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Sectoral Governance under the EU's Bilateral Agreements and the Limits of Joint Institutional Frameworks: Insights from EU-Swiss Bilateralism for Post-Brexit Relations with the UK

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Abstract

Joint Institutional Frameworks governing the EU's relations with third countries often fail to address important issues of sectoral governance. Non-EU countries benefit from access to EU sectoral bodies, but this is limited, and alternative avenues of co-operation are therefore needed. This article contributes to existing research on EU bilateral relations, which has thus far not paid sufficient attention to the external face of sectoral governance. The qualitative case comparison studies the well-established, yet increasingly politicized bilateral co-operation with Switzerland in order to draw insights for UK–EU relations, and contrasts two strategically important areas of market integration, namely electricity and financial markets. The findings show that politicization and (external) disintegration have repercussions for allegedly 'technical' areas of co-operation where formalized requirements for EU sectoral bodies, public and private, become more stringent and less permissive to accommodate informal modes of co-operation that in the past facilitated external participation.

Keywords: bilateral relations; equivalence; disintegration; private governance; informal governance

Introduction

Bilateral agreements are an important tool for the European Union (EU) to govern its external relations, not least because they help expand the scope of territorially bound political authority based on binding arrangements between the contracting parties. Such formalized and jointly institutionalized frameworks are frequently accompanied by mechanisms of informal co-operation designed either to cover policy fields where no contractual relation exists, to provide for flexible solutions in addition to formal frameworks, or indeed to involve public and private actors that otherwise do not have access to formal decision-making bodies. Such arrangements are of particular relevance at times when negotiations on formal bilateral relations face a deadlock, or when contracting partners seek to renegotiate existing relations. Phases of politicization or differentiated disintegration in particular are expected to be characterized by an increase in informal sectoral arrangements complementing Joint Institutional Frameworks (JIFs) set-up under bilateral trade or trade-related agreements.

This article addresses the following research questions. *First, what are the limits of JIFs in addressing issues of cross-border sectoral governance? Second, what is the role of formal and informal mechanisms of co-operation to fill these gaps? Third, how do private actors get involved in cross-border co-operation alongside public actors?* In doing so, the article considers examples from the EU–Switzerland relationship and discusses

their relevance for the EU's post-Brexit relations with the UK. The arrangements established through the range of EU–Switzerland agreements – the so-called ‘Bilaterals’ – constitute a specific type of JIF which, due to its static, compartmentalized and sector-specific (particularistic) nature, leaves ample room for informal co-operation and private actor involvement in areas which are only partially or not covered at all by the JIF. The qualitative case study draws on cross-sector comparisons from the EU's increasingly politicized bilateral co-operation with Switzerland and draws parallels with current UK–EU relations. It compares two strategically important areas of market integration, namely electricity and financial markets, two sectors not covered by formal EU–Switzerland agreements. The article is structured as follows: first, it conceptualizes third-country access to EU sectoral bodies and the role of informal and private governance, as well as alternative routes for co-operation; second, it discusses the limits of bilateral agreements and their JIFs to address sectoral governance based on the example of the EU's bilateral relations with Switzerland and the newly established external relations with the UK; third, it applies the conceptual framework to the two sectors for EU–Swiss relations and explores options for the EU's future sectoral co-operation with the UK.

I. Conceptualizing External Sectoral Governance

This article contributes to the rich literature on the EU's privileged and strategic partnerships with third countries (for example Gstöhl and Phinnemore, 2019) by focusing on areas of bilateral co-operation largely neglected by JIFs. It argues that both informal modes of co-operation and the involvement of private actors constitute governance devices which complement formal bilateral co-operation through JIFs and help to address persisting – or in the context of politicization and disintegration, newly emerging – regulatory gaps. The following sections briefly revisit key insights from the literature on EU bilateral agreements and JIFs, and then present an analytical framework for explaining third-country strategies when seeking to secure involvement in the EU's sectoral governance regimes.

Mind the Gap: Sectoral Governance and the Limits of JIFs

JIFs established through EU bilateral agreements can take different forms and vary in their sectoral scope and depth. Bilateral agreements and their institutional frameworks can be either dynamic by requiring continuous adaptation of the third country to the evolving EU acquis, or static and particularistic depending on the kind of contract negotiated. A horizontal agreement covering various policy fields with a dynamic character saves transaction costs for both sides, yet also entails a significant loss of sovereignty for the third country. Sector-specific agreements subject to continuous re-negotiation, by contrast, allow the third country to safeguard its autonomy, yet involve considerable transaction costs for the negotiating parties. Moreover, the need for various alternatives to formal arrangements increases when domestic politicization leads to external disintegration. Given that politicization will typically not affect all policy areas equally, the concept of external differentiated (dis)integration (Schimmelfennig and Winzen, 2020) is useful to capture variation across sectors.

Sectoral governance rarely features in research on EU external relations, although a strand of the literature is taking shape that addresses the external relations of EU sectoral bodies such as agencies (Lavenex, 2015; Coman-Kund, 2018; Hofmann et al., 2019; Lavenex et al., 2021). A key insight provided by this literature is that third-country access to EU sectoral bodies is essentially limited to policy areas where EU supranational authority is pronounced (Lavenex, 2015; Lavenex et al., 2021, p. 432). This is due to the fact that many EU bodies have emerged from pre-existing regulatory networks open to third countries. Once these networks hold a formal policy mandate, and are transformed into EU agencies enshrined in secondary law, participation becomes more restricted. This article focuses on how informal and/or private governance constitute alternative venues for co-operation in view of such limited participation in formal public bodies. In so doing, it contributes to existing research on EU external governance, which has thus far paid only limited attention to informal and private governance aspects. This stands in contrast to the rich literature on these modes of governance in the EU's internal policy (Christiansen and Piattoni, 2004; H  ritier and Rhodes, 2010; Christiansen and Neuhold, 2012).

