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Institutional aspects of the planned Switzerland-EU Framework Agreement 2.0

Paper for the attention of the Swiss WAK (Economic Affairs and Taxation Committee) of the National Council, 12 February 2024

The WAK National Council has invited me to analyse the institutional aspects of the Framework Agreement 2.0 ("FA 2.0") and to compare them with previous proposals for regulating Switzerland's relationship with the EU, in particular the draft Institutional Framework Agreement 2018 ("InstA 2018").

The paper analyses the structural elements, the expected impact on Switzerland and the quality and accuracy of the information provided to the Swiss Parliament.

I have been involved in the debate on Switzerland's relationship with the EU in many capacities since 1989 (see list at the end). Supporters of FA 2.0 try to invalidate my arguments with defamatory claims. This modus operandi concerns me. This is about setting the course for the future of Switzerland. Only factual arguments count.

I. Dynamic adoption of EU law

Identical to the 2018 InstA draft.

Switzerland would have a right to have a say in the adoption of new FA 2.0-relevant EU law.

No right of codecision.

II. Monitoring

Identical to the 2018 InstA draft.

EU Commission can take Switzerland to an "arbitration tribunal" unilaterally, i.e. without its consent. This "arbitration tribunal" must ask the ECJ for an interpretation in the form of a binding judgment if EU law

is implicated. The non-neutral EU Commission would become Switzerland's de facto supervisory authority.

III. Dispute settlement

1. 2013: Pure Commission/ECJ model

Since 2010, a "docking model" has been discussed at the suggestion of the EU Commission. The idea was that Switzerland would retain its sectoral approach, but submit to the institutions of the EEA/EFTA pillar (EFTA Surveillance Authority ["ESA"] and EFTA Court). Switzerland could have appointed one member to each of these bodies. The ESA could have initiated infringement proceedings against Switzerland. Private individuals and companies could have applied to Swiss courts for a referral to the EFTA Court, which would have had a Swiss judge sitting on its panel. The author of this short paper was in contact with the President of the Swiss Confederation, Doris Leuthard, and took part in a Federal Council meeting on Europe in August 2010 (Ein EWR-Advokat findet Gehör bei den Bundesräten | Berner Zeitung).

Following the appointment of a new head of the FDFA in 2012, there was an abrupt change of direction in European policy. At the end of 2013, a negotiating mandate was adopted that provided for a single type of procedure: a dispute settlement procedure with the EU and Switzerland as parties. In the event of a conflict, the EU Commission was to have the right to take legal action before the ECJ unilaterally, i.e. without Switzerland's consent. A negotiating mandate was adopted on this basis at the end of 2013.

The model was soon rejected by leading politicians. For example, StR (now BR) Karin Keller-Sutter in the St. Galler Tagblatt of 17 August 2015:

"The ECJ is the court of the opposing party and therefore not neutral." Switzerland must rethink its strategy and focus on the EFTA Court again (EU policy - staging of the chief negotiator is just a big bluff by the Federal Council (tagblatt.ch)).

2. 2018: Commission/arbitration tribunal/ECJ model

In January 2018, the EU Commission then put a model on the table in which an arbitration tribunal would precede the ECJ (EU's Swiss proposal

could serve as Brexit blueprint (ft.com)). If a case involved EU law or treaty law with the same content as EU law, the arbitration tribunal would have to request a binding interpretation from the CJEU. The arbitration tribunal would then decide the case on this basis. Our highest court, the Federal Supreme Court, would have had nothing to say.

It was the time of Brexit, and the EU Commission also offered the model to the British. In August 2017, ECJ President Koen Lenaerts proposed to the British that they be subordinated to the EFTA Court (Post-Brexit-law-enforcement-cooperation-negotiations-and-future-options.pdf (ukandeu.ac.uk)).

The mechanism with the arbitration court without power was not invented for the Swiss and the British. It stems from the EU's association agreements with the former Soviet republics of Armenia, Georgia, Moldova and Ukraine. In the British debate, there was talk of the "Ukraine" model right from the start.

The British rejected the "Ukraine" model for the Trade and Cooperation Agreement with the EU, but had to accept it in the Withdrawal Agreement due to inept negotiations by PM Theresa May. The duration of the withdrawal agreement is limited. There have been no cases to date.

In March 2018, the negotiating mandate was changed to the "Ukraine" model at the suggestion of the FDFA.

