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# Outsiders on the inside

Swiss and  
Norwegian lessons  
for the UK

By David Buchan

# Outsiders on the inside: Swiss and Norwegian lessons for the UK

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- ★ Calls are multiplying in the UK for a renegotiation of Britain's relationship to the European Union. Many British eurosceptics are eyeing Norway and Switzerland and asking whether Britain would be better off outside the EU with Norwegian and Swiss-style association agreements.
- ★ The answer is no, because these association agreements increasingly frustrate many Norwegians and Swiss, and the EU itself. Norway's European Economic Area (EEA) arrangement has denuded the content of the country's political debate, while Switzerland's relationship with the EU has reached an institutional impasse.
- ★ The Norwegian and Swiss experiences underscore the difficulty of developing a form of associate membership satisfactory both to Brussels and the country in question. However, the eurozone crisis could end up creating an outer ring of EU states focussed mainly on the single market that could be acceptable to Britain and perhaps attractive to Norway and Switzerland.

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The eurozone crisis has plunged the European Union's entire structure into flux. The 17- country eurozone could solidify into a United States of Europe, with a fiscal and political union to back up its monetary union. Or the eurozone could disintegrate, probably breaking up the wider European single market as well. In either eventuality, the UK, which has become the most malcontent of EU members, will almost certainly want to renegotiate its relationship with, if not its membership of, the EU. This may well involve a loosening of ties. In the view of many of the UK's growing number of eurosceptics, Britain should seek a similar kind of relationship to the EU as Norway and Switzerland.

The one element of EU membership that most Britons, even many eurosceptics, want to preserve is access to Europe's single market. And access to the single market is what Norway fully has, and what Switzerland to a large degree has. So the notion of being half in and half out of the EU – of being part of the single market, but not having to pay into the EU budget or be part of the common agriculture and fisheries policies and so on – is appealing to many Britons.

Could Britain adopt a similar link to the EU as Norway and Switzerland have? And would it want to? This paper suggests the answer to both questions is no – not least because these relationships are no longer proving entirely satisfactory to the Norwegians, the Swiss or the EU itself, and are therefore not a suitable model for other countries to follow.

Norway's ties to the EU have functioned rather well for Norway, but they require the country to implement nearly unconditionally large swathes of EU legislation. Even in Norway, this is beginning to create difficulties and it would

be unpalatable for the UK. Switzerland has more control over which EU legislation it introduces. This is likely to be more attractive to British politicians. But Swiss-EU ties have reached an impasse and the EU is so frustrated with the model that it is unlikely to be willing to offer it to the UK.

It is natural that many in the UK should cast an eye on the relationships that their one-time partners in the European Free Trade Association (EFTA) – Norway and Switzerland – have forged with the EU. In doing so, however, they should be aware of the growing dissatisfaction building up around both relationships. These dissatisfactions are not identically shared in Oslo, Berne or Brussels.

Norway has recently carried out an exhaustive review of the impact of its relationship with the EU, through the European Economic Area (EEA), rather similar to the UK government's current 'audit' of the impact of EU membership on Britain. The Norwegian review concludes that the EEA agreement – which involves Norway (and the two smaller EEA members, Iceland and Liechtenstein) adopting EU legislation in which it has no direct say –

has run smoothly and to Norway's general economic and social benefit. But the review also accepts that the EEA agreement has, by its very nature, sapped Norway's political debate of content and created a democratic deficit. For its part, the EU has, predictably, no problem with the political subservience inherent in Norway's EEA arrangement. Indeed it is political, or policy, subservience that has ensured the smooth technical running of EU-Norwegian relations.

For the EU, it is precisely the lack of any such political subservience, or more precisely any supranational dispute settlement, in Switzerland's agreements with the EU that is causing increasing problems in EU-Swiss relations and increasing frustration in Brussels. The EU is in fact trying to push Switzerland into accepting some form of supranational surveillance of its agreements with the Union. So, as far as EU-Norwegian relations go, it is the Norwegians who are less happy than the EU, and in the EU-Swiss relationship, the frustration is more on the EU than the Swiss side.

Switzerland's proposed solution to the institutional problems raised by Brussels is very similar to the EEA,

though the Swiss government cannot say this too loudly because the Swiss people voted against joining the EEA in 1992. In effect the Swiss now want 'EEA Plus' – the right to influence EU laws as they are being made (which Norway clearly has) but also the right to ignore or reject EU laws once the laws have been made (which Norway has only marginally). If the Swiss were to get 'EEA Plus', Norway would almost certainly want the same. The EU might then find its demands of Switzerland boomeranging in the form of an unwanted re-negotiation of the EEA.

It is possible, as will be suggested at the end of the paper, that future institutional changes inside the EU – for instance, a formalised two-tier EU – could provide a solution to the tensions and frustrations surrounding Norway's and Switzerland's relationships with the EU. But for the moment neither relationship provides a model attractive to Britain. The UK would find it politically intolerable to accept hand-me-down legislation as the Norwegians do in the EEA. A Swiss-style relationship based on bilateral negotiations and agreements would be inherently more palatable to the British, but it is probably not a model that is any longer on offer from Brussels.

