

**THE EEA REVIEW AND
LIECHTENSTEIN'S
INTEGRATION STRATEGY**

JACQUES PELKMANS

AND

PHILIPP BÖHLER

**CENTRE FOR EUROPEAN POLICY STUDIES (CEPS)
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Jacques Pelkmans is Senior Research Fellow at CEPS and Visiting Professor, College of Europe Bruges. Philipp Böhler is a PhD candidate, Law Department, University of Kent and former researcher at CEPS.

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Centre for European Policy Studies
Place du Congrès 1, B-1000 Brussels
Tel: (32.2) 229.39.11 Fax: (32.2) 219.41.51
E-mail: info@ceps.eu
Internet: www.ceps.eu

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PREFACE

European integration continues to be ‘in flux’. Since the early 1990s, the dynamics have been almost breathtaking: three treaty revisions in the EU and no fewer than three enlargements, increasing its size from 12 to 27 members. In 1994, the European Economic Area (EEA) became operational, quietly extending the single market (except agriculture and fisheries) to Iceland, Liechtenstein and Norway. In addition, the euro was introduced and the eurozone enlarged from its initial 11 to 17 countries. The single market deepened steadily. There was and continues to be some turmoil in the domestic politics of some member states due to the financial and economic crisis and concerns about the deepening and the scope of the EU *acquis*. The dynamics are clearly not petering out: the crisis has prompted a rapid deepening of EMU, mostly for the eurozone but to some extent also for the EU as a whole, new EU members are likely to accede, a few EU countries want to enter the eurozone and market integration with a host of European countries (e.g. Andorra, San Marino, Monaco, Switzerland, Turkey and some European neighbourhood countries) may well be intensified and different approaches (including enlargement of the EEA) are under discussion. Last but not least, in the UK a major debate led by Prime Minister David Cameron has been unleashed about the terms of EU membership, with an option of an ‘in or out’ referendum in 2017.

Given the overwhelming prominence of the EU, often mistakenly labelled ‘Europe’, it might have gone unnoticed that a new element in the European integration debate is formed by discussions about the functioning and future of the EEA as well as options for deep market integration with other non-EU European countries. In December 2012, the European Commission and the EEAS submitted a joint “EEA review” paper, after an invitation from the Council to do so two years before. In May 2013, the EEA Council (comprising the EU and the three non-EU EEA member countries) will engage in a first discussion on the EEA and possible alternative options for better market integration with various European countries. This CEPS study, requested by the Liechtenstein government, aims to serve as a contribution to the analysis and discussions

leading up to the high-level EEA review and decision-making. This book is intended to stimulate the political leadership in Liechtenstein, public opinion leaders and others to engage in strategic thinking about the many options for the Principality in the near and medium-term future. Where relevant, matters specifically important for Liechtenstein have been highlighted. However, we are convinced that the 'EU circuit' in Brussels and in all capitals in the EEA-30 as well as policy-makers in non-EEA countries in Europe will also find the study useful for two reasons: first, it is, apart from the recent Norwegian EEA review (in Norwegian mostly), the only in-depth study of the EEA as it functions today; second, as far as we know, it is the only study to systematically screen every not-too-extreme option that is relevant (we discuss nine, with sub-options) in a sound, wide-ranging and strategic debate about European market integration.

The first ideas for this study emerged from fascinating discussions between the first author and H.E. Prince Nikolaus von und zu Liechtenstein when the latter was still ambassador for Liechtenstein in Brussels. Later, the government of the Principality of Liechtenstein commissioned CEPS to do the study with flexible and fairly open terms of reference. The authors are grateful to Liechtenstein for the confidence in CEPS to design and elaborate this work. The study has benefited from many insights acquired from interviews with representatives and stakeholders, both in Brussels and Vaduz. We are also grateful to the participants of the CEPS EEA workshop held in Brussels in June 2012. The authors are especially indebted to Christian Frommelt, Sieglinde Gstoehl, Ulf Svendrup, Matthias Oesch and Marc Maresceau. Various draft texts have been greatly improved due to meticulous comments from and insightful discussions with Marius Vahl and Ambassador Kurt Jaeger.

The authors alone are responsible for any omissions and errors remaining.

Jacques Pelkmans
& Philipp Böhler
Brussels

EXECUTIVE SUMMARY

The present study is concerned with a new element in the recent European integration debate: discussions about the functioning of the European Economic Area (EEA), modes of improving the EEA, its possible enlargement as well as other options to deepen and enlarge European market integration to more (non-EU) countries. The EEA includes the 27 member states of the EU and three non-EU countries: Iceland, Liechtenstein and Norway. Focusing on the EEA means, by definition, concentrating on the EEA-3 countries and their position in today's and a future EEA, as well as an interest in the EU and its position towards the EEA. However, this study has been designed as an exercise in strategic thinking. Therefore, it incorporates a wider spectrum of alternative options and sub-options than the EEA. Since the government of Liechtenstein has requested CEPS to make this study, it comprises some specifics related to Liechtenstein but these aspects are mainly found in the first two chapters and, otherwise, scattered throughout the text. It should help EU experts to better appreciate the particularities of Liechtenstein in the EEA and beyond, which is not easily accomplished in the frantic 'EU circuit'. Nevertheless, these country-specific observations do not dominate the study at all and the text can be read just as well as a more general treatise on the functioning of the EEA today and in future as well as on a range of alternative options in European market integration.

After a first introductory chapter, chapter 2 summarises three centuries of how Liechtenstein was finding its way in Europe. Its two central aspirations have always been, on the one hand, to achieve independence and recognition as a sovereign state, and, on the other hand, to allow Liechtenstein to prosper by assuming a pragmatic approach to commerce – and later, to economic integration. Its move into the EEA in 1995 has undoubtedly proved a most successful strategy, notwithstanding the initial fears about a lack of experience and of administrative capacity.

Chapter 3 explains the deep and wide-ranging market integration in Europe today and Liechtenstein's position in it. After an excursion into the customs union and the currency union with the Swiss and the ingenious

compatibility of the free trade area aspects of the EEA and the customs union regime of Switzerland (based on the principle of 'parallel marketability'), most of the chapter consists of an extensive exposition of the EEA and its functioning, in particular the cooperation amongst the EEA-3 countries in the take-over of a steady stream of new internal market 'legal acts' and related questions. The EEA is institutionally explained with all its bodies and the 'two-pillar structure', including its underlying philosophy, made intelligible. This philosophy is based on the rejection of supra-nationalism by the EEA EFTA countries, in other words, an insistence on their sovereignty. Because the EEA-3 do want to be part of the EU internal market, the practical effect of the EEA is a mere 'residual' sovereignty: legally, the EEA Agreement is a normal intergovernmental treaty, but in actual practice the take-over of EU legal acts is hardly ever 'negotiated' - most of the time, it is merely processed quasi-automatically via Joint Committee decisions (JCDs). The escape clause is Art. 102, also called the 'nuclear option', under which the EEA-3 (but not the EU countries of the EEA) might insist upon their sovereign discretion not to adopt a specific EU legal acts but at the price of losing market access to the EU in the related part of the relevant Annex.

The substance of the EEA adds up to the 'single market-minus', that is, all of the single market-minus agriculture and fisheries. This substance can be summed up by the economic freedoms (free movement of goods, services, capital, labour and codified technology like IPRs, plus the right of establishment), the EU regulation necessary for these freedoms to be applicable without derogations from member states (e.g. for market failures not sufficiently addressed at EU level) and five of what the EEA Agreement calls 'horizontal' policies (consumer protection, environment, social policies, statistics and company law). Although one might argue about the rationale of having (only) five such policies, the EEA remit is extremely ambitious, large and 'deep' for non-EU countries. Since the EU extends its single market to the EEA EFTA states, it insisted on the 'homogeneity' of the EEA-30 market. This adds further ambition and discipline.

The EEA Agreement is 'static' in the sense that its main text has never been amended, yet incredibly 'dynamic' in that all new EU *acquis* for the single-market-minus is continuously incorporated in the Annexes of the Agreement via JCDs. By late 2012, the incorporation of (so-called 'EEA-relevant') EU legal acts in the Annexes added up to over 7,000 EU legal acts (starting from 1994). These EU legal acts are diverse, ranging from directives and regulations enacted by the European Parliament and the Council, via decisions and recommendations to numerous instances of EU

implementing acts. Moreover, the 7,000-plus turn out to be a gross measure, not (or hardly) taking into account the abolition of EU acts later or codification and recasting (etc.) – which has been done with some frequency in the EU since 2005 – and also including numerous trivial (rather than substantive) amendments of directives or regulations. On the whole, and despite the complicated two-pillar procedures, the EEA is regarded as a success story. This is due, in no small measure, to the EEA-3 countries having organised themselves effectively in Brussels and domestically in ways that routinely incorporate EU laws into the Agreement or (especially EU legal acts with 'direct effect', a denial of their sovereignty) doing so after obtaining explicit national parliamentary approval.

Liechtenstein, Switzerland and the EU have accomplished two instances of 'trilateralisation': i) enabling Liechtenstein EU market access in processed agricultural products via an agreement with Switzerland, and ii) attaching the Schengen protocol for Liechtenstein to the Swiss-EU Schengen Association Agreement (but in fact valid as a 'stand-alone' one). There is a host of other bilateral agreements between Liechtenstein and the EU and/or its member states, including a recent series of tax information exchange and double taxation agreements (with 11 EU countries).

Chapter 4 discusses the dynamics of European integration in the wider sense, in effect Liechtenstein's strategic environment. The following eight changes in this environment are considered:

1. *The EEA Review of the European Commission.* For the first time since the EEA began, EU Council of Ministers has announced that it expects to have an extensive exchange in May 2013 in the EEA Council. The Review is different from past Council conclusions invariably comprising praise for the functioning of the EEA, although these are largely repeated. This time a more systematic inspection of EEA practices and some structural features will be critically discussed, to wit, the question of EEA relevance and the lack of any procedure *ex ante*, the increasing backlog of incorporating EEA-relevant EU acts into domestic law of the EEA-3, breaking the EU's taboo on using Art. 102, the participation of the EEA-3 in EU agencies and a frank discussion of opening up the EEA to non-EU countries other than Switzerland.

2. *Amending the EEA Agreement.* The EEA Review from the Commission comprises three suggestions for substantive amendments: i) a 'more comprehensive approach' by bringing some bilateral agreements under a single framework, possibly the EEA; ii) bringing under the EEA the

EU policy on trafficking in human beings, if not more judicial cooperation; and iii) altering Art. 128 and opening up EEA membership for non-EU countries other than Switzerland.

3. *Transforming Swiss-EU economic relations.* The EU has signalled in unusually frank terms that the a-la-carte bilateral approach to EU market access the Swiss continue to favour is exhausted. Instead, the EU insists on four conditions that, together, have the effect of mimicking the EEA (except for some 'holes' in the set of bilaterals). In addition, some other concerns are put forward (e.g. preferential corporate taxation and backtracking on free movement of persons). Swiss-EU economic relations are of paramount importance to Liechtenstein.

4. *Iceland's application for EU membership.* If Iceland were to join the EU (which is far from certain given the polls and the preferences of several political parties), the EEA-3 would shrink to EEA-2. This raises questions about the viability of the EEA, as the EU would partner with only two countries, and about the vulnerabilities of tiny Liechtenstein in its relationship with Norway.

5. *Changes in sentiment in Andorra, Monaco and San Marino (AMS).* All three entities are interested in deepening market integration with the EU, with San Marino wishing EU membership, and EEA membership as a second option, and Andorra having recently come out in favour of joining the EEA as well. The Commission has published an 'options' paper for the AMS, with two 'viable' options: participation in the EEA and a framework association agreement.

6. *Turkey's EU candidacy.* Turkey has been in pre-accession negotiations with the EU for 14 years, much longer than any other candidate, whilst *acquis* adoption has progressed very little so far. Inside Turkey there is clearly less interest than before and the blockage of the Cyprus issue does not help, to put it mildly. This is frustrating and unbecoming for a privilege as great as pre-accession. Sooner or later, Turkey will have to reconsider its options, if it retains its unwillingness. Possibilities might include a separate bilateral based on the EU-Turkish customs union, membership of the EEA or concluding its 'own' EEA look-alike.

7. *EEA membership for advanced neighbourhood countries.* The EEA might envisage extending membership to countries like Ukraine, Moldova and Georgia in the medium-run. Ukraine has already concluded a free trade area with the EU, but it is not signed yet.

8. *The recent 'inner dynamics' of the EU.* These dynamics, in particular, with respect to EMU and to some extent in network industries, have raised questions about the ability of non-EU EEA countries to participate fully, given the higher degree of centralisation in (say) the EU banking union in progress. It boils down to effective although circumscribed participation in EU agencies, insofar as the EEA-3 enterprises or banks are or could be affected directly.

Chapter 5 analyses nine options and sub-options and, sometimes, in combination with one another. The chapter is drafted as a strategic reflection, often encouraging readers to think in terms of alternative options. The table below provides a summary of these options or scenarios (2nd column), what they mainly entail (3rd column) and some annotations (4th column). The table only mentions the key elements – it cannot do justice to the extensive analysis provided along with ample details provided in the chapter.

Scenarios/options for Liechtenstein's integration strategy

Option/scenario		Required actions	Comments
1.	Status quo EEA	Status quo, no change necessary	Implausible
1a	Status-quo-plus EEA	No change Agreement, better managing the EEA (reduce 'backlog'), address specific items (e.g. EEA relevance)	Feasible, attractive for substantive and political reasons
2.	'More EEA' (change agreement)	Extension of scope/ substance, tighter procedures	Judicial cooperation seems feasible, EEA-3 desire access to EP and Council
3.	(non-EU) EEA enlargement	Switzerland, other new members via amending EEA Agreement	Commission breaks taboo, EEA-3 politically reticent
4.	EEA-bis, or, parallel EEA look-alikes	For Switzerland, AMS countries, Turkey, advanced neighbourhood, UK minus Scotland	Not very different from EEA, 4 conditions for Switzerland to be applied to any EEA-bis + far-reaching I.M. <i>acquis</i>

5.	Less EEA	Scope of EEA reduced (via Art. 102 or amending Agreement)	Constrained option, EU insists on homogeneity
5a		EEA-2 (after Iceland's EU accession)	'Rebuilding' EEA EFTA pillar do-able; Unnatural alliance in EEA-2? Less single-voice?
6.	Bilaterals on single market-minus	For the UK, minus Scotland, perhaps EEA-3 countries, Switzerland, Turkey, AMS and neighbourhood; the key question is: What differences with 4?	If different from option 4, not attractive due to lack of legal (EEA-type) order; flexibility limited; a-la-carte for UK-minus means less access to single market
7.	More EU deepening	Single market and its governance, including the banking union; Can the EEA-3 absorb this change?	Critical to participate in ECB and some EU agencies, with vote when affecting EEA banks/enterprises directly
8.	Less, or differentiated, EU	Reducing scope of substance (opposite of 'widening') or 'variable geometry (e.g. euro 'ins' vs 'outs')	A divided EU (or, different speeds) problem for EEA if single market is affected (e.g. EU patent or banks)
8a		EU countries exiting (opposite of 'enlargement'); corollary >> options 3 /4 /6 for ex-EU country?	Unlikely, but if yes, access to single market will remain desirable; three options
9.	Liechtenstein joining EU	Although <i>not</i> current policy, adverse scenarios might prompt a U-turn; can the EU accommodate a small-sized country? And can Liechtenstein handle it?	Might be feasible for the Commission in longer run; requires novel institutional approach; Liechtenstein could make pro-active proposals on basis of cost-benefit studies

It should be noted that the authors of this study have refrained from making choices. This is of course up to Liechtenstein itself. Their purpose is to think strategically and consider alternatives. In any event, the state of flux in European integration is such that some scenarios are much more plausible than others, at least today. Finally, we venture to say that this reflection can also be helpful for the discussions leading up to the official EEA review.

1. PLACE, PURPOSE AND STRUCTURE OF THE STUDY

The Principality of Liechtenstein has become deeply embedded in European integration. It is predominantly involved in European *economic* integration, flanked by a range of cooperative arrangements in several policy areas. On the whole, Liechtenstein's economic integration with the EU¹ and EFTA countries is regarded as a success. Indeed, as recently as 2010, the official stocktaking and assessment report by Liechtenstein itself² drew this conclusion for many reasons. It begs the question why a new study should be undertaken.

This study is quite different from and, to a significant degree, complementary to the 2010 Liechtenstein report for four reasons. First, the present study is made by an independent, European think-tank (CEPS)

¹ According to the consolidated versions of the Treaty on the European Union (TEU), O.J. 2008, C 115, p. 13 and the Treaty on the Functioning of the European Union (TFEU), O.J. 2008, C 115, p. 47, no distinction will be made between the European Communities and the European Union following the unification brought about. In situations where the context makes such a distinction necessary it will be indicated which organisation is meant. The new terminology, pursuant to Art. 19 TEU, will be applied in the main text. The former Court of First Instance (CFI) will be referred to as the General Court (GC), the former European Court of Justice (ECJ) as the Court of Justice (CJ) and the court as an institution will be referred to as the Court of Justice of the European Union (CJEU). In the table of cases and the footnotes the terminology of the TEU and TEC in the version of the Treaty of Nice will be used when applicable. In the following all treaty articles will be numbered according to the Treaty of Lisbon, where a change in substance compared to the EU and EC Treaties has not been effected.

² Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend 15 Jahre Mitgliedschaft des Fürstentums Liechtenstein im Europäischen Wirtschaftsraum (EWR), No. 17/2010 (http://www.llv.li/amtsstellen/llv-sewr-dokumente_publicationen-ewr-abkommen/llv-sewr-dokumente_publicationen-veroeffentlichte_berichte_und_antraege.htm).

working in the 'Brussels' environment. CEPS appreciates the confidence that the Principality has shown in us. Serious and open-minded policy thinking is undoubtedly greatly facilitated by independent analysis. Second, the present study is future-oriented whereas the 2010 Liechtenstein report assessed the impact of 15 years of the European Economic Area (EEA) on the country and its economy, and the actual functioning of Liechtenstein in the EEA system. No country in the modern world can escape its strategic environment, of course, but this is a fortiori true for a very small country³ like Liechtenstein. Perhaps one might employ more forceful wording for Liechtenstein's predicament: it is absolutely essential for the country to anticipate, as much as possible, how its strategic environment might evolve, whether it might entertain some hope to selectively influence thinking and activities in that environment and, not least, how it can adjust to such changes in ways that would yield benefits to the country.

As we hope to demonstrate, the European strategic environment is changing in a number of ways (chapter 4) and this process will continue for quite some years. In some respects, it is also assuming continental characteristics, stretching from Iceland to the Caucasus and Turkey, if not beyond. A crucial aspect of this unfolding transformation is the complex set of changes taking place in the EU itself, in the form of an unexpected deepening of its economic integration in response to the financial and sovereign debt crisis and the complex ramifications this might have.

Third, this study focuses on future European integration options of Liechtenstein, which renders it almost by definition a 'strategic' study of possible EU and EEA avenues,⁴ and far less a report on the internal capacities of Liechtenstein for participation in the EEA and the latter's economic and other impact on the country until 2009, as the 2010 Liechtenstein report did. Fourth, lest it be forgotten, the European Union itself has proven to be highly dynamic even *before* the crisis – with three

³ In official EU, EFTA and EEA documents and in the literature, one encounters altogether no less than six different terms for very small countries in Europe: micro-states, very small states, Kleinststaat (German for smallest possible state), countries with small territorial dimension, independent states with small territorial extension (ISSTEs) and small-sized countries. This study will either mention the countries by name or employ only the terms ISSTEs and small-sized countries.

⁴ One can wonder whether the EEA or the EEA-3 (the EFTA countries of the EEA) have common 'strategies'. For a plea in this direction, see Pelkmans & Böhler (2012).

successive changes of the EU treaties since Liechtenstein became an EEA member in 1995, and a formal initiation of the eurozone with 11 EU countries, meanwhile having grown to 17 members. Moreover, the EU has enlarged from 15 to 27 countries.

Although our study aims at understanding actual and possible changes in the strategic environment of Liechtenstein, and considers options for addressing them when called for, it ought to be clear from the start that two aspects play a predominant role: the EEA and Liechtenstein's profound integration with Switzerland. With Switzerland it shares a customs union (and Swiss regulation in related fields) and a currency union. There are also many personal bonds with the Swiss. For Liechtenstein, far more often than not, the EEA is the concrete legal and institutional framework of European economic integration. It is not hard to appreciate why. The EEA is a very ambitious arrangement of 'deep' and (in terms of scope) very 'wide' market integration, encompassing far-reaching mutual market access and common regulation, including institutional and other implications. It cannot be a surprise, therefore, that a strategic reflection on Liechtenstein's European integration options will predominantly consist of thinking about options for the EEA.

Nevertheless, irrespective of the necessity and predominance as a theme, the EEA is not the only possible option for Liechtenstein, as we shall demonstrate. It all depends on whether or not one is willing to take into account alternative future scenarios for changes in European integration, which are more far-fetched. There is simply no way of knowing whether one should "think outside of the EEA box" and how far-fetched such scenarios "should" be. It is the responsibility of the authors, not an explicit assignment from the Liechtenstein government, to draw the options fairly wide. We are convinced that strategic thinking is best done by incorporating what today is regarded as implausible (but not completely unrealistic) scenarios.

Two historical lessons from the origins of the EEA are telling in this respect. First, imagine that Liechtenstein had asked CEPS in 1988 to conduct a study on its options for European integration. Could anybody realistically have anticipated that the EU would offer to open up 'wholesale' the participation of EFTA countries in the entire internal market barely one year later, not to speak of the collapse of communism, the iron curtain, the Warsaw Pact and COMECON by the end of 1990? Second, and perhaps less sensational but surely giving food for thought, would the founding fathers of the EEA on the EFTA side (or Liechtenstein, for that

matter) have realised in 1992⁵ that the EEA risked losing all its members? Although this never happened, it was a razor's edge away: once the EEA treaty had been signed, and Swiss voters (also in 1992) had already rejected EEA membership, domestic political debates in Austria, Finland, Sweden and Norway swung to the EU membership option. The Norwegian referendum split the country but the 50% yes vote was barely 2% short! With just 2% more in favour, from the EFTA side only Iceland would have entered the EEA. Half a year later Liechtenstein would have joined to constitute an EEA-2 with not even 300,000 people, yet having a relatively ambitious institutional framework, with 'deep' market integration substance on which it had little experience. These two examples show how important it is not to limit strategic reflection too much.

This study is structured as follows. After a brief excursion into Liechtenstein's history until its entry into the EEA, with special emphasis on the Principality's two central aspirations when positioning itself in Europe, a lengthy chapter 3 surveys the present position of Liechtenstein in European economic integration and cooperation. It deals with the EEA as such, the 'deep' market integration Liechtenstein now enjoys – emanating from the EEA – and its legal and institutional structure, Liechtenstein's profound economic bonds with Switzerland and a range of bilateral cooperation agreements with the EU and its member states, respectively. Readers knowledgeable about the EEA and related issues of economic cooperation and integration between the EU (or EU countries) and EFTA countries, in particular Liechtenstein, can skip chapter 3 and proceed immediately to chapter 4. Chapter 4 discusses eight actual or potential changes in the European strategic environment relevant for Liechtenstein. Some of these are not or need not be independent from each other. Chapter 5 analyses nine scenarios, possibly 'options' in a strategic reflection, for addressing the implications of such changes, some options being incremental, some fairly radical, as well as plausible combinations of some of them. The idea is to offer ample and rich food for thought and strategy. Chapter 6 concludes.⁶

⁵ The year of signing the EEA Treaty.

⁶ Several annexes provide details about how the EEA really works in substance. Although the EEA plays a dominant role in this study, our text is meant to support strategic reflections amongst the leaders of Liechtenstein and presumably for the 'EU and EEA circuit' in Brussels and national capitals as well; hence, it is not a report on the numerous technical aspects of the EEA itself.

2. LIECHTENSTEIN: A SHORT HISTORY AND ITS MOVE INTO THE EEA

The Principality of Liechtenstein is an independent state with small territorial extension. It has existed in its current dimensions since 1719. For nearly 300 years, its strategic thinking and diplomacy have been driven by two aspirations: on the one hand, the quest for independence and recognition as a sovereign state, and, on the other hand, a pragmatic approach to commerce – later, to economic integration – allowing Liechtenstein to prosper. After some illustrations from Liechtenstein’s history, the country’s route into the EEA will be briefly chronicled.

2.1 Liechtenstein’s aspirations before the EEA

The primacy of recognition by other European political entities was central to the early history of Liechtenstein. When the Princely Family of Liechtenstein acquired the County of Vaduz and the Lordship of Schellenberg some 300 years ago, an underlying ambition was the right to direct participation of these two small shires in the institutions of the Holy Roman Empire of the German Nation (*Reichsunmittelbarkeit*).⁷ Schellenberg, as well as Vaduz provided the family of Liechtenstein with a direct political influence in this ancient integration project of the Germanic parts of Europe. Their participation consisted of a seat and full rights in the Imperial Diet, the German *Reichsfürstentag*.⁸

⁷ In fact, as Beattie (2012, p. 6) notes, the county of Vaduz was already subordinate to the Holy Roman Emperor since 1396 and the same goes for Schellenberg since 1434. In 1495 the Holy Roman Empire of the German Nation was founded with both Vaduz and Schellenberg as ‘immediate fiefs’ entitled to have a seat in the Imperial Diet.

⁸ See Friese (2011, p. 170); see also Angermeier (1984).

In the two centuries following the dissolution of the Holy Roman Empire of the German Nation in 1806, the problem of full recognition as a sovereign state assumed different forms and required distinct time-bound strategies, with both adverse and successful outcomes. Liechtenstein became part of the *Rheinbund* (Confederation of the Rhine), founded after Napoleon's victory in the Battle of Austerlitz in 1805 as the successor of the Holy Roman Empire of the German Nation. The acceptance in the Rheinbund was an express recognition of the formal independence and sovereignty of the Principality.

After the end of Napoleon's reign, Liechtenstein became a member of the German Confederation (*Deutscher Bund*), which consisted of 39 sovereign states; a further renewal of the Principality's statehood. In 1853 Liechtenstein entered into a customs and currency agreement with Austria, followed by a postal agreement in 1912. However, after the Austrian-Prussian war of 1866, causing the dissolution of the German Confederation, Liechtenstein became a 'protectorate' of Austria. Perhaps this was a mixed blessing, since Liechtenstein lost some of its independence. Liechtenstein stayed neutral throughout World War I (as it was not part of any alliance). Nevertheless, the war turned out to have disastrous consequences for the Principality: due to the devaluation of the Austrian currency Liechtensteiners lost all their assets. When the Austrian empire was terminated after World War I, Liechtenstein found a new partner and ally in its neighbouring country Switzerland. Here one observes the principality's second trait, a pragmatic approach to economic integration. In 1919, Liechtenstein delegated its foreign representation to Switzerland, followed by a postal agreement in 1920 and finally the current customs treaty in 1923.⁹ Furthermore, Liechtenstein unilaterally adopted the Swiss franc as its official currency in 1924.

In world diplomacy, it applied for membership of the League of Nations in 1920 but was rejected due to its delegation of some sovereign rights to Switzerland and the lack of an army.¹⁰ During World War II, Liechtenstein as well as Switzerland remained neutral. After the war, economic integration began to assume greater importance. Liechtenstein's economy underwent a transformation from a predominantly agricultural

⁹ See Friese (2011, p. 176 ff); see also Liechtenstein, von und zu (2007).

¹⁰ Friese (2011, pp. 218-219).

state to one of the most highly industrialised countries in the world.¹¹ In actual practice, its participation in the Swiss customs union gave it full access to GATT and negotiated MFN (most-favoured nation) treatment by GATT partners before it joined the WTO later in 1995.¹² When EFTA was founded in 1960 in Stockholm, Liechtenstein benefited indirectly via Switzerland – it was not itself a member of EFTA (until 1991). The Swiss role in GATT and EFTA is best characterised as ‘*mediation*’. Originally, EFTA membership for Liechtenstein was refused because Liechtenstein was represented in trade relations with third countries by Switzerland. When, in 1972, the EEC and EFTA countries concluded a series of bilateral industrial free trade areas (FTAs), an economically important issue for Liechtenstein, all that Liechtenstein was able to obtain was the right to send its own envoy to the mixed committee meetings of the EEC-Swiss FTA. For matters covered by the Swiss-Liechtenstein customs union, Liechtenstein authorised Switzerland bilaterally to represent it. Once the EEC and EFTA countries began to intensify their economic relations under the sectoral approach of the Luxembourg process (begun in 1984), and more ambitiously as from 1989 under the Oslo process, Liechtenstein initiated a diplomatic demarche to obtain full membership of EFTA, which was granted in 1991. This was one of the reasons why the 1923 Swiss-Liechtenstein customs union treaty was amended subsequently.¹³ When negotiating what later would become the EEA Agreement, economic freedoms other than free movements of goods (e.g. services and capital) were on the table and of course these went far beyond what was covered by the customs union with Switzerland.

Not surprisingly, EFTA membership not only reflected the importance of economic integration for Liechtenstein’s economy. It was also crucial for the country’s quest for recognition as an independent state. After its failure to maintain its former full recognition in the new international order after the first world war (given the rejection of membership in the League of Nations), Liechtenstein undertook fresh attempts to acquire better acceptance in the international community. It became a member of the International Court of Justice in 1949, one of the

¹¹ Schönholzer & Eisenhut (2008).

¹² Liechtenstein joined the WTO on 1 September 1995.

¹³ Vereinbarung zwischen Liechtenstein und der Schweiz zum Vertrag vom 29. März 1923 über den Anschluss des Fürstentums Liechtenstein an das schweizerische Zollgebiet, *Liechtenstein Law Gazette* 1995 No. 77, 28 April 1995.

main UN bodies, followed by its participation in the Helsinki Process of the Commission on Security and Cooperation in Europe (CSCE) and by a stepwise involvement in the Council of Europe (through membership in some of the so-called 'open Conventions') leading to full membership in 1978. Also on UN membership, Liechtenstein went its own course, even after the negative vote in the Swiss referendum on its possible UN membership in 1986. Liechtenstein became a UN member in 1990. This diplomatic move is explained by Liechtenstein's strong desire to ensure, once and for all, full recognition as a sovereign and independent state.

2.2 Liechtenstein's way into the EEA

After the signature of the EEA in Oporto, national constitutional requirements called for referenda in Switzerland and Liechtenstein to ratify the agreement. In December 1992 the Swiss population (50.3% against) and cantons (18 out of 26 rejected) voted against Swiss participation in the EEA agreement. Just one week later Liechtenstein's population voted 'yes' to the Principality's participation in the EEA (55.8% yes votes). Before the referendum, participation in the EEA without Switzerland had not been seriously discussed.¹⁴ This outcome was not realistically expected by any of the actors in Liechtenstein or Switzerland.

The non-participation of Switzerland in the EEA triggered a major problem for Liechtenstein's effective participation in the EEA. The Customs Treaty of 1923 did not allow Liechtenstein to participate in an international economic integration agreement without Swiss participation. The 1991 amendment of the Customs Treaty resolved the issue for EFTA membership but did not foresee the rejection of the EEA by the Swiss population. Therefore, as Liechtenstein participates fully in the Swiss Customs area, a new, special regime had to be designed to accommodate Liechtenstein's simultaneous participation in the EEA and Swiss market. The problem was resolved with a second amendment of the Customs Treaty with Switzerland, now allowing Liechtenstein to participate in international agreements without Switzerland, subject to a special bilateral understanding. This amendment emancipates Liechtenstein from dependence from Switzerland insofar as European integration is concerned. In addition, a complex market surveillance mechanism was

¹⁴ See Baur (2002, pp. 17-29).

introduced to allow for the participation in two separated markets (referred to as ‘principle of dual marketability’).

A smaller problem was also quickly addressed. For Austria, Finland, Sweden, Norway and Iceland on the EFTA side and the 12 member states of the European Union, the EEA agreement had entered into force on 1 January 1994, whilst Switzerland and Liechtenstein were finalising their bilateral agreement that would allow Liechtenstein to join the EEA. Hence, Liechtenstein was given a temporary observer status pending the conclusion of developments with its neighbour. Moreover, Liechtenstein insisted that some special provisions would need to be incorporated in the EEA Agreement given Liechtenstein’s unique geographic and demographic specificities. This was acknowledged via adaptations with regard to the free movement of persons. After the successful customs negotiations with Switzerland and a second referendum in April 1995 (55.9% yes votes), Liechtenstein finally became a full EEA member on 1 May 1995.¹⁵

However, a new issue emerged. The EEA was initially designed for seven EFTA countries, but by the time that the EEA was about to come into force, matters turned out to be quite different. Switzerland could not participate due to the negative referendum. Austria, Finland and Sweden decided to go for EU membership already before the EEA negotiations came to an end.¹⁶ The three countries acceded to the EU on 1 January 1995. This left the EEA agreement with just two EFTA countries (Norway and Iceland) until the entry into force of the agreement with respect to Liechtenstein in May 1995. However, Norway had also planned to become an EU member, which became impossible when, in November 1994, the Norwegian people voted against EU membership in a referendum (47.8% ‘yes’ votes against 52.2 ‘no’ votes). Nevertheless, for a certain time, the feasibility or credibility of the EEA was at stake: it almost would have become an organisation for just Iceland and Liechtenstein with a population at the time of not even 300,000 people, and starting with a transitory phase (1 January 1995 until 1 May 1995) with just one EFTA country in the EEA, namely Iceland. It is good to see the contrast with the initial prospect when the EEA negotiations began: the EFTA side of the

¹⁵ Decision of the EEA Council No 1/95 of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein (OJ 1995 L 86, p. 58).

¹⁶ Austria already submitted its application in July 1989, Sweden in July 1991, followed by Finland in March 1992.

EEA would have counted 33 million people! The migration of former EFTA countries also led to an unforeseen imbalance in the overall EEA: rather than 33 million people and seven EFTA states compared to more than 350 million EU citizens in 12 EU countries, the EEA of mid-1995 counted 5 million people and three EFTA states compared to some 375 million people and 15 countries in the EU.

Fortunately, after this rather eventful 'early childhood' of the EEA, the EEA would experience a period of 18 years of stability in which Liechtenstein quickly found its place and functioned well.

3. LIECHTENSTEIN'S DEEP AND WIDE INTEGRATION INTO EUROPE TODAY

Liechtenstein's economic integration with the EU and other partners on the continent is far-reaching. Moreover, the long-established partnership with Switzerland is highly valuable in economic and practical terms. Liechtenstein also engages in a wide spectrum of non-economic forms of cooperation with the EU, individual member states of the EU and other European or neighbourhood countries. Any reflection on Liechtenstein's strategic responses to the numerous actual or possible changes on the continent, not least those of the EEA and the EU itself, first requires a sound and comprehensive assessment of the country's integrative and cooperative 'assets' it has been able to build up and enjoy over the last few decades.

This chapter surveys the complex economic and non-economic integration of Liechtenstein with Europe. The authors will not attempt to provide the benefits and costs for Liechtenstein, as this would require a rigorous methodology and indeed call for a different study. Occasional illustrations of qualitative costs and benefits are made, however. The main point of the study is that any new integration strategies that Liechtenstein might wish to consider in response to changes in its strategic environment should be based on a thorough understanding of today's status quo and its advantages. After a reminder of the country's bonds with Switzerland, section 3.2 explains at length Liechtenstein's EEA membership and what it entails for decision-making, implementation and prosperity. The EEA functions well and so does Liechtenstein in it, but there are still queries about complexity and critical mass. Sections 3.3 - 3.6 deal respectively with the 'trilateralisation' between Liechtenstein, Switzerland and the EU, lingering obligations in EFTA (including FTAs with third countries), non-EEA relations between Liechtenstein and the EU, and, finally, bilateral and multilateral cooperation with EU member states. The idea is to keep the survey succinct, limiting the text to what is needed as a basis for strategic reflection in chapters 4 and 5.

3.1 The Swiss connection: A partnership with profound economic integration

Although the EEA and, by implication the EU, has come to dominate European economic integration of Liechtenstein, the manifold economic and regulatory relations of Liechtenstein with its neighbour Switzerland have remained of utmost importance to the Principality. Moreover, there are a few complicated interactions between Switzerland, Liechtenstein and the EEA. Liechtenstein is (or can be) affected, as well, by the bilateral relationships between Switzerland and the EU. The present short subsection serves as a reminder of this critical relationship.

As noted before, the special relationship between Liechtenstein and Switzerland dates back to the first quarter of the last century. In 1919, Switzerland took over the diplomatic representation of Liechtenstein in countries where the Principality does not have an embassy.¹⁷ Recently, this cooperation has been extended to Austria: in 1979 Switzerland concluded an arrangement with Austria concerning consular cooperation.¹⁸ These two agreements provide Liechtenstein citizens with consular assistance in states in which the Principality is not represented, first by Swiss representation, and in case Switzerland has no representation, by Austrian representations. Economic cooperation and integration was soon to follow: agreements covering postal and telecommunication services in 1921¹⁹ and a treaty establishing a customs union between Switzerland and Liechtenstein in 1923.²⁰ In 1924 Liechtenstein unilaterally introduced the Swiss franc as its official currency.²¹ This unilateral introduction of the Swiss franc was cemented by a formal agreement signed in 1980 between Switzerland and Liechtenstein. However, this treaty is both wider and deeper and resembles

¹⁷ Letter exchange between Liechtenstein and Switzerland of 21/24 October 1919, not published.

¹⁸ Agreement between Austria and Switzerland signed on 3 September 1979 concerning consular cooperation, not published.

¹⁹ This agreement was terminated in 1999 due to the EEA membership of Liechtenstein, *Liechtenstein Law Gazette* 1999, No. 63, 26 March 1999.

²⁰ *Liechtenstein Law Gazette* 1923, No. 24, 28 December 1923.

²¹ *Liechtenstein Law Gazette* 1924, No. 8, 20 June 1924.

a monetary union: Swiss monetary, credit and exchange rate policies are also applied in Liechtenstein on the basis of the monetary treaty of 1980.²²

Other agreements between Switzerland and Liechtenstein cover police cooperation,²³ reciprocal treatment of Swiss-Liechtenstein citizens,²⁴ mutual recognition of judicial decisions in civil matters²⁵ and patent protection.²⁶ Against the backdrop of Swiss and Liechtenstein Schengen association the two countries concluded in 2008 a framework agreement on Schengen-relevant aspects of visa, immigration, residence and police cooperation.²⁷

Amongst all these agreements, the customs union treaty and the monetary union stand out. Whereas the monetary union presents no problems for the 'deep' market integration in the EEA, the customs union risks being incompatible with the FTA nature of the EEA because Liechtenstein is an integral part of the Swiss customs territory (as the WTO calls it). One might argue that the common tariffs with Switzerland need not represent a serious problem as long as certificates of origin (the hallmark of any FTA) are employed and verified properly. However, the customs treaty nowadays also covers the free movement of goods, the abolition of border controls, the adoption of Swiss commercial, agricultural and environmental policies as well as the relevant Swiss technical regulation. Clearly, this is potentially a source of recurrent conflict with the

²² *Liechtenstein Law Gazette* 1981, No. 52, 18 November 1981.

²³ Agreement of 27 April 1999 between the Principality of Liechtenstein, Switzerland and Austria on cross-border cooperation of police and customs authorities, *Liechtenstein Law Gazette* 2001, No. 122, 9 July 2001.

²⁴ Liechtenstein - Swiss agreement of 6 July 1874 on residency, *Liechtenstein Law Gazette* 1875, No. 1, 14 April 1875.

²⁵ Agreement of 25 April 1968 between the Principality of Liechtenstein and Switzerland on mutual recognition and enforcement of judicial and arbitration decisions in civil matters, *Liechtenstein Law Gazette* 1970, No. 14, 20 March 1970.

²⁶ Agreement of 22 December 1978 between the Principality of Liechtenstein and Switzerland on the protection of patents, *Liechtenstein Law Gazette* 1980, No. 31, 7 May 1980; As Swiss law on patents is applicable also in Liechtenstein, the introduction of an EU-wide patent in the foreseeable future will have implications on the current legal situation in Liechtenstein.

²⁷ Framework agreement between the Principality of Liechtenstein and Switzerland on cooperation in the fields of visas, immigration, residence and police cooperation in border zone, *Liechtenstein Law Gazette* 2009, No. 217, 7 August 2009.

EEA – with its ‘own’ free movement and extensive technical regulation – in a number of ways. After the Swiss rejection of the EEA in 1992, this source of potential conflicts had to be addressed, for Liechtenstein to be capable of maintaining its Swiss connection in goods markets *and* enter the EEA.

The bilateral agreement between Liechtenstein and Switzerland of 2 November 1994 complementing the Customs Union agreement²⁸ allows Liechtenstein to participate in the EEA without Switzerland and provides for rules dealing with the collision of EEA law with applicable Swiss law in Liechtenstein. Art. 3 of the agreement stipulates that Swiss law and EEA law are simultaneously applicable in Liechtenstein. In case the two legal orders deviate from each other, EEA law shall prevail over the Customs Union agreement with respect to Liechtenstein's EEA partners. The principle of ‘parallel marketability’²⁹ allows products to freely circulate in Liechtenstein fulfilling either the EEA or Swiss product requirements. At the same time, this system restricts access of products to other EEA countries marketed under diverging Swiss product requirements and vice versa. A ‘market surveillance system’³⁰ was introduced to monitor the good functioning of the principle. The surveillance of the ‘parallel marketability’ was assigned to the new Liechtenstein customs authority.³¹ The process of arriving at this complex arrangement took two years of negotiations and detailed technical work.³²

The 1994 agreement with Switzerland lies at the basis of EEA Council Decision No. 1/95³³ recognising that the regional union between Switzerland and Liechtenstein does not impair the good functioning of the EEA. This was a precondition for the EEA to enter into force with respect to Liechtenstein on 1 May 1995, after a second positive referendum on the EEA in Liechtenstein on 4 April 1995.

²⁸ *Liechtenstein Law Gazette* 1995, No. 77, 28 April 1995.

²⁹ In German: “*parallele Verkehrsfähigkeit*”.

³⁰ In German: “*Marktüberwachungssystem*”.

³¹ Renamed in 2007 as Authority for Commerce and Transport. The latter was in the meantime included into the Authority for national economy.

