



Chapitre de livre

2023

Accepted version

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How to cite

LAVENEX, Sandra, VEUTHEY, Alexandre Maxime. The Swiss model in the context of Brexit: from 'side-street' to 'dead-end'? In: Handbook on the European Union and Brexit. John Erik Fossum, Christopher Lord (Ed.). [s.l.] : Edward Elgar, 2023. p. 345–361.

This publication URL: <https://archive-ouverte.unige.ch/unige:166829>

20. The Swiss model in the context of Brexit: from ‘side-street’ to ‘dead-end’?

Sandra Lavenex and Alexandre Veuthey

INTRODUCTION

Switzerland’s special status as a quasi-member state enjoying many privileges of European integration without bearing the political costs of membership has certainly inspired Brexit debates. Yet, by the time of Brexit, Switzerland’s unique model of association had increasingly come under strain – and what started as a ‘side-street’ to European integration had turned into a ‘dead-end’.

Adamant of their national sovereignty and preferring trade liberalisation over political unification, Switzerland and the United Kingdom (UK) share many parallels in their relations to the European Union (EU). This also includes their ambivalent attitude towards freedom of movement which, at different points, has proved a stumbling block. Whereas the UK has opted for joining the EU, Switzerland has remained in the European Free Trade Area (EFTA) and has negotiated a unique set of bilateral agreements granting considerable access to the single market. It did not come as a surprise when in the context of Brexit, ‘leave’ proponents put forward the Swiss model as a way to reap the economic benefits while avoiding sovereignty losses of integration. What this debate failed to recognise, however, is that de facto Switzerland is subject to considerable sections of EU law – without participating in its development. Furthermore, the references to Switzerland failed to realise that the Swiss model of bilateral agreements increasingly stood under pressure both from within and from without.

This chapter examines the connections between the Swiss model of European integration and Brexit in two steps. We start by retracing the trajectory of the Swiss model before turning to its relevance in the Brexit debates, on the one hand, and the reverberation of Brexit on Swiss-EU relations, on the other hand.

TRAJECTORY OF THE SWISS MODEL

A Side-Street Opening up: The Bilateral Agreements

The current model of EU-Switzerland relations finds its origins in the negative popular vote regarding accession to the European Economic Area (EEA) in 1992. Among the most decisive motives against EEA accession were opposition to freedom of movement for EU/EEA citizens and parallel endeavours of the Swiss Federal Government to move towards full EU membership. Indeed, in 1992, just a few months before the referendum, the Swiss government had sent a letter to Brussels asking for the opening of EU membership talks. This confounded the questions of EEA and EU membership in the eyes of the voters and increased opposition to the EEA (Dupont and Sciarini, 2001). The Swiss government’s pro-European inclination coupled

with popular opposition resulted in a unique ‘side-road’ of bilateral sectoral agreements. The bilateral agreements were negotiated in two rounds in 1999 and 2004, and came to supplement an existing set of agreements including the 1972 EU-Switzerland free trade agreement. One can say that despite recurrent politicisation of the bilateral arrangements (see below), this solution suited the Swiss interest in deep market access without supranational transfers relatively well. In any case, the letter expressing the willingness to accede to the Union was formally withdrawn in 2016.

Today, Swiss-EU relations are regulated by more than 120 mainly market access-related agreements (Dupont and Sciarini, 2007; Lavenex and Lehmkuhl, 2009; Oesch, 2018; Schwok, 2015).¹ The first bilateral agreements signed in 1999 came into force in 2002 and cover technical barriers to trade, public procurement markets, some agricultural products, overland transport, civil aviation, research and the free movement of persons. These agreements are legally bound by a ‘guillotine clause’: in case one of the agreements is unilaterally revoked, the other six agreements would also cease to have effect. The second round of bilateral agreements was signed in 2004. These cover a range of relatively minor issues (participation in EU education programmes and the MEDIA programme for the audio-visual industry; accession to Eurostat and the European Environmental Agency; reduced customs duties on processed agricultural products; and income tax exemptions for retired EU officials living in Switzerland) and more contentious points such as accession to the Schengen/Dublin agreements, the fight against fraud and taxation of savings. Of these, the agreement on Schengen/Dublin was subject to a referendum in June 2005. It was accepted by 54.5 per cent of the Swiss electorate (Schwok, 2009, pp. 53–66).

The evolving EU *acquis* and deepening interdependence motivated the Federal Council in 2008 to ask for a third round of bilateral agreements covering free trade in agricultural goods, public health, electricity, and participation in several EU institutions including the European Defence Agency, Galileo, the EU’s emission trading system and ESDP Missions. After initial discussions, this eventual third round of sectoral negotiations has been stalled, mainly due to the EU’s determination to reform the overarching institutional relations with Switzerland (see below).

A Unique Institutional Setting

The bilateral agreements between the EU and Switzerland differ from other forms of deep association and the EEA in various respects (Church, 2007; Gstöhl, 2002; Lavenex, 2011; Lavenex and Schwok, 2015). First, bilateral agreements have only been concluded in areas in which both parties share an interest in cooperation. Second, and contrary to the EEA, commitments under the bilateral agreements are, with the exception of the air transport and Schengen/Dublin agreement, static as they lay down the scope of necessary regulatory adaptation at the time of their conclusion (Lazowski, 2006, pp. 168, 172).

