

## Negotiating privileged partnerships: EU-Switzerland relations and the joined-up approach in practice

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### Executive Summary

> The European Union's 2016 Global Strategy calls for a more 'joined-up' approach – that is, for greater coherence – in the EU's external action. One aspect of this coherence concerns the strategic link between sectoral cooperation with third countries, such as participation in EU programmes, and matters of foreign policy more broadly (e.g. a diplomatic dispute).

> The EU's 'privileged partnerships' with neighbouring countries offer them deeper market access in exchange for the institutionalisation of their relations with the EU. A case in which the EU has in recent years successfully managed to deploy a joined-up approach in this regard is its relationship with Switzerland. The EU is in particular linking further sectoral cooperation to the signature of an 'Institutional Framework Agreement'. This joined-up approach was facilitated by a significant degree of internal coordination and centralisation.

> Whereas the EU's wish to engage in a consistent approach towards non-EU partners that participate in the extended Internal Market, stressing the balance of rights and obligations, is understandable, it increases the third countries' costs of non-compliance with the EU's position. This may, in turn, reduce the EU's attractiveness in those countries and also lead to the loss of benefits for the EU.

In recent years, the European Union's (EU) neighbours have increasingly demanded to deepen their access to the internal market. In response, the EU has called for a further institutionalisation of its relations with these countries. These institutionalised relationships, labelled as 'privileged

partnerships', involve "extensive reciprocal rights and obligations, selective *acquis* adoption, policy cooperation and integration" (Gstöhl and Phinnemore 2019, 5). They may also include "bilateral institutions, surveillance and possibly even judicial enforcement arrangements, dispute settlement mechanisms and in certain instances privileged 'decision-shaping' access to EU institutions, bodies and agencies" (ibid.). The EU is currently negotiating such partnerships with Switzerland and the small-sized states Andorra, Monaco and San Marino. Negotiations with the United Kingdom (UK) on the future framework governing their relations also seem to follow the model of privileged partnerships, since also in this case the EU makes deeper access to its internal market conditional on the institutionalisation of relations.

In the past, negotiations with Switzerland and the UK, two sovereignty-prone countries, have proved challenging for the EU, in particular with regard to the institutional arrangements the Union desired. In this policy brief, I argue that the EU can strengthen its position in these negotiations by developing a stronger external coherence. Drawing on Gebhard's (2017) typology of EU external coherence, I focus on the horizontal and internal types of coherence. While horizontal coherence refers to the concertation between the supranational and the intergovernmental spheres of EU external action, internal coherence concerns the institutional coordination between the different areas of the EU's external relations.

The objective to enhance the EU's coherence in its external relations was at the heart of the EU's 2016 Global Strategy. In this document, the EU explicitly underlined its will to better integrate its diverse forms of external relations by stating that one of the tools to develop a more effective external action was to become "more joined-up across our external policies, between Member States and EU institutions, and between the internal and external dimensions of our policies" (European External Action Service 2016, 11).

Focusing on EU-Switzerland relations and the negotiations of an Institutional Framework Agreement (InstA), this policy

brief offers an analysis of whether and how the EU indeed follows its objective of developing a more coherent – joined-up – approach in relations with third countries. While analysing EU diplomatic practice vis-à-vis one major partner country in Europe, this policy brief sheds light on how the EU could manage its relations with other neighbouring countries seeking privileged partnerships similar to Switzerland's, that is, extensive access to the Single Market without EU membership. It first conceptualises the joined-up approach and then discusses three instances where a more joined-up and coherent approach can be observed in this bilateral relationship: sectoral agreements, sectoral cooperation and the EU's own internal organisation. In particular, the EU has linked the negotiation of market access agreements to the prior signature of the InstA. The policy brief concludes by discussing the implications of the findings for EU diplomatic practices and relations with third countries more generally.

### Conceptualising the joined-up approach

Since the beginning of the 21<sup>st</sup> century, the EU's external influence has mainly developed along two axes: foreign policy and sectoral policies. Foreign policy encompasses the development of traditional, state-like, diplomatic relations, for instance via the creation, in 2010, of the European External Action Service (EEAS) alongside the development, since the early 1990s, of a Common Foreign and Security Policy (CFSP). Yet, the EU also exerts its influence in third countries through cooperation within policy sectors and the diffusion of its sector-specific rules and norms. These two vectors of influence, foreign policy and sectoral cooperation, have evolved independently from each other and with varying degrees of success.

