The Swiss Way. The Nature of the Swiss Relationship with the EU

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THE SWISS WAY

The nature of Switzerland’s relationship with the EU

Sandra Lavenex and René Schwok

Switzerland has a unique type of association with the European Union. Unlike other European Union (EU) neighbourhood policies that imply the extension of (parts of) the Union’s aquis communautaire such as the European Economic Area (EEA) or the European Neighbourhood Policy (ENP), Swiss–EU relations are based on a set of negotiated sector-specific agreements and lack central coordinating institutions or enforcement mechanisms. At first sight, this arrangement promises a much greater degree of autonomy and self-determination towards the EU than the comprehensive and legally constraining architecture of the EEA. Indeed, official discourse in Swiss politics has tended to justify this type of association as a form of ‘pragmatic bilateralism’ (Steppacher 2008: 144) with Switzerland and the EU cooperating in areas of mutual interest, but in which the former basically retains its political sovereignty. This official depiction has been questioned in public and academic debates. While Eurosceptics have bemoaned Switzerland’s ‘creeping subjugation’ to EU rule, supporters of EU accession regret that by adhering to a large part of the aquis communautaire yet not participating in EU decision-making institutions, Switzerland has willingly marginalised itself as a ‘passive executor’ of European Community (EC) law (Gabriel and Hedinger 2002: 707 [authors’ translation]). Thus, there are grounds for questioning whether the difference in association makes up for a less hegemonic relationship for Switzerland than what is the case with the EEA countries.

Fifteen years after the adoption of the first round of bilateral agreements, the Swiss type of EU association is challenged from within and from without. In Switzerland, a majority of the population has voted in favour of a popular initiative which, calling for the introduction of quotas on EU immigrants, runs counter to the agreement on the free movement of persons concluded with the Union and herewith one of the basic pillars of the association. Meanwhile, in the EU, increasing dissatisfaction with the complex and particularistic Swiss solution has been
voiced for nearly one decade, culminating in the determination to reform the current arrangements in the direction of an EEA-like framework agreement.

This chapter gives an overview of Swiss–EU bilateralism from its inception until today and discusses this evolution in terms of the balance among state sovereignty, integration and hegemony. Throughout this review, the argument is proposed that this balance is contingent on the tension between two partly antagonistic dynamics in Swiss–EU relations: the functionalist pressure for pragmatic, incremental and problem-oriented integration, on one hand, and the political debate on the constitutional ordering of this de facto membership, on the other hand. Whereas for many years, ‘bottom-up’ functionalism has allowed Swiss public officials to participate in the inter-administrative, transgovernmental structures underpinning European integration, thereby safeguarding the balance between subjugation and participation, with the increasing formalisation of the EU and its external relations, the boundaries between membership and non-membership have hardened, making more political solutions – and compromises – unavoidable.

The origins of Swiss–EU bilateralism

At first glance the relations between Switzerland and the EU can be considered similar to those of the other European Free Trade Agreement (EFTA) countries. The Swiss have, however, because the outset been even more ‘reluctant Europeans’ than the people of Scandinavian countries have owing to their self-perception of being a Sonderfall or a ‘special case’ (Gstohl 2002).

Traditionally a distinction has been made between functional/economic versus political integration, whereby the Swiss are strong supporters of the former but remain strongly opposed to the latter. The reluctance towards any form of political involvement with European integration already manifested itself in the negotiations between the EC and Switzerland on an associated status beginning in 1962. According to the conceptions of the EFTA states the association agreements could come to cover all the ‘economic’ aspects of the EC, without extending to the political elements (Zbinden 2006: 117). Neither the Swiss population nor the Swiss business association, at that time the Vorort, were in favour of such an association, and thus, the Swiss were not unhappy when France vetoed the British entry into the Community and with it the attempt to associate the EFTA members (Zbinden 2006).

At the same time, the countries that had joined the then EC remained Switzerland’s main trading partners. Apart from a number of limited agreements the first important treaty concluded to safeguard this privileged access to the EC market was the Free Trade Agreement of 1972, leading notably to the removal of customs duties and quotas on industrial products (Schwok 2010: 105–106). The free trade agreements allowed for strengthening the economic ties with the EEC without having to participate in any political activities.