³² See Nell (1996, pp. 101-124).

³³ Decision of the EEA Council No 1/95 of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein.

In the following sections covering the scope and institutional framework of the EEA as well as other integration instruments of Liechtenstein, we will refer to the special relationship of Liechtenstein with Switzerland where necessary.

3.2 Liechtenstein in the EEA: Joining the 'single market-minus'

The EEA enlarges the EU's internal market to the three EFTA states³⁴ Liechtenstein, Norway and Iceland and this with great success. The EEA EFTA states "are in principle a true part of the EU's internal market through the EEA agreement."³⁵ The only two excluded policy domains are agriculture (but not the related food safety regulation) and fisheries, even though even in those areas some market access issues have been addressed. It is therefore convenient to employ the term 'single market-minus' as shorthand. It shows immediately that, irrespective of many technicalities and institutional arrangements, the essence of the EEA is both simple and highly ambitious. Since the EU single market is very large with its 500 million consumers, it is bound to be of overwhelming importance to the highly export-oriented economy of Liechtenstein.

In the words of the preamble of the EEA agreement, the parties to the agreement are

- "...considering the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;
- ...determined to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, as well as for strengthened and broadened cooperation in flanking and horizontal policies..."

³⁴ In this study we shall refer to these three countries as the EEA-3 or the EEA EFTA states.

³⁵ See Tobler et al. (2010, p. 12).

EU policies not covered in EEA agreement

- *Common Agriculture and Fisheries Policies (although the Agreement contains provisions on various aspects of trade in agricultural and fish products)*
- *Customs Union*
- *Common Trade Policy*
- *Common Foreign and Security Policy*
- *Tax Policy*
- *Justice and Home Affairs (even though the EFTA countries are part of the Schengen area); or*
- *Monetary Union (EMU).*

In other words, the cornerstones of the internal market, i.e. the four freedoms (goods, persons, services and capital), plus the right of establishment, together with the (extensive) EU regulation that makes free movement possible, complemented with common competition policy, are to be fully implemented by the EEA EFTA countries. The internal market is a very dynamic field of law, always adapting to changing

circumstances and still widening its scope to new policy areas. Apart from changes in legislation, the interpretation of primary and secondary law by the CJEU adds another dynamic element to the legal aspect of the internal market. Furthermore, new proposals for internal market deepening have been made at irregular intervals ever since the EEA went into force, for example, two successive internal market 'strategies' proposed by Commissioner Frits Bolkestein in 1999 and 2003 (which included the services Directive), the internal market review of November 2007 (emphasising implementation issues) and the two Single Market Acts of 2011 and 2012.³⁶

In addition, the EU is exploring more centralised methods to regulate the internal market, such as the more frequent reliance on EU agencies.³⁷ Such new attempts of regulating the internal market not only raise questions within the EU but also in the context of the EEA agreement, as the latter's declared end is "establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition". For the EEA-3 the issue is whether and to what extent

³⁶ For a concise history and detailed references, see Pelkmans (2010). The first Single Market Act is COM (2011) 206 of 13 April 2011; the second is COM(2012) 573 of 3 October 2012.

³⁷ See Chamon (2011), Andoura & Timmerman (2008) and Lavrijsen & Hancher (2009).

'decision-shaping' is still possible for them if EU agencies decide and regulate about the common rules and the (equal) conditions of competition.

Last but not least, the EU has amended its founding treaties three times since 1995, while the EEA Agreement did not undergo any substantive revision since its entry into force in 1994. The (TFEU) treaty provisions on the internal market were not altered by the three revisions. Rather, the procedures within the EU have been adapted, the role of its institutions developed further and the delimitation of what substantially forms part of internal market legislation and what can be considered as lying outside its purview has become increasingly blurred. These aspects may have a great impact on the EEA. For the EU-27, the internal market is a dynamic creature, evolving and deepening. It is regarded as the EU's principal 'asset' and therefore EU countries are often prepared to accept far-reaching arrangements to make it work more effectively. Within the EU, supranational institutions and a broad consensus on the 'pooling' of national sovereignty provide for the necessary means to guarantee a level playing field for economic operators and the adequate protection of individuals. In legal terms the strongest manifestations of 'supranationality' are the principles of direct effect³⁸ and of supremacy³⁹ of EU law over national law. These are exactly these unique features of the EU's (constitutional) legal order that were unacceptable to the EFTA countries at the time.⁴⁰

Insofar as the EEA, and hence, the internal market, is concerned, however, the refusal of 'supranationality' by the three EFTA states has at best a residual meaning. This observation is factual and does not intend in any way to discredit domestic political preferences. Indeed, since refusing 'supranationality' is a politically and even constitutionally overriding consideration for the EEA-3, these questions can only be assessed and decided by local politics and referenda. Nevertheless, as will be explained below, the practical effect of the EEA on EEA-3 countries (insofar as the single-market-minus is concerned, not other areas) and their market participants does not differ from the effects it has on EU member states. And judicial review, though seemingly complicated, is institutionalised in such a way as to arrive at similar, if not identical, results as under EU

³⁸ ECJ, C-26/62, van Gend en Loos, 1963 ECR 1.

³⁹ ECJ, C-6/64, Costa v ENEL, 1964 ECR 585, 593.

⁴⁰ See Graver (2002, p. 75).

judicial review. We shall review the core characteristics of the EEA institutional system, the provisions of which ensure that autonomous decision-making remains a day-to-day activity of EEA-3 countries. But in substance, this is not so because the EEA is to be 'homogeneous' in terms of free movement and the related (EEA) regulation, whereas competitive conditions are expected to be equal. There is one 'escape' from this tight straightjacket: Art. 102, EEA. In strictly formal terms, it can be argued that this clause enables EEA-3 countries to retain national 'sovereignty', but only in the sense that EU members do not have this discretion: EEA-3 countries can decide not to incorporate certain subcategories of the EEA (say, when a new directive is to be adopted) but at a high price, so high that this provision⁴¹ has so far not been used by any EEA-3 country. Indeed, it is known as the 'nuclear option' expressing both its dramatic nature and the preference to avoid its use! The EU and the EEA-3 have gone far in pre-empting the use of the clause, e.g. by lengthy negotiations and some compromises. As we shall see later, the taboo of giving up this abstinence might well be broken soon. With the enormous regulatory dynamics in the EEA since 1995 (see further), the distinction between the EEA for EU members and the EEA for the three EFTA-EEA countries is infinitesimally small – the disparities really only matter *outside* the EEA remit! The EEA is thus very ambitious indeed.

When it became clear during the late 1980s that the envisaged cooperation between the EC and EFTA was to include the whole internal market in contrast to a sectoral approach, the above-mentioned elements had to be embedded in an appropriate institutional and legal framework. At the time this was unexplored territory.⁴² No agreement up until then, and none since (except the EEA), has attempted to achieve the ambitious goal of exporting the internal market as a whole.

One has to be aware of the inherent asymmetry in the EEA. Whereas the EEA-3 has to take over all EEA-relevant EU legislation, these countries can only help 'shape' EU decision-making, not co-decide in any way. To have a seat at the table and be able to vote, if necessary, one has to be a fully-fledged EU member state in Council and the citizens of that EU country will vote for MEPs in the European Parliament (the co-legislator in

⁴¹ Art. 102 EEA.

⁴² See the commemorative publication by EFTA, *European Economic Area 1994-2009*, Brussels, p. 40.

practically all EEA-relevant matters). Also permanent derogations from the EU (internal market) *acquis* – as a non-EU country – are excluded, with only minimal exceptions,⁴³ as they would have led to unacceptable discrepancies within the internal market.

National political and constitutional restraints in the EFTA countries as well as from the EU side,⁴⁴ along with the full integration of the EFTA countries into the EU's Internal Market (except for agriculture and fisheries) called for a unique institutional and legal set-up. An agreement to “establish common rules without a common supranational power”⁴⁵ has been characterised as “mixing oil and vinegar”.⁴⁶

Nonetheless, answers to these apparent paradoxes were found. As will be set out in the following, the EEA manages to accommodate the need of far-reaching economic integration with the rejection of supranationalism by the EEA EFTA countries.

3.2.1 *The EEA Agreement: Flexible and static at the same time*

Before providing an overview of the substantive scope of the EEA with special regard to Liechtenstein, a brief technical introduction to the EEA will be given.

The EEA Agreement consists of 129 articles in the main text of the agreement, including 22 annexes to the agreement and 49 protocols as they stood at the date of signature 2 May 1992. The 49 protocols and the 22 annexes are accorded the same legal value as the main agreement.⁴⁷ The protocols and annexes have several purposes. They render the provisions of the main agreement more specific, contain derogations from the scope of the EEA, provide for special arrangements for certain contracting parties

Elements of the EEA Agreement

- *Main text of the Agreement*
- *22 Annexes to the Agreement*
- *49 Protocols to the Agreement*
- *Final Act*

⁴³ Ibid, p. 30; for some derogations with regard to Liechtenstein, see below.

⁴⁴ Cf. ECJ, Opinion 1/91, (1991) ECR I-6079 rejecting the first design of the EEA, with the envisaged EEA Court, consisting of EU and EFTA judges, as incompatible with the EU legal order. Subsequently, a more complex “two-pillar” system has become the EEA system of today.

⁴⁵ Graver (2002, p. 75).

⁴⁶ See Borde (1997).

⁴⁷ For a more detailed overview, see Annex I.

and define the legal quality of EEA law in the national legal orders. Translated in EU-terms, these norms constitute the 'founding treaty' or the EEA's primary law.

The EEA Agreement- Content overview

- *Preamble*
- *Part I – Objectives and Principles*
- *Part II – Free Movement of Goods*
- *Part III – Free Movement of Persons, Services and Capital*
- *Part IV – Competition and other Common Rules*
- *Part V – Horizontal Provisions relevant to the Four Freedoms*
- *Part VI – Cooperation outside the Four Freedoms*
- *Part VII – Institutional Provisions*
- *Part VIII Financial Mechanism*
- *Part IX – General and Final Provisions*

Part I of the EEA Agreement sets out its general objectives, which are stated in Art. 1 EEA: creating a homogenous European Economic area, in which the four freedoms are realised, undistorted competition can prevail and closer cooperation in research, education and social policy shall be aspired. Parts II and III reproduce the core provisions of the historical TEC as regards the freedom of movement of goods, persons, services and capital, plus the right of establishment, with specific adaptations to the EEA.

Part IV reproduces the provision of the TFEU with regard to competition and state aid; hence, the EEA rules have the same substantial content as those EU rules.

Part V of the EEA lists so-called 'horizontal-policy' areas. These areas are outside the core of the Internal Market but are nonetheless essential for the smooth functioning of the EEA (the Internal Market). They include social policy, consumer protection, environment, statistics and company law. In these areas the EEA EFTA states also take over the majority of EU legislation, when relevant for the functioning of the Internal Market.

Part VI of the EEA lists areas of cooperation outside the Internal Market. The policies listed are only indirectly relevant for the good functioning of the Internal Market. Currently the EEA EFTA states participate in several EU programmes.⁴⁸ These areas of cooperation include research and technological development, information services, the

⁴⁸ See Annex VI.

environment, education, training and youth, social policy, consumer protection, small and medium-sized enterprises, tourism, the audio-visual sector and civil protection.

The first six parts of the EEA deal with substantial Internal Market and flanking policies. Part VII of the EEA, on the other hand, lays down the institutional provisions regulating the management of the EEA and its context. Part VIII introduces the EEA's Financial Mechanism, which mirrors the EU's Cohesion Funds. The EEA EFTA states are obliged to set up the Financial Mechanism with a view to reduce the economic and social disparities between the regions of the enlarged Internal Market. The EEA finishes with Part IX with general and final provisions.

The EEA Agreement is commonly described as an agreement that is static and dynamic at the same time. These two terms relate to the nature of the content of the agreement. Ordinary international agreements include the rights and obligations of the parties as stated in the agreement at the date of the signature of the agreement. This essentially means that any change of rights and obligations can only be achieved if *all* parties to the agreement agree. An example of such agreements can be found in the Bilateral I package between the EU and Switzerland, which we shall discuss later.⁴⁹ With one exception the latter are static in nature. In case of a failure to find an accord on amendments, the agreements cannot be changed and will continue to exist in the form as they stood at the date of signature.

In this sense, the EEA is such a standard international agreement with regard to its main text, its many protocols and the 22 annexes as they stood at the date of signature. However, the EEA EFTA states have not just agreed to apply and implement the mere wording of the EEA but also to take over the interpretation of these provisions by the CJEU as far as their wording is identical to the TFEU and the acts adopted pursuant to the TFEU.⁵⁰ This creates the highest possible level of homogeneity for the main agreement and the 'pre-signature' *acquis* found in the annexes of the EEA Agreement.

This deep integration with regard to the 'pre-signature' is remarkable but not a unique feature of the EEA. It can also be found in the context of

⁴⁹ Except the Agreement between the European Community and the Swiss Confederation on Air Transport, OJ L 114 of 30/04/2002, p. 73.

⁵⁰ Art. 6 EEA.

other agreements concluded by the EU.⁵¹ The special and paradoxical feature of the EEA is that, its static characteristics notwithstanding, its working is highly dynamic. This dynamic nature is laid down in Part VII of the EEA. The annexes and certain protocols to the EEA are constantly amended, month after month, by the EEA Joint Committee as the way to implement any EEA-relevant additions to the EU *acquis* in the EEA-3 countries. For this purpose the EEA uses what is called the 'reference method'.

It comprises a mechanism, managed by the EEA Joint Committee, including (new) EEA-relevant EU legislation into the respective Annexes of the EEA ('mirror-legislation') by making references to the title and the position of the respective EEA-relevant act in the EU's Official Journal. This dynamic element of the EEA is essential for continuous homogeneity of the rules applicable in the EU and the EEA EFTA states. This substantive *acquis* taken-over by the EEA EFTA states *after* the signature of the EEA can be described as the 'post-signature' *acquis*. With regard to the 'post-signature' *acquis*, the EFTA Surveillance Authority (ESA) and the EFTA Court are obliged to pay due account to the principles laid down in the case law of the CJEU in so far as the *acquis* is identical in substance to the corresponding EU provisions.⁵² This contrast between the pre- and post-signature *acquis* derives from the fact that the EEA EFTA countries did not transfer legislative powers to the institutions of the EEA.

EEA-relevance of an EU legal act is established if the legal act is within the scope of the Internal Market, the horizontal or flanking policies (as specified) as well as competition policy as defined by the EEA. It is either the EU, usually the responsible Directorates of the Commission, or the EEA EFTA states themselves, that qualify an EU legal act as 'EEA-relevant'. Interestingly enough, there is neither a formal procedure, nor any legal criterion for establishing whether an act is EEA-relevant or not. Up until today this has not resulted in major difficulties in the application of the EEA, except for occasional frictions kept outside the public domain, but problems cannot be excluded in future. At the time when the EEA was negotiated, the EU legal framework made it easy to differentiate between Internal Market *acquis* (1st Pillar) and other policy areas. This demarcation

⁵¹ The bilateral agreements between Switzerland and the EU provide for a similar level of homogeneity when it comes to 'pre-signature' *acquis*.

⁵² Art 3. Surveillance and Court Agreement (SCA).

line has become blurred, not least with the entry into force of the Lisbon Treaty abandoning the pillar-structure and introducing the Area of freedom, security and justice governed by the 'community method'.⁵³ It would seem that a clear procedure for the definition of EEA-relevance would be helpful for the EEA.

3.2.2 *Substantive coverage of the EEA, with special regard to Liechtenstein*

The adoption of the EU's Internal Market *acquis* is an ambitious undertaking for the EEA-3. The 'pre-signature' *acquis* (in 1995) comprised no less than 1,875 EU legal acts to be transposed into the EEA EFTA states' legal orders. Aside from these legal acts, the four freedoms (goods, persons, establishment and capital), including their interpretation by the CJEU,⁵⁴ also had to be incorporated into domestic law. Even more impressive is the number of legal acts taken over by the EEA EFTA states after the signature of the EEA ('post-signature' *acquis*). By the end of 2011, this number amounted to 5,910 legal acts added by the EEA Joint Committee employing the 'reference-method'.⁵⁵ As of October 2012, 6761 EU legal acts were applicable in the EEA.

This plethora of EU legal acts can be found in the 22 annexes to the EEA Agreement. These annexes are thematically structured and contain the references to the EEA-relevant EU legal acts.⁵⁶ For Liechtenstein, two sets of special provisions apply. First, provisions are foreseen accommodating the

⁵³ A good example of the increasing difficulty to distinguish 'purely' Internal Market (EEA)-relevant legal acts from other acts is Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states. This Directive employs the concept of Union citizenship, which is not applicable in the EEA. Furthermore, the Directive contains provisions applicable to third-country nationals, which are outside the scope of the EEA. The EEA EFTA states incorporated the Directive in Annex V and VIII of the EEA, although without adaptations.

⁵⁴ E.g. including the 'Cassis de Dijon' principle of mutual recognition.

⁵⁵ Approximately an additional 900 acts were taken over by simplified procedures. Note that the 7,000 acts also include (many) recommendations and EU decisions.

⁵⁶ See Annex II for an illustration, an excerpt of Annex 10 on "Services in General" and Annex III for a complete overview of the Annexes to the EEA; for the detailed content of the Annexes, see <http://www.efta.int/legal-texts/eea/annexes-to-the-agreement.aspx>.

partnership with Switzerland (see 3.1). Second, Liechtenstein with its very small geographic dimension and a ratio of foreigners as high as 38.4% in 1994⁵⁷ is potentially exposed far more severely to the consequences of the free movement of persons than other EEA member states. These two issues were addressed in Protocol 15 to the EEA Agreement, in Decision No. 1/95 of the EEA Council confirming Liechtenstein's full accession to the EEA in May 1995 and later also recognised again in Joint Committee Decision 191/1999 and in the two EEA enlargement treaties.

Why are there (not) 7,000 plus EU-EAA-relevant acts?

Since the EEA began in 1994, more than 7,000 EU legal acts have been inserted in the annexes of the EEA Agreement by JCDs, according to the EFTA website. This seems daunting. It makes the EU internal market, hence the EEA, look like a regulatory machine. However, it is little known how one should actually 'read' this overall figure and what lies behind it. We mention three aspects shedding light on the magnitude of the actual internal market acquis. First, the overall figure is about "EU legal acts" and these are not only, or not even mainly, (Council and EP) directives and regulations. Even larger than these two categories are the number of EU decisions (targeted), recommendations and implementing acts (arising out of comitology, usually derivatives of directives or regulations already in the annexes).

Second, the annexes have never systematically been cleaned up as a result of the EU activities of 'Better Regulation' since 2005 (and occasionally beforehand). These activities include abolition, simplification, codification and recasting of directives and some regulations or decisions. The latest Commission report on these activities [COM (2012)746 of 12 Dec. 2012 on EU Regulatory Fitness, p. 9] mentions that no less than 4,450 EU legal acts have been repealed, of which 1,750 were the result of codification and recasting. We do not know how many of these are in the EEA annexes but, since the internal market assumes a large share of EU regulation, perhaps as much as 2000 or more items in the annexes are phantoms, as these EU legal acts no longer exist. Third, there are many JCDs on amendments of directives and regulations. For every amendment, a new JCD is adopted. Amendments can be substantive and prepared for years, but there are numerous amendments that are trivial (e.g. one sentence or a minor aspect, etc.). Therefore, the annexes comprise many hundreds of items where double-counting or triple-counting occurs, due to amendments.

⁵⁷ According to Liechtenstein, Statistisches Jahrbuch 2011 (Authority for Statistics).

3.2.2.1 *Free movement of goods*

Liechtenstein fully applies the EEA *acquis* with regard to the free movement of goods. However, as suggested above, special arrangements for Liechtenstein were provided for in Decision 1/95 as well as innovative solutions by Liechtenstein itself.

The EEA Council acknowledged the customs union between Liechtenstein and Switzerland, with a declaration attached to Protocol 4 to the EEA on rule of origin. Swiss customs authorities are empowered to issue certificates-of-origin (EUR1) for EEA goods, which are imported into Liechtenstein and brought to Switzerland and subsequently re-exported into the market of an EEA contracting party. Furthermore, the term 'exporter' for the purpose of Protocol 4 also covers Swiss exporters, if the latter re-export EEA goods imported into Switzerland via Liechtenstein back to the market of an EEA contracting party.

Furthermore, Annex II of Decision 1/95 permits the application of Swiss technical regulations and standards deriving from the Swiss-Liechtenstein Customs Union by Liechtenstein to certain products⁵⁸ marketed in the Liechtenstein market. Products exported to other EEA contracting parties must, of course, be compliant with the technical regulations and standards of the EEA *acquis*.

These amendments to the EEA with regard to the free movement of goods reflect the importance of Liechtenstein's relationship with Switzerland and exemplify the pragmatism Liechtenstein employs when it comes to the adoption of foreign legislation. Two distinct legal orders are applicable in Liechtenstein. In the words of Advocate General Colomer:

Two legal systems meet in one place: one governs relations between Switzerland and Liechtenstein, the other regulates the latter's membership of the EEA. If there is no conflict between the

⁵⁸ Products covered by Annex II of Decision 1/95: Motor vehicles, agricultural and forestry tractors, lifting and mechanical handling appliances, household appliances, gas appliances, construction plant and equipment, other machines, pressure vessels, measuring instruments, electrical material, textiles, foodstuffs, technical regulations, standards, testing and certification, medicinal products, fertilisers, dangerous substances, cosmetics, construction products, personal protective equipment, toys, machinery, tobacco, energy, spirit drinks, cultural goods, explosives for civil use, medical devices, recreation craft and marine equipment (Products covered by Annex II to the EEA).

systems, they are permeable; as a general rule, nothing prevents a product from Switzerland moving from the territory of its partner to that of another EEA member, and vice versa. If, on the other hand, there is conflict, the barriers are raised and the markets are sealed, so that goods authorised in Liechtenstein can be exported to the other Contracting Parties to the Agreement only if they comply with EEA rules. In conclusion, goods which enjoy unimpeded freedom of movement within the customs union do not, merely because of that, enjoy the same freedom within the EEA.⁵⁹

Another interesting aspect in the context of free movement of goods is Liechtenstein's implementation of the 'pharmaceutical package'.⁶⁰ This legislative package was incorporated into the EEA in May 2009.⁶¹ The provisions of this legislative package oblige the EEA EFTA states to employ centralised and decentralised authorisation procedures for human and veterinary medicinal products.⁶² Liechtenstein negotiated a bilateral agreement with Austria,⁶³ which provides for the automatic recognition of Austrian authorisations also with regard to Liechtenstein. Liechtenstein outsourced authorisation procedures required by EEA law to another EEA contracting party, Austria.

With regard to veterinary and phyto-sanitary matters, foodstuffs and spirits as well as the removal of technical barriers to trade in wine, the EEA

⁵⁹ Opinion of Advocate General Colomer in Cases C-207/03 and C-252/03 *Novartis*, [2005] ECR I-3209, para 39.

⁶⁰ Directives 2004/24/EC, OJ L 136, 30.4.2004, p.85; 2004/27/EC, OJ L 136, 30.4.2004, p. 34; 2004/28/EC, OJ L 136, 30.4.2004, p. 58; Regulation EC 726/2004, OJ L 136, 30.4.2004, p. 1.

⁶¹ EEA Joint Committee Decision Nr 61/2009 of 29 May 2009.

⁶² Directive 2001/82/EC of 6 November 2001 on the Community code relating to veterinary medicinal products, OJ L 311, 8.11.2001, p. 1; and Directive 2001/83/EC of 6 November 2001 on the Community Code relating to medicinal products for human use, OJ L 311, 28.11.2001, p. 67.

⁶³ Agreement between the Austrian Federal Government and the Government of the Principality of Liechtenstein regarding the automatic recognition of authorised or registered medicinal products in Austria for human or veterinary use, Austrian Federal Law Gazette, BGBl III No. 126, 12 November 2010.

is not applicable to Liechtenstein.⁶⁴ In these areas, Liechtenstein has access to the EU market through the EU-Swiss agreements. This interesting solution will be discussed in section 3.3 on “Trilateralisation”.

3.2.2.2 *Free movement of persons and right of establishment*

Liechtenstein is an independent country with small territorial extension in the heart of Europe. Due to its geographic and demographic features, the principles of free movement of persons and the right of establishment are two very sensitive areas for the principality.

The EEA took due notice of this sensitivity when Liechtenstein first became a member of the EEA. In Decision 1/95 of the EEA Council, the EEA contracting parties acknowledged the validity of the free movement of persons with regard to Liechtenstein:

The EEA Council recognises that Liechtenstein has a very small inhabitable area of rural character with an unusually high percentage of non-national residents and employees. Moreover, it acknowledges the vital interest of Liechtenstein to maintain its own national identity.

Therefore Protocol 15 to the EEA allowed Liechtenstein to keep in force its national provisions making the entry, residence and employment subject to prior authorisation for a transitional period until 1 January 1998. Moreover, Liechtenstein was authorised to keep in force quantitative limitations for new residents, seasonal workers and frontier workers. These restrictions on the free movement of persons would have to be gradually reduced by the end of the transitional period. At the end of this transitional period, Liechtenstein invoked a safeguard clause while continuing to uphold the mentioned restrictions also after the expiry of the transitional period. The EEA Joint Committee undertook a review of the situation in Liechtenstein with regard to the freedom of movement of persons. This led to a negotiated compromise solution. On 17 December 1999,⁶⁵ the EEA Joint Committee decided that the “specific geographical situation of

⁶⁴ Veterinary and Phytosanitary Matters: Annex I to the EEA; foodstuffs: Chapter XII of Annex II to the EEA; spirit drinks: Chapter XXVII of Annex II to the EEA; removal of technical barriers to trade in wine: Protocol 47 to the EEA.

⁶⁵ Decision of the EEA Joint Committee No 191/1999 of 17 December 1999 amending Annexes VIII (Right of establishment) and V (Free movement of workers) to the EEA Agreement, OJ L 074, 15.03.2001, p. 29.

Liechtenstein still justifies the maintenance of certain conditions on the right of taking up residence in that country". In the same decision, the EEA Joint Committee required Liechtenstein to introduce a quota based on parameters set out in the decision. This decision provided for a new transitional period until 31 December 2006. Before the expiry of the second transitional period, the EU was negotiating with the EEA EFTA states the EEA enlargement for the 10 new EU member states. EEA membership follows from EU membership.⁶⁶ In the course of these negotiations, Liechtenstein obtained a transformation of the previous two transitional periods into a quasi-permanent exception. The conditions laid down in the EEA Joint Committee Decision 191/1999 concerning the national measures, which Liechtenstein is allowed to maintain, shall continue to apply subject to a review "every five years, for the first time before May 2009".⁶⁷ The details of the special arrangement for Liechtenstein can be found in the beginning of Annex VIII to the EEA Agreement under the heading sectoral adaptations.⁶⁸ Up until today no such review has been conducted. However, it is very likely that future reviews will confirm the application of the special regime, as it is hard to imagine that the geographic and demographic situation of Liechtenstein would change significantly.

According to the current arrangement, Liechtenstein issues 56 residence permits for economically active and 16 permits to economically non-active persons. Half of the totally available permits are issued according to a lottery drawing taking place twice a year.

3.2.2.3 *Free movement of services*

In the field of services, Liechtenstein fully applies the EEA *acquis*. Nevertheless, relations can sometimes be conflictual and pragmatic

⁶⁶ Art. 128 EEA.

⁶⁷ Agreement on the participation of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic in the European Economic Area - Final Act - Declarations, OJ L 130, 29.4.2004, pp. 11-80.

⁶⁸ See Annex IV for the detailed reproduction of the special arrangement negotiated by Liechtenstein.

solutions have to be found. An example is in payments services, although this was eventually resolved.⁶⁹

A further complication has occurred in the context of Regulation 1781/2006 laying down rules for payment service providers to send information on the payer throughout the payment chain. This is done for purposes of prevention, investigation and detection of money laundering and terrorist financing. This regulation was incorporated into Annex IX to the EEA in 2008.⁷⁰ The consequence of this regulation with regard to Switzerland is that payment orders directed to Switzerland can no longer be treated as inland transactions by Liechtenstein institutions and Liechtenstein therefore had to invoke a derogation pursuant to Art. 17 of that regulation. The upshot is a costly adaption of the payment infrastructure within Liechtenstein.⁷¹

3.2.2.4 *Free movement of capital*

Art. 40 EEA prohibits any restriction and discrimination of the free movement of capital amongst the Contracting Parties of the EEA. The ECJ ruled that the substantial content of Art. 40 EEA is identical in substance to the relevant provision in the TFEU.⁷² However, in a subsequent case⁷³ involving a Liechtenstein company owning real estate property in France ('Rimbaud Case'), the identical treatment of capital originating in

⁶⁹ A special problem did arise with respect to the Principality's relations with Switzerland. Since Liechtenstein is in a monetary union with Switzerland, payment services are regulated by Swiss law, including money transfers, direct withdrawals and credit card payments. After the incorporation of Directive 2007/64/EC – the payment services Directive – into Annex IX of the EEA Agreement in 2008 by EEA Joint Committee Decision No. 114/2008 (OJ L 339, 18.12.2008, p. 103), Switzerland was regarded in the light of the Directive as a third country. This situation caused Swiss credit card issuers to raise their fees for payments in Liechtenstein. As Liechtenstein had not yet issued its own credit cards, but its population was using cards issued by Swiss entities, this situation called for the introduction of Liechtenstein-issued cards. However, this solution raises new complications, as the newly issued cards would be regarded as third-country cards in Switzerland. This issue has been resolved in 2012.

⁷⁰ EEA Joint Committee Decision No. 81/2008, OJ L 280, 23.10.2008, p. 12.

⁷¹ For further details on the two issues, see Frommelt & Gstoehl (2011).

⁷² ECJ, Case C-452/01 Ospelt, 2003 ECR I 9743.

⁷³ ECJ, Case C-72/09 Etablissement Rimbaud, 2010 ECR I 10659.

Liechtenstein was cut short because of lack of sufficient mutual administrative assistance on tax matters, the EU's Mutual Administrative Assistance Directive 2011/16/EU⁷⁴ not being applicable under the EEA Agreement.⁷⁵

Such exchange of information procedures are established within the EU by the EU's new Mutual Assistance Directive 2011/16/EU⁷⁶ or by bilateral agreements providing for an equivalent procedure. In an earlier case,⁷⁷ based on almost identical facts involving a Luxembourg company, the Court, deemed the French legislation as infringing the free movement of capital as laid down in the TFEU. The problem is no longer relevant for Liechtenstein since the Tax Information Exchange Agreement between France and Liechtenstein is now in force and addresses the issue.

Meanwhile, Liechtenstein concluded an agreement with France on the exchange of information in tax matters,⁷⁸ which will most probably prevent an identical assessment of the facts as happened in the 'Rimbaud case'. Nonetheless, this judgment shows that market access may not always apply fully for economic actors originating from EEA EFTA countries due to the limitations of the EEA (here, with respect to exchange of

⁷⁴ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11.3.2011, p. 1.

⁷⁵ The facts of the case concerned a French 3% tax due by foreign entities owning real estate in France. The payment of this tax can be avoided if the owner of the real estate provides the French tax authorities either an annual disclosure regarding the name and location of the ultimate shareholders, or by committing to do so at the request of the French tax authorities. This exemption applies only if the French tax authorities can verify the accuracy and completeness of the information provided. Since between France and Liechtenstein no exchange of information procedure, which would have allowed the French tax authorities to verify the information provided, existed at the time, the Court denied the tax benefit to the Liechtenstein company in conformance with Art. 40 of the EEA Agreement.

⁷⁶ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11.3.2011, p. 1.

⁷⁷ ECJ, Case C-451/05 Elisa, 2007 ECR I 8251.

⁷⁸ Agreement between the Government of Liechtenstein and the Government of the Republic of France concerning the exchange of information in tax matters, Liechtenstein Law Gazette 2010, Nr 358, 18 November 2010.

information). In the Rimbaud case, the non-inclusion of the EU's mutual assistance Directive 77/79/EC⁷⁹ allowed France to treat a Liechtenstein company differently from a company with a seat in the EU.

3.2.2.5 *The EEA Financial Mechanism and Norway grants*

The EEA countries agreed on the need to reduce regional economic and social disparities and to strengthen the bilateral relations with 15 central and southern European EEA countries.⁸⁰ This treaty objective is realised by the EEA grants. Funding is available for non-governmental organisations, research and academic institutions and the public and private sector. The funds of the EEA grants are administered by the Financial Mechanism Office (FMO), which is administratively part of the EFTA Secretariat in Brussels. Next to administering the EEA grants, the FMO also acts as its secretariat, reports to the Financial Mechanism Committee (FMC, consisting of representatives from the EEA EFTA states) and serves as a contact point for the beneficiary countries.

The FMC is the highest decision-making body of the EEA grants. It consists of representatives of the EEA EFTA states and its tasks are to formulate the policy of the EEA grants, draw up guidelines, approve programme allocations, monitor and control the allocations and finally evaluate the use of the grants.

The EEA grants are directed towards regions within the EU showing demonstrable needs for funding in line with national priorities and general European policy goals. The main policy fields include environmental protection and management, protection of cultural heritage, climate change, renewable energy, human and social development, civil society and academic research in the mentioned areas.

Since the EEA Agreement entered into force in 1994, the EEA EFTA states have contributed to social and economic progress of the 15 (less-affluent) EU countries by four cohesion instruments:

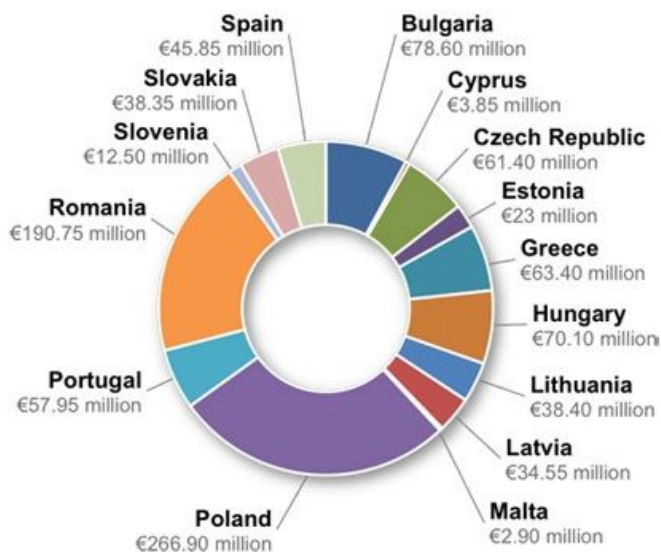
- Financial Mechanism for the period 1994–1998,
- Financial Instrument for the period 1999–2003,
- EEA Financial Mechanism for the period 2004–2009,
- EEA Financial Mechanism for the period 2009–2014.

⁷⁹ Further recourse to this Directive will be made below under 3.5.

⁸⁰ Art. 115 EEA.

The overall budget for the EEA grants for the period of 2009-2014 amounts to €988.5 million, available in annual tranches of €197.7 million in the period 1 May 2009 to 30 April 2014.⁸¹

Figure 1. Allocation of EEA grants, 2009-2014



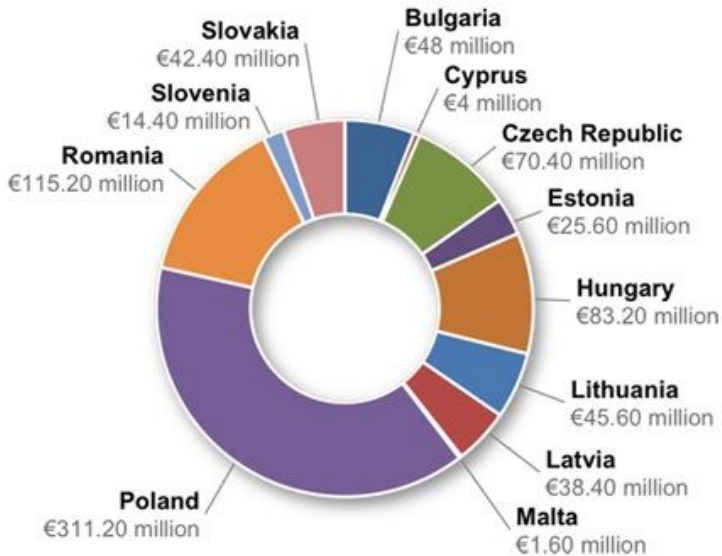
Source: Financial Mechanism Office.

While the EEA grants are jointly financed by Liechtenstein, Iceland and Norway, Norway has also decided to develop its own programmes of grants in addition to the EEA grants.

The Norway grants amounted to €800 million for the period of 2009-2014. The figure below shows the allocation of these funds with respect to single EU member states.

⁸¹ Agreement between the European Union, Iceland, the Principality of Liechtenstein and the Kingdom of Norway on an EEA Financial Mechanism 2009-2014, OJ 2010 L 291, p. 4.

Figure 2. Allocation of Norway grants, 2009-2014



Source: Financial Mechanism Office.

In 2007, when the agreements to include Bulgaria and Romania in the EEA were signed, Norway agreed to additionally grant €68 million to Bulgaria and Romania in the framework of Norwegian Cooperation Programmes.

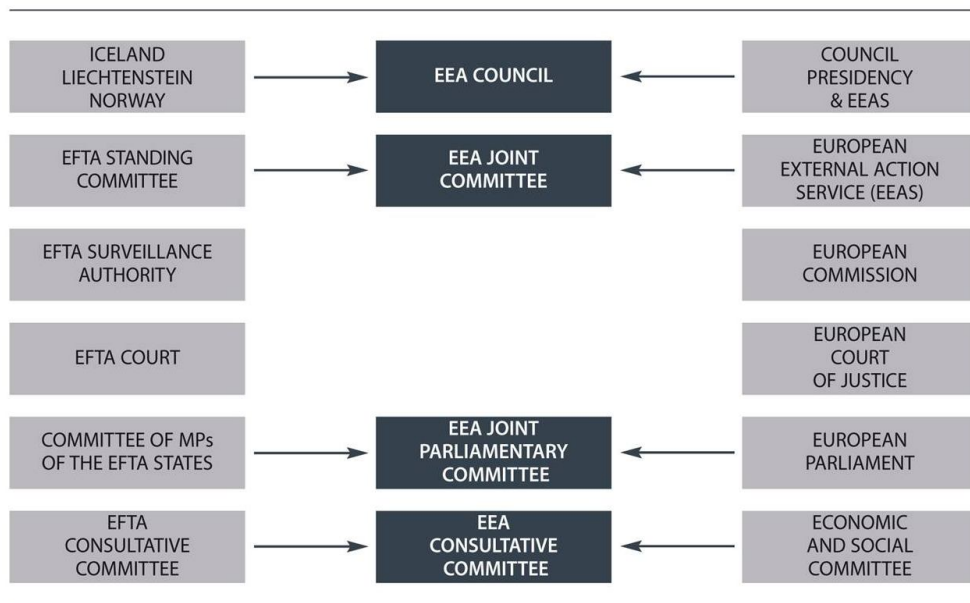
3.2.3 The legal and institutional structure of the EEA

The institutional model of the EEA is based on the so-called 'two-pillar' structure. On the one side, the EEA EFTA countries set up their own institutions in the framework of EFTA, which roughly mirror the EU's institutions (EFTA pillar). On the EU side of the agreement, the EU is represented simply by its existing institutions (EU pillar). The two sides of the 'two-pillar' structure meet in joint EEA bodies consisting of representatives of the EEA EFTA states and the EU. The institutional structure of the EFTA pillar is completed with the EFTA Court and the EFTA Surveillance Authority (ESA). The EFTA Court and ESA were set up independently from other EEA EFTA institutions by the Surveillance and Court Agreement,⁸² concluded only by the EEA EFTA states.

⁸² Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice, OJ (1994) L344, p. 3.

The following section presents the composition and main functions of these three kinds of EEA EFTA institutions. An overview is found in Figure 3.

Figure 3. The two-pillar EEA structure



Note: This diagram illustrates the management of the EEA Agreement. The left pillar shows the EFTA states and their institutions, while the right pillar shows the EU side. The joint EEA bodies are in the middle.

Source: EFTA Secretariat.

3.2.4 Joint EU and EFTA Organs

3.2.4.1 The EEA Council

The legal foundations of the EEA Council can be found in Arts 89 to 91 of the EEA Agreement. It is the highest political organ of the EEA, but not really comparable with the European Council of the European Union. The EEA Council has no 'summits' (e.g. with prime ministers) and usually operates at the Council of Ministers level. In actual practice, however, the EU Council of Ministers is represented by the Presidency, whether the foreign minister or e.g. the minister for European affairs. But formally, it consists of the members of the Council of Ministers of the European Union, one member of the government of each EFTA-EEA state and members of

the European Commission. Since the Lisbon Treaty, the Commission is replaced by the EEAS. The EEA Council meets twice a year, apart from urgent meetings, with an alternating presidency between a member of the Council and one of the EFTA-EEA states of six months. The EFTA Surveillance Authority and the European Investment Bank enjoy observer status in the EEA Council's meetings.

Figure 4. EEA Council meeting in Brussels, November 2011



Source: <http://tvnewsroom.consilium.europa.eu>.

In the EEA Council, decisions are taken by agreement of the EU, represented by the Council and the EEAS, on one side, and the EEA EFTA states, speaking with one voice, on the other side. This decision-making procedure therefore requires a 'double-consensus'. In a first stage, the EFTA-EEA states have to reach a consensus amongst each other and in a second stage, agreement with the EU has to be reached. This requires a high degree of compatibility between the EEA-3 countries; indeed, for practical purposes, the EFTA-EEA states operate as one bloc. This procedure is based on 'one state-one vote' principle, implying that even (very) small countries have 'veto-power'.

In the EEA Council this decision-making modus does not have practical consequences, as it gives general political impetus (without voting) and meets only twice a year. However, this procedure is also applied in the EEA Joint Committee, which is more important for regular decision-making on legislation.