Most bilateral agreements are based on the mutual recognition of the ‘equivalence of legislation’. This means that the ‘equivalent’ Swiss laws are explicitly listed in the annexes to the sectoral agreements. In case of legislative revisions equivalence must be reassessed. In practice, however, Switzerland has been assessing the ‘euro-compatibility’ of each legislative act prior to adoption since 1992; which constitutes a kind of voluntary adaptation to the *acquis* (dubbed ‘autonomer Nachvollzug’) (Church, 2000; Gava and Varone, 2012, 2014; Gava et al., 2014; Honegger, 2004, pp. 43–4; Jenni, 2014; Maiani, 2013).

Under the bilateral agreements the contracting parties are responsible for ensuring implementation on their respective territories, with the exception of the air transport case which recognises the jurisprudence of the Court of Justice of the EU (CJEU) and provides for dynamic legislative alignment with the EU *acquis*. In essence, the implementation of the bilateral agreements is based on the international law principle of ‘good faith’. In order to deal with potential challenges arising in implementation, joint committees have been set up under each agreement. These committees are composed of experts from the responsible Commission Directorates General (DG) and the Swiss administration. These deal with potential disputes and can incorporate new EU legislation into the bilateral agreements, subject to the prior consent of the Swiss Federal Council. The agreements on air transport and free movement of persons also include a reference to relevant CJEU Case Law and the respective joint committees can decide on the inclusion of subsequent case law (Lazowski, 2006, p. 168). Meanwhile, Swiss Courts still diverge on whether they are under an obligation to take over further developments of the EU *acquis* or not (Tobler, 2021).

At least formally, the political monitoring procedure respects Switzerland’s sovereignty as it avoids subjugation under a supranational jurisdiction. The only exception is the agreement on air transport, which is a partial integration agreement. It is, as noted above, dynamic because it provides for the steady incorporation of new EU legislative acts and it is subject to the monitoring and control functions of the European Commission and the CJEU.

In sum, EU-Switzerland relations have evolved along a functionalist, expert-based interaction ‘from below’ in a fragmented set of sectoral agreements. This fragmentation comes along with a particular degree of complexity and a lack of political leadership, which has posed challenges to overall strategic action – prompting the European Commission to seek a more centralised institutional relationship (see below).

The bilateral agreements also foresee Switzerland’s participation in the decision-shaping process, but in a more restricted manner than for the EEA EFTA states. The formal rules are contained in a declaration on participation in the committees annexed to the bilateral agreements which stipulates that Switzerland has the right to participate as an ‘active observer’ with a right to speak, but not to vote, in the areas of research, air transport, social security and the recognition of diplomas (Grolimund and Vahl, 2006, p. 47; Honegger, 2004, p. 45). As in the Norwegian case, association with the Schengen and Dublin agreements involves the most far-reaching participation rights as Swiss officials have direct access to all relevant Council working parties, yet without the right to vote (Lavenex, 2015). In all other areas, the Commission has to consult with Switzerland on legislative proposals that further develop the *acquis* in areas in which legislation is equivalent. Once legislation has passed the pre-pipeline stage, the possibilities to influence it decrease markedly, in contrast to the arrangement found under the EEA (Grolimund and Vahl, 2006). This holds in particular for the elaboration of the implementing legislation in the comitology committees. As under the EEA, the Commission has to consult Swiss experts when drafting legislation in the areas relevant to the bilateral agreements and it mentions the Swiss positions in the pursuant Committee discussions. In contrast to the EEA EFTA states, however, the informal practice allowing EEA EFTA experts to assist comitology meetings as observers has not been extended in a general manner to Switzerland. Whereas the sectoral DGs have often been in favour of this informal practice, and have repeatedly allowed Swiss participation on an ad hoc and informal basis, the Legal Service of the Commission and DG Relex/European External Action Service (EEAS) have been increasingly disinclined to accept these special solutions for non-members (Honegger,

2004, p. 88). As we argue further below, tensions resulting from negotiations on an overarching Institutional Agreement and the Brexit process have reinforced these tendencies.

Swiss presence in EU agencies is also significantly more limited than Norway's. Switzerland participates in the Agency for Air Transport Security and the European Environmental Agency. Association with the Schengen and Dublin Agreements in justice and home affairs (JHA) has also implied the conclusion of cooperation agreements with Europol, the European Police College CEPOL, the prosecution agency Eurojust and the borders agency Frontex. With progressive implementation of the bilateral agreements Switzerland has expressed interest in joining more EU agencies, for instance, in the fields of medicines or energy regulation (Schweizerische Eidgenossenschaft, 2010). However, in the absence of agreement on a central institutional treaty (see below), the European Commission has refused formalising Swiss access to other decentralised agencies.

From the Swiss perspective, this bilateral model has provided the Swiss economy with satisfactory access to the single market. In addition, the negotiated issue-specificity of the bilateral agreements, their mainly static nature, as well as the lack of supranational enforcement mechanisms promised a stronger preservation of Swiss sovereignty vis-à-vis the EU than existing alternatives such as the EEA. Yet in reality, sovereignty has been compromised by the practice of autonomous adaptation to the *acquis*. Over the last decade, this delicate compromise has increasingly come under pressure from both domestic politicisation, symbolised most strongly in the 2014 Swiss popular vote against 'mass immigration' and from the EU's demands for the conclusion of an overarching institutional framework agreement.

