



## Switzerland's implementation of EU legislation

**SUMMARY** *Switzerland and the EU are linked via more than 120 bilateral agreements, which concern the single market and other sectors. So far, the country has not been willing to join the EU for reasons of neutrality, direct democracy, its federal structure and economic considerations, among other things. A large number of EU acts are implemented by Switzerland without any obligation to do so, mainly due to economic considerations. Binding obligations to implement EU law are enshrined in the various bilateral agreements, but mostly they do not extend to take account of changes in EU law. Swiss courts are not obliged to follow the jurisprudence of the Court of Justice of the EU but alignment is common practice.*

*The EU considers the number and structure of the bilateral agreements cumbersome to manage and is trying to convince Switzerland to put relations into a more systematic framework with effective institutions.*

*The general pressure of the financial crisis has led Switzerland to reform its banking laws and further reforms will follow. However Switzerland maintains its policy of keeping banking secrecy. Currently, Switzerland has signed bilateral agreements with Germany, the UK and Austria on savings tax. Switzerland has fixed its currency to a minimum level, and while economic growth predictions have been revised downwards they are still positive.*



Historic bridge linking Germany and Switzerland

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### EU-Swiss relations

#### Introduction

Switzerland is highly interlinked with the EU: in 2011, 59% of the country's exports went to the EU, while imports from the EU amounted to almost 78%.<sup>1</sup> Moreover, the country participates in many EU policies and contributes to the Cohesion Fund.

Switzerland's partners in the European Free Trade Area (EFTA) joined with the EU through the single over-arching European Economic Area (EEA) Agreement. In contrast, Swiss relations with the EU are governed by more than 120 bilateral sectoral agreements (about 20 main and 100 subsidiary texts). Switzerland also adopts further EU legislation to make its alignment with the *acquis communautaire* more coherent. Nevertheless, the complexity of the current maze of bilateral agreements – most of which are not automatically adapted to developments in the EU *acquis* – and the lack of a supranational authority to settle disputes have called into question the possibility of continuing on this basis.

#### Why Switzerland has not joined the EU

The Swiss people and cantons (a double majority was needed) decided in a December 1992 referendum, by a very close margin, against EEA membership. Half a year

before that, the Swiss Federal Council (government) had applied for EU membership. Since then, the application has lain dormant, and in 2005, it was dropped as an official priority of the government.

Some of the Swiss arguments against EU membership are similar to those for rejecting the EEA. The Swiss are deeply attached to **neutrality**, and many of them fear that EU membership would call neutrality into question, despite EU Member States Austria, Finland, Ireland, and Sweden having remained non-aligned.

**Direct democracy** is an equally treasured concept and practice in the country. It would be impossible to submit each EU regulation to a referendum. They could though be envisaged on the way in which Switzerland implements directives. The academic René Schwok, however, claims that the fears of Switzerland having to adapt its **federal structure** in the event of accession are also unfounded: EU membership would allow the Swiss cantons more influence on EU decision-making than the current bilateral agreements.

Finally, **economic arguments** are put forward against joining: the Swiss fear becoming poorer through the EU. Employers' organisations fear the loss of privileges, because many sectors are heavily protected (agriculture) or profit currently from the differences between Swiss and EU legislation (banks, multinationals, insurance companies). Switzerland would have to raise its VAT rate (currently 8%) and eventually

adopt the euro, unless it were successful in negotiating a derogation to keep its own currency.

The Swiss government estimated in 2006 that its annual **budgetary contribution** to the EU would be CHF 3.4 billion.<sup>2</sup> The cost of the current bilateral agreements was considered to be much lower: CHF 472 million.

## Formal EU-Switzerland links

In 1972, the Community and Switzerland established a free trade area, and an agreement on insurance companies entered into force in 1989.

### European Economic Area

The EFTA members, including Switzerland, signed the EEA Agreement in 1992. Today, Norway, Iceland and Liechtenstein (the EFTA-EEA states) are the remaining partners with the EU Member States. The EEA extends the EU's internal market to non-Member States by eliminating barriers to the free movement of goods, services, capital and persons. It includes competition law, support for the poorer EU Member States and social, environmental, cultural and research initiatives, but does not extend to agriculture, visas, asylum policy, taxation, neutrality, or the Swiss franc (CHF), all issues where passions in Switzerland can run high.

Enforcement of EEA rules is based on two pillars: an EU one – the Commission and Court of Justice – and for the EFTA-EEA states, the EFTA Surveillance Authority and EFTA Court. The EFTA-EEA states are consulted on the shaping of new EU legislation in the internal market, although they have no vote. In contrast, Switzerland has only [observer](#) status in discussions within the EFTA pillar.

