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EU Law in the Swiss Legal Order–Opportunities and Pitfalls

Carl Baudenbacher[♣] and Laura Melusine Baudenbacher[♦]

EU law enters the Swiss legal system through two gateways: bilateral agreements concluded with the EU and the autonomous implementation of EU law. Awareness of the situation creates opportunities, but there is also significant legal uncertainty.

Switzerland is economically highly integrated into the European single market. However, it is not part of the supranational organizations European Union and European Economic Area ("**EEA**"). The country is linked to the EU through a network of (with one exception) institution-free bilateral treaties.

How EU Law Enters Swiss Law

EU law is mainly transfused into the Swiss legal order through two gateways:

(1) EU law is adopted based on bilateral treaties with the EU.

(2) Since 1988, Switzerland has followed a program of autonomous implementation of EU law in federal legislation.

Bilateral Agreements

Early Agreements

The most important bilateral treaty to date is the 1972 Free Trade Agreement ("**FTA**"),[1] which covers industrial products originating in the EU and Switzerland. At the time, the other EFTA States Austria, Finland, Norway, Portugal, and Sweden concluded parallel FTA's with the then EEC.

In 1985, an Agreement on Direct Insurance

♣ Prof. Dr. iur. Dr. rer. pol. h.c., Senior Partner, Baudenbacher Law Ltd., Zurich, Switzerland; Door Tenant Monckton Chambers, London, United Kingdom; Visiting Professor London School of Economics LSE; President of the EFTA Court 2003-2017.

♦ Dr. iur., Managing Partner, Baudenbacher Law Ltd., Zurich, Switzerland; Lecturer at the University of Luxembourg. The author discloses that as a "*référendaire*" (law clerk) she was responsible for the reasoning of the Federal Administrative Court's judgments *BMW* and *Elmex* (*i.e.*, *GABA* and *Gebro*).

[1] Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, OJ L 300 of 31 December 1972 pp. 189-280, available here.

Other Than Life Insurance was concluded.[2]

Bilaterals I and Bilaterals II

On 6 December 1992, EEA-membership was rejected in a referendum. In 1999 and 2004, Switzerland and the EU concluded two packages of agreements: the "**Bilaterals I**" and the "**Bilaterals II**". Part of the first package are the Free Movement of Persons Agreement ("**FMPA**"),[3] the Mutual Recognition of Conformity Assessment Agreement ("**MRA**"),[4] and the Air Transport Agreement ("**ATA**").[5] The second package includes the Schengen/Dublin association and the Savings Taxation Agreement ("**STA**").[6]

In substance the bilateral agreements are largely based on EU law. However, they are essentially static in nature. Adaptations to new developments in EU law require Switzerland's consent in each individual case, and there are no supranational institutions which could apply a dynamic interpretation to their substance.

Except for the ATA, the bilateral agreements are enforced through a two-pillar model, *i.e.*, through each party's courts and institutions. Under the ATA, however, Switzerland recognized the jurisdiction of the other party's institutions: the European Commission and the European Court of Justice ("**ECJ**").

Invocability by Private Operators

Contracting parties to the bilateral agreements are the EU and Switzerland. The question has arisen whether private operators can invoke provisions of these treaties in national and EU court proceedings. If this question is answered in the affirmative, such provisions also take precedence over conflicting national law.

Regarding the **FTA**, the Swiss Federal Supreme Court initially took a negative stance towards the invocability of the competition provisions in cases *Stanley Adams*[7] and the free movement of goods

2 Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance, OJ L 205 of 27 July 1991, pp. 3–44, available here.

3 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L 353 of 31 December 2009, pp. 71–90, available here.

4 Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment, OJ L 114 of 30 April 2002, pp. 369–429, available here.

5 Agreement between the European Community and the Swiss Confederation on Air Transport, OJ L 114 of 30 April 2002, pp. 73–90, available here.

6 Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ L 385 of 29 December 2004, pp. 30–49, available here.