On the one hand, even though the EU has made advances in foreign policy and diplomatic capabilities, it is still often referred to as primarily an 'economic giant, but a political dwarf' in international affairs. On the other hand, facing the slowdown in the enlargement process and the presence of countries asking for association below the threshold of membership, the EU has sought alternative means to export its norms and practices to third countries. This 'functionalist extension' (Lavenex 2014), which operates through the externalisation of EU norms, rules and practices to third countries thanks to political-administrative and socio-economic mechanisms of external governance, has proved to be an effective vector of influence for the EU beyond its borders. The purpose of the joined-up approach promoted by the Global Strategy is to bundle EU capabilities by integrating its foreign policy and external sectoral cooperation, thereby enhancing the coherence and effectiveness of its external action.

In this context, the term 'joined-up approach' expresses the wish to better integrate the EU's sectoral cooperation with a third country and its general foreign policy vis-à-vis that country. In the negotiation of privileged partnerships, the EU's joined-up approach is understood as a practice which, through significant degrees of horizontal coherence (between the oftentimes supranational sectoral policies and the intergovernmental CFSP) and of internal coherence (via inter-institutional coordination between different areas of EU external action), links deeper market access for third countries with further institutionalisation of their relations with the EU.

The negotiations with Switzerland offer a paradigmatic case for studying the emergence of such a joined-up approach. Since the Swiss failure to ratify the European Economic Area (EEA) Agreement by popular vote in 1992, the EU and Switzerland have developed a unique kind of partnership governed through an increasing number of bilateral sectoral agreements. The resulting relationship has for a long time mainly been regarded as technocratic in nature. However, the success in 2014 of a popular initiative against 'mass migration' spiked tensions in EU-Swiss relations. The vote prevented the Swiss government from signing the Protocol extending the EU-Swiss agreement on the free movement of persons to Croatia, which joined the EU in 2013. The EU made an apparent link between the signature of this Protocol and Switzerland's participation in Erasmus + and Horizon 2020 (European Commission 2014, 27, 30). As a result, Switzerland was excluded by the EU from participation in the Erasmus + programme and was only partially associated to Horizon 2020. The government finally sought to reconcile the required change of the Federal Constitution with the bilateral agreement on the free movement of persons by opting for a 'light' implementation which gives priority to Swiss residents in job recruitment.

Nevertheless, this politicisation of EU-Swiss relations has continued during the negotiations on the InstA, which aims at providing an institutional umbrella for the governance of current and future mutual market access agreements. The reluctance of the Swiss Federal Council to endorse the Agreement at the end of negotiations in December 2018 led the EU to call some aspects of their sectoral cooperation into question, such as the non-extension of the Swiss stock exchange equivalence. This hints at a joined-up approach by the EU as it links a technical issue to a political disagreement, i.e. the signature of the InstA.

The joined-up approach in EU-Swiss relations is now examined by means of three different aspects related to horizontal and internal coherence. The first one is *sectoral agreements* signed between the EU and Switzerland on a specific policy. These agreements in sectors such as trade,

free movement of persons or transport offer mutual market access. They may also provide for Swiss participation in EU programmes such as the EU Research and Innovation Framework Programme. The negotiations and signature of such agreements call for horizontal coherence on the EU side. The Council gives the Commission the mandate to negotiate these agreements, which requires concertation between these two institutions. Joined-up action in this case would imply that the EU has made the negotiation or signing of sectoral agreements conditional on the institutionalisation of relations.

Another aspect, which requires horizontal and internal coherence, is *sectoral cooperation* involving EU-Swiss technocratic cooperation on a sectoral policy. Sectoral cooperation means permanent collaboration in areas where an agreement is already in force between Switzerland and the EU. Formal cooperation takes place through the joint committees, which are responsible for the implementation and adaptation of the bilateral agreements. Another instance of sectoral cooperation is the Swiss officials' access to EU expert groups, which assist the Commission in the preparation and implementation of EU legislation. Indicators of EU joined-up action in this area would be a suspension of joint committees or of Swiss officials' access to EU expert groups because of the Swiss refusal to sign the InstA. As the joint committees are enshrined in legal texts, a suspension of their work due to the deadlock in negotiations would be an indicator of a strong joined-up approach. Swiss technocrats' access to the expert groups is often less legally formalised.

Finally, a joined-up approach is also reflected in how coherently the EU is organised internally. Therefore, the last aspect to investigate is the *EU's internal organisation* in terms of both coordination and centralisation. This dimension encompasses horizontal and internal coherence, as it consists of coordination between the different institutions and areas of the EU's external action. Joined-up coordination can be observed if the different Commission Directorates General (DG) and the EEAS coordinate their cooperation with Switzerland. Further, if an EU institution (the Commission or the EEAS) takes the lead in supervising and controlling bilateral relations with Switzerland, this would be a sign of centralisation aimed at joining up EU external action.

