontal and flanking policies

50. In comparison with the bilateral path, the EEA also added horizontal and flanking policies. This included concepts such as equal treatment between men and women, labour rights, participation in enterprises, consumer or environmental protection, and some social policy, education and youth, tourism, civil protection together with European economic and social cohesion.
51. The financial solidarity towards less affluent countries and regions of the EU that would have been asked from Switzerland as a member of the EEA would be greater than that required under the Bilateral Agreements I and II.

Figure 3: Overview of the scope and depth of the EEA/EFTA and Swiss options

	European Economic Area (EEA/EFTA)	Bilateral agreements (Switzerland)
Free trade area in industrial goods	Yes	Yes
Free trade area in agricultural goods	No	No (in negotiation)
Free Movement of workers	Yes	Yes
Free movement of capital	Yes	Yes
Free Movement of services	Yes	No
Common External Tariff	No	No
Absence of border control (mutual recognition)	Yes	No
Absence of border control (VAT/indirect taxation)	No	No
Value added tax harmonization	No	No
Absence of border control (rules of origins)	No	No
Common integrated institutions	Yes	No
Decision Shaping	Yes	No (mostly)
Recognition of the CJEU's judicial supervision	Yes	No (mostly)
Participation to EU agencies	Membership/observer status	Selective membership/observer status
Participation to Comitology for experts	Yes (informal)	No
Adoption of the <i>acquis</i> (amount / method)	"Nearly full" / automatic	Partial / in a case- by-case basis

See Schwok, R. (2009) and Lavenex, S. (2011)

The bilateral approach is largely deadlocked since 2007

52. Since 2007, no more significant agreements were signed. This can be attributed to the EU dissatisfaction regarding the continuous Swiss' strategy aiming at concluding rigid "tailor-made agreements".
53. Recently, the European Union demanded that Switzerland adopt the evolution of the relevant EU *acquis* and called for a uniform interpretation in its application.
54. For its part, the Swiss Confederation does not want to lose its autonomy of decision and to accept the rulings of foreign judges. In fact, Bern would prefer as a model for future agreements the 2009 Switzerland-EU bilateral agreement on "the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures" (also known as the "24 hours" agreement).
55. This technical agreement offers interesting institutional components.
56. First, it provides a participation in the early stage of the legislative process.
57. Second, Switzerland does not adopt automatically the evolution of the relevant EU *acquis*. Although it declares itself in principle ready to adopt the new EU legislation, the internal approval processes are respected.
58. Third, if Switzerland were not able to adapt to the evolution of the relevant EU *acquis*, the whole agreement would not become automatically terminated (there could be however proportionate "rebalancing measures" decided by the EU).
59. Fourth, the settlement of dispute about the interpretation or application of the agreement is also very creative because it is not left to the EU Court of Justice but to the Joint Committee or to an ad hoc arbitration.
60. This contrasts sharply with the EEA agreement since there are no such possibilities of independent arbitration on the proportionality of the EU rebalancing measures.
61. That being said, the European Union has constantly repeated that the 24 hours agreement will not serve as a framework model for the future of the Swiss-EU relations.

C- Advantages and disadvantages of the two options

62. Within the following analysis, our goal is not to argue for or against the UK leaving the EU. This is a political decision to be taken by the British themselves.
63. Besides, we are also aware that the circumstances of a return of the UK into EFTA are not comparable to the situation of EEA/EFTA countries as well as Switzerland.
64. Finally, although not addressed within this text, we acknowledge that a withdrawal of the UK from the EU itself would likely result in an avalanche of consequences that are difficult to assess.

Advantages of joining EFTA

65. First, EFTA membership would imply a far lower British financial contribution. Costly EU policies are not included, especially the ones related to the onerous CAP.
66. Nevertheless, one should also keep in mind that EEA/EFTA membership is not free of costs. These three countries have to pay for policies in which they are included. Their most important financial contribution is related to their participation in EU structural funds (1.8 billion Euros allocated to 13 EU member states for the 2009-2013 period). Similarly, Switzerland, which is not even part of the EEA, had to disburse significant amounts to secure its relationship with the EU. Indeed, through its bilateral agreements, Bern is also obliged to contribute, though far less than EEA/EFTA states, to the "reduction of socio-economic disparities" in the Union.
67. Thus, it is plausible that a country with a larger GDP such as the UK would have to disburse much more than the above-mentioned amount if it was to join the EEA/EFTA pillar or even to adopt a Swiss approach through the use of bilateral relations.
68. In terms of the total financial cost, it is possible, by extrapolation, to provide the following figures for both potential EEA/EFTA pillar membership and the Swiss-type bilateral approach (all-included): EUR 2.54 billions and EUR 1.62 billions per annum, respectively. However, it is also important to note that the UK would have to negotiate the exact amount of its contribution in both cases. Hence, these figures are only intended to be indicative as they assume that the UK would get the same treatment as EEA/EFTA states or Switzerland.
69. In addition to the above mentioned elements, the UK government would also be free to set its VAT level. That being said current British VAT level is 20% for most of their products, which is much higher than the 15% required by EU legislation. Therefore, it is unlikely that a withdrawal from the EU would change immediately anything in this regard.
70. Another advantage of EFTA membership is that States within this organisation have demonstrated their capacity to ratify free-trade agreements faster and with more partners than the EU.⁵ As of 2012, EFTA member states have implemented 24 free trade agreements (covering as much as 33 countries).
71. It should be noted that the EFTA countries negotiated agreements with all States, which have concluded a Free Trade Agreement with the EU.
72. Additionally, it is interesting to observe that the EFTA States preceded the EU in their free-trade agreements with Canada, Columbia, the Gulf Cooperation Council, Ukraine and South Korea. Moreover, they are also well advanced in their negotiations with India, Indonesia, Thailand, Russia, Belarus and Kazakhstan.
73. It can be argued that Switzerland and Norway have been more efficient in terms of developing their free trade network than the EU. Indeed, the Union is often mired with internal disagreements as well as its institutional constraints in matters of trade