At the eve of the 1986 Single European Act, that targeted the completion of the Internal Market, the EFTA countries, fearing economic marginalisation, intensified
their relations with the EC. The 1984 Luxembourg Declaration on the idea of a ‘European Economic Space’ between the EC and EFTA was well received in Switzerland. When it became apparent that – in spite of Delors’ 1989 promise of joint decision-making structures – the reinvigorated EC was not going to open up its internal decision-making processes to the non-member states in the EEA, the Swiss government became a more reluctant supporter of this association. The failure of this promise motivated the Swiss Federal Council, like the governments of most other EFTA states, to submit a formal membership application in 1991. The justification for this step was the recognition that the EEA would entail far-ranging losses of sovereignty that could only be compensated for with full membership. This realisation, however, came as a complete surprise to the Eurosceptic Swiss citizenry which, consequently, expressed its discontent with a rejection of the EEA Agreement by popular referendum on 6 December 1992.

Concerned for the future of its export-driven economy, the Swiss government embarked on the bilateral path asking the EU to open negotiations on access to the internal market. The European Commission accepted the principle of new negotiations but prevented the Swiss from taking advantage of the bilateral talks by engaging in a pick and choose tactic and controlling the negotiation agenda (Dupont and Sciarini 2007).

The legal scope of Swiss–EU bilateralism

The legal scope of pragmatic bilateralism is limited to the issue areas in which bilateral agreements have been concluded. This stands in contrast to the ‘global’ nature of the EEA. In addition to the Free Trade Agreement of 1972 and more than a hundred minor ones (Vahl and Grolinund 2006: 22), a total of hitherto 16 bilateral agreements have been concluded in two rounds of negotiations. These bilateral agreements differ strongly with regard to their thematic width and hence horizontal scope; whereas some, such as the agreement on the Free Movement of Persons, cover significant sections of the EU aquis, others are much more specific.

The bilateral agreements

The first bilateral agreements that were concluded in 1999 guarantee a large and unhindered access to the internal market for Switzerland and include the elimination of technical barriers to trade, the opening of public procurement markets at the municipal level, the reduction of customs duties and quotas on certain agricultural products, participation in EU research programmes, air transport; land transport and the free movement of persons (Schwok 2009: 38). The last two agreements, and in particular the one on the free movement of persons that was already controversial under the EEA negotiations, were subject to particular contention in Switzerland. Nevertheless, presenting them as a package with the other agreements facilitated their approval by 67 per cent of the Swiss voters in May 2000 in a referendum. Consequently, all these agreements entered into force at the same time in June 2002 (Schwok 2010: 38–47).
A special feature of the first round of agreements is the so-called guillotine clause stipulating that if a party terminates one agreement, the other party has the right to resign all other agreements. This clause was inserted in order to avoid that Switzerland rejects the free movement of persons but benefits from the agreements in the other areas (Koch and Lavenex 2007). In addition, there is an implicit political link between the free movement of persons and Switzerland’s participation in the Schengen and Dublin Agreements concluded under the second round of bilateral negotiations (see the later discussion); it is difficult to imagine that the member states would agree on the abolition of systematic controls at the Swiss–EU borders as stipulated by the Schengen provisions if Switzerland were to reject the extension of free movement to the new member states in upcoming referenda.

The market liberalisation path of the first bilateral agreements was pursued in a second round of negotiations starting in 2001 that led to the signing of a second series of bilateral agreements in October 2004. The majority of these agreements covered relatively minor issues (participation in EU education programmes and the MEDIA programme for the audiovisual 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). The contentious negotiations concerned accession to the Schengen and Dublin Agreements, the fight against fraud and taxation of savings. Of these, the agreement on Schengen and Dublin was subject to a referendum in June 2005 but was accepted by 54.5 per cent of the Swiss electorate (Schwok 2009: 53–66). Taking into account other minor agreements, Switzerland and the EU now cooperate through a stunning number of about 120 bilateral agreements.

In view of conducting a third round of bilateral agreements the Federal Council in 2008 issued a statement declaring that Switzerland would like to cooperate on eight further issue areas with the EU (free trade in agricultural goods, cooperation in public health policy, electricity, cooperation with the European Defence Agency, participation in Galileo, participation in the EU’s emission trading system and an agreement on cooperation in European Security and Defence Policy [ESDP] Missions). Despite some discussions, this eventual third round of sectoral negotiations has been stalled, mainly due to the EU’s determination to reform the overarching institutional set-up of its relations with Switzerland (see the later discussion).

