# The Integration of Switzerland into the Framework of EU Law by Means of the Bilateral Agreements

*Benedikt Pirker and Astrid Epiney*

**Dieser Beitrag wurde erstmals wie folgt veröffentlicht:**
***Astrid Epiney/Benedikt Pirker,* The Integration of Switzerland into the Framework of EU Law by Means of the 'Bilateral Agreements', in: Peter-Christian Müller-Graff/Ola Mestad (Hrsg.), The Rising Complexity of European Law, Berlin 2014, 39-66. Es ist möglich, dass die Druckversion – die allein zitierfähig ist – im Verhältnis zu diesem Manuskript geringfügige Modifikationen enthält.**

## Table of Contents

G. Bibliography

# A. Introduction

On December 6th 1992, a clear majority of the Swiss cantons and a narrow majority of the Swiss people replied 'no' when asked whether Switzerland should join the European Economic Area (EEA). They thereby sent Switzerland on a journey quite different from that undertaken since that time by its fellow European Free Trade Area (EFTA) countries, some of which have acceded to the European Union (EU) since then, while others[1] continue to form the EFTA part of the EEA. Switzerland, on the contrary, continues to this day to follow what is often referred to as the 'bilateral path'. The present contribution intervenes 20 years after these events to examine Switzerland's state of integration into EU law based on this high number of individual, specialized agreements which have been concluded between Switzerland and the EU.[2]

While Switzerland decided to neither join the EEA nor the EU, closer ties with the internal market were seen as an economic necessity. Consequently, the various agreements and in particular the two packages of 'Bilateral Agreements' concluded in 1999 and 2004 contain mechanisms which transfer EU law to Switzerland to ensure compatibility between the two legal orders.

A first part of the paper briefly sets out these two sets of Bilateral Agreements, before a second part explores the transfer mechanisms. Part and parcel of these mechanisms is the interpretation of the norms contained in the Bilateral Agreements in a manner similar to EU law. A third part thus examines how the interpretative practice of the Court of Justice of the European Union (CJEU) and of the Swiss Federal Supreme Court has developed in the presence of the mentioned transfer mechanisms. While a noticeable degree of integration of Switzerland into the internal market emerges from the present survey, a number of shortcomings emerge simultaneously. At the political level, the bilateral process also seems to have reached its limits. Consequently, a fourth section explores possible future developments, including a variety of proposals developed to improve the institutional set-up of Swiss-EU bilateralism, and discusses their practical viability.

[1] Iceland, Norway and Liechtenstein.

[2] The EU and its Member States in some situations, where competence issues called for a mixed agreement.

# B. The Bilateral Agreements I and II

The relations between the EU and Switzerland are a complex subject matter, with in fact a wide variety of international treaties being in force.[3] For the purpose of the present contribution, however, a short survey over the most important agreements will suffice; these are arguably the two packages commonly referred to as the 'Bilateral Agreements I' and the 'Bilateral Agreements II'. All agreements are classic international treaties rather than what is often referred to in the doctrine as integration treaties; they rest upon the premise of equivalence of the contracting parties legislation, do not foresee formal integration into the *acquis* of EU law and only possess an institutional structure typical for international treaties rather than an elaborate institutional system as it can for example be found in the context of the EEA.[4] The two exceptions to this rule are the Agreement on Air Transport and the Agreement on Schengen/Dublin, as is subsequently shown.

There is no overarching agreement; the two packages of bilateral agreements are merely politically linked, while in the case of the Bilateral Agreements I there is indeed also a – limited – legal link: All Bilateral Agreements I had to enter into force simultaneously, and the non-prolongation or termination of one agreement would have entailed the non-application or loss of force of the other agreements of the package.[5]

## *1. The Bilateral Agreements I*

As to their content, the package of the Bilateral Agreements I comprises seven sectoral agreements. The Agreement on the Free Movement of Persons[6] has proven to be the most important, but also debated agreement.[7] The Agreement purports to liberalize the free movement of workers and self-employed persons, non-working persons and the transboundary provision of services, while harmonising certain norms of the contracting parties for this purpose. It contains in its main part central provisions such as the principle

---

3 See for an overview of some of the newer agreements *Kaddous/Jametti Greiner* (eds.), Accords bilatéraux II et autres accords récents. See for an overview of the Bilateral Agreements I and II and some other recent agreements with further references *Epiney/Metz/Pirker*, Parallelität, 95 ff.

4 See *Thürer/Hillemanns*, in: Bilaterale Verträge I & II, 39 (40).

5 See Article 25 (4) Agreement on the Free Movement of Persons for an example of such a 'guilloutine' clause contained in all seven Bilateral Agreements I.

6 OJ 2002 L 114, 6 ff.

7 See *Boillet*, Interdiction de discrimination, 43; *Borghi*, La libre circulation des personnes, 4 ff; *Schnell*, Arbeitenehmerfreizügigkeit in der Schweiz, 41 ff.

of non-discrimination, in its annex I details on the rights of various groups of persons, in its annex II provisions on the coordination of social security systems[8] and in its annex III provisions on the mutual recognition of diplomas.[9]

The Agreement on Air Transport[10] is a partial integration agreement[11] aimed at the integration of Switzerland into the European air space. For this purpose, it lays down some central principles such as non-discrimination and the freedom of establishment and adopts for Switzerland a variety of EU norms such as the third liberalization package in the air transport sector, technical harmonisation norms and the competition law rules. By means of this sectoral integration the EU institutions have gained powers of supervision and control also for Swiss-related air transport matters.[12]

The other agreements are more narrowly focused and present a less elaborate institutional structure. The Agreement on Land Transport[13] combines the liberalisation of market access in road and rail traffic of persons and transportation of goods with environmental protection objectives.[14] The Agreement on Public Procurement[15] extends the liberalization commitments undertaken by the EU and Switzerland under the Government Procurement Agreement in the framework of the World Trade Organisation to new actors such as municipalities and new economic sectors such as electricity and water services.[16] The Agreement on Scientific and Technological Cooperation[17] enables Switzerland to participate as an equal partner in EU research programmes.[18] The Agreement on Mutual Recognition in Relation to Conformity Assessment (hereinafter Mutual Recognition Agreement) [19] should eliminate the problem of double assessment and double certification for Swiss producers to which they found themselves subject as long as the conformity

8 See e.g. *Kahil-Wolff*, in: Personenfreizügigkeitsabkommen, 49 ff.
9 See on this topic *Gammenthaler*, Diplomanerkennung, 298 ff.
10 OJ 2002 L 114, 73 ff.
11 See on this notion in more detail *Schweizer*, in: Auslegung und Anwendung von „Integrationsverträgen", 23 (38).
12 See in more detail *Haldimann*, in: Bilaterale Abkommen Schweiz-EU, 443 (459 f.).
13 OJ 2002 L 114, 91 ff.
14 See *Sollberger*, Konvergenzen und Divergenzen im Landverkehrsrecht der EG und der Schweiz, 177 ff; *Sollberger/Epiney*, Verkehrspolitische Gestaltungsspielräume der Schweiz, 17 ff.
15 OJ 2002 L 114, 430 ff.
16 See *Biaggini*, in: Bilaterale I & II, 651 ff.
17 OJ 2002 L 114, 468 ff.
18 See closer on the background of scientific cooperation between the EU and Switzerland *Vahl/Grolimund*, Integration ohne Mitgliedschaft, 30.
19 OJ 2002 L 114, 369 ff.

evaluations were not recognized by the EU.[20] Finally, the Agreement on Trade in Agricultural Products[21] essentially limits its commitment of liberalization of trade to specific product groups, as neither of the two contracting parties wanted to make further concessions in the field of their respective agricultural policies.[22]

### *2. The Bilateral Agreements II*

The second package of bilateral agreements was signed in 2004, containing on the one hand some topics designated sometimes as *leftovers* from the Bilateral Agreements I, and on the other hand a number of new topics.[23] An agreement on services was excluded from the negotiations because of the diverging interests between Switzerland and the EU on this topic.[24]

The Agreement on Processed Agricultural Products[25] amends the 1972 Free Trade Agreement between the EU and Switzerland to simplify the existing prize stabilization mechanism and improve market access for both trading partners.[26] The Agreement on Statistics[27] establishes cooperation in this field to ensure the transfer and publication of statistical data in a form compatible with EU standards and the access of Swiss experts to the relevant EU committees.[28] The Agreement on the Participation of Switzerland in the European Environmental Agency and the European Environment Information and Observation Network[29] formalizes the earlier informal cooperation between Switzerland and the EU and obliges Switzerland for this purpose to adopt specified EU secondary law.[30] Based on the MEDIA Agreement[31] Switzerland is able to participate in the EU's MEDIA program. The

---

20 *Bühler*, in: Bilaterale Verträge I & II, 581 ff.