7 ATF 104 IV 175 "*Stanley Adams*", available in German here.

rules in *Omo*,[8] but later adopted a more liberal line.[9] Nevertheless, uncertainty remains as the *Stanley Adams* and *Omo* decisions were never openly overruled. The situation is further complicated since the Federal Supreme Court held that provisions of the Agreement between the EU and Switzerland on Direct Insurance Other Than Life Insurance may be invoked before Swiss courts.[10]

On the European side, the ECJ held in *Kupferberg* that provisions of a free trade agreement between the EU and a non-EU Member State (*in casu* Portugal) may be invoked before courts in the EU.[11]

Provisions of the **FMPA** may be invoked before the courts of Switzerland and of the EU Member States.[12]

The **STA** was replaced in 2015 by an Automatic Exchange of Information Agreement,[13] in force since 2017. Swiss legal literature assumes that its provisions are invokable in court.[14] On the EU side, a case has yet to reach the ECJ. The pending *UBS v France* litigation may prove to be a test case. On 21 February 2019, a Paris first instance court sentenced UBS Switzerland to pay a fine of €3.5bn and damages of €800m for unauthorised solicitation of clients on French territory and money laundering of tax fraud[15]. The invocability and primacy of the STA were disregarded. No request for referral to the ECJ was made at that instance.[16]

Interpretation: The *Polydor* rule

Since the bilateral agreements are based on EU law, many provisions are worded

8 ATF 105 II 49 "*Omo*", available in German here.

9 Judgment of the Federal Supreme Court 2A.593/2005 of 6 September 2006 "*Qualicare*", cons. 5.4, available in German here; *see* also the judgment of the Federal Administrative Tribunal A-8382/2007 of 29 September 2008 "*Motosuisse et al. v ASTRA*", cons. 11, available in German here.

10 ATF 138 I 378 "*SVV v Canton Glarus*", available in German here.

11 Case C-104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, EU:C:1982:362, paragraphs 17-26, available here.

12 *Astrid Epiney*, Zur Bedeutung der Rechtsprechung des EuGH für die Anwendung und Auslegung des Personenfreizügigkeitsabkommens, ZBJV 151, 2005, 1, pp. 1 *et seq.*; Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, EU:C:2009:697, available here.

13 Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ L 333 of 19 December 2015, pp. 12–49, available here.

14 *See*, for example, *Anne Peters/Myriam Jung*, Öffentlich-rechtlicher Rechtsschutz im Zusammenhang mit den Bilateralen II, AJP/PJA 8/2005, 954, pp. 957 *et seq.*; *Jan Ole Luuk/Stefan Oesterhelt/Maurus Winzap*, EuGH Report 1/10, Steuer Revue Nr. 3/2010, 242, available here.

15 The judgment is available here.

16 The case is currently pending before the Paris *Cour d'Appel*. Depending on the outcome, it is conceivable that other states will follow France's example.

identically or similarly to provisions in Union law. However, it is unclear whether they should be interpreted according to the same rules as parallel EU law. In *Polydor*,[17] a case concerning the free trade agreement EEC-Portugal, the ECJ held that the considerations that led to a particular interpretation of articles of EU law on the free movement of goods were not applicable to the parallel provisions of a bilateral free trade agreement with an EFTA State because of differences in aim and context as well as the absence of instruments available to the EU to achieve uniform application of its law. The term "instruments" meant the European Commission and the ECJ. It was clear that this would also apply to the **FTA**. In fact, one may assume that *Polydor* was the ECJ's answer to the Swiss Federal Supreme Court's approach on invocability in *Stanley Adams* and *Omo*.

The ECJ adopted a similar stance in the *Zurich Aircraft Noise Dispute* between Switzerland and the European Commission dealt with under the **ATA**. It ruled that the freedom to provide services guaranteed under EU law could not be transferred unquestioningly to the ATA if the latter did not expressly contain a corresponding provision.[18] This meant that discriminations of Switzerland were possible that would not have been lawful within the EU.

In its early case law, the ECJ also applied *Polydor* to the **FMPA**. Consequently, certain discriminations were found to be possible under this treaty which would be illegal under the Treaty on the Functioning of the European Union ("**TFEU**") and under the EEA Agreement. In the subsequent *Grimme* case,[19] the ECJ highlighted that Switzerland rejected the EEA Agreement, which would have allowed for an interpretation in line with EU law. The EU Court thereby indicated that it took offence at the lack of an overarching monitoring and judicial mechanism under the FMPA. However, in the 2019 *Wächtler* case,[20] the *Polydor* and *Grimme* jurisprudence was not applied to the FMPA. In this judgment, the ECJ derived most of its reasoning from its jurisprudence on EU rules and principles. Consequently, significant legal uncertainty exists on the EU side regarding the interpretation of the FTA, the FMPA, the ATA, and the STA.