The legal nature of obligations

The bilateral agreements between the EU and Switzerland differ from the EEA Agreement in various respects. First of all, the issue specificity of the former differs strongly from the broad scope of the latter. Bilateral agreements have only been concluded in areas in which both parties manifested an interest in furthering cooperation. What is more, the two forms of association differ with respect to their dynamism. Whereas the EEA, as an integration agreement, provides for the EEA countries’ steady adaptation to the evolving EU acquis, the agreements concluded with Switzerland are, as a general rule, static in nature as they lay down the scope of necessary regulatory adaptation at the time of their conclusion. There are two
exceptions to this general rule: the bilateral agreement on air transport and the agreement on Switzerland's association with the Schengen and Dublin agreements. Both agreements provide for dynamic alignment with future EU regulations and directives (Lazowski 2006: 168, 172) and, as such, are in stark contrast to the agreements on the taxation of savings and on fighting fraud, which are entirely ‘static’.

Whereas the agreements on air transport and on Schengen and Dublin are at least partial integration agreements, most of the 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 practice, however, this requirement of 'equivalence of legislation' has led to far ranging adaptations of Swiss legislation to European standards (Honegger 2004: 43–44). The recognition of equivalence was merely a formality, provided that Switzerland has been assessing the 'euro-compatibility' of each legislative act prior to adoption since 1992; the practice of voluntary adaptation to the aquis (autonomer Nachvollzug) is one of the main sources of Europeanisation in Switzerland, also independently from the existence of the bilateral agreements (Church 2000; Jenni 2014).

The questions of how to ensure the 'equivalence of legislation' and of how to organise legislative adaptation to new developments in Community Law as propagated by the dynamic agreements were one of the key issues during the negotiations of the bilateral agreements (Lazowski 2006: 168), and it remains one of the core questions in bilateral relations to date. As in the EEA negotiations before, a balance needed to be struck between ensuring the autonomy of the parties and assuring the functioning of the agreements. From the outset it was clear that a quasi-automatic dynamic incorporation procedure as in the EEA would not be an option for Switzerland. That is why a special organisational solution was found with the key role assigned to the joint committees. The functions of the Swiss joint committees are much more limited than were those of the EEA Joint Committee, because the Swiss joint committees are only in charge of one specific sectoral agreement and not the bulk of the relations between the EU and Switzerland. Another specificity of the Swiss joint committees is that they do not all have the same competences (Honegger 2004: 85–86). The Swiss joint committees exert in part functions that come close to those of the EEA Joint Committee, for example when they make technical changes to the annexes of the bilateral agreements, that is when they incorporate new EU legislative instruments into the bilateral agreements. In some areas the joint committees have been given the competence to decide on the incorporation of new legislation into an agreement; this competence is subject to the prior consent of the Swiss Federal Council that is formally in charge of the work conducted in the committees. In other words, the joint committees do contribute to the further development of the joint 'aquis helveto-communautaire'. Yet in contrast to the EEA case – where incorporation of new legislative acts into the EEA aquis constitutes the main source of adaptation to EU law – in Switzerland the decisions of the joint committees are only one source amongst others with voluntary adaptation to EU law playing a crucial role in bringing about euro-compatibility (Schweizerischer Bundesrat 2007: 5921).
Apart from new legislation, a second source of dynamism for the *aquis* is the jurisprudence of the Court of Justice of the European Union (CJEU). This is why a reference to the relevant CJEU case law was inserted into the agreement on air transport and in the agreement on the free movement of persons. The decision whether subsequent case law is to be incorporated into the *aquis* is delegated to the respective joint committees (Lazowski 2006: 168). The opinions of the Swiss courts still diverge concerning the question whether they are under an obligation to take over further developments of the EU *aquis*.

