

The LSE Continental breakfasts are one element of a wider academic programme that aims to understand and inform the process of agreeing Britain's future relationship with the rest of Europe. The breakfasts are private, off-the-record meetings for a select group of distinguished individuals from around the world. They bring together LSE's most renowned academic experts with a diverse group of insightful and influential people to explore key issues shaping the European political landscape.

Meetings are held under Chatham House rules, so that opinions expressed may be reported but not attributed. These seminar-style events typically open with short presentations from two experts, one of which is usually a member of the LSE faculty, followed by open discussion among the group.

In these write-ups, issues raised in the discussions are collected into an essay including references to relevant research and exploring some questions in more depth. The authors are encouraged to elaborate and reflect, so they should not be read as an unvarnished record of the discussion.



## Is Switzerland a model for the UK-EU relationship?

London December 6, 2017

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Some prominent members of the campaign for the United Kingdom to leave the European Union have advocated a future relationship between the UK and the EU similar to that enjoyed by Switzerland. This essay pulls together the points made in a discussion at LSE that included the Swiss ambassador to the UK, examining the pros and cons of the Swiss model, and what lessons it holds for the UK in its future relationship to the EU.

Switzerland enjoys a unique relationship with the EU by taking part in the European Free Trade Association (EFTA) without being a member of the European Economic Area (EEA). Whereas adopting the Swiss model may prove incompatible with some UK priorities, reflecting on the EU-Swiss relations might provide useful pointers for the way the UK negotiates with the EU.

This essay examines what the Swiss model is and how it compares to alternative models for relations with the EU; the reasons that the EU might be unwilling to replicate the Swiss model for the UK; the reasons the UK might not be comfortable in a Swiss-type relationship; the elements of the Swiss model that might fit the UK; and the lessons that the Swiss model provides for the Brexit negotiations.

### Where does the Swiss way fit in the options on the table for the UK deal?

Switzerland's relationship with the EU was not built in a day but has rather evolved over the years in long rounds of bilateral negotiations. The Free trade agreement signed in 1972 marked the start of an organic development of sector-by-sector membership of the Single Market. More than 120 agreements have covered a variety of sectors from the Dublin regulation, which specifies humanitarian standards regarding asylum seekers, to Schengen Accords, which removed border patrol between Switzerland and the EU (Jenni, 2016). If a spectrum of post-Brexit negotiations scenarios were to be drawn, the Swiss way would be situated closer to the soft Norwegian-style option, just above a 'Comprehensive Economic and Trade Agreement Plus' (CETA plus) option that would resemble the EU-Korea Free-Trade Agreement with more services provisions.

The 'Swiss way' has some merits. It enables flexible and tailor-made agreements to be made and potentially modified in the future. It is founded on a nuclear option in the spirit of Delors' co-

decision procedures<sup>1</sup>, which requires that if one agreement is breached, then all are breached ('Tous l'acquis, rien que l'acquis'). Each bespoke, modular agreement is subject to scrutiny in a joint committee<sup>2</sup> that ensures it is transposed into Swiss law in compliance with the EU law ('autonomer Nachvollzug') so that the integrity of the single market is protected ('verträglichkeitsprüfung') (Jenni, 2016). However, those joint committees only meet once a year and are generally not able to take decisions by themselves (Buchan, 2012). As Switzerland is under no legal obligation to take on new EU legislation, some legal disputes about new agreements or amendments can arise and remain unresolved. The fact that all agreements of a negotiation need to be approved, known as the guillotine provision, has contributed to more stalemate situations. The first round of bilateral negotiations, where the free movement of persons was agreed, could not have come into force in 2002 without the approval of all the other seven agreements \_they include air traffic, agriculture, trade barriers.

Yet, the 'Swiss way' is considered too restrictive by the EU and the UK for several reasons.