First Potholes and a Dead-End

The first signs that the Swiss model of bilateral agreements would not hold for long can be traced back to 2008, four years after the conclusion of the second round of agreements. In its biennial conclusions on the EU's relations with Switzerland, the Council stated that 'taking part in the internal market requires a homogenous and simultaneous application and interpretation of the constantly evolving *acquis*' (Council of the European Union, 2008, para. 31). In 2010, the Council went one step further and explicitly declared its dissatisfaction with the bilateral agreements: while the 'system of bilateral agreements has worked well in the past, the key challenge for the coming years will be to go beyond that system, which has become complex and unwieldy to manage and has clearly reached its limits' (Council of the European Union, 2010, para. 48). The Council insisted that dynamic adaptation to the evolving *acquis*, homogeneous interpretation, surveillance and judicial enforcement mechanisms as well as a dispute settlement mechanism should be incorporated into the EU-Switzerland agreements (*ibid.*). The Council reaffirmed its previous conclusions in 2012. It concluded that 'the approach taken by Switzerland to participate in EU policies and programmes through sectoral agreements in more and more areas in the absence of any horizontal institutional framework, has reached its limits' (Council of the European Union, 2012, para. 31).

When domestic political actors in Switzerland started to question commitments made under the bilateral agreements, the European partners were thus already challenging the sustainability of the Swiss model. As noted above, the first important domestic challenge came in 2014 when the national conservative Swiss People's Party filed an initiative on 'mass immigration' that opposed the principles of freedom of movement. The initiative provided that all immigration to Switzerland should be limited by quotas and annual caps, and that employers should

respect the principle of national preference in the hiring process – thereby annulling the privilege enjoyed by EU/EFTA nationals under freedom of movement. In a prospective manner, the text of the initiative also prohibited the conclusion of any international treaty contrary to its provisions.²

The initiative's approval by a narrow margin of 50.3 per cent came as a surprise. Not only was its call for quotas incompatible with the free movement agreement, such a unilateral breach also had the potential to annul all bilateral agreements due to the aforementioned 'guillotine clause'. Moreover, the reference to future international treaties had a straightforward implication as Switzerland was, at the time, expected to sign the Protocol extending the EU-Swiss agreement on free movement of persons to Croatia.

The success of the 'mass immigration' initiative led to a series of tensions that gradually undermined Swiss-EU relations. Because of the 'guillotine clause', the Swiss government was not able to sign the Protocol. In response, the EU decided to exclude Switzerland from European scientific research programmes such as Erasmus+ and the EU's framework programme for research and innovation, Horizon 2020. The situation was resolved when, in December 2016, the Swiss Federal Council adopted an implementation law³ that is compatible with the free movement agreement. The law stipulates that in sectors where the unemployment rate of the Swiss population exceeds a certain threshold, employers are obliged to communicate vacancies first to Swiss residents, but it does not contain an obligation to favour Swiss applicants, nor does it impose quotas on EU/EFTA workers. This allowed the Swiss government to sign the Protocol and to return to full association status in Horizon 2020.

EU pressure for the negotiation of an overarching institutional framework agreement unfolded in parallel to these political tensions. As indicated above, under the bilateral agreements, Switzerland does not have to adopt the new EU *acquis* nor to follow the CJEU jurisprudence, and there is no supervisory authority nor a judicial dispute settlement mechanism. In the eyes of the EU, this legal framework threatens to undermine the homogeneity of the single market. The negotiations towards such an institutional framework agreement started in 2014, and lasted until the end of 2018⁴ with the publication of a draft agreement. The draft agreement applied to five current market access agreements: the free movement of persons, land transport, air transport, technical trade barriers and agriculture – as well as all future market access agreements.⁵ The proposal reflected a delicate balance between the EU's request for stronger enforcement mechanisms and Switzerland's opposition to 'foreign judges'. It proposed a 'two-pillar model' whereby Switzerland remained responsible for the proper implementation of the agreements on its territory without supranational supervision authority but provided for a dispute settlement mechanism, which could be triggered by the Commission. The dispute settlement mechanism would come into play when the joint committees were unable to find a compromise and would be conducted by an arbitration tribunal. This tribunal would be composed of one judge appointed by Switzerland, one appointed by the EU, and a third one appointed by the two aforementioned judges. Only when the interpretation or application of EU law was in doubt would the tribunal refer cases to the CJEU whose judgment would then be binding. The draft agreement also took a dynamic approach ensuring that relevant developments in EU law would be continuously incorporated.

In a surprising move, once the draft agreement was published, the Federal Council did not formally endorse it but decided to conduct consultations with the relevant stakeholders such as cantonal governments, political parties and interest groups (Federal Council, 2018) – arguably to address widespread discontent with specific provisions, notably concerning state subsidies,

flanking measures for posted workers and the EU citizens' rights directive (Schwok, 2020). These concerns put socio-economic issues at the centre of the debate, notably the protection of wage levels and concerns about possible negative consequences for the Swiss social security system.

