

2017

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Recommended Citation

Peel, Tim, "Better the Devil You Know? UK Alternatives to EU Membership" (2017). *Minnesota Journal of International Law*. 313.
<https://scholarship.law.umn.edu/mjil/313>

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Note

Better the Devil You Know?

UK Alternatives to EU Membership

Tim Peel*

As part of the Conservative re-election mandate and in response to growing unrest from anti-Europe members (“Euroskeptics”) within his own party, British Prime Minister David Cameron promised a United Kingdom-wide referendum on its membership in the European Union (“EU” or “Brussels”).¹ This marked the first time since 1975 the British people had been directly consulted about the UK’s relationship with Europe,² and only the third time in the nation’s history the government had called a national referendum.³ Despite a closely fought contest,⁴ on June 23, 2016, the United Kingdom stunned

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1. See The Conservative Party Manifesto 2015: Strong Leadership, A Clear Economic Plan, a Brighter, More Secure Future 30 (2015), <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> [hereinafter Conservative Party Manifesto 2015]; Roger Liddle, The Risk of Brexit: Britain and Europe in 2015, at 13–14 (2015); Vaughne Miller et al., House of Commons Library, Briefing Paper No. 07214, Exiting the EU: UK Reform Proposals, Legal Impact and Alternatives to Membership 8 (2016); *David Cameron Promises In/Out Referendum on EU*, BBC (Jan. 23, 2013), <http://www.bbc.com/news/uk-politics-21148282>.

2. Helen Wallace, *The UK: 40 Years of EU Membership*, 8 J. CONTEMP. EUR. RES. 532, 533 (2012).

3. See ELISE UBEROI, HOUSE OF COMMONS LIBRARY, BRIEFING PAPER NO. 07212, EUROPEAN UNION REFERENDUM BILL 2015–16 8 (2015), <http://research.briefings.files.parliament.uk/documents/CBP-7212/CBP-7212.pdf>.

4. See *Brexit Poll Tracker*, FIN. TIMES, <https://ig.ft.com/sites/brexit-polling/> (last visited June 27, 2016) (displaying Brexit poll results from September 2015 to June 2016); Freddie Sayers, *There Has Been a Move Toward Remain, But It Might Not Be Enough*, YOUNGOV, <https://yougov.co.uk/news/2016/06/21/there-been-move-toward-remain-it-might-not-be-enou/> (last visited June 27, 2016) (discussing poll results up until two days before the referendum vote).

Europe and most of the western world by voting to leave the European Union—a decision also known as “Brexit.”⁵ This Note seeks to explore two possible treaty arrangements available to the UK following Brexit. The background section will discuss the UK’s relationship with the EU, EU exit procedures, and will introduce alternative treaty options using Switzerland and Norway as case studies. The analysis section will assess the viability of each alternative in light of the UK’s current relationship with the EU and its aims for EU reform. Finally, this Note concludes that both the Swiss and Norwegian approaches are inferior to full EU membership.

I. BACKGROUND

A. THE UK AND EUROPE

The United Kingdom has a long history with continental Europe that extends hundreds of years into the past before the United Kingdom came into being in its current guise.⁶ In the context of this lengthy history, erstwhile enemies and competitors on the continent have only recently become the UK’s political and economic partners, while previous animosity and suspicion have not been entirely forgotten.⁷ Consequently, the UK’s relationship with Europe and the EU in particular has often been politically contentious,⁸ and is perhaps better characterized as a marriage of convenience than one of endearing love and devotion.⁹ By way of modern example, more

5. See Anushka Asthana et al., *UK Votes to Leave EU after Dramatic Night Divides Nation*, GUARDIAN (June 24, 2016, 02:51 AM), <http://www.theguardian.com/politics/2016/jun/24/britain-votes-for-brexit-eu-referendum-david-cameron>; Steven Erlanger, *Britain Votes to Leave E.U.; Cameron Plans to Step Down*, N.Y. TIMES (June 23, 2016), http://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html?_r=1; Brian Wheeler & Alex Hunt, *The UK’s EU Referendum: All You Need to Know*, BBC (June 26, 2016), <http://www.alghad.com/articles/974362-The-UKs-EU-referendum-All-you-need-to-know>.

6. See generally Union with Ireland Act 1800, 39 & 40 Geo. 3 c. 67, pmbl., art. 1 (U.K.) (demonstrating that the UK did not come into being in its current format until the accession of Northern Ireland in the early 19th Century).

7. See, e.g., Sam Wilson, *Britain and the EU: A Long and Rocky Relationship*, BBC (Apr. 1, 2014), <http://www.bbc.com/news/uk-politics-26515129>.

8. UBEROI, *supra* note 3, at 6.

9. See Matthias Matthijs, *David Cameron’s Dangerous Game: The Folly of Flirting with an EU Exit*, 92 FOREIGN AFF. 10, 12 (2013) (“The United Kingdom’s

people in the UK fail to see themselves as citizens of Europe than all but three of the EU's twenty-eight member states.¹⁰ One academic suggests that Europe has always been a problem for Britain in a way that it has not for any other member state in the EU, striking at such pronounced British nerves as a strong national identity and a proud colonial history.¹¹

A conflicted approach to the EU has been evident from the very beginning of the European project, as the UK initially opted out of joining the European Community (an earlier iteration of the EU), only to change course entirely and apply to join several years later.¹² However, the UK struggled to convince its European counterparts that it was a worthy, or rather, appropriate member of the European club and did not achieve accession to the European Community until approximately 10 years later, in 1973.¹³ Further flip-flopping followed when the UK held a referendum a mere two years after its accession in which 67% of voters cast their ballots in favor of sticking with Europe rather than abandoning the European Community altogether.¹⁴

In more recent times, despite recognizing the value of the free movement of goods and services known as the Single Market—possibly the UK's chief purpose for EU membership¹⁵—the UK's resistance to Europe continued with rejection of key policies such as the single currency,¹⁶ the

relationship with Europe has never been warm, much less passionate; it is more like a loveless marriage [based] on cost-benefit analysis rather than rhetoric about a common European destiny . . .” (alteration in original).

10. See EUR. COMM'N, STANDARD EUROBAROMETER 82 PUBLIC OPINION IN THE EUROPEAN UNION, FIRST RESULTS 27 (Dec. 2014), http://ec.europa.eu/public_opinion/archives/eb/eb82/eb82_first_en.pdf (indicating that 49% of those surveyed in the UK do not feel like citizens of the European Union).

11. See Vernon Bogdanor, Professor Emeritus, Gresham College, Lecture on Britain and the Continent at Gresham C. (Sept. 17, 2013), <http://www.gresham.ac.uk/lectures-and-events/britain-and-the-continent>.

12. Wallace, *supra* note 2, at 532.

13. See Wilson, *supra* note 7 (noting that the UK's application to the EEC, a precursor to the EU, was vetoed twice by then French President Charles de Gaulle).

14. See UBEROI, *supra* note 3, at 6.

15. David Cameron, Prime Minister, United Kingdom, EU Speech at Bloomberg (Jan. 23, 2013), <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>.

