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Influences of the European Acquis Communautaire on Swiss Contract Law

NTBR 2022/22

1. Introduction

It is well known that Switzerland is not a Member State of the European Union. While there is a theoretical possibility that Switzerland may accede to the EU at some time in the future, the political realities to make such a step seem currently unlikely. Instead, Switzerland is legally connected to the EU's single market by over 100 bilateral, sectoral agreements about specific topics. Negotiations between the Swiss government and the EU Commission about a future 'common institutional framework agreement' that would incorporate these bilateral agreements were conducted for some time, but have not been successful.

In the current legal situation, Switzerland is under no obligation to implement the EU's *acquis communautaire* in the field of contract law into Swiss law, or to apply EU legal acts forming part of this *acquis*. However, it has often been acknowledged by Swiss authors that the European *acquis* has gained an increasing influence on Swiss contract law in recent years.[2] Before investigating in more detail how this influence has manifested itself, it may be helpful to list reasons why decision makers in an independent 'third State' like Switzerland may choose, and have in the past at least considered, to take the European contract law *acquis* into account:

First, an adoption of EU-made contract law rules may be driven by political reasons that have to be seen in a broader context (hereinafter 'political considerations'). In the case of Switzerland, it has been the government's declared goal to make Swiss law (including contract law) 'EU compatible' (or 'eurocompatible'), in order to keep all options for a possible closer relationship with the EU open.[3] Where this goal has been actively pursued, it was done by way of a so-called 'autonomous adoption' of EU law *(autonomer Nachvollzug)*, with the adoption being described as 'autonomous' because it did not occur in fulfilment of any legal obligation, but due to an independently made, politically driven decision of the Swiss law maker.

Second, the EU's contract law *acquis* may be followed in order to avoid disadvantages that could follow from Swiss contract law simply being different from the law of the EU States[4] (hereinafter 'level playing field considerations'). Within the EU, the same argument is the basis of the harmonisation of contract law in order to preserve the internal market's functioning (Art. 114 TFEU); in the discussion in Switzerland, it focusses on the disadvantages for Swiss consumers[5] and/or Swiss enterprises[6] which may follow from Switzerland's contract law differing from the EU's shared contract law standard. The reasoning is particularly valid in light of the strong export orientation of the Swiss economy and the importance of its trading relations with the EU. In contrast to the third reason (to be addressed immediately below), level playing field considerations do not presuppose that EU contract law rules concerned are of a particularly good quality; it is the difference in law alone that renders the proverbial playing field uneven.

Third, the European contract law *acquis communautaire* could be followed in a third State like Switzerland because the *acquis*' content provides a superior solution (hereinafter 'quality considerations'). This would accord with a traditionally accepted benefit of comparative law in general, namely foreign laws serving as an aid to legislators by identifying superior solutions developed in other countries.[7] Where such quality considerations are relevant drivers, European rules that do not apply in Switzerland *ratione imperii* are adopted *imperio rationis*.

Against this background, it will in the following be investigated how the EU's *acquis communautaire* has in the past influenced the legislative making of contract law (under 2.) and the interpretation of contract law by courts (under 3.) in Switzerland. A final section (under 4.) will attempt some explanations and conclusions.

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2 P. Gauch, W.R. Schluep & J. Schmid, *Schweizerisches Obligationenrecht – Allgemeiner Teil*, 11th ed., Zurich: Schulthess (2020), para. 22a; C. Huguenin & R.M. Hilty, 'Einleitung vor Art. 1 ff.', in: C. Huguenin & R.M. Hilty (eds.), *Schweizer Obligationenrecht 2020 – Entwurf für einen neuen allgemeinen Teil/Code des obligations suisse 2020 – Projet relatif à une nouvelle partie générale*, Zurich: Schulthess (2013), para. 46; T. Probst, 'Die Rechtsprechung des Europäischen Gerichtshofes als neue Herausforderung für die Praxis und die Wissenschaft im schweizerischen Privatrecht', *BJM* (2004), pp. 225, 229; I. Schwenzer & C. Fountoulakis, *Schweizerisches Obligationenrecht Allgemeiner Teil*, 8th ed., Bern: Stämpfli (2020), para. 1.11.

3 Gauch, Schluep & Schmid, *supra* note 2, para. 22a.

4 F. Nyffeler, 'Die Anwendung autonom nachvollzogener Normen des EU-Rechts', in: *Festschrift 100 Jahre Aargauischer Anwaltsverband*, Zurich: Schulthess (2005), pp. 35-36.

5 D. Donauer & B.A. Möri, 'Widerrufsrecht im schweizerischen Konsumentenschutz – Aktuelle Entwicklungen', *AJP* 2015, p. 339, 349; B. Haidmayer, 'Das neue Widerrufsrecht im Telefonhandel', *SJZ* 112 (2016), pp. 1, 4.

6 T. Probst, 'Der Einfluss des EU-Rechts auf den Gesetzgebungsstil im schweizerischen Privatrecht', in: *Die Schweiz und die europäische Integration: 20 Jahre Institut für Europarecht*, Zurich: Schulthess (2015), pp. 249, 250.

7 See K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3rd ed., Oxford: Clarendon (1998), pp. 16-7.

2. Influences on contract law making in Switzerland

2.1 *Parallel development prior to 1993*

The very early years of EC law making in the area of consumer law were less marked by a one-sided influence of the emerging European *acquis communautaire* on Swiss law than by a parallel development: At the time the discussions about introducing a consumer right of withdrawal for doorstep selling situations into the Swiss Law of Obligations (*Obligationenrecht*, OR) commenced in the 1980s, they initially occurred independent from the preparations for the EC Doorstep Selling Directive, although the latter project was well noticed.[8] When Arts. 40a-40e OR entered into force in 1991, they showed strong similarities with the slightly earlier adopted Directive, without being fully in compliance with the latter's wording.[9] Another Swiss provision newly introduced at that time – Art. 6a OR on the unsolicited supply of goods (inertia selling) – even predated the developments in the EC, where such a provision would not become part of the *acquis communautaire* until 1997 (through Art. 9 EC Distance Selling Directive).[10]

2.2 *Autonomous adoption of EC contract law directives in 1993 ('Swisslex' program)*

The by far most important influence of the European *acquis* upon Swiss contract law occurred in 1993, when a number of EC directives in the field were autonomously adopted in Switzerland through the so-called 'Swisslex' program. This legislative program had a political history: In the early 1990s, the Member States of the European Community and those of the European Free Trade Area (EFTA) had negotiated the European Economic Area (EEA) Agreement, which would allow the then seven EFTA States – among them Switzerland – to participate in the EC's internal market. The EEA Agreement was signed on 2 May 1992, and the Swiss government of the day intended to ratify it in due course. As part of this process, no less than 90 EC directives were scheduled to be implemented into Swiss law in order to align it with the EC's internal market *acquis communautaire* (a legislative package called 'Eurolex' program), as required by the EEA Agreement.

