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TAKING BACK CONTROL? – SUSTAINING NATIONAL SOVEREIGNTY VIS-À-VIS THE EUROPEAN UNION

A COMPARATIVE PERSPECTIVE ON THE EU – UK TRADE AND COOPERATION AGREEMENT AND THE SWISS BILATERAL WAY

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List of Abbreviations

BV –	Bundesverfassung der Schweizerischen Eidgenossenschaft (Federal Constitution of the Swiss Confederation)
ECA –	European Communities Act 1972
EC –	European Community
ECJ –	European Court of Justice
EEA –	European Economic Area
EEC –	European Economic Community
EFTA –	European Free Trade Association
EU –	European Union
Euratom/EAEC –	European Atomic Energy Community
FMPA –	EU – Switzerland Free Movement of Persons Agreement
FTA –	Free Trade Agreement
IFA –	EU – Switzerland Institutional Framework Agreement
LPF –	Level playing field
QMV –	Qualified Majority Voting
TCA –	EU – UK Trade and Cooperation Agreement
TEU –	Treaty on European Union
TFEU –	Treaty on the Functioning of the European Union
UK –	United Kingdom of Great Britain and Northern Ireland
UKIP –	United Kingdom Independence Party
WA –	Withdrawal Agreement

Abstract

This thesis addresses *the question "To what extent has the UK been able to regain sovereignty following the conclusion of the EU – UK Trade and Cooperation Agreement (TCA), and what parallels can be drawn with the Swiss model of Europeanisation?*

To answer this question the post-Brexit relations of the United Kingdom with the European Union are analysed and compared to the Swiss Model of Single Market access. Employing descriptive, evaluative, and hermeneutic methods the legal framework guiding these relationships and the prevalent forms of sovereign decision making are explored. Further emphasis lies on the governance procedures laid forth in the TCA and the EU-Switzerland bilateral agreements regarding their impacts on parliamentary sovereignty in the UK and popular sovereignty in Switzerland.

The thesis finds that both the supremacy of parliament and the referendum in a third country have similar effects on that countries' approach to Europeanization. It shows that the rationale of these countries is to reduce limitations on their institution's autonomy to the minimum while gaining as much access to the EU's Single Market as possible. Hence, both cooperation regimes include similar governance models and dispute settlement procedures that limit autonomy but not sovereignty.

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Chapter 1

1.1 Introduction

On 23 June 2016, the electorate of the United Kingdom of Great Britain and Northern Ireland took the unprecedented decision to urge its government to withdraw the UK from the European Union via a nationwide referendum. The Referendum stood at the end of a fierce campaign during which so-called *Remainers*, who aimed at continuing the UK's EU membership, clashed with so-called *Brexiteers*, who campaigned to leave the EU. The ultimately successful Brexiteer-movement was led by the "Vote Leave" campaign, which included prominent politicians like the current Prime Minister, Boris Johnson. The campaign was organized around the notion of "taking back control" (Vote Leave, 2016a). As this thesis will show, the view of "We should take back the power to kick out the people who make our laws", brought forward by the "Vote Leave" campaign (2016a), expressed the desire to reinstate full legislative control. It rejects the idea of Europeanization through an 'ever closer union', with regards to the supremacy of European (supranational) Law and proclaims to return to a "pre-1973 constitutional settlement in which Parliament exercises legislative sovereignty" (Cygan, Lynch, & Whitaker, 2020, p. 1608). Furthermore, the thesis finds that joining the EEC or the European Union respectively had resulted in a relocation of legislative competencies away from member states' parliaments particularly the UK which holds supreme legislative power over the UK (UK Parliament, n.d.).

On 31 January 2020, the UK formally left the EU and on 31 December 2020, ceased to participate in the European Single Market. However, after long negotiations, the EU Commission (cf. Common Commercial Policy: Article 207(1;3) TFEU) and the UK drafted the EU-UK Trade and Cooperation Agreement (TCA) outlining the terms of their new relationship. It had been provisionally applied from January to April 2021 before being ratified by both Parties. (Hallak, et al., 2021)

The binary question raised by the 2016 Brexit-Referendum, whether to leave or remain in the EU, did not allow inference as to how the UK should shape its relationship to the EU after leaving (Dunin-Wasowicz, 2017). As a result, several modes of future EU-UK relations were discussed. These included the *Norway model*, *Canadian model,* and *Swiss model* (Deutscher Bundestag, 2018). As a reference for the new TCA, this thesis focuses on the Swiss model, which represents a similarly special case in the European order of states. Swiss democracy involves the supreme position of the referendum, while the United Kingdom features the supreme position of parliament (UK Parliament, n.d.; Widmer, 2008).

Ultimately this thesis aims at investigating whether the British Government has been successful in "taking back control" in concordance with voter's expectations of regained sovereignty. It will identify the Brexiteers' concept of sovereignty. Its main objective will be to analyse the implications on this concept of sovereignty, posed by the TCA and to investigate if these implications are also found in alternative cooperation models of non-EU states with the EU, namely the *Swiss Model*. The guiding research question therefore is:

> *To what extent has the UK been able to regain sovereignty following the conclusion of the EU – UK Trade and Cooperation Agreement (TCA), and what parallels can be drawn with the Swiss model of Europeanisation?*

1.2 Body of Knowledge and Relevance

The TCA negotiations concluded in December 2020 and it provisionally entered into force on 1 January 2021. After years of uncertainty about the future relations between the EU and the UK, there

an agreement, bound to provoke academic attention. Previously, this agreement could not, in practical terms, be the focus of scholarly interest. This thesis extends the existing academic discourse by comparing the TCA with an existing model of close economic cooperation with the EU. Looking at the Swiss example, with its particular emphasis on sovereignty as a raison d'etat, allows for the comparison of two similar cases in the orbit of the EU, addressing an existing gap in the academic discourse.

Furthermore, especially considering the continued high degree of Euroscepticism in EU member states, there is a societal interest in whether autonomy can be restored in member states after the withdrawal from the EU as advocated by its proponents, and in which manner this can be achieved. Moreover, the question posed is important considering its political impact on the UK, as the UK's Government is closely intertwined with the pro-Brexit camp and will be judged by its success or failure in restoring sovereignty. This thesis will also lay the ground for further research on the impact of Brexit in economic terms, as it connects economic policy with developments in governance procedures.

Scientific literature after the Brexit referendum has abundantly concerned itself with the preference formation leading up to the vote, establishing that the notion of "taking back control" influenced voting behaviour (cf. Arnorsson & Zoega, 2018; Goodwin & Milazzo, 2017; Henderson et al., 2017). Many scholarly contributions centred around the issue of parliamentary sovereignty. Schmidt (2020), for instance, argues that core features of the UK polity, like parliamentary sovereignty, are central to understanding why "taking back control" resonated with voters. Bickerton (2019) writes about the constitutional changes in the UK over its tenure as an EU member state, as well as the conflicts about sovereignty following the referendum. He argues that there was a disjuncture between the transformed constitutional structure and the traditional parliamentary sovereignty in the UK. Baldini, Bressanelli & Massetti (2018), assessed the impact of the Brexit process on the British political system, arguing that it consolidates majoritarian traits by strengthening the executive over the legislative and central over devolved powers. Similarly, Cygan, Lynch & Whitaker (2020) concern themselves with the adaptation of Parliament post-Brexit, stating that a 'reparlamentarisation', the exercise of repatriated competencies depends on the future agreement between the UK and the EU.

In addition to literature, the sources for this thesis consist of legal documents, in the form of treaties, judicial rulings and decisions by the relevant bodies as further listed in the bibliography.

