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JOINT PARLIAMENTARY COMMITTEE

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on

The Review of the EEA

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1/ Introduction

The EU Council has called for a review of the EEA Agreement, in response to the reviews undertaken in Liechtenstein and Norway. According to the conclusions on relations with EFTA countries adopted by the Council on 14 December 2010,

“[t]he Council encourages ... a review of the functioning of the EEA Agreement, taking into account that EU-EEA EFTA relations have developed over the past 15 years in depth and in scope both within the framework of the EEA Agreement and beyond.

[I]t should be examined whether the EU interest is properly served by the existing framework of relations or alternatively by a more comprehensive approach, encompassing all fields of cooperation and ensuring a horizontal coherence.

The EU review should also take into account possible developments in the membership of the EEA.

With regard to the “technical” functioning of the Agreement, the possibility of up-dating and simplifying some of the procedures ... should be explored, taking into account notably the massive technological development which now could be of benefit in the general functioning of the EEA Agreement.”

The Council thus clearly envisages a comprehensive assessment, covering the technical, legal and political dimensions of not only the EEA Agreement as such, but the entire relationship between the EU and the three EEA EFTA States.

The EU is in parallel embarking on similar reviews of its relations with Switzerland through an informal working group of the Commission and Swiss authorities as well as an assessment of its relations with European countries of small territorial dimension such as Andorra, Monaco and San Marino.

Combined, these three processes entail a comprehensive review of EU relations with the EFTA States which are full partners in the Internal market, which in turn coincides with three major developments in the EU:

- the implementation of the new Lisbon Treaty, which further amends its internal decision-making structures and processes and substantially changes the EU’s foreign policy machinery as well as;
- the recent adoption of new and comprehensive political and economic strategies for the Union as a whole for the next decade; and
- changes to the economic governance of the Union in response to the greatest economic crisis since World War II.

The *potential* consequences for the EEA are of course profound. In light of the on-going developments in the EU, the Council conclusions raise a number of fundamental questions about the relationship that should be thoroughly analysed and discussed by the EEA Joint Parliamentary Committee.

2/ Why? And why now?

The Government of Liechtenstein conducted a review of the EEA which was completed in the autumn of 2010. In early 2010, the Norwegian Foreign Ministry established an independent EEA review committee, which will analyse all of Norway's agreements with the EU. The final report is expected towards the end of 2011. The European Parliament carried out its own assessment of EU relations with the EFTA countries in 2010, now to be followed by the three reviews requested by the EU Council.

Why all these reviews of the EEA, and why now? First of all, a comprehensive and authoritative review of the EEA has never been undertaken. Such assessments are normal features of any policy process. Secondly, recent developments in the EEA, most noticeably Iceland's EU membership application in 2009, warrant it, as it entails changes to the EEA if or when it eventually joins the Union.

The third and perhaps most important reason relates to the long-term development of relations between the EU and the EEA EFTA States. Negotiations on the EEA were concluded in the first half of 1992, a year-and-a-half before the Maastricht Treaty establishing the EU entered into force. Since then, these relationships have evolved piecemeal and on an ad hoc basis through a gradual evolution of practice in the EEA and the conclusion of additional agreements of more limited scope in policy areas beyond the EEA, as EU competences were gradually extended through successive treaty reforms in the 1990s and 2000s. In the past, when the EU has been given new competences in new policy areas, the EEA EFTA States have typically responded by concluding bilateral agreements with the EU. The Union has dozens of agreements with Iceland, Liechtenstein and Norway and most of these have been concluded after the signing of the EEA. None of these agreements measure up to the EEA in terms of scope or importance, but neither are they negligible: they include, amongst others, the agreements on Schengen/Dublin association and with Europol, as well as agreements on participation in ESDP operations.

3/ State of Play for the EEA

The EEA functions well ...

The mantra of intermittent assessments of the EEA Agreement is that it functions well according to its original intentions. This is, however, only part of the story. Yes, the Agreement works in the sense that the institutions established to manage the Agreement function well, ensuring legal homogeneity and thus mutual market access.

... but challenges abound ...