In this article, the terms 'informal' and 'private governance' refer to the institutional framework and the policy process rather than policy outcomes. More specifically, I follow the definition by Christiansen and Piattoni (2004, p. 6) who regards governance as 'informal when participation in the decision-making process is not yet or cannot be codified and publicly enforced'. A distinction between formal and informal governance is drawn between settings where participation is based on a formal mandate, as opposed to (informal) settings where participation is based on the possession of resources (see also Christiansen, 2012, p. 221). Along the same lines, 'private governance' is understood in a broad sense, encompassing both formal and informal processes of co-operation. The term is used for settings in which a body that is (partially) composed of private actors holds a formal mandate involving a process of delegating authority. Such a mandate can be delegated with the intention of filling a specific regulatory gap. The term 'private governance' is also used for informal settings where actors initiate co-operation on a voluntary basis instead of co-operating based on a formal mandate. Informal private co-operation is frequently formalized over the course of time, especially in cases where previously established informal schemes for cross-border co-operation created by private actors have proven to be effective. Private governance is driven to a large extent by functional needs for co-operation such as economic interdependence or technical externalities, rather than by political motives. This is why it may provide a viable alternative for co-operation, especially in times of politicization and contestation. Moreover, there is reason to believe that private regulatory bodies will be more open to accommodate the interests of third parties who have important resources such as information or technical capacity at their disposal. It is for these reasons that external governance has a higher likelihood of resulting in private rather than public modes of co-operation.

Considering all possible combinations of actor participation (public and private) within two modes of co-operation (formal and informal), we can differentiate between four types of sectoral bodies (see Table 1). Informal bodies (options 2 and 4) will facilitate third-country participation in sectoral governance, as do broad principles and soft law (Wessel, 2021). A cornerstone of bilateral relations is the principle of equivalence of legislation (Lavenex, 2011, p. 379), which provides an incentive for the parallel evolution of the legal orders of contracting partners especially for those areas where bilateral contracts

Table 1: Modes of Co-operation and Actor Participation in EU Sectoral Bodies

<i>Mode of co-operation</i>	<i>Formal</i>	<i>Informal</i>
Actor participation		
<i>Public</i>	1. Sectoral body holding a formal mandate	2. Informal sectoral body
<i>Private</i>	3. Private sectoral body holding a formal mandate	4. Informal private sectoral body

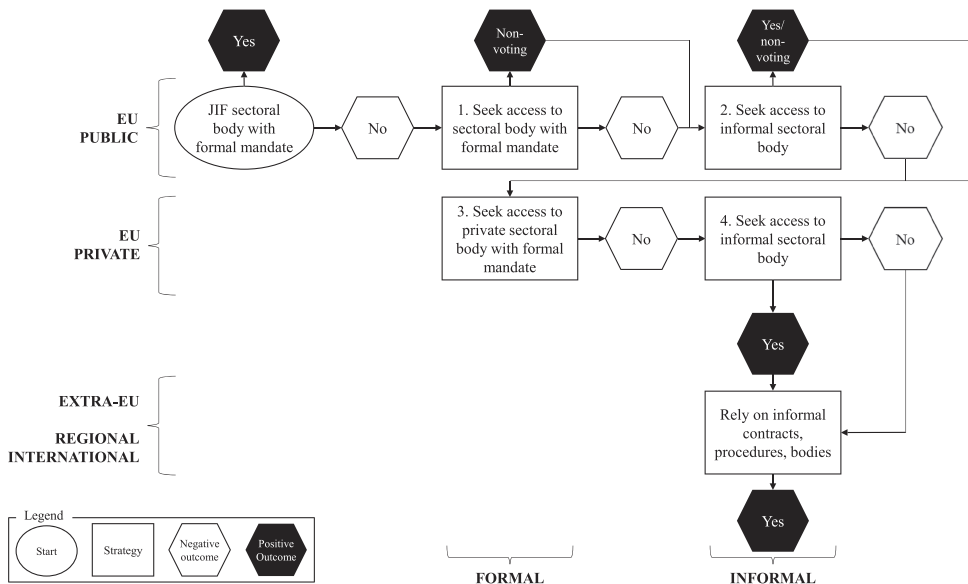
Source: Author's own illustration.

do not provide any regulatory detail. The use of rules such as equivalence can be specified through soft law instruments, for instance through Memoranda of Understanding (MoUs).

Third-Country Access to EU Sectoral Bodies

The key argument made in this article is that third countries will seek to co-operate through modes of informal and private governance (options 2 and 4 in Table 1) where formal access to sectoral bodies (options 1 and 3 in Table 1) is not granted. This is a likely outcome where EU sectoral bodies holding a formal mandate specified in secondary law operate according to clearly defined rules in terms of participation. I posit that a third country's strategy in gaining access to EU sectoral bodies is best understood as a hierarchy of preferences as depicted in Figure 1, that is, a third country will prefer participation in formal over informal public bodies, and participation in public over private bodies. Different from a strict decision-tree logic, the realization of a certain positive outcome does not preclude, however, the attempt to realize the next best option. On the contrary,

Figure 1: Third Country Access to Sectoral Governance



Source: Author's own analysis and presentation.

we can expect several positive outcomes to be secured simultaneously in order to maximize influence, which is why further steps are also expected with a positive outcome.

As a starting point, we could imagine that a JIF introduces a sectoral body for bilateral co-operation with a formal mandate in the sense that the body would produce regulatory output binding for both parties. Such an outcome may be difficult, however, in cases where it risks bypassing the EU's internal governance, which is highly legalistic and formalized. If we assume that a JIF will not provide for such a body, or that if it were introduced such a body would be constrained in its remit, the next best option for the third country would be to seek access – as either a full member or an observer – to an EU body involved in sector-specific decision-making based on a formal mandate (option 1, as shown in Table 1). The assumption here is that full access is typically denied, while non-voting status may be granted. The next best option – or complementary option where non-voting participation is granted – is to seek access to an informal sectoral body (option 2). Here third countries may be granted non-voting observer status with a right to take the floor in specific circumstances. Such informal bodies typically co-exist with more formal bodies as a result of institutional layering (Thatcher and Coen, 2008), where, for instance, an EU agency will be created in addition to a pre-existing European network of national regulators. It is precisely the networks' flexibility to engage with external sectoral bodies that is one of their *raison d'être*. In some sectors where no established mechanisms of co-operation are available to public actors, or where access is limited, private governance (options 3 and 4) constitutes an alternative. In option 3, third-country private actors would be granted access to a private EU sectoral body holding a regulatory mandate. Such access may, however, not be granted to third-country private actors, or access may be limited. Third countries may as a result seek to have access to an informal network of private sectoral bodies (option 4).