1.3 Sub-Questions and Scientific Approach

This thesis' guiding question will be answered using descriptive, evaluative and hermeneutic methods. To achieve that four sub-questions, introduced in this section, will be discussed in separate chapters. The first step is the introduction of the *Swiss Model* of integration regimes with the EU. The *Swiss model* was the best fitting option for the UK, as it can be located in the middle grounds between losing Single Market access and losing sovereignty (Schwok & Najy, 2018) due to being the result of a rationale "to constrain relations with the EU on topics of common interest and to maintain utmost national autonomy" as Linder observed (2013, p. 191). Furthermore, the UK's position is not dissimilar to that of Switzerland, since its political order including direct democracy and neutrality, like the UK's parliamentary sovereignty, is also a special case in the existing international order. Thus, the first sub-question will be:

1) What characterizes the Swiss model of EU third country relations and to what extent is it consistent with popular sovereignty in the Swiss Confederation?

This question will be answered descriptively via the analysis of the Swiss Constitution and the Swiss bilateral way. Chapter 2 thus examines the development of EU-Switzerland relations, particularly concerning the tension between the international state order and popular sovereignty. It will demonstrate that the Swiss bilateral path is the product of its national constitution which hinders progressive integration. With this in mind, an outlook on future EU-Swiss relations will also be attempted.

The second step will be exploring the question of what constitutes the Brexiteer's goal of regained control, to allow later inference as to how it is established through the TCA. The second sub-question discussed in chapter 3 is:

2) What did the UK pursue with its policy of "taking back control"?

Thus, chapter 3 will discuss the objective of "taking back control" as a response to the evolution of parliamentary sovereignty in the UK. The question will be answered, employing descriptive and explanatory methods. The legal evolution of parliamentary sovereignty over the half-century leading up to the formal Brexit will be analysed, by identifying key principles and developments of the UK's constitution. The analysis will focus on the challenges to parliamentary sovereignty, both nationally and supranationally. This will be done via a combination of literature study and the analysis of relevant legal and policy documents. This part of the thesis aims to establish the context out of which a successful Brexit campaign could emerge, highlighting the particularities of the UK's constitutional order and its conflict with European integration. Furthermore the response to this evolution by the "Vote Leave" campaign is analysed through its statements, and policy briefings. The goal is to gain a basic understanding of what the campaign's aims were for the post-Brexit UK.

Subsequently, the question of how parliamentary sovereignty relates to the TCA arises. Thus, the third sub-question is:

3) To what extent is the TCA consistent with the goal of regained sovereignty?

The answer to this question will entail an evaluation of the TCA's content and its consistency with national autonomy. The main focus of chapter 4 will lie on the governance by the institutional framework established in the agreement, which will be compared to the implications of EU membership on autonomy/sovereignty discussed in chapter 3.

The ambivalent desire for further economic integration and simultaneous rejection of political integration with the EU can be found in both the UK and Switzerland. This is demonstrated by the literature (Goodwin & Milazzo, 2017; Emmenegger, Hausermann, & Walter, 2018), the Brexit referendum but also by the successful *Masseneinwanderungsinitiative*, which directly contradicted the freedom of movement in the EU-Switzerland agreements. This shows that it is not only British democracy that has had problems coming to terms with the supranational nature of relationships with the EU. To emphasize the similarities and differences, the two models are evaluated comparatively concerning their effect on the form of sovereignty prevailing in the respective country. The aim is to judge which of the two models has stronger implications for sovereignty. Hence, the concluding sub-question for chapter 5 is:

4) To what extent do the governance models of the TCA and the Swiss bilateral way differ in respecting the prevalent form of sovereignty in each country?

1.4 Central Concepts

In the following section, the central concepts of this thesis are introduced abstractly. First, sovereignty in general and its interpretation in the UK and Switzerland are introduced. Then, institutional aspects of the European Union impacting the sovereignty of member states are outlined, namely the primacy of European law and core functions of the single market.

1.4.1 Sovereignty

Sovereignty in general refers to the source of all authority or the supreme non-derivative ruling power. According to Carl Schmitt, the sovereign has the monopoly of the final decision (1922, p. 19). In Schmitt's definition of sovereignty, the central characteristic of sovereignty is the power to suspend

all applicable law in a state of emergency, the *extremus necessitatis casus*, revealing the essence of state authority. He states that the norm doesn't prove anything, while the exception proves everything. In consequence, we can regard sovereign power as the authority that enables a sovereign to establish law without deriving the right to do so from elsewhere (cf. Schmitt, 1922, p. 19).

Sovereignty as the supreme, legally independent, non-derivative power is an ambiguous formula that cannot be found in this absolute form in reality, regardless of whether it refers to intra-state or inter-state sovereignty. If one would apply it to inter-state sovereignty, a sovereign state would not be subject to any non-derivative authority externally. Agnew refers to this idea in today's modern state order as "the mythos of territorial sovereignty" (2019, p. 2). It is not more than a myth or an illusion, as almost all contemporary states are members of international treaties and organizations that limit their effective autonomy and sometimes even obtain the monopoly of the final decision as is the case with the European Union. In this thesis, autonomy is understood as the freedom of a nation to exercise its sovereignty free from external influences, while sovereignty is understood as the supreme decision-making right of a nation's institutions without being overruled by external institutions like courts.

1.4.1.1 Parliamentary Sovereignty in the UK

Sovereignty in the UK has been historically found in the monarch's competencies alone. In principle, she is the source of all authority and reigns supreme. However, since the establishment of a constitutional monarchy, her authority has been largely symbolic. Instead, sovereignty has shifted toward the supreme, unchallengeable power of the legislative (Häkkinen & Kaarkoski, 2018, p. 55). This meant that "there exists no competing authority with the power to legislate for the [UK] or to impose limits upon the competence of Parliament" (Bradley & Ewing, 2007, p. 55). The tradition of sovereignty in the uncodified UK constitution endows the supreme legal authority on Parliament, allowing it in principle to make or unmake any law, without being bound by laws, constitutional principles or the people. Derived from the "Crown in Parliament" principle (Abromeit, 1995, p. 52) it is "the most important part of the UK constitution" (UK Parliament, n.d.). This doctrine distinguishes the UK from countries with codified constitutions, that impose limits on the supremacy of parliament. For instance, through the instrument of judicial review. The task of the judicial review in the UK was limited to the non-substantial question of whether pieces of legislation constituted an Act of Parliament or not (Bradley & Ewing, 2007, p. 77 f.). Notwithstanding the legal inversion, politically the UK's form of government can be referred to as an "elective dictatorship". Since the House of Commons is elected through a first past the post system, the government is usually based on a one-party majority and led by the party leadership. Together with parliamentary supremacy, this leads to an unchallenged concentration of power in the executive/leadership of the majority party (Schmidt, 2020, p. 782).

In light of European integration, the dogma of legislative supremacy has been questioned. To examine this process chapter 3 analyses the UK's constitutional evolution up to the Brexit referendum.

1.4.1.2 Popular Sovereignty in Switzerland

The Swiss model of popular governance represents a special case that is unique in the world. It is essentially characterised by the outstanding right of the referendum to make the final decision. The core element of Swiss direct democracy is that the powers of state organs are bound to the "reservation of the rights of the people" (Abromeit, 1995, p. 54), i.e., extensions of state activity require the consent of the people. In contrast to other European states, Swiss state bodies do not have powers implied in the constitution but are granted these powers through constitution changing referenda. Abromeit classifies the system prevailing in Switzerland as a semi-direct democracy as popular decisions are commonly featured but not the standard case in its legislative procedures and also because the cantons, which are often subject to directly democratic decision making themselves, are required for constitutional amendments (1995, p. 54). Nonetheless, the source of all authority and the monopoly of the final decision resides with the people.

Especially the possibility to block legislation has shaped Swiss democracy. To neutralize the unpredictability of the facultative referendum, lawmakers rely heavily on consensus-based decisions, as opposed to the majoritarian decision making found in the UK (Abromeit, 1995, p. 54 f.). Moreover, popular sovereignty stands in stark contrast to the executive-heavy model of European governance. In Chapter 2 the relationship of Swiss popular democracy with European Governance will be discussed.