Another dimension determining the legal quality of Swiss–EU bilateralism refers to the monitoring of the implementation of the bilateral agreements. In contrast to the EEA, where a sophisticated monitoring procedure has been put in place for ensuring ‘legal homogeneity’, the bilateral agreements lack such formalisation. Under the bilateral agreements the contracting parties are responsible for ensuring implementation on their respective territories, with the exception of the air transport case. In essence the implementation of the bilateral agreements is based on the international law principle of ‘good faith’. To ensure the good functioning of the agreements the joint committees have been endowed with the power to manage the implementation of the agreement, to exchange information on implementation and on further legislative and judicial developments in the legal order of the contracting parties and to settle disputes that may arise (Honegger 2004: 72).

At least formally, the political monitoring procedure respects Switzerland’s sovereignty as it avoids subjugation under a supranational jurisdiction. The only exception to this rule is the agreement on air transport, which is a partial integration agreement. It is as noted above dynamic, because it builds on EU law and has made provisions for the dynamic incorporation of new legislative acts. The implementation of the agreement is subject to the monitoring and control functions of the supranational organs of the EU, the European Commission and the CJEU. These characteristics lead to a blurring of the distinction between EU membership and non-membership or between the EEA model and Swiss–EU bilateralism. In light of the dynamic adaptation procedure and the powers granted to the supranational institutions under the Schengen and Dublin Agreements, the latter has also been qualified as a partial integration treaty.

**The organisational scope of Swiss–EU bilateralism**

The bilateral agreements with Switzerland, in contrast to the EEA, do not have a multilateral dimension. Their legal basis reflects the complexity of legal obligations and organisational forms resulting therefrom: agreements were concluded either between Switzerland and the EU (Schengen), the EC (most agreements) or the member states (free movement and fraud), individually or jointly. The contracting parties to the agreements vary in function of the internal distribution of competences between the EU/EC and the member states. This peculiar fragmentation of the bilateral agreements finds reflection in their political management on the side of the EU. In contrast to other association relations, the European External Action
Service (formerly DG Relex), which is normally responsible for managing relations with third countries, does not have the lead role in the relations with Switzerland. In practice the sectoral directorates-general (DGs) manage the everyday implementation of the bilateral agreements. These particularities are illustrations of the fact that relations between the EU and Switzerland have, at least until now, been closer to a functionalist, expert based interaction 'from below' than to classical, coordinated 'top-down' diplomacy. Another consequence of this fragmentation is a particular degree of complexity of organisational structures and a lack of political leadership which pose particular challenges to the overall strategic management of relations with Switzerland.

In the absence of a hierarchical institutional structure, the main fora to discuss regulatory approximation and eventual problems of implementation are the joint committees established under each bilateral agreement. The Swiss delegation to the joint committees consists of experts from the Swiss federal administration, a representative of the coordinating body in the Swiss administration, the integration office, a representative of the Swiss mission in Brussels and, in issues related to cantonal competence, a representative of the cantons. The EU normally sends experts from the sectoral DGs; the latter are normally accompanied by an European External Action Service (EEAS) representative in charge of the relations with Switzerland (Honegger 2004: 62–66). Below the level of the joint committees we find a number of subcommittees and expert groups that have been created to implement the agreement at the technical level. Marius Vahl and Nina Grolimund (2006) mention that ten subcommittees have been created for the implementation of the agriculture agreement alone under the bilateral agreements. This high level of functional specialisation translates into close ties between the Swiss officials and those in charge of relations with Switzerland in the sectoral DGs. It seems as if most problems are solved in direct 'informal' contacts at administrative level, and that the meetings of the joint committees mainly 'rubber-stamp' the solutions elaborated informally. The problem-solving capacity at the expert level has also been used as an explanation why no formal dispute settlement procedures have been initiated in the various joint committees. After a first phase of implementation, however, some contention has started to arise as to how to ensure proper implementation of the aquis (Möckli 2008; Tobler 2008).

The bilateral agreements also foresee Switzerland's participation in the decision-shaping process. Formally the rules are similar to those established for the EEA EFTA states, but in practice opportunities for participation are more restricted. The formal rules are contained in a declaration on participation in the committees, which was annexed to the bilateral agreements. This declaration 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 (Honegger 2004: 45; Vahl and Grolimund 2006: 47). Moreover, the Commission has to consult with Switzerland on legislative proposals that further develop the aquis in areas in which legislation is equivalent. Nonetheless, the possibilities to influence legislation, once it has passed the pre-pipeline stage,
decrease markedly, in contrast to the arrangement found under the EEA. 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. However, in contrast to the EEA EFTA states 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 are usually 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/the EEAS have been increasingly disinclined to accept these special solutions for non-members (Honegger 2004: 88).

