

The Swiss Way: 120 agreements but no Perspective?

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A. Introduction

After the negative vote on December 6th to the question whether Switzerland should join the European Economic Area (EEA), the relationship between Switzerland and the European Union was redefined and is based on a new approach which is often referred to as the “bilateral way”. The idea was (and still is) that it is a necessity for Switzerland to develop closer ties with the internal market; furthermore, a certain number of questions was integrated in the approach because the European Union was (and still is) interested in an international agreement.

So, two packages of “Bilateral Agreements” were concluded (in 1999 and in 2004) which cover various areas and which contain generally mechanism which integrate EU law into the agreements in order to ensure compatibility between the legal situation in the European Union and in the relationship with Switzerland.¹

The first package (1999) comprises seven agreements regarding the following domains:²

¹ See in more detail to the Agreements *Astrid Epiney, Beate Metz, Benedikt Pirker. Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz. Ein Beitrag zur rechtlichen Tragweite der „Bilateralen Abkommen“*, Zürich, 2012, 95 et seq.; see for an overview *Benedikt Pirker/Astrid Epiney, The Integration of Switzerland into the Framework of EU Law by Means of the „bilateral Agreements“*, in: Peter-Christian Müller-Graff/Ola Mestad (eds.), *The Rising Complexity of European Law*, Berlin, 2014, 39 (40 et seq.).

² See for the text of the agreements OJ 1999 L 114, 1 et seq.

- mutual recognition in relation to conformity assessment (technical barriers to trade);
- trade in agricultural products;
- scientific and technological cooperation (research);
- public procurement;
- air transport;
- land transport;
- free movement of persons.

The second package (2004) contains agreements on the following topics:³

- processed agricultural products;⁴
- participation of Switzerland I the European Environmental Agency and the European Environment Information and Observation Network;⁵
- statistics;⁶
- media;⁷
- youth and professional education,
- fraud combate;⁸
- taxation of savings income;⁹
- Schengen and Dublin;¹⁰
- pensions.

Over and above these agreements, a lot of further more or less important agreements between the European Union (and sometimes also its Member States) and Switzerland exist, some of them concluded before the mentioned bilateral agreements, some of them concluded after their conclusion. So, e.g., the Free Trade Agreement from 1972 is still very important, and in 2009 a new agreement on customs security measures¹¹ entered into force. All in all, about 120 agreements exist on various topics, and there are probably very few persons who really know in detail all these agreements.

However, there is no doubt that the mentioned bilateral agreements are of particular importance. But it is precisely this bilateral way which seems

³ See for the text of the agreements BBl 2004 5965 et seq.

⁴ OJ 2005 L 23, 19 ff.

⁵ OJ 2006 L 90, 36 ff.

⁶ OJ 2006 L 90, 2 ff.

⁷ OJ 2007 L 303, 11 ff.

⁸ OJ 2009 L 46, 8 ff.

⁹ OJ 2004 L 385, 30 ff.

¹⁰ OJ 2008 L 53, 5 ff., 50 ff.

¹¹ OJ 2009 L 199, 24 ff.

to run into growing political difficulties; furthermore, different constitutional initiatives which were adopted by the Swiss cantons and the Swiss people are at least in a potential conflict with some of these agreements which does not facilitate the relationship between Switzerland and the European Union.

In this context, the present contribution aims first of all to analyse the mechanism of “integration” of EU law into the most important of the bilateral agreements (B.) and the principles of interpretation of these agreements (C.) before turning – in an excursus – to the relationship between national law and international Law (D.) and concluding with some remarks on the degree of intergration and the perspectives (E.).

B. “Integration Mechanisms” in the framework of the bilateral agreements

As mentioned above, the bilateral agreements cover a very large range of very different topics. However, the most important among these agreements (so the agreement on free movement of persons, the agreements on air and land transport or the agreements on the Schengen and Dublin acquis) aim at a “partial integration” of Switzerland in the EU acquis. In other words, they should guarantee that the relevant and defined EU acquis applies also to Switzerland, in a parallel way as to a Member State. In order to reach this goal, different techniques have been defined which should ensure the “integration” of the relevant EU law in the bilateral agreements. So, the bilateral agreements are on the one side “normal” agreements of international law; on the other side, they are “integration agreements” since their aim is precisely to ensure the integration of Switzerland in a part of the EU acquis.