1.4.2 Institutional Concepts

1.4.2.1 Primacy of European Law

The principle of primacy of European Law, even though not enshrined in the treaties is a central principle of the European Union. It is based on the tenet of *lex superior derogat legi inferiori,* which means that in case of a collision of European law with national law the law higher up in the hierarchical order prevails in that case the European Law. In the absence of a norm in the treaties this principle was developed through the jurisprudence of the Court of Justice of the European Union (cf. Van Gend en Loos v Nederlandse Administratie der Belastingen, 1963; Costa v ENEL, 1964). The primacy of European law applies to all national acts, regardless of the time they were adopted, however, it is not absolute as it only applies to areas in which the member states have conferred legislative sovereignty to the EU (e.g. Single Market, environment and transport but not taxation or social policy) (Primacy of EU law, n.d.). As the Court of Justice of the European Union is the highest judicial authority on the interpretation of EU law it is also the supreme court in the hierarchy of the union's court system.

European Law is mostly set via the co-decision procedure of the Council and the European Parliament. The Council as an intergovernmental institution normally decides via qualified majority voting (QMV). A qualified majority is reached through a double majority of 55% of member states containing at least 65% of the EU's population. Together with the primacy of European law, this can result in the adoption of regulations by a country that did not vote for its adoption. Arguably this constitutes a significant imposition on member states' sovereignty.

1.4.2.2 Single Market

In differentiating a common market from a customs union, one has to emphasize that a customs union may immediately remove the most apparent trade barrier, tariffs, but it does not reduce other forms of trade barriers that make a foreign product less competitive in a domestic market. These barriers are non-tariff or regulatory barriers, which arise through the difference between legal systems. This is why the EEC decided to move to a more thorough approach to remove these barriers, adopting the Single European Act (1987). It introduced the harmonization of national legislation, QMV and established the Single Market.

The Single Market is based on the four freedoms established in Articles 26(2) TFEU: The free movement of goods, the free movement of capital (Articles 63-66 TFEU), the free movement of persons (Article 3(2) TEU, Articles 4(2)(a), 20, 26, 45-48 TFEU) and the freedom to establish and provide services (Articles 26, 49-55, 56-62 TFEU). From these freedoms, the EU derives principles like the *mutual recognition principle* from the Cassis de Dijon decision (Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, 1979), which allows any product marketed in one member state to be marketed legally in the Single Market. Furthermore, the EU harmonizes national law by establishing common regulations and standards normally through QMV. (Maciejewski, Ratcliff, & McGourty, 2020) As the following examples show these are exported as the EU utilizes its relative size to require their adoption for affiliation with the Single Market (Damro, 2012).

Chapter 2: Swiss Popular Democracy and its Relationship with the EU

The following chapter looks to answer the question: *What characterizes the Swiss model of EU third country relations and to what extent is it consistent with popular sovereignty in the Swiss Confederation?* It introduces particularities of the Swiss constitutional order by analysing the Swiss Bundesverfassung (BV). Furthermore, it will introduce the Swiss bilateral way and discuss whether it conflicts with the popular sovereignty principle, by describing the example of the Masseneinwanderungsinitiative.

2.1 Particularities of the Swiss Constitutional order

The Swiss model of democracy is used by many populists to demonstrate the ideal form of popular sovereignty. It grants the people an ultimate right of final decision not via representative bodies such as parliaments, but through direct decision making in referenda. Of course, representative bodies also exist in Switzerland, in the form of the two-chambered parliament, but the right of the ultimate decision resides with the people. As for amendments to the constitution, for joining international organisations and for federal laws not derived from the constitution, an obligatory referendum must be held in which the people and cantons have to approve (art. 140(1) BV). Furthermore, the people may be asked to vote on federal laws and international treaties in facultative referenda, if requested by 50,000 voters or eight cantons (art. 141(1) BV). The prominent position of the people in the legislature is also reflected in the possibility of popular initiatives. 100,000 voters can demand a revision of the BV in the form of a general suggestion or a concrete draft (Article 139 BV).

One striking peculiarity in the Swiss judicative is the fact that it does not include the possibility of constitutional review, meaning that once laws are passed by parliament, federal courts can only signal incompatibility with the constitution in constitutional review, but cannot annul laws. (Die Schweizerische Bundesverfassung, nd.)

The central conflict in Switzerland's integration into the international order arises out of the fact that the BV does not provide clarity on the relationship between international and Swiss federal law. The BV does prohibit initiatives that conflict with imperative provisions of international law (article 139(3) BV), like the ban on offensive warfare, torture, genocide or slavery, but international law is not per se above Swiss law in the hierarchy of norms, which is why referenda on initiatives that run counter to international treaties are permitted (Kläser, 2014). Meanwhile, the principle of *pacta sunt servanda* is a central requirement for the international rule of law. It obliges the parties to an agreement that has entered into force to regard it as binding and to execute it in good faith (Lukašuk, 1989, p. 513).

The fact that the people can exercise its prerogative to challenge Swiss obligations from international treaties domestically, means that the Swiss constitution allows for a volatile Swiss position in the system of international relations due to potential conflicts with the *pacta sunt servanda* principle. Therefore, together with the lack of a constitutional review for adopted laws, it can be subsumed that the Swiss constitutional order places the principle of democratic rule through the referendum higher than the stability of its international relations.

2.2 The Bilateral Way

Switzerland could have joined the EC or the EU if it wanted, but as Linder has argued joining the EU is illogical for Switzerland considering the *globalisation paradox* (2013), referring to the choice between strong globalisation, sovereignty and democracy. According to this approach, nation-states can provide just two of them, which is why EU member states have to partially concede sovereignty to the bloc to gain economically or to consolidate their national democracies. For Switzerland joining the EU would not promise huge economic returns, hence from its perspective the prospect of stronger

globalisation at the expense of sovereignty, is not as appealing. Accordingly, in December 1992 the Swiss People rejected their government's proposal of joining the 12 EEC states and the 7 EFTA states in the new EEA. Even though the popular vote was close (Yes: 49.7% No: 50.3%) the cantons decisively rejected it (Yes: 6 2/2 No: 14 4/2) (Bundeskanzlei, 1992). Similar to the Brexit campaign, the opposition drove a campaign that "vehemently defended national sovereignty and the political neutrality of Switzerland" (Linder, 2013, p. 191).

In 2018 52% of Swiss exports went to the EEA and 70% of Swiss imports hail from there (Eidgenössisches Department für Auswärtige Angelegenheiten, 2021a). Thus, alternatives to Switzerland's integration into the EEA were sought. This led to what Linder calls "Europeanisation without institutionalisation" (2013, p. 192), where Switzerland is adopting EU policies, without participating in EU institutions and its decision making. One could argue that the protection of popular sovereignty on the national level, has cost the Swiss people their democratic right to participate in the decision-making procedures in the supranational arena.

In the following sections, the Swiss *bilateral way* will be described using key developments and mechanisms that characterize the EU – Switzerland relations.