However, on 6 December 1992, the Swiss voters rejected Switzerland's membership in the EEA in a referendum, thereby rendering a ratification of the EEA Agreement impossible. In spite of this development, the Swiss government introduced a scaled-down version of the initial 'Eurolex' program – now reduced to 27 of the initially covered 90 EC directives (including some from the area of contract law) and slightly renamed as 'Swisslex' – into the Swiss parliament. In explanation of this step, the government made very clear that it aimed at a 'Euro-compatibility' of Swiss law in order to pave the way to new negotiations with the EU side over Switzerland's closer integration into the common market;[11] the autonomous adoption of various European contract law directives through the 'Swisslex' program was therefore driven by political considerations of the day.

The resulting changes to Switzerland's contract law first of all affected the OR, where a limited number of provisions had to be amended in order to make them compliant with EC directives. The still rather new provisions on consumer contracts in Arts. 40a-40e OR, which had only been included into the OR in 1991, were slightly revised[12] to fully align them with the EC Doorstep Selling Directive.[13] In addition, provisions on employment contracts in Arts. 333 et seq. and Arts. 335d et seq. OR were adjusted in line with the EC Acquired Rights Directive[14] and the EC Collective Redundancies Directive[15] from the 1970s,[16] although efforts were made to adhere to Swiss terminology in redrafting them.[17]

Other EC contract law directives of the 'Swisslex' program were not adopted through an amendment of the OR, but by creating new stand-alone laws: The EC Consumer Credit Directive[18] was autonomously implemented through the *Bundesgesetz über den Konsumkredit* (KKG),[19] and the EC Package Travel Directive[20] through the *Bundesgesetz über Pauschalreisen* (*Pauschalreisegesetz*, PauRG).[21] The latter law deviated from the Directive in a number of smaller points, generally to the detriment of the consumer. One could

8 Botschaft zu einem Bundesgesetz über die Förderung der Konsumenteninformation und zu einem Bundesgesetz über die Aenderung des Obligationenrechts (Die Entstehung der Obligationen) vom 7. Mai 1986, *BBl* 1986, II, pp. 389-90.

9 See M. Koller-Tumler, in: *Basler Kommentar zum Obligationenrecht I*, 7th ed., Basel: Helbing Lichenhahn (2020), Vor Art. 40a-40f, para. 2: 'Die Novelle fügte sich in eine gesamteuropäische Entwicklung ein'.

10 H. Honsell & T. Pietruszak, 'Der Vernehmlassungsentwurf zu einem Bundesgesetz über den elektronischen Geschäftsverkehr', *AJP* 2001, 771, 772: 'Der schweizerische Gesetzgeber hat diesbezüglich bereits 1990 Vorarbeit geleistet…'.

11 Botschaft über das Folgeprogramm nach der Ablehnung des EWR-Abkommens vom 24. Februar 1993, *BBl* 1993 I, p. 805, 810: 'Erst eine Kompatibilität des schweizerischen mit dem europäischen Recht ermöglicht die Wahrung aller Optionen, d.h. einen möglichen EWR- oder EG-Beitritt ohne unüberwindbare Hürden oder allenfalls eine auf bilaterale Abkommen beschränkte Alternative'.

12 Botschaft, *supra* note 11, p. 880; R. Dornier, in: *Zürcher Kommentar zum schweizerischen Zivilrecht*, Zurich: Schulthess (2010), Vorbemerkungen zu Art. 40a-40f, para. 10.

13 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, *OJ* L 372, 31 December 1985, p. 31 et seq.

14 Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, *OJ* L 61, 5 March 1977, p. 26 et seq.

15 Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, *OJ* L 48, 22 February 1975, p. 29 et seq.

16 Botschaft, *supra* note 11, pp. 880-1.

17 Probst, *supra* note 6, p. 255.

18 Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, *OJ* L 42, 12 February 1987, p. 48 et seq., as amended through Council Directive 90/88/EEC of 22 February 1990 amending Directive 87/102/EEC …, *OJ* L 61, 10 March 1990, p. 14 et seq.

19 Botschaft, *supra* note 11, p. 862.

20 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, *OJ* L 158, 23 June 1990, p. 59 et seq.

21 Botschaft, *supra* note 11, p. 887.

furthermore mention the EC Product Liability Directive[22] which was adopted through the *Bundesgesetz über die Produktehaftpflicht* (*Produktehaftpflichtgesetz*, ProdHG),[23] although its rules are arguably not part of contract law in the narrow sense.[24] These special laws shared a rather complicated wording and a legislative structure closely modelled on the EC directives, thereby significantly differing from the typical style of Swiss private law.[25]

It is interesting to note that neither of the abovementioned Swiss contract law rules, although initially modelled on EC directives, were later updated when some of these directives had been amended by the EU legislator. Instead, the Swiss legislator remained passive[26] – presumably because the political considerations behind the autonomous adoption of 1993 were no longer valid and other considerations had not taken their place. A suggestion in literature that would have required the Swiss government to present an amendment proposal to parliament every time an autonomously adopted EU directive is amended[27] remained in any case unsuccessful. Against this background, the occasional assessment of today's Arts. 40a-40f OR still being 'eurocompatible' in spite of the missing adoption of newer EU consumer directives[28] must seem doubtful.

2.3 *Lack of comparable influence of more recent EU contract law directives*

In comparison to the broadscale influx of European *acquis* rules by virtue of the 'Swisslex' program, more recent EU directives in the field of contract law have remained almost without influence on Switzerland's contract law. This decrease in influence stands in contrast to the development of EU contract law itself, which is generally regarded as having moved from an initial harmonisation of only narrow, rather specific questions of contract law (notably in the area of consumer protection) towards an increasing maximum harmonisation of central contract law questions.

2.3.1 *Unfair Contract Terms Directive and Timeshare Directive*

The EC Unfair Contract Terms Directive of 1993[29] has not been autonomously adopted in Swiss law;[30] in fact, the OR has remained free of any provisions specifically addressing standard terms.[31] Also the EC Timeshare Directive's rules, originally of 1994,[32] never became part of Swiss contract law. An attempt to adopt the Directive's recast version of 2009[33] in Switzerland by adding its provisions to the OR as new Arts. 40 et seq. was made, but rejected in parliament.[34]

2.3.2 *Electronic Signatures Directive*

One sub-area in which the *acquis communautaire* has had a relatively strong influence on Swiss law are its provisions on electronic signatures. The role of these rules in the general field of contract law is, of course, quite narrow; within the OR, they are primarily reflected in Art. 14(2)*bis* OR, which recognizes electronic signatures complying with certain technical validation requirements as equivalent to handwritten signatures.[35] Already when the first Swiss provisions on electronic signatures were drafted, they were strongly influenced by the EC Directive on Electronic Signatures of 1999,[36] which had been adopted slightly earlier.[37] This influence went further than in other instances, in that Swiss law – mostly its provisions on the technical side of the electronic signature validation regime – also copied the structure of the *acquis* model, including the long-winded definitions[38] that the Swiss law maker has traditionally been wary of. In doing so, it differed from other cases of autonomous adoptions where *aquis* provisions were often significantly redrafted in accordance with the general, simple drafting style of Swiss law. The contrary approach of staying close to the EC model[39] was probably chosen here due to the formal, technical subject matter, and in order to enable a cross-border mutual recognition of the Swiss and the EU validation regimes.[40] Insofar, the autonomous adoption was driven by level playing field considerations.