3.2.4.2 The EEA Joint Committee

The EEA Joint Committee (EEA JC) is the most important organ in the EEA decision-making process as it is responsible for the daily management of the EEA. It serves the contracting parties as a forum for the exchange of

views and information, but its most critical role is incorporating new EEA-relevant EU *acquis* into the annexes to the EEA. Its meetings take place approximately 8 times a year and are not public. According to Art. 93 of the EEA Agreement and its rules of procedure,⁸³ the EEA JC consists of the representatives of the contracting parties. Their ambassadors represent the EEA EFTA countries and the European External Action Service (EEAS) as well as representatives of the EU member states represent the EU side. However, the EU member states are almost never present. The European Central Bank and the EFTA Surveillance Authority (ESA) enjoy observer status, but interviews revealed that the ECB is usually absent. As is the case with the EEA Council, the representative of the EU, i.e. the EEAS, holds the chair for six months followed by a representative of an EEA EFTA state for the subsequent six months.

In its rules of procedure, the EEA JC may establish subcommittees to assist its work. At the moment the EEA JC is assisted by five permanent subcommittees. These subcommittees are responsible for the following subject matter:

- free movement of goods, competition, state aid, state monopolies of a commercial character, intellectual property and procurement;
- free movement of capital and services;
- free movement of persons;
- flanking and horizontal policies such as research and development, social policy, environment, statistics, education, consumer protection, small and medium-sized enterprises, tourism, audiovisual sector and civil protection; and
- legal and institutional matters.

In actual practice, the first four subcommittees often meet jointly.

Furthermore, under each subcommittee a working group can be established to deal with individual tasks. These working groups report to the subcommittee under which they have been established. Recently,

⁸³ Decision of the EEA Joint Committee No 1/94 of 8 February 1994 Adopting the Rules of Procedure of the EEA Joint Committee (OJ L 85, 30.3.1994, p. 60; EEA Supplement No. 1, 30 March 1994, p. 1) as amended by: Decision of the EEA Joint Committee No 24/2005 of 4 February 2005 amending the Rules of Procedure of the EEA Joint Committee (OJ No L 161, 23.6.2005, p. 54 and EEA Supplement No. 32, 23.6.2005, p. 32), e.i.f. 8.2.2005.

informal meetings have been held with the EEAS to address e.g. the backlog in implementation (see further) and the preparation of EU (hence, EEA) membership of Croatia.

3.2.4.3 *The EEA Joint Parliamentary Committee*

The EEA Joint Parliamentary Committee consists of 24 parliamentarians, 12 from the European Parliament and 12 from the EFTA countries' parliaments. It meets twice a year, once in an EFTA state and once in the European Parliament.

The EEA Joint Parliamentary Committee is an advisory body and contributes to the better understanding between the EEA EFTA countries and the European Union by debate and discussion. It has no procedural powers in the EEA decision-making procedures. The Committee may express its views in the form of report and resolutions. The president, who is elected by the plenum of the Committee and alternatively comes from the European Parliament and the EFTA countries each year, has the right to be heard by the EEA JC, but this has not happened for years.

3.2.4.4 *The EEA Consultative Committee*

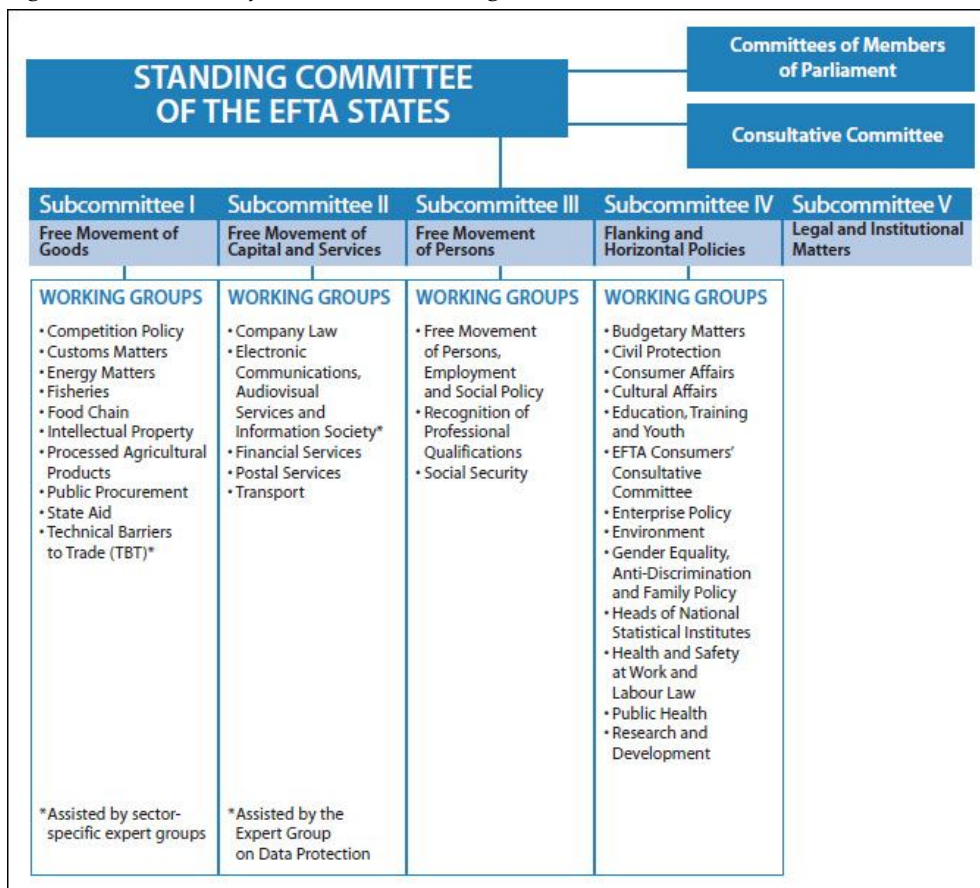
As the EEA Joint Parliamentary Committee, the EEA Consultative Committee is an advisory body, composed of members of the EFTA Consultative Committee and the European and the European Economic and Social Committee (EESC). The Committee meets once a year to deepen the ties between the social partners of the EFTA and EU sides, given the deep market integration between all EEA countries. The Committee expresses its view in reports and resolutions.

3.2.5 *The Organs of the EFTA Pillar*

3.2.5.1 *The EFTA Standing Committee*

The Standing Committee is a forum in which the EFTA states consult each other to agree on a common position before meeting the EU representatives from the EEAS in the EEA Joint Committee. It brings together the ambassadors of the EEA EFTA states and Switzerland, which enjoys observer status, as well as ESA. The Standing Committee has set up sub-committees to assist its work. These subcommittees again have different working groups to prepare the work of the Standing Committee.

Figure 5. Structure of the EFTA Standing Committee



Source: EFTA Secretariat.

3.2.5.2 The EFTA Consultative Committee

The Consultative Committee of the European Free Trade Association (EFTA) consists of representative of trade unions and employers' organisations of the EFTA countries. Its representatives meet with representatives of the European Economic and Social Committee in the EEA Consultative Committee.

The EFTA Consultative Committee is forum for dialogue and consultation between the EFTA social partners and the EFTA authorities. It gives input to work of the EFTA Standing Committee and the EFTA Ministerial Council focusing on economic and social issues related to the EEA. The EFTA Consultative Committee meets four to five times a year.

3.2.5.3 *EFTA Parliamentary Committee*

The EFTA Parliamentary Committee⁸⁴ is composed of parliamentarians from the EFTA member states. The Committee links the work of EFTA with the national political life of its member states. Its work focuses on EEA-related matters and its representatives meet with Members of the European Parliament in the EEA Joint Parliamentary Committee. It also meets twice a year with the EFTA Standing Committee.

3.2.6 *The EFTA Court and EFTA Surveillance Authority*

In analogy with the EU, the enlarged internal market under the EEA needs an institutional foundation to guarantee its correct implementation and judicial arbitration in case of a violation of the agreement. Accordingly, the EEA requires the EEA EFTA states to “establish an independent surveillance authority (the EFTA Surveillance Authority or ESA, the authors) as well as procedures similar to those existing in the Community, including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition (Art 108 (1) EEA),” as well as a court of justice (the EFTA Court, Art 108 (2) EEA).

Following the ‘two-pillar’ system, the CJEU and the European Commission have enforcement powers which should ensure the fulfilment of the obligation under the EEA by the EU member states, while ESA and the EFTA Court are responsible for this task with regard to the EEA EFTA states. The two pairs of institutions are expected to work together and inform each other about ongoing cases and complaints.

For this purpose the EEA EFTA states have concluded the Surveillance and Court Agreement (SCA).⁸⁵ The SCA agreement entered into force on the same date as the EEA, 1 January 1994, with respect to Austria, Finland, Iceland, Norway and Sweden. With the accession of Austria, Finland and Sweden to the EU on 1 January 1995 and the subsequent accession of Liechtenstein to the EEA, the SCA was adjusted to meet the new factual circumstances with regard to ESA and the EFTA

⁸⁴ Formally, there is a committee for EFTA and one for the EEA, but in actual practice they meet jointly.

⁸⁵ Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, OJ (1994) L344, p. 3.

Court.⁸⁶ From this date onwards, Iceland, Liechtenstein and Norway are parties to the SCA, as well as to the EEA. Although similar in important aspects for the EEA, ESA and the European Commission are not fully comparable. The greatest difference is that ESA has no political role, unlike the Commission with the critical right (indeed, a near-monopoly) of initiative. On the other hand, whereas the Commission is the 'guardian' of the EU Treaty, ESA is the guardian of the EEA Agreement for the EEA-3. Recently, ESA's remit has been extended a little, for instance it is involved in the allocation of CO₂ permits under the Emissions Trading Scheme (ETS) and has become responsible for veterinary and transport safety inspections.

3.2.6.1 *The EFTA Court*

Initially the EFTA Court⁸⁷ was located in Geneva, but its seat was moved to Luxembourg, not far from the CJEU, in 1996. The EFTA Court's bench is filled with three judges, one from each EEA EFTA state. The Judges of the EFTA Court are appointed by common accord of the EEA EFTA states for a term of six years (SCA Art 30). The current EFTA Court President is a Swiss citizen (Prof. Carl Baudenbacher, who was nominated by Liechtenstein).

The Court has jurisdiction with regard to EFTA states that are parties to the EEA Agreement – currently Iceland, Liechtenstein and Norway. The Court has jurisdiction with respect to:

- the settlement of disputes between two or more EEA EFTA states regarding the interpretation or application of the EEA;
- actions brought by ESA against a EEA EFTA state to fulfil an obligation under the EEA
- to give advisory opinions on the interpretation of the EEA agreements, raised before a national court. In contrast to the EU legal order, these advisory opinions are not binding and no national court is legally obliged to request such an opinion.
- actions brought by a member state against decisions of ESA or its failure to act;
- actions brought by a natural person against decisions that are of direct and individual concern to this person or ESA's failure to act.

⁸⁶ Agreement adjusting certain Agreements between the EFTA States ('Adjusting Agreement') of 29 December 1994 (EFTA states' official gazettes).

⁸⁷ For more information on this institution, see its website (www.eftacourt.int).

In short, the jurisdiction of the EFTA Court mainly corresponds to the jurisdiction of the CJEU in the EU legal order, with the exception of the non-binding nature of advisory opinions, in contrast to the binding preliminary ruling procedure in the EU's legal order.

The proceedings before the EFTA Court consist of a written and an oral part and all proceedings are in English except in cases where an advisory opinion is sought by a national court of an EEA EFTA state. In the latter case, the opinion of the Court is in English and in the national language of the requesting court. The average duration of proceedings before the EFTA Court between the years 2003 and 2008 was six to eight months.⁸⁸

3.2.6.2 *The EFTA Surveillance Authority*

The EFTA Surveillance Authority (ESA) is located in Brussels and consists of three members, appointed by a common accord by the EEA EFTA states for a renewable term of four years. The members of ESA, the so-called 'College', are completely independent in the performance of their duties. The EEA EFTA states appoint a president from the three College members for a term of two years.⁸⁹

The EFTA Surveillance Authority is endowed with the function of supervising the fulfilment of obligations under the EEA by the EEA EFTA states. This means the correct and timely implementation of the main text of the EEA agreement including the competition provisions, its constantly updated annexes as well as its protocols. As regards competition law, ESA enjoys the same competencies as the Commission in the EU. ESA cooperates closely with respective Commission services to ensure the homogeneous application of Internal Market law. ESA can take decisions, formulate recommendations, deliver opinions and issue notices or guidelines with regard to the specific matters.⁹⁰

⁸⁸ EFTA Court, *Legal Framework and Case Law*, 3rd ed, Luxembourg, 2008 (http://www.eftacourt.int/images/uploads/Legal_Framework_Finalweb.pdf).

⁸⁹ The current College members of ESA are: Oda Helen Sletnes (President, Norway), Sabine Monauni-Tömördy (Liechtenstein) and Sverrir Haukur Gunnlaugsson (Iceland).

⁹⁰ The ESA College employs officials and other employees to enable it to fulfil the tasks set out in the SCA. Currently ESA employs 67 highly qualified officials, mainly lawyers but also economists, veterinary and food safety inspectors and

ESA monitors and assesses the implementation of EEA law (Directives and Regulations) into the national legal orders of the EEA EFTA states. Next to the four freedoms (goods, workers, services and capital), ESA is also competent for the areas of food safety, transport, public procurement, state aid, competition rules, environment and energy. The competences of ESA correspond to those of the Commission, the main difference being the exclusion of fisheries and agriculture.

The EEA EFTA states are obliged to submit to ESA the measures with which they intend to implement EEA law. ESA will assess the national implementation measures. In case of non- or mal-implementation, ESA will first send a 'Letter of Formal Notice' to the respective EEA-3 state asking it to clarify and explain its national measure. This is followed by a 'Reasoned Opinion', if the 'Letter of Formal Notice' and the state's response to it does not prove full compliance. The 'Reasoned Opinion' provides the respective EEA-3 state for the opportunity to forward its arguments to prove compliance of the national measure and/or adjust its national measure so as to conform to EEA law, respectively ESA's 'Reasoned Opinion'. In case the EEA-3 states do not conform to the 'Reasoned Opinion' or are of a different legal opinion, ESA can bring the matter to the EFTA Court.⁹¹

ESA not just ensures the application of the EEA with regard to the EEA EFTA states, but also enforces the competition, state aid and procurement provisions of the EEA against individual market actors. To this end it enjoys the same powers as the Commission does vis-à-vis individuals. The Preamble of the EEA Agreement notes the "important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights." Therefore, ESA also protects the rights of individual market actors granted to them under the EEA against infringement of those rights by an EEA EFTA state or other market actors. Every individual can directly file complaints with ESA, which may initiate proceedings if it deems the complaint justified.

communications and IT experts. The nationality of these officials is not limited to the EEA-3 states.

⁹¹ Art. 31 SCA.

EFTA Secretariat in Brussels

The EFTA secretariat is a low-key institution in the Brussels circuit but this does not mean it is unimportant. The EEA-3 countries rely heavily on the EFTA Secretariat, established for this purpose in Brussels (besides the EFTA Secretariat in Geneva since 1960). Unlike the European Commission, which has the sole right of legal initiative at EU level, the Secretariat serves the EEA-3 in the day-to-day management of the functioning of the EEA.

The term 'functioning' should be read as:

- *the anticipation of and response to a steady stream of internal market legislation, followed by*
- *the incorporation of these EU acts into EEA-3 domestic legislation, based on Joint Committee Decisions.*

Given the nature and set-up of the EEA, the EU is typically the 'policy driving force' of the internal market-related activities of the EEA-3. The EFTA Secretariat lubricates virtually the entire process on the part of the EEA EFTA countries. For resource-related reasons, Iceland and Liechtenstein lean more heavily than Norway on the work, expertise and informal contacts of the EFTA Secretariat.

In practice, the Secretariat

- *prepares drafts of (EEA-related) documents for internal EFTA meetings (Standing Committee, subcommittees, working groups, consultative committees) and the meetings of EEA bodies (Joint Committee, advisory bodies and the EEA Council). Whenever joint texts are negotiated between member states, the Secretariat is a crucial resource whether for intra-EFTA instances or for the entire EEA (with the EEAS).*
- *performs Secretariat work (e.g. drafts agendas, conclusions, minutes, background notes and papers and speaking points) and*
- *monitors EU activities, especially with a view to anticipating future EU legislation ('pipeline acquis' – expected EU acts announced in Commission annual programmes, roadmaps and otherwise), on which it may provide early recommendations and analysis. The Secretariat is held to regularly update lists of what may be forthcoming as well as analysis of the impact for the EEA-3*

In interviews by the authors, the Secretariat invariably gets favourable reviews. Nevertheless, the Secretariat's effectiveness might be hindered by a habit of attracting officials only on fixed duration contracts (maximum 6 years). This practice leads to high staff turnover whilst institutional memory and expertise suffer. The Norwegian report by the EEA Review Committee of January 2012 calls for an audit of the Secretariat in this respect. It goes without saying that an effective Secretariat is very important for Liechtenstein, especially because of its naturally limited administrative capacity.

3.2.7 *The decision-making process of the EEA*

As indicated above, the EEA EFTA states have *not* transferred any legislative powers to a supranational organisation, unlike the member states of the EU. Accordingly, the basic rule of public international law – a state cannot be bound by a treaty without its consent – is applicable to the ‘post-signature’ *acquis*. Therefore, following the internal decision-making procedure in the EU, the incorporation of EEA-relevant EU legislation into the EEA agreement has to be based on a unanimous decision by all contracting parties. Normally, under classical international law, this would require negotiations between all parties to an agreement in order to change the latter. However, for the very dynamic context of the EEA, updating its annexes nearly on a monthly basis (to a lesser degree its Protocols) to keep up with the EU’s legislative developments, this would be totally inadequate and render the EEA unworkable. Therefore, a *de facto* almost automatic and rapid mechanism had to be invented, while legally respecting the sovereignty of the EEA-3.

The model chosen is a so-called ‘two-pillar’ system. For this purpose, EFTA opened a branch of its secretariat in Brussels and created the bodies necessary to coordinate and prepare the EFTA EEA states’ participation in the joint EEA organs. The different EFTA bodies were introduced above in section 3.2.5. The coordination function of the EFTA bodies is essential for the proper functioning of the EEA because in the decision-making body, the EEA Joint Committee, the EFTA side of the EEA, faces the EU side with one single voice.⁹² Therefore, the EEA EFTA states have to reach an accord before meeting with the EU in the EEA Joint Committee.

The EU pillar on the other side consists of the EU institutions, as (now) listed in Art. 13 TFEU. After the negotiation of the EEA, three additional bodies have been added to the family of EU institutions, i.e. the Court of Auditors, the European Central Bank and the European Council. Furthermore, with the Treaty of Lisbon and the establishment of a European External Action Service (EEAS), the representation of the EU by the Commission has been replaced by the EEAS. These changes of EU institutions have so far not been formally reflected in the EEA. More problematic still, the European Parliament is not recognised in the EEA as a true co-legislator, although this role was already prominent in 1995 and has

⁹² Art. 93 EEA.

become applicable to practically all internal market legislation, following the treaty amendments of Amsterdam, Nice and Lisbon.

The EFTA pillar and the EU pillar of the EEA meet in the joint EEA bodies. These bodies are made up of EU representatives and EEA EFTA countries' representatives in equal measure. These organs create an institutional bridge between the internal and autonomous decision-making procedures of the EU on one side and the EFTA-EEA countries on the other. The joint EEA bodies are the EEA Council, the EEA Joint Committee, the EEA Joint Parliamentary Committee and the EEA Consultative Committee. As noted, the most important of these bodies is the EEA Joint Committee ensuring the effective implementation and operation of the EEA. The EEA Joint Committee takes decisions, which amend the annexes of the EEA with references to new EEA-relevant EU legislation. The period between the entry into force of EU acts within the Union and within the EEA should be kept as small as possible. The ideal scenario would be simultaneous entry into force, but this cannot be fully achieved. In fact, implementation delays of the EEA-3 have become somewhat worrying. In the field of services, for example, the average delay between the entry into force of an EU legal act and the entry into force of the EEA Joint Committee decision incorporating it into the EEA was 623 days. With respect to legal acts in the field of environment the delay amounted to 641 days.⁹³

Facilitating such a high level of homogeneity, the Commission is held to inform the EEA EFTA states' officials about prospective Internal Market legislation in the proposal stage of new acts. This also implies the right of EEA EFTA states to participate in committees that help the Commission to draft legislative proposals. Either side of the EEA can raise issues concerning legislative proposals in the EEA Joint Committee. This procedure provides for the possibility of the EEA EFTA states to actively shape EU legislation already in the proposal stage of new acts and is usually referred to as 'decision-shaping'.

In the event that the EEA EFTA states do not want to take over new EEA-relevant EU acts or if they cannot reach an accord on a 'single voice', Art. 102 paras 4 to 6 EEA stipulates that the part of the Annex of the EEA that would be directly affected by the new EU legislation, will be suspended, after a conciliation procedure would prove to be unsuccessful. Such a suspension of an entire annex would not merely include the specific

⁹³ Frommelt & Gstoehl (2011, p. 49).

legal act having caused the disagreement in the EEA Joint Committee but also already included legal acts in that annex relevant to this subject. There is a caveat in para. 6, namely, that the rights and obligations (e.g. for companies) already acquired shall remain. In other words, the price to be paid by the EEA-3 for a refusal to incorporate one new EEA-relevant EU act is likely to be considerable, if not high. It would abolish market access of the EEA EFTA states with regard to that specific area of the Internal Market. No wonder Art. 102 paras 4–6 is usually called the ‘nuclear option’. This nuclear option has the practical effect of by-passing the formal maintenance of sovereignty (on EEA issues) for the EEA-3 countries and forcing them to accept a de facto dependence on EU decision-making. In 18 years, Art. 102 has only been formally invoked twice and in both instances, the six-month conciliation allowed any suspension to be averted.⁹⁴ Because some 7,000 legal acts and recommendations have gone through the two-pillar system since 1995 (the post-signature *acquis*), it is exceedingly hard to uphold the notion of any policy autonomy for the EEA EFTA countries in EEA-relevant EU acts, unless and only if one is willing to argue that the ‘decision-shaping’ is always successful in addressing the concerns of the EEA-3. Nevertheless, there have been instances that proved very difficult to reconcile. And today there are several EU acts already in force for a while, such as the 2008 postal Directive, the deposit insurance Directive adopted during the crisis and e.g. the data retention Directive where the probability of compromise is regarded as low to zero. Norway is manifest in refusing to incorporate the postal Directive, for example. Hence, the nuclear option will have to be applied and the taboo of never invoking it will soon be broken. Is this a sign that the writing is on the wall? Might it happen more frequently now that the EU internal market continues to deepen further? Will the strong tendency evident for the last decade to apply regulations (instead of directives) for the internal market prompt more instances where reconciliation will be next to impossible?⁹⁵

From the EU perspective, the insistence of the EEA-3 countries to retain sovereignty in EEA matters automatically renders them ‘third

⁹⁴ In both cases the EU objected: in 2002 about the money laundering Directive (conciliation took 8 months) and in 2006 about the Directive on the free movement of persons (with almost 12 months of talks).

⁹⁵ In Pelkmans & Correia de Brito (2012, p. 39 and footnote 70), it is shown that after 2002 the number of EU regulations for the internal market increased four-fold, whereas the number of directives remained roughly constant.

countries' in a legal sense, their very close cooperation with the EU notwithstanding. In this light, the EEA's institutional structure and the close involvement of third countries in the preparation of EU internal decision-making is unique. Indeed, the EEA Agreement is the most advanced and sophisticated procedural mechanism for the involvement of third countries in the preparatory stages of the EU decision-making process.⁹⁶

On the EU side the EEA is managed by the Commission and since the entry into force of the Lisbon Treaty also by the EEAS. While the former is responsible for the technical questions with regard to the EEA, the latter represents the EU in the joint EEA bodies.

3.2.8 An assessment of Liechtenstein's EEA membership

This section will shed some light on the effects and results of Liechtenstein's EEA membership for the last 18 years. We should emphasise that we do not pretend to make an independent, new assessment.

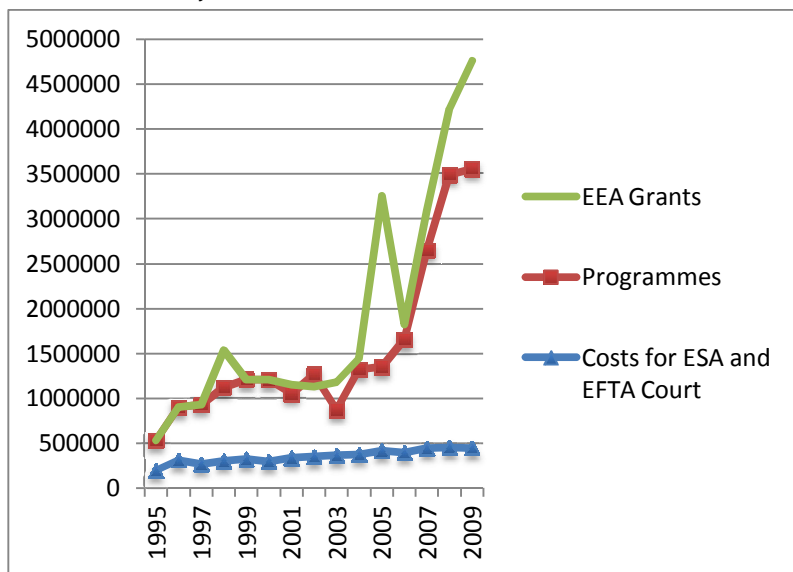
After strong initial resentments towards the EEA in the early 1990s, especially coming from the free professions,⁹⁷ the overall assessment after 18 years of EEA membership is a positive one. The latest report from the Liechtenstein government to the parliament on the occasion of 15 years EEA membership in 2010 draws a positive conclusion. Liechtenstein managed to maintain and even improve the good general economic framework of the Principality during the 15-year membership in the EEA. Initial fears such as negative effects in the services sector did not materialise. Moreover, EEA membership opened the door for new business opportunities and new markets for Liechtenstein's entrepreneurs. In this context the legal order of the EEA served Liechtenstein especially well. It protects the Principality against the 'usual power politics' and guarantees application of the rule of law in relation to the EU and its member states with regard to market access. This is and was especially important in the context of the tax transparency and fraud issues as well as state aid matters in taxation of the last decade. The overall conclusion of the Liechtenstein

⁹⁶ See Roman (2008, p. 44).

⁹⁷ See e.g. Richard Hopkins, "Can Liechtenstein's Lawyers Survive the EEA?", *International Financial Law Review*, March 1992, p. 21.

government is that level of integration provided for by the EEA is generally appropriate.⁹⁸

Figure 6. Expenditure incurred by Liechtenstein due to the EEA from 1995-2009 (Swiss francs)



EEA membership of course comes at a cost. These costs can be substantial, also with regard to administrative capacity. In the period between 1995 and 2009, the Principality incurred in total approximately 28 million CHF additional costs due to its EEA membership.⁹⁹ These costs break down as follows: 5.3 million CHF for ESA and the EFTA court, 17.8 million CHF for the participation in EU programmes and 5.2 million CHF for EEA grants. Figure 6 shows a sharp increase of expenditure in the fields of EEA grants and EU Programmes, while the administrative costs of ESA and the EFTA court are relatively stable.

⁹⁸ Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend 15 Jahre Mitgliedschaft des Fürstentums Liechtenstein im Europäischen Wirtschaftsraum (EWR), No. 17/2010, pp. 72-74.

⁹⁹ According to the Bericht und Antrag of the government to the Parliament, the exact number is 28,394,588 CHF.

Figure 7. Share of total costs per field of expenditure since 1995

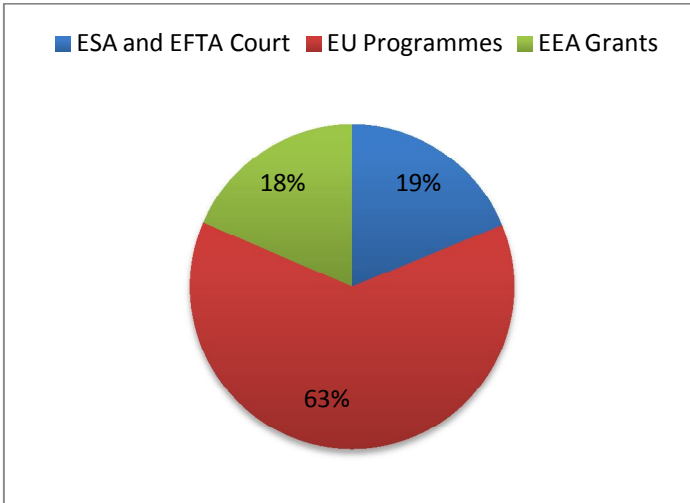


Figure 7 shows that the bulk of the costs (63%) incurred by the Principality due to its 18 years of EEA membership is in the field of EU programme participation. EEA grants account for just 18% and the administrative costs for ESA and the EFTA Court account for the remaining 19% of total costs. Hence, the mere costs of the EEA are relatively small compared to additional EU programme costs. These numbers, however, do not include the costs incurred within the national administration for additional personal. Initial approximations of the government estimated 10 additional posts. After the negative referendum in Switzerland in 1992, the creation of additional posts appeared to be necessary. Accordingly, estimates of 1995 included 13 additional posts.

The revised estimate turned out to be insufficient for the high workload of the Principality due to the plethora of legal acts incorporated into the EEA. The latest estimates say that approximately 85 employees within the national administration deal with EEA matters on a regular basis.¹⁰⁰

¹⁰⁰ Cf. Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend 15 Jahre Mitgliedschaft des Fürstentums Liechtenstein im Europäischen Wirtschaftsraum (EWR), No. 17/2010, pp. 63-65.

3.3 Trilateralisation – linking Liechtenstein, Switzerland and the EU

Although Liechtenstein's economic interest might be largely shaped by the EEA, its profound economic interdependence with Switzerland remains quite significant too. In several areas, this has eventually led to pragmatic forms of accommodation of Liechtenstein's regulatory preferences between the EU, Switzerland and Liechtenstein. We refer to this form of accommodation as 'trilateralisation'. The first instance where the Principality had recourse to this form of cooperation with the EU was in the context of the EEC-Swiss Free Trade Agreement of 1972, whose scope was enlarged to Liechtenstein by a separate trilateral agreement.¹⁰¹

3.3.1 *Trade in agricultural products*

With the entry into force of the EEA in Liechtenstein, EEA Council Decision 1/95 temporarily suspended the application of Protocol 3 to the EEA on processed agricultural products until 1 January 2000. On 26 October 2004, an agreement between the EU and Switzerland was signed amending the EU-Swiss FTA as regards the provisions applicable to processed agricultural products.¹⁰² This agreement also provided for the extension of its application to Liechtenstein, given the Customs Union between Switzerland and Liechtenstein. With EEA Joint Committee Decision No. 177/2004, the transitional exemption of Protocol 3 to the EEA was transformed into a lasting arrangement for Liechtenstein. In future, Liechtenstein will continue to apply Swiss legislation to processed agricultural products.

As to veterinary issues,¹⁰³ EEA Council Decision 1/95 likewise temporarily exempted Liechtenstein. With EEA Joint Committee Decision 1/2003 and the entry into force of the Swiss-EU agreement on

¹⁰¹ Additional agreement on validity for the Principality of Liechtenstein of the agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, OJ L 300, 31.12.1972, p. 188.

¹⁰² Agreement between the European Community and the Swiss Confederation amending the agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 concerning the provisions applicable to the processed agricultural products, OJ L 23 of 26.01.2005, p. 17.

¹⁰³ Annex I of Chapter I to the EEA.

trade in agricultural products,¹⁰⁴ this exemption from the application of the EEA veterinary rules became permanent.

Most recently, Switzerland, the EU and Liechtenstein have agreed to extend the EU-Swiss agreement on trade in agricultural products also to Liechtenstein in 2007.¹⁰⁵ As a final step of regulating trade in agricultural products between Switzerland, the EU and Liechtenstein, the EEA Joint Committee decided to exempt Liechtenstein fully¹⁰⁶ from the application of EEA *acquis* related to agricultural products with EEA Joint Committee Decision No. 97/2007, thus ensuring a consistent application of a single set of rules for the entire food chain on the Liechtenstein market.

Although seemingly technical, this result is remarkable. Liechtenstein had initially intended to implement the EEA *acquis* to trade in agricultural products. When it turned out that Swiss-EU trade in agricultural products grew continuously (although the original EFTA concessions in agriculture were minimal), Liechtenstein chose to maintain its regulatory framework and attempt its inclusion into the Swiss-EU bilateral relationship. The outcome can be referred to as the 'trilateralisation' of trade in agricultural products between Liechtenstein, Switzerland and the EU.

3.3.2 *Schengen association - one agreement - three participants*

A prima facie similar, although technically very different, solution was found for the free movement of persons under what is called 'Schengen'.¹⁰⁷

¹⁰⁴ This agreement is part of the EU-Swiss Bilateral I agreement package; for further information see Annex VII of the study.

¹⁰⁵ Additional Agreement between the European Community, the Swiss Confederation and the Principality of Liechtenstein extending to the Principality of Liechtenstein the Agreement between the European Community and the Swiss Confederation on trade in agricultural products, OJ L 270, 13.10.2007, p. 5.

¹⁰⁶ The application of Annex I to the EEA (Veterinary and Phytosanitary Matters), Annex II to the EEA (Chapter XII: foodstuffs, Chapter XXVII: spirit drinks) and Protocol 47 to the EEA (removal of technical barriers to trade in wine) was suspended with regard to Liechtenstein by EEA Joint Committee Decision No. 97/2007 of 28 September 2007, OJ L 47, p. 3.

¹⁰⁷ For the purpose of this study the Schengen Association of Switzerland and Liechtenstein is used to illustrate what the authors refer to as 'trilateralisation'. The following is also applicable to the Dublin association of Switzerland and Liechtenstein. The latter is based vastly on the same basic principles as the former. Agreement between the European Community and the Swiss Confederation

The Schengen *acquis*, originally separate treaties between just five of the then 12 EEC member states,¹⁰⁸ included into the EU legal order by the Amsterdam Treaty, nowadays applies in all EU member states (except the UK, Ireland, Bulgaria, Romania and Cyprus) as well as to Norway, Iceland, Switzerland and since December 2011 also to Liechtenstein.

A logical precondition for a third country to become associated with the Schengen area – although not explicitly mentioned in any of the association agreements concluded – is a treaty on the freedom of movement of persons. With regard to the EEA 3, the EEA fulfils this requirement. Switzerland and the EU concluded a separate agreement on the freedom of movement of persons in the framework of Bilateral I.¹⁰⁹

The Schengen acquis abolishes

- *internal border controls between the EU member states and associated third countries*
- and establishes harmonised rules for*
- *Visas*
- *External border controls*
- *Illegal migration*
- *Criminal and police cooperation*

While Iceland and Norway had already concluded a Schengen Association Agreement with the EU¹¹⁰ in 1999 as a consequence of Finland,

concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L53 of 27/02/2008, p. 3; Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L161 of 24/06/2009, p. 6.

¹⁰⁸ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, pp. 13–18.

¹⁰⁹ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L114 of 30/04/2002, p. 6.

¹¹⁰ Agreement concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway on the association of these two states to the implementation, to application and to the development of the *acquis de Schengen*, OJ L 176 of 10.07.1999, p. 35.

Sweden and Denmark joining Schengen, it was neither offered nor of interest to Liechtenstein at that time.

However, in 2001 when it became clear that its neighbour Switzerland, with whom the Principality had applied an open-border policy for decades, was interested in a Schengen Association Agreement, Liechtenstein also expressed its interest in participating in the Schengen area and in engaging in parallel negotiations to that end. The EU however wanted to progress and conclude negotiations with Switzerland first as this constituted – for all sides – a pre-requirement for Liechtenstein joining. This strong connection was furthermore reflected in the EU-Swiss agreement¹¹¹ itself by an article enabling Liechtenstein to accede to the EU-Swiss agreement by means of a protocol. Taking into account that Norway and Iceland also share one association agreement in this field, Liechtenstein decided to make use of the protocol solution, provided that this approach would allow for the granting of the same status as the other three EFTA states. In addition, it had to be a 'stand-alone' solution, meaning that Liechtenstein's association will continue even if the Swiss agreement is terminated. Before all of this could be achieved during the negotiations in the first half of 2006, Liechtenstein and the EU completed their negotiations on an agreement on taxation of savings¹¹² in 2004, and the Swiss people approved their Schengen association in a public vote in June 2005.

While the Swiss Schengen Association Agreement entered into force on 1 March 2008 and thereby paved the way for Switzerland to become a fully-fledged Schengen member on 12 December 2008, the Liechtenstein protocol was only signed by the three parties at the end of February 2008.¹¹³

¹¹¹ Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, OJ L53 of 27/02/2008, p. 1.

¹¹² This agreement entered into force in 2005 and was followed by a positive Council decision in 2006 to open negotiations on the protocol allowing Liechtenstein to participate in the Schengen area on the basis of the EU-Swiss agreement.

¹¹³ Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's

Furthermore, due to the reluctance of some EU member states in the Council connected to tax cooperation of the Principality,¹¹⁴ Liechtenstein was only able to fully join as Schengen member on 19 December 2011.¹¹⁵

Since December 2011, Liechtenstein is the 26th member of the Schengen area. Liechtenstein took over the entire Schengen *acquis* with minor exemptions and fully participates in the mixed committee initially established under the EU-Swiss agreement and extended by the protocol. This achievement of Liechtenstein is of interest in the context of this study for two reasons.

First, Liechtenstein did not insist on negotiating and concluding a parallel agreement covering the whole substantive scope of Schengen membership, but decided to make use of the clause in the Swiss agreement allowing it to participate in the arrangement negotiated by its neighbour and close partner Switzerland via an additional protocol. The result is again an example of what we refer to as 'trilateralisation', although in this case, the negotiated Schengen protocol is de facto an own Schengen Association Agreement. As the protocol contains itself all the essential provisions and has its own termination clauses that are independent from the Swiss agreement, it is not dependent on the latter's (continued) existence. Actually, the protocol transforms the bilateral Swiss-EU agreement into a full trilateral agreement identical in substance to the Norway-Iceland-EU Schengen Association Agreement. As in the field of processed agricultural products, the Schengen arrangement of Liechtenstein highlights the Principality's pragmatic and flexible approach when it comes to European integration and at the same time highlights its close bonds with Switzerland. Second, similar to the EEA agreement, the EU-Swiss-Liechtenstein Schengen Association Agreement is a dynamic agreement. It obliges Liechtenstein to take over the Schengen *acquis* as it

association with the implementation, application and development of the Schengen *acquis*, OJ L83 of 26/03/2008, p. 3 and 5.

¹¹⁴ This led to the negotiation of a Cooperation Agreement between the EU and Liechtenstein to combat fraud and any other illegal activity to the detriment of their financial interests and to ensure exchange of information on tax matters (anti-fraud agreement). This agreement has so far not been agreed to by the EU Council.

¹¹⁵ Schengen enlargement: Liechtenstein to become 26th member state, Brussels, 13 December 2011, 18446/11, PRESSE 489. The entry into force of the Schengen protocol is linked to putting into effect the Dublin/Eurodac protocol with regard to Liechtenstein.

stood with regard to Iceland, Norway and Switzerland at the date of signature of the additional protocol and also its further development.

To this end, the Schengen Association Agreement established institutional and procedural mechanisms. A 'mixed committee' is set up, which consists of representatives of Switzerland, Liechtenstein, the Council and the Commission, and which in practice meets together with the mixed committee of the other EFTA states Norway and Iceland established by their Schengen Association Agreement. The mixed committee meets at the level of ministers, senior official or experts depending on the subject matter.¹¹⁶ The mixed committee is informed by the Council about any new legislative proposal falling within the scope of the Schengen Association Agreement. In the same manner as in the EEA, the Commission is held to informally consult with experts from Liechtenstein and Switzerland when drawing up legislative proposals as they do with the other Schengen-associated states Norway and Iceland.

After new legislation is adopted within the EU, the Council immediately informs the four associated states. Following this information, the EFTA states have 30 days to notify the Council whether they accept the new legislation or not. They might also notify further internal constitutional requirements, mainly direct democratic constitutional requirements, which allow them to fulfil the national constitutional requirements during an extended notification period.

In case of non- or a negative notification, the Schengen Association Agreement shall be "considered terminated unless the Mixed Committee, after carrying out a careful examination of ways of continuing the Agreement, decides otherwise within 90 days. Termination of the Agreement shall take effect three months after the expiry of the 90-day period" (Art 7 (4)). This is therefore a heavier 'nuclear option' which leaves little, if any, choice. Similar to the EEA Joint Committee, the mixed committee shall keep under constant review the case law of the CJEU to guarantee the application of the Schengen *acquis* in a homogenous manner.

Compared to the EEA institutional and procedural set-up, the Schengen Association Agreement appears to be rather simple and straightforward. Although there is only a single body and a plain 'take-it-or-leave' take-over procedure, with an even more severe 'nuclear option'

¹¹⁶ Cf. Arts 3-5 Schengen Association Agreement.

than the EEA, in its Art. 7, the Schengen Association Agreement has nonetheless satisfied the Liechtenstein government.

This mainly owes to the fact that, in contrast to the EEA, where Liechtenstein does not participate in the discussion of the Council prior to decisions on EEA-relevant EU legal acts, the Schengen mechanism provides for participation of Liechtenstein's officials in such discussions, also at ministerial level. Of course, Liechtenstein has no vote in the formal decision-making. In the case of Liechtenstein, its demographic features would render it very hard to influence Council voting effectively, even if it were an EU member state. Accordingly, sitting at the table and participating in discussions at ministerial level appears to be already a useful accomplishment. Compared to the very technical procedures of the EEA, where such a place at the table of the Council is not even foreseen, the Schengen mechanism provides a 'sense of inclusion' for Liechtenstein officials in the decision-making process of the EU. It may well be that Liechtenstein one day would find this set-up more effective and pragmatic than the EEA mechanism.

In the context of future integration strategy, the Schengen mechanism can be regarded as an alternative model to integrate third-countries into the Internal Market.

3.4 EFTA

Nowadays, EFTA as an organisation is often forgotten when thinking about European integration in a wider sense. With the EEA having become so prominent for three EFTA states and leaving only Switzerland in EFTA without the EEA but having 'deep' bilateral agreements with the EU, EFTA has largely lost its significance for market integration in Europe. It still matters in trade policy, however, vis-à-vis third countries.

In 1952 Belgium, France, Germany, Italy, Luxembourg and the Netherlands signed the Treaty on the European Coal and Steel Community (ECSC) and subsequently in 1957 the Treaty on the European Economic Community (EEC) and the Treaty on the European Atomic Energy Community (Euratom).

