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Functioning of Swiss-EU Agreements: Hidden Dynamics and their Reasons*

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Drawing on the political function and the legal form of the agreements between Switzerland and the EU, this text analyses which Swiss-EU agreements are frequently revised and why. This analysis is useful for evaluating a commitment to a dynamic incorporation of EU legislation, which is part of the draft institutional framework agreement currently under scrutiny in Switzerland.

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Summary

Recent empirical research has analysed an aspect of Swiss-EU sectoral agreements that is not normally part of the public debate: the ongoing amendments of the agreements. The research shows that about half of all Swiss-EU sectoral agreements are more or less frequently revised. Revisions are especially frequent when the agreements refer to EU law. Moreover, agreements are revised although there are only weak institutional rules that facilitate revisions. The research shows that specific functions of the agreements and certain institutional rules explain which agreements were frequently revised. The agreements that are supposed to be covered by the institutional framework agreement are among the most frequently revised agreements. The institutional agreement would thus formalise and strengthen mechanisms that partly already play a role.

Participation in a multilateral project or bilateral cooperation?

The European Union (EU) and Switzerland have different views on the political function of their common agreements. The EU sees them as agreements by means of which Switzerland participates in a **multilateral project**, whereas Switzerland considers them to be bilateral agreements with rules that are, at least partially, distinct from EU principles. The analysis of the way the agreements are actually working shows that both views can in part be justified and in part critisized.

Empirical research covering the period 1990–2010 shows that about a quarter of Swiss-EU sectoral agreements refer directly to EU law (see Table 1). The function of these agreements in particular is to integrate Switzerland into the multilateral European integration project. Switzerland can thus be analysed as a case of external differentiated integration, since according to current political scientific definitions this presupposes the extension of EU rules to third states. However, empirical

research also shows that about half of the Swiss-EU agreements have never been revised. This distinguishes them from the rapidly evolving EU legal acts and points to the typically static character of international agreements.

Table 1: Number of Swiss-EU agreements in force for at least one year in the period 1990–2010

Total number of agreements in force	98
Number of agreements that were revised in the period (≥1 times)	52
Number of agreements with Mixed Committees	23
Number of agreements with dynamic evolution clauses	4
Number of agreements with direct ref. to EU law (in the original agreement text)	28

Note: Based on data collected by the author using publicly accessible official documents of the Federal Administration (Systematic Collection of Federal Law and Official Collection of Federal Law); data collection procedures and reliability described in detail in Jenni (2016).

The function of EU legislation in sectoral agreements

EU legislation plays an important role especially in those agreements that aim to provide mutual market access, i.e. access for Swiss companies to the EU's single market, and access for companies from the EU to the Swiss market. To fulfil these functions the agreements need to create a level playing field, in terms of competition, for economic actors from both markets. A level playing field means that the rules governing both markets are similar enough so that economic actors do not need to incur (too much) additional effort or expense to become active in the other market.

In the EU's single market, the level playing field is created by harmonised regulations or, in areas where regulations are not harmonised, by the mutual recognition of national standards. In the EEA, the level playing field is pursued by a principle called the homogeneity of legislation. Since 2010, the **Council of the European Union** has also used the concept of homogeneity to describe the legal requirements for Switzerland's access to the EU's single market. In contrast, Swiss legal scholars and official documents mostly use the notion of 'equivalence of legislation' in order to describe the relationship between EU and Swiss law based on the sectoral agreements. Hence, Switzerland and the EU agree to consider their respective legislation in a specific issue area as 'equivalent'. In some agreements, the 'equivalent' legal acts are explicitly listed in the agreements' annexes. Legally, neither Switzerland nor the EU loses its autonomy to change these legal acts.

Equivalent and even identical rules play a role beyond market access. They are the basis for the principle of non-discrimination, which is central to the **Free Movement of Persons agreement (FMPA)**. They lie at the heart of cooperation agreements in issue areas as diverse as statistics, the environment agency, border control (Schengen) and the taxation of savings. By contrast, equivalent rules are less important in areas like research.

Changes to EU legislation and revisions of Swiss-EU agreements

The equivalence of legislation is impaired if one party to the agreement changes its rules. In such cases, Switzerland and the EU have to re-assess whether the agreement can continue to carry out its allotted function in light of the change to the legislation by one party. The other party may be forced to modify its own rules and the agreement then has to be updated in order to re-establish the equivalence.