There has been an accumulation of structural challenges as the EU continues to evolve while the EEA Agreement remains the same. These were raised by the EEA JPC in its 2008 report on Future Perspectives for the EEA which did raise a number of pertinent questions in the ongoing debate about the EEA. In this report the fundamental transformation of the EU in the time since the EEA entered into force was depicted and the way this had impacted the EEA EFTA States and the cooperation under the EEA. The

co-rapporteurs cited examples of new forms of European governance ranging from new policy-making methods to new instruments which increasingly have a bearing on the EEA and its functioning. The co-rapporteurs argued that these new forms of European governance did not seem to fit easily with the EEA Agreement which was based on a purely legal approach; a clear distinction between the Internal Market and other EU activities; and the central role played by the Commission as the sole initiator of new legislation. The growing use of non-binding instruments therefore led to questions as to whether or not these need to be adhered to when they cover areas falling within the scope of the EEA Agreement.

Moreover, the co-rapporteurs argued that with the Lisbon Treaty entering into force, important elements included the abolishment of the pillar system, which would further blur the lines between the EEA relevant Internal Market and other EU policies and the further strengthening of the European Parliament, essentially constituting an embryonic parliamentary system at European level. Furthermore, these changes would also introduce additional new elements of relevance such as a growing role for national parliaments in the EU.

In sum, increasingly frequently the EEA EFTA States would be faced with a choice between either a *de facto* broadening of the scope of the agreement if new cross-sectoral rules are incorporated or attempting to exclude them. The latter, the co-rapporteurs argued, could over time undermine the credibility of the EEA and the guaranteed access to the Internal Market by producers and exporters in the EEA EFTA States. It was argued that notwithstanding the prevailing view that changes within the EU, including the increased role of the European Parliament and the admission of more member states, have not affected the EEA Agreement, it seemed that the EEA EFTA States needed to strengthen their internal coordination and cooperation on a whole range of issues. The co-rapporteurs also touch upon the possibility of revising the EEA, an issue that had been raised occasionally at that time, but without any serious efforts.

...and continue to accumulate: The Lisbon Treaty and the new EU strategies

The Lisbon Treaty has streamlined and speeded up the decision-making process in the EU. From the perspective of the EEA JPC, the most important change brought about by the Lisbon Treaty is undoubtedly the further strengthening of the European Parliament. Co-decision has been extended in approximately 40 different areas, including trade, agriculture, fisheries, criminal matters and the EU budget, and now applies to legislative measures in virtually all policy areas. This is especially challenging for the EEA EFTA States as the EEA Agreement does not provide them with any formal link to the European Parliament to influence legislation.

The Lisbon Treaty has streamlined the decision-making process which facilitates a more comprehensive and integrated approach to EU policy, with the same procedure across both the old first and second pillars, and the creation of an EU (as opposed to only an EC) legal personality. This facilitates EU policies and legislation covering both the internal market and other policy areas. This constitutes a particular challenge for the EEA EFTA States as far as it blurs the lines between what falls squarely under the EEA and what

falls outside its scope, making the decision on the EEA relevance of particular pieces of legislation potentially difficult.

Moreover, since the entry into force of the Lisbon Treaty in December 2009, the EU has adopted new overarching long-term strategies such as Europe 2020 with its seven flagship initiatives in which a key objective is to ensure and enhance horizontal coherence through more integrated approaches to EU policy-making. Despite the EEA EFTA States often share the same policy challenges as the EU States in this respect and in spite of having much to offer towards a common approach to these challenges, they are not full participants in these initiatives. It will be difficult to assess the EEA relevance of the proposed measures under the myriad of initiatives taken under Europe 2020. The main reason is that many of these proposals are pre-pipeline measures with yet undefined policy instruments. The precise scope of some of these measures is also unclear. Some actions may fall squarely within areas covered the EEA while others might involve the national level in areas outside the EEA. And then there would also be initiatives that border on being on the internal market and other policy areas. A conservative estimate would indicate that at least half of the nearly 300 measures under Europe 2020's seven flagship initiatives are EEA relevant.

