ARTICLES

ONE OF MANY CHALLENGES AFTER 'BREXIT'

The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?

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ABSTRACT

Defining an alternative arrangement for the UK's future relationship with the European Union following 'Brexit' will raise both substantive and institutional issues. In the public debate, the latter tend to be underestimated. The present article is based on the thesis that, should the UK seek a market access agreement based on EU law rules, it will face strict institutional demands from the Union that go far beyond the element, often mentioned in the 'Brexit' debate in the context of EEA membership, of having to accept EU-made law as it comes. The thesis is derived from experience with the EU's legal arrangements with other partners, notably the EFTA States as well the current negotiations with Andorra, Monaco and San Marino.

Keywords: alternative arrangement; Brexit; EEA; institutional framework; Switzerland

§1. INTRODUCTION

According to Article 50(2) TEU, an agreement on leaving the European Union (EU) should set out the arrangements for the Member State's withdrawal, 'taking account of the framework for its future relationship with the Union'. This wording appears to indicate that defining the framework for the future relationship is not formally part of the withdrawal agreement but rather an issue of its own (though for the purposes of negotiation, it certainly seems reasonable to consider both issues at the same time).

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Article 50 TEU does not indicate what the future framework might be either in terms of substance or form. In the 'Brexit' debate, it is widely assumed that, particularly in the economic field, it should be more than what is sometimes referred to as the Hong Kong model, that is, more than mutual WTO membership. Indeed, it has been argued that a simple cancelling of the UK's EU membership without establishing a new framework that would replace it is not in the country's (and indeed the Union's) interest.[1] Instead, the aim should be 'a new relationship' between the UK and the European Union.

In this respect, the generally accepted idea appears to be that the new relationship should take the form of an agreement between the UK and the Union, notably on economic exchange[2] but possibly also on other matters.[3] The present contribution does not deal with the substantive side of such an agreement. Much has already been written about options such as EFTA and EEA membership following the Iceland, Liechtenstein and Norway model (in the public discussion often referred to as 'the Norway model'), sectoral bilateral agreements following the Swiss model, a customs union following the Turkish model and a modern generation trade and investment agreement following the Canadian model.[4] Neither does this contribution address the (admittedly intriguing)

1 To mention one example of many, see M. Ford, 'Workers' rights from Europe: the impact of Brexit', advice written for TUC (Trades Union Congress), of 10 March 2016, www.tuc.org.uk/international-issues/europe/eu-referendum/workers%E2%80%99-rights-europe-impact-brexit, para. 83: '[I]t is almost unimaginable that the UK Government would simply repeal the European Communities Act 1972 because that would lead to legal and commercial chaos. (…) The UK would, presumably, need to enter into some form of trading agreement with the EU as to the nature of its future trading relationship, just as other States such as Norway or Switzerland which are not members of the EU have done'.

2 Purely legally speaking, an economic agreement with the EU need not be comprehensive in terms of substance. Rather, it is conceivable that certain issues are addressed on the national level (for example residence rights of EU citizens in the UK through national immigration law) or through bi- or multilateral agreements with EU Member States, though legally this is possible only insofar as the EU does not enjoy an exclusive competence in the field in question (thus for example not in the field of external trade, Article 3(1)(e) TFEU).

3 The example of the EFTA states shows that an agreement with the EU might also cover non-economic matters such as participation in (parts of) the EU external border law and asylum law, further administrative cooperation (for example in the areas of environmental protection or competition) and participation in the EU's education, research and culture programmes (at present Erasmus+, Horizon 2020 and Creative Europe). However, the Swiss example shows that the EU links education and research to the free movement of persons. On 9 February 2014, when Switzerland voted to change its Federal Constitution with the aim of establishing a system of unilateral control of immigration based on quotas and national preference, the EU refused to renew the EU–Swiss agreements on education and research. Subsequently, a transitional and in terms of substance limited regime for research was set up pending implementation of the Swiss vote. The EU has made it clear that a continuation and, indeed a return to full participation, in its research programme will depend on a continued upholding of the free movement of persons for all Member States, including the most recent, Croatia.

4 Including also in a UK government policy paper: Cabinet Office, Alternatives to Membership: possible models for the United Kingdom outside the European Union (Mai 2016), www.gov.uk/government/publications/alternatives-to-membership-possible-models-for-the-united-kingdom-outside-the-european-union. Before that, see already for example S. Dhingra and T. Sampson, 'Life after BREXIT: What are the UK's options outside the European Union?', *PAPERBREXIT of The Centre*

question of whether the UK might succeed in obtaining a market access agreement that goes substantially beyond the WTO rules while at the same time excluding (full) free movement of persons.[5] All of this will be a matter for political decision-making, first internally in the UK and in the EU respectively, and subsequently, once the procedure of Article 50(2)-(4) TEU has been set in motion, for negotiations between them. One has to wait and see.

Rather than discussing substance, this contribution focuses on what may be called a 'technical' issue, namely the institutional framework of an alternative arrangement, should that arrangement take the form of an agreement with the EU and should that agreement provide for market access 'EU style', that is, market access based on legal concepts that are part of the EU's internal market law (as opposed to an agreement that remains outside the realm of EU law, for example by relying on WTO law). Unlike other aspects of the 'Brexit' debate, this is not (yet) a very emotional subject, even though it is highly important in practice. In fact, it may be argued that on this level some particularly tricky challenges lie ahead for the UK.

The present article is based on the following thesis which is derived from experience related to the EU's legal arrangements with other partners: should the UK seek an 'EU style' market access agreement, it will face strict institutional demands from the EU that go far beyond the element, often mentioned in the 'Brexit' debate in the context of EEA membership, of having to accept EU-made law as it comes, without participation in the decision-making process.[6]

Indeed, a comparative analysis of the EU's legal arrangements with other partners shows that the former has certain well-defined aims with respect to the institutional framework for an 'EU style' market access agreement. The first of these is the homogeneity of the law of the agreement with the EU law from which it is derived. In this respect, the

for Economic Performance (CEP) of the London School of Economics and Political Science no. 1 (2016), http://cep.lse.ac.uk/pubs/download/brexit01.pdf.