A first package of sectoral agreements (**Bilateral agreements I**) was, after long negotiations, signed in 1999 and entered into force in 2002, approved by referendum in Switzerland. The Swiss had to agree to the whole package or risk losing all of these agreements, as the EU insisted on a "guillotine clause". The package concerns mainly single-market related policies and free movement and establishment of persons. The Annex provides a complete list.

The signature of Bilaterals I between the EU and Switzerland also made revision of the EFTA Convention between Switzerland and EFTA-EEA members necessary.<sup>3</sup>

### Follow-up referenda:

In 2005, Swiss voters agreed to extend the agreements to the MS that joined the EU in 2004, again influenced by guillotine clause. Switzerland agreed to contribute CHF 1 billion to EU research, education and

cohesion programmes over ten years. The prolongation of the right of free establishment and its extension to Bulgaria and Romania was approved in 2009.

The **Bilateral Agreements II** (listed in Annex) were signed in 2004, without a guillotine clause. Only those concerning Schengen, the fight against fraud and the taxation of savings interest raised opposition in Switzerland, and to some extent in the EU, but all entered into force eventually.

The Swiss [European Integration Office](#) estimated that the Bilaterals II package would have a positive effect on the **Swiss budget**: reduced customs revenues from processed agricultural goods and participation in the European Environmental Agency and the MEDIA programme would cost CHF 80 million, while the federal budget would save the same amount through reduced asylum costs due to Schengen/Dublin. Switzerland would also profit from the withholding tax imposed on savings interest.

### Implementing EU law in practice

There are no common institutions between Switzerland and the EU to guarantee convergence of legislation. This contrasts with Norway, Iceland and Liechtenstein, which use the [EEA institutions](#) as a vehicle to adopt EU legislation and rules and to take part in the EU's decision-making process. Switzerland therefore [lags behind Norway](#) in terms of both legal arrangements and its access to the single market. The [influence](#) of EU law on Swiss law can be [observed](#) mainly in two forms.

#### Bilateral agreements

Under the agreements, EU law is either implemented by using similar terms and rules in Swiss legal instruments or through references to secondary EU law. Both options lead to legally binding implementation. A third non-binding option

foresees the obligation for Switzerland to take the respective EU acts into account.

Bilateral agreements are generally static, i.e. updates to changes in EU legislation are not automatic. Changing the texts themselves is usually only possible via the joint EU-Swiss committees supervising the various sectoral agreements. However, the committees meet only once a year and this option has rarely been used due to the lengthy authorisation procedures needed on both sides. Annexes to the agreements are more flexible since the committees themselves are competent to decide on amendments.

The [Schengen](#) and [Dublin](#) association agreements are **exceptions**, including a general obligation for Switzerland to adapt to the evolving EU law (and including penalties for non-compliance). In return, like Norway, Switzerland is an associate member, involved in the shaping of developments and participating in meetings at all levels.

#### Autonomous adaptation

After the failure of the EEA referendum, Switzerland decided to adopt in national law a range of Community legislation in the field of trade and consumer protection, with the aim of increasing the competitiveness of Swiss enterprises and to improve consumer protection. This so-called **autonomous adaptation** (*Autonomer Nachvollzug*) is applied mostly in cases of economic relations. It has also been used in the fields of the bilateral agreements, when the Swiss government has unilaterally followed developments in the *acquis communautaire* without waiting for the cumbersome process of amending the agreement. For example, in 2010, a Swiss law brought in the *Cassis de Dijon* principle, going further than the 1999 bilateral agreement.

Autonomous adaptation means the Swiss legislature is inspired by EU legislation although there is no obligation for Switzerland to approximate its domestic legislation. The EU act is either reproduced

completely or the act is adapted to EU law. There are no official statistics, but studies estimate that approximately [40-60% of federal laws](#) which have recently been autonomously adopted or reviewed were influenced to some extent by EU law.

[Concerns](#) have been raised about the **democratic deficit**, i.e. whether the Swiss population can be informed better about the influence of EU law on Swiss law. While Switzerland has no possibility to influence the EU legislative process, more and more legislation is being taken over from the EU. It is also [observed](#) that bilateral agreements are more and more drawn into the dynamic development of EU legislation which also leads to a loss of Swiss sovereignty.

### Monitoring and implementation

In general, only Swiss authorities are [competent](#) for the implementation of binding EU law. However, for the surveillance and control of competition law in the field of the EU-Swiss air transport agreement, EU institutions are competent.

### Role of CJEU and Swiss courts

In order to guarantee the compatibility of Swiss law with EU law in areas where autonomous adaptation applies, the Swiss government [recognises](#) the need to take EU jurisprudence into account when interpreting terms which have been transposed literally or with the same context from EU law.