### **Drawbacks and difficulties for the EU**

The EU feels Switzerland is *cherry picking* without fulfilling the membership obligations and accepting ECJ jurisdictions (Shepherd and Wedderburn, 2016). Unlike for countries in the EEA which have to directly apply the EU rules without having a say, the Switzerland-EU relations entail ongoing and continuous negotiations that need to be reached by both parties. This causes legal disputes in case of disagreement, for which the judicial framework is not entirely clear. De jure, the Court of Justice of the European Free Trade Association States plays a role in resolving disputes, but de facto, the EFTA court 'shadows' interpretations of the European Court of Justice (ECJ). Not only are the EFTA's Court Statute and its Rules of Procedure modelled on those of the ECJ, but the EFTA Court follows ECJ case law as a rule (law on the books). The judgments in Norway, Liechtenstein and Iceland, the non-EU members who belong to the EFTA court, carry the same force as the preliminary rulings rendered by the ECJ under Article 267 TFEU. As such, a move out of the EU and into the EEA, implies a subjugation of national sovereignty, since members lose their representation in all the EU law-making bodies, but remain subject to the laws. The EU would however prefer to maintain a level playing field with the UK as it does with the EEA countries to the sort of relationship it has with Switzerland, whereby they "autonomously copy EU law", which results in perpetual dispute often followed by threats of trade restrictions eventually followed by Swiss acquiescence.

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<sup>1</sup> Established under the Delors Commission, the co-decision procedures constitute the EU legislative process in which both the Council and the Parliament need to approve amendments proposed by the Commission. They will eventually turn into directives and regulations which have to be adopted by all EU countries.

<sup>2</sup> Joint committees provide opportunities for mutual exchange of information, for advice and for consultation on the implementation of amendments. Decisions are made unanimously to avoid one party acting unilaterally. Each of over 20 joint committees meet once a year to oversee the functioning of the agreements. Exceptions include the agreements on the taxation of savings income and on pensions.

If any legal dispute occurs between an EU country and Switzerland, the ECJ can only intervene when there is a clash between Swiss law and EU law. The ECJ is therefore powerless to act when there is no Swiss law corresponding to the EU law, which can lead to situations where Swiss companies are operating within the Single Market but are not bound by its rules. This is where the heart of the problem lies. The 'Swiss way' is considered an inflexible tool in which 'à la carte' agreements are inevitably problematic for the EU.

Therefore, a more binary choice for the UK of either CETA or European Economic Area (EEA) types is proposed by the EU because they fit better into existing structures. CETA covers some services, some regulatory equivalence and disputes resolution mechanisms without having the extensive mutual recognition, monitoring and sanctions of a 'CETA Plus' agreement. The EEA is relatively easy for the EU, as states have to apply the whole EU acquis and no new agreements are needed if the EU changes its regulatory architecture.

### **Drawbacks and difficulties for the UK**

One important drawback to adopting the Swiss model for the UK is the obligation to fulfil the fourth pillar of the single market if it still wants to be part of it, *the free movement of persons*. Following the Swiss initial restriction of freedom of people, the EU immediately sanctioned Switzerland by limiting the university partnerships with the EU like HORIZON 2020, which eventually prompted Switzerland to temper the law to bring it in line with the EU legislation. This seems unacceptable from the British point of view since one of the main driving forces for Brexit was the desire to control immigration by curtailing the free movement of people (Shepherd and Wedderburn, 2016).

Another main incompatibility with the Swiss model is the fact that it does not cover *financial services*. Financial Services 'passporting'<sup>3</sup> is not part of the Swiss agreement, partly because of an initial Swiss desire to retain their banking secrecy rules. However, having since been forced to become more transparent some Swiss banks pressed for access to the single market, and finance is currently part of the negotiations of the third package. In spite of the high degree of convergence between Switzerland and the EU, the financial services deal seems to be running into the sand. The deal was originally conceived at a time that Switzerland seemed to be moving towards full membership, but as that prospect has receded, the EU has become less willing to extend a key market access within the bilateral framework in which they are not comfortable. Furthermore, the required regulatory convergence is currently a source of political disagreements in Switzerland. As such, the Swiss financial sector's access to the Single Market is restricted, leaving it at a competitive disadvantage. Since financial services is the UK's largest export sector and almost 5,500 UK firms rely on corporate 'passports' to do business with other EU companies (Treanor, 2016), it seems unlikely that the UK would favour such model.

