

Post-2020 UK-Switzerland Trade Agreement also for the EU?

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‘Formal’ Brexit happened on 31 January, followed by a rather short transition period of 11 months for the United Kingdom (UK) and the European Union (EU) to negotiate a new relationship. At the beginning of this transition period there was intense discussion about whether the parties should agree to an extension, as the deadline was seen as too short to negotiate a substantial agreement. Some proposed to only conclude a ‘bare bones’ free trade agreement (FTA), and I suggested on this website that a model for such an FTA already exists in reality.

The clock is ticking

Now that the Coronavirus has hit the globe, leading to lockdowns and making negotiations difficult, one could think – and some argue – that there is a case for the UK Government to request an extension without losing face. However, as the Economist explains, the UK Government does not want to hear of this.

We are now, at the beginning of May, eight months away from the definitive Brexit date and two months away from the date on which an assessment of the negotiations should be made and a decision about extending these taken. It seems that the negotiating parties’ positions are still wide apart. On 18 March, the EU proposed a 440-page draft agreement. Although the UK had tried to pressure the EU by announcing that it would already publish a proposal on 9 March, to the author’s knowledge no draft texts by the UK are yet publicly available. If neither party changes its position and no extension is agreed, the prospect of another ‘no deal’ is looming at the end of the year.

‘Proper’ free trade with Switzerland

Meanwhile, the UK has been pursuing its ‘Global Britain’ free trade agenda, though not with as much success as it had hoped. Some seem to think that the UK Government’s negotiations on a trade agreement with the United States (US) may give it leverage over the EU. However, it appears that not much progress has been made in these negotiations. Indeed, the only trade agreement that the UK has been able to conclude with a relatively important trade partner is the one agreed with Switzerland. Based on an additional agreement, parts of this will also apply to Liechtenstein. Of the UK’s non-EU trading partners, Switzerland is number three, after the US and China (2018). Total trade in goods and services

between the UK and Switzerland in 2019 was £31.4 billion. It might therefore be worth giving an overview of the UK-Switzerland Trade Agreement.

The overall 'deal' between Switzerland and the UK actually consists of a package of several agreements. First, there are several standalone agreements, namely the:

- Agreement on the International Carriage of Passengers and Goods by Road
- Agreement relating to Scheduled Air Services
- Agreement on Direct Insurance other than Life Insurance and Decision
- Agreement on Citizens' Rights following Withdrawal of UK from the EU and Free Movement of Persons Agreement
- Agreement on Admission to the Labour Market for a Temporary Transitional Period following the withdrawal of the UK from the EU and the Free Movement of Persons Agreement
- Transitional Agreement on Social Security for a Temporary Period following the Withdrawal of the UK.

These agreements are, essentially, copies of the bilateral agreements in place between Switzerland and the EU, so were already in force between the two countries when the UK was an EU Member State. In substance, therefore, there is no change.

Then there is the UK-Switzerland Trade Agreement; an agreement which itself is a framework agreement referring to several other agreements. The issue with the Trade Agreement is, therefore, a bit more complex. If we look again at the relationship between Switzerland and the EU, the basis for trade in goods is still the Free Trade Agreement between Switzerland and the (then) EEC of 1972 (Switzerland-EU FTA). This is the only one of the standard FTAs concluded between the EEC and the EFTA States when the UK joined the EEC that is still fully in force. The agreement is a so-called 'first generation FTA', i.e. an FTA that is rather basic and essentially aims at facilitating trade in goods by lowering tariffs and removing basic barriers to trade. There are no provisions on e.g. services or intellectual property, nor can any provisions on sustainable development be found, in contrast to newer types of trade agreement.

Of course, there were some additional trade-related developments in the relationship between the EU and Switzerland, which were incorporated into the bilateral agreements after Switzerland rejected participation in the European Economic Area (EEA) in 1992. Noteworthy examples are the Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment (MRA Agreement) and the Agreement between the European Community and the Swiss Confederation on trade in agricultural products (Agricultural Agreement), both signed in 1999.

In the UK-Switzerland Trade Agreement negotiations, both parties agreed to transpose the substance of the trade-related EU-Switzerland agreements into their bilateral relationship. There was little time to negotiate, and they wanted to have the essential agreements in place and entering into force when the transitional period elapses. Instead of literally re-phrasing the agreements, they opted for a solution whereby the relevant agreements would be referred to and applied *mutatis mutandis*.

In order to implement this, there is a – relatively short – framework agreement: the UK-Switzerland Trade Agreement, which essentially sets out that the following agreements are ‘incorporated into and made part’ of the Trade Agreement (Article 1(1)):

- (a) Agreement in the form of an Exchange of Letters of 21 July 1972 between the Swiss Confederation and the European Community concerning certain agricultural and fishery products, as subsequently adapted by the further Agreements of 5 February 1981, 14 July 1986 and 18 January 1996 (‘the ‘Fisheries and Agriculture Exchanges of Letters’)
- (b) Agreement between the European Economic Community and the Swiss Confederation, done at Brussels on 22 July 1972 (the ‘Free Trade Agreement’)
- (c) Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement, done at Luxembourg on 21 June 1999 (the ‘Procurement Agreement’)
- (d) Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment, done at Luxembourg on 21 June 1999 (the ‘MRA Agreement’)
- (e) Agreement between the European Community and the Swiss Confederation on trade in agricultural products, done at Luxembourg on 21 June 1999 (the ‘Agricultural Agreement’)
- (f) Agreement in the form of an Exchange of Letters between the Community and each of the EFTA countries that grants tariff preferences under the GSP (Norway and Switzerland), providing that goods originating in Norway or Switzerland shall be treated on their arrival on the customs territory of the Community as goods with content of Community origin (reciprocal agreement), done at Brussels on 14 December 2000 (the ‘GSP Exchange of Letters’)
- (g) Cooperation Agreement between the European Community and its Member States and the Swiss Confederation to combat fraud and any other illegal activity to the detriment of their financial interests, done at Luxembourg on 26 October 2004 (the ‘Anti-Fraud Agreement’)
- (h) Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures, done at Brussels on 25 June 2009 (the ‘Customs Security Agreement’)

