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The EU–Switzerland Agreements and the Role of the Swiss Federal Supreme Court in the Five-Storey House of European Courts

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I. Introduction

During his impressive academic career, Thomas Cottier has dealt with a notable variety of topics. However, one common aspect stands out and meanders like a red thread through all his writings: the endeavour to examine the various layers of government not individually, but instead holistically. Considering the different layers of government as an integrated whole allows the working out of similarities and differences between them, the definition of rules for the interaction of their authorities and for the allocation of competences, responsibilities and standards of review, and the developing of instruments to compensate for failures of one level with measures from another. Thomas Cottier has made a number of groundbreaking contributions: 'The Prospects of 21st Century Constitutionalism' of 2003, 'Multilayered Governance, Pluralism, and Moral Conflict' of 2009 and 'Towards a Five Storey House' of 2011.[1] These writings have been instrumental in the development of a better understanding of how the constitutional functions of our modern times can be secured across the different levels of governance, which – together – contribute to an overall constitutional system. Countless researchers around the globe have taken up Thomas Cottier's work and developed his conceptual thinking further, both theoretically and practically, also with a view to its application in specific policy areas.

[1] Thomas Cottier and Maya Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7(1) *Max Planck Yearbook of United Nations Law* 261; Thomas Cottier, 'Multilayered Governance, Pluralism, and Moral Conflict' (2009) 16(2) *Indiana Journal of Legal Studies* 647; Thomas Cottier, 'Towards a Five Storey House' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Governance and International Economic Law*, 2nd edn (Hart Publishing, 2011) 495.

This chapter takes up this thread and attempts to link the quest for multilayered governance with a second pillar of Thomas Cottier's *oeuvre*, namely Switzerland's integration into the EU legal area. The situation is complicated: Switzerland and the EU have developed a tight network of bilateral agreements, consisting of 20 main agreements, supplemented by over 100 secondary agreements, protocols and exchanges of letters.[2] Within this framework, various agreements, such as the Agreement on the Free Movement of Persons (AFMP), the Agreement on Air Transport (AAT) and the Schengen/Dublin Association Agreements (SAA, DAA), envisage the sectoral integration of Switzerland into the law of the EU and are based, for this purpose, on EU secondary law. Irrespective of this partially far-reaching integration, a two-pillar approach prevails at the institutional level. That means that each party (Switzerland and the EU) is individually responsible for the good functioning of the agreements. The same holds true with respect to legal protection. The Swiss Federal Supreme Court has no right to refer questions on the interpretation of the bilateral agreements to the European Court of Justice (ECJ) as, formally, it is not part of the EU's *Rechtsprechungsverbund*,[3] ie the EU's network of courts.

Currently, Switzerland and the EU are negotiating new institutional rules for those bilateral agreements which permit Switzerland's participation in the Union's internal market.[4] This includes a new dispute settlement model. The model envisages the setting up of a framework under which the EU and Switzerland can request the establishment of an arbitration tribunal if they disagree on the interpretation of any of the treaty provisions. However, such an arbitration tribunal must involve the ECJ when the interpretation of EU law is at issue. Moreover, the relevant authorities in the EU and Switzerland would interpret and apply the

[2] For general accounts on Swiss–EU relations, see Thomas Cottier and Rachel Liechti, 'Schweizer Spezifika: Direkte Demokratie, Konkordanz, Föderalismus und Neutralität als politische Gestaltungsfaktoren' in Fritz Breuss, Thomas Cottier and Peter-Christian Müller-Graff (eds), *Die Schweiz im europäischen Integrationsprozess* (Nomos, 2008) 39; Thomas Cottier, 'Swiss Model of European Integration' in Stefan Diezig and Astrid Epiney (eds), *Schweizerisches Jahrbuch für Europarecht, 2012/2013* (Schulthess, 2013) 377; Thomas Cottier et al, *Die Rechtsbeziehungen der Schweiz und der Europäischen Union* (Schulthess, 2014) passim; Thomas Cottier and Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland: Cases, Materials and Comments* (Staempfli Publishers, 2005) passim; Sandra Lavenex and René Schwok, 'The Swiss Way: The Nature of the Swiss Relationship with the EU' in Erik Oddvar Eriksen and John Erik Fossum (eds), *The European Union's Non-Members* (Routledge, 2016) 248; Matthias Oesch, *Switzerland and the European Union: General Framework, Bilateral Agreements, Autonomous Adaptation* (Dike Verlag Zurich, 2018). This contribution builds, in part, on the following publications: Matthias Oesch and Aliénor Nina Burghartz, 'The "Common Market" with Switzerland' in Robert Schütze and Takis Tridimas (eds), *The Oxford Principles of European Union Law*, vol II (Oxford University Press, forthcoming); Matthias Oesch, *Der EuGH und die Schweiz* (EIZ Publishing, 2023).

[3] For this term, see BVerfGE 140, 317 – Identitätskontrolle.

[4] See Federal Department of Foreign Affairs, Switzerland's European Policy, www.eda.admin.ch/europa/en/home.html; Thomas Cottier, 'Die Souveränität und das institutionelle Rahmenabkommen' (2019) 115(11) *Schweizerische Juristen-Zeitung* 345; Marc Maresceau and Christa Tobler (eds), *Switzerland and the EU: A Challenging Relationship* (Brill Nijhoff, 2023); Christa Tobler, 'The EU–Swiss Sectoral Approach Under Pressure: Not Least Because of Brexit' in Stefan Lorenzmeier et al (eds), *EU External Relations Law* (Springer, 2021) 107.

bilateral agreements in accordance with the case law of the ECJ – irrespective of whether the relevant judgment was issued before or after the signing of the agreement in question. These novelties will be remarkable as they will significantly affect the Federal Supreme Court's role in Swiss–EU relations.

