

The Future Relationship between EU and UK

“Bilateral Agreements” EU – Switzerland as a Model?

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I. Introduction

In the wake of the forthcoming withdrawal of the United Kingdom from the European Union, the question arises as to the form of the relations between the (future) third country United Kingdom and the EU. One possible scenario would be that these relations were to be regulated in one or more agreement(s) between the UK and the EU. At present, only the very vague outlines of possible objectives – which would have to be agreed upon by both parties – of such agreements, have become apparent. It remains, in particular, unanswered if and if yes to what extent the UK seeks to continue to participate in the internal market or parts of it or whether it rather seeks to conclude a “simple” free trade agreement. The latter solution would, however, also provide for a number of different levels of cooperation.

The first version – which would, in the end, result in a type of soft Brexit – gives rise to complex questions. It would essentially imply that the respect of certain EU law requirements would furthermore need to be ensured, which, in turn, relates to the issues of the updating of agreements and dispute settlement. In the framework of the latter, the role of the Court of Justice of the European Union (CJEU) would also need to be clarified.

Such close interlocking with or a genuine participation in the internal market or parts of it of third states can already be observed in two cases: On the one hand, in the framework of the European Economic Area (EEA) and, on the other hand, in the case of the Bilateral Agreements between the EU and Switzerland. Since an accession of the UK to the EEA currently appears unlikely, the question arises as to whether the Bilateral Agreements Switzerland–EU could provide for a type of model for the design of the relations between the UK and the Union. The present contribution aims to present the Bilateral Agreements Switzerland–EU against this background: After an overview of the material scope of the agreements (II.), the characteristics of the latter shall be outlined (III.), before discussing the so called institutional questions which

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have been in the centre of attention these last years (IV.), and presenting, in a synthesis, the probable characteristics a “Swiss model” would entail (V.). In the form of an excursus (VI.), the issue of the relations between the UK and third countries (such as Switzerland) shall be addressed before rounding off the contribution with a short conclusion (VII.)

II. The Bilaterales: Scope

The so-called “bilateral way” was developed following the negative vote on 6 December 1992 as to the question whether Switzerland should join the EEA.¹ The main underlying idea was (or still is) to develop closer ties with the internal market, as this is regarded as being essential, in particular for Switzerland. Furthermore, a certain number of further, specific questions were integrated in the approach because the European Union and/or Switzerland were (and still are) interested in international agreements in these matters.

Thus, two packages of “Bilateral Agreements” were concluded in 1999 and in 2004, covering various areas and containing mechanisms which integrate EU law into the agreements in order to ensure compatibility between the legal situation in the European Union and Switzerland in the respective areas.²

The first package of 1999 comprises seven agreements concerning the following domains:³

- mutual recognition in relation to conformity assessment (technical barriers to trade);
- trade in agricultural products;
- scientific and technological cooperation (research);
- public procurement;
- air transport;
- land transport;
- free movement of persons.

The second package of 2004 contains agreements on the following topics:⁴

¹ The following chapter is largely based on research conducted in another context, see in particular *Astrid Epiney/Sian Affolter*, The Swiss Way: 120 Agreements but no Perspective?, in: Thomas Giegerich/Desirée C. Schmitt/Sebastian Zeitzmann (eds.), *Flexibility in the EU and Beyond: How Much Differentiation Can European Integration Bear?*, 2017, p. 197 et seq.

² See for more details on the agreements *Astrid Epiney/Beate Metz/Benedikt Pirker*, Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz: Ein Beitrag zur rechtlichen Tragweite der “Bilateralen Abkommen”, 2012, p. 95 et seq.; *Matthias Oesch*, Switzerland and the European Union: General Framework, Bilateral Agreements, Autonomous Adaptation, 2018, p. 19 et seq.; *Thomas Cottier et al.*, Die Rechtsbeziehungen der Schweiz und der Europäischen Union, 2014, p. 79 et seq.; for an overview, see *Benedikt Pirker/Astrid Epiney*, The Integration of Switzerland into the Framework of EU Law by Means of the “Bilateral Agreements”, in: Peter-Christian Müller-Graff/Ola Mestad (eds.), *The Rising Complexity of European Law*, 2014, p. 39 (40 et seq.);

³ See Decision of the Council and of the Commission 2002/309/EC as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation, OJ 2002 L 114, p. 1.

⁴ See Botschaft zur Genehmigung der bilateralen Abkommen zwischen der Schweiz und der Europäischen Union, einschliesslich der Erlasse zur Umsetzung der Abkommen (“Bilaterale II”), 1 October 2004; for the text of the agreements BBl Bundesblatt (Federal Gazette of the Swiss federal government), 2004, p. 5965.

- processed agricultural products;⁵
- participation of Switzerland in the European Environmental Agency and the European Environment Information and Observation Network;⁶
- statistics;⁷
- media;⁸
- youth and professional education;
- fraud combat;⁹
- taxation of savings income;¹⁰
- Schengen and Dublin;¹¹
- pensions.

⁵ See Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 as regards the provisions applicable to processed agricultural products, attached to Council Decision 2005/45/EC of 22 December 2004 concerning the conclusion and the provisional application of the Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 as regards the provisions applicable to processed agricultural products, OJ 2005 L 23, p. 17.

⁶ See Council Decision of 27 February 2006 on the conclusion, on behalf of the European Community, of the Agreement between the European Community and the Swiss Confederation concerning the latter's participation in the European Environment Agency and the European Environment Information and Observation Network, OJ 2006 L 90, p. 36.

⁷ See Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics, attached to Council Decision of 27 February 2006 on the conclusion of the Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics, OJ 2006 L 90, p. 1.

⁸ See Agreement between the European Community and the Swiss Confederation in the audiovisual field, establishing the terms and conditions for the participation of the Swiss Confederation in the Community programme MEDIA 2007, attached to Council Decision of 28 September 2007 concerning the signature and provisional application of an Agreement between the European Community and the Swiss Confederation in the audio-visual field, establishing the terms and conditions for the participation of the Swiss Confederation in the Community programme MEDIA 2007, and a Final Act, OJ 2007 L 303, p. 9.

⁹ See Cooperation agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests, attached to Council Decision of 18 December 2008 concerning the signature, on behalf of the European Community, of the Cooperation Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests, OJ 2009 L 46, p. 6.

¹⁰ See Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, attached to Council Decision 2004/911/EC of 2 June 2004 on the signing and conclusion of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments and the accompanying Memorandum of Understanding, OJ 2004 L 385, p. 28.

¹¹ See Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, attached to Council Decision 2008/147/EC of 28 January 2008 on the conclusion on behalf of the European Community of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 53, p. 5, and Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, attached to Council Decision 2008/149/JHA of 28 January 2008 on the conclusion on behalf of the European Union of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, OJ 2008 L 53, p. 50.

Apart from these agreements contained in the so called “Bilateral Agreements I and II”, many other more or less important agreements between the European Union (and sometimes also its Member States) and Switzerland exist, with some of them having been concluded before the mentioned Bilateral Agreements and others after the conclusion of the second package. For example, the Free Trade Agreement from 1972¹² is still of high importance and in 2009, a new Agreement on Customs Security Measures¹³ entered into force. All in all, about 120 agreements on various topics exist and there are probably only very few who truly know all these agreements in detail.

Furthermore, the European Union and Switzerland plan to conclude further agreements in a certain number of areas. Currently negotiations are ongoing regarding an agreement on electricity and an agreement on agriculture, food safety, product safety and public health.¹⁴ However, the conclusion of these agreements is, at the moment, dependent on whether a solution to the problem of the so called “institutional matters”¹⁵ is found or, in other words, whether the parties manage to conclude a so called “institutional framework agreement”. This is due to the Union’s persistent stance that there will be no future agreements granting access to the internal market as long as the institutional matters have not been resolved.¹⁶

Many and, in particular, the most important agreements of the so called “Bilaterales” foresee the integration of Switzerland into parts of the internal market respectively the EU *acquis*, which causes for a number of complex and open questions. Central to and signifying for the discussion is the tension between bedding such agreements into the framework of classic international public law, on the one hand, with them at the same time aiming at allowing a third state to participate in the EU internal market which involves the agreements “taking over” supranational EU law, on the other hand.

