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# A ‘bare bones free trade agreement’ or rather back to the seventies?

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> Brexit happens on 31 January, following which the United Kingdom (UK) and the European Union (EU) have a period of 11 months to negotiate a new relationship. Is this feasible? And what outcome can we expect in such a short period?

## State of play

To many experts, if not most, this deadline seems too short to negotiate anything substantial, let alone ratify the result. Prime Minister Boris Johnson, however, has excluded asking for an extension of the transition period, inserting a respective section 15A stating that ‘a Minister of the Crown may not agree in the Joint Committee to an extension of the implementation period’ into the last version of the Withdrawal Agreement Bill, which was passed by Parliament on 9 January 2020.

Supporters of this amendment argue that the EU is capable of striking a deal within this period if forced, whilst the EU Chief Negotiator has said that only a ‘bare bones free trade agreement (FTA)’ could be negotiated within this short timeframe. However, many pro-Brexit publicists would be happy with this, having mostly argued in favour of such an FTA. We need not go into the question here of what a ‘bare bones FTA’ would mean economically.

## The option of a basic FTA taken seriously

A lot of this rhetoric may be the usual haggling and war-mongering prior to commencing negotiations. However, objectively it seems difficult to conclude anything comprehensive within the given timeframe. Some believe that the stage has been set in such a way that only by quickly negotiating a basic agreement can a new ‘no deal’ situation at the end of 2020 be averted. And politically, a basic FTA seems exactly what the current UK Government is prepared to negotiate. It therefore warrants a closer look at what options exist.

What would a 'bare bones FTA' mean? We can exclude the Canada-type FTA, or even the EU's FTA with Korea, as proposed by the European Commission at an earlier stage. These types of trade agreements – as well as most even less elaborate FTAs concluded by the EU with third countries – are far too complex to be agreed within the given timeframe. Whilst the EU-Korea FTA was negotiated in a comparatively short timeframe (three years), negotiations with Canada took seven years. Given the cumbersome ratification process on the EU side, these agreements take at least another year or two to be – provisionally – applied, political hiccups notwithstanding.

An FTA that can be realistically negotiated therefore either needs to be very basic, indeed 'bare bones', or already exist in order to be used as a model for negotiations. As to the first, Lorand Bartels from the University of Cambridge has proposed a minimal text for such a 'bare bones FTA'. It essentially refers to the relevant agreements of the World Trade Organization and lifts all customs duties. It also uses the model of the Pan-Euro-Mediterranean Convention on cumulation of origin to somehow include regional product chains, and includes only a very light institutional setup.

As to the second, an FTA need not be as bare and basic as the one proposed by Lorand Bartels. There is indeed one FTA concluded between the EU and a European country with a rather powerful exporting economy that might cover what the UK Government and supporters of Brexit want: The FTA between the EU and Switzerland (EU-Swiss FTA). Further, given the concept of path dependence in the context of policy making, which suggests that political players tend to base their decisions and choice of options on past experience and models, looking at an existing model of an FTA between the EU and another European country might prove helpful.

## The EU-Swiss FTA

The EU-Swiss FTA is the remainder of a series of FTAs concluded by the (then) European Economic Community (EEC) in 1972 and 1973 with those EFTA States that, unlike the UK and Denmark, had chosen not to join the EEC or, as in the case of Norway, could not do so because of a negative referendum on EEC membership. Interestingly, it was the UK that wanted the EEC to negotiate these FTAs in order to maintain trade relations with its former EFTA partners.

The original FTAs were signed within less than a year of negotiations – as individual but standardised agreements – on 22 July 1972 by Austria, Iceland, Portugal, Sweden and Switzerland; on 14 May 1973 by Norway; and on 5 October 1973 by Finland. They came into force on 1 January 1973, except for Portugal (1 March 1973), Norway (1 July 1973) and Finland (1 January 1974). When Austria, Finland and Sweden joined the (then) European Community (EC) in 1995, their respective FTAs were no longer applicable. The same was true for most parts of the FTAs with Iceland and Norway, as well as those parts of the EU-Swiss FTA applicable to Liechtenstein, as these were replaced by provisions of the Agreement on the European Economic Area (EEA Agreement). However, some provisions of the FTAs were not replaced and remained applicable to the latter three countries. Most importantly, protocols on imports of fish and fisheries products from Iceland and Norway respectively into the EU are still in force and of considerable importance.

The main objective of these EEC-EFTA FTAs was the dismantling of tariff barriers. Hence, all tariffs in trade between the Community and the individual EFTA countries have been abolished since 1 January 1984, with exceptions. A second objective of the EEC-EFTA FTAs was the abolition of quantitative restrictions. These were abolished in bilateral trade at the date of entry into force of the agreements, although some EFTA countries have retained a small number of quantitative restrictions. Apart from the agreement with Iceland, where tariff concessions were granted for certain fish products, no liberalisation of primary agricultural trade was provided for in the FTAs. Since the free trade zone is not a customs union, it was necessary to establish rules to define clearly which goods would be eligible for duty-free treatment (rules of origin).

All of the FTAs have an evolutive clause allowing for cooperation outside the trade area. These provisions were – prior to stepping up relations between the EC and EFTA in the early 1980s – used extensively by all parties concerned, and an interlinking network of cooperation activities was established. This covered a wide variety of areas such as economic and monetary policy, environment, workers' health and safety, consumer protection, transport, development aid, energy and industrial policy. Some of the EFTA States also interconnected their data transmission networks with the Community's EURONET (Community data transmission network) and at the time most also participated in the Community's Cooperation in Science and Technology. Most of this cooperation and participation in Community (EU) policies has since been substituted by that foreseen by the provisions of the EEA Agreement or, to some extent, the Bilateral Agreements between the EU and Switzerland.

