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Legal Europeanization as Legal Transformation:
Some Insights from Swiss “Outer Europe”

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EUROPEAN UNIVERSITY INSTITUTE
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Abstract

The “Europeanization” of non-EU countries’ laws is predominantly seen as an “export” of the EU *acquis*, especially in the case of so-called “quasi-member” states such as Switzerland. Based on an examination of the Swiss experience, this paper highlights the flaws of this conceptualization: the Europeanization of Swiss Law is a highly differentiated phenomenon, encompassing several forms of approximation to EU Law. All of these forms fall short of an “export” of norms, and result in the creation of something new: a “Europeanized law” that is similar to, but qualitatively different from, EU Law. Another drawback of the “export” metaphor is the emphasis it places on the isomorphism of positive legislation. Europeanization goes deeper than that. As shown in this paper, it is a process of transformation involving not only positive law, but also legal thinking. The Swiss case demonstrates how significant such deeper transformations can be: the Europeanization of positive law has induced an alteration of the traditional canon of legal interpretation. It also demonstrates how problematic such transformations can be: the above-mentioned alteration has not given rise to a new and universally accepted canon of interpretation. This reflects the tension between the need for clear “rules of reference” for EU legal materials – which are required in order to restore coherence and predictability to an extensively Europeanized legal system – and the reluctance to give a legal value to foreign legal materials – which is rooted in a traditional understanding of the concept of “law”. Such tension, in turn, shows what deep and difficult transformations are required in order to establish a viable model of legal integration outside supranational structures.

Keywords

Europeanization, Switzerland, autonomer Nachvollzug, adaptation autonome, *acquis communautaire*, European Law, differentiated integration, harmonisation, globalization, international relations

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1. Introduction

Across disciplines, and even within the same discipline, the word “Europeanization” is used to designate different phenomena.¹ In this paper, I will use it to designate only one of these phenomena: the impact of EU Law on domestic legal orders (hence, *legal* Europeanization). This kind of Europeanization, as is well known, not only concerns the legal orders of the EU member states, but also those of third countries. In the case of Switzerland, legal Europeanization is indeed so pronounced that the country has been styled a “quasi” or “near” member state alongside the non-EU members of the EEA.²

It must be added that within the class of “quasi member” states Switzerland is definitely a special case. In fact, the Europeanization of Swiss Law has not taken place within a global “legal infrastructure” such as the EEA Agreement. Rather, it has developed in a reactive, incremental, *ad hoc* fashion, and it has taken a great many legal forms.³

¹ For political scientists, the word “Europeanization” may designate the effects of European integration on domestic policies, politics, and politics – both in EU member states and in third states: see GOETZ/MEYER-SÄHLING, *The Europeanisation of national political systems: parliaments and executives*, forthcoming. In legal literature it is sometimes used as a synonym for “communitarization”, i.e. for the extension of EC competences to include a particular subject-matter (see e.g. GUILD, *The Europeanisation of Europe’s Asylum Policy*, *International Journal of Refugee Law* 2006, 630-651). It also refers to the “influence” of European Law on the domestic laws of member and third countries, and on international regimes (see HARDING, *The Identity of European Law: Mapping out the European Legal Space*, *European Law Journal* 2000, 128-147). On the various meanings of the word for lawyers see ZILLER, *L’européisation du droit: de l’élargissement des champs du droit de l’Union européenne à une transformation des droits des Etats membres*, *EUI WP, LAW n. 2006/19*.

² See SCHIMMELFENNING, *Europeanization beyond Europe*, *Living Rev. Euro. Gov.*, Vol. 2 (2007), n.1; KUX/SVERDRUP, *Fuzzy Borders and Adaptive Outsiders: Norway, Switzerland and the EU*, *Journal of European Integration* 2000, 237-270.

³ See BOVET, *Réception du droit public économique étranger en Suisse*, *Revue de droit suisse* 2000, II, 281-312. See also SCHWEIZER, *Wie das europäische Recht die Schweizerische Rechtsordnung fundamental beeinflusst und wie die Schweiz darauf keine systematische Antwort findet*, in EPINEY/RIVIERE (eds), *Auslegung und Anwendung von “Integrationsverträgen”*, Zürich 2006, 23-57.

In other words, and contrary to preconceptions about Swiss tidiness, Switzerland runs an advanced but rather chaotic “Europeanization lab”, where a myriad experiments take place in parallel.

Precisely for this reason, the Swiss case has much to offer to anyone interested in understanding and conceptualizing Europeanization. Legal Europeanization is often associated with the idea of a “legal export” (or transplant, transfer, cut and paste *etc.*) of EU norms into national laws.⁴ The Swiss case apparently confirms this characterization – after all, we are told, “in the case of quasi-members [...] it is obvious that the transfer of the *acquis communautaire* is at the core of Europeanization”.⁵ And yet, on closer inspection, none of the expressions above accurately describes the impact of EU Law on the Swiss legal order. Even if we equate Europeanization with some sort of “norm-transfer”,⁶ it is still the case that it is an extremely diversified phenomenon, encompassing varying degrees of approximation, and always resulting in the creation of something new – more or less similar to, but still different from, EU Law. All in all, the Swiss experience suggests that Europeanization is essentially a process of transformation, involving in its most spectacular forms a “thorough or dramatic change” of domestic legal orders.⁷

This transformation occurs, first and foremost, at the level of positive law. In Section 2, I will describe the transformation of Swiss Law under European influence, and I will highlight its forms, its logics, and its overall features. Space precludes an exhaustive overview of the multiple and evolving ways of legal Europeanization in Switzerland. Only its main expressions will therefore be considered.

Legal Europeanization is also a transformation of legal thinking – namely, of legal culture and of legal reasoning. In Section 3, I will examine it from this angle. This deeper change is a largely unintended, but practically unavoidable consequence of the approximation of Swiss Law to EU Law. It is also an unfinished and problematic business involving, as I will point out in my concluding remarks, fundamental questions related to the coherence and predictability of the law, the rule of law, the separation of powers, and *in fine* the very concept of law.

⁴ See e.g. PETROV, Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries, *European Foreign Affairs Review* 2008, 33-52; TEUBNER, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, *Modern Law Review* 1998, 11-32; SCHMMELFENNING, *op. cit.*, at 4; GAL, The ‘Cut and Paste’ of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant, *European Journal of Law Reform* 2007, 467-484.

⁵ SCHMMELFENNING, *op. cit.*, at 4.

⁶ And this is in itself debatable, given that EU Law sometimes has an “impact” on domestic law in the absence of any “approximation”. For instance, the prospect of Swiss-EU free movement of persons has led to a profound modification of Swiss labour law that did not, however, imply the “transposition” of EU models: see VEUVE, Mesures d’accompagnement de l’Accord sur la libre circulation des personnes, in FELDER/KADDOUS (eds), *Accords bilatéraux Suisse-UE (Commentaires)*, Geneva, Basel, Munich, Bruxelles, 2001, 289-310.

⁷ Concise Oxford English Dictionary, 8th ed, 1991, for the verb “to transform”.