Following these events, attempts to avoid an economic dividing-line on the European continent were explored within the Organisation for European Economic Cooperation (OEEC), the forerunner of the Organisation for European Cooperation and Development (OECD). The attempts to form a Western European free trade area, however, failed

mainly due to the irreconcilable differences of the British and French positions. In late 1958 and early 1959, seven non-EEC countries (United Kingdom, Sweden, Austria, Switzerland, Portugal, Denmark and Norway) came together to explore the possibility of the creation of a free trade area amongst themselves. The final outcome of this process led to the Convention establishing the European Free Trade Association on 4 January 1960 in Stockholm (Stockholm Convention). EFTA established an industrial free trade area amongst its contracting parties.

In the 1960s Western Europe was characterised by two economic blocs, 'inner six', the EEC members, and the 'outer seven',¹¹⁷ the EFTA members. With Finland,¹¹⁸ Iceland¹¹⁹ and Liechtenstein joining later, EFTA consisted of 10 members and associated countries. This situation would change drastically in the decades to come. By 1973 EFTA was reduced to just six full members plus Finland and Liechtenstein, while Western Europe was close to achieving the goal of a continent-wide industrial free trade area due to the EFTA-EEC FTAs of 1973, which were implemented fully by the end of the decade.¹²⁰ Portugal left EFTA for the EU in 1986, whereas Austria, Finland and Sweden acceded to the EU in 1995, leaving EFTA with just four members, i.e. Iceland, Liechtenstein, Norway and Switzerland.

Initially, the Principality was not an EFTA member on its own right, but its participation was mediated by Switzerland as well as its representation in EFTA organs. This status of mediation through Switzerland changed in 1991, when the Principality became a full EFTA member on its own.¹²¹

EFTA lost many members in the course of time and consequently was reduced greatly in economic importance as a free trade area. The EEA has established a (deep) FTA amongst the EEA-30, including three of the four current EFTAs. As a response to this new reality, the EFTA members

¹¹⁷ EFTA founding members: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom.

¹¹⁸ Finland became an associated member in 1961. Note that Ireland never was an EFTA member but had a FTA with the UK.

¹¹⁹ Iceland joined in 1970.

¹²⁰ With the exception of some sectors with longer transitional periods (paper and steel) and more generally trade in agriculture and fish; see Norberg et al., 1993, p. 47).

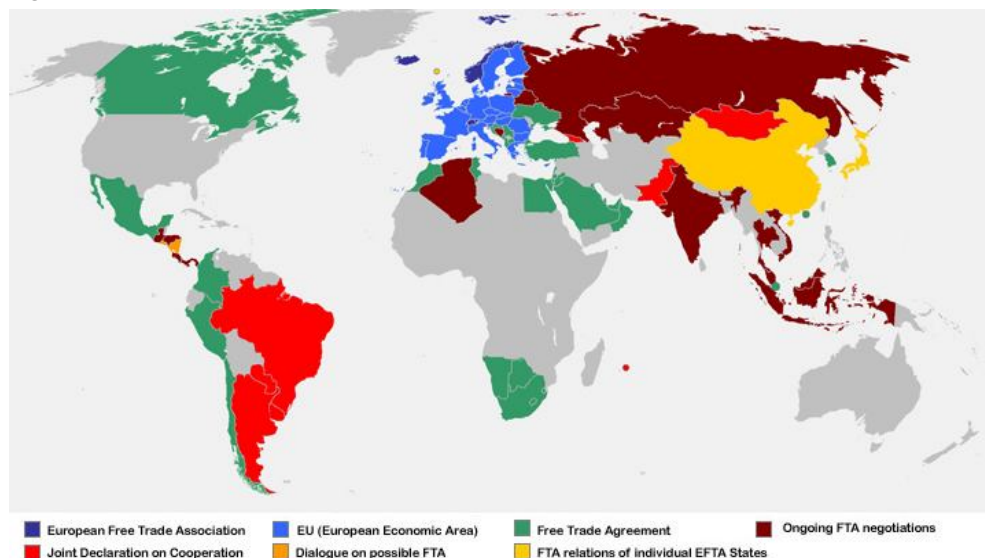
¹²¹ Frommelt & Gstoehl (2011, pp. 12-16).

amended the Stockholm Convention in June 2001 in Vaduz. This so-called 'Vaduz Convention', introduced into the Stockholm Convention the rules and principles of the EEA and the EU-Swiss bilateral relationship with regard to intra-EFTA relations (such as principles of free movement).

This adaptation, however, had little effect on Liechtenstein as it already enjoyed deep market integration into Switzerland due to the customs and monetary unions. The main significance of the 'Vaduz Convention' lies in the Icelandic and Norwegian relationship with Switzerland.

Despite the minor importance of EFTA for today's free trade in Europe, it is still very active in the conclusion of FTAs with the world economy.

Figure 8. Global trade blocs



Source: EFTA Secretariat.

EFTA has concluded 24 FTA agreements covering 33 countries. For Liechtenstein this means market access to the EEA-30 market via the EEA, the Swiss market via its bilateral relationship with Switzerland and at the same time the Principality benefits from EFTA's web of free trade agreements throughout the world.

3.5 Agreements between Liechtenstein and the EU outside the EEA

Liechtenstein's relationship with the EU has so far been described by the EEA, its association with Schengen and Dublin and the participation of the Principality in agreements between Switzerland and the EU. A fourth type is based on bilateral agreements between Liechtenstein and the EU.

Currently, five bilateral agreements are in force between the EU and Liechtenstein, two of which are side products of Liechtenstein's accession to the EEA and EEA enlargement with respect to Romania and Bulgaria.¹²² One agreement is on external border funds,¹²³ a consequence of the Schengen association with Liechtenstein and another one deals with the exchange of classified information.¹²⁴

Notwithstanding the importance of these agreements within their respective fields, the most important bilateral agreement in the context of this study is the agreement on taxation of incomes from savings of 2004.¹²⁵ This agreement was already mentioned in section 3.3.2 in the context of Schengen, as it was a precondition for Liechtenstein to enter the Schengen area.

¹²² Agreement in the form of an Exchange of Letters between the European Community and the Principality of Liechtenstein concerning the provisional application of the Agreement on the participation of the Republic of Bulgaria and Romania in the European Economic Area and the provisional application of four related Agreements, OJ L 221, 25.08.2007, p. 7.

¹²³ Agreement between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein on supplementary rules in relation to the External Borders Fund for the period 2007 to 2013, OJ L169, 03.07.2010, p. 22.

¹²⁴ Agreement between the European Union and the Principality of Liechtenstein on security procedures for exchanging classified information, OJ L187, 21.07.2010, p. 1.

¹²⁵ Agreement between the European Community, and the Principality of Liechtenstein of the measures equivalent to those provided for in Council Directive 2003.48.CE on taxation of savings income in the form of interest payments - Memorandum of understanding, OJ L 379, 24.12.2004, p. 83.

Under this agreement Liechtenstein applies measures equivalent to those of the EU's Directive on taxation of savings income.¹²⁶ Liechtenstein levies a withholding tax on EU bank clients, 75% of which is transferred to the tax relevant country of residence of EU citizens. The rate of the withholding tax corresponds to the incremental rate of the Directive and has stood at 35% since 1 July 2011.

This agreement can be regarded as a step forward in tax cooperation between Liechtenstein and the EU. However, the 2004 agreement only provides for an exchange of information in very limited circumstances such as sufficiently justified requests in the case of the suspicion of fraud.

The tax evasion affair of the year 2008¹²⁷ and the subsequent repositioning of the Principality as a cooperative jurisdiction,¹²⁸ which had as a direct consequence the removal of Liechtenstein from the OECD's blacklist of uncooperative tax havens in May 2009, brought about even deeper cooperation with EU member states in anti-fraud and tax matters.

Against the backdrop of these turbulent times for the Principality, the EU concluded an anti-fraud agreement with Liechtenstein in June 2008. After reopening this draft anti-fraud agreement to enlarge and deepen its scope – insisted on in preliminary negotiations by the EU and several of its member states – the Commission proposed another Council decision in December 2009 to approve the amended anti-fraud agreement.¹²⁹

The anti-fraud agreement with Liechtenstein is intended to serve as a model for similar agreements with Switzerland, Andorra, Monaco and San Marino.¹³⁰ The Council, however, has so far not adopted this agreement due to vetoes of Austria and Luxembourg. These two countries are the last

¹²⁶ Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, OJ L 157, 26.6.2003, p. 38.

¹²⁷ For a more detailed overview of these events see Maresceau (2011, pp. 520-525).

¹²⁸ See Liechtenstein Declaration of 2009 (www.oecd.org/ctp/harmfultaxpractices/42826280.pdf).

¹²⁹ Amended Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Cooperation Agreement between the European Union and its Member States, of the one part, and the Principality of Liechtenstein, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests and to ensure exchange of information on tax matters, COM (2009)648 final.

¹³⁰ Ibid, p. 4.

EU member states, which still apply a withholding tax and refuse the automatic exchange of information as provided for in Directive 2003/48 (mainly, because of their reticence to give up bank secrecy). This transitional option provided for under the regime of the taxation of savings Directive should come to an end once the EU concludes anti-fraud agreements, for which the Liechtenstein anti-fraud agreement serves as the basis, with Switzerland, Andorra, Liechtenstein, Monaco and San Marino.¹³¹

Liechtenstein nowadays finds itself in the curious and somewhat frustrating position that it has fulfilled the calls from the EU side to provide for more transparency and cooperation in tax matters, only to be put on the bench again by internal struggles within the EU. The current situation is not likely to change in the near future.¹³²

3.6 Bilateral relations with EU member states

3.6.1 Tax agreements with EU member states

The bilateral relationship between the EU and Liechtenstein with regard to taxation and transparency does not *prima facie* exclude bilateral agreements between Liechtenstein and EU member states. In parallel with the developments in bilateral relations with the EU, Liechtenstein recently concluded tax information exchange agreements (TIEAs) and double taxation agreements (DTAs) with several EU member states and Norway and Iceland.¹³³

The parallel existence of these bilateral agreements and the envisaged anti-fraud agreement with the EU is not unproblematic. Some question the competence of EU member states to conclude bilateral agreements due to an overlap with EU competencies in the same field. This means that these bilateral agreements cannot include provisions that contradict or regulate the same field as the EU-Liechtenstein agreement on taxation of savings of 2004.

¹³¹ Art. 10 (2) of Directive 2003/48/EC.

¹³² "Danes push for deal on banking transparency", *European Voice*, 24 February 2012 (<http://www.europeanvoice.com/article/imported/danes-push-for-deal-on-banking-transparency/73678.aspx>).

¹³³ For a complete and current list of TIEAs concluded by Liechtenstein, cf. <http://www.regierung.li/index.php?id=306>. DTAs are relevant as well because they normally contain information exchange rules, too.

Once the intra-EU blockage of the EU-Liechtenstein anti-fraud agreement by Austria and Luxembourg would be lifted, potential conflicts of existing bilateral agreements of EU member states with the Principality will need to be addressed.

For Liechtenstein, the bilateral route in the field of tax information exchange proved to be the only possible way to address the demands raised by its European partners, as long as intra-EU struggles within the EU prevent a collective solution with regard to tax information exchange. Liechtenstein acted swiftly and provided for the necessary transparency of its financial sector to live up to its intentions in the Liechtenstein Declaration of 2009. This again is an example of the pragmatic approach of the Principality, using international law to accommodate its place within an integrated Europe.

Tax information exchange and double taxation agreements concluded by Liechtenstein since 2009

EU member states

- Austria, DTA & TIEA concluded 29.1.2013
- United Kingdom, TIEA concluded 11.08.2009; DTA 11.06.2012
- Luxembourg, DTA concluded 26.08.2009
- Germany, TIEA concluded 02.09.2009, DTA 17.11.2011
- France, concluded 22.09.2009
- Ireland, concluded 13.10.2009
- Belgium, concluded 10.11.2009
- Netherlands, concluded 10.11.2009
- Finland, concluded 17.12.2010
- Denmark, concluded 17.12.2010
- Sweden, concluded 17.12.2010

EEA contracting parties

- Iceland concluded 17.12.2010
- Norway 17.12.2010

4. THE DYNAMISM OF LIECHTENSTEIN'S STRATEGIC ENVIRONMENT

4.1 Introduction and overview

The strategic environment of Liechtenstein is in flux. There are many reasons why the Principality might be well served by a thorough reflection about these actual and potential changes. There is no doubt that Liechtenstein's European integration strategy of the last quarter century has been successful, perhaps even more successful than expected at the time. The paramount question today is whether this success can be taken for granted in light of the dynamics of the country's strategic environment. The present chapter discusses eight actual or potential changes that (may) affect the future positioning or indeed the predicament of Liechtenstein in the medium- to long-run. Chapter 5 will present a range of scenarios and, on this basis, discuss a spectrum of options for addressing these challenges, ranging from relatively technical to more disruptive ones. We hope that this analysis can be helpful for Liechtenstein to set out a future European integration strategy in its best interest.

Liechtenstein's future European integration strategy is and will remain inextricably linked to the EU, directly as well as indirectly. The EU has developed into a kind of European 'hegemon', so far broadly a 'benign hegemon' as an economic and civil power, not a military one. The most important recent change for Liechtenstein is therefore that the EU has recently gone beyond the 18 years routine of daily EEA affairs and taken stock of the working of the EEA - which can be analysed on the EU-27 side (see 4.2) and on the EEA EFTA countries' side (see 4.3) - and its relations with Switzerland (see 4.4), the possible accession to the EU by Iceland and the repercussions for the EEA (see 4.5) and finally the future economic integration with three small-sized states which are not part of the EEA (Andorra, Monaco and San Marino) (see 4.6). All of these aspects are of clear interest to Liechtenstein. The stocktaking has begun with the EU Council conclusions in December 2010, in which it makes a number of important policy statements and 'encourages' a review of the EEA on the

EU side. This review was submitted to Council on 7 December 2012. The present chapter will also venture into two more far-fetched and so far only potential changes in the near future that might be of strategic interest to Liechtenstein: a new 'solution' for Turkey, one option of which might be membership of the EEA (see 4.7) and, in the longer run, EEA membership of one or more relatively advanced countries now under the European Neighbourhood Policy (ENP) (see 4.8). Finally, the EU itself is transforming rapidly, prompted by the financial and economic crisis, and this is likely to have repercussions for Liechtenstein as an EEA-3 country (see 4.9).

In December 2010 the Council of the European Union published its conclusions on its relations with the EFTA states.¹³⁴ The main message concerning the EEA is a very positive one. In the words of the Council:

the EEA: functions properly so long as all Contracting Parties incorporate the full body of the relevant EU *acquis* relating to the internal market into their national law. The Council welcomes that the EEA countries have demonstrated an excellent record of proper and regular incorporation of the *acquis* into their own legislation and encourages them to maintain this good record to ensure the continued homogeneity of the internal market. The Council notes with interest that Norway and Liechtenstein have launched work for an in-depth review of their experiences with the EEA Agreement. The Council encourages a parallel exercise on the EU-side and looks forward to an exchange on findings with the EEA EFTA countries in due time.¹³⁵

Section 4.3 will focus on a possible amendment of the EEA Agreement. The reason is simple. The two EEA-3 countries remaining in the EEA in case Iceland might join the EU, Norway and Liechtenstein, have themselves reviewed the EEA, the benefits they enjoy and the costs incurred, be it political (especially Norway) or administrative (especially Liechtenstein). Both reports are quite favourable and provide few, if any, reason for major initiatives on their part. However, this does not mean that amending the EEA Agreement is excluded, because both countries surely have specific desires for amendment. First, the EEA Treaty has never been substantially amended (except for an extension of the membership base as a consequence of EU enlargements) and the experience of 20 years of EEA

¹³⁴ Council conclusions on EU relations with EFTA countries, 3060th General Affairs Council meeting, Brussels, 14 December 2010.

¹³⁵ *Ibid.*, paras 3 and 4.

(18 years with respect to Liechtenstein) has given rise to a number of suggestions on how to improve the EEA. Liechtenstein could make an inventory of suggestions for amendment. The enthusiasm for a new version of the EEA Treaty is tempered by the risk of opening a Pandora's box. However, the EU has a tradition of distinguishing a relatively modest, technical and 'controlled' treaty change from a genuine rewrite of the treaty. The former need not open a Pandora's box. A prerequisite for sticking to a modest treaty change is presumably that a rather precise negotiating mandate is first formulated by the 30 political leaders, (perhaps even) helped by a proposal of the Commission after extensive consultation with the EEA-3. One key issue is whether some currently excluded and sensitive policy areas (like fisheries or agriculture) would be covered, which is (probably) inconsistent with pursuing a modest and 'controlled' amendment. A few suggestions for EEA amendments and improvements will be made in chapter 5.

The Swiss-EU relationship did not get such a positive evaluation from the European Council (see 4.4). In surprisingly straightforward wording, the Council stated:

in full respect of the Swiss sovereignty and choices, the Council has come to the conclusion that while the present system of bilateral agreements has worked well in the past, the challenge of the coming years will be to go beyond this complex system, which is creating legal uncertainty and has become unwieldy to manage and has clearly reached its limits. In order to create a sound basis for future relations, mutually acceptable solutions to a number of horizontal issues, set out below, will need to be found.¹³⁶

In short, for the EU, the bilateral and sectoral approach to Swiss-EU economic relations is exhausted. The EU will seek a solution providing for an institutional framework for the taking over of new EU *acquis*, the surveillance of its implementation and a tribunal to secure homogeneous interpretation and legal certainty. Obviously, the future of Swiss-EU economic relations is critical for Liechtenstein.

A fourth possible change in the strategic environment of Liechtenstein's European integration is the application for EU membership by the EEA EFTA state Iceland (see 4.5). If Iceland accedes to the EU, the EEA would be left with just two countries on the EEA EFTA side of the

¹³⁶ Ibid., para 6.

agreement. This gives food for thought both on technical and legal solutions as well as on the nature of future cooperation between the two remaining EEA EFTA partners.

A fifth change may follow from a renewed interest in European integration on the part of three countries 'with small territorial dimension', namely, Andorra, Monaco and San Marino (see 4.6). San Marino is openly playing with the wish of full EU membership, while Andorra is seeking a deep association possibly of an EEA-like kind, which is also the second-best scenario for San Marino. Monaco, on the other hand, is very reluctant when it comes to any kind of deeper market integration, although – or because – it is already involved profoundly via France. However, it too is engaged, with the other two in this process of reflection. In the view of the Council of the EU,

a similar assessment (as concerning the EEA) should also be undertaken concerning the relations of the EU with the European countries of small territorial dimension, and more in particular the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Their current relations with the EU are extended but fragmented, with large parts of the *acquis* related to the internal market not introduced in their legislation and therefore not applicable.¹³⁷

In November 2012, the Commission published an options paper as the basis for further debate and later decisions¹³⁸

A sixth element of possible change in the medium run concerns Turkey (see 4.7). Despite its official status as a candidate country, Turkish membership seems further away than ever.¹³⁹ On the one hand, there are national and European debates, mainly concerned with the shift to a more Islamic civil society in Turkey; on the other hand the Cyprus conflict and the very slow progress of *acquis* adoption under official pre-accession are increasingly frustrating the prospect of Turkish accession.¹⁴⁰ Irregular and

¹³⁷ Council conclusions on EU relations with EFTA countries, para 8.

¹³⁸ European Commission (2012c).

¹³⁹ Böhler, Pelkmans & Selçuki (2012b).

¹⁴⁰ Commission Staff Working Paper, Turkey 2012 Progress Report, accompanying the Communication from the Commission of the European Parliament and the Council, Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final.

informal suggestions (even by Chancellor Merkel) about a 'privileged partnership' have been heard for at least a decade or more, without ever defining what such a partnership would consist of. Given the mutual interest in 'deep' economic integration between the EU and Turkey, and remaining frictions on issues related to the political Copenhagen criteria,¹⁴¹ it seems to be just a question of time and opportunity until EEA membership of Turkey might politically be suggested as a (politically) convenient alternative.¹⁴²

Seventh, in the longer run, the EEA model might perhaps also become interesting for the more advanced countries falling under the ENP and wishing to be part of the EU internal market (see 4.8). Some of them cannot become an EU member (as they are not a European country), and others might not be ready for all the Copenhagen criteria.

The eighth challenge comes from the EU itself (see 4.9). The EEA is quite a resilient arrangement, having accommodated no less than three EU treaty renewals without major problems. Also, the start of the eurozone in 1999 has so far not given rise to any particular EEA issues. What is new today is the deepening and widening of the EU's economic integration as a result of the financial and sovereign debt crisis and the transformation of the eurozone that goes considerably further. In particular, the degree of centralisation acceptable to EU member states seems to be shifting up and this is likely to create challenges inside the EEA.

4.2 The EEA review of the EU

As noted, the EU Council of Ministers has, after having taken notice of the reviews of the EEA in Liechtenstein and Norway, "encouraged a parallel exercise on the EU side" of the EEA. As of late January 2013, the situation is as follows: the EEAS in close cooperation with the European Commission submitted a review in the form of a Commission Staff Working

¹⁴¹ Stability of institutions, guarantee of democracy, the rule of law, human rights and respect for and protection of minorities.

¹⁴² An example of how easily this suggestion can arise and how immune the original authors can be to counterarguments, given the nature, operation, demanding requirements and membership of the EEA, readers are referred to an exchange on the leading website for economists in Europe (VoxEU) between Gylfason & Wijkman (2010), Böhler, Pelkmans & Selçuki (2012a) and Gylfason & Wijkman (2012).

Document,¹⁴³ discussed in more detail below, and shortly thereafter the Council adopted 'Conclusions' on 20 December 2012.¹⁴⁴ The Council conclusions referred first to the relations with the four EFTA countries, called "stable and close", looking forward to "further strengthening and deepening", and announcing to reassess the state of relations in two years. This general statement is followed by country-specific comments, which we shall refer to where appropriate. Second, the Council notes the following on the EEA review: "[T]he EEAS and the Commission have carried out an assessment of the EEA agreement which will be closely examined by the Council in the coming months. The Council expects that an extensive exchange with EEA partners on the results of the respective reviews is held at the next EEA Council meeting in May 2013" (para. 27). Except ("as a matter of priority") for expressing a concern about the backlog of EU legal acts which have not yet entered into force in EEA EFTA countries, the Council takes no position at this moment. We shall thus focus on the EEAS-Commission EEA Review in some detail.

The Review assumes a broad approach and casts the net wide. In doing so, it touches upon several potential changes in Liechtenstein's strategic environment, which we discuss in other subsections in this chapter, such as amending the EEA Treaty (4.3), the links with Switzerland (4.4), the option of only two EEA EFTA countries (4.5) and the question of the market integration with the AMS countries (4.6). There is even an indirect reference to countries falling under the EU's neighbourhood policy. In 4.2 we shall only sum up what suggestions are made for changes that can be accomplished within the present EEA Treaty framework.

The Review recalls the rather different situation at the outset of the EEA from that of today. It finds that: "the EEA Agreement can be considered to have functioned well: it has provided the bedrock for very good and close EU relations with the EEA EFTA countries over the past two decades." It suggests that, with some pragmatic extensions, the EEA Agreement would offer "EEA EFTA countries a convenient alternative EU membership-status on an à-la-carte basis, suitable to the political and institutional sensitivities of one of the two sides". Subsequently, a series of issues are discussed, with queries (presumably to the Council) either in the

¹⁴³ European Commission (2012a).

¹⁴⁴ Council of the EU, meeting No. 3213 of the Transport, Telecommunications and Energy Ministers, Brussels, 20 December 2012.

text or explicitly in a few question boxes. Most of these are found under horizontal issues, discussed below. Some sectoral issues are of very limited importance to Liechtenstein: the EU efforts to liberalise market access for agricultural goods and processed agri-products as well as the transit question in fisheries are all directed to Norway (and Iceland to a lesser extent, not least as it is negotiating accession anyway). Other ones are of a lesser importance in general (e.g. whether the EEA-Norway grants fit the EU's regional or Cohesion Policy, the beneficiaries are the same; a highly technical issue of temporary withdrawal of tariff preferences relate to aspects that Liechtenstein has already addressed (e.g. an anti-fraud agreement where the problem now lies on the EU side). A few procedural suggestions are made which either seem a useful instance of modernisation (e.g. better use of the EUR-Lex database and electronic tracking of the processing of EEA-relevant *acquis*) or 'soft' additions to the EEA *acquis*, without any need for amendment (social dialogue and political dialogue). Under the label of a "more comprehensive approach", some parts of non-EEA cooperation between the EEA-3 countries and the EU might be considered to be brought under "a single framework", without any further specification. But not 'Schengen', because Schengen, Dublin and EURODAC "seem adequate as stand-alone measures". Finally, the enlargement of the EEA on account of non-EU countries is brought up, explicitly opening up the option of revising the EEA Agreement so as to remove the EFTA requirement for EEA membership of non-EU countries.

Apart from the last question, which we shall discuss later, the core of the EEA Review is therefore to be found in the horizontal issues. Six such issues are introduced as follows:

i. On the scope of the Agreement. One question relates to the implications of the quite dynamic internal (market) development of the EU for the day-to-day operations of the EEA. The Review concurs with our observation in chapter 3 that a grey zone has emerged between what is internal market *stricto sensu* (as was quite clear in the early 1990s) and what falls under other policies, generating problems of identifying 'EEA relevance', as discussed in greater detail below. This question is exacerbated by an EU practise of legislating 'packages' (not always delineating what exactly is internal market-related and what is not, because for the EU it is irrelevant) and, occasionally, by new institutional arrangements arising from EU treaty amendments. The Review subsequently concurs with the "heightened interest by EEA EFTA states in judicial cooperation, ... including terrorism, serious crime and police cooperation". The Review advocates the inclusion of EU policy on

trafficking in human beings (Dir. 2011/36) in the EEA Agreement. Policy domains much closer to the internal market such as taxation, in which Liechtenstein might possibly be interested, are not mentioned.

ii. On EEA relevance of a future EU legal act. The two sides in the EEA each make their own assessment of what acts are EEA-relevant (see chapter 3), which is bound to lead to frictions. In the recent past there have also been more and more cases where the EEA-3 countries themselves could not agree what was EEA-relevant, thereby putting into question the 'single-voice' principle for the EEA-3 in the Agreement. At times, this has prompted one or the other EFTA EEA country to incorporate EU acts not having been marked as EEA-relevant (see footnote 53 for a telling example). Such moves lead to laws that neither enjoy ESA surveillance nor judicial protection by the EFTA Court. Thus, on both sides, the issue of EEA relevance has become more problematic than it was initially. Although there are potentially heavy conflict resolution rules (esp. Art. 102, EEA) *ex post*, there is no common procedure *ex ante*. The review suggests to carry out a systematic scrutiny of EEA relevance in internal market issues *stricto sensu* as well as in case of the five flanking policies specified in the EEA Agreement.¹⁴⁵

iii. On delays in the incorporation of legal acts. The increasing backlog (at least until 2011) of incorporating EEA-relevant EU acts into the domestic legislation of EEA EFTA countries has begun to seriously worry the EU. As noted, the EU Council of Ministers calls it a matter of priority. In late 2011 the backlog amounted to more than 500 acts, and was reduced to 427 by October 2012. This ought to be appreciated against the total of more than 7,000 acts since the beginning of the EEA (but remember that many of those are not EU Regulations or Directives, but also Recommendations or Decisions; see also the box on p. 31). The thrust of the Review on this point is that the EU should develop a "response strategy" as it discerns a "growing recourse to a selective approach". In a lengthy analysis the Review attempts to substantiate that the EFTA side exploits more and more often its "de facto delaying power" via a) prolonged negotiations between the EEA-3 (as it has to speak with 'one voice'); b) late submission of Joint Committee Decisions (JCDs); c) protracted negotiations of 'adaptations', requested in no less than 33% of all cases, often on institutional issues,

¹⁴⁵ Social policy, consumer protection, environment, statistics and company law. Part V, EEA.

where the Review insists with unusual frankness that such requests are increasingly difficult or unacceptable to address; d) delays in domestic procedures, and tactically failing to live up to the (timely) notification requirement, thereby pre-empting the infringement procedure by ESA (a 'clear breach') and e) delays in the application of EU acts, adding up roughly to one year difference between the EU and the EEA-3, but e.g. five years for the hygiene package.

iv. Conflict resolution on new (EEA relevant) EU acquis. The EU has never invoked Art. 102, EEA, always trying to employ persuasion or to find equivalence of legislation. The EU essentially holds that the problem has grown but refrains from using a term like 'intolerable' – instead it asks, in a question box, whether the Art. 102 suspension procedure should be launched in "some specific unresolved cases". From media reports, it is known that the Review refers to Norway. But the irritation about "lengthy negotiations and unproductive situations of public political controversy" in some EEA-EFTA countries (suggesting an "alleged imposition from Brussels" although the country itself is the culprit) is obvious.

v. EEA-3 participation in EU agencies. During the EEA negotiations, the EU hardly had EU agencies, and none in the regulatory domain. Moreover, the CJEU assumes a strict position here. The Review advocates a horizontal Agreement but avoids providing details. This issue is already important (see chapter 3) and is bound to grow more important in future, with the internal dynamics of the EU in single market and EMU questions.

vi. Strengthening the EFTA Surveillance Authority. The Review advocates strengthening, although it realises that ESA is not accountable to the EP or equivalent (as the Commission is) and not controlled by the EU Court of Auditors (except for financial control by the EFTA Board of Auditors). Strengthening would refer to the control, by ESA, of the application of the EEA Agreement and better monitoring.

It might be useful to underline that the Commission ignores or in any event does not explain two important reasons for the increasing backlog, its priority issue. One is that the regulation on the European Banking Authority (EBA) with stronger supervisory powers and the task of writing a common rulebook is (constitutionally) very difficult for the EEA-3 to swallow, as this more centralised agency will be able to exercise considerable influence on EEA-3 banks although the EEA-3 countries are not represented in the EBA, except as observers. As a result of this problem, a comet tail of subsequent EU (implementing) acts has become jammed in the EEA system. Second, the increasing number of EU acts that have 'direct

effect' (the sharp rise in the use of EU Regulations rather than Directives in the internal market; greater frequency of Decisions and some comitology legislation) causes queues in national EEA-3 parliaments (at least in Norway and Iceland) because their involvement is constitutionally required. It shows that deepening of the internal market becomes more cumbersome, if not close to intolerable, for the two-pillar structure to handle properly. There is also the suggestion that the EFTA side has a de facto delaying power "...with limited recourse for the EU" because it is the EFTA side that "is responsible for drafting the Joint Committee Decisions (JCDs) which introduce EU acts into the EEA Agreement". This presentation is curious, if not self-serving, since right from the start of the EEA, the EU has left the drafting to the EEA-3 (having a very strong interest in making the EEA work) and has never been willing to make available the resources for assuming systematically this work. The EEA-3 have set up a special EFTA-EEA secretariat in Brussels (see box on p. 50) that coordinates deliberations amongst the three and has built up a tradition of pro-active drafting of JCDs. The EU could have co-financed an EEA Secretariat and made available human resources together with the EEA-3; alternatively, the Commission could have shared the burden of drafting by alternating with the EEA-3 on, say, a half-yearly basis. All this is not to say that there are no genuine problems with the backlog - problems of domestic political resistance or sensitivity do exist and have worsened.

One can also understand that the EU is worried about the high number of adaptations of EU acts, representing around one-third of the total. Yet, most of these adaptations are institutional and are therefore embedded in such a two-pillar system, with at least formal maintenance of national sovereignty for the EEA-3. In any event, the overall backlog has gotten out of hand and measures have to be considered. The Review takes the position that, ideally, the 'large majority of acts' should enter into force simultaneously in the EU and in EEA-3. Interviews lead us to believe that the following suggestion lies behind this statement: an identical date of the entry-into-force for both sides, with a six-month extension to allow for the fulfilment of constitutional requirements in EEA-3 countries. Twisting the arm of the EEA-3 with legislative clauses decided solely by the EU internally is inconsistent with the nature of the EEA, no matter how important the backlog issue is. The EEA is based on an international treaty and each and every introduction of a new EU legal act into the annexes is formally a negotiation, followed by a JCD. The solution to render this system efficient and effective is the requirement of a 'homogeneous' (and

dynamic) (wider) internal market. And normally this works admirably well. However, the limit of this system is reached where national (EEA-3) constitutions have to be honoured. Until and unless these are adapted to make this possible, Norway and Iceland (and sometimes Liechtenstein) will need time to let their national parliaments decide. Such a system of strict deadlines would have to be voluntarily accepted by the EEA-3, with all the consequences at home for the introduction of fast-track procedures.

The EEA Review of the EU follows two reviews of the working of the EEA by Liechtenstein in 2010 (Government of Liechtenstein, 2010) and by Norway in 2012 (Government of Norway, 2012).¹⁴⁶ However, the Liechtenstein Review is about the first 15 years of Liechtenstein in the EEA and focuses on the domestic aspects; it is not about future integration strategy and contains no proposals to amend the EEA Agreement. Nor does the Norwegian White Paper make any proposal to amend the Agreement, although in the summary it says it is in the interest of the EU and the EEA EFTA states "to maintain and further develop the EEA agreement". The independent Norwegian EEA Review Committee report¹⁴⁷ stresses an important characteristic of Norwegian domestic politics about Europe: depoliticisation.¹⁴⁸ The White paper differs fundamentally from the Norwegian EEA Review Committee report in that the latter is frank and open in its analysis and suggests numerous improvements, some of which would imply amendments of the EEA Agreement, whilst the former is merely expressing praise and satisfaction, adding some open and general wishes on "further developing the internal market" and securing the participation "in EU agencies, supervisory bodies and other specialist bodies". The upshot is that the EEA Review by the EU will be the trigger to further analysis, consultation, negotiation, improvements of the EEA without treaty change and with possible amendments of the Agreement.

¹⁴⁶ Government of Norway (2012). The latter report is in Norwegian, but its key messages have appeared in English (www.eu-norway.org/news1/Norway-the-EEA-Agreement-and-Norways-other-agreements-with-the-EU/).

¹⁴⁷ Norwegian EEA Review Committee (2012); for selected chapters in English, see www.eu-norway.org/news1/Report-by-the-EEA-Review-Committee-Norways-agreements-with-the-European-Union/

¹⁴⁸ *Ibid.*, chapter 27, p. 8: "There is little reason to rock the boat. For some the memories of 1994 [a reference to the controversies around the referendum on EU membership, J.P & P.B.] still live with them, and it is feared that debates about the EEA and Schengen could revive fundamental tensions over EU membership."

Quite another matter is a series of queries about the enlargement of the number of EEA countries that one might envisage. Several of the subsections in this chapter relate to this general issue. In case the EU would find enlargement of the EEA suitable, it is sometimes held that the EU cannot formally achieve that in routine legislative proposals. Enlargement of the EEA-30 with non-EU countries would occur if, and only if, the four current EFTA states would first agree on the candidate country's EFTA membership (Art. 128, EEA). If correct, this legacy would maintain the curious power of Switzerland to veto enlargement of an association (the EEA) of which it is not a member, solely because the EEA was designed exclusively for EFTA at the time. However, a careful reading of Art. 128 does not confirm this widely held view: it merely says that EFTA members may apply, not that others might not. Anyway, this (supposed) power of veto can be removed by the EEA-30 of course, but it requires a revision of Art. 128 in a formal renegotiation with ratification. Lacking any progress in enlargement procedures of the EEA, the EU might eventually be faced with several parallel new frameworks for different (groups of) countries in Europe, which increases complexity, especially if they are heterogeneous. Having the EEA Agreement as an umbrella framework for countries in Europe wishing to be part of the internal market, would seem to be preferable for the EU, assuming of course that those countries are willing and able to be part of the demanding EEA.

4.3 Amending the EEA Agreement

In 2012 the EEA celebrated its 20th anniversary. The EEA provides for a solid and wide bridge of market integration between (currently, EFTA) countries not willing to accept supranationality and the non-internal-market *acquis* of the Union but keen to participate 'deeply' in the EU's market integration.

It was noted before that the EEA can be described as a stable and dynamic agreement at the same time. While dynamism refers to the steady development of the substantive scope of the EEA, month after month, stability of the EEA holds true in the sense that the main text of the EEA agreement has never been amended with regard to its institutional and procedural aspects.

This is remarkable, to say the least, keeping in mind that the basis of the EEA is the concept of the Internal Market dating from the period before the Treaty of Maastricht. At the same time, it is useful to realise that, conceptually and in terms of fundamental treaty provisions, the internal

market has hardly changed since the Single European Act,¹⁴⁹ even though the EU treaties have been amended with respect to values, institutional aspects and justice and home affairs. Nevertheless, after 20 years of intense experience with the EEA, one wonders whether a revision of the EEA is not becoming more and more urgent for the EEA-3 to keep up with the developments on the EU side of the agreement. In this regard, not only the question of the substance of such a revision is important but also what procedural method should be used to amend the EEA. Indeed, the EU Review of the EEA comprises three suggestions for substantive amendments of the EEA agreements: i) assuming a 'more comprehensive' approach by bringing in some bilateral agreements under a single framework - it should be noted that the Commission does not specify that 'a single framework' should be the EEA; ii) bringing under the EEA the EU policy on trafficking in human beings, if not more judicial cooperation and iii) opening the debate, not yet a proposal, on enlarging the non-EU EEA and doing away with the prior EFTA conditionality for EEA membership. The removal of this condition of course requires treaty amendment, too. We further investigate these questions below under 5.3 and 5.4.

4.4 Transforming Swiss-EU economic relations

The Council of the EU and the Commission insist on four major points, which together would surely transform Swiss-EU economic relations and bring the Swiss much closer to an EEA-like arrangement. First, the EU insists on an institutionalised procedure regulating the take-over of new EU *acquis* (insofar as covered in Swiss-EU bilaterals) including the case law of the CJEU. Second, an independent, preferably international surveillance mechanism should be installed. Third, the EU Council calls for an effective judicial enforcement mechanism for the bilateral agreements. Fourth, a tribunal serving as the final arbitrator in disputes concerning the bilateral agreements should be set up.

The Council also identifies several other points of contention, including the cantonal practice of preferential company taxation, which is incompatible with the EU competition rules (but it is contested whether

¹⁴⁹ For a comparison over time, see Pelkmans (2006, pp. 18 et seq). The major areas of deepening and widening of the internal market since 1992 did not require a revised EU treaty. The deepening and widening since 1992 is set out in Pelkmans (2011a and 2011b).

these rules apply). Furthermore, the incoherent application of the freedom of movement of persons agreement is brought up. A recent example is the re-establishment of quantitative limitations for certain categories of residence permits as regards EU citizens of eight EU member states (Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia and Czech Republic).¹⁵⁰ Last but not least, the cooperation and information exchange in tax matters and the fight against fraud and evasion in tax matters are also mentioned in the Council conclusions.

As a result the EU will take into consideration that “in assessing the balance of interests in concluding additional agreements, it will have in mind the need to ensure parallel progress in all areas of cooperation, including those areas, which cause difficulties to EU companies and citizens”. This essentially means that, if the structural questions of the Swiss-EU relationship are not resolved, no further substantial negotiations will be concluded. This need not have direct implications for Liechtenstein, depending on which dossiers are at stake, but it does not augur well for EU-Swiss economic relations.

The EU-Swiss relationship is of great concern to Liechtenstein. As noted, the Liechtenstein-Swiss economic relationship is a very close one. Some circles even consider it of greater importance to Liechtenstein than the relationship with the EU and its EEA partners. In any event, the transformation of Swiss-EU relations will be keenly watched by Liechtenstein.

4.5 Icelandic EU membership application

In July 2009, Iceland submitted its application for EU membership and formal accession negotiations were opened in July 2010. In October 2012, out of 33 negotiation chapters, 18 negotiation chapters were opened and 10 provisionally closed.¹⁵¹ By the end of 2012, 27 chapters had been opened and 11 closed. Many chapters do not require much adjustment, as EEA membership has already obliged Iceland to implement the bulk of EU internal market legislation into its national legal order. Furthermore, the

¹⁵⁰ See http://www.europarl.europa.eu/the-president/en/press/press_release_speeches/press_release/2012/2012-april/press_release-2012-april-10.html.

¹⁵¹ European Commission (2012b).

chapters "Science and Research" and "Education and Culture" are also more or less aligned.

Icelandic accession to the EU would matter to the EEA. The three EEA contracting parties would be reduced to just two, Norway and Liechtenstein. Some minor adjustments of the EEA would be inevitable (see 5.6). So far, the will to continue the EEA with just two members on the EFTA side is firm. A lingering thought, however, is whether this scenario is invariably always positive for Liechtenstein in the longer run. Huge differences in size, diverse economic interests, the geographical distance from one another and contrasting political traditions suggest that it might well be a somewhat artificial couple. One seasoned observer in the Brussels EU circuit opined (in an interview) that the departure of Iceland from the EEA would render Liechtenstein more vulnerable to the consequences of Norwegian domestic political sensitivities, more so than is already the case in matters like the backlog, for example. He added: "I would advise them to find a new friend."

It is unclear whether Iceland will finally decide to join the EU or not. Iceland sees its application for membership not as swapping it with EEA membership, but as a natural development in its European integration strategy. With the financial crisis hitting Iceland extraordinarily hard in 2008, the country was especially drawn to deeper integration with the EU given the euro. As EEA membership already integrated Iceland into the EU's internal market, there are not many policy areas left that are contentious. Fisheries, agriculture and regional cohesion are the big challenges in the negotiations with the EU.

An interesting aspect of Icelandic public opinion is that a majority of Icelanders support its government's decision to start accession negotiations, but there is nonetheless a rather strong majority against accession. This odd situation can be understood as giving the government the consent to assess the negotiation possibilities, especially to explore special arrangements and/or opt-outs in case of Icelandic membership.

Political parties show little enthusiasm for EU membership. Within the present government coalition, only one of the two parties supports membership. The upcoming Icelandic parliamentary elections, scheduled for April 2013, might see the centre-right party coming back into power.

