

Negotiating Single Market access with the EU: institutional lessons from Switzerland



Switzerland is in the midst of negotiating an institutional framework for some of its more important bilateral agreements with the EU. **Laura Knöpfel (King's College London)** and **Cenni Najy (University of Geneva)** look at what institutional lessons can be learned for the UK as it tries to leave the EU while remaining partly in the Single Market.

Chapter 4 of the Chequers [policy paper](#) proposes the conclusion of several bilateral agreements with the EU. After the UK's departure from the union, those agreements should allow the UK to retain some access to the Single Market, mainly for goods. The paper envisages the creation of a horizontal institutional arrangement that would cover the majority of the post-Brexit agreements. It also foresees that disputes about the interpretation of a provision of a common rulebook might arise. In such cases, the UK concedes that the Court of Justice of the European Union (CJEU) should play a role in the settlement of disputes.



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The UK is not the only third country that is currently deliberating a horizontal institutional framework to embed bilateral relationships. For more than four years, [the EU](#) has been negotiating the institutional dimension for some of its existing sectoral agreements with Switzerland. [The institutional dimension](#) should include a legally binding dispute settlement mechanism.

Admittedly, the Swiss and British situations differ on a very fundamental level. Whilst one country is seeking a closer relationship with the EU the other one is trying to leave it in an orderly fashion. Nevertheless, the Swiss experience might offer some valuable insights. Indeed, both countries seek continued access to the Single Market whilst positioning themselves outside of the EU.

[Only in 2008](#) and almost ten years after the conclusion of the [first set of sectoral agreements \(Bilaterals I\)](#), the “institutional question” between Switzerland and the EU emerged. [For the European Council](#), the loose institutional setting of these agreements had hampered the development of legal homogeneity within the Internal Market. Initially, [the Swiss were sceptical](#). [The country has been compliant with its obligations and disputes were few](#). Moreover, the Swiss government feared a loss of sovereignty through, for example, an increased role for the CJEU. Yet it began to address the issue – not voluntarily, but because [the EU had decided not to conclude any new market access agreements without an institutional arrangement](#).

Since May 2014, [Switzerland and the EU have been negotiating an institutional agreement](#) which should cover some, but by no means all, of the 120 bilateral treaties currently in force between the parties. [The negotiations have been long and frustrating. One reason for the difficulty has been the inability of the parties to agree on a new dispute settlement mechanism.](#) To date, [agreement-specific Joint Committees](#) – diplomatic bodies – have had the exclusive competence of resolving disputes. Disagreements occurred and the issues that had been raised in front of the Joint Committees could in the vast majority of cases be resolved through low-key back-channel diplomatic negotiations. But the EU has made clear that it intends to relocate the resolution of disagreements from the diplomatic into the legal sphere. For Switzerland, it was out of the question that a judicial body of the EU could be the only competent body to decide on a dispute.

In late 2017, [both parties expressed their willingness to find a compromise in the form of an arbitration panel.](#) The panel would be ad-hoc and the arbitrators' competences far-reaching. However, the compromise did not settle the issue. The EU accepted an arbitration solution [provided that the CJEU would be competent to issue an interpretative ruling on disputed provisions that contain EU law.](#) Considering the [bilateral treaties entanglements with EU law,](#) Switzerland has disagreed. [But the Swiss government conceded that the CJEU might be asked to interpret disputed treaty provisions which contain core EU law.](#) Provisions that are not defined in relation to EU law would be interpreted by the arbitration panel, bindingly and solely. Currently, Switzerland and the EU are trying to find common ground on what ought to be considered as EU law.

In a [recent policy brief for the Swiss foreign policy think tank Foraus](#), we analysed the provisions of the bilateral agreements and came to the conclusion that they could be classified into three different types: 1) treaty provisions defined by explicit reference to EU law, 2) treaty provisions that are identical in substance to EU law and 3) treaty provisions that include so-called “concepts” of EU law.

Accordingly, we proposed adjusting a binding settlement mechanism according to the degree of a provision's closeness to EU law. If a provision is defined by reference to EU law or is identical in substance, the envisaged arbitration panel must refer the dispute to the CJEU. The interpretation provided by the CJEU judges is then binding on the arbitration panel. If, however, the interpretative divergences concern a concept of EU law, an arbitration panel can – but is under no obligation to – refer the dispute to the CJEU. In both instances, the CJEU's decision is only binding upon the arbitration panel which then takes the ultimate decision on the whole dispute. Such a dispute solving mechanism represents a compromise between the Swiss and the EU positions. It is, however, not a legally neat solution. Rather, it reflects the [Swiss way of “muddling through”](#) which has characterised the country's relationship with the EU since the 1990s.

Arguably, Swiss bilateral integration is the result of peculiar circumstances and is therefore unique. Nonetheless, we believe that the Swiss experience has some value for the UK. There are at least three lessons to be learned from the late Swiss-EU institutional tale:

- Maintaining legal homogeneity within the Single Market has become a stated aim for the EU, in particular in regard to third countries that participate in the Single Market. Therefore, the conclusion of new market access agreements without an institutional agreement seems very unlikely.
- As part of an institutional framework, the EU wants to locate the resolution of disputes in the legal and not in the political or diplomatic sphere, as was previously the case with Switzerland.
- The EU might accept the appointment of an ad hoc arbitration panel to solve disputes in last instance. However, the CJEU will most likely play a significant role as the sole interpreter of disputed provisions that are closely defined in relation to EU law. It remains to be seen what provisions will be considered as EU law (and therefore having to be interpreted by the CJEU in case of dispute). The result of the Swiss-EU negotiations will be an important indicator of EU's flexibility in that regard.

This post represents the views of the authors and not those of the Brexit blog, nor the LSE.

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