16. See Iain Begg, *Could It Be 'Brexpulsion' Rather than 'Brexit'?*, 18 EUR. POL'Y ANALYSIS 1, 4 (2015).

Schengen agreement,¹⁷ the EU fiscal treaty,¹⁸ and joint police and criminal justice measures.¹⁹ In a further demonstration of its desire to keep the EU at arm's length, Britain enacted the European Union Act, which required a national referendum to approve any further concession of power to the EU or amendment to existing EU treaties.²⁰ The UK has strongly opposed surrender of sovereignty to Brussels²¹ and rejected outright the European ideal of an "ever closer union."²²

The Eurozone crisis in 2011 and 2012, coupled with Brussels' failure to take decisive steps to address the struggling economies of several member states, added to lingering discontent with the UK's EU membership and breathed new wind into the sails of Euroskeptics within the Conservative Party.²³ Calls for a straight in/out referendum grew louder, evidenced by a number of Private Members' Bills to that end.²⁴ In 2013, David Cameron finally relented by announcing that a national referendum would be held on Britain's continued membership in the EU²⁵ and later renewed that promise in the 2015 Conservative Party Manifesto.²⁶ Following his successful reelection, Cameron originally committed to hold a referendum before the end of 2017,²⁷ but brought the date forward to June

17. See *id.*; CONSERVATIVE PARTY EUROPEAN ELECTION MANIFESTO 2014, at 34 (2014), [https://www.conservatives.com/~media/Files/Downloadable%20Files/MANIFESTO%202014/Large%20Print%20Euro%20Manifesto_English.a shx](https://www.conservatives.com/~media/Files/Downloadable%20Files/MANIFESTO%202014/Large%20Print%20Euro%20Manifesto_English.a%20shx) (stating that the Conservatives have kept Britain out of the Schengen open borders area).

18. See Bruno Waterfield, *EU Suffers Worst Split in History as David Cameron Blocks Treaty Change* TELEGRAPH, (Dec. 9, 2011), <http://www.telegraph.co.uk/news/worldnews/europe/ey/8945155/EU-suffers-worst-split-in-history-as-David-Cameron-blocks-treaty-change.html>.

19. See MILLER ET AL., *supra* note 1, at 7.

20. European Union Act 2011, c. 12 (U.K.).

21. See Philip Hammond, *Britain's Four-Point Package for EU Reform*, POLITICO (June 10, 2015, 12:01 AM), <http://www.politico.eu/article/britains-four-point-package-for-eu-reform> (noting that Britain's EU membership has resulted in a loss of sovereignty causing public support for continued EU membership to be wafer thin).

22. See Consolidated Version of the Treaty on European Union art. 1, Oct. 26, 2012, 2012 O.J. (C 326) 1; Cameron, *supra* note 15, at 6 ("We understand and respect the right of others to maintain their commitment to this goal [of an ever closer union]. But for Britain - and perhaps for others - it is not the objective.") (alteration in original).

23. See LIDDLE, *supra* note 1, at 11-14.

24. MILLER ET AL., *supra* note 1, at 8; UBEROI, *supra* note 3, at 31-32.

25. See Cameron, *supra* note 15.

26. CONSERVATIVE PARTY MANIFESTO 2015, *supra* note 1, at 30.

27. *Id.*

23, 2016 on the back of “successful” negotiations with EU leaders concerning the UK’s EU membership.²⁸

B. THE UK’S RENEGOTIATED EU MEMBERSHIP

In anticipation of the referendum, Cameron met with European leaders early in 2016 to renegotiate Britain’s EU membership and attempt to secure concessions in several policy areas.²⁹ Cameron alluded to the main areas of focus for renegotiation in a number of earlier speeches and articles,³⁰ and fleshed out the key points in a letter to the president of the European Council.³¹ UK demands included: rejection of an ever-closer union (which contemplates restoration of parliamentary sovereignty), a curb on immigration into the UK from within the EU (including a freeze on social benefits to migrants), policies to ensure that non-Euro countries are not penalized for maintaining a different currency, and targets to reduce the burden of excessive EU legislation.³² The EU proved remarkably receptive and substantial agreement was achieved on many of the key policy areas.³³ Having secured what he believed to be a

28. See *EU Referendum: Cameron Sets June Date for UK Vote*, BBC (Feb. 20, 2016), <http://www.bbc.com/news/uk-politics-35621079>.

29.

See Jan Strupczewski & Elizabeth Piper, *Cameron Hails EU Deal to Give Britain ‘Special Status’, Battle Looms*, REUTERS (Feb. 20, 2016, 3:25 AM), <http://www.reuters.com/article/us-britain-eu-idUSKCN0VS153>; see also Cameron, *supra* note 15, at 6 (“It is wrong to ask the people whether to stay or go before we have had a chance to put the relationship right.”); *Q&A: What Britain Wants from Europe*, BBC (Feb. 17, 2016), <http://www.bbc.com/news/uk-politics-32695399>.

30. See, e.g., Cameron, *supra* note 15; David Cameron, *David Cameron: The EU Is Not Working and We Will Change It*, TELEGRAPH (Mar. 15, 2014, 9:00 PM), <http://www.telegraph.co.uk/news/newsttopics/eureferendum/10700644/David-Cameron-the-EU-is-not-working-and-we-will-change-it.html>; see also Mark Leftly, *EU Referendum: What are David Cameron’s Demands in the EU Talks?*, INDEPENDENT (Nov. 7, 2015), <http://www.independent.co.uk/news/uk/politics/eu-referendum-what-are-david-cameron-s-demands-in-the-eu-talks-a6725741.html> (discussing the main points of negotiation Cameron planned to address with the EU).

31. Letter from David Cameron, Prime Minister, United Kingdom, to Donald Tusk, President, European Council (Nov. 10, 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf [hereinafter *Cameron Letter*].

32. See *id.*

33. See Jennifer Rankin, *David Cameron’s EU Deal: What He Wanted and What He Got*, GUARDIAN (Feb. 19, 2016, 5:17 PM), <http://www.theguardian.com/world/2016/feb/19/camerons-eu-deal-what-he-wanted-and-what-he-got>.

special status for Britain as a result of the renegotiation,³⁴ Cameron campaigned for the UK to remain in the EU.³⁵ Although the reaction to Cameron's EU deal was mixed in some quarters³⁶ and skeptical in others,³⁷ Britain's later vote to leave the EU effectively rendered the renegotiation meaningless.

C. WITHDRAWAL REQUIREMENTS

While the British people voted to leave the EU several months ago, in order to make its departure officially binding and for the withdrawal process to commence, Britain needed to trigger Article 50 of the Treaty on the European Union ("TEU").³⁸ While Article 50 governs withdrawal of a member state, it provides relatively sparse detail on the process.³⁹ To withdraw, a member state must notify the European Council of its intention and negotiate an agreement covering the arrangements for withdrawal and its future relationship with the EU.⁴⁰ The decision to leave does not require the formal agreement of other member states⁴¹ and there are no explicit conditions for withdrawal.⁴² Although the *decision* to withdraw from the EU does not require the agreement of other member

34. Strupczewski & Piper, *supra* note 29.

35. See Ivana Kottasova, *UK Leader: Why Europe Is Good for Britain*, CNNMONEY (Mar. 10, 2016, 11:41 AM), <http://money.cnn.com/2016/03/10/news/eu-uk-referendum-david-cameron/index.html>; Heather Stewart et al., *David Cameron Makes Final Plea for Britain to Remain in the EU*, GUARDIAN (June 22, 2016, 2:46 PM), <http://www.theguardian.com/politics/2016/jun/22/david-cameron-makes-final-plea-for-britain-to-vote-to-remain-in-the-eu>; *EU Referendum: Cameron Sets June Date for UK Vote*, *supra* note 28; Q&A: *What Britain Wants from Europe*, *supra* note 29.