In the following, we review the institutional features of the bilateral agreements, summarise the jurisprudence of the Federal Supreme Court on their interpretation and their supremacy in the event of a conflict with Swiss law, and critically assess the role of the Federal Supreme Court in accommodating the agreements in the Swiss legal system (section II). While the Swiss courts are not, formally, part of the EU's network of courts, the Swiss government regularly participates in preliminary ruling proceedings before the ECJ. *De lege ferenda*, it should be considered to grant the Federal Supreme Court the right to refer questions on the interpretation of the bilateral agreements to the ECJ (section III). An epilogue wraps up the findings (section IV).

II. Bilateral Agreements and the Courts

The institutional setting of the bilateral agreements is remarkably meagre: they follow traditional patterns of public international law based on a classic understanding of state sovereignty. A two-pillar approach, under which each party is individually responsible for the good functioning of the agreements, is predominant. This applies to legal protection as well. The Federal Supreme Court relies on the case law of the ECJ not only when interpreting the bilateral agreements involving Switzerland's participation in the internal market, but also when defining the intertwining of these agreements and Swiss law in the case of a conflict. Remarkably, for some agreements, it has established strict supremacy. In fact, the Federal Supreme Court's case law reveals its dual function: on the one hand, it acts as the final arbiter for the bilateral *acquis* in the 'Swiss pillar', similarly to the ECJ in the 'EU pillar'; and, on the other hand, it acts as the highest court of Switzerland, similarly to the national courts in the EU pillar.

A. Legal Protection

In the case of a dispute, the EU and Switzerland meet in joint committees to discuss pending issues and, ideally, to settle them. The agreements do not provide for common authorities to survey the correct interpretation and application of the agreements by the parties, to render authoritative interpretations or to grant legal protection. As there is no common surveillance authority (such as the European Commission or the European Free Trade Association (EFTA) Surveillance Authority) nor a common arbiter (such as the ECJ or the EFTA Court), the relevant authorities of the EU, its Member States and Switzerland, respectively, fulfil these tasks.

In the EU, the European Commission is responsible for supervising Member States to ensure that they are correctly interpreting and applying the agreements. It can do this by bringing any disputed measure before the ECJ (Article 258 of the Treaty on the Functioning of the European Union (TFEU)).[5] Legal protection for individuals is provided by administrative authorities and courts of the Member States. These are usually competent to implement and apply the bilateral agreements, thus ensuring the proper fulfilment of these tasks (Articles 216 and 291 TFEU). The ECJ is called upon to interpret the bilateral agreements by way of the preliminary ruling procedure; under this procedure, Member State courts can refer questions on the interpretation of EU law, including international treaties, to the ECJ (Article 267 TFEU). In practice, almost all ECJ judgments on the bilateral agreements to date have concerned preliminary rulings on the interpretation of the Agreement on the Free Movement of Persons. When the bilateral agreements are applied by the authorities of the EU, in particular by the European Commission and agencies, legal protection is provided by the General Court and the ECJ (Article 263 TFEU).

In Switzerland, there is no special body to supervise the correct interpretation and application of the bilateral agreements with the EU. Legal protection is provided by the administrative authorities and courts on the cantonal and federal levels. In any case, it is usually the Federal Supreme Court which acts as the court of last instance. There is no possibility for Swiss courts to request a preliminary ruling from the ECJ on the interpretation of the bilateral agreements. Nevertheless, Swiss courts have developed strategies to incorporate ECJ jurisprudence and thus to ensure that it is harmonised with the case law of the ECJ. They interpret the bilateral agreements, which are based on EU law and envisage Switzerland's sectoral integration into the EU legal order on the basis of specific methods of interpretation of EU law and in light of ECJ jurisprudence.[6] Furthermore, Swiss courts sometimes deliberately delay a decision on a legal question in the Swiss context and wait for a judgment of the ECJ on that question in the context of EU law.[7] This demonstrates the pragmatism with which Swiss courts often handle EU law issues.

Exceptionally, the Agreement on Air Transport (AAT) provides for a specific regime with respect to certain rights and obligations. The European Commission

[5] See, eg press release by the Commission, dated 30 September 2010, on the communication of a reasoned opinion to Greece with the request to respect the Savings Income Agreement of 2004; response of the Federal Council of 18 May 2011 to the motion 11.3157 'Beziehungen zwischen der Schweiz und Italien. Wogen glätten' regarding the Commission's request to Italy to respect its public procurement commitments towards Switzerland.

[6] See below.

[7] The Federal Administrative Court suspended an ongoing case for almost 10 months in 2008–09 in order to wait for an ECJ judgment on a legal question similar to the one at issue before the Swiss court; BVGer B-3064/2008 of 13 September 2010 (where, however, it was a matter of the Euro-compatible interpretation of a Swiss provision which had been aligned to EU law autonomously and not as a result of an obligation provided for in a agreement).

and the ECJ are responsible for surveillance and judicial review vis-à-vis Switzerland (Articles 11, 18 and 20 AAT).[8]

B. Interpretation

EU and Swiss authorities interpret the bilateral agreements based on the traditional methods of interpretation under public international law pursuant to Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT).[9] A special case concerns the interpretation of bilateral provisions based on EU law, the wording of which is identical with, or at least similar to, the relevant provision in EU law.

When called upon to interpret free trade and association agreements with third countries, the ECJ has consistently found that a parallel interpretation can only be considered if the purpose and the context of the provision in question are comparable to the purpose and the context of the parallel provision in EU law, especially when considering the degree of integration of the agreement.[10] According to the ECJ, these findings are also relevant for the interpretation of the agreements with Switzerland.[11] At the same time, the ECJ assumes – in particular in its more recent jurisprudence on the Agreement on the Free Movement of Persons – a presumption towards a parallel interpretation of a bilateral provision, which is based on EU law and envisages the sectoral integration of Switzerland into the EU legal order.[12] The ECJ does not hesitate to interpret the bilateral agreements in favour of a complaining party when such an interpretation is appropriate in light of its methods of interpretation; in doing so, the ECJ draws on its jurisprudence on EU law.[13]

[8] On this legal basis, the European Commission, the General Court and the ECJ decided the dispute on aeroplane noise pollution between Switzerland and Germany, Case C-547/10 P *Switzerland v Commission* EU:C:2013:139.

