European and External Relations Committee

The EU referendum and its implications for Scotland

Written submission from Christian Dadomo and Dr Noëlle Quénivet

1. We welcome the opportunity to comment on the implications for Scotland of the UK leaving the European Union (EU). In our submission detailed below we focus on the legal aspects and challenges of what we consider to be the best suited alternatives to EU membership for Scotland. We do not purport to offer a socio-economic analysis of those issues.

2. Whilst the overall UK population has voted for Brexit the population in Scotland has expressed its wish to remain within the EU. The best way to square the circle ie to ensure that Scotland still benefits from the advantages offered by the EU whilst being outside is for the UK and therefore Scotland to retain access to the Single Market. It is our premise that the main objective of the UK is still to secure a deal with the EU with a view to enjoying full and continued participation in the Single Market. This would be definitely guaranteed by acceding to the European Economic Area (EEA) Agreement – which would entail the UK becoming a member of the European Free Trade Association (EFTA) – or possibly by negotiating a series of bilateral agreements alike Switzerland as both solutions would amount to 'EU membership lite'. Anything else would appear to go against the wishes and interests of the population of Scotland.

3. Both a 'classic' free trade agreement (FTA) (see recent FTAs with Canada (CETA), Singapore, Vietnam) and a customs union (eg Customs Union with Turkey) with the EU are likely to fail to cater for the UK's and Scotland's needs in relation to the provision of services. Likewise, free movement of persons would be limited, if at all allowed. Other recently suggested options include a Cross-Channel Trade and Investment Partnership (see proposal here), a Continental Partnership (see proposal here) or any other form of customised relationship agreement. Since it is difficult to gauge what such agreements would cover and how they would operate as they would be tailored to the needs of both the EU and the UK as its trading partner we are unable to assess the full effectiveness and practicality of these alternatives.

4. In this light, our submission focuses on the UK membership to 1) the European Free Trade Association (EFTA); 2) the EEA Agreement (often coined the 'Norway Model'); and 3) the so-called 'Swiss Model'.[1]

European Free Trade Association (EFTA)

Purposes, Principles and Obligations under the EFTA Convention

5. EFTA was established by the EFTA Convention of 4 January 1960 as amended and consolidated on 1 July 2013. Its current membership includes Iceland, Liechtenstein, Norway and Switzerland.

[1] All these alternatives are considered for Scotland as part of the UK and not as an independent State.

6. It is an international organisation which was created with the view to promoting free trade with fair conditions of competition and some form of economic integration between its Member States.

7. For that purpose, the original EFTA Convention signed in Stockholm essentially focussed on the free trade in goods which is now covered in Chapter Two of the current convention. This chapter includes the prohibition of tariff barriers (customs duties and charges having equivalent effect on imports and exports, and discriminatory internal taxations) and non-tariff barriers (quantitative restrictions and measures having equivalent effect on imports and exports). It also establishes rules on customs and origin matters and guarantees greater market access for agricultural goods and free trade for fish and marine products.

8. In the wake of the 1994 EEA agreement and the EU-Swiss Bilateral Agreements, EFTA States agreed to further their economic cooperation in the 2001 Vaduz Convention by strengthening competition rules applicable to public and private companies and the right of establishment and by including free movement of persons, trade in services (including services in land and air transport), free movement of capital and the protection of intellectual property rights.

9. While the right of establishment and trade in services are subject to the national treatment obligation (ie 'no less favourable' treatment clause), the principle of equal treatment applies to the free movement of persons.

10. The Convention also provides for safeguard measures allowing Member States, after notifying the EFTA Council and triggering the consultation procedure, to take unilateral measures when it faces 'serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist' (Article 40 of EFTA Convention). This provision can only apply between Switzerland on the one hand and the EEA EFTA States on the other.

Advantages and Disadvantages of EFTA Option for the UK and Scotland

11. At first sight, joining EFTA as an international organisation seems to be the easiest solution for the UK (and Scotland), and this is so mainly for two reasons.

