

The Logic of Negotiations between Switzerland and the EU

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The negotiations of the institutional framework agreement, which is currently under review in Switzerland, were cumbersome and long. The EU pressured Switzerland by putting on hold other negotiations and repeatedly limiting its recognition of the equivalence of Swiss stock market regulations. The linkage of seemingly unrelated issues is a negotiation strategy often applied in Swiss-EU relations that in one case can favour the EU and in another Switzerland.

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Summary

Switzerland and the EU share a history of long, controversial and cumbersome negotiations. Negotiations have been characterised by threats, concessions, the linkage of seemingly unrelated issues, but also by the successful reconciliation of sometimes contradictory interests. The negotiation outcomes have been influenced by unequal and issue-specific bargaining power. These negotiations led to agreements of diverse reach and focus. The agreements have proven to provide mutual benefits and to be rather stable, but also to be a fragile means of cooperation. Either party can choose to suspend, not to apply or not to update an agreement in response to an action of the other party. Ironically, an institutional framework agreement, which is criticised among other things for the establishment of an arbitration court and for the role it assigns to the European Court of Justice, would reduce the need to resort to such unfriendly bargaining tactics.

A history of long negotiations

The history of Swiss-EU relations shows that sectoral agreements often require long negotiations. The **Insurance Agreement**, which provides sectoral market access for insurance companies in the non-life sector, was negotiated for sixteen years (1973-1989). The agreement was first initialled in 1982, but had to be re-negotiated after the EC changed its respective legislation. The official negotiations of the Bilateral I agreements lasted six years (1993-1999). The difficult issues were **Overland transport** and the **Free Movement of Persons (FMPA)**. In both issues, Swiss policies differed considerably from EU rules. Switzerland step-by-step accepted the EU rules, but also achieved concessions (e.g. transitional periods in the case of the FMPA, or the night ban for trucks in the case of overland transports).

The negotiations on the Bilaterals II package lasted four years (2001–2004). The hardest bargain concerned the extension of the taxation of savings directive to Switzerland, because Switzerland's financial sector regulations diverged from the then new EU taxation of savings directives. Two years also seem to be the minimum for more recent negotiations (e.g. the **Framework for Cooperation with the European Defence Agency (EDA)** 2009–2013; **Cooperation between competition authorities** 2011–2013). The institutional framework agreement, the draft of which is currently under scrutiny in Switzerland, was negotiated in four years between 2014 and 2018. Not concluded negotiations concern, among others, **Switzerland's participation in the EU's electricity market** (negotiations since 2007).

Diverging views on the role of EU legislation

Often, negotiations last so long because Switzerland and the EU disagree about the closeness of an agreement to EU legislation. If, in addition, Switzerland has a different regulatory tradition, this often requires policy changes in Switzerland. For example, EU legislation plays an important role in the agreements on **civil aviation, overland transport**, the **free movement of persons** (Bilaterals I), taxation of savings (now **automatic exchange of information**), border control (**Schengen**), asylum (**Dublin**, all Bilaterals II) and **customs security**.

When the Federal Council introduced the autonomous adaptation policy in 1988 ('Autonomer Nachvollzug' in German), it already expected that an utmost compatibility of Switzerland's domestic legislation with EU law would be a precondition for successful negotiations with the EU on any form of further integration, be it accession to the EU, the EEA or sectoral agreements

The Swiss government already in 1988 expected that an utmost compatibility of Switzerland's domestic legislation with EU law would be a precondition for successful negotiations with the EU on any form of further integration, be it accession to the EU, the EEA, or sectoral agreements (see [here](#) and [here](#)). In this year, the Swiss government introduced the so-called 'autonomous adaptation policy' ('Autonomer Nachvollzug'). Since then, Swiss legislation relevant for the Single Market has largely been harmonised with the respective EU rules.

Often, such harmonisation took place during negotiations with the EU. During the Bilaterals I negotiations, for example, Switzerland adapted its regulations on vehicle weight and length to EU standards step by step during the negotiations. With these measures, the Swiss government and parliament showed their commitment to achieving an agreement on overland transport. This was especially necessary because in 1994, a popular initiative known as the '**Alpine-initiative**', requiring the transfer of traffic from road to rail, was approved at the polls. The initiative's aim contradicted the EU's request not to limit traffic capacities on transit routes. With its domestic policy changes, the Swiss government could re-start negotiations and achieved some concessions from the EU, like the recognition of the above mentioned charges for heavy vehicles or the night driving ban, a policy aimed at transferring traffic from the road to the rail.