5 In that regard, suffice it to say that an approach allowing for permanent limits to the free movement of persons would go against the EU's idea of 'extending the internal market' to its Western European neighbours and of the 'multilateral nature' of this market, as repeatedly expressed in the recent past; see for example Council Conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, 16 December 2014, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf, para. 44 et seq.; and the European Parliament Resolution, 'EEA-Switzerland: Obstacles with regard to the full implementation of the internal market', 9 September 2015 para. 18, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015–0313+0+DOC+XML+V0//EN. With respect to the realistic possibilities, The Economist has concluded that: 'At one end of the spectrum is a "soft Brexit": full membership of the single market, or something close to it, in return for retaining the principle of free movement of people. At the other end is a "hard Brexit": a clean break, sacrificing membership of the single market for full control over how many and which EU nationals can move to Britain'; The Economist, 'May Time', *The Economist* (2016), www.economist.com/news/leaders/21702187-no-nonsense-conservative-has-taken-britains-helm-she-should-make-case-minimalist, p. 9.

6 Among many other contributions to the debate, for example in the studies discussing alternative options see footnote 4 above.

EU increasingly insists that the agreement must 'grow' together with EU law, that it is interpreted in line with EU law and that there are mechanisms ensuring that this will be the case. The second aim of the EU concerns the safeguarding of the autonomy of the EU legal order, which prevents the setting up of mechanisms giving the task of authoritative interpretation of the agreement's substantive rules, insofar as they are based on EU law, to a court different from the Court of Justice of the European Union (CJEU), for example an ad hoc arbitration tribunal. As a matter of the EU's constitutional requirements, the ultimate authority must remain with the CJEU.

The present article discusses the challenges that may arise from this double aim for the UK against the comparative background of EEA law, the EU–Swiss Agreements and – albeit more briefly – the current negotiations on a new market access agreement with the so-called AMS states (Andorra, Monaco and San Marino). Admittedly, none of these concerns the particular situation of a Member State leaving the EU. It remains to be seen whether the special situation of a withdrawing Member State will have consequences for what can be achieved in terms of an alternative arrangement, also on the institutional level. At the same time, it is entirely conceivable that the EU will extend its present attitude notably towards Switzerland and the AMS states to the UK when that country looks for an alternative arrangement. It would therefore be useful to be informed about the legal and political developments on the institutional level in these other contexts, also in the context of 'Brexit'.

§2. 'INSTITUTIONAL MATTERS': A COMPARATIVE PERSPECTIVE

The experience of the EFTA and AMS states in their relations with the EU shows that the latter's double aim of homogeneity and of safeguarding the autonomous nature of Union law leads to four specific institutional issues, namely: 1) the homogeneous interpretation of agreements with the EU law from which they are derived; 2) international supervision in order to monitor compliance with the agreement; 3) the settlement of disputes between the parties to the agreement; and 4) the updating of the agreement in the light of new EU law.

These issues are well known from the current negotiations between the EU and Switzerland on a renewed institutional framework for the EU–Swiss sectoral agreements. At present, the latter consist of a complex web of far more than 100 agreements that have developed since the 1950s.[7] However, some ten years ago the Union declared itself

[7] Textbooks providing a general overview on the EU–Swiss agreements tend to be written in the German language; see for example M. Oesch, *Europarecht. Band I: Grundlagen, Institutionen, Verhältnis Schweiz–EU* (Stämpfli, 2015); T. Cottier et al., *Die Rechtsbeziehungen der Schweiz und der Europäischen Union* (Stämpfli, 2014); C. Tobler and J. Beglinger, *Grundzüge des bilateralen (Wirtschafts-)Rechts. Systematische Darstellung in Text und Tafeln, 2 volumes (Charts and Text)* (Dike, 2013). A fact sheet of

to be disenchanted with the institutional framework of the present system. It therefore demanded an institutional overhaul along the lines of the institutional framework of EEA law, failing which it declared it was not prepared to conclude any new market access agreements with Switzerland.[8] Negotiations on the 'institutional matters', as they are commonly referred to in Switzerland, began in spring 2014 and are ongoing. They relate to both future agreements and to a number of the existing agreements, though so far there is no official information on the specific list of the latter (probably only those covering fields that are dynamic under EU law). With respect to the mandates of the parties to the negotiations, the Swiss Federal Government has published some basic elements (which is rather unusual).[9] On the side of the EU, there is only a brief press release.[10] An unofficial and unconfirmed version of the EU's mandate was leaked through the media.[11]

The same institutional issues that are seen in the EU–Swiss negotiations also appear in the current negotiations with the AMS states[12] on a new and encompassing internal market association.[13] The Council has remarked that the new arrangement 'will

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the Swiss Federal Government providing an overview on the Swiss foreign European policy is available in English, see www.eda.admin.ch/dam/dea/en/documents/fs/00-FS-Europapol-lang_en.pdf, as well as another fact sheet on the development of the legal relationship with the Union, see www.eda.admin.ch/dam/dea/en/documents/fs/FS-Entwicklung-Beziehungen-CH-EU_en.pdf. General information provided by the European Commission' External Action Service (EEAS) is also available in English, see http://eeas.europa.eu/switzerland/index_en.htm.

8 For example Council Conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, 16 December 2014, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf, para. 44; see also at the end of this contribution in the conclusions. Generally on the so-called institutional issues see for example J. de Sépidus, 'Ein institutionelles Dach für die Beziehungen zwischen der Schweiz und der Europäischen Union – Wie weiter? Ein Überblick über die Vor- und Nachteile unterschiedlicher Optionen', *Jusletter* (2014); A. Glaser and L. Langer, 'Die Institutionalisierung der bilateralen Verträge: Eine Herausforderung für die schweizerische Demokratie', *Schweizerische Zeitschrift für internationales und europäisches Recht* (2013), p. 563–583; C. Tobler, 'Die Erneuerung des bilateralen Wegs: Eine wachsende Annäherung an den EWR in den zur Diskussion gestellten Modellen', *Jusletter* (2013).

9 See the Federal Government's information in the factsheet on 'Institutional issues', www.eda.admin.ch/dam/dea/en/documents/fs/11-FS-Institutionelle-Fragen_en.pdf.

10 See Europa Rapid Press Release, Negotiating mandate for an EU-Switzerland institutional framework agreement, 6 May 2014. A request for access to this document by the present writer led to 'a partially accessible version' (on file with the present writer) that reveals nothing. According to the EU, its position in the negotiations would be seriously weakened should its internal views and negotiation strategy be made public while negotiations are still ongoing.

11 Also on file with the author.

12 Generally on the relationship with the Union, see http://eeas.europa.eu/andorra/index_en.htm, http://eeas.europa.eu/monaco/index_en.htm; and http://eeas.europa.eu/sanmarino/index_en.htm. In academic writing, see in particular M. Maresceau, 'The Relations between the EU and Andorra, San Marino and Monaco', in A. Dashwood and M. Maresceau (eds.), *Law and practice of EU external relations* (Cambridge University Press, 2008), p. 279–308; D. Dosza, 'EU relations with European micro-states. Happily ever after?', 14 *European Law Journal* (2008), p. 93–104.

