

Overview: Instruments, Issues and Challenges of Swiss-EU Relations

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This text provides an overview of the historical development of Swiss-EU relations while pointing to institutional peculiarities of the agreements between Switzerland and the EU and highlighting specific challenges, such as the increasing relevance of EU legislation.

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Summary

Swiss-EU relations date back to the early days of European integration. Since the 1990s, they have been considerably expanded, i. e. they cover more and more policy areas, but they have also been deepened, as some of the newer sectoral agreements, for example, are directly based on EU legislation and are in a process of dynamic evolution. The patchwork approach of Swiss-EU relations is shaped by particularistic domestic interests and cultural reservations in Switzerland, which also complicated the search for a new institutional framework for the Swiss-EU agreements.

The EFTA approach to European integration

In 1951 the six countries Italy, France, Germany, Netherlands, Belgium and Luxembourg co-founded the European Coal and Steel Community (ECSC) and later, in 1957, the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM). Another multilateral route to deeper European integration is the **European Free Trade Association (EFTA)**. EFTA was founded in 1960 by Switzerland, the United Kingdom (UK), Austria, Denmark, Norway, Portugal and Sweden as a reaction to the creation of the EEC. EFTA provided for economic integration, but was less ambitious than the EEC, as its members were sceptical about political integration.

While in 1970 EFTA had eight full members and one associate member (Finland), today EFTA has only four members: Iceland, Liechtenstein, Norway and Switzerland. Its main functions are the management of the agreement on the European Economic Area (EEA; more information [here](#)) and the **EFTA Free Trade Agreements (FTAs) with a total of 27 countries from all continents**. As the Swiss electorate rejected the agreement on the EEA in 1992 with a tiny majority of 50.3% of the votes and 18 out of 26 of the Swiss cantons, Switzerland did not join the EEA. EFTA is thus significant for Switzerland today because of its FTAs.

To implement the EEA Agreement, the EEA EFTA states also established the EFTA Court and the EFTA Surveillance Authority, which are responsible for the monitoring, implementation and interpretation of EEA rules in the EEA/EFTA countries. In the past, the EFTA institutions were repeatedly brought up in discussions about an institutional framework for (some of) the Swiss-EU sectoral agreements. The draft of an institutional agreement currently under review in Switzerland does not foresee a role for the EFTA institutions in Swiss-EU relations.

History and development of Swiss-EU sectoral agreements

Today, the most important element of Switzerland's European politics is its policy-specific, bilateral cooperation with the EU. As early as 1957, Switzerland concluded an agreement with the ECSC. After a few agreements of minor importance concluded in the 1960s (e.g. the **1967 Agreement on the watch industry** and the **1967 Tariff Agreement on certain cheeses**), in 1972 Switzerland signed the **Free Trade Agreement (FTA)**, which is still an important pillar of Swiss-EU relations. Most other major agreements have been concluded after 1990. Between 2014 and 2018, Switzerland and the EU negotiated an **institutional framework for (some of) their sectoral agreements**. The negotiations were difficult and it is not clear whether or not Switzerland will ratify the agreement.

Important issue areas and collaboration principles were already defined in the first sectoral agreements. The first agreement with the ECSC dealt with transport, which is still a central issue in Swiss-EU relations. The 1972 Free Trade Agreement (FTA) regulates trade in industrial goods and has remained the basis for the access of Swiss exporters to the EU market ever since. The 1993 insurance agreement is the only agreement of the insurance sector and was the first agreement based on the principle of 'equivalence of legislation'. The principle says that no party to the treaty formally loses its autonomy to amend or create legislation within the area of the agreement, and the parties accept that the rules of both parties are equivalent. The equivalence of legislation principle still plays a role today, for example in the **agreement on overland transport**.

After the rejection of the EEA in 1992, Switzerland's sectoral approach to European integration gained new momentum. Legal scholars such as Christa Tobler and Francesco Maiani characterised the policies of the early 1990s as a change in Switzerland's European policy from a passive to a more active approach. They write that this active attitude has been characterised by intensive, difficult and long negotiations between the Swiss government and the EU and by an increasing significance of EU legislation for Swiss-EU relations. The outcome was two packages of sectoral agreements (Bilaterals I and II), various additional agreements of diverse scope and significance, including a few agreements which subordinate Switzerland to EU jurisdiction (e.g. the **civil aviation agreement** or oblige it to dynamically incorporate future EU legislation (e.g. the **Schengen Association Agreement**).