36. See *Cameron's EU Deal: The Reaction at Home and Abroad*, GUARDIAN (Feb. 20, 2016, 3:18 PM), <http://www.theguardian.com/politics/2016/feb/20/cameron-eu-deal-reaction-politicians-journalists>.

37. See, e.g., Jon Stone, *Tory MPs Brand David Cameron's EU Deal 'Thin Gruel,' 'Watered Down' and Full of Broken Promises*, INDEPENDENT (Feb. 3, 2016), <http://www.independent.co.uk/news/uk/politics/david-cameron-insists-eu-deal-is-the-strongest-package-ever-but-his-own-mps-arent-impressed-a6850941.html>.

38. See Jennifer Rankin et al., *What Is Article 50 and Why Is it So Central to the Brexit Debate?*, GUARDIAN (June 25, 2016, 7:32 AM), <http://www.theguardian.com/politics/2016/jun/25/article-50-brexite-debate-britain-eu>.

39. See Consolidated Version of the Treaty on European Union, *supra* note 22, art. 50.

40. See *id.*

41. See MILLER ET AL., *supra* note 1, at 28.

42. See KLAUS DIETER BORCHARDT, *THE ABC OF EUROPEAN LAW* 18 (2010), http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf.

states, international legal norms dictate that EU member states must consent to any withdrawal agreement.⁴³ If no agreement is reached as to the manner in which the withdrawal will take place, withdrawal automatically becomes effective two years after notification of the intention to withdraw, unless the parties agree to an extension.⁴⁴ No withdrawal agreement has been concluded under current EU treaty provisions.⁴⁵ However, EU trade agreements with other nations have typically required longer than three years and frequently longer than five years to conclude.⁴⁶

Until withdrawal becomes effective, the withdrawing member state retains all the privileges of EU membership, except that it cannot participate in discussions about, nor vote upon the terms of any withdrawal agreement in the European Council.⁴⁷ The absence of a UK vote on a withdrawal agreement may affect the voting balance of member states and, one report contends, grant the France-led protectionist bloc a significant majority sway.⁴⁸ The EU would negotiate any agreement through the European Council, following a mandate from EU ministers acting by a qualified majority after obtaining consent

43. See MILLER ET AL., *supra* note 1, at 28 (“There is no mention in Article 50 TEU of ratification of the withdrawal agreement by Member States, but this would be necessary under international legal norms.”). *But see* STEPHEN BOOTH ET AL., OPEN EUROPE, WHAT IF . . . ? THE CONSEQUENCES, CHALLENGES & OPPORTUNITIES FACING BRITAIN OUTSIDE EU 14–15 (2015), <http://2ihmoy1d3v7630ar9h2rsglp.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/150507-Open-Europe-What-If-Report-Final-Digital-Copy.pdf> (noting that the approval of member states need not be unanimous, unless it cuts across policy areas within the preserve of member states, such as investment protection or elements of transport).

44. See BORCHARDT, *supra* note 42.

45. See HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 13/42, LEAVING THE EU 5 (2013), <http://researchbriefings.files.parliament.uk/documents/RP13-42/RP13-42.pdf> (quoting the President of the European Council who stated that a UK exit “would be legally and politically a most complicated and unpractical affair”); BOOTH ET AL., *supra* note 43, at 14.

46. See BOOTH ET AL., *supra* note 43, at 15–16 (noting that an agreement with Canada commenced in 2009 and has yet to be concluded, while it took Switzerland approximately 10 years to conclude its bilateral arrangement with the EU).

47. See FLEXCIT: A PLAN FOR LEAVING THE EUROPEAN UNION 38 (July 2016), <http://www.eureferendum.com/documents/flexcit.pdf> [hereinafter FLEXCIT]; Consolidated Version of the Treaty on European Union, *supra* note 22, art. 50 § 4; BOOTH ET AL., *supra* note 43, at 14.

48. See BOOTH ET AL., *supra* note 43, at 15.

from the European Parliament, the latter of which has veto power over the entire withdrawal agreement.⁴⁹

D. WHAT ARE THE ALTERNATIVES?

The non-exhaustive table below demonstrates a variety of different treaty arrangements and trade agreements the EU has entered with countries throughout the world:

Country	EU Treaty Arrangement
Norway, Lichtenstein, Iceland	Agreement on European Economic Area ("EEA") & European Free Trade Association ("EFTA") membership
Switzerland	Bi-lateral trade agreements & EFTA membership
Turkey	Customs Union Agreement
Australia	EU-Partnership Framework
United States	Bi-lateral trade agreements; work on comprehensive agreement (Transatlantic Trade and Investment Partnership).
Argentina	Mercosur Agreement
South Africa	Trade Development and Cooperation Agreement
Canada	Comprehensive Economic & Trade Agreement

Source: European Commission⁵⁰

While the UK could feasibly have attempted to model its future relationship with the EU after any of the above treaty arrangements, Switzerland and Norway provide two particularly interesting case studies because each is an immediate European neighbor and significant trade partner, but has deliberately refused full EU membership.

49. *See id.* at 14; HOUSE OF COMMONS LIBRARY, *supra* note 45, at 10.

50. Aggregated from a number of individual country pages. *See Countries and Regions*, EUR. COMM'N, <http://ec.europa.eu/trade/policy/countries-and-regions/> (last visited Nov. 17, 2016).

1. The Swiss Approach

Despite the importance of EU trade to its economy,⁵¹ in 1992 Switzerland rejected membership in the EEA, which would have granted unrestricted access to the Single Market and provided a basis for commencing negotiations for full EU membership.⁵² Instead, rather than formalizing its relationship with the EU through a single comprehensive treaty arrangement or through its membership in the European Free Trade Association, Switzerland negotiated a series of bilateral agreements that cover specific economic and social sectors.⁵³ The most important of these agreements are known as Bilaterals I and II,⁵⁴ which cover areas such as trade, aviation, research, transport, agriculture and the environment.⁵⁵

Switzerland does not have full access to the Single Market and no current agreement that covers services specifically, including financial services.⁵⁶ Furthermore, the EU conditioned the bilateral approach upon Switzerland's acceptance of the free movement of persons⁵⁷ and inserted a "guillotine clause," whereby, if any of the separate elements is breached, the remaining elements of the bilateral agreement cease to apply after a period of six months without resolution.⁵⁸

51. See FED. DEP'T OF FOREIGN AFF., SWITZERLAND AND THE EUROPEAN UNION 21 (Nov. 2, 2015), https://www.eda.admin.ch/dam/eda/en/documents/publications/EuropaeischeAngelegenheiten/Schweiz-und-EU_en.pdf (noting that the EU is Switzerland's most important trading partner).

