# 9

# Mutual Recognition and EFTA

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## I. Introduction

The decision in *Cassis de Dijon*[1] has had a profound effect on the advent of the EU's single market. But has the effect spilled over to the EU's closest neighbour, namely, to Member States of the European Free Trade Association (EFTA) – Iceland, Liechtenstein, Norway and Switzerland? These four States are, now next to the United Kingdom (UK), economically and politically the EU's closest partners. They participate in, or have at least partial access to, the EU's internal market.[2] Hence, the EFTA States have also been influenced by EU law, both legislation and jurisprudence.

While mutual recognition has gained a lot of academic attention in the EU, its application in the context of the EFTA States has not attracted much interest. Either it is simply seen as a 'given', or, in the case of Switzerland, scholarship concentrates on the specific Swiss situation.

This chapter seeks to argue that the *Cassis de Dijon* story does not stop at the EU's borders. It has had a significant effect in all States of the European Economic Area (EEA), including the three participating EFTA States, which may not be surprising given their level of integration with the EU. More surprising is the dramatic effect of the *Cassis* ruling in Switzerland,[3] internally, with the EU and in respect of external trade more generally. Yet so far little EU attention has been paid to this story. This lack of interest coincides with the ignorance of other models of European integration, such as EFTA.

[1] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, ECLI:EU:C:1979:42. See also the Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon') [1980] OJ C256/2.

[2] G Baur, 'Privileged partnerships – The partner countries' (institutional) perspectives' in S Gstöhl and D Phinnemore (eds), *The Proliferation of Privileged Partnerships between the European Union and its Neighbours* (London, Routledge, 2020) 23, 24–25.

[3] Acknowledged in the UK Internal Market White Paper, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf, 99–100.

This contribution will first look at what EFTA is and how its Member States relate to the EU's internal market legislation and jurisprudence. Then it will look at how mutual recognition and the *Cassis de Dijon* principle are respectively applied, if at all. The position of Switzerland, given its special form of association with the EU's internal market with regard to the free movement of goods, and indeed the partial lack of a link with the EU regarding other freedoms, will be of particular interest in this context. We will, however, focus on the free movement of goods and only consider the other freedoms occasionally. The chapter will conclude with a set of final observations.

## II. The European Free Trade Association

EFTA is an intergovernmental organisation founded in 1960 by those Western European countries that did not share the belief of other Western European countries in an economic community, with a customs union, that would gradually evolve into a political community, or, as it happened, Union.[4] These countries had unsuccessfully advocated a large Western European free trade area prior to the inception of the European Economic Community (EEC) in 1957.[5] They still preferred to form a free trade zone among themselves, without surrendering much of their sovereignty or adopting the aim of deepening political integration.[6] The signatories to the EFTA Convention[7] were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK. Finland joined later as an associate member, a special status that was necessary to enable it to accommodate its membership with the EU with its policies to the then Soviet Union.[8] Iceland joined in 1970, and Liechtenstein, which had been covered from the beginning through a protocol due to its regional union with Switzerland, formally joined in its own right in 1991. There were also successive withdrawals from EFTA by Denmark and the UK on 1 January 1973; Portugal on 1 January 1986; and Austria, Finland and Sweden on 1 January 1995. These countries all joined what became the EU.

[4] See, eg, V Curzon-Price, The essentials of Economic Integration (Basingstoke, Macmillan, 1974) 31, describing the sceptical attitude of the UK in view of the 'plans for a comprehensive customs union including not only industrial trade, but also agricultural production and a host of other common transport, social and services policies'.

[5] See B Hurni, 'The failure to establish the large free trade area' in P du Bois and B Hurni (eds), *L'AELE d'hier à demain/EFTA from Yesterday to Tomorrow* (Geneva, EFTA, 1987) 27.

[6] See generally L Rye, 'Integration from the outside' in HA Ikonomou, A Andry and R Byberg (eds), *European Enlargement across Rounds and Beyond Borders* (Abingdon, Routledge, 2017) 194.

[7] Convention Establishing the European Free Trade Association signed in Stockholm on 4 January 1960 ('Stockholm Convention').

[8] Finland had managed, with difficulty and bravery, to remain independent after 1945, but at the price of not daring to antagonise the Soviet Union. On the one hand, it thus had to remain neutral, in a sense that fully joining EFTA was difficult in the light of the UK's being its driving force and at the same time one of the Soviet Union's major antagonists; see G Baur, *The European Free Trade Association* (Cambridge, Intersentia, 2020) 66.

Since its foundation EFTA has had two major aims: first, the introduction of free trade of industrial goods and several processed agricultural and fisheries products between its Member States; and, second, the creation of a free trade area comprising both the seven members of EFTA and the six (now 27) EEC Member States. Later, a third aim was added, namely concluding free trade agreements (FTAs) with third parties other than the EU.

The EFTA States entered a new era altogether when they signed, in 1992, the Agreement on the EEA. By signing that, the EFTA States were effectively to join the European Community's (EC) internal market and to be treated with regard to it as if they were EC Member States.[9] Switzerland, however, did not ratify the EEA Agreement. After some more years of negotiations, the EU and Switzerland agreed on essentially two sets of 'Bilateral [sectoral] Agreements' to gain access to the internal market, at least in some important areas.[10]

## A. Free Trade Areas

Achieving the first aim mentioned in the EFTA Convention meant establishing a free trade area among the EFTA States, while the second aim meant extending that free trade area to the then EEC, establishing free trade between the EFTA States and the EU. We will deal with each in turn.

### *i. The Free Trade Area between the EFTA States*

The original purpose of establishing a free trade zone between its Members is still the basic aim of the EFTA Convention. Initially, the objectives were:

(a) the promotion of continued and balanced strengthening of trade and economic relations;
(b) free trade in goods.

The aim of establishing a free trade area between the EFTA States themselves was achieved – with the exception of Portugal, which benefited from a certain 'development bonus' – by 31 December 1966, when all tariffs were lowered to zero.

In the wake of the conclusion of the first batch of Bilateral Agreements between the EU and Switzerland in 1999, which gave the latter certain amount of access to the EU's internal market, the four EFTA States agreed to revise the EFTA Convention[11] so as to achieve a sufficient basis to also mutually grant one another the rights conferred to the EU by the EEA Agreement and the Bilateral Agreements respectively. The EFTA Convention's objectives, which essentially consisted in

[9] See section III.A.
[10] See section III.B.
[11] The revised EFTA Convention ('Vaduz Convention') was signed on 21 June 2001 and entered into force on 1 June 2002.

establishing free trade in goods, were thus supplemented by the following additional objectives:

(c) the progressive liberalisation of the free movement of persons;
(d) the progressive liberalisation of trade in services, and of investment;
(e) fair conditions of competition affecting trade between the Member States;
(f) the deepening of the public procurement markets of the Member States; and
(g) appropriate protection of intellectual property rights.

In practice, the four EFTA countries integrate internal market legislation autonomously into the annexes to the EFTA Convention, making EFTA law vastly similar to EU law – or EEA law for that matter – as far as it is applicable. EFTA thus becomes a 'free trade area with internal market elements'.[12] Therefore, this can be seen as a triangle of mutual rights and duties between (i) the EU and the EEA EFTA States, (ii) the EU and Switzerland, and (iii) Switzerland and the three other EFTA States, Iceland, Liechtenstein and Norway.