The recent history of Swiss-EU relations provides two examples of this necessity: one where an agreement was smoothly revised and one where Switzerland and the EU were unable to reach agreement on the modification.

The example of a smooth revision is the **total revision of the agreement on customs security measures in 2009**. The agreement threatened to lose its effectiveness when the EU adopted a so-called prior notification requirement for goods entering the EU from third states. Technical barriers to trade - abolished 20 years before- would have been reinstalled. Switzerland quickly adapted its own security requirements to EU standards and accepted a totally revised agreement with a legally binding commitment to dynamically incorporate new EU legislation in this area. Apparently, the functioning of the agreement depended on the continued equivalence of the rules and the benefit was important enough for Switzerland to quickly agree on a revision based on the EU rules.

The example of a failed re-negotiation concerns the Free Movement of Persons Agreement (FMPA). The **popular initiative "against mass immigration"**, which was approved at the Swiss polls in 2014, required the Swiss government to re-negotiate the terms of the Free Movement of Persons Agreement (FMPA), in order to reconcile it with the initiative's demand to limit immigration. The EU did not enter into negotiations and the agreement was not revised.

Moreover, to emphasize its disapproval of the Swiss vote on the initiative against mass immigration, the EU refused to ratify the already agreed total revision of the agreements on Switzerland's participation in EU programs in the areas of education, research (Horizon2020), and audio-visual cooperation (MEDIA). Swiss participation in these EU programmes has to be re-negotiated at every renewal of the EU's respective multi-annual programs.

In a nutshell, updating a sectoral agreement can be difficult and time-consuming, if it requires new negotiations between Switzerland and the EU. Negotiations open the door to new linkages of different issues and re-assessments of the terms of an agreement. Negotiations can also fail altogether – either because one party does not wish to negotiate or refuses to ratify the final agreement (see EFTA-Studies analysis **The Logic of Negotiations between Switzerland and the EU**). Empirical research shows that in fact only slightly more than half of all the sectoral agreements that were in force in the research period 1990–2010 were revised at all during this time (see Table 1).

The role of Mixed Committees

The authors of the sectoral agreements were well aware that revisions would be necessary in order to maintain the function of many of the agreements. Many sectoral agreements set up so-called Mixed Committees, which facilitate agreement revisions. A few recent agreements, namely the Schengen and Dublin association agreements and the agreement on Customs security measures oblige Switzerland to continuously incorporate EU legislation in the area of the agreements.

