

**Zeitschrift:** Swiss review : the magazine for the Swiss abroad  
**Herausgeber:** Organisation of the Swiss Abroad  
**Band:** 45 (2018)  
**Heft:** 6

**Artikel:** What exactly are they talking about?  
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**DOI:** <https://doi.org/10.5169/seals-906551>

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# What exactly are they talking about?

A year before the elections, the desire of many politicians to get their fingers burnt by the most heated dossier in federal Bern has noticeably declined. The dossier in question is the institutional framework agreement between Switzerland and the European Union. While it might sound tedious, it is essentially the key to the advancement of the current bilateral path.

HEIDI GMÜR

Will the Federal Council dare to take the plunge in domestic politics? Or will it capitulate before the finish line? During late summer, the years of trying to find a solution to the institutional issues with the European Union (EU) came to a head over this question. The Federal Council's answer came at the end of September: neither nor. It wants to continue negotiations with the EU and reach an agreement as soon as possible, to guarantee the continuation of the successful bilateral path into the future. However, the Federal Council does not want to make any concessions in the form of accompanying measures to combat wage and social dumping, as Brussels recently demanded with the force of an ultimatum. At least not for the time being in the face of the domestic political resistance that has built up over the summer.

A final round of negotiations began in autumn and was marked by uncertainty as to whether it would be possible to reach an agreement at all under the circumstances. If not, the framework agreement would ironically not fail because of the SVP's resistance against the frowned upon "foreign

judges", but because of the resistance of the trade unions and the SP to alternative forms of wage protection accepted by the EU.

In order to answer this question, we have to go back to the origins, which can be found in Switzerland. The idea of an agreement to establish a common framework for the increasingly complex set of bilateral accords between Bern and Brussels first emerged in the Council of States in 2002. In 2006, the Federal Council mentioned the possibility of a framework agreement in a Europe Report. Finally, in 2008 the EU made it clear that it was no longer prepared to continue with bilateralism as before. It wants to ensure uniform application of EU law by Switzerland, which enjoys privileged access to the Single Market thanks to the bilateral accords, even though it is neither a member of the EU nor the EEA. Brussels is particularly concerned about the dispute about individual accompanying measures taken by Switzerland, which has remained unresolved for years. In the eyes of the EU these measures are not compatible with the agreement on the free movement of persons. An exam-

Federal Councillor Ignazio Cassis tries to explain the complex framework agreement during a speech by using colourful blocks.

Photo: Keystone



ple of such a measure is the so-called eight-day rule, which requires foreign companies that want to send employees to Switzerland for brief assignments to give eight days' notice.

In the years to come, the EU will increasingly insist on resolving institutional issues. In 2012, the EU made it known to Switzerland that there won't be any new bilateral accords without a framework agreement. The negotiations started in May 2014. At the end of 2017, the EU lost its patience for the first time. It punished Switzerland for its hesitation by only recognising Swiss stock market regulations for one year and made an extension dependent on the progress of the framework agreement. This galvanised Bern, where there are growing fears of additional, economically damaging blows.

### What does the framework agreement regulate?

Essentially, there are two aspects: the dynamic adoption of legislation and the settlement of disputes.

The current bilateral agreements, with the exception of the Schengen/Dublin agreement, are static in nature. However, EU law is constantly evolving. Switzerland already regularly adapts its national law to match new EU laws, especially where it deems it necessary to ensure unhindered access for the economy to the EU Single Market, as in the case of stock exchange regulations. But the new approach will be an institutionalised, dynamic adoption of legislation.

Nowadays, Bern and Brussels are able to discuss their differences in the Joint Committee, a politico-diplomatic body. In the event that opinion is divided, there is no legal way of achieving an agreement. From a political point of view, each side is at liberty to take retaliatory measures to exert pressure on the other side, which represents a principle of "might makes right". In future, there will be a jurisdiction for the settlement of disputes.

During the negotiations conducted to date, it has been agreed – at the insistence of Switzerland – that the framework agreement should only apply to five of the 120 or so bilateral agreements. Namely for those that regulate the economy's access to the EU Single Market. These are the agreements on the free movement of persons, technical barriers to trade, air and land transport as well as agriculture. Future agreements on market access shall be covered by the framework agreement. One example is the electricity market agreement that Switzerland would like to conclude.

### How does the dynamic adoption of legislation work?

In principle, Switzerland would commit to always adopting new EU Single Market laws instead of adopting these independently on a case-by-case basis. In return, Switzer-

land would be given a say in the further development of EU law and a sufficient period of time during which it could adapt national law in accordance with its principles of direct democracy. Thus, Swiss voters would still have the final say. If they reject the adoption of new EU law in a specific case, the EU could indeed take retaliatory measures. But unlike today, the framework agreement would ensure that these would be proportionate.

### How will disputes be settled in the future?

In its 2013 negotiating mandate, the Federal Council stipulated that disputes should be resolved by the European Court of Justice (ECJ). However, this met with increasing resistance on the domestic front. Eventually the EU offered Switzerland the option of negotiating a new arbitration solution instead of an ECJ solution. This defused the debate about "foreign judges", especially since the arbitral tribunal would consist of a judge appointed by Switzerland and a judge appointed by the EU, as well as a jointly appointed president. Nevertheless, this solution will not change the fact that the European Court of Justice remains the decisive authority for the interpretation of EU law.

### Which decisive issues remain?

Questions regarding the so-called EU Citizens Directive have yet to be resolved. So far, Switzerland has refused to adopt it, since it would have consequences regarding family reunification, access to social welfare and the expulsion of EU citizens. Meanwhile, a consensus on the regulation of state aid seems to be within reach. In addition to subsidies, this also includes tax relief and state investments in companies, which are particularly widespread in the cantons. By contrast, such subsidies are frowned upon in the EU in as far as they distort cross-border competition. However, the accompanying measures remain the most difficult issue. If the positions of Bern and Brussels do not become more closely aligned, all other negotiation successes would become irrelevant. After all, what always applies during negotiations also applies in this case: "Nothing is agreed, until everything is agreed".