22 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ* L 210, 7 August 1985, p. 29 et seq.
23 Botschaft, *supra* note 11, p. 884.
24 But see Huguenin & Hilty, *supra* note 2, para. 47, who consider the ProdHG and the underlying Product Liability Directive to form part of (consumer) contract law.
25 Probst, *supra* note 6, p. 257.
26 Nyffeler, *supra* note 4, p. 40.
27 Nyffeler, *supra* note 4, p. 54.
28 Dornier, *supra* note 12, para. 7.
29 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* L 95, 21 April 1993, p. 29 et seq.
30 C. Müller, 'Einleitung in das OR', in: *Berner Kommentar zum Obligationenrecht*, Bern: Stämpfli (2018), para. 56; Schwenzer & Fountoulakis, *supra* note 2, para. 1.11.
31 For Art. 8 UWG and its control of standard terms from a competition law perspective, see *infra* 2.4.
32 Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, *OJ* L 280, 29 October 1994, p. 83 et seq.
33 Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, *OJ* L 33, 3 February 2009, p. 10 et seq.
34 Koller-Tumler, *supra* note 9, para. 2c.
35 In addition, Art. 59a OR governs the liability of owners of a cryptographic key used to generate electronic signatures or seals.
36 Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, *OJ* L 13, 19 January 2000, p. 12 et seq.
37 Botschaft zum Bundesgesetz über Zertifizierungsdienste im Bereich der elektronischen Signatur (ZertES) vom 3. Juli 2001, *BBl* 2001, p. 5679, 5692-3, 5695, 5713: 'Der vorliegende Entwurf für ein Bundesgesetz über Zertifizierungsdienste im Bereich der elektronischen Signatur entspricht grundsätzlich den Vorgaben des europäischen Rechts'.
38 Botschaft, *supra* note 37, p. 5692-3; Botschaft zur Totalrevision des Bundesgesetzes über die elektronische Signatur (ZertES) vom 15. Januar 2014, *BBl* 2013, p. 1001, 1007: 'Aus diesem Grunde wurden auch der für die Schweiz eher untypische Aufbau des Gesetzes mit den umfangreichen Begriffsdefinitionen und die europäisch geprägte Terminologie beibehalten'.
39 Botschaft, *supra* note 38, p. 1019: 'Gerade im Hinblick auf die Kompatibilität zur europäischen Regelung und eine künftige gegenseitige Anerkennung wurde die Terminologie und Gesetzestechnik der europäischen Richtlinie in einem Masse übernommen, dass das ZertES ein Stück weit einen Fremdkörper innerhalb der schweizerischen Gesetzgebung bildet'.
40 See Botschaft, *supra* note 37, p. 5695, 5702; Botschaft, *supra* note 38, p. 1007.

In addition, the law of electronic signatures became a rare example of the Swiss legislator adapting Swiss provisions to later amendments of the European *acquis* model; an 'updating' activity not seen in other areas of Switzerland's EU-influenced contract law:[41] During a pending law reform in 2014, the Swiss legislator took note of and partially adjusted its draft[42] in order to better harmonize it with the then draft of the EU eIDAS Regulation of 2014.[43] In this context, the Swiss legislator stressed the desirability of a uniform terminology for new technical phenomena in the field, which was easier achieved by Switzerland following the EU terminology[44] – again, a level playing field consideration.

2.3.3 *Distance Selling Directive, Consumer Sales Directive and e-commerce Directive*

The EC Distance Selling Directive of 1997,[45] the EC Consumer Sales Directive of 1999,[46] which harmonised central questions in the law of consumer sales and in Germany even triggered an unprecedented reform of contract law in general, and also the EC e-commerce Directive of 2000[47] have all remained without much influence on Swiss contract law. Attempts to make provisions of these central directives part of Swiss law were made on two occasions.

Already in 2001, the Swiss government presented a first proposal that would have implemented the core of these three directives into the OR, albeit with certain deviations.[48] Under the inconspicuous label of a 'Federal Law on Electronic Commerce', the proposal in fact contained fundamental changes to Swiss contract law well beyond electronic contracting.[49] In the field of e-commerce, it would have introduced a withdrawal right for consumer online purchases, although under less advantageous conditions than in the Distance Selling Directive;[50] for example, no right of withdrawal would have been given for contracts below CHF 100.[51] Information duties from the Distance Selling and the e-commerce Directives were also included, although less comprehensively, by being limited to essential pieces of information.[52] This deviation from the European *acquis* was criticised in literature from a level playing field perspective, because it would have meant that Swiss companies still had to comply with different rules in transactions with their Swiss customers on the one hand and their EU customers on the other hand.[53]

The proposal would furthermore have affected the OR's general contract law by, for example, amending provisions on contract formation and on the place of performance; changes that were not required by the Distance Selling Directive.[54] Finally, the proposal foresaw the autonomous adoption of the Consumer Sales Directive's provisions on buyers' remedies for the delivery of defective goods and would thereby have changed the traditional, still Roman law-based Art. 197 et seq. OR not only for consumer purchases, but for all sales contracts.[55] In its explanations for this broad reform proposal, the Swiss government on the one hand relied on level playing field considerations,[56] pointing out that the new buyer's right to request repair of defective goods (adoption of Art. 3(3) Consumer Sales Directive) would end the current discrimination of Swiss consumers shopping in Switzerland compared to those shopping in the EU.[57] On the other hand, it relied on quality considerations in citing the Consumer Sales Directive's remedy provisions as a model, although it at the same time referred to the remedy provisions of the CISG.[58]

When this autonomous adoption of three EU directives was put up for public consultation, the reception among Swiss academics was mixed.[59] More importantly, the proposal met with such fierce resistance from the Swiss business community that the government eventually withdrew the proposal.[60] In explaining this step, the government referred to the critique from Swiss businesses and mentioned three reasons for the draft's withdrawal: First, it pointed to the principle of party autonomy underlying Swiss contract law, which reflects that citizens are competent and able to judge what is in their best interest ('*mündige Bürger*'). 'Rights of withdrawal and remedies for the delivery of defective goods do not take this into account and constitute a type of

41 See *supra* 2.2 in fine.

42 Botschaft, *supra* note 38, p. 1007: 'Auch die Kompatibilität der schweizerischen Gesetzgebung mit der europäischen Signaturrichtlinie (Richtlinie 1999/93/EG über gemeinschaftliche Rahmenbedingungen für elektronische Signaturen; nachfolgend: EU-Richtlinie) soll im Hinblick auf eine zukünftige internationale Anerkennung nicht tangiert werden', p. 1019.