2. The Transformation of Swiss Law

2.1. *Setting the (political) scene*

While a limited approximation of Swiss Law to EEC Law could already be observed in the late 1980s, the “big bang” event that would set off legal Europeanization on a large scale took place in 1992, and more precisely on December the 6th. In the preceding months, the Swiss government (Federal Council) had abandoned its traditional stance on European affairs – no accession, free-trade, “pragmatic” cooperation in non-economic matters⁸ – by simultaneously signing the EEA Agreement and filing an application for EU accession. This spectacular U-turn was motivated by various factors: the end of the cold war had reduced the “neutrality” obstacle to accession; the EU was on the verge of dramatically expanding its membership and the scope of its activities; the EEA negotiations had made it clear that EFTA countries wishing to cooperate with the EU would henceforth be required to accept the *acquis*.⁹ In short, the traditional danger of “discrimination” in the internal market was now compounded by a risk of “isolation” that could only be dispelled by accession, or “satellization”.¹⁰ These weighty reasons were not enough, however, to convince the Swiss people. In a dramatic referendum, on December 6, the EEA Agreement was rejected, and the prospects of EU membership suddenly became very distant.¹¹

On the morning of December 7, the Federal Council knew that it would have to walk the high wire. Exclusion from the EEA promised to have dire consequences for the Swiss economy. Moreover, cooperation with the EU would in time become vital in non-economic matters such as migration and security. At the same time, popular hostility to any (perceptible) loss of sovereignty had become all too evident. With the *Programme following the rejection of the EEA Agreement*,¹² adopted in February 1993, the Federal Council proposed its own “third way” to integration: on the one hand Switzerland would try to conclude sector-specific agreements with the EU; on the other hand it would seek to align its domestic legislation to the EU *acquis*. Apparently, this was a return to a reassuring past: both elements of this strategy had already featured in the 1988 *Report on integration*,¹³ and had raised no controversy at the time. But continuity was little more than that: a deceptive appearance. The 1993 Programme was the springboard for far-reaching change.

⁸ See Federal Council, Rapport sur la position de la Suisse dans le processus d'intégration européenne, Feuille fédérale Suisse (FF) 1988 III 233.

⁹ See Federal Council, Rapport sur la question d'une adhésion de la Suisse à la Communauté européenne, FF 1992 III 1125; See also Federal Council, Message relatif à l'approbation de l'accord sur l'Espace économique européen, FF 1992 310.

¹⁰ See Federal Council, Rapport sur la question d'une adhésion de la Suisse à la Communauté européenne, op. cit., at 1144.

¹¹ On the EEA vote and on its political consequences, see SCHWOK, Suisse-Union européenne – L'adhésion impossible?, Lausanne, 2006.

¹² Federal Council, Message sur le programme consécutif au rejet de l'Accord EEE, FF 1993 I 757.

¹³ Op. cit., at 329 ff.

2.2. *The unilateral Europeanization of Swiss Law*

Since 1988, as said, the government had unilaterally pursued regulatory alignment to EU standards. To this end, it had started the practice of examining the “euro-compatibility” of its own legislative proposals. But this approach was followed only in order to avoid involuntary and unnecessary divergences of legislations having cross-border repercussions – namely, of technical legislation. And *de facto*, so-called “autonomous adaptation” of Swiss Law to EU Law (*autonomer Nachvollzug*) had been a relatively rare occurrence until 1992.¹⁴

The 1993 Programme, by contrast, proposed “euro-compatibility” as a general guideline for socio-economic legislation, and the guideline was consistently implemented in later years. The process of systematic alignment started with the *Swisslex* programme of legislative reform – a suitably renamed and reformatted version of the legislative package prepared in view of the EEA accession (*Eurolex*). Thereafter, it continued with such vigour that in 1999 the Federal Council observed:¹⁵

Dans la pratique, le Parlement et le Conseil fédéral n'adoptent qu'exceptionnellement des actes juridiques qui ne sont pas [euro-]compatibles.

This was not merely a quantitative change. The rationales behind the quest for “euro-compatibility” had also changed. In the 1988 philosophy, the goals of autonomous adaptation were essentially: (a) to minimize obstacles to trade, and (b) to ease future negotiations with the EU. These rationales were maintained, strengthened, and expanded. Henceforth, *autonomer Nachvollzug* would also serve the purpose of reducing distortions of competition, including when such distortions would have actually played to the advantage of Swiss industry.¹⁶ This accounts for the marked expansion of Europeanization observed in the 1990s – from technical legislation to economic law at large.¹⁷

Unilateral Europeanization, moreover, could no longer be identified with autonomous adaptation in the strict sense – that is, a legislative policy *aiming specifically* at euro-compatibility. EU law also became a major source of inspiration in a logic of lesson-drawing. Conceptually, of course, this was nothing new.¹⁸ However, the influence of EU law became particularly strong during the 1990s. For example, in 1996 the Swiss Parliament adopted the Federal Law on the Swiss Internal Market.¹⁹ This Law “transposed” the four fundamental freedoms (as interpreted in *Cassis de Dijon*) into Swiss law with the aim of reducing the fragmentation of the Swiss market along cantonal lines. A classic EC solution for a purely Swiss problem.

¹⁴ BAUDENBACHER, Zum Nachvollzug europäischen Rechts in der Schweiz, *Europarecht* 1992, 309-320.

¹⁵ Federal Council, Suisse-Union européenne: Rapport sur l'intégration 1999, FF 1999 3600, at p. 3634: “In practice, the Parliament and the Government only exceptionally adopt measures that are not [euro-]compatible” (author’s translation).

¹⁶ See Federal Council, Message sur le programme consécutif au rejet de l'Accord EEE, op. cit., at p. 762.

¹⁷ See MALLEPELL, Der Einfluss des Gemeinschaftsrechts auf die schweizerische Gesetzgebung 1993-1995, *Swiss Papers on European Integration* n. 21, 1999.

¹⁸ For instance, German Law was a major source of inspiration for the drafters of the Swiss civil code.

¹⁹ Classified Compilation of Federal Law, 943.02.

The Europeanization of legislative *process* must also be mentioned here. What had started as a voluntary practice for selected areas – the practice of including in legislative proposals an analysis of their “euro-compatibility” – has become a general obligation by virtue of Article 141 of the Law on the Federal Parliament.²⁰ Before proposing and passing new legislation, the Federal Government and the Federal Parliament are now required to assess on a routine basis its “euro-compatibility”, even in non-economic areas such as immigration law.²¹

2.3. *The contractual Europeanization of Swiss law*

Since 1993, in parallel with the unilateral *rapprochement* described above, the EU and Switzerland have been involved in a continuous cycle of exploratory talks, (difficult) negotiations, and ratification of the results thereof. The first round of negotiations started at the initiative of the Swiss government, anxious to offset the negative consequences of the country’s self-exclusion from the EEA. Its themes were therefore essentially, though not exclusively, economic.²² The second round of negotiations was opened instead at the request of the EU, which was eager to see its own Directive on the taxation of savings income applied by selected third states, including Switzerland. Switzerland accepted, but requested parallel negotiations on some “left-overs” from the first round, as well as on association to the implementation of the Schengen and Dublin *acquis* – a step that, it may be noted in passing, marked an expansion of Swiss-EU relationships from the essentially economic to the broadly political. In both rounds, negotiations were characterized by issue-linkages and multi-level games. One of the main threads of this complex texture, and the one that interests us here, was the confrontation between the competing values of “uniformity” and “autonomy”.