## The European Economic Area agreement

The European Economic Area (EEA) is the bridge between the EU and three of the four members of the European Free Trade Association (EFTA) – Norway, Iceland and Liechtenstein; the fourth EFTA member, Switzerland, has separate bilateral agreements with the EU. The 30 EEA states (EU-27 plus EFTA-3) have two bridging institutions – an EEA ministerial council and a joint committee of senior officials – that rest on separate pillars for implementation and judicial enforcement. The EFTA pillar mirrors the EU one. The EFTA Surveillance Authority monitors compliance of EEA rules by the three EFTA states, as the European Commission does for EU states, and the EFTA Court adjudicates over the three EFTA states as the European Court of Justice does over the EU-27.

The traffic over the bridge is one-way – legislation flows from the EU to the EFTA states. The EEA was never intended to make its own rules and laws, but rather to be a transmission belt of the EU *acquis* to those states which wanted access to the single market but not as a full EU member. At the core of the EEA are the four freedoms of movement of goods, service, capital and people, plus some 'flanking and horizontal policies' such as competition rules and legislation on health and safety at work which are essential accompaniment to the internal market. So, if ever the UK were to join the EEA, it would not escape the working time directive. As an EEA member, it would also have to continue to accept workers from Eastern Europe.

Excluded from the EEA are the EU's common policies on agriculture, fish, foreign and security policy, justice, immigration and of course money. However, Norway has chosen to align its policies on justice, immigration, by like Switzerland, joining the Schengen and Dublin conventions. They also choose to align their foreign and security policies with the EU.

Participation in the single market has a financial price. Both Norway and Switzerland pay a share of EU programmes on research, education and so on in which they take part, and from which they benefit. But neither gets any direct return from their payments to the EU's aid and cohesion programmes. These payments amount to €1.79 billion from Norway over 2009-14 and just over €1 billion from Switzerland over 10 years. They can both afford this: they are two of the richest countries in Europe.

## Could Britain follow Norway?

The EU-Norwegian relationship was never a model, but more an accident of history. Norway joined other EFTA countries in negotiating, with Brussels, the EEA that came into force in January 1994, but it would have then joined the EU, if the Norwegian people had not voted against that in a referendum later in 1994. Today it is easy to get the impression that the EEA – basically an arrangement for automatic adoption by a group of EFTA countries of EU legislation – was tailored especially for Norway, because Norway’s only partners on the EFTA side are small Iceland and tiny Liechtenstein. However, the EEA was originally dreamed up by then president of the European Commission Jacques Delors also to give four sizeable, and neutral, EFTA countries – Austria, Sweden, Finland and Switzerland – a satisfactory half-way house short of EU membership. In 1990 Delors was worried about the effect of enlargement, particularly bringing in neutral countries, on the Union’s emerging political identity. But the halfway house did not prove satisfactory for these four. Austria, Sweden and Finland sought, and obtained, full EU membership. The Swiss people had already said no to the EEA. So, this left only three Eftans in the EEA which had been elaborately constructed to give EFTA participants mirror institutions to those of the EU.

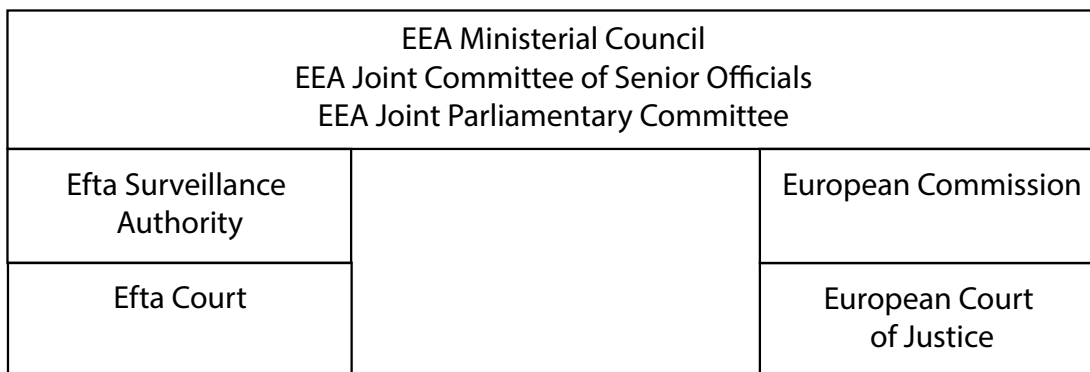
Somehow, the three EFTA participants in the EEA have, with the help of the EFTA secretariat in Brussels, managed to hold down their end of a political seesaw that has three countries at one end and 27 at the other. Yet the loss of one more Eftan participant might upend the arrangement. Icelandic membership of the EU is still unlikely, partly because of the difficulty of negotiating a deal on fish and whales. But the official Norwegian review of the EEA suggests that if Iceland were to join the EU, “to maintain a comprehensive international institutional apparatus just for Norway and Liechtenstein would for most people pass into the realms of the absurd”<sup>1</sup> Iceland’s departure would effectively turn the EEA into what it mostly already is: a bilateral EU-Norwegian arrangement.

Had all seven Eftan countries that negotiated the EEA between 1990 and 1992 stayed in the arrangement, the outcome on EEA legislation might have worked slightly more equitably. But the EEA was never about negotiation or co-legislation, and was intended mainly as a vehicle for EFTA adoption of EU laws and rules. EFTA participants were given “a right of reservation” to suspend indefinitely application of any EU law they particularly disliked. Astonishingly, of the more than 6,000 new pieces of EU legislation incorporated into the EEA, Norway has only in 17 cases considered entering a reservation, and only actually done so once (in the past year, it has raised an objection to postal liberalisation). Of the Norwegian parliament’s 287 votes of approval since 1992 on significant EU agreements or legislative acts, 265 were unanimous and most of the other 22 passed by a broad majority. In addition to all this, Norway has unilaterally adapted its legislation or policy in certain areas outside the EEA such as in social or foreign policy.