52. See *id.*

53. See *Switzerland*, EUR. COMM'N, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland> (last visited Nov. 2, 2015); see generally *List of Treaties by Country: Switzerland*, EUROPA, <http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=3820&countryName=Switzerland> (last visited Nov. 14, 2015).

54. See FED. DEP'T OF FOREIGN AFF., *supra* note 51, at 24–25.

55. See FED. DEP'T OF FOREIGN AFF., THE MAJOR BILATERAL AGREEMENTS SWITZERLAND EU 7, 17 (2016), https://www.eda.admin.ch/dam/dea/en/documents/folien/Folien-Abkommen_en.pdf.

56. See CONFEDERATION OF BRITISH INDUST., DOING THINGS BY HALVES? ALTERNATIVES TO UK EU MEMBERSHIP: LESSONS FROM SWITZERLAND AND NORWAY 11 (2013), http://www.cbi.org.uk/media/2133649/doing_things_by_halves_-_lessons_from_switzerland_and_norway_cbi_report_july_2013.pdf. *But see* BUS. FOR BRITAIN, CHANGE OR GO: HOW BRITAIN WOULD GAIN INFLUENCE AND PROSPER OUTSIDE AN UNREFORMED EU 240 (2015), <http://forbritain.org/cogwholebook.pdf> (claiming that, even in the EU, the Single Market is underdeveloped for services).

57. FED. DEP'T OF FOREIGN AFF., *supra* note 51.

58. See FED. DEP'T OF FOREIGN AFF., *supra* note 51, at 26 (noting that the

Switzerland is required to make economic contributions to a variety of social cohesion programs, in addition to the programs in which it participates directly.⁵⁹ Recent estimates indicate that Switzerland contributes approximately £420 million (or approximately \$520 million as of November 2016) annually, which is lower than the UK's net contributions to the EU on either an aggregate or per capita basis.⁶⁰

Few give serious credence to the Swiss approach as a viable alternative treaty arrangement for the UK.⁶¹ The principal challenges with this approach include EU dissatisfaction with the bilateral model, the static nature of bilateral agreements, and serious uncertainty over the nature of an agreement the UK could secure for itself under this model.⁶² By contrast, other commentators find virtue in the bilateral model, noting that it retains some access to the Single Market,⁶³ at least partial sovereignty,⁶⁴ and flexibility to pursue trade agreements with third countries.⁶⁵

2. The Norwegian Approach

Norway maintains a close relationship with the EU despite rejecting full membership in two separate national referenda.⁶⁶

guillotine clause applies to Bilaterals I, which contain the agreement on the free movement of persons).

59. See, e.g., ARABELLA THORP, HOUSE OF COMMONS LIBRARY, STANDARD NOTE SN06090, SWITZERLAND'S RELATIONSHIP WITH THE EU 6 (2011), <http://researchbriefings.files.parliament.uk/documents/SN06090/SN06090.pdf>; MILLER ET AL., *supra* note 1, at 40–43; BOOTH ET AL., *supra* note 43, at 57.

60. MILLER ET AL., *supra* note 1, at 43.

61. See, e.g., MILLER ET AL., *supra* note 1, at 41; BREXIT, *supra* note 47, at 48–50; BOOTH ET AL., *supra* note 43, at 57–61.

62. See FLEXIT, *supra* note 47, at 48–50; CONFEDERATION OF BRITISH INDUSTRY, *supra* note 56, at 13. *But see* IAIN MANSFIELD, A BLUEPRINT FOR BRITAIN: OPENNESS NOT ISOLATION 9 (2014), http://www.iea.org.uk/sites/default/files/publications/files/Brexit%20Entry%20170_final_bio_web.pdf (suggesting that the best alternative to EU membership for the UK lies “somewhere between that of Turkey’s and Switzerland’s: [sic] membership of EFTA . . .”); BUS. FOR BRITAIN, *supra* note 56 (stating that many of the criticisms of the Swiss model do not stand up to scrutiny).

63. See CONFEDERATION OF BRITISH INDUSTRY, *supra* note 56, at 10; THORP, *supra* note 59, at 3.

64. See, THORP, *supra* note 59, at 5 (noting that none of Switzerland’s agreements with the EU transfers any legal or decision making authority to a supranational body).

65. See BUS. FOR BRITAIN, *supra* note 56, at 239.

66. ARABELLA LANG,

Like Switzerland, Norway is a member of the EFTA, which aims to promote free trade between its members (consisting of Switzerland, Norway, Iceland and Lichtenstein) and the EU.⁶⁷ EFTA membership is not required to enter trade agreements with the EU, but is a prerequisite to joining the EEA.⁶⁸ Norway's additional membership in the EEA permits full access to the Single Market.⁶⁹

In return for access to the Single Market, the EU, through the EEA agreement, requires Norway to adopt a significant portion of the *acquis communautaire* ("acquis"), the accumulated body of European law, including the free movement of persons, capital, goods and services, known as the "four freedoms."⁷⁰ EEA membership also requires adoption of "flanking" policies in areas horizontal to the four freedoms, such as labor law, consumer protection, and environmental policy,⁷¹ but excludes common policies in the areas of agriculture, fisheries, trade (with third countries), security, and the establishment of a customs union.⁷² The absence of full integration in these latter areas allows Norway some discretion to set its own policies and to enter into trade agreements with other countries without the EU's consent or involvement.⁷³ All in all, it is estimated that Norway has adopted approximately three-fourths of the EU's *acquis* as a direct result of EEA membership,⁷⁴ in addition to having

HOUSE OF COMMONS LIBRARY, STANDARD NOTE 6522, NORWAY'S RELATIONSHIP WITH THE EU 2 (2013), <http://researchbriefings.files.parliament.uk/documents/SN06522/SN06522.pdf>.

67. See generally *The European Free Trade Association*, EFTA, <http://www.efta.int/about-efta/european-free-trade-association> (last visited Nov. 14, 2015) (providing background information on the European Free Trade Association).

68. FLEXIT, *supra* note 47, at 84 (noting that there is no necessity for the UK to join the EFTA in order to negotiate bilateral agreements with the EU); BOOTH ET AL., *supra* note 43, at 56 (noting that accession to the EEA must be preceded by joining the EFTA).

69. See generally *The Basic Features of the EEA Agreement*, EFTA, <http://www.efta.int/eea/eea-agreement/eea-basic-features> (last visited Nov. 14, 2015) (describing the role of the European Economic Area); *Countries and Regions: Norway*, EUROPEAN COMM'N, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/norway> (last visited Nov 14, 2015) (explaining Norway's trade situation policies and statistics).

70. *Id.*; see also Agreement on the European Economic Area, Jan. 3, 1994, 1994 O.J. (L 1) 1 (stating the four freedoms).