Finally, the entry into force of the Lisbon Treaty in late 2009 has prompted significant changes to the EU's foreign policy machinery. The merger of the external relations of the now defunct European Community and the Common Foreign and Security Policy under the new High Representative/Vice President and the creation of the European External Action Service (EEAS) are the most notable innovations. These changes have created some uncertainty about who will actually represent the EU at the highest levels in the EEA Council, how the EEA will be managed in the EU Council structures and how the new EEAS, which has overall responsibility for the EEA on the EU side, will interact with the Commission services, which manage the day-to-day development of the internal market, and thus the EEA.

One may further note that the EEA-responsible unit in the EEAS, which used to be in the directorate dealing with the developed world in DG Relex in the Commission, has been moved to the directorate in charge of relations with other European neighbours. The Lisbon Treaty also introduces explicit provisions for EU neighbourhood policy through the new Article 8 TEU.

4/ Key issues and challenges for the EEA Review

As noted in the EU Council conclusions, relations between the EU and the EFTA countries have further intensified through the conclusion of additional agreements in 'new' EU policy areas such as justice and home affairs and security and defence policy. This is also the case for European countries of small territorial dimension (ECSTDs).

These developments are part of broader trends. Firstly, the last two decades have seen a *proliferation of additional bilateral agreements*. Previously, relations with third countries were based on one comprehensive agreement limited to the policy areas of the European Community. The gradual expansion of EU competences through the three pillar structure

of the EU has subsequently been accompanied by the conclusion of additional bilateral agreements limited to specific policy areas (CFSP, asylum, visa policy, etc).

Secondly, the EU has concluded *multilateral sector-specific treaties*, such as the Euro-Med trade system on rules of origins, the Energy Charter of the 1990s and now the Energy Community treaty, the agreement on a European Common Aviation Area, and the European Committee for standardisation to mention a few. These often follow sequentially from bilateral sector-specific agreements, replacing previous networks of bilateral treaties. Participating states are most commonly the EFTA States as well as EU candidate countries.

A third and more recent trend is for the EU to negotiate *comprehensive agreements* with neighbouring third countries such as Russia, Ukraine and Moldova. These overarching agreements will replace the previous system of one principal agreement covering old first pillar issues combined with several more limited agreements in other policy areas.

All of these trends can be found in the Council conclusions.

4.1/ “Comprehensive approach”

Critics of the EEA frequently posit a ‘Swiss model’ as an alternative approach. The EU, on the other hand, seems to be moving in the opposite direction: rather than splitting the EEA into sector-specific agreements, the EU seems to favour a comprehensive approach encompassing all areas of cooperation.

In this context the differences between the Swiss and the EEA models are however exaggerated. According to the (incomplete) EU Council database on international agreements, the EU has 70 agreements with Switzerland and 63 with Norway. By contrast, the EU now aims to have one – 1 – with Ukraine, Russia, Moldova, and other neighbours. Moving towards a ‘Ukrainian model’ would be quite dramatic and require re-negotiation of literally hundreds of international treaties.

4.2/ “Developments in the membership of the EEA”

With the partial exception of Switzerland, the three EEA EFTA States are currently the only non-EU Member States in the EU’s Internal Market. That might change if the Council conclusions are followed through.

“A similar assessment should also be undertaken concerning the relations of the EU with the European countries of small territorial dimension, and more in particular the Principality of Andorra, the Principality of Monaco and the Republic of San Marino.”

“An analysis of the possibilities and modalities of their possible progressive integration into the internal market should be undertaken by the EU during the first half of 2011 under the Hungarian Presidency, in accordance with the Declaration on Article 8 of the Treaty on the European Union, taking into account the particularities related to their size.”

Again, the EU is in a sense responding to developments rather than initiating them. Relations with Andorra have developed considerably over the last decade or so. In light

of this, the Andorran government commissioned an independent review of its relations with the EU which was subsequently published in 2007. In the report the author advocates a gradual advancement of the relatively limited relationship between EU and Andorra through four stages, ranging from unilateral reforms in certain sectors to an original model for virtual membership of the EU. According to the report at stage three Andorra could seek a comprehensive multi-sector treaty which could be along the lines of Liechtenstein and the EEA which constitutes an example of virtually complete inclusion in the EU's internal market space, with all four freedoms and extensive harmonisation of regulatory standards. Needless to say, there could be no membership of the EEA without membership of either EFTA or the EU.