As the Bilateral Agreements between the EU and Switzerland grant – compared to the EEA – the lowest degree of mutual rights, this was agreed to be the common denominator for liberalisation among the four EFTA countries. Take the free movement of persons as an example: with regard to that freedom, Iceland, Liechtenstein and Norway have essentially the same level of integration as the EU, especially given the incorporation of the so-called 'Union Citizenship Directive'[13] into the EEA Agreement, as amended according to the scope of that Agreement.[14] This Directive has not yet, however, been made part of the Agreement on the Free Movement of Persons (AFMP) between the EU and Switzerland. It has therefore not been incorporated into the EFTA Convention either.

### *ii. The Free Trade Agreements between the EEC States and the EFTA States*

With the accession of Denmark, Ireland and the UK to the (then) EEC, links also became closer between the EEC and the remaining EFTA countries (Austria, Finland, Iceland, Norway, Portugal, Sweden and Switzerland with Liechtenstein).

[12] See Baur, *The European Free Trade Association* (n 8) 8, 78.

[13] European Parliament and Council Directive (EC) 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

[14] Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement, [2004] OJ L 158/77, 'whereas … (8) The concept of 'Union Citizenship' is not included in the Agreement. (9) Immigration policy is not part of the Agreement. (10) The Agreement does not apply to third country nationals. Family members within the meaning of the Directive having third country nationality shall nevertheless enjoy certain derived rights such as those foreseen in Articles 12(2), 13(2) and 18 when entering or moving to the host country.'

The EU-Swiss FTA is the last of a series of standardised FTAs the (then) EEC had concluded in 1972 and 1973 with each of those EFTA States that, unlike the UK and Denmark, had not chosen to join the EEC or, as in the case of Norway, could not do so because of a negative referendum on EEC membership. Interestingly, it was the UK that wanted the EEC to negotiate these FTAs, in order to maintain its trade relations with its former EFTA partners upon joining the EEC.

The main objective of the EEC-EFTA FTAs was the dismantling of tariff barriers. On 1 July 1977, after a transitional period of four and a half years, the last tariff barriers, except for certain sensitive products, between the (by then) EC and the EFTA states had been removed. And as from 1 January 1984, the last remaining tariffs were abolished. By that time, a large Western European free trade area ('internal trading area'), with a population of over 300 million people and encompassing 17 countries, had been created.[15] The 'large Western European free trade area' came into being 27 years after it had initially failed.

A second objective of the EEC-EFTA FTAs was the abolition of quantitative restrictions (ie quotas) that occurred in bilateral trade when the agreements entered into force. Some EFTA countries did, however, retain a small number of quantitative restrictions.

Apart from the agreement with Iceland, where tariff concessions were granted for certain fish products, no liberalisation of primary agricultural trade was provided for in the FTAs.

Since the free trade zone was not a customs union, it was necessary to establish rules to define clearly which goods were eligible for duty-free treatment (rules of origin).[16] By this, goods could be prevented from entering the free trade area through the country with the lowest customs tariff.

An FTA cannot be a surrogate for trade in goods that otherwise would constitute free movement of goods as, for example, in the EEA Agreement. The FTA is an international law agreement that clearly falls outside of the scope of an association agreement as mentioned in Article 217 of the Treaty on the Functioning of the European Union (TFEU). Rather it is is a trade agreement in accordance with Article 207 TFEU.

As a consequence, there is no direct effect of EU law or corresponding interpretation of the case law of the Court of Justice in the EFTA States. This was made clear through jurisprudence in some of the EFTA States. In contrast to the EU's position, which foresees the direct effect of FTAs,[17] the direct effect of the FTAs' provisions was mostly denied by national courts of the EFTA States. This was the case even in Switzerland and Austria, which have a monistic international law system and a generally international law-friendly attitude. Sticking

[15] N Faustenhammer, 'Introduction' in HG Koppensteiner (ed), *Rechtsfragen der Freihandelsabkommen der Europäischen Wirtschaftsgemeinschaft mit den EFTA-Staaten* (Vienna, Orac, 1987) 1, 13.

[16] Put simply, in order to assess whether goods qualify for tariff waivers or reductions, and also whether these can be imported quota-free, it has to be assessed where these goods originate.

[17] Case 104/81 *Hauptzollamt Mainz v CA Kupferberg & Cie KG aA*, ECLI:EU:C:1982:362.

with Switzerland, the case *Stanley Adams*[18] was an important example: the Swiss Federal Court said that an individual who had 'blown the whistle' on his employer for illicit business practices, could not rely on Article 23 FTA (competition and state aid) because it did not lay down concrete duties for private parties. It only stated what practices were not compatible with the provisions of the FTA, without prohibiting these. Another such case, clearly deviating from the Court of Justice's practice, was *OMO*:[19] the Court of Justice allows the holder of an intellectual property right (eg a trademark) to block the placing of the product on the market by a competitor, but only for so long as the trademark owner has not placed the product on the relevant market (here, the EU) for the first time. However, in *OMO*, the Swiss Federal Tribunal refused to apply the same approach in the context of the FTA: Articles 13 (quantitative restrictions on imports) and 22 (principle of sincere cooperation) FTA were subject to an autonomous interpretation. The Swiss court held that there was nothing that would allow for a corresponding application of the Court of Justice's jurisprudence, despite the same or similar wording. Hence, the trademark owner could forbid parallel imports at all times. There were more cases confirming that view.

The Court of Justice retaliated in its famous landmark decision *Polydor*,[20] a case concerning the importation into the UK of gramophone records from Portugal. The Court of Justice held that despite 'the similarity between the terms of Articles 14(2) and 23 of the FTA – here between the EEC and Portugal – on the one hand and those of Articles 30 and 36 of the EEC Treaty on the other,' this was 'not a sufficient reason for transposing to the Agreement the [Court of Justice's] aforementioned case law.'[21] It saw such a distinction as being necessary because the scope of that case law had to be determined in the light of 'the [Union's] objectives and activities', that is merging 'national markets into a internal market having the characteristics of a domestic market'.[22] This was not so with the FTA, however, which has a different objective, namely to establish a free trade area and to eliminate all obstacles to the Member States' trade in accordance with GATT rules.[23] This argument was taken up by the Swiss Federal Court again in its decision in *Physiogel*.[24] The case was about imported products that were advertised as having a healing effect. These products were not registered as medicinal products, however, and were therefore considered to be cosmetics. For cosmetics, though, promotions of any kind that would indicate healing, soothing or preventative effects were prohibited. Promotions such as 'in collaboration with dermatologists', 'for itchy skin prone to allergies' or 'for the care of neurodermatitis, diabetes, psoriasis'

[18] BGE/ATF 104 IV 175.
[19] BGE/ATF 105 II 49.
[20] Case 270/80 *Polydor Limited and RSO Records Inc v Harlequin Records Shops Limited and Simons Records Limited*, ECLI:EU:C:1982:43.
[21] ibid para 15.
[22] ibid para 18.
[23] ibid para 10.
[24] Swiss Federal Court, 6 September 2006, 2A.593/2005.

contradicted the provisions of food legislation. Hence, imports were forbidden by the competent administrative body and ultimately confirmed by the Swiss Federal Court. The latter reverted to the argument that Article 13 FTA, although essentially identical in wording with Article 34 TFEU, could not be interpreted in the same way, as the objectives of the two treaties were different. Furthermore, Switzerland had not agreed to directly apply the *Cassis de Dijon* principle, nor was there (at the time) anything in internal legislation to that effect.[25] This example is to show that as a – probably unintended – consequence[26] of the Swiss Federal Court's rather rigid interpretation of the FTA, it could not be used as a basis to apply the *Cassis de Dijon* principle. Had the Swiss Federal Court set the course of jurisprudence in another direction at the time, that is in the same way as the Court of Justice later did in *Kupferberg*,[27] which was absolutely possible, the FTA might well have been a sufficient basis for applying the *Cassis de Dijon* principle between the EU and Switzerland as well.