### The Institutional (Dis-)Agreement

The current model of EU-Switzerland relations finds its origins in the negative popular vote regarding Switzerland's accession to the EEA in 1992. Since then, the EU and Switzerland have signed multiple bilateral agreements to develop their relations, which are mainly market access-related. Under the bilateral agreements, Switzerland does not have to adopt new EU *acquis*, with exceptions like

Schengen, nor to follow the full Court of Justice of the EU's (CJEU) jurisprudence, and there is no supervisory authority, nor judicial dispute settlement mechanism. However, the EU increasingly grants extended access to the internal market in exchange of certain obligations such as a 'dynamic' approach to the relationship, independent surveillance, judicial enforcement, a dispute settlement mechanism and a homogeneous interpretation of the agreements (Baur 2019, 28-29). As a result, the two parties have negotiated an InstA, which aims to consolidate actual and future mutual market access by "protecting the homogeneity of the internal market and ensuring legal certainty for authorities, citizens and economic operators" (Council of the EU 2014) through the institutionalisation of EU-Switzerland relations. This agreement follows the principle of a balance of rights and obligations for access to the internal market, which is an integral part of the EU's 'privileged partnerships'.

In December 2018, the negotiations ended with a draft agreement. The agreement applies to five current market access agreements: the free movement of persons, land transport, air transport, technical trade barriers, and agriculture – as well as all future market access agreements. Furthermore, it introduces a dispute settlement mechanism with an arbitration tribunal and ensures that relevant developments in EU law are incorporated into the agreement. This mechanism should, however, respect Switzerland's decision-making procedures. Although this draft agreement does not introduce all five obligations mentioned above (see Baur 2019 for a detailed analysis), it nevertheless represents a significant improvement over the current structure of bilateral agreements regarding the balance of rights and obligations for access to the internal market. Instead of endorsing the Agreement at the end of the negotiations, the Federal Council decided to conduct consultations with various relevant stakeholders, who had voiced discontent with specific parts of the InstA, notably the state subsidies, the flanking measures for posted workers and the obligation to adopt the EU citizens' rights directive (Federal Council 2018). These consultations eventually led to requests for clarification to ensure sufficient support among the Swiss population (Federal Council 2019).

The EU has shown signs of exasperation towards the Swiss position. Then Commission President Juncker stated in June 2019 that discussions and declarations could be undertaken to clarify certain parts of the InstA, but that the Agreement would not be re-negotiated (Juncker 2019). As a result, the EU and Switzerland are currently facing a disagreement on the appropriate model to frame the governance of their relationship, i.e. the InstA. This political context coupled with the sectoral-based structure of EU-Switzerland relations provides a useful case for scrutinising whether and how the EU develops a joined-up approach vis-à-vis third countries.

## EU external action towards Switzerland

The following analysis of the abovementioned three aspects of EU-Swiss relations shows an increasing EU joined-up approach. This strong trend does of course not preclude that sectoral cooperation in some areas may still function rather independently from the overarching foreign policy debates on the institutional framework agreement.

### *Sectoral agreements*

Regarding the sectoral agreements, the EU's joined-up approach is illustrated by its decision to make the conclusion of the Institutional Framework Agreement a precondition for the negotiation of new as well as for the further development of existing market access agreements. This approach was already used earlier with the Council of the EU stating in 2008 that "in assessing the balance of interests in concluding additional agreements, the Council will have in mind the need to ensure parallel progress in all areas of cooperation" (Council of the EU 2008). However, the ex-ante conditionality applied by the EU has become stronger and broader since 2014. Indeed, the EU has frozen not only the negotiations of new market access agreements, e.g. in the field of electricity, but also the talks on updating the current ones, such as the Mutual Recognition Agreements, which would have a significant impact on Swiss exports.

Switzerland's participation in EU programmes has also been affected. In the research and innovation sector, there has been a lot of uproar when the European Commission published its proposal for a regulation establishing 'Horizon Europe', the new framework programme for research and innovation, in 2018. Indeed, in the article establishing the association of third countries with the programme, Switzerland is no longer part of the category 'European Free Trade Association (EFTA)' but is now in the 'third countries' category (European Commission 2018). This change of group implies the conclusion of a stricter agreement covering the Swiss participation in the programme that could restrain Switzerland's involvement in particular domains. The link between Switzerland's association status to Horizon Europe and the InstA is blurry. EU officials have argued that it is merely a reorganisation of third countries' participation according to the type of agreements they have with the EU and that it has nothing to do with the InstA. Switzerland could simply no longer be in the same category as the other EFTA countries which are members of the EEA.

Overall, the EU has clearly made sectoral agreements conditional on the conclusion of the InstA, which indicates a joined-up approach.

### *Sectoral cooperation*

The EU has in the past hardly used the participation of Swiss technocrats in EU expert groups in a joined-up way. Historically, the Swiss expertise is appreciated in Brussels. As a result, it has been common that Swiss experts are invited to participate in EU expert groups even though there is often no legal basis for such a participation. Recently, this informal participation right has been revoked for Swiss experts, especially in the health sector, where they are no longer allowed to participate.