The *sovereignty issue* represents the most fundamental difficulty for the UK in adopting the Swiss way, especially because it constituted the strongest argument in the Leave Campaign (Shepherd and Wedderburn, 2016). Despite originally refusing to be part of the EEA on sovereignty grounds, Switzerland has found itself in that exact same position as it is obliged to apply de facto EU laws in each negotiation of its bilateral sectors. As mentioned above, one example is the rejection of quotas on EU workers by the Swiss Parliament overturning the results of a 2014 referendum. The parliament opted instead for giving residents priority in new job vacancies (Henley, 2016). This U-

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<sup>3</sup> The EU passporting system for banks and financial services companies enables firms that are authorised in any EU or EEA state to trade freely in any other with minimal additional authorisation. These passports are the foundation of the EU single market for financial services.

turn decision was mostly taken to remain compatible with the EU law and keep access to the Single Market (Alfonso, 2014). Since the EU is their biggest trading partner and they cannot afford to put that trade at risk by falling foul of their package agreements, Switzerland has no choice but to adapt to the EU product standards to sell products. As a result, it is a mistake to think Switzerland does not have to follow EU directives. For a European country outside the Union to trade with the rest of Europe, it must abide by EU regulations. The House of Commons Foreign Affairs Committee reported that the best way to have effective say in the way the UK's tradable economy is regulated is to remain inside the Union (Foreign Affairs committee report, 2013).

The Swiss way represents too many compromises for the UK but not enough to satisfy the EU that the UK would not undermine the rules of the Single Market. As a result, some people expect that the UK is likely to end up with a limited free trade agreement, 'CETA minus' because i) there is not enough time; ii) the EU is not willing to accept an extensive services agreement; iii) the EU will be satisfied with a limited agreement on trade given that the UK sells services to the EU and the EU sells goods to the UK, iv) an extensive trade agreement will be hard to ratify in all EU27; and v) for the UK it is better than nothing.

### **That said, what aspects of the Swiss Model could be adapted to the UK?**

The way Switzerland has managed customs checks with the EU customs security, cooperation and facilitation area could be relevant for the UK. Implemented in 1990 and revised in 2009, this landmark agreement has led to very close convergence between the EU and Switzerland with regards to facilitating goods transit. Despite regulatory convergence, there still are customs checks of EU goods in Switzerland. However goods arriving or transiting from EU and non-EU countries do not require extra checks by Switzerland since they are assumed to have been controlled by the EU countries.

The Swiss model is particularly instructive for the UK when it comes to consider the medium-term perspective after the transition period. Although the UK might come out of its exit negotiation deal with a relatively limited free trade agreement, continuous negotiations with the EU will carry on. The UK/EU relationship will remain a permanent feature of both domestic and foreign politics of Britain. Many people seem to agree that the medium-term architecture of the UK-EU relationship in the next ten-fifteen years should already be being worked out in spite of the lack of discussions on the matter in the British Parliament and among the party leaderships.

The way Switzerland started from an initial agreement and has gradually 'bolted on' bilateral agreements by sectors is therefore interesting to consider. The UK could potentially look like the Swiss model with decision-making archetypes similar to the EEA and Delors' co-decision procedures or Bruegel's 'Continental Partnership'. The latter is a new form of collaboration that would include continued partnership in terms of the free movement of goods, services and capital with limited labour mobility (Bruegel, 2016). This new inter-governmental system would guarantee decision making and implementation of regulations in line with the EU single Market ones. It would also allow closer cooperation in the domains of foreign policy, security and defence. Once the trade agreement has been signed, the two parties will bolt on various aspects of trade, economic and social politics (Fleming, 2017). This may include expanding creative industries with the MEDIA programme, enlarging the academic field with HORIZON 2020 and ERASMUS programmes, sharing data to guarantee security and protection, as well as creating an EU-UK common arrest warrant and judicial cooperation to combat terrorism or an EU-UK 'Blue-Card' for skilled workers. Such a medium-term model would be particularly acute at times of discussions of further spill-over integration with the two-tier model, as currently suggested by Macron and Junker (Gotev, 2017).

## **Conducting the negotiation: Lessons to learn from the Swiss model?**

While the Swiss model might be difficult to implement, there are many lessons to learn from it.