2.2.1 The 1972 Free Trade Agreement

The first important bilateral agreement between Switzerland and the EEC was struck in 1972 and provides the main legal basis for trade relations as it prescribed the dismantling of trade barriers. For instance, Article 3(1) prevents new customs between the parties, while Article 3(2) prescribed the stepwise reduction of existing customs resulting in a customs-free zone. Furthermore, all measures with similar effects as customs (cf. Article 6) as well as quantitative restrictions on imports (cf. Article 13) were abolished. With the approval granted in the obligatory referendum on the 1972 FTA, the Swiss people (Yes: 72.5 % No: 27.5%) and the cantons (Yes: 19 6/2 No: 0) committed themselves to a liberalised and deregulated foreign trade policy, a commitment that has not been abandoned. (Bundeskanzlei, 1972)

2.2.2 Bilateral I

While the 1972 FTA allowed for market access, the 1992 EEA membership campaign sought market participation. Following its rejection in the referendum, the EU and the Swiss government tried to prevent an isolated Switzerland through the *bilateral way.* This meant pursuing a series of sectoral bilateral agreements that developed the economic cooperation between both partners. As Linder observed, "The rationale was to constrain relations with the EU on topics of common interest and to maintain utmost national autonomy" (2013, p. 191). In 2000 the Swiss people approved the first package of seven bilateral agreements, including one on "the free movement of persons" (FMPA) (EU – CHE, 2002, p. 6 ff.), which were approved by the EU, Euratom and the Member States in 2002. These agreements are linked through a guillotine clause: according to Article 25(4) FMPA, "The seven Agreements […] shall cease to apply six months after receipt of notification of non-renewal […] or termination […].". This was meant to prevent cherry-picking in light of the contingency that is popular democracy. As every Party has the right to withdraw itself from an international agreement, the Swiss may choose to reject parts of the agreement package. The EU, as a rather cumbersome organisation in terms of decision-making, would have its hands tied without a guillotine clause to quickly terminate other treaties in return, subjecting it to exploitation. The guillotine clause is therefore a safeguard of the treaties for the EU against the potential for faster decisions in referenda. In addition, Switzerland is said to have insisted on an expiry date in the negotiations on the FMPA and thus on the possibility of further referenda, which led the EU to doubt the durability of the complete package so that it, in turn, insisted on the guillotine clause. (Schäfer & Gafafer, 2020)

The most prominent instance of this contingency concerned the FMPA, which was challenged in the *Masseneinwanderungsinitiative* and resulted in calls for triggering the guillotine clause.

2.2.3 Bilateral II

The bilateral way was continued in 2004 when Switzerland and the EU signed the second package, the bilateral II agreements. It consists of nine agreements that exceed the economic framework set in the bilateral I package, by expanding political and scientific cooperation. These include agreements on anti-fraud measures, media, processed agricultural products, the environment, statistics, pensions, education, exchange of information in tax matters, as well as accessions to the Schengen and Dublin agreements. Only the accession to Schengen/Dublin was subject to a referendum and approved by 54.6% of the people in June 2005 (Bundeskanzlei, 2005). In contrast to the Bilateral I agreements, the Bilateral II agreements do not contain a guillotine clause. (Eidgenössisches Department für Auswärtige Angelegenheiten, 2021b)

The bilateral II package was regulated differently from the bilateral I package as the integrity of the Single Market's four freedoms was not jeopardised by cherry-picking. For instance, the Schengen area, which can certainly be seen as an extension of the free movement of persons, does not include the Single Market members Ireland and Cyprus. By implication one can subsume that the accession to Schengen, as well as the other bilateral II agreements, did not have the same fundamental significance for the EU as the bilateral I package.

2.2.4 Measures beyond Bilateralism

To develop its relationship with the EU and gain further access to the Single Market, Switzerland ventured beyond formal bilateralism: Switzerland now unilaterally harmonizes its commercial law with EU law by regularly reviewing economic legislation for EU compatibility and through the process of the so-called *Autonomer Nachvollzug* ("autonomous adaption"). Switzerland adapts to European law by adopting it directly, even though no such obligation exists under international law. It only refrains from doing so if a deviation from EU law serves its interests and also seems justifiable from the point of view of integration policy (Oesch, 2011, p. 28 ff.). For example, the mutual recognition principle from the Cassis de Dijon ruling was adopted into Swiss law, so that products approved in the EU can be sold on the Swiss market without additional regulation. Together with the bilateral agreements, this meant that regarding commercial law, "Brussel's acquis communautaire […] applies in Switzerland" (Linder, 2013, p. 191). Undoubtedly, Switzerland's autonomy is limited to a certain extent, even though Switzerland itself decides which laws to adopt, a considerable part of Swiss legal provisions is taken over from EU law without the Swiss government, let alone the people, having a say in the process of drafting it.

Consequently, Linder argues, the traditionally domestically protectionist Swiss economy was integrated into the EU's commercial agenda of internal liberalization and harmonization. Which benefited export-oriented businesses (e.g. pharmaceutics and technology) and the service industry, which profited from the greater market. At the same time, he argues, this approach has negatively affected industries like agriculture and craft industries that mainly produced for the domestic market and are overwhelmed by the foreign competition (2013, p. 192).

2.2.5 Institutional Governance

The 1972 FTA established a joint committee consisting of representatives of Switzerland and the EEC to monitor the proper functioning of the Agreement, by making recommendations and taking decisions when prescribed by the FTA, which the Parties implement following their provisions (art. 29 f.). For instance, Article 23 (2) stipulates that if a contracting party believes that a certain practice is not compatible with the functioning of the agreement in the field of competition law, it can refer the matter to the joint committee, which considers the case intending to eliminate the practice or otherwise reach an agreement. If this is not successful, the complaining party is entitled to take safeguard measures, e.g. by withdrawing tariff concessions (Article 27(3a)).

All EU – Switzerland agreements are governed by such joint committees. They are monitoring tools and platforms for information exchange and consultation and decide by common agreement of the parties, for example on adaptations of the annexes (technical adaptations). The fact that the committees are intergovernmental bodies means that the limitation of Switzerland's autonomy through these institutions is marginal. Furthermore, there is no automatic mechanism that compels Switzerland to apply the EU acquis, which is a key difference to the dynamic legal harmonization of the EEA.

2.2.6 The proposed and failed institutional agreement

The present institutional framework of the bilateral relations between Switzerland has been relying on the *autonomer Nachvollzug* or lengthy selective renegotiations of the agreements in case European law changes . This Europeanisation without institutionalisation means that Switzerland adopts regulations without having a say in their making (Linder, 2013). This led to negotiations on a new institutional framework agreement (IFA) concerning the FMPA, as well as the agreements on technical barriers to trade, agriculture, land and air transport (art. 2 IFA), which would be adapted through dynamic legal harmonisation This would mean that the EU informed Switzerland via the responsible sectoral committee, when it adopted law within the range of one of the concerned agreements. The sectorial committee would then adopt a decision per the agreement in question or recommend a revision of the agreement to integrate the EU legislation. In the former case, Switzerland would adopt the law immediately, in the latter it when the revisions are signed by the contracting parties. (art. 13 f. IFA).

In return, Switzerland would have received the right to contribute to EU legislative procedures, for example by consulting Swiss experts (art. 12(1) IFA) and participating in the drafting of legislative proposals by the Commission (art. 12(4) IFA), addressing the democratic deficit present in the adoption of laws not made in Switzerland.

The final version of the IFA had been available for almost three years since November 2018, when the Bundesrat opted to withdraw from the negotiations on 26 May 2021. According to the Bundesrat, there were still substantial differences in key areas of the agreement (Eidgenössisches Department für Auswärtige Angelegenheiten, 2021c).

Possibly the role of the ECJ has been a subject of contention. The negotiated text holds that in case of disputes the relevant joint committee would have been consulted, but if it failed to find a solution accepted by both parties, a court of arbitration would have been seized of the matter. The crux of the matter is that this court of arbitration would have had to refer to the ECJ for a binding decision on questions concerning the interpretation of the EU acquis (art. 10 IFA). Even though Switzerland would have had the same rights as the member states before the ECJ, it would have had to submit to a supranational court. The fact that the EU was supposed to be both a contracting party and an arbitrator of disputes is, of course, controversial in sovereignty-minded Switzerland. Just like most standards of international dispute settlement mechanisms, including international courts. As Schmidt holds: "For Switzerland, acknowledging that the ECJ has the last word, violates the Swiss conception of the people being the sovereign" (2020, p. 782)

In particular, however, the introduction of a directive on EU citizens, which would have made it easier for EU citizens to join the social assistance system, seemed to be unacceptable to the Bundesrat, stating that it aims at the continuation of the bilateral way, deeming it to be a common interest with the EU. The European Commission however voiced its regrets of the Swiss unilateral decision and reiterated that

> *"This agreement would have allowed for a consolidation of the bilateral approach and ensured its sustainability and further development. Without this agreement […] [the] bilateral agreements will inevitably age […]. Already today, they are not up to speed for what the EU and Swiss relationship should and could be"* (European Commission, 2021).