43 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, *OJ* L 257, 28 August 2014, p. 73 et seq.

44 Botschaft, *supra* note 38, p. 1015: 'Alleine hätte die Schweiz daher eine solche neue Terminologie kaum einführen können. Im Schlepptau der EU sollte dies aber möglich sein'.

45 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *OJ* L 144, 4 June 1997, p. 19 et seq.

46 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ* L 171, 7 July 1999, p. 12 et seq.

47 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *OJ* L 178, 17 July 2000, p. 1 et seq.

48 Bundesgesetz über den elektronischen Geschäftsverkehr (Teilrevision des Obligationenrechts und des Bundesgesetzes gegen den unlauteren Wettbewerb) – Vernehmlassungsvorlage, Begleitbericht zum Entwurf (Januar 2001), pp. 31-2.

49 G. Spindler, 'Bemerkungen zum geplanten Bundesgesetz über den elektronischen Geschäftsverkehr', *sic!* (2001), 259; F.S. Jörg/O. Arter, 'Ein kritischer Blick auf den Entwurf zum Bundesgesetz über den elektronischen Geschäftsverkehr', *AJP* 2002, 165, 166; Probst, *BJM* (2004), pp. 225, 232-3.

50 Vernehmlassungsvorlage, *supra* note 48, pp. 15-6.

51 Criticism from Honsell/Pietruszak, *AJP* 2001, 771, 781.

52 Vernehmlassungsvorlage, *supra* note 48, pp. 14, 30.

53 Jörg & Arter, *AJP* 2002, 165, 171.

54 Jörg & Arter, *AJP* 2002, 165, 183.

55 Negatively viewed by Honsell & Pietruszak, *AJP* 2001, 771, 787.

56 Honsell & Pietruszak, *AJP* 2001, 771, 781.

57 Vernehmlassungsvorlage, *supra* note 48, p. 7.

58 Vernehmlassungsvorlage, *supra* note 48, pp. 22, 24, 27.

59 For a critical view see Honsell & Pietruszak, *AJP* 2001, 771, 787, 790; Jörg & Arter, *AJP* 2002, 165, 186; for a more positive view see Schwenzer & Fountoulakis, *supra* note 2, para. 1.11.

60 Donauer & Möri, *AJP* 2015, p. 339, 340; Haidmayer, *SJZ* 112 (2016), pp. 1, 4.

patronisation of the consumer by the legislator.'[61] Second, it mentioned that rights of withdrawal and more comprehensive sales law remedies would cause additional costs for enterprises, which they would have to pass on to consumers through higher prices; and third, it found that electronic commerce in Switzerland had in the past developed positively even without the proposed new consumer rights.[62]

In direct reaction to this development, a new reform proposal was presented by a member of the Swiss parliament in 2006, now focusing on the introduction of a right of withdrawal for internet purchases modelled on the Distance Selling Directive, but no longer covering provisions of the Consumer Sales Directive. It was not before 2012 that a parliamentary report on the proposal[63] was published; in the meantime, the EU Consumer Rights Directive[64] had been adopted, replacing and partially reforming the Doorstep Selling and the Distance Selling Directives. The Swiss parliamentary report named the Consumer Rights Directive as background, but also listed the Draft Common Frame of Reference, the draft Common European Sales Law and various foreign domestic laws.[65] In support of the proposed *acquis* adoption, the report mentioned the ongoing political negotiations between Switzerland and the EU about bilateral agreements, in which this topic had been discussed[66] (political considerations), but added that by reforming its consumer law, Switzerland would merely follow the general international development.[67] Regarding the reform's effect for private parties, it argued that Swiss consumers should not be treated worse than EU consumers,[68] and that Swiss enterprises had in any case to respect foreign consumer law when conducting transactions beyond Switzerland's borders[69] (level playing field considerations). Academic authors viewed the proposal positively.[70]

In supporting the proposal, the Swiss government similarly relied on level playing field considerations by pointing out that Swiss consumers and enterprises should not be at a disadvantage compared to their EU counterparts;[71] in addition, the government referred to future negotiations with the EU Commission, which the latter had made dependent on Switzerland adopting the EU consumer law *acquis*[72] (political considerations). In explaining the reform's design in accordance with the Consumer Rights Directive, the government interestingly stressed that it was not aiming at the Directive's autonomous adoption, but at the creation of equivalent rules for international distance sales[73] – an emphasis on level playing field considerations with an apparent rejection of quality considerations.

In the two chambers of the Swiss parliament, by contrast, the proposed withdrawal right for online contracts proved to be highly controversial, resulting in heated discussions. In the end, a compromise restricted the withdrawal right to contracts concluded over the telephone (today's Art. 40b(d) OR), excluding the practically much more important online contracts that are the focus of the EU Directives. The law reform as eventually agreed may therefore qualify as a partial autonomous adoption of the Distance Selling Directive,[74] but cannot hide that the regulatory core of the European *acquis* was not included into Swiss contract law. This outcome has been criticised in parts of Swiss literature[75] for reflecting the lowest common denominator,[76] but has been welcomed by other authors.[77]

2.3.4 *Late Payment Directive*

The EC Late Payment Directive of 2000[78] became part of the legislative discussion in Switzerland in connection with a parliamentary motion of 2008, which – without calling for the Directive's autonomous adoption – proposed an appropriate increase of Switzerland's statutory interest rate, which the law had fixed at 5% since the OR's entry into force in 1881 (Arts. 73(1), 104(1) OR).[79] In supporting the motion, the Swiss government referred to empirical data about payment behaviour in Europe collected by the EU Commission[80]

61 Bundesamt für Justiz, 'Konsumentenschutz wird nicht ausgebaut', Press release of 9 November 2005: 'Widerrufsrechte und Gewährleistungsansprüche tragen dem keine Rechnung und stellen eine Form der Bevormundung des Konsumenten durch den Gesetzgeber dar'.

62 Bundesamt für Justiz, *supra* note 61.

63 Ständerat, Parlamentarische Initiative 'Mehr Konsumentenschutz und weniger Missbräuche beim Telefonverkauf': Bericht der Kommission für Rechtsfragen vom 23. August 2012.

64 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ* L 304, 22 November 2011, p. 64 et seq.

65 Ständerat, *supra* note 63, p. 11 et seq.

66 Ständerat, *supra* note 63, p. 15.

67 Ständerat, *supra* note 63, p. 15.

68 Ständerat, *supra* note 63, pp. 7, 16; accord Donauer & Möri, *AJP* 2015, pp. 339, 349; Haidmayer, *SJZ* 112 (2016), 1, pp. 4-5.

