1 Introduction: The EU-Swiss Agreements

Situated in the Western part of Europe, Switzerland is fully surrounded by states belonging to the European Economic Area (EEA), more specifically the EEA/EFTA State Liechtenstein and the EU Member States Austria, France, Germany and Italy. Almost 30 years ago, the Swiss Federal Government favoured an association of Switzerland to the then European Communities through EEA membership, intended by it as a stepping stone towards Community membership. In 1992, the Federal Government sent a letter to Brussels requesting talks about a possible accession. At that time, Switzerland was instrumental in negotiating the EEA Agreement (Nell 2012). However, following the signing of the EEA Agreement by the Federal Government, a negative popular vote ended the plans for EEA membership (Freiburghaus 2015) and thereby also the government’s plans for Switzerland to eventually join these Communities. Indeed, the letter of 1992 was formally withdrawn in 2016.

Following the negative vote on EEA membership, Switzerland continued on the path, commenced in the 1950s, of negotiating sectoral or bilateral agreements, first with the European Communities and subsequently with the EU. Today, there is a large number of EU-Swiss agreements covering many diverse issues, both economic and non-economic, and making up what in Switzerland is commonly referred to as the “bilateral law”.¹ In terms of the EU’s internal legal basis for this system,

¹For brief introductions to the EU–Swiss bilateral law in the English language, see Pirker (2017) and Oesch (2018). A fact sheet of the Swiss Federal Government providing an overview on the
only one particular package of (mostly) economic agreements—namely the so-called “Bilaterals I” of 1999, including notably the Agreement on the Free Movement of Persons (FMPA)\(^2\)—is formally based on the association provision of Art. 217 TFEU. Two additional agreements in the fields of asylum and border law, namely the Schengen\(^3\) and Dublin\(^4\) Agreements of 2004, represent associations of a different kind and so does the Research Agreement of 2014,\(^5\) which is a successor to a number of previous agreements linking Switzerland to the EU’s research framework programmes.

In the economic context, it is important to understand that, different from EEA law which fully extends the EU’s internal market law to the EEA/EFTA States, the EU-Swiss bilateral law only leads to a partial association of Switzerland to the EU’s internal market. Further, the institutional framework is distinctly different from that of the EEA, namely considerably less developed.

Overall, the Swiss-EU bilateral agreements represent a unique type of legal relationship of the EU with its largest European neighbour, namely the EU, resulting in a distinct legal system that has been called “complex, almost beyond comprehension” (Ott 2017, p. 170). It is also a model that, before the advisory vote of 26 June

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\(^2\) Agreement of 21 June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, [2002] O.J. L 114/6 (for Switzerland: SR 0.142.112.681; note: different from the O.J., the SR provides for consolidated versions of the agreements in the country’s three official languages German, French and Italian). With the following enlargement protocols: extension to the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic (Enlargement Protocol 1): [2006] O.J. L 89/30, AS 2006 995; extension to Bulgaria and Romania (Enlargement Protocol 2): [2009] O.J. L 124/53, AS 2009 2491; extension to Croatia (Enlargement Protocol 3): [2017] O.J. L 31/3, AS 2016 5261.

\(^3\) Agreement between the European Union and the Swiss Confederation on the Schengen acquis; [2008] O.J. L 53/52 (for Switzerland: SR 0.362.31); as extended to Liechtenstein, [2011] O.J. L 160/3 (for Switzerland: SR 0.362.31).

\(^4\) 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, [2008] O.J. L 53/5 (for Switzerland: SR 0.142.392.68); as extended to Liechtenstein, [2011] O.J. L 160/139 (for Switzerland: SR 0.142.395.141).

\(^5\) Agreement for scientific and technological cooperation between the European Union and the Swiss Confederation associating the Swiss Confederation to Horizon 2020—the Framework Programme for Research and Innovation and the Research and Training Programme of the European Atomic Energy Community complementing Horizon 2020, and regulating the Swiss Confederation’s participation in the ITER activities carried out by Fusion for Energy, for the EU O.J. 2014 L 370/3, (for Switzerland SR 0.424.11).
2016 in the United Kingdom of Great Britain and Northern Ireland (UK) on the issue of leaving the Union (“Brexit”), was studied by the then UK Government in view of a potential alternative relationship with the EU after withdrawal from the Union.\(^6\) However, the new government established after the vote stated that it was aiming neither at this nor at any other pre-existing model (but rather at “a new, comprehensive, bold and ambitious free trade agreement”).\(^7\)

In fact, it should be noted that the “Switzerland model” as it exists at present has never been on offer from the EU side. In the present writer’s estimation, this concerns both the substantive extent (or rather: limits) and the present institutional framework of that system. Indeed, in both respects the “Switzerland” model has come under political pressure. In spring 2014, Switzerland and the EU began negotiating a renewed institutional framework for a limited number of existing as well as for future market access agreements. The pressure resulting from that development is one of two major topics of the present contribution. The second topic concerns the developments within Switzerland on limiting migration from the EU with the potential of endangering the very existence of a key part of the bilateral system. In both respects, the political developments around Brexit—where the same issues also play an important role—have had the effect of increasing the pressure on the EU-Swiss system.