[9] BGE 149 II 129, con 6; BGE 133 V 329, con 8.4; BGE 132 V 53, con 6.3; Case C-70/09 *Hengartner and Gasser* EU:C:2010:430, para 36; Case C-581/17 *Wächtler* EU:C:2019:138, para 35; Thomas Cottier and Nicolas Diebold, 'Warenverkehr und Freizügigkeit in der Rechtsprechung des Bundesgerichts zu den Bilateralen Abkommen' *Jusletter* (2 February 2009) 237; Astrid Epiney, Beate Metz and Benedikt Pirker, *Zur Parallelität der Rechtsentwicklung in der EU und der Schweiz: Ein Beitrag zur rechtlichen Tragweite der Bilateralen Abkommen* (Schulthess, 2012); Benedict Vischer, *Einheitliche Auslegung im Bilateralen Recht* (EIZ Publishing, 2023) 8.

[10] Christa Tobler, 'Die EuGH-Entscheidung Grimme – Die Wiederkehr von Polydor und die Grenze des bilateralen Rechts' *Schweizerisches Jahrbuch für Europarecht* (SJER) 2009/2010, 369; see also Johannes Antonius Maria Klabbers, 'The Reception of International Law in the EU Legal Order' in Robert Schütze and Takis Tridimas (eds), *The European Union Legal Order*, Oxford Principles of European Law, vol I (Oxford University Press, 2018) 1208, 1216–20.

[11] Case C-351/08 *Grimme* EU:C:2009:697, para 29; Case C-70/09 *Hengartner and Gasser* EU:C:2010:430, paras 41–42; Case C-547/10 P *Switzerland v Commission* EU:C:2013:139, para 80; Case C-355/16 *Picart* EU:C:2018:184, para 29.

[12] Astrid Epiney, '"Brexit" und FZA' *Jusletter* (20 March 2017) Rz 5.

[13] For an overview on such cases, see Matthias Oesch and Gabriel Speck, 'Das geplante institutionelle Abkommen Schweiz-EU und der EuGH' SJER 2016/2017, 257, 267.

The same pattern has emerged in the jurisprudence of the Swiss Federal Supreme Court and the Federal Administrative Court. They interpret those bilateral agreements, which are based on EU law and aim at Switzerland's sectoral integration into the EU legal order, pursuant to the specific methods of interpretation of EU law and in view of the ECJ jurisprudence.[14] This is particularly relevant for the Agreement on the Free Movement of Persons and the Schengen/Dublin Association Agreements. Nonetheless, the Federal Supreme Court emphasises that certain agreements entail a less far-reaching level of integration than EU law does and, thus, must be interpreted autonomously. This holds true for the Free Trade Agreement of 1972: in a judgment of 2005, the Federal Supreme Court confirmed that this agreement was 'in principle to be interpreted and applied autonomously', but simultaneously pointed out that ECJ jurisprudence on parallel provisions in EU law is 'not irrelevant'.[15]

Occasionally, bilateral agreements explicitly oblige the authorities in Switzerland and the EU to consider the case law of the ECJ. This applies in particular to the Agreement on the Free Movement of Persons and the Agreement on Air Transport. Pursuant to Article 16(2) of the former, authorities shall take account of the relevant case law of the ECJ prior to the date of signature of the agreement, ie, prior to 21 June 1999, 'insofar as the application of this Agreement involves concepts of Community law'. The wording of Article 1(2) of the latter is similar. Both provisions impose an obligation to provide information with respect to ECJ judgments rendered after the date of signature of these agreements; if appropriate, the joint committee shall determine the implications of such case law. The Schengen/Dublin Association Agreements also deal with the interpretation of EU secondary law by Switzerland. However, they do not explicitly oblige Swiss authorities to take the case law of the ECJ into account (Articles 8 and 9 SAA, Articles 5 and 6 DAA). All of these provisions constitute *leges speciales* in relation to Articles 31–33 VCLT.

The Federal Supreme Court has repeatedly been called upon to interpret Article 16(2) AFMP.[16] In doing so, it has found that the case law of the ECJ on parallel provisions in EU law issued prior to 21 June 1999 is binding (*massgebend*) and, consequently, that Swiss authorities are obliged to follow it (*Befolgungspflicht*).[17] With respect to the case law of the ECJ issued after that date, there is an obligation to take it into consideration (*Beachtungsgebot*), but Swiss authorities may deviate from it in case there are cogent reasons to do so.[18] In practice, the distinction between ECJ judgments issued prior to 21 June 1999 and those issued after that

[14] See, eg BGE 142 II 35, con 5.2, where the Swiss Federal Supreme Court explicitly referred to the 'effet utile' as interpretative method.

[15] BGE 131 II 271, con 10.3 (own translation); see also BGE 118 Ib 367, con 6; BGer 2A.593/2005 of 6 September 2006.

[16] See, in particular, BGE 136 II 5, con 3.4; BGE 136 II 65, con 3/4; BGE 136 II 177, con 3.2; BGE 139 II 393, con 4; BGE 142 II 35, con 3.

[17] BGE 139 II 393, con 4.1.