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There are several reasons why Norway has been so apparently passive. One is that much EU legislation has suited Norway. Its initial fears that EU legislation would undermine its social and environmental policies or Nordic co-operation were never realised; the presence of other Nordic countries inside the EU helped ensure that. Another reason is that while the EEA is almost no Norwegian politician’s first choice, it is almost everyone’s second choice as an acceptable compromise in a national political establishment still battle-weary from the divisive 1972 and 1994 EU membership referendum campaigns.

The EEA’s two pillar structure



<sup>1</sup>: ‘Outside and Inside: Norway’s Agreements with the European Union’, Oslo, January 2012.

Nor is this war considered over. Norway today seems less likely than ever to join the EU outright, given the contrast between its petro-prosperity and the debt travails of the eurozone. But the 'No to the EU' campaign is a permanent organisation with 30,000 members around the country and substantial trade union backing, because, says Sigborn Gjelsvik, a leading figure in the campaign, "the question of EU membership will come up again, and we have to be ready".<sup>2</sup> He may be right. The anti-EU movement currently has public opinion on its side. However, if this mood were to shift, groups such as the NHO employers' federation, which has consistently favoured EU membership, would return to the fray. Some Norwegians who know most about the EEA favour EU membership. Oslo law professor Fredrik Sejersted, who chaired the EEA review committee, scrupulously followed his official mandate in focussing his committee report on the EEA alone, and not alternatives. But, speaking personally, he says "the only rational conclusion is to join the EU – we are effectively inside the EU but without voting rights".<sup>3</sup>

Norway has only gradually grasped the structural changes in Brussels that have led to the erosion of its influence to shape EU decisions. The political science term "decision shaping" was more or less invented by the Delors Commission to reassure EEA countries that, though they could not have a formal vote on the final outcome of new EU laws, they would be consulted in the early drafting of proposals and would so be able to shape, if not take, EU decisions. And indeed the EEA agreement allows Norway and its two smaller partners to participate in Commission working groups and some specialised rule-making committees. But much has changed since Delors' time, in particular the shift of power from the Commission to the Council of Ministers and the European Parliament, where the Eftans have no formal representation. Concessions from the Commission count for little if they are rejected by the other two EU bodies. Norway (and Canada for that matter) is still smarting from legislation on the sale of seal products which started as a Commission proposal to promote the more humane killing of seals, but ended as a virtual ban by Council and Parliament legislators on seal products in the EU.

Norway, and also Switzerland, find it hard to make their voices heard in the proliferating number of EU agencies, such as on pharmaceuticals, aviation, marine safety, energy regulation and so on, to which the Commission has sub-contracted important rule-making and administrative duties. Norway participates in 26 of these agencies, but often struggles to assert itself because these agencies are outside the EEA and Norway has no vote in them.

There are other legislative developments in Brussels that make Norwegian decision-shaping harder. There used to

2: Interview with author, June 2012.

3: Interview with author, June 2012.

be little argument about what legislation was relevant to the single market, and therefore to the EEA. It was all categorised as 'first pillar' legislation, using qualified majority voting (QMV) in quite separate procedures from second and third pillar issues of foreign, security, justice and home affairs. The Lisbon treaty abolished the pillar structure and applied QMV to a far wider range of EU legislation, thus making new laws harder to categorise definitively as relevant or not relevant. The same treaty gave more powers to the Parliament, which is producing hundreds of amendments that Norwegian diplomats – without any MEPs of their own – find hard to track, let alone influence. Furthermore, there has been a recent trend to fast-track legislation through Commission-Council-Parliament 'trialogues', which provide no opening for Norwegian lobbying.

*“ Enlargement of the EU has automatically extended Norway's EEA partners into eastern and central Europe. ”*

Enlargement of the EU has automatically extended Norway's EEA partners into eastern and central Europe. This has brought an influx of east European workers into the labour market (which Norway has accepted far more readily than Switzerland). But enlargement has also diluted the EU's interest in Norway. A representative of the Norwegian employers' federation, NHO, says "We feel we have access [in Brussels] and the doors are open to us, but no one listens. Interest in Norway, and the influence of Norway, is diminishing".<sup>4</sup>

The Norwegian EEA review committee concluded in its 2012 report: "This raises democratic problems. Norway is not represented in decision-making processes that have direct consequences for Norway, and neither do we have any significant influence on them...our form of association with the EU dampens political engagement and debate in Norway and makes it difficult to monitor the government and hold it accountable for its European policy". Professor Sejersted, chair of the review committee, explains the downward spiral that dampens debate: "There is no upside for Norwegian politicians to engage in European policy. The only Norwegian minister to go to Brussels is the justice minister who goes for meetings of Schengen [visa and cross-border police co-operation] in which Norway is represented. Because politicians are not interested in European policies, the media are not interested, and lack of media interest reinforces the lack of politicians' interest". Significantly, Norway, and to an even greater extent Switzerland, report that Schengen is one of their most satisfactory areas of co-operation with the EU, because they can participate in all Schengen discussions, from the lowest working group up to ministerial level.

4: Interview with author, June 2012.

