



Swiss-EU Relations

With a Focus on the Current Situation

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Summary¹

In 1992, Swiss voters rejected an accession to the European Economic Area (EEA). Among different reasons for this were institutional and sovereignty questions, such as the dynamic adoption of new EU legislation, and the Swiss Government announcement of the EEA being a training camp for a future EU membership. Instead of the multilateral EEA approach, Switzerland chose a bilateral approach with Bilateral Agreements I and II, which were signed in 1999 and 2004, respectively. The two packages regulate aspects of the economic, political, and cultural landscapes and benefit both parties with legal certainty and market access in selected policy sectors.

About ten years ago, the EU expressed its desire for an Institutional Framework Agreement (IFA) with Switzerland to protect the homogeneity of the internal market, to remove legal barriers, and to introduce a more efficient dispute settlement procedure. The draft of the negotiation result (not initialed) presented in 2018 raised three concerns about which the Swiss Government sought clarification from the EU: wage protection, state aid, and the Citizens Rights Directive. These three issues continue to be central concerns for many Swiss voters because these rules could potentially create social or economic problems. Without acceptable clarification on these points from the EU, there is a considerable risk that the Swiss people could reject the IFA in a future referendum, which would put Switzerland and (to a lesser extent, of course) the EU in a difficult situation.

To avoid such a consequence, Switzerland must exercise caution. If a satisfactory solution cannot be reached, Switzerland must consider alternatives to a premature submission of the IFA to avoid legal uncertainty during an interim period.

Regardless of the upcoming bilateral developments, Switzerland, at the heart of Europe, traditionally has a positive relationship with the EU. These friendly relations are all the more important when considering today's challenges, in which Switzerland can show solidarity with Brussels and support the larger-scale European goals of promoting peace, democracy, and human rights in the world.

1. The Swiss Approach

Since the creation of the European Economic Community (EEC) in 1957, the predecessor of the EU [hereafter, we use the term "EU" for all the Brussels European institutions], Switzerland has closely followed the European integration process. However, EU membership was not considered opportune in Switzerland for three political reasons: Firstly, the Swiss people wanted no cession of decision-making, particularly regarding Switzerland's existing direct Democratic instruments like the popular initiative and the referendum. Additionally, Switzerland had no interest in a customs union because it did not want to give up its treaty-making power. Lastly, Swiss foreign policy is strongly devoted to the principle of neutrality and was in high esteem at the time, particularly due to Switzerland's non-involvement in the First and the Second World Wars. However, the Swiss were interested in economic collaboration and wanted some form of association agreement that included economic cooperation. In 1957, 1962, and 1963 the Swiss Government made three attempts to enter into an association agreement, all of which resulted in failure. Only in 1973, when the UK and Denmark left the European Free Trade Association (EFTA) and joined the EU, Switzerland, along with the remaining EFTA countries, opted for partial economic integration in the form of a Free Trade Agreement (FTA).

Switzerland at the Crossroads

In 1989, Jacques Delors launched the idea of establishing a European Economic Area (EEA). This notion was met positively by the Swiss Government, which then presented the idea of an economical but not political integration to the Swiss people. The institutional question of the adoption of future EU laws, and how that process is handled in the EEA with no decision-making right for its members, raised concerns of sovereignty for the Swiss. Additionally, six months ahead of the referendum, the Swiss Government communicated its intention to regard the EEA only as a transitional model, and that the final goal would be Swiss membership into the EU. This approach made a (narrow) majority of the Swiss voters hesitant and it became one of the reasons why Swiss voters rejected the accession to the EEA Agreement in 1992, in opposition to the Swiss Government. Consequently, this blocked a EU membership.

1 This paper is a policy brief written as a follow-up after the NUPI seminar on Swiss-EU relations on 26 November 2020, where Professor Ambühl was a main speaker. Due to formatting requirements, it is published in the research paper series

The Bilateral Agreements

After the rejection of the EEA, the Swiss Government wanted to fill the legal gap. From 1993 until 1998, the Bilateral Agreements were negotiated. The package “Bilateral Agreements I” laid the foundation for the future bilateral path to come. It was signed in 1999, consists of seven sectoral agreements: Free movement of persons, Technical barriers to trade (Mutual Recognition Agreement – MRA), Public procurement markets, Agriculture, Land transport, Civil aviation, and Research. The leftover topics of “Bilateral Agreements I” were taken up in further negotiations and were supplemented with additional issues. These negotiations took place between 2000 and 2004 and resulted in “Bilateral Agreements II”, which were signed in 2004. This agreement package includes nine sectoral agreements: Schengen/Dublin, Taxation of Savings (later becoming Automatic Exchange of Information (AEOI)), Combatting fraud, Processed agricultural products, Environment, Statistics, MEDIA program (Creative Europe), Pensions, and Education. All in all, we have access to individual, important sectors but the broad integration, which the EEA provides is missing.