3. FA 2.0

According to the "Common Understanding" ("CU"), the "Ukraine" model is also to be introduced in FA 2.0. The FDFA, the Conference of the Cantonal Governments and professors in favour of this are endeavouring to attribute as much independence as possible to the arbitration tribunal. Three arguments are put forward:

(1) The arbitration tribunal will have legal discretion as to whether to seize the ECJ.

It is pointed out here that, according to the 2018 InstA draft, the ECJ should only be called upon if it is

> "relevant to the resolution of the dispute and necessary for its decision".

The arbitration tribunal alone decides on this. Switzerland has negotiated better than the post-Soviet republics in this regard. The latter is not true because the requirement of "relevance" is also contained in the EU's agreement with Armenia (Article 342[2]).

In practice, the two terms do not change the fact that the ECJ must always be called upon when EU law is "implicated". It is conceivable that the arbitral tribunal may wish to dispense with the involvement of the ECJ, e.g. if clear ECJ case law exists. However, even then it would have no discretion in adopting this case law.

The dispute resolution clause will be applied by the arbitration tribunal in light of its purpose. Because the aim is to achieve the greatest possible homogeneity in the internal market, the arbitration tribunal will grant an application by the EU to the ECJ in cases of doubt.

Structural and sociological considerations also come into play here. The arbitration tribunal would be an ad hoc institution without its own registry, without permanent court clerks, without established practice and procedures and without "institutional memory". For this reason alone, it would have difficulties rejecting a well-founded application by the EU to send a case to the ECJ. Furthermore, the arbitrators would naturally be interested in preserving their good reputation. More or less openly expressed hopes that they would be particularly sympathetic to Switzerland and therefore prepared to interpret an agreement with the EU in Switzerland's favour are pure wishful thinking.

(2) The arbitral tribunal will have legal discretion as to whether and how it implements the ECJ's ruling.

It is true that the arbitrators could theoretically deviate from the judgment of the ECJ. But that would be a clear violation of the law. Switzerland cannot base its relations with the EU on the hope that decision-makers will systematically violate rights and obligations to the detriment of the EU or in favour of Switzerland.

(3) The arbitration tribunal will have de facto discretionary powers because the "Ukraine"-model has similarities with the preliminary ruling

procedure in the EU, where the national supreme courts also have discretionary powers.

Supporters say that the highest courts of the EU member states sometimes violate their duty to refer cases to the ECJ with impunity and in certain cases even refuse to follow the ECJ. So here too, future EU policy will be based on a hope or request to a court to violate the law. Moreover, the comparison of the arbitration tribunal with the highest courts of the EU member states is untenable.

IV. Assessment by independent foreign commentators

Independent and renowned international observers, who have no hidden agenda with regard to Swiss EU policy and do not hope to have a seat on a future arbitration tribunal, speak plainly about whether the arbitration tribunal would have its own powers:

Franklin Dehousse, a former Belgian judge at the General Court of the EU, refers to this approach as “judicial imperialism”.

Oslo professor of international law and former director at King’s College, University of London, Mads Andenas, describes the FA 2.0 approach as the “poor man’s EEA”.

British political scientist Beth Oppenheim considers the mechanism to be “strongly tilted in the EU’s favour” and describes the arbitration tribunal as “a fig leaf”.

According to Belgian international law expert Guillaume van der Loo, the “arbitration tribunal” is intended to “conceal” the enormous transfer of sovereignty to the EU. It is an extreme obligation that does not suit Switzerland.

According to the British barrister Martin Howe KC, the “arbitration tribunal” acts as a mere “post box” for the transmission of the dispute to the ECJ and as a “rubber stamp” when the answer comes back.

Dutch law professor Dimitry Kochenov speaks of an “unequal treaty”.

The Luxembourg business lawyer Joë Lemmer sees the “arbitration tribunal” as a “Trojan horse with the ECJ in its belly”.

The Italian lawyer and lecturer Maurizio Lo Gullo, who also practices in Lugano, explained that the ECJ would become an organ of Switzerland.

RA PD Dr Christian F. Schneider, University of Vienna: “Unnecessary loss of sovereignty compared to the other EFTA states”.

Member of the German Bundestag and Attorney Wolfgang Kubicki: If you want the arbitration tribunal, you can just as well go directly to the ECJ.

V. Would the ECJ be neutral?

This all boils down to the question of whether the ECJ can be regarded as a neutral court in relation to Switzerland. In June 2013, former Secretary of State Yves Rossier provoked with the sentence that the ECJ judges are foreign judges, but it is also about foreign law ("Yes, they are foreign judges" | Tages-Anzeiger (tagesanzeiger.ch)).