According to recent opinion polls held in October and November 2012, only 36% support the upholding of the EU membership application while 54% are in support of scrapping the application, while 10% are

undecided.¹⁵² When it comes to EU membership itself, 58% oppose it and just 27% support it, while 15% are unsure.¹⁵³

4.6 The AMS countries and European integration

The European countries 'with small territorial dimension' or 'small-sized countries', as the EEAS calls them, Andorra, Monaco and San Marino (AMS) are currently in a process of re-evaluating their European integration strategy. Their ambitions vary from full EU membership, to EEA membership or an EEA-like structure all the way to sectoral integration.

The AMS countries are often seen as similar given their common characteristic: very small size. Nevertheless, they are quite different, not only in their integration prospects but also in their structures. Indeed, they also differ from Liechtenstein, in particular in the structure of their economies and the (lack of) experience in detailed market integration. The differences in the structure of their economies would seem to call for individualised solutions for each of them. Table 1 shows that the AMS countries have a number of similarities with the EU and Liechtenstein, facilitating the process of 'deeper' economic integration to which they now aspire. However, the table also lists a series of differences with Liechtenstein, some of which matter a great deal when embarking on closer integration: the AMS are not in the EEA and do not have a high degree of internal market *acquis* adoption (and this without EU surveillance); the three are not industrialised (a lot of *acquis* is relevant here) in contrast to Liechtenstein; and they are not members of the Schengen area. Moreover, their current customs union arrangements might make the EEA option (in case one would pursue this) rather complicated unless the EFTA requirement were dropped.

¹⁵² See <http://www.mbl.is/frettir/innlent/2012/11/12/fjlgar-sem-vilja-afturkalla-esb-umsoknina/>).

¹⁵³ See <http://heimssyn.is/um-80-kjosenda-sjalfstaedisflokks-og-framsoknarflokks-andvigir-esb/>).

Table 1. Similarities and differences between Liechtenstein and AMS countries

	Liechtenstein	Andorra	Monaco	San Marino
SIMILARITIES				
1.	Very small size	Idem	Idem	Idem
2.	Good relations with EU	Idem	Idem	Idem
3.	Values in common with EU	Idem	Idem	Idem
4.	High income p.c.	Idem	Idem	Idem
5.	UN and Council of Europe membership	Idem	Idem	Idem
6.	Specialising in financial services	Idem	Idem	Idem
7.	Savings tax agreement with EU	Idem	Idem	Idem
DIFFERENCES				
8.	FTA with EU	CU with EU	CU with France	CU with EU
9.	Highly industrialised (with 42% of GDP)	More agricultural than industrial	Industry small	More agricultural than industrial
10.	Tourism not important	Tourism key	Tourism key	Tourism key
11.	Currency Swiss Fr	Euro	Euro	Euro
12.	EEA member, with IM <i>acquis</i> for 18 yrs	IM <i>acquis</i> adoption only selective; no monitoring; no independent enforcement	Idem, except some <i>acquis</i> via France	Idem
13.	Member of Schengen area	No	No, but visa-free via FR	No, yet no border controls between Italy and San Marino
14.	Member of WTO	No	No	No

The European Commission is currently reflecting on an EU strategy to better integrate the AMS countries into the EU internal market. According to interviews conducted in early 2012 in Brussels, the most likely legal structure might be a framework agreement, providing the institutional set-up, completed by three country-specific protocols. These protocols will most likely contain different parts of the EU's internal market *acquis* to provide for the most efficient integration possible, especially in the light of the limited administrative capacities of the countries. However, this remains speculation. The Commission has meanwhile published a paper¹⁵⁴ with five options for the AMS. The first one, maintaining the status quo, is rejected. This is obvious when the AMS are clearly seeking deeper integration and the EU has shown to be receptive. The second one is a sectoral approach, and exactly one that the EU has found too complicated and lacking legal certainty in the case of Switzerland. Indeed, the Commission rejects this option, too. The third option is a framework association agreement, the fourth is participation in the EEA and the fifth, EU membership. In chapter 5, the two, what the Commission calls, "viable" options will be discussed under, respectively, 5.4 and 5.5. EU membership, a 'long-term possibility' for the AMS, is discussed for the case of Liechtenstein in 5.10, given the first-ever opening for small-sized countries in a Commission document.

4.7 Turkey

2013 marks the 16th year since Turkey applied for EU membership. Since the Helsinki European Council in 1999, Turkey has been an official candidate country for EU membership. Its pre-accession status, which should come with a further deepening of economic integration accompanied by the gradual realisation of the required domestic reforms and appropriate market institutions, as well as the on-going negotiations of the 35 chapters for accession, are beginning to lose credibility. Only one of 35 chapters has been provisionally closed and the 2012 progress report is anything but stimulating reading.¹⁵⁵

Too little pre-accession and EU preparation is taking place, despite the hopeful beginnings a while ago. The political impetus inside the EU has weakened considerably, with sensitivities about the practical implications

¹⁵⁴ COM (2012) 680 of 20 November 2012, see European Commission 2012c.

¹⁵⁵ See European Commission (2012d).

of a less secular and more conservative Muslim society, possibly about the mere size of the country, about the stagnation of human rights reform, about the slow pace of structural and economic reforms after an initially promising start and about the lack of political will to resolve the Cyprus question. It is also true that the ambitious (e.g. technical harmonisation) annexes of the 1995 EU-Turkey Customs Union, in force since 1996, have not yet been fully implemented or, in some respects, just partially or not at all.

The political resolve in Turkey has also waned given the Arab spring and Turkey's strategic interests in the region, the beginnings of the Black Sea cooperation, the active interest it takes in economic relations with East Asia (Turkey is courted by several East Asian countries, including Indonesia, to conclude free trade areas), the recurrent political strains in high-level political relations between the EU (or, indeed, EU countries) and Turkey and, not least, the apparently lower priority of still deeper economic integration with Europe, beyond the appreciable accomplishments of today, since Turkey has enjoyed healthy economic growth before and even during the crisis.¹⁵⁶

The frustration on both sides and the sombre prospects of a success once referenda would be held on Turkish membership, have long prompted calls for what is termed a 'privileged partnership'. It is hard to give concrete meaning to this idea because sceptical leaders (like Angela Merkel and Nicolas Sarkozy, to mention the two most prominent ones) are prudent enough not to define it, whereas Ankara (indeed, the country as a whole) rejects it firmly. This seems justified: how can one be a candidate country for EU membership, with a clear route travelled by many candidates before, and nevertheless be presented with a (less!) privileged 'partnership' instead? However, this does not deter some observers and politicians from suggesting the EEA as a model for such a partnership (see also 4.1). These suggestions are usually driven by the simplistic idea that the EEA is about deep economic integration without EU membership, without showing much of an understanding of how the EEA really works and how demanding it is in terms of *acquis* adoption and enforcement. It is crucial for the EEA-3 to clarify, in no uncertain terms and long before

¹⁵⁶ On average, real annual economic growth has been 4% since 2005, implying steady catch-up with the EU per capita income. Lately, economic growth seems to be petering out with a mere 1% in 2012 and a similar growth rate expected for 2013.

European politics might drift towards this 'partnership' with Turkey for reasons of convenience, what it takes to be an EEA member and what this must mean for Turkey as well.

4.8 EEA membership for European neighbourhood countries?

The European Neighbourhood Policy (ENP) was developed in 2004, in an attempt to avoid the emergence of new dividing lines between the enlarged EU and its neighbours. It aims to strengthen ties instead, thereby supporting prosperity, stability and security for all. The ENP framework covers 16 of the EU's closest neighbours – Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine. However, it is a bilateral policy between the EU and each one of the mentioned partner countries, complemented by regional and multilateral cooperation initiatives, such as

- the Eastern Partnership (launched in Prague in May 2009),
- the Union for the Mediterranean (UfM), the Euro-Mediterranean Partnership, formerly known as the Barcelona Process, re-launched in Paris in July 2008) and
- the Black Sea Synergy.

Within the ENP, the EU offers its neighbours a privileged relationship, building upon a mutual commitment to common values including democracy and human rights, rule of law, good governance, market economy principles and sustainable development. The ENP goes beyond existing relationships by offering political association and deeper economic integration, increased mobility and more people-to-people contacts. The level of ambition of the relationship depends on the extent to which these values are shared.

The ENP remains distinct from the process of EU enlargement although it does not prejudge, for European neighbours, how their relationship with the EU may develop in future, in accordance with treaty provisions.

In contrast to the EEA, the ENP has a broad political agenda stimulating the ENP countries to develop domestic structures and norms to live up to the high standards of the EU in fields beyond economic relations, such as fundamental rights, good governance, the rule of law and

democracy. This political ambition is accompanied by the establishment of a (bilateral) “deep and comprehensive free trade area with a view to providing for gradual integration into the EU’s internal market”.¹⁵⁷

However, this gradual integration into the internal market has to be ‘read’ properly and cannot be compared to the EEA. The initial Communication of the Commission merely foresaw a “stake in the internal market for the ENP countries”.¹⁵⁸ Moreover, the envisaged association agreements will most likely include “best endeavour-clauses,”¹⁵⁹ far away from the strict, rule of law-based internal market legal order provided for by the EEA.

These differences are not the result of discrimination from the EU-side of the ENP country against the EFTA countries. Rather, the ENP countries are structurally not yet fit to take part in a homogeneous internal market, based on the EU *acquis*. This might change in the decades to come. One country trying hard to mimic far-reaching market liberalisation is Georgia. With Ukraine, an FTA has been agreed but not yet signed (pending i.a. on more humane treatment of the jailed former prime minister). It is conceivable in future that progress would become impressive enough for the EEA to begin to be considered as an option. But it is good to remember what the Commission writes in the EEA Review. After first stating that the EEA has proven to be a well-functioning means to extend the internal market and certain EU policies “to the three EEA EFTA states with advanced legal systems and a high level of development”, the Commission adds that “EEA participation requires a legal and economic capacity to assimilate and implement correctly a substantial volume of EU legal acts” (European Commission, 2012a, p. 17).

4.9 EEA implications of the recent ‘inner dynamics’ of the EU

Ever since 1995, the substance of the EEA has grown enormously, altogether with some 7,000-plus EU acts or decisions or recommendations

¹⁵⁷ Joint Press Statement, 14th EU-Ukraine Summit, 16691/10, PRESSE 312.

¹⁵⁸ Communication from the Commission to the Council and the European Parliament, “Wider Europe – Neighbourhood: A New Framework for Relation with our Eastern and Southern Neighbours”, COM(2003) 104 final, p. 4.

¹⁵⁹ Hillion (2011, p. 11).

with 'EEA relevance' included in annexes. Despite three treaty changes, the scope of the internal market treaty rules has remained practically the same. Since the financial crisis, a renewed 'deepening' of EU economic integration can be observed, which goes beyond previous developments in the field of the internal market. We refer to the on-going attempts of the EU, de-facto led by the eurozone, to build up a more coherent and effective Economic Union, underpinning the monetary union, but at the same time improving the internal market for financial services and its proper functioning. Indeed, for a while (say, between late 2008 and spring 2011), the EU response to regulatory gaps and failures as well as the neglect of financial stability (giving rise to systemic risks via contagion) consisted of the strengthening of the (prudential) regulation of financial markets whilst extending rules and supervision to market players and activities thus far having remained unregulated (such as derivatives without a counterparty, credit rating agencies, equity and hedge funds managers, corporate governance of banks and bonuses, etc.). New EU institutions were set up such as EU agencies (called Authorities) for supervision of banks (EBA), insurance and securities as well as a European Systemic Risk Board (ESRB). The new agencies represent a modest degree of centralisation, with some marginal power to decide in case of conflicts between national supervisors. This has proven difficult to digest for the EEA-3. Indeed, Norway and Iceland argue that this set-up generates significant constitutional problems for them. When this study was concluded, the EU and the EEA EFTA states had still not resolved the participation of the EEA-3 in the EBA. In any event, Liechtenstein seems ready to accept the new architecture for supervision of banks, insurance companies and securities firms. The ESRB probably does not pose a fundamental problem as it remains an advisory organ with analytical, reporting and (soft) warning duties. On the contrary, the ESRB can be regarded as an improvement of the governance of EMU and the EU-27-wide economic policy coordination under Art. 121 TFEU, which can only benefit the EEA-3 as well.

A tougher challenge appeared with the debates on an effective EU bank resolution regime, possibly with an EU deposit guarantee system (that is, a centralisation compared to mere EU regulation of national systems) as well. For bank resolution to be effective, it needs to be capable of rescuing or splitting up (in good and 'bad') banks, and in particular those operating transnationally and/or otherwise posing dangers of

contagion.¹⁶⁰ In turn, for credibility and readiness, this requires EU *bank* rescue funds (not to be confused with the European Stability Mechanism or ESM, which is meant for sovereign risks of eurozone *countries*), which do not exist and for which there is, as yet, no legal basis. Stronger yet, such resolution has traditionally been reserved for national treasuries, backed up by 'national fiscal capacity', in other words by national taxpayers, a capacity that the EU level does not have. Moreover, it opens the possibility that EU authorities and not national ones would decide to seize control of a failing bank, a highly sensitive issue. Such centralisation sits uncomfortably with the EEA approach, if it can be made compatible at all. One can have endless conversations about what 'sovereignty' is and is not, especially given today's profound economic interdependence, but it is exceedingly hard to argue credibly that the ultimate sacrifice of national control over banks when failure is imminent, does not undermine a core principle of the EEA Agreement (two-pillar structure). Therefore, if it would turn out that the Single Supervisory Mechanism (SSM) would apply EU-wide over the entire internal market – the economically sound position – EEA participation in the ECB bank supervisor, in one form or another, would be a 'must'.

In the course of 2012, this debate intensified in the light of the sovereign debt crisis in the eurozone. The upshot is likely to be an outcome that renders it even more difficult for EEA-3 countries to make it compatible with the two-pillar system.¹⁶¹ The newest proposals have

¹⁶⁰ For example, a domestic bank which maintains a portfolio of sovereign bonds, some of which might be risky, or which has extended its investments to risky ventures in other EU countries during a 'bubble'.

¹⁶¹ The central problem in this crisis is the vicious interaction between weak banks and weak sovereigns in the euro area. It looks like a throttling embrace. Many banks in the relatively unproblematic countries of the eurozone hold portfolios of sovereign bonds from problematic countries in the same eurozone (partly, as their higher risk ensures higher interest rates earnings). And they cannot be sold for a good price. The upshot is that the weakness of such banks is a direct function of the probability of debt restructuring of the weak eurozone countries. In the extreme, one may say that Greece's debt restructuring cannot be pursued, although it would be rational, simply because such banks (e.g. in France, Germany and other euro countries) would lose enormously. A fortiori, this is true for Spanish or Italian banks, not to speak of Greek banks loaded with Greek bonds. With the obligation of strengthening own bank capital under new rules beginning in 2013, deleveraging is pursued vigorously by banks, which further increases the anxiety

become known as the 'banking union'. The 'banking union' is not a eurozone but an EU proposal, consisting of three closely related elements: i) common, centralised supervision of all (6,000-plus) banks in the EU, with national supervisors in a subordinate role – this goes much further than the EBA; ii) a single EU bank resolution authority and iii) an EU-wide deposit insurance system, pre-empting bank runs and reducing savings or capital flight between EU countries, whilst yielding bank-paid EU funds over time for bank resolution. The coherence of these proposals makes them credible, but at the same time, quite radical for some EU countries (mostly, outside the eurozone, albeit Germany does not favour the common deposit insurance system – yet – and e.g. France has some reservations about bank resolution). However, for the EEA-3, this is irrelevant when it comes to strategic reflection about future integration strategies. Liechtenstein will have to position itself, because if the Liechtenstein banks (and other EEA-3 banks) were not to fall under the banking union, it would mean nothing less than that the internal banking market would no longer be a single one. The main query is whether and to what degree, two supervisory systems can be maintained without differential effects on rating, distinct effects in terms of competition and uncertainties in the case of crisis. Rescuing a bank with national state aid has proven to be a clumsy, if not unsuitable approach, yet this would be the consequence of not resorting under a common bank resolution regime, belonging to the banking union. These effects will be less problematic, the more uniform the so-called common supervisory rule book – which is being written by the EBA at the moment – will be.

There is an even more grandiose 'vision' pronounced by Council President Herman Van Rompuy: the banking union would have to be regarded as one of four 'unions' together completing a new and effective EMU, or better, the E of EMU. These other three unions are: a fiscal union for the eurozone (but open to other EU countries), a 'competitiveness' union and a 'political union'. We think it is useful for Liechtenstein, Norway and Iceland to follow these new ideas closely as they might affect, directly or indirectly, the details, working and economic effects of the EU internal market. The problem is that it is still early days in these developments and their long-run implications are not yet clear. The four 'unions' add up to an admittedly elegant exposition of what it takes to have

about this vicious interaction. This is the compelling background for the newest proposals set out in the text above.

an effective and credible EMU, with political legitimacy. It is conceivable that some elements of these 'unions' might eventually develop in ways, which might affect the EEA as it stands, but there would seem to be no immediate issue. It should be noted that the fiscal union basically exists since the so-called 'six-pack' decision in the autumn of 2011, the integration of national fiscal conduct in the European Semester of economic policy coordination and the recent new treaty – an intergovernmental one, ratified by eurozone and some non-euro countries, but leaning on EU rules – called the Treaty on Stability, Coordination and Governance (of 2 March 2012). The so-called 'competitiveness union' or the 'political union' might have been communication labels, but little has been heard from them since. They would seem to entail no consequences for the EEA as far as we can now grasp.

5. THINK STRATEGY: ASSESSING ALTERNATIVE OPTIONS FOR LIECHTENSTEIN

5.1 Introduction

Given the many actual or possible changes in Liechtenstein's strategic environment, as sketched in chapter 4, the present chapter discusses nine options, several with sub-options. The various options are not always exclusive: in some instances, (sub)options can be applicable simultaneously. The aim of analysing so many options is mainly to facilitate strategic thinking on the part of Liechtenstein's political leaders, the public administration, public opinion and opinion leaders with respect to the Principality's positioning in European integration in the near and mid-term future. We venture to add that the present analysis might also help to structure, and perhaps clarify, the ongoing debates in the 'EU circuit' in Brussels and national capitals. In this sense, it can also be regarded as a contribution to the EEA Review, which the Commission and the EEAS initiated in December 2012.

For Liechtenstein as a country and the few non-Liechtenstein observers who are knowledgeable about the country's positioning in European integration, a considerable part of the following scenario-based analysis is not entirely new, or, at least, it could be retrieved from the work of scholars or documents. Indeed, the prospect of the Oslo Process of EU-EFTA negotiations (24 years ago) and the emergence of the EEA already prompted three government reports discussing several strategic choices for the Principality (Government of Liechtenstein, 1989; 1992a about the EEA; 1992b about EU membership). Because more than a generation has passed since those days, it seems worthwhile to re-iterate the main points against the backdrop of the current accomplishments and the dynamics of Liechtenstein's strategic environment. In addition, the present chapter is based on a much wider spectrum of options. The authors also wish to refer to a recent contribution of two authoritative Liechtenstein scholars in a rich paper [Frommelt & Gstoehl, 2011] requested by the Norway EEA Review

Committee. This study is most helpful in many ways. It also contains lots of little known data and analysis on e.g. the backlog and some other aspects of the EEA-3, with an emphasis on Liechtenstein. Our strategic approach is considerably wider, however. Another important difference is that the European Commission has meanwhile issued critical papers on the AMS and on the EEA (European Commission, 2012c and European Commission 2012a) whilst the Council of Ministers of the EU has also expressed its (still prudent) view.

A central problem of any strategic analysis of this kind is whether and to what extent one considers options as relatively limited changes of the status quo, or, more daringly, one is also willing to explore politically more radical scenarios. When it comes to relatively limited changes of the status quo, it is reasonable to expect a broadly accommodating attitude of countries and/or the EU, possibly with some frictions about special derogations or the opposite, extra 'opt-ins'. This seems reasonable because the homogeneity of internal market rules, rights and obligations is essentially a functional concern, and because the hegemon, anchor and magnet functions of the EU (and its internal market) remain attractive for all European countries and even slightly beyond. If selective issues arising from the internal market *acquis* are truly sensitive, some kind of accommodation will eventually have to be found, perhaps at a price. The same goes for institutional extension to include for example Switzerland.

But more radical or 'unwelcome' scenarios should not be excluded a priori, if one wishes to 'think strategy'. As illustrations, it is worth considering *less* and not only *more EEA*, a modest degree of splintering of the EU (with Britain – not Scotland – exiting the EU and renegotiating some kind of market access agreement; also, what about potential independence movements of Catalonia and Flanders, although – if ever they would become 'countries' and separate states – they would wish to remain or indeed 'become' EU members), a withdrawal of the Turkish candidacy for EU membership (hence, alternative ways to access the EU internal market) and, increasing tensions between the eurozone and the 'outs', the non-euro countries of the EU. What these far-fetched and very different scenarios have in common is '*high politics*' rather than a functional approach of problem-solving given the lure of major economic benefits. For Liechtenstein, the functional approach and the reliance on treaties and the rule of law is much to be preferred. The more radical scenarios might be seen as 'out of the box' and disturbing. However, as long as the EEA would remain, Liechtenstein could afford to remain an innocent bystander, watching the political turbulence from afar. This could work in the case of

Turkey's withdrawal from pre-accession as long as it would opt for a weak bilateral instead and not for an attempt to join the EEA. It is also likely to happen if the EU might fragment by some regions going independent, yet wishing to stay inside the EU anyway. In the case of a British exit, implausible as it would seem today, Liechtenstein might simply join the EU response on a new market access agreement. Its experience and good performance in the EEA might be of help in case Britain would wish to accede an enlarged EEA. However, one cannot take for granted that, were Britain to accede the EEA, the EEA would not be transformed *de jure* or *de facto*, and whether such a change would be beneficial for Liechtenstein is impossible to judge at the moment. The scenarios of 'less EEA' and frictions between the eurozone and the 'outs' (at least, if these would result in adverse effects for the proper functioning of the single market) might be worrying for Liechtenstein. At the moment, it is in particular the construction of the 'banking union' that should ensure better (European) supervision of banks all over the single market and - in the supposedly rare occasion of a bank failure - the EU supervisor (the ECB) would act both instantaneously and with direct intervention powers to solve the consequences (i.e. bank resolution) with the help of EU rescue funds and without adverse implications for taxpayers, savers and/or systemic risks. But the details of this sound idea turn out to be difficult to agree inside the eurozone as well as between EU eurozone and (at least, some) non-eurozone countries. Both the options of 'less EEA' and 'more EEA' may or may not be worrisome, depending on the form and substance of each one of them.

In Table 2 we summarise the nine scenarios/options and sub-options that we consider important enough to reflect upon: status quo, more EEA, enlarging the EEA, EEA-bis and EEA-tris, less EEA, bilateralism, more EU, less EU via core and 'others' as well as exit, and Liechtenstein joining the EU.

Table 2. Scenarios/options for Liechtenstein's integration strategy

No.	Scenario	Requirements
1.	Status quo EEA	Status quo, no change necessary
1.a	Status quo-plus EEA	No treaty change; better managing the EEA (reduce backlog); address specific items (e.g. EEA relevance)
2.	'More EEA' (treaty change)	Extension of scope/substance; tighter procedures

3.	(Non-EU) EEA enlargement	Switzerland (no treaty change); other new members via EEA Treaty change (or, possibly, EFTA Treaty)
4.	EEA-bis, or, more parallel EEA look-alikes	4.A for Switzerland; 4.B for AMS countries; 4.C for Turkey; 4.D for advanced neighbourhood; 4.E for the UK minus Scotland
5.	Less EEA	Scope of EEA reduced (via Art. 102 or treaty change)
		EEA-2 (after Icelandic accession to the EU)
6.	Bilaterals on single-market-minus	For the UK, minus Scotland; perhaps EEA-3 countries, Switzerland, Turkey, AMS and neighbourhood. The key question is: what differences with 4?
7.	More EU deepening	Especially Single Market, its governance, including the banking union – Can the EEA absorb this change?
8.	Less, or differentiated, EU	Reducing scope of substance (opposite of ‘widening’) or ‘variable geometry’ (e.g. euro ‘ins’ vs ‘outs’)
		EU countries exiting (opposite of ‘enlargement’); corollary >> options 4 or 6 for ex-EU country?
9.	Liechtenstein joining EU	Although <i>not</i> current policy, adverse scenarios might prompt a U-turn – Can the EU accommodate a small-sized country? And can Liechtenstein handle it?

5.2 Status quo: If it ain’t broke, don’t fix it

Chapter 4 has shown that there is a lot of flux in the strategic environment of Liechtenstein. Nevertheless, the EEA-3 are quite happy with the EEA and so is the EU. The Governments of Liechtenstein¹⁶² and Norway¹⁶³ have

¹⁶² Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend 15 Jahre Mitgliedschaft des Fürstentums Liechtenstein im

clearly signalled this and the European Council Resolution of December 2010 is full of praise of the EEA and the EEA-3. The Council Conclusions of 20 December 2012 essentially repeat this, underlining the 'priority' of reducing the number of outstanding legal acts (see 4.2). So, why 'fix', i.e. amend, the EEA when there would seem to be little urgency and the minor irritations or drawbacks might be accommodated otherwise?

Although there is undoubtedly merit in merely enjoying the secure and beneficial status quo, Liechtenstein's environment might not allow it due to changing circumstances. A first option, avoiding the cumbersome or somewhat risky route of treaty amendment, is what we call the '*status-quo-plus*' (see below in 5.2): functional solutions of current issues in the EEA such as better managing the incorporation process (less backlog) and addressing institutionally the question of determining what EU legislative proposals are 'EEA relevant', both firmly *within* the context of the existing Agreement. EEA Agreement annexes have also been amended with EU legal acts in domains that fall outside the formal EEA remit, showing a highly pragmatic flexibility and pointing to considerable discretion to 'develop' a status quo-plus without much ado. Another possibility is that the EU and/or one or more EEA countries might wish to propose a controlled and limited EEA Treaty revision about the substance, institutions and procedures, pre-empting a Pandora-box effect via a tightly circumscribed mandate (see 5.3). This could come about, say, because the Icelandic application for EU membership might fail or because scepticism about the EEA in Norway might be growing to intolerable levels and the government would feel compelled to act. The latter possibility could mean a modest amendment of the EEA ('more EEA') or perhaps even what we call 'less EEA' (see 5.6). As noted in 4.3, the recent Commission EEA Review suggests two possible amendments of the substance of the EEA Agreement (both 'more EEA').

Europäischen Wirtschaftsraum (EWR), No. 17/2010, accessible on http://www.llv.li/amtsstellen/llv-sewr-dokumente_publicationen-ewr-abkommen/llv-sewr-dokumente_publicationen-veroeffentlichte_berichte_und_antraege.htm.

¹⁶³ Norwegian EEA Review Committee (2012), "Outside and Inside, Norway's agreements with the European Union", accessible in Norwegian at <http://www.regjeringen.no/en/dep/ud/documents/nou-er/2012/nou-2012-2.html?id=669368>. Even more so, the Norwegian White Paper of October 2012 (see Government of Norway, 2012).

Another reason for not allowing the status quo might emerge from Switzerland. So far, Switzerland has responded very prudently to the critical December 2010 Council view. That might well be a function of the cordial relations between two partners. The EU has exercised pressure via the freezing of some dossiers (e.g. electricity interconnectors and related issues), but it is not excluded that firmer insistence will be observed soon. Once EU pressures become serious, the Swiss might begin to compare the EU proposals with other options (such as joining the EEA, see 5.4) and this might be seen by the EU as well as Switzerland and the EEA-3 as an occasion to go for a limited revision of the EEA as well. The EU would probably welcome Swiss EEA membership since it solves the Swiss bilateral problem in a sound fashion and would better justify the demanding EEA processes. Of course, if the Swiss would wish to join the EEA, the complications of the Liechtenstein-Switzerland market integration are likely to be reduced and this would be welcome. Much less probable but not impossible is Swiss EU membership, a fall-back option still toyed with in Switzerland by some political factions in the federal government and the cantons. Swiss EU membership would reduce the complexities now inherent in 'trilateralisation', but that is probably much less important than Liechtenstein being forced to rethink its options in such an event. With the Swiss going into the EU, Liechtenstein might be tempted or feel compelled to join the EU together (5.10), but it would thereby incur the considerable costs of EU membership (for a small-sized country) and, at the same time, feel uncertain how quickly and under what terms the EU would be willing to accommodate such a small country, in particular, institutionally.

In some scenarios, it is costly to stick to the EEA Agreement when it comes to enlargement. Thus, when considering treaty amendment, the question of what non-EU countries can join the EEA (enlargement¹⁶⁴) demands attention (5.4). The EEA has no articles on enlargement with non-EU countries, besides the possibility for Switzerland to opt in as EFTA member. The Agreement does specify, as noted in 4.3, that (other than EU

¹⁶⁴ For readers only reading chapter 5, it is useful to clarify three terms, as the literature and the EU circuit is not always unambiguous in terminology. 'Deepening' a given domain of the *acquis* refers to firmer commitments, fewer exceptions of this accepted *acquis* domain and tougher (or speedier) procedures. 'Widening' refers to scope (i.e. which domains are added to the *acquis*) and not to the number of countries. The latter falls under the label of 'enlargement'.

countries) EFTA states can apply. Keeping this element of the status quo has become questionable. Even the European Commission in its EEA review speaks of "... some merit for engaging in further reflection on the advantages and disadvantages of enlarging the EEA Agreement or enlarging the geographical coverage of the EEA".

Nor might the status quo be preferable in the case of the AMS countries, and possibly not in the case of Switzerland. The AMS countries might end up in bilateral approaches, given their differences and distinct preferences (see 4.6), but the EU would find this less than preferable. For the moment, two of the five options in the recent Commission AMS options paper¹⁶⁵ are seen as 'viable': participation in the EEA or a framework association agreement, which one might call 'EEA-bis' for simplicity. However, this option can also be read in the December 2010 Council conclusions for Switzerland; this could be denoted as "EEA-tris" (see 5.5). In 5.5 and 5.7, various EEA look-alikes are discussed and compared with the option of going bilateral for these countries as well as for Turkey (if opting for EEA membership or an EEA look-alike) or, eventually, for advanced neighbourhood countries. Recently, it has become clear that the domestic debate inside the United Kingdom has led to some discussion about the EEA or EEA look-alike options (e.g. Buchan, 2012).

It might also be difficult to maintain the status quo if the deepening of the EU single market (especially, the banking union, but possibly also moves towards more independent EU agencies in network industries) would be pursued with gusto (5.8). On the other hand, there are euro-sceptical voices in the Union calling for a reduction of scope, that is, the opposite of 'widening' (for instance, some substantive powers on selective labour market regulation should be 'returned' to the member states) or for more 'variable geometry', which are likely to affect the EEA *acquis* (5.9, 'less EU', perhaps in combination with 5.6). Of course, 'less EU' taking the form of an EU country leaving the Union is of direct concern to the EEA-29 ; what matters perhaps just as much is the subsequent step - would that country opt for the EEA (5.4), an EEA look-alike (5.5) or a bilateral agreement (5.6)? Finally, the option of Liechtenstein joining the EU, even if remote today, might become more realistic in some scenarios such as a Swiss desire to join the EU or (say) Icelandic EU membership in combination with Norway going bilateral.

¹⁶⁵ See European Commission (2012c), as quoted in 4.6.

For all these reasons, the status-quo should not be taken as a given. More likely than the status quo in its current form is the ‘status quo-plus’. The status quo-plus cannot be firmly defined in substantive terms, precisely because it presupposes new initiatives to change practices, introduce new procedures and amend annexes in a highly pragmatic way (as the EEA-3 has already done several times, e.g. introducing effective national criminal sanctions that were never envisaged to be part of the Agreement). Thus, the status quo-plus may well be a dynamic but somewhat ad-hoc route to reduce practical problems in the functioning of the EEA as they arise. What *can* be done is to give a few examples of current issues that might be resolved without the overly heavy (and risky) amendment of the EEA Agreement itself.

The EU Review of the EEA is summarised in 4.2. Issues to be resolved or lubricated under a ‘status quo-plus’ approach may include the following four:

- i. *Judicial cooperation, including on terrorism, serious crime and police cooperation.* The EU Review speaks of “how to address heightened interest by EEA EFTA States” in this area which might point to the status quo-plus approach. It finds it important “to include the policy on trafficking in human beings in the EEA Agreement” and adds that there is a need “for a coherent approach”. Given the two-pillar system and precedents, this formulation does not necessarily imply (only) amendment of the Agreement; it may also be solved by incorporation in the annexes, because national parliaments can agree beforehand.
- ii. *The serious omission of not having any organized coordination of which EU legal acts are “of EEA relevance”.* This oversight should be addressed under the status quo-plus approach. Of course, the present ‘omission’ has the advantage that the EEA-3 can mark an EU legal act as EEA relevant, even when the EU does not, so that the three can bring it into the annexes. Thus, the EU could assume a ‘benign neglect’ attitude (as it has so far) whenever the EEA-3 would align their legislation to EU legal acts, even when the EU has not denoted it as “EEA relevant”.¹⁶⁶ Should the opposite happen or be expected,

¹⁶⁶ It is not entirely clear what the EU’s attitude is: benign neglect or disapproving. The EU Review notes that “no analysis has been undertaken so far by the EU side to verify to what extent the *acquis* in the flanking sectors has been incorporated. Consideration should be given to whether the EU should carry out a systematic

however, a procedure with pre-agreed criteria ought to be employed in which both sides can discuss the matter and the probable consequences. The difference of view can be the consequence of (what the EU Review calls) 'grey areas', precisely where the criteria should help the parties to agree, or result from the lack of 'one EEA-3 voice'. Different views can emerge from the correct observation that the division "between the four freedoms of the internal market and flanking sectors [...] has become more permeable and the inter-linkage between the two has [...] increased". The flanking sectors¹⁶⁷ are not considered part and parcel of the internal market, only considered 'relevant to the four freedoms', which reflects a legalistic (rather than a conceptual economic) approach to the internal market in the Agreement. Moreover, why only five such sectors? Such a narrow legalistic approach sits uneasily with the deepening and widening of the internal market, which is fundamentally the result of the functional inter-linkages (whether inconsistencies, omissions, complementarities or distortions, etc.), which market participants experience. It might be that EEA negotiators two decades ago wanted to delineate in fairly exact legal terms the borderlines of the internal market and call that the 'internal market'. This is largely based on the four freedoms – whereas the internal market is by definition an economic concept and has to be defined more widely in order to avoid drawing arbitrary demarcations. For sound economic reasons given the ultimate EU treaty objectives, what really matters to serve these objectives with its most prominent 'means', the single market, is that the internal market functions properly, as recognised in the treaty from the beginning. For the EEA to be truly 'homogeneous', it is the combination of the establishment *and* the proper functioning of the internal market, which matters for prosperity, growth and other

scrutiny of the assessment of 'EEA relevance' of EU acts by the EFTA side in general and whether it should assess the current scope of incorporation of EU *acquis* outside the internal market into the EEA Agreement, resources permitting" (p. 5).

¹⁶⁷ Called "horizontal provisions relevant to the four freedoms" (Part V, EEA), there are five: social policy, consumer protection, environment, statistics and company law.

economic EU goals.¹⁶⁸ Indeed, this is the thrust of what the EU itself has been doing. The almost permanent dynamism of deepening and, to some extent, widening, of what is often informally denoted as the single market is driven by the functional logic of spill-overs and interdependencies between markets and/or policy domains, which simply by-passes any too narrow legal fixation.

Still, the question is not always functional. Disagreement between the EEA-3 countries can also occur. It may be caused by domestic political constraints in (say) one country, a problem presumably not encountered in the other two. Experience has shown that this rarely happens, but when it does, a procedure on 'EEA relevance' should not be expected to resolve the problem, unless the EU would invoke Art. 102 and non-incorporation would entail a cost for the unwilling country as well as for the other two EEA countries. The Review is explicit in calling for a "response strategy" in such cases, breaking the taboo on the recourse to Art. 102.¹⁶⁹ Coming close to an overt threat, the Review lifts the taboo and openly discusses the possible use of this 'heavy' procedure, with an explicit question addressed to Council (p. 10).

- iii. *The complex set of issues around the 'backlog' in the incorporation of EU legal acts.* Both the 'priority' declared by the EU Council as well as the tone and details of the Review strongly suggest that the 'homogeneity' of the internal market is endangered by the nature and the size of the backlog. In 4.2 we have already observed that the Review fails to appreciate that a considerable share of the backlog is not political but the upshot of two forms of deepening of the internal

¹⁶⁸ This reasoning is elaborated more concretely and at great length in Pelkmans, 2006, various chapters, and in a more concise form, in Pelkmans, 2011b. This is also why e.g. the EU Digital Agenda has the effect of extending internal market issues into private law and other areas, why a properly functioning internal market cannot do without a least-distortive taxation *acquis*, why an EU patent is indispensable for the working of the internal market and why a relaxed and ad-hoc EU attitude to environmental policies (leaving more discretion to member states, as sometimes advocated in eurosceptic circles) would seriously undermine the proper functioning of the internal goods and services market.

¹⁶⁹ Interestingly, the Review does not say that Art. 102 has never been invoked; rather, it says that it has never "been considered", which points to a taboo. Nevertheless, the Review is inaccurate (our footnote 94, p. 53).

market *acquis*, creating greater problems for the EEA-3 than in the past. One sticking point is the Regulation on the European Banking Authority, where the more centralised character of supervision generates problems for the EEA-3, in turn causing a logjam of implementation legislation; the other one is a little noticed but significant form of deepening of the internal market, namely, the EU's increasing use of EU Regulations instead of Directives and the higher frequency of employing Decisions, both of which have 'direct effect', hence prompting the need for parliamentary approval one by one in Norway, Iceland and Liechtenstein. From experience and for domestic institutional reasons, we know that this tends to take less time in Liechtenstein than in Iceland and Norway. The compromise character of the EEA combining supranationalism for the EU and formal insistence on sovereignty by the EEA-3 is subjected to increasing tensions by this steady deepening.

This is not to deny that EEA-3 countries (and, in particular, Norway) have more and more systematically looked for what the Norway EEA review has called 'safety valves' for domestic politics in case of highly sensitive issues. The recent frequency of this happening has led some observers to call this 'obstructionism'. Liechtenstein is worried about this trend, if only because it fears that, sooner or later, the EU will no longer accept such procedural tactics and act with Art. 102 actions which might also damage Liechtenstein. The 'response strategy' of the EU may well include more strict adherence to the letter and spirit of the EEA Agreement in a status quo-plus approach for deliberate late submissions of JCDs or tactically late notifications and the like. Moreover, the mere publication of the EU EEA review itself has already led to accusations directed at Norway by one MEP in the media,¹⁷⁰ generating political pressures that have so far been untypical for the amicable atmosphere in the EEA-30 circuit. Whether the problem of 'adaptations' – where institutional matters play a role – can be resolved like this is far from certain, since the roots of these requests for adaptation are often found in the compromise nature of the EEA as such. For the Commission to hold that such requests are increasingly difficult or unacceptable to address is tantamount to

¹⁷⁰ "EU threatens to punish Norway for breaching EEA agreement", Euractiv, 30 January 2013 (<http://www.euractiv.com/consumers/eu-threatens-punish-selfish-norw-news-517431#comment-10446>).

saying that the underlying philosophy of the EEA is at stake or, perhaps unwittingly, that the EEA-3 have to drift, with the EU, towards ever greater deepening, without representation.

- iv. *The rising influence of EU Agencies.* A subset of the slow but steady trend of deepening the internal market consists of the rising influence of EU agencies. The EU Review advocates a ‘horizontal Agreement’ on EEA-3 participation in EU agencies, but provides no detail. Whatever the details of an eventual proposals, it is disturbing and inefficient to negotiate, each time, a special arrangement for EEA-3 countries in every new agency of some importance or with every major new task for them. More and more agencies have executive or even regulatory influence, regulatory or pre-regulatory functions or powers in case of conflicts between national regulators. Although there are sound reasons why EU agencies have arisen,¹⁷¹ especially with the deepening and widening of scope of the internal market, it is, for some of them, the nature of their competences and a creeping tendency of quasi-centralisation (e.g. in banking and some network industries) that render it critical for the EEA-3 countries to be able to participate in such agencies (if only, due to their constitutional requirements). Not only will this issue not go away, if anything, it is likely to grow in importance in future. Calling for a horizontal agreement amounts to a recognition of the EU of a genuine problem that deserves to be addressed in a status quo-plus approach.

The EU review also advocates a strengthening of control, by ESA, of the application of the EEA Agreement. Moreover, ESA should invest in better monitoring, as the Commission and ESA monitoring are not comparable in rigour and scope. Although the EU review does not say so, it stands to reason that advocating a “strengthening [...] of the level of control by ESA [...]” has everything to do with item iii. above, the increase in the backlog. ESA could intervene if (for example) tactically late submissions frustrate its surveillance and enforcement function, rather than recourse by the EU to Art. 102 or other more contentious measures. This would appear to be a sound application of the status quo-plus approach.¹⁷²

¹⁷¹ See for instance Majone (2002), Coen & Thatcher (2008), Lavrijssen & Hancher (2008), Nicolaides, Geveke & den Teuling (2003) and Geradin & Petit (2005).

¹⁷² Legally, however, it would imply that ESA’s enforcement functions apply already before an EU legal act becomes part of the EEA Agreement.

5.3 More EEA, via treaty revision of substance and institutions

After 20 years of EEA, the intentions of the founding fathers of the EEA have been more than just fulfilled. The EEA provides for an unwavering bridge between EFTA states (minus Switzerland) and the EU's Internal Market.

On the one hand, the stability of the EEA suggests that the agreement negotiated in the late 1980s and early 1990s is of high quality. On the other hand, given the dynamism of the EU with three EU treaty revisions and continuous deepening of the internal market in this period, one wonders whether a substantive and perhaps institutional amendment of the EEA Agreement is not desirable or, indeed, necessary for a proper functioning of the EEA. Note that a treaty amendment for purposes of allowing EEA membership for non-EFTA countries (in fact, enlargement) will be discussed in 5.4.