On the Swiss side, the Federal Supreme Court did not adopt an approach such as the *Polydor* rule. Nevertheless, there is legal uncertainty due to the existing but not always practised homogeneity rules. The **FMPA** and the **ATA** contain provisions according to which Swiss courts shall in

17 Case C-270/80, *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited*, EU:C:1982:43, available here.

18 Case C-547/10 P, *Swiss Confederation v European Commission*, EU:C:2013:139, available here.

19 Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, EU:C:2009:697, available here.

20 Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, EU:C:2019:138, available here.

principle follow the case law of the ECJ when interpreting these agreements. The Swiss Federal Supreme Court's case law has been largely, but not entirely, consistent on this issue.[21] A certain divergence between EU and Swiss jurisprudence lies in the nature of the bilateral agreements: Swiss courts are neither entitled nor obliged to refer questions of interpretation of the bilateral treaties to the ECJ for a preliminary ruling. Moreover, a Swiss court may have to decide a question on which there is no relevant ECJ case law. This creates challenges, but also opportunities for private operators.

Autonomous Implementation of EU Law

The Programme

For more than 30 years, Switzerland has systematically implemented EU law autonomously, *i.e.*, without any legal obligation to do so.[22] According to Article 141 of the Federal Parliamentary Act,[23] the Federal Council must explain the relationship to European law when justifying and commenting on national draft laws. This creates a *de facto* pressure. In practice, about 60% of all federal laws are influenced by EU law requirements. Notable business law codes impacted by this approach include the Cartel Act of 1995/2004 ("**CartA**"),[24] the Product Liability Act,[25] IP law, various laws on consumer protection, labour law, and company law. Because of the voluntary nature of autonomous implementation and absent the possibility to refer questions to the ECJ, inconsistencies arise that may be of importance to economic operators. Moreover, no institutions exist that would monitor the implementation of EU law into Swiss law (such as the European Commission in the EU or the EFTA Surveillance Authority in the EFTA pillar of the EEA).

An additional complication arises through the fact that the Federal Council refuses to indicate which new Swiss laws are based on autonomously implemented EU law. This creates legal uncertainty.

Interpretation of EU Law Based on Swiss Law

Special challenges arise in connection with judicial enforcement of autonomously implemented EU law. The legislature does not oblige the courts to interpret autonomously implemented law in a way that is compatible with European law. And both the Federal Supreme Court and the Federal Administrative Court have so far

[21] ATF 132 V 423 "*M. v Ufficio dell'assicurazione invalidità del Cantone Ticino*", available in Italian here.

[22] *See* already *Carl Baudenbacher*, Zum Nachvollzug europäischen Rechts in der Schweiz, EuR 1992, 309.

[23] Federal Act on the Federal Assembly of 13 December 2002, SR 171.10, available in English here.

[24] Federal Act on Cartels and other Restraints of Competition of 6 October 1995, SR 251, available in English here.

[25] Federal Act on Product Liability of 18 June 1993, SR 221.112.944, available in German here.

failed to develop a uniform approach to the question of relevance of ECJ case law. While some Divisions have based their decisions on EU law, others have attached less importance on Union law as a source of interpretation. This has led to diverging case law in several areas.

Transfer of Undertakings

In a landmark ruling of 25 March 2003 on the law of transfer of undertakings, the Federal Supreme Court's First Civil Division stated that although EU law does not have a direct binding effect in Swiss law, it constituted an instrument of interpretation because the 1993 reform of the Code of Obligations ("**CO**") aimed at aligning Article 333 CO (the provision on transfer of undertakings) with the relevant EU Directive.[26] Autonomously implemented EU law must be interpreted in conformity with European law "*in case of doubt [...] insofar as the methodology to be observed domestically permits such an approximation*".[27] As it is ultimately the Federal Supreme Court which decides what the Swiss methodology requires and when a case of doubt exists, there is a lack of legal certainty.

Competition Law

The Federal Council's Dispatch[28] repeatedly emphasises that the 1995 CartA law was modelled as closely as possible on the European template. The Federal Supreme Court had difficulty following this guidance in the first years. The most notable decision was the *Swisscom Mobile* ruling by the Second Public Law Division of 11 April 2011 of the Federal Supreme Court.[29] The Competition Commission ("**ComCo**") had fined leading Swiss telecommunications provider Swisscom Mobile over CHF 333 million for abuse of a dominant position by imposing unreasonably high mobile termination charges. Although the relevant provision of Swiss law—Article 7 (2) lit. c CartA—is essentially identical to Article 102 (2) lit. a TFEU, the Federal Supreme Court interpreted the Swiss norm autonomously. Swiss and EU law were said to differ in

[26] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61 of 5 March 1977, pp. 26–28, available here; today Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82 of 22 March 2001, pp. 16–20, available here.