2.3 The conflict between the Swiss notion of direct democracy with the international order exemplified in the Masseneinwanderungsinitiative ("mass immigration initiative")

In 2014 the Swiss people (Yes: 50.3% No: 49.7%) and the cantons (Yes: 12 5/2 No: 8 1/2) adopted the popular initiative "Against Mass Immigration" that was then codified in article 121a BV (Bundeskanzlei, 2014), obliging Switzerland to actively shape its immigration policy, obliges the introduction of limits and quotas on immigration and forbids the transfer of sovereign powers regarding these provisions to other states or supranational organisations. On a plebiscitary basis, Switzerland had thus unilaterally decided to undermine the free movement of persons without stepping out of the FMPA, thereby being in breach with it. However, initiatives that propose constitutional amendments, breaching Switzerland's international treaties are de jure possible in Switzerland (Kläser, 2014). As a result of this referendum triggering the guillotine clause, even though generally undesirable, was considered by EU officials (Haase, 2014).

It is an example that clearly illustrates the conflict between the Swiss constitutional order and its political use in the context of Swiss – EU relations and the challenging relationship between founding rules of international law and the use and exercise of direct democracy. The initiative could not be applied completely, as it demanded fixed limits on European workers, while simultaneously not demanding an end to the bilateral way, which had been approved by the Swiss people in 2000. This plan could only succeed with the approval of the EU, and with a compromise. But the latter was not willing to concede such a limitation of its position in the FMPA. As the Council concluded: "the free movement of persons is a fundamental pillar of EU policy and […] the internal market and its four freedoms are indivisible" (Conclusions on EU-Switzerland relations, p. 2). Hence, parliament decided to continue the bilateral way, which meant that fixed limits on foreign workers were not introduced. Nonetheless, the Swiss President, reiterated that the people would have the final say on all European policy issues (2017). In this spirit, the limitation initiative (Begrenzungsinitiative), which called for the termination of the FMPA in the event of failed negotiations with the EU, was submitted in 2018 and rejected by a clear majority of the people (Bundeskanzlei, 2020).

2.4 Conclusion

The bilateral way as the leitmotif of Swiss European policy cannot be seen as a product of the political situation in Switzerland alone. Swiss popular sovereignty makes integration into the international order extremely complicated, explaining the non-accession to the EU and the EEA, despite obvious economic advantages. Undoubtedly a majority of the population has voted against joining (see 1992 EEA referendum), but it is an ostensible causality, because, in the interaction between polity, policy and politics, polity influences policy and politics. Just as Switzerland became a concordance democracy by virtue of its many veto players, the supreme status of the referendum through a sovereign people made it nearly impossible for the country to integrate itself into supranational orders. Meanwhile, the tradition of neutrality and popular sovereignty makes supranational integration unpopular enough to veto further integration. In the failure of the IFA, we see how the consensual nature of Swiss democracy slows down openness to change. The mere possibility of being defeated in the referendum is great enough to act as conservatively as possible.

Nonetheless, one can conclude that the Swiss bilateral way up to date was successful in moderating the contenting issues of sovereignty and economic integration with popular sovereignty, as it does not include supranational impositions on Switzerland. The concessions, such as the unilateral adoption of the EU acquis through the *autonomer Nachvollzug*, are necessary given the imbalance between the parties. Although the EU gains an important partner, Switzerland must cooperate with the EU in order not to end up in total isolation. So far, the concessions have been marginal regarding the forfeiture of sovereignty, as the *autonomer Nachvollzug* is a voluntary instrument under Swiss control.

However, this imbalance will increasingly lead to Switzerland having to surrender more of its sovereignty, as the EU pushes for more integration.

If the nature of the Swiss democracy prevents further integration the question remains how the current bilateral path can be updated and, if not, to what extent the economy, which is now geared to exports, will be damaged by its outdatedness. The example of the Masseneinwanderungsinitiative has shown that the Swiss people are willing to set limits on further integration, but it is also proof that the EU is not willing to abandon its principles when it comes to access to the Single Market. It is questionable whether the EU will ease its rigid stance on an institutional framework to accommodate Switzerland's domestic policy concerns. As things stand, future EU-Switzerland relations are in limbo.

In the following chapter, the arc is drawn to the United Kingdom. Its special parliamentary democracy is examined concerning its integration into the EU to explain the conflicts that ultimately led to Brexit.

Chapter 3: The Evolution of Parliamentary Sovereignty and Taking Back Control

This chapter concerns itself with the question *What did the UK pursue with its policy of 'taking back control'?* First, however, the changes in sovereignty under EU membership in the UK will be examined. A distinction is made between national and international changes. In the national context, the change was expressed through progressive devolution to sub-national levels and the introduction of referenda into the UK polity, while in the international context, the familiar mechanisms of the EU resulted in declining sovereignty.

3.1 National challenges on Parliamentary Sovereignty

3.1.1 Popular Sovereignty

On 27 March 1972, the member states of the EC signed the Treaty of Accession with Denmark, Ireland, Norway and the UK (Treaty of Accession, 1972). The ratification processes show the differences in the ultimate decision-making rights in the accession states. While Norway and Denmark held referenda the UK ratified the treaty in parliament. Before 1975 "Referenda were generally alien to the British constitutional tradition, considered illegitimate challenges to the sovereignty of parliament." (Bickerton, 2019, p. 890) In 1975, after accession to the EC, the UK held its 'first Brexit referendum' about its membership in the common market. What was exceptional then, became obligatory for amendments of the TEU or TFEU through the 'referendum lock introduced in section 2(2c) of the EUA (European Union Act, 2011). Both instances exemplify the growing imposition of popular sovereignty on parliamentary supremacy under Europeanisation. In line with its partners in the EU, the UK abandoned the total autonomy of parliament and allowed the electorate to weigh in on issues outside of general elections.

3.1.2 Devolution

Since 1998, the UK has undergone a significant process of devolution. The Scotland Act, Government of Wales Act, Northern Ireland Act and Greater London Authority Act of 1998 created devolved legislative bodies that govern themselves independently. These established a 'reserved powers' model which limits the powers of the UK parliament to those that are reserved and leaves those that are not specified to the devolved parliaments. The decentralised legislative institutions are not federal parliaments; they remain subordinate to Westminster and could be formally abolished by it at any time. Nevertheless, this development is significant because it shows how the European principle of subsidiarity has also taken hold in the UK. To the extent that the centralist UK Parliament has agreed to devolve powers to sub-national entities.

3.2 EU challenge on Parliamentary Sovereignty

In 1972 Parliament passed the ECA (European Communities Act, 1972), as amending national law for treaties requires Acts of Parliament (Bradley & Ewing, 2007, p. 59). The ECA incorporated the EC acquis communautaire into UK legislation, which meant that the primacy of EC law established in Costa v E.N.E.L. (1964) was also applied in the UK (Section 2(4) ECA). Accordingly Community law with direct effect became enforceable in UK courts.

This was put to the test in the Factortame rulings (1989 – 2000) when the Spanish company challenged the Merchant Shipping Act 1988, mandating that licences for fishing vessels be issued only to British owned vessels. In Factortame's view, this violated, inter alia, the principle of non-discrimination (now art. 18 TFEU). The court of first instance ruled in its favour and suspended the law concerning Factortame. However, the Court of Appeal overturned this decision as it held that:

> *"the court had no power to suspend the application of an Act, since 'it is fundamental to our (unwritten) constitution that it is for Parliament to legislate and for the judiciary to interpret and apply the fruits of Parliament's labours.'"* (Lord Donaldson MR, 1989 as cited in Bradley & Ewing, 2007, p. 134)

The ECJ, however, held that the effectiveness of Community law was impaired if such a rule of national law could prevent the effectiveness of rights claimed under Community law. This ruling was interpreted to mean that "EC law must take priority over domestic legislation, even if this means that the British courts are required to set aside a fundamental constitutional principle" (Bradley & Ewing, 2007, p. 134). This instance showed that parliamentary supremacy had been limited by EU membership as an Act of Parliament could be disapplied by courts. Section 2 ECA, thus, not only introduced a 'competing authority with the power to legislate over the UK' but also bound its future self, by subjecting it to the primacy of Community law in case of inconsistencies with UK law.