Following these consultations, the Swiss government requested clarifications and eventual amendments to ensure sufficient support among the Swiss population who would eventually have to endorse the agreement in a popular referendum (Federal Council, 2019). Then President of the EU Commission Jean-Claude Juncker stated that clarifications could be undertaken but that the agreement would not be renegotiated (Juncker, 2019). Despite several rounds of discussions between EU and Swiss negotiators, no compromise could be found on the Swiss concerns. In a sudden and widely unexpected move, the Swiss Federal Council in May 2021 announced one-sidedly – apparently without consultation with the EU counterparts – that it had decided not to sign the agreement and withdrew from the negotiations (European Commission, 2021a; Parmelin, 2021).⁶

In the run-up to this unilateral move, the EU had taken an unusually strong stance linking unrelated issues to the negotiations in order to put pressure on the Swiss government (Veuthey, 2020).⁷ For instance, the Swiss stock exchange equivalence, which previously gave EU investment firms the right to trade shares on Swiss trading venues, was not extended after June 2019. Moreover, the EU froze the negotiations that had been on the table for several years, for example, the update of the Mutual Recognition Agreement on medical devices and an agreement in the field of electricity (European Commission, 2021b). As in 2014, the EU threatened to exclude Switzerland from research and innovation cooperation. Whereas under the Horizon 2020 regulation, Switzerland was entitled to be associated to the programme as an EFTA state (Official Journal of the European Union, 2013, Article 7), the 2021 Horizon Europe regulation opens association to EFTA states 'which are members of the EEA' (Official Journal of the European Union, 2021, Article 16) – de facto relegating Switzerland to a third country. This means Swiss research institutions can only participate in a consortium of at least three institutions from three different member states or associated countries (*ibid.*, Article 22), and have to participate at their own costs (European Commission, 2021c, p. 14). Switzerland's change of status in Horizon Europe was confirmed by the Programme Guide published by the Commission in June 2021, after Switzerland's unilateral withdrawal from the negotiations on the Institutional Agreement. The Programme Guide does not include Switzerland in the list of countries to which the transitional provisions apply until the entry into force of the association agreements under negotiation and stipulates that 'legal entities established in Switzerland are currently not covered by these transitional arrangements' (*ibid.*, pp. 12–13).

In conclusion, the 'Swiss Way' of EU association provides a unique pattern of decentralised sectoral agreements in fields of mutual interest. While effectively binding Switzerland to a very large share of the EU *acquis*, the existing arrangements formally preserve Swiss sovereignty as they omit the dynamic adoption of evolving EU law (except for the Schengen and air transport agreements) and the monitoring and/or sanctioning of compliance by EU institutions. This unique model has its origins in a phase when the Swiss government had signalled willingness to join the EEA and eventually also the EU – with the first years of implementation, however, the EU soon became dissatisfied and demanded reforms that would bring the Swiss model closer to the one of the EEA. By the time that the parties started the negotiation of the new Institutional Agreement, existing commitments, in particular regarding freedom of movement, had become increasingly contested in Swiss domestic politics – showing the potential

vulnerability of an association based on the principle of ‘good faith’. The draft Institutional Agreement paraphrased in 2018 proposed introducing, for five current and all future agreements, dynamic legal approximation and a ‘two-pillar’ supervisory mechanism involving a judicial dispute settlement system. Avoiding a direct implication for the CJEU, this system only acknowledged an indirect role for the court – thus minimising one of the key arguments of Eurosceptic parties in Switzerland. Nevertheless, socio-economic concerns regarding wage protection and social security systems came to dominate the debate. This mobilised political groups who had traditionally taken a rather pro-European stance, in particular the Socialist Party and trade unions. Whereas a solution to the EU’s demands for a new institutional arrangement guaranteeing the continuation of the Swiss model seemed to be within reach, domestic politicisation in Switzerland and the limited flexibility of the EU have effectively turned the bilateral agreements from a ‘side-street’ to a ‘dead-end’.

BREXIT AND SWISS-EU RELATIONS

Economic Ties and Political Barriers

Historically, Switzerland’s and the UK’s concerns with European integration have often converged, and can be summarised in the trade-off between maximising economic integration gains and minimising sovereignty losses (Dardanelli and Mazzoleni, 2021). Both countries were founding members of the 1960 European Free Trade Association (EFTA), which provided an economic alternative to supranational integration. Nevertheless, the European Economic Community (EEC) countries’ rapid economic growth motivated the UK to seek EEC membership early on – despite vivid domestic opposition (HC Deb, 1972). The UK’s accession to the EEC along with Denmark and Ireland in 1973 had an immediate impact on the remaining EFTA members as custom duties would have had to be reintroduced in relation to the UK and Denmark (Schwok, 2015, p. 15). As a result, Switzerland and the EEC concluded a free trade agreement in 1972 which, providing for the abolition of customs duties on industrial goods and certain processed agricultural products, laid the ground for Switzerland’s gradual integration in the single market.

