How does European Union Law Influence Swiss Law and Swiss Policies ?

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I. Introduction

Switzerland as a non-member State of the European Union is not bound by European Union Law as such. Fact is, however, that European Union and especially European Community law and policies have a big impact on large areas of Swiss law and policies, which is not surprising considering the geographical, economic and political situation of the Swiss Confederation in the 'middle' of Europe and the European Union. The different ways in which Swiss law and policies are influenced by EU and EC law and policies will be analysed under II., with a special attention to the area of environmental law. The main focus of this contribution is an analysis of selected aspects of the so called 'bilateral agreements' between Switzerland and the European Community and / or the European Union and / or its Member States (III.), these agreements being at present the most important way of influence of European Union law on Swiss law. A short conclusion (IV.) tries to compare – from a legal point of view – some elements of the 'bilateral way' to the status of a member of the European Union.

II. Forms of Europeanization of Swiss law – an overview

Swiss Law is influenced in various ways – whose legal effects are different – by European Community Law. One can cite mainly four different forms: 'inspiration' of Swiss law by EC law ('autonomous adaptation') (1.), international treaties (2.), comparative law methods (3.) and a sort of indirect harmonisation by the participation of Switzerland and of the EC at multilateral agreements (4.). These different methods of Europeanization of Swiss law are not necessarily exclusive but can overlap, so that for one legislative act two or more methods are used.

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1. 'Autonomous adaptation'

Since Switzerland and the European Union and its Member States have a very narrow relationship, especially as far as economic relations are concerned,[1] the Swiss legislator is very often inspired by Community legislation and approximates its domestic legislation to Community law, especially to EC directives, without, however, being obliged to do so. In this sense, the decision to 'copy' Community Law is an 'autonomous' decision, which is the reason for this technique often being referred to as 'autonomer Nachvollzug' or 'autonomous adaptation'.[2] The reasons for this voluntary approximation to Community Law are in most cases of an economic order: the aim is to thereby avoid economic difficulties resulting from different legislation in the European Union on the one hand and in Switzerland on the other hand. This inspiration of Swiss law by Community legislation has first been explicitly pointed out in a report of the Swiss government in 1988. The report insisted that the economic future of Switzerland depended largely on the degree to which one could assure a domestic legislation that was as 'eurocompatible' as possible. A domestic legislation in conformity with European Union law was deemed necessary at least in all areas of law that were of transnational character.[3] This is the background for the fact that each 'message' (a sort of preparatory document elaborated by the Swiss Government in the legislation process) contains a chapter examining the compatibility of the envisaged act with European Community Law and sometimes also with the national law of important Member States, especially the neighbouring States (Germany, France, Italy, Austria).

One can distinguish two main manners of inspiration of the Swiss legislator by European Community Law:

- First, one can more or less completely reproduce certain Community acts in Swiss law, and the aim of the legislative act is precisely the adaptation of Swiss law to certain Community acts. This very far reaching way of 'autonomous adaptation' – which is the

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1 Cf. to this issue Rolf Weder, Swiss international economic relations: assessing a small and open economy, in: Clive H. Church (ed.), Switzerland and the European Union, 2007, 99 et seq.; Clive H. Church/Christina Severin/Bettina Hurni, Sectors, structures and suspicions: financial and other aspects of Swiss economic relations with the EU, in: Clive H. Church (ed.), Switzerland and the European Union, 2007, 126 et seq.

2 Cf. to this technique in detail Matthias Amgwerd, Autonomer Nachvollzug von EU-Recht durch die Schweiz, unter spezieller Berücksichtigung des Kartellrechts, Basel 1998; Bruno Spinner/Daniel Maritz, EG-Kompatibilität des schweizerischen Wirtschaftsrechts : Vom autonomen zum systematischen Nachvollzug, FS Roger Zäch, 1999, 127 et seq.; Astrid Epiney/Annekathrin Meier/Robert Mosters, Die Kantone zwischen EU-Beitritt und ‚Bilateralem Weg'. Bewertung ausgewählter europapolitischer Optionen aus rechtlicher Sicht, in: Konferenz der Kantonsregierungen (ed.), Zwischen EU-Beitritt und bilateralem Weg: Überlegungen und Reformbedarf aus kantonaler Sicht. Expertenberichte im Auftrag der Arbeitsgruppe ‚Europa – Reformen der Kantone', Zurich 2006, 77 (85 et seq.).

3 Bericht des Bundesrates über die Stellung der Schweiz im europäischen Integrationsprozess vom 24.8.1988, BBl 1988 III 249 (380).

focus of this paragraph – takes mainly place in areas in which transnational economic relations are very important. The Swiss legislation on technical barriers to trade[4] is e.g. essentially identical with the corresponding Community acts. In the field of competition law, the Swiss system is influenced to a high degree by the Community system[5] and the case-law of the Swiss competition commission very often refers to decisions of the European Commission or the European Court of Justice.[6] But also in other areas, Community acts are reproduced in Swiss law. Some directives in the field of European Private Law have, for instance, been 'incorporated' *de facto* in Swiss law.[7] All in all, one must recognise that the 'eurocompatibility' of Swiss legislation is the rule and the adoption of a legislative act which is not in conformity with European Community Law is the exception for which good reasons must be given.[8]

- Secondly, a legislative act can only be inspired in a very punctual way by Community law. In this case, we are rather in the area of the application of a method of comparative law.[9]