III. The Bilaterales: Characteristics

A. Overview

¹² See Accord entre la Communauté économique européenne et la Confédération suisse, attached to Règlement (CEE) no. 2840/72 du Conseil, du 19 décembre 1972, portant conclusion d'un accord entre la Communauté économique européenne et la Confédération suisse, arrêtant des dispositions pour son application et portant conclusion de l'accord additionnel sur la validité pour la principauté de Liechtenstein de l'accord entre la Communauté économique européenne et la Confédération suisse du 22 juillet 1972, OJ 1972 L 300, p. 189.

¹³ See Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures, attached to Council Decision 2009/556/EC of 25 June 2009 concerning the provisional application and conclusion of the Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures, OJ 2009 L 199, p. 24.

¹⁴ For an overview on current developments see the website of the Swiss Directorate for European Affairs (DEA) <<https://www.eda.admin.ch/dea/en/home/verhandlungen-offene-themen/verhandlungen.html>> (last accessed on 24 September 2018).

¹⁵ Cf. below chapter IV.

¹⁶ See, e.g., the Council conclusions on EU relations with the Swiss Confederation of 28 February 2017, 93/17.

The Bilateral Agreements present a number of common features which, however, can differ between the Bilateral Agreements I and the Bilateral Agreements II. Certain agreements can also present very specific features.¹⁷ In general,¹⁸ the Bilateral Agreements constitute classical international and thus not actual integration agreements in the sense of a genuine integration of Switzerland into the EU. This general approach can be seen, on the one hand, in the content of the agreements (which are based on the principle of the equivalence of legislation or of standards and do not foresee an actual integration into the EU *acquis*) and, on the other hand, in the institutional structure which corresponds to the “classic structure of international public law”.

In the following, the characteristics of the Bilateral Agreements cannot be presented extensively.¹⁹ Indeed, it is rather only the most central aspects which shall be illustrated.

- The agreements contained in the two packages of the Bilateral Agreements each constitute separate, self-contained treaties. At present, there is no overarching framework agreement regulating cross-sectoral issues or questions. Such an agreement is, however, currently being negotiated with regard to the institutional questions, as will be shown below.
- Despite constituting separate agreements, there are certain links or connections between the agreements. With regard to the Bilateral Agreements II, the connection is solely of political nature. Regarding the Bilateral Agreements I, however, the connection is of a legal nature. The seven agreements constitute a package insofar as that the final provisions of each agreement foresee that they can only enter into force together and that the non-renewal or termination of one agreement would lead to the other agreements also no longer being applied.²⁰
- The substantive content is, in principle, static. The often foreseen possibility of further developing the agreements’ content – in particular with regard to updating the agreements’ content in line with developments in EU law – does not change much in this regard, at least structurally, since the updating must be explicitly agreed to by both

¹⁷ The following chapter is largely based on research conducted in another context, see in particular *Epiney/Metz/Pirker* (fn. 2); *Epiney/Affolter* (fn. 1); see furthermore *Astrid Epiney*, Zur institutionellen Struktur der Bilateralen Abkommen – Bestandsaufnahme, Perspektiven und Bewertung, in: Stefan Keller/Stefan Wiprächtiger (eds.), *Recht zwischen Dogmatik und Theorie* (Festschrift Marc Amstutz), 2012, p. 35 et seq.; *Astrid Epiney*, Beziehungen Schweiz-EU: status quo und Perspektiven, in: Patrik Schellenbauer/Gerhard Schwarz (eds.), *Bilateralismus – was sonst? Eigenständigkeit trotz Abhängigkeit*, 2015, p. 25 et seq., each with further references.

¹⁸ An exception can be seen in the Agreement on Air Transport which forms part of the Bilateral Agreements I. This agreement foresees a genuine integration into the EU *acquis*, in particular regarding the competences of the Union’s institutions (cf. Art. 20 of the agreement). Furthermore, The Schengen and Dublin Association Agreements can be seen as agreements resulting in partial integration, when taking into account Switzerland’s rather extensive obligations with regard to “taking over” the relevant parts of the EU *acquis* and its development, as it will be discussed further below.

¹⁹ Cf. in this regard *Tobias Jaag/Magda Zihlmann*, Institutionen und Verfahren, in: Daniel Thürer et al., *Bilaterale Verträge I & II*, 2007, p. 65 et seq.; *Daniel Felder*, Cadre institutionnel et dispositions générales des accords bilatéraux II (sauf Schengen/Dublin), in: Christine Kaddous/Monique Jametti Greiner (eds.), *Accords bilatéraux II Suisse – UE et autres accords récents*, p. 93 et seq.

²⁰ See, e.g., Art. 25 para. 4 of the Agreement on the Free Movement of Persons.

(or all) parties. Thus, the material scope of the agreements, in principle, corresponds to EU legislation in force at the point of signature of the agreements and an update due to new developments requires the consent of the treaty parties. This may take place in the so-called joint committee where applicable.

However, this does not change the fact that it is possible to establish a link to the EU *acquis*. This can be done by using various techniques. If this link is established by the inclusion of references to EU law into the agreement or its annexes, the agreements are generally based on the principle of the equivalency of legislation. According to this principle the inclusion of references does not entail an obligation to formally create an equal legal situation. It is rather with regard to the content of the legislation applied, that the criterion of equivalency is pertinent. The Agreement on Air Transport and the Schengen and Dublin Association Agreements form an exception to this rule. Here, the EU legal acts referred to are to be implemented and applied in Switzerland,²¹ thus making Switzerland “genuinely” bound by the relevant EU legal acts.

- Furthermore, the agreements only cover certain areas. Thus, a sectoral approach is followed and – unlike the EEA – it is not about ensuring full participation in the internal market, but rather only about partial participation (even if the agreements seen together assure a participation in essential parts of the internal market and some other areas of EU law).
- With regard to the content of the agreements it can be differentiated between cooperation agreements, which focus on the cooperation of the treaty parties in certain areas or the participation of Switzerland in certain EU-programs, liberalisation- and harmonisation-agreements and, lastly, (partial) integration-agreements.
- The application and interpretation of the agreements lie, in principle, in the hands of the responsible authorities or courts of the treaty parties. This is in line with the fact that the agreements constitute treaties of classic public international law. Thus, it is up to the treaty parties to apply and interpret the agreements. However, a number of exceptions to this rule can be observed:

First, certain agreements oblige the treaty parties to create or name specific authorities or the agreement itself names the responsible authorities. This is the case, e.g., for the Agreement on the Environment with regard to setting up the network EIONET,²² for the Agreement on the Taxation of Savings Income,²³ or for the Agreement on Public Procurement which contains an obligation to create a specific surveillance authority.²⁴ The autonomy of the treaty parties with regard to the manner in which the agreements are implemented is thus reduced. This is, however, only of organisational nature.

²¹ Cf. the wording in Art. 2 para. 2 Schengen Association Agreement.

²² Cf. Art. 5 Agreement on the Environment.

²³ Art. 11 in connection with Annex I Agreement on the Taxation of Savings Income.

²⁴ Art. 8 Agreement on Public Procurement.

Second, the application of important parts of the Agreement on Air Transport is subject to the competent institutions at EU level, thus the Commission and the CJEU.²⁵ In this case, contrary to above, it is not only at an organisational level that the autonomy of the different treaty parties is restricted but it is rather about granting the EU's institutions legally substantive decision-making powers.

Finally, certain agreements – in particular the Research and the MEDIA Agreement²⁶ – foresee that EU institutions can conduct financial controls in Switzerland. This is due to the fact that the agreements ensure Switzerland's participation in EU-programs and thus the access to EU funds. Again, in this case substantive powers of decision or control are assigned to the EU, however, to a rather restricted extent.