Finally, when none of these formal and informal modes of co-operation with EU public and private sectoral bodies are accessible, sectoral co-operation may rely on alternative venues. These are summarized as 'extra-EU' as they are situated outside EU institutional structures and procedures, but are not necessarily non-EU. In cases where JIFs do not introduce bodies for sectoral co-operation, bilateral relations frequently rely on informal contracts, procedures and bodies such as MoUs, equivalence and fora for regulatory co-operation. Moreover, third countries may be able to exert influence through informal governance at the regional or international level.

Case Selection and Research Design

This article examines two instances of the EU having a special relationship with a third country: the long-standing bilateral relations with neighbouring Switzerland; and the recent case of newly established external relations with the UK, a former Member State. Switzerland has maintained special relations with the EU since 1999 when the first package of bilateral agreements ('Bilaterals I') was signed. This relationship continues to be contested domestically in Switzerland. In the UK, the Brexit vote of June 2016 led to the triggering of the withdrawal process and eventual departure from the EU on 31 January 2020.

To discuss the lessons to be drawn from EU–Swiss relations for the UK–EU relationship, we can usefully consider modes of co-operation in two economic sectors that are of

strategic importance for both the EU and external partners, namely electricity and financial markets. While these areas of single market regulation do not form part of the EU–Swiss Bilaterals, and are only vaguely addressed in the UK–EU Trade and Cooperation Agreement (TCA), which was formally adopted in April 2021, there is a pressing need for co-operation as a result of technical and economic interdependence. In the electricity sector, which relies on a physical infrastructure, there is a clear difference between the EU's dependence on Switzerland as an important transit country, which is geographically situated at the heart of the (Central) European electricity market, as opposed to the United Kingdom which is a net importer of electricity situated at the EU's periphery (see Supporting Information S2, Figure Electricity Flows by Country). On financial regulation, the EU is dealing with two influential internationalized players (see Supporting Information S3, Figure Exports of Financial and Insurance Services), especially in the case of the UK.

The qualitative case comparison draws on the analysis of documents, media coverage, secondary literature and semi-structured interviews. In total 24 interviews (see Supporting Information S1, Inventory of Expert Interviews) have been conducted with experts from European sectoral authorities, the European Commission, and industry, as well as national ministries and regulators involved in EU sectoral governance. The interviewees were asked how they perceive the changing institutional environment in a given sector and the potential impact on bilateral relations with third countries in general and the UK and Switzerland in particular.

II. Politicization, (External) Differentiated Disintegration and Sectoral Co-operation

While policy-making in Switzerland has been Europeanized to a significant extent, the UK opted out of integration in certain key policy areas when it was a Member State, and strives for a maximum degree of policy autonomy as a third country. External and internal differentiated integration (Leuffen et al., 2013; Schimmelfennig and Winzen, 2020) have as such characterized the EU's relations with these two countries for decades already. Moreover, both countries have a legacy of difficult relations with the EU, be it as a member or a close neighbour (George, 2000; Gstöhl, 2002). The domestic situation was characterized by high-profile politicization of the (future) relations with the EU, especially throughout the last decade. This situation has had tangible repercussions for sectoral co-operation in electricity and finance.

The Special Case of EU–Swiss Bilateralism

Through more than 100 bilateral agreements covering numerous policy areas, the Swiss have been granted a special status by the EU where most other treaties with third countries and regions involve a framework agreement. EU–Swiss relations are governed by two packages of bilateral agreements, signed in 1999 and 2004. A first package, endorsed by a public vote in 2000, covered the areas of free movement of people, technical barriers to trade, public procurement, agriculture, air transport and research. The free movement agreement that was part of this package includes a guillotine clause meaning that the EU can revoke the first package as a whole if the Swiss would not respect the free

movement principle (Grolimund, 2009, pp. 24–9). The second package expanded its reach to the areas of environmental policy, agricultural products, public statistics, media, combating fraud, tax savings incomes as well as integrating Switzerland into the Schengen and Dublin systems.

By 2014, EU–Swiss bilateralism faced a serious challenge when a public vote ‘against mass immigration’ mandated policy-makers to curtail free movement even though it is fundamental to the function of the Bilaterals I as a package. The Swiss therefore sought to renegotiate the status quo of bilateralism throughout 2014 and 2015, but ultimately failed to conclude a new agreement with the EU and instead had to accommodate the changes required to implement the referendum through domestic reforms (Eckert, 2018). Another public vote held in September 2020, the so-called ‘Limitation Initiative’, sought to achieve strict implementation of the 2014 vote and could have put at risk the Bilaterals. The initiative failed, however, to secure the required support (Henley, 2020).

Importantly, the Bilaterals do not include provisions covering either electricity or financial markets. The negotiation of the second package of the Bilaterals included talks regarding the governance of financial markets, yet these failed due to Swiss reservations on issues including banking confidentiality. Similarly, discussions on closer co-operation in energy policy launched in 2007 were also unsuccessful (Hettich et al., 2015, p. 1). Switzerland was reluctant to accept equivalence with EU law, notably because it did not wish to commit to full market opening or to accepting jurisdiction of the Court of Justice (Lowe, 2017, p. 4).

The EU side, by contrast, had asked for a framework agreement as a precondition for any further sector-specific arrangements (Stalder, 2019). Negotiations on the so-called Draft Institutional Framework Agreement (DIFA) were launched in 2014 (Kaddous, 2019). The goal of the DIFA, for which a text had been finalized by November 2018, was to provide for a more dynamic framework, which would allow for regular updating of bilateral rules. Moreover, a dispute settlement mechanism for conflicts arising from the application or interpretation of rules was to be established. In May 2021, however, the Swiss Federal Council decided to terminate the negotiations unilaterally, a move that resulted from a highly politicized debate about the drawbacks of the DIFA in the areas of wage protection, state aid rules and access to the Swiss welfare state for EU immigrants (Walter, 2021).