As an export-driven economy surrounded by EU member states, Switzerland has always been highly dependent on trade with its neighbours. In 2021, 51 per cent of Switzerland’s exports went to the Union, and 69 per cent of its imports originated from the EU. On the side of the EU, Switzerland is the EU’s fourth biggest export and import market for goods, after the US, China and the UK (accounting for 8 per cent of EU foreign trade). The EU is also the most important partner when it comes to direct investment. About 78 per cent of foreign direct investment in Switzerland originates in the EU. Conversely, approximately 51 per cent of Swiss direct investment abroad flows into the EU. Key Swiss export industries are machinery and electronics, precision tools, chemical and pharmaceutical products, and the financial business. In other sectors, interdependence with the EU stems from Switzerland’s geographic position at the heart of Europe, for example, for land transport or electricity markets. Switzerland also has close ties with the EU when it comes to employment. At the end of 2018, more than 457,898 Swiss nationals were living and working in the EU, while 1.4 million EU 28/EFTA citizens were living in Switzerland – amounting to roughly 16.5 per cent of the overall Swiss

population. In addition, more than 315,000 people from EU/EFTA countries commute across the border on a daily basis.⁸

In contrast to the UK, where economic interests led to a ‘reluctant’ membership,⁹ Switzerland’s political system with its direct democracy and its emphasis on popular sovereignty is seen as widely incompatible with this option (Linder and Müller, 2021). In fact, Switzerland’s ambiguous status as non-member state progressively integrating the rules of the single market has provided fertile ground for the rise of Eurosceptic political forces. Classically, this role has been filled by the national conservative Swiss People’s Party (SPP) which, combining an anti-European with an anti-immigration position, has grown to the largest party in Parliament (accounting for roughly 30 per cent of the seats) (Hutter et al., 2016). Swiss European policy has become even more complicated in recent years with parts of the second biggest political party in Switzerland, the Socialist Party (SP), joining the Eurosceptic camp (Schwok, 2020). Formally a loyal supporter of the government’s European policy, the SP has played a key role in the contestation of the Institutional Agreement. As mentioned above, the key issues that brought the agreement to fail were not the compromise solution found regarding monitoring and enforcement. The main issues were a combination of leftist concerns for the protection of wages and work conditions, on the one hand, and more (but not exclusively) right-wing apprehension against the possible abuse of the social security system following adoption of the citizens’ rights directive, on the other.

The Swiss Model in the Brexit Debates

Given the similarity of interests, it is not surprising that the Swiss bilateral model inspired Brexit debates. In the run-up to the Brexit referendum, the Swiss model was put forward as an example to follow for the UK. Concerning trade, it was argued that ‘Switzerland has all the advantages of commercial access without the costs of full membership’ (Hannan, 2012). Daniel Hannan, then Conservative MEP, emphasised that since the common external tariff does not bind Switzerland, it is free to define its own trade policy. For instance, Switzerland can freely sign trade agreements with third countries and does not have to consider the national interests of other EU member states when defining its trade position. Hannan also pointed out that Switzerland had an advantage over the UK in terms of per capita exports to the EU. Switzerland’s economic success was, therefore, a strong argument for the Leave campaign. Nigel Farage even argued that Switzerland ‘was an inspiration for the UK leaving the EU’ (Swissinfo, 2020).

Yet, not all commentators understood the Swiss bilateral agreements correctly. This was for instance the case regarding freedom of movement. Regretting that the UK has ‘been forced to surrender control of its own borders and is powerless to halt a new wave of immigration’, David Campbell Bannerman (2013), then Conservative MEP, argued that the safeguard clause included in the bilateral agreement between Switzerland and the EU on the free movement of persons allowed Switzerland to refuse issuing residence permits to EU citizens. Yet this safeguard clause only applies to the accession of new member states and for a transitional period. It is therefore comparable with the transitional period that some EU member states had themselves imposed on citizens from the newly acceded Central and Eastern European countries. Whether by ignorance or in a deliberate move, Brexiteers thus misrepresented Switzerland’s EU commitments.

The debates following the Brexit referendum also include various references to the Swiss model.¹⁰ Some commentators suggested that this model granted advantageous access to the single market on a ‘pick-and-choose’ basis without an obligation to comply with EU rules and directives, or the CJEU.¹¹ As highlighted in the first part of this chapter, however, Switzerland has to follow the EU *acquis* to ensure continued access to the single market in the sectors covered by the bilateral agreements. Whether through updates to the bilateral agreements or through autonomous legal adaptation, Switzerland must maintain its standards and production norms at the same level as those of the EU and therefore must comply with EU rules over which it has no say. Another point that found insufficient reflection in the Brexit debates is that Switzerland was able to negotiate its access to the single market only because it accepted the free movement of people. Last but not least, those supportive of a Swiss-style UK withdrawal agreement failed to take into account that the EU was no longer satisfied with the system of bilateral agreements and had been pushing for a new setup already since 2008.