- Since many agreements foresee mechanisms for updating the agreement's content in view of aligning with developments taking place at the level of EU legislation, regard must also be directed towards possible rights of participation of Switzerland in the legislative process of the EU, thus possible decision-shaping powers. The agreements often allow for a certain participation of Switzerland when legal acts which will or may be included into the respective agreement are concerned. The relevant provisions or issued declarations towards Switzerland²⁷ foresee that Swiss representatives can participate in the role of observers in meetings of committees and expert groups of the council when legal acts or legislative projects are discussed which could be of importance for the development of the agreements. Furthermore, participation at actual council meetings is also possible. This possibility is designed in an especially far-reaching way in the context of the Schengen and Dublin Association. However, it is important to note that participation remains, also here, constricted to being granted advisory rights.
- Finally, the institutional structure is to be examined. In general,²⁸ the agreements foresee a joint committee which is constituted by representatives of the European Union on the one hand and representatives of Switzerland, on the other hand. The competences of these joint committees generally extend to three important areas:
 - The exchange of information, consultation and other “soft” mechanisms in order to ensure the functioning of the agreement;
 - the settlement of disputes with, however, no possibility of taking decisions which are binding on the parties;

²⁵ Art. 11, 20 Agreement on Air Transport.

²⁶ Annex C Agreement on Research, Annex IV MEDIA Agreement.

²⁷ In relation to the Bilateral Agreements I, these “rights” were enshrined in a declaration (Erklärung zur Teilnahme der Schweiz an den Ausschüssen, included in the final acts of the agreements), in the Bilateral Agreements II they can sometimes be found in the agreements themselves.

²⁸ Exceptions in the sense of an agreement not foreseeing a joint committee can be seen in the Agreements on the Taxation of Savings Income and on Pensions as well as in the Agreement on Education. The Agreement on Trade in Agricultural Products foresees two joint committees.

- and the taking of binding decisions as far as this is explicitly provided for in the agreement. In this regard, it is primarily the competences to update the references to secondary law contained in the annexes and to take decisions on protective measures which are of importance.

In the following, two particular characteristics or rather institutional aspects shall be looked at in a more detailed manner. First, the question of the different mechanisms of integrating EU law into the agreements or of integrating Switzerland into the internal market shall be discussed. Then, the contribution will go on to examine the question of the interpretation of the Bilateral Agreements in more detail.

B. “Integration Mechanisms” in the Framework of the Bilateral Agreements

As mentioned above, the Bilateral Agreements cover a very large range of rather different topics. However, some of the most important among these, e.g. the Agreement on Free Movement of Persons, the Agreements on Air and Land Transport or the Agreements on the Schengen and Dublin *acquis*, aim for a “partial integration” of Switzerland into the EU *acquis*. In other words, they should guarantee that the relevant and defined EU *acquis* also applies to Switzerland, in a way that is parallel to a Member State. In order to reach this goal, different techniques have been outlined which are intended to ensure the “integration” of the relevant EU law into the bilateral agreements.

The present section first deals with the integration of the EU *acquis* at the moment of conclusion of the agreements (I.), before turning the focus towards the mechanisms for developing the agreements in line with developments of EU law (II.).

1. *Integration of the EU Acquis at the Moment of Conclusion*

The Bilateral Agreements mainly operate through two different mechanisms when they intend to “include” or “integrate” parts of EU law into the framework of the agreements:

First, many articles of the agreements merely copy the wording of the relevant provisions of EU law, sometimes, however, with slight adaptations to the text (e.g. referring to contracting parties instead of Member States). For example, the Agreement on Public Procurement provides for a principle of non-discrimination on grounds of nationality in its Art. 6; this principle is also taken on in Art. 2 of the Agreement on the Free Movement of Persons. The latter agreement also transposes a number of free movement rights from the relevant EU primary and secondary law in its Annex I. In this context, the question may, however, arise as to the extent to which the articles of the Bilateral Agreements really aim to integrate EU law and whether they are to be interpreted in the same way as EU law.

Many agreements also refer directly to EU secondary acts, usually in their annexes. Therefore, these annexes contain lists of secondary acts and the contracting parties are required to either apply EU secondary law or equivalent norms. In such cases, Switzerland is effectively bound to apply EU secondary law or to at least create an equivalent legal framework. Examples in this context are the Annexes II and III to the Agreement on the Free Movement of Persons

(containing lists of secondary acts on mutual recognition of diplomas and social security) or the Annexes to the Schengen and Dublin Association Agreements, containing lists of the relevant EU *acquis*. This mechanism seems to be the EU's preferred system in the context of the Bilateral Agreements, since it ensures a (relatively) far-reaching adoption of the requirements of EU law also in the relations to Switzerland and facilitates the development of the agreement, as it will be shown in the following.

However, also the agreements integrating parts of the EU *acquis* contain "autonomous" articles which do not refer to EU law. So, art. 24 annexe I of the Agreement on the Free Movement of Persons foresees some special exceptions as the scope of the agreement is concerned.

2. *Development of the Agreements*

The integration of EU law through the framework of the Bilateral Agreements is, in general, based on the state of EU law at the moment the treaty is signed. In this respect, the Bilateral Agreements are static agreements and follow a "traditional" approach of international law. However, EU law is subject to constant change. Therefore, the aim of the agreements designed to achieve a certain level of integration, which is to guarantee a parallel between the legal situation in the European Union and in the relationship with Switzerland, implies, in the fields covered by the agreements, the necessity of integrating new EU law developments into the framework of the agreements. Three mechanisms can be distinguished in this respect:

- First of all, the agreement may be revised. Such a revision is, of course, perfectly possible under international law; however, it involves a complicated procedure requiring new negotiations, signature and ratification of the contracting parties, requirements which are especially important with respect to the treaties also (jointly) concluded by the Member States (mixed agreements). It is, thus, not really surprising that this mechanism is not very practicable and the contracting parties have never used it in the context of the Bilateral Agreements to date.
- Second, agreements which contain lists of EU secondary acts in their annexes generally foresee that the joint committee (composed of representatives of the contracting parties) can take the binding decision to modify and adapt the annexes which subsequently implies the possibility to carry over new EU legal developments into the framework of the agreement. Since the joint committees decide by unanimity, both contracting parties have to agree on such an integration of new legal developments.
- Finally, some agreements, especially those concerning Schengen and Dublin, provide for a "de facto-obligation" of Switzerland to take over new legal developments in the fields covered by the agreements. Switzerland is free to apply its normal legislative procedure for this purpose, but the sanction for non-adaptation to the future Schengen or Dublin *acquis* consists of, in principle, termination of the whole agreement.²⁹ A less far-reaching system in this context is foreseen in the Agreement on Customs Security

²⁹ See Art. 7 para. 4 Schengen Association Agreement.

Measures. According to Art. 29 para. 1 of said agreement, a treaty party (de facto the EU) is entitled to take “appropriate rebalancing measures”, which includes the suspension of the provisions of chapter III on customs security measures, if the “equivalence of the Contracting Parties’ custom security measures is no longer assured” (thus or de facto if Switzerland fails to take over developments of EU law in the relevant area). The joint committee of the agreement can then ask an arbitral tribunal to examine the proportionality of the measures taken.

The second and the third of the aforementioned mechanisms can, in principle, provide for a legal development of the agreements which “follows” the relevant amendments of EU law. However, these mechanisms generally do not apply to the parts of the agreements which replicate the wording of EU law. Thus, as long as the agreements apply the technique of taking over the wording only, the legal development of the agreements following amendments of EU law can only be realised by modifications using the “normal” procedures of international law which is – as mentioned – not very realistic. The consequence of this situation is that there are – especially as far as the first package of Bilateral Agreements is concerned – important parts of the agreements which are based on the legal situation in the EU at the time of signature, despite the fact that EU law has, in the meantime, been amended. Therefore, the legal parallel (or the so-called homogeneity) which should have been attained is only partially realised. As an important example, one may refer to Annex I to the Agreement on Free Movement of Persons: this annex contains the different rights of free movement and has to a large extent copied the wording of the relevant directives (but also of some articles of the treaties) which have in the meantime been abolished and replaced by Directive 2004/38.³⁰ The joint committee cannot decide to integrate this directive into the agreement since the reference to EU law is not made by listing the relevant secondary acts but by replicating the wording of EU law. The joint committee does not, therefore, have the competence to modify Annex I to the Agreement in this respect.