Reasoning in terms of strategic options, the closest alternatives with respect to solving lingering problems about the functioning of the EEA are the status quo-plus (5.2) and treaty amendment, more specifically a modest, tightly controlled treaty revision (5.3). Should one wish to consider more radical changes of the EEA Treaty, the nature of the original EEA and its underlying presumptions about sovereignty and political legitimacy might be affected to such an extent that the closest alternative options would rather be a far-reaching bilateral with the EU (5.6) or indeed EU membership (5.10). Thus, if one were to argue that the deepening of the internal market requires much stronger degrees of centralisation in some policy domains (which are inconsistent with the current EEA Agreement), such transfer of powers would be regarded by EEA-3 countries as an overhaul of the Agreement, likely to cause a political earthquake in their domestic constituencies. During interviews, in the CEPS EEA workshop with practically all stakeholders, held in June 2012, and in the recent literature, the authors have not found any credible advocacy for a radical amendment of the EEA Agreement. This is likely to be ascribed to thinking in terms of alternatives: once it would be suggested to address problems by deep reforms of the EEA, countries would likely go for other options with greater political legitimacy. But precisely for that reason, neither the EEA-3 nor the EU would be interested to propose and support such a radical move in the first place.

The case of Iceland is telling: it is exploring the full consequences of EU membership, but if the voters would not support accession, Iceland is

almost certainly not going to plea for more than selective amendments of the EEA Agreement. The Norwegian Government White Paper of October 2012 does not suggest any radical revisions. In the main messages, there are two phrases which, if anything, point to a status quo-plus approach or perhaps to technical/incremental change. It states that "... it is in the interest of all parties to maintain and further develop the EEA agreement" (a wording that is fully consistent with the status quo-plus, but might possibly be read as favouring technical revisions, too). The government also writes that "Norway wishes to continue to play an active part in further developing the internal market... [] ...in accordance with the Single Market Act I and the Single Market Act II"¹⁷³ (which would seem to imply little else than a constructive attitude to make the EEA work well in the near future). The independent Norwegian EEA Review Committee did not advocate an overhaul of the EEA Agreement. It proposes to bring the 'patchwork' of numerous cooperation arrangements with the EU, besides the EEA itself, into a "common framework" and the simplest way of doing this "would probably be some form of expanded EEA Agreement.... The reform could be purely institutional and could involve a common framework around existing agreements, or, one might at the same time consider whether further areas of EU cooperation should be included."¹⁷⁴ The Commission's EEA Review looks sympathetically at such suggestions but its formulation is still very open at this stage.¹⁷⁵ The only 'further area' the Norwegian Committee discusses explicitly in this respect is 'justice policy' in a general framework agreement or as an extension of the EEA. Of course, this is exactly the area which the Commission suggests to reflect on, with one specific proposal at this stage: "... include the policy on trafficking in human beings in the EEA Agreement".¹⁷⁶

Once one views the status quo-plus and technical or modest EEA Treaty revisions as close alternatives, one can appreciate that the EU and the EEA-3 would not be too eager to go down the route of formal EEA Agreement revision. The fear of not being able to contain the revision to a

¹⁷³ Government of Norway (2012).

¹⁷⁴ *Ibid.*, p. 9 of ch. 28.

¹⁷⁵ European Commission (2012a, p. 16): "Benefits could be found in bringing some of these agreements under a single framework agreement for the sake of legal clarity..."

¹⁷⁶ *Ibid.*, p. 5.

few well-defined issues (opening the Pandora box) always plays a role. The authors suggest that, prior to the formal opening of such negotiations, a clear and unanimous political agreement should be concluded on what would be the only questions to be negotiated; if, for some domestic (e.g. elections) or other reasons, this political deal is not honoured later on, the other EEA parties would suspend the negotiations. If the new demands from party X to the Agreement for less or more areas of negotiation cannot be unanimously accepted, the political deal is considered 'dead'. This containment approach would deter opportunistic behaviour and help accelerate the negotiations. However, quite apart from any containment of Pandora effects, the incredible flexibility of the EEA as experienced over two decades renders the status quo-plus very attractive to all EEA parties. Just remember that, beyond the policy areas that are clearly part and parcel of the internal market as defined in the Agreement, a range of 'grey area' EU legal acts have been incorporated in the annexes, as well as some acts not being 'EEA relevant' according to the Commission.

Thus, it is likely that the issues discussed in 5.2 will not be moved into the option of amendment of the Agreement too easily. Moreover, the flexibility stretches beyond these already remarkable accomplishments. As to participation of EEA-3 countries in EU agencies, so far, a highly pragmatic approach has been followed (be it at times after lengthy negotiations, attempting to satisfy national constitutional requirements as well as the CJEU case law), without amendment of the Agreement. Another example is found in minor technical adaptations accomplished via the rules of procedure in the EEA Joint Committee. More daringly, one might even consider including new technical amendments in newly created supplements (whether annexes, protocols, other) to the EEA Agreement. It is only in the case of judicial cooperation (such as trafficking in human beings) that a highly specific amendment of the Agreement would be called for. This should be possible. The EU itself has also practiced very minor amendments of the treaty, e.g. on the EU budget rules or a few sentences in the EMU section of the treaty. In the very near future, however, there is one question that might be more challenging for the EEA: the EU banking union, in fact, a more centralised supervisory structure, with bank resolution powers (from the better capitalisation of a bank, or, its restructuring, all the way to seizing control of a failing bank, and resolving all problems, including temporary funding of a 'bad' bank). Knowing that the EBA regulation (and a tail of EU implementing acts) has still not led to agreement in the EEA on the representation issue after almost two years – an EBA which is far from fully centralised in such critical functions – one

cannot but wonder how the banking union is going to be absorbed into the EEA under a status quo-plus approach. The recent negative ruling of the EFTA Court on Icesave and the lingering duty of Iceland to pay for lost deposits of citizens of the UK and the Netherlands¹⁷⁷ will certainly not increase the willingness of EU countries to make substantive concessions in such a dossier.

An issue dear to the EEA-3 is that, two decades ago, ‘decision-shaping’ has been framed in a rather narrow fashion: it merely refers to the preparatory track of a Commission legislative proposal. In other words, the EEA-3 do not routinely have access to Council committees or (say) the Coreper, let alone, the Council of Ministers, when EEA-relevant questions are worrisome for one or all EEA-3 countries. Neither do these countries have guaranteed access to the European Parliament or their committees, although there might be informal possibilities based on goodwill or via hearings. Occasionally, this lack of access to the EU legislator, where they could alert these bodies to take into account specific aspects important for the EEA-3, can be very frustrating for EEA-3 diplomats or ministers. All that is desired is an opportunity to be consulted, to help ‘shape’ legislation that, later, they will have to incorporate in any event.

Some accommodation on the part of the EU would appear to accord well with the unique depth and quasi-automaticity of the EEA. It is also hard to argue convincingly that ‘decision-shaping’ should concern solely proposals and not the very decisions that matter in the final analysis. So far, the EU has been deaf about ideas to turn ‘proposal-shaping’ into genuine ‘decision-shaping’.¹⁷⁸ Indeed, the Commission’s EEA Review does not even mention this issue. Here, the EU seems not to behave as the benign hegemon. The typical response, if ever the question is addressed, is that the EEA-3 are ‘third countries’ as far as Council and the EP are concerned. Why can’t these organs, once the (EEA-relevant) issues are pressing enough, give a hearing to the EEA-3? Outside the EEA-3, there are no ‘third countries’ with anywhere near the same obligations about internal market legislation. Again, the question arises whether this can be accomplished pragmatically under a status quo-plus approach or whether to go the route of an

¹⁷⁷ Case E-16/11 of 28 January 2013 (see www.eftacourt.int/images/uploads/16_11_Judgment.pdf).

¹⁷⁸ With one exception: Schengen. In Schengen issues, the EEA-3 countries have a seat at the table, without a vote of course. See section 3.3.2.

amendment of the EEA Agreement. The latter makes the problem heavier and tougher to solve than clever accommodation under a pragmatic approach. One suggestion is to consider Memoranda of Understanding between the Council, respectively the European Parliament, and the EEA-3, with practical solutions for relatively important issues, without jamming the system for every individual EU legal act.

5.4 More EEA, via (non-EU) enlargement

At the moment, the EEA is meant for EU and EFTA countries. Legally, there is a subtlety in Art. 128, EEA: it says that EFTA members “may apply”. New EU member states must become members of the EEA. Strictly, it does not say that non-EFTA non-EU countries cannot apply or are excluded. Nevertheless, the factual reading nowadays is clearly that the EEA is an exclusive club, unless Art. 128 is amended. The Commission's EEA Review says “that, de facto, participation in the Agreement is open exclusively to the only remaining EFTA member Switzerland” (p. 17). There have also been informal suggestions from the EEA-3 that they consider the EEA as ‘theirs’ and would resist new members other than Switzerland. With the functional and more open debate on the AMS, given the Commission's options paper of November 2012, these informal objections are now being transformed into conditionalities such as administrative capacity and other qualities, which may open the door to enlargement.

Initially EFTA was a club of seven countries, which most probably fulfilled all EU membership criteria, but were (at first or are still) not willing to join the EU. The number reduced to only three by the mid-1990s. Due to sequencing, the EU offer stood even when the number of countries and indeed the total population of the non-EU EEA fell sharply. However, during the negotiations, the EEA turned out to emerge as a complex organisation, legally and institutionally. It needed this structure to accommodate the wishes of the EFTA countries (sovereignty) and the EU (international surveillance, independent court, homogeneity) alike. One might be forgiven for thinking that, for reasons of complexity alone, the EEA-3 might welcome enlargement, since a larger size of the group would better justify the intricate structures of the EEA. Indeed, imagine for a moment that Switzerland would join the EEA-3 after all, and remembering that it was often Switzerland in the early 1990s that insisted on procedures entailing complexity in the EEA-to-be in order to bolster the domestic political legitimacy for a later referendum, it would surely be welcomed by

the EU, as it would make all the EEA efforts for the Union more worthwhile.

Nevertheless, after the sharp decline in non-EU EEA membership, a curious reversal has taken place. In 1989, it was the EU side offering this exclusive deal to its closest trading partners and direct neighbours, but nowadays it is the EFTA resisting enlargement. In the 2010 report on EU policy,¹⁷⁹ the Swiss federal government held that an enlargement of EFTA, a precondition for EEA membership, is not on the table and might never be. Of course, if the EEA-30 wants to change the EEA Agreement and open up to other candidates, Switzerland is irrelevant. In the absence of a treaty change, however, and interpreting Art. 128 as is usually done, the Swiss attitude would block any EEA enlargement other than Swiss EEA membership! Today, the question is whether the Commission's EEA Review has not shifted the goalposts. The Review sees "... some merit for engaging in further reflection on the advantages and disadvantages of enlarging ... the geographical coverage of the EEA" (p. 17). For this issue, the EU being roughly 100 times the size of the EEA-3, matters a great deal: it is the large and prosperous EU's internal market that other countries are interested in and the EEA model could perhaps be one option for other countries to obtain good access.

But which non-EU candidate countries would wish to join the EEA? One might envisage the following, depending on one's willingness to include less or more far-fetched scenarios: Switzerland, AMS countries, Turkey, a few more advanced countries in the wider EU 'neighbourhood' like eventually Georgia, Ukraine or Moldova, or, in case the UK (without Scotland) would say 'yes' to a referendum (in 2017) exiting the EU, possibly Great Britain. As long as Switzerland would be the one and single country joining the EEA-3, there is no problem whatsoever. Quite the contrary, as an EFTA member it could join right away and, as noted, the EU would welcome it, because it would solve the problems with Switzerland as specified in section 4.4 and render the heavy EEA structure more justifiable. In addition, it would simplify a number of issues of relations between Liechtenstein and Switzerland. Today the probability of the Swiss joining the EEA is very low. This position might change only if there were sufficiently important changes in their strategic environment, or, perhaps, if the EU might eventually be fed up with the reticence of Switzerland to

¹⁷⁹ Government of Switzerland (2010, p. 7265).

accommodate the four demands (4.3) as specified in the December 2010 Council Conclusions and respond more fiercely vis-à-vis Switzerland.

For all other countries mentioned, it is a good deal more complicated. The core question for them is whether they would be willing and capable. First, some remarks on willingness. It is most doubtful, to put it mildly, whether the UK would be politically prepared to join the EEA, although the country would surely wish to remain 'in' the internal market in one way or another. The overwhelming reason is 'political legitimacy'. The EU has a considerable degree of political legitimacy with its direct and indirect representation in the Council and the European Parliament, by virtue of being regarded as the decisive European integration project pre-empting war in Europe (confirmed by the Nobel Peace Prize in 2012), by countries' right to vote and by the benefits of a common (though relatively small) budget. EEA membership has none of those features. It is an indirect alignment of national policy with the EU's internal market, with limited rights to 'shape' policy and a quasi-obligation to take over new *acquis*. Great Britain going into the EEA would also mean that there is no representation of its people, unlike the direct elections for the European Parliament and the indirect representation via the Council of Ministers. One might perhaps argue that the EU does not have *enough* political legitimacy, but moving from the EU to the EEA would certainly amount to a major setback in this regard.¹⁸⁰

As noted before and underscored in the literature on the EEA, including the recent Norwegian assessment report on the EEA,¹⁸¹ countries like the EEA-3 make a political choice to accept this in exchange for joining the internal market, merely on the basis of 'policy-shaping'. This choice made by relatively small European countries having very important economic links with the EU is not so strange, if one remembers the setting around 1990-91. The Maastricht Treaty was about to introduce even more qualified majority voting (QMV) on internal market subjects (than the Single European Act). This matters most for small countries, fearing an uphill struggle to engineer a blocking minority for issues, which are really crucial for them. Thus, their rationale amounted to: if you can easily be outvoted even as an EU member, the EEA construct – with its quasi-

¹⁸⁰ Prime Minister Cameron, in his speech of 23 January 2013, firmly rejected the EEA option. See 5.5.

¹⁸¹ See Norwegian EEA Review Committee (2012).

obligation to implement the internal market *acquis* anyway – is acceptable too. But the UK (perhaps without Scotland) is unlikely to see it that way. Reasons might include the mere size of the country (easier to engineer a blocking minority or prompt changes in draft directives/regulations), 40 years of experience in the EU with decision-making, and the exit provision in the EU Treaty¹⁸² referring to ‘negotiations’ between the EU and the exiting country, say, on retaining market access under a new arrangement. Such reasons strongly suggest the option of a bilateral agreement between the EU and the UK discussed in 5.7.

Turkey, a candidate for EU membership since 1999, refuses to consider any ‘other’ arrangement than fully-fledged EU membership. Their logic is unassailable. How can one consider the EEA or any ‘privileged partnership’, a term sometimes used by politicians sceptical of Turkish EU membership but at best ill-defined, if one has officially been recognised as a candidate for the EU and receives all the treatment (and pre-accession funds) that comes with the candidature? From a strategic perspective, however, the Turkish position is less credible. As shown in detail in Böhler, Pelkmans & Selçuki (2012b), the Turks have made little progress on the adoption of the *acquis* as measured in the annual progress reports (and this after no less than 14 years), there is stagnation in the progress towards the political Copenhagen criteria and the Cyprus issue has remained blocked. Moreover, even if Turkey would accelerate the work and fulfil all tasks under pre-accession in the next few years, there is a serious risk that one or the other national referendum would reject Turkish membership. In that event, Turkey might eventually opt for the EEA. Böhler, Pelkmans & Selçuki show that this would not be a good idea because the implementation and enforcement demands of the EEA are very high indeed and it is doubtful whether Turkey would be ready soon enough to live up to these requirements. Moreover, the EEA has never been politicised, which is one of the reasons why this construct works so well. A big country like Turkey, soon with a larger population than any EU country, and expected to experience a range of adjustment problems to the proper application of the internal market *acquis*, would be tempted time and again to turn sensitive issues into negotiations during the decision-shaping or later, in the EFTA Standing and the EEA Joint Committee, about delays, exceptions or other aspects. This would change the EEA into a less-than-functional mechanism and its smoothness would be lost. The current

¹⁸² Art. 50 TEU.

EU objections¹⁸³ about the backlog of the EEA-3 and the irritation about the tactical (mis)use of procedural twists for reasons of domestic political sensitivity would probably be greatly magnified once politicisation by Turkey would become a perennial EEA problem. Such a prospect would seem to be unacceptable to the EEA-3, too. It is much to be preferred to conclude a bilateral agreement with Turkey (5.7).

As to the other countries mentioned above, only one AMS country has expressed a clear willingness to join the EU (San Marino), whereas both San Marino and Andorra have expressed an interest in joining the EEA. The Commission's options paper¹⁸⁴ considers joining the EEA as a 'viable' option. However, the paper takes for granted that the AMS would have to become an EFTA member and that the EU "would need to discuss with existing members ... [and] ... Switzerland the possibility of enlarging EFTA to small-sized countries". To give Switzerland such a strong position in finding a good market integration arrangement for the AMS in the EEA (of which the Swiss are not even a member) is remarkable, to say the least. The Commission's EEA review of only three weeks later, however, speaks openly about amending the EEA Agreement and allowing non-EFTA countries into the EEA. For Liechtenstein, having itself gone through a rapid adjustment and quick *acquis* adoption at the time, the critical issue with an AMS country coming into the EEA is likely to be that the good functioning of the EEA Agreement is guaranteed. This would be important irrespective of whether one speaks about the substance of the *acquis* adopted, the smooth incorporation of new EU legal acts or proper enforcement. On monitoring and enforcement, the favourable experience of the EEA EFTA bodies ESA and the EFTA Court should be helpful in this respect. It is noteworthy that the options paper nowhere emphasises that there is an issue of administrative capacity and appreciable administrative costs of the internal market-minus that AMS would incur. Altogether, one can reasonably expect that accession to the EEA would take some time in order to ensure that the EEA remains as solid as it is today.

Neighbourhood countries such as Ukraine, Georgia and Moldova all express long-run visions about EU membership but the authors are not aware of any position on their possible membership of the EEA.

¹⁸³ See the Commission's EEA Review (European Commission, 2012a).

¹⁸⁴ See COM (2012) 680, European Commission (2012c p. 17).

When speaking about capacity, rather than willingness, of ‘prospective’ EEA members to implement and properly enforce the *acquis*, there is no doubt about Switzerland. But this conviction is less certain for AMS countries. To begin with, the current status of *acquis* adoption in the AMS is incomparably less ambitious than for the EEA-3 and, moreover, they have no experience with surveillance and EU (or EFTA Court’s) case law. These countries would first have to catch up for years on the existing internal market *acquis*, with some kind of ‘pre-accession’ reporting and assistance on jurisprudence (etc.), before they could enter the EEA. They would have to demonstrate sufficient administrative capacity to deal with the steady stream of new *acquis* (not to speak of the adoption of existing *acquis*). All three are relatively rich countries and this might help. Nevertheless, their economic structures are somewhat one-sided, in different ways (see Table 1 in 4.6) and this might hinder the absorption of the *acquis* in selective areas. Therefore, quite apart from willingness, there are issues about capacity that require time to adjust and ‘learn’, assuming a determination to reach the performance now accomplished by the EEA-3. Capacity issues are probably more serious in countries such as Turkey (although this aspect is seemingly improving), and nothing less than profoundly problematic for Ukraine, Georgia and Moldova. In the medium run, it is thus not possible for the latter three countries to join the EEA, irrespective of their willingness and irrespective of the problem of prior EFTA membership.

Finally, a prospective enlargement of the EEA (beyond Switzerland) is hard to envisage without a revision of the EEA Agreement. As section 4.3 already suggested, this might open a Pandora’s box and it will be essential to contain this tendency by a strict and limited mandate for treaty revision allowing enlargement without going through EFTA. The problem for the EU strategy will then be whether the EU wants to be saddled with (perhaps) a series of EEA look-alikes (5.5) or propose an amendment of the treaty. Of course, an amendment of the EEA Agreement with respect to enlargement does not automatically imply that candidates other than Switzerland would end up in the EEA: they might still prefer an EEA look-alike tailored for them and the EU choice is whether this is, on balance, the least-unattractive solution.

5.5 EEA-bis and EEA look-alikes

For ‘prospective’ EEA candidates like the AMS countries (or, at least, some of them), Switzerland and in future perhaps Turkey and/or some

neighbourhood countries, an alternative with slight differentiation amongst them are new EEA look-alikes, sometimes called EEA-bis (e.g. AMS), EEA-tris (e.g. Switzerland) and so on. An even more speculative note might suggest some special EEA-like arrangement for the UK to stay in the internal market, if the country were to leave the EU. A hesitant beginning of the debate in the UK has been intensified by the UK government's commitment to engage in a cost/benefit review of UK EU membership which is underway.¹⁸⁵ The Government's review will "... be comprehensive, evidence-based and analytical" (Ibid.). Even though the widespread perception in and outside Britain is that the Review, analytical or not, has to be seen against the background of a highly political, often deeply misinformed debate in the country, the initiative was welcomed as an attempt to shed more light, provide facts and proper analysis on the question of Britain's EU membership. All this changed radically with Prime Minister Cameron's speech on 23 January 2013 promising an 'in/out referendum' in 2017 if the Conservatives win the next elections. In that speech, the Prime Minister pledged to campaign in the 'yes' camp. Interestingly, he denounced the EEA option, held as an alternative option for Britain by some radical eurosceptics. Nevertheless, from now on, any reflection on possible changes of Liechtenstein's strategic environment can no longer dismiss the possibility that the UK might exit the EU and consider an EEA look-alike, or perhaps even the EEA itself. A perceptive, though quite speculative reflection on the UK's options upon exit, in particular the EEA, has been published by David Buchan (2012) who goes as far as to ponder about a new "single market club with the UK, Norway and Switzerland" (conveniently ignoring Liechtenstein in both his analysis

¹⁸⁵ Although it is widely appreciated that this review is instigated by the political turmoil in the UK on EU membership, the official title is: "Government review of the balance of competences between the UK and the EU". The UK Department for Business, Innovation and Skills (BIS) (in charge of the Internal Market part of the review) writes: "[the] review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It will not be tasked with producing specific recommendations, and will not prejudge future policy or look at alternative models for Britain's overall relationship with the EU. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernizing, reforming and improving the EU in the face of collective challenges." (Source: Dept of BIS Call for Evidence, November 2012.)

and conclusions) outside the EU. However, Buchan clearly sees how difficult it will be to opt for a 'static' agreement, without either becoming dynamic in substance (which the EEA is) or eventually breaking down, given that ambitions may grow too far apart.

The two-fold essence of EEA look-alikes is likely to be found in a) the four conditions specified for Switzerland in December 2010 (see 4.4) and b) a very far-reaching adoption of the initial Internal Market *acquis*. In both (a) and (b) one could envisage some (probably few) limitations. Once these conditions would be fulfilled, one can ask the question why not accede to the EEA (see 5.4)? If the sticking point would be the lack of political legitimacy of 'decision-shaping', it scarcely explains the insistence on separate arrangements because any EEA-bis, or EEA-tris, etc., would have no more influence than the present EEA-3 members. If the sticking point is found, rather, in special deals yielding a more selective adoption of the internal market, one arrives at the problem of Switzerland's bilaterals with the EU. On the sectoral or 'salami-type' approach, the EU has clearly crossed the Rubicon of declaring this as too much *à-la-carte*. True, in the Swiss case, the four conditions in (a) are not fulfilled; if they were, the EU would accept some (though rather modest) degree of *à-la-carte* given the historical legacy of the bilaterals with the Swiss. In practice, however, Switzerland is much closer in internal market substance and application of the relevant EU *acquis* inside Switzerland to the EEA than is often realised. However, it is doubtful whether the EU would accept, in any new EEA look-alike, more than a few and marginal limitations. Thus, one should expect new negotiations on EEA look-alikes to fail if countries would seek to tinker with all three conditions. Such a failure would imply a starker political choice for the EU's negotiating partners between a genuine EEA-bis, with all that it takes, or accession to the EEA (5.4) or, a more *à-la-carte* bilateral that, presumably, does not give full access to the EU Internal Market (see 5.7).

One should also not forget that EEA look-alikes have very different implications depending on what countries one focuses. For AMS countries and Turkey, an EEA-bis would mean a massive adoption of Internal Market *acquis*, presumably largely before the agreement would come into force. Both the AMS and Turkey have customs unions with the EU

(Monaco with France), which may help,¹⁸⁶ but the 21 chapters (out of 35 ; and not counting agriculture and fisheries) of any EU membership negotiation which cover the internal market are rich in regulatory *acquis* and entail many technical areas. Turkey is somewhat ahead, despite its failure, so far, to adopt many relevant *acquis* chapters, because the 1995 Customs Union agreement contains annexes with a large technical harmonisation *acquis* and links to European standards where relevant for the new approach. Turkey has become a fully-fledged member of CEN/CENELEC (in 2010) writing these European standards.

Switzerland, on the other hand, would be capable of having 'its own' EEA-bis in a few years time if it would be willing. The famous four institutional conditions (item a, above) would probably take some time (as well as institutional negotiations) and important gaps in the existing bilaterals – the most prominent is undoubtedly the EU *acquis* in banking and insurance – would have to be filled. However, this prospect cannot be discussed without wondering why Switzerland would not opt for the EEA itself (5.4).

The UK would, however, find itself in yet another class. If the EEA-bis for the UK would be reminiscent of the EEA, even though the overlap would be incomplete,¹⁸⁷ the UK would drastically *reduce* the EU *acquis* it would apply. Apart from the non-internal market *acquis* (perhaps partially solvable via cooperation), agriculture and fisheries, it would 'lose' both the indirect (VAT, excise duties) and direct taxation *acquis*. Since the EEA-bis is likely to be a free trade area, it will also start facing tariffs which can be costly for the UK where peaks exist. If it would maintain a customs union with the EU, it would have to ensure sufficient negotiation power when the EU employs its trade policy bilaterally and multilaterally. The UK might attempt to retain some residual power in a few (single market) areas, although the EU is unlikely to grant the country much as it would undermine a sufficient degree of homogeneity, a condition to grant full access to the Internal Market. Also, the dynamic adoption of new EU

¹⁸⁶ One reason why an EEA-bis might be preferred above the EEA is that the latter is a free trade area; combining this with customs unions might generate complications.

¹⁸⁷ As an example, eurosceptic Conservatives or the UKIP politicians often insist that, in their view, the environmental *acquis* and that of labour market regulation do not really 'belong' to the Internal Market, and should be 'returned' to Britain. This would apply to the EEA or EEA-bis as well.

Internal Market *acquis* into British domestic law might be subject to a kind of ‘nuclear option’ and it is possible that the Brits might obtain more discretion here. Nevertheless, this pretty daunting scenario clarifies how stark the choices are when the UK begins to reflect on EU exit and the follow-up (e.g. in an EEA-bis).

The AMS countries have, realistically, only two options in the short to medium run: one is an EEA look-alike called a single ‘Framework Association Agreement’ (FAA)¹⁸⁸ for the three and the other consists of participation in the EEA (see 5.4). The longer-run option of EU membership (discussed in 5.10) is not dismissed out of hand by the Commission. The FAA is a single framework; the Commission rejects separate bilateral agreements with each one of them, for reasons of complexity and unnecessary differentiation. This might lead to a problem because, at the moment, only San Marino clearly favours EU membership or, as a fall-back option, the EEA or an EEA look-alike. Monaco, given its profound integration with France, is only keen to solve a number of specific drawbacks of its current predicament. Andorra assumes an intermediate position but has not published a detailed strategy or position. It is therefore far from certain whether an FAA would be conceived for more than one country of the three. According to the Commission, the substance and institutional arrangements (e.g. decision-shaping and observers in EU programmes and agencies) of the FAA are analogous to, but not the same as in the EEA, given the small size of the countries. The conditions that Switzerland would have to fulfil are echoed in the options paper, with the proviso that monitoring and enforcement of the *acquis* might be assumed either by the Commission and the CJEU, or the EEA EFTA institutions (ESA, EFTA Court) or an ad-hoc supranational authority.

5.6 Less EEA, reducing scope or membership

A detached view of the EEA will have to recognise that, despite the praise from the EU, the EEA has never been popular. During the negotiations and in the short episode before the effective beginning of the EEA, most non-EU countries involved applied for EU membership: Finland, Sweden, Norway, Austria and Switzerland. A Swiss referendum on the EEA – pending the application for EU membership – demonstrated that the political legitimacy

¹⁸⁸ By the Commission in its options paper on the AMS. See European Commission, 2012c.

of the EEA for non-EU countries is problematic. In Norway, the initial acceptance of the EEA, after the 'no' vote in the 1994 referendum about joining the EU, has been eroding recently. In Austria, Sweden and Finland, the EEA was seen as a waiting room or perhaps as fallback option. In Iceland, the longstanding rationale of joining the EEA was a function of the sensitivity about the EU fisheries policy and to some extent agriculture, but these sensitivities would seem to run less deep today (given reforms in both these EU policies), resulting in renewed criticism about the lack of political legitimacy of the EEA. For all these reasons, it is sensible to reflect on the possibility of 'less EEA', whether in substance or in the number of (non-EU) members.

The scope of the EEA agreement is based on the appreciation of the Internal Market as it stood at the beginning of the 1990s. This concept of Internal Market has considerably evolved and is still in flux today. As a consequence, the substantive content of the EEA is also evolving, keeping up with its foundation, the Internal Market.

The more integrated the Internal Market becomes, the more it touches upon more sensitive issues of sovereignty and self-determination (network industries, taxation, judicial cooperation, European civil law, company law, financial services, banking supervision and resolution as well as the question of EU Agencies). The internal market as it stood in the early 1990s was already fairly 'deep' and 'wide' in scope. Still, a plethora of barriers and distortions could be found in a series of markets and much deepening and some widening of scope has since taken place. Over the last 15 years, the EU has undergone several constitutional changes, was hit by what has now become the 'Great Recession' (financial and banking crisis, sovereign debt, economic downturn), saw the introduction of the euro and is debating an ambitious new deepening of the eurozone and some aspects of the internal market in its wake. One can seriously wonder whether the Internal Market meanwhile accomplished, not to speak of the further rounds of deepening the EU is now preparing, is what the EFTA countries signed up to in Oporto in 1992.

Could the EEA's substance be limited or reduced and would this be a possible political stabiliser in countries like Norway and Iceland? On the basis of today's EEA, founded on the idea of homogeneity and the full adoption of the cross-border free movement plus the right of establishment and all the EU regulation that goes with it, it is neither possible to limit or reduce its substance from the past, nor (more than marginally) the new *acquis* forthcoming in future. This homogeneity cannot be provided on a

voluntary basis as the Swiss example of *'autonomer Nachvollzug'* shows. The EU is only willing to fully accept national legislation of a third country as compliant with EU law if the latter is under surveillance and judicial review by independent internal bodies. It could also not work easily via permanent derogations. Permanent and substantive derogations (the Liechtenstein special arrangement with regard to persons is technically not permanent) for single EEA countries are very rare and individual arrangements with regard to additional *acquis* for single EEA member states are not possible in the current EEA. Thus, if an EEA-3 country would want to 'opt in' with regard to a certain aspect of the Internal Market, it has to do so bilaterally (see section 5.7), unless an individual opt-in by certain EEA EFTA states would be agreed within the EEA. But a bilateral approach might have a drawback: the single EEA country would be exposed to the powerful EU leverage in bilateral negotiations, unlike in the EEA legal system, which excludes leverage on a diplomatic level and replaces it by a legal system equal for all. For the EU, a limitation or opt-outs of the internal market *acquis* under the EEA is thoroughly unattractive: it already finds the EEA heavy going and if this special arrangement would no longer deliver homogeneity, the EU might lose interest.

What about fewer EEA members? The obvious example is of course the case of Iceland having applied for EU membership (see 4.5). This instance of 'less EEA' is presumably viable if institutional adaptations are agreed. The adjacent box provides a few suggestions of such adaptations.

Possible technical adaptation for an EEA-2

- A third ESA member, without EEA-2 nationality
- The actual nomination of the third EFTA Court judge
- Simplification of the EEA decision-making procedure in the light of just two contracting parties, e.g. committee structure
- Softening of the 'single-voice' principle for the EEA-2

The box contains changes of critical positions or their nationality, a quest for simplification and exceptions to the single-voice principle which is compulsory for the EFTA side of the EEA. The first two alterations should not be too difficult, if parties are constructive. The third one can be interpreted as a protection for Liechtenstein against the (relative) dominance of Norway in EEA-2. One idea could be that, as a rule, the principle would be maintained,

because otherwise the EU might as well go for bilaterals. However, if disagreement in the EEA-2 would linger too long, the EU could be consulted and if there are no major objections of substance, the EEA-2

could 'agree to disagree' and support the one country willing to take over the relevant EU act. In effect, this would mean that the country agreeing with the EU would escape an Art. 102 procedure. As noted below, this is one remedy for coping with a likely Norwegian 'hegemony' in the EEA-2.

Both the Norway EEA Review and the Commission's EEA Review insist on 'rebuilding' the EFTA-EEA pillar once it would become clear that Iceland would join the EU. However, it is anything but certain whether or not Iceland will, in fact, leave the EEA-3 for the EU. In case Iceland would leave, the EEA can continue with two countries, with the re-arrangements as suggested. Nevertheless, for Liechtenstein, there is a tactical issue in an EEA for only two non-EU members. The EEA-2 would be dominated by Norway even more than the EEA-3 is today. This is potentially a source of occasional problems because the two countries not only differ radically in size, but also have rather divergent economic and business interests, based on distinct forms of economic specialisation and resources. We have already quoted a source from the EU circuit in Brussels recommending Liechtenstein "to find a new friend", referring to the combination of diverse interests and vast difference in size as well as resources in an EEA-2, making it impossible to avoid conflicts forever. Norway has already earned a reputation of occasionally playing 'big brother' in the EEA-3.¹⁸⁹ Moreover, there are also signals that – the good cooperation in the EEA-3 notwithstanding – Liechtenstein is not much appreciated as a partner. Such signals are usually covert or given in closed circles. However, the Norway EEA Review (2012) is very frank about it:

The alliance with Liechtenstein is quite simply bizarre – a small principality in the Alps with 35,000 inhabitants, close connections to Switzerland, a tradition of being a tax haven, and a political system of governance that has been criticised by the Council of Europe for not living up to modern democratic standards. This is a state that has other priorities and interests than Norway." (p. 10, ch. 27)

To the extent that this is suspected to be an issue of potential concern, the query is whether Liechtenstein has any alternative option. In the

¹⁸⁹ The Norwegian EEA Review Committee (2012) puts it as follows: "This [the EEA] is the only organisation in which Norway is a superpower, having a certain effect on Norway's self-image, extending so far as Norway viewing this as a 'Norwegian' model, and not always treating its two fellow EFTA partners as fully equal cohorts in a common endeavour" (ch. 27, p. 11).

extreme, the country could think of one or more new EEA members to ensure greater diversity and balance in the non-EU EEA. Exceptions to the 'single-voice' principle are a modest remedy as well.

5.7 Bilateral routes to the single market-minus

The EEA is a integration agreement, built on the *acquis* of the Internal Market of the EU. The EEA is not open to special arrangements, negotiated exemptions and traditional commercial diplomacy negotiations that are so common under (bilateral or regional) trade agreements. Hence, all EEA countries have to adopt the same legislation, except in very rare cases. Specific requests or arrangements are not acceptable as a rule, whether they arise from 'less EEA' or 'more EEA'.

With the EU membership application of Iceland, the EEA-3 might shrink to the EEA-2. As noted, this is still viable on the condition of certain re-arrangements. Nevertheless, one cannot exclude that either Norway or Liechtenstein might eventually have second thoughts, even though this is not the case at the moment. Whenever this hesitation might emerge, the option of a bilateral rearrangement of the current Internal Market-minus *acquis* will have to be considered.

Such a 'bilateralisation' of the EEA, however, is likely to have serious drawbacks, although there are also some positive aspects.

First of all, as explained above, the EEA creates a legal order. This order provides for rights and obligations of each contracting party. Disputes are not settled on the negotiation table (e.g. as with Switzerland) but, in the last instance, before the EU or EFTA court. Political and economic leverage of the parties involved in a dispute are reduced to a minimum because the interpretation of the (EEA) treaty and EU case law does not depend on size or influence. In fact, there is no such thing as a 'dispute' between countries: country A or B infringes EU-EEA law or not. A bilateral agreement for each one of the EEA-3 cannot provide for the same institutional and legal set-up as the EEA. It is crucial to appreciate that three bilateral agreements (one for each EEA-3 country with the EU) could not function with the current ESA and EFTA court system, as they would not create a single legal order, in which adjudication is feasible, but separate agreements with different approaches to interpretation and most probably somewhat different substantial content. If the EEA-3 would decide to switch from the regional approach to bilaterals, they would lose the protection of this legal system.

The point should be well understood. It is certainly not the case that leverage in negotiations is invariably used and that EEA parties often engage in confrontational negotiations. Quite the contrary, relations in the EEA-30 are cordial and negotiations frequently low key as well as functional. In functional approaches, a common legal system is still helpful but not essential. However, a legal order is precious and valuable, precisely when interests are sensitive and/or once frictions become politicised (say, in domestic politics). A telling example is the debate in 2004 about the EU-Swiss Freedom of Movement agreement. The EU openly threatened to cancel all seven agreements (Bilateral I, see Annex VII) if Switzerland would not ratify the persons agreement. With regard to Liechtenstein, it is good to remember that the Principality was not allowed to participate in Schengen unless it would ratify an agreement on taxation of savings (based on a 2003 EU Directive but falling outside the EEA), a then sensitive issue in Liechtenstein domestic politics. Yet another example concerns Switzerland once again. When the EU introduced the '24-hour rule',¹⁹⁰ the current Swiss-EU agreements did not provide for a Swiss exemption from this new measure. The consequences for trade between Switzerland and the EU would have been severe if every single lorry would have to lodge Entry Summary Declarations. A solution was found and the problem disappeared as fast as it surfaced. Curiously, there was little media coverage about the EU-Swiss road transport agreement, signed to solve a similar issue. The latter agreement implies *automatic* Swiss adoption of EU *acquis* in road transport whereas non-compliance may result in the suspension of the entire agreement. Knowing the Swiss resistance against automatic take-over of EU *acquis*, one begins to appreciate how much pressure was exerted on Switzerland to sign this agreement.

A fourth example involving Iceland and Norway is their Schengen association of 1999. The Nordic Passport Union had provided for the free movement of persons amongst its members for decades. Swedish and

¹⁹⁰ EU Regulation 1875/2006 requires, as a general principle, that all goods brought into the customs territory of the Community, regardless of their final destination, shall be covered by an Entry Summary Declaration (ENS), which should be lodged at the customs office of first entry, i.e. the first intended port of call within the customs territory of the Community. The ENS must be lodged at the customs office 24 hours before the goods are brought into the customs territory of the Community; in the case of deep sea containerised traffic, the ENS is to be lodged before loading in the foreign load port.

Finnish EU Schengen (EU) membership however would have marked an end to this free movement, unless additional agreements with Norway and Iceland would be concluded. The final outcome was one association agreement, which, similar to the EU-Swiss road transport agreement of 2008, provides for the automatic taking over of all (!) EU *acquis* in Schengen-type issues, without any decision-making power for Norway or Iceland. Again, the consequence of non-compliance is the suspension/termination of the entire agreement.

The examples show the rule-setting power of the EU vis-à-vis smaller European countries. The Union behaves as a ‘regulatory hegemon’: you can benefit from the collective good we offer you, but solely under the same ‘homogeneous’ regulatory regime. Whether this makes the EU a ‘benign’ hegemon or not hinges on one’s appreciation of the costs (no autonomy) and the benefits (e.g. full and guaranteed access to the Internal Market). The EU position is understandable, however. No third country is obliged to participate, but if it does, it is according to the rules of the EU. These rules are cemented into bilateral agreements, with clauses suspending entire agreements in case of non-compliance (e.g. Switzerland).

In contrast, the EEA agreement offers equal legal protection for all countries involved, as it provides for a legal system dealing with questions of compliance in the form of infringement of the treaty, in a similar way as within the EU. The EU did not have to do this. One can perceive it as the result of a forthcoming attitude of the EU vis-à-vis close and trusted neighbours, with the economic and political features of EEA EFTA countries. One could even argue that the EEA was not intended to last. Norway tried to join the EU twice (1972 and 1994), Switzerland submitted its EU application at the same time it signed the EEA Agreement, Iceland applied in 2009 for full EU membership. Liechtenstein is the only EEA-3 country with no historical aspiration, so far, to join the EU and there would seem to be no such intention to do so in the near future.¹⁹¹ Moreover, the EU has never offered a similar agreement to any third country.

From this perspective, if the EEA-3 would decide to bilateralise the EEA, it would appear as if they were throwing away a gift. If such a move is well considered, it is likely to emerge from the electorate’s perception of the costs, in the form of a lack of autonomy. Liechtenstein would be well

¹⁹¹ Interview conducted by the authors with His Serene Highness Hereditary Prince Alois von und zu Liechtenstein in June 2012.

advised to reflect about its implications. Thus, a bilateralisation is only likely to occur as the consequence of strategic developments such as Icelandic (or perhaps even Norwegian, eventually) EU accession, and/or a Norwegian switch to bilateralisation based on pressures from its electorate. If each EEA-3 country were left on its own, it goes without saying that Norway's negotiation position – given its relative size, resources and vital importance for Europe's energy security – is incomparably stronger than that of Liechtenstein. One form of mitigation one may imagine is a prior consensus in the entire EEA-30 that any bilateralisation would be based on the premise to maintain the EEA *acquis* and to employ legal rather than diplomatic resolution of suspected 'infringements'. This still begs the question how to deal with future *acquis*, the takeover of 'post-signature' *acquis*. Thus, one cannot deny that some residual risk remains inevitable in a bilateralisation.

A positive side of bilateralisation would be a more flexible approach in EU relations of the EEA-3. Liechtenstein would for example have the possibility (if the EU agrees) to get a permanent exemption for the free movement of persons, rather than today's at least formally temporary one under the EEA. Every single country could arrange for specific packages of *acquis*, fitting their individual means. This could include more energy policy for Norway while finding exceptions in environmental policy (seal hunting e.g.). Liechtenstein could negotiate a package of market access in services with a special focus on financial services, possibly also including the EU tax rules in the Internal Market *acquis*.¹⁹² The latter is, however,

¹⁹² This domain is complicated, even without its technicality, and it is not possible, given the nature of this study, to elaborate. We merely note three aspects. First, the EU Internal Market does not 'enjoy' more than a truncated tax *acquis*, especially in corporate taxation. As noted earlier, endless modifications and ingenious exemptions of the corporate tax base in many EU countries have led to a deeply distorted system of corporate taxation in the single market where transfer pricing can still be profitable despite some disciplines and where corporate seats, at times the location of subsidiaries and postbox firms are heavily influenced by (competitive) tax (base) rules and informal agreements with authorities. Adopting the tax *acquis* is therefore at best a mixed blessing. Second, in a more formal perspective, one can wonder whether 'soft law' such as the EU Code of Conduct on harmful taxation belongs to the Internal Market *acquis*. Incorporation in the EEA (which is not the case at the moment) would make it binding for the EEA-3, a rather odd consequence. Third, Liechtenstein might be interested in incorporating the tax *acquis* of the EU but it cannot do this in the EEA framework. At the outset of

unlikely to happen as not all EU member states might want another low-tax country in the EU market. Still, the constraints for bilateralisation are severe: too much heterogeneity will reduce and eventually terminate the EU's willingness to act as a 'benign' regulatory hegemon.

