

Switzerland-EU Relations: The Bilateral Way in a Fragilized Position

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Relations between Switzerland and the European Union are in bad shape and the Swiss are tearing each other apart on this issue. There are two major issues at stake. First, the Swiss government is dithering over whether or not to initial a new Institutional agreement with the European Union (EU), although it was finalized by the negotiators in November 2018. In the event of non-acceptance by Switzerland, the European Union has already announced retaliatory measures. Secondly, in September 2020, Swiss citizens will have to vote on a popular initiative to scrap the agreement on the free movement of persons between Switzerland and the EU. A positive vote would sound the death knell for the bilateral treaties between both entities as they are bound together by a guillotine clause. These difficulties between Switzerland and the EU are certainly not new. But two fresh developments have arisen. On the one hand, the support of the socialists and trade unionists for the bilateral way is waning. On the other hand, the European Union has become less flexible than it previously was. The worst should, logically, be avoided because the Swiss have always been a pragmatic people and solutions are relatively easy to find. But an accumulation of blunders, combined with misperceptions of the actual power relations, could prove fatal.

Keywords: Switzerland, EU external relations, EU external agreements, European Free Trade Association (EFTA), European Economic Area (EEA), Institutional agreement, Free movement of people, immigration, referendum, Brexit

1 INTRODUCTION

Relations between Switzerland and the European Union (EU) are being challenged by a new crisis. This is troubling the Confederation and has given rise to much internal debate on the topic. The Swiss were already known to have had, by far, the most referendums on European integration as they have voted no less than seventeen times, directly or indirectly, on the issue of their relationship with the EU¹! But the rest of Europe shows little interest in this, even though Switzerland is

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¹ This number (seventeen) is debatable. Indeed, some of the popular initiatives have aimed at undermining the bilateral approach with the EU, but they do not explicitly mention the term 'EU'. This is for instance true of the 2014 popular initiative 'against mass immigration'. See part III for further details.

the EU's fourth-largest economic partner after the United States, China, and the United Kingdom² and its Gross Domestic Product (GDP) is about a quarter of that of the UK.³

There are two issues of concern. First, the Federal Council (government) refuses to initial a new Institutional agreement with the EU, although it was finalized in November 2018, after five years of negotiations between Swiss and European diplomats. This is a spectacular slap in the EU's face. Especially coming from a Swiss government that has historically always been extremely careful not to upset its neighbours. Most political parties are also reluctant about this deal, including those, such as the Socialist Party, which have traditionally supported bilateral agreements with the EU and even EU membership. The European Union has announced retaliatory measures, which has led to a crisis.

Secondly, in September 2020, Swiss citizens will be called to vote in a referendum launched by the Swiss People's Party (SPP),⁴ on whether or not to withdraw from the agreement on the free movement of persons with the EU. Should the people vote 'yes', almost all bilateral agreements with the EU would be endangered by virtue of a 'guillotine clause'. The tension would then reach its peak.

Before looking in detail at these issues, we must first recall the main aspects of the relationship between Switzerland and the European Union.⁵

Following the negative referendum on the European Economic Area (EEA) on 6 December 1992, Switzerland and the EU decided to put in place sectoral bilateral agreements. This bilateral way can be divided into three periods.

The first period began in 1993 with negotiation towards a first series of bilateral agreements, the BA1. These were signed on 21 June 1999 and became effective on 1 June 2002.⁶ From a legal point of view, the different sets of bilateral agreements (BA1) are interconnected. In other words, if Switzerland terminates one of them, then all the others can be cancelled by the EU. This is what the concept of 'guillotine clause' refers to. The negotiation was extremely difficult and

² European Parliament, *The European Union, and Its Trade Partners* (Brussels May 2019), <https://www.europarl.europa.eu/factsheets/en/sheet/160/1-union-europeenne-et-ses-partenaires-commerciaux> (accessed 15 June 2020).

³ UK GDP = 2,824,850MD, Switzerland GDP = 703,165MD, *Country Comparison, United Kingdom v. Switzerland*, <https://countryeconomy.com/countries/compare/uk/switzerland> (accessed 6 May 2020).

⁴ The Swiss People's Party (SPP) is an anti-immigration, anti-EU right-wing nationalist party. It is the party with the highest vote share (over 25%) and is represented in government by two ministers (out of seven).

⁵ For a subtle up-to-date historical synthesis, see C. Church, *Switzerland and European Integration* (Oxford Encyclopaedia of European Union Politics May 2019).

⁶ *Agreement Between the Swiss Confederation, of the One Part, and the European Community and Its Member States, of the Other Part, on the Free Movement of Persons*, Concluded on (21 June 1999), <https://www.admin.ch/opc/fr/classified-compilation/19994648/index.html> (accessed 15 June 2020).

diplomats took a long time to find compromise solutions. They were not based on a pre-established model and were not intended as long term solutions. Throughout this period, the negotiations were jeopardized on several occasions by popular votes on land transport sector (road and rail). But the negotiations were finally successfully completed and 67.2% of Swiss citizens voted in favour of the agreement in a referendum in May 2000.