With regard to the interest of the EU regarding the integration of developments at EU level in the relevant areas, it can be observed that the EU appears to prefer foreseeing a “de facto obligation” to carry over developments, as it can be seen in the Schengen Association Agreement.³¹ With regard to the future development of the relationship between Switzerland and the EU, as it will be analysed below, it seems unlikely that Switzerland will manage to completely disregard this demand.

Finally, when talking about the integration of developments of the relevant EU *acquis*, it is to be pointed out that the question of whether a specific EU legal act constitutes a development of the *acquis* relevant to an agreement can sometimes appear to be a difficult one to answer. For

³⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 77.

³¹ Cf. already NZZ of 9 December 2008, EU-Mitgliedstaaten äussern sich kritisch zur Schweiz.

example, the new General Data Protection Regulation³² is not seen as a development relevant to the Schengen Association Agreement, despite the fact that the previous directive³³ (which has been repealed by the new regulation) was seen as being part of the relevant *acquis*.³⁴

C. The Interpretation of the Bilateral Agreements

The Bilateral Agreements are international treaties in the sense of the Vienna Convention on the Law of Treaties (this convention only applying directly to treaties between States but also containing a large part of, as far as the interpretation of treaties is concerned, customary international law). Thus, their interpretation has to follow the relevant principles of international law and the specific rules of interpretation in EU law cannot – as such – be applied to the Bilateral Agreements.³⁵ However, applying the principles of interpretation of international law may lead to those parts of Bilateral Agreements reproducing EU law having to be interpreted in the same way as those articles or secondary acts are interpreted in the framework of EU law, for example by taking into account the rulings of the CJEU (“parallel interpretation”): Art. 31 of the Vienna Convention sets out a number of elements to be used when interpreting international treaties:

- First, with respect to the ordinary meaning, the use of the same wording as is used in EU law and/or the reference to EU secondary legislation constitutes an important (but not sufficient) argument in favour of such a parallel interpretation.
- Second, the context of the Bilateral Agreements calls for such a parallel interpretation since the agreements form a sort of network providing for a real but in some sort limited “integration” of Switzerland into the EU *acquis*.
- Third, – and this may be the decisive argument – most of the Bilateral Agreements (and generally those which take over EU law) involve a partial integration of Switzerland into the relevant EU *acquis* as a fundamental objective. This integration, however, can only be realised in an effective manner if the relevant parts of the agreements are interpreted in the same way as in EU law, thus integrating the rulings of the CJEU. Some agreements (e.g. Art. 16 (2) of the Agreement on Free Movement of Persons) therefore explicitly provide for an obligation for Switzerland to interpret articles of the agreement referring to EU law in the same way as the CJEU does in its rulings. Even if this obligation is limited to rulings given prior to the signature of the agreement, this does

³² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119, p. 1.

³³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, p. 31.

³⁴ Cf. in this regard *Astrid Epiney/Markus Kern*, Zu den Neuerungen im Datenschutzrecht der Europäischen Union, in: Astrid Epiney/Daniela Nüesch (eds.), *Die Revision des Datenschutzes in Europa und die Schweiz/La révision de la protection des données en Europe et la Suisse*, 2016, p. 39 et seq. (72 et seq.).

³⁵ See for further details, *Epiney/Metz/Pirker* (fn. 2), p. 191 et seq.

not mean that later rulings are irrelevant since the very objective of the agreement (parallel legal situation) suggests they are to be regarded as being of certain relevance. As a result, one may formulate the principle that Bilateral Agreements have to be interpreted parallel to the relevant articles/secondary legislation in EU law if the latter has been integrated into the agreement and if the aim of the relevant parts of the agreement is precisely to guarantee a parallel legal situation. In other words, if the objective is to extend the relevant EU law *acquis* to Switzerland in order to provide for a participation of Switzerland in the defined/relevant part of the EU *acquis*, the Bilateral Agreement is to be interpreted in the same way as the relevant EU law. This principle of parallel interpretation is – in light of the overall objective of parallelism – not limited to a static situation at the time of signature but has to be understood in a dynamic way, seeing as only such an approach is able to achieve the aim of parallelism. However, there are some difficulties in the concrete application of the principle. Three main points may be mentioned in this context:

- First, the aforementioned principle only sets a general framework; it does not provide a detailed analysis of the concrete legal question. Hence, a case-by-case examination is necessary and in this context, the question if and to what extent a concrete article contained in the Bilateral Agreements truly incorporates EU law will very often be crucial and the answer to this question is not always clear in advance.
- Second, with respect to the rulings of the CJEU, the decisions have to be analysed to determine which parts are really relevant for the interpretation of the Bilateral Agreements. For example, rulings based on the concept of European citizenship are, in principle, not to be followed since this concept has not been taken up in the Agreement on Free Movement of Persons. However, since some rights conferred on European citizens are taken up in the Agreement in the same way, those aspects of the rulings are, in principle, also to be taken into account when interpreting the relevant articles of the Agreement.
- Finally, one has to remember the lack of parallelism in some fields covered by the Bilateral Agreements since amendments of EU law have not been integrated into said agreements. This situation may raise the question of which parts of the “old” EU law have retained their validity also in the light of the amended EU legislation so that, for example, the relevant rulings of the CJEU can also still be of some importance in the framework of the agreements.

Despite all these questions and difficulties, one has to admit that, all in all, the agreements work rather well. In particular, it seems that the CJEU and the Federal Supreme Court in Switzerland (*Bundesgericht*) apply the principles developed before, even if at time the focus may be different. The practice of the two courts – which almost exclusively concerns the Agreement on Free Movement of Persons – has also seen some developments and has become clearer over time.

The CJEU has certainly pointed out the specificities of the EU–Swiss relationship, in particular the Swiss decision not to participate in the EEA and to pursue another way and a lower degree of integration, in its first rulings on the Agreement on the Free Movement of Persons without, however, really dealing with the above-mentioned questions.³⁶ However, the latest case law has taken a different approach and finally argues in favour of a principle of parallel interpretation, also raising the question of whether concepts or notions of EU law are really integrated into the agreement. In this sense, the Court argued that Switzerland is linked to the EU by a multitude of agreements covering various areas and containing rights and obligations corresponding to those contained in EU law. Hence, the overall objective of those agreements is to intensify the economic relations between the contracting parties. On this basis, and by referring also to its own rulings after the signature of the agreement, the Court has argued – in relation to the relevant articles in the agreement – in the same way as it does in the framework of EU law, for example concerning the inclusion of indirect discrimination in the concept of discrimination, the interpretation of “public order” as a derogation from the guaranteed freedoms, the relevance of the principle of free movement in relation to tax law or provisions in the field of social security.³⁷ In one case, the CJEU even pointed out that the preamble and Art. 16 para. 2 of the Agreement on the Free Movement of Persons lead to the conclusion that a parallel legal situation between the EU, on the one side, and Switzerland, on the other, is intended by the agreement and that thus, in principle, the rulings of the CJEU are relevant. It applies this approach to Art. 2 of the Agreement (the principle of non-discrimination), which is interpreted parallel to Art. 18 TFEU.³⁸

The Federal Supreme Court of Switzerland has already been called to interpret and apply the Agreement on the Free Movement of Persons on many occasions. It developed the principle that central concepts, notions and provisions of the agreement were carried over from EU law and ought to be interpreted and applied in conformity with the case law of the CJEU, which in theory includes the case law developed after the signature of the agreement.³⁹ The Supreme Court has even explicitly formulated this concept, mainly referring to the aims of the agreement, and has recently confirmed this approach despite some new provisions in the Federal Constitution potentially being in conflict with the Agreement on the Free Movement of Persons.⁴⁰ Therefore, one can conclude that the case law of the Federal Supreme Court applies

³⁶ Cf. in particular CJEU, Case C-351/08, *Grimme*, ECLI:EU:C:2009:697; CJEU, Case C-541/08, *Fokus Invest*, ECLI:EU:C:2010:74; CJEU, Case C-70/09, *Hengartner*, ECLI:EU:C:2010:430.