As will be seen below, both pressure points relate to Switzerland’s access to the EU’s internal market and to the EU’s insistence on homogeneity in this respect. Whilst there may be a marked trend towards more flexibility inside the EU in various policy fields, to the point of making differentiated integration a structural characteristic that is necessary to help prevent a breakdown of the EU integration project (De Witte et al. 2017, p. 6), vis-à-vis closely related neighbouring states like Switzerland, the EU’s rhetoric has increasingly emphasised the need for homogeneity when it comes to its traditional core project, namely the internal market. The discussion begins with the negotiations on the institutional issues (below Sect. 2) and then moves on to migration and free movement (below Sect. 3). The following account essentially consists of a description of the legal and political context, in line with the modest aim to provide information that enables a comparative discussion in a situation where the model of the Swiss-EU relationship is much cited but often little known in the political and legal discourse.

\(^6\)UK Government, Cabinet Office, *Alternatives to Membership: possible models for the United Kingdom outside the European Union* (March 2016), https://www.gov.uk/government/publications/alternatives-to-membership-possible-models-for-the-united-kingdom-outside-the-european-union (accessed 9 March 2020); before that e.g. Dhingra and Sampson (2016) and Piris (2016).

\(^7\)Prime Minister Theresa May in her “Lancaster House speech” of 17 January 2017: “We are leaving the European Union, but we are not leaving Europe. And that is why we seek a new and equal partnership – between an independent, self-governing, Global Britain and our friends and allies in the EU. Not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries.”; The government’s negotiating objectives for exiting the EU: PM speech, https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech (accessed 9 March 2020).
2 A First Pressure Point: The Institutional Framework of Certain Market Access Agreements

2.1 The Emergence of the “Institutional Issues”

The first pressure point discussed in the present contribution concerns the institutional framework of the EU-Swiss legal relationship, that is, the rules relating to the interpretation, supervision and enforcement of the agreements as well as their revision and, more specifically, their adaptation to new EU law in the relevant field. Compared to the EU and EEA law, the institutional framework of the present EU-Swiss agreements is modest, notably on the Swiss side (on the EU side, the usual EU procedures apply, including in particular the preliminary ruling procedure under Art. 267 TFEU and the infringement procedure under Art. 258 TFEU et seq.). In addition, the system lacks homogeneity as different agreements contain different rules. There are various Joint Committees that oversee the administration of the different agreements.

In the beginning of the twenty-first century, the Swiss think tank, “Groupe de réflexion Suisse-Europe”, proposed an administrative simplification through the creation of a single framework for all existing agreements, with one single Joint Committee.8 However, this led nowhere. Subsequently the EU, having in mind increased homogeneity of Switzerland’s market access agreements with the EU law from which these agreements are derived in terms of their substance, suggested a revision of the institutional framework of certain bilateral agreements.

The EU’s wish for more homogeneity has to be seen against the background of the view, developed over time within the political institutions of the EU and apparently becoming ever stronger, that today the Union’s internal market exists in an enlarged or extended form, and as such represents not just an internal EU project but rather a multilateral project with an external dimension through the participation—although to different degrees—of Switzerland and of the EEA/EFTA states Iceland, Liechtenstein and Norway (e.g. Tobler et al. 2010; Tobler and Baur 2015).9

8 Documents on file with the author. The think tank’s website is www.groupe-suisse-europe.ch (accessed 9 March 2020). See now also Müller (2020), p. 36.
9 For completeness, it should be added that the European Parliament has demanded a renegotiation of several EU-Swiss agreements in a wholly different context, namely that of money laundering, tax avoidance and tax evasion. Para. 150 of the Parliament’s Recommendation following the inquiry on money laundering, tax avoidance and tax evasion of 13 December 2017 reads: “Stresses that the EU should renegotiate its trade, economic and other relevant bilateral agreements with Switzerland to bring them into line with EU anti-tax fraud policy, anti-money laundering legislation and legislation on the financing of terrorism, so as to eliminate serious flaws in the Swiss supervisory system that enable a policy of internal banking secrecy to continue, the creation of offshore structures worldwide, tax fraud, tax evasion not constituting a criminal offence, weak supervision, the inadequate self-regulation of obliged entities, and aggressive prosecution and intimidation of whistle-blowers.”; http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2017-0491%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN (accessed 9 March 2020).
The Swiss Federal Government agreed to open negotiations on the institutional issues, estimating that in this manner a higher degree of legal certainty can be achieved than under the present system. The negotiations commenced in spring 2014, relating to the agreements on the free movement of persons, air transport, land transport, conformity assessments and agricultural goods, plus ideas on a subsequent overhauling of the bilateral regime in the field of the free movement of goods. In December 2018, the Swiss Federal Government published a draft text as it resulted from the negotiations up to that time (see in the English language notably Kaddous 2019; in German e.g. Epiney 2018; Ambühl and Scherer 2019; Baldi 2019; Cottier 2019; Tobler and Beglinger 2020). Following a consultation process it organised, the Swiss Federal Government, in summer 2019, wrote a letter to the European Commission stating that certain points still need clarification. By the time of updating the present contribution (mid-March 2020), the government has not yet been able to define suggestions as to how these issues should be addressed. The present writer has suggested the negotiation of common declarations addressing these points (Tobler 2020a, b). The government wanted to await the outcome of a popular vote—set originally for 17 May 2020 but was subsequently postponed because of the Coronavirus pandemic to 27 September 2020—on migration (on this issue, see below Sect. 3.2).