However, the Swiss courts have no legal obligation to follow the jurisprudence of the CJEU. This was underlined again in a recent decision<sup>4</sup> by the Swiss Federal Supreme Court in relation to product liability. At the same time, the Court stated that the intention of the Swiss legislator to adapt Swiss law autonomously to EU law should be taken into account and that this approach of harmonisation should not be challenged if there are no good reasons to do so.

Only the bilateral agreements on free movement of persons and air transport, and

the Schengen and Dublin Association Agreements include direct references to the relevance of the jurisprudence of the CJEU.<sup>5</sup> For the other agreements, the general interpretation principles of international treaties<sup>6</sup> apply when evaluating on a case by case basis whether CJEU jurisprudence has to be followed or taken into account.

### Recent developments and debate

It has become more and more obvious that the large number of bilateral agreements has become too complicated. It is increasingly difficult to ensure the agreements are updated to the evolving *acquis communautaire*. Minor differences between Swiss and EU legislation, e.g. weaker consumer protection for the same product in Switzerland, can lead to competitive advantages and imbalances in the internal market. At the same time, smaller Swiss companies face challenges like the REACH Regulation which requires testing of chemicals on EU territory. As a consequence, a Swiss company has to ask a partner based in the EU to do their testing and needs to entrust them with business-sensitive information to do so.

A major problem is the lack of legal remedies for dispute settlement because there are no supranational authorities (like the EFTA Court and Surveillance Authority) foreseen to handle this. The agreements are administered by [joint committees](#), which have to agree unanimously on solutions, limiting their effectiveness.

### New arrangements?

Switzerland is [interested in discussing new bilateral agreements](#) but the EU institutions are against pursuing this path, and want to put relations into a more systematic framework. The EU's key requests are the following: as a de facto member of the internal market, Switzerland should implement new legislation and CJEU case law concerning the bilateral agreements automatically. Supervision and enforcement of the existing agreements must be ensured.



The [Council](#) already stated in 2010 that the bilateral system had reached its limits. The Parliament [called](#) for horizontal solutions as well.

Members of the Swiss government [said](#) in 2010 that their country's "red line" was respect for Swiss sovereignty. On 15 June 2012, the Swiss government adopted "[principles for institutional solutions with the EU](#)", [foreseeing a national independent supervisory body](#) with limited powers for future agreements and only Swiss members. However, an internal EP [briefing](#) reports that, under this proposed arrangement, should Switzerland refuse to implement a piece of EU legislation, there would still be no effective dispute settlement mechanism. All that the EU could do would be to apply proportionate counter-measures, which could not be assessed by the CJEU or the EFTA court, but by an external arbiter. The EEAS is continuing its evaluation of the proposals. The Council plans to adopt its position in December 2012.

## Financial sector

There is no agreement on financial services between Switzerland and the EU, in particular due to the Swiss desire to maintain bank secrecy. Larger Swiss banks do business across the EU via subsidiaries in EU Member States while smaller banks are mainly active inside Switzerland only.

The general [pressure](#) to reform banking practices as a consequence of the crisis has led Switzerland to revise its Banking Act. [Further reforms in the field of financial services, tax regulation](#) and [consumer protection](#) are expected to follow. EU legislation in this field ([MiFID](#), [EMIR](#) and [AIFMD](#)) will also have an impact on the sector as Swiss banking activities are interconnected with the EU.

Currently, the EU has [savings tax agreements](#) with five neighbouring countries: Switzerland, Andorra, Monaco, Liechtenstein and San Marino. The EU has a

strong interest in extending the scope of its [Savings Tax Directive](#), demanding that Switzerland agree to automatic exchange of information between tax administrations. One argument for Switzerland not to move further at EU level is the [Rubik agreements](#) with Germany, the United Kingdom and Austria (not yet in force). They foresee tax deducted at source by Switzerland, thereby maintaining Swiss bank secrecy. Switzerland intends to discuss further Rubik agreements with other EU Member States.

Pressure on [Swiss banking secrecy](#) may also be exerted by the US [model inter-governmental agreement](#) negotiated with France, Germany, Italy, Spain, and the UK under the Foreign Account Tax Compliance Act (FATCA). It foresees that the parties hand over certain bank account data of US citizens. Switzerland is currently negotiating a FATCA deal but it is [questionable](#) whether this will ease the ongoing tax dispute with the US.

As to corporate taxation, the Commission [found](#) in February 2007 that certain forms of corporate tax regimes which exist in some Swiss cantons constituted a form of state aid incompatible with the 1972 Free Trade Agreement. The issue has not yet been resolved but Switzerland adopted a [mandate](#) for dialogue with the EU in June 2012.

