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The EU–UK Trade and Cooperation Agreement from Switzerland's perspective

On 24 December 2020, the European Union and the United Kingdom agreed on the terms of their post-Brexit relationship. The new Trade and Cooperation Agreement (TCA) was signed on 30 December 2020 and has been provisionally applied since the beginning of the year. The TCA has already been approved by the UK Parliament, while the European Parliament is expected to vote on consent in March.

The TCA is essentially a free trade agreement which extends cooperation in a number of other areas. It thereby differs quite significantly from Switzerland's bilateral agreements with the EU, which go beyond free trade and give Switzerland full access to the European single market in specific sectors. Regarding the Swiss–UK bilateral relationship, Switzerland has already – under the Federal Council's Mind the Gap strategy – negotiated a series of new agreements, independent of the TCA, which largely preserve the same rights and commitments on both sides.

1 Key elements of the EU–UK agreement

The TCA consists of three main pillars:

- a **free trade agreement** covering the trade of goods and services as well as a number of other areas such as investment, competition, state aid, sustainability, air and road transport, energy; participation in EU flagship programmes such as Horizon Europe, health, e-commerce, data protection and cybersecurity, and coordination of social security systems;

- a new framework for **law enforcement and judicial cooperation** in criminal and civil matters;

- a third pillar on **governance,** providing clarity on institutional issues such as the creation of a Joint Partnership Council and various committees and working groups to ensure the TCA is property applied and interpreted. This includes binding enforcement and dispute settlement procedures, such as arbitration, as well as remedial and compensatory measures (across sectors, where relevant).

In principle, the TCA is a **free trade agreement** which covers all relevant sectors and also provides for close cooperation at a political and technical level. The two sides agree to mutually waive customs duties and quantitative restrictions ('zero tariffs, zero quotas') on all goods, including agricultural products. This free trade approach means that the UK does not adopt EU law with the TCA (no legal harmonisation). Consequently, the EU and the UK now form two separate markets, i.e. two different regulatory areas, and the UK no longer enjoys equal conditions of barrier-free access to the European single market. Specifically, UK goods – although free of tariffs – will now be subject to EU customs procedures when imported into the EU, as well as all other applicable EU requirements on import (testing, inspection, registration, etc.) to ensure compliance with EU rules. Moreover, the negotiated tariff-free trade is subject to relatively restrictive rules of origin which are interpreted on a purely bilateral basis. (This means that existing value chains, which include value added from third countries including Switzerland, Mediterranean states and the Western Balkans, are not automatically included as tariff-free trade.)

In the area of **financial services,** the TCA means that UK financial services firms lose the cross-border passporting rights they previously had in the EU. Although the TCA covers financial services, the free trade approach includes only very general commitments, similar to those the EU has agreed with other free trade partners.

A joint declaration accompanying the TCA sets out draft conditions for the UK to remain in certain **EU programmes.** This gives the UK continued access to Horizon Europe, the Euratom research and training programme, the ITER fusion test facility, the Copernicus Earth observation programme and the EU's Space Surveillance and Tracking (SST) system.

Under the TCA, the UK commits to maintaining a level playing field for **open and fair competition** while not adopting EU law in this area. This is achieved by guaranteeing high standards that are informed by the relevant EU law, not only in relation to **state aid** but also in areas such as environmental protection and climate change, labour and social standards, and tax transparency (anti-dumping measures,

see point 2.c.). Binding mechanisms for **enforcement and dispute settlement,** which also provide for remedial measures, are designed to prevent undercutting of EU state aid standards, for example if the UK were to take advantage of its regulatory autonomy to grant unfair subsidies. Either side may also take appropriate compensatory measures (such as the reintroduction of tariffs) through the rebalancing mechanism, e.g. if the EU were to increase certain requirements significantly above those of the UK.

In regard to dispute settlement, the TCA provides for the possibility of **classical arbitration,** with no role for the European Court of Justice (ECJ). This is a logical consequence of adopting a free trade approach without legal harmonisation: if the UK does not adopt EU law under the TCA, the ECJ has no role to play in the interpretation of EU law. The ECJ nonetheless retains some areas of jurisdiction, specifically concerning the Protocol on Ireland and Northern Ireland as well as the EU–UK Withdrawal Agreement (in matters concerning EU law, such as protection of the free movement rights acquired under the Withdrawal Agreement) and also UK participation in EU programmes (regarding decisions by EU bodies).

The TCA may be **terminated** by either side. This would invalidate the entire agreement package, including any additional agreements subsequently concluded between the EU and the UK. There is also the possibility of terminating certain parts or titles of the TCA, e.g. on trade. However, if, for example, the heading on fisheries were to be terminated, other headings under the same part of the TCA, e.g. road transport or aviation, would also have to be terminated, based on a horizontal 'guillotine clause'.