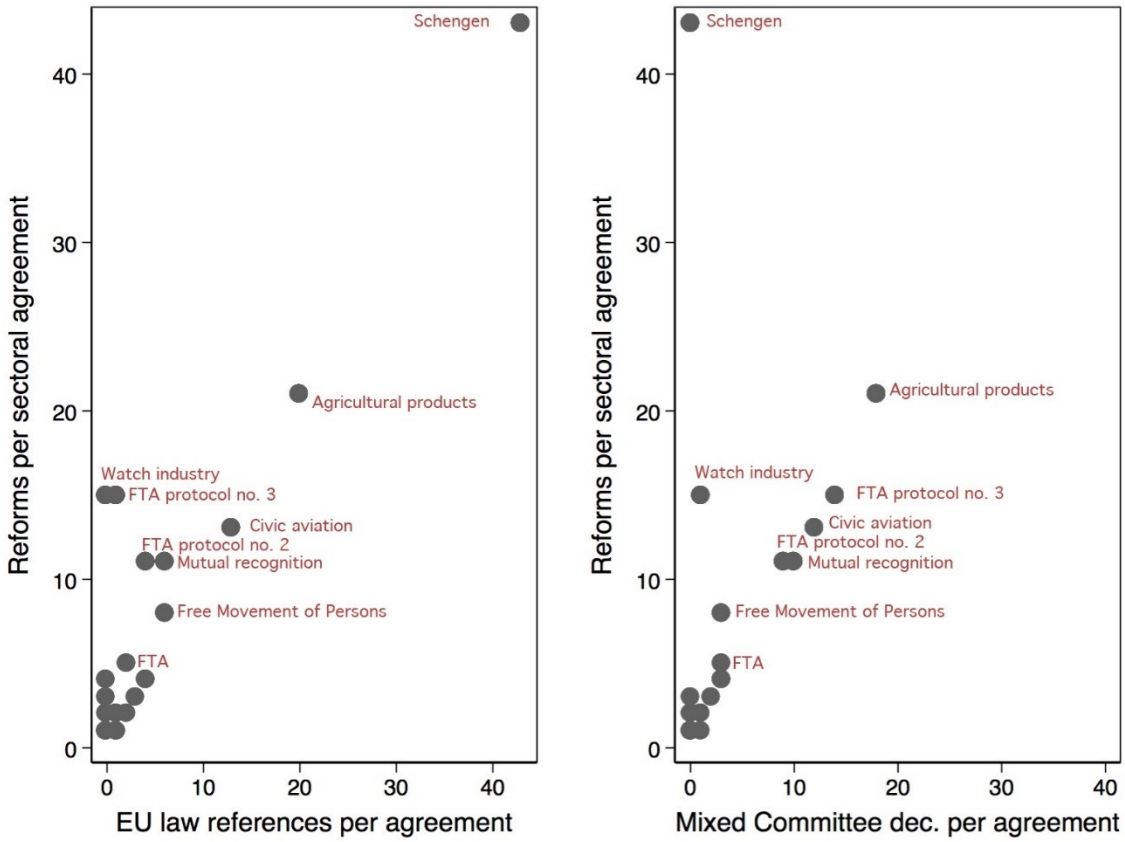
The Mixed Committees are bodies staffed by representatives of the European Commission and the Swiss federal administration respectively and they decide by consensus. In addition to their main role i.e. the exchange of information, they are the first port of call for Swiss and EU diplomats to discuss issues that are controversial. Today, a total of 24 Mixed Committees exist for the management of 23 different agreements (see Table 1; see also **complete list of Mixed Committees**).

Most importantly in terms of the revision of agreements, many Mixed Committees can amend the annexes to the agreements in their own right. In the annexes, the legal acts of EU secondary law applicable to Switzerland are listed. Out of the 23 existing Committees, 11 Committees have revised the respective agreement annexes. In total, these 11 were responsible for 85 out of 161 agreement revisions between 1990 and 2010 (see Table 2).

The Mixed Committees responsible for most agreement revisions are those of the **Free Trade Agreement (FTA)**and of three agreements of the **Bilaterals I** (Agricultural products, Civil aviation, and Mutual recognition of conformity assessments). Graph 1 shows the frequency of reforms per sectoral agreements (vertical axis) as well as the number of these reforms that refer to EU law (horizontal axis, graph on the left) and the number of reforms that were decided in a Mixed Committee (horizontal axis, graph on the right).

The graph shows that the FTA and related protocols were revised rather often by the respective Mixed Committee, but not always with reference to EU law. In contrast, revisions of the Bilaterals I agreements more frequently referred to EU law. It is important to note, however, that Mixed Committees decide by consensus and are thus anything but a mechanism for 'automatic' agreement updates.

Graph 1: Number of revisions per sectoral agreement from 1990 to 2010



Note: Detailed information on the agreements: Agricultural products - Agricultural products, Bilaterals I (SR 0.916.026.81); Watch industry - Supplementary Agreement to the Agreement on Watch Industry Products (SR 0.632.290.131); FTA protocol no. 3 - Protocol on products originating in the FTA (SR 0.632.401.3); Civil aviation - Air transport agreement, Bilaterals I (SR 0.748.127.192.68); FTA protocol no. 2 - Protocol on certain agricultural products to the FTA (RS 0.632.401).2); Mutual recognition - Agreement on mutual recognition in relation to conformity assessment, Bilateral I (technical barriers to trade, RS 0.946.526.81); Free Movement of Persons, Bilateral I (RS 0.142.112.681); FTA - Free Trade Agreement 1972 (RS 0.632.401); same data source as described in the note to Table 1.

The role of the dynamic update obligation

Legal obligations to dynamically update an agreement are a more recent and (still) rare development in Swiss-EU relations. So far, only four agreements, namely the **Schengen and Dublin association agreements**, the **Agreement on Switzerland's contribution to Frontex** and the **Agreement on customs security measures** contain dynamic provisions (see Table 1). There is some disagreement among legal scholars as to the legal scope of these provisions. While it is undisputed that amendments to legal acts listed in the original agreements have to be adopted by Switzerland, it remains unclear whether this also applies to new acts in these areas.