12. First, the legal framework of a European free trade area is already in place. This means that there a free trade agreement already exists between EFTA Member States, the benefits of which the UK and Scotland would enjoy straight away without having to negotiate separate trade deals. Furthermore, the UK and Scotland would benefit from the guarantee of a mutual application and enforcement of the terms of the Convention by its Member States through dispute resolution mechanisms such as the procedures of consultation on the interpretation and application of the Convention and of arbitration for cases of alleged violations;

13. Second, accession to EFTA is not a particularly onerous procedure as the UK only needs to secure the approval for its accession by way of a decision of the EFTA Council requiring unanimity of all EFTA members (Article 56(1) of EFTA Convention). The downside is of course that any EFTA State may block the application of the UK. Whilst the formal process appears easy at first sight, the informal access process might be more difficult as the UK would need to persuade

all EFTA States that it is in their advantage to allow it to join EFTA. Amongst the factors that such States will be looking at are:

a. the costs of the UK joining EFTA (including expenses relating to renegotiating EFTA's FTAs) and whether these can be compensated by the UK contributions to the market and the budget;

b. the change in the balance of political and legal powers in EFTA and, more specifically, the EFTA Council;

c. the change in the economic balance and competition in the fisheries sector. Free trade in fishery products is an essential part of the EFTA Convention since this sector is of prime importance to Norway and Iceland.

14. While the UK was an early EFTA founding member prior to becoming an EEC member State, and thus might be under the impression that it would easily access the EFTA Convention and benefit from its provisions, it might be worth pointing out that there are a number of drawbacks.

15. First, the UK would not fall back to a *status quo ante* position since the objectives and scope of EFTA have considerably changed and evolved since the UK withdrawal in 1973 (see paras 7-8) and the creation of the EEA (see paras 21-24).

16. Second, the UK would have an obligation to apply to become a party to free trade agreements negotiated by EFTA (Article 56(3) of EFTA convention). EFTA has so far negotiated 27 FTAs covering 38 countries. Many FTAs focus on the trade of goods and the protection of intellectual property rights. To respond to the challenges and opportunities of today's globalised economic environment the more recent agreements include rules on trade in services, investment and/or public procurement (eg EFTA-Chile FTA, EFTA-Ukraine FTA). As a result of this new approach, older FTAs have been revisited and modernised (eg EFTA-Turkey FTA). These developments would be beneficial to the UK service sector.

17. It should be noted that the expression 'shall apply to become' means that the UK would not automatically become a party to such agreements. EFTA's FTAs would need to be renegotiated. EFTA allows its States to use reservations, exemptions and special commitments in regard to certain trade aspects. In other words, whilst benefiting from such EFTA FTAs the UK would be able to ensure that its interests in specific sectors are safeguarded.

18. The downsides of the renegotiations are that some EFTA States might not be keen on reopening the negotiations of 27 FTAs. First, such a move might jeopardise compromises that were negotiated hard by the current EFTA States and might lead to further concessions on their part. Second, as agreements in the fisheries sector have always proved to be a major difficulty in such FTAs, the accession of the UK (with Scotland), a key player in this sector, might further complicate negotiations with EFTA partners. Being of prime importance to Norway and Iceland, those countries are unlikely to be willing to compromise on fishery matters. This could be a major issue for the Scottish fisheries sector.

19. EFTA States are free to conclude bilateral agreements with third countries separately from EFTA but they have generally preferred to negotiate within EFTA with the exceptions of FTAs signed by Switzerland with China and Japan, and the FTA signed by Iceland and China. After joining EFTA, the UK would have that option.

20. The major EFTA's trade agreement is of course the EEA agreement with the EU (see paras 21-24). Again, the UK will not automatically accede to it but might be obliged to apply to become a party to it. This might be an obligation that the UK may not wish to undertake though it would be expected that the UK accedes to it simultaneously to the EFTA Agreement. We believe it would be in Scotland's interest for the UK to accede to the EEA Agreement. Accession of the UK to the EEA Agreement is governed by Article 128 of the EEA Agreement (see paras 25-28).

European Economic Area Agreement (EEA Agreement) – the 'Norway Model'

Purposes, Principles and Obligations under EEA Agreement

21. The 1993 EEA Agreement is a mixed agreement of association between the then European Community (now EU), the Member States of the EU and three of the four Member States of EFTA, Iceland, Liechtenstein and Norway (see paras 5-10). Following the Swiss referendum of 1992, Switzerland declined to sign the EEA, thus opting for continuing with bilateral agreements with the EU (so called Swiss model) (see para 43).