Although all four EFTA States are now linked to the EU by either the EEA Agreement or the Swiss-EU Bilateral Agreements, the EEC-EFTA FTAs are still partly in force. Mainly for Iceland and Norway, provisions on imports of fish and fisheries products into the EU are laid down in additional protocols to the respective FTA with the EU. These protocols are re-opened regularly when importation quotas are raised as a trade-off for an increase in payments into the Financial Mechanisms (cohesion funds of the EEA EFTA States and of Norway 'bilaterally') following EEA Enlargement. The EEC-Switzerland FTA still provides the legal basis for trade in goods between Switzerland and the EU. And the Agreement between the EU and Switzerland on mutual recognition in relation to conformity assessment (Mutual Recognition Agreement (MRA)[28]), one of the Bilateral Agreements of the first package, also refers to the EEC-Switzerland FTA. The picture is thus more than complex.

## III. The Relationship of the EFTA States with the EU and in Particular its Internal Market

Section IV will look at mutual recognition and *Cassis de Dijon* in the context of the EEA and of the Swiss-EU relationship respectively. Before that, this section will

[25] N Diebold and M Ludin, 'Das *Cassis de Dijon*-Prinzip in Praxis und Politik' in *Schweizerisches Jahrbuch für Europarecht/Annuaire Suisse de droit européen 2016/2017* (Bern, Stämpfli, 2017) 373.

[26] Unintended consequence is an important concept of historical institutionalism. It tries to explain why gaps emerge between the initial intentions and later developments. Factors that are likely to create such gaps include autonomous actions of actors or institutions, their restricted time horizons, including the discounting of long-term consequences and actors' changing preferences over time; see S Gstöhl and D Phinnemore, 'Introduction: Privileged Partnerships between the European Union and Third States' in Gstöhl and Phinnemore (eds), *The Proliferation of Privileged Partnerships* (n 2) 1, 7.

[27] *Hauptzollamt Mainz v CA Kupferberg & Cie KG aA* (n 17).

[28] See further ch 10 by Leinarte and Barnard in this volume.

introduce the two concepts of accessing the EU's internal market and participating in it.

## A. Iceland, Liechtenstein and Norway's Participation in the EEA as the EU's Enlarged Internal Market

When the EEC embarked on the creation of an internal (common) market in the mid-to-late 1980s, the EFTA States were interested in participating in it. In 1992, all EFTA States, with the exception of Switzerland, ratified the EEA Agreement. It has therefore become the comprehensive basis for cooperation between the EU and the three EEA EFTA States, Iceland, Liechtenstein and Norway.

The aim of the EEA Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the EEA States, with equal conditions of competition and respect for the same rules. Experience confirms that the EEA Agreement is functioning well and generally to the satisfaction of the EEA States. All relevant EU legislation in the field of the internal market has been integrated into the EEA Agreement, and implementation rates of this legislation in the EEA EFTA States are comparable with those of the EU Member States. The internal market is governed by the same basic rules, enabling goods, services, capital and persons to move freely about the EEA.

Participating in the EEA does not, however, entail membership of the Customs Union, thereby permitting EEA/EFTA States to make their own FTAs with third countries, which they have done extensively. It also excludes EU agricultural and fisheries policies. With respect to the internal market rules, all four freedoms on which the EU is based are to be applied, in principle, in the same way as in the EU.[29]

In order to make the EEA work without the EFTA States' encroaching on the EU's autonomy, a two-pillar-structure was established. The EU instititutions, such as the Commission or the Court of Justice, were mirrored by respective EFTA institutions: the EFTA Surveillance Authority and the EFTA Court. The two pillars are bridged either by common institutions or by a system that ensures close cooperation and homogeneous decision making.

The internal market rules ensure that goods can move freely across the borders of all (now) 30 countries in the EEA on the basis of equal conditions of competition. Buyers and sellers of goods do not have to pay customs duties when trading in most products. Prior to the internal market, there were many different national technical regulations and standards, which stipulated that products needed to be manufactured and tested in specific ways or that the products had to have certain properties. Through the mutual recognition or harmonisation of national technical

[29] See generally C Frommelt, 'The European Economic Area: a flexible but highly complex two-pillar system' in Gstöhl and Phinnemore (eds), *The Proliferation of Privileged Partnerships* (n 2) 46.

standards, and through the mutual recognition of testing procedures, these technical barriers to trade (TBTs) are being removed.

## B. Swiss-EU Relationship

The relationship between Switzerland and the EU, unlike the EEA Agreement, is not a coherent set of rules set out in one agreement. Its two main features, which will be considered in the context of this contribution, are (i) Switzerland's selective ('sectoral') access to the internal market, and (ii) the autonomous adaptation of Swiss law following the EU's legal development.

### *i. Selective Access to the Internal Market*

Switzerland, having rejected accession to the EEA in 1992, needed several years to negotiate sectoral agreements ('Bilateral Agreements') giving it access to the EU's internal market in some areas of mutual interest. A first batch of Bilateral Agreements included free movement of persons, mutual recognition in relation to conformity assessment, public procurement, agriculture, land transport, civil aviation and research. These agreements were signed in 1999 and entered into force in 2002, 10 years after the EEA Agreement had been rejected in a referendum.

A second batch of Bilateral Agreements, signed in 2004, included membership of Schengen/Dublin, the automatic exchange of information (former taxation of savings agreement), the combating of fraud, processed agricultural products, the environment, statistics, participation in the MEDIA Programme (Creative Europe), pensions and education. These agreements entered into force between 2005 and 2009. Few additional agreements have been concluded since.[30]

The approach taken in the EU-Swiss relationship with regard to the four freedoms is thus, unlike the EEA Agreement, piecemeal. The free movement of goods does not in itself follow the comprehensive approach laid down in the EEA Agreement in Articles 8–27. The FTA of 1972 continues to be the basis for the free movement of goods between the two parties, but is now supplemented by the Agreement on the Elimination of Technical Barriers to Trade (also known as the Mutual Recognition Agreement (MRA)).[31] It regulates the recognition, compliance and examination of many industrial products traded between Switzerland and the EU. This is done on the basis of harmonisation of the law and equivalence of product requirements. Thus, placing on the market is facilitated reciprocally in almost 20 sectors, in particular for machinery, motor vehicles, medical devices, electrical equipment and telecommunication equipment. The last of these helps in integrating Switzerland into the EU's telecommunications market.

[30] See generally M Oesch, *Switzerland and the European Union* (Zurich, Dike, 2018).

[31] Agreement of 21 June 1999 between the Swiss Confederation and the European Community on mutual recognition in conformity assessment [2002] OJ L114/369.