In legal terms, we emphasize three remarks. “Bilateral Agreements I” are interconnected by a guillotine clause and form an entity, which is not the case for “Bilateral Agreements II” (with the guillotine clause the EU wants to prevent a pick and choose situation; when one agreement is terminated all the others are also terminated). Moreover, the “dynamic adoption” of the EU law is only applicable to Civil Aviation, as well as to Schengen/Dublin, and the Customs Security agreement. In these three dynamic agreements, Switzerland, as a non-EU member state, has no *decision-making* power but *decision-shaping* rights.

The Popular Support in Switzerland

In contrast to Switzerland’s EEA rejection of 1992, which would have led to a rapprochement between the country and the EU, the subsequent path with the two bilateral packages had sufficient support in Switzerland and still does until today. What the Swiss people think is indeed the decisive factor in the Swiss approach to the bilateral relations with the EU, because whatever the Swiss negotiation team has agreed upon with the EU is normally subject to a referendum and could be rejected by the Swiss population.

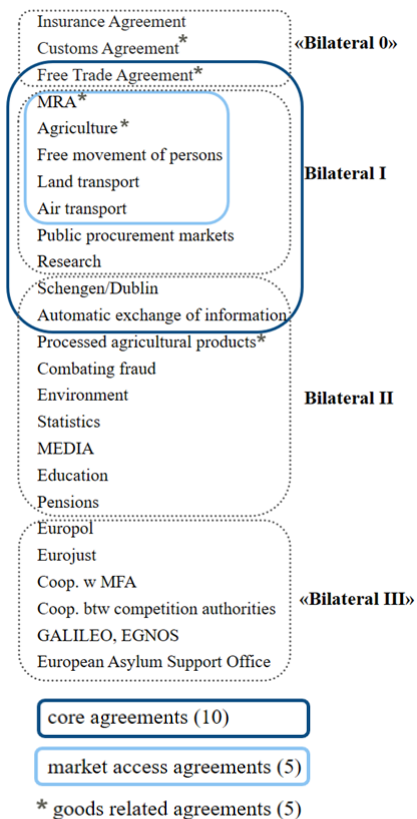


Chart 1: Main agreements Switzerland – EU

Against this background, Swiss negotiators are well-advised to regularly consult Swiss voters and other relevant stakeholders from the very start of the negotiation process. In doing so, they can determine the main priorities and concerns of Swiss voters regarding negotiations with Brussels, which could be a crucial step towards winning their popular vote.

What Does a Bilateral Approach Mean for Switzerland?

This bilateral approach has three clear advantages for Switzerland. Firstly, the bilateral packages guarantee legal certainty and better market access. Secondly, the agreements are only relevant for selected policy sectors. This constitutes the approach’s main difference from the EEA. Thirdly, Switzerland maintains a certain degree of freedom regarding legislation and politics that are not part of the Bilateral Agreements, which are foreign policy, economic policy, foreign trade policy, monetary policy, taxation and finance, social policy, and agriculture. Within the framework conditions provided by international and national political and legal restrictions, Switzerland can make these policy decisions autonomously. However, by choosing the bilateral path, Switzerland also faces three clear disadvantages, namely, there is no full participation in the selected policy sectors, and (logically) no participation at all in the other sectors of the European integration process, and there are unsatisfied market access demands such as a possible electricity, a service agreement or a public health agreement.

Overall, Switzerland has roughly 120 agreements with the EU, 25 of which

are at the center of the bilateral relationship (see Chart 1). Within these agreements, Bilateral Agreements I and II, including the FTA, can be classified as the main agreements (“Bilateral 0” and “Bilateral III” are non-official denominations).

Level of Integration

Switzerland is *de facto* well integrated into the EU – not only geographically, but also economically and demographically. 1.4 million EU citizens reside in Switzerland (FDFA, 2020a); 460,000 Swiss citizens reside in the EU (FDFA, 2020a). There are 334,000 daily commuters from the EU to Switzerland (FDFA, 2020a). With this, Switzerland has the highest level of transnational daily commuters within Europe.