The EU maintained from the outset that advanced cooperation and integration would only be on offer if based on the application of the *acquis*. As the Commission pointed out in 1993,²³

Any agreement would need to deal satisfactorily with the implementation of the Community *acquis* and the need for Switzerland to accept the discipline involved.

This requirement responded to different rationales. In part, requiring Switzerland to implement the *acquis* was linked to the object and goals of each prospective agreement. In some matters, regulatory convergence was *the goal* of the negotiation for the EU.²⁴ In others, the EU saw it as a necessary precondition for the form of cooperation that was envisaged.²⁵ At the same time, the Union’s insistence on the acceptance of the *acquis* also had much to do with broader political concerns, and more precisely with the

²⁰ Classified Compilation of Federal Law, 171.10.

²¹ See e.g. Federal Council, Message concernant la loi sur les étrangers, FF 2002 3469, para. 5.

²² The negotiations also covered “non-market” items such as the free movement of persons not pursuing an economic activity, as well as scientific and technological cooperation.

²³ European Commission, Communication on Future relations with Switzerland, COM (93) 486, para. 13.

²⁴ E.g. regarding the taxation of savings income, as already noted.

²⁵ E.g. as a way to ensure a level playing field while including some Swiss industries in the internal market, or as a way to ensure homogeneous controls at the external borders before admitting Switzerland to the Schengen “club”.

question of fitting the “Swiss piece” into the wider jigsaw of the Union’s external relations.²⁶

The Swiss government, for its part, was not fundamentally opposed to cooperating on the basis of the *acquis*. Anticipating strong domestic resistance, however, it objected to the application of some aspects of the *acquis* – e.g. the free movement of persons “en bloc”, EC weight limits for lorries, and any European rule, present or future, that might threaten banking secrecy. Moreover, and again in view of domestic hostility to losses of sovereignty, it strove to negotiate less-than-full obligations to transpose the *acquis*. In this regard, the “static” character of the prospective agreements was a non-negotiable red line: any obligation to apply the *acquis* would only refer to the “pre-signature” *acquis*, while Switzerland would retain (at least formal) control of the acceptance or refusal of the “post-signature” *acquis*.²⁷

The negotiations eventually produced sixteen “sectoral” agreements – a first package of seven, signed in 1999 and in force since 2002,²⁸ and a second package of nine, signed in 2004 and almost entirely in force as I write.²⁹ Unsurprisingly, the agreements reflect the parties’ competing agendas on the issue of regulatory convergence. Where the EU sought an approximation based on the *acquis*, namely in the sectors of the free movement of persons, air and land transport, taxation, security (Schengen), and asylum (Dublin), it obtained it. Nonetheless, Swiss negotiators were able to secure some limited but important “victories”: transitional periods,³⁰ some permanent exemptions,³¹ and in some cases softer versions of the obligation to apply the relevant *acquis*.

As a consequence, the agreements that require Switzerland to implement the *acquis* have only one characteristic more or less in common: they are all “static”,³² with the partial exception of the Schengen/Dublin agreements.³³ In contrast, each defines in its

²⁶ In particular, the EU was conscious that granting Switzerland full access to the internal market or EC-programmes *à la carte*, or without requiring the full implementation of the *acquis*, might undermine EEA solidarity (European Commission, *op. cit.*, para. 10). Likewise, in areas where parallel bilateral negotiations were ongoing or had been concluded with other third countries (e.g. on the taxation of savings or Schengen/Dublin), it was reluctant to grant privileged treatment to Switzerland.

²⁷ On the distinction between pre-signature and post-signature *acquis*, see PETROV, *op. cit.*

²⁸ Agreements on the Free Movement of Persons, Air Transport, Land Transport, Trade in Agricultural Products, Mutual Recognition in Relation to Conformity Assessment, Government Procurement, and Scientific and Technological Cooperation (OJ 2002 L 114).

²⁹ Agreements on Taxation of Savings Income (OJ 2004 L 385/28), Trade in Processed Agricultural Products (OJ 2005 L 23/17), Cooperation in the Field of Statistics (OJ 2006 L 90/1), Participation in the MEDIA Programmes (OJ 2006 L 90/22), Participation in the European Environment Agency and EIONET (OJ 2006 L 90/36), Association to the implementation and development of the Dublin and Schengen *acquis* (OJ 2008 L 53), Fight against Fraud (ratification pending, not yet published in the OJ), Taxation of Retired Officials from the EU Institutions (not published in the OJ).

³⁰ Especially in the implementation of the Agreement on the free movement of persons, and of the Land transport agreement.

³¹ E.g. a permanent exemption from applying future Schengen *acquis* threatening banking secrecy: see SCHWOK, *Un rapprochement ... qui éloigne la Suisse d’une adhésion*, *Revue du Marché commun et de l’Union européenne* 2004, 645-650.

³² I.e. they incorporate the pre-signature *acquis*, and require the consent of both parties for each “updating”.

³³ According to these agreements, Switzerland is at liberty to accept or to refuse the post-signature *acquis*. However, failure to accept the new *acquis* entails in principle the termination of the agreements.

own terms the exact manner and form of *acquis* implementation, as shown by the following examples.

The Agreement on Air Transport (AAT) is in a way the most linear and perfected instrument of legal Europeanization. Its “General provisions” reproduce word by word the provisions of the EC Treaty relating to non-discrimination, freedom of establishment, and competition. Its annex enumerates all the regulations and directives that Switzerland is required to implement – basically, all the air transport *acquis*. This operation of incorporation (textual and by reference) is perfected through Article 1(2), which reads:

Insofar as they are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice and the Commission of the European Communities given prior to the date of signature of this Agreement [...].

The Agreement on the Free Movement of Persons (AFMP) replicates the same scheme of textual incorporation of, and references to, EC secondary legislation. However, the Parties are not required to literally apply the EC legislation referred to, but rather to ensure the application of “equivalent rights and obligations” (Art. 16(1) AFMP). Moreover, the pre-signature case law of the Court of Justice must be “taken into account” (Art. 16(2) AFMP), rather than followed. Somewhat confusingly, a joint declaration enjoins the Parties to “apply the *acquis communautaire* [...] in accordance with the Agreement”.

Further down the line of Europeanization we find the Land Transport Agreement (LTA), which again contains both references to EC legislation (together with an obligation to apply them by equivalence, Art. 52(6)) and provisions replicating EC Law “originals”. However, no reference is made to the case law of the ECJ.

The Agreements associating to Schengen and Dublin (respectively AAS and AAD), my last example, are conceived differently. Both Agreements stipulate clearly that Switzerland is required to “accept and apply” the relevant EC and EU *acquis*, and that the interpretation of the *acquis* should be “as homogeneous as possible”. However, they do not lay down an obligation for the Swiss authorities to take into account the case law of the Court. Rather, they rely on exchange of information and reporting, and provide for termination in case of “substantial divergences” in the application of the *acquis* unless the Parties can find a political solution.