[18] ibid.

date plays a subordinate role in the jurisprudence of the Federal Supreme Court. The court considers precedents of the ECJ on questions related to the bilateral relations analogously, disregarding the date of their issuance. As a result, a 'dynamic adaptation of the case law' arises.[19] As far as can be seen, the Federal Supreme Court has hitherto never explicitly deviated from an ECJ judgment based on an autonomous interpretation found to be more appropriate. However, according to the Federal Supreme Court, deviations are possible if a bilateral provision pursues a different purpose than the similarly worded provision of EU law does (that is, if the objective is not to extend EU law to the Swiss–EU relations). According to the Federal Supreme Court, this is the case of conditions that must be met for the expulsion of a criminal foreigner to be compatible with the Agreement on the Free Movement of Persons: the Federal Supreme Court does not interpret Article 5 of Annex I AFMP 'in the context of criminal law' analogously to the practice in EU law since this agreement 'is essentially an economic law agreement'.[20] According to the Federal Supreme Court, a deviation is also necessary if claims are not (primarily) based on traditional rights of free movement (in conjunction with the principle of non-discrimination), but rather on EU citizenship or its core elements.[21]

Seemingly, the Federal Supreme Court has not yet dealt with the scope of Article 1(2) AAT.[22] Presumably, considerations similar to those made regarding the interpretation of the Agreement on the Free Movement of Persons are also applicable here.

C. Supremacy

The principle of *pacta sunt servanda* (Article 26 VCLT) provides a starting point for determining the relationship between the bilateral agreements, on the one hand, and EU and Swiss law, on the other hand. A breach of an obligation under bilateral agreements by the EU or Switzerland gives rise to a responsibility under international law. However, the issue of international obligations differs from the question of the supremacy of the agreements within the EU and Swiss legal order. Such a question is to be answered through EU and Swiss constitutional law.

According to well-established ECJ case law, international treaties are situated between primary and secondary EU law in the hierarchy of EU law.[23]

[19] Andreas Zünd, 'Grundrechtsverwirklichung ohne Verfassungsgerichtsbarkeit' (2013) 22 *Aktuelle Juristische Praxis* 1349 (own translation).

[20] BGE 145 IV 364, con 3.4.4 (own translation); see also BGE 145 IV 55, con 4.2.

[21] BGE 139 II 393, con 4.1.2; BGE 136 II 5, con 3.6.3; BGE 136 II 65, con 4.

[22] For a case in which a communal court took a different route, see the judgment of the Court of Bülach of 2 February 2016, FV150044-C/U AB/ad, con 4.2. In interpreting the Air Passenger Rights Regulation (EC) No 261/2004, which is referred to in the AAT, the court deliberately deviated from the ECJ ruling in Case C-402/07 *Sturgeon* EU:C:2009:716.

[23] Joined Cases C-402/05 and C-415/05 *Kadi v Council and Commission* EU:C: 2008:461; Paul Craig and Grainne de Burça, *EU Law: Text, Cases and Materials*, 7th edn (Oxford University Press, 2020) 367, 406.

It can be assumed that this hierarchy applies to the relationship between EU law and the bilateral agreements as well. EU primary law, including the Charter of Fundamental Rights, thus takes precedence over bilateral law in the event of a conflict. By contrast, bilateral law is binding on the EU legislator and the Member States, and takes precedence over secondary EU law as well as over national law.

In Switzerland, the principle of primacy of international law generally applies (see Article 5(4) Swiss Constitution).[24] However, the Swiss Federal Supreme Court has consistently held that the authorities shall apply a federal act when the Federal Assembly has intentionally enacted that legislation contrary to a treaty obligation and is consciously prepared to face international responsibility. This exception to the principle that international law supersedes federal acts in the case of a conflict is known as the *Schubert* exception, established by the Federal Supreme Court in 1973.[25] Notwithstanding the *Schubert* exception, treaties that guarantee fundamental rights, such as the European Convention of Human Rights, must be respected in any circumstance (*PKK* counter-exception, pursuant to the plaintiff's name in the relevant case, the Partiya Karkerên Kurdistanê).[26] Moreover, the *Schubert* exception does not apply to the Agreement on the Free Movement of Persons, which must always be respected without any possibility of intentional deviation for the Federal Assembly (*AFMP* counter-exception).[27] Lastly, in 2022, the Federal Supreme Court extended the strict supremacy to the Dublin Association Agreement and held that Article 28 of the Dublin III Regulation, which is referred to in this agreement, as interpreted by the ECJ, took precedence over a conflicting provision of the Federal Act on Foreign Nationals and Integration.[28] It underscored that strict supremacy always takes place in cases where 'obligations on the part of Switzerland concerning human rights and the free movement of persons' are at stake.[29] While these rulings are far-reaching, they also have given way to various questions which remain, for the time being, unanswered.[30] In particular, it is unclear whether supremacy is indeed unconditional or whether the Federal Supreme Court reserves the right to deny supremacy in exceptional cases and to apply a Swiss rule instead.

[24] For these issues in general, see Walter Haller, *The Swiss Constitution in a Comparative Context*, 2nd edn (Dike Verlag, 2016); Patricia Egli, *Introduction to Swiss Constitution Law*, 3rd edn (Dike Verlag, 2024).

[25] BGE 99 Ib 39, con 3/4.

[26] BGE 125 II 417, con 4d.

[27] BGE 142 II 35, con 3.2.

[28] BGE 148 II 169, con 5.2, referring to Case C-60/16 *Khir Amayry* EU:C:2017:675.

[29] ibid E 5.2.

[30] *cf* Giovanni Biaggini, 'Die "Immerhin liesse sich erwägen"-Erwägung im Urteil 2C_716/2014: Über ein problematisches höchstrichterliches obiter dictum' (2016) 117(4) *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 169; Astrid Epiney, 'Ist die "Schubert-Rechtsprechung" noch aktuell? Zur Frage des Verhältnisses zwischen Völker- und Landesrecht' [2023] *Aktuelle Juristische Praxis* 699, 708–09; Matthias Oesch, *Der EuGH und die Schweiz* (n 2) 103–06.

D. The Federal Supreme Court's Dual Function …

The Federal Supreme Court's case law on the interpretation and supremacy of the bilateral agreements reveals its dual role in the process of European integration.