Since the beginning of the above process, the EU has raised the political stakes at issue. First, the EU stated that it would not be prepared to conclude new market access agreements with Switzerland without a renewed institutional framework. This is aimed particularly at an agreement in the field of electricity,
which has been under negotiation for many years and has become stuck because of the institutional questions. More recently, the EU added more generally that “the conclusion of the Institutional Framework Agreement on the basis of the present text is [...] an essential element for deciding upon further progress towards mutually beneficial market access” (see also below Sect. 2.4).

2.2 Subjects of Negotiations and Swiss Concerns: The Examples of Supranational Supervision and Dispute Settlement

When asking Switzerland to enter into institutional negotiations, the EU defined as its desiderata the four elements of (1) dynamic adaptation of the agreements in question to the evolving EU law, (2) interpretation of these agreements in line with the EU law from which they are derived, (3) a supranational supervision mechanism and (4) the inclusion of a judicial element in the mechanism for the settlement of disputes between the parties to the agreements, in the shape of the CJEU (this choice being due to the doctrine of the autonomy of the EU legal system, which is part of the Union’s constitutional law).

The EU’s original idea in this respect was a system like that of the EEA. However, when it emerged in pre-negotiation talks between the EU and Switzerland that the Swiss Government rejected any formal type of supranational supervision, this particular element (above, number 3) was dropped. Instead, the outline of the dispute settlement mechanism (above, number 4) was adjusted in two steps.

In a first step, the parties agreed to negotiate on a system where, if a dispute cannot be resolved in the relevant Joint Committee, one party alone can turn to the
CJEU for a decision on the interpretation of the agreement in question. In a subsequent step in the EU-Swiss negotiations, the model was modified to add an arbitration panel that can be called upon if the Joint Committee is unable to find a solution. In this model, now included in the draft text of the Institutional Agreement, the Arbitration Panel has to turn to CJEU for help with the interpretation of bilateral law that, in terms of its content, derives from the EU law. The Court’s ruling on this interpretation binds the Arbitration Panel.

Both systems are markedly different from the system under EEA law, where both parties must agree if the CJEU is to have a say in the framework of the dispute settlement mechanism under Art. 111 EEA (Tobler 2015a; Fredriksen 2017). Obviously, from the point of view of sovereignty such a system makes it easier for a non-EU Member State to agree to a decisive role of the CJEU, as the court of the other party, since it is in its power to prevent it from being called upon. On the side of the EU, it would seem that the EEA system is acceptable because under EEA law there are other procedural means to promote homogeneity with the EU law, including notably the preliminary ruling system and the infringement procedure.

According to the Swiss Federal Government, the system now included in the draft Swiss-EU Institutional Agreement is acceptable from the perspective of Switzerland’s sovereignty as it is not the CJEU that decides on the dispute but rather the Arbitration Panel (if in the light of the Court’s interpretation), i.e. there is no direct, but at the most indirect, jurisdiction of the CJEU over Switzerland.

The views of academics in Switzerland on this matter differ. On the one hand, Epiney has lauded the Federal Government for succeeding in “squaring the circle” by avoiding a supranational supervision mechanism and finding an approach to dispute settlement that avoids (direct) jurisdiction of the CJEU over Switzerland (Epiney 2013). Similarly, Oesch and Speck (2017, p. 263) considered the approach chosen by the Federal Government the best available option, although giving a decisive role to the CJEU is “not ideal from the point of view of court psychology”.

In the present writer’s view, overall a system based on the EEA approach, comprising all of the four institutional elements, would have been a very valuable option. Although here a supranational supervision mechanism is part and parcel of the system, it would not have to involve the European Commission and the CJEU but could, instead, allow Switzerland to “dock on” to other, pre-existing bodies such as the EFTA Surveillance Authority (which, under EEA law, takes the role of the Commission for EEA matters arising in the EEA/EFTA states) and the EFTA Court (which, under EEA law, takes the role of the CJEU for EEA matters arising in the EEA/EFTA states), provided that these bodies were prepared to take on this extra role. Incidentally, this is a solution much advertised by the former president of the EFTA Court, Carl Baudenbacher (see in particular Baudenbacher 2019). At the same time, there is, unfortunately, a tendency in broad circles in Switzerland to think negatively of the EEA. This might make it difficult to win the public opinion

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23 For a, in the present writer’s view, timely warning against reviling the EEA see the former Swiss diplomat von Tscharner (2017).
for an EEA approach—a task that is particularly important in a political system where national laws as well as international agreements can be felled through referenda and new rules can be introduced through constitutional initiatives even if they contradict the bilateral agreements.