21 OJ 2002 L 114, 132 ff.

22 *Senti*, in: Bilaterale Verträge I & II, 731 ff.

23 See on the background of the topics chosen for the Bilateral Agreements II *Ambühl*, in: Bilaterale Abkommen II Schweiz-EU, 5 (8 f.).

24 *Epiney*, Zur rechtlichen Tragweite eines Einbezugs der Schweiz in den unionsrechtlichen Besitzstand im Bereich des Dienstleistungsverkehrs, 5 f.

25 OJ 2005 L 23, 19 ff.

26 See generally on the limits of the current contractual relations between Switzerland and the EU in the agricultural sector *Epiney/Furger/Heuck*, Zur Berücksichtigung umweltpolitischer Belange bei der landwirtschaftlichen Produktion in der EU und in der Schweiz, 1.

27 OJ 2006 L 90, 2 ff.

28 See *Bürgi-Schmelz/Gamez*, in: Bilaterale Verträge I & II, 809 ff.

29 OJ 2006 L 90, 36 ff.

30 See on Switzerland and the European Environmental Agency *Epiney/Schneider*, EurUP 2004, 252 (253 f.).

31 OJ 2007 L 303, 11 ff.

Agreement on the taxation of pensions received by former EU officials resident in Switzerland[32] avoids double taxation of such income. The Schengen[33] and Dublin[34] Association Agreements provide for an association of Switzerland and oblige the latter to adopt a number of EU legal norms of both regimes. Both agreements emphasize the requirement of uniform application and interpretation of the mentioned legal norms and provide for a system of transposition which obliges Switzerland to implement new legislation adopted at the EU level within two years.[35] The Agreement to Combat Fraud[36] provides for mutual administrative and legal assistance between the EU, the EU Member States and Switzerland in the fields of indirect taxation, subsidies and public procurement.[37] The Agreement on the Taxation of Savings Income[38] is linked to Council Directive 2003/48/EC. It does, however, not introduce an automatic exchange of information like the directive, but provides for tax deduction at source.[39]

Since the conclusion of the Bilateral Agreements II, other agreements have been negotiated and concluded.[40] However, as is examined in the final part of the present contribution, the 'bilateral path' seems to run into growing political trouble and is considered by some to have reached its limits. To understand the differences between the various agreements and the individual legal challenges each of them offers, the mechanisms of transfer of EU law contained to varying degrees in the agreements must be explored more closely.

## C. Transfer mechanisms of EU law in the Bilateral Agreements

As has been shown, the Bilateral Agreements cover diverse topics. Some agreements are simply international treaties without the need for replicating EU law in any way. Examples for this would be the Agreement on the taxa-

[32] Agreement of 26 October 2004, not published in the Official Journal.
[33] OJ 2008 L 53, 50 ff.
[34] OJ 2008 L 53, 5 ff.
[35] See closer on the agreements *Epiney/Meier/Egbuna-Joss*, in: Bilaterale Verträge I & II, 903 ff.
[36] OJ 2009 L46, 8 ff.
[37] See in detail on the agreement *Meier*, Schutz der finanziellen Interessen der EU, 284 ff.
[38] OJ 2004 L 385, 30 ff.
[39] *Schelling*, in: Bilaterale Abkommen II Schweiz – EU, 501 ff.
[40] See e.g. the Agreement on the Simplification of Inspections and Formalities in Respect of the Carriage of Goods and on Customs Security Measures, OJ 2009 L 199, 24 ff.

tion of pensions with its very limited focus and the Agreement on Processed Agricultural Products which merely revises the list of products in Protocol Nr. 2 of the 1972 EU-Swiss Free Trade Agreement.[41]

For other topics closer related to the EU legal *acquis*, however, different techniques had to be applied to ensure the transfer of EU law into the obligations of bilateral agreements together with the continuous adaptation in the light of new developments in EU law and to foster similar application and interpretation of the 'parallel' legal norms. The focus of the present section lies thus not only on the presentation of these mechanisms, but also on the possibilities to use them to bridge the divide between the seemingly static regime established by the Bilateral Agreements and the need for dynamic adaptation to hit the moving target of the EU internal market *acquis*.

Some of these mechanisms apply at the moment of the conclusion of agreements; others act at the level of revision and change of agreements; again others relate to the question of interpretation of the agreements and the relevance of the case law of the CJEU.

## I. Transfer of EU law at the moment of conclusion of agreements

As one first technique, many agreements replicate the wording of EU law in their text and thereby "transpose" EU law to the context of the Bilateral Agreements. Examples are the Agreement on Public Procurement with its principle of non-discrimination in Article 6 or the Agreement on the Free Movement of Persons which transposes a number of free movement rights in its annex I through identical wording. The question resulting from this technique is whether these 'parallel' norms are also to be interpreted in the same way as EU law.

Many agreements also contain references to EU secondary law, often in their annexes. Typically, the referencing provisions require the contracting parties to apply the EU secondary law or equivalent norms. Based on the principle of equivalence of legislation, Switzerland is consequently bound to apply these provisions or to create equivalent, though not formally identical legal norms in its domestic law.[42] The Mutual Recognition Agreement for example refers to such EU secondary law.[43] The Agreement on the Free Movement of Persons takes up EU secondary law in its Annex II on the co-

[41] The present section follows roughly the taxonomy of agreements already developed and suggested in *Epiney/Metz/Pirker*, Parallelität, 182 ff.

[42] *Schaerer*, AJP 2004, 340 and footnote 16.

[43] Chapter 1 Section IV Annex I of the Mutual Recognition Agreement.

ordination of social security and in its Annex III on the recognition of diplomas.

Other agreements take matters further and foresee that Switzerland has to 'implement and apply'[44] the mentioned EU secondary legislation, which entails in practice a duty to implement EU law comparable to that of a EU Member State.[45] Examples include the Schengen Association Agreement which imposes this obligation in relation to the EU secondary legislation contained in its annexes or the Agreement on Air Transport which binds Switzerland as if it were an EU Member State to implement EU secondary law contained in its annexes.[46]

Sometimes, agreements only provide for a weaker obligation to 'take into consideration' EU secondary law, which does not bind Switzerland, but obliges it to take the pertinent law into account.[47] As a practical effect, it can safely be assumed that Switzerland will in all likelihood not deviate from such norms unless for specific reasons.[48]

In summary, while the two first kinds of references to EU secondary law have a binding effect, the last one implies only a duty to consider the pertinent acts. As to the differences in the formulation of the binding obligations to apply EU secondary law, there seems to be a conceptual difference which, however, does not really imply a difference also in the result, so that in the two cases EU secondary law has to be applied respectively respected.[49]

## II. Transfer of EU law by means of later change to or revision of agreements

In principle, the Bilateral Agreements state the law in a static fashion; this feature also applies to the references to EU secondary law, and stems essentially from the impossibility under Swiss constitutional law to use dynamic references.[50] With the constant change to which EU law is subject, a need to adapt the static framework of the agreements to such changes arises. New

---

44 Article 2 (1) Schengen Association Agreement.

45 So, the secondary legislation referred to in the annexes of the Schengen Association Agreement have to be applied or implemented as such and not only in the areas covered by the agreement, cf. *Epiney*, SJZ 2006, 121 (122 ff.). See for a contrasting view also adopted by the Swiss Parliament *Brunner*, in: Revision des Datenschutzgesetzes, 139 (140 ff.).