This percentage of favourable votes, which may seem surprisingly high today, can be explained by the combination of two factors. First, the SPP had not opposed this agreement, although it provided for the free movement of EU nationals. Secondly, the Socialist Party and the trade unions successfully negotiated compensation measures, called flanking (or accompanying) measures to verify compliance with minimum working and wage standards to reduce the risk of wage dumping.

The second period was characterized by the consolidation and extension of the bilateral way. It started in 2002 with the effective implementation of the BA1 set of agreements and the signing of a series of new bilateral agreements, BA2. The main one pertains to Switzerland's participation in the Schengen Area and the Dublin system. This phase was also punctuated by several referendums on the abolition of free movement of persons, in which the majority of voters rejected the abolition.

The third period is marked by fragility and uncertainty. It began in 2014 with the success of the popular initiative, launched by the SPP, against 'mass immigration', which threatened the bilateral agreement package as a whole. At present, relations between the EU and Switzerland are therefore at a dead-end precisely because of the two issues examined in this article.

2 THE INSTITUTIONAL AGREEMENT (2018)⁷

In general terms, this agreement stems from the European Union's desire to modify its relations with Switzerland.⁸ Indeed, the former considers that the bilateral agreements are inadequate because they give Switzerland too many

⁷ Federal Department of Foreign Affairs, *Accord facilitant les relations bilatérales entre l'Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe*, [Agreement facilitating bilateral relations between the European Union and the Swiss Confederation in those parts of the internal market in which Switzerland participates], (Berne, 23 Nov. 2018). There is no English translation, https://www.dfae.admin.ch/dam/dea/fr/documents/abkommen/Accord-inst-Projet-de-texte_fr.pdf (accessed 15 June 2020).

⁸ In fact, this project was originally of Swiss origin and was only intended to consolidate the bilateral path. However, in the course of the negotiations, the European Union changed its nature and transformed it towards more institutional integration of Switzerland into the EU system. See F. Müller, *Kleine Geschichte des Rahmenabkommens* (Zurich NZZ Libro 2020).

opportunities to depart from European law and to undermine the homogeneity of the Internal Market.

Switzerland's response to EU pressure has been mixed. The Federal Council would have preferred to maintain the existing mechanism. Any shift towards a more supranational solution, which would give more powers to European institutions, would be met with serious resistance within the country. As a result, the Swiss government has, for years, pursued a policy of procrastination in an attempt to buy as much time as possible.

It is important to note in order to understand the Swiss position on this issue that the bilateral and sectoral agreements governing relations between Berne and Brussels are relatively unburdensome. Except for the Schengen and air transport agreements, they do not require the Confederation to adopt the developments of the 'EU acquis' relevant to those bilateral agreements. Nor do they confer upon a supranational institution such as the European Commission, the power to verify that Switzerland is applying European law correctly. They do not oblige Switzerland to follow the jurisprudence of the Court of Justice of the EU (CJEU), although, in practice, it increasingly refers to it. Finally, there is no mechanism for a judicial dispute settlement; there are only political mechanisms which involve senior officials of both parties in joint committees.

Finally, on 6 December 2018, after ten years of discussions, five years of effective negotiations and thirty-two rounds of meetings, the text of an 'Agreement facilitating bilateral relations between the EU and Switzerland' (Institutional agreement) was published. But in an extraordinary turn of events, it was not endorsed by the Federal Council, which did not initial it. To buy time, the Swiss government has undertaken a broad consultation with political parties, governments of the twenty-six cantons and interest groups to find out their position. This resulted in fifty-four often very detailed reports⁹ and ... even more confusion. To buy yet more time, the Federal Council has asked the EU for concessions¹⁰ that, Brussels, so far, does not want to make.¹¹ The President of the European Commission, Jean-Claude Juncker, clearly indicated that he could just provide some additional clarifications, but that 'the agreement will not be

⁹ These fifty-four reports can be consulted on, <https://www.eda.admin.ch/dea/en/home/verhandlungen-offene-themen/verhandlungen/institutionelles-abkommen/institutionelles-abkommen-stellungnahmen.html> (accessed 15 June 2020) A twenty-page synthesis is also available: Bundesrat, Bericht über die Konsultationen zum institutionellen Abkommen zwischen der Schweiz und der Europäischen Union, [Report on the Consultations on the Institutional Agreement between Switzerland and the European Union], (7 June 2019).

¹⁰ Federal Council, *Letter from the Federal Council to the President of the European Commission*, (7 June 2019), https://www.dfae.admin.ch/dam/dea/fr/documents/bericht_konsultationen_insta/20190607_Lettre-CF-President-Commission-europeenne_fr.pdf#_blank (accessed 15 June 2020).