In addition, there are provisions on how the incorporated agreements are to be interpreted (Article 2), within which scope (Article 3) and what the territorial application shall be (Article 4). Further, joint committees are being put in place for the incorporated agreements (Article 6) and will, therefore, continue the institutional setup as it exists between Switzerland and the EU. Another option would have been to establish a single joint committee for the overall relationship between Switzerland and the UK. A review of the Trade Agreement shall take place within 24 months of its entry into force, i.e. at the end of the transition period (Article 8).

This is supplemented by an additional Memorandum of Understanding (MoU) signed between the Swiss State Secretary of Economic Affairs (SECO) and the UK Department of International Trade (DIT)

on the occasion of the signature of the UK-Switzerland Trade Agreement. In the MoU, the parties confirm to revise, if necessary, the annexes to the incorporated agreements, notably the aforementioned MRA Agreement and the Agricultural Agreement. More importantly, however, the parties also agree, 'regardless as to whether the United Kingdom-Switzerland Trade Agreement has come into effect, to conduct exploratory discussions with a view to replacing or modernising the United Kingdom-Switzerland Trade Agreement' (MoU, para 5). Furthermore, the parties consider to extend their henceforth bilateral relationship by incorporating provisions on additional areas, such as trade facilitation, trade in services, protection of intellectual property rights, labour, environment, trade remedies and dispute settlement.

Additional agreement on Liechtenstein

Liechtenstein has been linked to Switzerland since the entry into force in 1924 of the Treaty of 29 March 1923 between Switzerland and Liechtenstein on the Accession of the Principality of Liechtenstein to the Swiss Customs Territory (Customs Treaty (CT)). Article 8 (1) of the CT stipulates that '[f]or the duration of this treaty, the Principality of Liechtenstein shall not autonomously conclude trade or customs treaties with any third country'. As a consequence, Liechtenstein was included in the geographic scope of both the EFTA Convention of 1960 and the EEC-Switzerland FTA of 1972 by means of an additional protocol. And the Agricultural Agreement between the EU and Switzerland was extended to Liechtenstein by an additional trilateral agreement in 2011.

As e.g. parts of the FTA and the Agricultural Agreement between Switzerland and the EU also apply to Liechtenstein, the new relationship between Switzerland and the UK had to be extended to Liechtenstein as well. To that end, an Additional Agreement was concluded 'between the United Kingdom of Great Britain and Northern Ireland, the Swiss Confederation and the Principality of Liechtenstein extending to the Principality of Liechtenstein certain provisions of the Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation'.

Despite Liechtenstein's inclusion into the Swiss customs territory and, therefore, foreign trade policy, at least as far as covered by the scope of the Customs Treaty, there is a general exemption that allowed Liechtenstein to become a member of the EEA independently of Switzerland (Article 8bis CT). As Liechtenstein is a party to the EEA Agreement, its future relationship with the UK also has to be seen from that perspective. Liechtenstein could therefore not simply be covered by the UK-Switzerland Trade Agreement in its entirety. And because the rules of the EEA Agreement are mostly derived from EU law, many aspects of the UK's future relationship with Liechtenstein, as well as with Iceland and Norway, will depend on the outcome of the negotiations between the UK and the EU. The degree of the UK's future involvement in the EU's Internal Market, if any, will also determine the freedom that the three EEA EFTA countries have in their respective future relations with the UK.

'Switzerland' for the EU?

However, as mentioned initially, nothing is clear yet with respect to the future trade relationship between the UK and the EU. Even a 'no deal' is possible (again). The EU's first draft ('New Partnership') reflects the idea of a comprehensive trade agreement, which also includes a role for the Court of Justice of the European Union (CJEU) where EU law is concerned, especially in ensuring a so-called 'level playing field' (LPF) in areas such as public procurement, workers' rights and environmental protection.

The UK has made it clear, however, that it only wants a comprehensive free trade agreement covering all trade issues, supplemented with additional agreements on fisheries, aviation, energy, internal security, irregular migration, mobility and social security, nuclear cooperation and security of information. It clearly does not want the LPF provisions going beyond those contained in a typical FTA, nor does it want these provisions to be subject to dispute resolution, and certainly not by the CJEU.

In light of the above, one wonders why the UK-Switzerland Trade Agreement has never been used publicly by the UK as an example of how it would like to shape its future relationship with the EU. Certainly, the scope of its existing relations and negotiations with the EU is, for now, larger than the scope of its relations with Switzerland, and of course we do not know what has been discussed between the two parties. From the EU we know that it clearly does not want to repeat the 'Swiss model'. But given the lack of time and assumed interest on both sides to enter into a new arrangement, even though there seems to be a certain readiness of the current UK Government to prefer 'no deal' over the EU's proposed agreement, this could nonetheless be an outcome. For the time being. Then again, as the EU has already experienced once before: '*c'est les provisoires qui durent*'. (To be continued).

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