69 Ständerat, *supra* note 63, p. 15 et seq.; Donauer & Möri, *AJP* 2015, pp. 339, 349.

70 Donauer & Möri, *AJP* 2015, pp. 339, 349.

71 Parlamentarische Initiative 'Mehr Konsumentenschutz und weniger Missbräuche beim Telefonverkauf', Bericht der Kommission für Rechtsfragen des Ständerats vom 14. November 2013: Stellungnahme des Bundesrates vom 14. März 2014, *BBl* 2014, pp. 2993, 2997.

72 Stellungnahme des Bundesrates, *supra* note 71, p. 2998.

73 Stellungnahme des Bundesrates, *supra* note 71, p. 3000: 'Dabei geht es nicht um einen Nachvollzug dieser Richtlinie, sondern darum, dass im Interesse sämtlicher Betroffener angesichts der zunehmenden Verflechtungen und der Internationalität gerade im Fernabsatzgeschäft möglichst gleichwertige Regelungen im Konsumentenschutz bestehen'.

74 Probst, *supra* note 6, p. 255.

75 Haidmayer, *SJZ* 112 (2016), 1, p. 9; Schwenzer & Fountoulakis, *supra* note 2, para. 1.11.

76 Haidmayer, *SJZ* 112 (2016), 1, p. 5.

77 F. Delli Colli & L. Rusterholz, 'Das geplante Widerrufsrecht im E-Commerce nach OR', *Jusletter* (8 September 2014), para. 35.

78 Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, *OJ* L 200, 8 August 2000, p. 35 et seq.; Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), *OJ* L 48, 23 February 2011, p. 1 et seq.

79 Motion der freisinnig-demokratischen Fraktion 08.3169 'Stopp dem Zahlungsschlendrian' of 20 March 2008.

80 Bundesamt für Justiz, 08.3169 Mo. Nationalrat (Fraktion RL). Stopp dem Zahlungsschlendrian – Begleitbericht zum Vorentwurf, August 2010, p. 4.

and to the Late Payment Directive itself, describing its contents and the effect it had had on the interest rate provisions in EU States.[81] In addition, the Swiss government drew on a report about the effectiveness of the Late Payment Directive's implementation published by the EU Commission in 2006 in accordance with Art. 6(5) of the Directive,[82] which had found that the Directive's effect in practice had been limited.[83]

Based on these experiences in EU States, the Swiss government concluded that an increase of the Swiss statutory rate of interest would be helpful to reduce late payments, but that a switch to a flexible statutory interest rate (as foreseen in the Directive) would be unsuitably complex in practice.[84] In addition, it argued that additional measures as under discussion within the EU (and subsequently implemented there through the Late Payment Directive's 2011 recast) would go too far for Switzerland.[85] The Directive itself was thus merely identified as the minimum harmonisation background of the EU States' current laws (a level playing field consideration only in a broader sense) and triggered a 'quasi-negative' quality consideration by being essentially rejected as a model, because the EU Commission's report had proven its limited effect in practice.

In the subsequent consultation among Swiss stakeholders, the proposed reform merely generated a lukewarm response. In light of this consultation outcome and, maybe more importantly, the fact that the market interest rate had in the meantime plummeted, so that the suggested fixed statutory interest rate of 10% no longer seemed suitable, the government withdrew the reform plans. In support of this step, it again referred to the report on the Directive's effectiveness[86] and its conclusion that the Directive's provisions alone had been insufficient to combat late payments[87] – in doing so, the Swiss government looked at the European *acquis* in practice rather than the *acquis* 'in the books' in assessing the influence it should have on Swiss law. As the government eventually concluded that – once again – the *acquis* should not be given any influence, the OR still contains a fixed legal interest rate of 5%, as has been the case since 1881.

2.3.5 *Digital Contents Directive and Sale of Goods Directive*

The two most recent EU directives in the field of contract law – the Digital Contents Directive[88] and the Sale of Goods Directive,[89] both issued in 2019 – have not (yet) been autonomously adopted in Switzerland. There can be little doubt that their adoption, in full or in part, will at least be carefully considered by the Swiss government and parliament, but the outcome of this process is difficult to predict. Within Swiss academia, some authors view the Sale of Goods Directive as a useful model for an overdue reform of Switzerland's sales law in Arts. 197 et seq. OR,[90] while others have been sceptical whether Swiss law needs rules as those contained in the two directives.[91] In this context, a particular challenge will arise from the two directives not only imposing a minimum, but a maximum degree of harmonisation, because it must seem unlikely that Switzerland will change its laws to be fully compliant with the directives' content.

2.4 *(Limited) influence on the reform of specific provisions of Swiss contract law*

The failed attempts to autonomously adopt any of the more recent EU contract law directives in Switzerland[92] does not mean that there has been no influence of individual provisions of certain directives in the context of narrower law reforms. Influences of this kind have occasionally been seen, although their extent was in each case very limited:

When the limitation period for buyers' remedies under Swiss sales law (Art. 210(1) OR) was extended from one year to two years, the reform proposal referred to the two-year limitation period in Art. 5(1) EU Consumer Sales Directive.[93] However, the reform's primary model was Art. 39(2) CISG and its two-year cut-off period,[94] and the domestic laws of France and Germany were similarly taken into account.[95]

81 Bundesamt für Justiz, *supra* note 80, pp. 4, 6 et seq.

82 Bericht über die Wirksamkeit der Gesetzgebung in der Europäischen Gemeinschaft für die Bekämpfung von Zahlungsverzug, durchgeführt von Hoche-Demolin-Brulard-Barthélémy für Commission européenne, DG Entreprises, Oktober 2006.

83 Bundesamt für Justiz, *supra* note 80, pp. 10-1.

84 Bundesamt für Justiz, *supra* note 80, p. 15. By contrast, Swiss authors have argued in favour of a flexible interest rate also in Swiss law; see R.H. Weber, 'Neukonzeption der Verzugszinsregelung', in: W. Wiegand, T. Koller & H.P. Walter (eds.), *Tradition mit Weitsicht: Festschrift für Eugen Bucher zum 80. Geburtstag*, Zurich: Schulthess (2009), p. 781, 799.

85 Bundesamt für Justiz, *supra* note 80, p. 11.

86 Bericht, *supra* note 82.

87 Bericht zur Abschreibung der Motion der freisinnig-demokratischen Fraktion 08.3169 'Stopp dem Zahlungsschlendrian' vom 4. April 2012, *BBl* 2012, 4651, 4653.

88 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, *OJ* L 136, 22 May 2019, p. 1 et seq.

89 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, *OJ* L 136, 22 May 2019, p. 28 et seq.