46 See on the latter *Haldimann*, in: Bilaterale Abkommen Schweiz-EU, 442 (453 f.).

47 See e.g. Article 2 Annex II Agreement on the Free Movement of Persons.

48 *Breitenmoser/Isler*, AJP 2002, 1003 (1013).

49 Cf. in detail, with further references, *Epiney/Metz/Pirker*, Parallelität, 142 ff.

50 *Wüger/Scapelli*, SJER 2005/2006, 287 (294).

developments can be integrated into the framework of the Bilateral Agreements by three different techniques: revision of agreements, decision-making powers of the joint committees and – as a rather recently created option – an obligation of continuous legal adaptation.

A revision of an agreement is perfectly possible under international law,[51] but involves a potentially cumbersome procedure which corresponds in principle to the procedure required for the signature and ratification of the agreement which had taken place in the first place.[52]

While it is thus an indispensable procedure to change e.g. the wording of an agreement itself, a simplified procedure has been put in place to change and adapt the references to EU secondary legislation mentioned previously. Typically, the agreements possess a joint committee which has the power to adopt binding decisions to adapt references in the annexes of the pertinent agreement to such new EU legislation.[53]

Remarkably, the agreements also foresee certain participation rights for Swiss delegates in the EU legislative process leading up to new developments in areas of concern for the pertinent bilateral agreement. They can participate as observers in the meetings of committees and expert groups of the Council of the EU as well as in some cases in Council meetings.[54] In terms of their institutions, it should also be noted that beyond the powers of the joint committee some of the agreements foresee special arrangements. The autonomy of Switzerland as a contracting party is in particular reduced in the case of the Agreement on Air Transport, where powers of implementation of competition law are transferred in substance to EU organs.[55]

As a last model, the Schengen and Dublin Association Agreements create an obligation for Switzerland not only to implement and apply the EU legal *acquis* contained in the pertinent agreement, but also to continuously adopt all later modifications and future developments of this *acquis*. Switzerland is free to rely on its normal legislative procedure for this purpose, but the sanc-

---

[51] Article 39 Vienna Convention on the Law of Treaties.

[52] See on the Swiss procedure for the conclusion and ratification of international treaties *Thürer/Truong/Schwendimann*, in: Ehrenzeller et al., BV-Kommentar, Artikel 184 BV, para 11 ff.

[53] See e.g. Article 18 Agreement on the Free Movement of Persons. On the legal nature of these decisions see *Wüger/Scapelli*, SJER 2005/2006, 287 (291 f. and 308 ff.).

[54] See *Jaag/Zihlmann*, in: Bilaterale Verträge I & II, 65 (74 ff.). On the particular mechanism in the Schengen/Dublin Agreement see *Gutzwiller*, in: Bilaterale Abkommen II Schweiz – EU, 245 ff.

[55] Articles 11 and 20 of the Agreement on Air Traffic.

tion for non-adoption of future Schengen or Dublin legal acts consists in the termination of the respective agreement.[56]

## III. Transfer of EU law by means of interpretation and the relevance of the case law of the CJEU

Apart from the adaptation to the changes in EU legislation, the Bilateral Agreements also face the challenge of interpretation of the 'parallel' norms they contain. Some of the Bilateral Agreements contain express provisions on the question of interpretation and also the relevance of case law of the CJEU. But also for the other agreements, there is a need to reflect upon the potential relevance of the CJEU's case law in interpreting norms in 'parallel' to EU law.

### *1. Provisions on interpretation in the Bilateral Agreements*

In some agreements, the contracting parties ensured that the question of whether case law of the CJEU interpreting 'transferred' provisions of EU law ought to have relevance was openly addressed. As the most prominent example, Article 16 (2) first sentence of the Agreement on the Free Movement of Persons requires that 'account shall be taken' of the case law prior to the date of signature of the agreement. The rather open phrasing evokes a number of questions.

Apart from this clause, Article 1 (2) second sentence of the Agreement on Air Transport contains an even more stringent wording: Rules that are substantially identical to EU legal norms 'shall, in their implementation and application, be interpreted' in conformity with CJEU case law. In practice, in the light of the subsequent discussion this wording arguably does not lead to a substantially different obligation.[57] For reasons of space, the present contribution focuses on the essentially similar questions raised under Article 16 (2) first sentence of the Agreement on the Free Movement of Persons.

First, it is unclear whether the provision contains an obligation to follow such CJEU case law or a mere duty to take it into consideration. Some have

[56] See on this 'all or nothing' principle *Epiney/Meier/Theuerkauf*, Plädoyer 2005, 38 ff.; *Baudenbacher*, in: Souveränität im Härtetest, 247 (258).

[57] See with similar results *Bieber*, in: Personenfreizügigkeitsabkommen, 1 (21 f.); see also *Cottier/Diebold*, SJER 2008/2009, 237 (259).

argued in favour of the second solution.[58] A different view can, however, arguably be based on the objective of the agreement to implement the free movement of persons on the basis of the legal obligations applicable in the context of EU law. Furthermore, it also gives full effect to this provision, as the existence of a more general duty to take account of the CJEU's interpretation where provisions of the Bilateral Agreements are similar to EU law seems beyond doubt.[59]

Second, it has to be assessed to what extent notions and concepts in the Bilateral Agreements 'mirror' EU law. The case seems rather clear for EU secondary legislation that is referred to in annexes. For other provisions, similar wording is a clear indication. However, where the phrasing of a provision deviates somewhat or the context appears different from a norm of EU law, things become more complex. While a case-by-case analysis is indispensable in such cases, the objective of the relevant agreement – which in most cases involves reproducing to some extent a parallel legal framework to that existing under EU law – must arguably weigh in on the decision. If such an objective exists, in case of doubt an interpretation following the interpretation given to the parallel EU legal norm by the CJEU seems preferable.[60]

A further difficulty consists in establishing a clear dividing line for 'old' case law that has been handed down before the date of signature of an agreement and 'new' case law handed down later. Centrally, new case law is not subject to the obligation of conform interpretation, but typically merely has to be notified to Switzerland and can be discussed in the competent Joint Committee.[61] But not all case law handed down after a specific date can easily be considered to be such 'new' case law.[62] Arguably, with the development of jurisprudence being a continuous, dynamic process[63] a number of cases handed down by the CJEU after the relevant date is likely to merely continue existing lines of jurisprudence, thereby confirming principles developed in earlier case law. In other cases, the CJEU may be applying such

---

58 *Cottier/Diebold*, SJER 2008/2009, 237 (258 ff.), although the authors emphasize that following interpretations given by the CJEU remains desirable nonetheless.

59 *Epiney/Metz/Pirker*, Parallelität, 157. See for similar views *Schnell*, Arbeitnehmerfreizügigkeit, 122; *Boillet*, L'interdiction de discrimination en raison de la nationalité, 54 ff.; *Mock/Filliez*, SZIER 2006, 237 (244); *Burri/Pirker*, SZIER 2012, 165 (172).

60 *Epiney/Metz/Pirker*, Parallelität, 159.

61 See e.g. Article 16 (2) second sentence of the Agreement on the Free Movement of Persons.

62 See, however, for such a formal view *Cottier/Evtimov*, in: Die sektoriellen Abkommen Schweiz-EG, 179 (200).

63 See on this point *Benesch*, Freizügigkeitsabkommen, 103.

principles to new and different cases which had not yet been encountered in the case law before the date of signature of the agreement. Arguably, the first situation can be considered to fall within the notion of 'old' case law, while in the second one can truly speak of 'new' case law.[64] There is, however, only a fuzzy boundary between the two categories: The more 'new' jurisprudence merely draws logical conclusions from principles established in older case law, the more such developments arguably ought to be seen as mere concretisation of 'old' case law, which could lead to a duty to follow such merely concretising case law. A case by case assessment is thus inevitable.