13 For the background see in particular Council conclusions on EU relations with EFTA countries, 3060th General Affairs Council meeting, Brussels, 14 December 2010, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf, para. 8; as well as the Communication from the

establish a more coherent and efficient institutional framework for relations, including institutional provisions to ensure the homogeneity and good functioning of the internal market (…)'.[14] It has been argued in academic writing that the planned association with the AMS states has model value for other countries.[15] Unfortunately for present purposes, at the time of writing there is no official information about the state of the negotiations. The specific content of the EU mandate has not been made public.[16] Even so, it will be seen below that the available documents reveal at least one element that is interesting in the present context.

In both cases, those of the negotiations with Switzerland and those with the AMS States, the legal regime of the European Economic Area (EEA) Agreement[17] has served as the EU's blueprint. The EEA brings together the EU and its (currently still) 28 EU Member States, on the one side, and the so-called EEA/EFTA states Iceland, Liechtenstein and Norway, on the other side. Though part of the negotiations and instrumental in this context, Switzerland rejected EEA membership in a popular vote in 1992.[18] Thereafter, it continued to pursue an approach based on sectoral agreements with the EU, as mentioned above, combined with unilateral aligning of national law to EU in selected fields (so-called autonomous adaptation).

The fact that EEA law serves as a blueprint for the EU is not surprising given that EEA law is largely modelled on EU law also with respect to institutional matters (that is, over and beyond the substantive law of the Agreement). There is, however, one important difference, namely the institutional two-pillar system. Essentially, for matters arising under EEA law in an EU Member State, the national procedures of that state and the usual EU law procedures apply, including in particular the infringement procedure, involving the European Commission and the CJEU (Article 258 TFEU onwards), and the preliminary ruling procedure before the CJEU (Article 267 TFEU). For EEA law

Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Options for Closer Integration with the EU, COM(2012) 680 final.

14 Council conclusions on EU relations with EFTA countries, 3060th General Affairs Council meeting, Brussels, 14 December 2010, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf, para. 8.

15 N. Forster and F. Mallin, *The Association of European Microstates with the EU. Integration Test with Model Value* (Stiftung Wissenschaft und Politik, 2014), www.swp-berlin.org/fileadmin/contents/products/comments/2014C27_frr_mln.pdf.

16 Council of the European Union, Press Release, Council adopts mandate to negotiate association agreement(s) with Andorra, Monaco and San Marino, ST 16972/14, 16 December 2014.

17 European Economic Area Agreement, signed in 1992, [1994] OJ L 1/3. For an updated version, see www.efta.int/legal-texts/eea. Generally on EEA law, notably, C. Baudenbacher (ed.), *The Handbook of EEA Law* (Springer, 2015), with numerous further references.

18 See in particular P.G. Nell, *Suisse – Communauté européenne. Au coeur des négotiations sur l'Espace économique européen* (Economica, 2012).

matters arising on the EEA/EFTA side, the ESA/Court Agreement[19] for the European level provides for essentially parallel procedures with specific EEA/EFTA institutions, namely the infringement procedure, involving the EFTA Surveillance Authority and the EFTA Court (Article 31 ESA/Court Agreement), and the advisory opinion procedure before the EFTA Court (Article 34 ESA/Court Agreement).[20]

§3. FOUR TRICKY INSTITUTIONAL ISSUES

The following part discusses the four institutional issues mentioned above against the background of the experience with the EFTA and AMS states and in view of a potential alternative, EU law-based arrangement for the UK following its withdrawal from the EU. It will be seen that all of these issues have proven to be tricky.

A. HOMOGENEOUS INTERPRETATION

With respect to the interpretation of 'EU style' market access agreements with non-Member States, the ideal system from the perspective of the EU is one where there is a legal obligation to interpret the law of the agreement that is based on EU law in line with that law. To the present author's knowledge there is currently no agreement that fully provides for such an approach, though the practice of EEA law and of one particular EU-Swiss agreement come close.

1. The EU's blueprint: EEA law

In the EEA, the basic homogeneity rule with respect to the interpretation of the law is Article 6 of the EEA Agreement. It states that the provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of Union law, must be interpreted in conformity with the relevant rulings of the CJEU handed down prior to the date of signature of the EEA Agreement. This principle is repeated and made more specific in Article 3 of ESA/Court Agreement. According to the wording of these provisions, therefore, the homogeneity obligation is limited in terms of time: CJEU case law must be followed up to the moment of the signature of the agreement. With respect to subsequent judgments, the obligation is merely to pay 'due account'. However,

19 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement), www.eftacourt.int/the-court/jurisdiction-organisation/surveillance-and-court-agreement/. Today, references to the EEC and the ECSC must be read as references to the EU and the reference to the Court of Justice of the European Communities as a reference to the CJEU.

20 On the function of the EFTA Court and the procedures leading to this court, see in particular EFTA Court (ed.), *The EEA and the EFTA Court. Decentred Integration* (Hart, 2014).

in practice the EFTA Court has gone beyond this wording by establishing the *general* presumption that, in the interest of market integration, identically worded provisions are to be interpreted in a homogeneous way.[21] For practical purposes, therefore, a very far-reaching homogeneity approach is being applied. It should be added that in practice that the EFTA Court regularly decides first on a new legal issue, in which case there is no CJEU case law that could be followed. This has led to a dialogue between the two courts that goes beyond a mere one-way street.[22]

2. Negotiations with Switzerland

Homogeneity in the interpretation of the law is also an issue in the current negotiations with Switzerland on the so-called institutional matters. The background to this is the fact that so far only two of the existing EU–Swiss agreements contain homogeneity rules on interpretation, namely the Agreement on the free movement of persons (FMP)[23] and the Agreement on air transport.[24] The relevant provisions, namely Article 16(2) and Article 1 respectively, go in a similar direction to the above-mentioned EEA law, though they are somewhat less strongly worded. However, in the practice of the Swiss Federal Supreme Court this has not made any decisive difference, at least with respect to the FMP Agreement. Here, the Federal Supreme Court has taken a similar approach as the EFTA Court, stating that, in the interest of market integration, there should in principle be a parallel interpretation beyond the date of signature of the

21 For example Case E-2/06 *EFTA Surveillance Authority v. Norway* [2007] EFTA Court Report 164. In this case, commonly referred to as the *Norwegian Waterfalls* case, the EFTA Court stated (para. 59): 'The principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be construed in the same way. There are certain differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty which may under specific circumstances lead to a different interpretation (…)'. The reference to differences in scope and purpose raise the issue of the *Polydor* principle; see for example C. Tobler, 'Context-related Interpretation of Association Agreements. The Polydor Principle in a Comparative Perspective: EEA Law, Ankara Association Law and Market Access Agreements between Switzerland and the EU', in D. Thym and M. Zoetewij-Turhan (eds.), *Rights of Third-Country Nationals under EU Association Agreeements. Degrees of Free Movement and Citizenship* (Brill/Nijhoff, 2015), p. 101–126.