All in all, a bilateralisation would take away a unique property from the current EEA-3. It risks being a one-way street because going back to an integration agreement with a legal order is most unlikely, as the EU would never offer such a deal again. History never repeats itself literally. Today's EU does not need to give away negotiation power anymore, and certainly not to a group of three countries which, even together, is rather small. One wonders what the EU would do in cases such as the UK (without Scotland?) and eventually, Turkey, if it is no longer a candidate. In the case of 'Brexit', one option for Britain is to negotiate a bilateral as Art. 50, EU suggests. There is no precedent, unless one would wish to regard the exit of Greenland in 1985 as such. It seems reasonable to expect that the UK (minus Scotland) would wish to maintain good access to the Internal Market. The UK minus Scotland is 11 times the size of the EEA-3 and it has a long history as an EU member. The problem is what EU countries would find acceptable. Judging by the reactions at the highest political level to David Cameron's speech of 23 January 2013, EU countries will simply not allow the UK-minus to pick and choose from the overall EU *acquis*, single market or other domains. And this stance would apply to the current *acquis* as well as new *acquis*. The negotiations will therefore be far from easy. It is everybody's guess today what might come out of them, but in any event one can be confident that a bilateral approach for Britain will be accomplished only at a high price. One can argue that Britain can choose between several options, a bilateral and the EEA (5.4), for instance. If the country would insist on its regulatory autonomy, a bilateral would be superior, yet the price will likely be significant differentiation and less smooth or plainly less access to the EU market, in particular with the dynamics of new *acquis* year after year.

the EEA, it was decided that taxation was not 'EEA-relevant'. One explanation of this curious interpretation is that unanimity in tax matters in the EU would lead the EU countries to have veto rights on each and every adaptation of already-agreed EU tax rules, whereas the EEA-3 would simply have to accept them.

5.8 More EU, especially the single market

The EU has demonstrated a remarkable 'inner dynamics' during the two decades since the EEA Agreement was signed. Recently, led by the eurozone and prompted by the deep and lingering budgetary and economic crisis, a further intensification of this 'inner dynamics' is taking place, in particular with respect to the 'banking union' proposals and possibly also the fiscal union ideas. Another area of slow but steady deepening is the internal market of network industries. In the following, it is assumed that the EU resolves the inevitable difficulties and sensitivities in the detailed regulatory regime and institutional arrangements of the EU banking union. It should be realised that the present study is a strategic study and not the place to enter into technicalities. Moreover, the detailed regulatory proposals by the Commission had not yet been published when the present study was finalised (late January 2013).

More integrated banking regulation, culminating in a real EU banking union and the integration of fiscal policy at eurozone level are logical approaches to the present challenges of the EU and its member states.

Introducing a banking union, with the ECB exercising fully-fledged supervision, gradually applicable to ever more banks in the EEA banking market over the next few years, is a very intrusive move with regard to national competences. Supervision can only be credibly and effectively exercised if the supervisory agency also has the power to regulate bank licences in case of a failure to live up to EU prudential and liquidity requirements, to recapitalise and/or restructure it and to seize control of a failing bank, if necessary for financial stability. The latter is called the 'bank resolution function': a seized bank will be fully taken over, including its management, it might be broken up in a 'sound' and a 'bad' bank, and the agency ought to have full access to funds to finance the temporary problems of the bad bank and/or liquidity for the entire bank. The idea is first to ensure that the EEA can trust its banks at all times. In addition, if banks have 'systemic' characteristics – perhaps "too big to fail" or highly networked with other financial institutions – it is critical to maintain trust and confidence in financial markets (fearing contagion towards other banks or financial institutions) by having the centralised power in the single market and the funds to credibly claim that financial stability will not be endangered. The banking union shifts these powers and the access to ample funds decisively from the national to the EU level, given the experience of the financial crisis since 2008 and the shortcomings of the

hopelessly fragmented and incomplete supervisory regime of the single banking market. The banking union therefore goes beyond the degree of centralisation in the previous reform of the EU's supervision system, including the EBA. Since the EEA-3 already have serious problems incorporating the EBA regime, in particular because no EEA-3 representation is (yet) foreseen in case EBA decisions would affect EEA-3 banks, these problems are likely to be magnified in the case of the banking union.¹⁹³

A key point in the institutional structure of financial market regulation (and network industries) are EU agencies and their respective powers. The recent formation of a range of EU agencies is held back within the EU by the so-called 'Meroni doctrine'. Because the degree of centralisation via EU agencies is contained, the EU Meroni doctrine also protects the EEA. The doctrine makes it constitutionally impossible for the EU legislator to create independent EU regulatory bodies, empowered to regulate certain economic sectors. The basic idea behind the Meroni doctrine¹⁹⁴ is simple: the member states as founders of the European Union have delegated powers to the EU level by the EU and TFEU Treaties; the EU level cannot, in turn, delegate these powers to other (EU) bodies or organs without keeping sufficient control over final political or regulatory outcomes for which EU-level treaty institutions are responsible. In other words, if 'independent regulatory agencies' are found to be necessary at EU level, the Treaty has to be amended, with a ratification process.

The European Council, in close coordination with the Commission and the ECB, has proposed an independent EU bank regulator/supervisor as the core of the 'banking union'.¹⁹⁵ This would plainly violate the Meroni doctrine, were it not that the proposal suggests locating the new EU supervisor in the ECB. The ECB is the only 'independent EU agency', thereby getting round the Meroni doctrine. This is only a sound solution if

¹⁹³ When this study went to press (mid-February 2013), no negotiations between the EU and the EEA-3 had taken place on whether the EEA EFTA states could be given voting rights in case the event that decisions by the ECB supervisor would directly affect EEA-3 financial institutions.

¹⁹⁴ It should be noted that the doctrine is named after a rather peculiar 1956 ECSC court case. See Doutheille de la Rochere (2009) and Chamon (2012). It is the constitutional logic, and not so much the Meroni case itself, that really matters in the EU regulatory and governance debate. See also Griller & Orator (2010).

¹⁹⁵ See Van Rompuy (2012).

inside the ECB the monetary and the bank supervision functions are separated carefully, because there may be conflicts of interest. However, in doing so, it becomes next to impossible for the EEA-3 (and presumably, in any EEA-bis) to accept this for their banks in such a form. In fact, the current intra-EU debate is already controversial between the 'ins' and the 'outs', and even within the eurozone. However, if central supervision and bank resolution would not apply to EU banks from some countries and indeed not to EEA-3 banks, the internal market for banking services risks being victimized as no longer 'homogeneous' in terms of strict and similar supervision. An important caveat to note is that, during the ongoing negotiations, a threshold of €30 billion balance sheet total, or (bank) assets of more than 20% of GDP, seems to have been agreed. This would concern some 200-300 banks. In any event, for each EU member state, the three largest banks always fall under ECB supervision, in addition to any bank receiving direct ESM support.¹⁹⁶

For Liechtenstein, it would mean that its banks would presumably not have to be part of the ECB supervisory system, at least not directly. Below this threshold, supervision would remain national, of course still based on EU rules, and, in future, on a common EU rule book. However, in case smaller banks evidence fragility, the ECB can still intervene and take over (national) supervision, but this has to be justified due to (say) weak solvability, etc. For Liechtenstein, this would mean that the current EBA arrangement (not yet agreed by the EEA-3, but in force in the EU) would be retained, except if a crisis situation would occur. However, the new rules have not yet been formally proposed by the Commission to the EU legislator (so, they might still be changed) and there are also suggestions that all banks in the EU would eventually fall under it, but at a later stage. With a non-homogeneous regime, the problems would only become visible once banks would get into difficulties.¹⁹⁷ Without the new bank resolution

¹⁹⁶ Although the ESM is originally meant for eurozone *countries*, as long as the common EU deposit insurance system has not been set up, it has been agreed that the ESM can also be used for *bank* resolution finance.

¹⁹⁷ This assumes that the ratings of banks by credit rating agencies (CRAs) would not differ solely due to SSM (the single supervisory mechanism of the ECB); much hinges on what strictness of supervision will be practiced by non-SSM countries, whether EU or EEA-3.

rules and EU funds,¹⁹⁸ a near-failing (systemic) bank not under the ECB supervision and resolution regime will generate instability and possibly contagion and is likely to prompt the third-best solution of recourse to national state aids. For EEA countries to accept the single supervisory mechanism constitutionally, some ingenious form of proper representation and consultation will be required, at least whenever EEA-3 banks are directly or indirectly involved (see below).

The EEA-3, participating fully within the EU market on financial services, are following these developments with anxiety. For the EEA Agreement does not transfer legislative powers to an international body and just transfers modest decision competences to ESA. Such an arrangement is necessary to protect the constitutional requirements of the EEA-3. For Iceland and Norway, it is very hard to imagine that they could accept an independent EU regulator with intrusive surveillance and resolution powers, regulating the internal financial market and especially every bank within it, or even only larger banks, including the EEA-3 market. In the case of Liechtenstein, the political problem might be similar but at least the constitution would seem not to be in the way as long as some satisfactory form of participation and representation can be agreed. Non-participation in the 'banking union' scheme forces the countries concerned to ensure having pro-active and tough regulators, short of incurring a negative reputation effect. On the other side, participation would require most probably changes in the national constitutions of Norway and Iceland, followed by referenda, about whether a 'third-country' body (the ECB) is allowed to exercise ultimate supervision and resolution powers over (some) national banks in the EEA-3.

¹⁹⁸ Such bank rescue funds will eventually be built up by a new EU common deposit insurance system over time, and these funds should serve as the ultimate 'fiscal capacity' for the regulator/supervisor in the ECB. However, proposals for a new EU common deposit insurance system should not be expected soon due to opposition e.g. from Germany. German cooperative and saving banks already have built up shared funds for calamities via their own deposit insurance system and are opposed in view of a perceived risk that their funds will eventually be mutualised at EU level. Absent common EU funds from a common deposit insurance scheme, at least for a while, it means that the ESM will have to back up any bank resolution for the time being. For a workable proposal on a European deposit insurance and resolution fund, see Schoenmaker & Gros (2012).

Perhaps this intrusiveness could be swallowed if representatives of the EEA-3 were allowed to sit on the board of the future regulator and vote. This however is not the case. In Opinion 1/92 the CJEU clearly prohibits the inclusion of third-country representatives with voting rights on EU matters within EU institutions, based on the protection of the independence of the EU legal order. This question requires careful reading, however. One needs to distinguish a) EU matters versus EEA-3 matters (or effects), and b) legislative versus administrative decisions. On (a), what is at stake for the EEA-3 are solely those decisions that affect mainly or entirely EEA-3 banks, not in the least decisions affecting mainly or entirely EU banks. In principle, that would seem compatible with the CJEU opinion. On (b), it goes without saying that the EEA-3 should never be involved in any way in EU legislative functions. But whenever administrative decisions directed to individual undertakings (say, an EEA-3 bank) or to specific national authorities are at stake, which clearly are 'EEA-relevant', it would seem to be compatible with the CJEU opinion; moreover, it is exceedingly hard to argue convincingly that a refusal of the EU to grant such 'participation' in the banking union (an essential part of the internal financial market *acquis* in future) is compatible with the purpose and spirit of the EEA Agreement and its functioning up until today.

This challenge is a fundamental one for the EEA. It seems like an unsolvable dilemma: how to accommodate the apparent paradox of not being able to accept an independent EU regulator on national constitutional grounds without full participation, and yet not being able to fully participate in such a regulator due to EU constitutional law (if too narrowly interpreted, as is the case today). A possible way out is suggested by what has happened under Schengen. In the case of the EU agency for external border controls Frontex, 'associated states' (and the EEA-3 are associated) can vote on matters that primarily or only concern them rather than EU countries. *Mutatis mutandis*, this could be applied in the banking union for matters which concern mainly or solely EEA-3 countries or their financial enterprises.

Even in the unlikely scenario that single EEA-3 countries would find innovative solutions to circumvent national constitutional requirements – for Liechtenstein, the constitution is not necessarily in the way – a global solution for all EEA countries is still necessary to guarantee a homogeneous application of (EU) EEA law in the entire Internal Market.

When looking for a solution within the current framework of the EEA, one might consider the ESA. The EEA-3 expressly conferred

authoritative powers to the ESA, especially in the field of competition law. ESA's powers here pierce the national constitutional shell and the EFTA court provides for the necessary legal protection of the individual against such decision powers vested in ESA. The example of ESA shows that such powers are known within the EEA and that (intrusive) market regulation could be accommodated for instance within the realm of an enlarged ESA competence.

What would such a solution look like, given the rather limited innovative possibilities under the current framework. An amendment to the Surveillance and Court Agreement (SCA) could allow the creation of an independent daughter institution of ESA, in charge of financial supervision of EEA-3 banks. The EFTA court could provide legal protection against the latter's decisions in the same way as it currently does with regard to ESA. Ensuring the greatest possible homogeneity of financial market regulation, this newly created EEA financial regulatory body could be given observer status in the deliberations of the EU regulatory body, be it the ECB or the EBA.

To provide for a solution for diverging or irreconcilable decisions between the two regulators, an appeal mechanism could be established that would allow one or the other regulator to file a case with the CJEU. The technical details of such a framework may be challenging, but the EEA itself and also the history of the EU show that innovative solutions might well overcome apparently insurmountable obstacles.

An additional question in the context of such a solution concerns the human resources necessary to guarantee sound and effective EEA-3 financial market surveillance. In the current set-up, the ESA cannot provide the expertise and additional administrators necessary to cope with such a task. A solution could be an additional agreement, by simple Joint Committee Decision of the EEA, with the EU regulator to include the EEA-3 market in its regulatory tasks, short of decision rights. ESA could be entrusted with formally adopting decisions based on an opinion by the ECB supervisor. One might even go further and ask the question whether an individual 'opt-in' for Liechtenstein could be agreed. It goes without saying that tasking the ECB also with the technical work on the EEA-3 banks would require a financial contribution of the EEA-3 to the EU regulator's budget and possibly provide for seconded national experts of the EEA-3 within the EU regulator.

'More EU' in the single market can also refer to some network industries, in particular those with large physical infrastructures i.e.

electronic communications (telecoms, internet, broadcasting), electricity, gas and rail. In all four, the Internal Market suffers from the absence of a genuine and independent EU regulator. This can be attributed to political resistance by member states, or, more subtly, of their national regulators, or once again the Meroni doctrine. Given this taboo, the EU attempts to cope with extremely complex network approaches of national regulators (not unlike the ones employed in financial markets, up until the crisis) and, more recently, selected and weak EU agencies.¹⁹⁹ It is true that awareness of the costly fragmentation of the single market in these sectors is slowly growing. Also, ACER and BEREC are currently engaged in addressing more seriously a number of lingering problems of the (not so) single market in, respectively, gas/electricity and eComms. Moreover, the Commission has announced that, in rail, it intends to request in 2014 a thorough investigation of the merits of an EU agency, presumably concerned with infrastructure users fees and slot allocation questions – issues that cannot be taken up by the European Rail Agency (assigned safety and interoperability). Although it is difficult to predict in the light of legal doctrine and political resistance, one cannot exclude that stronger EU agencies will eventually emerge in such markets. That is why the suggestion of the Commission of a “horizontal approach”,²⁰⁰ pre-empting lengthy and difficult negotiations, is so important. However, no reference is made to a new horizontal approach inside the EU itself. On 13 June 2012, the European Parliament, Council and the European Commission agreed on a “common approach” to EU agencies. Most is on ‘governance’, such as similar performance and management requirements as well as financial control. Nowhere is there any reference to EEA-3 representation, not even under “relations with stakeholders”. Also in the Roadmap of 18 December 2012, which is a follow-up of the 13 June accord, the EEA-3 is nowhere referred to.²⁰¹

¹⁹⁹ These complexities are explained in detail in e.g. Lavrijsen & Hancher (2008).

²⁰⁰ In its EEA Review, COM (2012) 425 (European Commission, 2012a, p. 10).

²⁰¹ The hyperlink from the Commission is not easy to trace: http://ec.europa.eu/agencies/documents/2012-12-18_roadmap_on_the_follow_up_to_the_common_approach_on_eu_decentralized_agencies.pdf

5.9 Less EU, substance or membership

Nowadays, it can no longer be taken for granted that all EU countries are whole-heartedly favouring the long-run creeping tendencies of ever-deeper integration, with a greater scope and more and more EU member countries. In times of a profound and lingering economic crisis, rising EU scepticism in several EU member states and resurfacing proposals of a multi-speed Europe, it appears more and more likely that certain EU member states do not want to shoulder more integration and opt for maintenance of the status quo. The status quo can refer to ‘deepening’, the widening of the scope of domains with some or major EU competences, and enlargement of the club. Whereas enlargement is a truly common decision via ratification, there is a risk that deepening and greater scope may generate negative feedback, culminating in a multi-speed EU or an EU of inner and outer circles. ‘Less EU’ may then result. The avant-garde or ‘core’ will move ahead of others,²⁰² whether due to a lack of capability (i.e. joining the eurozone but not yet ‘ready’ to fulfil the entry conditions) or willingness (e.g. a lingering resistance in the UK, yet not in Scotland). ‘Less EU’ does *not* mean, here, that the EU would suffer from lower ambitions or diminishing the Internal Market *acquis*, but rather a somewhat divided Union, with two ambitions. The eurozone is formally open to the ‘outs’, but the deeper EMU becomes, the greater the risk is for the ‘outs’ that a division might nevertheless emerge. The ‘banking union’ – an Internal Market affair but one clearly led by the eurozone – might cause such a division as well. An eventual increase in the powers of network agencies (say in telecoms or energy) might also take place in the future. The free movement of persons, or workers, and the rigour of Schengen repeatedly cause frictions between different country coalitions.

Since the beginning of the new millennium, one can discern a subtle renaissance in Europe of a popular notion of sovereignty. The current study is not the place to discuss this notion. It is enough to mention that the distribution of legislative powers within the EU is not always welcome to all EU member states. The EEA Treaty does not formally confer legislative

²⁰² As shown recently, this may happen on the basis of “enhanced cooperation” (EU patent; financial transactions tax) or separate intergovernmental treaties, based on EU law as much as possible and explicitly meant to be incorporated into EU law later on. As noted, the eurozone itself might also contribute in actual practice to a widening between the ‘ins’ and the ‘outs’.

powers upon international institutions, but rather preserves the sovereignty of its contracting parties. Such an approach might eventually be more attractive for some EU member states, especially those with 'eurosceptic' electorates. From this perspective it cannot be dismissed entirely that national eurosceptic politicians will attempt to rally a national electorate behind a pragmatic curtailment of market integration and political integration. Would it go too far to eventually expect the creation of a new international organisation, not fully similar to the EEA due to selected limitations and opt-outs, strongly interwoven with the core EU framework but solely for market integration?

Apart from the considerable difficulty of separating matters of market integration from what might be seen as the unwanted 'too much Europe', such a development would bring back a division within Europe between two blocs of economic integration.

Interestingly, the loudest EU member state – the UK – was also the leading sponsor of the creation of EFTA in the 1960s. Norway might also be inclined to return to its old (EFTA) club. Switzerland, too, might see its national objections to the implications of its eventual EU membership better accommodated in a circle of former EFTAs, now wedded to deeper economic integration than before, but distinctly less than recent trends inside the Union. Iceland would historically also tend more towards such an approach, if its EU application is not followed by accession. Although perhaps far-fetched, a newly formed influential bloc could develop itself into a lighter alternative of the much further-reaching EU market integration. Matters like Schengen and Dublin could still be dealt with on the basis of the current association agreements.

Such a new division in market integration in Europe will not happen so easily. The advantages of today's EU internal market are simply too great and diversified. Moreover, the old EFTA club would also be split, with Austria, Finland and Sweden firmly in the EU.

Liechtenstein, although still an EFTA country, might not regard such (admittedly speculative) a scenario as positive. The Principality is not against deep EU market regulation. Even when it comes to questions such as participation in EU agencies, it takes a pragmatic approach, aware of the fact that a market with 500 million people has for sure more expertise and

resources to create a sound regulatory framework in financial services than a country with 36,000 people.²⁰³

In addition, Liechtenstein's renewed transparency policy, embedded most clearly in the "Vaduz Declaration of 2009", renders Liechtenstein more willing to even accept the EU tax *acquis* and to cooperate fully with tax administrations of other EU member states, thereby being a partner in a most sensitive issue in a number of EU countries.

5.10 Joining the EU

In a strategic reflection on options and scenarios related to European integration and the positioning of Liechtenstein, the possibility of Liechtenstein joining the EU cannot be ignored. At the moment, the Principality gives low priority to EU membership. The present combination of i) membership of the EEA, ii) the customs union, monetary union and other close (e.g. regulatory) cooperation with Switzerland, iii) additional cooperation with the EU and with its member states in selected areas and iv) the membership of EFTA (with its free trade agreements), the Council of Europe, the OSCE and the WTO, suits Liechtenstein well. Moreover, as we shall discuss below, even if there were a slight preference for political reasons to pursue EU membership, it would entail considerable costs to Liechtenstein and require solutions in the EU hitherto not foreseen or practiced. In such a case, the benefits would have to exceed the costs by a considerable margin. The benefits of EU membership, over and above what Liechtenstein already enjoys, are not just a function of the deeper integration, with a wider scope of policy domains that the EU brings. Certainly for small-sized Liechtenstein, the net benefits might also consist of greater certainty of avoiding possible adverse developments, which would render the alternative options for the Principality less attractive or too disruptive. From the eight previous scenarios in this chapter, one adverse development might be 'less EEA' (whether in scope or involving only two EFTA countries rather than three) or a drastic shift to bilateral solutions. Nor can one exclude that, one day, Switzerland might join the EU, which would immediately prompt considerations about Liechtenstein joining the EU in tandem with its close neighbour. It might consider a joint application for accession to the EU far less risky because Liechtenstein has long feared, and perhaps still fears, that such a small-sized state would not

²⁰³ Interview conducted by the authors with an expert, Brussels in June 2012.

easily be accepted. Once some kind of new formulae for small-sized countries would be found, Liechtenstein would be free to decide EU membership on the merits. Joining together with Switzerland would do away with the complexities that currently arise such as trilateralisation and the unique combination of a free trade area (EEA) with a customs union with Switzerland. Given the close legal and economic ties between both countries, an EU membership of one of the two alone would inevitably have far-reaching and complicating consequences for Liechtenstein's relationship with Switzerland.

The additional economic benefits of EU membership would probably be rather marginal. Liechtenstein's agricultural activities are modest and it has no interest in fisheries, the two areas excluded from the EEA. In any event, assessing the benefits of today's common agricultural policy (with selective high tariffs, very few price interventions and direct farm payments, at its core) compared to Liechtenstein's prevailing agricultural regime cannot be our task in the present study. Beyond the internal market, and what the EEA calls 'flanking policies' (already part of the EEA *acquis*), there is first of all the EMU. As a new EU member state, Liechtenstein would be expected to eventually join the euro. If properly designed and operated, the eurozone entails benefits. However, it so happens that today's currency in Liechtenstein is rock solid (the Swiss franc) and, apart from appreciation of that currency vis-à-vis the euro, which hinders Liechtenstein's export competitiveness, there is little incentive to swap currencies before the eurozone has stabilised with firm and better governance. However, Liechtenstein could wait quite a while, as experience of other new EU countries has shown.

Another change to be mentioned is the switch to the EU customs union. This is technically complex, but, as Andorra and San Marino have already enjoyed a customs union with the EU for a long time, it must be feasible without great difficulties, but it would have the political consequence of putting an end to the current customs unions with Switzerland unless the latter were to join the EU as well. A third area of interest is taxation since Liechtenstein's taxation *acquis* from bilateral agreements with the EU is partial. This area is technically complex, but, even more importantly, a comparison with today's regimes (that is, Liechtenstein's and that of the EU) is also complicated by the incompleteness of the taxation *acquis* of the Union itself. The semi-taboo (a 'red line' for some) on taxation for certain EU member states has allowed the perpetuation of highly distortive exceptions and tax break policies with respect to the tax base of national corporate taxes, to some degree

compensated by different tax rates. Whereas distortions in the internal market tend to be addressed sooner or later by means of new EU regulation and/or CJEU case law in many domains and submarkets, unanimity in Council and the 'red line' politics by some governments have caused a stalemate, if not a costly denial of the problem in taxation. Unlike the EU, the US has a well-defined federal tax base pre-empting such distortive 'tax competition' in its single market. It is therefore far from easy to identify the benefits of joining the EU tax *acquis* as it stands today.

The benefits of joining the EU might have more to do with institutional and political questions, perhaps even with a sense of security for some countries. Liechtenstein perceives few immediate benefits from the EU's foreign, security and defence policies although its tradition points to non-involvement. Indeed, the strategic environment might suffer from adverse developments, which might justify a reversal of this stance, although at the moment it would seem far-fetched considering that Liechtenstein does not have any armed forces. It might also benefit from a spectrum of softer but not necessarily uninteresting EU policies (often more cooperative than integrative) such as education and culture, TENs, science and research, although most of these areas are already covered by the EEA Agreement. In other areas, Liechtenstein already enjoys cooperative agreements with the EU and/or its member states. The country would also take part, fully, in EU agencies, which matter more and more as several agencies begin to assume (restricted but real) executive, risk assessment and regulatory functions.

Insofar as there is or has been debate in Liechtenstein on EU membership, the emphasis inevitably turns around the derogations, costs of adjustment, the contribution to the EU budget, the permanent administrative and representation burdens and the consequences for the future relationship with its close neighbour Switzerland. Furthermore, one perceives a significant degree of unpredictability on the part of the EU about the factual and legal solutions of an eventual membership for the Principality due to the 'size factor'. Derogations and certainly permanent derogations are normally refused in accession negotiations. Clearly, Liechtenstein would seek a quasi-permanent derogation on the free movement (and establishment) of persons as it now enjoys in the EEA. Even though no small-sized country with either a considerably smaller territorial dimension and/or population base than current small EU member states has ever applied for membership, it is not impossible that this request might be granted, but it will not be easy or happen without a price.

The costs of adjustment would be relatively large although temporary, of course, and probably still tolerable. Although the (large) EEA *acquis* helps Liechtenstein avoid much of the problems EU candidate countries have when preparing for membership, there are still considerable efforts to be undertaken before or upon entry. *Acquis* in domains such as agriculture, justice, freedom and security (beyond Schengen & Dublin), trade policy (and hundreds of trade agreements) and financial control would be far from trivial. The contribution to the EU budget might easily amount to €28 million or more, annually.²⁰⁴ The administrative burden would be higher than today in the EEA given a number of tasks member states have to fulfil in the EU system (including courts) and given the additional *acquis*. It is of course conceivable that some such tasks are delegated to other EU countries (as Liechtenstein already does with Austria in some instances) or are considered as not applicable (e.g. fisheries; air transport, etc.) or irrelevant. What would seem to be more difficult still is the representation burden. EU countries send their officials to hundreds of Council committees, in addition to hundreds of comitology committees for executive refinements of specific EU legislation. The EU bodies are crucial in the EU system: besides the core three (Commission, Council and European Parliament), there are the Committee of the Regions, the European Economic and Social Committee, the EU Court of Auditors, the EU Court of Justice (in fact, two courts), the European Investment Bank and the European Central Bank (knowing that Liechtenstein has no central bank of its own). What about the ± 35 EU agencies and a range of executive or other quasi-agencies?

Moreover, the 'size factor' matters not only for the capacity to ensure representation in agencies and committees, it also requires solutions to Liechtenstein's role and representation in the Commission, the Council and the European Parliament. It is here that the unpredictability about the positioning of the EU is great. Suggestions if not speculations about the extent to which Liechtenstein could enjoy a 'virtual' membership in terms

²⁰⁴ Calculating the (theoretical) budget contribution of Liechtenstein would require a separate exercise. The figure in the text is an approximation, arrived at as follows: Luxembourg is also a prosperous country and pays around €280 million, with a population ten times that of Liechtenstein. Thus, Liechtenstein would pay some €28 million a year as a first approximation. However, it would no longer pay the funds under the EEA to poor EU countries as these would be under Cohesion & Structural Funds spending inside the EU itself.

of representation have no basis whatsoever in law or prior experiences. Luxembourg and Malta are small, too, but their populations are still 10 times or more that of Liechtenstein; when constraints are so severe, 10 times makes a great deal of difference. Recently, the European Commission has, for the first time (as far as is known to the authors), made a timid move to begin addressing the problem. In an options paper on the three small-sized AMS countries,²⁰⁵ it says that EU membership "... remains a long-term possibility but is not retained here". This creates an opening for considering EU membership of Liechtenstein, which, legally, is anyway unlikely to be prevented, given existing accession criteria.²⁰⁶ The paper identifies two major difficulties. First, the EU institutions "... are currently not adapted to the accession of these three small-sized countries [and] ... such changes ... would require important negotiations within the EU". Second, the administrative capacity "... to fulfil all obligations as EU Member States" is called "limited", without any elaboration. Liechtenstein's record in the EEA is excellent, suggesting that the "ability to implement the EU *acquis*" would not seem to be a problem. It follows, by implication, that the genuine issue is representation, presence in debates and preparation of decisions and burden-sharing.

²⁰⁵ COM (2012) 680 of 20 November 2012, EU relations with Andorra, Monaco and San Marino: Options for closer integration with the EU (European Commission, 2012c, p. 18).

²⁰⁶ For a detailed legal study, see Breuss (2011).

6. CONCLUSIONS

European market integration has become central to the prosperity of Liechtenstein. Some 25 years ago, the Principality started to realise that what was then the European Economic Community had assumed leadership in Western Europe. A civil Community, it mainly focused on deepening and widening the scope of market integration. Soon after Liechtenstein had joined the negotiations of the EEA Agreement, communism as well as the Soviet Union collapsed. At the same time, the EEC negotiated the Maastricht Treaty strengthening market integration and adding EMU to its ambitions. In this entirely new strategic environment, now stretching all over the European continent, the EU emerged as a civil European hegemon driving ever-deeper market integration (and later, monetary integration) for a quickly increasing number of EU countries. The EEA grew out of an EEC offer to its closest trading partners, although three of them eventually joined the EU and Switzerland – the most important one for Liechtenstein – did not participate in the EEA. Several waves of extending market integration (or, indeed, full integration with the EU) over the continent, like a domino or ‘me-too’ process, took place: first the Visegrad countries requesting the fullest possible market access, followed by other central European countries and, still later, by Turkey. With three enlargements (in 1995, 2004 and 2007), the EU has de facto become the European civil hegemon with an attractive market of 500 million mostly high-income consumers. Today, several small countries from former Yugoslavia might join the EU, with Croatia first in line and almost certain to obtain accession, and Iceland might perhaps follow. The Turkish candidacy looks a good deal less firm.

Although nowadays the EU experiences some internal tensions due to divergent views on how far the EU market and EMU integration ought to go, these might well be a natural reaction to decades of steady deepening and widening as well as enlargement. Not long ago, the combination of these three processes was seen as impossible as it would tax domestic politics and political legitimacy in member states too much and/or it would run into a wall of resistance at high political level. A better reading of these trends seems to be that the EU successfully pursued this unique

combination but paid too little attention to grassroots politics and political legitimacy. Repairing these mistakes is difficult as it has bred mistrust and cheap Brussels bashing, which has had the effect of eroding the very 'permissive consensus' among voters that enabled deep integration. The crisis and the fault lines it revealed made matters worse. Even if the deepening and widening of scope of market integration, and to some extent of the Economic Union and its governance as well, would stop, or slightly and selectively be pushed back, it is nevertheless most unlikely that this will affect greatly the accomplishments of both market and EMU integration of the EU. There are still countries eager to join the EU and, now that the EMU crisis is slowly receding, there are also EU countries applying to join the eurozone (e.g. Latvia). Several neighbourhood countries are also beginning to climb the ladder of deepening market integration with the EU and adopting the relevant market regulation *acquis* for this purpose.

The EU is therefore going to remain the economic hegemon in Europe for the foreseeable future and the fullest possible access to its internal market is and will remain critical. It is exceedingly hard to envisage another scenario, even with some degree of boldness. As the Norway EEA Review put it: there is simply no alternative. For Liechtenstein, it simply means that it has made the right choice of opting for the greatest possible market integration – the EEA – with the (ever-larger) EU. Moreover, it has done so whilst maintaining a very high degree of economic integration with non-EU and non-EEA Switzerland by means of a customs union and a common currency. As the 2010 Liechtenstein assessment of 15 years of EEA membership showed, the Principality has done very well in the EEA. Although hard to substantiate with rigorous economic analysis, Liechtenstein's prosperity is due, in no small measure, to this unique combination of two-sided economic integration with the EU and with Switzerland. Our study sets out in considerable detail (in chapter 3 and Annexes) how deep and wide Liechtenstein's market integration and other cooperation with the EU and its member states have become today.

The present study first provides no less than eight expected or possible changes in the Principality's strategic environment (in chapter 4) and subsequently sketches no less than nine scenarios or options (and some sub-options as well, all in chapter 5) in an attempt to stimulate strategic reflection amongst the leadership and public opinion in Liechtenstein. The present chapter is purposefully kept short – it is not meant to do justice to the subtleties of each and every option, but rather to draw broad conclusions. It is hoped that this strategic thinking might also be of use for

the current debates in Brussels and national capitals leading up to the EEA Review of the EU or indeed the entire EEA-30.

With so many scenarios, one might lose track of the hard-core interests of the Principality. At the moment, these interests are best served by its two-sided economic integration, i.e. the status quo. Improvements are conceivable, indeed desirable, and the 'status quo-plus' option for the EEA attempts to weigh what might be possible and what is risky about it. This option may comprise the intricate questions about 'EEA relevance' of EU legal acts, coming to a more cooperative approach based on explicit criteria; some problems causing the EEA-3 backlog to get out of hand (and absorbing the announced EU 'response strategy', including recourse to Art. 102); the participation in EU agencies based on what the Commission calls a horizontal approach and some minor issues around the ESA. A border case is the desire to include judicial cooperation (terrorism, serious crime, police cooperation) in the EEA Agreement: can it be included into annexes – probably – or would one favour a carefully limited amendment of the Agreement? However, vital as these considerations are, a singular focus on the status quo(-plus) cannot suffice for Liechtenstein for the simple reason that Liechtenstein has at best marginal, and more probably no, influence on its strategic environment. The strategic environment can change in many ways and it is not merely prudent but essential that Liechtenstein understands such changes and, if it considers them important and likely enough, prepares for timely responses.

The option of 'more EEA' via amendments of the Agreement is feasible but most if not all of the issues can be resolved via the status quo-plus option, given the incredible flexibility of the Agreement and the practices developed in the EEA over time. Now that the EU is beginning to seriously look at the EEA again – which it has not done since 1994 – the EEA-3 would seem wise to accommodate most of the improvements in the existing treaty framework except more open enlargement clauses, which do require amendment of the Agreement. The EU has surely become more critical on specific aspects (like the backlog and strategic behaviour by e.g. Norway and, a few times, Iceland – whilst still praising the EEA as working well overall – but all such aspects would seem to be manageable within current arrangements. Enlarging the EEA has never been on the agenda for two decades, but now this can no longer be excluded. In fact, the European Commission has broken a taboo by explicitly bringing up the possibility of amending the Agreement and opening the EEA, in principle, to non-EFTA European countries.

Of course, this does not mean that there is a queue of countries eager to join: the only countries that might consider membership are Switzerland (under the existing treaty; but at the moment, it is most unlikely), San Marino and Andorra. More speculatively, it might be an option for Turkey, if it would give up its aspirations as an EU candidate country (and this might happen) or, in more extreme scenario, Britain (without Scotland) if a referendum in 2017 would turn out to be negative. In the long run, the EEA might open up to neighbourhood countries, too. In fact, the AMS (Andorra, Monaco, San Marino) countries have recently been handed two 'viable' options by the Commission: EEA membership or an EEA look-alike.

For Liechtenstein, it is critical that the quality of today's EEA does not suffer in the process and, if prospects of EEA enlargement become more firm, insist with the EU and its EEA-3 partners that the EEA should not be used for political convenience. However, if the Swiss would join - hence, reverse their attitude on the EEA - it would be most positive for the Principality, because the complexities of two-sided integration would reduce greatly and the benefits are only too obvious. It is quite probable that, once large countries (e.g. the UK or Turkey) would consider the EEA as a serious option, they might wish to negotiate their 'own' EEA or EEA look-alike. Such negotiations would not be easy if the expectations of these countries amount to fully-fledged market access. This is equally the case for Switzerland, now locked in a series of market access bilaterals with the EU. The EU has sharpened its conditionality since 2010 in no uncertain terms and the upshot would ideally be an EEA look-alike (or the EEA as such). The famous four conditions cannot be compromised to a large extent (even though that seems to be what Switzerland is trying to do), which means that the Swiss see their options reduced considerably. This is crucial for Liechtenstein given its deep economic integration with its closest neighbour: an EEA look-alike for the Swiss is probably convenient for Liechtenstein too.

Other options directly linked to the EEA could be 'less EEA' (in substance or fewer members) and the conclusion of bilateral market access treaties. Reduction of the scope of the EEA is sometimes suggested in Norway but the government has firmly supported the status quo in its recent White Paper (except for open diplomatic phrases "to develop the internal market" and to "develop the EEA Agreement", which can only mean 'more EEA', not less). This ("less EEA") could be one reason why the UK, if it would leave the EU, might wish to negotiate its 'own' EEA look-alike and argue that the flanking policies should be negotiable to some extent. This line of thinking is not entirely excluded, given the legalistic

rather than economic concept of the internal market in the EEA Agreement. Less EEA in membership will happen if Iceland joins the EU. We suggest some simple institutional adjustments to re-arrange the EEA-2. The real problem of an EEA-2 is whether Norway and Liechtenstein, with diverse interests and traditions and given the huge relative size difference, would continue to work together as before, also in cases where Norway would be faced with political or other constraints. Partners agreeing bilateral with the EU will not easily be granted fully-fledged market access. The Swiss experience is the deepest bilateral so far and the EU has learnt lessons: the choice will be either an EEA look-alike or less-than-full market access. We perceive no reason why this would be different for the UK (despite their longstanding EU membership) and the very critical reactions to Cameron's speech of 23 January 2013 by political leaders all over the EU (no *à-la-carte* EU) are consistent with this. The same would go for Turkey.

Two scenarios can be envisaged about the EU itself: 'more EU' (via deepening) and 'less (or differentiated, hence, looser) EU'. Both are inspected in some depth. The harder one for the EEA-3 at the moment is undoubtedly 'more EU', especially in the 'banking union' and, in future, possibly with some of the EU agencies in network industries. The banking union can only be accommodated by EEA-3 countries if the EU is willing to adopt an ingenious construction via the ESA and an assignment to the ECB supervisor to analyse and advise on the relevant EEA-3 banks. This seems compatible with the CJEU case law as long as this close cooperation only or mainly matters for EEA-3 banks, and not for the EU as a whole. Given the current frictions about the EBA, this would require a different attitude on the EU side. 'Less' (or a more divided) EU can be an issue for Liechtenstein (or the EEA-3) if some degree of (re)fragmentation of the internal market might occur. Less EU may also mean that one or more EU countries exit the Union. This need not be immediately worrying for Liechtenstein, depending on what market access arrangement succeeds membership.

Finally, when Liechtenstein considers options and future strategy, it has so far always taken for granted that the EU would be very reticent if not negative about Liechtenstein EU membership. Moreover, the extra costs of EU membership for the Principality are considerable and the benefits (beyond market integration) not many and not impressive. The first assumption is no longer valid: the AMS options paper from the Commission provides a prudent opening in the longer run. This could be a reason for Liechtenstein to reflect on a *modus*, or several, for the EU to render it practical and acceptable. The second assumption is not wrong (as we briefly sketch) but deserves to be studied much more seriously. It also

matters what Switzerland will do in the medium-term. It stands to reason that, if the Swiss were to apply for EU membership one day, Liechtenstein should seriously consider submitting a joint application.