Furthermore, the supreme position of the ECJ conflicted with parliamentary sovereignty. The ECJ is heavily impacting parliaments ability to 'make or unmake any law', by excercising judicial review, protecting the four freedoms. Schmidt argues that the majoritarian and common-law tradition of the UK, in general, was at odds with the overconstitutionalized EU. An institutional mismatch that she deems is in part to blame for the "Leave" victory (2020, p. 790).

Nonetheless, the UK Government claimed that parliament "has remained sovereign throughout [the UK's] membership of the EU" (HM Government, 2017, p. 13), and procedurally it had. The British people might have triggered the UK's exit politically but withdrawing from the EU requires a decision under a member state's constitutional requirements (art. 50(1) TEU). The UK Supreme Court held that the royal prerogative for HM Government on foreign affairs was not extendable on withdrawing from the EU. Instead, an Act of Parliament was needed to trigger withdrawal (R v Secretary of State, 2017, p. 5).

This case reiterated the persistence of parliamentary sovereignty by showing that parliament remained legally sovereign over the government, but more importantly, by showing that no automatism binds parliament to popular decisions. The Brexit referendum was not formally binding, theoretically allowing Parliament to ignore it and remain a member of the EU. That Parliament nevertheless decided to follow the political mandate of the electorate cannot be deemed a loss of sovereignty, as it was a political choice, not a legal one. Over the course of EC/EU membership, Parliament could at any time have called on the government to terminate membership without the need for affirmation or a final decision by other bodies, and it could have repealed the ECA as it did in reality after Brexit. Staying regardless can be read as a declaration of acceptance of EU rules.

3.3 The Vote Leave Campaign

This section will examine the general objectives of the pro-Brexit campaign, thereby reconstructing the sovereignty ideal approved by citizens in the referendum. As the Brexit referendum was a cross-party issue vote, reference is made below to the leading organisation in the pro-Brexit camp, Vote Leave (Press Association, 2015).

The campaign presented five supposed core benefits for the UK in leaving the EU. First, the UK would save £350 million per week, available for redistribution. Second, the UK would control its borders, in the sense that it could make safer decisions about them itself without being overruled by 'EU judges'. Third, the UK could decide on its immigration policy and create a system that favours skills over (EU) nationalities. Fourth, the UK could enter in FTAs separate from the EU, which created the opportunity for more jobs. And finally, the ability to determine one's laws through elections. (Vote Leave, 2016a)

Not all of these benefits should be considered as crucial for the retaking of control. The first benefit independent budgeting, for instance, has not been out of Parliament's control in the first place. The annual plans on budgeting and taxation need to be approved by Parliament, which also applied to the UK's contribution to the EU budget. The demand that funds should be distributed in line with British interests (e.g., the infamous NHS bus), is not solved by establishing autonomy from the European Union. Instead, it is just a demand to parliament itself, which had this capacity throughout the process of Europeanisation.

Secondly, even though the UK did not participate in the Schengen area or numerous EU measures on migration and asylum, the campaign claimed the free movement of people in the EU increased crime and perpetuated terrorism as the UK supposedly was unable to control its borders. Furthermore, immigration from the EU would take away spots for better-skilled immigrants from non-EU countries (Vote Leave, 2016b). In subsumption, the campaign rejected a core principle of the Single Market, the free movement of persons. However, the problem is again only superficially within the EU's domain. Since freedom of movement applies fundamentally only to citizens of the EU, the UK was free to determine who resided in its territory even before Brexit. In particular, the argument that EU membership prevents the admission of better-educated non-Europeans seems absurd given the distribution of competencies in immigration policy. The demand for retaken territorial sovereignty could therefore only concern the freedom of movement by EU citizens, as the UK would have had the right to reject anyone else regardless and also make sure to control its borders following its provisions.

Thirdly, the campaign denounced the fact that the EU's common trade policy envisages international trade, and thus trade agreements, as the exclusive domain of the supranational level. It claimed that "Brussels negotiates everything on our behalf and does a bad job" (Vote Leave, 2016c). Ideally, according to the campaign, the UK would be able to engage in trade between sovereign nations as opposed to the paternalism exercised by the EU. The campaign has a point asserting that the common trade policy represents a considerable restriction of member state sovereignty, as it does not allow member states to act as independent states pursuing their economic interests. Instead, the Single Market acts en bloc, first, to preserve its integrity and, second, to strengthen its negotiating position. To do so, its participants have to accept this restriction of autonomy or control, a trade-off the Brexiteers were seemingly not willing to make.

Finally, the unequivocal appeal for the restoration of parliamentary sovereignty. The demand that you should be able to vote for or kick out the people who make your laws (Vote Leave, 2016a) constitutes an outright rejection of inclusion in a politically integrated union of nations and thus the campaign's objective in one sentence. EU membership has led to a loss of sovereignty through the binding of national courts to decisions of the European Court of Justice or the supremacy of EU law over national law. The demand for the strengthening of these more democratically legitimised institutions is therefore only logical when seeking to re-establish national sovereignty.

3.4 Conclusion

This chapter has shown how EU membership affected the notion and the exercise of sovereign powers in the UK. In the course of membership, policy areas were devolved to sub-national levels, while the supranational level, in turn, gained more regulatory powers. Together with the introduction of national referenda, this shift in responsibilities represented a clear loss of sovereign power to the Westminster Parliament. EU membership and its impact on parliamentary sovereignty came at the end of a century in which Britain had evolved from a global empire to a more or less United Kingdom. This, together with the perceived overreaching by the EU, can be seen as reasons for the Leave majority in the Brexit referendum. Such a decision is rarely monocausal, but there seems to be a plausible link between the nationalist stance of the Brexit campaigners, the perceived subordination to foreign rule and the actual loss of power in world affairs (cf. Henderson, et al., 2017).

This context allowed the launch of a successful movement to leave the EU, which embraced nationalist ideals of sovereignty. Said movement is ideologically and personally closely intertwined with the UK government that negotiated the TCA with the EU. So, given the central question of this chapter, one can only conclude that the UK was aiming at reaching as small limitations as possible on its autonomy from non-UK players. Pursuing the notion of an autonomous Britain that could decide sovereignly for or against trading partners, for or against immigration from EU countries and for or against laws was embraced by the electorate. It constitutes an absolute rejection of outer influence on the UK. Nonetheless, the position of the Vote Leave campaign should not be taken as synonymous with that of the UK government, but its forecasts can be understood as legitimate expectations of the British electorate.

In the next chapter, these expectations are the basis of an analysis of the TCA that will show whether the negotiated results reflect them or not.

Chapter 4: Sovereignty and the EU – UK Trade and Cooperation Agreement

On 24 December 2020 the European Commission and the UK reached an agreement on a TCA, outlining the EU – UK relationship after a transition period (01 February – 31 December 2020) ended. During this period EU law continued to apply in the UK as established in the Withdrawal Agreement (WA). The WA was accompanied by a political declaration, setting the objective for the new relationship, "an ambitious, wide-ranging and balanced economic partnership" (Hallak, et al., 2021, p. 1). On 1 January 2021, the TCA came into force provisionally, before it was subsequently ratified in both the UK and EU Parliaments.