[27] ATF 129 III 335 "*Metallbau X.*", cons. 6, available in German here (unofficial translation). This case law was confirmed shortly after in a package travel case, *see* ATF 130 III 182 "*A v B*", cons. 5.5.1, available in German here.

[28] Federal Council Dispatches are reports prepared by the Federal Council (the Swiss government) explaining draft laws. They are addressed at Parliament. The aim of a dispatch is to inform Parliament about the draft law, the objectives sought, and the underlying problems, and to convince Parliament of the Federal Council's proposal. Dispatches regularly serve as an aid to interpretation of the respective acts.

[29] ATF 137 II 199 "*Swisscom Mobile Termination*", available in German here.

terms of conceptual orientation in that Swiss law was based on the abuse principle and not on the prohibition principle. Article 7 (2) lit c CartA was interpreted to the effect that the element of "imposition" had an independent meaning. Consequently, the Federal Supreme Court ruled in favour of Swisscom Mobile.

In later cases, the Second Public Law Division of the Supreme Court shed its anti-European reflex. In the *Publigroupe* ruling of 29 June 2012,[30] it argued that since the CartA Act was strongly oriented towards European competition law, the case law on Article 102 TFEU should be taken into consideration. In the *GABA* landmark case,[31] the Federal Supreme Court rejected as "misleading" the argument that the Federal Administrative Court's ruling had wrongly referred to the same legal situation in the European Union due to Swiss law allegedly being based on the abuse principle as opposed to EU law which is based on the prohibition principle. The *BMW* ruling of 24 October 2017[32] confirmed this approach, thereby also upholding the Federal Administrative Court's decision.[33]

New ECJ case law

An unresolved question is what approach Swiss courts should take when the ECJ dynamically develops EU law after implementation in Switzerland. An example is the case law on compensation for non-material damage for lost holiday enjoyment. When the Package Travel Directive[34] was enacted in 1990, the question was left open. In its 2002 *Simone Leitner* decision, the ECJ held that a tour operator's liability could be extended to non-material damages.[35] Should the Federal Supreme Court be confronted with a similar case, it would have to decide whether to follow this jurisprudence. The Court's First Civil Division ruled on 24 October 1989, *i.e.*, before the Package Travel Act came into force, that no compensation was owed for the loss of

30 ATF 139 I 72 "*Publigroupe*", available in German here.

31 ATF 143 II 297 "*GABA*", available in German here.

32 ATF 144 II 194 "*BMW*", available in German here; confirmed in ATF 144 II 246 "*Altimum*", available in German here.

33 Judgment of the Federal Administrative Tribunal B-3332/2012 of 13 November 2015 "*BMW*", available in German here; *see* already judgment of the Federal Administrative Tribunal B-506/2010 of 19 December 2013 "*GABA*", available in German here.

34 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326 of 11 December 2015, pp. 1–33, available here.

35 Case C-168/00, *Simone Leitner v TUI Deutschland GmbH & Co. KG.*, EU:C:2002:163, available here.

holiday enjoyment.[36].

Conclusion

Under the bilateral agreements, Switzerland has adopted EU law on a broad basis. However, it must be examined in each case whether a provision is invocable in court. On the Swiss side, invocability is largely guaranteed, although some uncertainty remains under the FTA. On the EU side, invocability is guaranteed. As far as interpretation is concerned, the ECJ's *Polydor* formula may pose challenges.

The programme of autonomous implementation has generally led to the Europeanization of large areas of Swiss business law.[37] In individual cases, however, delicate problems may arise. It is not always clear whether a statute has been designed according to European specifications. Even where this is the case, there may still be deviations. Finally, there may be no relevant ECJ case law, or the ECJ may have passed new case law after the implementation. Economic operators should thus examine each individual case carefully.

[36] ATF 115 II 474, cons. 3a, available in German here. The court noted that the question of whether such loss was eligible for compensation had been answered in the affirmative by the Higher Court of the Canton of Zurich in a 1980 judgment (ZR 79/1980 Nr. 131).

[37] *See Matthias Oesch*, Schweiz – Europäische Union.Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug, Zurich 2021, Part III., available here.