With regard to the other freedoms, only the free movement of persons is close to the level of integration found in that of the EEA EFTA States. The Agreement on the Free Movement of Persons (AFMP)[32] is fairly comprehensive. It lacks, however, the dynamic element of the EEA Agreement that would guarantee that Agreement to reflect the level of integration in the EU or the EEA for that matter. This explains why, for example, the Citizens' Rights Directive 2004/38[33] is not covered by the AFMP. As to services, only a is minimum covered by the Bilateral Agreements, such as cross-border services in the AFMP or land and air transport in the respective agreements.[34]

The EU always saw these Bilateral Agreements as a transitional arrangement that would ultimately be replaced by a more comprehensive agreement, and it insisted on adding an institutional framework to the existing Bilateral Agreements. The requirement for an overarching institutional or governance framework was triggered by the refusal of the Swiss to update the AFMP. Formal negotiations began five years ago, and around the same time that the (first) Withdrawal Agreement (2018) between the EU and the UK was published, a draft Institutional Framework Agreement (IFA) between the EU and Switzerland was made available to the public.[35] Although the situation is not quite comparable in substance, reactions to the draft text, political discussions and reactions to wishes for renegotiation by the EU have been very similar on both the British and Swiss political scene.

### *ii. Autonomous Adaptation of Swiss Law*

In order to understand the discussion in the next section on *Cassis de Dijon* in Swiss law, the Swiss concept of autonomous adaptation ('*autonomer Nachvollzug*', '*reprise autonome*')[36] needs to be introduced. Historically, Swiss law has been influenced by European law since the early days of the EEC. This is obvious, given Switzerland's geographical situation at the centre of the continent, surrounded by EU Member States. This became government policy in 1988, shortly before negotiations on the EEA Agreement began:

> Our goal has to be to secure the greatest compatibility of our legislation with the legislation of our European partners in the areas of cross-border significance (and only there).

[32] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/6.

[33] See n 13.

[34] See n 32 and the Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road [2002] OJ L114/91, as well as the Agreement between the European Community and the Swiss Confederation on Air Transport [2002] OJ L114/73.

[35] Available at www.eda.admin.ch/dam/dea/fr/documents/abkommen/Acccord-inst-Projet-de-texte_fr.pdf; see generally C Kaddous, 'Switzerland and the EU – Current issues and new challenges under the Draft Institutional Framework Agreement' in Gstöhl and Phinnemore (eds), *The Proliferation of Privileged Partnerships* (n 2) 68.

[36] See generally F Maiani, 'Legal Europeanization as Legal Transformation: Some Insights from Swiss "Outer Europe"' in F Maiani, R Petrov and E Mouliarova (eds), *European Integration Without EU Membership: Models, Experiences, Perspectives* (Max Weber Programme (MWP)) (Florence, EUI, 2009/10) 4–9; Oesch, *Switzerland and the European Union* (n 30) 139–53.

> … This pursuit of parallelism is not motivated by the introduction of an automatism to adopt European law, but by the prevention of unwanted and unnecessary legal differences, which hamper the aspired mutual recognition of legislation on a European level.[37]

This policy of rendering Swiss law 'euro-compatible' by autonomous adaptation was then set in law: all new laws or amendments of old ones had to be 'systematically examined as to their compatibility with EU law'.[38]

When EU law is adopted without the existence of a legal obligation to do so, there is, of course, a wide variety of ways to do this. Authors write of 'autonomous adaptation' when the EU model is adopted more or less unchanged. European law can, however, also influence Swiss law in a more general and informal way, for example by adoption of its principles or a general spirit, that does not differ fundamentally from the influence of other preparatory work, for example on a bill.[39] Of course, if the adjustment is based not on economic incentives but on pressure, there can no longer be any talk of an 'autonomous' process. This is the case, for example, when compatibility with EU law is a prerequisite for access to the EU's internal market.[40]

In the first half of the 1990s, the Swiss economy was characterised by a marked weakness in growth. The causes seemed to be not only the strong currency, but also – due to the absence of any form of integration with the internal market – the protectionist character of the Swiss economy combined with a low level of competition. After Swiss voters had refused to contemplate membership of the EEA, there was a call for a revitalisation of the Swiss economy. Basic reforms laid the ground nationally for the Bilateral Agreements. While these Agreements opened the markets in important areas, the autonomous adaptation of Swiss commercial law was crucial for intensifying competition in the domestic market. In 1995, three important laws in key regulatory areas were passed on the same day: the Federal Act on Technical Barriers to Trade,[41] which removed non-tariff barriers; the Internal Market Act,[42] which broke down inter-cantonal boundaries; and the new Cartel Act,[43] which introduced effective rules for competition.

[37] Swiss Federal Council, *Report on Switzerland's position in the European integration process*, BBl 1988 III 249, 380 (German) / FF 1988 III 233, 365 (French); translation by Oesch, *Switzerland and the European Union* (n 30) 140.

[38] Oesch, *Switzerland and the European Union* (n 30) 140; Federal Act on the Federal Assembly [Parliament], SR/RS 171.0, Art 141(2)(a).

[39] For terminology that alternates between 'autonomous adaptation' and 'inspiration', see Swiss Federal Council, *Europe Report 2006*, BBl/FF (Federal Gazette) 2006, 6815, 6831–33 (German). As a criterion for choosing the form of adaptation see ibid 6831 (translation by the author): 'The so-called autonomous adaptation is sought wherever economic interests (competitiveness) require or justify it.'

[40] A Heinemann, 'Rechtliche Transplantate zwischen Europäischer Union und der Schweiz' in L Fahrländer et al (eds), *Europäisierung der schweizerischen Rechtsordnung* (Zürich, Dike, 2013) 20.

[41] Bundesgesetz über die technischen Handelshemmnisse (THG)/Loi fédérale sur les entraves techniques au commerce (LETC), 6 October 1995, SR/RS 946.51.

[42] Referring to the Swiss domestic internal market; Bundesgesetz über den Binnenmarkt (BGBM)/Loi fédérale sur le marché intérieur (LMI), 6 October 1995, SR/RS 943.02.

[43] Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG)/Loi fédérale sur les cartels et autres restrictions à la concurrence (Loi sur les cartels, LCart), 6 October 1995, SR/RS 251.

The alignment with EU trade law provided a stimulus for growth: greater freedom was given to entrepreneurship, while tightening the antitrust law was meant to rein in the anticompetitive behaviour of undertakings. The economic advantages of the autonomous adaptation of Switzerland's trade law can thus be summarised as follows: (i) cost reductions resulted from the Europe-wide standardisation of legal requirements; (ii) the markets were opened; (iii) competition was intensified by legal imports that were induced by an economic interest on the legislator's part.[44]

# IV. Mutual Recognition and *Cassis de Dijon*

## A. The Enlarged Internal Market

In the Introduction, I briefly sketched the structure of free movement of goods in the EU:[45] essentially, there is either (i) harmonisation, or (ii) in the non-harmonised area, mutual recognition under the terms of the *Cassis de Dijon* jurisprudence.