When it comes to the Republic of San Marino there have been moves to seek further integration with the European Union. On the basis of a study which a Committee consisting of a broad range of political and economic stakeholders had undertaken, a referendum on whether to seek EU membership had been organised for 27 March 2011. The referendum, which had been brought about by a public initiative supported by all political parties was cancelled by San Marino authorities who have claimed that the outcome of such a referendum would be mired in legal uncertainties. However, San Marino authorities have sent a formal request to the European Commission and to the President of the European Council asking for the initiation of a consultation process with a view to possible ways to further integrate the Republic of San Marino to the European Union.

As in the case of its EFTA partners, Switzerland's relationship with the EU was essentially conceived in the pre-Maastricht era. It embarked on its 'bilateral way' in early 1993, following the negative vote on the EEA in a referendum in December 1992. During 2010, the Swiss Government reviewed its relations with the EU, including an assessment of its current 'bilateral way' and possible alternatives such as joining the EEA and EU membership. It concluded in August 2010 that Switzerland should continue with the bilateral approach.

The EU does not seem to agree. Indeed, the changes sketched by the EU Council would be quite dramatic:

“[T]he Council has come to the conclusion that while the present system of bilateral agreements has worked well in the past, the key challenge for the coming years will be to go beyond that system, which has become complex and unwieldy to manage and has clearly reached its limits.. [H]orizontal issues related to the dynamic adaptation of agreements to the evolving *acquis*, the homogeneous interpretation of the agreements, an independent surveillance and judicial enforcement mechanisms and a dispute settlement mechanism need to be reflected in EU-Switzerland agreements.

In this context, the Council welcomes the setting-up of an informal Working Group of the Commission and Swiss authorities.

[I]n concluding additional agreements, [the Council] will have in mind the need to ensure parallel progress in all areas of cooperation.”

Furthermore, the European Parliament has expressed a similar opinion in its resolution on EEA-Switzerland in September 2010:

"Notes that (...) there is a need to discuss the possibility of going beyond the existing institutional framework and perhaps concluding an all-encompassing bilateral agreement to the mutual benefit of Switzerland and the EU;"

If these elements were all to be implemented, EU-Swiss relations would be governed within an institutional framework closely resembling that of the EEA.

It is far from clear how these two processes with the ECSTD's and Switzerland square with the already existing EEA. Does the EU envisage *multiple EEA's*? How would these be designed to enable them to work in practice? Or does the EU Council envisage an *expanded EEA*? It should be reiterated that should the EEA be expanded this would of course require the ECSTD to either join EFTA or become members of the EU. A middle way is difficult to envisage. In addition, in the longer run it is possible that such developments would not be limited to the EU's Western neighbours.

In addition, the EU accession negotiations with Iceland were opened on 27 July 2010. As EU membership would mean an end to EFTA membership for Iceland, this might weaken the EFTA pillar. Should the negotiations conclude in favour of the EU membership and should the decision be carried by the Icelandic people as well as European electorates, there would be a supplementary impetus for serious re-think of the EFTA-EU-EEA framework.

4.3/ International treaties or political frameworks

So far, this paper has focused on treaty-based relations between EU and the EFTA countries on the one hand and EU-third country relations on the other. Another trend in EU foreign policy is that these agreements are developed under the aegis of *regional political frameworks*. This is particularly prominent in relations with neighbouring countries under the European Neighbourhood Policy (ENP, itself divided into an Eastern Partnership and the Union of the Mediterranean), but can also be seen in relations with other regions and continents, for instance the EU-Africa strategy and the EU-ASEM process with Asian countries.

When the ENP was initiated in 2003, the explicit long-term goal was for relations with the EU's Southern Mediterranean and Eastern European neighbours that "resemble the close political and economic links currently enjoyed with the European Economic Area." A central element of the comprehensive agreements currently under negotiation with Ukraine and Russia (which, incidentally, is not covered by the ENP) is to establish Deep and Comprehensive Free Trade Areas. Many of the EU's ENP partners are increasingly involved in EU programmes and agencies, previously the preserve of the EFTA States.