Beyond the clause on interpretation, the case of the Agreement on the Free Movement of Persons allows, however, to demonstrate that even 'new' jurisprudence from the CJEU may play an important role for Swiss courts. The objective of the agreement can only be reached if also later developments in the CJEU's case law are given at least some legal relevance by those courts. There can of course be no unconditional obligation for Swiss courts to follow the CJEU's later holdings for parallel notions in the Bilateral Agreements. But the objective of the agreement calls for a presumption of relevance, which can then be rebutted e.g. by arguments showing that new case law modifies the character of notions or concepts in the agreement in an unpredictable manner or that the structure or content of the agreement oppose the transposition of the CJEU's solution.[65] The later overview on the Swiss Federal Supreme Court's interpretative practice demonstrates that Swiss courts have effectively developed a similar approach.

### *2. The interpretation of the Bilateral Agreements in absence of an interpretation clause*

Still, the majority of the Bilateral Agreements does not contain an express provision on the relevance of interpretations given by the CJEU in its jurisprudence for the interpretation of the norms of the Bilateral Agreements. In principle, Swiss courts are thus called to interpret the Bilateral Agreements autonomously. The rules of interpretation of international law applicable in this case, however, do not suggest that they are able to fully disregard such interpretations. Already as a starting point, for the purpose of fulfilling in

[64] *Epiney/Metz/Pirker*, Parallelität, 168 f. See also *Boillet*, L'interdiction de discrimination en raison de la nationalité, 59 ff.; *Mock/Filliez*, SZIER 2006, 1237 (246); *Schnell*, Arbeitnehmerfreizügigkeit, 122 f.

[65] *Epiney/Metz/Pirker*, Parallelität, 170. See on the concept of a modification in the case law *Maiani*, ZSR 2011 I 1, 27 ff.; *Epiney*, EuR 2008, 840 ff.; *Epiney/Mosters*, SJER 2008/2009, 53 (59 ff.).

good faith a treaty obligation under international law it seems difficult for one contracting party to refuse completely to take into account and engage in any way with interpretations given to that obligation by the other party, if that obligation is to be fulfilled to some extent in a uniform manner.[66]

Furthermore, the customary rules of interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties (VCLT) reinforce the argument in favour of an interpretation inclining towards solutions already found by the CJEU (hereinafter referred to as 'parallel interpretation'). Article 31 sets out a number of elements to be used in interpretation.

As regards the ordinary meaning as a first element, the very use of parallel terminology to EU law both in the text of the Bilateral Agreements and in the references to EU secondary legislation in the annexes constitutes a powerful argument in favour of such parallel interpretation.[67]

Second, the 'context' set out in Article 31 is a wide notion that encompasses both the structure of the treaty surrounding a particular norm as well as further elements listed in Article 31 (2) VCLT. Already the structure of many Bilateral Agreements points towards parallel interpretation, with many norms being surrounded or complemented by norms phrased after EU law or by references to EU secondary law. Additionally, according to Article 31 (3) lit. c 'any relevant rules of international law applicable in the relations between the parties' are to be taken into account next to the context of a norm. The network of Bilateral Agreements arguably qualifies in many cases as such a wider background for the interpretation of a norm of one particular agreement and supports through its constant intensification an interpretation close to solutions found by the CJEU in the EU law context.[68]

Third, as a general rule most Bilateral Agreements count among their objectives a central purpose to provide for a partial integration into the EU legal *acquis* of the relevant sector. Again, based on Article 31 (1) VCLT this militates in favour of parallel interpretation. Furthermore, also for this purpose the above-mentioned network of the Bilateral Agreements can be used to bolster the teleological argument for parallel interpretation, as from this network resorts an overall *telos* of connecting Switzerland to determined areas of the EU internal market.[69]

---

66 *Bieber*, in: Personenfreizügigkeitsabkommen, 1 (18 f.).

67 *Epiney/Metz/Pirker*, Parallelität, 179.

68 *Ibid.* See for an earlier similar argument in the context of the interpretation of the 1972 Free Trade Agreement between Switzerland and the EU *Cottier/Diebold*, SJER 2008/2009, 237 (257 f.).

69 *Epiney/Metz/Pirker*, Parallelität, 180. See for similar views *Oesch*, FS Borghi, 361 (364 f.).

As a notable feature, in the light of this overall *telos* the taking into consideration of such CJEU law is not limited to interpretations handed down before the date of signature of an agreement; rather, to achieve this purpose it must necessarily operate in a dynamic fashion.[70]

By contrast, these general points must stand in practice the test of a case by case examination of the interplay of elements present in a particular situation of norm interpretation. Every norm or concept in the Bilateral Agreements will present different conditions based on which the mentioned elements of interpretation have to be weighed to reach a decision as to whether an interpretation by the CJEU ought to be followed or not. Yet, these points constitute potentially powerful reasons to proceed to parallel interpretation on sound argumentative ground.

It should be noted at this point that the Schengen/Dublin Association Agreements also do not contain an interpretation clause and therefore the above findings are in principle applicable to their case. However, based on the specific characteristics of the two agreements even stronger arguments militate in favour of a comprehensive duty for Switzerland to interpret the Dublin and Schengen *acquis* as transferred by the respective agreement in conformity with the CJEU's rulings, past and future. First, the objective of both agreements is to integrate Switzerland comprehensively into the *acquis*. Second, both agreements include the obligation for Switzerland to both adopt the *acquis* at the moment of signature, but also later developments. Finally, the sanction of termination of the respective agreement in case of major deviations from the *acquis* also indicates that parallel interpretation is a paramount objective of both agreements.[71]

Having discussed the various mechanisms of transfer of EU law and its interpretation to the context of the Bilateral Agreements, we subsequently discuss the interpretative practice that has emerged to verify to what extent actual integration into the EU internal market through the courts has succeeded.

[70] See also *Jaag/Zihlmann*, in: Bilaterale Verträge I & II, 65 (91); *Kaddous*, in: Accords bilatéraux II Suisse-UE, 63 (88); *Kaddous*, in: Accords bilatéraux Suisse-UE, 77 (103).

[71] *Epiney/Metz/Pirker*, Parallelität, 176.

# D. Interpretative practice under the Bilateral Agreements

## I. Interpretation of the Bilateral Agreements by the Court of Justice of the European Union

An overview over the interpretative practice of the CJEU shows that at least the early case law is somewhat shallow in its argumentation. The Court either excludes the relevance of parallel interpretations of EU law norms because of the limited scope of obligations contained in the Agreement on the Free Movement of Persons which all cases are about or relies in a somewhat peculiar way on the specificity of Swiss – EU relations, insofar as the latter are based on the Swiss desire *not* to join the EEA and to pursue a lower degree of economic association with the internal market. Only the latest case law provides more extensive arguments on the interpretation of the agreements and establishes the basis for parallel interpretation in the future.

In *Hauser*, the question referred to the CJEU concerned the compatibility of a rule which gave preference to German farmers for the lease of agricultural land with the Agreement on the Free Movement of Persons and acted to the disadvantage of Swiss farmers.[72] The Court had to examine whether the prohibition of discrimination enshrined in Article 15 of Annex I of the Agreement applied to self-employed as well as employed frontier workers. Based on a careful grammatical, teleological and systematic interpretation it found the prohibition applicable to both situations.[73] The case concerns, however, more the scope of application of the relevant norm rather than its content, so that there was no need to reflect on parallel interpretation with EU norms.