¹¹ European Commission, *Letter from the President of the European Commission to the Federal Council*, (11 June 2019) (unpublished).

renegotiated'.¹² An internal letter from Commissioner Johannes Hahn to Jean-Claude Juncker is even more direct in its refusal to grant any concessions to Switzerland and reflects a certain exasperation with the Federal Council's procrastination.¹³

2.1 THE MAIN COMPONENTS OF THE DRAFT INSTITUTIONAL AGREEMENT

The scope of the agreement is for the time being limited to five areas: the free movement of persons, land transport, air transport, technical trade barriers, and agriculture. Future agreements in other fields, such as electricity, for example, could be later included.

As regards Switzerland's implementation of these agreements, the EU wanted it to be monitored by a supranational authority, such as the European Commission, the EFTA Surveillance Authority or by a new monitoring mechanism. But the Confederation opposed the proposal. In the final compromise text (Articles 6 and 7) Switzerland remains alone responsible for the correct implementation of the agreements on its territory (two-pillar model). But the Commission can now monitor Switzerland's proper implementation of the agreements and can initiate a dispute settlement procedure in the event of suspected non-compliance.¹⁴

2.2 DISPUTE SETTLEMENT

The main difficulty was related to the settlement of disputes (Article 10 and Protocol 3). Currently, in the event of a disagreement arising between the EU and Switzerland, the matter is brought before the Joint Committees comprising diplomats from the European Commission and from Switzerland. If they cannot agree, there is no legal mechanism in place to compel them to reach a solution. Switzerland would have liked to keep the status quo, but the EU has demanded that the Court of Justice of the European Union (CJEU) be the final and binding arbitrator on disputes, to avoid deception on the part of Swiss actors.

At first sight, the compromise proposal set out in the draft Institutional agreement seems to favour the Swiss side, which has obtained the possibility to establish an Arbitral Tribunal, which occupies an important place in the text. The

¹² *Ibid.*

¹³ J. Hahn, *Letter to the President of European Commission*, (17 June 2019). (Not officially published, but on the website of AUNS), https://asin.ch/content/uploads/2019/06/EU_Kommissar-Johannes-Hahn_Originalbrief-4.pdf (accessed 15 June 2020).

¹⁴ Federal Department of Foreign Affairs, *supra* n. 7, Art. 7.3. 'The European Commission and the competent Swiss authorities respectively monitor the implementation of the agreements concerned by the other contracting party. The procedure laid down in Art. 10 for difficulties of interpretation or application applies'. (My translation, R.S.).

tribunal would be composed of an equal number of arbitrators appointed by Switzerland and the EU. The resulting mechanism would thus be characterized by impartiality. But in practice, if the dispute concerns the interpretation or application of EU law, which is almost always the case, the Arbitral Tribunal will have to refer the matter to the CJEU. And the latter's ruling shall be binding on the Arbitral Tribunal and the parties!

The SPP argument mostly revolves around the 'foreign judges' – those in the CJEU – who would have the authority to issue decisions that are binding on Switzerland. And they denigrate the powers of the Arbitral Tribunal, which they see as a sham tribunal.

It should be noted that this issue has been the subject of much debate among legal experts.¹⁵ Opponents to the Institutional treaty have seen it as evidence that the Arbitral Tribunal would have almost no independence from the CJEU,¹⁶ whereas those among experts who are more favourable to European integration tend to place emphasis on the broad leeway given to the Tribunal.¹⁷

Note finally that, if Switzerland decided to not implement a decision made by the Arbitral Tribunal under guidance from the CJEU, or if the EU considered that the measures implemented by Switzerland contravene the ruling, the EU would be entitled to impose compensatory measures (retaliatory action). However, the Confederation has been able to ensure that any compensatory measure implemented by the EU must conform with the principle of proportionality. Should opinions differ on the subject, an Arbitral Tribunal may then examine the proportionality of these measures at Switzerland's request.

2.3 ADJUSTMENT TO DEVELOPMENTS IN EU LAW

The EU wanted Switzerland to commit to almost automatically adjusting to developments in EU law, in areas relevant to the bilateral agreements, failing which legal discrepancies, and, therefore, obstacles to trade would arise too often.

¹⁵ Some of them were heard by the Foreign Affairs Committees of the National Council (Lower House): *Institutionelles Abkommen Schweiz EU. Öffentliche Anhörung der APK-N*, To watch the hearings, <https://www.youtube.com/watch?v=LODKvWROkxU> (accessed 15 June 2020).

¹⁶ C. Baudenbacher, *Rechtsgutachten zur Streitentscheidungsregelung des InstA zu Handen der Kommission des Nationalrates für Wirtschaft und Abgaben WAK*, St Gallen (6 Feb. 2019); P. Widmer, *Die Schweiz darf den EU-Rahmenvertrag nicht unterzeichnen*, *Neue Zürcher Zeitung* (5 Jan. 2019).