22 See for example V. Skouris, 'The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions', in C. Baudenbacher, P. Tressel and T. Örlygsson (eds.), *The EFTA Court Ten Years On* (Hart Publishing 2005), p. 123–129.

23 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] OJ L 114/6 (for Switzerland: SR 0.142.112.681; unlike the OJ, the SR provides for consolidated versions of the agreements). With the following enlargement protocols: extension to the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic: SR 0.142.112.681.1, [2006] OJ L 89/30; extension to Bulgaria and Romania: SR 0.142.112.681.1, [2009] OJ L 124/53; extension to Croatia: signed by Switzerland in 2016 but not yet ratified and thus not yet published).

24 Agreement between the European Community and the Swiss Confederation on air transport, [2002] OJ L 114/73 (for Switzerland: SR 0.748.127.192.68).

agreement, even in the absence of a legal obligation under the Agreement to follow such an approach.[25]

For the Agreement on air transport there is to date no comparable case law from the Federal Supreme Court. Before the lower courts, the issue has come up in the context of air passenger rights. Certain courts have refused to take into account CJEU case law such as *Sturgeon*[26] because it was handed down after the date of signature of the agreement.[27] On the EU side, the CJEU has not yet had the occasion to decide on the matter.[28] In the view of the present author, logic would indicate that the same approach as the FMP Agreement should apply, particularly since the Air Transport Agreement provides for an even higher degree of integration with the EU legal order.[29]

Given the situation just described, it is not surprising that an interpretation approach based on a broad understanding of homogeneity is reflected in the EU's demands for an institutional overhaul of the EU-Swiss Agreements. According to the unofficial text of its mandate, the EU aims at an approach where the (entire!) agreements as well as the EU acts referred to in them are interpreted and applied in conformity with the case law of the CJEU, both prior and subsequent (!) to the signature of the corresponding agreement. In addition, the new framework should provide for a procedure to be followed should Switzerland depart from CJEU case law. Ultimately, if no solution is found, this would

25 See the leading decision BGE 136 II 5, consideration 3.4, in the German language of the case: '*Gemäss Art. 16 Abs. 2 FZA ist für die Anwendung des Freizügigkeitsabkommens die einschlägige Rechtsprechung des EuGH vor dem Zeitpunkt der Unterzeichnung (21. Juni 1999) massgebend. Das Bundesgericht kann aber, ohne dazu verpflichtet zu sein, zum Zwecke der Auslegung des Freizügigkeitsabkommens auch seither ergangene Urteile des Gerichtshofs heranziehen* (…). *Hierbei ist beachtlich, dass das Abkommen die Freizügigkeit auf der Grundlage der in der Europäischen Gemeinschaft geltenden Bestimmungen verwirklichen will (Präambel) und die Vertragsparteien zur Erreichung der Ziele des Abkommens alle erforderlichen Massnahmen treffen wollen, damit in ihren Beziehungen gleichwertige Rechte und Pflichten wie in den Rechtsakten der Europäischen Gemeinschaft, auf die Bezug genommen wird, Anwendung finden (Art. 16 Abs. 1 FZA). Das bedeutet, dass für die vom Abkommen erfassten Bereiche eine parallele Rechtslage verwirklicht werden soll* (…). *Um das Abkommensziel einer parallelen Rechtslage nicht zu gefährden, wird das Bundesgericht in angemessener Weise nach dem Stichtag (21. Juni 1999) ergangene Rechtsprechungsänderungen des EuGH in seine Beurteilung einbeziehen und ihnen Rechnung tragen. Das gilt allerdings nur, soweit das Abkommen auf gemeinschaftsrechtliche Grundsätze zurückgreift. Da der EuGH nicht berufen ist, für die Schweiz über die Auslegung des Abkommens verbindlich zu bestimmen, ist es dem Bundesgericht überdies nicht verwehrt, aus triftigen Gründen zu einer anderen Rechtsauffassung als dieser zu gelangen. Es wird dies aber mit Blick auf die angestrebte parallele Rechtslage nicht leichthin tun*'.

26 Joined Cases C-402/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon, Alana Sturgeon v. Condor Flugdienst GmbH and Stefan Böck, Cornelia Lepuschitz v. Air France SA*, EU:C:2009:716.

27 For example judgment of the district court (*Bezirksgericht*) of Bülach of 2 February 2016, *Kläger gegen Edelweiss AG*, consideration 4.2.

28 A case on this matter concerning the Air Transport Agreement, *Kammerer*, is pending at the time of writing. It does not explicitly raise the specific question mentioned above but rather concerns the application of the Agreement to flights from a third country to an airport in Switzerland; Case C-172/15 *Ljiljana Kammerer, Frank Kammerer v. Swiss International Air Lines AG*, pending; see [2016] OJ C 211/31.

29 The Swiss federal administration calls this particular agreement a 'partial integration agreement', as opposed to 'liberalization agreements' such as the FMP; Botschaft zur Genehmigung der sektoriellen Abkommen zwischen der Schweiz und der EG vom 23. Juni 1999, BBl. 1999 6128, p. 6156.

lead to the termination of the relevant agreement(s). According to its description of the mandate, the Swiss Federal Government agrees with a 'consistent interpretation of EU law [meaning only that, not the entire agreement] contained in the[se] agreements (…) in compliance with the principles of public international law and the pertinent jurisprudence of the Court of Justice of the European Union (CJEU)'. It remains to be seen whether this also includes future CJEU case law, as demanded by the EU.

Finally, the EU also appears to favour a system where the Swiss courts should have the possibility to request the CJEU to give a preliminary ruling. At present, there is a lack of balance in this respect, as such requests are possible (or mandatory, as the case may be) under EU law for courts in the Member States (namely due to the fact that the agreements are part of EU law) but not for the courts in Switzerland under the EU–Swiss Agreements. The Swiss Federal Government is not sanguine about the introduction of this procedure into the system but has not excluded it altogether either. Again, the result of the negotiations in this respect remain to be seen.