The present section deals first with the integration of the EU acquis at the moment of conclusion of the agreements (I.); secondly, the focus is on the mechanisms of developing the agreements after a revision of EU law (II.).¹²

¹² The following chapter is partly based on research already done in another context, see in particular *Astrid Epiney*, Zur institutionellen Struktur der Bilateralen Abkommen – Bestandsaufnahme, Perspektiven und Bewertung, in: FS Marc Amstutz, Zürich, 2011, 35 ff.; *Astrid Epiney*, in: *Avenir Suisse*, XX; see also in more detail *Epiney, Metz, Pirker*, Parallelität der Rechtsentwicklung (note XX), 182 ff., each contribution with further references.

I. Integration of the EU acquis at the moment of conclusion

The bilateral agreements operate mainly with two different mechanisms when they intend to “include” or “integrate” parts of EU law in the framework of the agreements:

- First, many articles of the agreements just take over the mere wording of the relevant articles in EU law, sometimes in adapting the text (e.g. by referring to contracting parties instead of Member States). So, the Agreement on Public Procurement provides in its Article 6 a principle of non-discrimination on grounds of nationality; this principle is also taken over in Article 2 of the Agreement on the Free Movement of Persons. This agreement transposes also in its annex I number of free movement rights from the relevant EU primary and secondary law. The question in this context may be sometimes in which extent the articles of the bilateral agreements really aim to integrate EU law and in whether they are to be interpreted in the same way as EU law.¹³
- Many agreements also refer to EU secondary acts as such, in general in their annexes. So, these annexes contain lists of secondary acts and it is required that the contracting parties apply either EU secondary law or equivalent norms. In this way, Switzerland is in the end bound to apply EU secondary law or to create at least an equivalent legal framework. Examples in this context are the annexes II and II of the Agreement on the Free Movement of Persons (containing lists of secondary acts on mutual recognition of diplomas and social security) or the annexes of the Schengen- and Dublin association, containing lists of the relevant EU acquis.

II. Development of the agreements

The integration of EU law in the bilateral agreements is in general based on the state of EU law at the moment of the signature of the treaty. In this respect, the bilateral agreements are static agreements and follow a “traditional” approach of international law. However, EU law is subject to constant change. So, the aim of the “integration agreements” to guarantee a parallelism between the legal situation in the European Union and in the relationship with Switzerland implies, in the fields covered by the agreements,

¹³ See as to this question below C.

the necessity to integrate new legal developments on the EU level in the framework of the agreements. Three mechanisms can be distinguished in this respect:

- First of all, the agreement may be revised. Such a revision is of course perfectly possible under international law; however, it involves a complicated procedure requiring new negotiations, signature and ratification of the contracting parties, requirements which are especially important in respect of the treaties also concluded by the Member States (mixed agreements). So, it is not really surprising that this mechanism is not very practicable and the contracting parties never used it until now in the context of the bilateral agreements.
- Second, agreements which contain in the annexes lists of EU secondary acts provide in general that the joint committee (composed of representatives of the contracting parties) can take the binding decision to modify the annexes which implies the possibility to take over new legal developments in the EU in the framework of the agreement by adapting the lists in the annexes. Since the joint committees decide by unanimity, both contracting parties have to agree on such an integration of new legal developments.
- Finally, some agreements, especially those concerning Schengen and Dublin, provide for a “quasi-obligation” of Switzerland to take over new legal developments in the fields covered by the agreements. Switzerland is free to apply its normal legislative procedure for this purpose, but the sanction for non-adaptation of future Schengen or Dublin acquis consists of, in principle the termination of the whole agreement.

In the latter two situations, the mentioned mechanisms can in principle provide for a legal development of the agreements which “follows” the relevant amendments of EU law. However, these mechanisms do in general not apply to such parts of the agreements which replicate the wording of EU law in the text of the agreements. So, as far as the agreements apply this technique, the legal development of the agreements following amendments of EU law can or could only be realised by modifying the agreements by the “normal” procedures of international law what is – as mentioned – not very realistic. The consequence of this situation is that there are – especially as the first package of bilateral agreements is concerned – important parts of the agreements which are based on the legal situation in the EU at the time of signature while EU law has been amended in the meantime. So, the parallelism which should be attained is only partly realised. As an (im-

portant) example, one may refer to annex I of the Agreement on Free Movement of Persons: This annex contains the different rights of free movement and has taken over in large parts the wording of the relevant directives (but also of some articles of the Treaties) which have been abolished in the meantime and replaced by Directive 2004/38. The joint committee cannot decide to integrate this Directive into the Agreement since the reference to EU law is not made by listing the relevant secondary acts but by replicating the wording of EU law, so that the joint committee has not competence to modify annex I of the Agreement.