In *Grimme*[74] and *Fokus Invest*,[75] the Court was asked whether legal persons could rely on the freedom of establishment as enshrined in the Agreement on the Free Movement of Persons. The CJEU held that the interpretation of parallel EU norms could not be transferred 'automatically' to the context of the Agreement. Then, however, it did not clarify when there could indeed be such parallel interpretation, but went on directly to answer the question asked, finding that the wording of the Agreement did not allow to extend the freedom of establishment to legal persons. In the doctrine, the case has predominantly been read as the confirmation that the rules of inter-

[72] CJEU, Case C-13/08 (Hauser), ECR 2008, I-11087.
[73] See in more detail *Epiney/Mosters*, SJER 2008/2009, 53 (84 ff.).
[74] CJEU, Case C-351/08 (Grimme), ECR 2009, I-10777.
[75] CJEU, Case C-541/08 (Fokus Invest), ECR 2010, I-1025.

pretation of international law would apply to the Agreement, as was to be expected; furthermore, the brief statement on no 'automatical' transfer of interpretations ought not to be understood as a broad and general refusal to ever interpret provisions of the Bilateral Agreements in a similar manner to EU law.[76] The most convincing interpretation of the Court's *dicta* seems to be that it did not find parallel notions to EU law in the norm to be interpreted and thus the question of parallel interpretation as posed by Article 16 (2) first sentence of the Agreement was not even at issue.

In *Hengartner*,[77] the fee to be paid for tenancy of a hunt in Austria was lower for persons resident in Austria and EU citizens, while Swiss and other non-EU-nationals not resident in Austria had to pay a higher fee. Finding that the contract on the tenancy of a hunt constitutes a case of service provision with potential cross-border elements in the present case, the Court then, however, held that the free movement of services as enshrined in the Agreement on the Free Movement of Persons was not applicable. According to the Court, the Agreement contained no provision based on which it would have been possible to apply the prohibition of discrimination to the case of recipients of a service subjected to fiscal rules on commercial transactions. Remarkably, the Court based its reading again strongly on a literal approach to the Agreement, without, however, considering whether the general prohibition of discrimination based on nationality enshrined in Article 2 of the Agreement could be applied in a similar way to Article 18 TFEU.[78] Furthermore, one argument for the particular interpretation of the Agreement seems to be for the Court the Swiss non-accession to the EEA, although this point arguably would require more comprehensive explanation.[79] Lastly, the Court does not refer to Article 16 (2) first sentence of the Agreement. This would have already helped to explain why the Court relies on its own case law from even after the date of signature of the Agreement to interpret the freedom to provide services.[80] Furthermore, it would have also forced the Court to justify in more detail why parallel interpretation of Article 2 of the Agreement with Article 18 TFEU was not considered to be applicable in the case.[81]

In *Graf*,[82] the Court had to interpret again Article 15 of Annex I of the Agreement on the Free Movement of Persons on the prohibition of discrimi-

[76] *Tobler*, SJER 2009/2010, 369 ff.
[77] CJEU, Case C-70/09 (Hengartner), ECR 2010, I-7233.
[78] *Epiney*, GPR 2011, 64 (66 ff.).
[79] See in more detail *Epiney/Metz/Pirker*, Parallelität, 162 f.
[80] See CJEU, Case C-70/09 (Hengartner), ECR 2010, I-7233, para 33.
[81] See in more detail *Bieber*, in: Personenfreizügigkeitsabkommen, 1 (16 f.).
[82] CJEU, Case C-506/10 (Graf), Judgment of 6 October 2011, not yet published.

nation, this time related to the access to a self-employed activity and its exercise. Looking beyond the decision by Switzerland to not join the EEA, the Court argued that the country was nonetheless linked to the EU by means of a multitude of agreements covering many different areas and containing rights and obligations corresponding at times to those contained in EU law. Also, the overall aim of these agreements was to intensify the economic relations between Switzerland and the EU.[83] Basing its reasoning subsequently on its own constant jurisprudence, the Court then stated that the concept of discrimination also encompassed material discrimination as in the present case.[84] The alleged justification of agricultural land-use planning and the rational division of agricultural land could in principle be considered in the public interest; nonetheless, the Court found it to not fall within the notion of 'public order' as the only available derogation laid down in Article 5 (1) of Annex I.[85] Summing up, the CJEU relied heavily on its own jurisprudence and – despite some minor ambiguities[86] – interpreted the Agreement following quite comprehensively its own interpretation of parallel EU law provisions.

Yet another recent case, *Bergström*,[87] illustrates more comprehensive reasoning on the interpretation of a Bilateral Agreement. The Court found in this case that periods of work and insurance as preconditions for a social benefit dependent on the level of income and paid as compensation for childcare should also be counted in the case of a person having worked in Switzerland before moving to an EU Member State. To justify this conclusion, the Court referred for the first time to the preamble of the Agreement on the Free Movement of Persons.[88] Furthermore, the Court deduced very broadly from the preamble that the 'freedom' provided for in the agreement would be impeded if a person were treated less favourably in her country of origin simply because she had used her free movement rights.[89] Article 8 lit. a of the Agreement at issue in the case contained in the Court's view an obligation of equal treatment apart from that provided for in Article 2 of the Agreement, because the latter were limited to situations of a beneficiary be-

83 CJEU, Case C-506/10 (Graf), Judgment of 6 October 2011, not yet published, para 33.
84 CJEU, Case C-506/10 (Graf), Judgment of 6 October 2011, not yet published, paras 25 ff.
85 CJEU, Case C-506/10 (Graf), Judgment of 6 October 2011, not yet published, paras 32 and 34.
86 *Epiney/Mosters*, SJER 2011/2012, 51 (94).
87 CJEU, Case C-257/10 (Bergström), Judgment of 15 December 2011, not yet published.
88 CJEU, Case C-257/10 (Bergström), Judgment of 15 December 2011, not yet published, para 27.
89 CJEU, Case C-257/10 (Bergström), Judgment of 15 December 2011, not yet published, para 28.

ing present in the territory of the other contracting party; implicitly, this seems to signify that the provision is to be interpreted like its corollary in EU law.[90]

## II. Interpretation of the Bilateral Agreements by Swiss courts – In particular the Swiss Federal Supreme Court

While the interpretation of the CJEU has thus only moved in recent jurisprudence from a rather reticent stance towards a more 'integrationist' method of interpretation, Swiss courts generally tended in many situations to rely on the interpretation of notions in EU law as having been transferred to the Bilateral Agreements.[91]

The Swiss Federal Supreme Court as the highest court has had to interpret in particular the Agreement on the Free Movement of Persons at quite many occasions. Typically, it based its reasoning on Article 16 (2) first sentence of that Agreement and held that central notions and provisions of the Agreement were in fact taken over from EU law and ought to be construed in conformity with the case law of the CJEU.

In what is perhaps the landmark case, the Federal Supreme Court had to interpret the conditions for the termination of a right of residence for reasons of public order and safety.[92] Being confronted with its own earlier jurisprudence which had followed that of the CJEU and a recent change in the jurisprudence of the CJEU,[93] the Federal Supreme Court explained that – as it had already done earlier – it could and would take into account in its interpretation of the Agreement on the Free Movement of Persons also jurisprudence of the CJEU given after the date of signature of the Agreement. This would be done to achieve the objective of the Agreement of a parallel legal situation of free movement, but only insofar as the pertinent provisions replicated principles of EU law. Even in such cases, if 'compelling' reasons spoke out against parallel interpretation, the Court held it might deviate from

[90] CJEU, Case C-257/10 (Bergström), Judgment of 15 December 2011, not yet published, para 30. However, the Court does not yet explain thereby whether Article 2 of the Agreement will subsequently also be interpreted similar to EU law, despite the restrictive scope the Court has given to it, see *Epiney/Mosters*, SJER 2011/2012, 51 (95).

[91] For reasons of space, the present contribution focuses on the highest court in Switzerland, the Federal Supreme Court.