2.4. *The Europeanization of Swiss Law: a powerful source of transformation, an imperfect phenomenon of “norm reception”*

At this juncture, it seems appropriate to recapitulate and set out more fully some key features of the Europeanization of Swiss Law as I have described it above.

In the Swiss experience, legal Europeanization is first and foremost an *expansive* process. As already noted, over the last twenty years EU Law has incrementally established its influence in ever broader areas of Swiss Law: from technical norms, to competition law, to labour and consumer law, to transport law, and out into areas traditionally considered to be at the core of national sovereignty, migration law and

perhaps, in the future, criminal law.³⁴ To-date, it does not seem exaggerated to qualify the Europeanization of Swiss Law as “massive”, although it is the result of incremental touches rather than of a grand design.

At the same time, as we have also seen, it is a *plural, polymorphic* phenomenon. It results from both international agreements and domestic legislation. Within these two “modes” of Europeanization there are, moreover, further differentiations. As noted, the rules of “incorporation” of the *acquis* provided for in the Swiss-EU agreements, and the logics thereof, display considerable diversity. This is the result of a compromise between the “uniformity” required by the EU and the “autonomy” defended by the Swiss authorities. Unilateral Europeanization displays a similar level of diversity. First, there are different logics behind the reception of rules and principles of European origin. In my simplified account, I have mentioned two: the aim to approximate Swiss Law to EU Law, and the imitation of (or inspiration to) EU regulatory models.³⁵ Second, reception of EU Law is made through very different legislative techniques – express references to EU Law, literal reproduction, reformulations of European principles and rules.

All these forms of Europeanization are, as a rule, *partial* or *selective*. Save a few exceptions, the Swiss-EU agreements that require the implementation of the relevant *acquis* leave some elements of this *acquis* outside their scope.³⁶ The free decision to align Swiss Law to EU Law is *a fortiori* selective. As emphatically stated in the *Europe 2006 Report* of the Federal Council,³⁷

L'adaptation autonome est uniquement poursuivie là où des intérêts économiques (capacité concurrentielle) le demandent ou le justifient [...]. Dans certains domaines, comme la politique fiscale, agricole ou étrangère, ou encore le marché intérieur, la législation suisse se démarque du droit européen et la Suisse conserve son autonomie, en appliquant par exemple des taux de TVA moins élevés.

In practice, when legislating on a given subject, the Swiss authorities may freely choose to “transpose” existing EU legislation *en bloc*, or with some limited exceptions, or only on selected points.

³⁴ I have mentioned above the fields in which the Swiss-EU agreements bring about some form of approximation. For a non-exhaustive enumeration of the fields in which Swiss Law has been unilaterally approximated to EU Law, see Federal Council, *Rapport Europe 2006*, FF 2006 6461, at 6477.

³⁵ Recent legislation reflects an additional rationale. Article 42(2) of the Federal Law on Foreigners (Classified Compilation of Federal Law, 142.20) aims at applying to family members of Swiss citizens the (originally EC) rules of admission that are applicable, under the AFMP, to the family members of EU citizens. This “second degree” Europeanization has been brought about in order to avoid reverse discriminations.

³⁶ See e.g. AFMP, Annex I, Art.24(4) *in fine*: “This Agreement does not regulate access to vocational training or maintenance assistance given to the students covered by this Article”.

³⁷ *Op. cit.*, at 6477: “Autonomous adaptation is only pursued when this is justified or required by Swiss economic interests (competitiveness) [...]. In some areas, such as fiscal, agricultural or foreign policy, or in the internal market, Swiss legislation deviates from EU Law and Switzerland retains its autonomy by applying, for instance, lower VAT rates” (author’s translation).

The discrepancies between EU Law and “Europeanized” Swiss Law tend, moreover, to grow over time. Hence, so-called “bilateral Law” (*bilaterales Recht*)³⁸ is often not updated to the latest developments of the relevant *acquis*.³⁹ Thus, for instance, the AFMP was not modified after the adoption of Directive 2004/38.⁴⁰ As a result, the free movement *acquis* applicable between Switzerland and the EU is something of a “living fossil”, coexisting with the present-time *acquis* applicable within the EU. The same can be said of unilaterally “Europeanized” domestic law: it is often the case that even legislation intended to bring about euro-compatibility is not updated to the latest developments of EU Law.

To sum up, the Europeanization of Swiss Law is an expansive, massive phenomenon. Swiss Law has been deeply, extensively transformed, and overall it has been approximated to EU Law to an extent that is surprising for a non-EU country. At the same time, if considered in a “transfer” or “export” perspective, the Europeanization of Swiss Law is a fragmentary, polymorphic and selective process, rarely – if ever – coming close to a faithful “transposition” of EU Law into Swiss Law.

3. The Transformation of Swiss Legal Thinking

3.1. *Legal integration without supranationalism, or the illusion of business as usual*

I hope I may be excused for having reserved another key feature of legal Europeanization in Switzerland – “classicism” – as a convenient opening for this section of the paper.

As everyone knows, the “ever closer union” among the societies and economies belonging to the EU is pursued through an innovative legal and institutional infrastructure: a “new legal order for the benefit of which the member states have limited their sovereign rights”,⁴¹ which is developed and overseen by supranational institutions, and whose uniform interpretation is ensured by a supranational Court. To some extent, integration within the EEA displays similar features.⁴²

By contrast, none of these features are present in the Swiss case. Switzerland pursues the goal of integration through “classical” legal means: ordinary international

³⁸ This expression is used, for instance, in TOBLER, Die Fidium-Finanz-Entscheidung des EuGH: ein Vorbote der Luxemburger Rechtsprechung zum bilateralen Recht, *Revue Suisse de droit international et européen* 2006, 307-311.

³⁹ The exceptions here are the AAD, AAS, and ATA.

⁴⁰ Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77).

⁴¹ ECJ, Opinion 1/91, EEA 1, [1991] ECR, I-6079, para. 21.

⁴² See in particular the contention that the EEA is “an international treaty *sui generis* which contains a distinct legal order of its own” (EFTA Court, case E-7/97, Sveinbjörnsdóttir, EFTA Court Report 1998, 95, para. 39).

agreements,⁴³ and equally ordinary domestic enactments. As Roland BIEBER humorously observed in 1996,⁴⁴

Die Schweiz setzt bisher [...] auf die *traditionellen* Gestaltungsmittel des Staates, vergleichbar einem altmodischen Professor, der seine Texte noch immer auf einer mechanischen Maschine schreibt und meint, der Aufwand eines Textcomputers sei viel zu groß (und zu teuer), er könne das gleiche Ergebnis mit den gewohnten Mitteln erreichen.

Pushing the “computer” metaphor a bit further, and drawing from Joseph WEILER this time,⁴⁵ one might think that although a great number of EU-Law “applications” have been downloaded into the Swiss legal order, this has not affected the legal order’s “operating system” – meta-rules such as the classification and hierarchy of sources, and the methods of legal interpretation.