Focus and scope of 'Bilaterals I' and 'Bilaterals II'

The first package, referred to in Switzerland as 'Bilaterals I' contains seven legally and politically connected agreements. They were negotiated throughout the 1990s, **approved by the Swiss electorate in 2000 with a 67.2% 'yes' majority**, and entered into force in 2002. The legal connection of the Bilaterals I is known as 'parallelism' or the 'guillotine clause'. The clause means that the seven agreements had to enter into force at the same time, and if one agreement were not ratified or was abrogated later on, all the other agreements in the package would be abrogated as well.

The Bilaterals I mainly aimed at strengthening Switzerland's economic relations with the EU, after the EU had completed its Single Market in 1992 (for a detailed analysis see **Switzerland's sectoral Access to the EU's Single Market**). In that sense, the Bilaterals I complemented the 1973 Free Trade Agreements. In addition to industrial goods, trade in agricultural products was facilitated, transport connections simplified (agreements on civil aviation and overland transport), public procurement was liberalised and technical barriers to trade lowered (agreement on mutual recognition of conformity assessment, MRA).

The second package deal, this time of nine agreements, is now known as 'Bilaterals II' and was signed in 2004. These agreements were connected politically (they could only be signed as a package), but only two of these agreements are legally connected (the association agreements to the Schengen regime on border control and the Dublin asylum regime, respectively). These two agreements were also the last ones of the package to enter into force in 2008.

Important agreements of both the Bilateral I and II packages dealt with immigration. Before this, immigration had not been covered by Swiss-EU agreements. With the Bilaterals I, the principle of the **free movement of persons was extended to Switzerland**. This issue was a core interest of the EU, and particularly of South European EU member states, from which many immigrants to Switzerland come. Prior to the agreement, Switzerland granted only very limited social security rights to immigrant workers, although the **Swiss workforce has consisted of over 20% of foreign workers since the 1960s. In 2016, for example, 79% of the foreign workforce came from an EU- or EFTA country**.

With the Bilaterals II, Switzerland became an associate member of the Schengen and Dublin regimes. This time, these issues crucial for immigration policy were included at the request of Switzerland. The Swiss government hoped that cooperation in matters of asylum (Dublin), organised crime, combatting the trade in drugs and similar issues (thanks mainly to the Schengen Information System SIS) would enhance Switzerland's internal security.

The remaining agreements of the two packages dealt partly with the continuation of earlier cooperation (e.g. in research and education) and partly added new policy areas to Swiss-EU relations. Apart from some technical cooperation agreements (e.g. **statistics**, the **European Environment Agency (EEA)**), the Bilaterals II also introduced cooperation in issue areas relevant for the financial

sector. At the request of the EU, an agreement on the taxation of savings income (now known as the **agreement on the automatic exchange of information** and one on the **fight against fraud** were included. EU rules in these areas would have been less effective if Switzerland had not been included.

Increasing significance of EU legislation

Today, the Bilaterals I and II are the cornerstones of Swiss-EU relations. More strongly than earlier agreements, they build on EU law, primarily secondary legislation. The 'equivalence of legislation' principle was complemented by so-called 'parallel provisions' in the main agreement texts and/or by direct references to EU legislation in their annexes. Parallel provisions paraphrase provisions and principles of EU legislation without specifically quoting the source. In direct references, the EU source is identified. The reliance on EU law explains, in addition to institutional factors, why the frequency of agreement revisions increased considerably after the entry into force of the Bilaterals I in 2002 (for a detailed analysis see **Functioning of Swiss-EU agreements: Hidden Dynamics and their Reasons**).

EU legislation has also gained in importance at the domestic level in Switzerland. The Swiss government had started to examine every bill with regard to its compatibility with EU law as early as 1988, as outlined in its **report on Switzerland in the European integration process**. This policy is often referred to in Switzerland as "autonomous implementation". Whereas initially this policy was primarily aimed at avoiding new incompatibilities with EU law, it became an active policy in the early 1990s with the goal of aligning legislation. For example, half of the domestic legal reforms prepared for EEA accession were enacted, although Switzerland did not join the EEA (**Swisslex package**).

