

The end of chocolate box-style integration? EU-Swiss relations after the referendum

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This is not the first time that Switzerland decided to do a bit of cherry picking. In fact, it started to dismantle the existing framework on the movement of persons two years ago when it reintroduced quotas for EU citizens from Central and Eastern Europe. At that time, the EU registered a mild protest. Now that the results of the referendum held on February 9th may also affect the West European nationals, the European Union will not, most likely, shy away from doing what it should have done a while ago. And that is to ask the Swiss authorities a simple question: Are you with us or not? All seven agreements falling under the Bilateral I package, which was signed in 1999, are bound by a so-called 'guillotine clause'. They must enter into force altogether or not at all. If one of them is terminated, the others will end up in the law history books too. Back in late 1990s, it was a smart move to include such a clause as it stopped Switzerland and its voters from choosing truffles over the less-popular chocolates from the same box. But in 2014, this arrangement may be more problematic than it appears to be at the first sight. This Commentary argues that the time has come for a serious and comprehensive discussion about the future of EU-Swiss relations.

A look back into history

From an historical perspective, this potentially dramatic turn in EU-Swiss relations is nothing new. Switzerland has been uneasy about the European integration process from the very start of the formation of the European Communities. However, close proximity to those involved, particularly after several rounds of EU enlargement, forced it to begin gradual integration with the European Union. Some moves were taken on a purely voluntary basis, particularly autonomous approximation of Swiss law with EU *acquis*. Yet, the bilateral contractual relationship developed quite incrementally leading to the existing framework composed of over 100 EU-Swiss agreements on a wide range of dossiers, starting with cheese and watches and ending with free movement of persons.

The thought of EU membership did cross Swiss minds in 1992 when, as a matter of fact, Switzerland applied for it. Furthermore, being an EFTA country, it was fully involved in the brainstorming on the European Economic Space, which eventually led to proper negotiations of, what is now, an Agreement with the EU on the European Economic Area. As is well known, the Swiss voters in a nation-wide referendum rejected the negotiated deal in 1992 and, consequentially, the carefully planned integration with the internal market unravelled completely. Not only did Switzerland fail to join the EEA, it also had to freeze its EU membership bid. Suddenly the authorities in Bern found themselves on a collision course

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with their own citizens and, at the same time, outside of the mainstream integration movement.

Knowing the economic impact of staying outside, with a mere Free Trade Agreement of 1972 and dozens of other sectoral deals in force, a way forward had to be developed. This led to two packages of bilateral treaties, which are currently in force. The choice of dossiers reflected interests and preferences of both sides. The Bilateral I package contains agreements on movement of persons, air transport, carriage of goods by rail and road, trade in agricultural products, mutual recognition in relation to conformity assessment, government procurement, scientific and technological cooperation. The agreements falling under the Bilateral II umbrella touch upon Schengen, asylum, taxation of savings, anti-fraud measures, trade in processed agriculture products, statistics as well as participation of Switzerland in the European Environmental Agency and in MEDIA programmes.

As already noted, the Bilateral I package is chained with the guillotine clause. This is generally not the case with the Bilateral II, but the Schengen and asylum agreements are bound by a *specific* guillotine clause. Arguably, there is also an invisible guillotine between the free movement of persons and Schengen agreements. They are inextricably linked, hence the latter cannot function without the former (but not the other way round). Some of those agreements lead to very deep legal integration between the European Union and Switzerland. As noted elsewhere, they resulted in the creation of the European Union Legal Space as Switzerland has an obligation to apply EU *acquis* mentioned in the annexes to these agreements.¹ This, as explained below, has proved to be quite problematic and raised justified concerns on the part of the European Union.

Is there a problem?

There is no doubt that the referendum of February 9th complicates EU-Swiss relations even further. It has already led to the suspension of ratification of a tailor-made Protocol to the Free Movement of Persons Agreement, allowing the extension of the existing regime to Croatian citizens. Some other bilateral negotiations have also been suspended. This does not mean to say, however, that the relationship had been trouble free until now. On the contrary: problems have been building up for quite some time and the latest development only exacerbates the accumulated tensions. From the legal point of view, the Swiss model of enhanced bilateralism or 'box of chocolates' integration has been flawed from the start. This model of integration without EU membership is based on the premise that Switzerland will voluntarily comply with the ever-changing EU *acquis* and, to this end, will guarantee the homogeneity of its law book and case law. Alas, the lack of robust enforcement machinery has allowed Switzerland to allegedly breach the Free Movement of Persons Agreement as well as to undermine the effectiveness and uniformity of EU law. Furthermore, with a few exceptions, Switzerland does not have the obligation to follow changes to EU law. This leads to a fragmentation of the legal regime, which is a headache for practicing lawyers and policy-makers. Already in December 2010, the Council of the European Union argued:

[d]ue to a lack of efficient arrangements for the take-over of new EU *acquis* including ECJ case-law, and for ensuring the supervision and enforcement of the existing agreements, this approach does not ensure the necessary homogeneity in the parts of the internal market and of the EU policies in which Switzerland participates. This has resulted in legal uncertainty for authorities, operators and individual citizens.