Overall, it is clear that there is nothing in Norway's experience with the EEA that would make such subsidiary association to the EU attractive to the UK. Of course, if the UK were ever to become an EEA member, it need not behave like Norway in aligning itself so passively with the EU. Britain is not a member of Schengen, and has no intention of joining for the foreseeable future. Moreover, as a country that still retains some of the trappings of great power status (such as a permanent seat on the United Nations Security Council and nuclear weapons), the UK would want a real say in any common foreign and security policy positions it took with the EU.

Inside the EEA, too, the UK would undoubtedly behave differently. British diplomats, in the re-named British Mission to the European Union in Brussels, could be counted on to assert fully their EEA right to participate in decision-shaping in Brussels, perhaps more forcefully than their Norwegian counterparts. But would different behaviour produce different results? Britain would face the same structural difficulties in exerting influence, notably the shift of power from the Commission to the more diffuse decision-making centres of the Council and the Parliament. On financial issues, EU legislators might well want to pay some heed to the interests of the City of London. But the UK government would not be present at the table, with a vote if not a veto, to insist that they should.

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## Could Britain follow Switzerland?

The EU-Swiss relationship has also arisen out of an accident of history. After Swiss voters rejected EEA membership in a referendum in 1992, Switzerland developed a special bilateral relationship with Brussels.

It is possible that the Swiss would have voted to join the EEA if their government had not made it clear that it saw the EEA only as a stepping stone to full EU membership. In May 1992 the Swiss government signed the EEA agreement (subject to approval in a referendum), and then in the same month went on, like the other EEA signatories of Austria, Finland, Sweden and Norway, to apply for EU membership. As it was, the Swiss people only rejected the EEA agreement in December of that year by 50.3 per cent to 49.7 per cent.

The following month the government announced that it was dropping the idea of EU accession negotiations and would henceforth pursue a bilateral relationship with the EU. One can safely say that Switzerland, with its tradition of direct democracy by referendum and high degree of decentralisation in the cantons, would have proved a less passive, not to say more awkward, member of the EEA than Norway has been. On the other hand, the presence of Switzerland would have created a somewhat more equal partnership between the EU and the EFTA members of the EEA, and probably created more 'political space' for Norway to assert itself and its interests.

Switzerland is more integrated than Norway into the EU because of geography, but lags behind Norway in terms of legal arrangements and the scope of its access to the single market. It is surrounded by EU member-states on all sides, with the tiny exception of Liechtenstein. Around €1 billion worth of goods flow back and forth every day across Swiss borders with the EU, as do some 260,000 residents in EU countries who cross into Switzerland every day to work there.

In a legal and administrative sense, Switzerland's participation in the EU internal market is less complete

“*The bilateral EU-Swiss relationship is extraordinarily close, but also difficult and becoming more so.*”

than Norway's participation through the EEA. Like Norway and other EEA countries, it has free trade in goods, but unlike the EEA it has no agreement with the EU on services. Swiss legislation is often very similar, even identical to that of the EU. The Swiss develop their legislation with the EU in mind, because they want to gain reciprocal advantage in the EU internal market on the basis that their legislation is equivalent to that of the EU. But Switzerland has no common institutions with the EU to guarantee such equivalence. Switzerland's relationship with the EU rests on a series of bilateral sectoral agreements – 20 of them important, another 100 less so – and not all important sectors are covered. Rather astonishingly, Switzerland has no accord with the EU on financial services, except for a 1989 agreement on non-life insurance. The country's two big banks – UBS and Credit Suisse – play a significant part in the EU financial market, but have to do so from their subsidiaries inside the EU instead of their headquarters in Zurich and Basel. Because the approach is sectoral, the EU-Swiss accords do not cover horizontal policies such as environment or competition, with the single exception of civil aviation where the Swiss accept EU competition and state aid rules.

The bilateral EU-Swiss relationship is extraordinarily close, but also difficult and becoming more so. From the beginning, the EU suspected the Swiss, who had rejected the comprehensive EEA solution, of wanting to cherry pick agreements in sectors that suited its interests. Building on Switzerland's 1972 free trade agreement (as part of EFTA) with the EU, the EU and Switzerland signed a first batch of seven sectoral market-opening agreements in 1999. At the EU's insistence, in order to create what Brussels saw as a fair balance of interest, these agreements had to be negotiated, signed and implemented together, with a so-called guillotine proviso

that if any of the seven agreements were cancelled, the other six would cease too. After two-thirds approval in a 2000 referendum, this first batch of bilateral agreements came into force in 2002.

However, by this time it was the EU side which, in a sense, wanted to cherry pick new areas for agreement. In particular, Brussels wanted Swiss co-operation in the taxation of savings deposited by EU residents in Swiss banks, and in combating the evasion of indirect taxes, especially in cigarette smuggling. So in the negotiation of a second batch of bilateral agreements, eventually signed in 2004, it was Switzerland which insisted that agreements in these tax and fraud areas had to be combined with accords in areas of Swiss interest – including environment, cultural affairs, and police security and asylum (with Switzerland becoming a party to the EU's Schengen free travel zone and the Dublin asylum conventions).

