

# The Model of the Integration of the Swiss Confederation with the European Union<sup>1</sup>

Inga Kawka

## Abstract

Switzerland has assumed an autonomous position towards the EU yet perceives the Union and its Member States as permanent and important partners. The basis for EU-Switzerland relations is a multitude of long-negotiated, sector-based bilateral agreements which vary in terms of both the level of precision on the integration-related objectives and formal principles aimed at ensuring integration dynamics. The article highlights the current model of cooperation between the Union and Switzerland and the problems with its enforcement.

**Keywords:** Switzerland, European Union, bilateral agreements

## Introduction

In terms of geography, Switzerland lies in the middle of Europe and is almost entirely surrounded by the European Union's Member States Germany, Italy and France, the only exception being Lichtenstein. The EU and its 28 Member States (in particular those neighbouring ones) are decidedly key international partners of Switzerland given the EU's economic and political weight as well as geographical and cultural proximity. Likewise, Switzerland is a key country for the Union. In 2016, 53.7% of Swiss exports were destined for the EU and 78.1% of the goods imported by Switzerland originated in the Union. Almost 60 % of the Swiss abroad (59.9%) live in EU Member States (464,409 persons) and most foreigners in Switzerland are EU citizens (68.5%, i.e. 1,395,523 persons). The Union is also Switzerland's key partner in terms of direct investment. In 2015, Swiss investment in the EU accounted for CHF 544.94 billion, 48.6% of all foreign investment made by Switzerland, while 78% (CHF 649.77 billion) of the foreign capital in the country in 2015 came from the EU<sup>2</sup>.

Additionally, the proximity between Switzerland and its EU neighbours is justified by Swiss political traditions, cultural life as well as scientific cooperation. Switzerland boasts a rich

---

<sup>1</sup> This research was funded by the Polish National Science Centre on the basis of decision number DEC-2013/09/B/HS5/04116.

<sup>2</sup> Direction des affaires européennes DAE, Faits et chiffres, <https://www.fdfa.admin.ch/dea/fr/home/europapolitik/eckwerte.html> (17 September 2017).

and long parliamentary tradition, its political parties cover similar agendas like those in EU Member States, while Swiss intellectual and scientific debates and movements cannot be separated from those in the Union<sup>3</sup>. Paradoxically, however, the Swiss refuse to join the EU despite close economic ties with the Union and its immediate neighbourhood. At the same time, they do not wish to be marginalised in Europe. The Swiss *2016-2019 Foreign Policy Strategy* is straightforward in stating that the development of stable cooperation with the EU is the Confederation's key objective. In sum, Switzerland has assumed an autonomous position towards the EU yet perceives the Union and its Member States as permanent and important partners, primarily as regards enhancing the competitiveness of the Swiss economy at international level (research, trade, innovation), ensuring Switzerland internal and external security (fight against terrorism and crime), improving the quality of life for its residents (mobility, employment, cultural diversity, environmental protection, health), as well as international cooperation and humanitarian aid<sup>4</sup>. Such goals are to be attained thanks to the development of stable bilateral relations.

### **1. Switzerland's impossible EU membership**

Despite the economic, demographic, cultural and scientific interdependencies between Switzerland and the EU, the obstacles making it impossible for the country to join the EU have proved insurmountable. In 1988, the Swiss Secretary of State Franz A. Blankart listed eight of them, the first two ones as of primary importance: 1) inability to retain neutrality, 2) threat to direct democracy, 3) limitation of federalism, 4) risks related to the freedom of movement of persons, 5) need to introduce major changes in the agricultural policy, 6) reduction of the Parliament's legislative competences, 7) reduction of the prerogatives of the Federal Court of Justice, 8) reduced authority as regards entering into international agreements<sup>5</sup>.

Similar reasons hampering Switzerland's accession to the EU had been given by the Federal Council in 1960. It issued a warning that the nation whose existence depended more on political will than a single language, culture or origin might not agree to a gradual weakening of its political independence. According to the Federal Council, Switzerland's joining the Communities would also mark the start of undermining the neutrality of the Confederation<sup>6</sup>. Such a position resulted from the assumption that the objective of the Communities was the

---

<sup>3</sup> R. Schwok, *Suisse – Union européenne. L'adhésion impossible ?*, Lausanne 2010, pp. 10-11.