³⁷ Cf. CJEU, Case C-506/10, *Graf*, ECLI:EU:C:2011:643; CJEU, Case C-257/10, *Bergström*, ECLI:EU:C:2011:839; CJEU, Case C-425/11, *Ettwein*, ECLI:EU:C:2013:121; CJEU, Case C-250/13, *Wagener*, ECLI:EU:C:2014:278. See also the general remarks on the interpretation of the Agreement on Free Movement of Persons in CJEU, Case C-656/11, *UK/Council*, ECLI:EU:C:2014:97.

³⁸ CJEU, Case C-241/14, *Bukovansky*, ECLI:EU:C:2015:766; in the same direction CJEU, Case C-478/15, *Radgen*, ECLI:EU:C:2016:705.

³⁹ See Federal Supreme Court, Case 2C_196/2009, *X. und Y. gegen Sicherheitsdirektion und Regierungsrat des Kantons Zürich*, BGE 136 II 5.

⁴⁰ Federal Supreme Court, Case 2C_716/2014, *A.A. und B.A. gegen Migrationsamt und Sicherheitsdirektion des Kantons Zürich*, BGE 142 II 35.

the principle of parallel interpretation in a very consistent manner, an approach that is also generally approved by the doctrine.⁴¹

However, these principles – even if guaranteeing in general a good functioning of the Agreements – do not change the fact that access to justice and dispute settlement follow the “traditional” principles of Public International Law. So, each party is responsible for access to justice (without a mechanism like the preliminary ruling) and there is no dispute settlement between the parties. This situation implies a risk of different interpretation and application of the Agreements.

IV. Institutional Questions

For several years now, there have been discussions regarding the institutional framework of the Bilateral Agreements. Official negotiations in the matter started in 2014 and are still ongoing.⁴² The issue at core is the EU’s demand that homogeneity is ensured as far as market access agreements are concerned or, in other words, the EU’s stance that Switzerland must adhere to the rules of the internal market when and where it wishes to take part in it. In this context, the EU demands consistency not only of the content of the law but also of its development, interpretation and thus application. Thereof essentially four main institutional matters or questions are derived: First, the issue illustrated above regarding the updating of the agreement, thus the question of the mechanism put in place to adjust the agreements to developments of the EU *acquis* that has been integrated into the agreements; second, the question of how to ensure consistent interpretation of the agreements which has also been discussed above; third, the question of how supervision monitoring compliance with the Bilateral Agreements is ensured and, lastly, the question of what procedures should be used to

⁴¹ See e.g. *Benedikt Pirker*, Zu den für die Auslegung der Bilateralen Abkommen massgeblichen Grundsätzen – Gedanken zu BGE 140 II 112 (Gerichtsdolmetscher), *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht*, 2015, p. 295 (296 et seq.); *Francesco Maiani*, La „saga Metock“, ou des inconvénients du pragmatisme helvétique dans la gestion des rapports entre droit européen, droit bilatéral et droit interne, *Zeitschrift für Sozialreform*, 2011, vol. I, p. 27 et seq.; *Matthias Oesch*, Der Einfluss des EU-Rechts auf die Schweiz – von Gerichtsdolmetschern, Gerichtsgutachten und Notaren, *Schweizerische Juristen-Zeitung*, 2016, p. 53 et seq.; in detail also *Epiney/Metz/Pirker* (fn. 2), p. 169 et seq. See for a summary and analysis of the relevant rulings of the *Bundesgericht* the regular reports in the *Jahrbuch für Migrationsrecht*, recently *Astrid Epiney/Daniela Nüesch*, Zur schweizerischen Rechtsprechung zum Personenfreizügigkeitsabkommen, in: Alberto Achermann et al. (eds.), *Jahrbuch für Migrationsrecht / Annuaire du droit de la migration 2017/2018*, 2018, p. 273 et seq.

⁴² In the light of the most recent developments in Swiss domestic politics the further continuation of the negotiations has become slightly unclear. The basic problem is that the EU has made a point of stating that certain of the so-called “flanking measures” which Switzerland introduced in order to secure wage protection (and which are supposed to “flank” the effects of the Agreement on the Free Movement of Persons) are no longer to be upheld in their current form and connected this with the negotiations regarding the institutional questions. In the wake of national discussions, the federation of the Swiss trade unions declared their refusal to take part in discussions, thus prompting some observers to state that the negotiations have factually come to an end. See e.g. NZZ of 9 August 2018, Die unheilige Allianz der Abschotter droht das Rahmenabkommen zu Fall zu bringen: „Mit dem Gesprächsboykott sind die Verhandlungen zwischen Bern und Brüssel über ein Rahmenabkommen wohl vorderhand gescheitert“. However, there is no official statement of any sort in the matter and negotiations are thus officially still ongoing.

settle disputes between the parties to the agreements.⁴³ The aim of a framework agreement would thus be to set down the answers to these questions in an overarching manner or, in other words, once and for all for future and possibly also current (market access) agreements. In the following, a number of specific issues shall be addressed in this regard. In this context, references to the negotiations between Switzerland and the EU will be made. It is, however, important to point out that these negotiations are ongoing which means that, firstly, information regarding the content of a possible agreement is rather sparse in certain areas and that, secondly, even if information has been distributed, essentially by the Swiss Federal Council who in some instances has stated that consensus has been reached on certain issues, account must be taken of the fact that “nothing is agreed until everything is agreed”.

First, the scope of application of an institutional framework agreement is to be determined. It namely needs to be defined whether the new agreement would be applicable also to existing agreements, thus possibly contradicting or implementing changes to the agreements’ proper approaches to the institutional issues, or if the scope of application would be restricted to new, future market access agreements. Currently, it appears that according to the ongoing negotiations the agreement would not only be applicable to agreements concluded in the future, but also to certain existing market access agreements, namely the Agreements on the Free Movement of Persons, on Land Transport, on Air Transport, on Trade in Agricultural Products and on the Mutual Recognition of Conformity Assessments.⁴⁴ Thus, not all existing market access agreements would fall into the scope of application of a future institutional framework agreement and it was seemingly possible to negotiate a limitation in this regard.

Second, the question of decision-shaping is to be addressed. According to the Swiss Federal Council, consensus has been found as to the procedure of updating the agreements. Any “automatism” in the sense that certain developments in EU law would automatically be binding also for Switzerland has seemingly been ruled out. Rather, a dynamic system is to be put in place. Thus, agreements would need to be adjusted to developments taking place at EU level but Switzerland could follow its own legislative process in this context, thus similar to the existing system in the Schengen Association Agreement. If, however, Switzerland failed to take over the relevant EU legal acts, the relevant agreement would not, unlike in the case of the Schengen Association Agreement, automatically be deemed suspended, but the other party

⁴³ On the legal questions surrounding an institutional framework agreement in general, further *Matthias Oesch/Gabriel Speck*, Das geplante institutionelle Abkommen Schweiz–EU und der EuGH, in: Astrid Epiney/Lena Hehemann (eds.), *Schweizerisches Jahrbuch für Europarecht 2016/2017*, 2017, p. 257 et seq.; *Oesch* (fn. 2), p. 165 et seq.; *Joëlle de Sépibus*, Ein institutionelles Dach für die Beziehungen zwischen der Schweiz und der Europäischen Union: Wie weiter?, in: Astrid Epiney/Stefan Diezig, *Schweizerisches Jahrbuch für Europarecht 2013/2014*, 2014, p. 397 et seq.; in detail also *Clémentine Mazille*, *L’institutionnalisation de la relation entre l’Union européenne et la Suisse: Recherche sur une construction européenne*, 2018, p. 456 et seq.