In fact, it has proven to be difficult in the political reality to communicate the difference between direct and indirect jurisdiction of the CJEU to the public and even to many members of the Federal Parliament. There is in Switzerland a lively public debate in which notably nationalist organisations lambast the institutional negotiations as a further proof of the EU’s attempts to “colonialise” Switzerland and to foist “foreign judges” on the country (e.g. Blocher 2017). The latter particularly has the force of a rallying cry in broad circles in Switzerland because the national founding myth includes the solemn promise never to tolerate foreign judges—an issue that, however, is often misunderstood according to historians (Kreis 2018).

Overall, the approach now envisaged in the draft Institutional Agreement on the dispute settlement mechanism reflects the outcome of a complex negotiation process that is unlikely to be reversible, especially given that other external EU agreements—among them the Brexit Withdrawal Agreement—provide for the same model.

2.3 The Link with Brexit

Institutional issues also play a role in the context of the UK’s withdrawal from the EU, both in the context of the Withdrawal Agreement and in the framework of a post-membership agreement with the EU. As the present writer noted elsewhere, the negotiations with Switzerland have influenced the negotiations between the EU and the Andorra, Monaco and San Marino (AMS) states on their association to the Union’s internal market, and she argued that the UK would find that the situation relating to Switzerland would also influence the Brexit negotiations (Tobler 2016).

Statements by then Prime Minister May and official UK documents showed that also in the context of Brexit there is the worry about any direct jurisdiction of the CJEU. Thus, according to the Prime Minister it is “vital that any agreement(s) reached […] are interpreted in the same way by the European Union and the United Kingdom […]. This could not mean the European Court of Justice – or indeed UK courts – being the arbiter of disputes about the implementation of the agreement

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24 As expressed in many media reports and political debates. Quite often the debate is based on at least partially wrong assumptions, see e.g. Wengle (2017).

25 This relates to the so-called Rütlischwur, an oath allegedly sworn in the thirteenth century on a meadow called Rüti in central Switzerland, by which three territories promised to support each other against the occupying forces (i.e. the Habsburgs, who—by the way—originally came from Switzerland).

26 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, O.J. 2020 L 29/7.
between the UK and the EU however. It wouldn’t be right for one party’s court to have jurisdiction over the other.”

Against that background, it is telling that a UK Government Policy Paper on enforcement and dispute resolution stated that “we will bring about an end to the direct jurisdiction of the Court of Justice of the European Union (CJEU)” and that it referred to examples of “agreements with third countries that provide for close cooperative relationship without the CJEU having direct jurisdiction over those countries.”

Following the conclusion of the Withdrawal Agreement, this aim can only refer to any future UK-EU Agreement. The negotiation mandates of the parties show that their aims in this respect differ fundamentally. As for the Withdrawal Agreement, not only does it provide for an important role of the CJEU during the transition period, but it also establishes a dispute settlement mechanism with an arbitration panel and an interpretative role of the CJEU in relation to provisions of Union law referred to in the Withdrawal Agreement—i.e. in essence the same model as that in the Swiss-EU draft Institutional Agreement (see already Tobler 2018).

Even so, in Switzerland certain circles put their hopes on Brexit and suggest that Switzerland should stop the institutional negotiations and wait for the regime that the UK and the EU will agree on for their future relationship (Neue Zürcher Zeitung 22 June 2017, Der Bund 8 March 2020). However, it may well be that a legal framework for the post-withdrawal relationship between the UK and the EU, if it can be agreed on, will be framed rather differently than the present Swiss-EU law and may, therefore, not be comparable. If so, this will have consequences for the institutional framework that the EU is willing to agree to. More specifically: the less an external regime in terms of its content is based on the EU law, the more the EU may be willing to depart from an EEA style institutional framework (Tobler 2016). However, if there is EU law-derived content, be it on free movement or on any other issues, the EU, based on the doctrine of the autonomy of its legal system, will have to insist on a role of the Court of Justice in its interpretation.

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27 Florence speech of Prime Minister May of 22 September 2017, https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu (accessed 9 March 2020).

28 Enforcement and dispute resolution—a future partnership paper”, 23 August 2017, https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper (accessed 9 March 2020), p. 2 (executive summary).

29 Compare UK Government, The Future Relationship with the EU. The UK’s Approach to Negotiations, 27.2.2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf (accessed 9 March 2020), with European Council, Directives for the negotiation of a new partnership with the UK, 25.2.2020, https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf (accessed 9 March 2020).
2.4 Further Challenges in Switzerland: Financial Market Matters, Data Protection and Medical Devices

Additional political complications have arisen because of the number of links that the EU has created with the institutional issues, links more of a political than a legal nature (Tobler 2020a, b; Tobler and Beglinger 2020, as of question 139).