British hopes for a sector-by-sector withdrawal agreement were quickly dashed by the EU with the argument that this would undermine the integrity of the single market (Tobler, 2021, p. 124). In 2017, the European Commission clearly stated that ‘preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach’ (European Commission, 2017, para. 9). This position was reaffirmed in February 2018 by the Commission’s Brexit chief negotiator Michel Barnier who stated that the EU ‘can’t possibly imagine a situation in which it would accept cherry-picking’ as the EU is ‘responsible for guaranteeing the integrity of the single market’ (Barnier, 2018). Michel Barnier’s remarks followed press reports about what might be in the UK’s post-Brexit trade proposal. That proposal, Theresa May’s Chequers plan, was unveiled in 2018. The plan proposed leaving the single market, the customs union, the common agricultural policy, the common fisheries policy, and ending the free movement of persons as well as the jurisdiction of the CJEU (HM Government, 2018). At the same time, it would ensure frictionless trade in goods through a free trade area and that the UK maintains a common rulebook for goods, including agri-food (*ibid.*). The UK would also participate in some EU agencies and continue to cooperate with the EU in certain areas, including security and science (*ibid.*). The EU strongly rejected Theresa May’s plan. Michel Barnier criticised the British customs plan and restated that the four freedoms of the single market were indivisible (Stone, 2018). During the State of the Union annual speech, Jean-Claude Juncker recalled that the EU was against cherry-picking and stated that the UK would not be part of the single market anymore ‘and certainly not only in the parts of it they choose’ (Juncker, 2018, p. 9). The EU finally rejected the Chequers plan in September 2018.

Brexit’s Impact on Swiss-EU Relations

The Brexit referendum and the subsequent negotiations on a withdrawal agreement have generated much interest in Switzerland. The initial expectation was that by leaving the EU, the UK would be a strong ally for Switzerland in its negotiations with Brussels. Before the referendum, former Swiss president and foreign minister Micheline Calmy-Rey said it would be in Switzerland’s interest for the UK to leave the EU (RTS, 2016a). She argued that the UK would have to renegotiate its partnership with the EU via bilateral agreements or by joining the EFTA and then the EEA. The latter solution would lead to a renewal of the EEA in a way that could be beneficial for Switzerland. Furthermore, joining forces with the UK would put Switzerland in a less asymmetric position in its negotiations with the EU (*ibid.*). These

remarks were criticised by members of the Swiss Parliament who argued instead that a Brexit would cause an earthquake within the EU that would relegate the Swiss file to the bottom of the EU priority list (RTS, 2016b). At the time, Switzerland was in a defensive position seeking a solution with the EU regarding the 2014 initiative against ‘mass immigration’. Therefore, a Brexit that would take all of Brussels’ attention would not be in Switzerland’s interest (ibid.).

After the referendum, Micheline Calmy-Rey reiterated her statement saying to the BBC that the UK and Switzerland should collaborate together to find a way to balance freedom of movement with single market access (Ahmed, 2016). In an interview with a Swiss newspaper, she also stated that Switzerland should let the UK negotiate first and play the role of ‘snow plough’ (Calmy-Rey, 2016). As a larger and more powerful country, she expected the UK to get more concessions from Brussels. Switzerland could then ask for the same.

However, the reality turned out to be the opposite. Brexit became Brussels’ main concern, and Switzerland lost priority, as some members of the Swiss Parliament had predicted. Moreover, the fact that the EU found itself negotiating the UK withdrawal agreement and the Institutional Agreement with Switzerland in parallel did not serve Switzerland’s interests. Indeed, having two countries seeking privileged access to the single market while insisting on their sovereignty made the EU tougher in both negotiations. The EU made it clear from the outset to Bern and London that its main objective was to preserve the homogeneity of the single market. In its negotiating mandate for the Institutional Agreement, the Council of the European Union declared that an overarching institutional framework was needed to ‘protect the homogeneity of the internal market and ensure legal certainty’ (Council of the European Union, 2014). In its guidelines for Brexit negotiations, the European Council also underlined that any agreement with the UK should be based on a balance of rights and obligations, the indivisibility of the single market’s four freedoms, and the need to ensure a level playing field (European Council, 2017). As a result, it became clear that the Swiss model did not offer a potential alternative path of integration for other countries like the UK. The EU established a link between the two negotiations and ensured that no concessions that would undermine the homogeneity of the single market would be accepted. The link between the two negotiations is illustrated by an internal letter sent by Commissioner Johannes Hahn to Commission President Jean-Claude Juncker after the Swiss Federal Council decided in 2018 not to sign the draft Institutional Agreement and to hold domestic consultations instead. Commissioner Johannes Hahn stated that:

We simply cannot accept further attempts of foot-dragging and watering down internal market rules, especially in what is probably the decisive phase regarding Brexit. I believe we have no choice but to pass this crystal-clear message that the Institutional Framework Agreement as it stands is as good as it gets. (Hahn, 2019)

In parallel to the negotiations, the EU has also hardened its position towards Switzerland in some areas of technocratic cooperation. Thanks to years of good cooperation, Swiss experts were invited to some EU technical meetings even when the bilateral agreements did not provide for it.¹² UK diplomats were well aware of that, and it has been reported to us that they were in weekly contact with their Swiss’ counterparts to compare their access to EU instances.¹³ As a result, the EU has excluded Swiss technocrats from all meetings where there was no legal framework that would provide for their presence in order to prevent the UK from exploiting this informal practice and demanding similar access.¹⁴

In sum, Swiss hopes to find a strong ally in the UK in their negotiations with the EU did not materialise. The EU has been intransigent in its negotiations with both countries insisting that privileged commercial access necessitates strong institutions guaranteeing the homogeneity of the single market. The EU's position can be illustrated with these words from a member of the EEAS in 2019: 'to protect the internal market it is necessary to enable everybody to interact according to the same rules and Switzerland should follow the Brexit negotiations to better understand the behaving of the EU'.¹⁵ One can only speculate whether the EU would have been more compromising towards Switzerland had Brexit not happened. In any case, the EU's determination to review the legal framework of its relations with Switzerland predates Brexit. It can however be said that Brexit certainly did not help Switzerland in its negotiations with Brussels, as the EU took a tough stance towards both countries to preserve the integrity of its single market.