¹⁷ C. Tobler & J. Beglinger, *Brevier zum institutionellen Abkommen Schweiz – EU*, (12 Oct. 2018), http://www.eur-charts.eu/wp-content/uploads/2018/10/Tobler-Beglinger-Brevier-Institutionelles-Abkommen_2018-10.1.pdf (accessed 15 June 2020); A. Epiney & S. Affolter, *Das Institutionelle Abkommen und die Unionsbürgerrichtlinie*, *Jusletter* (11 Mar. 2019); M. Oesch, *Switzerland-EU Bilateral Agreements, the Incorporation of EU Law and the Continuous Erosion of Democratic Rights*, *Y.B. Eur. L.* ye005 (23 Aug. 2019), <https://doi.org/10.1093/yel/yez005> (accessed 15 June 2020).

However, the Federal Council would have preferred to keep the current status quo, in which the Confederation has not yet engaged in adjusting to developments in the 'EU acquis' relevant to the bilateral agreements (except for Schengen and air transport). In practice, Switzerland almost always implements EU law but its decision to do so is made independently.

The compromise reached consists of a dynamic adoption approach. Thus, both the static model wanted by Berne and the automatism advocated by Brussels are ruled out. The advantage of the notion of 'dynamic' over that of 'automatic' is that Switzerland can decide on each legal development in accordance with the decision-making procedures established by its Constitution. Thus, the right to hold a referendum is respected. However, if Switzerland is unable to implement one development in EU law, the EU may initiate dispute settlement proceedings which would not leave Switzerland much room for manoeuvre (see above: Dispute settlement).

It should be noted that the EU has granted Switzerland one of its old demands, namely to participate in comitology processes and to be systematically consulted in shaping developments of relevant EU law and thus to be able to present its concerns early on in the process ('decision shaping'). The Confederation was thus granted the same status as Norway, Iceland, and Liechtenstein in the EEA.

However a few concrete issues emerged during the negotiations that illustrate the difficulties that Switzerland would face if it were to adopt a dynamic adoption approach to EU law developments. These issues pertain to (1) posted workers, (2) the revision of the Regulation on the coordination of social security systems, (3) The directive on the protection of rights of EU citizens.

2.3[a] *Posted Workers*

The EU considers some of Switzerland's flanking measures to be discriminatory towards EU citizens. With this in mind, Protocol 1 of the draft Institutional Agreement requires that Switzerland adopt EU Enforcement Directive 2014/67 and the amended directive 2018/957 concerning the posting of workers.

This poses two main problems for Swiss trade unions and left-wing parties. First, Switzerland currently applies a rule, in some specific sectors, whereby EU companies must provide notification at least eight days prior to posting workers to Switzerland. But the EU wished to remove this restriction, which it considers contrary to its law, and discriminatory for its workers. Finally, a compromise was reached and a four-day rule was agreed upon. But this still does not satisfy the 'Swiss left'.

Secondly, Switzerland currently requires a financial deposit from companies posting workers to Switzerland to ensure that they pay all the social security costs for their posted employees. But the EU considers that this, too, is discriminatory, and therefore contrary to EU law. Indeed, this condition is not required of Swiss companies. In the end, an agreement was reached. Switzerland waives this guarantee requirement, but a financial guarantee may nevertheless be requested from European economic operators who have already been convicted for failing to meet their financial obligations. Once again, this is deemed unsatisfactory by the trade unions and the Socialist Party.

2.3[b] *The Revision of the Regulation on the Coordination of Social Security Systems*

The EU is currently further revising Regulation No 883/2004 on the coordination of social security systems. A key issue concerns the change of responsibility for paying unemployment benefits to cross-border workers. In practice, it is currently the country of residence (e. g. Italy) that pays benefits to a cross-border worker who has lost his previous job in the Canton of Ticino. It is envisaged that in future the state of employment (e. g. Switzerland) should pay such unemployment benefits.

The revision process is still ongoing; This is why the revision of the regulation is not mentioned in the Institutional agreement. But this revision might pose a difficulty for Switzerland and be a new example of why the dynamic adoption approach is problematic for the Confederation. Indeed, any dispute concerning Switzerland's future adoption of amended Regulation 883/2004 would have to be settled under the dispute settlement mechanism. Here it is not only the SSP, but also some employers' organizations and the right wing of the liberal Party (Free Democratic Party) who take a negative view of such a provision, which might impose a high cost on the federal budget.

2.3[c] *The Directive for the Protection of EU Citizens' Rights*

At present, Switzerland does not fully apply this Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within Switzerland. For Brussels, this directive constitutes a further development of the agreement on the free movement of persons and must, therefore, be applied by Switzerland; this is contested by Berne.

From a material point of view, this poses several concerns to the Swiss conservative sectors, related in particular to the extension of social protection rights of EU nationals, the extension of their protection against expulsion, as

well as their right of permanent residence for those have stayed in Switzerland for five years.

In the draft Institutional agreement, the EU waived the requirement that Switzerland explicitly commit to adopting the directive in question within a specified period. But some fear that Brussels might soon bring up the issue again. In this case, too, should a disagreement arise with the EU as to Switzerland's adoption of this Directive, the dispute settlement mechanism provided for under the Institutional agreement would apply. This explains the concerns expressed by some, both within the ranks of the SPP and in part of the traditional right.