First, stock exchange equivalence. During his visit to Switzerland in November 2017, Commission President Juncker had promised that the European Commission would decide on the issue of the recognition of the Swiss stock exchange in the context of the new MiFIR/MiFID 2 legislation. For non-Member States trading with the EU, this legislation leads to the need of the unilateral recognition of equivalence of the systems of those states by the EU. In November 2017, the news agency Reuters reported that all looked set for positive decisions on the equivalence of the Swiss and USA stock exchanges. However, when the Commission issued equivalence decision relating to Hongkong, the USA and Australia but not to Switzerland, this raised eyebrows in Switzerland. When the decision on Switzerland was taken on 21 December 2017, it was limited to a duration of one year and its renewal made conditional particularly on progress of the Institutional Agreement. Consideration

30 in the preamble to the Implementing Decision stated:

To ensure the integrity of financial markets in the Union, this Decision should expire on 31 December 2018, unless extended by the Commission before that date. When deciding on whether to extend the applicability of this decision, the Commission should in particular consider progress made towards the signature of an Agreement establishing that common institutional framework.32

The above-mentioned temporal limitation did not reflect any regulatory discrepancies between the Swiss and EU systems but rather appeared to be politically motivated (Hungerbühler 2017). In 2018, the Commission issued another equivalence decision, this time limited to a duration of half a year and again linked to the Institutional Agreement.33 After this period, the Commission did not renew its

30 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, [2014] O.J. L 173/84, and Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, [2014] O.J. L 173/349.
31 EU moves to recognise equivalence of US, Swiss stock exchanges before MIFID 2, https://www.reuters.com/article/eu-mifid-usa-swiss/eu-moves-to-recognise-equivalence-of-us-swiss-stock-exchanges-before-mifid-2-idUSL8N1NM2RV (accessed 9 March 2020).
32 Commission Implementing Decision 2017/241 of 21 December 2017 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council, [2017] O.J. L 344/52.
33 Commission Implementing Decision (EU) 2018/2047 of 20 December 2018 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council, [2018] O.J. L 327/77.
equivalence decision. So far, Switzerland has been able to avoid negative consequences of this move by the EU through unilateral measures.

The Swiss Government reacted harshly, accusing the EU of blatant discrimination and of making a political link between two wholly unrelated matters. The views expressed by experts in public on whether there is a breach of WTO law differed. Whatever the correct analysis, it is in any event safe to say that the course of action chosen by the EU is not helpful in winning the public opinion in Switzerland as far as the Institutional Agreement is concerned.

It must be added that stock exchange equivalence is not the only challenge that Switzerland is facing in terms of equivalence decisions. More specifically, there are more equivalence issues in the field of financial markets. Further, there is also the issue of data protection (Tobler and Beglinger 2020, as of question 147). At the time of updating the present contribution (mid-March 2020), Switzerland is working to complete the revision of its data protection law. Here, again, the current EU legislation, namely the General Data Protection Regulation, requires a new so-called adequacy decision. Under this Regulation, the EU Commission has to report to the European Parliament and the Commission about, among others, the transfer of personal data to third countries or international organisations, with particular regard to adequacy decisions (Art. 97(2) GDRP). It remains to be seen how Switzerland will proceed with the revision procedure and what the Commission will state in its report in this respect.

A further challenge that needs to be mentioned is related to the announcement of the EU that the conclusion of the Institutional Framework Agreement based on the draft text is “an essential element for deciding upon further progress towards mutually beneficial market access” (see above Sect. 2.1). In practice, this appears to mean that absent progress on the institutional issues, the EU may not be willing to update existing market access agreements. At the moment, this raises serious concerns on the mutual recognition of conformity assessments in the field of medical devices, as covered by the bilateral agreement on conformity assessments. The background to this issue is the current EU legislation on medical devices, Regulation 2017/745. Whilst part of this Regulation has already been incorporated into the EU-Swiss Mutual Recognition Agreement (MRA), a large part is still missing. In

34 See Thomas Cottier in the Swiss TV news show “10vor10” (21 December 2017). https://www.srf.ch/sendungen/10vor10/katalonien-knatsch-mit-der-eu-schoggi-goes-china (accessed 21 December 2017), who stated unequivocally that there is no breach, vs. Lorand Bartels and Christian Häberli, who think otherwise, as reported by the daily Tages-Anzeiger (28 December 2017) (accessed 9 March 2020).

35 Regulation (EU) No 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) [2016] O.J. L 119/1.

36 Regulation (EU) No 2017/745 the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC [2017] O.J. L 117/1.
the EU, this part should have been applied as of 26 May 2020, but this date has been postponed by one year because of the Coronavirus pandemic.\footnote{Regulation (EU) 2020/561 of the European Parliament and of the Council of 23 April 2020 amending Regulation (EU) 2017/745 on medical devices, as regards the dates of application of certain of its provisions [2020] O.J. L 130/18.} The EU has stated that it is not willing to agree to an updating decision in the Joint Committee. At the same time, it argues that, absent this update, the entire chapter on the mutual recognition of conformity assessments in the Agreement can no longer be applied. It remains to be seen what will happen next. In the present writer’s opinion, should the EU act as announced, this would amount to a breach of Art. 27 of the Vienna Convention on the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