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## Static versus dynamic agreements

The EU-Swiss agreements are, formally, static sectoral agreements, in the sense that they recognise the identical or equivalent nature of EU and Swiss legislation in the sector up to the date of the agreements' signature. Switzerland is under no obligation, as Norway is in the EEA, to take on new EU legislation because, as an official in Berne says, "we want to preserve our right to say no". This right to say no is the more important to the Swiss because they do not have any formal influence on the development of EU legislation. Unlike their Norwegian counterparts, Swiss officials are not automatically included in the working groups convened by the Commission for development of new legislation. The 18 joint EU-Swiss committees which supervise the various sectoral agreements can be used to discuss new legislation. If one of the two parties is planning new legislation relevant to the sector, it is supposed to mention it to the other side. But these joint committees only meet once a year and are generally not able to take decisions by themselves.

The one exception to this static relationship is the Schengen arrangement for visa free travel and cross-border police co-operation to which Switzerland is a party. On the same basis as Norway, Swiss participation in Schengen ranges the full gamut from working group to ministerial meeting. Partly because Switzerland feels it has a decision-shaping role in Schengen, and partly because of the inherent need for speedy and consistent updating of co-operation in policing and visa and frontier controls, the Swiss are happy for a 'dynamic' agreement with the EU in this area.

When and where the two sides can agree to update an agreement, this is usually done with amendments to an

The same wary balancing of interests continues today, especially in the financial area. Switzerland has not pressed for an agreement on financial services, for two reasons. First, the interests of its financial players conflict. Its larger commercial, private and cantonal banks have already set up EU subsidiaries from which they can do business right across the Union, while its smaller cantonal banks do not want to do business outside Switzerland anyway. Second, Switzerland has not wanted to put itself in a position of being *demandeur* in the financial sector, for fear of inviting extra pressure on its bank secrecy.

Neither of these factors would inhibit a Britain outside the EU seeking a financial service agreement. The UK would have nothing to fear on the bank secrecy issue, and much to lose without an agreement to allow financial service companies to continue to carry out all transactions in the EU from London.

“*Switzerland is under no obligation, as Norway is in the EEA, to take on new EU legislation*”

annex rather than changes to the main text, which would require parliamentary ratification by all 27 EU member-states, as well as by the European and Swiss parliaments. Usually, the updating amounts to Switzerland complying with the EU *acquis*. Sometimes, all this requires is a recognition that Switzerland has adopted "equivalent" legislation to that of the EU. However, the EU has grown tired of recognising the equivalence of Swiss legislation, because it does not give the same legal certainty to individuals and companies as the actual implementation of the EU *acquis* into Swiss law. Nor is the EU always impressed by elements of the *acquis* that Switzerland adopts unilaterally: a prime example is Switzerland's unilateral recognition of the European Court of Justice's landmark Cassis de Dijon ruling which established the principle of mutual recognition. Although they recognise the ruling and agreed to allow the import of Cassis de Dijon, the Swiss have so far refused to make any general commitment to the EU that binds themselves to mutual recognition (because that would be seen as bowing to foreign judges, whom William Tell famously resisted). For its part, the EU complains that anything adopted unilaterally can be renounced unilaterally, and therefore cannot be relied upon. As a result, anything authorised for sale in any of the EU's 27 member-states can be sold in Switzerland, but not all Swiss goods can be sold in the EU.

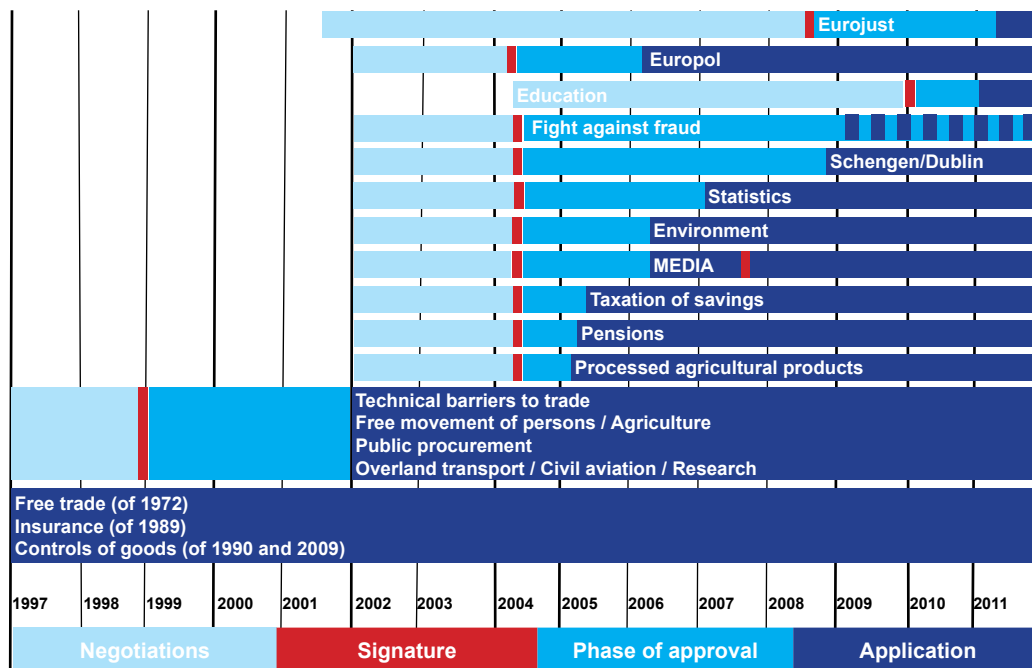
Frequently, the EU comes up with legislation in an area not covered by an existing agreement. One such piece

of legislation is the REACH regulation for chemicals. This 2006 regulation (REACH standing for Registration, Evaluation, Authorisation and restriction of Chemicals) is a vast regulatory catch-up on the large number of chemicals put on the EU market before proper testing started. The legislation requires the testing of all chemical components sold in the EU to take place inside the EU. This is not a problem for big Swiss companies like Nestlé, Novartis or Syngenta, because they all have subsidiaries in the EU. However, smaller Swiss companies without branches in the EU have to rely on their customers in the EU to do the testing for them, which makes these Swiss companies fearful about their customers prying into their commercial secrets. Switzerland would like a bilateral agreement with the EU to ease this problem, but, as explained below, the EU is no longer interested in negotiating any new agreement without institutional change.