3. *Negotiations with the AMS states*

With respect to a future association agreement with the AMS states, there is one interesting element to be mentioned in the present context that also applies with respect to other institutional issues (and therefore will not be repeated below in these other contexts). The Commission remarked in 2013 that it might be too cumbersome for the very small states in question to set up specific institutions in a two pillar system like that of the EEA. The Commission therefore mentioned the possibility that it and the CJEU could be used instead.[30] Obviously, for the EU itself that would not only be simpler but it would also seem to imply a stronger guarantee of homogeneity.

Should such an approach be followed, it would in effect result in a one-pillar system based on the EU institutions alone. In the Swiss media it has been assumed that this will indeed be the chosen model.[31] If so, it could acquire the function of a further model that the EU might wish to uphold in future institutional negotiations with non-Member States, such as the UK.

4. *Implications in view of 'Brexit'*

Overall, it appears that in the practice of the interpretation of EEA law and, partially, also that of the EU–Swiss agreements, there is a homogeneity approach that goes beyond

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30 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Options for Closer Integration with the EU, COM(2012) 680 final, p. 5 et seq.

31 S. Gremperli, 'Rahmenabkommen mit EU. Drei Zwergstaaten spuren vor', *Neue Zürcher Zeitung* (2015), www.nzz.ch/schweiz/drei-zwergstaaten-spuren-vor-1.18605356.

the formal rules of the agreements in question. In view of the future, the negotiations with Switzerland show that the EU will wish to anchor an encompassing obligation of homogeneous interpretation in new agreements, rather than trusting the integration-mindedness of courts different from its own. It is therefore to be expected that the issue of homogeneous interpretation would also be raised in negotiations on an alternative arrangement for the UK, if that arrangement were meant to result in 'EU style' market access. It also appears conceivable that the EU, in its mandate for the negotiations, would follow a combination of the models that are emerging from the current negotiations with the AMS states (including in particular the possibility of a one-pillar system) and with Switzerland (including in particular the elements of a preliminary ruling procedure before the CJEU and of sanctions if prior or subsequent CJEU case law is not followed). In any case, in the present writer's opinion it is to be expected that the EU will insist on an approach where CJEU case law must be followed not only with respect to the interpretation of substantive provisions and concepts of the agreement that are derived from EU law but rather with respect to the agreement as a whole. For the UK, this might be tricky insofar as many 'Brexiteers' wanted precisely to move away from CJEU case law.

B. INTERNATIONAL SUPERVISION

The following, somewhat briefer parts turn to three remaining institutional matters. With respect to international supervision in order to monitor compliance with the agreement, EEA law provides for a mechanism that is modelled on EU law and is to some extent even identical to it. As already noted, for the EU Member States the infringement procedure under Articles 258 and onwards of the TFEU applies, and for the EEA/EFTA states, a largely parallel mechanism has been set up under Article 31 ESA/Court Agreement, with its own, specific institutions.

As for the present EU-Swiss Agreements, an element of international surveillance akin to the infringement procedure is completely missing. Again, on the side of the EU Member States, EU law applies, though the infringement procedure is rarely used.[32] On the Swiss side, there is no comparable procedure. Informally, the European Commission at times has taken the rule of investigator, for example when it argued that the corporate tax regimes of Swiss Cantons (that is, the Swiss sub-states) infringed Article 23(1) of the EU–Swiss Free Trade Agreement[33] on state aid. The Commission at the time adopted a decision on the matter – interestingly, a decision that was not addressed to anyone in particular -, finding that the Swiss rules were incompatible with the good functioning

32 For example in Case C-360/95 *Commission v. Spain*, EU:C:1997:624.

33 Agreement between the European Economic Community and the Swiss Confederation, [1972] OJ L 300/189 (for Switzerland: SR 0.632.401).

of the Agreement.[34] The dispute was eventually solved at the political level when Switzerland agreed to revise its Federal legislation that forms the framework for the Cantonal rules.

Unsurprisingly against this background, an element of international supervision was on the EU's original wish list for an overhaul of the institutional system of the EU–Swiss agreements. According to the unofficial text of the mandate, the EU favoured an approach where the European Commission (!) would have supervised the application of the agreements by Switzerland. To this end, the Commission should have been given investigatory and decision-making powers reflecting those already vested in the Commission in the field of the EU's internal market. However, the Swiss Federal Government was and remains firmly opposed to this, not least for fear that an international mechanism would be rejected by the people because of the highly emotional issue of the 'foreign judges'.[35] According to the description of the Federal Government's mandate, it is essential to 'retain Switzerland's autonomy as a EU non-member'. The original idea of the Swiss Government therefore was that the authorities of each party ensure the application of the agreements on their respective territory, with overall supervision being provided by the competent Joint Committee. However, when suggested before the negotiation mandates were adopted, this proved insufficient for the Union.[36] In order to get around this problem, the Federal Government proposed a novel and surprising approach in the different context of dispute settlement, meant to be used instead of a formal international supervision mechanism. That appeared to be acceptable to the EU at least in principle (see further below).

What does all of this imply for the UK? It is certainly to be expected that the issue of international supervision would come up in institutional negotiations with the UK. In this context, it is possible that the EU would propose that its institutions are in charge, as it did in the negotiations with Switzerland (and as the Commission hinted in the context of the AMS states). Again, this would pose challenges to 'Brexiteers' whose avowed aim is precisely to win back national control. They might therefore be weary of international scrutiny from the EU even outside EU membership.

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34 Commission Decision of 13 February 2007 on the incompatibility of certain Swiss company tax regimes with the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, COM(2007) 411 final. See for example C. Tobler, 'State aid under Swiss-EU bilateral Law: The Example of Company Taxation', in M. Bulterman et al. (eds.), *Views of European Law from the Mountain. Liber Amicorum Piet Jan Slot* (Wolters Kluwer, 2009), p. 195–205.

35 Compare in this context the Swiss popular initiative 'Swiss law instead of foreign judges (self-determination initiative)', which aims at placing Swiss law above international law, www.svp.ch/kampagnen/uebersicht/selbstbestimmungsinitiative/um-was-geht-es/.

36 See the letter of the Swiss Federal Government of 15 June 2012, www.eda.admin.ch/content/dam/dea/de/documents/eu/Brief-Barroso-20120615-Unterzeichnet_fr.pdf, and the response of the then Commission President Barroso of 21 December 2012, www.eda.admin.ch/content/dam/dea/de/documents/eu/Brief-BXL-CH-20121221_de.pdf.