After all, the argument would go, commentators, practitioners, and judges are faced with the usual legal acts, and may go about their business of interpretation and application according to received methods. Such a conclusion would not be contradicted by the fact that, in dealing with some agreements, they are required to go to the library and peruse “foreign” case law (see Art. 16(2) AFMP and 1(2) AAT). In fact, these can be seen as special cases grounded – most “classically” – in an explicit contractual stipulation. Hardly anything revolutionary.

But while all the foregoing is true to some extent, the “operating system” of Swiss Law *is* changing, although the change is still incomplete and contradictory.

3.2. *The cognitive opening of Swiss legal culture to EU Law*

I would like to start by emphasizing an obvious and therefore usually overlooked fact: EU Law, and “EU Law in Switzerland”, have gradually become standard topics in Swiss academia. In the last eighteen years, monographs and edited books on the *Europäisierung* or on the *Einfluss von EU-Recht* on Swiss law have appeared on a regular basis and with increasing frequency. Specialized periodicals and paper series have mushroomed, and articles on Europeanization are common in prestigious mainstream law reviews. Even textbooks on Swiss Law are more and more often enriched by comparative chapters on EU Law. Last but not least, EU Law has become a compulsory course in most Swiss Universities, and some have recently established special courses on the “Influence of EU Law on Swiss Law”.

⁴³ Ordinary in the sense that they do not establish supranational institutions, nor a supranational legal order. See FELDER, *Appréciation juridique et politique du cadre institutionnel et des dispositions générales des accords sectoriels*, in FELDER/KADDOUS (eds), *Accords bilatéraux Suisse-UE* (Commentaires), Geneva, Basel, Munich, Bruxelles, 2001, 117-148.

⁴⁴ BIEBER, “Staatlicher Alleingang” als Alternative zur Integration? – Zur Rolle der Schweiz am Rande der Europäische Union, *Vorträge, Reden und Berichte aus dem Europa-Institut* n. 346, 1996, at 1: “Switzerland has so far trusted in the State’s traditional means of action, just like an old-fashioned professor who keeps writing his texts on a mechanical typewriter, as he thinks that switching to a computer would be too big (and too costly) a change, and that he can achieve the same result in the good old way” (author’s translation).

⁴⁵ WEILER, *The Reformation of European Constitutionalism*, *Journal of Common Market Studies* 1997, 97-131: “Constitutionalism is the DOS or Windows of the European Community”.

In short, examining Swiss Law through a “European lens” has quietly become second nature to an increasing proportion of Swiss scholars and to today’s students – the future generation of Swiss lawyers of all descriptions.

This conclusion can be transposed, to some extent, from academic discourse to judicial discourse. References to EU Law in Swiss judgments, once rare and much remarked, have become quite common of late.⁴⁶

It must be stressed that in and of itself, this fact does not represent a qualitative change in Swiss judicial thinking. In fact, Swiss judges have a tradition of referring to foreign legal materials in their decisions. Such references have always been considered to be the expression of a free, “comparative” exercise undertaken by the judge to nourish her reflection on the problem at hand – no more, no less.⁴⁷ Frequent references to EU Law, therefore, merely tell us that in “cognitive” terms Swiss judges (and litigation lawyers) are more and more open to EU Law – in other words, that EU Law is becoming a stable feature in the intellectual landscape of many Swiss legal practitioners.

3.3. *The conceptual and operational opening of the Swiss Methodenlehre to EU Law*

Apart from the penetration of EU Law into national legal culture, the Europeanization of Swiss Law has triggered an explicit debate on the qualitative transformations it causes to, or requires from, Swiss legal thinking. This discussion has been framed in terms of methods of interpretation: should “Europeanized” Swiss Law, domestic and international, be interpreted in the light of EU legislation, case law, and administrative practice? Or, to state it differently, should it be interpreted so as to produce “euro-compatible” results? And if so, on what dogmatic foundations, in what circumstances, within what limits?

While all these questions have also been debated with reference to the interpretation of Swiss-EU agreements,⁴⁸ the most stimulating discussions have concerned the interpretation of unilaterally “Europeanized” legislation, and I will henceforth concentrate on this topic.

Quite remarkably, the idea that “euro-compatible” interpretation is *required* for enactments adopted with a view to harmonize Swiss Law to EU Law has by now

⁴⁶ These early meetings between the Federal Tribunal and EU Law are exhaustively documented in a work published in 1999 by the late Olivier JACOT-GUILLARMOD and significantly titled: *Traces de droit communautaire dans la jurisprudence du Tribunal fédéral suisse*, in RODRIGUEZ IGLESIAS/DUE/SCHINGTEN/ELSEN (eds), *Mélanges en hommage à Fernand Schockweiler*, Baden Baden, 1999, 213-232.

⁴⁷ On the traditional use of foreign legal materials by Swiss judges see GERBER, *Der Einfluss des ausländischen Rechts in der Rechtsprechung des Bundesgerichts*, in *Perméabilité des ordres juridiques* (Publications de l’ISDC n° 20), Zürich 1992, 141-163; see also WERRO *La jurisprudence et le droit comparé*, *ibidem*, 165-172.

⁴⁸ See in particular EPINEY, *Zur Bedeutung der Rechtsprechung des EuGH für Anwendung und Auslegung des Personenfreizügigkeitsabkommen*, *Zeitschrift des bernischen Juristenvereins* 2005, 1-31; see also KADDOUS, *L’influence du droit communautaire dans la jurisprudence du Tribunal fédéral suisse*, in *Le droit à la mesure de l’homme: Mélanges en l’honneur de Philippe Léger*, Paris 2006, 407-422.

become canonical in the literature.⁴⁹ This *is* a qualitative step beyond the traditional characterization of foreign law as a mere source of inspiration for Swiss lawyers.

It may be useful to note, in passing, some corollary propositions that descend from this basic idea:

- A “euro-compatible” interpretation is not required when the legislator has merely drawn inspiration from EU Law, no matter how striking the similarity between Swiss Law and its “model”. In such cases, to be distinguished from *autonomer Nachvollzug* proper, no obligation to interpret Swiss Law in conformity with EU Law can be inferred.⁵⁰ Granted, the Swiss judge *may* still freely use relevant EU legislation and case law in a “comparative perspective”, as a help for interpretation (*Auslegungshilfe*).
- Given the selective nature of “autonomous adaptation”, care must be taken in not applying the principle of “euro-compatible” interpretation to the provisions reflecting a deliberate deviation from EU Law.⁵¹
- “Euro-compatible” interpretation does not amount to a mechanical reception of EU regulatory or jurisprudential solutions. The material aims and interests pursued through the *autonomer Nachvollzug* must be taken into account and may justify, in certain cases, euro-incompatible interpretations of purportedly euro-compatible provisions.⁵²

That said, the decisive importance attributed to the legislator’s intention to harmonize is a source of considerable problems. To begin with, even careful examination of the *travaux préparatoires* is not always conclusive: it may be unclear whether domestic provisions that are identical or similar to EU provisions are indeed the expression of a will to harmonize. The inverse may also be true. A clear intention to harmonize may find expression in normative utterances whose conformity to the EU “original” is