[92] BGE 136 II 5.

[93] See CJEU, Case C-127/08 (Metock), ECR 2008, I-6241, which concerns family reunion for Union citizens, which could before that case and could then no longer be made dependent upon a condition of previous legal residence in a EU Member State.

the CJEU's interpretation, but would not do so 'carelessly'.[94] Subsequently, the Federal Supreme Court found no such reasons and therefore followed the change in the case law of the CJEU.[95]

Apart from this case, a number of other lines of case law can be mentioned to demonstrate the relative ease with which the Supreme Court has followed the case law of the CJEU. It has done so to interpret the notion of a 'worker',[96] to exclude from the scope of the Agreement the problem of reverse discrimination[97] or to clarify that a residence permit possesses only declaratory value.[98]

It should, however, also be noted that in some instances the Supreme Court applies a stricter interpretation of the Agreement's provisions. As an example, it emphasized at various occasions that the concept of Union citizenship had not been included in the Agreement, which would practically exclude or at least severely restrict the possibility to rely on the pertinent case law of the CJEU.[99]

## E. The limits of Swiss-EU bilateralism: Current problems and suggested solutions

The above brief survey on interpretative practice on the Bilateral Agreements has shown an increasing tendency of the CJEU and a remarkable willingness of Swiss courts to interpret provisions of the Bilateral Agreements in parallel with their EU law corollaries. This development certainly has helped to somewhat overcome the potential problems of linking the static regime of the Bilateral Agreements with its cumbersome procedures of amendment with the dynamic evolution of EU internal market law. Yet, the price to be paid for such interpretative adaptation is a low degree of legal certainty.[100] Moreover, this approach cannot solve all problems raised by the static character of most of the Bilateral Agreements; it reaches its limits, in particular,

---

[94] BGE 136 II 5, para 3.4 ('triftige Gründe' and 'leichthin' are used in the original German version).

[95] See on this case *Epiney/Metz*, Jahrbuch für Migrationsrecht 2009/2010, 243 (266 ff.); *Kaddous/Tobler*, SZIER 2010, 597 (620 ff.).

[96] BGE 131 II 339, E.3.1.

[97] BGE 129 II 249.

[98] BGE 136 II 329.

[99] BGE 130 II 113. See sceptically *Epiney/Metz/Pirker*, Parallelität, 166. Later case law seems to somewhat abandon this restrictive approach between the lines, see BGE 135 II 265 and in more detail *Epiney/Metz*, Jahrbuch für Migrationsrecht 2009/2010, 243 (257 ff.).

[100] See *Baudenbacher*, in: Souveränität im Härtetest, 247 ff.

in situations where EU law is taken over by parallel wording, so that legislative developments of EU law cannot be taken over by decisions of the mixed committees.

Apart from these central problems, in political terms the Swiss strategy to continue the 'bilateral path' of negotiating ever new agreements in sectors of interest is meeting increasing resistance from the EU. The 2010 Council Conclusions on the relationship between the EU and the EFTA States took a vividly critical stance of the bilateral relations with Switzerland, while simultaneously applauding the EEA's contribution. The Council emphasized the lack of efficient mechanisms in the Bilateral Agreements to ensure the adaptation to new developments of the EU legal *acquis* including the new case law of the CJEU; the bilateral path would thus not produce the necessary uniformity of law and had led to problems of legal certainty for authorities, economic operators and citizens. It had in the Council's view 'clearly reached its limits'.[101]

Faced with this opposition, the debate in Switzerland has explored various options. Accession to the EU or the EEA is no political option due to public opinion and any mechanism close to such dynamic legal adaptation as proposed by the EEA would face challenges of unconstitutionality.

A variety of alternatives are thus currently discussed. Some suggest opting for increased recourse to arbitral tribunals in future agreements to resolve disagreements on the interpretation and application of agreements. The need for consent of the opposing party and earlier experience make this, however, no truly helpful option.[102] Others would suggest transferring authority for the supervision and interpretation of the law of the Bilateral Agreements to the EU Commission and the CJEU. However, this would cause a severe imbalance in Swiss-EU relations, as Switzerland would thus become subject to EU organs. Another solution envisaged is the creation of international organs of supervision and interpretation, somewhat similar to the EEA. A variant of this option would be to create a 'Swiss pillar', i.e. independent organs of supervision and interpretation in Switzerland. Slightly modified, Switzerland could also 'dock on' the competent EEA organs for the same purpose, i.e. the EFTA Surveillance Authority and the EFTA Court. It remains, however, doubtful as to whether the EU is truly ready to accept one of these variants and is not likely to push for actual accession of Switzerland to the EEA as the EU's preferred solution.[103]

---

[101] Council Conclusions on EU relations with EFTA countries of 14 December 2010, see in particular pt. 6.

[102] See sceptical on arbitration clauses as 'paper tigers' *Tobler*, SZIER 2012, 1 (8).

[103] See for a concise overview of the various alternatives currently debated *Thürer*, SJZ 2012, 477 (482 ff.).

The Swiss federal government seems to be currently opting for a minimalist approach, hoping to be able to continue to find bilateral solutions while opening discussions with the EU on the feasibility of other options.[104] In 2012, it submitted to the EU a proposal to introduce homogeneous legal development in the future mainly by creating a domestic authority for surveillance in Switzerland that could also engage legal proceedings in front of domestic courts. The official reaction by the Council in December 2012, however, emphasized that no new agreements would be concluded before an adequate institutional framework had been found, which would need to include a dynamic adaptation of the law of agreements to the developments of the EU legal *acquis* and international mechanisms for surveillance and judicial interpretation.[105] The EU position insists on the equivalence of such an institutional solution with that found in the framework of the EEA, where the 'EFTA pillar' consists of the EFTA Surveillance Authority and the EFTA Court which fulfil similar functions to the EU Commission and the CJEU. While this view seems to put the idea of a 'dock on' solution linking the Bilateral Agreements to the EEA EFTA pillar institutions back on the table, the question remains unanswered why EEA EFTA countries' officials and judges ought then to be in charge of supervising and interpreting the law of the Bilateral Agreements which is foreign to them. The creation of autonomous international institutions seems thus a more logical and legitimate solution despite the substantial effort this would require.[106]

Summing up, whatever solution will be found, it is most likely that for Switzerland, any future bilateral solution will hardly be less restrictive of sovereignty than the mechanisms of automatic legal adaptation created in the Schengen/Dublin Agreements; in terms of its institutions, it will probably be as 'internationalised' as the EEA.[107]

## F. Conclusion

The survey on the integration of Switzerland into the EU internal market by means of the Bilateral Agreements has produced a mixed picture. The Bilateral Agreements nowadays cover a large number of areas, but each agreement remains narrowly focused on a particular sector. They possess the potential to adapt to some extent to new developments in EU law. However,

[104] *Thürer*, SJZ 2012, 477 (483).
[105] Council Conclusions on EU relations with EFTA countries of 20 December 2012, see in particular pt. 33.
[106] *Epiney*, Volkswirtschaft 2013, 6.
[107] *Epiney*, Volkswirtschaft 2013, 7.

the mechanisms for adaptation are often cumbersome and the overall legal regime has proven to be static and incomplete at a number of occasions.

To some extent, the courts have intervened to remedy some shortcomings. Swiss courts have quite soon adapted to look at the CJEU's case law when interpreting the most important Agreement on the Free Movement of Persons and its notions taken from EU law. Also, the CJEU has started in its most recent case law to refer more broadly to preambles and overall objectives of free movement contained in the same agreement after a rather reticent start, which could point towards a more parallel approach to interpretation in the future. However, despite this progress in interpretation, there remain political stumbling stones. In particular, the EU is ever less willing to grant Switzerland the "privilege" of its bilateral model and insists on the resolution of institutional questions before further bilateral agreements can be concluded. Alternatives to the current system of the Bilateral Agreement are discussed, but do not seem very viable in practice.