C. DISPUTE SETTLEMENT

As stated above, the Swiss Federal Government has proposed a novel and surprising approach to a new judicial element in a future dispute settlement mechanism. Dispute settlement under the present EU-Swiss Agreements focuses on diplomatic discussions in the Joint Committees in charge of the individual agreements. There is no judicial element here, which means that it has not been possible to solve certain disputes for many years, for example the dispute on the Swiss requirement that service providers under the FMP Agreement must provide information about their activity at least eight days before they begin with the work.[37] In this situation, the EU has called for the introduction of a judicial element along the lines of EEA law.

Under EEA law, disputes between different EEA/EFTA states may be handled by the EFTA Court (Article 32 ESA/Court Agreement). Conversely, disputes between a (or several) EEA/EFTA state(s) and the EU fall under the procedure set out in Article 111 EEA Agreement. There are several stages and aspects of the procedure.[38] The dispute first goes to the EEA Joint Committee, which is generally in charge of ensuring the effective implementation and operation of the Agreement (Article 92 EEA Agreement). Importantly for present purposes, the dispute may eventually end up at the CJEU, though only when the parties agree on calling on the Court (Article 111 EEA Agreement). In practice, and perhaps not surprisingly given the need for consent, this has never happened.

With respect to Switzerland, the EU has also suggested a model that includes the CJEU as the final judicial authority. Switzerland finds it difficult to agree to such a model because of the above-mentioned issue of the 'foreign judges' (though in the present author's opinion, that is not really a problem where, as is the case under EEA law, a ruling of the CJEU can be avoided by simply refusing to agree to call on that Court). However, the Swiss Federal Government appears to consider an international supervision mechanism even more dangerous. In order to avoid it, it is prepared to accept the CJEU as the court in charge of the interpretation of substantive rules that are derived from Union law (but only those, to the exclusion of other provisions of the relevant agreement) in the dispute settlement mechanism, including the possibility that the parties unilaterally (!) call on this court and including the binding nature of the court's rulings.[39] For the EU, such an approach would mean that in practice supervision could happen indirectly through this mechanism (investigation by the Commission,

37 See European Parliament, *Internal Market Beyond the EU: the EEA and Switzerland* (2010), www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636 EN.pdf, p. 26.

38 See C. Tobler, 'Dispute Resolution under the EEA Agreement', in C. Baudenbacher (ed.), *The Handbook of EEA Law* (Springer, 2015), p. 195–207.

39 'The competence for resolving disputes will lie with the joint committees. Within this framework, questions concerning the interpretation of EU law that is part of a given bilateral agreement can be submitted by either party to the CJEU.' The Federal Government's information in the factsheet on

which goes to the CJEU where necessary in the name of the Union). Conversely, the Swiss Federal Government, in order to make this approach acceptable to the Swiss public, puts the emphasis elsewhere, namely on the fact that after a CJEU ruling the dispute goes back to the Joint Committee and, therefore, to the common political level. At the time of writing, the parties have yet to agree on how far the jurisdiction of the CJEU would stretch and what would be the sanctions if Switzerland were to refuse to follow the ruling in the Joint Committee.

A final remark regarding Switzerland: the fact that the EU insists on a dispute settlement mechanism that includes a decisive role of the CJEU has to do with the concern for the autonomy of the EU legal order. As was already stated, it implies that with respect to legal concepts taken from Union law in agreements with non-Member States the ultimate authority must remain with the CJEU. At present, some EU-Swiss Agreements give ad hoc arbitration tribunals a role that does include the interpretation of market access rules, contrary to the modern EU doctrine[40] (namely Article 17 of the Agreement on thermonuclear fusion of 1978[41] as well as Article 38 of the Insurance Agreement of 1989).[42] These agreements date from before the Court's decisive case law on the autonomy of the EU legal order, which began with the setting up of the EEA.[43] Since then, the EU has been insisting on an approach that is in line with the CJEU's case law on this matter, also in contexts other than the EEA. For example, according to Article 29(3) of the more recent EU–Swiss Agreement on customs modalities,[44] arbitration tribunals can be used only for judging matters such as the proportionality of sanctions.[45] It may be interesting to note that the same approach is also visible in more recent trade agreements

'Institutional issues', www.eda.admin.ch/dam/dea/en/documents/fs/11-FS-Institutionelle-Fragen_en.pdf.

40 See C. Tobler, 'Schiedsgerichte im bilateralen Recht?', *Schweizerische Zeitschrift für internationales und europäisches Recht* (2012), p. 1–6.

41 Cooperation Agreement between the European Atomic Energy Community and the Swiss Confederation in the field of controlled thermonuclear fusion and plasma physics, [1978] OJ L 242/1 (for Switzerland: SR 0.961.1).

42 Agreement between European Economic Community and the Swiss Confederation on direct insurance other than life assurance, [1991] OJ L 205/3 (for Switzerland: SR 0.961.1).

43 Opinion 1/91 (*EEA I*), EU:C:1991:490; and Opinion 1/92 (*EEA II*),EU:C:1992:189. More recently for example Opinion 1/09 (*Patent Court*), EU:C:2011:123.

44 Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures, [2009] OJ L 199/24 (for Switzerland: SR 0.631.242.05).

45 Article 29(3) provides with respect to rebalancing measures: 'The scope and duration of such measures shall be limited to what is necessary in order to remedy the situation and to secure a fair balance of rights and obligations under this Agreement. A Contracting Party may ask the Joint Committee to hold consultations about the proportionality of these measures and, where appropriate, decide to submit a dispute on the matter to arbitration in accordance with the procedure laid down in Annex III. No question of interpretation of provisions of this Agreement that are identical to corresponding provisions of Community law may be resolved within this framework.'

that are of a hybrid nature in terms of the origin of their rules, such as the EU-Ukraine Association Agreement.[46]

Again, the question may be asked: what does all of this imply for potential negotiations with the UK? And again, it is conceivable that the EU might translate its experience with Switzerland into this new framework, including in particular the possibility for each party to unilaterally call on the CJEU without the other party's prior consent. Moreover, this could be the case even in the event that an arrangement with the UK includes an element of international supervision, different from the present stage of the EU–Swiss negotiations. If so, it would imply that the Union would offer the UK the worst of two worlds, namely a combination of the EEA system, on the one hand, and the Swiss negotiations, on the other hand.