On the one hand, it acts as the final arbiter for the bilateral *acquis* in the Swiss pillar. Here, its function is similar to that of the ECJ as the supreme court for the internal market in the EU pillar. Hence, a supranational perspective dominates. Adhering to the case law of the ECJ – the Federal Supreme Court has never referred to cogent reasons in order to deviate from an ECJ ruling – ensures the uniformity of the law. From such perspective, the justification for the markedly consistent Euro-compatible interpretation of the agreements and their supremacy is based on a comprehensible logic: Switzerland participates sectorally in the internal market, similarly to the Member States. From here, it is a small step to call for strict supremacy in analogy to EU law and thus to ensure the proper functioning of the agreements. Against this background, it is not surprising that the Federal Supreme Court – in addition to other considerations (democratic legitimation through the acceptance in a referendum, guarantee of legal protection) – also referred, in order to justify strict supremacy, to the ECJ rulings in *van Gend en Loos* and *Costa/Enel*, the two groundbreaking rulings that paved the way for the ECJ to triumphantly establish the basis for the primacy of EU law and its constitutionalisation.

On the other hand, the Federal Supreme Court, acting as the highest court of Switzerland, represents the hinge between the bilateral *acquis* and national law. This also involves a specifically Swiss perspective. To date, the Federal Supreme Court has not addressed this perspective in its supremacy jurisprudence – admittedly a delicate terrain. When acting in this competence, its role resembles that of the highest courts of the Member States, which respect the unconditional primacy of EU law and the ECJ's prerogative to have the last word on its validity and interpretation generously, albeit not without limits.[31] In one form or another, primacy is accepted in most Member States on the condition that EU law duly guarantees the protection of fundamental rights, that the EU institutions act on the basis of existing competences (*ie* they do not act ultra vires) and that EU law respects the identity of the national constitution (or at least its fundamental content). This means that the Member States retain the last word on the effect of EU law in the national context. Various national courts have not shied away from declaring a Union act or a judgment of the ECJ incompatible with constitutional requirements. Recent examples include the ruling by the German Federal Constitutional Court in 2020 on the ECJ's acceptance of the European Central Bank's public sector purchase programme and the ruling by the Polish Constitutional Court in 2021 on the

[31] Craig and de Burça (n 23) 314, 328–56; Koen Lenaerts, Piet van Nuffel and Tim Corthaut (eds), *EU Constitutional Law* (Oxford University Press, 2021) 23.025–23.030.

ECJ's lack of competence to interpret the EU treaties regarding the independence of national judges.[32]

E. … but without the Right to Refer Questions to the ECJ

In the EU, the preliminary ruling procedure provides a mechanism for national courts to refer questions on the interpretation of the EU Treaties and on the validity and interpretation of EU legal acts to the ECJ (Article 267 TFEU). As the ECJ has noted in 1973, this procedure 'is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community'.[33] It is 'the jewel in the crown of the EU legal system'[34] and the 'keystone'[35] for the good functioning of the EU as a 'union based on the rule of law'.[36] It formalises cooperation and, ideally, contributes to a fruitful dialogue between the ECJ and the national courts, both being jointly responsible for ensuring that EU law is observed when interpreting and applying the EU Treaties (*cf* Article 19 of the Lisbon Treaty on European Union). National courts are 'juges de "droit commun" de l'ordre juridique de l'Union'[37] or 'agents of the Community order … as de facto Community judges'.[38] With their integration into the European network of courts, they have increased their influence: 'This dialogue is probably the source of the ECJ's success in strengthening the power of national courts at the national level and making them allies against national governments.'[39]

The national courts are well advised to give the ECJ the opportunity to comment on a disputed legal act or judgment before an open confrontation, explaining to the ECJ the reasons why it should choose their proposed solution and formulating a preferred judgment.[40] Thereby, a question of interpretation can also be referred to the ECJ more than once. Vice versa, the ECJ is well advised to consider the sensitivities of the national courts and to take their objections to presumably unconstitutional EU legislation seriously, as well as to avoid ignoring

[32] For an overview on such cases, see Renata Uitz, 'The Rule of Law in the EU: Crisis, Differentiation, Conditionality' (2022) 7(2) *European Papers* 929, 933; Matthias Oesch, *Der EuGH und die Schweiz* (n 2) 68–72; Vischer (n 9) fn 104.

[33] Case 166/73 *Rheinmühlen Düsseldorf* EU:C:1974:3, para 2.

[34] Kai Purnhagen and Lawrence W Gormley, 'Court Cases' in *Oxford Encyclopedia of EU Law* (2022) para 6, https://opil.ouplaw.com/home/OEEUL.

[35] Case C-619/18 *Commission v Poland* EU:C:2019:531, para 45.

[36] Case C-583/11 P *Inuit* EU:C:2013:625, para 91.

[37] Case C-1/09 *Gutachten Patentgericht* EU:C:2011:123, para 80.

[38] Alec Stone Sweet, 'The Juridical Coup D'État and the Problem of Authority' (2007) 8 *German Law Journal* 915, 925.

[39] Samantha Besson, *Droit constitutionnel européen*, 2nd edn (Stämpfli Verlag, 2023) para 549 (own translation).

[40] Art 107(2) of the ECJ's Rules of Procedure expressly encourages a national court to state in urgent preliminary ruling procedures what answer it proposes to the questions referred for a preliminary ruling.

any complaint concerning overly integration-friendly judgments. Thus, the ECJ adjusted its case law after Italy's Corte Costituzionale had announced that it would not implement an ECJ ruling in a dispute concerning limitation periods for VAT offences, as the said ruling was considered to violate the Italian Constitution.[41] The ECJ and the national courts thus influence and control each other in a system of vertical separation of powers. The President of the ECJ, Koen Lenaerts, shares the view of Andreas Vosskuhle, then President of the German Federal Constitutional Court, according to which 'the relationship between the ECJ and national constitutional courts … is not about superiority or subordination, but about an appropriate division of responsibility and allocation in a complex system of multi-level governance'.[42]