It is thus before this background that the bilateral strategy leaves us with an ambivalent, mixed impression. Neither seems to be there reason for exuberant joy, as the bilateral way is quite incomplete as an integration strategy; nor is there need for desperation, as at least currently the Bilateral Agreements are working in an – admittedly rather pragmatic – fashion.

# G. Bibliography

*Ambühl, Michael:* Bilaterale Abkommen II – Politische Würdigung, in: Christine Kaddous/Monique Jametti Greiner (eds.), Bilaterale Abkommen II Schweiz-EU und andere neue Abkommen, Basel 2006, 5 ff.

*Baudenbacher, Carl:* Rechtsprechung: Rechtssicherheit als Standortfaktor, in: Katja Gentinetta/Georg Kohler (eds.), Souveränität im Härtetest. Selbstbestimmung unter neuen Vorzeichen, Zurich 2010, 247 ff.

*Benesch, Sebastian:* Das Freizügigkeitsabkommen zwischen der Schweiz und der Europäischen Gemeinschaft, PhD thesis Tübingen 2007.

*Biaggini, Giovanni*: Das Abkommen über bestimmte Aspekte des öffentlichen Beschaffungswesens, in: Daniel Thürer/Rolf H. Weber/Wolfgang Portmann/Andreas Kellerhals (eds.), Bilaterale Verträge I & II Schweiz – EU, Zurich/Basel/Geneva 2007, 651-728.

*Bieber, Roland:* Die Bedeutung der Rechtsprechung des Gerichtshofs der Europäischen Union für die Auslegung völkerrechtlicher Verträge, in: Astrid Epiney/Beate Metz/Robert Mosters (eds.), Das Personenfreizügigkeitsabkommen Schweiz – EU: Auslegung und Anwendung in der Praxis, Zurich/Basel/Geneva 2011, 1-27.

*Boillet, Véronique:* L'interdiction de discrimination en raison de la nationalité au sens de l'Accord sur la libre circulation des personnes, Basel 2010.

*Borghi, Alvaro:* La libre circulation des personnes entre la Suisse et l'UE, Commentaire article par article de l'accord du 21 juin 1999, Geneva/Lugano/Brussels 2010.

*Breitenmoser, Stephan/Isler, Michael*: Der Rechtsschutz im Personenfreizügigkeitsabkommen zwischen der Schweiz und der EG sowie den EU-Mitgliedstaaten, AJP 2002, 1003-1021.

*Brunner, Stephan C.:* Zur Umsetzung von „Schengen" und „Dublin" im Bereich des Datenschutzes: Drei Thesen, in: Astrid Epiney/Patrick Hobi (eds.), Die Revision des Datenschutzgesetzes/La révision de la Loi fédérale sur la protection des données, Zurich 2009, 139 ff.

*Bühler, Theodor*: Abkommen über die gegenseitige Anerkennung von Konformitätsbewertungen, in: Daniel Thürer/Rolf H. Weber/Wolfgang Portmann/Andreas Kellerhals (eds.), Bilaterale Verträge I & II Schweiz – EU, Zurich/Basel/Geneva 2007, 581-648.

*Bürgi-Schmelz, Adelheid/Gamez, Gabriel*: Rahmenbedingungen unter Bedeutung des Statistikabkommens, in: Daniel Thürer/Rolf H. Weber/Wolfgang Portmann/Andreas Kellerhals (eds.), Bilaterale Verträge I & II Schweiz – EU, Zurich/Basel/Geneva 2007, 809-832.

*Burri, Thomas/Pirker, Benedikt:* Stromschnellen im Freizügigkeitsfluss: Von der Bedeutung von Urteilen des Europäischen Gerichtshofes im Rahmen des Personenfreizügigkeitsabkommens, SZIER 2010, 165 ff.

*Cottier, Thomas/Diebold, Nicolas*: Warenverkehr und Freizügigkeit in der Rechtsprechung des Bundesgerichts zu den Bilateralen Abkommen. Zur Anwendung und Auslegung von nachvollzogenem Recht und Staatsverträgen unterschiedlicher Generationen, in: Astrid Epiney/Nina Gammenthaler (eds.), Schweizerisches Jahrbuch für Europarecht/Annuaire suisse de droit européen 2008/2009, Bern/Zurich 2009, 237 ff.

*Ehrenzeller, Bernhard/Mastronardi, Philippe/Schweizer, Rainer J./Vallender, Klaus A.* (eds.): Die schweizerische Bundesverfassung, Kommentar, 2 Bände, 2. Aufl., St. Gallen 2008.

*Epiney, Astrid:* Datenschutz und „Bilaterale II". Zu den Auswirkungen der Schengen-Assoziierung auf das schweizerische Datenschutzrecht – ausgewählte Aspekte, SJZ 2006, 121 ff.

*Epiney, Astrid:* Die Schweizer Europapolitik: Wie tragfähig ist der Bilateralismus? Eine rechtliche Perspektive unter besonderer Berücksichtigung der institutionellen Struktur der Abkommen, Volkswirtschaft 2013 (forthcoming).

*Epiney, Astrid:* Von Akrich über Jia bis Metock: zur Anwendbarkeit der gemeinschaftlichen Regeln über den Familiennachzug – Gleichzeitig eine Anmerkung zu EuGH, Rs. C-127/08 (Metock), Urt. v. 25.7.2008, EuR 2008, 840-858.

*Epiney, Astrid:* Zur rechtlichen Tragweite eines Einbezugs der Schweiz in den unionsrechtlichen Besitzstand im Bereich des Dienstleistungsverkehrs, Zurich/Basel/Geneva 2011.

*Epiney, Astrid:* Zu Tragweite und Auslegung des Personenfreizügigkeitsabkommens Schweiz – EU. Anmerkung zum Urteil des EuGH vom 15. Juli 2010, Rs. C-70/09 – Hengartner, GPR 2011, 64 ff.

*Epiney, Astrid/Furger, David/Heuck, Jennifer*: Zur Berücksichtigung umweltpolitischer Belange bei der landwirtschaftlichen Produktion in der EU und in der Schweiz : ein Vergleich unter besonderer Berücksichtigung der Implikationen eines Freihandelsabkommens im Agrar- und Lebensmittelbereich, Zurich 2009.

*Epiney, Astrid/Meier, Annekathrin/Egbuna-Joss, Andrea*: Schengen/Dublin, in: Daniel Thürer/Rolf H. Weber/Wolfgang Portmann/Andreas Kellerhals (eds.), Bilaterale Verträge I & II Schweiz – EU, Zurich/Basel/Geneva 2007, 903-981.

*Epiney, Astrid/Meier, Annekathrin/Theuerkauf, Sarah:* „Schengen": ein neuer Prüfstein für die Schweiz, Plädoyer 2005, 38 ff.

*Epiney, Astrid/Metz, Beate:* Zur schweizerischen Rechtsprechung zum Personenfreizügigkeitsabkommen, in: Albert Achermann/Martina Caroni/Astrid Epiney/Walter Kälin/Minh Son Nguyen/Peter Uebersax (eds.), Jahrbuch für Migrationsrecht 2009/ 2010, Bern 2010, 243-278.

*Epiney, Astrid/Metz, Beate*: Zur schweizerischen Rechtsprechung zum Personenfreizügigkeitsabkommen, in: Alberto Achermann/Cesla Amarelle/Martina Caroni/Astrid Epiney/Walter Kälin/Peter Uebersax (eds.), Jahrbuch für Migrationsrecht 2011/2012, Bern/Zurich 2012, 223 ff.

*Epiney, Astrid/Metz, Beate/Pirker, Benedikt*: Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz – Ein Beitrag zur rechtlichen Tragweite der „Bilateralen Abkommen", Zurich/Basel/Geneva 2012.