⁴⁹ See in particular WIEGAND/BRÜLHART, Die Auslegung von autonom nachvollzogenem Recht der Europäischen Gemeinschaft, Swiss Papers on European Integration n. 23, 1999; COTTIER/DZAMKO/EVTIMOV, Die europakompatible Auslegung des schweizerischen Rechts, in EPINEY/THEUERKAUF/RIVIERE (eds), Annuaire suisse de droit européen 2003, Bern, Zürich 2004, 357-392; AMSTUTZ, Interpretatio multiplex. Zur Europäisierung des schweizerischen Privatrechts im Spiegel von BGE 129 III 335, in EPINEY/RIVIERE (eds), Auslegung und Anwendung von “Integrationsverträgen”, Zürich 2006, 93-119; NYFFELER, Die Anwendung autonom nachvollzogener Normen des EU-Rechts, in Festschrift 100 Jahre Aargauischer Anwaltsverband, Zürich, 2005, 35-55; WALTER, Das rechtsvergleichende Element – Zur Auslegung vereinheitlichten, harmonisierten und rezipierten Rechts, Revue du droit suisse 2007, I, 259-277.

⁵⁰ See COTTIER et al., op. cit. The distinction is not always made, so that “autonomous adaptation” ends up being an all-encompassing concept for unilateral Europeanization (see e.g. KADDOUS, cit.). However, the distinction is sound in principle, and is moreover upheld by the Swiss Federal Tribunal: compare ATF 128 I 295, para. 4c, and ATF 129 III 335, § 6 (on this judgment, see below).

⁵¹ See e.g. COTTIER et al., cit.

⁵² See in particular COTTIER et al., cit., as well as WALTER, cit. This is often expressed by saying that since the aim of autonomous adaptation is market integration, then Swiss judges should reject “euro-compatible” interpretations that lead to the creation of trade obstacles (COTTIER et al., at 369). But the link between autonomous adaptation and market integration should not be seen as exclusive: the key consideration in euro-compatible interpretation is the legislator’s will to harmonize (COTTIER et al., at 364) and this will may well be expressed in non-economic fields. Otherwise stated: should the Swiss norm-giver decide to *align* domestic rules on the fight against terrorism with the relevant EU Framework-Directive, it would be difficult to argue that the principle of “euro-compatible” interpretation should not apply because the alignment is not linked to market integration.

dubious. In such cases, should the interpreter give more weight to legislative intent or to wording? This dilemma arises frequently in a diachronic perspective. As noted above, even when “euro-compatibility” is the key goal of their enactments, Swiss norm-givers rarely resort to dynamic references to EU Law. It must be added that *autonomer Nachvollzug* is usually a punctual act, which is not followed by screening procedures tracking the evolution of the “transposed” EU norms. It is therefore often the case that originally euro-compatible Swiss rules become over time euro-*in*compatible, due to the evolution of EU legislation and case law. Should the interpreter take into account such “subsequent” EU Law, and if so how far can she go in “updating” domestic legislation?

On all these questions, widely different views have been expressed. This is so, chiefly, because scholars differ on the theoretical underpinnings of “euro-compatible” interpretation. While some see it as a specific application of the historical and teleological methods of interpretation,⁵³ others consider it to be the expression of systematic or “strengthened” comparative interpretation.⁵⁴ This is not the place to conduct an extensive review of the literature, but the positions expressed by two authors deserve examination, since they are paradigmatic of the innovation/tradition polarity created by Europeanization in Swiss legal thinking.

In a series of flamboyant contributions, Marc AMSTUTZ has developed the most coherent and ambitious conceptual theorization of “euro-compatible” interpretation to date.⁵⁵ This author styles the Swiss *autonomer Nachvollzug* as an instance of “interlegality” – in the words of Boaventura da Sousa SANTOS, the intersection of different “legal spaces superimposed, interpenetrated and mixed in our minds as well as in our actions” that are nonetheless “non-synchronic, and thus result in uneven and unstable combinations of legal codes”.⁵⁶ In this perspective, AMSTUTZ argues that the purpose of autonomous adaptation is not to achieve legal uniformity. Rather, it is to create the conditions under which distinct legal orders are so “synchronized” as to make it possible to have a unitary “order of actions” through the creation of “normative compatibilities”, which must be maintained as the legal orders evolve.⁵⁷ This task, he further states, requires constant and subtle adjustments that cannot be accomplished by the legislator. Only the judge is fit for the task, under a very general mandate, so to say, to make interlegality work.⁵⁸ The practical consequences of this argumentative line are far-reaching. *Autonom nachvollzogenes Recht*, as interlegal law, must always be

⁵³ KRAMER, *Konvergenz und Internationalisierung der juristischen Methode*, in MEIER-SCHATZ (ed), *Die Zukunft des Rechts*, Basel 1999, 71-89.

⁵⁴ WALTER, *op. cit.*

⁵⁵ See in particular AMSTUTZ, *Evolutorische Rechtsmethodik im europäischen Privatrecht – Zur richtlinienkonformen Auslegung und ihren Folgen für den autonomen Nachvollzug des Gemeinschaftsprivatrechts in der Schweiz*, in WERRO/PROBST (eds), *Le droit privé Suisse face au droit communautaire européen*, Bern 2005, 105-144; ID., *Normative Kompatibilitäten – Zum Begriff der Eurokompatibilität und seiner Funktionen im Schweizer Privatrecht*, EPINEY/RIVIERE/THEUERKAUF/ WYSSLING (eds), *Annuaire suisse de droit européen 2004/2005*, Bern, Zürich 2005, 235-252; ID., *Interpretatio multiplex*, *op. cit.*

⁵⁶ SANTOS, *Law: A Map of Misreading. Towards a Postmodern Conception of the Law*, *Journal of Law and Society* 1987, 279-302, at 297-298.

⁵⁷ AMSTUTZ draws the distinction between “legal order” and “order of actions” from Hayek’s works: see in particular *Interpretatio multiplex*, *cit.*, or AMSTUTZ, *In-between worlds: Marleasing and the emergence of Interlegality in Legal Reasoning*, *European Law Journal* 2005, 766-784.

⁵⁸ AMSTUTZ so construes, for instance, the *Swisslex* programme (see above).

interpreted in such a manner as to create “normative compatibilities” with EU Law, *present and future* – until and unless a contrary will is unambiguously expressed by the norm-giver, i.e. until and unless the mandate to make interlegality work is revoked. This must be done, as far as possible, through the mobilization of the domestic methods of interpretation. To this extent, AMSTUTZ’s position is close to that previously expressed by WIEGAND and BRÜHLHART that “euro-compatibility” is a “goal for interpretation” (*Auslegungsziel*) rather than a method of interpretation.⁵⁹ But according to AMSTUTZ, it is an overriding goal: if the application of the domestic methods of interpretation yields no “euro-compatible” result, then the judge must proceed to *create* a euro-compatible legal solution.

