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Brexit, EFTA and EEA

This press release is based on a speech given by Prof. Dr. Dr. h.c. Carl Baudenbacher, the President of the EFTA Court, at the Swiss Institute of Foreign Research at the University of Zurich. *Baudenbacher's* lecture covered aspects of the future possible relationship between the United Kingdom and the EU in finding a relationship that works for all through EFTA and the EEA, as well as the implications and opportunities of Brexit for Switzerland.

I. The question of market access

The question arises whether following Brexit the United Kingdom respectively its operators will lose access to the European single market. Non-EU Member States may, under the terms that have been addressed to Switzerland by the EU Council, conclude market access agreements with the Union if they accept supranational monitoring and a supranational court. Membership in the European Economic Area (EEA) on the EFTA side fulfills those conditions. The 1992 EEA Agreement extends the EU internal market to the three EFTA States Norway, Iceland and Liechtenstein. The essence of the agreement is a two-pillar structure. The law in the EU and the EFTA pillar is largely identical in substance. But the three EFTA countries have their own watchdog (EFTA Surveillance Authority, ESA) and their own Court (EFTA Court). In order to join the EEA, the United Kingdom would first have to join EFTA. This would require the consent of the current four EFTA countries Iceland, Liechtenstein, Norway and Switzerland.

II. Four crucial questions

Foreign Secretary *Boris Johnson* has recently hinted that the United Kingdom would be prepared to bring in its strength in the areas of intelligence, security, defence and foreign policy.

1. Legislation

At present, the three EFTA States have a co-determination right in the preparation of new EU legislation which is then transposed into the EEA law, but no voting right. Whether that is sufficient for a country of the size and importance of the United Kingdom, is an open question. In this respect, one must remember that when the EEA process started in January 1989, European Commission President *Jacques Delors* offered the EFTA States a new, more structured partnership “with common decision-making and administrative institutions.” The idea was not realised, but the proposal shows that such a solution is not excluded.

2. Free movement of persons

The United Kingdom no longer seems to want to accept the free movement of persons as an absolute right. Critics see this freedom in a broader economic context, involving the different degrees of economic development in the EU Member States. Since the economically weaker countries no longer have the ability to regain competitiveness through depreciating their own currency, the potential for brain drain is increasing. A recent study by the Brussels-based think tank *Bruegel* discusses whether the EU should make a concession to the United Kingdom on this point. Unlike the freedoms of goods, services and capital, the free movement of persons is in the view of the authors not economically but politically determined. It is difficult to imagine that the former German Federal Minister and now Chairman of the Bundestag's Committee on Foreign Affairs *Norbert Röttgen* has signed the document without backing from the Federal Government.

3. Financial contributions for the benefit of the EU

The *Bruegel* paper also contends that UK payments into the EU budget are vital. In *Baudenbacher's* view, the UK will need to make financial contributions just as the EEA/EFTA States do. However, in the case of EEA membership on the EFTA side, the British payments would be significantly lower than previously as an EU Member State, and the lion's share would no longer flow directly into the EU budget. The EFTA States have their own organization and choose the projects they want to fund.

4. Supranational court

The British people seem to be dissatisfied with the Court of Justice of the European Union. British politicians have argued for years against the perceived interference with the country's sovereignty. Opponents of British EEA membership on the EFTA side have, however, argued that this would not change, since the United Kingdom would then be subject to the jurisdiction of the EFTA Court. In that regard, *Baudenbacher* referred to the fact that the EFTA Court is an independent court of law. Because of its size, a British judge would sit in each case. The President of the EFTA Court also mentioned that the court system of the EFTA pillar leaves the EFTA countries more sovereignty than the court system of the EU pillar leaves the EU countries. The political concept of '*ever closer Union*' does not exist in the EFTA pillar. This is reflected in the EFTA Court's case law. Moreover, that case law is to a large extent market-oriented. *Baudenbacher* foresaw that the common law-thinking would become even more relevant for his Court. For the record, it should be noted that in light of the ECJ's case law to adopt the *Bruegel* paper's proposal of using the ECJ with additional non-EU judges, has no chance.

III. The Swiss dimension

Switzerland is affected by Brexit and its possible consequences as regards the free movement of persons. The notion that Berne should seek a solution independently from Brexit is not particularly imaginative, even if with the soft implementation of the mass immigration initiative there is, at the moment no great pressure. Negotiations concerning an institutional agreement should be discontinued, in

Baudenbacher's view. The plan of the Federal Council to let the ECJ decide in case of a conflict, but at the same time to have the last word, is not feasible. If there is the slightest doubt as to the absolutely binding force of its judgments, the ECJ, which has to rule on the matter, would say no. This was confirmed by ECJ President *Lenaerts* and his predecessor *Skouris*. Experts of EU law anticipated that from the outset, but Berne refused to listen. Conversely, Parliament and if necessary the people would say no, if the Bundesrat does not have the option to reject a ruling of the ECJ at reasonable conditions. It may well be that not even this is sufficient. The concept of foreign judges is according to *Baudenbacher* an inappropriate description of the Federal Council's model. The ECJ should be seen, and would act as the court of the other party. Likewise, the Commission would be the watchdog of the other party. They lack impartiality.

As for the exclusion of an EFTA solution by the Federal Council, *Baudenbacher* repeated the criticism he had voiced from the beginning that the Foreign Ministry - whether against their better judgment or not - has spread six falsehoods about the EEA. A particularly serious mistake is the conclusion that since the EFTA Court has only jurisdiction in EFTA pillar, its judgments have only binding effect in the EFTA pillar. Anyone, the EFTA States, the EU countries, third countries, but also private companies and citizens are bound by those judgments. With the Brexit decision of the British voters, a new situation has arisen anyway.

Finally, the speaker raised the question whether the Helvetic militia system is overwhelmed with such problems. That political parties, cantons, associations and parliamentarians have believed the Foreign Ministry's allegations - both concerning the ECJ and the EFTA Court - is worrying. Moreover, there is the question of whether too many dreamers and too few grafters are dealing the Europe dossier. Those who work out proposals and negotiate about a European court model need to know how European courts function. *Baudenbacher* observed that it would not come to his mind to conduct heart surgery. For the future he recommended the convening of a round table with international experts. They would have the task to take stock and to develop future-oriented concepts.