The question if there is a real 'autonomous adaptation' or only a punctual inspiration from European Community Law has to be answered by interpreting the text and the history of the legislative act in question. In the first case, difficult questions of interpretation have to be answered, so e.g. the question if the act has to be interpreted in conformity with European Community Law and the rulings of the Court of Justice, and – if the answer to this question is in the affirmative – if also further legislative developments or further developments in case-law have to be taken into account.[10]

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4 'Bundesgesetz über technische Handelshemmnisse', SR 946.51. In the field of environmental law, for instance the preparatory „message" of the Swiss government to the legislative act concerning territorial planning ('Raumplanungsgesetz') refers to the Directive 96/61 respectively to the proposition of this directive, cf. BBl. 1994 III 1075.`Furthermore, in the area of legislation on genetically modified organism, the Swiss legislation refers in very large parts to the correspondent directives. Cf. to this issue Zu den Implikationen des gemeinschaftlichen Umweltrechts in der Schweiz, EurUP 2004, 252 (257). An 'autonomous application' of the principle Cassis de Dijon which consists in addmitting (in principle) in Switzerland all products which can be comercialized somewhere in the European Union (cf. to this issue in detail Andreas Kellerhals/Tobias Baumgartner, Das « Cassis de Dijon »-Prinzip und die Schweiz, Schweizerische Juristenzeitung 2006, 321 et seq.), is a sort of autonomous adaptation of Swiss legislation since by doing so, European legislation (an dto some extent also national legislation of Member States) becomes decisive fort he question if product can be commercialised in Switzerland.

5 'Fusionsgesetz', SR 221.301.

6 Cf. to this issue the yearly reports in the Annuaire Suisse de droit européen, compare the last report Patrick L. Krauskopf/Sabrina Carron, Rechtsentwicklungen im Europäischen Recht und die Schweiz: Wettbewerbsrecht 2007, Annuaire Suisse de droit européen 2007/2008, 2008, 121 et seq.

7 Cf. to this issue Franz Werro/Thomas Probst, La jurisprudence de la CJCE en matière de droit privé et son influence sur la pratique du droit Suisse, Annuaire Suisse de droit européen 2005/2006, 2006, 453 et seq.; Franz Werro, Un reflet de l'actualité en droit privé européen, Annuaire Suisse de droit européen 2007/2008, 2008, 93 et seq.

8 Cf. Spinner/Maritz, FS Roger Zäch (note 2), 127 (137).

9 Cf. II.3.

10 Cf. to this issue Marc Amstutz, Interpretation multiplex. Zur Europäisierung des schweizerischen Privatrechts im Spiegel von BGE 129 III 335, FS Ernst A. Kramer, 2004, 67 et seq.

Over and above this, such an 'autonomous adaptation' raises a lot of questions as far as the really autonomous character of this technique is concerned: in situations in which it is deemed necessary to adapt Swiss legislation on Community standards, Switzerland reproduces Community acts in whose adoption it had not been involved.[11] This situation is – from a political point of view – only defendable if this technique applies to rather technical matters and / or is restricted to a narrow field of application.[12] In this context, one can also mention that in many areas of rather technical character, Swiss legislation contains delegations which allow the government to adopt itself legislative acts which reproduce developments in Community Law.[13]

2. International treaties

International agreements can contain obligations for Switzerland to assure equivalent legislation in respect of a part of the *acquis communautaire*. Switzerland has up to now concluded over a hundred treaties (of more or less importance) with the European Union. The most important ones are – beside the Agreement on Free Trade from 1972 – the so-called Bilateral Agreements from 1999 and from 2004[14]. (These agreements – insofar as they reproduce parts of the *acquis communautaire* – will be discussed in further detail below.[15]) For the purpose of our typology of the different ways European law influences Swiss law, an international agreement is – from a Swiss point of view – necessary in all situations in which the autonomous way described above[16] does not lead to the desired results. This is the case mainly in the following situations:

- Switzerland wishes to participate in a Community agency. The participation of Switzerland in the European Environmental Agency was e.g. only possible after the

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11 Cf. to this issue Karine Siegwart, Das Europa-Fenster, URP/DEP 2004, 266; Oliver Diggelmann, Der liberale Verfassungsstaat und die Internationalisierung der Politik. Veränderungen von Staat und Demokratie in der Schweiz, 2005, 114 et seq.

12 Cf. also *infra* IV.

13 Cf. to his issue Epiney/Nathalie, EurUP 2004 (note 4), 252 (257-258).

14 Cf. the text of these agreements in OJ 2002 L 114, 1 et seq. = BBl. 1999. 6489 et seq.; BBl. 2004, 5965 et seq. Cf. to these agreements Daniel Felder/Christine Kaddous (eds.), Accords bilatéraux Suisse – UE (Commentaires) / Bilaterale Abkommen Schweiz – EU (Erste Analysen), 2001; Christine Kaddous/Monique Jametti Greiner (eds.), Accords bilatéraux II Suisse – UE et autres Accords récents / Bilaterale Abkommen II Schweiz – EU und andere neue Abkommen, 2006; Thomas Cottier/Matthias Oesch (eds.), Die sektoriellen Abkommen Schweiz – EG, 2002; Daniel Thürer/Rolf H. Weber/Roger Zäch (eds.), Bilaterale Verträge Schweiz – EG – ein Handbuch, 2002; Daniel Thürer/Rolf H. Weber/Wolfgang Portmann/Andreas Kellerhals (eds.), Bilaterale Verträge I & II Schweiz – EU – ein Handbuch, 2007; Stephan Breitenmoser, Sectoral agreements between the EC and Switzerland: Contents and context, CMLRev 2003, 1137 et seq.; Christine Kaddous, The relations between the EU and Switzerland, in: Alan Dashwood/Marc Maresceau (eds.), Law and Practice of EU External Relations: Salient Features of a Changing Landscape, 2008, 227 (230 et seq.).