In sum, four main reasons explain the lack of enthusiasm of the Swiss government for this draft Institutional agreement.

First, the Swiss negotiators have had to make concessions and to shift the red lines drawn initially by the Federal Council, for instance on the role of the CJEU.

Secondly, the SPP has already announced that, should the text of the agreement finally be approved by a majority in both houses of parliament, it will demand that the text be submitted to a referendum. And indeed, the SPP will have no difficulty collecting the 50,000 signatures required to force the government to submit the issue to a popular vote.

Thirdly, the Socialist Party strongly opposes parts of the agreement on flanking measures which it believes would have a weakening effect on the social protection system in Switzerland.

Finally, the centrist and right-wing liberal parties hesitate to officially endorse the Institutional agreement. But in any case, they have only three out of seven representatives in government, namely two Liberal-radicals and one Christian Democrat. They are also a minority in the National Council, i.e. the lower house of parliament.

3 POPULAR INITIATIVE AGAINST THE AGREEMENT WITH THE EU ON THE FREE CHOICE OF RESIDENCE (2020)¹⁸

On 27 September 2020, the Swiss people will be asked to vote on the popular initiative 'For moderate immigration' (limitation initiative). The reason for this new initiative is related to the frustrations of the SPP, which considers that the outcome of its 2014 popular initiative entitled 'Against mass immigration',¹⁹ has not really been implemented, even though it was approved by 50.3% of Swiss voters and, has now been added to the Federal Constitution (Article 121a).

¹⁸ Popular initiative 'for moderate immigration' (limitation initiative), <https://www.bk.admin.ch/ch/f/pore/vi/vis483.html> (accessed 15 June 2020).

¹⁹ Popular initiative 'Against mass migration'. As it was approved, it was added to Art. 121a of the federal constitution, <https://www.bk.admin.ch/ch/f/pore/vi/vis413t.html> (accessed 15 June 2020).

3.1 THE SPP 2014 INITIATIVE APPROVED BY THE PEOPLE HAS NOT BEEN IMPLEMENTED

It will be recalled that the 2014 initiative requires the Confederation to limit the number of residence permits awarded to foreigners, by means of annual quotas and to introduce the principle of national preference. The SPP craftily led the people to believe that the text of the initiative only targeted non-European foreigners, whereas, in fact, it could only be relevant to EU (and EFTA) citizens since they were the only foreigners who were not already subject to quotas and the national preference principle.

The approval of this initiative by the voters had caused a drama in Switzerland because no one had a solution to overcome an insurmountable contradiction.²⁰ Indeed, on the one hand, Switzerland could not impose quotas on immigrants and a national preference rule on nationals of EU countries since the Agreement on the free movement of persons formally prohibits it. But, on the other hand, the new Article 121a in the Federal Constitution had to be applied and to impose quotas on immigrants and a national preference rule on nationals of EU countries.

Tension reached a new peak when the EU imposed sanctions restricting Swiss universities' participation in European scientific research programmes, following the Federal Council's refusal to grant free movement of persons to Croats, in accordance, precisely, with this new constitutional article.

Dozens of compromise solutions were then envisaged and negotiations were also conducted in an attempt to convince the EU to soften its position, but the latter refused to budge, even slightly, on the principle of the free movement of persons.

Finally, the Federal Council and Parliament resolved to adopt legislation, in 2016, for implementing this new Article 121a of the Constitution.²¹ But this legislation is, in fact, nothing more than window dressing in that it is not really enforced. Indeed, the measures introduced do not set any immigration quotas nor do they enforce the principle of national preference. They only stipulate that, employers looking for employees are required to look first at the profiles of job seekers residing in Switzerland, but without being forced to hire them.²²

²⁰ A popular initiative to vote again in order to scrap the Art. 121a out of the Constitution was significantly called 'Out of the Dead End' [Raus aus der Sackgasse]. It had even collected more than the required 100'000 signatures, <https://www.bk.admin.ch/ch/d/pore/vi/vis458.html> (accessed 15 June 2020).

²¹ Implementation of Art. 121a of the Swiss Federal Constitution: The Federal Council passes the amendments to ordinances, https://www.ejpd.admin.ch/ejpd/fr/home/aktuell/news/2017/2017-12-081.html#_blank (accessed 15 June 2020).

²² The European Union reacted discreetly to this outcome by simply indicating that it could live with this solution and did not criticize it.

It should be noted that Swiss diplomats had secretly informed their EU counterparts of the Swiss parliament's proposal in order to ensure that their reaction was not overly positive, which would have

Moreover, this is only applied in the event of high unemployment in certain sectors or regions.