To put it simply, under the EEA Agreement, the three EFTA States – Iceland, Liechtenstein and Norway (EEA EFTA States) – were granted treatment, 'as if they were EU Member States'.[46] This means that the EU's approach applies to the EEA EFTA States. The provisions on free movement of goods are set out in Part II of the EEA Agreement. The chapter on the basic principles includes product coverage,[47] provisions relating to the rules of origin,[48] rules concerning customs duties and charges having equivalent effect,[49] quantitative restrictions and measures having equivalent effect,[50] discriminatory internal taxation[51] and rules on State monopolies of a commercial character.[52] These rules 'reproduce the wording of the corresponding provisions in the EEC Treaty' and, therefore, with a few exceptions, following from the fact that the EEA Agreement does not create a customs union, 'the EEA Agreement ensures the free movement of goods to the same extent as the EEC Treaty'.[53]

The Agreement aims at creating 'a dynamic and homogeneous European Economic Area'.[54] From this it follows that the EEA Agreement (ie its Annexes) is

[44] Heinemann, 'Rechtliche Transplantate' (n 40) 19.
[45] See section I.
[46] M Emerson, 'Which Model for Brexit?', *CEPS Special Report 147* (Brussels, Centre of European Policy Studies, 2016) 3.
[47] Art 8 EEA.
[48] Art 9 EEA.
[49] Art 10 EEA.
[50] Arts 11–13 EEA.
[51] Arts 14 and 15 EEA.
[52] Art 16 EEA.
[53] S Norberg et al, *EEA Law – A Commentary on the EEA Agreement* (Stockholm, Fritzes, 1993) 314–15.
[54] Preamble to the EEA Agreement, fourth recital.

constantly updated, 'as closely as possible to the adoption by Union of the corresponding new Union legislation with a view to permitting a simultaneous application of the latter as well as the amendments of the Annexes to the Agreement'.[55]

In order to guarantee homogeneity, this must also be reflected in the jurisprudence. However, the EEA Agreement refers only to 'the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement'.[56] The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement (SCA)),[57] however, also sets out rules for future jurisprudence of the Court of Justice, in as much as

> the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement …[58]

Nonetheless, in practice, this distinction was not greatly pondered by the EFTA Court, which from the very beginning interpreted EEA law in conformity with the jurisprudence of the Court of Justice, irrespective of whether such rulings were handed down prior to or after the date of signature of the EEA Agreement.[59] It was therefore also clear that the three EEA EFTA States could not be affected by the *Polydor* jurisprudence,[60] at least with regard to policies falling within the scope of the EEA Agreement.

Hence, the set-up in the EEA with regard to the free movement of goods from a legislative point of view was the same as in the EU: a harmonised area, including the relevant secondary legislation of the EU, and the non-harmonised area where mutual recognition applies. With regard to the rules that apply to the latter, the scope of the *Cassis de Dijon* principle was extended to the EEA EFTA countries as the Court of Justice's jurisprudence was applicable under the EEA Agreement as well.

## B. Switzerland

In order to mitigate the consequences of not participating in the internal market, Switzerland autonomously[61] introduced *Cassis de Dijon* into its domestic law. This was done in two ways: first, *Cassis de Dijon* was used as a means to liberalise the

[55] Art 102(1) EEA.
[56] Art 6 EEA.
[57] [1994] OJ L344/3.
[58] Art 3(2) SCA.
[59] Case E-1/94 *Restamark* [1994-1995] EFTA Ct Rep 15; P Wennerås, 'Commentary to Article 6 EEA' in F Arnesen et al (eds), *Agreement on the European Economic Area – A Commentary* (Baden-Baden, Nomos, 2018) fnn 8–9.
[60] See n 20; S Norberg. 'The European Economic Area' in P Oliver (ed), *Oliver on Free Movement of Goods in the European Union*, 5th edn (Oxford, Hart Publishing, 2010) 493.
[61] See section II.B.ii.

domestic market (see section IV.B.i); second, and more interestingly in the context of this chapter, it was introduced to facilitate external trade (see sections IV.B.ii–v). There is, however, no direct link, by international agreement or otherwise, that formally connects these Swiss forms of *Cassis de Dijon* to the principle of EU law. Nor is there any duty to apply the Court of Justice's jurisprudence in that respect. Therefore, each form of the Swiss '*Cassis de Dijon* principle' is to be interpreted autonomously in its respective context. It thus rather becomes '*Cassis de Berne*'.[62]

### *i. Federalism and the Notion of* Cassis de Dijon

Switzerland is a federal state. Federalism is, next to direct democracy and neutrality, seen as one of the pillars of the Swiss Constitution.[63] The position of the cantons is very strong and, to cut a long story short, they normally hold those legislative rights that have not been expressly handed to the Confederation, that is, the national level.[64] Hence, many laws regulating the market, for example on lawyers' access to the bar, or conditions for submitting offers for local construction projects or even rules regarding the efficiency of boilers, were (and to some extent still are) cantonal. This led to a closed domestic market and high prices for goods and services. Much of this would have been remedied by the legislative programme, 'Eurolex', which would have opened up the national market when Switzerland prepared for joining the EEA in 1992. *Cassis de Dijon* would have had the same meaning in Switzerland as in the EU, as is the case in the other EFTA States, Iceland, Liechtenstein and Norway.

However, when EEA accession was rejected in a referendum by the Swiss electorate, the Government in 1993 proposed transposing most of its 'Eurolex' Bill into its subsequent 'Swisslex' Bill. One of the laws contained in that package was the so-called Internal Market Act (IMA).[65] The central provision of that IMA reads as follows:

> Any person has the right to offer goods, services and work throughout the territory of Switzerland, provided that the exercise of the relevant gainful activity is permitted in the canton or commune in which [s]he is established or domiciled.[66]

In its explanatory message, the Swiss Government expressly referred to 'the *Cassis de Dijon* principle' to explain its intention behind the IMA.[67]

[62] T Cottier and D Herren, 'Das Äquivalenzprinzip im schweizerischen Aussenwirtschaftsrecht: von Cassis de Dijon zu Cassis de Berne' in *Schweizerisches Jahrbuch für Europarecht/Annuaire Suisse de droit européen 2016/2017* (Bern, Stämpfli, 2009) 249.

[63] See, eg, O Nicole-Berva, *Swiss direct democracy: a brief history and current debates* (2016) available at www.demokratiezentrum.org/fileadmin/media/pdf/Direkte%20Demokratie/Swiss_direct_democracy_OpheliaNicoleBerva.pdf.

[64] Art 3 Swiss Constitution.

[65] See n 412.

[66] Art 2(1) IMA (author's own translation).

[67] BBl_1995 I_1213, 1263 (German), FF 1995 I 1193, 1243 (French).

So, as if it were a magic wand to solve all problems, the term '*Cassis de Dijon* principle' entered the arena. Given that there is no formal link with *Cassis de Dijon* (for example, there was no agreement introducing the *Cassis de Dijon* principle as it is understood in the EU into Swiss law), that term, in the Swiss domestic context, started to have a life of its own. It is not fully identical with that in the EU.