We therefore see contrasting dynamics in the Swiss case: first, attempts to deepen bilateral relations in some policy areas such as energy markets; second, high-level politicization of the status quo in other areas such as free movement and migration policies; third, a desire on the EU side to normalize EU–Swiss relations and agree on a framework agreement similar to the schemes adopted with other third countries.

Bilateral Relations with a Former Member State: The EU and the UK Post-Brexit

The recent attempts by both Switzerland and the UK to redefine their relationship with the EU have affected the capacity and willingness of EU policy-makers to compromise with one or the other negotiating partner. Switzerland sought renegotiation once Brexit was looming, with attempts to loosen the ties with the EU being dubbed ‘Schwexit’ (Gemperli, 2016). In the UK, Brexiteers praised the ‘Britzerland’ model as a way forward, promising a prosperous future outside of the EU (Harvey, 2016). The UK’s recurring

attempts to renegotiate or bypass the terms and conditions agreed to in the context of withdrawal, for instance on matters regarding Northern Ireland, have strained relations with the EU (Holden and James, 2021). Moreover, domestic politicization has occurred mainly around the theme of free movement and migration policy in both countries, resulting in a desire to loosen EU-imposed constraints in these policy areas, while prioritizing access to the single market (Eckert, 2018).

Future relations between the UK and the EU are governed by three distinct JIFs: the UK–EU Withdrawal Agreement, the UK–EU Trade and Cooperation Agreement (TCA) and the UK–Euratom Agreement (see also Tyushka, Phinnemore and Weiß in this symposium). Of particular relevance for this article is the TCA (OJ L 149, 30.04.2021), which introduced a partnership council comprised of UK and EU representatives who meet in different configurations. The body can amend the TCA and can issue recommendations on matters regarding the agreement's implementation. Its work is supported by a trade partnership committee (TPC), trade specialized committees and specialized committees. One of these specialized committees deals with energy policy. Moreover, the TCA covers energy matters, whereas it only defines some general rules applicable to financial services.

As a result, key sectors such as electricity and finance are either fully excluded from the JIF (Swiss case) or are being addressed only to a limited extent (UK case). This raises questions about the limits of JIFs, what alternative formal and informal governance mechanisms might exist or be developed, and the role of private actors.

III. Governing Cross-Border Aspects of a Physical Infrastructure: Electricity

The governance of a physical infrastructure such as electricity requires processes of technical co-operation to address cross-border issues, and is driven by a geographical logic. In accordance with their location, the rationale for co-operation will vary for Switzerland and the UK. The following sections will compare the Swiss and UK cases regarding the respective rationales for co-operation and access to sectoral governance.

Diverging Rationales for Co-operation

With Switzerland as a non-EU (energy) island at its geographical heart, the EU has strong incentives to agree to certain levels of co-operation with this third country, and vice versa. The need for co-operation is less pressing in the case of the UK due to its peripheral island position. As highlighted during hearings on the EU's external energy relations at the House of Lords, the UK, unlike Switzerland, does not bring anything which is indispensable to the functioning of the internal electricity market (House of Lords, 2018, Q 45). Both third countries, however, depend on electricity imports from EU countries, although the extent to which this is the case differs.

In view of the geographical centrality of Switzerland in the EU internal electricity market, it is puzzling that the Bilaterals do not cover this important area of economic and technical co-operation. Switzerland is not part of the European Economic Area (EEA) and thus also not of the internal electricity market. As a result, other European partners perceive the Swiss to some extent as free riders who in many respects have enjoyed privileged access to the EU market and sectoral governance, while not complying with the EU regulatory framework (Interviews P 1, A 6). In order to demonstrate that market

access and deeper co-operation are conditional on the agreement of the DIFA, the EU has been less accommodating in recent years. An insightful case is the EU-wide market coupling and intra-day coupling scheme introduced in 2015. The regulation states that Switzerland could access the scheme if the following conditions are fulfilled: the country implements key aspects of EU electricity market legislation and an intergovernmental agreement on electricity co-operation is concluded (Article 1.4 of the regulation). Since these conditions were not fulfilled, the EU scheme was introduced without Switzerland as a participant, which from a Swiss perspective had major drawbacks for the domestic market (Höltzsch, 2015). Further negative repercussions are expected for domestic electricity security in the aftermath of the Swiss decision to formally stop the DIFA negotiations (Walter, 2021). In this context, the European Commission has noted that Swiss energy dependence has increased because of the country's decision to decarbonize and that Switzerland relies on electricity imports from neighbouring countries in winter (European Union External Action Service, 2021).

The UK is even more dependent on electricity imports from EU countries, especially as it needs to accommodate intermittent generation caused by a growing reliance on renewables. Brexit comes at a time when an extensive process of grid expansion is underway (for details see Supporting Information S4, Figure UK Cross Border Electricity Interconnectors and S5, Figure UK Imports and Exports of Electricity). Currently the UK shares four electricity interconnectors with EU countries, and an additional eight interconnectors have been approved by the British regulatory authority (Ofgem, 2021). As of June 2021, the UK's interconnected capacity was at 6 GW, expected to rise to beyond 15 GW in 2025 with the completion of the mentioned projects (Ofgem, 2021).

In view of this situation, the TCA contains a mutual commitment to network development and security of supply (Articles 314–315, OJ L 149/406–407, 30.4.2021). It also ensures that the existing allowance for selected interconnectors to sell capacity rights ahead of time will continue to apply (Article 311, OJ L 149/401–404, 30.4.2021) and that the status quo in which individual interconnector transactions are not charged will be maintained. The UK will, however, not be included in EU procedures on capacity allocation and congestion management, which is why the two parties have committed to coordination in these areas (Articles 311–312, OJ L 149/401–405, 30.4.2021). The Protocol on Ireland/Northern Ireland annexed to the Withdrawal Agreement (OJ L 29/102–177, 31.2.2020), however, requires the UK to continue to apply EU legislation governing wholesale electricity markets in respect of Northern Ireland.