22. The purpose is to create a homogeneous 'European economic area' bringing together the EU Member States and EEA EFTA States into a single market within which equal conditions of competition are ensured and competition rules are respected. Through this Agreement EU legislation on the Single Market four freedoms (goods, persons, services and capital) applies to the 31 EEA States. Citizens and economic operators of the EEA enjoy equal rights and obligations within the Single Market.

23. Further, the Agreement provides for 'horizontal provisions' relevant to the four freedoms (social policy, consumer protection, environment, statistics and company law) and, outside the four freedoms, for further cooperation in so-called 'flanking' policies in areas such as research and development, environment, education, tourism and civil protection.

24. However, the Agreement does not cover certain EU policies such as the Common Agriculture and Fisheries Policies (with the exception of provisions on trade in agricultural and fish products), the Customs Union, the Common Trade Policy, the Common Foreign and Security Policy, the Justice and Home Affairs (yet, all EFTA countries are part of the Schengen Area) and the Economic and Monetary Union.

25. The UK is currently a Contracting Party as defined under Article 2 of the EEA Agreement. After the UK leaves the EU, the UK would logically no longer fulfil the requirements of being party to the Agreement as Contracting Parties to the EEA Agreement must be either Member States of the EU or EFTA. However, it is unclear whether the UK would automatically be withdrawn from the EEA Agreement as the latter does not specifically provide for the situation where an EU or an EFTA State

leaves its organisation. The withdrawal procedure from the EEA Agreement under Article 127 would oblige the UK as a Contracting Party to give at least 12 months' notice in writing to the other Contracting Parties.

26. What complicates matters is the fact that Article 50 TEU provides that the agreement on the withdrawal from the EU takes also into account the framework of the future UK-EU relationship. There are then two options with regard to the EEA Agreement: either the UK wishes to remain an EEA Contracting Party or it no longer does.

27. Should the UK wish to remain a Contracting Party (this time as an EFTA Member State) then this would need to be specified either in the UK-EU withdrawal agreement or/and in the framework agreement for the new UK-EU relations. Negotiations for EFTA membership would then need to commence as soon as possible to provide a smooth transition from EU to EFTA membership so as to continue its EEA Agreement membership. In the meantime, the EEA Agreement might provisionally apply to the UK until its status as an EFTA Member State is confirmed.

28. Should the UK wish to withdraw from the EEA Agreement, it would have to trigger the Article 127 procedure by giving notice to the EEA Contracting Parties of its intended withdrawal. The difficulty here resides in the timing of the 12 months' notice so as to synchronise the withdrawal from the EEA Agreement with the withdrawal from the EU. Ideally, the EU-UK withdrawal agreement should specify that the UK leaves the EEA Agreement on the same day as it leaves the EU. If the 12 months' notice goes beyond the withdrawal date of the UK from the EU then the doctrine of *rebus sic stantibus* of public international law would apply (see below). If the 12 months' notice ends before the UK leaves the EU then the EEA Agreement would cease to apply before the EU treaties cease to apply to the UK, thus leading to a potential conflictual situation with regards to UK's obligations. This reinforces the need for the UK and the EU to specify in the withdrawal agreement the UK's obligations with regard to the EEA Agreement. Should the UK fail to invoke Article 127 of the EEA Agreement, the doctrine of *rebus sic stantibus* (Article 62 of the Vienna Convention on the Law of Treaties) would apply. First, the circumstances that existed at the time of the conclusion of the EEA Agreement would have fundamentally changed. This would be the case here as the UK originally joined the EEA Agreement as an EU member State and the UK's obligations and rights as a non-EU Member State would be radically different from the ones it had as an EU Member State. Second, at the time of the signature of the EEA Agreement in 1993 the possibility of a withdrawal of an EU Member State from the EU could not have been contemplated since Article 50 TEU was only introduced in the Lisbon Treaty in 2009. As a result of the application of this doctrine, the EEA Agreement would become inapplicable to the UK from the moment it leaves the EU.

Advantages and Disadvantages of the EEA Option for the UK and Scotland

29. This option, also referred to as the 'Norway model', is the one most mentioned by experts and some politicians as it is seen to bring some of the advantages of EU membership without being a member of the EU.

