

NKF Client Alert

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Brexit at last – what it means for Swiss-UK relations

Ratification of the EU (Withdrawal Agreement) Bill

Boris Johnson's EU (Withdrawal Agreement) Bill – the UK implementing legislation for the EU Withdrawal Agreement which was agreed between EU and UK negotiators in October 2019 – has been approved by both Houses of the UK Parliament and given Royal Assent on 23 January 2020 becoming the EU (Withdrawal Agreement) Act 2020 – 3.5 years after the Brexit referendum on 23 June 2016.

This means that the UK is now set to leave the European Union **at 11.00 pm (GMT) / midnight (CET) today, 31 January 2020**, starting a transition period scheduled to end on 31 December 2020.

The final versions of the EU Withdrawal Agreement and Political Declaration published on 17 October 2019 include limited substantive changes to Theresa May's Withdrawal Agreement, which failed to receive UK parliamentary approval, other than the Protocol on Ireland and Northern Ireland.

While the EU Withdrawal Agreement which was ratified by the European Parliament on Wednesday, 29 January, still provides for the possibility of an extension of the initial transition or implementation period, as it is now called, for 1 or 2 years, section 33 of the EU (Withdrawal Agreement) Act stipulates that "*A Minister of the Crown may not agree in the Joint Committee to an extension of the implementation period.*"

Also in deviation from its predecessor, the EU Withdrawal Agreement no longer refers to "close regulatory alignment" between the UK and the EU in relation to the trade in goods and includes some slight adjustments to the "level playing field" concept.

1. Implementation Period

During the implementation period, EU law – including any third-country agreements concluded by the EU – will continue to apply in the UK, the UK will remain in the single market and the customs union, even though it will no longer formally be an EU member state and hence have no more decision-making powers.

In April 2018, the Swiss Federal Council confirmed that the temporary continued application to the UK of EU third-country agreements shall also apply to the bilateral agreements between Switzerland and the EU. Switzerland and the EU (including the UK) have formally confirmed this through an exchange of notes.¹ This means that, in particular, the following bilateral agreements continue to apply during the implementation period, extending the timeframe to reach agreement on the future relationship between Switzerland and the UK:

- Free trade agreement
- Insurance agreement
- Agreement on customs facilitation and security

¹ See: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-77979.html>.

- Agreement on the free movement of persons
- Agreement on mutual recognition in relation to conformity assessment
- Agriculture agreement
- Air transport agreement
- Rail and road transport agreement

2. 'Mind the gap' and 'Mind the gap plus'

In recognition of the importance of the relationship between Switzerland and the UK and in order to prepare for a potential no-deal Brexit, the Swiss Federal Council adopted its 'Mind the gap' strategy early on in October 2016, only a few months after the Brexit referendum. In the context of its 'Mind the gap' strategy, Switzerland has concluded a number of new bilateral agreements with the UK in those areas currently governed by bilateral agreements between Switzerland and the EU (see above) with the aim of ensuring legal continuity and securing existing mutual rights and obligations:

- Air transport agreement (signed on 17 December 2018)
- Insurance agreement and overland transport agreement (signed on 25 January 2019)
- Trade agreement (signed on 11 February 2019)
- Citizens' rights agreement (signed on 25 February 2019) – based on the agreement on the free movement of persons, the citizens' rights agreement safeguards the rights acquired by Swiss and British citizens, respectively, prior to the end of the implementation period
- Provisional agreement on mutual access to the labour market (signed on 10 July 2019)²
- Provisional agreement on the coordination of social security schemes (signed on 31 October 2019)³

The new agreements (with the exception of the two provisional agreements) would only enter into force following the end of the implementation period and may be subject to further amendments and adjustments depending on the outcome of the negotiations between the UK and the EU.

One area that is notably absent from this list is financial services as, despite there having been a mandate for negotiations since 1999, no financial services agreement exists between Switzerland and the EU which could have been 'duplicated' for the relationship between Switzerland and the UK.

A prominent exception in the area of financial services where pre-emptive action has been taken by both the EU and Switzerland is the trading and clearing of derivatives for which London is still the unrivalled European centre. Pursuant to FINMA Guidance 01/2019, FINMA provisionally recognises UK derivatives regulations with respect to the clearing, reporting and risk mitigation obligations (under the UK EMIR Transposition Act) as being equivalent to the relevant requirements of the Swiss Financial Market Infrastructure Act. While not expressly addressed in the Guidance, the expectation is that FINMA will uphold its recognition of UK-based financial market infrastructures under the EMIR regime post-Brexit.