⁴⁴ Press conference of the Federal Council of 5 March 2018, where it was confirmed that consensus has been reached as regards the restriction of the framework agreement’s scope of application to these five specific agreements and future market access agreements.

could rather take compensatory measures. In the sense of an “institutional counterbalance”⁴⁵, such a procedure, however, entails with it the demand that certain decision-shaping rights are put in place. It appears probable that the future mechanism would be inspired by existing systems, such as, e.g., in the Schengen Association Agreement. However, to date and as far as can be seen, there have not been any statements as to what can be expected from an institutional framework agreement in this regard. In any case, rights will be restricted to simple participation in EU legislative procedures and any decision-making rights are not to be expected. Nevertheless, the impact that possibilities of decision-shaping by Switzerland can have, are not to be underestimated. For instance, with regard to the amendments to Directive 91/477/EEC on control of acquisition and possession of weapons,⁴⁶ which has been judged relevant for the Schengen *acquis* and the Schengen Association Agreement could thus be suspended if Switzerland refuses to take over the new legislation, Switzerland succeeded in giving the respective amendments a “Swiss finish”. It namely appeared possible for Switzerland to persuade the EU legislator to introduce an exception with regard to members of the military who, as is customary in Switzerland, are allowed to keep their weapons at home, even after having fulfilled their military duty. Art. 6 para. 6 Directive 91/477/EEC now foresees that “Member States applying a military system based on general conscription and having in place over the last 50 years a system of transfer of military firearms to persons leaving the army after fulfilling their military duties may grant to those persons, in their capacity as a target shooter, an authorisation to keep one firearm used during the mandatory military period.” This illustrates nicely how Switzerland was able to apply its rights of decision-shaping to introduce a very “Swiss” provision into an EU legal act.⁴⁷

Furthermore, a question discussed rather intensely, at least in public discussion, is the one regarding dispute settlement. This currently also remains an open question which is still being negotiated. However, it seems that progress in this regard has been made. According to the Federal Council, Switzerland suggested the implementation of an arbitration system, after this was first introduced to the discussion by the EU Commission’s president in the framework of an official visit to Switzerland.⁴⁸ Thus, according to the Federal Council’s proposition, disputes would be brought before an arbitral tribunal. In a first step, this tribunal would then assess the question of whether the disposition(s) relevant to the dispute constituted EU law or “proper” bilateral law. This can already pose problems. The arbitral tribunal would thus need to

⁴⁵ *Federal Council*, Bericht in Erfüllung des Postulats Hans Fehr 10.3857 vom 1. Oktober 2010: Konsequenzen des Schengen-Anpassungszwangs, 7 June 2013, BBl 2013, p. 6319 et seq. (6332); see also *Matthias Oesch*, Die bilateralen Abkommen Schweiz – EU und die Übernahme von EU-Recht, AJP 2017 638, p. 643.

⁴⁶ Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons, OJ 1991 L 256, p. 51 as amended by Directive (EU) 2017/853 of the European Parliament and the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, OJ 2017 L 137, p. 22.

⁴⁷ See in this regard also *Oesch* (fn. 45), p. 645 et seq.

⁴⁸ Press release of the Federal Council 5 March 2018, <<https://www.eda.admin.ch/dea/de/home/aktuell/medienmitteilungen.html/content/dea/de/meta/news/2018/3/5/69970>> (last accessed on 26 September 2018); NZZ of 28 December 2017, EU bringt eine Schiedsgericht-Lösung ins Spiel.

determine whether a disposition in question is to be seen as a provision copying EU law, thus a “copy-paste-provision” or whether the disposition in question is an “autonomous article” created in or by the negotiations between the treaty parties. It appears easily imaginable that this could, in practice, be more difficult as it may seem to be on paper. If the arbitral tribunal deems the disposition as constituting EU law, the Court of Justice of the European Union would be asked to decide on the interpretation of the disposition in question and the arbitral tribunal would issue its decision only afterwards, bound by the interpretation laid down by the CJEU. Apart from raising the difficulty of having to distinguish dispositions of “copied” EU law and other dispositions in the agreement, this proposal also raises the question of whether such a procedure would be regarded as compatible with EU law in light of the principle of autonomy of EU law developed by the CJEU.⁴⁹ In relation to the question of different entities deciding on disputes possibly based on EU law, the principle of autonomy of EU law seemingly means that the CJEU must be responsible for the interpretation of any EU law disposition. The court seems to have confirmed this position in a recent ruling with relation to the question of the competences of an arbitral tribunal in investor-to-state disputes, as foreseen by an agreement between two Member States. The court seems to state that, if a tribunal is to resolve disputes which are “liable to relate to the interpretation or application of EU law”⁵⁰, this tribunal must either constitute a court or tribunal of a Member State within the meaning of Art. 267 TFEU – which would mean it could submit questions to the CJEU – or its decisions must be subject to review by a court of a Member State, which would again mean that questions of EU law could be submitted to CJEU.⁵¹ To what extent the conclusions from said ruling regarding investor-to-state dispute settlement can be transferred to state-to-state dispute settlement and to agreements concluded between the EU and third states, and thus to the issue of the dispute settlement between Switzerland and the EU, is unclear.⁵² In any case, it appears safe to conclude that any procedure put in place in an institutional framework agreement must ensure that the final interpretation of EU law is decided upon by the CJEU. It also appears imaginable that the CJEU’s jurisprudence relating to the principle of autonomy of EU law could mean that it would need to be possible for one treaty party to request a ruling of the CJEU on the question whether the relevant provision of the Bilateral Agreements contains EU law. In this case, if the arbitral

⁴⁹ Cf. in this regard CJEU, Opinion 1/91, *EEA I*, ECLI:EU:C:1991:490, Note 30 et seq.; CJEU, Opinion 1/92, *EEA II*, ECLI:EU:C:1992:189, Note 18 et seq.; CJEU, Opinion 1/09, *European Patents Court*, ECLI:EU:C:2011:123, in particular Note 67 et seq.; CJEU, Opinion 2/13, *Accession to the ECHR*, ECLI:EU:C:2014:2454, in particular Note 179 et seq.; cf. regarding the latter also *Benedikt Pirker/Stefan Reitemeyer*, Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law, Cambridge Yearbook of European Studies 2015, p. 168 et seq.

⁵⁰ CJEU, Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, Note 39.

⁵¹ CJEU, Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, Note 39 et seq.; cf. in this regard also *Laurens Ankersmit*, Dispute settlement in the current generation of trade and investment agreements of the EU: departing from the days of caution and restraint?, in: Astrid Epiney/Lena Hehemann, Schweizerisches Jahrbuch für Europarecht 2017/2018, 2018, p. 365 (375 et seq.).

⁵² Cf. *Andreas Glaser/Heidi Döring*, Die Streitbeilegung in den Bilateralen Abkommen Schweiz–EU, in: Astrid Epiney/Lena Hehemann, Schweizerisches Jahrbuch für Europarecht 2017/2018, 2018, p. 451 et seq. (462); *Marco Muser/Christa Tobler*, Schiedsgerichte in den Aussenverträgen der EU: Neue Entwicklungen unter Einbezug der institutionellen Verhandlungen Schweiz–EU, Jusletter of 28 May 2018.

tribunal should decide that the provision relevant to the dispute constituted genuine bilateral law and not EU law, the treaty parties would have the possibility to challenge this decision before the CJEU. To date, it seems no information on whether the EU plans to introduce such an option in an institutional framework agreement has been communicated.⁵³ A look at the CJEU's jurisprudence on the autonomy of EU law – and especially the latest ruling that even disputes *liable* to relate to EU law must be brought before the CJEU – reveals, however, that it cannot be deemed unlikely that granting an arbitral tribunal the final say on whether a provision constitutes EU law or not could be regarded as contrary to EU law.