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. Although participation in agencies is still less developed than with Norway, it may be expected that more associations will be sought as the implementation of the bilateral agreements progresses and the fields of cooperation expand (Schweizerischer Eidgenossenschaft 2010). Normally the agency has the power to engage in relations with a third country and the modalities for doing so are stated in the statutes. In the case of Europol, which is merely a coordinating body, the Council of Ministers has to adopt a decision indicating the countries with which Europol can enter into negotiations. In the case of Switzerland, the Council asked Eurojust to negotiate an agreement pursuant to the conclusion of the bilateral agreements II. 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 forthcoming-a; Wichmann 2009).

To sum up, the main characteristics of 'pragmatic bilateralism' between the EU and Switzerland are the fluid junctions among formal obligations, informal practices and the organisational complexity, highlighting the sectoral diversity of forms of association to EU structures. While at first sight the negotiated issue specificity of the bilateral agreements, their mainly static nature as well as the lack of supranational enforcement mechanisms promise a stronger preservation of Swiss sovereignty vis-à-vis the EU than the more comprehensive, dynamic and hierarchical EEA, in practice the scope for derogations from the dynamically evolving acquis is similarly limited, thus reducing the relevance of these formal differences.

**Political design versus bottom-up functionalism**

Beyond the formal provisions of the bilateral agreements, Swiss integration into EU transgovernmental structures has traditionally occurred from the bottom up,
in an informal manner, motivated by questions of interdependence and sustained by the compatibility of political-administrative structures. For instance, in the field of internal security, the Swiss Federal Department of Justice was associated to the Schengen executive committee and relevant working groups well before the formal cooperation treaty was signed (Lavenex 2006). The same is true in environmental policy, where Swiss officials from the Federal Office for the Environment have been cooperating with the European Environmental Agency from the outset, well before a formal bilateral association treaty was signed (Schweizerischer Eidgenossenschaft 2010). In the absence of an overarching hierarchical agreement such as the EEA and in the light of an evolving EU competence in many policy areas, access to relevant transgovernmental networks has become increasingly restrictive. It can be said that this level of decentralised functionalist engrenage – or intermeshing – has entered a foreign policy logic in which the European Commission and the Council of the EU seek to control and to limit Switzerland’s bottom-up integration into common regulatory structures (Lavenex forthcoming-b).

A good example for the constraining impact of evolving EU competence is the aviation sector. Here, cooperation among European states used to occur through specialised pan-European intergovernmental organisations such as the Joint Aviation Authorities or Eurocontrol. With the creation of the European Aviation Safety Agency (EASA) these organisations in which Switzerland used to be an active member have lost much of their influence. As a consequence, Switzerland has had to negotiate its accession to EASA as part of a commitment to align with the EU’s evolving aviation aquis (Lehmkuhl and Siegrist 2009).

In other cases, Swiss access to pre-existing transgovernmental cooperation frameworks has been limited by the latter’s formalisation under the auspices of the EU. In the field of health policy, the creation of an EU agency, the European Centre for Disease Prevention and Control (ECDC), has to some extent centralised the pre-existing system of transgovernmental coordination and information among European health authorities. Switzerland has traditionally played a very active role in these transgovernmental networks. With the latter’s formal integration under the auspices of the ECDC, Swiss participation has increasingly been put in question and has even led to its exclusion from some of these networks, such as, for instance, the European Antimicrobial Resistance Surveillance System and the European Food- and Waterborne Diseases and Zoonoses Network (Schweizerischer Eidgenossenschaft 2010: 72). A third salient example is energy policy, where cooperation was originally based on the informal coordination of national regulators and other stakeholders in two fora, the so-called Florence Forum of regulators in the field of electricity and the Madrid Forum on gas. Besides the European Commission, national regulators, transmission system operators, member state governments, electricity traders and consumers, as well as third countries, including Switzerland, participate in these fora. Over time, efficiency concerns have led to a greater formalisation of these networks in the framework of the European Regulators Group for Electricity and Gas and the Agency for the Cooperation of European Energy
Regulators. In this process, Switzerland has lost its informal access and participation has been made conditional on the conclusion of a formal bilateral agreement on energy policy. In sum, with progressive development of EU competence, ‘[t]he forum process has thus shifted from an informal and relatively inclusive network with very limited power to a formalised, institutionalised and more powerful, but exclusive network’ (Jegen 2009: 590). In other words, the progressive institutionalisation, formalisation and supranationalisation of EU policymaking internally provides a structural limit to the flexible participation in relevant transgovernmental structures, thereby narrowing down a formerly horizontal space of coordination under more hierarchical structures.