71. FOREIGN AFF. COMMITTEE, THE FUTURE OF THE EUROPEAN UNION: UK GOVERNMENT POLICY, 2013–14, HC 87-II, at 52 (UK).

72. *Id.*

73. See BOOTH ET AL., *supra* note 43, at 56.

74. LANG, *supra* note 66.

concluded a further 74 voluntary agreements with the EU outside the EEA framework.⁷⁵

In contrast with the Swiss bilateral arrangement, the EEA agreement is dynamic in the sense that new policies are automatically integrated into an open-ended annex to the agreement.⁷⁶ Despite this, EEA countries can exercise a right of reservation, or veto, which, at least in theory, permits outright rejection of any specific piece of EU legislation an EEA member deems objectionable.⁷⁷ However, EEA members are expected to make “every effort to find a mutually acceptable solution where a serious problem arises in any area.”⁷⁸ Norway has no official say in the development or implementation of EU policy,⁷⁹ but is permitted to give input at various junctures,⁸⁰ and makes a concerted effort to exert its influence in the early stages of policy development through lobbying.⁸¹

Like Switzerland, Norway is required to make monetary contributions to a variety of EU social programs and is the single largest contributor among EEA member countries.⁸² Norway’s annual contributions in 2013 were estimated at approximately €600 million (or \$650 million), making it the tenth largest contributor to EU programs despite lacking full-fledged EU member status. Norway’s contributions represent a little over half of the UK’s per capita contributions as an EU member.⁸³

Experts generally favor Norway’s EFTA/EEA treaty arrangement over Switzerland’s bilateral approach.⁸⁴ Those

75. CONFEDERATION OF BRITISH INDUS., *supra* note 56, at 7.

76. CONFEDERATION OF BRITISH INDUS., *supra* note 56, at 6.

77. *Id.* at 7.

78. Agreement on the European Economic Area, *supra* note 70, at 102.

79. CONFEDERATION OF BRITISH INDUS., *supra* note 56, at 8.

80. *Id.*; *see also* NORWEGIAN MINISTRY OF FOREIGN AFF., NORWAY AND THE EU – PARTNERS FOR EUROPE 16–17 (2011), https://www.regjeringen.no/globalassets/upload/UD/Vedlegg/eu/norge_og_eu_2011.pdf (noting EU invitations to participate in several EU bodies).

81. *See* JONATHAN LINDSELL, CIVITAS: INST. FOR THE STUDY OF CIVIL SOC’Y, THE NORWEGIAN WAY: A CASE STUDY FOR BRITAIN’S FUTURE RELATIONSHIP WITH THE EU 40 (2015), <http://www.civitas.org.uk/pdf/TheNorwegianWay> (stating that, while it is true that Norway has no voice or representation on every EU committee, “[i]t has plenty of input.”).

82. *See* NORWEGIAN MINISTRY OF FOREIGN AFF., *supra* note 80, at 18 (reporting that Norway contributed approximately €1.79 billion between 2009–2014 to reduce social and economic disparities within the EEA).

83. CONFEDERATION OF BRITISH INDUS., *supra* note 56, at 7.

84. *Compare* FOREIGN AFF. COMM., *supra* note 71, at 54 (noting that the EEA Agreement is often considered a second best solution to both closer or looser ties with the EU), *and* CONFEDERATION OF BRITISH INDUS., *supra* note

who are supportive of the Norwegian approach point to undiminished access to the Single Market,⁸⁵ reduced monetary contributions to the EU⁸⁶ and a stronger voice on the international stage.⁸⁷ Conversely, critics suggest that EU red tape would remain with EEA membership,⁸⁸ while the UK would also lose its power to shape and influence policy,⁸⁹ a phenomenon sometimes referred to as a “democratic deficit.”⁹⁰ In addition, some question whether the UK’s size, profile, and objectives are sufficiently similar to other EFTA/EEA countries to warrant joining their ranks.⁹¹

II. ANALYSIS

A. WITHDRAWAL

Whatever alternative EU arrangement the UK considers, it will first need to begin with withdrawal from the EU. While the EU recognizes Article 50 of the TEU as the official means for withdrawal, no member state has ever gone through this process. Consequently, because the withdrawal process and its outcome are conjectural, several commentators have suggested that the UK should negotiate an exit outside the EU treaties.⁹² This could be accomplished by relying upon the Vienna Convention on the Law of Treaties (“Vienna Convention”), a United Nations agreement that, *inter alia*, provides guidance for the abrogation of treaties between states.⁹³ Some commentators contend that the Vienna Convention would allow the UK to

56, at 9 (concluding that the Norwegian model would not work for the UK), *with NORTH*, *supra* note 47, at 55 (“The UK will have to adopt an ‘off-the-shelf’ option and the best one on offer is the EEA agreement.”), and *LINSELL*, *supra* note 81, at 83 (“The Norwegian approach to the European Union offers a genuine alternative to consider.”).

85. *See, e.g.*, *BUS. FOR BRITAIN*, *supra* note 56, at 233.

86. *See, e.g.*, *CONFEDERATION OF BRITISH INDUS.*, *supra* note 56, at 7.

87. *See, e.g.*, *LINSELL*, *supra* note 81, at 27, 30.

88. *See, e.g.*, *MILLER ET AL.*, *supra* note 1, at 39.

89. *See, e.g.*, *JOHN SPRINGFORD ET AL.*, *CTR. FOR EUROPEAN REFORM, THE ECONOMIC CONSEQUENCES OF LEAVING THE EU* 32 (2014), http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/report_smc_final_report_june2014-9013.pdf.

90. *See BOOTH ET AL.*, *supra* note 43, at 67 (explaining that the democratic deficit is a major drawback to the EEA/EFTA arrangement).

91. *See, e.g.*, *FOREIGN AFF. COMM.*, *supra* note 71, at 54–55.

92. *FLEXIT*, *supra* note 47, at 38.

93. *Id.*

bypass formal negotiations contemplated in TEU Article 50 and provide a stronger platform for the UK to dictate the course of proceedings.⁹⁴ However, the legal principle of *lex specialis derogat legi generali* is likely to apply, whereby greater weight is given to the more specific of two or more treaty provisions that touch upon the same subject matter.⁹⁵ In addition, any attempt to negotiate outside the framework set forth in the EU treaties would likely aggravate European powers and damage the UK's chances of maintaining positive future relations with the EU.⁹⁶ Consequently, despite the attendant uncertainty, it is likely that the UK will have to negotiate through the Article 50 framework.

B. THE SWISS BILATERAL MODEL

Switzerland's bilateral approach comports with a classic form of government cooperation,⁹⁷ but is somewhat unique in that it comprises a collection of individual agreements, rather than a single treaty covering a broad swathe of policy areas.⁹⁸ Although some authors assert the contrary, Switzerland's membership in the EFTA is not a prerequisite to the bilateral approach and did not significantly influence the structure of its treaty arrangement with the EU.⁹⁹ Consequently, the UK would not need to join the EFTA in order to negotiate a comparable bilateral model.¹⁰⁰ However, while the bilateral approach is available as a theoretical alternative treaty arrangement, it has some significant practical limitations.