15 III.

16 II.1.

conclusion of a bilateral agreement (from 2004). The desire of Switzerland to participate in some of the Community Agencies in the area of Health Protection in the future will also have to be implemented by an agreement.

- If recognition of Swiss decisions by the European Community or its Member States is required, an international agreement is necessary to establish such an obligation of recognition. The participation at a Community system like the emission trading scheme e.g. needs to be settled in an international treaty. Otherwise the recognition of Swiss emission rights in the European Union would not be assured. But also in cases where Community Law states an obligation for Member States to introduce some sort of a administrative control system, for example before a product will be admitted to the common market, only an agreement can assure that Swiss controls are recognised as equivalent to the ones in EU member states.
- Finally, if one wants to guarantee a real right to market access, an international agreement is necessary. There are such agreements e.g. in the areas of free movement of persons or of air transport.[17]

In all these cases, a third country like Switzerland will never be allowed to participate in the decision-making process at EU-level; there are good reasons to support the opinion that such a participation would not even be compatible with the EC Treaty, even if it would only be a participation in the decision-making of an agency (at least if the agency has in some sense governmental authority).[18]

3. Comparative law methods

Swiss legislation and Swiss decisions are very often influenced by legal developments in other countries and in the European Union, even when there is no intention to reproduce specific legal developments. In this sense, Community law can rather be considered as a source of inspiration. The legislator examines – before adopting a legislative act – the corresponding legal developments in the European Union (and very often in some other countries, especially important Member States of the EU) and is – in one way or another – inspired by some aspects of this legislation.

But also the Federal Court (‘Bundesgericht’) refers sometimes to Community law in the interpretation of the European Court of Justice when interpreting Swiss law, although the Court does not reproduce Community law. This method is not only applied to find solutions in economic areas of law but more generally in cases in which the legal problems in Swiss

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17 Cf. III.

18 ECJ, opinion 1/91 (EEA), 1991, I-6079; ECJ, opinion 2/92 (EEA), 1992, I-2821; cf. to this issue Astrid Epiney/Silvana Schnider, Die Europäische Umweltagentur: Eine neue „Einrichtung“ der EG und ihre Bedeutung für die Schweiz, Umweltrecht in der Praxis (URP/DEP) 1995, 39 et seq.

and Community law seem to be similar. The Federal Court has for instance applied the principle of equal treatment between men and women as far as affirmative action is concerned in the same way as the European Court of Justice and referred explicitly to a ruling of the ECJ.[19]

As far as the courts are concerned, these references are sometimes not without problems from a methodical point of view: the Federal Court seems to apply them in a rather pragmatic way without really analyzing on what conditions and in which situations a solution applied by the European Court of Justice (or another court in the Member States) should be applied with regard to a problem in Swiss law. In our view, such a reference is only possible in cases in which it is established that the context, the systematic and the aim of the legal provision to be applied is really the 'same' in Swiss and in European law. This approach implies a real analysis of the legal context in Swiss and in Community Law which one usually searches for in vain in the case-law of the Federal Court. It is definitely not sufficient to refer to a ruling of the ECJ and continue with a remark that there is no reason not to apply the same principles.

4. 'Harmonisation' by multilateral international treaties

Finally, one has to remember that Switzerland and the European Community (and its Member States) are parties to a large number of multilateral international agreements. These treaties contain a certain number of obligations for the parties which have to be transposed in national (or supranational) law. If the European Community and Switzerland are parties of the same agreements, they therefore have the same obligations, and in this sense, international law contributes to 'harmonise' Swiss law with Community Law. One can find a lot of examples for such legal developments, especially in the area of environmental protection.[20]

III. The 'bilateral agreements'

1. Overview

After the rejection of the agreement on the European Economic Area (EEA) in the 1992 referendum, Switzerland has up to now concluded two 'packages' of bilateral and sectoral[21]

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19 ECJ, aff. C-450/93 (Kalanke), 1995, I-3051 and BGE 123 I 152; ECJ, aff. C-409/95 (Marschall) and BGE 125 I 21.

20 As an example, one can namely cite the Convention of Aarhus on environmental information, participation and access to justice (which Switzerland has not yet ratified) or the Convention on environmental impact assessment with its protocole of Kiev. Cf. in detail with some (more) examples and references Epiney/Schneider, EurUP 2004 (note 13), 252 (258 et seq.).

21 The notion of 'bilateral agreements' stands in contrast with the multilateral approach of these agreements. From a legal point of view, the expression is imprecise because the agreements are partially multilateral

agreements with the European Community and (in some cases) the European Union and the Member States. The aim of these agreements is to guarantee – since the EEA could not enter into force for Switzerland – the participation of Switzerland in some parts of the integration process taking place within the framework of the European Union. Some agreements also concern specific problems for which reciprocal obligations have been defined.