The previous chapter analysed the legitimate expectations by the British people, brought about by the Vote Leave campaign. These expectations of taking back control in the sense of national autonomy, are put to test in this chapter. To do this the institutional governance and substantial provisions of the TCA are examined, regarding their compliance with the expected autonomy, answering the question *to what extent the TCA is consistent with the goal of regained sovereignty?*

4.1 Institutional Governance

The TCA includes seven parts, two of which contain horizontal provisions, like the institutional framework and dispute settlement procedures. The other parts concern specific fields like trade, transport, law enforcement etc.

In article INST.1 TCA, a partnership council (PC) is founded to oversee the implementation and application of the agreement. The PC is an intergovernmental body that is comprised of members of the UK Government as well as representatives of the EU. It is assisted by Trade Partnership Committees (art. INST.2(1a) TCA). Similar to the joint committees they "will monitor the

implementation of the agreement and assist the [PC] and may also adopt decisions and recommendations" (Hallak, et al., 2021, p. 4). In this capacity, they do not are not able to restrict the sovereignty of the contracting parties.

In article INST.9 ff., the TCA establishes a dispute settlement framework, which is intended to ensure a decision in the event of a dispute, should consultations in the PC not resolve it. An independent arbitration tribunal composed of 15 experts will be established for this purpose. Each Party appoints five arbitrators, and the PC appoints another five who are neither EU nor UK citizens. In case of disputes the tribunal delivers an interim report to the Parties, to which they can reply with a request to review aspects of the report. If there are no replies the interim report serves as a ruling, if there are, the tribunal addresses the aspects as requested and delivers a ruling.

> *"If, […] the arbitration tribunal finds that the respondent Party has breached an obligation under [the TCA] that Party shall take the necessary measures to comply immediately with the ruling of the arbitration tribunal in order to bring itself in compliance with the covered provisions"* (art. INST.21(1) TCA)

Art. INST.21(1) shows that there are no supreme, sovereignty restricting institutions that can bind the Parties to comply with the tribunal's ruling. Instead, it is left to the perpetrator of the violation to bring themselves back into line with the TCA by their means. To ensure this happens, the respondent Party has to notify the complaining Party about measures taken to comply. If it does not or if the tribunal finds that the measure is not sufficient, the "respondent Party shall, at the request of and after consultations with the complaining Party, present an offer for temporary compensation" (art. INST.24(1) TCA). If such an agreement on temporary compensations is not reached, the complaining Party may suspend the application of obligations under the covered provisions. However, this suspension "shall not exceed the level equivalent to the nullification or impairment caused by the [original] violation" (art. INST.24(5) TCA), which again is ensured with the possibility of review by the tribunal. Both the suspended obligations and the temporary compensation will end after the Parties agree on a mutually agreed solution or the Parties reach an agreement that sufficient measures have been taken "to bring the respondent Party into compliance with those covered provisions." (art. INST.24(13) TCA) Furthermore, the TCA, by contrast to the cancelled IFA, does not give the courts of either Party jurisdiction over the other, neither does it give the arbitration tribunal the ability to bind domestic courts or tribunals of either Party regarding the interpretation of domestic law (art. INST.29 TCA).

Given these institutional factors one can subsume that compared to EU membership, with the entailing subjugation to the ECJ and the primacy of EU Law, the UK has re-established most autonomy vice versa the EU. The TCA does not include supranational or supreme institutions that limit the sovereign decision-making procedures in the UK. Especially parliamentary sovereignty which was limited through the primacy of EU law and the ECJ's supreme position is strenghtened, even though its national limitations remain. While the TCA prescribes a dispute settlement procedure, its arbitration tribunal is not able to bind national institutions like the judicative, parliament or the government. Instead, it provides provisions aiming at adopting mutually agreed solutions and if not feasible, enables the Party hurt by a breach of TCA rules, to unilaterally adopt retaliatory measures. Thus, it may be concluded that the institutional set-up of the TCA does not affect the UK's national autonomy to nearly the same extent as EU membership.

4.2 Substantial Provisions

However, a restriction of autonomy is not only possible through institutional provisions but can also arise through provisions of a substantial nature. In particular, rules dealing with regulatory standards and their development can limit the autonomy of the Parties.

The TCA includes level playing field (LPF) provisions. LPF provisions are included in FTAs to preserve fair competition conditions between the economies. In the absence of tariffs and quotas, fair competition could be hurt by state subsidies or differing standards. Therefore, in this case, the EU and UK agreed on non-regression and rebalancing provisions, to prevent diverging standards. Under Title XI of Part One, the TCA includes LPF provisions covering the fields of competition, subsidy control, state-owned enterprises/monopolies, taxation, social standards, environment and climate.

Under the LPF provisions on competition policy, the LPF Title XI TCA obliges the parties to maintain competition law that addresses anti-competitive business practices. This is to prevent anti-competitive cartels, monopolies or monopsonies (art. 2.2. (1) TCA). Even though the Parties agreed to cooperate, "where doing so is possible and appropriate" (art. 2.4(2) TCA), each Party is responsible for enforcing the competition law independently in its territory. In the field of competition policy, it can thus be ascertained that a Party by committing itself to this particular type of legislation loses its legislative autonomy, understood as the absolute rejection of external influences but, has to be considered sovereign as those policies are written and implemented by the parties themselves.

Regarding subsidies and state aid the TCA prescribes a system of subsidy control that prevents subsidies from having a material effect on trade or investment between the Parties. To avoid falling under the general prohibition of subsidies, they must, among other things, serve a specific public interest objective, such as addressing market failures or distributional problems. Moreover, they must be subject to a proportionality assessment and their objective cannot be achieved by means that are less distortive of competition. If a Party deems a subsidy inappropriate it can request information and consultations regarding that subsidy. It may also adopt appropriate remedial measures. If necessary, the responding Party may call for an arbitration tribunal. Again, these provisions do not show a loss of sovereignty for the UK as the TCA does not limit the sovereign decision making by parliament, but it limits the UK's autonomy by disallowing certain facets of the important policy instrument subsidies. In other words, the UK is fully able to provide subsidies if it wants to, however, the remedial measures took by the EU are undesirable so that the UK refrains from doing so.

Regarding labour, environment and climate standards a non-regression principle applies. This principle entails that Parties may not lower their standards below pre-TCA levels to the detriment of trade and investment. Even though the EU aimed at including the ECJ to evaluate the pre-Brexit standards it was not included in the adopted version of the TCA (Hallak, et al., 2021, p. 16). Hence, the standard's non-regression do not reveal a loss of sovereignty, but again a loss of autonomy. This can be asserted because the parties are enforcing the standards through a domestic system that is not even reviewed through the ordinary dispute settlement mechanism. Instead, dialogue, consultation, information exchange and cooperation should resolve the disagreements in this regard.

4.3 Conclusion

The previous sections of this chapter described the institutional and substantial features of the TCA that may limit the sovereignty of the UK. The horizontal provisions do create an institutional framework, that can limit the autonomy of the UK, but it is not able to do it in a manner that limits its sovereignty. Compared to EU membership the TCA does not give the EU rights to establish law in the UK, hence not limiting parliamentary sovereignty, it does not include provisions that bind the UK to judicial decisions by the ECJ, or any other non-UK court, it does not include the UK in the common trade policy, and it does not allow for the overruling of UK positions by way of QMV. Concerning the institutional governance of the agreement, it can thus be said that the UK has reclaimed control if one applies the standard of restored sovereignty to it.

The TCA does not include provisions that limit Parliament's right to legislate for the UK, however, it does penalize legislation, not in line with the LPF provisions. The UK is therefore sovereign in its capacity to legislate, but it has committed itself to legislate in a way that does not harm trade with the EU. In this respect, there is a loss of autonomy, but it is certainly marginal compared to EU

membership as the LPF provisions would represent the lesser of two evils in the trade-off between loss of autonomy and economic regress. Moreover, they only apply to selected policy areas, which allows the British government to promulgate its regained control elsewhere.