⁵ Schwok, R. (2010) "Specificities of Switzerland's Relations with EFTA", in Bryn, K. & Einarsson, G. (eds.) *EFTA 1960-2010, Elements of 50 Years of European History*, Reykjavik, University of Iceland Press, pp. 117.

policies (mainly related to the existence of divergent interests and views regarding agriculture and conditionality).

74. Finally, it is also important to underline that EFTA member states are free to enter into trade agreements independently. Thus, if the UK would join the EFTA, it would certainly benefit from a greater freedom of manoeuvre to sign free trade agreements with other countries in the world.
75. Concerning dimensions of foreign policy, security and defence, bilateral agreements between the UK and the EU, based on the Norwegian model, would undeniably better protect British sovereignty. It would come however at the expense of a loss of influence, particularly on CSDP. This would also mean that it would be more difficult for the UK to control or even to slow down the development of a more integrated EU defence "from the inside".
76. While it can be argued that a withdrawal from the EU would imply a decrease of adaptation to new norms the Norwegian and even the Swiss cases show that these two "outsider" countries have still adopted directly or indirectly a certain number of EU laws.

Challenges of EFTA and EEA membership

77. In order to accede to EFTA or to the EEA/EFTA pillar, the UK would have to follow a potentially difficult path.
78. First, the UK would have to submit an application to EFTA. Unlike the EU, this organization does not pursue an active enlargement policy and, according to a well-informed source: "Feasibility and desirability of a possible EFTA enlargement would have to be assessed on a case-by-case basis for each possible applicant".
79. As a matter of fact, there is no guarantee that EFTA States would welcome any new member or simply not veto its application (as the EFTA convention specifies that unanimity is needed in case of enlargement). Indeed, this organization represents a quite homogenous bloc in terms of countries' size, economic development and trade preferences. Hence, the accession of big countries such as the UK would certainly shake the established bases of the whole organization. Besides, it is also questionable if the British would accept to deal on a one to one basis with small countries such as Liechtenstein.
80. Furthermore, even if London secured an EFTA membership, it is not guaranteed that the three EEA/EFTA States would welcome the UK in "their" pillar. As we have seen, these countries would have to adopt a common position during the joint decision making procedure. While this has not proven to be a problem until now, it could very well change with the arrival of a new member. These three countries would be laying at the mercy of any kind of British opt-out, leading potentially to a partial or even the total suspension of the EEA agreement.

Swiss or EEA option?

81. Arguably, the Swiss option can be seen as relatively favourable when compared to the EEA option as a way to formally maintain its sovereignty. That being said, the EU is clearly against the perpetuation of this *sui generis* bilateral relation mechanism, which is a case resulting from the several economic and political particularities of Switzerland.
82. In contrast, the EEA option could result in the support of the European Commission and of its member States. There is also the advantage of providing full access to the EU internal market. Given EEA's evolutionary nature, this allows for easy and rapid adaptation to the developments of EU legislation, while also offering strong legal certainty, and therefore predictability.
83. The main challenge of the EEA option is related to the undermining of UK sovereignty. If the UK withdraws from the EU, it may very well end up becoming a sort of "satellite" of the European Union if it joins the EEA/EFTA pillar. Indeed, its government would be obliged to automatically adopt certain legislation within important policy areas, while being unable to take part in the making of decisions.
84. In 2012, Norwegian experts mandated by the government went as far as relating these sovereignty problems to a more general question of democratic deficit. In their view, the Norwegian government cannot be held accountable for most of its European policy.⁶ Thus, one has to seriously question the argument that the EEA would be a better deal for the UK because it would restore important parts of the British national sovereignty.

6 June 2012

⁶ EEA Review Committee (2012) "Outside and Inside: Norway's Agreement With The European Union", *Official Norwegian Reports (NOU 2012:2)*, Oslo, 17 January, pp. 7.