The end of the Swiss Sonderweg?

The EU’s internal dynamics towards more formalised cooperation structures and supranational procedures, its growing assertiveness in foreign affairs, and dissatisfaction with the evolving, ever more complex and particularistic Swiss ‘solution’ raise – together with the contention within Switzerland – the possible limits of Bilateralism as we know it.

While Eurosceptics in Switzerland have been moaning the country’s creeping membership in the EU, and only a minority of the population has maintained a wish to fully join the EU, the bilateral ‘Sonderweg’ has been accepted by the ruling elites as the best possible compromise between the formal retention of national sovereignty and the necessary policy integration into the common European space.

Thus, Swiss–EU bilateralism that started as a pragmatic reaction to the failure to ratify the EEA subsequently became largely accepted in Switzerland as a stable basis for its genuine path to European integration. Long ignored on the part of the Swiss decision makers, this accommodation has not been shared by their EU counterparts. Rather than accepting the pragmatic Sonderweg as a compromise, EU partners originally perceived Swiss–EU bilateralism as an interim solution to an eventual full membership or another, EEA-type framework agreement. This difference in perspectives is partly due to the fact that notwithstanding the rejection of the EEA and the conclusion of the bilateral agreements instead, the Swiss demand for EU accession, tabled in 1991, was never officially withdrawn, but merely ‘frozen’. At the latest with the massive rejection of a popular initiative ‘Yes to Europe’ calling for EU accession in 2001 and the proliferation of bilateral negotiations, those with EU hopes for an eventual Swiss accession have been deceived. The admission of 12 new member states in 2004 and 2007 who – in contrast to Switzerland’s selective approach – had had to adopt the *acquis communautaire* in full in order to qualify for membership, further diminished the scope of tolerance for this kind of particularism. The hardening of the EU’s position towards Switzerland’s incremental *de facto* integration, finally, is linked to the former’s determination to develop a more cohesive foreign policy, including a coherent strategy of association relations with its neighbours to the east, south and west (Lavenex 2009).
Renovation of the bilateral way: Progress and setbacks

Since the mid-2000s, the Federal Council has uttered its wish to have other agreements with the Union. This request was met with reluctance from Brussels because the EU demanded a better institutional mechanism for granting additional access to its internal market to Swiss products and services (Council of the European Union 2010, 2012). This EU reluctance came from a concern that Switzerland might take advantage of this relatively loose legal framework in order to gain a comparative advantage over other European economic competitors. To put it clearly, the EU wanted to adapt the institutional mechanism with Switzerland to a new one closer to what is done at the level of EEA. The idea is to be sure that agreements between Switzerland and the EU would adapt in a quasi-automatic way to the evolution of the relevant Community acquis, as well as to ensure its homogenous legal interpretation. The EU also insisted on setting up a supranational mechanism for controlling the enforcement by Switzerland of new EU regulations on a model close to the EEA/EFTA surveillance authority. Furthermore, Brussels underlined the necessity to have a judicial mechanism rather similar to the one in Luxembourg for the EEA/EFTA states (Council of the European Union 2010, 2012). The Swiss government reacted in June 2012 by making counter-proposals (Widmer-Schlumpf 2012):

The issue of surveillance. A surveillance authority shall be established to control a proper implementation of the new EU legislations with the Swiss bilateral order. This body should be independent from the Swiss bureaucracy but composed only of Swiss citizens.

Contractual violations. In case of a violation of the terms of agreement, this new surveillance authority could open a court procedure. To ensure homogeneity of interpretation, the EU and Swiss highest courts would set up an 'institutionalised dialogue'.