1. Sovereignty

On its face, the bilateral approach appears to have preserved sovereignty in certain policy areas and the freedom to reject some EU proposals outright. In some respects, then, the

94. *Id.*

95. *Id.*

96. See BOOTH ET AL., *supra* note 43, at 16 (stating that unilateral withdrawal through the Vienna Convention on the Law of Treaties should not be used “[u]nless the UK is truly prepared to ‘go it alone’”) (alteration in original).

97. See CONFEDERATION OF BRITISH INDUS., *supra* note 56, at 10.

98. See FED. DEP'T OF FOREIGN AFF., *supra* note 51, at 43 (indicating that Switzerland has concluded 120 agreements with the EU).

99. FLEXIT, *supra* note 47, at 59.

100. *Id.* (noting that EFTA membership is not required to pursue the “Swiss option”).

bilateral approach appears to have given Switzerland the ability to determine the areas in which it wants to cooperate with Europe and those where the national interest is such that it wishes to remain autonomous.¹⁰¹ The structure of the bilateral approach not only preserves Swiss sovereignty for policy areas outside the bilateral agreements, but also extends to policy areas falling squarely within the bilaterals by avoiding transfer of any legal or decision-making authority to the EU as a supranational body.¹⁰² This contrasts with the experience of EU member states whose domestic laws and even national constitutions are expected to yield in the event of conflict with EU legislation or directives.¹⁰³ In addition, each party to the bilateral agreements is responsible for implementation of the terms in its own territory.¹⁰⁴ Hence, at least on paper, the degree of sovereignty Switzerland has been able to retain appears impressive and would appeal to the UK, given its sense that it has conceded too much power to Brussels as a consequence of EU membership.¹⁰⁵

However, Swiss sovereignty is more illusory than real. In practice, Switzerland must adopt a wide range of EU rules and policies on a voluntary basis in order, for example, for its businesses to have continued access to the EU import market.¹⁰⁶ Indeed, one author estimates that approximately 40% of Swiss legislation is derived from the EU,¹⁰⁷ a striking estimate considering that Switzerland has specifically opted out of cumbersome EU policies, such as the Common Agricultural Policy (“CAP”) and Common Fisheries Policy (“CFP”).¹⁰⁸ As another author notes, “[i]f support for the Swiss model in the UK is motivated by a desire to escape EU regulation, then the former is certainly not the way to pursue that objective.”¹⁰⁹ Crucially, the Swiss model requires adoption of EU rules and regulation, voluntarily or otherwise, without any say or influence over their

101. *Id.*

102. *Id.*

103. See John Henry Dingfelder Stone, *Agreeing to Disagree: The Primacy Debate Between the German Federal Constitutional Court and the European Court of Justice*, 25 MINN. J. INT’L L. 127, 129 (2016).

104. THORP, *supra* note 59, at 5.

105. See Cameron, *supra* note 30 (noting that powers should not always flow to Brussels).

106. CONFEDERATION OF BRITISH INDUS., *supra* note 56, at 12.

107. NORTH, *supra* note 47, at 48.

108. See THORP, *supra* note 59, at 2.

109. FOREIGN AFF. COMM., *supra* note 71, at 73.

development.¹¹⁰ The irony here is that “an arrangement meant to protect Switzerland’s autonomy is actually eroding it.”¹¹¹ Further, when Switzerland has attempted to fully assert its supposed sovereignty by rejecting a particular policy, the EU has reacted strongly with the threat of sanctions and a full review of its treaty obligations.¹¹²

2. Free Movement of Persons

The EU specifically conditioned the bilateral approach upon acceptance of the free movement of persons,¹¹³ which is likely to remain a condition were the UK to pursue a similar treaty arrangement. Data from 2013 indicate that approximately 23% of Switzerland’s population is foreign versus only 13% of the population of England and Wales, leading one author to conclude that the bilateral approach offers no particular advantage with respect to immigration.¹¹⁴ Although Switzerland accepted the free movement of persons as a central element of its treaty arrangement with the EU when the Bilaterals originally became effective, it has since become a contentious issue domestically.¹¹⁵ Matters came to a head in 2014 when Swiss voters approved an initiative to restrict the free movement of persons in derogation of Bilaterals I:¹¹⁶ an initiative similar in intent to the UK’s proposal to restrict immigration from within the EU.¹¹⁷ In response, the EU threatened to reduce Switzerland’s access to EU institutions and the Single Market, and cancel Bilaterals I.¹¹⁸ Although the EU has yet to carry out the more serious

110. MILLER ET AL., *supra* note 1, at 39.

111. FOREIGN AFF. COMM., *supra* note 71, at 72.

112. *See UE Warns Switzerland All Treaties Will Be Reviewed After Anti Immigration Vote*, EURONEWS (Sep. 2, 2014), <http://www.euronews.com/2014/02/09/eu-warns-switzerland-all-treaties-will-be-reviewed-after-anti-immigration-vote>.

113. FED. DEP’T OF FOREIGN AFF., *supra* note 51, at 21.

114. *See FLEXIT*, *supra* note 47, at 62.

115. *See* FED. DEP’T OF FOREIGN AFF., *supra* note 51, at 29–30 (explaining that the Swiss government introduced tighter immigration measures following the accession of 10 EU member states in 2004 and Swiss voters approved an initiative against mass immigration in 2014).

116. *See id.*

117. *See* Cameron Letter, *supra* note 31.

118. *See, e.g., EU Warns Switzerland All Treaties Will Be Reviewed After Anti-Immigration Vote*, *supra* note 112; Nicola Forster & Ivo Nicholas Scherrer, *Switzerland and the EU: The Heavy Cost of Isolation*, HUFFINGTON POST (Mar. 20, 2014, 6:37 PM), <http://www.huffingtonpost.com/student-reporter/>

elements of these threats, its reaction suggests limited scope for Britain to seriously negotiate the free movement of persons to its advantage and virtually precludes its outright prohibition.

3. The Single Market

Switzerland's access to the Single Market appears adequate on its face, but the absence of a provision covering services, specifically financial services, will be of particular concern to the UK.¹¹⁹ Because the UK's economy is heavily services-dependent¹²⁰ and houses the EU's largest and most important financial center,¹²¹ access to the Single Market would need to include services to have any real value to the UK.¹²² In an attempt to secure broader market access than Switzerland, the UK could invoke its trade deficit with the EU¹²³ or relative economic power as the fifth largest economy in the world.¹²⁴ However, despite any gains in leverage this might bring over Switzerland's position, the EU remains a more important market for the UK than does the UK to the EU.¹²⁵ Consequently, there is no guarantee that the bilateral model would provide the kind of market access the UK requires. In any event, consistent with the Swiss experience, the EU is likely to require concessions in the form of EU regulation and monetary contributions as a prerequisite to access to the Single Market.

switzerland-and-the-eu-th_b_5003363.html. See also Jon Henley, *Whatever You Do, Don't Become Switzerland, Academics Tell UK*, GUARDIAN (Nov. 11, 2015), <http://www.theguardian.com/politics/2015/nov/11/whatever-you-do-dont-become-switzerland-swiss-academics-tell-uk> (explaining that funding for academic research has experienced severe cuts following the Swiss vote on EU immigration quotas).