The trickiest problem is the lack of any legal remedies or procedures for settling disputes arising out of the EU-Swiss agreements. This stems from the EU's refusal to acknowledge any supranational judicial or quasi-judicial authority except its own institutions of the European Commission and the ECJ, and from Switzerland's refusal to accept any supranational judicial authority at all. So disputes go unresolved. This is likely to be the fate of

the latest dispute over the Swiss decision in April this year to re-introduce temporary quotas on the entry into Switzerland of workers from the eight East European states that joined the EU in 2004. Berne says this is legal under a transition "safeguard" provision in the EU-Swiss Bilateral Agreement on Free Movement of Persons; Brussels says this is illegal, since the safeguard provision can only now be applied against all 27 member-states, and not against the eight. At the June meeting of the joint committee supervising this agreement, there was a stand-off between the two sides. This impasse may persist until 2014, at which point, according to Switzerland's interpretation of the agreement, the safeguard provision expires.

The Swiss government is under general political pressure to curb immigration. But it was unwise to act against the EU's intake of 2004. East European states already take a rather cold-eyed view of Swiss demands for exceptions and special arrangements when they themselves had to swallow the entire EU acquis – often with derogations or delays but never exceptions – as the price of their EU membership. The eight countries which joined the EU in 2004 are therefore likely to be unsympathetic to Switzerland's recent proposals for a new institutional arrangement with the Union.



Bilateral agreements Switzerland-EU

Source: © Integration Office FDFA/FDEA



## The Coming crunch

Switzerland's new proposals respond to EU demands for a fundamental change in bilateral relations. The EU's impatience with Switzerland has been building for a long time. Already in the 1990s, say Commission officials, it became clear that the Swiss were not updating their legislation in parallel with the EU in several sectors. In 2008, the EU Council of Ministers complained that EU-Swiss bilateralism was not working satisfactorily. In 2010, the EU Council went further, saying it would make no new agreement with Switzerland without institutional change. In the Council conclusions, the EU said that the system of bilateral agreements had "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 homogenous interpretation of the agreements, independent surveillance and judicial enforcement mechanisms and a dispute settlement mechanism need to be reflected in EU-Switzerland agreements".<sup>5</sup> The message was that Switzerland needed to agree to take over the EU *acquis* faster and more uniformly, to allow outside supervision and enforcement, and to commit itself to solving disputes. Effectively, these demands virtually amount to the Swiss adopting the EEA arrangement they rejected 20 years ago.

The Swiss government made three important counter-proposals in June 2012. First, Switzerland has agreed on the need for more homogeneity in legislating, enforcing and interpreting bilateral agreements with the EU. In practical terms, "we accept the obligation to take over future relevant legislation, and that if we do not do this, there will be a consequence", explains a senior official. The consequence is not spelled out, but would presumably be some form of EU retaliation or suspension of all or part of a sectoral agreement. Berne proposes that an international tribunal, with EU and Swiss representation on it, would be set up to judge, not the merits of the EU response but merely whether it was proportionate. For its part, Brussels refuses to accept anything resembling a standard international arbitration panel for what it regards as internal European business.

Second, Swiss courts would be obliged to take account of ECJ case law and rulings. In almost all cases, the Swiss federal supreme court in Lausanne does this already. However, formalising this practice would require a Swiss constitutional change, because it would give the Swiss supreme court the right to control whether Swiss federal law is in line with EU agreements, and therefore the possibility of changing Swiss federal law. At present, Switzerland's supreme court plays no constitutional role; it cannot strike down any law that has been approved by the Swiss people, through referenda, and by a majority of the country's 26 cantons. The new

obligation for conformity with EU law would also apply to laws passed by the cantons. The latter have said they have no objection to this, as long as federal Swiss law is subjected to the same EU conformity controls. The federal government in Berne has agreed to this.

Third – and this is the totemic issue for both sides – the Swiss propose 'an independent national surveillance authority' to supervise the agreements. This body would be able to take any one breach of EU-Swiss agreements before the Swiss courts. Staffing this authority would be Swiss experts appointed by the Swiss parliament. In this proposal, the nearest the Swiss come to accepting foreign supervision is to concede that the authority's Swiss staff could have dual nationality.