In addition, Switzerland is looking to further strengthen its relationship with the UK through enhanced cooperation post-Brexit ('Mind the gap plus'). The trade agreement already provides for exploratory talks to be held in order to replace, update or further develop the agreement, including in further areas such as services, intellectual property rights, employment, the environment and

² As this agreement will in principal terminate on 31 December 2020, the authors' understanding is that it will not enter into effect given the implementation period under the Withdrawal Agreement until 31 December 2020.

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dispute resolution and it would appear that there is certainly an appetite on both sides for closer cooperation in the area of financial services in particular.

3. Bilateral agreements (largely) unaffected by Brexit

There are a number of bilateral agreements between Switzerland and the UK which will remain (largely) unaffected by Brexit as the UK is a party to those agreements as an individual state and not as a member of the European Union. These include:

3.1 Taxation

- 1977 UK-Switzerland double taxation agreement, as last amended by the 2017 protocol
- OECD and Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, ratified by the UK in 2008 and by Switzerland in 2016
- OECD Global Standard on the Automatic Exchange of Information (exchange of information between Switzerland and the UK since 2018)

3.2 Choice of law, arbitration and judicial cooperation

- Swiss Private International Law Act and UK conflicts of laws rules
- New York Convention on Recognition and Enforcement of Foreign Arbitral Awards
- Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters
- Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters
- European Convention on Information on Foreign Law

4. Possible gaps & steps to take (non-exhaustive)

4.1 Jurisdiction, recognition and enforcement of judgements

Questions of jurisdiction and the recognition and enforcement of judgements in civil and commercial matters between Switzerland and the UK are governed by the Lugano Convention concluded between the EU, Switzerland, Norway and Iceland. The understanding of the Federal Office of Justice is that the Lugano Convention will continue to apply between the UK and Switzerland until the end of the implementation period as provided for in the EU Withdrawal Agreement.⁴ After the end of the implementation period on 31 December 2020, unless the UK has re-joined the Lugano Convention in its own right, matters relating to jurisdiction clauses and the recognition and enforcement of judgements between the UK and Switzerland will, subject to certain limited areas where bilateral agreements exist, be governed by the Swiss Private International Law Act and the relevant national (primarily, common) law rules in the UK. The recognition and enforcement of an English judgement in Switzerland (and *vice-versa*) may, therefore, become somewhat more cumbersome and time-consuming and some parties may consider including arbitration clauses in their contracts instead.

An alternative to the UK re-joining the Lugano Convention is for the UK, and Switzerland, to accede to the new Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters signed on 2 July 2019.

⁴ The Federal Office of Justice (FOJ) notes, however, that Swiss courts and other authorities are not bound by the FOJ's legal assessment (see: <https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007/brexit-auswirkungen.html>).

4.2 Other contractual provisions

- *Definitions and references* – (e.g. "EU", "EEA" and "EU law") should be accompanied by references to the UK if it is to be included and references to EU Regulations may need to be supplemented or replaced by references to the relevant UK legislation
- *Data protection* – data protection clauses may need to be amended in light of the UK's approach to the GDPR
- *Provisions on costs and fees* – should take account of possible changes in tax law, in particular, VAT, increased customs formalities, the imposition of quotas and tariffs on goods and currency/exchange rate fluctuations after the UK leaves the single market and the customs union at the end of the implementation period and allow for pricing adjustments
- *Material Adverse Change, force majeure and frustration* – parties should consider whether they want to expressly exclude Brexit from these events or, on the contrary, allow for renegotiation or even termination in the case of negative consequences of Brexit

5. What happens next?

Negotiations between the UK and the EU on their future relationship are expected to commence in early March, with EU Council Meetings scheduled for 26/27 March and 18/19 June where an indication of progress may be given. Any agreed deal would probably need to be ready for approval by the European Parliament at its meeting in the week of 26 November if it is to be implemented by the end of the implementation period on 31 December 2020.

While Switzerland, in the context of its 'Mind the gap' strategy, has made considerable efforts to 'Brexit-proof' its relationship with the UK as much as possible, many aspects of such future relationship will be determined by the outcome of the negotiations between the UK and the EU by the end of the implementation period. It will, therefore, continue to be very important for Swiss and UK businesses to closely monitor the progress of the negotiations and assess any potential implications for them.

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