### Effects of the crisis

On 6 September 2011 the Swiss National Bank decided to freeze the franc-euro exchange rate to a minimum of CHF 1.20. The Bank [stated](#) that it "will enforce this minimum rate with the utmost determination and is prepared to buy foreign currency in unlimited quantities". This September, the situation remains [unchanged](#) since the Swiss franc is still high, having a negative impact on the Swiss economy. The [Swiss government's panel of experts cut their economic growth prediction](#) from 1.4% to 1.0% for 2012 and from 1.5% to 1.4% for 2013.

A recent [report by the rating agency Standard and Poor's](#) observed a [recycling effect](#) of euros from the eurozone periphery to its core via the Swiss National Bank, leading to further divergence of interest rates in sovereign bonds. Large sums of savings from Spain, Greece and Italy have been transferred to Switzerland. To keep the level of the franc down, the Swiss National Bank bought a large amount of state bonds issued by Germany, France, the Netherlands, Finland and Austria. The Swiss National Bank [challenged](#) S&P's report, stating that its holdings with other central banks, like the ECB, were not taken into account.

## Main references

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[Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz](#)/ Astrid Epiney, Beate Metz, Benedikt Pirker, 2012, 301 p.

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## Endnotes

<sup>1</sup> [Switzerland, country briefing](#), 2012, DG EXPO PolDep, July 2012, 16 p.

<sup>2</sup> [ECB annual exchange rate](#) 2006: €1 = CHF1.57; 2012: fixed by Switzerland at €1 = CHF1.20

<sup>3</sup> Swiss State Secretariat for Economic Affairs (SECO): information pages on [EFTA](#).

<sup>4</sup> [BGE 137 III 226 E.2.2.](#)

<sup>5</sup> [Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz](#)/ Epiney, Metz, Pirker, 2012, p.154 ff.

<sup>6</sup> [Vienna Convention on the Law of Treaties](#), Art 31: "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose."

## Annex: EU-Switzerland (CH) Bilateral Agreements

**1972 [Free Trade Agreement](#)**, OJ L 300, 31.12.1972, pp. 189-280: industrial goods originating in the EU or CH exempt from customs duties, no more quotas, duty reduction for agricultural goods.

**1989 Insurance Agreement:** Insurance companies in CH and EU may choose their domiciles. Not applicable to life insurance or reinsurance companies.

### **2002 [Bilateral Agreements I:](#)**

- Air transport: gradual access to each other's markets in civil aviation.
- Public procurement markets: reciprocal opening of markets for municipal public procurement.
- Research: Swiss participation in EU research programmes.
- Agriculture: partial simplification of trade in agricultural products (cheese, processed dairy food, but not fresh meat, milk and wheat), dismantling of tariffs, mutual recognition of regulations in veterinary medicine, plant protection, bio food.
- Eliminating technical barriers to trade: simplified access to market, certification of products, evaluations, inspections, authorisations, to be mutually recognised. Less bureaucracy at borders but does not go as far as [Cassis de Dijon](#) principle.
- Overland transport: gradual opening of markets for road and rail transport to competition. Higher levy on lorries passing through CH (CHF 325), CH allows higher weight limits (passing from 28t to 40t).
- Free establishment/movement of persons: gradual opening of labour markets, with some pre-requisites: employment contract, self-employed or financially independent, health insurance. Also applicable to EFTA nationals. Currently, subject to a dispute: in 2012, CH reintroduced quotas for workers from eight MS, which the EU considers a breach of the agreement.

### **2005 [Bilateral Agreements II:](#)**

- Schengen and Dublin agreements: no more systematic control of persons at borders, but retained for merchandise. Strengthened controls at Schengen external borders to combat crime, collaboration with SIS (Schengen Information System). Avoidance of multiple requests for asylum, Eurodac fingerprint database.
- Taxation of savings interest: While maintaining banking secrecy, CH agreed to introduce a withholding tax (phased in from 15% to 35%) on income accruing from EU residents' savings. It redistributes 75% of this tax to EU Member States.
- Fight against fraud: CH helps the EU to combat fraud in customs duties, subsidies and public procurement markets. In return, has obtained further guarantees on banking secrecy.
- Processed agricultural products: reduction or elimination of tariffs on many food industry products.
- Statistics: CH cooperates with Eurostat.
- Pensions: Removal of double taxation on pensions of retired EU officials living in CH.
- Environment: CH becomes a member of the European Environment Agency.
- MEDIA programme: CH joins this programme aimed at supporting the European audiovisual sector.
- Education, occupational training, youth: CH joins programmes supporting cross-border mobility mainly of young people (Socrates, Leonardo, Youth...)