<sup>4</sup> *Stratégie de politique étrangère 2016-2019. Rapport du Conseil fédéral sur les axes stratégiques de la politique étrangère pour la législature*, Département fédéral des affaires étrangères (DFAE), Bern 2016, p. 15ff.

<sup>5</sup> F. A. Blankart, *Considérations sur la politique européenne de la Suisse*, « Cadmos » 1988, no 38, pp. 22-38.

<sup>6</sup> Message du Conseil fédéral à l'Assemblée fédérale sur la participation de la Suisse à l'association européenne de libre-échange (Du 5 février 1960), Feuille Fédérale no 10, Berne, 10 mars 1960, vol. I, p. 889.

creation of an association or union that was not just economic but also political and in the long term a super-state<sup>7</sup>.

## 2. EU-Switzerland bilateral agreements currently in force

Switzerland's cooperation with the EU is based on a unique model. Unlike in the case of other international agreements providing a comprehensive framework for the EU's relations with its neighbours such as the Agreement on the European Economic Area<sup>8</sup>, stabilisation and association agreements (with the Western Balkan states) or association agreements with some countries covered by the Eastern Partnership<sup>9</sup>, the basis for EU-Switzerland relations is a multitude of long-negotiated sector-based bilateral agreements which in principle do not foresee the establishment of coordinating institutions ensuring their application. That kind of relations, referred to as pragmatic bilateralism, assumes cooperation in areas of common interest of the Union and the Confederation while retaining complete political independence of the latter<sup>10</sup>. It highlights an evident contradiction between the will to pursue integration and the absence of institutional solutions to make it happen. Most of the sector-based agreements have been drafted, straightforwardly or by default, in order to integrate the Swiss legal order in a given area with the EU's equivalent legal domain. As the EU's policies and law are constantly developing, many of the bilateral accords foresee the implementation of mechanisms that allow further integration. Still, those agreements vary in terms of both the level of precision on the integration-related objectives and formal principles aimed at ensuring integration dynamics. As a result, a number of bilateral accords remain incomplete in that regard<sup>11</sup>.

Just as is the case with the other EFTA countries, Switzerland's economic relations with the Community began by signing a free trade agreement with the EEC that related to industrial products<sup>12</sup>. The pact reflected the general policy of the Community, comprising nine Member States back then, towards the EFTA states. Similar agreements were signed with Austria, Iceland, Portugal and Sweden in 1972 as well as Finland and Norway in 1973. As a result of the establishment of the EEA and the accession of Portugal, Austria, Finland and Sweden to the European Union, Switzerland remains the only EFTA state still bound with the

---

<sup>7</sup> Ibidem, p. 888.

<sup>8</sup> Agreement on the European Economic Area, Polish Special Edition OJ EU, 1/Volume 52, pp. 3-366.

<sup>9</sup> Association Agreement between the European Union and their member states, of the one part, and Ukraine, of the other part, OJ EU, L 161, 29 May 2014, pp. 3-2137.

<sup>10</sup> S. Lavenex, R. Schwob, *The Swiss Way. The nature of Switzerland's relationship with the EU*, in: *The European Union's Non-Members: Independence Under Hegemony?*, Erik Oddvar Eriksen, John Erik Fossum (eds.), Routledge 2015, p. 36ff.

<sup>11</sup> S. Jenni, *Switzerland's Differentiated European Integration. The Last Gallic Village?*, Springer, 2016, pp. 105-107.

<sup>12</sup> Industrial products (1 January 1973) – Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, RS 0.632.401, OJ L 300 of 31 December 1972, p. 189, Polish Special Edition, Chapter 11, Volume 11, p. 105.

EU by a free trade agreement<sup>13</sup>. The next major bilateral EU-Switzerland agreement was that of 10 October 1989 ensuring mutual freedom of enterprise in the insurance sector<sup>14</sup>.