The Brexit Deal and its Perception in Switzerland

The UK's negotiated agreement with the EU has spurred some discussion in other closely associated non-member states such as Norway (Fossum and Vigrestad, 2021) and Switzerland in the potential advantages of aligning their EU affiliation more closely with that of the EU-UK agreement. When the EU and the UK announced on Christmas Eve 2020 that they had finally reached an agreement to govern their future post-Brexit relationship – the EU-UK Trade and Cooperation Agreement (TCA) – reactions in Switzerland were divided. The Swiss sovereigntist right welcomed the agreement negotiated by Prime Minister Boris Johnson.¹⁶ Comparing the draft Institutional Agreement and the TCA, they stressed the absence of the CJEU in the dispute settlement mechanism, the fact that the agreement does not provide for dynamic adoption of EU law by the UK and that there is no guillotine clause to pressure the contracting partner. They also pointed out that since the free movement of persons is not part of the agreement, the EU Citizenship Directive does not apply. These four points were exactly what the Swiss sovereigntist right opposed in the Institutional Agreement's draft text – which led some to call the EU-UK agreement a 'heavy humiliation for Switzerland' (Schaller, 2020). The TCA raised attention also beyond the national conservative camp. Autonomiesuisse, an association of entrepreneurs, stated that the TCA gave 'Switzerland the opportunity to conclude a better framework agreement' (Autonomiesuisse, 2020). They felt that this agreement resolved the political issues of sovereignty and that Switzerland should follow suit. Some members of the Swiss Liberal Party also indicated that the Federal Council should seek a solution similar to what Johnson had negotiated with respect to the role of the CJEU (Tages Anzeiger, 30 December 2020). Herewith these members of the Liberal Party made a U-turn from their earlier support for the Institutional Agreement, thereby joining the widening camp of opponents.

On the other side of the spectrum, it has been argued that the two agreements are not comparable and that 'talking about Swiss failure and British success was like comparing apples and pears' (Schwok and Najy, 2020). These voices underline that the agreement negotiated by London is essentially a free trade agreement and is thus closer to the Swiss-EU free trade agreement signed in 1972 than to the system of bilateral agreements that goes much further in terms of market access (ibid.). Similarly, the CJEU plays no role in the 1972 free trade agreement, and that agreement anyway falls outside the scope of the Institutional Agreement (Cottier, 2020). The absence of the CJEU from the TCA – like the 1972 Switzerland-EU free

trade agreement – is explained by the fact that these do not contain EU law (Tages Anzeiger, 28 December 2020). This is fundamentally different from the market access approach under the bilateral agreements, which, as discussed above, contain EU law. This is why the CJEU figures in the dispute settlement mechanism negotiated in the Institutional Agreement.

Also in substance, the TCA falls short of the EU-Switzerland bilateral agreements. The former is limited to avoiding the reintroduction of customs duties on trade in goods. Swiss-EU agreements remove a large number of non-tariff barriers thanks to the mutual recognition agreement and the equivalence of standards (phytosanitary, veterinary etc.). It should be noted here that following the Swiss Federal Council's decision not to sign the Institutional Agreement in May 2021, the EU decided not to update any market access agreements with Switzerland or to sign new ones (European Commission, 2021a). Therefore, the non-updating of the Swiss-EU mutual recognition agreement will inevitably create new non-tariff barriers over time. Nevertheless, Switzerland still has privileged access to the single market.

Post-Brexit discussions in Switzerland have also shown that the exclusion of freedom of movement from the TCA also comes at a price: it ends the mutual recognition of professional qualifications and the possibilities for British companies to send their staff for limited or extended assignments in the EU, and creates difficulties for some British companies to recruit qualified workers in the EU (Tages Anzeiger, 27 December 2020). London has also lost access to the Schengen Information System, the EU's police database containing information on individuals and entities that pose potential security threats.

In sum, the TCA clearly falls short of Swiss-EU bilateralism in terms of market access. Yet, the fact that this agreement excludes CJEU jurisprudence, the dynamic adoption of EU law and freedom of movement has been seen as attractive by the more Eurosceptic parts of the Swiss constituency. In any case, the TCA has not helped build support for the Institutional Agreement in Switzerland and may have contributed to the Federal Council's unilateral withdrawal.

CONCLUSION

Switzerland and the UK have historically shared an interest in the economic benefits of European integration with a concern over sovereignty losses. While the UK decided to join the EC/EU in 1973, Switzerland has sought a privileged partnership. The extent of market access and the lightness of sovereignty transfers found under the bilateral agreements benefited from a political climate in which the Swiss government had originally supported EEA membership and even eventual EU accession.