90 Y. Atamer & S. Hermidas, 'Die neue EU-Richtlinie zum Verbrauchsgüterkauf: Regelung, Neuerung und mögliche Ausstrahlung auf das schweizerische Kaufrecht', *AJP* 2020, pp. 48, 62 et seq.

91 Schwenzer & Fountoulakis, *supra* note 2, para. 1.11.

92 See *supra* 2.3.

93 Parlamentarische Initiative 'Mehr Schutz der Konsumentinnen und Konsumenten. Änderung von Artikel 210 OR': Bericht der Kommission für Rechtsfragen des Nationalrates vom 21. Januar 2011, *BBl* 2011, 2889, pp. 2892, 2896; Parlamentarische Initiative 'Mehr Schutz der Konsumentinnen und Konsumenten. Änderung von Artikel 210 OR': Bericht der Kommission für Rechtsfragen des Nationalrates vom 21. Januar 2011 – Stellungnahme des Bundesrates vom 20. April 2011, *BBl* 2011, 3903, p. 3905: 'Besonders zu begrüssen ist, dass damit das schweizerische Recht im Einklang mit Artikel 39 Absatz 4 [sic] des Übereinkommens der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf gebracht wird.'

94 Bericht der Kommission für Rechtsfragen, *supra* note 93, pp. 2892, 2896. On the interaction between Art. 39(2) CISG and domestic limitation periods, see U.G. Schroeter, 'A Time-Limit Running Wild? Art. 39(2) CISG and Domestic Limitation Periods', in: M.B. Andersen & R.F. Henschel (eds.), *A tribute to Joseph M. Lookofsky*, Copenhagen: DJØF (2015), p. 335 et seq.

95 Bericht der Kommission für Rechtsfragen, *supra* note 93, pp. 2892, 2896.

The Consumer Sales Directive's influence remained therefore rather limited,[96] with the Swiss legislator's quality considerations applying to other model provisions to at least the same extent as to the Directive.

In a similar manner, Art. 3 EC Unfair Contract Terms Directive was cited by the Swiss legislator as a source of inspiration when reforming Art. 8 UWG,[97] a provision that for the first time introduced a general fairness test for standard terms in consumer contracts into Swiss law, albeit as part of the law of unfair competition and not in the OR's contract law. In support of this reform (which, in light of Swiss law's traditional reluctance to control standard terms, amounted to a significant novelty), it was pointed out that consumers facing standard terms within the EU are protected by the Unfair Contract Terms Directive's fairness standard; the resulting discrimination of Swiss customers had therefore to be removed by introducing a similar fairness requirement into Swiss law[98] (a typical level playing field consideration). Although the Directive's influence in this context was rather narrow,[99] with its 'grey' and 'black' lists of unfair terms not being made part of Swiss law,[100] it has been argued that the interpretation of Art. 8 UWG must now in principle follow the Directive's Art. 3 and its interpretation by the ECJ.[101]

2.5 *Influence on the academic contract law reform project 'OR2020'*

Finally, mention should be made of a large-scale academic reform project that aimed at a fundamental revision and update of the Swiss Law of Obligations. Under the moniker 'OR2020', a group of 23 academics from all Swiss law faculties worked from 2007 until 2011 on a draft for a revised General Part *(Allgemeiner Teil)* of the Swiss OR, including its contract law provisions. The finalized OR2020 draft text was published in 2012.

Given that OR2020 was an academic project and therefore less directly affected by political factors than law reform proposals in parliament, one could have expected the European *acquis communautaire* to play a more prominent role in this context. And indeed, the explanations accompanying the OR2020 draft readily acknowledged the great significance of the European contract law developing at EU level also for Switzerland.[102] However, the OR2020 materials made similarly clear that the EU's *acquis* had been considered, but not necessarily followed;[103] in addition, it was pointed out that not only EU directives in force had been taken into account,[104] but that inspiration had also been taken from European soft law projects like the Principles of European Contract Law, the UNIDROIT Principles of International Commercial Contracts of 2010, the Draft Common Frame of Reference or the Acquis Principles.[105] Finally, the OR2020 drafters stressed that they had aimed at maintaining the readable and easily understood language that the Swiss OR has traditionally been famous for,[106] intentionally distancing themselves from the technical, almost incomprehensible legislative style and language of the European legislator.[107] As far as consumer protection rules were concerned, the OR2020 draft made it a point to limit itself to a single 'anchor provision' in the OR, relegating all consumer law provisions (including those influenced by EU law) to a separate Consumer Law Act.[108]

The OR2020 draft, which was described by its creators as the start of a broad dialogue that may eventually lead to a formal parliamentary law-making proposal,[109] received a mixed response in Swiss academia[110] – an arguably unsurprising outcome, taking into account the ambitious scope of the suggested reform. On the political level, it was nevertheless soon picked up by parliamentary motions in support of the OR2020 reform,[111] which in turn lead to the Swiss government conducting a broad public consultation about the project.[112] When the consultation resulted in predominantly negative reactions from stakeholders, this sealed OR2020's political fate, and the government opted against presenting a formal legislative reform proposal.[113] It is telling that the explanation for this decision did not mention the project's European angle with a single word.

3. Influences on the interpretation of Swiss contract law

The influence of the European contract law *acquis communautaire* on the Swiss courts' jurisprudence is from the outset subject to stricter requirements than its influence on the legislator, because Swiss judges cannot take the *acquis* into account at their free will, but only as far as Swiss legal methodology allows them to do so.[114] Case law of the Swiss courts, in particular of the Swiss Federal Supreme Court

96 Gauch, Schluep & Schmid, *supra* note 2, para. 22c.
97 Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) vom 2. September 2009, *BBl* 2009, pp. 6171, 6173, 6179; Probst, *supra* note 6, p. 257.
98 Botschaft, *supra* note 97, p. 6169.
99 Gauch, Schluep & Schmid, *supra* note 2, para. 22b.
100 Botschaft, *supra* note 97, p. 6173. Arguing in favour of an introduction of such lists also into Swiss law E.A. Kramer, 'Konzeptionsfragen zur Vertragsinhaltskontrolle', *ZSR* 137 (2018), I, pp. 295, 324.
101 F. Thouvenin, 'Art. 8 UWG: Zur Strukturierung eines strukturlosen Tatbestandes', *Jusletter* (29 October 2012), para. 2.
102 Huguenin & Hilty, *supra* note 2, para. 46.
103 Huguenin & Hilty, *supra* note 2, paras. 46, 47, 53.
104 Huguenin & Hilty, *supra* note 2, para. 50.
105 Huguenin & Hilty, *supra* note 2, para. 52.
106 See Zweigert & Kötz, *supra* note 7, pp. 171-2.
107 C. Huguenin & B. Meise, 'OR 2020: Braucht die Schweiz ein neues Vertragsrecht? – Eine Einführung', *SZW* 2015, p. 280, 290; Huguenin & Hilty, *supra* note 2, para. 29.
108 Huguenin & Hilty, *supra* note 2, para. 49.
109 Huguenin & Hilty, *supra* note 2, para. 8.
110 For a critical assessment, see H. Honsell, 'Kritische Bemerkungen zum OR 2020', *JZ* 2013, 457.
111 See 'Modernisierung des Allgemeinen Teils des Schweizerischen Obligationenrechts': Bericht des Bundesrates in Erfüllung der Postulate 13.3217 Bischof und 13.3226 Caroni vom 31. Januar 2018, no. 1.1.
112 See in detail Bericht des Bundesrates, *supra* note 111, no. 2.1 et seq.
113 Bericht des Bundesrates, *supra* note 111, no. 3.3.
114 Swiss Supreme Court, 25 March 2003 – 4C.316/2002, *BGE* 129 III 335, at no. 6: 'soweit die binnenstaatlich zu beachtende Methodologie eine solche Angleichung zulässt'; E.A. Kramer, *Juristische Methodenlehre*, 5th ed., Bern: Stämpfli (2016), p. 325.