As the Swiss and the cantons refused to join the EEA Agreement on 6 December 1992, the Federal Council launched talks with a view to signing successive bilateral agreements. The sector-based accords (Bilaterals I) signed as a result of those negotiations in Luxembourg on 21 June 1999 cover seven areas: the free movement of persons, removing technical barriers in trade, air transport, road transport, government procurement, agriculture as well as scientific and technological cooperation. The agreements in question entered into force on 1 June 2002. They can be divided into three types<sup>15</sup>: integrational ones (the agreement concerning air transport<sup>16</sup>), cooperation agreements (the one on scientific and technological cooperation<sup>17</sup>), and liberalisation ones based on the principle of legislative equivalence (the agreement on the free movement of persons<sup>18</sup>, agreement on road transport<sup>19</sup>, agreement on removal of technical barriers in trade<sup>20</sup>, agreement on trade in agricultural goods<sup>21</sup>, and the agreement on government procurement<sup>22</sup>).

---

<sup>13</sup> Ch. Kaddous, *Les accords sectorielles dans le système des relations extérieures de l'union européenne*, w : *Accords bilatéraux Suisse – EU*, D. Felder, Ch. Kaddous (eds.), Bâle, Genève, Munich, Bruxelles 2001, p. 78.

<sup>14</sup> The Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than the life insurance was signed in Luxembourg on 10 October 1989, (Accord entre la Confédération suisse et la Communauté économique européenne concernant l'assurance directe autre que l'assurance sur la vie), RS 0.961.1.

<sup>15</sup> Ch. Kaddous, *Les accords sectorielles...* p. 79.

<sup>16</sup> Agreement between the European Community and the Swiss Confederation on Air Transport, RS 0.748.127.192.68, OJ L 114 of 30 April 2002, p. 73. 2004 Special Edition, Chapter 11, Volume 41, p. 94.

<sup>17</sup> Accord de coopération scientifique et technologique entre les Communautés européennes et la Confédération suisse - OJ L 114 of 30 April 2002, p. 468 (not published in Polish). This Agreement is not in force anymore. Currently binding is the **Agreement for scientific and technological cooperation between the European Union and European Atomic Energy Community 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**, OJ L 370 of 30 December 2014, p. 3.

<sup>18</sup> **Agreement 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**, RS 0.142.112.681, OJ L 353 of 31 December 2009, p. 71.

<sup>19</sup> Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road, RS OJ L 114 of 30 April 2002, p. 91, 2004 Special Edition, Chapter 11, Volume 41, p. 114.

<sup>20</sup> **Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment**, OJ L 114 of 30 April 2002, p. 369, 2004 Special Edition, Chapter 11, Volume 41, p. 407.

<sup>21</sup> **Agreement between the European Community and the Swiss Confederation on trade in agricultural products** (OJ L 114 of 30 April 2002, p. 132), 2004 Special Edition, Chapter 11, Volume 41, p. 159.

<sup>22</sup> **Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement**, OJ L 114 of 30 April 2002, p. 430, 2004 Special Edition, Chapter 11, Volume 41, p. 471.

Another batch of bilateral agreements (Bilaterals II) was adopted by the Union and Switzerland on 26 October 2004. They pertain to nine areas. Each of them entered into force on a different date. From the legal point of view, they are not linked, i.e. unlike Bilaterals I, they do not share the “guillotine” clause<sup>23</sup>.

Six of the agreements in question pertain to secondary issues and it was not difficult to conclude them. These are ones concerning: processed agricultural goods<sup>24</sup>, environmental protection<sup>25</sup>, statistics<sup>26</sup>, the audio-visual sector<sup>27</sup>, old-age pensions of officials of the European institutions and agencies<sup>28</sup>, and processed agricultural goods<sup>29</sup>. Three, however were subject to intensive negotiations and cover counteracting financial fraud<sup>30</sup>, the Schengen/Dublin *acquis*<sup>31</sup> and taxation of savings income in the form of interest payments<sup>32</sup>. The agreements related to Switzerland’s adoption of the Schengen/Dublin *acquis* were approved by 54.6 % of the Swiss in a referendum held in June 2005<sup>33</sup> while its extension to include matters related to

---

<sup>23</sup> R. Schwok, *Suisse – Union européenne...* p. 47.