3.2 THE NEW SPP 2020 INITIATIVE AGAINST THE FREEDOM OF MOVEMENT OF EU NATIONALS

It is therefore not surprising that the SPP viewed this so-called application legislation as a betrayal of the 2014 popular vote and of Article 121a of the Constitution. That is why this party has resumed its offensive by launching a new initiative, this time entitled 'For moderate immigration'. But unlike the previous text, it explicitly calls for a prompt termination of the agreement on the free movement of persons with the EU.

Should this new SPP initiative be approved by Swiss voters in September 2020, a new Article 121b would be inserted in the Federal Constitution.²³ The article stipulates that no new international treaty providing for the free movement of foreign nationals may be concluded with Switzerland. And the text specifies that the Confederation must negotiate with the EU toward terminating the current agreement on the free movement of persons within twelve months following the approval by the people and the cantons of a new constitutional article (Article 197, 12). If this objective cannot be achieved, the government will have to terminate the agreement with the EU within thirty days.

According to the SPP, the free movement of persons has a negative impact on Switzerland. Since the agreement with the EU came into force, the resident population has increased by more than one million people: As of late 2019, Switzerland's population reached almost 8.5 million inhabitants, 25.1% of whom were foreigners. For the SPP, Switzerland does not have the capacity to absorb such an influx of people. Moreover, the number of cross-border commuters is constantly on the rise: more than 320,000 European workers cross the border daily to work in Switzerland. The SPP believes that a termination of the agreement on the free movement of persons would not prompt the EU to revoke all bilateral agreements because it has an interest in maintaining the other agreements, Switzerland representing its third-largest export market after the United States and China.

For the Federal Council and all the other parties (liberal right, centre, left and greens), the SPP project would jeopardize relations with the EU, Switzerland's main economic partner. They believe that the free movement of persons is of

given ammunition to the SPP for denouncing Brussels' connivance, (Personal interview with a Swiss diplomat, Geneva, 12 Apr. 2019).

²³ Popular initiative 'for moderate immigration', *supra* n. 18.

crucial importance for Switzerland. It allows employers to recruit specialized skilled labour from European countries quickly, flexibly and without undue administrative burden. This situation strengthens the competitiveness of the local economy and guarantees full employment. The abolition of the free movement of persons agreement would, therefore, have serious negative consequences: not only for the Swiss economy but also for the scientific research sector.

They point out that, since the agreement came into force, immigration has not caused a rise in the unemployment rate – one of the lowest in Europe – or in the rate of social benefits claims. According to several studies, if the bilateral agreements I were cancelled, the Gross Domestic Product would decrease by 5 to 7% over the next twenty years.²⁴

This limitation initiative is not expected to gain majority support among Swiss citizens since the SPP attracts support from only 25% of voters in federal elections and all other political, economic, trade union and intellectual forces are firmly opposed to it. But the SPP's victory in the 2014 popular initiative shows that this forecast could prove wrong. Furthermore, the controversies surrounding the flanking measures and the EU Citizenship Directive, which have characterized the debate on the Institutional agreement, have significantly muddled the pro-European message, particularly among socialists and trade unionists, as well as conservative employers.

In conclusion, one cannot exclude the possibility that the new popular initiative launched by the SPP might be adopted. This would mean the end not only of freedom of movement of persons but also of the bilateral approach as a whole, because of a 'guillotine clause' according to which, it should be recalled, all the agreements in the first package are bound together (denunciation clause, Article 22). It would also jeopardize Switzerland's participation in the Schengen Area and the Dublin mechanism, as the European Commission has repeatedly stated.

4 A BILATERAL WAY IN A FRAGILIZED POSITION

4.1 CHANGES IN SWISS POLITICAL FORCES

The bilateral way between the European Union and Switzerland is currently under threat. This is primarily due to changes in political forces in Switzerland. Indeed, nowadays, unlike in the 1990s and 2000s, only two parties (Liberals and Christian Democrats) are ready for compromises with the EU. But they represent only a

²⁴ BAK, *Die mittel- und langfristigen Auswirkungen der Bilateralen I auf die schweizerische Volkswirtschaft*, (Basel 2015); Ecoplan, *Volkswirtschaftliche Auswirkungen eines Wegfalls der Bilateralen I*, (Berne 2015).

minority within the Federal Council.²⁵ The majority of the government is composed of the SPP and of the Socialist Party.

SPP remains the country's main political force and won the highest number of votes in the October 2019 elections for the lower house (over 25.6%). It has two representatives in the seven-seat government who openly support the anti-EU position of their party. What is most astonishing is that it no longer surprises anyone that two cabinet-members automatically disagree with the other members. In no other state on the planet would this be so unremarkable.

The novelty concerns the Socialist Party, which also heads two government departments. Indeed, its current attempt to square the circle is out of the ordinary. Thus, on the one hand, the Socialist Party opposes this Institutional agreement because it implies adopting EU legislation of social protection, which in its view, prioritizes free trade at the expense of workers' protection. But, on the other hand, the Socialist Party continues to advocate Switzerland's accession to the European Union, which obviously requires that the Confederation adopt all EU legislation, without discussion.

