

Switzerland ditches draft framework agreement with EU – with Liechtenstein as collateral damage?

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On 26 May 2021, the Swiss Federal Council (Government) declared that it would not be pursuing talks on an institutional framework agreement (IFA) with the European Union any further. Hence, after seven years of negotiations, consultations, talks about possible amendments and a lot of rather uninformed domestic squabble, the parties have failed to conclude an agreement that would have underpinned the current bilateral agreements with an institutional framework. If concluded, this would have put Switzerland more or less on a par in the areas covered by the IFA with the other three EFTA States, which participate in the EU's internal market through the EEA Agreement.

The essential obstacles to an agreement

After lengthy negotiations, a draft IFA was published in November 2018 and the EU declared that the negotiations were concluded. Rather than signing the draft IFA, however, somewhat oddly because legally not foreseen, the Swiss Government engaged in an equally lengthy 'consultation procedure' with stakeholders. The resulting comments and reservations were manifold and the focus changed again and again over the course of time. On the one hand, they were based on the individual interests of the various groups, such as those of the trade unions in connection with the flanking measures ('wage protection'). The two other major objections of substance concerned the incorporation of the so-called union citizenship directive and the adoption of state aid according to EU law. On the other hand, the European Court of Justice had been blown up into a 'bogeyman' and given an importance in the IFA that it would probably never have had. With regard to all issues, there was little or no rational, fact-based discussion. It is understandable, however, that the use of 'the other party's court' seemed unattractive at first glance. In addition – and these concerns only arose very late – the problem of the 'dynamic adaption of law' was suddenly seen as a major obstacle. This is certainly legally relevant in Switzerland's constitutional structure, as there is a tension with regard to direct democratic rights (referenda, etc.) as they are handled in Switzerland.

There are, however, three fundamental problems that will also cause problems in the future for the relationship between Switzerland and the EU if not addressed: First, Switzerland does not really know what it really wants in relation to the EU. Views of political actors and stakeholders are too bogged down with a very narrow focus on their interests. This, combined with a lack of informed leadership, leads to a political discourse that is purely domestic and void of reference to the EU. Second, this solipsistic attitude results in widespread ignorance about the EU and, as a consequence, about the EU's

'constitutional' limits and constraints. Third, following on from this, there is no awareness of the EU's essential character as a 'community of law' (*Rechtsgemeinschaft*). Hence, many actors in the Swiss discussion are oblivious to the fact that the conditions for a third country to participate in the EU's internal market are defined by law. Switzerland, much like the United Kingdom in the Brexit process, was essentially trying to negotiate on a political basis, claiming compromises, flexibility and pragmatism where the EU and its institutions tasked with the negotiations were unable to grant these legally. It might be worth looking into these fundamental problems of mutual understanding before attempting new negotiations, otherwise these might be doomed from the beginning as well.

Consequences for the Swiss-EU relationship

In the course of the negotiations, but also during the consultation phase in which a large number of Swiss stakeholders expressed their views on the draft IFA, the Commission stated that without an IFA the existing bilateral agreements would become obsolete, meaning that an update to the bilateral agreements will only be possible if it corresponds to the interests of the EU. This will lead to an erosion of the legal basis between the EU and Switzerland, and will mean that access to the internal market, where it was guaranteed before on the basis of the same rules, is no longer guaranteed. The Commission repeated this on 26 May in its first reaction to Switzerland's breaking off the negotiations. Above all, the EU does not need to take any action; it simply needs to do nothing and the bilateral agreements will erode all by themselves.

Incidentally, a first example arose immediately: The EU did not agree to transfer the renewed medical devices legislation into its bilateral law with Switzerland. Mutual recognition and related trade-facilitating effects ceased to apply that very same day. This means that Switzerland no longer has equivalent access to the EU's internal market in this area. For example, the Swiss authorities are no longer informed about dangerous components for breast implants or hip prostheses. Conversely, parts produced in Switzerland, e.g. for coronavirus ventilators, may no longer meet EU safety standards and must therefore be re-tested before being exported to the EU single market. This significantly increases costs for companies.

Consequences further afield: Liechtenstein

The aforementioned erosion of bilateral law between Switzerland and the EU will probably also affect the relationship between Liechtenstein and Switzerland, as there will be less and less convergence between the legal systems. For example, the requirements for parallel marketability are likely to increase if the bilateral agreement on technical barriers to trade is no longer supplemented, as is now the case with medical devices. This is because, accordingly, Swiss products can no longer be exported to the EU under the same unbureaucratic conditions. As a consequence, Liechtenstein is subject to a stronger obligation to control the parallel marketability of goods and ensure that non-recognised products are not exported into the other market.

Another example is food legislation, which is important for some Liechtenstein companies. The food law that applies to Liechtenstein is currently based on the bilateral agreement between Switzerland and the EU, the content of which corresponds to the relevant chapter of the EEA Agreement. If the agreement between Switzerland and the EU is no longer renewed or even terminated, Liechtenstein

must transfer this area of regulation either to the EEA framework or to a regulated relationship between Liechtenstein and the EU. This affects not only the areas of veterinary and food law, but also parts of the free trade agreement. As a direct consequence, an increased administrative burden and greater legal uncertainty are to be expected due to increasingly different standards in Switzerland and the European Economic Area.

Indirect disadvantages are also to be expected for the Liechtenstein economy: Based on its regional union with Switzerland, Liechtenstein has been granted some exemptions from EEA law, mostly as an exception within the framework of the adoption of EEA law. The areas of statistics and intellectual property are particularly worth mentioning here. Also important for Liechtenstein's financial services sector is the temporary exemption that Liechtenstein was granted with regard to international payment transactions. As in the other areas, this was agreed under the assumption that Switzerland would also establish a system that conforms to the internal market. There is therefore a real possibility that, due to Switzerland's decoupling from the common rules, the EU will be less willing to grant Liechtenstein specific exemptions with reference to the Switzerland-Liechtenstein regional union. Incidentally, the changes mentioned are also likely to affect the EFTA free trade area between Liechtenstein, Iceland, Norway and Switzerland, because it is likely to stop developing largely in parallel with the current bilateral agreements or the EEA Agreement.

For Liechtenstein, it is therefore imperative to identify as quickly as possible the areas in which there is a risk of regulatory differences. Then, in the sense of 'forward-looking legislation', the necessary changes must be prepared and brought into force at the appropriate time.

Good news for the EEA Agreement

Finally, a very different consequence of the failure of the IFA needs pointing out: There were fears that EEA-critical circles in Iceland and Norway might see the IFA as an alternative to the EEA Agreement because, for example, it does without a supervisory authority and common court and does not apply to all fundamental freedoms. These considerations should now be off the table with the failure of the IFA, and the EEA Agreement emerges stronger from this comparison. This is good news for Liechtenstein in particular, as the EEA Agreement still is – at least for the foreseeable future – the best solution on which to base its European integration policy.

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