<sup>24</sup> Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 as regards the provisions applicable to processed agricultural products, OJ L 23 of 26 January 2005, p. 19.

<sup>25</sup> Agreement between the European Community and the Swiss Confederation concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network, OJ L 90 of 28 March 2006, p. 37.

<sup>26</sup> Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics, L 90 of 28 March 2006, p. 2.

<sup>27</sup> Agreement between the European Community and the Swiss Confederation in the audiovisual field, establishing the terms and conditions for the participation of the Swiss Confederation in **the MEDIA Plus and MEDIA Training Community programmes**, OJ L 90 of 28 March 2006, p. 23.

<sup>28</sup> Agreement between the Swiss Federal Council and the Commission of the European Communities with a view to avoiding the double taxation of retired officials of the institutions and agencies of the European Communities resident in Switzerland, [https://www.eda.admin.ch/content/dam/dea/en/documents/abkommen/pensionen\\_en.pdf](https://www.eda.admin.ch/content/dam/dea/en/documents/abkommen/pensionen_en.pdf) (10 December 2017).

<sup>29</sup> Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of July 22, 1972 as regards the provisions applicable to processed agricultural products, OJ L 23 of 2005, p. 19.

<sup>30</sup> Cooperation agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests, OJ L 46 of 17 February 2007, p. 8.

<sup>31</sup> Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen *acquis*, OJ L 53 of 27 February 2008, p. 52; Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 53 of 27 February 2008, p. 5.

<sup>32</sup> Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, L 385 of 29 December 2004, p. 30; **Agreement in the form of an Exchange of Letters between the European Community and the Swiss Confederation on the date of application of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments**, L 385 of 29 December 2004, p. 51.

<sup>33</sup> <https://www.admin.ch/ch/fi/pore/va//20050605/index.html> (10 November 2017).

biometric passports was subject to a vote on 17 May 2009, where 50.1 % of the voters approved the extension of the Schengen *acquis*. In addition to the two Bilaterals I and Bilaterals II “packages”, some other agreements have also been adopted, such as on: cooperation in the context of Europol (2004) and Eurojust (2008), customs facilitations and customs security (1990 and 2009); education, vocational training, youth (2010); cooperation with the European Defence Agency (2012); cooperation with competition protection authorities (2013), and satellite navigation (Galileo and EGNOS - 2013). The adaptation is planned of an agreement allowing Switzerland to participate of the European electricity market. Currently, there exist around twenty key agreements between the EU and Switzerland and circa a hundred others. The relevant list has been published on the website of the Federal Foreign Affairs Department (*Département fédéral des affaires étrangères DFAE*)<sup>34</sup>.

### **3. Institutional framework of the bilateral agreements**

As regards the bilateral agreements between the Union and Switzerland, there are no uniform institutional rules. Conversely, they change depending on the level of integration they envisage. It is a rule, however, that efficient functioning of the bilateral agreement is ensured by the Joint Committee, a platform of information exchange, discussion and mutual consultations between the parties. As the parties' rights are equal, decisions of Joint Committees are taken consensually. Such bodies may take decisions exclusively as provided for by the agreement, thus it is the classic international cooperation format<sup>35</sup>. In the case of some agreements which do not relate to access to the EU and Swiss markets, e.g. those concerning taxation of savings income in the form of interest payments or cooperation between competition protection bodies, Joint Committees have not been instituted at all.

#### **3.1. Adjusting bilateral agreements to the changing EU legislation**

The bilateral agreements between the EU and Switzerland are of static nature. Most contain an annexed list of legal acts to be implemented by Switzerland (pre-signature *acquis*/fixed *acquis*)<sup>36</sup>. Switzerland, in turn, may act at its discretion when it comes to the transposition of the provisions of the EU's *acquis* adopted already after the bilateral agreement

---

<sup>34</sup> List of the bilateral agreements between the European Union and Switzerland [https://www.eda.admin.ch/content/dam/dea/fr/documents/publikationen\\_dea/accords-liste\\_fr.pdf](https://www.eda.admin.ch/content/dam/dea/fr/documents/publikationen_dea/accords-liste_fr.pdf) (10 November 2017); the thematic list available at: <https://www.admin.ch/opc/fr/european-union/international-agreements/index.html> (10 November 2017).