30. Access to the EEA Agreement would legally require joining the EFTA (see para 21) as it is only open to EFTA countries, the EU as such and EU Member States. According to Article 128 EEA Agreement, accession of the UK will be the result of an (enlargement) agreement between all Contracting Parties (ie the EU, its Member States and EFTA Member States) and the UK determining the terms and conditions of its participation and to 'be submitted for ratification or approval by all Contracting Parties in accordance with their own procedures'. For many States approval by Parliament or through a national referendum is the specified procedure under their constitutions. This means that not only the EU itself but also any single EU or EFTA Member State can delay or block the UK's accession to the EEA Agreement. Furthermore this ratification process can be very lengthy. For example, while Croatia signed the EEA Agreement with the other Contracting Parties on 11 April 2014 and ratified it on 24 March 2015, the EEA Enlargement Agreement has still not entered into force as from July 2016 since only 13 out of 31 EEA States have so far ratified the EEA Enlargement Agreement. That being said the EEA Agreement applies provisionally to Croatia.

31. Once the UK is readmitted in the EEA, it would have continued access to the EU Single Market. However, access to the Single Market means that all four freedoms are guaranteed. In this regard there would be no changes in the current legal obligations of the UK, notably in relation to free movement of persons and intra-EU migration since all four freedoms are generally viewed as inseparable. This would be a bone of contention for the UK Government but not necessarily for the Scottish government.

32. The main difference between EU and EEA membership is that the latter would cover fewer areas of competences such as agriculture, fisheries, external relations and notably cooperation in civil and criminal matters (which is covered by chapters 3, 4 and 5 of title V TFEU on AFSJ and which the UK was always been keen on opting out). Fisheries and agriculture would be of particular interest for Scotland. Yet, while EEA membership would mean greater control by the Scottish government over those policies as these are devolved matters, Scotland would also lose EU funding in those areas and face greater competition from Norway and Iceland.

33. Whereas the UK as an EU Member State participates in the law-making process relating to those four freedoms within the Single Market, as an EEA EFTA member, it would have to abide by those EU laws without any influence over their creation and without the power to challenge them by way of judicial review as is the case for EU Member States under Article 263 TFEU. In the creation of EU acts the Commission is only required to seek the views of experts of various committees within the EEA Joint Committee (the institution in charge of the effective implementation of the EEA Agreement). This is nothing but a consultation process of EFTA States. Democratic deficit is indeed one of the main criticisms raised against the law-making process in the EEA as pointed out in the 2012 EEA Review Committee report *Outside and Inside. Norway's Agreements with the European Union* (in Norwegian) (pages 7-8 (in English)).

34. Furthermore, in order to guarantee the homogeneity and legal certainty of the EEA, Article 102 of the EEA Agreement provides that new or amended EU legislation must be incorporated in the relevant Annex of the Agreement by way of a consensual decision of the EEA Joint Committee. In other words, EU acts do not

automatically become law in the EEA EFTA States as the EU principle of primacy does not apply to EFTA States as implied by the terms of Article 102(3) second sentence. Whilst this procedure technically allows EEA EFTA States to veto the enactment of EU acts in the EFTA States' legal orders, in practice Article 102 provides for prolonged negotiations with a view to arriving to a mutually acceptable solution.

35. In case such solution is not found within the time limits set out in Article 102 the part of the Annex that is affected by the dispute is provisionally suspended. However, the fact that all internal market issues are interlinked renders the issue of suspension even more complex, if not impossible, as the use of the Article 102 clause would put into question the entire fabric of the EEA Agreement. This would explain why so far no suspension has ever occurred. The only example of an attempted veto was Norway's reservation to the Third Postal Directive in 2010 (see Annual Report of the EEA Joint Committee 2014, 14 October 2015, para 26) which was finally lifted in 2014 after a long debate. This suggests that EFTA States may have no serious veto power. Much alike the decision-making process, the enactment procedure leaves the EFTA States with very little influence over the incorporation of newly enacted EU legislation into the EEA legal framework. That being said, whilst current EFTA States have exercised caution over the use of reservation, it would be reasonable to expect that the UK would express less shyness in using this option especially if UK interests of special importance were threatened by EU legislative acts planned for inclusion in the EEA Agreement annexes. This opinion would be supported by the current UK voting record in the Council of Ministers of the EU (see UK in a Changing Europe Blog Post and House of Commons Library Standard Note SN/IA/6646).