119. CONFEDERATION OF BRITISH INDUS., *supra* note 56, at 12.

120. *Id.* at 4.

121. See LONG FIN., THE GLOBAL FINANCIAL CENTRES INDEX 15, at 5 tbl.1 (2014), http://www.longfinance.net/images/GFCI15_15March2014.pdf; SPRINGFORD ET AL., *supra* note 89, at 49.

122. See SPRINGFORD ET AL., *supra* note 89 (noting that services account for an unusually high proportion of UK exports).

123. *Id.* at 28.

124. See, e.g., News Release, Ctr. for Econ. & Bus. Research, World Economic League Table 2016 Highlights, 4 tbl.1 (Dec 26, 2015), <http://www.cebr.com/welt-2>.

125. Compare MILLER ET AL., *supra* note 1, at 11, with Jonathan Porter, *After Brexit: How Important Would UK Trade Be to the EU?*, NAT. INST. ECON. & SOC. RESEARCH (Nov. 2, 2015), <https://www.niesr.ac.uk/blog/after-brexit-how-important-would-uk-trade-be-eu>. But see MANSFIELD, *supra* note 62, at 14 fig.1 (demonstrating that UK trade with the EU has declined over time).

Indeed, for the type of broad access the UK would prefer, the EU may require more extensive concessions, similar to those it currently requires of EEA member countries.

4. EU Bilateral Aversion

Perhaps the greatest obstacle to the bilateral approach is a strong EU aversion to this type of treaty arrangement.¹²⁶ For example, in 2012, the European Council reported that “the approach taken by Switzerland to participate in EU policies and programmes through sectoral agreements in more and more areas in the absence of any horizontal institutional framework, has reached its limits and needs to be reconsidered.”¹²⁷ The Council added: “[A]ny further extension of this system would in addition bear the risk of undermining the EU’s relations with the EEA EFTA partners.”¹²⁸ One author suggests that part of the problem with the bilateral approach is that it is not a “conscious, studied arrangement, but a series of *ad hoc* responses” to Swiss rejection of full EU membership.¹²⁹ Whether or not this observation is entirely accurate, one can reasonably conclude that the bilateral model is an aberration, and the EU has little stomach to see another treaty develop along similar lines.¹³⁰ Hence, given EU aversion to the bilateral approach in general and a stated dislike for policy “cherry picking” characteristic of the approach in particular,¹³¹ any attempt by the UK to negotiate a series of bilateral agreements is likely to prove futile.

C. BILATERAL SUMMARY

The Swiss option does not represent a significant improvement over the UK’s current arrangement with the EU,

126. See Council of the European Union “I/A” Item Note 17151/12, Draft Council Conclusions on EU Relations with EFTA Countries ¶ 31 (Dec. 12, 2012), <http://data.consilium.europa.eu/doc/document/ST-17151-2012-INIT/en/pdf>.

127. *Id.*

128. *Id.*

129. FLEXIT, *supra* note 47, at 48.

130. *Id.* (noting that the Swiss model is seen as an exception, rather than a formal model).

131. *Id.* at 39 (quoting *Criticism from Berlin: Merkel Sees “Significant Problems” Arising from the Swiss Vote*, DER SPIEGEL (Feb. 10, 2014, 1:00 PM), <http://www.spiegel.de/politik/ausland/merkel-sieht-probleme-nach-schweizer-votum-zur-zuwanderung-a-a952533.html>).

and is in some ways inferior. For example, the bilateral agreements have not adequately curtailed immigration, given an estimated four-fold net EU immigration increase as compared with the UK.¹³² Likewise, while Switzerland has experienced some reduction in the imposition of EU regulation, it is still obligated to adopt a significant portion of EU rules with limited say in their development. Even the apparent bright spot of Swiss sovereignty is of little practical use if, when exercised, it threatens the existence of other elements of the treaty arrangement.

D. THE NORWEGIAN (EEA) MODEL

EEA membership largely dictates Norway's treaty arrangement and relationship with the EU. Rather than an alternative path to EU membership, some see the EEA as a stepping-stone to prepare countries for full accession to the EU.¹³³ Iceland provides some support for this theory, having formally applied for EU membership in 2009, although it has since withdrawn from negotiations.¹³⁴ As an initial matter, given the UK's vote to withdraw from the EU, it is unlikely to be enthusiastic about a treaty arrangement that echoes the very sentiment of the "ever closer union"¹³⁵ it sought to escape. Other elements of the EEA approach offer some advantages over the bilateral model, but ultimately fail to adequately satisfy UK objectives.¹³⁶

1. The Single Market

As a member of the EEA, Norway's access to the Single Market is more substantial than Switzerland's. Indeed, Norway's access to the Single Market is no greater (or worse) than the UK's current access as a full-fledged EU member state, but, like Switzerland, has the advantage of exclusion from CAP,

132. BOOTH ET AL., *supra* note 43, at 59.

133. FOREIGN AFF. COMM., *supra* note 71.

134. *European Neighbourhood Policy and Enlargement Negotiations: Iceland*, EUROPA, http://ec.europa.eu/enlargement/countries/detailed-country-information/iceland/index_en.htm (last visited Jan. 28, 2016).

135. See Consolidated Version of the Treaty on European Union, *supra* note 22.

136. See generally Cameron Letter, *supra* note 31 (laying out UK reform objectives); Rankin, *supra* note 33 (reviewing Cameron's reform objectives).

CFP and some other policy areas.¹³⁷ Aside from offering superior domestic control over policy areas outside the EEA Agreement, perhaps the greatest strength of the EEA approach is that it comprises an “off-the-shelf” solution.¹³⁸ This type of solution would allow the UK to remain in the Single Market with virtually all of the privileges it currently enjoys.¹³⁹ Moreover, because the UK already has the technical measures in place as a fully-fledged member of the EU, an off-the-shelf approach would allow it to seamlessly adopt most, if not all, of the EEA Agreement in a relatively short space of time.¹⁴⁰ In contrast, the Swiss approach would involve time-consuming and human capital-intensive negotiation of a series of individual agreements that may impose unique technical demands.¹⁴¹

2. Democratic Deficit

Superior market access, however, comes at a price in the form of substantial adoption of the *acquis*, including the four freedoms,¹⁴² together with additional rules the EU periodically adds to the annex of the EEA Agreement.¹⁴³ In one respect, the UK would be no worse off by following the Norwegian approach because, in most instances, the EU already requires acceptance of rules and legislation as a signatory to EU treaties. However, like the bilateral model, as a member of the EEA, the UK would no longer have the ability to influence or veto legislation (the democratic deficit).¹⁴⁴ Whether this represents a significant disadvantage when compared with the status quo is a matter of debate. For example, one report suggests that a democratic deficit is also present in the EU,¹⁴⁵ while another questions the value of the UK’s existing veto power and its ability to influence legislation even with full EU member status.¹⁴⁶ While it is true

137. See BOOTH ET AL., *supra* note 43, at 60.

138. FLEXIT, *supra* note 47, at 55.

139. BOOTH ET AL., *supra* note 43, at 50.

140. See FLEXIT, *supra* note 47, at 55.

141. See BUS. FOR BRITAIN, *supra* note 56, at 241.

142. *Id.* at 236.