<sup>35</sup> *Rapport du Conseil fédéral Rapport du Conseil fédéral en réponse au Postulat Keller-Sutter...* p. 58.

<sup>36</sup> A. D. Casteleiro, *Relations Between European Union and Switzerland: a Laboratory for EU external Relations?*, in: Francesco, M., Petrov R., Mouliarova E. (2009), *European integration without EU membership models, experiences, perspectives*, MWP Working Papers. No 10, [http://cadmus.eui.eu/bitstream/handle/1814/11294/MWP\\_2009\\_10.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/11294/MWP_2009_10.pdf?sequence=1), p. 107.

was signed<sup>37</sup>. This is how things stand although the bilateral agreements are based on the principle of equivalence between EU law, on the one hand, and Swiss law on the other. That principle should be effected by means of Joint Committees composed of representatives of the Union and Switzerland. To that end, Joint Committees make diplomatic efforts yet in many cases are unable to achieve consensus<sup>38</sup>. This is exacerbated by the fact that the Committees meet only rarely (once or twice a year), negotiations concerning updates of EU-Swiss bilateral agreements lack transparency and exchange of information between EU administration and the Committees as well as the latter themselves is not sufficiently intensive. Consequently, Switzerland enjoys far-reaching autonomy as regards the implementation and application of acts of EU secondary legislation adopted after bilateral agreements were signed<sup>39</sup>. Switzerland may then choose which areas of the EU *acquis* to adopt and does not automatically adjust its legislation to changes in EU secondary legislation<sup>40</sup>. This results in bilateral agreements not being updated as EU law develops, for instance the Agreement concerning the free movement of persons<sup>41</sup>.

Likewise, Switzerland does not automatically adjust its legislation to the jurisprudence of the Court of Justice of the European Union (CJEU) as regards the single market freedoms, if the case law appears after a given bilateral agreement was signed. It is the Joint Committees that should define specific consequences which may result from CJEU case law with regard to the functioning of the treaties concluded between the EU and Switzerland. The shortcomings of the bilateral agreements between the EU and Switzerland at the stage of their implementation suggest that changes are necessary. In 2010, the European Council stated in its conclusions that “while the present system of bilateral agreements has worked well in the

---

<sup>37</sup> D. Buchan, *Outsiders on the inside Swiss and Norwegian lessons for the UK*, Centre for European reform, September 2012, [http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/buchan\\_swiss\\_norway\\_110ct12-6427.pdf](http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/buchan_swiss_norway_110ct12-6427.pdf); A. Łazowski, *Switzerland*, in: S. Blockmans, A. Łazowski (eds.), *The European union and Its Neighbours*, The Hague 2006, p. 157.

<sup>38</sup> European Parliament, (Directorate General For Internal Policies, Policy Department A : Economic And Scientific Policy, Internal Market And Consumer Protection), Brussels 2010, <http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf> PE 429.993.

<sup>39</sup> D. Buchan, *Outsiders on the inside Swiss and Norwegian lessons for the UK*, Centre for European Reform, September 2012, [http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/buchan\\_swiss\\_norway\\_110ct12-6427.pdf](http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/buchan_swiss_norway_110ct12-6427.pdf) (20 May 2014).

<sup>40</sup> Adam Łazowski, ‘Switzerland’ in Steven Blockmans, Adam Łazowski (eds.), *The European Union and Its Neighbours* (T.M.C Asser Press 2006) 157.