### *Institutional difficulties and problems of divergence*

The thirteen years of negotiations on the third package, in particular in relation to financial services, highlight the institutional difficulties and problems of divergence that Switzerland faces with the EU (Jenni, 2016). The EU wants the ECJ to have jurisdiction to ensure that the integrity of the Single Market law is safeguarded, not Switzerland. But, to what extent is the UK willing to converge or diverge with the EU? A key element of the campaign for the UK to leave the EU was to free itself from EU regulations, whereas Switzerland has more of a disposition towards regulatory convergence. (Shepherd and Wedderburn, 2016).

### *Danger of spurring Anti-Europeanism*

Some people worry about the risk of increasing anti-Europeanism in the UK as almost every aspect of government policy affecting market conditions has to be negotiated with the EU, casting the EU in the perpetual role of an obstacle or opponent. Following the 1992 referendum that saw Switzerland very narrowly rejecting membership of the EEA, which had been framed as a step towards EU membership, political resentment towards the EU has steadily increased, and recent polls show that support for EU membership has fallen to 11%. It might be particularly worrying for political stability in the UK (Fleming, 2017), as the UK is perhaps less immune to political turmoil than the remarkably stable Swiss system.

### *Asymmetrical power dynamics*

Dealing with the EU requires an understanding of the power dynamics between the EU and Switzerland that rest on asymmetry (Jenni, 2016). Since the EU considers itself a political community with its sets of principles and rules, it puts its principles first and becomes inflexible. Every time the EU changes any law, it is up to Switzerland to converge to that law domestically, not the other way round. Some have described the relationship in terms of the EU 'putting' non-EU countries in a special 'pillar' with limited room for manoeuvre. This may pose the risk of becoming a satellite state, just like Puerto Rico is to the United States.<sup>4</sup> EEA members and Switzerland have become 'satellites' with no institutional representation, unrepresented in the Delors' co-decision procedures where institutional legislation was approved by both the Council and the Parliament. The UK would benefit from recognising that it faces a stark choice between open access to the Single Market, and gaining the autonomy to regulate its own economy. A failure to recognise this would be likely to lead to continual disputes with an inflexible EU making threats of trade restrictions, followed by humiliating climb downs.

The same goes for financial contributions to the EU. They may continue as long as they remain compatible and converge with the EU requirements. In the Swiss case, a large amount of cohesion funds for projects driven by Switzerland for EU recipients that are considered priority areas have been conducted, i.e. vocational training and migration are currently considered. Whereas such an asymmetric relationship is well-accepted in Switzerland, it seems harder to sell for the UK. One can hardly imagine a permanent UK commitment to pay generally to the EU, even if the UK has some say over the nature of the project. The UK might however accept making payments that will be mutually beneficial such as paying to be part of the HORIZON 2020 programme.

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<sup>4</sup> Puerto Rico's current political status limits the autonomy of the Puerto Rican government given the level of US federal presence, which includes a branch of the US Federal District Court.

### *No other treaties will replace the Single Market*

The UK needs to 'realise' that any other treaties will not be a substitute for full membership of the Single market. To avoid disparity with the EU, the Swiss free-trade agreements with third countries are completed *after* deals are signed between these third countries and the EU, such that Switzerland operates as a sort of 'manual' rather than automatic member of the single market (Shepherd and Wedderburn, 2016). There are some exceptions to this rule, as shown with the deal with China (Lanteigne, 2015). Yet, such substantive mutual agreements are not substitutes to the Free Trade Agreement of the EU. Given how asymmetric the Swiss bargaining power was, the Swiss were surprised to get such a favourable deal with China, but the Chinese afterward explained that their motivation was that they meant to create a blueprint for their much more important agreement with the EU. Moreover, the EU is Switzerland's largest trading partner and any other agreements with large countries remain secondary. For instance, due to geographical closeness, Swiss trade with Lombardi is more important than trade with China and their trade with Tyrol is twice as significant as that with Russia. The UK perhaps needs to recognise that such agreements are only complementary and could not compensate the loss for leaving the Single market. As for the desire to further expand new areas of agreements between the UK and Switzerland, a financial services deal may prove difficult because they are competitors and Switzerland would not like to provoke Brussels.

In a nutshell, the Swiss model is instructive for the UK, but perhaps as much because of its inherent problems and its unsuitability for the UK rather than as a blueprint for a future UK-EU relationship. However, there are important implications.

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### Introductory remarks

Alexandre Fasel	Swiss Ambassador in London
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### Other Participants

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