There are two sides to this measure. On the one hand, it puts pressure on the Swiss to sign the InstA. On the other hand, according to EU and Swiss officials, this is also linked to Brexit, as the EU does not want the UK to exploit this informal practice and demand similar access. In sectors where there is a legal basis for Swiss participation, such as research and the movement of persons (Schengen area/Dublin Regulation), there has been no such revocation of the right to participate. The sectoral joint committees have not been affected by the dispute around the Institutional Framework Agreement.

### *Internal organisation of the EU*

In its internal functioning, the EU has recently demonstrated coordination and a high degree of centralisation in the conduct of its relations with Switzerland. The EEAS organises internal meetings bringing together all EU staff working with Switzerland in sectoral areas. During these meetings, each policy officer gives a briefing on the cooperation with Switzerland in the respective sector. With these meetings, the EEAS ensures close coordination across all sectoral policies towards Switzerland.

The most striking aspect in the development of a joined-up approach towards Switzerland is, however, the strong centralisation of EU action under the responsibility of the Commission's Secretariat-General (SG). An internal memo sent to EU staff in 2015 requires that the SG must first approve any action or decision concerning Switzerland. As a result, individual Directorates-General cannot take any initiative without getting the Secretariat-General's endorsement, which ensures a common approach across all sectors of cooperation with Switzerland. As the SG has imposed a hard line against Switzerland, linking sectoral cooperation to progress on the InstA, sectoral cooperation has been negatively affected by this.

Altogether, this centralisation under the SG's lead therefore represents a significant factor in the joined-up approach adopted by the EU in its relations with Switzerland.

## Conclusion and policy implications

This policy brief has shown that the EU has started to use the joined-up approach to put pressure on Switzerland to sign the InstA, which intends to ensure greater homogeneity regarding access to the Single Market. This is evidenced by a high degree of coordination of all services involved in these bilateral relations, as well as stronger centralisation, which enhances the coherence of EU action. The EU has also made the conclusion of negotiations on current and future market access agreements conditional on the signing of the InstA. However, this approach came at the price of a further drop in positive perceptions of the EU in Switzerland.

The case of EU-Switzerland relations can be instructive for the way the EU tries to act in a joined-up way vis-à-vis other third countries in similar negotiations. By suspending or limiting the sectoral participation of third countries in EU policies, the EU increases the costs for a third country to not accept the obligations, i.e. institutionalisation, that come with the benefits, i.e. access to the internal market, of their partnership with the EU. The joined-up approach can also have internal effects abroad as the third countries' interest groups might put pressure on their government to resume cooperation.

The study of the Swiss case in particular brings to the fore Brexit and how it has impacted the EU's action towards third countries seeking substantial market access. Indeed, the departure of a member state has risked threatening the European integration process as such. Switzerland, being a non-EU European country with strong access to the Single Market, represents a potential alternative path of integration for countries pursuing similar objectives, that is, access to the Single Market without EU membership. The EU now seems to link the different negotiations with third countries in order to avoid setting any precedent tying its hands in the future.

The EU's decision to change Switzerland's status from 'EFTA country' to 'third country' in Horizon Europe can be interpreted in this way. It seems likely that the re-organisation is linked to the EU's re-definition of its relations with the UK. If one considers the participation in Horizon 2020 projects, the UK ranks second among all EU member states. It is therefore not in the EU's interest to give the UK privileged access to Horizon Europe, as this could result in a significant amount of money being invested in non-EU research institutions. Thus, the UK would also be placed in the category of 'third countries'. A specific agreement would then have to be negotiated between the EU and the UK to regulate the British participation in Horizon Europe, allowing the EU to better control the scope of UK participation in the EU's Research Framework Programme. This move would also allow the EU to enhance the value of EEA membership, helping the Norwegian government to better sell the benefits of EEA membership to a critical domestic audience.

This contribution can also be connected to the debates on the future of Europe and differentiated integration (Leuffen et al. 2013). Indeed, the EU seems to make the participation of third countries in its Single Market and related policies conditional on a stronger alignment with the EU *acquis*. In this respect, the joined-up approach can be seen as an instrument to ensure a level playing field – a point that plays an important role in the EU-UK negotiations on a future partnership. While the joined-up approach can be effective in negotiating 'privileged partnerships', it could come at the price of losing the benefits of external differentiated integration for the EU. By suspending or limiting external sectoral cooperation in certain areas, the EU might lose the advantages of functional collaboration with interdependent third countries, such as Switzerland or the UK. This might also lead to a loss of external expertise for the EU, as illustrated by the health sector in the Swiss case.

## Further Reading

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