Is it conceivable that all of these countries are both willing and able to become fully integrated in the internal market on the basis of the EEA Agreement? That seems highly unlikely in the foreseeable future, to say the least. The alternative would be to develop

some sort of ‘*variable geometry EEA*’. How would that then be designed, and how could it be made to function?

Or is the “comprehensive approach’ mooted by the EU Council envisaged as a legally non-binding political framework rather than a new treaty? Are they considering a ‘*Western European Partnership*’, a political framework for sets of bilateral and multilateral agreements? This would allow for ‘differentiation’ between different partner countries according to their interests and level of development. But what would be the added value of such a framework for EU-EEA EFTA relations, which according to the Council conclusions these were “good and close in 2008, [and] have further intensified in the past two years”?

4.4/ Deepening the relationship

All of the hypothetical options noted above would be massive endeavours, probably requiring years of negotiations among up to 50 European and neighbouring states. From the perspective of the EEA EFTA States, this would at the outset simply be an exercise to reorganise or re-structure their relationship with the EU, but not necessarily alter the substance of their relationships.

In the context of the overall EU Council conclusions of a deep and positive relationship, this raises the obvious question: is it really worth the effort?

This question is particularly acute in EFTA countries where the EU is a highly contentious political issue. There are numerous metaphors in the English language for such a course of action: don’t upset the apple cart; don’t rock the boat; don’t open Pandora’s box; let sleeping dogs lie; or simply, leave well alone.

4.5/ Addressing EEA EFTA concerns

To the extent that there are concerns about the overall structure and functioning of the EEA in the EFTA countries, these are often related to the gradual erosion of the basic political deal reached in the early 1990’s. The changes on the EU side have weakened the ability of the EEA EFTA States to participate and contribute to policy developments in the areas covered by the agreements, while the contributions of the EEA EFTA States through the EEA and Norway Grants to overcome economic and social disparities in the new EU member states has increased to a level whereby the EEA EFTA States are bigger net financial contributors than most EU Member States.

From an EEA EFTA perspective, the technical update “taking into account ... the massive technological development” mooted in the Council conclusions could be seen as a euphemism for ‘e-mail-democracy’ replacing ‘fax-democracy’, which has been a frequent criticism of the EEA in the EEA EFTA countries. While this may be in accordance with the letter of the EEA Agreement, which allows for decisions to be taken by ‘written procedure’ under certain circumstances, there is an increasingly widespread

view that these developments in the day-to-day management are at odds with the spirit of the original deal which allowed for the creation of the EEA in the first place.

But there are other, more fundamental concerns about how the EEA is evolving. Democracy is a key issue. While the EU has made great strides towards reducing its democratic deficit, notably with the strengthening of the European Parliament, this has paradoxically increased the 'double democratic deficit' on the EFTA side. If the EEA EFTA side were to agree to any sort of revision of existing arrangements, these democratic concerns would need to be addressed.

The EEA EFTA States do not participate in the decision-making at EU level. However, the EEA Agreement contains provisions for input from the EEA EFTA side at various stages before new legislation is adopted. Input can take the form of participation of EEA EFTA experts in EU committees or the submission of EEA EFTA comments as well as adoption of resolutions in response to initiatives from the Commission. Bearing in mind that the EEA EFTA States have little influence on the decision-making phase on the EU side, it is all the more important for them to get actively involved in the decision-shaping process of EEA legislation.

One prominent challenge to the EEA EFTA States after the implementation of the Lisbon-Treaty is that co-decision between Council and Parliament has been extended to almost all legislative areas. The European Parliament has always been a "blind-spot" under the EEA with the only formal link between the EFTA and EU pillars being the EEA Joint Parliamentary Committee. But after Lisbon, this problem has become all the more acute and concrete. It is the co-rapporteurs' opinion that different solutions to this problem should be explored, in order for the main propositions of the EEA to remain intact, i.e. to maintain the EEA EFTA States' right to influence decisions at an early stage. One of several alternatives that could be explored, possibly through amendments to the Agreement, could be to extend to the EEA EFTA States the right to be heard by the European Parliament's substance committees during their deliberations of EEA relevant legislation. The same would apply to the Council working group on EFTA.