36. One of the reasons for this reluctance to use reservations against the incorporation of EU acts in the relevant EEA Agreement annexes is that the EEA Joint Committee can show some flexibility. As per Article 102 of the EEA Agreement the Joint Committee must 'find a mutually acceptable solution' and this might involve granting adjustments provided that EFTA States are able to demonstrate that they are necessary and/or justified by domestic conditions that are different from those in EU Member States. Although some exemptions and adaptations are being made for the EFTA States (eg Citizenship Directive 2004/38) the expectation is that the annexes to the Agreement must be as similar as possible to the EU legislation. Moreover, negotiating adaptations will be all the more difficult for EFTA States if similar requests for adaptations or exemptions have been previously denied to EU Member States.

37. According to Article 103 of the EEA Agreement, once EU acts have been incorporated in the relevant annex of the EEA agreement they still need to be adopted by the EFTA States following their constitutional requirements. This means that all acts, including regulations that are directly applicable under EU law, are to be transposed into EFTA States' national law. Relatedly, the principle of direct effect under EU Law is unknown to the EEA legal framework. In practice, EFTA States have never rejected the transposition of EU acts incorporated in the annexes of the EEA Agreement as this would, according to Article 103, amount to the suspension of the application of the EEA Agreement for the relevant sector. That being said, EFTA

States have occasionally, much alike some EU States, failed to transpose EU acts into national law.

38. Within the EEA Agreement the UK would benefit from a surveillance and enforcement mechanism against other EEA EFTA Member States. Indeed EEA EFTA States are monitored by the EFTA Surveillance Authority (ESA) and the EFTA Court that were created in pursuance of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement) as required under Article 108 of the EEA Agreement in the same way as EU Member States are supervised by the European Commission and the CJEU. Both the European Commission and ESA maintain close cooperation in their supervisory role. For its part, the EFTA Court can be regarded as the equivalent of the CJEU for issues relating to EEA EFTA States and deals with actions brought by ESA against EEA EFTA States relating to the application and implementation or interpretation of EEA rules. Additionally, the Court hears appeals against decisions taken by ESA. Moreover, it advises national courts in EEA EFTA States on the interpretation of the EEA Agreement and rules. Finally, it settles disputes between two or more EEA EFTA States. Overall, the jurisdiction of the EFTA Court mirrors that of the CJEU over EU Member States. For the sake of consistency between EU Law and EEA Law, both ESA and the EFTA Court 'shall pay due account to the principles laid down by the relevant rulings by the [CJEU]' as per Article 3 of the Surveillance and Court Agreement. The UK can thus rely on the legal certainty provided by this paired system of interpretation and enforcement. At the same time the UK might be more content with EFTA bodies (ESA and Court) that are more driven by a market oriented rather than an integrationist approach.

39. Nevertheless, this enforcement mechanism does not allow the UK to bring legal proceedings against EU Member States that fail to comply with the EEA Agreement in the same way as it would have the possibility to do under the EU treaties following the Article 259 TFEU State against State enforcement procedure. Under Article 111 of the EEA Agreement the settlement of disputes concerning the interpretation or application of the Agreement is dealt with by the EEA Joint Committee. The main role of the EEA Joint Committee is to maintain the good functioning of the EEA Agreement and to find an acceptable solution. Negotiations within the EEA Joint Committee are therefore essentially of a diplomatic nature. Within three months after the initiation of the procedure the parties to the dispute may agree to seek legal advice from the CJEU on the interpretation of the rules concerned. If no ruling by the CJEU has been requested and if after six months of negotiations no agreement on a solution is reached, the Contracting Parties may resort to safeguard measures under Article 112(2) of the EEA Agreement (see paras 39-40) or to apply the Article 102 procedure designed to guarantee the legal security and homogeneity of the EEA (see paras 34-35). It must be noted however that the procedure under Article 102 has never been activated.