The Swiss 'side-street' has inspired Brexit supporters, and has recurrently been invoked as a possible model for the UK. However, these arguments have often misrepresented the actual functioning of the bilateral agreements – and failed to acknowledge that already starting in 2008 the Commission demanded substantive revisions of the Swiss model. The call for an Institutional Agreement providing for dynamic legal commitments and some form of judicial monitoring was justified by the need to protect the homogeneity of the single market. In parallel with the partial politicisation of bilateral agreements in Switzerland, the EU developed an increasingly tough stance on these institutional reforms. On the one hand, the EU decided not to sign or update any market access agreements with Switzerland as long as the institutional questions were not solved. On the other hand, the EU introduced issue-linkages making

cooperation under existing agreements in research or financial markets conditional on the advancement of the Institutional Agreement.

The parallel EU-UK negotiations following Brexit did not alleviate the pressure on Switzerland, nor did they corroborate Brexiteers' interest in the Swiss model. The EU made it very clear that a partnership relying on sectoral agreements was no option. Instead of widening the scope of negotiations, Brexit therefore reinforced EU pressure on the Swiss model. The Swiss Federal Council's unilateral decision in May 2021 to end the negotiations on an Institutional Agreement is unlikely to reduce this pressure. Whereas the actual status quo with the bilateral agreements is not invalidated, without regular updates, their substance and hence market access will gradually erode.

Beyond the specific case of Switzerland and Brexit, the developments examined in this chapter highlight a new approach in the EU's relations with third countries, in which the homogeneity of the single market and the balance of benefits and obligations predominate over economic or other functional interests in promoting integration below the threshold of membership. Part of this package is the obligation to sign on to the dynamic adaptation of the evolution of the *acquis* and a dispute settlement mechanism, similar to the model of the EEA. In sum, the Swiss 'side-street' of bilateral sectoral agreements may well have turned into a 'dead-end'.

NOTES

1. For an inter-institutional analysis of the EU's position throughout these negotiations, see Najj (2019).
2. Initiative populaire fédérale 'Contre l'immigration de masse', <https://www.bk.admin.ch/ch/f/pore/vi/vis413t.html> (accessed 27 July 2020).
3. See Implementation of Article 121a Cst. Federal Council adopts ordinance amendments at <https://www.sem.admin.ch/ejpd/fr/home/actualite/news/2017/2017-12-081.html> (accessed 2 July 2021).
4. See Timeline of Swiss-EU relations since 2013 (aspects related to the Institutional Agreement) at https://www.eda.admin.ch/dam/europa/en/documents/abkommen/20210526-mm-europapolitik_beilage-8-2_chronologie_EN.pdf (accessed 28 July 2021).
5. Agreement facilitating bilateral relations between the European Union and the Swiss Confederation in the parts of the internal market in which Switzerland participates (final version), https://www.eda.admin.ch/dam/europa/fr/documents/abkommen/Accord-inst-Projet-de-texte_fr.pdf (accessed 5 July 2021).
6. See Federal Department of Foreign Affairs, 'No signing of Swiss-EU institutional agreement', Press release, 26 June 2021, <https://www.fdfa.admin.ch/eda/en/fdfa/fdfa/aktuell/news.html/content/eda/de/meta/news/2021/5/26/83705> (accessed 28 July 2021).
7. See Hahn (2019).
8. See the official information portal of the Swiss federal administration at <https://www.eda.admin.ch/europa/en/home/europapolitik/ueberblick/wirtschaftliche-bedeutung.html>.
9. See for example Margaret Thatcher, Speech to the College of Europe ('The Bruges Speech'), 20 September 1988, <https://www.margaretthatcher.org/document/107332> (accessed 10 August 2021).
10. See for example Business Insider, 'May's government reportedly now wants a Swiss-style Brexit deal', 16 October 2017, <https://www.businessinsider.com/mays-government-reportedly-now-want-a-swiss-style-brexiteer-deal-2017-10?r=US&IR=T> (accessed 9 December 2021); Tony Connelly, 'Brexit talks: Goodbye Canada, hello Switzerland?', *RTE*, 12 January 2020, <https://www.rte.ie/news/brexit/2020/0110/1105666-brexit-talks/> (accessed 9 December 2021).
11. See for example Senior European Experts, 'Switzerland and the European Union', *The expert's briefing*, 2020.
12. Interview with a Member of the Swiss Mission to the EU, Brussels, 10 September 2019.

13. Interview with a Member of the Swiss Federal Administration, online, July 2020.
14. Interview with a Member of the Swiss Mission to the EU, Brussels, 10 September 2019 and interview with a Member of the Swiss Federal Administration, online, July 2020.
15. Interview with a Member of the EEAS, Brussels, 12 September 2019.
16. Roger Köppel [@KoeppelRoger], Boris Johnson hat es richtig gemacht. Hart verhandelt, keine Unterwürfigkeit, Deal erreicht – ohne fremde Gesetzgeber und fremde Richter. Und ohne Personenfreizügigkeit. SEHR WICHTIG. [Tweet], Twitter, 24 December 2020, <https://twitter.com/KoeppelRoger/status/1342174398783094785> (accessed 9 December).

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