In recent years, Switzerland and the EU totally revised two sectoral agreements in order to adapt them to new EU legislation. One example is the **Customs Security agreement**. With the revision, Switzerland was able to avoid the risk of being treated as a third state, which would have meant more thorough custom controls at the Swiss-EU borders. The other example is the total revision of the **taxation of savings agreement** (originally concluded as part of Bilaterals II), in order to incorporate the new **EU directive on the automatic exchange of information**. In these cases, Switzerland was ready to quickly adapt the agreements to new EU legislation, because of crucial practical advantages and also of international pressure.

A current example, where the transposition of EU law requires Switzerland to change its policy is the new **EU directive on firearms**. Because the directive is part of the Schengen acquis, Switzerland is obliged to incorporate the new directive. Interest groups in Switzerland collected enough signatures to demand a referendum and the Swiss voters will be called to vote on the incorporation of the firearms directive in May 2019.

Diverging views on institutional mechanisms

Switzerland and the EU also often disagree about the mechanisms for legal development, interpretation, and dispute settlement related to the sectoral agreements. Up until today, mechanisms for the legal development of agreements were installed in the form of Mixed Committees or dynamic obligations to incorporate future EU legislation. Similarly to the diversity of the agreements with regard to the closeness to EU legislation, the agreements are also diverse with regard to the competences they assign to Mixed Committees and the role of other institutional mechanisms (for a detailed analysis see **Functioning of Swiss-EU Agreements: Hidden Dynamics and their Reasons**).

The draft institutional agreement currently under review in Switzerland would put an end to these ad hoc solutions for five existing and all future sectoral agreements guaranteeing market access to Switzerland. Switzerland would be obliged to transpose new EU legislation when the EU declares it relevant for the areas covered by the market access agreements. As until now, controversies about interpretation and enforcement would be discussed in the Mixed Committees, but in case they cannot find a solution, an arbitration court can be established. This arbitration court would have to consult the European Court of Justice in cases when the controversy concerns EU legislation.

The role of bargaining power

Although in general the EU has more bargaining power thanks to its sheer size, Switzerland's bargaining power can be enhanced by specific interest constellations in the EU, by bargaining strategies, or by domestic politics.

Bargaining power is crucial to explain the outcome of intergovernmental negotiations. According to intergovernmentalist theories of European integration, it is influenced by "the unilateral and coalitional alternatives to agreement, including offers to link issues and threats of exclusion and exit"

(Moravcsik 1995: 612). The situation the negotiation partners are in – the alternatives they have to an agreement with each other – and the strategies they apply – the linkage of issues and threats of exclusion and exit – are crucial to understanding the negotiations between Switzerland and the EU, too.

The available alternatives to an agreement with the EU normally reduce Switzerland's bargaining power. Alternatives to agreement are rare for Switzerland, because, if Swiss interests are best met by European integration, they are best met with a sectoral agreement with the EU. Sometimes, the unilateral **incorporation of EU rules into Swiss legislation is discussed as an alternative**. While this can be advantageous for Switzerland in some cases, it falls short of the overall advantages of a sectoral agreement, because the EU usually does not treat such unilateral measures as the extension of its own rules and hence does not grant Swiss actors any rights based on that (for a discussion of the unilateral incorporation of the Cassis de Dijon principle, see EFTA-Studies analysis **Switzerland's sectoral access to the EU's Single Market**).

Issue linkage and threats of exit

The strategies of the linkage of issues and threats of exclusion and exit can be used by Switzerland to enhance its bargaining power. These strategies explain why absolute bargaining power matters less than the issue-specific constellation of interests. Although Switzerland has less absolute bargaining power than the EU in terms of its economic and political weight, it sometimes has bargaining advantages, for example in economic sectors where it is in competition with the EU or with important EU member states.

The most famous example of issue linkage is the **Bilaterals I package**. The EU benefited from the fact that the Swiss government saw no alternatives to market access agreements, while the success of its Single Market did not crucially depend on Switzerland. The EU requested that Switzerland's market access agreements were linked to issues of its own interest, and its threat to exit (or not even enter) negotiations otherwise was credible. The issues of Swiss interest were overland transport and civil aviation, public procurement and technical barriers to trade; the issues of interest for the EU were the free movement of persons and trade in agricultural products.

The issue linkage consisted of parallel negotiations on all issues and the legal linkage of the resulting seven agreements (including an agreement on research). This strong linkage of the issues forced the parties to agree on compromises. If one agreement was not concluded, or if one was rejected at the polls, all others would have become obsolete. This parallelism has a legal quality known as the 'guillotine clause' and is still effective: all seven treaties will be automatically abrogated if one agreement is terminated.