The so-called 'bilateral I' agreements entered into force in 2002. They include seven agreements in the fields of public procurement, technical barriers to trade, research, road and rail transport, air transport, agriculture and free movement of persons. From a legal and political point of view, the latter agreement is of special importance.[22] The seven agreements form a 'package' insofar as they are linked by a so-called 'guillotine clause': They could only enter into force collectively and the non-prolongation or cancellation of each single one would result into the concomitant cancellation of all other agreements. From a institutional point of view, however, each agreement is an autonomous agreement, relating to different matters and containing its own institutional provisions. No framework agreement exists.

Contrary to the EEA, these treaties cannot be qualified as 'integration agreements' since they are – from a merely formal point of view[23] – classic international treaties which are of a static and non-dynamic character so that they do not imply a real involvement in the ongoing integration process in the framework of the European Union. They are based on the principle of equivalence of legislation and standards and from an institutional point of view, they refer to Joint Committees consisting of representatives of each contracting party deciding by unanimity. These committees shall ensure the correct application of the agreements, settle differences between the parties and modify certain parts of the treaties. In principle, no provisions of Community law are taken over. However, as already mentioned before[24], large parts of the politically and legally important agreements (especially the agreements on transport and on free movement of persons), refer to Community law and aim insofar at the participation in the relevant sections of the *acquis communautaire*. This contrast – the bilateral agreements as classic international agreements on the one hand with a form of

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agreements (when the Member States are Parties as well). The term 'sectoral agreement' describes the legal position more precisely since it refers to the fact that each agreement treats a specific area. In this contribution, we will, however, use the term 'bilateral agreements' as it has become term most commonly used.

22 Cf. especially to this agreement Astrid Epiney, Das Abkommen über die Personenfreizügigkeit – Überblick und ausgewählte Aspekte, Jahrbuch für Migrationsrecht / Annuaire du droit de la migration 2004/2005, 2005, 45 et seq.; Sebastian Benesch, Das Freizügigkeitsabkommen zwischen der Schweiz und der Europäischen Gemeinschaft, 2007; Walter Kälin, Das bilaterale Abkommen der Schweiz mit der EG über die Freizügigkeit von Personen, ZAR 2002, 123 et seq.; Martin Nyffenegger, Grundzüge des Freizügigkeitsabkommens unter besonderer Berücksichtigung der Übergangsbestimmungen, in: Bernhard Ehrenzeller (Hrsg.), Aktuelle Fragen des schweizerischen Ausländerrechts, 2001, 79 et seq.; Steve Peers, The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis, European Journal of Migration and Law 2000, 127 et seq.; Edgar Imhof, Das bilaterale Abkommen über den freien Personenverkehr und die soziale Sicherheit, SZS/RSAS 2000, 22 et seq.

23 Cf. also the remarks under IV.

24 II.2.

'integration content' on the other hand – raises complex questions of interpretation which will be dealt with below.[25]

Soon after concluding the 'bilateral I' agreements, Switzerland and the European Union entered into negotiations for the 'bilateral II'[26] agreements. These eight treaties deal with the 'left overs' from the 'bilateral I' agreements (processed agricultural products, statistics, environment, media and education, pensions and services; the latter subject has been abandoned during the negotiations) and with some new political concerns from both sides as well (taxation of savings, fight against fraud and Schengen/Dublin). The different 'bilateral II' agreements are not legally connected with each other (contrary to the bilateral I); however, they are (partially) linked from a political point of view. They were signed in October 2004 and have mostly entered into force, with the notable exception of the agreement on the fight against fraud.

In our context the agreement on cooperation in the fields of justice, police, asylum and migration (Schengen/Dublin) is of major interest. It envisages – even if it is also formulated as a classic international treaty – an integration of Switzerland into the corresponding parts of the *acquis communautaire*, including in principle the obligation to adopt also its further developments.[27]

It is envisaged to conclude further bilateral agreements in the future; at present, the areas of agriculture, health, Eurojust, Galileo, emission trading, chemical regulation and electricity are of special importance.[28] As far as the content of these future agreements are concerned, one can assume that they will as far as possible integrate existing Community Law, as this is already the case in large parts of the bilateral I and II. The question of the legal interpretation and implications will therefore remain of major importance in the future.

2. Different forms of recurring to the acquis communautaire and their legal implications

a) Preliminary remarks: the interpretation of the bilateral agreements

As already mentioned earlier,[29] the bilateral agreements reproduce, at least as far as important parts of some agreements are concerned, parts of the *acquis communautaire.* The question of the interpretation of those articles or parts of the agreements is therefore raised. The point of departure has to be that these agreements are international treaties which do not constitute special integration agreements so that the Vienna Convention on the Law of the Treaties has

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25 Cf. in detail to this issue III.2.

26 Text and 'Message' of the bilateral II Agreements in: BBl. 2004, 5965 et seq.

27 To a great extent the agreement is analogous to the association agreements with Norway and Island. Cf. Astrid Epiney, Schengen, Dublin und die Schweiz, AJP 2002, 300 (304 et seq.).

28 Cf. information at www.europa.admin.ch.

29 III.1.

to be applied by analogy (since the Convention does not apply directly to treaties concluded by international organisations but large parts of the Convention, including the articles on the interpretation of international treaties, have attained the status of international customary law).[30] According to articles 31-33 of the Convention, an international treaty has to be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in the light of its purpose and its objective. These principles – which cannot be analyzed in detail in this contribution – are as such rather abstract and general; in particular, the different methods referred to in art. 31 can be combined and assessed in different ways. These principles are thus somewhat flexible, and allow taking into consideration the particularities of each treaty (as, e.g., its contents, its objectives or its relationship with other treaties are concerned) that are decisive for its interpretation.