40. Article 112 of the EEA Agreement allows a Contracting Party to adopt unilateral safeguard measures '[i]f serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising'. Whilst this provision is often viewed as an 'emergency brake' it must be stressed that it can only be invoked following a rigorous procedure spelled out in Article 113. The whole procedure entails: first, that the Contracting Party notifies the other parties of its

intention to take safeguard measures and provides all relevant information; second, that it enters into consultation with the EEA Joint Committee in order to find a 'commonly acceptable solution'; third, it does not adopt the intended measures within a month after notification unless consultations have been completed within that time or when exceptional circumstances require otherwise; fourth, it notifies the EEA Joint Committee of the adopted safeguard measures without delay; and fifth, the safeguard measures are to be reviewed by the EEA Joint Committee every three months or any time at the request of any Contracting Party. By definition, safeguard measures are limited in scope and duration to what is strictly necessary as they are meant to remedy the situation. Further, measures which least disturb the functioning of the Agreement are given priority. In other words, the invocation and application of safeguard measures is more difficult than often claimed. Moreover, it carries the risk of retaliation measures by any other Contracting Party. Indeed, if a Contracting Party deems the safeguard measures to create an imbalance between the rights and obligations under the Agreement it may under Article 114 adopt proportionate retaliation measures, eg the suspension of some aspect of preferential trade. These measures must nevertheless be strictly necessary to remedy the imbalance, and priority must be given to measures that disturb least the functioning of the EEA Agreement. The reason for imposing such limited justifications for the use of safeguard measures and such a tight procedure is simple: safeguard measures are likely to harm the functioning of the Single Market and contradict the very principles upon which the EEA Agreement is founded. As a result, as mentioned above, such measures can only be triggered in specific, contained situations. For example, Liechtenstein managed to secure by way of Article 112 safeguard measures the continued application of immigration restrictions that were in place during the transitional period following its accession to the EEA Agreement. These were accepted by the EEA Joint Committee on the ground of 'specific geographical situation of Liechtenstein' justifying 'the maintenance of certain conditions on the right of taking up residence in that country'. Provided that the UK can make a compelling case for 'economic, societal or environmental difficulties of a sectorial or regional nature' it might be able to secure an emergency brake with regard to free movement of persons.

41. A similar, albeit slightly different, approach to the use of so-called safeguard measures is for a State to negotiate the adoption of such measures from the outset. Indeed, prior to its accession to the EEA Agreement, Liechtenstein had secured the application of its national law regarding entry, residence and employment of non-nationals. The UK could, likewise, request such a deal that would be included in a specific protocol appended to the EEA Agreement, in a similar way to Protocol 15 EEA which was originally meant to deal with transitional provisions. Liechtenstein's concerns are now addressed in the Sectoral Adaptations contained in Annex VIII. This option might allow the UK to preserve its access to the Single Market whilst enabling it to control migration flows.

42. It must be stressed that although EEA membership does not equate to full EU membership the reality is that the further the EU integrates and the further the Single Market deepens the more difficult it is for EEA EFTA States to avoid European integration by stealth. In other words, the UK's desire to distance itself from an 'ever closer union' might prove wishful thinking. It might however be the best alternative to EU membership for Scotland whose population voted to remain within the EU.

43. Overall, this alternative might be regarded as one providing a deal that would be favourable on the one hand to the UK by keeping Scotland in the Union and on the other to Scotland by keeping access to the Single Market without the prospect of potential economic damage as a result of an inevitably complicated and potentially protracted UK exit. Essentially, this option is a method of leaving the EU whilst still benefiting from its advantages and regaining sovereignty over areas covered by EU common policies. However, this scenario may well be suited for Scotland for the long run but less so for the UK as a whole as the UK might prefer to see it as a compromise position for the short to medium term and subject to later review. Whatever the timespan of this option, it will come at a financial cost as any EEA Member State must contribute to the EU budget in return for access to the EU Single Market.

Bilateral Trade Agreements – the 'Swiss Model'

General Considerations

44. Originally, EU-Swiss relations were governed by the Free Trade Agreement of 1972. Switzerland took part in the negotiations of the EEA Agreement but ratification was prevented by a referendum in 1992. As a consequence, owing to Switzerland's increasing need to access the Single Market, it engaged in a series of negotiations with the EU leading to bilateral agreements known as 'Bilaterals I' in 1999 and 'Bilaterals II' in 2004. The former cover free movement of persons, technical trade barriers, public procurement, agriculture, air and land transport and participation in the EU's framework scientific research programmes. The latter notably include Switzerland's participation in the Schengen agreements and Dublin regulations, agreements on taxation of savings, processed agricultural products, combating fraud, participation in the European Environment Agency, and Swiss financial contributions to economic and social cohesion in the new EU Member States. All in all Switzerland and the EU have negotiated over 120 bilateral agreements (list of agreements available here in French) over a period of 40 years, all of which are managed through a structure of dozens of joint committees and subgroups.

