

# Two souls in Europe's breast: the attractions of EFTA for the UK



*Could Britain gain from joining the European Free Trade Association? **Carl Baudenbacher (Monckton Chambers and former president of the EFTA court)** looks at the prevailing legal systems in Iceland, Switzerland, Liechtenstein and Norway, and concludes that they share aspects of legal doctrine with the UK.*

In 1992, Jacques Delors, then President of the EU Commission, said that if, over the next ten years, Europe would not be imbued with a soul, meaning that it would be given a spirituality and a deeper sense, the game would be over. This was a somewhat presumptuous statement because Europe had from the very beginning of integration two souls. On 25 March 1957, the EEC Treaty with supranational institutions was concluded by France, Germany, Italy and the three Benelux countries. On 4 January 1960, the EFTA Convention was signed by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom.

EFTA had no competence to enact legislation; there was no common surveillance and no common court; however, EFTA was an immediate economic success. However, the attractiveness of the EEC, later EC and EU, became so strong that from 1973 on, when the UK and Denmark left EFTA for the EEC, most EFTA States were determined to switch sides and in fact did so.



Photo: [Marian Gonzalez](#) via a [CC-BY-NC-SA 2.0 licence](#)

Nevertheless, today the three EEA/EFTA States, Iceland, Liechtenstein and Norway, prosper outside of the EU; their ambition is limited to economic objectives, namely to secure their operators comprehensive access to the single market. The fourth EFTA State, Switzerland, is linked to the EU by way of a series of bilateral agreements which do not, however, cover the whole single market *acquis*. Whereas the three EEA/EFTA States are linked to the EU by way of a two pillar system which gives them the right to have their own independent surveillance authority and their own court, the Swiss-EU agreements are governed by diplomatic bodies. All the four EFTA States have safeguarded their sovereignty in crucial areas which in the EU have been communitised, such as agriculture, fisheries or foreign trade. "Two souls, alas, dwell in my breast" is the lament of Goethe's Faust, describing one as clinging to the world with robust love's desires and the other as rising from the dust to reach sublime ancestral regions.

Europe's division is made manifest, in part, through its two families of legal systems. Britain is the birthplace of the common law. Unlike in civil law jurisdictions, the traditional focus is not on legislation, but on case law. The comparative law theory of legal origins holds that institutions depend on political factors, in particular the dominant beliefs in France on the one hand and in England on the other on the roles of the King/Queen/Government, the Parliament, the judiciary and individuals in society. The school's basic finding has been described by Professor Paul G. Mahoney from the University of Virginia, in the following words:

"English common law developed as it did because landed aristocrats and merchants wanted a system of law that would provide strong protection for property and contract rights, and limit the Crown's ability to interfere in markets. French civil law, by contrast, developed as it did because the revolutionary generation, and Napoleon after it, wished to disable judges from thwarting government economic policies."

In order to achieve certainty, uniformity and consistency, the common law relies on judicial precedent (*stare decisis*). When a court engages in vertical *stare decisis*, it follows a precedent from a higher court. A court adhering to its own precedent or a precedent by another court on same judicial level engages in horizontal *stare decisis*. But the doctrine of precedent allows for a certain degree of flexibility. Under specific conditions, courts may overrule, reverse or disapprove of previous decisions. As a result of the precedent system, judges have enormous power to shape the law. Civil law systems place the main emphasis on comprehensive codes of law and other statutes. Courts find the law by interpreting the law enacted by the legislature.

The four EFTA countries are usually considered civil law countries. On closer inspection, however, one discovers that they have a flair of a hybrid between common and civil law. Article 1 of the Swiss Civil Code gives the judge the power and the duty to act like a legislature in certain situations. Benjamin N Cardozo, the later Justice of the US Supreme Court, wrote in 1920 that "the tone and temper in which the modern judge should set about his task are well expressed in the first article of the Swiss Civil Code of 1907." Iceland and Norway do not have a concise civil code. The courts have thus been given a significant role in developing judge made law. As regards Liechtenstein, it should be added that the country has, as the only civil law jurisdiction, largely adopted Anglo-Saxon trust legislation.

The five countries at issue have more commonalities. They are in particular characterised by their belief in free trade and open markets. In the UK as in Switzerland, the Hegelian glorification of the state as "the reality of the moral idea" has barely found followers. Nor has the French idea of "la Nation" as being the only legitimate power been adopted. The same goes for Liechtenstein. Norway is, on the other hand, characterised by a strong state. This is, however, not the case in Iceland. Both in the UK and in Switzerland, courts base themselves on the assumption that human beings are reasonable in the sense of "normal." In 1933, Lord Justice Greer in *Hall v Brooklands Auto-Racing Club* famously termed the reasonable man 'the man on the Clapham omnibus.' In Switzerland, the same liberal image of man has been used by the courts in unfair competition cases. Similarly, in cases concerning internet law and insurance law such as *Inconsult* or *Vienna Life*, the EFTA Court has based itself on such an image of man.

When I spoke on Brexit and EEA at UCL on 7 February 2018, Professor Piet Eeckhout argued that the five non-EU countries in question ought to join forces. I concur. The goal should be to establish a comprehensive European two pillar system whose common denominator would be the single market. The experience of the EEA Agreement and of its institutions, ESA and the EFTA Court, could play a role in this. With the participation of Switzerland and of the UK, the non-EU States could possibly negotiate some sort of a co-decision right on the legislative level. That is what the influential Brussels based Bruegel think tank [suggested](#) in August 2016.

I finally add that the five non-EU countries seem to have important brothers in spirit within the EU27. The UK's closest partners in the north – the Netherlands, Denmark, Ireland, Sweden, Finland, the Baltic states – appear to feel orphaned by Brexit. Their approach to trade and economic policy is basically the same as the one of the five outsiders. The concerns of the northern EU states are all the more justified since then French President François Hollande stated a few days after the Brexit vote that the EU27 should consider "adapting" EU competition law focusing on growth, employment and investment. This corresponds to traditional French wishes could easily go hand in hand with an (even) more protectionist trade policy. One may therefore assume that the Northern EU states have an interest to support the construction of two structures of the kind outlined above.

*This post represents the views of the author and not those of the Brexit blog, nor the LSE. It first appeared at the Monckton Chambers [Brexit Blog](#).*

*Professor Carl Baudenbacher is former president of the EFTA Court and a door tenant at Monckton Chambers.*

[How the EFTA Court works – and why it is an option for post-Brexit Britain](#)