Not automatic but 'dynamic' adoption of new EU rules. The provisions of the Swiss constitution, including the possibility to organise referendums, must be ensured when adjusting to the evolution of the relevant acquis.

Participation in the phase of 'decision-shaping'. Switzerland, like the EEA/EFTA States, should be allowed to take part in the early stage of the EU decision mechanism for the body of legislation, which is relevant to Switzerland.

In case of persisting litigation, the involved agreement must not become automatically terminated. Instead, there might be some rebalancing measures decided by the offended party. An arbitration court composed on parity between Swiss and EU citizens shall review the scope, duration and proportionality of those measures if asked by one of the parties.

The Swiss–EU Joint Committee as the only mechanism of settlement of disputes must be. This function should not be attributed to the CJEU.

Brussels expressed disappointment with the Swiss counterproposals. An unpublished report by the European External Action Service (2012) showed even some
irritation. This text of September 2012 qualified Berne's proposals as 'unbalanced' and 'not corresponding to the requirements expressed by the Council'. It rejected the Swiss' views because they did not provide uniform interpretation and application, that is sufficient elements in order to create homogeneity (European External Action Service 2012).

The report underlined that a Swiss surveillance authority, even if it is independent from the traditional Swiss bureaucracy, cannot meet the criteria of impartiality, which should be monitored by either the ESA or the EFTA Court in relation to the EEA/EFTA countries, or by the Commission and the CJEU in relation to the EU member states (European External Action Service 2012). In addition, the EU was not satisfied because Switzerland proposed an illusion of a mechanism of arbitration. The Swiss suggestion would only assess the proportionality of the countermeasures which could be adopted by the EU against Switzerland in case of non-acceptance by Berne of the evolution of the EU aquis. But Brussels wanted of course a mechanism which applies as soon as there is a point of divergence between the EU and Switzerland. Because, otherwise its original goal to re-establish homogeneity and to avoid that the divergence in legal regimes would persist. Thus, the goal of re-establishing homogeneity would not be met, as the divergence in legal regimes would persist. For all those reasons, the European Commission officially rejected the Swiss proposals in December 2012 (Barroso 2012).

In order to get out of the deadlock, the top Swiss and EU negotiators produced in 2013 another unpublished document called the O'Sullivan/Rossier non-paper (O'Sullivan and Rossier 2013). David O'Sullivan was then the chief operating officer at EEAS, and Yves Rossier, the state secretary at Federal Department of Foreign Affairs. This is again a compromise between the positions of both camps. Thus, on the issue of the adoption of new EU legislation by Switzerland, they accepted that it should not be automatic but 'dynamic' and that it shall respect Swiss constitutional requirements, especially those related to direct democracy.

On the issue of control of the implementation of EU regulations by Switzerland, they agreed in the non-paper that it was not necessary to set up a new surveillance authority. It means that Switzerland shall therefore primarily continue to monitor the implementation of the bilateral agreements on its own territory. The European Commission is nevertheless mentioned in this context. Depending on the needs of the sectors, it could also have the possibility to conduct investigations. EU agencies and other bodies may also have a role in the implementation of the agreements. Consequently, a few voices were raised in Switzerland to express their dissatisfaction with a proposal that gives too many rights of investigation to the Commission, a body composed of foreign officials and widely considered as the epitome of a supranational bureaucracy hostile to Swiss sovereignty.

As for the settlement of disputes, the mixed committees shall remain the main bodies for solving the issues. Interestingly, the non-paper contemplated that, in case of non-agreement, either party may refer to the CJEU, which would decide the matter. Note that its judgment will be 'binding' on both parties, that is including Switzerland. This sentence has obviously generated much criticism in Switzerland,
especially from the Swiss People's Party, who saw in it the triumph of foreign judges. Keep in mind that in the Swiss political mythology, 'the foreign judge' is assimilated to the enemy that William Tell had fought.

To make the whole compromise more ambiguous, the non-paper stated that, although the CJEU ruling will be binding for Switzerland, this latter country could still have the possibility not to implement the new relevant EU legislation. In this case, it is anticipated that the EU could take rebalancing measures, including the suspension or the cancellation of the agreement.

Finally, nothing was mentioned about the monitoring of the proportionality of the potential rebalancing measures (O'Sullivan and Rossier 2013). This point was left to later negotiations.