This conclusion is wrong: treaty law is common law of both parties. And the concept of foreign judges is an empty formula; the decisive factor is whether a judge is neutral.

The current Federal Councillor Karin Keller-Sutter has in 2015 rejected the ECJ with the argument that it is the court of the other side. In fact, the ECJ lacks neutrality. Just like the Commission or the Council, the ECJ is an “institution” of the EU (Article 13 TEU).

NC Gerhard Pfister in the Tagesanzeiger of 28 September 2020:

> “’We must finally talk about the fundamental problem: sovereignty. The role of the European Court of Justice in the framework agreement is toxic’ […]. It is unacceptable for a unilateral European court to decide on the relationship between the EU and a non-member […].”

Swiss professors have objected that the ECJ has already ruled on many cases involving Swiss private individuals and companies without any systematic discrimination. Switzerland as a state therefore has nothing to fear.

This argument confuses apples and oranges. The cases that the ECJ has ruled on so far concerned preliminary ruling proceedings, e.g. concerning a Swiss national who worked in Germany or someone who wanted to buy a piece of land or acquire a hunting patent in Austria. In such cases, a court such as the ECJ is just as neutral as the Federal Supreme Court is the other way round, for example when an Italian lawyer seeks access to the Swiss legal market. Under FA 2.0, however, it would be a completely different matter, namely disputes under international law between Switzerland as a state and the EU as a supranational entity. In such cases, the ECJ, as the court of the EU, would not be neutral towards Switzerland. The ECJ has been accepted in this role in the air transport agreement with the EU. So far, there is one precedent that has not ended well for Switzerland: the Zurich aircraft noise dispute. According to the judgment of the ECJ, the population in Switzerland, Hesse and Upper Bavaria are less worthy of protection against aircraft noise than those in the southern Black Forest (Case C-547/10 P). The consequences for Zurich Airport are well known.

VI. Exceptions to the ECJ's jurisdiction

1. Scope

The Federal Council is not prepared to discuss the outlined dispute resolution model again in the negotiations. Its main aim is to get the trade unions on board, whose demand for absolute wage protection prompted it to break off the InstA 2018 negotiations. Exceptions are also to be made for the EU Citizens' Rights Directive and state aid. In the case of the directive, the aim is to accommodate those who fear easier immigration into the social security systems. With regard to state aid, the cantons are to be placated by the fact that, for the time being, no action will be taken against cantonal tax competition, the state guarantees of some cantonal banks and the cantonal building insurance monopolies.

Regardless of what exceptions Switzerland can currently negotiate in these areas, this approach is inadequate because it only represents a snapshot in time. In the future, as yet unknown conflicts will arise, for example, in the areas of land transport, energy supply or the liberalisation of rail transport. The same applies to a future services agreement, which would also cover financial services. Moreover, the EU could insist on abandoning the exemptions at the latest when further agreements are concluded. This would mean the probable end of controlled immigration, cantonal tax competition, cantonal building insurance monopolies and cantonal banks.

Finally, no one can prevent the EU from taking the position in future that the 1972 Free Trade Agreement must also be institutionalised. Even if Switzerland were able to negotiate significant exemptions from the ECJ's jurisdiction, this could not make up for the huge loss of sovereignty.

2. In case of doubt, the ECJ will decide

It follows from the Common Understanding that in the event of disputes between the EU and Switzerland, the ECJ will decide in cases of doubt. Point 10 of the CU states that

> "Where the dispute raises a question concerning the interpretation or application of a provision that falls within the scope of an exception from the dynamic alignment obligation set out in paragraph 9 and where such dispute does not involve the interpretation or application of concepts of Union law, the arbitral tribunal should decide the dispute without referring to the Court of Justice of the EU."

It should be noted that the CU does not speak of "notions", but of "concepts of Union law". "Concept" is a vague term. According to common experience, the arbitral tribunal would tend to grant an application by the EU Commission to the ECJ in cases of doubt. This means that the ECJ would ultimately decide on the scope of exceptions.

Ulrich Mückenberger (1971): "Exemptions have second-class reality".

According to the ECJ's established case law, exemptions must be interpreted narrowly.

What will the EU states plead?

VII. One-pillar model

1. Fundamentals

The entire FA 2.0 project is based on conceptually false premises. The incessantly repeated phrase that the agreement rests on a "two-pillar model" is untenable.