This radical thesis has been opposed by Franz NYFFELER, whose view is grounded in a more traditional understanding of the rule of law and of the separation of powers.⁶⁰ In his analysis, EU legal materials must be seen as a mandatory but *subsidiary* means of interpretation for “autonomously adapted” Swiss law – i.e. as an element that is clearly subordinate, for instance, to the provision’s wording and (national) legal context. NYFFELER adds, in an “originalist” vein, that since the mandatory reference to “foreign legal materials” is only justified by the legislator’s intention to harmonize, then it must be understood as covering only those materials that were positively *known* to the legislator. Updating *autonom nachvollzogenes Recht* to new EU Law is primarily a task for the legislator. Failing legislative intervention, the judge *may* only take into account subsequent EU Law in the traditional comparative perspective, and only in order to confirm a solution that is attainable through the traditional methods of interpretation.

This brief and incomplete summary of the scholarly debate surrounding the interpretation of “Europeanized” Swiss Law highlights two interrelated aspects. First, the Europeanization of Swiss Law, in the form of *autonomer Nachvollzug*, has carried with it a change in the doctrinal understanding of the methods of legal interpretation: “foreign legal materials”, and more particularly EU legislation and case law, have come to be seen as possessing a legal value that is qualitatively different from that which was traditionally assigned to them – non-binding “sources of inspiration”. However, and this is the second point, the *exact* value of these materials is disputed, with positions that range from AMSTUTZ’s “interlegal” view to NYFFELER’s more conservative stance.

This discussion has not remained confined to the academic world. Quite to the contrary, it has also unfolded in courts, giving rise to some much-remarked pieces of judicial reasoning.

In a judgement rendered in 2003 on the application of Article 333 of the Obligations Code (ATF 129 III 335), the Swiss Supreme Court (Federal Tribunal) made the following statement:⁶¹

⁵⁹ See WIEGAND/BRÜHLHART, *op. cit.*

⁶⁰ NYFFELER, *op. cit.*

⁶¹ ATF 129 III 335, § 6: “Domestic law that has been autonomously adapted to EU Law must, in doubt, be interpreted in a “euro-compatible” manner. It is harmonized law and as such in the end, like international agreements, unifying law. Of course it is not unifying law in the form of uniform law. Nonetheless, when the Swiss legal order is adapted to a foreign legal order – here EU Law – harmonization must not be sought only in the formulation of the norm, but also in its interpretation and

Nachvollzogenes Binnenrecht ist im Zweifel europarechtskonform auszulegen. Es ist harmonisiertes Recht und als solches im Ergebnis - wie das Staatsvertragsrecht - Einheitsrecht. Zwar ist es nicht Einheitsrecht in Form von vereinheitlichtem Recht. Wird aber die schweizerische Ordnung einer ausländischen - hier der europäischen - angeglichen, ist die Harmonisierung nicht nur in der Rechtssetzung, sondern namentlich auch in der Auslegung und Anwendung des Rechts anzustreben, soweit die binnenstaatlich zu beachtende Methodologie eine solche Angleichung zulässt.

A few lines below, the Federal Tribunal also took a position on whether “subsequent” developments in EU Law should be taken into account:⁶²

Die Angleichung in der Rechtsanwendung darf sich dabei nicht bloss an der europäischen Rechtslage orientieren, die im Zeitpunkt der Anpassung des Binnenrechts durch den Gesetzgeber galt. Vielmehr hat sie auch die Weiterentwicklung des Rechts, mit dem eine Harmonisierung angestrebt wurde, im Auge zu behalten.

As emerges from these passages, the Federal Tribunal has been cautious in recognizing the principle of “euro-compatible” interpretation. It has thus stressed that “euro-compatibility” considerations are *subsidiary*, i.e. that they come into play only in case of “doubt” and provided that the “euro-compatible” solution can also be reconciled with traditional methods of interpretation. Moreover, in adopting a dynamic view of “euro-compatibility”, it has not attributed a clear legal value to “subsequent” EU Law. The die has nonetheless been cast: under these reservations, the stringency of which has been questioned in the literature,⁶³ the Federal Tribunal has recognized EU legal materials as having the value of *mandatory points of reference* for the interpretation of Swiss Law that has been “autonomously adapted”.⁶⁴

This judgement is now widely regarded as the leading case on “autonomously adapted” Swiss Law.⁶⁵ It is viewed – and applauded or criticized, as the case may be – as the expression of a general adaptation of Swiss judicial *Methodenlehre* to the new reality of Europeanization. The present situation is, however, more complex. To be sure, a general adaptation along the lines of ATF 129 III 335 may come about in the future. To-date, however, it has not yet been accomplished: the above-mentioned *dicta* have been greeted by other Swiss judges, supreme or not, with hesitation, or even with resistance.

application, insofar as this is permitted by the methods of interpretation that must be observed under national law.” (author’s translation).

⁶² *Ibidem*: “In applying the law, adjustments [to EU Law] must not be oriented according to the legal situation that prevailed when the national law was aligned [to EU Law] by the legislator. Rather, the interpreter must also keep in sight the subsequent development of the law with which harmonization is sought” (author’s translation).

⁶³ WALTER (op. cit., at p. 270) has styled the condition of compatibility with the traditional methods of interpretation as *Sibyllinisch*. WALTER’s perplexity can only be understood in the light of the flexible use Swiss courts make of the above principles of interpretation – so-called *Methodenpluralismus* or, in a pejorative sense, methodological “anything goes” – whereby no element of interpretation, not even the wording of a provision, can in itself *exclude* possible interpretations of a norm. See in particular WIEGAND/BRÜHLHART, cit., as well as PICHONNAZ/VOGENAUER, Le “pluralisme pragmatique” du Tribunal federal: une méthode sans méthode?, *Pratique juridique actuelle* 1999, 417-426.

⁶⁴ See in particular AMSTUTZ, *Interpretatio multiplex*, op. cit., at 94.

⁶⁵ See in particular NYFFELER, op. cit., at 37.

Thus, the same chamber of the Federal Tribunal (First Civil Court), sitting in different formations, has given a restrictive reading of the principles expressed in ATF 129 III 335, putting an uncharacteristically strong emphasis on the *wording* of domestic provisions as a limit to “euro-compatible” interpretation.⁶⁶ Other Courts of the Federal Tribunal have simply ignored the precedent set by ATF 129 III 335. For example, in interpreting the domestic regulations on VAT, the Second Public Law Court of the Tribunal consistently holds that⁶⁷

Es steht ausser Frage, dass der Verfassungsgeber [...] die schweizerische Verbrauchsbesteuerung derjenigen der Europäischen Gemeinschaft und ihrer Mitgliedstaaten annähern wollte. [...] Die Umsatzsteuerrechte der Europäischen Gemeinschaft und ihrer Mitgliedstaaten haben deshalb exemplarische Bedeutung für die Schweiz und bilden eine nicht zu vernachlässigende Erkenntnisquelle bei der Interpretation des schweizerischen Mehrwertsteuerrechts, wenn es darum geht, die Zielsetzungen der Harmonisierung, wie sie dem schweizerischen Verfassungsgeber vorgeschwebt haben, zu erreichen

This dictum seems to uphold the traditional idea that foreign law may at most be a “source of inspiration” for the interpretation of Swiss Law, even when the norm-giver has clearly sought harmonization.