Access to Formal and Informal Bodies for the Co-operation of Regulators

In EU electricity governance, formal sectoral bodies currently coexist alongside informal bodies. The EU Agency for the Cooperation of Energy Regulators (ACER), created in 2011, replaced the formal network for the co-operation of national energy regulators, the European Regulators' Group for Electricity and Gas (ERGEG), which had been operational since 2003. By contrast, the informal network of energy regulators, the Council of European Energy Regulators (CEER), established in 2000, continues to complement the work of ACER and provides a more flexible forum for regulatory exchange (Interview A 8). CEER and a body bringing together transmission system operators (TSOs) at European level, the European Transmission System Operators (ETSO), were both initiated as a result

of the Florence Electricity Forum (FEF). The FEF was created in 1999 at the initiative of the European Commission to promote discussion amongst stakeholders, and was composed of public officials and market participants. Membership and voting rights in ACER are limited to EU countries, while the EEA countries Iceland and Norway are non-voting members. Moreover, ACER maintains external relations with other energy regulators such as the US regulator through MoUs. CEER membership is open to EEA countries, and new members are admitted by a decision of the CEER General Assembly. The CEER statutes leave some flexibility in granting membership to a 'European country which has a long-lasting experience of regulating a liberalized energy market according to European standards' (Article 5.1). Moreover, observer status without voting rights can be granted to EU accession countries, EFTA countries, as well as contracting parties of the Treaty establishing the Energy Community (Article 6.1 CEER statutes).

As a non-EEA country Switzerland has limited access to these EU sectoral bodies. Despite aspiring to full membership (Schweizerische Eidgenossenschaft, 2008, p. 34), Switzerland has only been granted observer status in the FEF. When national regulators took the initiative to co-operate informally inside the CEER, the Swiss regulator was not invited to participate. More than a decade later, in 2012, Switzerland in its capacity as an EFTA country obtained observer status alongside EU candidate countries Macedonia and Montenegro (Schweizerische Eidgenossenschaft, 2012). The Swiss regulator EICOM, created in 2008, sits outside ACER and has not participated in ERGEG. Since 2011 Switzerland is, however, an observer in the Pentalateral Energy Forum (PLEF), which currently brings together the energy ministries from Austria, Belgium, France, Germany, Luxembourg and the Netherlands. The PLEF is a forum for political, consensus-based informal co-operation at regional level with the declared goal to improve joint implementation of infrastructure-related operational issues, based on input from regulators, TSOs and market participants. Co-operation inside the PLEF helps Switzerland to address externalities caused in the interconnected central European electricity infrastructure (Interview N 5). Such informal co-operation may, however, become less flexible in the implementation of the EU's Clean Energy Package adopted throughout 2018 and 2019 which, through the creation of so-called regional coordination centres (Article 35 Internal Electricity Market regulation (EU) 2019/942), seeks to enhance regulatory oversight at regional level.

In contrast to the arrangement with the Swiss, the JIF structure with the UK includes a sectoral body with a formal mandate. According to the TCA, a new specialized committee on energy shall be created to address cross-border issues (Articles 8, OJ L 149/26, 30.4.2021). Meanwhile the TCA excludes UK participation in ACER (Article 318, OJ L 149/413, 30.4.2021). At the time of writing, the CEER still lists the UK regulator as a full member. In line with the criteria defined in the CEER statutes, the UK's membership could be revoked by the CEER General Assembly if the country was found to deviate from 'European standards' (Article 5.1, CEER statutes) in energy regulation. The UK will not have access to ACER, while continued membership in CEER is likely (Interview A 8).

Access to Private Governance

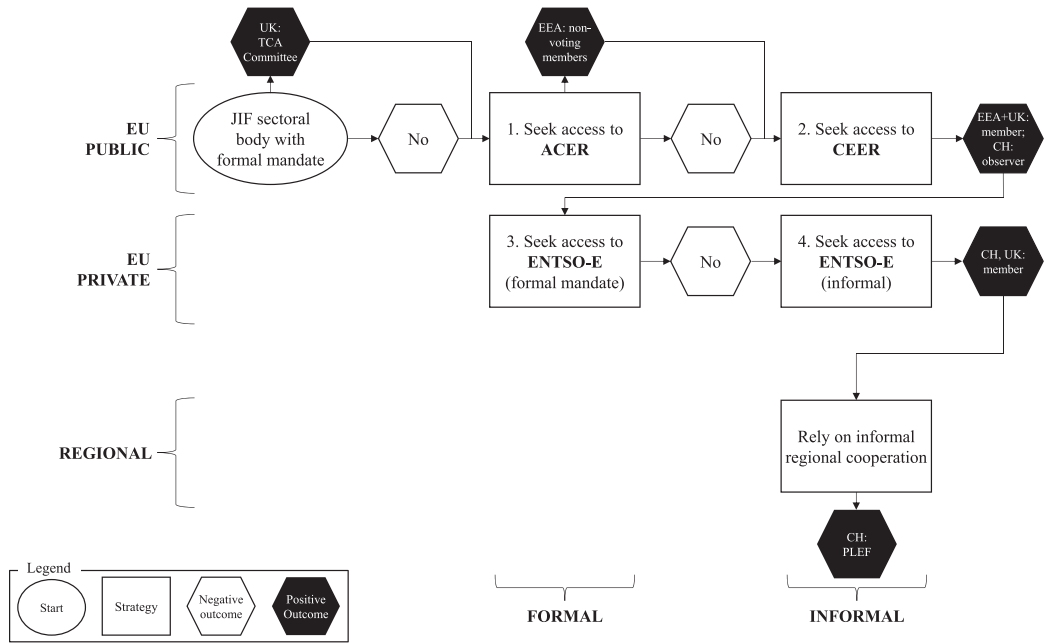
As guarantors of grid security, operators of electricity transmission systems are specific types of economic actors and draw on an important legacy of cross-border co-operation

