

SWITZERLAND AND THE EU: CHALLENGES AND UNCERTAINTIES OF BILATERALISM

Switzerland is under pressure to transform its relations with the EU into a bilateral association model resembling the European Economic Area. Even as a non-member, Switzerland finds it difficult to escape the dynamics of legislation in the EU. This again raises the fundamental question of how the Swiss should shape their relations with the EU. The pros and cons of membership ought to be assessed no longer just from the perspective of Swiss economic interests in Europe but also in the broader context of how to safeguard Swiss interests globally.



President of the Swiss Confederation Doris Leuthard and President of the European Council Herman Van Rompuy in Brussels, 19 July 2010.

The nature of the EU debate in Switzerland has changed. After the conclusion of the Bilateral Treaties I (1999) and II (2004), the discussions focused for a long time on tactical matters of implementation, consolidation, and expansion of the policy of sectoral agreements with the EU (see CSS Analysis no. 37 [☞](#)). The “bilateral way” has proven to be acceptable for a domestic majority and to serve Swiss business interests. Recently, however, there have been new efforts to shift the debate on Europe back onto a more strategic level. The fundamental foreign policy issue of how Switzerland’s relations with the EU should be structured is once more attracting attention.

The shift in the European debate began with the Federal Council’s 2009 Foreign Policy Report, which mentioned growing difficulties connected with the bilateral policy and described the EU question as being “increasingly crucial”. Based on the

argument that the bilateral way should not lead to a de-facto membership without voting rights, the Federal Council announced a report on the various policy options vis-à-vis Europe. Subsequently, a number of actors laid out their views of European policy, with the criticism of bilateralism voiced by the Avenir Suisse think-tank generating a particularly strong response.

In its September 2010 Report on European Policy [☞](#), the Federal Council concludes that the bilateral way is currently still the most suitable instrument for upholding Swiss interests. At the same time, however, it goes into elaborate detail as to the growing challenges of bilateralism. The analysis and the inferred short- and mid-term priorities for Swiss European policy reveal an increasing pressure for further development of the current approach towards a bilateral association model resembling

the European Economic Area (EEA). This is a sensitive issue, as the Swiss had rejected the EEA option in 1992. The current exploratory talks between Switzerland and the EU on how to structure their relations in the future are thus of great significance as far as the long-term viability of the bilateral approach is concerned.

It is true that the majority of Swiss parties and businesses are not currently interested in reviving the grand European debate of the 1990s. Furthermore, given the EU’s difficulties in dealing with the financial and economic crisis, the issue of Swiss accession to the EU is unlikely to be discussed with the same acrimony and urgency as it once was. However, the pressure for the Swiss to reconsider their policy options vis-à-vis the EU is likely to increase.

Bilateralism and EU dynamics

A close reading of the Report on European Policy 2010 suggests that two of the characteristics of bilateralism that are accommodating of Swiss concerns are increasingly being called into question. First, the bilateral treaties are more and more being drawn into the dynamics of EU legislation, even though most of them were conceived as static intergovernmental agreements. This implies a growing loss of sovereignty for Switzerland. In December 2008, the Council of the EU noted with regard to Switzerland that “taking part in the internal market requires a homogenous and simultaneous application and interpretation of the constantly evolving *acquis*.” Since then, in several negotiations over new bilateral agreements, the EU has pro-

posed provisions that stipulate automatic suspension of the respective agreement in case Switzerland should fail to adopt new EU legislation. However, the EU's demand for the full adoption of the relevant legislation and of future amendments also applies to existing agreements. From the EU's point of view, the principle of equivalence between Swiss and EU legislation can no longer serve as the foundation of bilateralism. Special arrangements that deviate from the rules of the internal market are met with increasing resistance in Brussels.

Second, it is becoming increasingly difficult to delimit bilateral agreements with the EU to specific sectors. For instance, the EU wishes to introduce into the negotiations over an agricultural free trade agreement the question of consumer protection rights. The latter are less far-reaching in Switzerland than in the EU, a factor that is occasionally viewed as an unfair competitive advantage in Brussels. In the energy sector, the EU also wishes to negotiate aspects of its environmental legislation. In addition to applying a broad definition of the *acquis* of EU legislation relevant to the respective negotiations, the EU also emphasises the principle of parallelism. The successful conclusion of new agreements is increasingly made dependent on Swiss concessions in sensitive matters such as cantonal corporate taxation. This again significantly restricts the freedom of manoeuvre for Switzerland to pursue its own policies.