On the one hand, there are clearly common features. For example, Swiss law follows EU law in its central point; the central provision of the IMA quoted above, ie free movement of goods services and labour, if lawful under the cantonal or local legislation of origin, was directly inspired by the EU principle and is therefore often seen as the central *Cassis de Dijon* principle ('*Cassis de Dijon*-Grundsatz *per se*').[68] The recognition of professional qualifications (diploma) as in Article 4 IMA is seen as derived from EU law as well.[69] Further, Swiss law recognises mandatory requirements. The original version of the law mentioned, for example, the protection of public health, the fairness of commercial transactions, the protection of the environment, consumer protection, social and energy policy, safeguarding a sufficient level of education with regard to professional qualifications subject to licensing.[70] It thus copied some elements from the Court of Justice's decision in *Cassis de Dijon*[71] and added some more that were not exhaustive. These mandatory requirements were subject to a proportionality test. The law also stated in which cases such mandatory requirements were seen as proportional. This was, however, not enough to break up protectionist practices at sub-federal level. Therefore, in 2006, these provisions were amended. According to the amended law, there are no longer any explicit mandatory requirements. Rather, the aforementioned list was replaced by a provision that foresaw under what conditions mandatory requirements were *not* to be seen as being proportional.[72] An example would be that a mandatory requirement would a priori not withstand the proportionality test if the protection of public interests could be achieved by provisions of the place of origin.[73]

On the other hand, there are differences between the Swiss approach and that of the EU: for instance, the IMA covers only restrictions to free movement originating from public authorities; in the EU, as the decision in *Bosman*[74] shows, EU law applies to a wider range of regulatory activities. However, *Cassis* in its Swiss domestic version applies in a broader manner and covers all four freedoms.[75]

[68] D Herren, 'Das Cassis de Dijon-Prinzip im schweizerischen Recht' in T Cottier (ed), *Die Europakompatibilität des schweizerischen Wirtschaftsrechts: Konvergenz und Divergenz* (Basel, Helbing Lichtenhahn, 2012) 59, 66.

[69] See D Herren, 'Das Cassis de Dijon-Prinzip' (Berne, Stämpfli 2014) 227; C Janssens, The Principle of Mutual Recognition in EU Law (Oxford, Oxford University Press, 2013) 15.

[70] Article 3(2) IMA of 1994.

[71] *Cassis de Dijon* (n 1) para 8.

[72] Art 3(2) IMA.

[73] Art 3(2)(a) IMA.

[74] Case C-415/93 *Bosman*, ECLI:EU:C:1995:463.

[75] T Cottier and B Merkt, 'La fonction fédérative de la liberté du commerce et de l'industrie et la loi sur le marché intérieur suisse: l'influence du droit européen et du droit intérnational économique' in

Furthermore, the notion of *Cassis de Dijon* in the Swiss domestic context provides for a statutory a priori equivalence of the different cantonal regulations.[76]

### *ii. Unilateral rather than Mutual Recognition?*

The blurring did not end there. As will be shown, Switzerland unilaterally introduced 'the *Cassis de Dijon* principle' into its legislation regulating international trade.[77] Because Switzerland did not join the EEA in 1992, the 1972 FTA with the EU remained the basis for bilateral trade in industrial products. As mentioned before, the Swiss Federal Court refused to adopt the case law of the Court of Justice on the free movement of goods on that basis. This was notably the case[78] with regard to the decisions in *Dassonville*,[79] *Cassis de Dijon*[80] and *Keck*.[81]

Switzerland does not therefore benefit from the *Cassis de Dijon* principle of mutual recognition, as is the case in the EEA, and numerous technical barriers to trade remained in place that contribute, for instance, to very high prices in Switzerland. It proved, however, not possible to overcome this unsatisfactory situation by negotiating a bilateral agreement with the EU introducing the *Cassis de Dijon* principles, or at least mutual recognition. This was due, on the one hand, to the difficulties in domestic politics as far as the relations between Switzerland and the EU are concerned. On the other hand, there was no interest on the EU's part to enter into further sectoral agreements, especially such that would benefit only Switzerland. Therefore, the Swiss legislator decided to introduce the *Cassis-de-Dijon* principle of mutual recognition autonomously and apply it unilaterally to products from the EEA.[82] This was done by amending the Federal TBT Act.[83] The respective amendments entered into force on 1 July 2010. The introduction of the *Cassis de Dijon* principle was expected to lead to lower prices for consumers, facilitating trade with the EEA States and thus saving well over CHF 2 billion annually.[84]

This newly introduced concept of *Cassis de Dijon* in the Swiss external trade context is not fully identical with that used in the Swiss domestic context.[85]

P Zen Ruffinen and A Auer (eds), *De la constitution. Etudes en l'honneur de Jean-François Aubert* (Basel, Helbing, 1996) 467.

[76] Art 2(5) IMA.

[77] M Oesch, 'Die Europäisierung des schweizerischen Rechts' in T Cottier (ed), *Die Europakompatibilität des schweizerischen Wirtschaftsrechts: Konvergenz und Divergenz* (Basel, Helbing Lichtenhahn, 2012) 13, 36.

[78] Swiss Federal Court (n 24) consideration 6.

[79] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82.

[80] See n 1.

[81] Cases C-267/91 and C-268/91 *Keck and Mithouard*, ECLI:EU:C:1993:905.

[82] See generally Oesch, *Switzerland and the European Union* (n 30) 149–51.

[83] See n 41.

[84] C Perritaz and N Wallart, 'Les conséquences économiques de la révision de la loi sur les entraves techniques au commerce' in *Die Volkswirtschaft/La Vie économique 10–2008*, 23.

[85] Oesch, 'Die Europäisierung des schweizerischen Rechts' (n 77) 36.

It suffices to mention the example of the mandatory requirements, equally foreseen in the external trade context.[86] In contrast to the amended version of the IMA, these are, however, explicitly stated in the TBT Act. Public interests that may constitute mandatory requirements may be the protection of public order and security, the protection of public health, the protection of the environment, security at work, consumer protection and fairness of commercial transactions, protection of the cultural heritage and the protection of property. These elements are, unlike those in the original version of the IMA, exhaustive.[87] A test of proportionality is to be applied here as well.[88]

And, again, the term '*Cassis de Dijon*' was not to be understood as identical with EU law. The recognition of the principle of mutual recognition in the Swiss measure differs in two ways from the *Cassis de Dijon* principle of mutual recognition that applies in the EEA:

- On the one hand, the Swiss version covers both products that are lawfully marketed based on Union product regulations and products that – in the case of incomplete or missing harmonisation in the EU – correspond to the technical regulations of an EEA Member State. Since the revision of the TBT Act, the *Cassis de Dijon* principle therefore applies to all products that are legally sold in the EEA.
- On the other hand, the autonomous introduction of that principle means that easier market access is one-sided, that is, in favour of products imported from the EEA. Conversely, Swiss products and their manufacturers in Switzerland do not benefit from easier market access in the EEA; it is a one-way street.[89] Even if such a procedure contradicts the fundamental principle of reciprocity, the legislator consciously accepts this disadvantage, since the mere unilateral application also appears to be economically advantageous for Switzerland.[90]

Prior to the legislative amendment, some academics were of the opinion that there was no need for legislative intervention in order to apply the *Cassis de Dijon* principle to products from the EU. These voices argued that it would be quite possible to interpret Article 13 of the FTA between Switzerland and the EU accordingly, and thereby introduce the *Cassis de Dijon* principle of mutual recognition through jurisprudence, at least for industrial goods.[91] However, as mentioned before, the Swiss Federal Court had hitherto shown little willingness to interpret the FTA

[86] Art 4(4) TBT Act.