3  A Second Pressure Point: Migration

3.1  A Swiss Vote and Its Link with Brexit

A link with Brexit also exists on the second pressure point discussed in the present contribution, namely migration into Switzerland, notably migration occurring under the present free movement regime with the EU. On 9 February 2014, the Swiss voting population accepted the constitutional initiative “Against Mass Immigration” launched by the Swiss Peoples Party (SPP), a nationalist party in Switzerland with a large following. In its campaign, the SPP argued notably that net immigration into Switzerland is too high and puts an unsustainable pressure on the country’s infrastructure such as streets, hospitals, power plants and the like.\footnote{See the initiative’s website (in the German, French and Italian languages), under “Argumente”, including an illustrative picture; \url{http://www.masseneinwanderung.ch/} (accessed 9 March 2020).} This argument is remarkably similar to that used in 2015 by the then Prime Minister David Cameron in the UK, with the aim of limiting the legal free movement regime between the UK and the other EU Member States through changes in the EU law.\footnote{“[C]ountries have got to be able to cope with all the pressures that can bring – on our schools, our hospitals and other public services. […] Net migration in the UK is running at well over 300,000 a year and that is not sustainable.”, BBC (9 December 2015).} He did, however, not succeed.

Conversely, in Switzerland the SPP did succeed, at least at first sight. Its initiative was accepted in the vote of 9 February 2014, leading to changes in the Swiss Federal Constitution (FC) on the very day of the vote. These changes include in particular the introduction of a new Art. 121a FC, which not only establishes an explicit principle of autonomous control of immigration in the Federal Constitution (“Switzerland shall control the immigration of foreign nationals autonomously.”) but also mentions specific means to be used to that end. These means include notably quantitative limits and quotas for all sorts of residence permits and national
preference in the field of employment. On international agreements, Art. 121a FC states that no new international agreements must be concluded whose content is not in line with this provision. Further, a new transitional provision resulting from the vote of 9 February 2014, namely Art. 197(11) FC, states that existing agreements that are contrary to Art. 121a FC must be renegotiated and amended within three years. More generally, a period of three years from the adoption of the new rules was set through the vote for implementation through federal law.

3.2 Implementation of the Vote and Remaining Challenges

The implementation of the result of the vote was challenging as it was clear from the outset that Art. 121a FC is in direct contradiction to the principles underlying a number of agreements concluded by Switzerland, among them most notably the FMPA with the EU (Hänni and Heselhaus 2013; Kaddous 2013),40 but also the EFTA Convention with Iceland, Liechtenstein and Norway,41 and further an encompassing customs agreement with neighbouring Liechtenstein.42 Following the vote, the Swiss Federal Government initially considered itself unable to sign the Protocol intended to extend the FMPA to the EU’s most recent Member State, Croatia, because it saw the Protocol as a new agreement contrary to Art. 121a FC. It was only after unwelcome political reactions on the side of the EU—including notably the refusal to renew the cooperation with Switzerland in the fields of research, culture and education—that the Government eventually came to the conclusion that in light of new developments it was after all able to sign the Protocol. In the field of research, this made it possible for Switzerland to move from a provisional arrangement agreed on with the EU in 2014 to full participation in the Horizon 2020 programme (see Art. 13(6) of the Research Agreement). Conversely, the cooperation in the other two fields (culture and education) has not been renewed at the time of updating the present contribution (mid-March 2020).43

On the issue of renegotiating existing agreements, on the EU side, the idea of homogeneity in the internal market again played an essential role. Following the vote, the Financial Times quoted Viviane Reding, then Vice President of the

40 Although creative suggestions for an implementation in line with both the Federal Constitution and the PMPA were made by Epiney (2014).
41 Übereinkommen zur Errichtung der Europäischen Freihandelsassoziation (EFTA), SR 0.632.31. Switzerland’s official languages are German, French and Italian (a fourth language, Romantsch, is a national language but not an official language). In this contribution, the German language version is used, in line with the present writer’s (Swiss) German native tongue, for official Swiss documents for which there is no English version.
42 Vertrag zwischen der Schweiz und Liechtenstein über den Anschluss des Fürstentums Liechtenstein an das schweizerische Zollgebiet, SR 0.631.112.514.
43 There are negotiations in the field of culture, see https://www.eda.admin.ch/dea/en/home/verhandlungen-offene-themen/verhandlungen/creative-europe.html (accessed 9 March 2020).
European Commission, as saying that “[t]he single market is not a Swiss cheese. You cannot have a single market with holes in it.” 44 When the Swiss Federal Government addressed to the EU a request for negotiations in view of revising the FMPA under the principles laid down in Art. 121a FC, the EU responded (unsurprisingly) that it was not interested in a revision aiming at the introduction of quotas and national preference. Within Switzerland, it was then suggested that one ought to attempt to make the EU agree to the introduction into the FMPA of a new clause which would allow Switzerland to limit migration from the EU once the extent of that migration passes a certain level45 or, alternatively, to request a creative solution from the Joint Committee in charge of the agreement based on the existing safeguard clause of Art. 14(2) FMPA.46 However, informal talks with the EU (which never reached the level of formal negotiations) on such matters did not yield any tangible result.