The dense web of relations with the EU and the intensifying legislation process in Brussels are also exerting growing reform pressure on Switzerland's political institutions. Since the leeway for refusal to adopt EU law will most likely be diminishing in the future, Switzerland must have an eminent interest in influencing EU consulta-

tions at the earliest possible stage from a consolidated domestic position. Similarly, once a decision has been made, Switzerland is given only a brief period to adapt EU legislation into Swiss law, creating serious challenges to its system of direct democracy based on referenda. Against this background, the Federal Council's Report on European Policy argues for in-depth discussions as to how the working methods of the executive and legislative branches can be adapted and how the cantons can be better integrated into European policy. While such discussions have long been expected to come up in the event of accession to the EU, the fact that they already have moved onto the agenda is indicative of how rapidly the bilateral way is evolving.

The Swiss strategy

Despite the growing challenges of bilateralism, the Federal Council currently makes no case for a change of strategy. In view of the current domestic political constellation in Switzerland and the economic situation in Europe, this is a perfectly understandable stance to take. Sudden changes are not helpful within the Swiss political system. According to the European Policy Report, the Federal Council therefore currently intends to secure and develop the bilateral way by means of four main measures.

First of all, it will seek to clarify core issues concerning the adoption of EU legislation, market supervision, and jurisdiction in exploratory talks conducted in the framework of a working group with the EU. In doing so, it is prepared in principle to adopt relevant EU law. However, in contrast to the solution demanded by the EU, whereby – in analogy to the EEA – a specific *acquis* is automatically suspended in a case where EU law is not adopted, the Federal Council demands that the EU should only be entitled to proportional compensation measures that maintain the balance within the agreement and are subject to oversight by an arbitration tribunal. The threshold of suspension would thus be set significantly higher for the EU. The Federal Council also rejects EU calls to have sole prerogative of interpreting the relevant laws and for arbitration to be submitted to the European Court of Justice. Furthermore, in return for its commitment to adopt EU law, it demands Swiss participation in decision shaping in those areas of legislation that are affected by the bilateral treaties. To this end, it strives for a solution that goes beyond the EEA approach, with Switzerland

being permitted to collaborate not only in the committees and expert groups working on the development of the respective *acquis*, but also in the corresponding working groups of the Council of the EU, as is already the case in the Schengen domain.

Second, the Federal Council is ready to explore with the EU the possibility of a horizontal institutional solution for all treaties in the form of a framework agreement. From the Swiss point of view, the usefulness of such an agreement will depend on the extent to which Switzerland can assert its position concerning the adoption of EU legislation. Even without a framework agreement, it is in Switzerland's interests to institutionalise at least a political dialogue with the EU. There is a double anomaly in the fact that Switzerland conducts regular political consultations with a growing number of states, but not with the EU, while Brussels for its part maintains a political dialogue with all of its trading partners save Switzerland.

Third, the Federal Council indicates that an effective future safeguarding of Swiss interests requires not just institutional reform and accelerated processes, but also an expansion of personnel resources in the federal administration and the parliamentary services. As a final measure, it notes that the perception of Switzerland as a partner in solidarity for the EU is an important precondition for securing the bilateral way. In this context, the importance of Swiss contributions to EU peace support activities and to a reduction of economic disparities within the enlarged EU should not be underestimated.

What next?

As far as the chances of success for the Federal Council's strategy are concerned, two observations need to be made. On the one hand, Swiss negotiators have managed to achieve remarkably good results for Switzerland in talks with the EU in recent years. It is certainly possible, therefore, that Switzerland will also negotiate a favourable solution in the key issue of the future procedure for adoption of EU legislation.

On the other hand, the starting point for Switzerland is much less advantageous this time. In the enlarged EU, the new members are largely sceptical towards special arrangements for Switzerland, since they had to adopt the entire *acquis communautaire* as part of the accession process. The Lisbon Treaty, too, implies a diminished propensity

Swiss-EU bilateral agreements

- 1972: Free trade for industrial products
- 1989: Insurance (excluding life insurances)
- 1990: Customs facilitation and security
- 1999: Bilaterals I: Free mobility of persons; technical obstacles to trade; public procurement market; overland transport; civil aviation; agriculture; research
- 2004: Bilaterals II: Taxation of savings; fight against fraud; processed agricultural products; environment; statistics; MEDIA programme; Schengen/Dublin; education, vocational training, youth; pensions

towards special solutions on the part of the EU. A particular challenge is the EU Parliament's newly acquired competence in approving the EU's international treaties. So far, the parliament as an institution favourable towards integration has been largely opposed to exceptional rules for third states.