The question is whether this Socialist behaviour is simply a tactical manoeuvre to obtain more concessions in matters of protection for workers. It should be recalled that that is exactly what the Socialist Party did throughout the process of ratification of Bilateral Agreements I and II. And everyone agrees that it had succeeded in obtaining concessions, in the form of so-called 'flanking measures' from the right-wing parties and employers.²⁶

Similarly, concessions from conservative and business circles should suffice to move the Socialist Party back towards a compromise solution. This could consist of approving the key elements of the propositions made by the *Foraus* think tank.²⁷ These are already applied in the canton of Geneva to the satisfaction of both the

²⁵ There is a 'magic formula' for dividing the seven seats of the Federal Council. The formula gives the Swiss People's Party, the Socialist Party and the Free Democratic Party (Liberals) each two seats and the Christian Democratic People's Party receives one seat. After the success in the Oct. 2019 federal elections for the lower House of the Green Party (13.2% of the vote) and the Liberal Green Party (7.8%), the discussion began to allow a representative of one of those environmental parties to sit on the Federal Council. But neither the Free Democratic Party (15.1%) nor the Socialist Party (16.8%) who are overrepresented in the government want to give up their second seat.

²⁶ The Green Party has not played a significant role in all the controversies on the European issue. Its position is generally close to that of the Socialist Party, although more discreet. This party is in principle in favour of Switzerland's eventual accession to the European Union. But it fears that EU legislation may encourage wage dumping. It should be noted that the centrist Liberal Green Party is the only party i.e. fully in favour of the Institutional agreement with the EU and, without conditions. It is interesting to highlight the paradox that the only party i.e. in favour of the agreement negotiated by the Swiss government is a party i.e. not part of it. While the governmental parties are all opposed or reluctant to the Institutional agreement.

²⁷ Foraus, *Mesures d'accompagnement et accord institutionnel: 10 propositions pour construire un consensus interne en vue d'un accord institutionnel*, (Mar. 2019), https://www.foraus.ch/wp-content/uploads/2019/03/FlaM_versionWEB.pdf (accessed 15 June 2020).

left and the right. They make it possible to tighten workplace inspections while involving trade unions and employers. They compensate for the negative effects of the removal of the security deposit requirement and of the shortening of the notice period required of employers before posting workers to Switzerland.

But the opposition currently expressed by the Socialist Party may be more fundamental than tactical. In other words, it may be indicative of a profound ideological shift within a Party that is driven by the fear of becoming obsolete. Is it afraid of experiencing the same decline as the parties from the same political family in France and Italy, as well as, to a lesser extent, in Germany and Austria.

As for the other parties that traditionally support the bilateral approach, they naturally have little inclination to give in to 'blackmail' from the left. Even more alarming, some employer circles in German-speaking Switzerland and the right-wing of the Free Democratic Party (liberal) seem prepared to refuse the Institutional agreement because it implies having to adopt the Citizens' Rights Directive.

4.2 A RELATIVE INFLEXIBILITY ON THE PART OF THE EU

The bilateral approach is also undermined by the intensifying pressure from the EU. Brussels wants to prevent Switzerland from following different rules than those adopted by their other non-EU European partners (level playing field). These considerations have led the EU to impose an Institutional agreement, which reinforces the satelization of Switzerland, particularly in connection with the binding nature of the European Court of Justice's rulings in dispute settlement proceedings.

Three main reasons explain Brussels' increasingly rigid stance.

First, the EU realized that the Institutional dimension of the agreements brokered in the 1990s was too favourable to Switzerland, perhaps because at the time they were intended as a temporary solution, and not as a permanent arrangement.²⁸

Secondly, several Swiss economic policies were considered improper, discriminatory or even deceitful by Brussels.

Thirdly, because any show of pliability towards Switzerland could have been used as precedents by third countries that have also embarked on a bilateral path with the EU: Eastern Partnership countries (Ukraine, Georgia, Moldova). This

²⁸ However, the claim that the European negotiators were generous with Switzerland because they anticipated that it would eventually join the EU anyway is a legend. This myth was disassembled piece by piece in a doctoral thesis by C. Najy, *The EU in the Negotiations of the Bilateral Agreements I with Switzerland (1992–1999)* 24 (Geneva, University of Geneva Aug. 2019).

applies especially to the United Kingdom and its negotiations for Brexit, which have led Brussels to adopt an uncompromising position.²⁹

Is the EU's position too inflexible? This criticism has often been levelled, particularly with regards to the Brexit negotiations.³⁰ Two reasons are generally given to explain its intransigence.

First of all, the EU has become more uncompromising because it feels it is in a stronger position than it was a few years ago. In the 1990s, the Union consisted of only twelve Member States and had competence only in essentially commercial areas. But today, however, the EU would feel more in a position of strength as a result of the larger number of its members and its increased power in a growing number of areas. This would explain its current hegemonic tendencies.

The second interpretation is its exact opposite. It is assumed that it is the fragility of the EU and its state of systemic crisis that explain its current intolerance. Like a lion wounded by all its difficulties, it feels tenser than if it were in a more serene situation.