(Bundesgericht), makes frequent references to EU legal acts and ECJ case law where a treaty law obligation authorizes or requires them to take these sources into account, as notably under the 1988/2007 Lugano Conventions on jurisdiction and the recognition and enforcement of judgments or the 1999 Agreement on the Free Movement of Persons between the EU and Switzerland. In the area of contract law, the picture is more mixed.

3.1 *Influence on the interpretation of Swiss contract law provisions autonomously adopting EU Directives*

As far as the interpretation of Swiss contract law provisions autonomously adopting EU Directives – notably those created through the 'Swisslex' program of 1993[115] – is concerned, there is agreement among Swiss legal writers that ECJ case law interpreting the model directives should be taken into account by Swiss courts.[116] The Swiss Supreme Court first confirmed this position in a leading decision of 2003[117] on the interpretation of Art. 333 OR in accordance with the EC Acquired Rights Directive[118] upon which it had been modelled in the 'Swisslex' program: the Court held that Swiss law created by autonomous adoption must be interpreted in accordance with European law, as far as Swiss legal methodology accommodates such an interpretation.[119]

In 2005, the Swiss Supreme Court adopted the same approach when once more interpreting Art. 333 OR.[120] In decisions from 2003 and 2013, the Supreme Court interpreted provisions in the *Pauschalreisegesetz* – another 'Swisslex' progeny – with reference to the EC Package Travel Directive[121] and to related case law of the ECJ;[122] in 2006 and 2011, the same occurred with regard to the *Produktehaftpflichtgesetz* and the EC Product Liability Directive.[123] Overall, *acquis*-compatible interpretations have nevertheless remained quite limited.[124]

Where they occur, they can be viewed as classical historical interpretations of Swiss contract law provisions in light of their respective drafting history.[125] Alternatively, the EC Directives' guiding function can be explained by the purpose of creating an *acquis communautaire*-compatible Swiss law pursued by the Swiss legislator at the time of the Directives' autonomous adoption.[126]

However, the Swiss Supreme Court has held that the goal to interpret autonomously adopting provisions in light of the European *acquis* is not limited to Directives that already existed when the 'Swisslex' program took place, but also extends to later acts of EU law further developing the European law with which harmonization was intended.[127] From this perspective, the *acquis*'s influence upon the interpretation of Swiss law is not of a static, but of a dynamic nature. Legal writers have criticized this approach and argued that post-adoption acts of EU law should only influence Swiss law's interpretation once the Swiss legislator has updated the adopting provisions, but not before.[128]

3.2 *Influence imperio rationis on the interpretation of other Swiss contract law provisions*

It is a different, interesting question whether the European *acquis* has also influenced Swiss case law where no autonomously adopting provisions were involved: If Swiss courts would also refer to EU directives or ECJ judgments in interpreting other Swiss contract law rules, this would arguably indicate the convincing nature of the *acquis* solution for the problem concerned. And while the Swiss Supreme Court has sometimes stressed that Swiss law made without EU law influence must in principle be construed autonomously,[129] the Supreme Court is generally open to comparative law considerations[130] and has also referred to EU legal acts or ECJ cases in the past.[131] However, it is striking that none of these examples concerned the European *acquis* in the area of contract law, but exclusively other fields. Against this background, it cannot be said that the EU's contract law *acquis* has yet had any influence *imperio rationis* on the Supreme Court's interpretation of Swiss contract law.

115 See *supra* 2.1.

116 Gauch, Schluep & Schmid, *supra* note 2, para. 22d; Kramer, *supra* note 114, p. 324 et seq.; Müller, *ibid.*, para. 51; Nyffeler, *supra* note 4, p. 36; also generally acknowledged in Swiss Supreme Court, 11 April 2011 – 2C_343/2010, 2C_344/2010, *BGE* 137 II 199, at no. 4.3.1 (obiter).

117 Nyffeler, *supra* note 4, p. 37; Probst, *supra* note 6, p. 250.

118 See *supra* note 14.

119 See Swiss Supreme Court, 25 March 2003 – 4C.316/2002, *BGE* 129 III 335, at no. 6: 'Nachvollzogenes Binnenrecht ist im Zweifel europarechtskonform auszulegen'.

120 Swiss Supreme Court, 5 August 2005 – 4C.432/2004, *BGE* 132 III 32, at no. 4.2.2.1.

121 Swiss Supreme Court, 26 November 2003 – 4C.233/2003, *BGE* 130 III 182, at no. 5.5.1.

122 Swiss Supreme Court, 10 January 2013 – 4A_450/2012, *BGE* 139 III 217, at no. 2.1.3.

123 Swiss Supreme Court, 19 December 2006 – 4C.298/2006, BGE 133 III 81, at no. 3; Swiss Supreme Court, 18 March 2011 – 4A_16/2011, BGE 137 III 226, at nos. 2.2, 2.3.

124 H. Seiler, 'Einfluss des europäischen Rechts und der europäischen Rechtsprechung auf die schweizerische Rechtspflege', *ZBJV* 150 (2014), pp. 265, 348.

125 Kramer, *supra* note 114, p. 324; Probst, *BJM* (2004), pp. 225, 248-9.

126 Kramer, *supra* note 114, p. 324; Nyffeler, *supra* note 4, pp. 42, 50; Probst, *BJM* (2004), p. 225, 234, 249.

127 Swiss Supreme Court, 25 March 2003 – 4C.316/2002, *BGE* 129 III 335, at no. 6: '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'; Swiss Supreme Court, 5 August 2005 – 4C.432/2004, *BGE* 132 III 32, at no. 4.1.

128 Kramer, *supra* note 114, p. 331-2; Nyffeler, *supra* note 4, pp. 41-2, 52.

129 Swiss Supreme Court, 11 April 2011 – 2C_343/2010, 2C_344/2010, *BGE* 137 II 199, at no. 4.3.1: 'Vom Recht der Europäischen Union unabhängiges schweizerisches Recht ist grundsätzlich autonom auszulegen'.