In 2019, the total value of trade between Switzerland and the EU amounted to 246 billion Euros, while the EU had a large trade surplus of 16.7 billion Euros with Switzerland (FDFA, 2020b). With this high level of intertwining, Switzerland may be the most-integrated country into the EU on the European continent, albeit without political or institutional integration. Therefore, maintaining positive neighborly relations has always been essential for Switzerland and the EU (see also Ambühl and Scherer, 2020).

According to us, the main argument against a full integration into the EU is the preservation of Switzerland’s politically broad-based direct democracy, which the Swiss populace largely seeks to maintain. Other Swiss concerns include the high value-added tax (VAT), which would roughly have to be doubled, and the perception of many Swiss citizens that neutrality within Europe is a unique feature of Switzerland.

2. The Negotiation of an Institutional Framework Agreement

After the conclusion of the last big bilateral package (“Bilateral Agreements II”), the EU began to emphasize its desire to create an Institutional Framework Agreement (IFA) with Switzerland to achieve two main goals: Firstly, to uphold the homogeneity of the internal market through a “dynamic” adoption of the Bilateral Agreements (a dynamization of the prior “static” agreements, so that these agreements have the same updating mechanism as the EEA). Secondly, to reach an efficient dispute settlement procedure to prevent long or unsolved disputes.

For example, the issue of the “eight day rule” (one of the sub-points of the wage protection), which forces EU contractors to satisfy all administrative hurdles eight days before commencing any new job in Switzerland, remains unresolved. If a dispute touches upon EU *acquis*, the EU demands a binding ruling and, in difficult cases, calls upon the European Court of Justice (ECJ) to consult, which many Swiss voters fear would result in the ECJ having the last say. This involvement of the ECJ would be a new element to the existing dispute settlement process between Switzerland and the EU, potentially perceivable as an asymmetric process.

As matters stand, the EU is currently unwilling to grant Switzerland additional market access agreements as long as the IFA is not concluded. Furthermore, all new market access agreements should be in the new IFA logic (dynamic adoption of new EU legislation; involvement of the ECJ) and should be integrated with the different sectoral agreements under one umbrella.

Draft Agreement

After protracted negotiations, the negotiating parties submitted a draft agreement of the IFA to the Swiss Government and the EU Commission in November 2018, but the draft was not initialed by Switzerland. The Swiss Government submitted the draft for consultation to the Parliament’s Foreign Affairs Committees, the cantons, the political parties, the social partners, and other stakeholders in Switzerland. There were many different reactions to the draft, including concerns about the nation’s sovereignty. Subsequently, the Swiss Government identified three main points that required clarification from the EU: legal certainty for the current level of wage protection in Switzerland, the exclusion of horizontal effects of the rules on state aid, and no obligation for an integral adoption of the Citizens Rights Directive. After delays due to the Coronavirus pandemic and a rejected referendum against the free movement of persons that allowed once again free movement in and out of the country, negotiations on the three aforementioned points resumed in the beginning of 2021. However, it remains to be seen, whether it will be possible to overcome the differences.

3. Prospects

If these three points of the IFA are renegotiated and the Swiss Government signs the resulting draft agreement, it

would then go to Parliament and be subject to a referendum. In a vote on the IFA agreement, the pros put forward could be the necessity of the IFA to gain access to new agreements and the cons could be the dynamization (bringing about a so-called democratic deficit, a de facto weakening of the Swiss Parliament) and the dispute settlement involving the ECJ. These points indicate that a vote regarding the IFA could be difficult.

Comparison with the Brexit Agreement

Conventional negotiation experience says that a party can only negotiate well when it can walk away from the negotiation, technically speaking, when it has a good BATNA (“best alternative to a negotiated agreement”) (see for example Lewicki et al., 2011). The BATNA can be considered as a metric for each negotiator’s bargaining power. Compared to the UK and its Brexit negotiations, Switzerland, with its many trade agreements, has a bigger BATNA against the EU than the UK did during their negotiations. This is all the more remarkable considering that larger countries usually have higher levels of BATNA. In the event of a “no-deal Brexit” with the EU, the UK would have had nothing to fall back on, unlike Switzerland with its 120 sectoral agreements acting as a kind of “safety net”. Switzerland continues having market access and a certain level of stability and security even without the conclusion of the IFA.