Answering the question *to what extent the TCA is consistent with the goal of regained sovereignty?* One can subsume that the TCA allows the UK and its Parliament to exercise its sovereignty to a larger extent than under EU membership. However, it is not autonomous in its decision making as the TCA may well influence the decision-making procedures to uphold trade and investment between the UK and the EU, for example through LPF provisions. Undoubtedly, however, the UK has regained sovereignty compared to EU membership.

The next chapter will compare the limitations on sovereignty established in this chapter to those of the Swiss bilateral way established in chapter 2.

Chapter 5: Conclusion (The UK and Swiss Models compared)

The previous chapters dealt with the trade and cooperation models vis-à-vis the EU on the part of the UK and Switzerland. They showed how these models respect or limit the prevailing types of sovereignty. This chapter will conclude this thesis with a comparison of the two models. Therefore, the final sub-question is: *To what extent do the governance models of the TCA and the Swiss bilateral way differ in respecting the prevalent form of sovereignty in each country?* To answer that question both prevalent sovereignty models, as well as the effects of the cooperation with the EU are compared.

5.1 Popular sovereignty v. parliamentary sovereignty

Both Switzerland and the UK are characterised by an unusual political system. The Swiss system is characterised by the prominent position of the electorate, while the British system includes principally unrestricted parliamentary sovereignty.

Both systems are democratically legitimized by the people, who can express their political will either through parliamentary elections or referenda. However, these two democratic elements are in contrasting relationships. In Switzerland, the parliament makes the majority of legislative decisions and engages in agenda-setting, but ultimately the people have the right of final decision through referenda. In the UK, on the other hand, referenda can be held, but they cannot to surpass the right of parliament to ultimately decide. Both systems include sub-national levels with decision-making powers, but while Switzerland has a genuine federal structure including cantons, able to vote in obligatory referenda, the UK is a centralised state which cedes some competencies to the sub-national level but may revoke them at any time.

The systems differ in the location of the right of final decision. Either in the people and some cases the cantons, as in Switzerland, or exclusively in parliament, as in the UK. This results in the two countries' forms of democracy,: Decisions in Switzerland are always subject to the possibility of a veto due to diversified social groups and federalism so that a concordance democracy has developed. On the other hand, the UK's frequent one-party governments are in principle not bound to the involvement of the opposition or the current will of the people, which results in an "elective dictatorship" in terms of the plenitude of power.

Sovereignty in Switzerland is thus understood as the unrestricted freedom of decision via referenda, whereas sovereignty in the UK places the decisions of parliament in the same place. This explains the rejection of EU membership by both states. Its supranational institutions would be in a position to set law that restricts the decision-making freedom of the Swiss electorate or the UK parliament. They would thus be limited in their sovereignty.

5.2 Maintaining sovereignty: TCA v. Bilateral Way

Both countries pursued integration with the Single Market while maintaining the utmost autonomy in their relationships with the EU. That this is only possible to a certain extent, is only logical given the relative market power between the EU bloc and individual countries. Nonetheless, this section will compare how far they were successful and give an outlook on how these cooperation regimes will develop in the future.

The institutional frameworks of both cooperation regimes are similar. Both include committees that monitor the implementation of the concerned agreement as well as provide a platform for information exchange. For Switzerland, these are the joint committees and for the UK the PC. Both do not significantly limit the respective forms of sovereignty, as they are intergovernmental bodies, without supranational legislative power.

The dispute settlement procedures also do not differ significantly in their limitation power on sovereignty or autonomy. In both regimes, disputes are primarily handled by the concerned joint committee. Differences arise after a dispute is not resolved there. As the IFA was cancelled the TCA's arbitration tribunal has no counterpart in the Swiss bilateral agreements. Instead, the Parties can adopt safeguarding measures or cancel the agreements. Non-surprisingly the UK rejected the ECJ's inclusion in any binding matter, as it could be seen as further subjugation under the EU's legal rule, which is why the TCA arbitration tribunal does not operate under such a provision. To sum up it can be asserted that the TCA and the EU – Swiss agreement's institutional governances and dispute settlement procedures are products of both countries' careful negotiation positions concerning limitations on foreign influence on national decisions. The UK followed its political mandate from the Brexit referendum to reject provisions limiting sovereignty, while the Swiss Bundesrat rejected the sovereignty limiting IFA following national pressures to maintain the supremacy of the referendum.

The main differences arise in the treatment of EU law and standards. On this front, the two countries are on opposite trajectories. While Switzerland is fundamentally moving closer to the EU, the UK is trying to distance itself from it to a large extent. As a former member state, the UK does not have to incorporate the EU acquis via instruments such as the *autonomer Nachvollzug* to adapt to the Single Market. Rather, their divergence is to be prevented through LFP provisions. Switzerland, on the other hand, is incorporating more and more EU law and Single Market standards into its legislation to prevent its isolation. Nonetheless, both countries are only marginally limited in their sovereignty, but their autonomy is impacted. In comparison, this is truer for Switzerland as the TCA's LPF provisions only refer to certain standards that can still be regulated autonomously and are only limited in their regress. The Swiss adoption of the EU acquis, is a sovereign process needed to maintain its economic prosperity as it can decide for itself which parts of the acquis it adopts. Upon closer consideration, though, it becomes clear that the adoption of the acquis is a consequence of economic constraints that cost Switzerland a considerable part of its autonomy.

5.3 Conclusion

To answer the question *to what extent do the governance models of the TCA and the Swiss bilateral way differ in respecting the prevalent form of sovereignty in each country?* One can conclude that compared to the limitations entailed in EU membership both cooperation regimes remove limitations on the sovereign decision making of Parliament or the referendum respectively. The main difference arises in the handling of EU law and standards needed to gain access to the Single Market, where Switzerland loses significantly more autonomy than the UK. Meanwhile, the institutional governances of both cases only differ in the presence of an arbitration tribunal in the TCA.

This thesis has answered the question "*to what extent has the UK been able to regain sovereignty following the conclusion of the TCA, and what parallels can be drawn with the Swiss model of Europeanisation?"* by introducing both political systems and their prevalent form of sovereignty as

well as of their cooperation with the EU. It has found that even though the UK and Switzerland differ in their governance models, both lie a heavy emphasis on the supremacy of one institution, Parliament in the UK and the Referendum in Switzerland. Both cases show that political systems with this feature have difficulties integrating themselves into a supranational order, as it erodes the supremacy of their national procedures. Due to the significantly longer chain of legitimization of supranational institutions they could be perceived as undemocratic, foreign impositions on the national democratic order. Hence, both states successfully aimed at establishing modes of Europeanisation that, where possible, do not limit the national sovereigns in their decision making power. The UK has thus, regained sovereignty and for the most part, autonomy, while Switzerland reiterated its need for sovereignty by cancelling the IFA.

At present, both the EU's relations with the UK and Switzerland are at a crossroads. Switzerland decided to withdraw from the planned IFA and affront the EU on 26 May 2021, which originally designated this agreement as a precondition for further agreements. Switzerland now needs to find ways to prevent the current treaties from becoming outdated. The UK, on the other hand, is now a third country vis-à-vis the EU for the first time since the 1970s and has to settle into this new role. The TCA creates a basis for the future partnership without significantly restricting sovereignty anew. Nevertheless, the UK is less integrated into the Single Market than it was before Brexit. Despite the LPF and non-regression provisions, it is likely that the now independent legal systems will diverge or that at some point the UK will also use a mechanism like the *autonomer Nachvollzug* to adopt EU law. In that case, given that the Swiss economy accounts for only one-third of the UK's GDP, it is likely that the UK will be in a better negotiating position than Switzerland is today.

The further development of these cases and also the evaluation of the economic consequences of both cooperation regimes are the substance of further research. The researcher is aware that the topic discussed is highly fluid. How contentious these political agreements are is best illustrated by the unexpected cancellation of the IFA by the Swiss Bundesrat. The terms of the EU's bilateral relations with the UK and Switzerland are subject to constant political change and can therefore only be seen as a momentary state of affairs.

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