[87] Botschaft [explanatory message by the government] zur Teilrevision des Bundesgesetzes über die technischen Handelshemmnisse vom 25. Juni 2008, BBl 2008 7275, 7309.

[88] Art 4(3)(c) TBT Act.

[89] C Tobler, 'Cassis de Dijon für die Schweiz: Pur oder on the Rocks' (2005) *Swiss Review of International and European Law* 567, 568.

[90] Explanatory message (n 87) 7299.

[91] In this vein see Tobler, 'Cassis de Dijon für die Schweiz' (n 89) 569–70; or A Kellerhals and T Baumgartner, 'Das "Cassis-de-Dijon" – Prinzip und die Schweiz' (2006) 102 *Schweizerische Juristenzeitung* 321, 326.

accordingly, and it did not show any signs that it would change its attitude significantly. Furthermore, it would be questionable anyway whether the Swiss Federal Court could manage such a far-reaching interpretation of the FTA, even if it were willing to adapt its jurisprudence. Compared to the integrative, pioneering role played by the Court of Justice in completing the internal market, the Swiss Federal Court's function in interpreting the FTA has been quite a different, and much more self-restrained.[92]

### *iii. Main Features of the New Regulation*

Since the amendment of the TBT Act in 2010, products that have been manufactured and legally placed on the market in accordance with the relevant provisions of EU law in the harmonised area, or of the EEA country of origin in the non-harmonised area, can also be imported and sold in Switzerland without further testing.[93] There is, however, a caveat with respect to product information. There, the principle applies that the product information must be written in at least one of the official Swiss languages.[94] Exceptions are permitted if product information in another language provides sufficient and unequivocal information about the product. This applies, for example, to Spanish or Greek wine, which is already labelled in a foreign language in Switzerland and can thus be sold.[95] Cosmetics, textiles and clothing, food and home furnishings, for example, all benefit from the unilateral introduction of the *Cassis de Dijon* principle of mutual recognition. These are products that do not comply – or do not comply fully – with Swiss technical regulations and whose free circulation between the EEA and Switzerland is not guaranteed by an international agreement either.[96]

There are, however, a few exceptional cases subject to special regulation to which the *Cassis de Dijon* principle does not apply.[97] This is the case with regard to products:

- that are subject to approval or registration. This primarily includes medicinal products based on the Medicinal Products Act,[98] as well as substances that are subject to legislation on chemicals;
- that require a prior import permit or are subject to a general ban on imports. This applies, for example, to products whose import is subject to authorisation

[92] M Oesch, 'Die einseitige Einführung des Cassis-de-Dijon-Prinzips' (2009) 11-12 *Anwalts Revue de l'Avocat* 520; as to the Swiss Federal Court's self-restrained attitude, see BGE/ATF 105 II 49 (n 19) consideration 3.

[93] Art 16a TBT Act.

[94] Arts 4a and 16e TBT Act.

[95] Explanatory message (n 87) 7312.

[96] ibid 7357.

[97] Art 16a(2) TBT Act.

[98] Bundesgesetz über Arzneimittel und Medizinprodukte (Heilmittelgesetz, HMG)/Loi fédérale sur les médicaments et les dispositifs médicaux (Loi sur les produits thérapeutiques, LPTh), 15.12. 2000, SR/RS 812.21.

based on the War Material Act[99] or the Goods Control Act,[100] as well as for products from countries against which Switzerland has issued an embargo based on the Embargo Act;[101]

– whose privileged import would be against overriding public interests. With regard to such products the Federal Council (Government) can issue an express exception.[102] It laid down certain exceptions in the executive ordinance. Such exceptions include alcopops, detergents and eggs from prohibited cage farming, where the respective legislation as to declaration of content is stricter than according to EU legislation.[103]

Products that have no access to the Swiss market for these reasons are listed on a special negative list available on the website of the State Secretariat for Economic Affairs (SECO).[104]

### *iv. Special Regulation for Food*

Food is subject to special regulation. Accordingly, foodstuffs that have been legally placed on the market in the EEA but do not meet the relevant provisions of Swiss food legislation require a special permit for marketing in Switzerland.[105] The Federal Office of Public Health is the licensing authority. Authorisation is granted if the food product:

– meets the product regulations in the EU or – in the event of lacking or incomplete harmonisation of EU law – the regulations of an EEA State and has been lawfully marketed;
– complies with the general level of Swiss health protection; and
– meets the requirements for product information.

[99] Bundesgesetz über das Kriegsmaterial (Kriegsmaterialgesetz, KMG)/Loi fédérale sur le matériel de guerre (LFMG), 13.12.1996, SR/RS 514.51.

[100] Bundesgesetz über die Kontrolle zivil und militärisch verwendbarer Güter, besonderer militärischer Güter sowie strategischer Güter (Güterkontrollgesetz, GKG)/Loi fédérale sur le contrôle des biens utilisables à des fins civiles et militaires, des biens militaires spécifiques et des biens stratégiques (Loi sur le contrôle des biens, LCB), 13.12.1996, SR/RS 946.202.

[101] Bundesgesetz über die Durchsetzung von internationalen Sanktionen (Embargogesetz, EmbG)/Loi fédérale sur l'application de sanctions internationales (Loi sur les embargos, LEmb), 22.3.2002. SR/RS 946.231.

[102] Art 16a(2)(e) TBT Act.

[103] Art 2 TBT Ordinance (Verordnung über das Inverkehrbringen von nach ausländischen technischen Vorschriften hergestellten Produkten und über deren Überwachung auf dem Markt, VIPaV/Ordonnance réglant la mise sur le marché de produits fabriqués selon des prescriptions techniques étrangères et la surveillance du marché de ceux-ci, OPPEtr; SR/RS 946.513.8).

[104] At www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/Technische%20Handelshemmnisse/Negativliste/negativliste.pdf.download.pdf/Liste_N%C3%A9gative_fr_20191120.pdf (French), www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/Technische%20Handelshemmnisse/Negativliste/negativliste.pdf.download.pdf/Negativliste_de_20191120.pdf (German).

[105] Arts 16c and 16d TBT Act.

The permit is issued in the form of a general ruling and also applies to similar food products.[106] If a similar food product complies with the product regulations on which the general ruling is based, it can be sold on the Swiss market without further testing and approval. Swiss producers can also rely on such a ruling if they want to manufacture and distribute food based on the provisions of such a ruling. There are, however, reservations with regard to the Swiss provisions on labour standards and animal protection.[107]

In practical terms, despite these special regulations, the *Cassis de Dijon* principle is equally applied in the area of food. The most important divergence from its application to other products is the need for prior approval for the first import. Nonetheless, this special regulation makes law enforcement easier in the food sector. The control effort is only to be incurred during the approval process prior to the first import. Thereafter, corresponding controls and clarifications are no longer necessary as part of market surveillance. This relieves the burden in particular on the cantons, which are traditionally responsible for enforcing food legislation.[108]

### *v. Some Drawbacks: Discrimination against National Products and Sovereignty Concerns*

The unilateral introduction of the *Cassis de Dijon* principle may result in domestic producers' being disadvantaged compared to their European competitors if a product from the EEA has to comply with less stringent product regulations than under Swiss law for producing the same product in Switzerland. Unsurprisingly, the problem of such national discrimination was discussed throughout the legislative process when the TBT Act was amended.[109]

In order to mitigate discriminatory effects, Swiss producers who produce only for the domestic market may also manufacture and market their products in accordance with technical regulations of the EU or – if there is no harmonisation – an EEA State.[110] Swiss producers can therefore freely choose whether they want to manufacture their products based on the Swiss product regulations, or based on the relevant provisions of EU law or of an EEA State.