C. The interpretation of the Bilateral Agreements

The Bilateral agreements are international treaties in the sense of the Vienna Convention on the Law of Treaties (this convention applying directly only to treaties between States but containing in large parts, so as the interpretation of treaties is concerned, also customary international law). So, their interpretation has to follow the relevant principles of international law, and the specific rules of interpretation in EU law cannot – as such – applied to the bilateral agreements.¹⁴ However, an application of principles of interpretation of international law may conduct to an interpretation of the parts of bilateral agreements which reproduce EU law in the same way as those articles or secondary acts are interpreted in the framework of EU law, in taking account the rulings of the ECJ (“parallel interpretation”): Article 31 of the Vienna Convention sets out a number of elements to be used while interpreting international treaties:

- First, referring to the ordinary meaning, the use of the same wording as in EU law and / or the reference to EU secondary legislation constitutes an important (but not a sufficient) argument in favour of such a parallel interpretation.
- Second, the context of the bilateral agreements is pleading for such a parallel interpretation since the agreements form a sort of network providing for a real but in some sort limited “integration” of Switzerland in the EU law acquis.
- Third – and this may be the decisive argument – most of the bilateral agreements (and generally those which take over EU law) have as a fundamental objective a partial integration of Switzerland into the

¹⁴ See as to the following part, already, in detail, *Epiney, Metz, Pirker*, *Parallelität der Rechtsentwicklung* (note XX), 191 ff.

relevant EU law *acquis*. This integration, however, can only be realised in an effective manner if the relevant parts of the agreements are interpreted in the same way as in EU law, integrating the rulings of the ECJ. Some agreements (e.g. art. 16 par. 2 of the Agreement on Free Movement of Persons) provide thus explicitly for an obligation of Switzerland to interpret articles of the agreement referring to EU law in the same way as the rulings of the ECJ. Even if this obligation is limited to rulings before the signature of the agreements, this does not mean that later rulings are irrelevant since the very objective of the agreement (parallel legal situation) pleads also in favour of the relevance of latter rulings.

As a result, one may formulate the principle that the bilateral agreements have to be interpreted parallel to the relevant articles / secondary legislation in EU law if EU law has been integrated in the agreement and if the aim of the relevant parts of the agreement is precisely to guarantee, *vis-à-vis* Switzerland, a parallel legal situation as in the framework of the European Union, in other words if the objective is to extend the relevant EU law *acquis* to Switzerland in order to provide for a participation of Switzerland at the defined / relevant part of the EU *acquis*. This principle of parallel interpretation is – in the light of the overall objective of parallelism – not limited to a static situation at the time of signature but has to be understood in a dynamic way, only this approach being able to achieve the aim of parallelism.

However, there are some difficulties in the concrete application of the principle. One may mention mainly three aspects in this context:

- First, the mentioned principle only sets a general framework; it does not replace a detailed analysis of the concrete legal question. So, finally, a case by case examination is necessary, and in this context, the question if and to what extent a concrete article contained in the bilateral agreements really takes over EU law will be very often decisive and the answer to this question is not always very clear in advance.
- Second, it has to be analysed in respect of the rulings of the ECJ which rulings or which parts of the rulings are really relevant for the interpretation of the bilateral agreements. So, e.g., rulings based on the concept of European citizenship are in principle not to be followed since this concept has not been overtaken in the Agreement on Free Movement of Persons. However, since some rights conferred to European citizens figure in the same way in the Agreement, those aspects of the rulings have in principle also to be taken into account in the interpretation of the relevant articles of the Agreement.

- Finally, one has to remember the lack of parallelism in some fields covered by the bilateral agreements, since amendments of EU law have not been integrated into the bilateral agreements. This situation may raise the question which parts of the “old” EU law have been integrated in the amended EU legislation so that e.g. also the relevant rulings of the ECJ can still be of some importance in the framework of the agreements.

Despite all these questions and difficulties, one has to admit that all in all the agreements work rather well. In particular, it seems that the ECJ and the Federal Supreme Court in Switzerland (“Bundesgericht”) apply the principles developed before, even if the accents are sometimes different. The practice of the two courts – which concerns almost exclusively the Agreement on Free Movement of persons – has also known some developments and has become clearer.