D. CONTINUOUS UPDATING OF THE AGREEMENT

A final, and in practice particularly important issue concerns the body of the rules that make up the common law. In order to guarantee homogeneity of EEA law with the Union law from which it is derived, the EEA Agreement provides for a dynamic system of updating. In this context, the EEA Joint Committee decides on the updating of the annexes of the EEA Agreement in line with new EU law in the relevant areas. It should be noted that there is no automatic updating (different from, for example, the present currency agreements with the AMS states).[47] Should the participating EEA/EFTA states refuse an update, the consequence would be that the relevant part of the agreement is provisionally suspended, at least in principle (Article 102(5) EEA Agreement).

The EU is on the whole pleased with this system, though lately it has expressed concern about delays in updating on the EEA/EFTA side.[48] For the EEA/EFTA States,

46 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, [2014] OJ L 161/3. Though largely based on WTO law, there are also elements of Union law in this agreement. For these and in the specific context of dispute settlement, Article 322(2) of the EU-Ukraine Association Agreement provides: 'Where a dispute raises a question of interpretation of a provision of EU law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel.' See also G. van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade. A New Legal Instrument for EU Integration Without Membership* (Brill, 2016), p. 299 et seq.

47 See on this issue G. Baur and C. Tobler, '"Automatische" vs. "dynamische" Rechtsübernahme. What's in a name?', in *Schweizerisches Jahrbuch für Europarecht 2015/2016* (Stämpfli, Schulthess, 2016), p. 347 et seq.

48 See Council Conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, 16 December 2014, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf, para. 28 et seq., in particular 34.

the EEA represents the compromise that grants them full access to the internal market without EU membership. The political price to be paid by them is that of accepting new law without participating in the decision-making in the EU's law-making process.[49] Extensive decision-shaping rights of the EEA/EFTA states give them valuable influence, but this is clearly not the same as full decision-making rights. Even though there is no legal obligation to take over new EU law, this situation may be perceived as a democratic problem. Surely that would also be an issue for the UK.[50]

Seen from that perspective, the legal situation under most of the EU-Swiss agreements might appear more attractive – even though here, too, there are no decision-making rights. In the EU–Swiss legal relationship, only three agreements are dynamic in nature, including in particular the Schengen[51] and Dublin Association Agreements,[52] plus the already mentioned Agreement on customs modalities. All other agreements have what is sometimes called a static starting point, meaning that they are based on EU (Community) law as it existed at the time of signature of the agreement. Updates may be possible either through formal revision or, within limits, through decisions by the Joint Committees in charge of monitoring the functioning of the agreements, depending on the rules of the individual agreements. However, Switzerland in the context of these other agreements cannot be forced to agree to such updates. If it says no, there will be no legal consequences under the agreement.

A notable example of this is the refusal of the Swiss Federal Government to update the FMP Agreement in the light of the Union Citizenship Directive.[53] Conversely, even though there was first some resistance on the side of the EEA/EFTA states, the EEA Agreement was eventually updated in this respect, though with a carve-out with respect

49 When Switzerland tried, in the 1990s and in the context of the negotiations on the EEA Agreement, to secure decision-making rights for the EFTA States, it failed; see P.G. Nell, *Suisse – Communauté européenne. Au coeur des négotiations sur l'Espace économique européen*, p. 170 et seq.

50 See for example Peers, who called it 'a very odd form of independence indeed', S. Peers, 'Article 50 TEU: The uses and abuses of the process of withdrawing from the EU', *EU Law Analysis* (2014), http://eulawanalysis.blogspot.ch/2014/12/article-50-teu-uses-and-abuses-of.html (in the debate about the entry).

51 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, [2008] OJ L 53/52 (for Switzerland: SR 0.362.31); as extended to Liechtenstein, [2011] OJ L 160/3 (for Switzerland: SR 0.362.311).

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

53 Directive 2004/38/EC 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] OJ L 158/77.

to the citizenship elements in the directive (the precise meaning of which remains to be determined by the courts).[54]

The fact that most EU-Swiss Agreements are not dynamic in nature is perhaps not surprising for older agreements such as the Free Trade Agreement of 1972 or the Insurance Agreement of 1989. Conversely, the fact that some more recent agreements (including in particular the FMP Agreement or the Air Transport Agreement) do not have a dynamic starting point should not be taken to mean that this could give hope to others such as the UK. In the framework of its demands for an institutional overhaul of the EU-Swiss agreements, the EU is aiming at creating a dynamic system including legal sanctions for refusal, failing which it is no longer prepared to conclude new market access agreements. This attitude hurts Switzerland in particular with respect to its wishes for a new agreement on the trade in electricity. Negotiations on this issue have been ongoing since 2007 and are blocked because of the institutional matters.[55]

Against this background it is difficult to imagine that the EU might agree to a non-dynamic system for an alternative arrangement with the UK. Therefore, it has been suggested in the discussion following 'Brexit' that the EEA, with its dynamic system, could be reformed in order to provide for full decision-making rights of the EEA/EFTA states, which would make it attractive (at least in that respect) for both the UK and Switzerland.[56] In the present author's view, it is difficult to imagine that this might happen. After all, it would weaken EU membership, and that cannot be the aim of the European Union in the present difficult situation. Instead, it is more likely that the UK would be faced with the demand of a fully dynamic system, with decision-shaping rights for the non-member but without decision-making rights, and with legal sanctions in the case of a refusal of an update.

§4. IN CONCLUSION: LESSONS FOR THE UK

The above discussion shows that the EU's attitude to the institutional framework of market access agreements 'EU style' with Western European non-Member States has evolved over time and continues to evolve. Whilst for a long time the EU (or rather at the

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54 Decision of the EEA Joint Committee No. 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement, [2008] OJ L 124/20. Compare C. Tobler, 'Auswirkungen einer Übernahme der Unionsbürgerrichtlinie für die Schweiz – Sozialhilfe nach bilateralem Recht als Anwendungsfall des Polydor-Prinzips', in A. Epiney and T. Gordzielik (eds.), *Personenfreizügigkeit und Zugang zu staatlichen Leistungen / Libre circulation des personnes et accès aux prestations étatiques* (Schulthess, 2015), p. 55–82.

55 See the Federal Administration's website, www.eda.admin.ch/dea/de/home/verhandlungen-offene-themen/verhandlungen/strom-energie.html.