A decisive feature of the Federal Supreme Court's role in interpreting and applying the bilateral agreements is that, formally, the highest Swiss court is not part of the Union's network of courts. It has neither a right nor an obligation to refer questions on the interpretation of the bilateral agreements to the ECJ, and, consequently, it is not involved in the process of joint judicial decision-shaping and decision-making between the ECJ and the national courts. This is a shortcoming of the institutional set-up. Currently, the informal dialogue between Luxemburg and Lausanne resembles a one-way street, with the ECJ hardly ever invoking the case law of the Federal Supreme Court.[43] Exceptionally, in a judgment of 2009, the ECJ referred to a judgment of the Federal Supreme Court of 2004 and declared that it would take due account of it in accordance with Article 1 of Protocol 2 to the Lugano Convention.[44] However, this explicit reference to a judgment of the Federal Supreme Court by the ECJ remains, as far as can be seen, an isolated case. In interpreting the Agreement on the Free Movement of Persons, the ECJ has never referred to the practice of the Federal Supreme Court (or other Swiss courts); a disappointing record.[45] In the case of bilateral agreements, which aim to integrate Switzerland sectorally into the internal market, the Federal Supreme Court is at least *factually* part of the Union's court system. Even though the ECJ's style

[41] Matteo Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union: CJEU, C-105/14 Ivo Taricco and others, ECLI:EU:C:2015:555; and C-42/17 M.A.S, M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017' (2018) 25(3) *Maastricht Journal of European and Comparative Law* 357, passim.

[42] Koen Lenaerts, 'Kooperation und Spannung im Verhältnis von EuGH und nationalen Verfassungsgerichten' (2015) *EuR* 3, 25 (own translation).

[43] At least, judges of the Federal Supreme Court meet regularly with judges of the ECJ (as well as other courts such as the ECtHR and the constitutional courts of neighboring states) to discuss legal issues, *cf* Bundesgericht, Geschäftsbericht 2022, 14, www.bger.ch. In the draft institutional agreement between the EU and Switzerland of 2018, the Federal Supreme Court and the ECJ would have been committed to a dialogue in order to promote a uniform interpretation (Art 11). This concern should be taken up again in the new negotiations.

[44] Case C-394/07 *Gambazzi* EU:C:2009:219, paras 35–38.

[45] Raphael Dummermuth, 'Im Auslegen seid frisch und munter!' (2023) 3 *recht – Zeitschrift für juristische Weiterbildung und Praxis* 175, 179.

of judgment is geared towards brevity, and, with the exception of the European Court of Human Rights (ECtHR), it generally does not refer to judgments of foreign courts, the Federal Supreme Court's role as the final arbiter on the interpretation of the bilateral agreements in the Swiss pillar would be acknowledged more adequately if the ECJ were to take note of its case law. A side view at the European Economic Area (EEA) reveals that the ECJ is conscious of the EFTA Court's important role in the 'EEA EFTA pillar' and regularly cites its case law.

III. Participation of Switzerland in ECJ Procedures

While the Federal Supreme Court formally is not part of the EU's network of courts, the Swiss government is able to participate in preliminary ruling proceedings before the ECJ (A). *De lege ferenda*, it should be considered to grant the Federal Supreme Court the right to refer questions on the interpretation of the bilateral agreements to the ECJ (B).

A. Government

(i) Preliminary Ruling Procedure

Special provisions of certain agreements allow Switzerland to participate in preliminary ruling proceedings before the ECJ concerning the interpretation of EU law which is also relevant for Switzerland due to the Schengen/Dublin Association Agreements or the Lugano Convention. The Lugano Convention authorises Switzerland to submit statements or written observations if a court of an EU Member State refers a question to the ECJ for a preliminary ruling on the interpretation of the Convention or a legal act referenced therein (Article 2 of Protocol 2 to the Lugano Convention). Analogous provisions can be found in the Schengen/Dublin Association Agreements (Article 8 SAA; Article 5 DAA).

Switzerland makes extensive use of this opportunity. In fact, between the entry into force of the agreements in 2008 and the beginning of 2023, the ECJ Registry notified Switzerland of 191 relevant proceedings based on the Schengen/Dublin Association Agreements. As there is a risk that the agreements will be terminated if Switzerland does not respect an ECJ ruling relevant to the Schengen/Dublin Association Agreements (Articles 9 and 10 SAA; Articles 6 and 7 DAA), it is not entirely surprising that Switzerland has submitted a statement in 42 of these cases.[46] The Federal Office of Justice decides whether a submission will be made

[46] The Federal Office of Justice maintains a publicly accessible list of these proceedings, www.bj.admin.ch/bj/de/home/sicherheit/schengen-dublin/uebersichten.html. Switzerland has never taken part in oral proceedings.

in proceedings and, subsequently, coordinates its preparation, which will then be sent to Luxembourg via diplomatic channels. Swiss submissions are generally not accessible to the public.[47] In the ECJ's deliberations, EU institutions, EU Member States and associated third states submitting a statement or an observation are listed; however, their content is generally not reproduced.[48] The Swiss government has summarised its practice as follows:

> Switzerland consistently makes use of the opportunity to comment on requests for preliminary rulings in order to exert its influence on legal developments in the EU. However, it refrains from commenting if it can be assumed from a precise analysis of the facts that the answer to the questions of interpretation posed will not have any repercussions on Swiss legislation and practice.[49]

Switzerland's active participation is remarkable as it potentially influences the ECJ's decision-making to the same extent as the statements of EU institutions (whereby the Commission is involved in practically all proceedings) and EU Member States (whereby participation varies considerably) do.[50] Switzerland thereby assumes co-responsibility for the development of case law in an area of EU law in which it is effectively treated as a Member State by virtue of its association. Swiss statements to the ECJ resemble the practice of *decision* (or *proposal*) *shaping* (which Switzerland practises within the framework of the Schengen/Dublin association when new EU legal acts are drafted by the European Commission), which is now also transferred to the judiciary.[51] Ideally, when drafting its statements, Switzerland consults with other states sharing similar interests related to currently debated issues to increase the impact of their arguments.