The two-pillar concept originates from EEA law. The EEA consists of an EU pillar with 27 states and an EEA/EFTA pillar with Iceland, Liechtenstein and Norway. Each pillar has its own structurally independent institutions up to the last instance. In the EU pillar, these are the EU Commission as the supervisory body and the ECJ as the judicial authority. These two bodies already existed at the time the EEA Agreement entered into force. New institutions were created for the administration of the EEA/EFTA pillar: the ESA and the EFTA Court. They have been in existence since 1 January 1994 and are currently celebrating their 30th anniversary.

The advantages of the two-pillar model for the EEA/EFTA states are obvious from a sovereignty perspective. Liechtenstein, Iceland and Norway are subject only to supervision by their own supervisory authority (ESA), in which their own representatives sit. In contrast to the EU Commission, which increasingly sees itself as a political body, the ESA is purely a supervisory authority.

ESA can initiate proceedings against Liechtenstein, Iceland and Norway before the EFTA Court in the event of breaches of EEA law. Here, too, these three countries each provide a judge as well as legal and non-legal staff. It is therefore their own court in their own pillar, which decides in the last instance on their EEA legal obligations. In this EEA/EFTA pillar system, the EU Commission has no right to investigate Liechtenstein, Iceland and Norway and bring a case to the ECJ on its own initiative. Only the authorities of these three states have this competence.

There can be no question of any of this under FA 2.0.

2. Subordination of Switzerland to the EU institutions

Because there is no two-pillar model in FA 2.0, the widespread assertion that Switzerland monitors itself is misleading. Unlike Liechtenstein, Iceland and Norway, Switzerland can be taken unilaterally by the EU Commission (via the “arbitration tribunal”) to its own court, the ECJ, at any time. The ECJ would have a monopoly in the interpretation of applicable law. This means that with FA 2.0, there would only be one pillar that monitors and judicially controls Switzerland: the European Union.

3. Role of the Federal Supreme Court

The Swiss Federal Supreme Court would be excluded from the proposed dispute resolution procedure. This shows particularly clearly how ill-considered the architects of the FA have proceeded. Without any serious comparative law analysis, concepts from the EEA were cherry-picked and adopted with a significant deterioration for Switzerland (unilateral access to the ECJ by the EU). For Liechtenstein, Iceland and Norway, the first subparagraph of Article 111(3) of the EEA Agreement provides:

> "If the dispute concerns the interpretation of provisions of this Agreement which are identical in substance to corresponding provisions of [...] [EU law] and if the dispute is not settled within three months of the referral to the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant provisions." (Emphasis added)

In the EU-Liechtenstein-Iceland-Norway relationship, the ECJ could only be involved in disputes concerning the interpretation of provisions of EEA law. It is therefore a matter of concretely formulated legal norms and not, as in the CU, of "concepts".

Furthermore, the ECJ can only be called upon by the EU Commission if the EFTA side agrees. This means that Vaduz, Reykjavík and Oslo have a veto right against the ECJ coming into play.

However, the decisive factor is not what is written on paper, but how a treaty is implemented in practice. In the thirty years of the EEA's existence, the first subparagraph of Article 111(3) EEA has never been used - even in politically controversial cases such as the collapse of the Icelandic banks during the financial crisis of 2008. The EEA has instruments that allow conflicts to be resolved in other ways while respecting the sovereignty of the parties involved as far as possible: the infringement procedure and the preliminary ruling procedure. The dispute settlement procedure in Article 111 EEA is only a last resort. And because it can only be applied with the consent of the EFTA side, it is symbolic legislation.

The sentence in the fact sheet "Institutional elements"

> "The competence of the Federal Supreme Court and the Swiss courts to interpret Swiss law is expressly preserved" (institutional-elements_EN.pdf)

leaves one perplexed. Of course the Federal Supreme Court is authorised to interpret the bilateral treaties. However, this does not follow from a commitment by the EU, but from Swiss law. The decisive factor is that the Federal Supreme Court would be excluded from the dispute settlement procedure.

The assertion that Switzerland is subject to the jurisdiction of the Federal Supreme Court under the FA 2.0 is false. Ultimately, it would be subject to the jurisdiction of the non-neutral court of the other party, the ECJ. Here too, the argument that FA 2.0 is based on a "two-pillar model" proves to be untenable.

The elimination of the Federal Supreme Court, which has not been addressed by the Federal Council, would be a serious matter. No other supreme court in the EU or EEA is treated so badly. In the EU and EEA, the highest national courts play an important role in the preliminary ruling procedure. They influence the judgment of the ECJ or the EFTA Court by formulating the questions referred. And they have set sovereignty-preserving limits for the ECJ and the EFTA Court in the implementation of preliminary rulings (A closer look at the Primacy of EU law - Brussels Report). One example among many is the case law of the French Conseil d'État that the protection of internal security remains a French competence as long as there are no equivalent guarantees in EU law (French data network, 21 April 2021). The Federal Supreme Court would not have these options. The FA 2.0 dispute resolution mechanism would be unconstitutional in Norway and Iceland, and probably in most EU states as well.