The **free movement of persons** no longer applies in the EU–UK relationship. As a consequence, the EU has also ruled out the UK's continued participation in the Schengen security cooperation mechanism and access to the Schengen Information System (SIS).

Under the TCA, the UK does not contribute to **cohesion** in the EU, i.e. reducing social and economic disparities; the EU expects this only of third countries which have access to the single market. (Likewise, other third countries with which the EU has only a free trade relationship, such as Canada or Japan, do not contribute to cohesion in the EU.)

2 Relevance for Swiss–EU relationship

a. Classic free trade arrangement versus access to the single market by sector

The free trade approach pursued by the UK differs significantly from the Swiss–EU bilateral path. The Swiss approach goes far beyond the **waiving of tariffs and quotas** (1972 Free Trade Agreement) and grants Switzerland **equal conditions of largely barrier-free access to the European single market** in specific sectors. This means that, in these sectors, Swiss manufacturers are largely treated the same as EU firms, and Swiss employees, students and economic actors are treated the same as those from the EU (and vice versa). Such equality of treatment is underpinned by the harmonisation of laws, brought about through the relevant market access agreements by either ensuring equivalence of Swiss legislation or adopting the corresponding EU law. In the 2015 report on the Keller-Sutter postulate *'Free trade agreement with the EU instead of bilateral agreements'* (de), the Federal Council concludes that even an updated and comprehensive free trade agreement would clearly constitute a step backwards from Switzerland's bilateral agreements with the EU. The same applies in comparison to the TCA.

The **benefits** brought by the Swiss–EU market access agreements include the following:

→ **Technical barriers to trade:** unlike Switzerland, and with the exception of just a few sectors (e.g. motor vehicles, medicinal products), the UK does not have an agreement with the EU on mutual recognition of conformity assessments or of equivalence of product regulations (Mutual Recognition Agreement [MRA]). UK products – as third-country products – therefore now have to fulfil EU requirements and may be subject to additional EU conformity tests and controls (constituting new technical barriers to trade), whereas certified Swiss products can be exported to the EU without any further requirements.

→ **Agriculture:** at the UK–EU border, checks must now be carried out on imports of foodstuffs, plants, animals and animal products, including checks for compliance with sanitary and phytosanitary regulations. These products can only be imported with the appropriate certificates. Switzerland and the EU, on the other hand, form a common veterinary area based on the Agreement on Agriculture, with no need for border controls, thanks to the harmonised regulations in trade of animals and animal products. The equivalence of the legal basis also gives Switzerland much wider market access, for example with regard to pesticides, animal feed and seed.

→ **Civil aviation:** the TCA is a classic bilateral air transport agreement aimed at maintaining basic air connectivity between the EU and the UK. However, with the Agreement on Air Transport, Switzerland participates in the EU aviation market on a largely equal footing. For example, unlike UK carriers, Swiss airlines are allowed to operate passenger or cargo flights between two EU member states ('Swiss home trade') as well as connecting flights to third countries (e.g. Zurich–Munich–Beijing). As Switzerland also participates in the European Union Aviation Safety Agency (EASA), all Swiss airworthiness certificates, licences and certificates of proficiency, etc. are automatically recognised in the EU.

→ **Overland transport:** unlike the UK, Switzerland participates in the deregulated EU road transport market on largely equal footing through its Overland Transport Agreement with the EU. Swiss carriers in freight transport have a transport licence recognised in the EU, which thereby allows them to provide transport services between EU member states – an activity not included in the TCA. The Overland Transport Agreement goes even further, e.g. with provisions on the road-to-rail policy and the heavy goods vehicle charge. Another important element of the Swiss agreement is international rail transport, which is not included in the TCA, but also does not play a major role in the EU–UK relationship.

→ **Free movement of persons:** the free movement of persons no longer applies to the UK–EU relationship, nor does the mutual recognition of professional qualifications and diplomas. This will make it more difficult for UK nationals to work in the EU and for the UK economy to access the European labour market. However, the Swiss–EU Agreement on the Free Movement of Persons gives Swiss nationals professional mobility and Swiss employers equal opportunities to recruit urgently needed skilled workers from the EU. The accompanying measures are an effective means of protecting Swiss wages.