Swiss academics take a rather positive view of Switzerland's having unilaterally introduced the *Cassis de Dijon* principle, as the chosen regulation consistently eliminates any form of possible disadvantage for domestic producers compared to competitors from the EEA. In their view it is the most liberal of all possible solutions, failing a respective agreement with the EU, and goes far beyond the approval procedure for hardship cases originally proposed by the Swiss Government. At the same time, there remains a certain level of discomfort. On the one hand, and

[106] Art 16d(2) TBT Act.
[107] Explanatory message (n 87) 7325.
[108] Oesch, 'Die einseitige Einführung des Cassis-de-Dijon-Prinzips' (n 92) 521.
[109] ibid 522.
[110] Art 16b TBT Act.

as a result of the unilateral approach, this system works only for imports, not for Swiss exports into the internal market. On the other hand, Swiss product regulations are quasi optional: the free choice of law in the area of product regulations is difficult to reconcile with a traditional understanding of sovereignty, as it prevails in Switzerland.[111]

In 2013, SECO published a report assessing the consequences of the introduction of the unilateral application of the *Cassis de Dijon* principle.[112] While the general effect is seen as positive, the assessment is more cautious in detail. It concludes that the direct benefits of the unilateral introduction of the *Cassis de Dijon* principle are rather modest. It was, in particular, difficult to assess the benefits in concrete monetary terms. Indirect effects, however, such as greater competitiveness – for example through increased parallel imports – are seen to be more important. Furthermore, less regulatory activity, thus liberating enterprises from bureaucracy, could also be observed. Overall, the unilateral introduction of the *Cassis de Dijon* principle in Switzerland seems to yield some benefits. However, it obviously does not create a situation similar to that in the EEA. And in comparison with the surrounding EU countries, prices for consumers in Switzerland still remain very high.

## V. Conclusion

By its landmark decision in *Cassis de Dijon*, including further jurisprudence in the same context, the Court of Justice, and in its wake the Commission with its respective Communication, set the framework for what EU Member States may – and may not – do with regard to mutual recognition in the non-harmonised area of free movement of goods. This jurisprudence gradually developed into a principle and spread. On the one hand, it is being applied to the other freedoms as well. On the other, through the EEA Agreement, that jurisprudence is also applied in the three EFTA States: Iceland, Liechtenstein and Norway. With respect to their participation in the EU's internal market, *Cassis de Dijon* hence applies in the same way as within the EU. The fourth EFTA State, Switzerland, however, does not fully benefit from the *Cassis de Dijon* principle, as its trade link with the EU is a much weaker one than that of the other EFTA States. With regard to free movement of goods, it still rests on the provisions of the bilateral FTA from 1972. And despite similar wording in both the FTA and the EEC Treaty, respective jurisprudence led to a situation where *Cassis de Dijon* could not be applied to free movement of goods between the EU and Switzerland. Hence, there was no mutual recognition

[111] Oesch, 'Die einseitige Einführung des Cassis-de-Dijon-Prinzips' (n 92) 522; Heinemann, 'Rechtliche Transplantate' (n 40) 23.

[112] *Report of the (Swiss) State Secretariat of Commerce on on the effects of the introduction of the '"Cassis de Dijon"-principle' in Switzerland* (2013) available at www.newsd.admin.ch/newsd/message/attachments/30420.pdf (German).

similar to the EEA. Yet, as we have seen, *Cassis de Dijon* has had a profound effect on the Swiss system: first, as an adapted statutory rule to open the domestic market; then as an autonomous adaptation of Swiss law. This time the purpose was to mitigate negative foreign trade effects failing an agreement with the EU granting mutual recognition outside the scope of the TBT Agreement. The term 'Cassis de Dijon' is used neither in an identical manner as in EU law, nor coherently. In Switzerland, 'the *Cassis de Dijon* principle' sometimes means the '*Cassis de Dijon* principles', according to the Court of Justice jurisprudence of the Court of Justice and as adapted to its use in Swiss law; sometimes it is rather used as a *pars pro toto* for mutual recognition alone.

The motivation for introducing 'the *Cassis de Dijon* principle' was essentially economic: prices for consumers should be lowered and trade with the EEA States facilitated. This was expected to lead to important annual savings for the Swiss economy. There are doubts, however, as to whether these expectations are being met.

Given the unilateral approach, this principle applies only to imports, not to exports, irrespective of whether they correspond to the applicable EU regulations[113] In this respect, harmonisation coordinated with the EU would of course be preferable.[114] Nonetheless, the unilateral introduction of the *Cassis de Dijon* principle also has some advantages. The waiver of harmonisation coordinated with the EU is simple and quick: no negotiations are needed, counterclaims can therefore not be made and Switzerland remains the mistress of the exceptions.[115]

It should also be noted that the introduction of the *Cassis de Dijon* principle has a strong dynamic component.[116] The recognition of foreign technical regulations refers not only to the present but also to the future. The free movement of goods thus becomes an experimental field in which experience with dynamic legal adjustments can be gained.

The unilateral introduction of the *Cassis de Dijon* principle by Switzerland can be seen as a lesson in Swiss integration policy. The Swiss legislator has once again had to make a concession to the fact that being outside of the internal market is associated with considerable disadvantages, mainly given the fact that the EU is Switzerland's major trading partner by far, and the country, geographically, is situated in its midst. At the same time, the EU is visibly less willing to take Swiss

[113] C Baudenbacher, 'Swiss Economic Law Facing the Challenges of International and European Law' (2012) 131 *Zeitschrift für Schweizerisches Recht II* 612: 'To be sure, autonomous implementation does not produce reciprocal rights and therefore no right to access to the EU's internal market for Swiss citizens and economic actors.'

[114] See the Swiss Government's position in *Europe Report 2006* (n 389) 6832: 'The enactment of law that is compatible with European law can alleviate discrimination in relation to the EU countries, but not eliminate it. The gap [between remaining discrimination and mutual recognition] can only be bridged by means of an agreement which would ensure that facilitations for the exchange of goods and services and for the movement of people are mutually granted. This means in particular that wherever possible, adaptation to Community law should not be done autonomously, but contractually.' (Translation by the author as closely as possible to the German original text.)

[115] Heinemann, 'Rechtliche Transplantate' (n 40) 23.

[116] Oesch, 'Die Europäisierung des schweizerischen Rechts' (n 77) 13, 38.

peculiarities into account and to provide tailor-made solutions for Switzerland. This attitude has increased with Brexit and the UK now acting, vis-à-vis the EU, from a similar position as Switzerland. Hence, Switzerland is left with the option either to participate in the internal market within the agreements offered by the EU, or not to participate. In the latter case, there are only autonomous options for Switzerland to minimise – at least to a certain degree – the economically most obvious disadvantages of staying outside. Ultimately, this is the price that Switzerland has to pay for its political independence.[117]

[117] In the same vein, Oesch, 'Die einseitige Einführung des Cassis-de-Dijon-Prinzips' (n 92) 522.