The early incorporation of EU rules into Swiss domestic legislation mainly concerned economic policies, as the EEA's focus is the access to the EU's Single Market. This eager unilateral incorporation of EU rules into national legislation facilitated the negotiations on Switzerland's sectoral agreements. With the Bilaterals I, unilateral incorporation of EU rules in federal laws became less frequent (for recent examples see EFTA-Studies analysis **Switzerland's sectoral access to the EU's Single Market**), while the sectoral agreements increasingly required domestic implementation measures at the statutory level. However, more recent empirical research has shown that the unilateral adoption of EU law decreased only at the legislative level, whereas there was an increased frequency of the government incorporating EU rules in its regulations.

The institutional peculiarity of Swiss-EU relations

With very few exceptions, the sectoral agreements do not delegate any decision-making power or judicial authority to the EU. One exception is the agreement on air transport, part of Bilaterals I. It assigns intervention rights to EU authorities in matters of competition surveillance and the European Court of Justice (ECJ) supervises its correct implementation.

The other relevant exceptions are the Schengen and Dublin association agreements, both parts of

Bilaterals II, and the less well-known and publicly scarcely discussed Customs Security Agreement of 2009, which replaced the agreement on the same issue from 1991. These agreements oblige Switzerland to continuously ('dynamically') adopt new EU legislation in the area of the agreement. As a result, the Schengen agreement is one of the most often revised agreements (see EFTA-Studies analysis **Functioning of Swiss-EU agreements: Hidden Dynamics and their Reasons**).

The Federal Council and a large part of the Swiss public praise this 'bilateral path' of European integration as a "royal road", because it combines the best of two worlds: the economic benefits of integration and the political benefits of independence from supranational institutions - and thus the preservation of an important element of the national identity. But the EU agrees less and less with this positive view. In particular, the EU is concerned with the legislative homogeneity of the Single Market, as important agreements grant Switzerland sectoral market access without obliging Switzerland to keep pace with legal developments in the EU.

Since 2014, at the request of the EU, Switzerland and the EU have been negotiating an **institutional framework** that would regulate legal evolution, implementation and dispute settlement for (some of the) sectoral agreements. Up till now, every agreement contains its own provisions regarding its administration, comprising rules regarding amendments, implementation and the procedure for dealing with disagreements between Switzerland and the EU. In contrast to the few special cases, most other important agreements are administered by Mixed Committees, which have limited competences in dispute settlement and the amending of annexes to the agreement.

The negotiations on an institutional framework are ongoing and cumbersome – and once again core interests and obstacles emerge which influenced Swiss-EU relations from the start. Switzerland has strong economic interests in the continuation and consolidation of the sectoral agreements. Large parts of the Swiss economy are export-oriented and the **EU is by far its largest trading partner**. But economic interests in Switzerland are diversified and sometimes very industry-sector-specific. As a result, there is still little backing within the Swiss economy for a framework agreement with the EU.

Probably the most important difference between Switzerland and other more integrated European states is that the patchwork of Swiss-EU agreements and the Swiss political system, with its consensus orientation and the direct-democratic elements, give diverse groups and particularistic interests a strong influence. Every compromise that Switzerland makes with the EU requires a broad supportive coalition at home and must thus reconcile very different interests.

Once again, the negotiations are also revealing cultural reservations. The independence of Switzerland and its political institutions (such as direct democracy) are crucial elements of Swiss identity. Closer institutional cooperation with the EU, which, among other things, is associated with an increase in immigration, is perceived as a threat. These reservations about European integration are on the political agenda because of recent and upcoming popular votes [referendums].

Last but not least, the Swiss-EU negotiations are closely related to developments in the EU and in EU member states. Fear of immigration and EU-scepticism is finding increasing support in (new) political parties in various EU countries. The EU is thus doing whatever it can to avoid granting Switzerland fundamental exceptions with regard to the principle of freedom of movement that it does not grant to EU members. The question of the significance of EU legislation and related jurisdiction for the (sectoral) market access of third countries is one of the most difficult sticking points also in the Brexit negotiations. It is clear that the specific interests and challenges that have shaped Swiss-EU relations are increasingly becoming relevant also for other European countries.

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EFTA-Studies.org provides in-depth analyses of the institutions and processes that link the EFTA states to the EU. An independent academic blog addresses developments in the EFTA states from a political and legal perspective, thus providing up to date information on the EFTA states' relations with the EU.

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