As far as the internal Swiss law is concerned, the vote of 2014 was followed by a lively (and lengthy) debate about possible unilateral approaches for its implementation. Eventually, the Swiss Federal Parliament in December 2016 decided in favour of an implementation through federal legislation based on a system of domestic preference on the employment market (in German called Inländervorrang light) which it considered compatible with the FMPA. Essentially, the new provisions require that, in case of a certain level of unemployment in particular sectors, employers are obliged to report vacancies to the regional employment offices, which are then given a certain time to find suitable candidates from its database. Informed about these persons, the employers are obliged to invite them for an interview (Bahadir 2016). An attempt to launch a popular referendum against this approach did not succeed, i.e. the necessary number of 50,000 signatures was not reached.

In December 2017, the Federal Government adopted further implementing legislation concerning the details of the new rules, providing for a step by step introduction of the preference system. The Federal Minister in charge spoke of “a typical Swiss compromise” (Neue Zürcher Zeitung 8 December 2017). In its conclusions on the relations with Switzerland of 28 February 201747 (i.e. before the last legislative step on the Swiss federal level as mentioned in the previous paragraph), the EU

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44 Financial Times (9 February 2014) Swiss clash with EU foreshadows tensions if UK votes to leave.
45 In academia, such an approach was proposed by Ambühl and Zürcher (2015). For a comparative approach, see Tobler (2015b, Jusletter).
46 Art. 14(2) FMPA provides: “In the event of serious economic or social difficulties, the Joint Committee shall meet, at the request of either Contracting Party, to examine appropriate measures to remedy the situation. The Joint Committee may decide what measures to take within 60 days of the date of the request. This period may be extended by the Joint Committee. The scope and duration of such measures shall not exceed that which is strictly necessary to remedy the situation. Preference shall be given to measures that least disrupt the working of this Agreement.”
47 European Council conclusions on EU relations with the Swiss Confederation of 28 February 2017, http://www.consilium.europa.eu/en/press/press-releases/2017/02/28/conclusions-eu-swiss-confederation/?+conclusions+on+EU+relations+with+the+Swiss+Confederation (accessed 9 March 2020), para. 3.
Council of Ministers cautiously welcomed the approach chosen by Switzerland, stating that the text adopted “by the Swiss Federal Assembly can be implemented in a manner compatible with the rights of EU citizens under the Free Movement of Persons Agreement (FMPA) if the necessary implementing ordinance clarifies outstanding open issues, such as the right to information as regards vacancies, and the procedure for the adoption of further measures, in particular with a view to guaranteeing respect for frontier workers’ rights.”

One may therefore conclude that with the implementation approach chosen, Switzerland was able to solve its “external” problem with the EU (and, implicitly, also with the other EFTA states), at least on the federal level and for the time being. However, it remains that there are certain problems on the cantonal level, including in particular a far-reaching preference system for residents applying for public jobs in the Canton of Geneva⁴⁸ and a new provision in the constitution of the Canton of Ticino that, in case of equal qualifications, provides for a preference system for residents (according to the text, possibly even Swiss nationals) in the employment market.⁴⁹ This has led to a parliamentary question in the European Parliament.⁵⁰

In addition to these cantonal issues, which have external effects vis-à-vis the EU and the other EFTA states, an “internal” problem remains: As a result of the federal implementation of Art. 121a FC, quotas for residence permits and national preference in the employment market are in place for non-EU and non-EFTA states only (as indeed was already the case before the vote of 2014). Conversely, the approach prescribed in Art. 121a FC to reach the goal of autonomous steering of migration is not applied on migration from the EU and EFTA states, where the free movement regimes under the relevant agreements continue to be applied by Switzerland. Attempts to remedy the tension between the Federal Constitution and the federal legislation implementing the vote of 9 February 2014 have led to diametrically

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⁴⁸This is based on Cantonal guidelines relating to the cooperation of employers with the Cantonal Employment Office, see https://www.ge.ch/document/procedure-recrutement-au-sein-etat-geneve and https://www.ge.ch/document/procedure-recrutement-au-sein-institutions-droit-public-entites-subventionnees (both accessed 9 March 2020).

⁴⁹The text of the new provision results from a popular initiative on the Cantonal level with the title “Prima i nostri” (“Ours First”). According to the new Art. 4(1) of the Cantonal Constitution: “Il Cantone provvede affinché […] sul mercato del lavoro venga privilegiato a pari qualifiche professionali chi vive sul suo territorio per rapporto a chi proviene dall’estero (attuazione del principio di preferenza agli Svizzeri).” Based on the political debate, it seems that what is meant is a preference system for residents, rather than Swiss nationals; see e.g. Botschaft über die Gewährleistung der geänderten Verfassungen der Kantone Thurgau, Tessin, Wallis und Genf, BBl 2017 5849, p. 5854. The Swiss Federal Parliament has found that it is possible to implement the new rules without infringing the FMPA (i.e. presumably, by refraining to give preference to Swiss citizens), see media report ‘Parlament sagt ja zu Inländervorrang in Tessiner Verfassung’, 4 December 2017, https://www.parlament.ch/de/services/news/Seiten/2017/20171204192527946145158159041_bsd200.aspx.