Relations between Switzerland and the European Union have become even more of a headache after the popular vote of 9 February 2014 anchoring in the Federal Constitution (Art. 121a) a limitation of immigration. The 'yes' was certainly very low, 50.3 per cent, but it was neither disputed nor relativised. This new constitutional article stipulates that the number of permits issued for the residence of foreigners in Switzerland may be limited by ceilings and quotas. These should be set according to the overall economic interests of Switzerland and in accordance with the principle of national preference.

Consequently, the EEAS considered that the implementation of quotas affecting EU immigration to Switzerland would be a violation of the bilateral agreement on free movement of persons. Formally, this would entitle the EU to activate the 'guillotine clause' according to which the unilateral denunciation of one bilateral agreement by one party permits the other party to suspend all other bilateral agreements (see the earlier discussion). This popular initiative thus constitutes a new stumbling block in Swiss–EU relations, and the EU has made it clear that there would be no solving of the institutional dimension as long as Switzerland does not offer guarantees for securing the continuation of free movement of persons.

In sum, this episode shows not only the delicate relationship of Swiss direct democracy and commitment to supranational EU law (see Blatter in Chapter 4 in this volume), it also points at the political context in which negotiations on a framework agreement unfold.

**Conclusion**

From the Swiss perspective, the bilateral Sonderweg was a compromise between the functional necessity of integration and the political infeasibility of an EU accession. First, the bilateral agreements provide for a highly selective and issue-specific extension of the EU's regulatory boundary. The horizontal scope of regulatory adaptation is also circumscribed by the static nature of most bilateral agreements. Also the fact that each sectoral agreement is the outcome of a process of bilateral negotiations enhances the chances for Swiss negotiators to maximise their interests. Finally, at the organisational level, the absence of a juridical monitoring system (with the
exception of the Air Transport Agreement) can be interpreted as an additional safeguard for Switzerland's sovereignty.

In practice, however, these advantages have had to be qualified and adherence to the bilateral agreements has generated obligations that are similar to those contained in the EEA EFTA agreement. Even though Swiss adaptation to EU regulations is for the most part not the result of the incorporation of EU legal acts under a bilateral agreement but of the voluntary alignment of Swiss legislation with EU standards (euro-compatibility), strong functional pressure for voluntary alignment is a structural fact. This *de facto* pressure also applies to the formally 'static' bilateral agreements and their adaption to the dynamic *aquis*. While formally more protective of Swiss de jure sovereignty, these distinctive features of the bilateral model: their negotiated, static and non-enforceable character have increasingly become artefacts in what *de facto* is a much more dynamic form of association.

In sum, Swiss bilateralism – while apparently more tailored – does not necessarily imply that the EU exerts less influence on Swiss policies than it does in the formally more constraining EEA. Nevertheless, it should be highlighted that much of this EU influence results from shared structural patterns of interdependence rather than from intentional attempts at domination (see also Chapter 1 in this volume). From the outset of European integration, Switzerland has followed this process from the fringes: politically as an outsider, functionally however very much at the core of cooperation endeavours, be it in trade, in transport, in environmental matters or in internal security. For many years, Swiss regulators and public officials have been able to liaise with their counterparts from the EU member states on an informal basis, joining relevant policy networks and transgovernmental bodies before negotiating the corresponding agreements. This functionalist integration from below has to a certain extent acted as a counterweight to the dominance of the *aquis communautaire* in the mutual relationship. With the increasing communitisation of EU policymaking, and the enlarged EU’s enhanced aspirations towards coherent and cohesive foreign policy relations, the scope for flexible, apparently apolitical arrangements has been reduced. With or without a continuation of the bilateral path, it seems certain that what some have seen as a ‘Swiss model’ is losing much of its exceptionalism. Even without the formal constraints put on state independence by the dynamic scope and enforcement mechanisms of the EEA, *de facto* interdependence, coupled with an increasingly supranational EU, question the very basis of the notion of Swiss sovereignty.

Notes
1 The first round of bilateral treaties was formally concluded as an 'association agreement' based on Art. 301 and 310 of the Treaty on the European Communities.

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THE EUROPEAN UNION’S NON-MEMBERS

Independence under hegemony?

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