(Eckert, 2019). Moreover, TSOs are often still in full or partial public ownership and thus do not entirely qualify as 'private' bodies (Meletiou et al., 2018). TSOs in many regions have built up elaborate mechanisms and organizations for international co-operation. ETSO, created in 1999, resulted from a merger of pre-existing regional bodies. Over the course of EU energy market integration, a formal European network for TSOs, with branches for electricity (ENTSO-E) and gas (ENTSO-G), was created. ENTSO-E was set up in 2009. Unlike ENTSO-G, which co-exists alongside a separate informal lobbying association Gas Infrastructure Europe, ENTSO-E is both an EU body fulfilling a formal mandate, as well as an informal organization composed of TSOs from inside and outside the EU. ENTSO-E brings together 42 member TSOs representing 23 countries, including candidate countries such as Albania, and third countries such as Norway. The legally mandated tasks of ENTSO-E include the development and implementation of network codes, adequacy assessments, network development planning and data-sharing platforms. As an interest organization, ENTSO-E represents the voice of its member TSOs and provides input to policy debates and decision-making. In legal terms, it could be argued that membership of non-EU TSOs in ENTSO-E is incompatible with the requirement that only members from countries that fully implement the EU *acquis* can be part of bodies that have a formal mandate in EU policy-making, which applies to ENTSO-E (Interview A 7). ENTSO-E does, however, limit access to the working groups and decision-making to TSOs from EU Member States when fulfilling its official mandate. Access is not limited where ENTSO-E engages in (informal) coordination which is not based on a mandate enshrined in EU law.

The Swiss TSO was a founding member of ETSO in 1999 and remains influential in ENTSO-E (Interviews IP 2, P 1). According to policy insiders, TSO arrangements tend to accommodate the interests of important third-country TSOs even where ENTSO-E fulfils its formal mandate (Interview N 5). The Swiss TSO fulfils important operational tasks in the area of data management and fully participates in various voluntary schemes such as the one for inter-TSO compensation (ITC) for cross-border flows or security of supply. It can therefore be argued that the Swiss TSO has become a transmission belt for Swiss influence in Brussels, and that the central position of the Swiss grid operator in the interconnected system has ensured that Switzerland's energy interests have not been marginalized altogether (Jegen, 2009, pp. 592–5). This legacy of well-functioning technical co-operation (Stalder, 2019) could be at risk in the context of high-level political disagreement and deadlock, which characterize the current state of bilateral relations. Discontinuation of Swiss participation of relevant schemes is considered by the EU side as a consequence of the failed DIFA: 'Switzerland would have to leave EU electricity trading platforms and cooperative platforms for grid operators or regulators' (European Union External Action Service, 2021).

UK-based TSOs such as National Grid were equally influential players in Brussels, which might seem surprising given the less central position of the UK electricity market. Indeed, the UK TSO was only marginally involved in TSO cross-border voluntary co-operation initially, such as in the scheme for inter-TSO co-operation, because the financial implications of cross-border flows were not substantial (Interview IP 1). Nevertheless, the UK TSOs' input and expertise were highly valued given that their organizational structure and their independence served as a model for European reform. This participation is at risk post-Brexit. According to the TCA, future co-operation with

Figure 2: Third Country Access to Electricity Market Governance



Source: Author's own analysis and presentation. [Colour figure can be viewed at [wileyonlinelibrary.com](https://onlinelibrary.wiley.com)]

the UK shall not 'involve, or confer a status comparable to, membership in ENTSO-E' (Article ENER.19.1). The exclusion of the UK as a non-EU country is straightforward when ENTSO-E fulfils its formal mandate. By contrast, whether or not ENTSO-E – when it acts as an informal organization – will continue to accommodate non-EU TSO members remains an open question.

Figure 2 visualizes the access options for third countries, specifying the arrangements for the Swiss and the UK cases. The key feature in electricity governance is the co-existence of formal and informal sectoral bodies, as well as of public and private bodies. This complex governance structure allows third countries to realize multiple options, with some question marks regarding the continued participation of the UK and Switzerland both in the CEER and ENTSO-E, as well as the informal nature of future regional co-operation such as inside the PLEF.

IV. Governing a Crisis-Ridden Sector: Financial Markets

The governance of financial markets has been strongly affected by the experience of the financial crisis that hit Europe after 2007. While pre-crisis mechanisms of informal and private governance existed and were mostly situated at the international level, post-crisis there has been a trend towards more formal governance and binding regulation, which holds for the EU in particular (Hardacre, 2012; Moloney, 2016). Facing an unseen level of EU regulatory activism, both Switzerland and the UK have an interest in playing

their part in shaping an evolving landscape of supervision and prudential regulation. The following sections discuss whether and how bilateral relations address financial market reforms; examine possibilities for the UK and Switzerland as third countries to access EU supervisory and regulatory bodies; and explore alternative mechanisms and arenas of co-operation at their disposal.

Bilateral Relations and Financial Markets

Switzerland and the UK have opted for relationships with the EU that in the case of finance are surprisingly underspecified given the importance of this sector for both countries. The Swiss Bilaterals, as noted already, do not cover financial services. The UK–EU TCA introduces some basic principles for sectoral governance (Article 187, OJ L 149/265, 30.4.2021), yet these fall considerably short of the aspiration of the City in London for a comprehensive chapter on financial services in the TCA (James and Quaglia, 2020, pp. 158–64). An MoU, still subject to approval, should establish a framework for future financial services co-operation. Importantly, as an informal agreement to reach an agreement, the MoU sits outside the formal bilateral relationship.

In essence, the resulting outcomes are remarkably similar for both Switzerland and the UK. Neither is part of the EEA, and have neither full access to the single financial market nor passporting rights for domestic banks – a point on which the European Commission negotiator was unwilling to compromise with the UK (James and Quaglia, 2020, p. 169). Passporting allows a firm operating in the single market to provide certain financial services in any EU country once it has received authorization for this type of activity by one national regulator and has applied for a ‘passport’ to do business throughout the EU. To circumvent the negative effects of being deprived of holding passporting rights, Swiss and UK banks and credit institutions can set up operations through subsidiaries in locations in the EU or the EEA, subject to EU banking law (Gortsos, 2019, p. 20). Alternatively, access to the single market can be granted to third countries if their rules are considered equivalent to EU rules (Duvillet-Margerit et al., 2017) and the UK–EU TCA explicitly states that access to the EU market will be conditional on equivalence decisions (Article 187, OJ L 149/265, 30.4.2021). In order to obtain equivalence, third countries have to demonstrate that they supervise their domestic and EU-based businesses appropriately. There are currently around 40 areas for equivalence decisions under EU law relating to financial services regulation. Decisions on regulatory equivalence are taken by the European Commission, usually in the form of implementing acts, in close co-operation with the third country and EU competent authorities, and can be withdrawn at any time. Essentially, in both scenarios – setting up subsidiaries or securing equivalence – the Swiss and UK financial sectors face the choice of either complying with EU standards or being deprived of access to the EU market.