⁵⁰Parliamentary question in the European Parliament by MEP Mara Bizotto, ‘Referendum in the Canton of Ticino to restrict cross-border worker numbers: urgent request for a Commission opinion’, 17 October 2017, see http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2016-007792&language=EN (accessed 9 March 2020).
opposed demands on the political level in Switzerland, namely on the one hand a constitutional initiative aimed at abolishing Arts. 121a and Art. 197(11) FC altogether—the so-called RASA initiative—and, on the other hand, plans for a constitutional initiative aimed at enforcing Art. 121a FC, if necessary by cancelling the FMPA and other free movement agreements—the so-called limitation initiative (Begrenzungsinitiative/limitation initiative or Kündigungsinitiative/cancellation initiative. In December 2017, the RASA initiative was withdrawn in a surprise move by the initiators. As for the limitation initiative, the SPP succeeded in collecting sufficient signatures. As already noted, the vote was originally set for 17 May 2020 but was then postponed to 27 September 2020 because of the Coronavirus pandemic. In the vote, the initiative was rejected.

It should be noted that in the case of the FMPA, a cancellation would have had far-reaching legal consequences because the agreements of the Bilaterals I package are linked to each other through a so-called “guillotine clause”, i.e. a clause at the end of each agreement in this package according to which the cancellation of one of them automatically ends the others after six months' time. In addition, a cancellation would also have endangered the Schengen Agreement, since the EU perceives the free movement of persons as a political prerequisite for the abolition of border controls. This in turn would have affected the Dublin Agreement, since the two Agreements can only be applied together (Art. 14(2) of the Dublin Agreement; Art. 15(4) of the Schengen Agreement). Other agreements might have been affected as well, notably if the EU, again, had made a political link between the cooperation in the fields of research, culture and education and the free movement of persons.

3.3 Migration and the Draft Institutional Agreement

It should be added that there is also an issue relating to immigration linked to the draft Institutional Agreement. More specifically, one of the three points which needs clarifications, according to the Swiss Federal Government, relates to the updating of the legal acquis of the FMPA with respect to EU Directive 2004/38. It has long been the wish of the EU to incorporate the rules of this Directive into the FMPA. However, the Swiss Federal Government did not agree to this. The parties to the negotiations so far have not been able to agree notably on the extent to which the Directive is relevant in the framework of the FMPA. Again, one of the suggestions

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51 RASA stands for “Raus aus der Sackgasse” or “Out of the dead end”.
52 See for the text of the initiative https://www.svp.ch/news/artikel/medienmitteilungen/schluss-mit-der-personenfreizuegigkeit/ (accessed 9 March 2020).
53 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 [2004] O.J. L 158/77.
made by the present writer for a common declaration addresses this point (see above Sect. 2.1).

3.4 Putting One’s Hope on Brexit?

Overall, it can be concluded that in spite of the “mild” implementation of Art. 121a FC the pressure on the EU-Swiss relationship in the context of migration continues, not least as a consequence of political developments and democratic mechanisms within Switzerland. In this situation, again, certain circles in Switzerland put their hopes on Brexit, suggesting that Switzerland might benefit from a deal eventually reached by the UK and the EU for their relations following the UK’s withdrawal from the EU. In 2017, these hopes were further fuelled when the Swiss academic, Michael Ambühl, was asked to advise the UK Government about his and his collaborator’s idea of a safeguard clause that, based on the FMPA, would allow Switzerland to limit migration (Wright and Waterfield 2017). It was hoped that if such a rule were given to the UK, Switzerland could expect the EU to yet agree to a change of the FMPA along the same lines.

However, again there is the time issue and the uncertainty on the content of any future arrangement as already mentioned in the context of the institutional issues—if such an agreement can be concluded at all. In addition, it has been the Swiss experience that the looming of Brexit limited the EU’s willingness to make concessions to Switzerland, even in the context of the interpretation of the existing safeguard clause in the FMPA. Conversely, what happens in Switzerland may influence the Brexit negotiations. According to the Financial Times (18 September 2016), the Alpine state of Switzerland, “surrounded by the EU but not part of it, had inadvertently become a test bed for how the bloc stands up to demands for special treatment from immigration-wary neighbours.”

4 Conclusion

The present contribution started by stating that Switzerland’s legal relationship with the EU represents a unique and complex model. Attractive as it may seem to certain other states, it is also a model under political pressure, both from inside and outside of Switzerland. It was seen that Brexit has not made matters simpler and neither do the democratic mechanisms in Switzerland. Indeed, it was seen that these mechanisms represent a considerable challenge, both in the context of migration based on free movement rules and on a renewed institutional framework for a number of EU-Swiss market access agreements. Ultimately, these issues touch on the very nature of the legal relationship between the EU and Switzerland, seen notably against the background of the EU’s increasing concern for a homogeneous internal market in its relations with close neighbouring states. In this context, it is not
surprising that the EU also in the Brexit negotiations has stressed the integrity of the internal market and stated that “preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach”.\(^{54}\) It remains to be seen whether, indirectly, this is also a message directed at Switzerland.

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