<sup>41</sup> European Parliament, (Directorate General For Internal Policies, Policy Department A: Economic And Scientific Policy, Internal Market And Consumer Protection), Brussels 2010, <http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf> PE 429.993.

past, the challenge of the coming years will be to go beyond this complex system, which is creating legal uncertainty and has become unwieldy to manage and has clearly reached its limits” as well as called for “the dynamic adaptation of the agreements to the evolving *acquis*.”<sup>42</sup>

### **3. 2. Correct application of bilateral agreements and the dispute settlement mechanism**

Once ratified, international agreements concluded by Switzerland are binding for it in external relations. After they have been published in the Official Journal<sup>43</sup>, they are also binding for individuals, if the standards stemming from them are self-executing<sup>44</sup>. Otherwise, a domestic legal act must be issued. The obligation to execute agreements concluded by the Union rests with its institutions and Member States. Such agreements constitute an integral part of the EU’s legal order. Pursuant to CJEU jurisprudence, the provisions of international agreements concluded by the Union are also directly effective<sup>45</sup>. Things are different in the case of mixed agreements, i.e. ones concluded with a third country by the Union and its Member States subject to ratification in all of them. They are concluded when their object goes beyond competences of the Union only and overlaps with those of the Member States. In EU-Switzerland relations, such an agreement is the one on the free movement of persons as well as one of 30 June 1967 concerning products of the clock and watch industry. In the areas where the Member States are competent, it will be national laws that resolve the issue of their direct effectiveness. Consequently, it is Swiss courts and those of the Member States that are responsible for the application of Switzerland-EU agreements, the latter enjoying the right to refer to the CJEU for a preliminary ruling as regards the implementation of such agreements. Nevertheless, the Court’s rulings are not binding for Swiss courts, which have no competence to refer to the CJEU for preliminary rulings. Likewise, there is no single body to resolve disputes resulting from the implementation of the bilateral agreements. Joint Committees, whose task is to ensure the correct functioning of the bilateral agreements, facilitate information exchange and consultations between the parties and, if requested by them, try to resolve disputes between them. In principle, however, the bilateral agreements between the Union and Switzerland do not envisage legal consequences when the delegations fail to reach an agreement in the Joint Committee format. As a result, certain solutions adopted by Switzerland - according to EU institutions - may be inconsistent with the bilateral agreements, as

---

<sup>42</sup>Council conclusions on EU relations with EFTA countries, 3060th General Affairs Council meeting, Brussels, 14 December 2010, para 6 et 48.

<sup>43</sup> Article 3 Loi fédérale sur les recueils du droit fédéral et la Feuille fédérale (Loi sur les publications officielles, LPubl) du 18 juin 2004 (Etat le 1er janvier 2010) 170.512.

<sup>44</sup> M. Aleksandrowicz, *System prawny Szwajcarii. Historia i współczesność*, Białystok 2009, p. 164.

<sup>45</sup> Judgment of the CJEU of 5 February 1976, *Conceria Daniele Bresciani contre Amministrazione Italiana delle Finanze*, in Case 87/75, ECR 1976, p. 129.



exemplified by the migrant quotas introduced by Switzerland for EU citizens<sup>46</sup>. Also missing is an institutional mechanism providing for a uniform interpretation of the bilateral agreements.

### 3.3. Uniform interpretation of the bilateral agreements by the parties

A uniform interpretation of the bilateral agreements between the Union and third countries is difficult to attain, the EEA Agreement being an exception. The effectiveness of the dialogue between the CJEU and the EFTA Court consisting in mutually taking into consideration and citing their respective rulings as well as adopting a uniform interpretation of the EEA Agreement results from their assuming the reciprocal nature of the provisions of that international pact. Such reciprocity, however is non-existent in the case of other international agreements concluded by the EU with third countries. In its 1982 ruling in *Polydor*, the CJEU interpreted the provisions of the free trade agreement with reference to an EFTA state (Portugal) in a manner different from the Treaty provisions of the same wording, justifying it by quoting different objectives of the two legal acts in question. Likewise, the CJEU refused to acknowledge the direct effectiveness of the provisions of the WTO Agreement, arguing that the parties to it did not guarantee reciprocity in that regard. It appears then that the reciprocity condition is difficult to meet in the case of other international agreements concluded by the EU with third countries. As regards Switzerland, the CJEU has spoken with regard to the Agreement on the free movement of persons. In its ruling in *Grimme*<sup>47</sup>, the Court stated that:

the interpretation given to the provisions of Community law concerning the internal market cannot be automatically applied by analogy to the interpretation of the Agreement, unless there are express provisions to that effect laid down by the Agreement itself (see, to that effect, the ruling of 9 February 1982 in Case 270/80 *Polydor and RSO Records*, ECR 329, paragraphs 15 to 19).