If an international treaty reproduces articles which are (also) incorporated in another international agreement, the Vienna Convention does not necessarily impose a parallel interpretation of the said provision. It must rather be analyzed if and to what extent such an interpretation may be coherent in application of the interpretation principles mentioned before. In this sense, the European Court of Justice has stressed that the fact that an international agreement reproduces Community law does not 'automatically' lead to a parallel interpretation of the treaty with Community Law since Community Law has a special constitutional structure and contains special objectives and principles which have significant consequences for its interpretation. However, a certain parallelism can result of the application of the principles included in articles 31 et seq. of the Vienna Convention if the international agreement pursues the same objectives as Community law in the relevant area.[31]

We can therefore conlcude that in all situations in which an international treaty with a non member state reproduces parts of Community Law and in which the aim of the agreement is precisely to guarantee an equivalent situation to the one in Community law, the international agreement has in principle to be interpreted in accordance with Community law. This results not of a direct application of Community law but of an application of the Vienna Convention on the Law of Treaties.[32] With respect to the bilateral agreements, one can in general conclude

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30 Cf. Walter Kälin/Astrid Epiney/Martina Caroni/Jörg Künzli, Völkerrecht. Eine Einführung, 2006, 17 et seq.

31 ECJ, aff. C-312/91 (Metalsa), 1993, I-3751; ECJ, aff. C-469/93 (Chiquita), 1995, I-4533; ECJ, aff. C-465/01 (Commission/Austria), 2004, I-8291. See also ECJ, aff. C-467/02 (Cetinkaya), 2004, I-10895. Cf. to this issue in the doctrine e.g. Andrea Ott, Die anerkannte Rechtsfortbildung des EuGH als Teil des gemeinschaftlichen Besitzstandes (*Acquis communautaire*), EuZW 2000, 293 (294 f., 297); Astrid Epiney, Steuern, Europa und die Schweiz – Ausgewählte Aspekte der „Europakompatibilität" kantonaler Steuerregime aus rechtlicher Sicht, in: Franz Jäger (ed.), Steuerwettbewerb: Die Schweiz im Visier der EU, 2008, 75 (79 et seq.).

32 One has, however, to admit that the rulings of the ECJ are not always coherent since the Court does sometimes admit a parallelism in interpretation, sometimes it denies such a principle in similar situations. Cf. ECJ, opinion 1/91 (EEA), 1991, I-6079; ECJ, aff. C-235/99 (Kondova), 2001, I-6427; ECJ, aff. C-63/99 (Gloszcuk), 2001, I-6369; ECJ, aff. C-257/99 (Barkoci und Malik), 2001, I-6557 (against a parallelism); ECJ, aff. C-268/99 (Jany), 2001, I-8615; ECJ, aff. C-162/00 (Pokrzeptowicz-Meyer), 2002, I-1049; ECJ, aff. C-163/90 (Legros), 1992, I-4625 (in favour of a parallelism). Cf. to this case-law in

that – as far as they reproduce parts of Community law – they aim at an integration of Switzerland in the relevant Community law or system so that in principle a parallel interpretation is indicated.[33] There remain, however, important difficulties when applying this principle to an individual article.[34]

b) Methods of reproducing Community law in bilateral agreements and their implications

aa) References to existing Community law

When analyzing the different forms of reproduction of Community law in bilateral agreements, two types of references to existing Community law can be distinguished:[35]

- An agreement (or rather certain articles of an agreement) can refer directly to certain Community law provisions (e.g. certain regulations or directives) and Switzerland can be obliged to ensure an equivalent legislation and application of that legislation ('direct reference' to Community law). This technique is generally used with reference to rather technical provisions contained in secondary law, mainly in directives and regulations. Annexes II and III of the agreement on free movement of persons contain e.g. a list of legal acts that Switzerland has to apply ('equivalence of legislation'). Annex 1 of the agreement on overland transport also lists a number of Community acts containing essentially technical provisions; Switzerland has to apply provisions that are 'equivalent' to these Community law provisions. The substantive law provisions in the Schengen/Dublin agreements also basically refer to the *acquis communautaire* by using this technique.
- Secondly, an agreement itself (or its annexes) can make an 'indirect reference' to Community law by reprocuding certain provisions whose content is largely or entirely based on the situation in the Community. Annex I of the agreement on free movement

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detail Eckart Klein, Zur Auslegung von völkerrechtlichen Verträgen der EG mit Drittstaaten, in: Astrid Epiney/Florence Rivière (eds.), Auslegung und Anwendung von ‚Integrationsverträgen' / Interprétation et application des ‚traités d'intégration', 2006, 1 (16 et seq.).

33 Cf. in detail the analysis of the agreement on free movement of persons in Astrid Epiney, Zur Bedeutung der Rechtsprechung des EuGH für Anwendung und Auslegung des Personnfreizügigkeitsabkommens, ZBJV 2005, 1 et seq.; Astrid Epiney/Robert Mosters, Un exemple d'interprétation des accords conclus entre la Suisse et l'Union européenne: l'accord sur la libre circulation des personnes, in: Astrid Epiney/Florence Rivière (eds.), Auslegung und Anwendung von 'Integrationsverträgen'. Zur Übernahme des gemeinschaftlichen Besitzstandes durch Drittstaaten, insbesondere die Schweiz, 2006, 57 et seq.; Edgar Imhof, Das Freizügigkeitsabkommen EG – Schweiz und seine Auslegungsmethode, ZESAR 2007, 155 et seq., 217 et seq.