Bilateral co-operation in the financial sector has not been left unaffected by the politicization dynamics discussed previously. The recent history of EU–Swiss relations is insightful in this regard. When in June 2019 the validity of a decision which considered Swiss stock markets equivalent to EU stock markets expired, the European Commission decided not to extend the decision and equivalence ended as a result. Equivalence had been granted under the EU regulatory framework on markets in

financial instruments in 2017, but was limited in duration to one year. The EU made further extension conditional on progress in negotiating the DIFA. A similar situation of politicization and issue linkage characterized the conclusion of the UK–EU MoU which, during 2021, remained blocked by France due to an ongoing dispute with the UK over fishing rights (Rose, 2021).

Outside EU Supervisory and Regulatory Bodies

EU financial market governance has witnessed continuous change over the last two decades. In 2001 a multi-stage governance framework (known as the ‘Lamfalussy’ process) was introduced to complement secondary law with technical implementing measures which were formulated with input from newly created committees of national regulators (Lastra, 2019, p. 11). Further change was triggered by the financial crisis with the creation of the European System of Financial Supervision in 2011 (EFSF). The EFSF consists of three European supervisory authorities (ESAs) and the European Systemic Risk Board (ESRB), entrusted with micro- and macro-prudential supervision, respectively (Grossman and Leblond, 2012, pp. 204–5). Three ESAs have replaced previously existing committees for the areas of banking, securities and insurance: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). Membership in the ESAs is limited to EU countries but observer status without voting rights has been granted to EEA states. The various bodies of the European Banking Union (EBU), which thus far have a remit limited to the eurozone, started to operate as of 2014.

As non-EEA bodies, Swiss financial authorities do not have access to any of these formal EU sectoral bodies, and the same applies to the UK. As a member state, the UK did not participate in EBU institutions, and post-Brexit is no longer taking part in the ESAs. With Brexit, the EBA has lost an important voice since the British were granted special voting rights which re-balanced the power structure between countries inside and outside the EBU. Brexit will thus reinforce the institutional power shift towards EBU countries (Howarth and Quaglia, 2017, Interviews A 1 and A 2).

Informal and International Co-operation

Overall, both Swiss and UK influence on EU financial market regulation will at most be indirect through informal, extra-EU modes of co-operation and/or international governance. The UK–EU MoU should create a joint financial regulatory forum (JFRF) which would facilitate voluntary co-operation between the EU and UK, similar to an EU mechanism established with Canada (Hall and Heneghen, 2021; Shalchi, 2021). Due to the informal nature of the JFRF, as well as of the MoU, they can be situated outside the formal JIF. Both the MoU and the JFRF aim to facilitate the implementation of equivalence.

While equivalence might appear as an entirely technical decision about regulatory detail, in practice it is a process driven by economic and political motives (Howarth and Quaglia, 2017, p. 162; Interview C 4). The 2019 decision of the European Commission to deprive the Swiss stock exchange of equivalence provides an insightful precedent for equivalence decisions being politically motivated. On the EU side, the decision was not only motivated by considerations with respect to EU–Swiss relations being deadlocked,

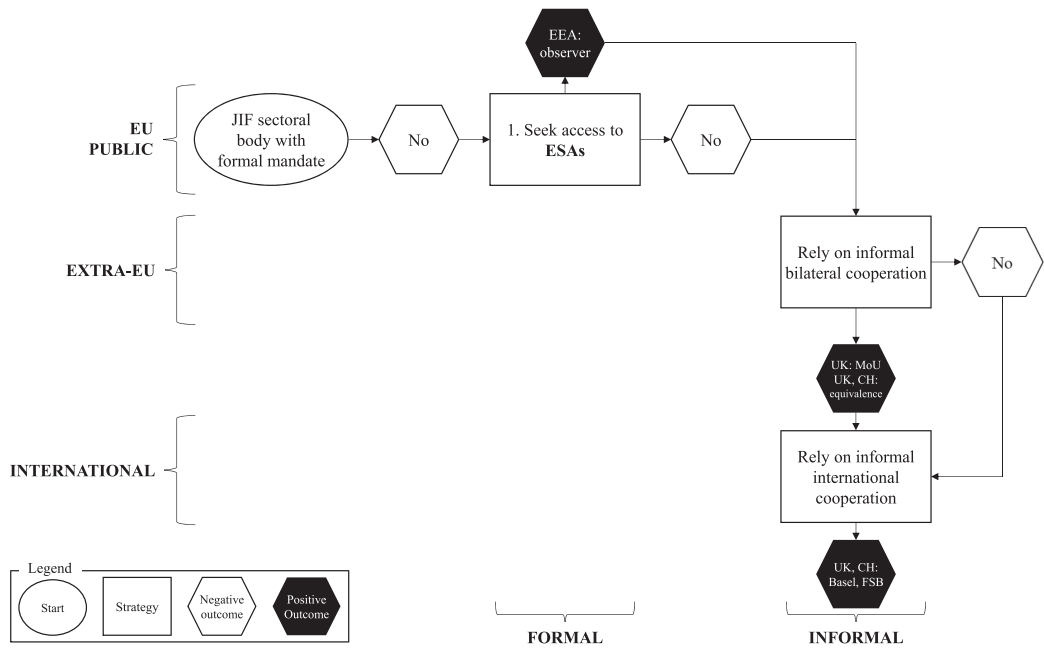
but probably also by ongoing negotiations on Brexit (Mooney, 2019). The decision also triggered issue linkage by the Swiss who then withheld the cohesion payment to the EU budget. Similarly, while it could be argued that due to its previous EU membership the existing UK framework is compliant with, and hence equivalent to, the EU Single Rulebook (Interview C 4), the approach taken is a different one. At the time of writing, it is not expected that the European Commission will grant equivalence to the UK soon. A Commission decision would be conditional on the establishment of the MoU and its regulatory committee (McGuinness, 2021). The EU is motivated by its desire both to move London-based clearing trading to EU locations, and to have more certainty about the extent to which the UK seeks to diverge from the EU's regulatory framework (Swinburne, 2020). As the Commissioner in charge puts it, the EU's approach should not be misperceived as a strategy to 'steal business away from London but rather to build our own infrastructures' (McGuinness, 2021). Moreover, a lack of regulatory alignment is indeed a likely scenario given UK–EU divergence with regard to institutional architectures, calibration of capital requirements and stress test assumptions (Haselmann and Tröger, 2021).