Furthermore, the question is also raised as to what the consequences are to be when a lack of homogeneity is detected. One probable answer seems to be that one treaty party could take compensatory measures towards the other party, at least according to the information issued by the Swiss Federal Council. These would then need to be in line with the principle of proportionality, a general principle of law which, in turn, constitutes a source of international law in the sense of Art. 38 para. 1 Statute of the International Court of Justice.⁵⁴ Whether this principle is respected in the concrete case could again be assessed by the arbitral tribunal as proposed in the context of a possible mechanism for dispute settlement. For this assessment of the proportionality of the compensatory measures, certain guidelines could possibly be laid down in an institutional framework agreement. As an *ultima ratio* with regard to a lack of homogeneity, the institutional framework agreement could possibly foresee that the agreement in question could be terminated by a treaty party. With regard to the already existing agreements that would possibly be covered by a framework agreement, this would, at least according to the current structure, mean that all five would be terminated, since they are all connected by the so-called “guillotine clause”, stating that the termination of one of the agreements concluded in the context of the Bilateral Agreements I leads to the termination of the other agreements of this package.⁵⁵

Finally, from a political point of view, it appears justified to ask where the main differences opposed to EU membership or being member of the EEA – which Switzerland rejected in a popular vote in 1992 – lie if all of the EU's demands were met, thus if Switzerland were to (more or less) completely adhere to the rules of the internal market in the relevant areas by, in particular, taking over developments of EU law (or else risking being the target of compensatory measures) and accepting the authority of the CJEU to interpret EU law contained

⁵³ See also *Muser/Tobler* (fn. 52) who point out that the EU Commission has included this option in the system proposed in its draft of a withdrawal agreement between the UK and the EU presented in February 2018. Art. 162 of this draft foresees that a dispute concerning the interpretation or application of the agreement is to be brought before a joint committee. This joint committee may, however, decide to submit the dispute to the CJEU for a binding ruling or, if the joint committee does not do so and fails to settle the dispute within three months, either the EU or the UK are entitled to submit the dispute to the CJEU. The text of the Commission's draft withdrawal agreement is available at <https://ec.europa.eu/commission/publications/draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_en> (last accessed on 26 September 2018).

⁵⁴ Cf. *Emily Crawford*, Proportionality, in: Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, 2012, Note 1.

⁵⁵ See, e.g., Art. 25 para. 4 of the Agreement on the Free Movement of Persons.

in the agreements. It essentially raises the question whether the relationship between the EU and Switzerland really is void of supranational elements – as this appears to be one main reason behind Switzerland’s choice of the “bilateral path” – or whether, at least in certain areas, Switzerland factually plays the role of a Member State without any decision-making powers. In the end it results in a political decision whether a state chooses to go “all in” and thus be able to take part in the making of decisions or whether it rather prefers to “stay outside” and to pay the price of having to adhere to rules without having any voting rights in the matter if it still wants to profit from the internal market.

V. Possible or Probable Characteristics of the “Swiss Model”

With regard to the relationship between the UK and the EU after Brexit it is to be examined whether the Bilateral Agreements between Switzerland and the EU could possibly serve as a model.⁵⁶ In this context, the main characteristics of the Bilateral Agreements as they were set out above and the demands of the EU with regard to the institutional questions shall be presented before the background of the situation of the UK, thus laying down the framework which would probably need to be respected if the UK should wish to follow the “Swiss path”.

- First, a crucial question when discussing the possible future relationship between the EU and the UK is the one regarding the exact amplitude of one or more possible agreement(s). The EU’s demand with regard to market access appears rather clear: One either adheres to the internal market with all its facets or one remains outside of the internal market. In this sense, the EU has made a point of repeatedly stating that so-called cherry-picking is not an option.⁵⁷ In this regard it is important to note that the very sectoral approach of the Bilateral Agreements between Switzerland and the EU was taken before the historical background of trying to work towards an accession of Switzerland to the EU. It is thus imagineable that the EU would not be willing to take the same path again, especially not with regard to a state withdrawing and not likely to accede to the Union in the near future.

⁵⁶ Cf. in this context also *Christa Tobler*, One of Many Challenges After ‘BREXIT’: The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?, *Maastricht Journal of European and Comparative Law* 2016, p. 575 et seq.; *Stephan Breitenmoser/Michael Jutzeler*, Das bilaterale Verhältnis der EU mit der Schweiz als pragmatische Lösung für den Brexit?, in: Peter Hilpold (ed.), *Europa im Umbruch*, *Europarecht Beiheft* 1, 2017, p. 77 et seq.; *Corinne Reber*, Swiss Bilateral Agreements with the EU as an inspiration for a future UK–EU relationship?, in: Andreas Kellerhals/Tobias Baumgartner (eds.), *New dynamics in the European integration process – Europe post Brexit*, 2018, p. 143 et seq.; *Astrid Epiney*, Die Beziehungen Schweiz – EU als Modell für die Gestaltung des Verhältnisses Grossbritanniens zur EU?, in: Malte Kramme/Christian Baldus/Martin Schmidt-Kessel (eds.), *Brexit und die juristischen Folgen*, 2017, p. 77 et seq. on which the following section is partially based.

⁵⁷ See for instance European Council (Art. 50) guidelines on the framework for the future EU–UK relationship of 23 March 2018, EUCO XT 20001/18, pt. 7: “The European Council recalls that the four freedoms are indivisible and that there can be no ‘cherry-picking’ through participation in the Single Market based on a sector-by-sector approach, which would undermine the integrity and proper functioning of the Single Market.”

- Furthermore, the Bilateral Agreements – or at least the agreements aiming at gaining market access – are mainly linked to the requirement of taking over EU law or, in other words, the EU *acquis* and its developments in the relevant sector. However, as the example of the Schengen and Dublin Association Agreements shows and as it has also become clear in the negotiations regarding an institutional framework agreement, this does not preclude Switzerland of following its ordinary legislative process. A certain timeframe is granted for this. Whilst the Schengen and Dublin Association Agreements foresee a period of two years, Switzerland apparently succeeded in negotiating a period of three years in the context of a possible institutional framework agreement, in the light of the fact that legislation is a slow-moving process, partly due to the system of direct democracy.⁵⁸
- With regard to the updating of (a) possible agreement(s) in line with developments of the relevant EU *acquis*, the question also arises whether certain exceptions could be foreseen. As it has been shown with regard to the scope of the Bilateral Agreements between Switzerland and the EU, Switzerland is currently not bound to take over all developments and was able to negotiate certain exceptions. For instance, one can state that Switzerland participates, at least to a certain extent, in the system of the free movement of persons but has not taken over Directive 2004/38, the so called citizenship directive. This is, however, due to the static nature of the Agreement on the Free Movement of Persons which requires consensus with regard to the updating of the agreement to developments at EU law level. When taking a look at the EU's demands in relation to an institutional framework agreement, which appear to rather clearly state that Switzerland is to take over EU law developments in the realm of market access agreements, it does not appear very probable that the current "Swiss model" of having such static agreements could be copied as it stands.
- With regard to the situation between Switzerland and the EU it has also been shown that it is currently still unclear what the consequences are when developments of EU law are not adopted despite being bound to do so. According to the negotiations regarding a framework agreement it appears likely that this would mean that compensatory measures – which would need to respect the principle of proportionality – could be taken.
- With the EU's requirement of laying down an obligation to take over EU law and its developments, come, on the other side of the coin, certain decision-shaping rights. In this regard it appears that the EU seems willing to grant the respective third states certain rights of participation in meetings of the council or commission committees.
- Apart from the requirement of taking over the relevant EU *acquis* including its developments, the principle of parallel interpretation and application as it was illustrated above is also to be pointed out in this context. This appears to be a central aspect of

⁵⁸ See NZZ of 9 April 2018, Die EU kommt der Schweiz entgegen.

agreements between the EU and third states, at least where a certain amount of integration of the respective state into the EU internal market is intended. Thus, it would need to be ensured that provisions of (a) possible agreement(s) which incorporate EU law with the objective of creating a parallel legal situation are interpreted (and thus applied) in the same way as the respective EU law is in the Union. This entails a certain obligation to take account of already existing case law of the CJEU at the point of signature of an agreement as well as its developments.

- This, in turn, raises the issue of the surveillance over the correct interpretation and application of the agreement(s) – which includes the aforementioned principle – and the settlement of possible disputes. In this regard it appears that the preferred option of the EU would be to designate the CJEU with a strong role in the matter. However, it also seems possible to foresee an option with an arbitral tribunal, nevertheless leaving the interpretation of EU law in the hands of the CJEU. The latter does not seem negotiable in the light of the principle of the autonomy of EU law as developed by the CJEU.
- Finally, it is to be pointed out that a lack of homogeneity possibly could, ultimately, lead to a termination of the agreement(s). In other words, in the areas of the internal market concerned by the agreement(s), the UK would need to adhere to EU law regarding the matter in question, at least to a significant extent, if the functioning of the agreement(s) should be ensured.