The recently established Federal Administrative Tribunal has manifested an even stronger reluctance to recognize a legal “status” to EU legislation and case law in the interpretation of *autonom nachvollzogenes Recht*. Thus, in recent judgments on the Law on Therapeutical Products – a clear case of autonomous adaptation – the Tribunal has sometimes reiterated the view quoted above (EU Law as *Erkenntnisquelle*). On one occasion, it has gone so far as to state that a legislative intent to harmonize has no impact on the methods of interpretation to be applied.⁶⁸

Hieraus kann [...] nicht abgeleitet werden, dass die schweizerischen Vorschriften den gleichen Gehalt aufweisen müssten, wie die für die Schweiz nicht unmittelbar anwendbaren EU-Regelungen. Vielmehr ist das schweizerische Recht autonom auszulegen.

Needless to say, the meaning of “*autonom auszulegen*” in this passage is “interpreting without taking into account EU legal materials”.

With this last judgment, Swiss courts have come full circle: they have expressed all the possible positions on the value of EU legal materials in Swiss Law. If ATF 129 III 335 is the leading case, then a great many judges are reluctant to follow the lead. The result

⁶⁶ See ATF 132 III 379, para. 3.3.5 and ATF 133 III 568, para. 4.6.

⁶⁷ ATF 124 II 193, para. 6: “It is undisputed that the constitutional legislator aimed at approximating Swiss turnover tax to that of the EU and of its member States. [...] The EU and member States’ regulations on turnover tax have therefore an exemplary significance for Switzerland and constitute a source of information that must not be disregarded in interpreting Swiss VAT Law, if the goal of harmonization, pursued by the constitution-giver, is to be attained” (author’s translation). This position was not altered after ATF 129 III 335: see e.g. Federal Tribunal, case 2A.40/2007, Aircraft Management, judgment of November 14 2007, available online at www.bger.ch, para. 2.4.

⁶⁸ Federal Administrative Tribunal, case C-2092/2006, Janssen-Cilag AG/Swissmedic, judgment of December 5 2007, available online at www.bundesverwaltungsgericht.ch, para. 3.5: “It may not be deduced from this that Swiss Law should have the same content as EU Law, which is not directly applicable in Switzerland. Swiss Law must rather be interpreted in an autonomous manner” (author’s translation).

of this, as evinced by the diversity of positions summarized above, is systemic incoherence and unpredictability in the fundamental operation of attributing meaning to the growing body of *autonom nachvollzogenes Recht*.

4. Concluding Remarks

Switzerland is a special case of Europeanization. If we take a broad perspective, encompassing all the non-EU countries that are presently under the influence of EU Law, Switzerland belongs to the restricted class of “quasi members”. In addition, its “bilateral way” of rapprochement to the EU – a mix of sectoral agreements and unilateral approximation of domestic legislation – is quite unique. Therefore, only prudent analogies – and certainly no generalizations – are allowed when drawing lessons on Europeanization, as a general phenomenon, from the Swiss experience. With these methodological *caveats* in mind, I would offer two tentative reflections on legal Europeanization in non-EU states.

The first concerns the concept of legal Europeanization itself. As I have pointed out in the introduction, and as we have seen, the term covers many different forms of interaction between EU Law and the Swiss legal order. In a comparative perspective, the spectrum of such interactions is even wider.⁶⁹ If the concept “legal Europeanization” is to embrace this complex and differentiated phenomenon in full, and still maintain any explanatory power, its content must probably be linked to the notion of transformation. And if this is correct, then we should also refrain from using the concept of “legal Europeanization”, as such, as a tool of legal analysis. The reason for this becomes apparent if we apply to “Europeanized” provisions the litmus test of “legal homogeneity” – is homogeneity between the provision at hand and its EU counterpart a relevant consideration at all? And given that perfect homogeneity is only an ideal-type, what level, what kind of homogeneity is sought? Like a beam of light, these questions turn the monochrome idea of “Europeanization” (Swiss or Ukrainian provision A looks identical/similar to EU provision B) into a rainbow of different “Europeanizations” – dynamic/static unification, approximation, inspiration, and so on. All of which, I should add, are more or less distant from the images evoked by words such as “cut/paste” or “export”.

My second reflection concerns the kind of transformative effects that Europeanization is likely to produce in legal thinking. As stated earlier, the superficial image of legal Europeanization in Switzerland is “approximation through classic means”. The natural implication, in terms of interpreting the Law, would be “business as usual”. Still, as we have seen, this is not the case. Even though the reception of EU Law into Swiss Law is mediated by classic forms of state normative power (laws and agreements), EU legal materials *as such* are coming to be seen as part of the domestic legal environment – not only in the traditional, cognitive sense, but in a stronger, positive-legal sense.

To be sure, this transformation is still in the making: a part of the judiciary has heard the new tune and is now playing it by ear; other judges remain steadfastly deaf to it. Therefore, to the extent that Europeanization has produced some change in the methods of interpretation of the Law, it has done so in an incomplete, contradictory manner. Or, to state it differently, Europeanization has not resulted (yet) in the establishment of a

⁶⁹ See, on “contractual” Europeanization, PETROV, *op. cit.*

new canon of legal interpretation. Rather, it has destabilized the existing canon, thereby generating systemic incoherence and unpredictability.

Such problems could, of course, be reduced if the Swiss legislator gave the Swiss judges and administration clearer “interpretive mandates” by using more explicit techniques of Europeanization.⁷⁰ But this is unlikely to happen on a large scale, given the “double talk” of the Swiss political authorities, who practise unilateral harmonization while insisting on the rhetoric of “sovereignty”.⁷¹ The burden is, thus, mainly on the shoulders of Swiss judges. Today, many of them seem inclined to put an end to the experience of ATF 129 III 335 and to return to the past – sticking to the trusted old methods of interpretation, and using EU legal materials as a “free” *Auslegungshilfe* for the growing body of “Europeanized” Swiss Law. This would be a way to dispel the disturbing thought that “foreign” legal materials may bind national authorities. Not, however, a way to recover coherence and predictability, since the “free” use of legal materials is structurally open to manipulation and selectivity.⁷² The alternative option Swiss judges have is to accept EU legal materials as part of “Swiss legality”, and to elaborate further on their status in domestic law. This option may seem unattractive, as it requires rethinking and adjusting deeply engrained concepts of the rule of law, and possibly of the law itself. But it is probably the only one responding to the need of the moment for the Swiss legal order: to develop, outside supranational infrastructures, a coherent and functioning model of advanced legal integration.

⁷⁰ E.g. by stating explicitly the goals it pursues in approximating Swiss Law to EU Law, or by monitoring periodically the continuing “euro-compatibility” of “autonomously adapted” laws (NYFFELER, *op. cit.*, at 54-55).

⁷¹ See the passage quoted above from Federal Council, *Rapport Europe 2006*, *op. cit.*

⁷² See DORSEN, The relevance of foreign legal materials in U.S. constitutional cases: a conversation between Justice Antonin Scalia and Justice Stephen Breyer, *International Journal of Constitutional Law* 2005, 519-541.