“*Switzerland's new proposals respond to EU demands for a fundamental change in bilateral relations.*”

The Swiss government is suggesting that any new institutional arrangement should apply to an EU-Swiss bilateral agreement on electricity that has been under negotiation for some time, and to all future bilateral agreements. Introducing a major institutional change under the cloak of an electricity accord is patently an attempt to minimise domestic political opposition to any institutional change. Silvia Baer, vice president of the highly eurosceptic Swiss People's Party (SVP), which won the largest vote share in the last election, admits that institutional change, if tacked on to a mere energy agreement, "will be hard for us to fight".<sup>6</sup> She suspects Brussels might connive by concealing, until after the vote on an energy agreement, its demand that institutional changes apply to all EU-Swiss agreements, existing as well as future ones. In fact, the EU has already made clear its desire to put all agreements, including the one on free movement of people – and therefore the current dispute over entry quotas for Central European workers – under the new institutional umbrella. Maximilian Stern, from the Zurich-based Foraus think-tank, believes that the institutional issues should be faced squarely, and negotiated and voted separately from any energy accord. "We believe that agreement on future institutional issues should take the form of a framework agreement with the EU, which Switzerland lacks".<sup>7</sup> Remarkably, Switzerland has no overall formal association agreement with the EU, of the kind that dozens of more distant countries do.

Prospects for an early solution to the impasse in the EU-Swiss relationship are not good. A senior Swiss official claims "we have gone 70 per cent of the way to meet the

5: Council conclusions, December 2010

6: Interview with author, July 2012.

7: Interview with author, July 2012.

EU's demands"<sup>8</sup> But the problem is that the EU evidently wants most of the remaining 30 per cent, and is not going to get it. The sticking point, as ever, is Swiss refusal to accept any supranational supervision or jurisdiction. For the EU, this is not enough in a world where EU member-states submit themselves to Commission supervision and ECJ rulings, and EEA members to ESA surveillance and Efta Court rulings. To a senior Commission official in Brussels, the idea of a "national independent" authority is laughable. "Just think how this would have worked with the Icesave bank issue, when the Efta Surveillance Authority decided that Iceland had not properly implemented the bank deposit guarantee legislation and took Iceland to the Efta court. You wouldn't have had an Icelandic national authority taking the Iceland government before an Icelandic court"<sup>9</sup> Swiss officials claim there are precedents in the form of Swiss competition authorities taking Swiss governments to Swiss courts, but concede that if the EU insists on trying to impose a 'supranational' authority on Switzerland, then prospects for a new EU-Swiss institutional deal are dead.

The practical effect of this is that some EU-Swiss disputes are simply unsolvable, because there is no authority to decree and enforce a solution. A major Swiss concession, in the government's latest proposals, is to acknowledge the unsolvability of certain disputes with the EU, and to accept the right of the EU, in these cases, to take retaliatory action (subject to an arbitration panel's views on the proportionality of such retaliation). However, the EU responds that it is not interested in retaliation, but in dispute resolution which, in Brussels' view, is not advanced at all by the latest Swiss proposals.

Both sides are playing a waiting game. The EU is sticking to its tactics of leaving it to the Swiss to come up with solutions, but knows it will have to produce a considered reaction to the Swiss proposals at least by the next EU Council of Ministers review of relations with Efta countries in December 2010. Meanwhile, the Swiss strategy, according to Maximilian Stern, is "to play for delay and in the meantime to press Germany to persuade the Commission to be more pragmatic" and to drop its insistence on supranational solutions. In another sign of the times, Switzerland, like Norway, increasingly cultivates Germany these days as a means of influencing outcomes in Brussels.

One option for Switzerland might seem to be an 'EEA-Lite' arrangement that would at least allow Switzerland to participate in the supranational monitoring of its behaviour through the Efta Surveillance Authority, and

in the supranational jurisdiction over it through the Efta Court. But the Swiss do not want this, the European Commission has not suggested it, and even Switzerland's fellow Eftans would have qualms. Norwegian officials say they could not refuse to accept Switzerland back into an arrangement that was partly crafted with the Swiss in mind, but they would not really welcome being displaced as "the big fish in the EEA pond". Where Norway and the other Eftans would openly complain is if the Swiss were to negotiate a better deal from the EU than they have, a sort of 'EEA-Plus' as mentioned earlier. This would be the case if the Swiss were to get the same decision-shaping right that EEA states have, while at the same time retaining their right to reject or ignore such EU decisions.

*“Clearly the Swiss system of bilateral agreements with the EU, as it currently stands, would suit Britain better than Norway.”*

Clearly the Swiss system of bilateral agreements with the EU, as it currently stands, would suit Britain better than Norway's link through the EEA. It would have to go one better than the Swiss agreements to include an accord on services, especially financial services. Otherwise, banks would leave London if they found they could no longer sell financial services around the EU from London. This would reduce turnover and employment in the City, just as lack of a financial services agreement is believed, by the Swiss themselves, to have reduced the size of the Swiss financial market place. However, the creation of a banking union among the eurozone countries will complicate the task of deciding what rules and regulations are relevant to maintaining a single market in financial services, and therefore keeping bilateral financial services agreements with third countries up to date. This is a problem that would face a Britain outside the Union, as surely as it will soon face Britain inside the Union.

What the EU negotiating strategy towards Switzerland tells us is that, if the UK tried to withdraw to a Swiss-style arrangement, the EU would insist on wholesale UK adoption of future single market legislation and on UK acceptance of surveillance and enforcement mechanisms. In short, something very like the EEA. In resisting this, the Swiss excuse of historic defiance of foreign judges would not be available to a Britain that would have tolerated, as an EU member, the supranational jurisdiction of the ECJ for more than 40 years.