Overall, equivalence has many drawbacks such as the risk of unilateral withdrawal, inconsistency, a lack of incentives for deep co-operation and a situation of regulatory uncertainty. Because of the constraints in the EU arena and the fragile nature of bilateral relations, international co-operation is an attractive alternative arena for both Switzerland and the UK to exert influence. The most important international bodies are the Financial Stability Board (FSB) and the Basel Committee (see Hardacre, 2012, pp. 462–5). In 2009, the FSB succeeded the Financial Stability Forum, which the G7 created in 1999. The European Commission and a number of EU Member States are FSB members, as are Switzerland and the UK. The Basel Committee, created in 1974, is an international standard-setting body which operates as an informal forum (Kerwer, 2005, p. 619). Participation is not based on any type of formal mandate, and it produces non-binding rules (Christiansen, 2012, p. 221). The Committee formulates supervisory standards and guidelines and issues statements of best practice. Even though the agreements achieved by both the FSB and the Basel Committee have the status of international soft law, they have often been incorporated into binding EU legislation. Having an influential role in the international arena thus ultimately means contributing to shaping the EU regulatory framework.

National authorities from both the UK and Switzerland, being important financial centres with long-standing traditions of financial regulation and supervision, are influential players in the international arena (Hardacre, 2012; Interviews A 1, C 4). Compared to the status quo prior to Brexit, the UK's exclusion from the ESAs will necessarily weaken its international presence in relative terms. It is widely argued that EU sectoral bodies have become ever more influential in international financial governance in recent years (Moloney, 2016).

Figure 3 visualizes the access options for the financial sector: with no formal access to the EU regulatory arena, Switzerland and the UK are left with the options of equivalence procedures in their bilateral relations with the EU, and international co-operation as an alternative arena to exert their influence. Moreover, UK actors may be able to engage in informal co-operation through the bespoke regulatory forum as part of the MoU.

Figure 3: Third Country Access to Financial Market Governance



Source: Author's own analysis and presentation. [Colour figure can be viewed at wileyonlinelibrary.com]

Conclusions

This contribution has examined how informal and private governance has helped to address a continued economic and technical need for sectoral co-operation in a context of domestic politicization and (external) differentiated disintegration. In doing so, it has provided an original addition to the rich literature on EU bilateral relations. Starting from the observation that JIFs do not cover all relevant policy areas and leave regulatory gaps in sectoral bilateral co-operation, the article developed a framework for analysis of third countries' access to EU sectoral governance. In doing so, it incorporated the generally under-researched roles of informal and private governance. It also considered the role of rules such as equivalence, and soft law instruments such as MoUs for areas where no institutionalized forms of sectoral co-operation exist. It is argued that alongside such rules, informal co-operation and the involvement of private actors constitute governance devices to address persisting or newly emerging regulatory gaps. These are frequently situated outside the EU's highly legalistic formal structures. In addition, arrangements at regional or international level constitute alternative venues for co-operation.

With regard to the two research questions posed initially, notable differences between sectors can be observed, while patterns of (future) bilateral co-operation with Switzerland and the UK are expected to resemble each other. The key difference in the sectors considered is that while EU governance of electricity markets offers third countries several access options through informal co-operation amongst regulators and private sectoral

bodies, the more formalized institutional structure in EU financial market governance does not. Informal co-operation of national energy regulators continues to exist alongside formalized co-operation inside the EU-level energy agency. In financial governance, by contrast, we do not see co-existing formal and informal structures. Moreover, the EU regulatory framework on electricity has mandated a private network with a role in the rule-making process, which is not the case with financial regulation. In the absence of access to EU sectoral bodies, co-operation in the financial sector relies on the equivalence procedure and informal co-operation either at the bilateral level – through MoUs and informal fora – or at the international level. Energy governance, by contrast, is complemented by co-operation at regional level, which in the EU tends to become increasingly formalized.

The EU's offer in terms of sectoral bilateral co-operation is expected to look very similar for the UK and Switzerland in the near future. The EU's electricity governance arrangements exclude Switzerland from access to the EU energy agency, yet the Swiss were involved in informal co-operation of regulators and infrastructure operators. While similar access may be granted to the UK, its peripheral position in the internal electricity market may well limit its *de facto* influence. Moreover, one could see that modes of informal co-operation become more constrained for third countries in the future, as a direct consequence of Brexit and the failure of the Swiss and European partners to agree on a framework agreement. In financial regulation, UK- and Swiss-based regulators will have to rely on mechanisms of international co-operation to make their voices heard, given that the ongoing institutionalization internal to the EU, both in the context of the EU-wide system of financial supervision and the Eurozone's Banking Union, will be strengthened. The bilateral relations of both countries with the EU will mainly be governed by equivalence, something that involves cumbersome processes of tailor-made decisions and a significant degree of regulatory uncertainty.

Both Brexit and the failed negotiations on a framework agreement with the Swiss could have repercussions for other third countries where formalized requirements for EU sectoral bodies, public and private, could become more stringent and less open to accommodating informal modes of co-operation that in the past were used to facilitate external participation. The general takeaway is that politicization and (external) disintegration will have wider repercussions for the EU's external relations with third countries, putting ever more emphasis on formal and rule-based approaches – which, in turn, heightens the need for informal modes of co-operation.

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Supporting Information

Additional supporting information may be found online in the Supporting Information section at the end of the article.

- S1:** Inventory of Expert Interviews.
- S2:** Figure Electricity Flows by Country.
- S3:** Figure Exports of Financial and Insurance Services.
- S4:** Figure UK Cross Border Electricity Interconnectors.
- S5:** Figure UK Imports and Exports of Electricity.