As the ECJ is concerned, it certainly pointed out in its first rulings on the Agreement on the Free Movement of Persons the specificities of the relationship EU – Switzerland, in particular on the Swiss decision not to participate at the EEA and to pursue another way and a lower degree of integration, without, however, really deal with the aboved mentioned questions.¹⁵ However, the latest case law sets the accents differently and argues finally in favour for a principle of parallel interpretation, also pointing out the question if concepts or notions of EU law are really integrated in the Agreement. So, the Court argued that Switzerland is linked to the EU by a multitude of agreements covering various areas and containing rights and obligations corresponding to those contained in EU law. So, the overall objective of those agreements is to intensify the economic relations between the contracting parties. On this basis, the Court argued – in relation to the relevant articles in the Agreement – in a parallel way as it does in the framework of EU law, e.g. as the inclusion of material discrimination in the concept of discrimination, the interpretation of “public order” as a derogation of the guaranteed freedoms, the relevance of the principle of free movement in relation to tax law or provisions in the field of social security are concerned,

¹⁵ Cf. in particular CJEU, case C-351/08 (Grimme), ECR 2009, I-10777; CJEU, Case C-541/08 (Fokus Invest), ECR 2010, I-1025; CJEU, cas C-70/09 (Hengartner), ECR 2010, I-7233.

this by referring also to its own rulings after the signature of the Agreement.¹⁶ In one recent case, the ECJ even points out that the preamble and article 16 par. 2 of the Agreement lead to the conclusion that a parallel legal situation in the EU on the one side and in relation to Switzerland on the other side is intended by the Agreement, so that the rulings of the ECJ are in principle relevant. It applies these principles to Article 2 of the Agreement (principle of non-discrimination).¹⁷

The Federal Supreme Court of Switzerland has already on many occasions had to interpret and to apply the Agreement on the Free Movement of Persons. It developed the principle that central concepts, notions and provisions of the Agreement were taken over from EU law and ought to be interpreted and applied in conformity with the case law of the CJEU, including in principle the case law after the signature of the Agreement.¹⁸ The Supreme Court has even formulated explicitly these principles, mainly referring to the aims of the Agreement, and it has recently confirmed its approach despite some new provisions in the Federal Constitution being potentially in conflict with the Agreement on the Free Movement of Persons.¹⁹ So, one can conclude that the case law of the Supreme Court applies in a very constant manner the principle of parallel interpretation, an approach which is also generally approved by doctrine.²⁰

D. Relationship between Bilateral Agreements and national law

- problem: initiatives, examples

¹⁶ Cf. CJEU, Case C-506/10 (Graf), ECLI:EU:C:2011; CJEU, cas C-257/10 (Bergström), ECLI:EU:C:2011:XX; CJEU, case C-425/11 (Ettwein), ECLI:EU:C:2013:XX; CJEU, case C-250/13 (Wagener), ECLI:EU:C:2014:278. See also the general remarks on the interpretation of the Agreement on Free Movement of Persons in CJEU, case C-656/11 (UK/Council), ECLI:EU:C:2014:97.

¹⁷ CJEU, case C-241/14 (Bukovansky), ECLI:EU:C:2015:766.

¹⁸ See BGE 136 II 5.

¹⁹ 2C_716/2014, 26th of november 2015. See on the relationship between Bilateral Agreements and national law below D.

²⁰ See e.g. *Benedikt Pirker*, Zu den für die Auslegung der Bilateralen Abkommen massgeblichen Grundsätzen – Gedanken zu BGE 140 II 112 (Gerichtsdolmetscher), ZBl. 2015, 295 (296 ff.); *Francesco Maiani*, La „saga Metock“, ou des inconvénients du pragmatisme helvétique dans la gestion des rapports entre droit européen, droit bilatéral et droit interne, ZSR 2011 I, 27 ff.; *Matthias Oesch*, Der Einfluss des EU-Rechts auf die Schweiz – von Gerichtsdolmetschern, Gerichtsgutachten und Notaren, SJZ 2016, 53 ff.; in detail also *Epiney/Metz/Pirker*, Parallelität der Rechtsentwicklung (note), 169 ff.

- principle of monism
- art. 5 IV Cst.: not clear
- case law of the Federal Supreme Court: relationship International Treaties
 - Federal acts:
 - Primacy of International Law
 - Exception: “Schubert”
 - Exception of the exception: international treaties concerning human rights and agreement on free movement of persons (TF 2C_716/2014, 25.11.2015)
 - Relationship International Treaties – Cst.: art. 190, confirmed by TF 2C_716/2014, 25.11.2015

E. Conclusion

- Difficulties in interpretation
- Slight differences in the rulings of the CJEU and the Swiss Supreme Court
- Institutional problems: difficulties with the EU
 - Common Court?
 - EFTA Court?
 - “Two pillars”?
 - CJEU (proposal of the Federal Council)?
- but actually: art. 12a Cst.: what way out?