143. CONFEDERATION OF BRITISH INDUS., *supra* note 56, at 6.

144. See FOREIGN AFF. COMM., *supra* note 71.

145. MILLER ET AL., *supra* note 1, at 21 (noting that the only way to mitigate the democratic deficit among EU member states is to reinforce the role of national parliaments).

146. See LINDSELL, *supra* note 81, at 27 (explaining that Britain attempted to use its veto power in 2011 to no effect).

that EEA members have a veto right for unreasonable EU rules in theory,¹⁴⁷ the right has rarely been invoked¹⁴⁸ and certainly not in connection with rules the EU regards as sacrosanct and central to its very purpose.¹⁴⁹ Consequently, the veto right may be of little practical use to the UK.

Thus, in actuality, the difference between the democratic deficit experienced by an EEA member versus an EU member states may be more imagined than real, although one could argue that a direct seat on the various EU councils is qualitatively preferable, even if not quantitatively measurable. But even if any potential democratic deficit under the EEA model would render the UK no worse off, the broad objective of Brexit is to secure a more favorable position, especially with respect to EU regulation.¹⁵⁰

3. Sovereignty

Under the EEA Agreement, the UK is unlikely to enjoy significant repatriation of sovereignty. While the UK would regain control over its agricultural and fisheries policies, among others, the requirement for EEA members to adopt significant portions of the *acquis* would prevent the UK from significantly altering its domestic policies with respect to immigration, a central demand in its recent renegotiation efforts with the EU.¹⁵¹

Likewise, burdensome EU legislation and red tape would continue to affect the UK as an EEA member, which requires flanking policies in addition to adoption of fundamental policies such as the four freedoms.¹⁵² The likelihood is that this would mean cumbersome EU rules that UK businesses have identified as particularly burdensome, such as the Working Time Directive, would remain in effect.¹⁵³

147. See BUS. FOR BRITAIN, *supra* note 56, at 234.

148. See LINDSELL, *supra* note 81, at 53–54 (noting that in all but a few cases, use of the reservation or veto by EEA/EFTA members has been averted).

149. The only time Norway appears to have flirted with exercising its veto right was in connection with an EU postal directive. See LINDSELL, *supra* note 81, at 58–60. Contrast this with the EU's reaction to Switzerland's attempt to renege on its commitment to the free movement of persons. See, e.g., Forster & Scherrer, *supra* note 118; Henley, *supra* note 118.

150. See Cameron, *supra* note 30.

151. See Cameron Letter, *supra* note 31.

152. CONFEDERATION OF BRITISH INDUS., *supra* note 56, at 6.

153. MILLER ET AL., *supra* note 1, at 39. The Working Time Directive is an EU policy that places restrictions on the maximum number of working hours

One area in which the EEA model permits greater exercise of sovereignty is on the international stage. Several commentators note that EEA membership would provide the UK with greater influence in international bodies.¹⁵⁴ While not a central UK concern in terms of its relationship with the EU, the ability to voice its own issues and agenda on the international stage, as distinct from those of the EU, could be a valuable asset and may help foster expansion of trade and treaty arrangements with countries outside the EU.

E. EEA SUMMARY

Like the Swiss approach, the EEA model fails to fully address the UK's central concerns with the EU and falls some distance short of the desired outcome. While some see the Norwegian approach as a viable alternative to EU membership,¹⁵⁵ it offers few substantive advantages and some significant drawbacks.

One particular drawback is that there is arguably less scope for reform under the EFTA/EEA Agreements than under the bilateral approach and, even if there was such a scope, there is no guarantee that existing members want to move the EEA in the same direction as the UK.¹⁵⁶ For example, a UK attempt to modify the existing EEA Agreement to include equal voting rights with full EU members (referred to as an EFTA/EEA-lite model by some authors)¹⁵⁷ is unlikely to prove successful because the EU's distaste for cherry picking, expressed in connection with the bilateral approach, would apply with equal force in the EEA/EFTA context. Put another way, the EU is unlikely to extend equal privileges without equal obligations. Furthermore, changes to the EEA model as it currently exists would require alteration to the governing treaties, which can only be

within a week, minimum daily rest periods and annual paid leave. See *Maximum Weekly Working Hours*, GOV.UK, <https://www.gov.uk/maximum-weekly-working-hours/overview> (last visited Aug. 29, 2016) (explaining the basics of the Working Time Directive); *Working Conditions: Working Time Directive*, EUROPEAN COMM'N, <http://ec.europa.eu/social/main.jsp?catId=706&intPageId=205&langId=en> (last visited Aug. 29, 2016).

154. See, e.g., BUS. FOR BRITAIN, *supra* note 56, at 234; LINDSELL, *supra* note 81, at 27–30.

155. See, e.g., FLEXIT, *supra* note 47, at 51.

156. See BOOTH ET AL., *supra* note 43, at 56–57 (noting the potential tensions that could develop between EFTA members were the UK to join).

157. See BOOTH ET AL., *supra* note 43, at 63–68.

accomplished with unanimous approval of EEA members and EU member states.¹⁵⁸ Perhaps because of these and other imperfections, one author characterizes the EEA model as a “halfway house.”¹⁵⁹ However, the orientation of EEA/EFTA members appears to be halfway *towards* the EU, rather than away from it. Such an orientation is unlikely to correspond with the UK’s long-term objectives if it elects to leave the EU.¹⁶⁰

III. CONCLUSION

The choice UK voters faced to leave the EU was one of enormous significance with the potential for wide-ranging consequences that will be felt by generations to come. Even as narrowly conceived, Brexit is likely to impact such diverse areas as business, trade, agriculture, the justice system, and the rights of British citizens living at home and abroad, to name a few. Broader implications include the UK’s place in the world, the impact upon the EU, and even the continued existence of the United Kingdom. Few times in the UK’s history has a government granted its citizens the opportunity to shape its future destiny in such dramatic fashion.

This Note has considered two alternative options the UK might consider in place of full EU membership. This Note concludes that the Swiss bilateral approach is largely an anomaly and faces a considerable uphill battle to continue to function in its current form. The Swiss approach is cumbersome and disjointed and does not sit well with the EU preference for closer unity and cooperation across a range of policy areas. The Norwegian approach offers some advantages over the bilateral model and provides a much greater degree of stability. However, in reality, the Norwegian model more closely resembles full EU membership and retains many of the shortcomings the UK either wishes to escape or reform. In summary, the gains to be realized from either approach are marginal and cannot justify the significant upheaval and uncertainty withdrawal from the EU is likely to cause. While in the near term at least, the better outcome of the referendum may have been for Britain to remain within the EU and to concentrate its efforts on producing

158. *Id.* at 67.

159. FLEXIT, *supra* note 47, at 55.

160. *But see id.* (stating that, “if EEA membership can be a halfway house for countries wishing to join the EU, it could serve equally well in reverse.”).

meaningful reform, that proverbial ship has sailed. Instead, Britain must now carefully consider how it will shape its future relations with its most immediate neighbors. Whether the UK can secure for itself a more advantageous arrangement with the EU and a brighter future remains to be seen.