Advantages and Disadvantages of the 'Swiss Model' for the UK and Scotland

45. The 'Swiss Model' would allow the UK to be a member of EFTA without being bound by the EEA Agreement whilst giving the UK some access to the Single Market. This model would certainly give the UK the ability to prioritise sectors to trade in but would not necessarily allow it to achieve its main objective which is to gain a sufficient level of access to financial services market in the EU. Further, such a piecemeal approach would also provide the UK with the flexibility to participate in certain aspects of cooperation in civil, criminal affairs and police matters as well as foreign policies as is the case for Switzerland. More specifically, this would provide the UK with the opportunity to maintain its participation and preserve its best interests in the Common Foreign and Security Policy and the area of Freedom, Security and Justice in which it has played a key role as an EU Member State.

46. Like Switzerland, the UK would also be able to exercise its freedom to create its own network of free trade agreements. This would be the case whether the UK is a member of EFTA or not.

47. Governed by classic public international law the main aspect of these agreements is that there is no dedicated mechanism to adapt the agreements to evolving EU legislation. Such agreements can be modified by ways of further agreements, including in the form of exchange of letters and protocols.

48. One of the key disadvantages of the 'Swiss Model' is that its piecemeal and sectoral approach is the product of a time- and resource-consuming process as the length of negotiations does not only depend on the political will of the UK and the EU alone but also on the need to involve relevant stakeholders in the consultation processes.

49. Furthermore, the lack of oversight mechanisms means that the implementation of these agreements is based on the good faith of both parties. This might be well received in the UK as no supranational supervisory body would be ensuring the UK complies with the agreement(s) whilst still enjoying the guarantee that the EU and its Member States comply with their own obligations under the agreement(s) as the EU and its Member States are subject to EU enforcement mechanisms. Yet, this would not shield the UK from retaliation measures taken by the EU to force UK compliance.

50. Another point to consider is the likelihood of the inclusion in the bilateral agreements with the UK of a so-called 'guillotine clause' whereby the termination of one agreement results in the termination of the other agreements.

51. Owing to the increasing difficulty to manage effectively this mass of separate agreements, the EU and Switzerland launched in May 2014 negotiations with a view to adopting a framework institutional agreement aimed at resolving the problems arising from the ever developing nature of the EU Single Market body of laws and at setting a dispute settlement mechanism into the current network of bilateral agreements. Pending the resolution of the free movement crisis resulting from the 2014 Swiss referendum, any further Single Market access for Switzerland would be made conditional on the adoption of this framework institutional agreement.

52. It is doubtful that the EU would accept to replicate this model in the case of the UK since it does not find it satisfactory in practice. Indeed, the EU would prefer a single comprehensive package deal keeping the four fundamental freedoms indivisible and interdependent, and including supervisory mechanisms.

Conclusions

53. Our recommendation is based on three premises: first, though Brexit can only be regarded as a reality to be dealt with, the referendum results have shown a clear dichotomy between the wishes of the people north and south of the Scottish border; second, retention of access to the Single Market is still a priority for the UK Government; and third, there is no clear indication yet that the Scottish people wants to secede from the UK.

54. The referendum was about EU membership and did not rule out other forms of non-EU membership such as the 'Norway model'. Accordingly, joining the EEA Agreement would not necessarily be against the wishes of the UK voters in general and Scottish voters in particular.

55. We would therefore recommend the UK to apply for EFTA membership so as to accede to the EEA Agreement as this would be in the best interests of Scotland even if this meant some adjustments to accommodate the UK's demands on curbing free movement of persons. Further, as it has been contended that the EEA Agreement needs updating, the Scottish Government might try and persuade the British Government to use accession to the EEA Agreement as an opportunity in the long run for revision of the EEA system possibly with a view to gaining co-decision rights by incorporating into the partnership between EFTA States and the EU common law-making processes and institutions.