On the other hand, in some areas the TCA goes far beyond the contractual obligations agreed between Switzerland and the EU. This is particularly true in relation to agricultural products, where the TCA provides for zero tariffs and quotas. In comparison, the Swiss–EU agreements provide for tariff concessions tailored to the interests of both sides in regard to basic agricultural goods and processed agricultural products.

b. Institutional mechanisms

Given its free trade approach, which is based on classic principles and standards of international economic law and not on harmonisation with EU law, the TCA also includes some institutional mechanisms for the EU–UK relationship not included in the draft Swiss–EU institutional agreement (InstA). There is therefore no need for dynamic adoption of legislation in the EU–UK relationship. Moreover, the ECJ's role in the interpretation of EU law no longer applies to dispute settlement between the EU and the UK.

With the InstA, however, Switzerland seeks to secure and enhance its access to the European single market on the basis of legal harmonisation. The InstA therefore provides for the **dynamic adoption** of developments in relevant EU law, as well as arbitration proceedings with the special provision that the court of arbitration will **consult the ECJ** – if necessary and relevant – for the interpretation of EU law in the bilateral agreements.

Given the different relationship models, and as long as the EU insists on ECJ sovereignty for the interpretation of EU law, the dispute settlement mechanism in the TCA is not transferable to the InstA.

c. Level playing field / State aid

Concerning the requirements for a level playing field (see also point 1), the UK's commitments, while not based on the adoption of EU law, are nonetheless inspired by EU law and, in terms of subject matter, are more comprehensive than the commitments set out in the draft InstA.

→ Apart from state aid, they also cover several **other horizontal areas** such as environmental protection and climate change, labour and social standards, and tax transparency (anti-dumping measures). The relevant provisions in the InstA refer only to state aid.

→ The UK's horizontal commitments also apply, with some exceptions (e.g. agricultural trade), to the **entire EU–UK trade relationship,** but without the UK gaining access to the single market. In contrast, the provisions in the InstA on state aid apply exclusively to the Agreement on Air Transport, forming also a framework for state aid rules in any future market access agreements. They therefore apply only in cases where Switzerland gains access to the single market.

→ Finally, the substantive state aid rules in the TCA are much **more detailed** than the provisions in the draft InstA (even if ultimately the UK's level of commitment is likely to be similar to Switzerland's in relation to the Agreement on Air Transport). The same goes for the rules in the TCA for monitoring state aid, thereby limiting the room for interpretation.

d. Regulatory autonomy

A comparison between the UK free trade approach and the path chosen by Switzerland reveals a degree of trade-off between regulatory autonomy and market access: free trade allows more regulatory autonomy at the expense of market access, while legal harmonisation in specific sectors improves market access but at the cost of some regulatory autonomy. However, as stated in the Federal Council's report on the Keller-Sutter postulate, the increase in regulatory autonomy obtained in a free trade relationship must be viewed in perspective, at least in the case of Switzerland and its specific context. This primarily concerns a degree of **formal autonomy.** The contractual legal harmonisation in the bilateral approach is limited to certain market sectors in which Switzerland, given its close economic ties even without any bilateral agreements, would in any case have a strong interest in harmonising its laws with those of its European neighbours, in a context of 'autonomous adoption'. (However, unlike with a contractual arrangement, with autonomous adoption there would be no mutual recognition of legal harmonisation, which in turn would create obstacles to market access.)

Moreover, the TCA's binding enforcement and dispute settlement mechanisms, with a provision for compensatory measures to ensure a level playing field, mean that any significant substantive divergence between UK and EU law would entail the risk of considerable additional costs.

3 Relevance for Swiss–UK relationship

Following the Brexit transition period, the bilateral agreements between Switzerland and the EU ceased to apply to the UK on 1 January 2021. Through the conclusion of seven successor agreements between Switzerland and the UK in the areas of trade, service providers, road and air transport, migration, insurance and police cooperation within the framework of the Mind the Gap strategy, **legal continuity** in the Swiss–UK relationship had already been largely guaranteed, irrespective of an agreement being reached between the EU and the UK.

Based on this new EU–UK agreement, however, **complete continuity is not possible** in certain areas of market access which are based on legal harmonisation in the Swiss–EU relationship. This is because, as the new EU–UK relationship is not based on legal harmonisation, the corresponding Swiss–EU agreements or parts thereof which are based on common rules cannot be directly transferred to the Swiss–UK relationship. This is the case, for example, with the Agreement on Customs Facilitation and Security, sectors of the Agreement on Agriculture (e.g. the annex on animal health) and the MRA (with the exception of motor vehicles, good laboratory practice and good manufacturing practice for medicinal products). Diagonal cumulation of origin is also not guaranteed, as the EU and the UK have agreed on purely bilateral rules of origin. This will have a negative impact on established value chains involving Switzerland.

Following the conclusion of this stage, cooperation with the UK can now focus on the Mind the Gap+ strategy, which seeks to **expand the Swiss–UK relationship** in other areas such as financial services and trade.