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ANNEXES

Annex I. Protocols to the EEA Agreement

Protocol 1	<p>“On Horizontal Adaptions”: Adaptions on how EU-specific content of EU legal acts (notification procedures, date of entry into force, committees etc.) is to be applied in the context of the EEA</p>	Protocol 26	<p>“On the powers and functions of the EFTA Surveillance Authority in the field of State Aid”</p>
Protocol 2	<p>“On products excluded from the scope of the Agreement in accordance with Article 8(3)(a)” The free movement of goods provisions of the EEA only apply to products falling within Chapter 27 to 97 of the HS (Harmonised Commodity Description and Coding System), excluding the products listed in this protocol. These are Albumins, albuminates and other albumin derivates and Industrial monocarboxylic fatty acids; acid oils from refining; industrial fatty alcohols. (Protocol was replaced by Annex I to Decision No 140/2001 (OJ No L 22, 24.1.2002)</p>	Protocol 27	<p>“On co-operation in the field of State Aid”</p>
Protocol 3	<p>“Concerning products referred to in Article 8(3)(b) of the Agreement” The same as with Protocol 2 but relating to processed agricultural and certain other products. (Protocol was replaced by Annex I to Decision No 140/2001 (OJ No L 22, 24.1.2002)</p>	Protocol 28	<p>“On intellectual property”</p>
Protocol 4	<p>“On rules of origin” This protocol puts down the rules of origin for the products originating in the EEA.</p>	Protocol 29	<p>“On vocational training”</p>
Protocol 5	<p>“On customs duties of a fiscal nature (Liechtenstein)” Liechtenstein may retain customs duties of a fiscal nature for products listed in this protocol. With regard to some only temporally with regard to others until it starts an own production of alike products.</p>	Protocol 30	<p>“On specific provisions on the organisation of cooperation in the field of statistics”</p>

Protocol 6	<p>"On the building up of compulsory reserves by Liechtenstein"</p> <p>Liechtenstein may build up reserves of indispensable products necessary for the survival of its population in times of shortage subject to a non-discriminatory scheme.</p>	Protocol 31	<p>"On cooperation in specific fields outside the four freedoms"</p> <p>This Protocol regulates the participation of EEA EFTA countries in EU policies outside the four freedoms (environment, social policy, consumer protection, transport, culture etc.). For a full list see Art 78 EEA.</p>
Protocol 7	<p>"On quantitative restrictions which Iceland may retain"</p> <p>Brooms, toothbrushes, non mechanical floor sweepers, etc.</p>	Protocol 32	<p>"On financial modalities for implementation of Article 82"</p> <p>Financial contribution for the participation in EU policies as provided for by Art 78 EEA (see Protocol 31).</p>
Protocol 8	<p>"On state monopolies"</p>	Protocol 33	<p>"On arbitration procedures"</p> <p>Such proceedings could arise in the context of safeguard measures.</p>
Protocol 9	<p>"On trade in fish and other marine products"</p>	Protocol 34	<p>"The possibility for courts and tribunals of EFTA States to request the Court of Justice of the European Communities to decide on the interpretation of EEA rules corresponding to EC rules"</p>
Protocol 10	<p>"On simplification of inspections and formalities in respect of carriage of goods"</p>	Protocol 35	<p>"On the implementation of EEA rules"</p> <p>This protocol stipulates the duty of EEA EFTA countries to introduce, if necessary, a statutory provision which provides for supremacy of EEA law in case of collision with national law.</p>
Protocol 11	<p>"On mutual assistance in customs matters"</p>	Protocol 36	<p>"On the Statute of the EFTA Joint Parliamentary Committee"</p>
Protocol 12	<p>"On conformity assessment agreements with third countries"</p>	Protocol 37	<p>"Containing the list provided for in Article 101"</p> <p>This protocol contains a list of EU committee to which EEA EFTA experts are associated against the backdrop of the good functioning of the EEA.</p>

Protocol 13	“On the non-application of anti-dumping and countervailing measures”	Protocol 38	“On the financial mechanism” The EEA financial mechanism shall provide financial assistance to the development and structural adjustment of Greece, Ireland, Portugal and Spain.
Protocol 14	“On trade in coal and steel products”	Protocol 38a	“On the EEA financial mechanism”
Protocol 15	“On transitional periods on the free movement of persons” This protocol allows Liechtenstein to transitionally derogate from certain aspects of the free movement of workers provision due to its special geographic and demographic features. The transitional period initially expired in 1998. However, it was extended until 2006 (EEA JC Decision No. 191/1999) and subsequently made subject to a review recurring every 5 years (2004 OJ L130/59).	Protocol 38b	“On the EEA financial mechanism”
Protocol 16	“On measures in the field of social security related to transitional periods on the free movement of persons” This Protocol deals with the application of Regulation 1408/71/EEC social security schemes on workers and self employed people. This protocol must be read combined with Protocol 15.	Protocol 39	“On the ECU” Outdated
Protocol 17	“Concerning Article 34” Art 34 EEA provides for the non-discrimination of companies established under the law of an EEA contracting party. This protocol states that EEA countries are free to regulate on third country access to their market.	Protocol 40	“On Svalbard” Kingdom of Norway has the right to exempt the territory of Svalbard from the application of the EEA.

Protocol 18	<p>"On internal procedure for the implementation of Article 43"</p> <p>This protocol establishes a procedure regulating the free movement of capital between the EEA EFTA countries and third countries.</p>	Protocol 41	<p>"On existing agreements"</p> <p>Outdated</p>
Protocol 19	"On maritime transport"	Protocol 42	"On bilateral arrangements concerning specific agricultural products"
Protocol 20	"On access to inland waterways"	Protocol 43	"On the Agreement between the EC and the Austrian Republic on the transit of goods by road and rail" out-dated
Protocol 21	"On the implementation of competition rules applicable to undertakings"	Protocol 44	"On Safeguard mechanisms pursuant to the enlargements of the EEA" Enlargement refers to the EU enlargements in 2004 and 2007 which also enlarged the EEA.
Protocol 22	"Concerning the definition of "undertaking" and "turnover"	Protocol 45	"On transitional periods concerning Spain and Portugal" Outdated
Protocol 23	<p>"Concerning the cooperation between the surveillance authorities"</p> <p>This protocol concerns the cooperation between the European Commission and the EFTA Surveillance Authority.</p>	Protocol 46	<p>"On the development of cooperation"</p> <p>Cooperation in the fisheries sector between the EEA EFTA countries and the EU.</p>
Protocol 24	"On cooperation in the field of concentrations"	Protocol 47	"On the abolition of technical barriers to trade in wine"
Protocol 25	"On competition regarding coal and steel"	Protocol 48	<p>"Concerning Articles 105 and 111"</p> <p>This protocol states that in case of diverging interpretations of EU acts respectively EEA acts between the CJEU and the EFTA Court, the EEA JC decision settling this divergence does not affect the independence of either legal order.</p>
		Protocol 49	"On Ceuta and Melilla"

Annex II. Excerpt of Annex X – Services in General

29.9.2012

EEA AGREEMENT

ANNEX X – p.1

ANNEX X

SERVICES IN GENERAL^{1}

List provided for in Article 36(2)

INTRODUCTION

When the acts referred to in this Annex contain notions or refer to procedures which are specific to the Community legal order, such as

- preambles;
- the addressees of the Community acts;
- references to territories or languages of the EC;
- references to rights and obligations of EC Member States, their public entities, undertakings or individuals in relation to each other; and
- references to information and notification procedures;

Protocol 1 on horizontal adaptations shall apply, unless otherwise provided for in this Annex.

ACTS REFERRED TO

1. **32006 L 0123**: Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptations:

- (a) In Article 3(3), “rules of the Treaty” shall read “rules of the EEA Agreement”;
- (b) In Article 4(1), “Article 50 of the Treaty” shall read “Article 37 of the EEA Agreement”;
- (c) In Articles 4(2) and 4(3), “Article 48 of the Treaty” shall read “Article 34 of the EEA Agreement”;
- (d) In Article 4(5), “Article 43 of the Treaty” shall read “Article 31 of the EEA Agreement”;
- (e) Article 4(8) shall read:
“overriding reasons relating to the public interest’ means, without prejudice to Article 6 of the EEA Agreement, reasons recognised as such in the rulings of the Court of Justice of the European Community, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers; recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;”;

^{1} Title, introduction text and point inserted by Decision No 45/2009 (OJ No L 162, 25.6.2009, p. 23 and EEA Supplement No 33, 25.6.2009, p. 8), e.i.f 1.5.2010.

Annex III. The Annexes to the EEA Agreement

Annex	Title	Chapter
Annex 1	Veterinary and Phytosanitary Matters	I. Veterinary Issues II. Feeding Stuffs III. Phytosanitary Matters
Annex 2	Technical Regulations, Standards, Testing and Certification - Part I	I. Motor Vehicles II. Agricultural and Forestry Tractors III. Lifting and Mechanical Handling Appliances IV. Household Appliances V. Gas Appliances VI. Construction Plant and Equipment VII. Other Machines VIII. Pressure Vessels IX. Measuring Instruments X. Electrical Material XI. Textiles XII. Foodstuffs
Annex 2	Technical Regulations, Standards, Testing and Certification - Part II	XIII. Medicinal Products XIV. Fertilizers XV. Dangerous Substances XVI. Cosmetics XVII. Environment Protection XVIII. Information Technology, Telecommunication and Data Processing XIX. General Provisions in the Technical Barriers to Trade XX. Free Movement of Goods - General XXI. Construction Products XXII. Personal Protective Equipement XXIII. Toys XXIV. Machinery XXV. Tobacco XXVI. Energy XXVII. Spirit Drinks XXVIII. Cultural Goods XXIX. Explosives for Civil Use XXX. Medical Devices XXXI. Recreation Craft XXXII. Marine Equipement Appendixes

Annex 3	Product Liability	
Annex 4	Energy	
Annex 5	Free Movement of Workers	
Annex 6	Social Security	
Annex 7	Recognition of Professional Qualifications	A. General system, recognition of professional experience and automatic recognition B. Legal professions C. Commerce and intermediaries Acts of which the Contracting Parties Shall Take Note
Annex 8	Right of Establishment	
Annex 9	Financial Services	I. Insurance II. Banks and other credit institutions III. Stock exchange and securities IV. Occupational Retirement Provisions V. Provisions applying to all kinds of financial services Acts of which the Contracting Parties Shall Take Note
Annex 10	Services in general	
Annex 11	Electronic Communication, Audiovisual Services and Information Society	Telecommunication services Postal services Data Protection Information Society Services Audiovisual services Acts of which the Contracting Parties Shall Take Note
Annex 12	Free Movement of Capital	
Annex 13	Transport Part I	I. Inland Transport II. Road Transport III. Transport by Rail IV. Transport by Inland Waterway V. Maritime Transport VI. Civil Aviation
Annex 13	Transport Part II	VII. Other Acts of which the Contracting Parties Shall Take Note Appendix 1
Annex 13	Transport Part III	Appendix 2

Annex 14	Competition	<p>A. Merger Control B. Vertical Agreements and Concerted Practices C. Technology Transfer Agreements D. Specialisation and Research Development Agreements E. and F. (deleted) G. Transport H. Information and Communication Technologies I. Coal and Steel J. Insurance Sector</p> <p>Acts of which the EC Commission and the EFTA Surveillance Authority Shall Take Due Account</p>
Annex 15	State Aid	<p>Public Undertakings Aid to the steel industry Aid to shipbuilding De minimis aid Services of general economic interest Aid to small and medium-sized enterprises, research, development, innovation, environmental protection, regional investments, female entrepreneurship, employment and training</p> <p>Acts of which the EC Commission and the EFTA Surveillance Authority Shall Take Due Account</p> <p>Appendix</p>
Annex 16	Procurement	
Annex 17	Intellectual Property	
Annex 18	Health and Safety at Work, Labour Law and Equal Treatment for Men and Women	<p>Health and safety at work Equal treatment for men and women Labour law</p>
Annex 19	Consumer Protection	
Annex 20	Environment	<p>I. General II. Water III. Air IV. Chemicals, Industrial Risk and Biotechnology V. Waste VI. Noise</p> <p>Acts of which the Contracting Parties Shall Take Note</p> <p>Appendix</p>

Annex 21	Statistics Part I	Business Statistics Transport and Tourism Statistics Foreign Trade Statistics Statistical Principles and Confidentiality Demographical and Social Statistics Economic Statistics Nomenclatures Agricultural Statistics Fishery Statistics Energy Statistics Environmental Statistics Information Society Statistics Statistics on Science and Technology
Annex 21	Statistics Part II	Appendix 1
Annex 21	Statistics Part III	Appendix 2
Annex 22	Company Law	

Annex IV. Liechtenstein's Special Arrangement with regard to the Free Movement of Persons and the Right of Establishment

The following special arrangements apply to Liechtenstein with regard to the free movement of workers and the right of establishment under the EEA Agreement. They are covered in Protocol 15 to the EEA Agreement as well as by sectoral adaptations inserted into Annex V to the EEA Agreement regarding the freedom of movement of workers and Annex VIII to the EEA Agreement regarding the right of establishment.

Protocol 15 on transitional periods on the free movement of persons (Switzerland and Liechtenstein)²⁰⁷

Article 1

The provisions of the Agreement and its Annexes relating to the free movement of persons between the EC Member States and EFTA States shall apply subject to the transitional provisions laid down in this Protocol.

Article 2

1. Notwithstanding the provisions of Article 4, Switzerland, on the one hand, and EC Member States and other EFTA States, on the other hand, may maintain in force until 1 January 1998 with regard to nationals from EC Member States and other EFTA States and to nationals of Switzerland, respectively, national provisions submitting to prior authorisation entry, residence and employment.

2. Switzerland may maintain in force until 1 January 1998 with regard to nationals of EC Member States and other EFTA States quantitative limitations for new residents and seasonal workers. These quantitative limitations will be gradually reduced until the end of the transitional period.

Article 3

1. Notwithstanding the provisions of paragraph 3, Switzerland may maintain in force until 1 January 1998 national provisions limiting professional and geographical mobility of seasonal workers, including the obligation for such workers to leave the territory of Switzerland at the expiry of their seasonal permit for at least three months. As from 1 January 1993, seasonal permits will

²⁰⁷ OJL. L 1, 03.01.1994, S. 176.

be automatically renewed for seasonal workers holding a seasonal work contract on their return to the territory of Switzerland.

2. Articles 10, 11 and 12 of Regulation (EEC) No 1612/68 as listed in point 2 of Annex V to the Agreement shall apply in Switzerland with regard to seasonal workers as from 1 January 1997.

3. As from 1 January 1993 and notwithstanding the provisions of Article 2 of this Protocol, the provisions of Article 28 of the Agreement and of Annex V to the Agreement shall apply to seasonal workers in Switzerland provided that such workers have completed 30 months of seasonal employment in the territory of Switzerland within a preceding reference period of four consecutive years.

Article 4

Switzerland may maintain in force until:

- 1 January 1996 national provisions requiring a worker who, while having his residence in a territory other than that of Switzerland, is employed in the territory of Switzerland (frontier worker) to return each day to the territory of his residence;
- 1 January 1998 national provisions requiring a worker who, while having his residence in a territory other than that of Switzerland, is employed in the territory of Switzerland (frontier worker) to return each week to the territory of his residence;
- 1 January 1997 national provisions concerning the limitation of employment of frontier workers within defined frontier zones;
- 1 January 1995 national provisions submitting to prior authorisation employment undertaken by frontier workers in Switzerland.

Article 5

1. Liechtenstein, on the one hand, and EC Member States and other EFTA States, on the other hand, may maintain in force until 1 January 1998 with regard to nationals from EC Member States and other EFTA States and to nationals of Liechtenstein, respectively, national provisions submitting to prior authorisation entry, residence and employment.

2. Liechtenstein may maintain in force until 1 January 1998 with regard to nationals of EC Member States and other EFTA States quantitative limitations for new residents, seasonal workers and frontier workers. These quantitative limitations will be gradually reduced.

Article 6

1. Liechtenstein may maintain in force until 1 January 1998 national provisions limiting professional mobility of seasonal workers, including the obligation of such workers to leave the territory of Liechtenstein at the expiry of their seasonal permit for at least three months. As from 1 January 1993, seasonal permits will be automatically renewed for seasonal workers holding a seasonal work contract on their return to the territory of Liechtenstein.
2. Articles 10, 11 and 12 of Regulation (EEC) No 1612/68 as listed in point 2 of Annex V to the Agreement shall apply in Liechtenstein with regard to residents as from 1 January 1995 and with regard to seasonal workers as from 1 January 1997.
3. The arrangements provided for in paragraph 2 shall also apply to members of the family of a self-employed person in the territory of Liechtenstein.

Article 7

Liechtenstein may maintain in force until:

- 1 January 1998 national provisions requiring a worker who, while having his residence in a territory other than that of Liechtenstein, is employed in the territory of Liechtenstein (frontier worker) to return each day to the territory of his residence;
- 1 January 1998 national provisions on restrictions on professional mobility and access to professions for all categories of workers;
- 1 January 1995 national provisions on restrictions on access to professional activities with regard to self-employed persons having their residence in the territory of Liechtenstein. Such restrictions may be upheld until 1 January 1997 with regard to self-employed persons having their residence in a territory other than that of Liechtenstein.

Article 8

1. Other than the limitations set out in Articles 2 to 7, Switzerland and Liechtenstein shall not introduce any new restrictive measures concerning entry, employment and residence of workers and self-employed persons as of the date of signature of the Agreement.
2. Switzerland and Liechtenstein shall take all necessary measures so that during the transitional periods nationals of EC Member States and of other EFTA States may take up available employment in the territory of Switzerland and Liechtenstein with the same priority as nationals of Switzerland and Liechtenstein, respectively.

Article 9

1. As from 1 January 1996 the Contracting Parties shall examine the results of the application of the transitional periods as set out in Articles 2 to 4. On completion of this examination the Contracting Parties may, on the basis of new data and with a view to a possible shortening of the transition period, propose provisions intended to adjust the transitional periods.

2. At the end of the transitional period for Liechtenstein the transitional measures shall be jointly reviewed by the Contracting Parties, duly taking into account the specific geographic situation of Liechtenstein.

Article 10

During transitional periods, existing bilateral arrangements will continue to apply unless provisions which are more favourable in their effect to citizens of the EC Member States and EFTA States result from the Agreement.

Article 11

For the purposes of this Protocol, the terms 'seasonal worker' and 'frontier worker' contained therein shall have the meaning as defined by the national legislation of Switzerland and Liechtenstein, respectively, at the time of signature of the Agreement.

**Declaration by the Government of Liechtenstein
on the specific situation of the country²⁰⁸**

The Government of the Principality of Liechtenstein, Referring to paragraph 18 of the Joint Declaration of 14 May 1991 from the Ministerial meeting between the European Community, its Member States and the Countries of the European Free Trade Association;

Reaffirming the duty to ensure compliance with all provisions of the EEA Agreement and to apply them in good faith;

Expects that due regard will be paid under the EEA Agreement to the specific geographical situation of Liechtenstein;

Considers that a situation justifying the taking of the measures referred to in Article 112 of the EEA Agreement shall in particular be considered to exist if capital inflows from another Contracting Party are liable to endanger the access of the resident population to real estate, or in the case of an extraordinary increase in the number of nationals from the EC Member States

²⁰⁸ OJL. L 1, 03.01.1994, p. 562.

or the other EFTA States, or in the total number of jobs in the economy, both in comparison with the number of the resident population.

**Decision of the EEA Joint Committee No 191/1999
(sectoral adaptations to Annex VIII)²⁰⁹**

Article 1

The following text shall be added to the SECTORAL ADAPTATIONS of Annex VIII to the Agreement:

"The following adaptations shall apply to Liechtenstein until 31 December 2006. Before that date, the Joint Committee shall undertake a review on the basis of which it may, duly taking into account the specific geographical situation of Liechtenstein and to the extent strictly necessary, decide to maintain such measures that may be deemed appropriate.

I

Nationals of Iceland, Norway and the EU Member States may take up residence in Liechtenstein only after having received a permit from the Liechtenstein authorities. They have the right to obtain this permit, subject only to the restrictions specified below. No such residence permit shall be necessary for a period less than three months per year, provided no employment or other permanent economic activity is taken up, nor for persons providing cross-border services in Liechtenstein.

The conditions concerning nationals of Iceland, Norway and the EU Member States cannot be more restrictive than those which apply to third country nationals.

II

1. The number of residence permits available annually for nationals of Iceland, Norway or an EU Member State exercising an economic activity in Liechtenstein shall be determined in such a way that the yearly net increase from the previous year in the number of economically active nationals of those countries resident in Liechtenstein is not less than 1,75% of their number on 1 January 1998. Residence permits to persons naturalised in the course of a year shall be deducted

²⁰⁹ OJL. L 74, 15.03.2001, p. 29.

from the basis on which the increase for the next year is calculated. Residence permits granted in excess of the minimum number shall not be counted against the increase due the following year.

2. The Liechtenstein authorities shall grant residence permits in a way that is not discriminatory and does not distort competition. Half of the net increase in the permits available shall be granted in accordance with a procedure that gives an equal chance to all applicants.
3. Residents who have a short-term permit and who exercise an economic activity shall be included in the quota. Such persons may remain in Liechtenstein under the conditions defined in the Agreement after the expiry of the permit, within the quota under which they entered the country. The permit under the quota shall be re-attributed when the person to whom it was attributed changes his residence to another country. The number of short-term permits available for the purposes of exercising an economic activity shall not deviate by more than 10 % from what it was in 1997.

III

Family members of nationals of Iceland, Norway and EU Member States residing lawfully in Liechtenstein shall have the right to obtain a permit of the same validity as that of the person on whom they depend. They shall have the right to take up an economic activity, in which case they will be included in the number of permits granted to economically active persons. However, the conditions in point II may not be invoked to refuse them a permit in the event that the annual number of permits available to economically active persons is filled.

Persons giving up their economic activity may remain in Liechtenstein under conditions defined in Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State²¹⁰ and in Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after

²¹⁰ OJL. L 142, 30.06.1970, p. 24.

having pursued therein an activity in a self-employed capacity²¹¹: they will no longer be counted in the number of permits available to economically active persons nor will they be included in the quota defined in point IV.

IV

A supplementary annual quota of 0,5% of the basis referred to in point II shall be available for persons who wish to take up residence on the basis of rights defined in Council Directive 90/364/EEC of 28 June 1990 on the right of residence²¹², Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees, and self-employed persons who have ceased their occupational activity²¹³ and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students²¹⁴.

Point II shall apply *mutatis mutandis*.

V

1. Liechtenstein may maintain in force for 5 years national provisions obliging seasonal workers and members of their family to leave the territory of Liechtenstein for at least three months at the expiry of their seasonal permit. Such persons may not be subject to any further restrictions. The seasonal permits shall be automatically renewed for seasonal workers holding a work contract on their return to Liechtenstein. The number of permits available to seasonal workers having the nationality of Iceland, Norway or an EU Member State shall not be less than the number of permits granted in 1997 less the number of permits for persons benefiting from the liberalisation in accordance with the following paragraph.
2. The number of persons exempted from the obligation to leave the territory of Liechtenstein annually shall be determined as the number of outstanding permits divided by the number of years remaining until the end of the transitional period for seasonal workers. The order of persons to benefit from the liberalisation shall be determined by the number of

²¹¹ OJL. L 14, 20.01.1975, p. 10.

²¹² OJL. L 180, 13.07.1990, p. 26.

²¹³ OJL. L 180, 13.07.1990, p. 28.

²¹⁴ OJL. L 317, 18.12.1993, p. 59.

consecutive renewals of seasonal permits and by the date of issue of the first such permit within this sequence.

3. Persons who have benefited from the liberalisation in accordance with the preceding paragraph shall not occupy a place under the quotas in accordance with points II and IV. Such persons will however be counted in the case of family members taking up economic activity in accordance with point III.

VI

Applicants for a residence permit shall receive a written reply by the end of the third month from the date of application. Rejected applicants shall have the right to a reasoned refusal in writing. They shall have the same legal remedies as Liechtenstein citizens as regards administrative decisions.

VII

A person employed in but whose residence is not in Liechtenstein (a frontier worker) shall return daily to his country of residence.

VIII

Liechtenstein shall provide the other Contracting Parties and to the EFTA Surveillance Authority all such information as may be necessary to control compliance with this Annex."

Article 2

The following text shall be added to the SECTORAL ADAPTATIONS of Annex V to the Agreement:

"The provisions in the SECTORAL ADAPTATIONS in Annex VIII concerning Liechtenstein shall apply, as appropriate, to this Annex."

EEA Enlargement 2004²¹⁵

Annex V (Free movement of workers)²¹⁶

1. In point 3 (Council Directive 68/360/EEC), adaptation (e)(ii) shall be replaced by the following:

'(ii) the footnote shall be replaced by the following:

"Belgian, Czech, Danish, German, Estonian, Greek, Icelandic, Spanish, French, Irish, Italian, Cypriot, Latvian, Liechtenstein, Lithuanian, Luxembourg, Hungarian, Maltese, Netherlands, Norwegian, Austrian, Polish, Portuguese, Slovenian, Slovakian, Finnish, Swedish and British according to the country issuing the permit."';

2. In point 7 (Commission Decision 93/569/EEC), the words 'Austria, Finland, Iceland, Norway and Sweden' shall be replaced with the words 'Iceland and Norway';

Annex VIII (Right of establishment)²¹⁷

1. The following shall be inserted before the heading 'ACTS REFERRED TO':

'TRANSITION PERIOD

The transitional arrangements set out in the Annexes to the Act of Accession of 16 April 2003 for the Czech Republic (Annex V, Chapter 1), Estonia (Annex VI, Chapter 1), Latvia (Annex VIII, Chapter 1), Lithuania (Annex IX, Chapter 2), Hungary (Annex X, Chapter 1), Malta (Annex XI, Chapter 2), Poland (Annex XII, Chapter 2), Slovenia (Annex XIII, Chapter 2) and the Slovak Republic (Annex XIV, Chapter 1) shall apply.

With regard to the safeguard mechanisms contained in the transitional arrangements referred to in the previous paragraph, with the exception of the arrangements for Malta, PROTOCOL 44 ON SAFEGUARD MECHANISMS CONTAINED IN THE ACT OF ACCESSION OF 16 APRIL 2003 shall apply.;

2. Under the heading 'SECTORAL ADAPTATIONS', the introductory paragraph of the adaptation regarding Liechtenstein, introduced by Decision of the EEA Joint Committee No 191/1999 of 17 December 1999, shall be replaced with the following:

²¹⁵ Agreement on the participation of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic in the European Economic Area (OJL. L 130, 29. 04.2004).

²¹⁶ OJL. L 130, 29. 04.2004, p. 33.

²¹⁷ OJL. L 130, 29. 04.2004, p. 59.

'The following shall apply to Liechtenstein. Duly taking into account the specific geographic situation of Liechtenstein, this arrangement shall be reviewed every five years, for the first time before May 2009.'

Joint Declaration by the EFTA States on free movement of workers²¹⁸

The EFTA States stress the strong elements of differentiation and flexibility in the arrangements for the free movement of workers. They shall endeavour to grant increased labour market access to nationals of the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia under national law, with a view to speeding up the approximation to the *acquis*. As a consequence, the employment opportunities in the EFTA States for nationals of the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia should improve substantially upon these States' accession. Moreover, the EFTA States will make best use of the proposed arrangements to move as quickly as possible to the full application of the *acquis* in the area of free movement of workers. For Liechtenstein, this will be done in accordance with the specific arrangements as foreseen in the Sectoral Adaptations to Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement.

EEA Enlargement 2007²¹⁹

Annex V (Free movement of workers)²²⁰

the text of the second paragraph under the heading 'Transition Period' shall be replaced by the following:

'The transitional arrangements set out in the Annexes to the Act of Accession of 25 April 2005 or, as the case may be, to the Protocol of Accession of 25 April 2005 for Bulgaria (Annex VI, Chapter 1) and Romania (Annex VII, Chapter 1), shall apply.

With regard to the safeguard mechanisms contained in the transitional arrangements referred to in the previous paragraphs, with the exception of the arrangements for Malta, PROTOCOL 44 ON SAFEGUARD MECHANISMS PURSUANT TO ENLARGEMENTS OF THE EUROPEAN ECONOMIC AREA shall apply.'

²¹⁸ ABl. Nr. L 130 vom 29.04.2004, S. 78.

²¹⁹ Agreement on the participation of the Republic of Bulgaria and Romania in the European Economic Area (OJL. L 221, 25.08.2007).

²²⁰ OJL. L 221, 25.08.2007, p. 28.

Annex VIII (Right of establishment)²²¹

the text of the second paragraph under the heading 'Transition Period' shall be replaced by the following:

'The transitional arrangements set out in the Annexes to the Act of Accession of 25 April 2005 or, as the case may be, to the Protocol of Accession of 25 April 2005 for Bulgaria (Annex VI, Chapter 1) and Romania (Annex VII, Chapter 1), shall apply.

With regard to the safeguard mechanisms contained in the transitional arrangements referred to in the previous paragraphs, with the exception of the arrangements for Malta, PROTOCOL 44 ON SAFEGUARD MECHANISMS PURSUANT TO ENLARGEMENTS OF THE EUROPEAN ECONOMIC AREA shall apply.'

Joint Declaration by the EFTA States on free movement of workers²²²

The EFTA States stress the strong elements of differentiation and flexibility in the arrangements for the free movement of workers. They shall endeavour to grant increased labour market access to nationals of the Republic of Bulgaria and Romania under national law, with a view to speeding up the approximation to the *acquis*. As a consequence, the employment opportunities in the EFTA States for nationals of the Republic of Bulgaria and Romania should improve substantially upon these States' accession. Moreover, the EFTA States will make best use of the proposed arrangements to move as quickly as possible to the full application of the *acquis* in the area of free movement of workers. For Liechtenstein, this will be done in accordance with the specific arrangements as foreseen in the Sectoral Adaptations to Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement.

²²¹ OJL. L 221, 25.08.2007, p. 28.

²²² OJL. L 221, 25.08.2007, p. 45.

Annex V. EEA EFTA Countries' Participation in EU agencies

EU agency	EEA Joint Committee Decision	EEA participation from
European Agency for Safety and Health at Work (EU-OSHA)	No. 160/2009	01.01.2010
European Aviation Safety Agency (EASA)	No. 179/2004	01.06.2005
European Centre for Disease Prevention and Control (ECDC)	No. 23/2005	01.01.2005
European Chemicals Agency (ECHA)	No. 25/2008	05.06.2008
European Environment Agency (EEA)	No. 11/1994	01.01.1995
European Food Safety Authority (EFSA)	No. 134/2007	01.05.2010
European GNSS Supervisory Authority (GSA)	No. 180/2004	01.01.2009
European Maritime Safety Agency (EMSA)	No. 81/2003	01.01.2004
European Medicine Agency (EMA)	No. 74/1999	01.01.2000
European Network and Information Security Agency (ENISA)	No. 103/2005	01.02.2006
European Railway Agency (ERA)	No. 82/2005	01.02.2006

Annex VI. EU Programmes with EEA Participation

Seventh Framework Programme (FP7)	
Competitiveness and Innovation Programme (CIP)	
Daphne - Combating Violence	
Consumer Programme 2007-2013	
Culture 2007	
Safer Internet Plus 2005-2008	
Marco Polo - Transport	
The Civil Protection Financial Mechanism 2007-2013	
Lifelong Learning Programme (LLP)	
Employment and Social Solidarity - PROGRESS	
Health 2008-2013	
Youth in Action	
MEDIA 2007	
Data Interchange - IDABC	
European Employment Services (EURES)	
Erasmus Mundus	

Annex VII. The EU-Swiss Bilateral Agreements – The Main Agreements

Bilateral Agreements of 1999 (Bilaterals I)		
Category	Agreement and content	In force since
Integration	Agreement between the European Community and the Swiss Confederation on Air Transport ²²³	01.06.2002
	This agreement provides on the basis of reciprocity for access to the EU's civil aviation market. In principle this agreement puts Switzerland in the same position as if it had joined the EU with respect to civil aviation.	
Cooperation	Agreement on Scientific and Technological Cooperation between the European Communities and the Swiss Confederation ²²⁴	
	The agreement concerned Swiss participation in the 5 th EU Framework Programme for Research and development including the corresponding Euratom programme.	
Liberalisation	Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons ²²⁵	
	This agreement provides EU nationals and Swiss nationals for the rights to entry, residence and access to work as employed persons and the right of establishment on a self-employed basis. Furthermore it facilitates the provisions of services, liberalising the provision of services of brief duration (up to 90 days per calendar year).	
	Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road ²²⁶	

²²³ OJ L 114 of 30/04/2002, p. 73.

²²⁴ OJ L114 of 30/04/2002, p. 468.

²²⁵ OJ L114 of 30/04/2002, p. 6.

²²⁶ OJ L114 of 30/04/2002, p. 91.

	<p>This agreement aims to coordinate the overland transport policy of Switzerland and the EU and especially to liberalise access to transport markets for the carriage of goods and passenger by road and rail.</p>	
	<p>Agreement between the European Community and the Swiss Confederation on trade in agricultural products²²⁷</p>	
	<p>This agreement's objective is to foster free trade between the EU and Switzerland by facilitating market access of agricultural products to the market. The agreement consists of two parts, one relating to tariff concessions and the other to the reduction of technical barriers to trade.</p>	
	<p>Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment²²⁸</p>	
	<p>This agreement introduces for most industrial products the reciprocal recognition of conformity ratings. Accordingly products can be certified by Swiss conformity assessment bodies and then be sold in the Internal Market and vice versa.</p>	
	<p>Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement²²⁹</p>	
	<p>The agreement aims at harmonising the rules of the government procurement markets of the EU and Switzerland.</p>	
'Guillotine Clauses'	<p>All single agreements of the Bilateral I package are interconnected by a clause stipulating that all agreements share the same legal faith. If one agreement is cancelled or not renewed the same will hold true for the other agreements (e.g. Art 25 (4) Free movement of Persons Agreement and Art 36 (4) Air Transport Agreement)</p>	

²²⁷ OJ L114 of 30/04/2002, p. 132.

²²⁸ OJ L114 of 30/04/2002, p. 369.

²²⁹ OJ L114 of 30/04/2002, p. 430.

Bilateral Agreements of 2004 (Bilaterals II)		
Category	Agreement and content	In force since
Integration	Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen <i>acquis</i> ²³⁰	Operational participation since 12.012.2008
	This agreement establishes the full association of Switzerland with the Schengen <i>acquis</i> . The agreement is based on the model used to associate Iceland and Norway to the Schengen area in 1999. ²³¹ The agreement provides Switzerland with the right to participate in the decision-making process for the development of the <i>acquis</i> without a voting right. This entails Swiss participation in the working groups of the Council and the Committees assisting the Commission as well as the Council of ministers in the respective field. The agreement also envisages the future development of the Schengen <i>acquis</i> , however, Switzerland is granted a two years period in which it can decide to take over new <i>acquis</i> or not by its legislature. The non-implementation of new <i>acquis</i> can lead to the suspension and finally termination or cancellation of the agreement.	
	Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland ²³²	Operational participation since 12.012.2008
	This agreement establishes the full association of Switzerland with the Schengen <i>acquis</i> . The agreement is based on the model used to associate Iceland and Norway to the Schengen area in 1999. ²³³ The agreement provides Switzerland with the right to participate in the decision-making process for the	

²³⁰ OJ L53 of 27/02/2008, p. 52.

²³¹ Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's Association with the Implementation, Application and Development of Schengen *acquis*, OJ L176 of 18.05.1999, p. 36.

²³² OJ L53 of 27/02/2008, p. 3.

²³³ Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's Association with the Implementation, Application and Development of Schengen *acquis*, OJ L176 of 18.05.1999, p. 36.

Bilateral Agreements of 2004 (Bilaterals II)		
Category	Agreement and content	In force since
	development of the <i>acquis</i> without a voting right. This entails Swiss participation in the working groups of the Council and the Committees assisting the Commission as well as the Council of ministers in the respective field. The agreement also envisages the future development of the Dublin <i>acquis</i> , however, Switzerland is granted a two years period in which it can decide to take over new <i>acquis</i> or not by its legislature. The non-implementation of new <i>acquis</i> can lead to the suspension and finally termination or cancellation of the agreement.	
	Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen <i>acquis</i>	19.12.2011
	This agreement allows the Principality of Liechtenstein to fully participate in the Schengen <i>acquis</i> via a protocol to the EU-Swiss Schengen agreement.	
Cooperation	Agreement in the form of exchange of letters between the European Community and the Swiss Confederation on the date of implementation of the agreement between the European Community and the Swiss Confederation envisaging measures equivalent to those provided for in Council Directive 2003/48/EC of 3 June 2003 on taxation of the incomes of the saving in the form of payments of interests ²³⁴	01.06.2005
	This agreement permits cross-border taxation of the savings of individuals liable to taxation in the EU. Switzerland introduced taxation at the source with an incremental increase of the tax rate to 35% (July 2011). The revenues are share between the EU and Switzerland in a ratio of 75% to 25%. Furthermore taxation on dividends or license-fee payments between associated companies is abolished. The agreement also contains voluntary exchange of information or on request in cases of tax fraud.	

²³⁴ OJ L385 of 29/12/2004, p. 51.

Bilateral Agreements of 2004 (Bilaterals II)		
Category	Agreement and content	In force since
	Cooperation Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests ²³⁵	Pending ²³⁶
	This agreement provides for cooperation in the fight against smuggling and other offences relating to indirect taxes. This agreement has not entered into force. Ratification of Austria and Luxembourg is pending.	
	Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics ²³⁷	01.01.2007
	This agreement adjusts Switzerland's standards of statistical data collection to those of Eurostat and provides for Swiss access to Eurostat data.	
	Agreement between the European Community and the Swiss Confederation concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network ²³⁸	01.04.2006
	This agreement provides for Swiss participation in the European Environmental Agency.	
	Agreement between the European Community and the Swiss Confederation in the audiovisual field, establishing the terms and conditions for the participation of the Swiss Confederation in the Community programmes MEDIA Plus and MEDIA Training ²³⁹	01.04.2006 ²⁴⁰

²³⁵ Not yet ratified by all EU members states, OJ L46 of 17/02/2009, p. 8.

²³⁶ Ratification by Austria and Luxembourg pending; implementation by Switzerland as of 08.04.2009; provisional application with respect to EU Member States, which ratified.

²³⁷ OJ L90 of 28/03/2006, p.1.

²³⁸ OJ L90 of 28/03/2006, p. 36.

²³⁹ OJ L90 of 28/03/2006, p. 23.

Bilateral Agreements of 2004 (Bilaterals II)		
Category	Agreement and content	In force since
	This agreement allows Swiss filmmakers to participate in the EU's MEDIA programmes.	
	Agreement between the European Union and the Swiss Confederation establishing the terms and conditions for the participation of the Swiss Confederation in the 'Youth in Action' programme and in the action programme in the field of lifelong learning (2007-2013) ²⁴¹	01.03.2011 ²⁴²
	This agreement provides for Swiss participation in the EU's educational programmes (e.g. Lifelong Learning, Youth in Action)	
	Agreement between the Swiss Federal Council and the Commission of the European Communities with a view to avoiding the double taxation of retired officials of the institutions and agencies of the European Communities resident in Switzerland ²⁴³	31.05.2005
	This agreement abolishes double taxation of former EU official residing in Switzerland. It applies currently to 50 individuals.	
Liberalisation	Agreement between the European Community and the Swiss Confederation amending the agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 concerning the provisions applicable to the processed agricultural products ²⁴⁴	30.03.2005
	This agreement amended the provision relating to processed agricultural products of the Free Trade Agreement 1972, further liberalising trade in this products between Switzerland and the EU. It provides for duty-free export of Swiss food industry products.	

²⁴⁰ Renewed agreement in force since 01.08.2010.

²⁴¹ OJ L87 of 07/04/2010, p. 9.

²⁴² Provisional application since 01.09.2007).

²⁴³ Not published in the OJ.

²⁴⁴ OJ L23 of 26/01/2005, p. 17.

Custom Facilitation and Security 1990 (completely revised in 2009)		
Category	Agreement	Entry into force
Cooperation	Agreement between the European Economic Community and the Swiss Confederation relating to the facilitation of controls and of the formalities at the time of the transport of goods ²⁴⁵	01.07.1991
	Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures ²⁴⁶	01.01.2011
	These agreements facilitate the controls and formalities for goods transport at the border between the EU and Switzerland. The second agreement excludes Switzerland from “24-hour notification rule” for import into the EU.	

Insurance Agreement (excluding life insurance) 1989		
Category	Agreement	Entry into force
Cooperation	Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than the life insurance -Protocol No. 1: the solvency margin -Protocol No. 2: the work programme -Protocol No. 3: relation between the ECU and the Swiss franc -Protocol No. 4: agencies and branches falling within the competence of companies the registered office of which is located out of the territories to which this agreement is applicable ²⁴⁷	01.01.1993
	This agreement provides for the freedom of establishment of insurance companies (not life insurance) between the EU and Switzerland.	

²⁴⁵ OJ L 116 of 08/05/1990, p. 18.

²⁴⁶ OJ L199 of 31/07/2009, p. 24.

²⁴⁷ OJ L 205 of 27/07/1991, p. 3.

EEC - Swiss Free Trade Agreement 1972		
Category	Agreement	Entry into force
Free Trade Agreement	Agreement between the European Economic Community and the Swiss Confederation -Protocol No. 1 on the arrangement applicable to certain products -Protocol No. 2 on the products subject to a special treatment to take account of the differences in cost of the integrated agricultural products -Protocol on No. 3 relating to the definition of the "original product" concept and to the administrative cooperation methods -Protocol No. 4 aiming at certain special provisions concerning Ireland - Protocol No. 5 on the applicable arrangement by Switzerland on imports of certain products subject to the arrangement aiming at the constitution of obligatory reserves ²⁴⁸	01.01.1973
	This agreement establishes an EU-Swiss free trade area for industrial products, prohibiting any form of custom duties or quotas between the two parties.	
	Additional agreement on validity for the principality of Liechtenstein of the agreement between the European Economic Community and the Swiss Confederation of 22 July 1972	01.01.1973
	This agreement provides for the application to the Principality of Liechtenstein of the EU-Swiss Free Trade agreement 1972.	

²⁴⁸ OJ L300 of 31/12/1972, p. 189.

Annex VIII. EEA Joint Committee Decision

4.10.2012

EN

Official Journal of the European Union

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DECISION OF THE EEA JOINT COMMITTEE

No 110/2012

of 15 June 2012

amending Annex XIII (Transport) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

- (1) Annex XIII to the Agreement was amended by Decision of the EEA Joint Committee No 95/2012 of 30 April 2012 ⁽¹⁾,
- (2) Commission Directive 2011/94/EU of 28 November 2011 amending Directive 2006/126/EC of the European Parliament and of the Council on driving licences ⁽²⁾ is to be incorporated into the Agreement,

HAS ADOPTED THIS DECISION:

Article 1

Point 24f (Directive 2006/126/EC of the European Parliament and of the Council) of Annex XIII to the Agreement shall be amended as follows:

(1) the following indent shall be added:

- **32011 L 0094:** Commission Directive 2011/94/EU of 28 November 2011 (OJ L 314, 29.11.2011, p. 31);

(2) the text of adaptation (e) shall be replaced by the following:

'In point 3 of Annex I, the words "European Union model" in letter (c) regarding page 1 of the licence shall be replaced by "EEA model".'

Article 2

The text of Directive 2011/94/EU in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 16 June 2012, provided that all the notifications under Article 103(1) of the Agreement have been made to the EEA Joint Committee ^(*).

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 15 June 2012.

For the EEA Joint Committee

The Acting President

Gianluca GRIPPA

⁽¹⁾ OJ L 248, 13.9.2012, p. 33.

⁽²⁾ OJ L 314, 29.11.2011, p. 31.

^(*) No constitutional requirements indicated.