When comparing the UK-EU Agreement to the bilateral approach of Switzerland, there are certain formal similarities respective to the IFA draft. However, two major differences are that the UK has a free trade agreement without participation in the EU internal market and, therefore, it excludes the free movement of people and assigns no role to the ECJ in dispute settlements. By contrast, Switzerland partially participates in the EU internal market, which is often cited as the main argument why the ECJ should play a role in settling Swiss disputes and is not necessary or legitimate in the case of the UK. Although, in our view, this reasoning is not fully convincing because the Bilateral Agreements did not involve the ECJ, even though Switzerland already participated in the EU internal market (for further elaboration on the Switzerland-UK comparison, see Ambühl, 2020).

Swiss Developments

In Switzerland, the internal approval procedure requires that new laws must first be signed by the Swiss Government, then earn majority support in Parliament, and finally pass a popular referendum. Within this framework, if the Government anticipates a likely rejection of the discussion in a popular vote, then it should consider not submitting the IFA in the first place, to avoid risking a majority No vote in a referendum. Hence, it would be important to find a way out of this situation. One alternative could be to consider working out a cooperation agreement for the time being.

Independent of the IFA negotiation’s outcome, Switzerland’s objective should be to continue a ‘good neighborhood’ policy, a partnership built on solidarity in which Switzerland, together with the EU, promotes peace, democracy, and human rights in the world. Switzerland should increasingly support the EU in mastering the challenges of our time such as climate change, the Covid-19 pandemic, and poverty, by providing substantial financial contributions. This effort would be justified. Norway, for example, surpasses Switzerland with its per capita contributions to the EU by five times.

In general, Switzerland and the EU should grant each other market access based on the existing bilateral treaty and cooperate in important fields like security, migration, and research, based on a new IFA, which provides the treaty with a solid legal base, a platform for political dialogue, and a basis to extend the set of agreements.

Comparability of Switzerland and Norway

When evaluating Switzerland’s current negotiations with the EU, it is important to analyze how other states in Europe deal with their big neighbor. Particularly, many similarities in terms of the historic background and the chosen bilateral path can be found when looking at Norway. After Norway’s rejection of the EU (1972, 1994) and Switzerland’s No vote to the EEA (1992) in referendums, both parties have sought alternatives to an EU accession. Additionally, Norway, along with Switzerland, abstains from playing a role in power politics, given today’s geopolitical context. Whereas the European institutional integration is stronger in the Norwegian case than in Switzerland due to Norway’s membership in the EEA, the key challenging issues remain the same in that a posi-

tive relationship with the EU is certainly a balancing act, although it is possible.

Both Norway and Switzerland have found systems that are quite satisfactory, Norway within the EEA and Switzerland with its bilateral system. For the time being, it does not seem likely that Western European non-EU states would deviate from their model in the near future, unless new integration systems or models evolve in Europe, which would more adequately meet the needs of individual countries with different integration capabilities and intentions (e.g. concentric circles, variable geometry, and different rates of integration). This question has experienced a new level of relevance simply because of Brexit. One criterion for future different integration speeds could be a more country specific participation in the internal market and in the free movement of persons system.

4. Concluding Remarks

The relations between Switzerland and the EU are traditionally very positive and rather problem-free, apart from minor issues such as the subject of wage controls, by which some small and medium-sized enterprises (SMEs) in the border area are moderately affected (see the aforementioned “eight day rule”).

Switzerland represents European values. It could even be said that Switzerland is a “Europe en miniature.” It is a nation committed to the rule of law and it is an important economic partner that does not create any real problems for the EU. With its diplomatic “good offices”, a tradition in humanitarian aid, and efforts in International Geneva, Switzerland supports European views and initiatives in the world. We remain convinced that, given the positive relations and with creativity, a solution can be found to satisfy the legitimate demands of both parties.

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Prof. Michael Ambühl heads the Chair of Negotiation and Conflict Management (NECOM) and the Swiss School of Public Governance (SSPG) at the Swiss Federal Institute of Technology (ETH Zurich). He is a former State Secretary of the Foreign Ministry and the Finance Ministry. His work revolves around mediation and conflict management, with a focus on “Negotiation Engineering”: a combination of theoretical and applied schools of thought based on his expertise as a Swiss diplomat and negotiator. Having worked for the Swiss diplomatic service for over 30 years, he negotiated numerous agreements between Switzerland and the EU (as Swiss chief negotiator of the package “Bilateral II”), the US, the UK and Germany. He facilitated talks between Armenia and Turkey, and the US and Iran.

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