56 Thus the president of the EFTA Court, C. Baudenbacher, 'Grossbritannien im EWR 2.0. "Die EU müsste mehr Mitbestimmung anbieten als 1992"', *Neue Zürcher Zeitung* (2016), www.nzz.ch/schweiz/aktuelle-themen/grossbritannien-im-ewr-20-die-eu-muesste-mehr-mitbestimmung-anbieten-als-1992-ld.91741.

time: the Communities) was prepared to conclude agreements with Switzerland that did not provide for a dynamic system of updating, homogeneous interpretation, international supervision and a dispute settlement mechanism with a judicial mechanism, all of that is very much on its agenda now, not only vis-à-vis Switzerland but also vis-à-vis the AMS states. The discussion also showed that whilst the EU's blueprint in this regard is the institutional system of the EEA, political developments have led to a situation where the current negotiations go beyond that system. It may well be that the UK, should it wish to negotiate an 'EU style' market access agreement with the EU, would be faced with demands from the EU resulting from an amalgam of all of these developments.

Admittedly, the situation of the UK is different from that of both Switzerland and the AMS states, as already noted in the introduction to this article. First, the UK starts from the position of full EU membership rather than seeking an association to the EU from the position of a third country. Second, any alternative agreement has to be seen against the background of the withdrawal agreement and will most likely be influenced by it. Third, it is possible that the negotiations on the alternative agreement take into account the February 2016 deal made by the Member States in order to accommodate the UK in the EU (which did not enter into force because of the 'Brexit' vote).[57] Finally, the UK belongs to the very largest economies of the world and as such has a much larger bargaining power than either Switzerland or the AMS states. It remains to be seen whether these special factors will have consequences for what the UK can achieve in terms of an alternative arrangement, also on the institutional level. Even so, the EU will rely on its experience with Switzerland and the AMS states, and it remains possible that the UK would be faced with the above-mentioned amalgam of institutional demands. Some of the pitfalls of such a situation might be avoided by joining, first, the EFTA and then, based on this, the EEA,[58] thereby stepping into an already existing institutional model (unless, that is, the EU were to use this occasion to suggest an institutional overhaul of the institutional framework of the EEA). However, EEA law covers the full internal market, including the free movement of persons,[59] which appears to have been one of the main concerns

57 Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, Annex I to the Council Conclusions of 18 and 19 February 2016, www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/.

58 According to Article 128 EEA Agreement: 'Any European State becoming a member of the [Union] shall, and the Swiss Confederation or any European State becoming a member of EFTA may, apply to become a party to this Agreement. It shall address its application to the EEA Council'.

59 One interesting difference compared to EU law is the existence of a safeguard clause under Article 112 EEA Agreement. It allows for unilateral measures, if serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising'. In the 'Brexit' debate, it has been argued that the free movement of persons under EEA law would be more acceptable for the UK than under EU law because of this clause, though invoking it would not be cost-free (see for example S. Peers, 'What next after the UK vote to leave the EU?', *EU Law Analysis* (2016), http://eulawanalysis.blogspot.de/2016/06/what-next-after-uk-vote-to-leave-eu.html). Compare also the situation with respect to Switzerland: following the popular vote of 9 February 2014, Switzerland and the Union have been engaging in

of those voting in favour of 'Brexit' (it is doubtful whether the mere granting to the new member of the possibility to limit free movement during an initial, transitional period would be sufficient in their view).[60]

As for the Swiss model, given the experience of the last years it seems clear that the present sectoral arrangements between the EU and Switzerland are not repeatable when it comes to their (at present very disparate) institutional framework. In this context, it may be worth recalling the larger picture by quoting from the Council's description in 2010 of the problems with the present EU-Swiss Agreements and beyond – keeping in mind that in the future 'beyond' may not only include the EEA/EFTA states and the AMS states but possibly also the UK:[61]

> Since Switzerland (…) has chosen to take a sector-based approach to its agreements in view of a possible long-term rapprochement with the EU. In full respect of the Swiss sovereignty and choices, the Council has come to the conclusion that while the present system of bilateral agreements has worked well in the 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. In order to create a sound basis for future relations, mutually acceptable solutions to a number of horizontal issues, set out below, will need to be found.
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> Though EU relations with the EFTA countries were extended over the years to many areas not covered by the internal market, these relations are mainly based on the progressive integration of the EFTA countries' economies into the EU internal market. In view of the need for a level playing field for all economic operators of the parties concerned and the continued development of internal market relevant acquis, the EU and the EFTA States should ensure homogeneity in the implementation of the acquis and the good functioning of the institutions.
>
> A similar assessment should also be undertaken concerning the relations of the EU with the European countries of small territorial dimension, and more in particular the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Their current relations with the EU are extended but fragmented, with large parts of the acquis related to the internal market not introduced in their legislation and therefore not applicable. (…)
>
> In full respect of the Swiss sovereignty and choices, the Council has come to the conclusion that while the present system of bilateral agreements has worked well in the past, the key challenge for the coming years will be to go beyond that system, which has become complex and unwieldy to manage and has clearly reached its limits. As a consequence, horizontal issues related to the dynamic adaptation of agreements to the evolving acquis, the homogeneous

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technical talks about the application of a partially corresponding provision of the EU–Swiss FMP Agreement, namely Article 14(2). This provision does not allow for unilateral action, and the talks about a commonly agreed approach have proved very difficult. Generally, on safeguard clauses with respect to the free movement of persons see C. Tobler, 'Schutzklauseln in der Personenfreizügigkeit mit der EU', *Jusletter* (2015).

60 See T. Helm, 'Brexit: EU considers migration "emergency brake" for UK for up to seven years', *The Guardian* (2016), www.theguardian.com/world/2016/jul/24/brexit-deal-free-movement-exemption-seven-years.

61 Council Conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, 16 December 2014, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf, para. 6 et seq. and 48.

> interpretation of the agreements, an independent surveillance and judicial enforcement mechanisms and a dispute settlement mechanism need to be reflected in EU-Switzerland agreements.

In Switzerland, critics have argued that, through its attitude of exporting its institutional rules to other parts of Europe, the European Union engages in a modern form of colonialization.[62] Whatever the merit of such an argument, from a realistic point of view it is reasonable to assume that, in negotiations with the UK on a future alternative arrangement to EU membership based on market access 'EU style', the EU might extend its institutional demands as described in this contribution to the new 'third state'. The UK would then have the unenviable task of weighing its options.

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62 This is a very common argument of right-wing circles in Switzerland who disagree with the aim of the Swiss Federal Government to find a commonly accepted solution on the institutional matters; for a critique, see 'Was ist eigentlich ein Kolonialvertrag?', www.unser-recht.ch/2015/08/14/was-ist-eigentlich-ein-kolonialvertrag/.