*Epiney, Astrid/Mosters, Robert:* Die Rechtsprechung des EuGH zur Personenfreizügigkeit und ihre Implikationen für das Freizügigkeitsabkommen Schweiz – EG, in: Astrid Epiney/Nina Gammenthaler (eds.), Schweizerisches Jahrbuch für Europarecht 2008/2009, Bern/Zurich 2009, 53 ff.

*Epiney, Astrid/Mosters, Robert:* Die Rechtsprechung des EuGH zur Personenfreizügigkeit und ihre Implikationen für das Freizügigkeitsabkommen Schweiz – EU, in: Astrid Epiney/Tobias Fasnacht (eds.), Schweizerisches Jahrbuch für Europarecht 2011/2012, Bern/Zurich 2012, 51 ff.

*Epiney, Astrid/Schneider, Nathalie:* Zu den Implikationen des gemeinschaftlichen Umweltrechts in der Schweiz, EurUP 2004, 252 ff.

*Gammenthaler, Nina:* Diplomanerkennung und Freizügigkeit, PhD thesis Zurich/Basel/Genf 2010.

*Gutzwiller, Susanne*: Komitologie und Gemischte Ausschüsse, in: Christine Kaddous/ Monique Jametti Greiner (eds.), Bilaterale Abkommen II Schweiz - EU und andere neue Abkommen, Basel 2006, 245-266.

*Haldimann, Urs*: Grundzüge des Abkommens über den Luftverkehr, in: Daniel Felder/Christine Kaddous (eds.), Bilaterale Abkommen Schweiz – EU (Erste Analysen), Basel 2001, 443-461.

*Jaag, Tobias/Zihlmann, Magda*: Institutionen und Verfahren, in: Daniel Thürer/Rolf H. Weber/Wolfgang Portmann/Andreas Kellerhals (eds.), Bilaterale Verträge I & II Schweiz – EU, Zurich/Basel/Geneva 2007, 65-102.

*Kaddous, Christine*: Les accords sectoriels dans le système des relations extérieures de l'Union européenne, in: Daniel Felder/Christine Kaddous (eds.), Accords bilatéraux Suisse – UE/Bilaterale Abkommen Schweiz – EU (Erste Analysen), Basel 2001, 77-115.

*Kaddous, Christine*: La place des Accords bilatéraux II dans l'ordre juridique de l'Union européenne, in: Christine Kaddous/Monique Jametti Greiner (eds.), Accords bilatéraux II Suisse – UE et autres Accords ré-

cents/Bilaterale Abkommen II Schweiz - EU und andere neue Abkommen, Basel 2006, 63 ff.

*Kaddous, Christine/Jametti Greiner, Monique (eds.):* Accords bilatéraux II Suisse – UE et autres Accords reécents/Bilaterale Abkommen II Schweiz – EU und andere neue Abkommen, Brussels 2006.

*Kaddous, Christine/Tobler, Christa:* Droit européen : Suisse – Union européenne/Europarecht: Schweiz – Europäische Union, SZIER 2010, 597 ff.

*Kahil-Wolff, Bettina:* L'application et l'interprétation de l'ALCP: le cas de la sécurité sociale, in: Astrid Epiney/Beate Metz/Robert Mosters (Hrsg.), Das Personenfreizügigkeitsabkommen Schweiz – EU. Auslegung und Anwedung in der Praxis/L'accord sur la libre circulation des prsonnes Suisse – UE. Interprétation et application dans la pratique, Zurich 2011, 49-80.

*Maiani, Francesco:* La „saga Metock", ou des inconvénients du pragmatisme helvétique dans la gestion des rapports entre droit européen, droit bilatéral et droit interne, ZSR 2011 I, 27 ff.

*Meier, Annekathrin:* Schutz der finanziellen Interessen der Europäischen Union : Implikationen für die Schweiz, Zurich 2007.

*Mock, Hanspeter/Filliez, Fabrice:* 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 fédéral, SZIER 2006, 237 ff.

*Oesch, Matthias*: Die Auslegung und Weiterentwicklung des Freizügigkeitsabkommens Schweiz – EU: Zugang zum Beruf des Notars und Anerkennung von Berufsqualifikationen als aktuelle Beispiele, in: Jean-Baptiste Zufferey/Jacques Dubey/Adriano Previtali (eds.), L'homme et son Droit, Mélanges en l'honneur de Marco Borghi, Zurich 2011, 361-382.

*Schaerer, Corinne:* Acquis communautaire suisse - Das für die Schweiz auf Grund der Bilateralen Abkommen vom 23. Juni 1999 relevante Gemeinschaftsrecht (Umfang und Zugang), AJP 2004, 340-342.

*Schelling, Christoph:* Grundzüge des Abkommens über die Zinsbesteuerung, in: Christine Kaddous/Monique Jametti Greiner (eds.), Bilaterale Abkommen II Schweiz - EU und andere neue Abkommen, Basel 2006, 501-526.

*Schnell, Christina:* Arbeitnehmerfreizügigkeit in der Schweiz, Ausgewählte rechtliche Aspekte zum Personenfreizügigkeitsabkommen, PhD thesis Zurich/Basel/Geneva 2010.

*Schweizer, Rainer J.:* Wie das europäische Recht die schweizerische Rechtsordnung fundamental beeinflusst und wie die Schweiz darauf keine systematische Antwort findet, in: Astrid Epiney/Florence Rivière (eds.), Auslegung und Anwendung von „Integrationsverträgen". Zur Übernahme des gemeinschaftlichen Besitzstandes durch Drittstaaten, insbesondere die

Schweiz/Inteprétation et application des traités d'intégration". De la reprise de l'acquis communautaire par des Etats tiers, notamment par la Suisse, Zurich 2006, 23 ff.

*Senti, Richard*: Abkommen über den Handel mit landwirtschaftlichen Erzeugnissen, in: Daniel Thürer/Rolf H. Weber/Wolfgang Portmann/Andreas Kellerhals (eds.), Bilaterale Verträge I & II Schweiz – EU, Zurich/Basel/Geneva 2007, 731-805.

*Sollberger, Kaspar:* Konvergenzen und Divergenzen im Landverkehrsrecht der Europäischen Gemeinschaft und der Schweiz. Unter besonderer Berücksichtigung des bilateralen Landverkehrsabkommens, Freiburg 2003.

*Sollberger, Kaspar/Epiney, Astrid:* Verkehrspolitische Gestaltungsspielräume der Schweiz auf der Grundlage des Landverkehrsabkommens, Bern 2001.

*Thürer, Daniel/Hillemanns, Carolin:* Allgemeine Prinzipien, in: Daniel Thürer/Rolf H. Weber/Roger Zäch, Bilaterale Verträge Schweiz – EG: Ein Handbuch, Zurich 2002, 39-64.

*Thürer, Daniel:* Europa und die Schweiz: Status quo und Potenziale einer Partnerschaft – Überlegungen zu einem pluralistischen Ansatz, SJZ 2012, 477-488.

*Tobler, Christa:* Die EuGH-Entscheidung Grimme – Die Wiederkehr von Polydor und die Grenze des bilateralen Rechts, in: Astrid Epiney/Nina Gammenthaler (eds.), Schweizerisches Jahrbuch für Europarecht 2009/2010, Zurich/Basel/Geneva 2010, 369-384.

*Tobler, Christa:* Schiedsgerichte im bilateralen Recht?, SZIER 2012, 1-8.

*Vahl, Marius/Grolimund, Nina:* Integration ohne Mitgliedschaft. Die bilateralen Verträge der Schweiz mit der Europäischen Gemeinschaft, Zurich 2007.

*Wüger, Daniel/Scarpelli, Samuele*: Die vernachlässigten institutionellen Aspekte der Bilateralen Verträge und die Aushandlung eines Rahmenvertrags, in: Astrid Epiney/Andrea Egbuna-Joss/Markus Wyssling (eds.), Schweizerisches Jahrbuch für Europarecht 2005/2006, Zurich/Basel/Geneva 2006, 287-325.