Legal scholars do, however, agree that legal obligations for the dynamic incorporation of EU legislation do not guarantee automatic updates. For example, the respective Mixed Committees can decide to exempt Switzerland from the implementation obligations. In addition, the Schengen and Dublin agreements recognise that the adoption of new rules in the areas of the agreements needs to be approved in the normal domestic legislative process in Switzerland. The required legislative process depends on the content of the rule to be adopted.

Thus, revisions of the Schengen and Dublin agreements do not lie in the competence of the respective Mixed Committees. Revisions of dynamic agreements are approved by the Swiss government, or, if required by Swiss federal law, are subject to approval by parliament and as a consequence can be challenged in a popular referendum. This explains why in Graph 1, the Schengen Association Agreement is the agreement with the most revisions that refer to EU law (graph on the left), but none of these revisions was decided upon by the Mixed Committee (graph on the right).

Table 2 shows that one third of all agreement revisions between 1990 and 2010 concerned a dynamic agreement. All these revisions concerned the Schengen agreement, although it entered into force only in 2008. As we do not yet have any similar data for more recent years (post-2010), and as dynamic agreements are a more recent phenomenon, we must be cautious when drawing conclusions about a general effect of dynamic provisions.

Table 2: Number of new agreements and agreement revisions between Switzerland and the EU between 1990 and 2010

Total number of new agreements*	Total number of agreement revisions		
46	161		
	Number of agreement revisions by Mixed Committees	Number of agreement revisions by a dynamic clause	Number of agreement revisions directly referring to EU legislation
	85	42	98

Note: * including total revisions; data source as described in the note to Table 1.

The role of references to EU law

The relevance of Mixed Committees and dynamic provisions must be interpreted in the light of a third characteristic of Swiss-EU agreements, which distinguishes them from most other international treaties: the direct references to EU secondary legislation. Although only about one quarter of all Swiss-EU agreements in the period 1990–2010 directly referred to EU legislation, almost two thirds of all agreement revisions in the same period directly referred to EU law. (Compare the figures in Table 1, which identifies the various characteristics of agreements, with Table 2 and Graph 1, which describe the characteristics of agreement revisions.)

A multivariate statistical analysis of the same data showed that direct references to EU law, together with Mixed Committees and dynamic update obligations, significantly enhance the probability that an agreement is revised. This finding calls into question the equal status of Swiss and EU legislation in agreements based on the 'equivalence of legislation' principle, as well as the Swiss view that the sectoral agreements can be developed independently from EU law. If agreements that directly refer to EU legislation are updated significantly more often, and these updates themselves refer to EU legislation more often, one must assume that the updates served the purpose of incorporating EU legislation.

Lessons for the framework agreement

These empirical findings point to three aspects that are relevant for the evaluation of a dynamic update obligation in a new institutional framework agreement. First, the findings show that the European Council's demand for clearer institutional rules for agreement updates makes sense from the EU's perspective. The modest institutional mechanisms in place in some of the existing agreements - even though they are consensual and do not circumvent the normal domestic decision-making process in Switzerland - already lead to more frequent agreement revisions.

Second, the findings indicate that incentives to update an agreement must play a role in addition to and independently of Mixed Committees and dynamic update obligations. These incentives are related to the role of EU legislation. Apparently the agreements fulfil their function better (or even only) if they are updated regularly.

Third, the reported research findings show that the market access agreements, which are supposed to be governed by a new institutional framework agreement, are exactly those that are already being frequently revised. In addition, it could make sense from both Switzerland's and the EU's point of view not to include the FTA in the framework agreement, as its revisions only rarely refer to EU law.

With regard to the dynamic update obligation, an institutional framework agreement will thus introduce no completely new elements to Swiss-EU agreements. Rather, it is likely to formalise and strengthen the existing mechanisms.

* Parts of this analysis, especially the data and the discussed findings of the statistical analysis, draw upon Chapter 3 of Sabine Jenni's book "Switzerland's differentiated European integration. The last Gallic village?" (see Sources and Further Reading).

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Sources and Further Reading

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