Useful to ensure the coherence of the case law of the CJEU and courts of third countries may be then other forms of broadly-understood judicial cooperation, such as submission of observations and intervening. This is very well understood by the European Commission, active as an *amicus curie* in proceedings before international courts and those of third countries<sup>48</sup>.

---

<sup>46</sup>Council conclusions on EU relations with EFTA countries 3213th Transport, Telecommunications and Energy Council meeting, Brussels, 20 December 2012, para 35 , (...)the Council notes with regret that Switzerland has taken a number of measures, which are not compatible with the provisions and the spirit of the Agreement on the Free Movement of Persons and undermine its implementation. In particular, the Council deeply regrets that Switzerland has unilaterally re-introduced quotas for certain categories of residence permits for citizens of 8 EU Member States. The Council considers this step to be discriminatory and clearly in breach of the Agreement, and strongly urges Switzerland to reverse its decision and to respect the agreed provisions".

<sup>47</sup> Judgement of the CJEU of 12 November 2009 in C-351/08, *Grimme*, paragraph 29.

<sup>48</sup> C. Nisser, G. Blanke, *Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings*, "European Competition Law Review" 2006, pp. 174-183; E.

Ongoing since 2014, the current EU-Swiss negotiations aim to provide an institutional framework for the functioning of the bilateral agreements between the EU and Switzerland. The negotiating mandate granted to the European Commission by the Council provides for the setting up of a tool to allow for supervision and monitoring of the application of the agreements by Switzerland. This would ensure the uniform application and interpretation of the Community's *acquis*. Pursuant to the EU's negotiating directives, the European Commission would be in charge of supervising the performance of the bilateral agreements while all disputes between the parties to the agreement would be resolved by the CJEU, whose decisions would be binding law. Further, the institutional framework would require from the parties prompt harmonisation of the agreements with *acquis communautaire*. Infringing on the Confederation's autonomy, such proposals seem hard to stomach for the Swiss. However, the EU's stance in these negotiations shows that the time has come to change the current model of EU-Switzerland relations<sup>49</sup> perceived by the EU institutions (e.g. the European Parliament) increasingly as cherry-picking rather than acting with due respect for the principle of reciprocity and the related compromise<sup>50</sup>.

## Closing remarks

The role of the EU as a global actor is growing, as exemplified by the Union's initiatives and programmes in the context of the stabilisation and association process in the Balkans, the Union for the Mediterranean, the European neighbourhood policy and the Eastern Partnership<sup>51</sup>. The nature of the EU's governance in that regard is referred to as *civilian power promoting universal norms in its neighbourhood and beyond*<sup>52</sup>. The way the Union's *acquis* is exported to Switzerland is unique. EU-Switzerland relations are based on a number of long-negotiated sector-based bilateral agreements that do not envisage either the establishment of a single coordinating institution that would ensure their application or dispute settlement mechanisms guaranteeing a uniform application of the agreements concluded. The Union and

---

Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, "Berkeley Journal of International Law" 2011, p. 201; <https://www.unige.ch/gsi/files/6914/2770/0564/Kaspiarovich.pdf>; <https://tel.archives-ouvertes.fr/tel-01230073/document>.

<sup>49</sup> A. Łazwoski, *The end of chocolate box-style integration? EU-Swiss relations after the referendum*, CEPS Commentary, 28 February 2014, p. 4.

<sup>50</sup> *EU cannot accept cherry-picking by Switzerland*, European Parliament News, Press Releases, Plenary session, 25-02-2014 <http://www.europarl.europa.eu/news/en/press-room/20140221IPR36669/eu-cannot-accept-cherry-picking-by-switzerland>

<sup>51</sup> R. Petrov, P. Kalinichenko, "The Europeanization of Third Country Judiciaries Through the Application of the EU *Acquis*: The Cases of Russia And Ukraine", *International and Comparative Law Quarterly* 2011, pp. 325-353, p. 326; D. Miąsik, A. Wróbel, *Europeizacja prawa administracyjnego – pojęcie i konteksty*, in: R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System prawa administracyjnego. Europeizacja prawa administracyjnego*. Vol. 3, Warsaw 2014, p. 10-11;

<sup>52</sup> J. Zielonka, *The EU as an International Actor: Unique or Ordinary?*, "European Foreign Affairs Review" 2011, pp. 281, 289.