In the negotiations on the **Bilaterals II package** the EU approached Switzerland. It wanted Switzerland to participate in its new policies regarding taxation of savings and the fight against fraud. The EU members Austria, Luxembourg and Belgium made Switzerland's participation a condition for

their own consent to **new EU legislation on taxation of savings**, because otherwise, their financial sectors would lose competitiveness compared to the Swiss financial sector. The EU thus had no alternative to an agreement with Switzerland and Switzerland could credibly threaten to exit negotiations if its interests were not met. Interestingly, Switzerland accepted the EU rules for the taxation of savings. As a concession, it requested negotiations in another issue area, namely the Schengen and Dublin regimes. Switzerland had pursued the **goal of becoming associated to the Schengen and Dublin regimes since the early 1990s**.

The linkage of the Bilaterals II package concerned only the negotiations. The agreements had to be signed as a package, which again forced Switzerland and the EU to reach compromises on all issues. In contrast to Bilaterals I, however, the treaties entered into force at different time points, and the abrogation of one treaty has no effect on the other treaties. The exception are the Schengen and Dublin Association Agreements, which are legally linked and entered into force at the same time.

In recent years, it has once again been the EU rather than Switzerland that has used the linkage of issues to its advantage. For example, it linked the electricity agreement and the agreement on agricultural and health issues to an agreement on an institutional framework for (some of) the sectoral agreements. Switzerland in the long term has no alternative to agreements for access to the EU's Single Market, as two-thirds of its exports go to the EU. Sooner or later, it must accept an institutional framework. But in the short term, the market access agreements that the EU is withholding are not crucial to the wealthy Swiss economy. Therefore, the EU is seeking new issues to pressure Switzerland. An example is the EU's recognition of Swiss stock market regulations, which it repeatedly granted only for short time periods since December 2017, linking an extension to the conclusion of the institutional framework agreement.

The role of Swiss domestic politics

Domestic politics play a role in international negotiations, because the government must not only achieve a compromise most favourable for its country in the international arena, but must also secure the support of domestic politics. Political scientists describe this situation of the government with the metaphor of a "two-level game".

In the case of Switzerland, domestic politics can enhance the Swiss government's bargaining power, if an agreement requires approval in a referendum. This played a role in both the Bilaterals I and II and can be interpreted as credible threats of exit. When an international agreement is initialled, it usually needs ratification by both parties to the agreement. If a government needs to get approval by parliament or at the polls, it can argue that concessions by the negotiation partners enhance the chances of getting this approval. No-one is interested in the rejection of an initialled agreement.

For example, against the background of the rejection of the EEA by a popular vote in 1992, the EU might have made concessions regarding transitional periods for the introduction of the free movement of persons, not least to enhance the chance of approval at the polls. A similar reasoning might

have led to the recognition of the domestic decision-making process in the Schengen Association agreement, despite the obligation to dynamically incorporate new EU legislation.

The requirement of a popular referendum is an asset that not only enhances the bargaining power of Swiss negotiators in the international arena. It also requires domestic compromises in order to build a pro-agreement coalition that is sufficient to win a referendum. An example are the so-called “flanking measures”: stronger labour market regulations that protect the domestic workforce against wage and social dumping. These measures brought the trade unions on board with the pro-coalition in the case of the free movement of persons principle. The draft institutional agreement explicitly mentions some of these anti-dumping measures, albeit in a softened version. This is one of the main critiques of the institutional agreement in Switzerland and one of the reasons why there might not be a domestic majority to support its ratification.

Conclusions

This analysis teaches us that long-lasting negotiations are normal in Swiss-EU relations. It shows that the diverging views, which made the negotiations on an institutional framework so cumbersome, also complicated negotiations in the past. The EU prefers agreements based on its own rules, while Switzerland sometimes has different policy traditions that are difficult to abandon. In addition, the EU prefers stronger supervision mechanisms, while Switzerland holds to its independence.

The negotiations are influenced by bargaining power and strategies, which is usual in international relations in general and European integration in particular. The analysis has described instances in which Switzerland had considerable bargaining power thanks to its sector-specific competitiveness or to the successful linkage of issues of its own interest to issues of interest to the EU. The fact that the EU did not have rapid success with its request for an institutional framework, although it linked the issue to new and already negotiated but not ratified market access agreements, shows that Switzerland can apparently afford the ‘no agreement’ alternative, at least in the short term. The irony of the current situation is that an institutional framework would provide a dispute settlement mechanism to solve conflicts between Switzerland and the EU without the resort to tit for tat strategies.

The EU and Switzerland have concluded many other agreements than those described in this analysis. One must assume that in general, the EU is successful in extending its own rules to Switzerland. Agreements relying on EU law are frequently amended (see EFTA-Studies analysis **Functioning of Swiss-EU Agreements: Hidden Dynamics and their Reasons**). Moreover, to some extent, the exceptions that the EU grants to Switzerland have counterparts in its internal policies. For example, the old member states were also granted transitional periods before they had to allow the free movement of persons from the new Central European member states. Also in the future, Swiss negotiators and the Swiss government will thus need good strategies and some luck in order to play their weak hand well.