For Switzerland, the EU-Swiss FTA still is the basis for its exchange with the EU on goods. However, in order to allow for industrial products from Switzerland to be exported to the EU in a manner similarly frictionless as from the EEA EFTA States (Iceland, Liechtenstein and Norway), it was necessary to negotiate an Agreement between the EU and Switzerland on mutual recognition in relation to conformity assessment (Mutual Recognition Agreement (MRA)), one of the Bilateral Agreements of the first package.

## Experience and expectations

First, it needs to be said that the FTA cannot be a surrogate for trade in goods that would otherwise constitute free movement of goods as e.g. in the EEA Agreement. The FTA is an international law agreement that clearly falls outside an association agreement according to Article 217 of the Treaty on the Functioning of the European Union (TFEU); it is rather a trade agreement according to Article 207 TFEU.

As a consequence, there is no direct applicability (direct effect) of EU law or corresponding interpretation of the case law of the Court of Justice of the European Union (CJEU) in the EFTA States. This has been made clear through jurisprudence in some of the EFTA States. In contrast to the EU's position, which foresees the direct effect of FTAs, direct applicability of their provisions has mostly

been denied by the national courts of the EFTA States. Astonishingly, this was also the case in Switzerland and Austria, despite their monistic international law system and their generally international law-friendly attitude. Sticking with Switzerland, the *Stanley Adams* case was a very important example: The Swiss Federal Court stated against someone who had 'blown the whistle' on his employer for illicit business practices, that Article 23 FTA (competition and state aid) did not lay down concrete duties for private parties, but only stated what practices were incompatible with the provisions of the FTA without prohibiting these. Another such case, clearly deviating from the CJEU's practice, was the *OMO* case: The CJEU allows the holder of an intellectual property right (e.g. a trademark) to block the placing of the product on the market by a competitor only for so long as the trademark owner has not placed the product on the relevant market (here: the EU) for the first time. However, in this important decision, the Swiss Federal Tribunal refused to apply the same approach in the context of the FTA: Articles 13 and 22 FTA were subject to autonomous interpretation and, in the Swiss Federal Tribunal's view, there was nothing to allow for corresponding application of the CJEU's jurisprudence, despite the same or similar wording. Hence, the trademark owner could forbid parallel imports at all times.

The CJEU retaliated in its famous landmark *Polydor* decision, a case concerning the importation into the UK of gramophone records from Portugal. The CJEU held that despite 'the similarity between the terms of Articles 14(2) and 23 of the FTA – here between the EEC and Portugal – on the one hand and those of Articles 30 and 36 of the EEC Treaty on the other' this was 'not a sufficient reason' for applying the CJEU's case law to the FTA. It saw such a distinction being necessary because the scope of that case law had to be determined in the light of 'the Community's objectives and activities', i.e. merging 'national markets into a single market having the characteristics of a domestic market'. This was, however, different to the FTA, which had a different objective. This came back to haunt the Swiss when the CJEU decided many years later in the *Switzerland v Commission* case on the Swiss-EU Air Transport Agreement:

The Swiss Confederation did not join the internal market of the European Union, the aim of which is the removal of all obstacles to create an area of total freedom of movement analogous to that provided by a national market, which includes inter alia the freedom to provide services. Consequently, the interpretation given to the provisions of European Union law concerning the internal market cannot be automatically applied by analogy to the interpretation of the EC-Switzerland Air Transport Agreement, unless there are express provisions to that effect laid down in the Agreement itself.

A second important feature of the EU-Swiss FTA is the fact that it has a very light setup. Corresponding to its international law character, a joint committee oversees its functioning or decides on any amendments. This works fine if there is agreement between the parties, but changes that are opposed by one of the parties will simply not be implemented. An example of this is Article 23(1)(iii) FTA, which states that 'any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' is 'incompatible with the proper functioning of the Agreement insofar as [it] may affect trade between the Community and Switzerland'. The EU

would like to see Switzerland taking a position on state aid that is similar to its own, but Switzerland has always rejected this. Among other reasons, there is fear that cantonal banks might lose their state guarantee, or that communal cooperative housing offering apartments at advantageous rent levels would no longer be possible. This is currently being discussed in the context of the draft Institutional Framework Agreement between the EU and Switzerland.

## Conclusion: in the eyes of some, the seventies might still be appealing…

So, on its own there is no obvious EU involvement whatsoever, which should please the current UK Government. Using an agreement that already exists, like the EU-Swiss FTA, as the basis for negotiating a trade agreement might indeed be the way out of the conundrum of time, given the short transition period until the end of this year and the UK Government's unwillingness to have it extended. Furthermore, the evolutive clause mentioned above might open up for extension of the FTA's scope, if and when the parties deem necessary. Should the UK want to further reduce costs and facilitate access for British products to the EU's internal market, it could, like Switzerland, try to negotiate an MRA. In the end, this might lead to what the EU has tried to prevent from happening: repeating the experience of Swiss 'cherry picking' through sectorial agreements. On the other hand, the UK would paradoxically have, after exiting the EU, gone back in time and reduced its contractual relationship with the EU to a minimum, only to, maybe, extend it again gradually to cover the needs of its citizens and industries. This approach would, however, not give the latter much to go on when planning their business activities even far beyond Brexit.

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