VI. Excursus: Relationship UK – Third Countries

With regard to Brexit, questions arise regarding the future relationship not only with the EU but also with third states such as Switzerland, a relationship which, as shown, is currently mostly regulated by treaties concluded between the EU (and its Member States) and Switzerland. If the treaty in question is a non-mixed treaty it becomes clear that the UK – no longer forming part of the EU – will cease to be a treaty party when Brexit comes into force. In the case of mixed treaties, such as, for example, the Agreement on the Free Movement of Persons between the EU and its Member States on the one hand and Switzerland on the other hand, the case does not appear quite as clear at a first glance since the UK itself is also a treaty party and not only the Union.⁵⁹ Thus, the conclusion could be drawn that a withdrawal from the EU would not change anything with regard to the status of the UK as a treaty partner. As concerns the Agreement on the Free Movement of Persons, such a conclusion is, however, to be rejected. The UK is a treaty partner solely due to its role as Member State, as this already becomes clear from the title of the agreement. The agreement does not foresee that there could be any other treaty partners other than the EU and its Member States on the one side and Switzerland on the other side and can thus be described as a “closed” agreement. Such an interpretation is also in

⁵⁹ The following is partially based on *Astrid Epiney*, “Brexit” und FZA: Zu den Perspektiven der Freizügigkeit zwischen der Schweiz und der EU im Gefolge des “Brexit”, Jusletter of 20 March 2017.

line with the general aim of the agreement which, according to the preamble of the agreement, is to “bring about the free movement of persons between [the treaty partners] on the basis of the rules applying in the European Community”. If a Member State withdraws from the Union, the EU law rules which form the basis of the agreement cease to apply to this state and it can thus no longer be viewed as part of the “EU pillar”. Thus, at least as far as the Agreement on the Free Movement of Persons with Switzerland is concerned, it can be stated that the UK will no longer be a treaty partner after Brexit.⁶⁰

In this regard, questions arise as to the future of individual rights acquired due to the agreement or which are in the process of being acquired. Generally, international agreements no longer have any legal effects once they cease to be in force. Treaty parties can, however, foresee exemptions to this rule in the agreement in question, as this was done for the Agreement on the Free Movement of Persons. Art. 23 of said agreement foresees that rights acquired by private individuals shall not be affected in the case of a termination or non-renewal of the agreement.⁶¹

With regard to rights in the process of being acquired, the treaty parties are to mutually agree on what action is to be taken. It can be argued that the provision also applies with regard to British citizens having acquired rights on the basis of the agreement in Switzerland and vice versa. While the provision was arguably intended to regulate the situation of the whole treaty being terminated, it can also be applied in this case, since the aim of the provision is to protect individuals’ rights already acquired or which are in the process of being acquired. And this concern matters not only when the whole treaty is terminated but also when it ceases to apply only with regard to the relationship between Switzerland and one former EU Member State.

It appears clear that there is a certain need to think about the design of the relationship between the UK and third countries, such as Switzerland, after treaties concluded between the EU and these third states, e.g. the Bilateral Agreements between the EU and Switzerland, will have ceased to apply in the relationship with the UK. In this context a number of scenarios appear possible. On the one hand, there could be no agreements regulating the relationship. With regard to the issue of the free movement of persons this does not appear very probable as this would mean a significant step back as regards the rights of individuals and currently does not appear to be in the interest of any party. On the other hand, and this appears more likely, the UK and Switzerland could conclude a new agreement. As regards the content, it could either take over the principles of the existing agreement between Switzerland and the EU and the latter’s

⁶⁰ Cf. for the same conclusion regarding the EEA Agreement, with a slightly different reasoning, *Dóra Sif Tynes/Elisabeth Lian Haugsdal*, In, Out or In-between? The UK as a Contracting Party to the Agreement on the European Economic Area, *European Law Review* 2016, p. 753 et seq. (763).

⁶¹ Cf. in this regard *Alvaro Borghi*, La libre circulation des personnes entre la Suisse et l’UE: Commentaire article par article de l’accord du 21 juin 1999, Art. 23, *passim*; *Gaëtan Blaser*, Commentary of Art. 23, in: Cesla Amarelle/Minh Son Nguyen (eds.), *Code annoté de droit des migrations: Volume III: Accord sur la libre circulation des personnes (ALCP)*, *passim*; also *Christa Tobler*, After ‘BREXIT’: will rights acquired in the context of the free movement of persons be protected? A comparative perspective, *Revista de Direito Constitucional e Internacional* 2017, p. 349 et seq.; *Christa Tobler*, Und wenn das Abkommen wegfällt? Erworbene Rechte nach Art. 23 FZA, in: Alberto Achermann et al. (eds.), *Jahrbuch für Migrationsrecht* 2015/2016, 2016, p. 43 et seq.

Member States or contain “new”, autonomously agreed upon provisions. Taking over the principles of the current agreement would entail the advantage that the existing situation could continue and that a certain degree of legal certainty could be upheld, seeing that many questions regarding application and interpretation of the Agreement on the Free Movement of Persons have already been dealt with. However, this would also imply that the UK would, to a certain extent, still be bound by “EU law” since, as it has been shown, the Agreement on the Free Movement of Persons is largely based on principles and concepts of EU law. It remains to be seen whether the UK is willing to agree to such a solution from a political point of view as the question of the free movement of persons appears to be one of the main issues that led to the decision to withdraw from the EU (however, seemingly not with regard to migration from Switzerland). Finally, the question also arises whether such an agreement between the UK and Switzerland would necessarily be concluded bilaterally or whether the conclusion of a trilateral agreement between the UK, Switzerland and the EU would be a possibility. This, however, would again entail that the UK were willing to subject itself to EU law to a certain extent.

VII. Conclusion

In the following, the disadvantages and advantages the UK would be faced with when following the “Swiss model” are to be set out. The main disadvantage would probably be that a conclusion of agreements similar to the agreements concluded between the EU and Switzerland could, depending on the point of view, lead to a reduction of “sovereignty”. This appears so in the light of the fact that the UK would probably be bound – legally or factually – to take over certain parts and the respective developments of EU law without having decision-making powers in this regard, to then apply these rules parallel to the way they are interpreted in the EU and to possibly, to a certain extent, be bound to follow the CJEU’s rulings with regard to the relevant EU law. However, in this context it is important to point out that the decision to conclude such agreements with the EU, which would then lead to the mentioned situation, is to be seen as a sovereign act, thus explaining why quotation marks are used in this context.

A further disadvantage could be seen in the overwhelming complexity of the “Swiss model”. It has been shown that currently the relationship between Switzerland and the EU is guided by more than hundred bilateral agreements, some of which even constitute mixed agreements. Currently, these agreements all follow their own institutional structure, many with their own joint committees. This calls not only for a great deal of work on both sides, but also creates a situation where it becomes increasingly difficult to stay on top of things.

On the other side, the main advantage of a solution based on the “Swiss model” would be its “individuality”. The agreement(s) would be concluded between the UK and the EU (and in certain areas possibly the latter’s Member States) alone, thus allowing for the creation of specific solutions beneficial to the treaty parties. This appears as the main advantage in comparison to a solution based on an accession of the UK to the EEA, where the UK would be

only one of four on one side of the negotiating table. At the same time, the “Swiss model” shows that participation at the internal market apparently remains possible, also with a tailor-made solution.

In the end, whether the UK should or will follow the “Swiss model” remains a political question, which is to be answered both on the part of the UK, but also on the part of the EU. Especially the latter will have to decide whether it is willing to take the same path again or whether it wants to keep regarding the relationship with Switzerland as an historical particularity which is not to be repeated in this form. This decision might, in the end, also be dependent on how the current negotiations between Switzerland and the EU on an institutional framework agreement turn out.