* Parts of this analysis, and especially the discussion of previous research in light of European integration theories, draw upon Chapter 4 of Sabine Jenni's book "Switzerland's differentiated European integration. The last Gallic village?" (see Sources and Further Reading).

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Sources and Further Reading

Afonso, Alexandre, and Martino Maggetti. 2007. "Bilaterals II: reaching the limits of the Swiss third way?" In *Switzerland and the European Union. A close, contradictory and misunderstood relationship*, ed. C. H. Church. London and New York: Routledge.

Bundesrat. 1994. „Bericht über die Aussenpolitik der Schweiz in den 90er Jahren Anhang: Bericht zur Neutralität vom 29. November 1993.“ Bundesblatt 1994 I 153, URL: https://www.eda.admin.ch/dam/dea/de/documents/berichte_botschaften/ap-90_de.pdf

Bundesrat. 1993. „Botschaft über das Folgeprogramm nach der Ablehnung des EWR-Abkommens.“ Bern: Bundesblatt 1993 805, URL: <https://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10052538>

Bundesrat. 1988. „Bericht über die Stellung der Schweiz im europäischen Integrationsprozess.“ Bern: Bundesblatt 1988 III 249, URL: <https://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10050830>

Christin, Thomas, and Simon Hug. 2002. "Referendums and Citizen Support for European Integration." *Comparative Political Studies* (35): 586-617.

Church, Clive H., Christina Severin, and Bettina Hurni. 2007. "Sectors, structures and suspicions. Financial and other aspects of Swiss economic relations with the EU." In *Switzerland and the European Union. A close, contradictory and misunderstood relationship*, ed. C. H. Church. London and New York: Routledge.

Dupont, Cédric, and Pascal Sciarini. 2007. "Back to the future: the first round of bilateral negotiations with the EU." In *Switzerland and the European Union. A close, contradictory and misunderstood relationship*, ed. C. H. Church. London and New York: Routledge.

Freiburghaus, Dieter. 2004. "Heteronomer Nachvollzug? Oder wie sich die Autonomie verflüchtigt." *Die Volkswirtschaft. Das Magazin für Wirtschaftspolitik* (9):35.

Gemperli, Simon, and Niklaus Nuspliger. 2015. "Rahmenabkommen mit der EU. Burkhalters Strategie unter Druck." *Neue Zürcher Zeitung*, 23.10.2015.

Good, Paul-Lukas. 2010. Die Schengen-Assoziierung der Schweiz. Dissertation, Hochschule für Wirtschafts-, Rechts-, und Sozialwissenschaften (HSG), Universität St. Gallen, St. Gallen.

Jenni, Sabine. 2016. *Switzerland's differentiated European integration. The last Gallic village?* Basingstoke: Palgrave Macmillan.

Jenni, Sabine 2014. „Europeanization of Swiss Law-Making: Empirics and Rhetoric are Drifting Apart.“ *Swiss Political Science Review* 20(2): 208-15.

Kux, Stephan, and Ulf Sverdrup. 2000. "Fuzzy Borders and Adaptive Outsiders: Switzerland, Norway and the EU." *Journal of European Integration* 22(3): 237-70.

Lavenex, Sandra, and Frank Schimmelfennig. 2009. "EU rules beyond EU borders: theorizing external governance in European politics." *Journal of European Public Policy* 16(6): 791-812.

Linder, Wolf. 2013. "Switzerland and the EU: the puzzling effects of Europeanisation without institutionalisation." *Contemporary Politics* 19(2): 190-202.

Maiani, Francesco. 2008. "Legal Europeanization as Legal Transformation: Some Insights from Swiss "Outer Europe"." *EUI Working Paper*. Max Weber Program (32):24.

Moravcsik, Andrew. 1993. "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach." *Journal of Common Market Studies* 31(4): 473-524.

Moravcsik, Andrew. 1994. "Why the European Union Strengthens the State: Domestic Politics and International Cooperation." *Working Paper Series #52*. Center for European Studies. Harvard University.

Moravcsik, Andrew. 1995. "Liberal Intergovernmentalism and Integration: A Rejoinder." *Journal of Common Market Studies* 33(4): 611-28.

Thürer, Daniel, Weber Rolf H., Wolfgang Portmann, and Andreas Kellerhals, eds. 2007. *Bilaterale Verträge I & II Schweiz – EU. Handbuch*. Zürich: Schulthess.

Trechsel, Alexander H. 2007. "Direct democracy and European integration. A limited obstacle?" In *Switzerland and the European Union. A close, contradictory and misunderstood relationship*, ed. C. H. Church. London and New York: Routledge.

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