34 Cf. below III.2.b).

35 Cf. in detail already the analysis in Epiney/Meier/Mosters, in: Zwischen EU-Beitritt und bilateralem Weg (note 2), 77 (98 et seq.). Of course, some bilateral agreements contain also completely autonomous provisions that do not refer in any form to the *acquis communautaire*. These provisions, however, do not raise any particular question so that this category of legal provisions will not be discussed in this contribution.

of persons, for instance, adopts certain Community law provisions literally or alludes to parallel obligations that can be found in Community law. Article 1 (3) of the agreement on overland transport refers as well to the principle of non-discrimination contained in Article 12 EC Treaty. A similar solution can be found in Article 6 of the agreement on certain aspects of government procurement which contains also the non-discrimination principle.

Whenever the agreements refer directly or indirectly to the *acquis communautaire*, the complex question arises, whether and to what extent those provisions are to be interpreted in the same way as the relevant provisions of Community law.[36] In the case of direct references to certain Community acts, a parallel interpretation is clearly indicated for two reasons: (1) there is really a reference to Community law and (2) it is obvious that the aim of this reference is precisely to guarantee a parallel legal situation in Switzerland. In cases where the reference is indirect, this question is more difficult to answer. One has to always carefully analyze if the relevant provisions really relate to Community law. This may be evident in certain cases (e.g. when reference is made to the notion of discrimination) but not in others (especially when the wording of the relevant provisions in the bilateral agreement differs in some way from the wording in Community law). Sometimes only partial reference to Community law is made. Even if one can deduce from the aim and the contents of the different bilateral agreements a general principle according to which one has to interpret the provisions of the agreement in the same way as Community law insofar as they refer to the latter, one has to analyze each provision individually in order to find out if and to what extent there is indeed a reference to Community law. Considerable uncertainties with respect to the legal meaning of the provisions of the bilateral agreements therefore remain.

Furthermore, these uncertainties need to be seen in the context of the system of legal protection which is – in the framework of the bilateral agreements (with an exception for the agreement on air transportation) – governed by the general principles applying to international treaties. Legal protection in Switzerland – where, due to a monist understanding of the relationship between national and international law, agreements are effective as such and certain provisions are self-executing[37] – is thus disconnected from the legal protection in the European Union, and Swiss courts do not have access to the ECJ within the preliminary ruling procedure. The ensuing risk of differential case-law on the interpretation of the agreements by the ECJ on the one hand (which has to interpret the agreements as an integral part of the Community legal system) and Switzerland on the other hand aggravates rather than remedies legal uncertainty. If the ECJ rules differently on a certain issue than Swiss courts, the question arises whether the latter are or will be under an obligation to modify their case-law.

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36 Cf. already above III.2.a).

37 See e.g. Daniel. Wüger, Anwendbarkeit und Justiziabilität völkerrechtlicher Normen im schweizerischen Recht, 2005, *passim*.

These issues are closely linked with the question of the pertinence of the ECJ's case-law in cases in which bilateral agreements refer to parts of the *acquis communautaire*. Some of the agreements contain an explicit obligation to take ECJ rulings into account as far as they were rendered before the agreements where signed. According to Article 16(2) of the agreement on free movement of persons, the rulings of the ECJ (rendered prior to the date of signature of the agreement) have to be taken into account while interpreting and applying the agreement as far as the latter refers to Community law notions. Furthermore, according to the Schengen association agreement a qualified deviation from case-law may lead to the cancellation of the agreement. In other agreements, however, there is no reference to the case-law of the ECJ, even though they also frequently make use of Community law terms. But also in these cases, one has to generally refer to the case-law of the ECJ considering the aim and the subject of the agreements.[38] In any case, it is questionable which rulings are deemed relevant and how to distinguish the 'old' case-law from the 'new' case-law that was developed after the signature of the agreements. Furthermore, one may even ask whether and to what extent new rulings have to be taken into account when interpreting and applying the agreements. In the framework of the bilateral agreements and according to their aim and subject matter, the following general principles can be established:

- A ruling of the ECJ has in any case to be taken into account when it only repeats or applies principles which have already been developed by the ECJ.[39]
- As far as new case-law is concerned, a principle according to which also new rulings are in principle relevant when applying and interpreting bilateral agreements can be established for situations where the aim and subject-matter of the agreements indicate that an equivalent application of relevant Community law and of the corresponding provisions of the bilateral agreements is intended.[40]
- And finally, one has always to bear in mind that aim and subject matter of the agreements support the conclusion that in case of a (certain) reference to Community law notions, the relevant provisions have in principle to be interpreted in accordance to their interpretation in Community law unless there is clear evidence to the contrary in the agreements.

A consistent application of these principles could attenuate the mentioned legal uncertainties and would correspond to the aims and subject matters of the agreements as well. The case-law of the Federal Court, especially its rulings rendered on the agreement on free movement of

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38 Cf. Rolf H. Weber, Alpentransitbörse im europarechtlichen Fadenkreuz, AJP/PJA 2008, 1213 (1214-1215); Kaspar Sollberger, Konvergenzen und Divergenzen im Landverkehrsrecht der Europäischen Gemeinschaft und der Schweiz, 2003, 338-339; Astrid Epiney/Kaspar Sollberger, Zum Gestaltungsspielraum der Vertragsparteien: die rechtliche Tragweite des Art. 32 des Abkommens über den Güter- und Personenverkehr auf Schiene und Strasse, in: Daniel Felder/Christine Kaddous (eds.), Bilaterale Abkommen Schweiz – EU: Erste Analysen, 2001, 521 (528).