The Council added that the system is not fit for purpose, and therefore:

¹ See further, A. Łazowski, "Enhanced multilateralism and enhanced bilateralism: Integration without membership in the European Union", *Common Market Law Review*, Vol. 45, 2008, pp. 1433-1458.

horizontal issues related to the dynamic adaptation of agreements to the evolving *acquis*, the homogeneous interpretation of the agreements, an independent surveillance and judicial enforcement mechanisms and a dispute settlement mechanism need to be reflected in EU-Switzerland agreements.²

The same issues were also raised in subsequent conclusions of the Council. According to 2012 Conclusions Switzerland is now, by having re-introduced the quotas for the Central and Eastern European states, in breach of the Free Movement of Persons Agreement. Following the referendum it is likely to do the same *vis-à-vis* the remaining member states and this will only make matters worse. However, before that happens it might be worth paying attention to the title of the existing agreement: it is about *free* movement of persons. Reintroduction of quotas will make the word “free” redundant.

There is one more systemic problem that merits attention. A very fragmented institutional set-up, principally leaving the decision-making in the hands of countless EU-Swiss committees, which are based on several bilateral agreements, does not help. So, as already argued, the time has come for a serious reconsideration of the bilateral relationship. This discussion should go beyond the current discourse about free movement of persons.

Options ahead

The guillotine clauses are both a blessing and a curse. To start with, they help to keep the reactions to the results of the referendum fairly balanced. Both sides are fully aware that a rapid move will make this sensitive situation even worse. The carefully stitched-together packages of bilateral treaties can come unravelled with the speed of the Concorde. As for the European Union, it has several options at its disposal. In the short term, it simply has to address the mere fact that Switzerland is in breach of its obligations and, ultimately, to make it clear that it has tools at its disposal to terminate the Bilateral I package. This is not only for the sake of clarity in relations with one of its most integrated neighbours but also to send a clear signal to Whitehall. If the EU allows Switzerland to get away with a serious breach of a cornerstone of bilateral relationship, it will give the UK eurosceptics a false impression that the Swiss model allows a third country to breach the bilateral agreements at its will and without consequences. This is something the European Union cannot afford when such an agreement creates a joined legal space with a neighbouring country. In the medium-term, the European Union may use the current situation as an opportunity to revamp quite considerably its relations with Switzerland and to create a framework that is far more coherent as well as easier to navigate and manage. The Association Agreements, which the EU hopefully will conclude with Moldova and Georgia, give an indication where things could be heading with Switzerland. Although the aims and scope of a new deal with Switzerland would be different, those draft agreements could be a good basis on which to start discussions with the Swiss authorities. Another option is to consider a model based on the European Economic Area.

The ball is squarely now in the court of the Swiss authorities and they are already planning the next steps. As per the results of the referendum, they have three years in which to impose quotas on EU citizens. The EU, however, should have a firm position too – and the sooner, the better. László Andor, European Commissioner for employment, social affairs and inclusion, has already made it clear in his statement to the European Parliament on February 26th that the EU’s “*marge de manoeuvre* [...] is extremely limited”. At the same time, the Swiss should not suffer under the illusion that the 1999 Agreement on Free Movement of Persons may be unravelled easily and without adverse consequences. This puts the Bern authorities

² Council conclusions on EU relations with EFTA countries, 14 December 2010.

in a very difficult position as, politically, they cannot escape the obligation to translate the outcome of the referendum into law.

Conclusions

The results of the referendum will imminently force both sides to explore an existential question: *Quo vadis?* Both the timing and the cards are to the EU's advantage, as the Swiss authorities will struggle with reconciling the existing obligations with the results of the referendum. Maybe it is worth thinking about the guillotine clauses. If they are triggered, Switzerland and the European Union may be obliged to reflect on whether these multiple agreements are worth the candle. Once deprived of the benefits of the internal market, the Swiss voters may come to appreciate that it is impossible to eat one's sweets and have them too. This may be a golden opportunity for the European Union to press for a comprehensive framework agreement with Switzerland that would simplify the existing regime and provide for a uniform institutional set-up.

What both sides cannot avoid, however, is a frank discussion about free movement of persons. That dossier will be crucial for any future steps that will be taken by the EU and the Swiss authorities.