VIII. The dispute settlement model as the core of EU neighbourhood policy ("ENP")

The dispute resolution model of RA 2.0 is not customised for Switzerland. It is an "off-the-shelf suit" that was developed for emerging countries that are on the EU's financial drip. These countries are the subject of the so-called EU Neighbourhood Policy ("ENP"). The model has already been realised in the association agreements with the four post-Soviet republics Armenia, Georgia, Moldova and Ukraine. Three of these are EU accession candidates. The background to this is the attempt to bring these countries closer to democracy, the rule of law and a market economy.

The EU also wants to impose this “Ukraine” mechanism on the countries of North Africa as part of trade agreements. These are former colonies of European powers with no prospect of joining the EU (neo-colonialism). These include Morocco, Algeria, Egypt and Jordan.

Switzerland is a world champion in innovation and one of the most successful economies in the world. In contrast to all EU member states, it is also one of the oldest democracies in the world. It is incomprehensible that a model developed for these countries should be suitable for Switzerland.

IX. Compensatory measures

If Switzerland were to lose a case before the ECJ or the arbitration tribunal, it would be obliged to implement the ruling. If it did not do so, the EU would have the right to take a series of “appropriate” compensatory measures in the agreement in question or in another agreement. It would be up to Brussels alone to organise these. Switzerland would only have the right to raise the question of the proportionality of these measures with the arbitration tribunal.

The formulation that compensatory measures must be proportionate originates from the EEA Agreement and merely reflects a matter of course. In constitutional states, all sovereign action must always be proportionate, in Switzerland, in Germany and of course also in the EU. This supposed concession to Switzerland is not one, and it would in no way be a substitute for the fact that the arbitral tribunal has no discretion in the core of the dispute.

X. Quality of the information

1. Bullshit

The FA 2.0 project was built on falsehoods from the outset. American moral philosophy speaks of "bullshit" in this context: talk that seeks to persuade without regard for truth (Harry G. Frankfurt, On Bullshit : Frankfurt, Harry G.: Amazon.de: Books). The bullshit spread by the FDFA was and is particularly serious in two respects:

(1) From the phase of the Commission/ECJ model (from 2013 onwards), it was above all the FDFA's claims that the ECJ would not be able to

“sentence” Switzerland, but would merely “provide expert opinions”. This would be more advantageous than proceedings before the EFTA Court, as the latter’s judgments are not binding on the EU. This reveals alarming gaps in the basic knowledge of the European judicial procedures.

(2) From the phase of the “Ukraine” mechanism (from 2018), it is above all the allegations that the arbitration tribunal would have discretion, that the ECJ would be neutral towards Switzerland and that Switzerland has negotiated a “two-pillar model”.

2. Deliberate misrepresentation

There are also statements by FA 2.0 proponents that go beyond the aforementioned bullshit policy because they want to proactively conceal the truth. Following the interruption of negotiations in May 2021, the Federal Council has replaced the horizontal approach with a vertical one. Institutional issues are no longer to be regulated across all agreements, but in the individual treaties. The Federal Council refers to this as the “package approach”. This alleged paradigm shift is being used to characterise the key institutional issues as just one of many questions, or even to gloss over them. This is deliberate misdirection.

This is particularly blatant in the case of two diagrams that were published online by the FDFA and economiesuisse on 15 December 2023, the day on which the Common Understanding and the draft negotiating mandate were presented to the public. In both, the fact that Switzerland is to submit to the EU institutions is simply suppressed. There is not a word to this effect.

I was a permanent visiting professor at the University of Texas in Austin for many years. I was also there during the famous O. J. Simpson murder trial in the mid-1990s. One of the issues in that case was whether O.J. had worn a blood-soaked glove that had been found at the crime scene. The glove didn't fit him, and Simpson's lead attorney, Jonnie Cochran Jr. concluded his summation by saying:

“It doesn’t fit, and if it doesn’t fit you must acquit.”

This convinced the jury and Simpson was acquitted.

Ladies and gentlemen of the National Council, I would like to say something similar to you with regard to the question of whether a FA 2.0 should be negotiated on the basis of the “Common Understanding”. I’ll just leave out one letter:

“It doesn’t fit, and if it doesn’t fit you must quit.”

Thank you very much for your attention.