In principle, a number of negotiated solutions are conceivable for the future design of the bilateral way. Should Switzerland accept the EU's demands, the institutional solution of bilateralism would strongly resemble a bilateral EEA approach. Unlike in the case of the EEA, however, Switzerland would still not have to participate in the entire internal market. Neither would it have to harmonise its position with those of other EEA members. On the other hand, should the EU accept the model proposed by the Federal Council, Switzerland would enjoy the additional benefits of a reduced risk of suspension in case of failure to adopt EU legislation and a greater degree of decision shaping than would be the case within the EEA. A compromise solution is also conceivable that would include elements of both approaches. All of these forms of bilateral association with the EU are more or less in close proximity to the EEA model – a fact that the Federal Council fails to mention.

Should the EU and Switzerland fail to agree on an overall solution, the EU will most likely table its demands concerning adoption of legislation at least when it comes to concluding new bilateral agreements. At the same time, it will most likely maintain pressure to inject the same dynamic into the existing agreements as well. It remains questionable whether the EU would be prepared to accept a mixed structure of dynamic and non-dynamic agreements modelled on the status quo. No doubt, from the Swiss point of view this would imply less of an approximation to the EEA approach than a bilateral association across the board. In this case, the longer-term viability of the bilateral way would however be questionable.

The European question in the global context

Compared to the status quo or the various possible forms of bilateral association, an EEA accession would bring few advantages for Switzerland. Out of the European policy scenarios listed in the Federal Council's report, essentially only the bilateral way – possibly in a dynamic form – and EU accession remain as viable options for Switzerland. Even if the bilateral way still enjoys strong

domestic backing and is supported by the corporate sector, EU membership should not be considered taboo as a longer-term option

in view of the growing challenges of the bilateral track. In this context, the Report on European

Policy offers a helpful analysis of the repercussions that EU accession would have for a variety of areas identified as key issues such as institutional aspects, Swiss economic and monetary policy, tax policies, and costs.

As an EU member, Switzerland would have equal rights in decisionmaking on new EU legal norms. Overall, the Federal Council judges that Switzerland's influence and access to information would be greatly improved. Swiss companies would have full access to the internal market. However, should Switzerland join the EU, there would be considerable reform pressure on the country's political institutions. The leeway for conducting independent policies on foreign affairs, foreign trade, the labour market, structural issues, and growth would be greatly diminished. The value added tax would have to be increased, and the Swiss tax system would have to be revamped. Whether or not the EU would concede exemption clauses for Switzerland in terms of non-participation in the monetary union and in the automatic exchange of information on savings tax would be a matter for negotiation. There can be no doubt that accession to the EU would constitute an even greater obstacle for Switzerland than was the case for many other states.

A major issue that is neglected in the Report on European Policy concerns the greater context of Switzerland's global positioning and interests. The European continent's relative loss of influence and the increasing power of Asia beg the question of how Switzerland can best assert its interests outside Europe. Since 2005, the Federal Council has been pursuing a strategy of global diversification in its foreign relations and foreign trade policy. In particular, this includes an expansion of political and economic relations with emerging markets and the conclusion of free trade agreements with a number of extra-European states. This has coincided with a shift in Swiss diplomatic resources away from Europe.

Future evaluations of European and foreign policy should assess in more detail

the possibilities and limitations of this approach as compared to the option of safeguarding global interests as part of the EU.

“In an increasingly non-European world, how can Switzerland best safeguard its interests?”

Should the Swiss decide to stick with the bilateral way, it seems obvious that this will at least re-

quire a significant increase of diplomatic resources for the country to defend its positions effectively both vis-à-vis the EU and in the global context.

The creeping loss of influence that Switzerland as a non-EU member is experiencing at the multilateral level must be discussed more frankly. Since the EU is constantly expanding its sphere of competence, other organisations such as the OSCE, the Council of Europe, and the European Space Agency have diminished in importance. At the same time, the EU is making an effort to speak with a single voice within these and other organisations such as the UN, restricting the scope of other member states to affect outcomes. In the WTO, the major trading blocs are increasingly negotiating solutions among themselves, weakening the traditional role of Switzerland as an influential mediator. It is becoming clear that in the multilateral context, too, global power shifts are having negative effects on the effective safeguarding of Swiss interests. Switzerland's non-consideration in the framework of the G20 as well as the debate over the Swiss seat in the executive directorate of the IMF are cases in point.

Such foreign-policy considerations may be less tangible than the traditional economic and institutional core issues of the Swiss debate on policy vis-à-vis Europe. But their importance has grown considerably as a result of globalisation. An overly one-sided focus on asserting economic interests against the EU is no longer a broad enough perspective to define European policy today.

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