39 Cf. in detail with further references and examples Epiney, ZBJV 2005 (note 33), 1 (15 et seq.).

40 Cf. in detail Epiney, ZBJV 2005 (note 33), 1 (23 et seq.).

persons, is however far from clear on these issues.[41] As far as the impact of new case-law is concerned, the Court applies a very pragmatic method and very often takes over new rulings of the ECJ and simply states that there is no reason to take another view than the ECJ without, however, explaining the legal reasoning behind this approach.[42] As a result, the Court considers that it remains entirely free to renounce taking over a new ruling of the ECJ in the future without giving any special reason. Furthermore, the Federal Court is sometimes rather reserved as to the exact relevance of Community law principles and case-law of the ECJ in the Swiss jurisprudence: while in some unambiguous cases it clearly refers to the case-law of the ECJ,[43] it seems to limit references to Community law and to the (new and sometimes also the old) case-law of the ECJ in other cases. The latter is the case especially[44] when interpreting the principle of non-discrimination, a fundamental principle of Community law which has been without any doubt incorporated in several agreements, especially in the agreement on free movement of persons. The Court seems to limit the scope of application of Art. 2 of the agreement on free movement of persons, disregarding the case-law of the ECJ.[45] It sometimes does not correctly apply the notion of material discrimination,[46] and it sometimes takes into account certain aspects of a new ruling of the ECJ while disregarding – without further explanation – other aspects.[47]

To sum up, the bilateral method leads inevitably to a certain number of difficulties as far as the application and interpretation of the agreements are concerned, especially when they refer to or reproduce parts of Community law. In applying a more consequent interpretation of the bilateral agreements in accordance with Community law and the rulings of the ECJ the inherent legal uncertainties could, however, be limited to a very large extent. Moreover, this

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41 Cf. in detail to the case-law of the Federal Court in the field of the agreement on free movement of persons Astrid Epiney, Zur schweizerischen Rechtsprechung zum Personenfreizügigkeitsabkommen, Jahrbuch für Migrationsrecht / Annuaire du droit de la migration 2004/2005, 2005, 141 et seq.; Astrid Epiney/Tamara Civitella, Zur schweizerischen Rechtsprechung zum Personenfreizügigkeitsabkommen, Jahrbuch für Migrationsrecht / Annuaire du droit de la migration 2007/2008, 2008, 227 et seq.

42 Cf. for instance BG, 2A.91/2003, 4.11.2003, BGE 130 II 1. See to this ruling Hanspeter Mock/Fabrice Filliez, Libre circulation des personnes et regroupement familial: à propos de la prise en compte de la jurisprudence de la Cour de Luxembourg par le Tribunal federal, SZIER 2006, 237 et seq. See also BG, 2A.39/2006, 3.8.2006.

43 Especially, as far as the reference to the notion of public order and security is concerned, cf. BG, 2A.39/2006, 31.5.2006; BG, 2A.315/2005, 18.10.2005. In detail to the case-law of the Federal Court on this subject Christine Kaddous/Christa Tobler, Droit européen: Suisse – Union européenne / Europarecht: Schweiz – Europäische Union,SZIER 2006, 467 (492 et seq.); Christine Kaddous/Christa Tobler, Droit européen: Suisse – Union européenne / Europarecht: Schweiz – Europäische Union, SZIER 2007, 637 (657 et seq.).

44 See also BGE 130 II 113: With respect to the principle of free movement of workers, the Federal Court seems to defend the opinion in this ruling that the agreement takes over only a part of the fundamental freedom of the EC Treaty. It is not clear to which part the Federal Court refers to and over and above this, this interpretation seems to be in clear contradiction to the aims of the agreement expressed in the preambule and in article 1 where one can read that the fundamental freedoms of the treaty are the basis for the agreement and that the agreement should ensure a parallelism with the guarantees of the Treaty.

45 Cf. BG, 2P.142/2003, 7.11.2003.

46 BG, 5A_374/2008, 11.8.2008.

47 So BG2A.275/2004, 25.5.2005 referring only partly to ECJ, aff. C-413/99 (Baumbast), 2002, I-7091.

approach seems also to be in accordance with aim and purpose of the agreements as far as they reproduce Community law. It is therefore very regrettable that the Federal Court's approach is not very clear in this regard and does frequently not seem to respect the fundamental principles of interpretation according to international law. Furthermore, the Federal Court's approach is unable to assure a minimum of legal certainty. It will often remain unclear for Swiss authorities and courts whether and to what extent Community law and the case-law of the ECJ will and should be taken into account when rendering a decision or a judgement in a particular case, which again detracts legal certainty.

bb) Further legal developments

The 'classic' international approach of the bilateral agreements implies that they contain – in so far unlike the EEA – in principle static obligations and that the joint committees play an important role in settling disputes and further developing the treaties. Concerning the reproduction of the *acquis communautaire*, this approach implies that one has to refer to the actual version of Community Law (including, as mentioned earlier, case-law) at the time of signature of the treaty. In other words, when Community law is modified, it is not automatically incorporated, on the basis of the bilateral agreements, in these agreements. Nevertheless, the agreements aim to ensure an equivalent legislation in Switzerland in relation to the EU, at least as far as they directly or indirectly refer to the *acquis communautaire*. However, this aim could not be achieved without taking into account the further development of Community law. Therefore, the agreements contain specific provisions for the 'adoption' of new Community law. Referring to legislation, one can basically distinguish between two mechanisms of adoption[48]:

- Either the joint committee is competent to modify provisions, which is provided for several bilateral agreements. This is in general the case in respect of the annexes to the agreement where Community acts which have to be 'adopted' by Switzerland are listed,
- or the agreements establish the obligation to adopt (in principle) the further developments of the relevant part of the *acquis communautaire*. Whereas the adoption takes place in accordance with domestic law, the agreement will be terminated automatically if new Community law remains unadopted. The Schengen- and Dublin association agreement includes this mechanism, and this technique will probably also be used for some of the future agreements.

[48] Cf. in detail to these techniques Epiney/Meier/Mosters, in: Zwischen EU-Beitritt und bilateralem Weg (note 2), 77 (98 et seq.). Only mechanisms that are already in the agreement itself are taken into account in this contribution. Moreover, the agreements can of course be modified at any time. A modification would, however, imply the rather ponderous international proceedings to conclude a treaty.

In cases in which none of these mechanisms are applied, an incorporation of new legislative developments in the bilateral agreements is not possible in a simplified manner – unless a simple modification of interpretation can assure an equivalent result. The content of Annex I of the agreement on free movement of persons has e.g. in certain parts been overruled by the adoption of Directive 2004/38 on the free movement of European citizens[49]. Of course, one can always modify the agreement itself but this procedure is long and complicated. It can therefore not be expected that the Parties will want to refer to this procedure unless an exceptionally important issue is at stake.

IV. Conclusion

The bilateral agreements aim, *inter alia*, at a participation of Switzerland in particular parts of the *acquis communautaire*, by recurring to instruments of international law. They constitute, from a formal point of view, pure instruments of international law and have no integration character in contrast to the EEA.[50] However, when analyzing in detail the manner in which Switzerland is directly or indirectly bound to the *acquis communautaire* on the basis of bilateral agreements, one can stress the following points:

- The legal effects of the provisions contained in the bilateral agreements that refer to parts of Community law are – at least in the interpretation of the Swiss Courts – largely unclear. Especially, it is not always sure to what extent articles of bilateral agreements actually recur to Community law and have therefore to be interpreted in accordance with Community law. Moreover, the exact relevance of the ECJ's case-law remains partly obscure. However, it is possible to remove large parts of the legal insecurity caused thereby by developing coherent guidelines in doctrine and in the case-law in order to define a 'principle of parallel interpretation' and its exceptions. However, a certain uncertainty is inherent in the technique of bilateral agreements.
- Concerning legislation, Switzerland has (in fact) to apply or to 'adopt' those parts of Community law referred to in the agreements. In cases in which the adoption of further developments of Community law is provided for, there will be a considerable political and economical pressure to adopt the corresponding new legislation, even though Switzerland does not take part in the decision-making process in the European Union.[51]

All in all, large parts of the bilateral agreements entail a sort of 'partial integration' in the legal system of the Union. The static character of the agreements does not really change this

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49 OJ 2004 L 158, 77.

50 Cf. above II.

51 In the context of the Association of Schengen, Swiss representatives will be consulted when a corresponding project is elaborated. The effect of this involvement should not be underestimated in a political context.

conclusion. Large parts of the bilateral agreements are in fact integration treaties, even if they have a formal character of 'classic' international law treaties. This 'partial integration' takes place without Switzerland contributing in the framework of the decision-making process in the European Union. Furthermore, it entails several disadvantages as far as legal security and legal protection are concerned. The question needs to be raised whether this special relationship really still makes sense or whether an accession would not be more adequate. At present, it seems that a majority of the population and the government are of the opinion that Swiss interests can be better realized by the 'bilateral way' than by an accession. However, the real question to be asked in my opinion is whether Switzerland wants to accept the shift of sovereignty to the European Union that would necessarily be entailed by an accession. This question is a highly political one but the decisive factors for its answer are the following:

- First, the question arises in how many areas bilateral agreements with the obligation of reproducing important parts of Community law will be concluded in the future. The further the material scope of application of such a 'partial integration without having the status of a Member' reaches, the more importance the difficulties discussed above will gain. Furthermore, the negotiations of bilateral agreements imply a huge effort for all parties involved, a problem that is yet aggravated by the widening of the European Union.
- Secondly, one has to analyze in which areas Switzerland is *de facto* obliged to have an legislation equivalent to Community law ('autonomous adaptation').
- Thirdly, the above mentioned institutional, legal and political difficulties have to be taken into consideration.
- Finally, a decision needs to be made on whether the additional shift of sovereignty in areas which are not yet covered by bilateral agreements is the way Switzerland wants to pursue.

So, the continuation of the 'bilateral way' together with other adaptations of Swiss law to the Community standard will inevitably lead to the consideration of the advantages and disadvantages of EU membership in comparison with the technique of bilateral agreements. The question of the durability of the bilateral way is also raised; even if one cannot draw a strict border line for the 'acceptability' - both from a legal and a political point of view – of the bilateral way, it is clear that the more Switzerland gets 'europeanized' by Bilateral Agreements, the more the question of accession has to be analyzed.