Switzerland cooperate in areas of their common interest while retaining the latter's complete autonomy. As a result, reciprocity in Swiss-EU relations is scarce. One of the consequences is the partial and selective nature of the integration between Switzerland and the EU as well as the absence of a uniform EU-Swiss legal space in the areas covered by the bilateral agreements. The creation of just such space would provide legal certainty to individuals, which is a necessary precondition for ongoing business operation and its effective development.

## **Bibliography**

ALEKSANDROWICZ, M. 2009. System prawny Szwajcarii. Historia i współczesność, Białystok 2009.

BLANKART, F. A., Considérations sur la politique européenne de la Suisse, « Cadmos » 1988, no 38, pp. 22-38.

BUCHAN, D. 2012. Outsiders on the inside Swiss and Norwegian lessons for the UK, Centre for European reform, September 2012, [http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/buchan\\_swiss\\_norway\\_11oct12-6427.pdf](http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/buchan_swiss_norway_11oct12-6427.pdf) ;

CASTELEIRO, A. D. 2009. Relations Between European Union and Switzerland: a Laboratory for EU external Relations?, in: Francesco, M., Petrov R., Mouliarova E. (2009), European integration without EU membership models, experiences, perspectives, MWP Working Papers. No 10, [http://cadmus.eui.eu/bitstream/handle/1814/11294/MWP\\_2009\\_10.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/11294/MWP_2009_10.pdf?sequence=1).

JENNI, S. 2016. Switzerland's Differentiated European Integration. The Last Gallic Village?, Springer, 2016.

KADDOUS, Ch. 2001. Les accords sectoriels dans le système des relations extérieures de l'union européenne. In : Accords bilatéraux Suisse – EU. D. Felder, Ch. Kaddous (eds.), Bâle, Genève, Munich, Bruxelles 2001.

LAVENEX S., SCHWOK R. 2015. The Swiss Way. The nature of Switzerland's relationship with the EU, in: The European Union's Non-Members: Independence Under Hegemony?, Erik Oddvar Eriksen, John Erik Fossum (eds.), Routledge 2015.

ŁAZOWSKI, A. 2006. Switzerland. In : S. Blockmans, A. Łazowski (eds.), The European union and Its Neighbours, The Hague 2006.

ŁAZWOSKI, A. 2014. The end of chocolate box-style integration? EU-Swiss relations after the referendum, CEPS Commentary, 28 February 2014.

LEVINE, E. 2011. Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation, "Berkeley Journal of International Law" 2011, p. 201; <https://www.unige.ch/gsi/files/6914/2770/0564/Kaspiarovich.pdf>; <https://tel.archives-ouvertes.fr/tel-01230073/document>

MIĄSIK D., WRÓBEL A. 2014. Europeizacja prawa administracyjnego – pojęcie i konteksty. In: R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), System prawa administracyjnego. Europeizacja prawa administracyjnego. Vol. 3, Warsaw 2014.

NISSER, C. BLANKE, G. 2006. Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings, "European Competition Law Review" 206, pp. 174-183.

PETROV, R. KALINICHENKO P. 2011. "The Europeanization of Third Country Judiciaries Through the Application of the EU Acquis: The Cases of Russia And Ukraine", International and Comparative Law Quarterly 2011, pp. 325-353.

SCHWOK, R. 2010 Suisse – Union européenne. L'adhésion impossible ?, Lausanne 2010.

ZIELONKA J. 2011. The EU as an International Actor: Unique or Ordinary?, "European Foreign Affairs Review" 2011, pp. 281 -289.

### **Contact Address**

Dr hab. Inga Kawka, prof. PU  
Chair of Public Law  
Institute of Law, Administration and Economy  
Pedagogical University of Cracow  
ul. Podchorążych 2  
30-084, Kraków  
E-mail: [inga.kawka@up.krakow.pl](mailto:inga.kawka@up.krakow.pl)