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## A Single Market Club

The EU-Swiss bilateral relationship is not a template that the EU wants to offer others. In theory, the EEA model ought to be transferable. But other countries do not seem

to want it. The idea of EEA membership has attracted occasional fleeting interest from some East European countries (such as Slovenia when its EU candidacy was

8: Interview with author, July 2012.

9: Interview with author, July 2012.

meeting Italian opposition over a territorial dispute), from Turkey wondering how to advance its problematic relationship with Europe, and from Morocco which applied for EU membership, and was rejected, in 1987. But none of Europe's partners has seriously sought to join the EEA three of Norway, Iceland and Liechtenstein. A Commission official offers an explanation: "It takes a lot of work for a government to get up to the administrative standard required for the single market, and it takes a high level of economic development for an economy to compete effectively in the single market. Why therefore, if your country can achieve this, would you conceivably want to consign yourself to the EEA and deny yourself a vote and a voice in the making of single market rules?"

It is hard to imagine a country of Britain's size and history taking on a Norwegian-style relationship to the EU. The change to being a 'taker' of EU policy would be all the more awkward for Britain, having once been on the other side of the table as a 'maker' of EU policy – which Norway has never been. The current Swiss model of piecemeal bilateral agreements with the EU might suit many UK eurosceptics. But any new version of this model is likely to be less attractive to the UK. As European Commission president José Manuel Barroso said in June 2012, "Norway and Switzerland are two marvellous countries I very much admire. But I think Britain is expecting a bigger role in the world than small countries [do]."<sup>10</sup>

Britain would also have to pay a financial price, as well as a political price, for retaining access to the single market. As a relatively rich country, it would presumably be expected to pay special contributions to EU cohesion and aid programmes on a similar basis to the Norwegians and Swiss do. Currently, Norway contributes Euros 340m a year to the EU. If multiplied by 12 for

Britain's much larger population, that rate would imply a contribution for the UK of just over €4 billion, or nearly half its current net contribution to the EU budget as a full member. That is a lot to pay for associate status of the club. No wonder that Professor Sejersted argues that the EEA model is suitable, if at all, "for small rich states with limited ambitions to influence policy", a comment that also fits the Swiss model.

“ Britain would also have to pay a financial price, as well as a political price, for retaining access to the single market. ”

Would the greater size of the UK economy count in the negotiations for association with the EU? It might, especially in financial services if the City of London, even outside the EU, were to remain Europe's premier finance centre. And the fact that the UK has a trade deficit with the rest of the EU might be a strength in such association negotiations. "The significant deficit the UK has with the EU, mainly in goods, shows that the EU also has a vested interest in continuing trade relations with the UK", notes a recent report by Open Europe. However, the think-tank goes on to point out that the deficit is small in relation to a large volume of total two-way trade, which is therefore mutually beneficial to both the UK and its EU partners.<sup>11</sup> The balance of trade appears to be immaterial. Switzerland runs a trade deficit with the EU, but this does not appear to give Berne any extra leverage over Brussels. More important is the volume of trade. The more trade you have, the more it makes sense to influence the rules governing it.

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## Conclusion

There are two important lessons for the UK from the Norwegian and Swiss experiences with the EU. First, a static agreement would be attractive to Britain if it left the EU, not least as it would help to stabilise relations with its former EU partners. But the Norwegian and Swiss experiences show that such agreements are largely illusory. Static agreements rarely remain so. They tend to evolve over time and, if they do not, they break down. Second, the Norwegian and Swiss stories are a reminder that the EU has, so far, never developed an associate membership satisfactory both to Brussels and the country in question. The Norwegian and Swiss experiences should caution the British not to embark on anything like associate membership lightly. These two countries have shown that the half-way house – neither in nor out – is an uncomfortable place to be.

The eurozone crisis could change this picture. At present, one would bet that if ever the UK, Norway and Switzerland were to re-join each other in the same organisation, it would be outside the EU, not inside. There is innate euroscepticism built into the self-images of Switzerland and Norway. The Swiss see themselves historically as a democracy in the midst of dictatorships that has survived the centuries by resisting foreign influence and keeping to itself. The Norwegians see themselves, culturally as well as geographically, as a northern people on the edge of Europe, and they make a political point when they stress that northern Norway is as far away from Oslo as Oslo is from Rome. These self-images are as powerful to many Swiss and Norwegians as the 'British bulldog breed' is to many UK eurosceptics.

10: *The Times*, July 12<sup>th</sup> 2012.

11: Open Europe, "Trading places: Is EU membership still the best option for UK trade?", June 2012.

Yet history keeps producing accidents. Any tighter integration of the eurozone core is likely to produce an outer tier of EU members who may simply want to stick with the single market and a loose form of political co-operation. This might be a very small tier. It might just include the two countries – Britain and the Czech Republic – which did not join the 25 others in signing the 2012 fiscal pact – plus Greece (whose euro currency membership will remain in doubt for some time to come) as well as poorer east European states which might, for a prolonged period, find new fiscal and economic integration too demanding.

If the obligations for this outer tier of EU countries were clearly limited and delineated (to remove any obligation on members to advance towards greater political or fiscal integration), it might just become attractive for Norway

and Switzerland to formally join. For this to happen, life outside the EU would also have to become seriously unattractive for them. It could become so for the Swiss if the EU presses its demands on the *acquis* and outside supervision. For the time being, the EEA suits Norway, but the EEA would be at risk if Iceland were to join the EU. Thus, a combination of events inside and outside of the EU could create a single market club with the UK, Norway and Switzerland in it.

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