The Lisbon Treaty has not only increased the European Parliament's powers significantly but it has also galvanized the relations between the European Parliament and the EU national parliaments in substantial ways. COFACC (Conference of Foreign Affairs Committee Chairs) and COSAC (Conference of Community Affairs Committees of Parliaments of the European Union) are the two inter-parliamentary gatherings of EU national parliaments, the European Parliament, and the national parliaments of EU accession countries, which have sought to accommodate the interests of national parliaments vis-à-vis the European Parliament and other EU institutions.

Since the entering into force of the Lisbon Treaty, these venues have gained in importance. COSAC (and COFACC to a lesser extent) provide an increasingly valuable link to the European Parliament which the EEA EFTA States' national parliaments should be able to harness in matters pertaining to the internal market. In the past some EEA EFTA States' national parliaments have been invited to observe these conferences

under a special arrangement and at the discretion of the rotating EU Presidency country at each given time. The EFTA Parliamentary Committee has also sought, on two occasions, to be granted observer status in COSAC without success.

In this respect it would be highly important for the EEA EFTA States' national parliaments if the European Parliament and other members of COSAC would review its position towards a permanent observer status for the EFTA Parliamentary Committee in light of: the EEA EFTA States being full participants in the internal market; through their deep cooperation in EU programmes and agencies; their substantial financial contributions through the EEA and Norway Grants; and the numerous bilateral agreements.

Sovereignty is another key issue. Many of the practical solutions found to 'new' issues in the EEA have raised questions of a constitutional nature in the EEA EFTA States. We are seeing more and more of this and recent examples include issues such as the Financial supervisory agencies, air safety and EASA as well as the EU patent court.

Final reflections

These reviews raise some hard questions, both for the EEA EFTA States and for the EU.

The innocuous-looking Council conclusions point towards a possible major revision of relations between the EU and the EEA EFTA States. To undertake such a comprehensive review of EU relations with all of its Western European neighbours will require considerable efforts. But the EU has limited resources at its disposal. EU officials working on these countries in the EEAS can probably be counted on one hand, and there is limited knowledge and experience of the EEA and EU-EEA EFTA relations elsewhere in the EU institutions. Given these specific challenges, it seems clear that increased resources are needed in order for the EEAS to be able to maintain a successful working of the EEA.

Considering the contentious nature of relations with the EU in most of the Western European countries outside the EU, there are obvious political risks associated with a major revision of relationships that on the whole are very positive, and changing a host of international treaties that on the whole function very well. Viewed from the EFTA side, it is a bit difficult to see how the rather cavalier attitudes towards EFTA shown by the Council conclusions serves the EU interests, as it aims to become a more prominent actor on the global stage.

It is not difficult to argue that the challenges for the EEA EFTA states posed by the evolution of the EU are on the whole rather minor compared with the basic deal which was accepted 20 years ago:

- Yes, the rise of the European Parliament has somewhat undermined the importance of the formal decision-shaping mechanisms, but was there really the expectation that this would compensate for the absence of the EEA EFTA States in the EU decision-making process?
- Yes, the scope of the EEA may have been somewhat extended over the last 17 years, but is this really significant compared with the acceptance that the four

- freedoms, EU competition and state aid policy would apply also in the EEA EFTA countries?
- Yes, the EFTA Surveillance Authority has a somewhat greater role than what was originally envisaged, but is this really of a different order than what was expected and agreed in 1992? The Agreement's golden rule of reaching an agreement between the EFTA and the EU side has never been breached over the years, however thorny issues might have been at each given time. But was there really the expectation that this would be anything but an extreme measure?
 - Yes, the 'EEA model' has evolved and been extended to other policy areas, albeit with somewhat different institutional forms and procedures. But all are essentially variants of the basic political deal: the EEA EFTA states were unwilling to join the EU, they wanted the economic and social benefits accruing from inclusion in the internal market, and this had the political price of being excluded from the decision-making process.

Isn't this all much ado about, if not nothing, but then very little? Or is the cumulative sum of an order that a new political grand bargain is required? That is perhaps the fundamental question which these reviews put on our agenda.