However, a thorough examination of the Institutional agreement tends to invalidate the notion that the EU has become particularly uncompromising. For example, it does not demand more of Switzerland than it did in the early 1990s during the negotiations on the European Economic Area. Indeed, the 1992 Porto agreement already provided that Switzerland, like the other EFTA countries, should dynamically adopt relevant EU law developments and that in the event of a dispute arising over the interpretation of EU law, the arbitration panel must refer the case to the Court of Justice of the European Union, whose ruling on the matter is binding on that panel.

Moreover, in the EEA agreement, the monitoring of the application of Community law in the EFTA/EEA countries is tighter and more stringent than it is in the Institutional agreement negotiated in 2018. Indeed, the EEA set up a

²⁹ This is explicitly acknowledged by the Commissioner Johannes Hahn in his personal letter to the President of the Commission Jean-Claude Juncker: 'We simply cannot accept further attempts of foot-dragging and *watering down internal market* [my emphasis], especially in what is probably the decisive phase regarding Brexit'. Hahn, *supra* n. 13.

³⁰ In comparative perspective, the Swiss model could constitute an interesting reference point for the United Kingdom. On this, *see* for instance, my hearing in the exiting the EU Committee of the House of Commons; R. Schwok, *Brexit, Swiss 'Model', Pros and Cons in Comparative Perspective* House of Commons, exiting the EU committee, (London Feb. 2018), <https://www.parliament.uk/business/committees/committees-a-z/commons-select/exiting-the-european-union-committee/news-parliament-2017/eu-withdrawal-government-response-special-report-published-17-19> (accessed 15 June 2020). As we finalize the writing of our chapter (May 2020), we must note that the Swiss model is not the path i.e. favoured by the government led by Boris Johnson. On reading his negotiating mandate, it appears that his ambition is solely a free trade agreement which would be limited to the abolition of customs duties, but which would not affect the removal of non-tariff barriers. This would be quite similar to the agreement that Switzerland had concluded with the European Economic Community in 1972 (in the context of the United Kingdom's departure from EFTA to join the Community ...).

supranational Surveillance body, which admittedly is composed exclusively of nationals of EFTA countries, but which rigorously and thoroughly monitors compliance with the provisions of the EEA agreement. Whereas in the new Institutional agreement between Switzerland and the EU, the monitoring is conducted exclusively by Swiss officials.

In EU agreements with Eastern Europe neighbouring countries, the latter are subject to much tighter control by the European Commission than Switzerland would be.³¹ Indeed, the Commission can at any time publish critical reports and lists of areas needing improvement, to ensure that Ukrainian, Moldovan and Georgian legislation is in line with EU law and that it is applied in conformity with Community law.

5 RESILIENCE OF THE BILATERAL APPROACH

Despite uncertainties, some factors contribute to reducing pessimism.

First, one cannot rule out that the Swiss left might reverse its opposition to the Institutional agreement if it obtained some compensation in the form of improvements in the flanking measures and of social guarantees in other areas. Centre-right parties could, for their part, reinforce their commitment to support the Institutional agreement once the 2020 initiative of the SPP has been put to a national vote and defeated.

Secondly, the Swiss have always demonstrated a strong sense of compromise. Many actors in various circles are aware that colliding head-on with the EU could lead to a serious crisis with its main neighbour. In this respect, the EU's non-recognition of the equivalence of Swiss stock exchange regulation has acted as a warning shot.³²

Failure to reach common ground with the Union could also lead to a breakdown in negotiations on issues such as electricity, public health, and food safety. This would lead to the additional risk of failing to reach an agreement on Switzerland's participation in the EU's next research Framework Programme from 2021, as well as on many other areas. This could also undermine the agreements on technical trade barriers and on mutual recognition in relation to conformity assessment – (MRA).³³ For example, the next update of the MRA will

³¹ G. Van de Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area* (Brill Nijhoff 2016).

³² Since July 2019, investment firms based in the EU are no longer allowed to trade on the Swiss stock exchange. The arrangement, known as 'equivalence', which previously allowed them to do that lapsed at the end of June 2019 and the European Commission has decided not to renew it. In response to the EU's move, Switzerland has banned the trading of Swiss shares on EU markets.

³³ A Mutual Recognition Agreement (MRA) is an international agreement whereby two or more countries commit to mutually recognize each other's conformity assessment results (e.g. test results or certifications). To this end, countries participating in the agreement may designate conformity assessment bodies.

include medical products. In Switzerland, this sector represents about 14,000 companies and over 58,000 jobs, 2.3% of the GDP and 4% of its export volume.

Finally, it is difficult to imagine that the bilateral approach might end because no alternative seems realistic. Indeed, according to consistent opinion polls, no more than 10% of Swiss people are in favour of EU membership. And an association with the EEA would also get little support and would raise a risk of satellization similar to that which is inherent in the Institutional agreement.