De lege ferenda, it is worth considering extending Switzerland's right to issue statements and written observations to other agreements that aim to integrate Switzerland into the internal market and are based on EU law for this purpose. This should be considered in the ongoing negotiations concerning new institutional rules. The Statute of the ECJ expressly allows for participation by third countries on the condition that it is provided for in the agreements concerned (Article 23 of the ECJ's Statute).

[47] *Prima vista*, neither Art 3, para 1, lit a, nos 4 and 5 of the Federal Act on Freedom of Information in the Administration of 2004 (documents relating to international dispute settlement proceedings and to constitutional and administrative judicial proceedings) nor Art 7, para 1, lit d of this act (affecting Switzerland's interests in matters of foreign policy and international relations) seems relevant, which means that there is a right of access to such statements. The Federal Office of Justice grants access to individual submissions if an applicant is interested in receiving a submission.

[48] On the function and influence of such statements and observations in ECJ proceedings in general, see Christoph Krenn, *The Procedural and Organisational Law of the European Court of Justice: An Incomplete Transformation* (Cambridge University Press, 2022) 59–73.

[49] Eidgenössisches Justiz- und Polizeidepartement, Fünfter Bericht des EJPD vom 17. März 2014 zuhanden der GPK-EJPD Stand der Umsetzung von Schengen/Dublin 2013/2014, 33, www.bj.admin.ch/bj/de (own translation).

[50] For statistics, see Krenn (n 48) 59–63.

[51] For an example of such decision (or proposal) shaping, see below.

(ii) Other Procedures

Switzerland was prevented from participating in the proceedings before the ECJ related to Directive 91/477/EEC (Weapons Directive), despite being a particularly affected party. The Weapons Directive, which belongs to the Schengen *acquis* relevant to Switzerland, was amended in 2017 with Directive (EU) 2017/853. It was clear that Switzerland had to adopt this amendment (*cf* Recital 36). Switzerland had previously succeeded in shaping the content of the new directive in a remarkable manner. As part of the *decision* (or *proposal*) *shaping*, it persuaded the Commission, the Council and the Parliament to include a provision specifically tailored to the circumstances of Switzerland – albeit formulated in general terms – and thus to install a 'Swiss finish', as it were (Article 6). The Czech Republic filed an action for annulment against the new directive with the ECJ, arguing, inter alia, that the Swiss finish was discriminatory because it led to an unjustified advantage for Switzerland compared to the EU Member States. The ECJ rejected this plea.[52] Nevertheless, Switzerland was not invited to submit a statement in these proceedings. In accordance with the above-mentioned agreements, the right to submit a statement or a written observation only exists in preliminary ruling proceedings. *De lege ferenda*, it would be conceivable to grant Switzerland the right to submit statements and written observations in annulment and infringement proceedings before the ECJ as well.

Moreover, in preliminary ruling proceedings, Switzerland's participation is actually limited to questions regarding the interpretation of an EU legal act relevant to the Schengen/Dublin Association Agreements or the Lugano Convention. Questions of validity are excluded from this, even though, in such cases, it is not only the validity of a legal act that is at stake, but also questions of interpretation with de facto prejudicial effect for the associated Schengen/Dublin states, and the annulment of an EU legal act might entail that the legal situation must also be adjusted bilaterally.[53]

B. Federal Supreme Court

The implementation and application of the bilateral agreements in Switzerland generally works well. Many lawyers are remarkably adept at finding their way through the jungle of EU law and are capable of accomplishing the 'translation' of this law into the bilateral context. Authorities interpret those agreements, which aim to integrate Switzerland into the internal market, consistently with the ECJ's jurisprudence. According to Andreas Zünd, judge at the Federal Supreme Court

[52] Case C-482/17 *Czech Republic v Parliament and Council* EU:C:2019:1035.

[53] For instance, such an adjustment would have been inevitable if the ECJ had declared the Air Passenger Rights Regulation (EC) 261/2004 null and void in Case C-12/11 *McDonagh/Ryanair* EU:C:2013:43.

until 2021 and thereafter judge at the ECtHR, the EU 'can rely on the fact that the application of the EU legal acts adopted by Switzerland remains compatible with the interpretation within the EU'.[54] The overtly generous interpretation of the conditions for the expulsion of foreign criminals by the Federal Supreme Court and the ruling of the Bülach District Court on the Air Passenger Rights Regulation are exceptions that confirm the rule.[55] With regard to those legal questions not yet subjected to any ECJ practice, Swiss courts have a 'first mover advantage'.[56]

Decisively, however, the Federal Supreme Court has no right to refer questions of interpretation to the ECJ. In view of the dicta from Lausanne, according to which the Agreement on the Free Movement of Persons and the Dublin Association Agreement take precedence over federal laws, and in view of the obligation envisaged in the ongoing negotiations to strictly comply with ECJ rulings independent of the date of their issuance, the need to formally integrate the Federal Supreme Court into the EU's network of courts is evident. The highest Swiss court should be competent to refer questions on the interpretation of a bilateral agreement to the ECJ.[57] The Federal Supreme Court would then be in the position to propose an interpretation that is preferable from a Swiss perspective and to actively shape the development of the law. It could also ask the ECJ to reassess unconvincing practices. The newly envisaged dispute settlement mechanism, according to which an arbitration tribunal would have to refer questions on the interpretation of EU law to the ECJ, would not exclusively be responsible for clarifying controversial issues of interpretation based on the input rendered by the ECJ. With a right of referral, it would primarily be up to the Federal Supreme Court to formulate the relevant questions of interpretation within a specific legal dispute and to refer them to the ECJ, instead of an arbitration tribunal in interstate proceedings.[58]

Models for such a set-up are already visible when glancing at agreements between the EU and other third countries:[59]

- The EEA–EFTA states Iceland, Liechtenstein and Norway can allow a court to ask the ECJ to rule on the interpretation of EEA provisions that correspond

[54] Andreas Zünd, 'Gastkommentar: Das Bundesgericht verliert seine Bedeutung' *Luzerner Zeitung* (23 March 2019) passim (own translation).

[55] See BGE 145 IV 364, con 3.4.4 (own translation); BGE 145 IV 55, con 4.2.

[56] This term originates from Carl Baudenbacher, 'Gastkommentar: Der EFTA-Gerichtshof ist unabhängig' *Neue Zürcher Zeitung* (26 July 2018) passim, www.nzz.ch/meinung/wie-unabhaengig-ist-der-efta-gerichtshof-ld.1398959, in relation to the role of the EFTA Court in interpreting EEA law; for an area of law in which the Federal Supreme Court possesses such a first mover advantage, *cf* Benedikt Pirker, 'Verbleiberechte gemäss dem Freizügigkeitsabkommen Schweiz-EU' [2023] *Aktuelle Juristische Praxis* 860, passim.

[57] *cf* also Joëlle de Sépibus, 'Ein institutionelles Dach für die Beziehungen zwischen der Schweiz und der Europäischen Union – Wie weiter?' *Jusletter* (14 July 2014) para 56.

[58] *cf* also Zünd, 'Gastkommentar (n 54); for further suggestions to provide the Federal Supreme Court a role in the proposed dispute settlement model, see Benedict Vischer, 'Feilen am Streitbeilegungssystem in den bilateralen Beziehungen' *Jusletter* (22 January 2024) passim.

[59] For the participation of third country courts in preliminary ruling procedures before the ECJ in general, see Jörg Gundel, 'Die Öffnung des Vorabentscheidungsverfahrens zum EuGH für nichtmitgliedstaatliche Gerichte' [2019] *Europäische Zeitschrift für Wirtschaftsrecht* 934, passim.

to EU provisions (Article 107 and Protocol 34 of the EEA Agreement). This option has not been used so far, primarily because the courts of the EEA–EFTA states may raise questions on the interpretation of the EEA Agreement before the EFTA Court (Article 34 of the Surveillance and Court Agreement). These courts take advantage of this opportunity and periodically refer interpretative questions to the EFTA Court.

- The Treaty establishing the Transport Community between the EU and the six countries of the Western Balkans of 2017 and the Agreement on the Creation of a European Common Aviation Area between the EU and various European countries of 2006 contain provisions that allow courts of these countries to refer questions on the interpretation of treaty provisions or provisions of legal acts referred to therein that are substantially identical to corresponding rules of the EU Treaty and to acts adopted pursuant to the EU Treaty to the ECJ for a ruling if necessary for a judgment (Article 19 and Article 16, respectively). These countries are free to stipulate the modalities according to which their courts are to apply this provision. Domestic laws can provide for a general right of referral by national courts or for an obligation of those courts, against whose decisions there is no judicial remedy under national law (Annex IV). No question of interpretation has ever been referred to the ECJ on the basis of these provisions.

Similar to the courts in the EU Member States, the Federal Supreme Court would continue to have no access to infringement proceedings (Article 258 TFEU) or to annulment proceedings (Article 263 TFEU).

IV. Epilogue

The envisaged conclusion of new institutional rules for those agreements which aim to integrate Switzerland into the EU internal market and are based on EU law provides a welcome opportunity to assess whether the Swiss model of European integration can still truly be regarded as the Swiss *Königsweg* (the Swiss king's way), as the bilateral way has been labelled by many.[60] This critical endeavour affords the chance to consider whether there may be a more effective method of safeguarding Switzerland's interests in Europe; moving from the policy of simply reproducing developments in EU law towards a more constructive approach and the assumption of (co-)responsibility for policy-making on a pan-European level. A new institutional framework is arguably inevitable in the short term, so that such a bilateral relationship can be put on a more solid basis and new agreements

[60] See Dieter Freiburghaus, 'Königsweg oder Sackgasse?' in Dieter Freiburghaus (ed), *Königsweg oder Sackgasse?: Schweizerische Europapolitik von 1945 bis heute*, 2nd edn (Neue Zürcher Zeitung, 2015) passim.

can be concluded. However, it is questionable whether new rules – which would institutionalise the already apparent tendency of de facto delegating legislative and judicial competence to Brussels, Strasbourg and Luxemburg – would represent a sustainable long-term solution. Political common sense and foresight – *gouverner, c'est prévoir* – call for all policy options vis-à-vis the EU to be kept open and periodically assessed, including the prospect of opting for full EU membership.

Thomas Cottier has repeatedly pointed out that the current model of the Swiss policy towards the EU might only be a *provisoire qui dure*, functioning as a stepping stone towards deeper integration but not providing a stable long-term solution. In 2013, he stated:

> The countries in the fourth circle [such as Switzerland] will retain formal sovereignty, but largely lose self-determination except for the decision whether or not to join another level of European integration. They need to make up their own minds, taking into account not only their own history and constitutional precepts, but also the needs of present and future generations in Europe facing emerging powers.[61]

In 2014, he reiterated the quest for a re-evaluation of Swiss policy towards the EU:

> Switzerland's fate is inevitably linked to that of its neighbors and the continent, culturally and economically, socially and politically. The country would do better to play an active role in shaping the future of this continent than to try to defend old privileges in an anxious and politically isolated manner. All of this requires a new and changed understanding of sovereignty, which seeks self-determination in the long term through co-operation, participation and integration.[62]

It is to be hoped that these considerations fall on fertile grounds – in Switzerland and beyond. Thomas Cottier's constant and tireless commitment and his contribution to better understanding and further developing international cooperation and European integration, including the role that Switzerland plays in these processes, are most remarkable and commendable.

[61] Thomas Cottier, 'Swiss Model of European Integration' in Diezig and Epiney (n 2) 377, 393.
[62] Cottier et al (n 2) 604 (own translation).