130 See for example, regarding the law of damages, Swiss Supreme Court, 20 December 2005 – 4C.178/2005, *BGE* 132 III 359, at nos. 3.2, 4.3.1, 4.4.1, 4.4.2; W. Gerhard, 'Die Rechtsvergleichung in der Rechtsprechung des Schweizer Bundesgerichts', *recht* (2004), 91 et seq., Probst, *BJM* (2004), pp. 225, 245.

131 See R. Dummermuth, 'Der Einfluss der Urteile des EuGH auf die schweizerische Rechtsprechung – Eine empirische Analyse der bundesgerichtlichen Praxis', *QFLR* (2/19), 15; Seiler, *ZBJV* 150 (2014), pp. 265, 305.

4. Summary and conclusions

In summary, the above stocktaking has shown that the European *acquis*' influence on Swiss contract law making has – somewhat surprisingly – in essence been limited to the 'Swisslex' program of 1993,[132] with all later attempts to autonomously adopt EU directives in the field eventually having been unsuccessful,[133] save for the narrow sub-topic of electronic signatures.[134] The contract law *acquis*' influence on Swiss case law has been equally limited by affecting the interpretation of autonomously adopting provisions of Swiss contract law,[135] but not extending any further.[136] This is so although the European contract law *acquis* did have a visible influence on reform discussions in Switzerland's contract law and more than once inspired reform proposals that resulted in parliamentary procedures – however, most of these proposals eventually failed in the political process, with the Swiss law maker concluding (often in light of stakeholders' sceptical views expressed in public consultations) that the reasons against 'eurocompatible' contract law provisions weighed heavier than the reasons in favour. The Swiss law maker's position towards the European *acquis* in this field has therefore not been one of ignorance, but one of reasoned dissent.

In trying to assess the reasons for this *status quo*, reference can once more be made to the three categories of potential reasons for an influence of the European *acquis* identified earlier:[137]

4.1 *Political considerations: No longer driving autonomous adoptions of contract law acquis*

Political considerations, notably the creation of a 'eurocompatible' Swiss consumer and contract law in order to signal good will and facilitate political negotiations about Switzerland's closer integration into the EU's common market, were clearly the driving force behind the 'Swisslex' program of the early 1990s.[138] They were therefore the reason for the historically by far most important influence of the European *acquis* in Swiss contract law. Also in recent years, political considerations have sometimes been cited when the Swiss government proposed EU-compatible changes to Swiss contract law, for example in case of the second attempt to adopt the Distance Selling Directive's withdrawal right.[139] However, such arguments have seemingly lost much of their appeal today, and are unlikely to carry significant future alignments with European law. One reason may lie in developments of 2019, when the EU Commission decided to no longer recognize the Swiss legal framework for stock exchanges as 'equivalent' under the MiFIR – not because Swiss law in this area had in any way changed (it had not), but because the then pending political negotiations with Switzerland about a horizontal institutional agreement[140] did not progress to the EU Commission's liking.[141] It is conceivable that this experience may have affected the Swiss perspective on the appropriateness of adapting central rules of Swiss contract law with the aim to generate political favour.

4.2 *Limited role of level playing field considerations*

Level playing field considerations – notably the disadvantageous position or outright 'discrimination' of Swiss consumers and/or enterprises resulting from Swiss contract law being different than the EU's contract law standard – have regularly been cited when eurocompatible law reform proposals were made in Switzerland; level playing field considerations may in fact be the most frequently relied upon argument in this context. At the same time, this standard argument has been much more critically evaluated in the Swiss law-making process than at EU level; a boilerplate statement like the one found in many EU contract law directives ('the objective of this Directive, namely […], cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level …')[142] is, at least in and of itself, unlikely to convince Swiss stakeholders.

Although often cited, level playing field considerations have in the end only rarely carried an autonomous adoption of EU contract law in Switzerland, namely in case of the rules on electronic signatures.[143] In all other reform proposals aiming at alignment with the European contract law *acquis*, the missing level playing field proved an insufficient argument to eventually convince the Swiss legislator. Counterarguments in this context included the significantly greater purchasing power of Swiss consumers in comparison with consumers in the EU, which supposedly militates against treating them equally[144] – an interesting and hardly convincing argument. More to the point has been a reference to the country-of-origin principle in Art. 3 e-commerce Directive which only protects service providers established in EU States, but not providers from Switzerland – as Swiss providers may therefore still need to comply with stricter rules in EU States' laws, the advantages of an eurocompatible Swiss e-commerce regulation remain limited.[145]

4.3 *Negligible quality considerations*

The quality of the European contract law *acquis* and of the solutions provided therein has played an even smaller role in Swiss contract law making, and no role at all in Swiss case law. Where provisions in EU directives were cited as

132 See *supra* 2.2.
133 See *supra* 2.3.
134 See *supra* 2.3.2.
135 See *supra* 3.1.
136 See *supra* 3.2.
137 See *supra* 1.
138 See *supra* 2.2.
139 See *supra* 2.3.3.
140 See already *supra* 1.
141 See Recitals 30, 31 Commission Implementing Decision (EU) 2017/2441 of 21 December 2017 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council, *OJ* L 344, 23 December 2017, pp. 52 et seq.
142 Recital 65 EU Consumer Rights Directive, *supra* note 64.
143 See *supra* 2.3.2.
144 Delli Colli & Rusterholz, *Jusletter* (8 September 2014), para. 35.
145 Jörg & Arter, *AJP* 2002, 165, 186.

a possible model for Swiss contract law, level playing field considerations played a much greater role than the EU provision's quality; in addition, the EU *acquis* was almost always referred to alongside other model rules, as international Conventions (like the CISG) or domestic contract laws. An interesting, more recent example was the Swiss legislator's attempted reform of the Swiss law on interest for late payments, where the focus was less on the Late Payment Directive's provisions than on their effect in practice, as had been evaluated in a report published by the EU Commission:[146] The Directive's quality was thus not judged by its rules in the books, but by their application in practice, allowing the Swiss legislator to take into account whether the potential EU model itself had achieved its own goals. Given that most EU Directives nowadays require the Commission to publish such reports, this may be an advisable approach also for other contract law contexts.

Where rules of the EU's contract law *acquis* were taken as a model (based on whatever considerations), the Swiss law maker has often deviated from the model, indicating a generally less-than-positive assessment of the EU law maker's legislative technique and drafting style.[147] Among the more frequent points of criticism have been the overly detailed provisions in EU directives[148] which required the Swiss legislator to redraft their rules in the simpler Swiss style,[149] and the frequency of changes to consumer rights at EU level, which were regarded as unsuitable for Swiss law.[150] Finally, information duties have generally been more selectively imposed in Swiss consumer law than in EU law, due to a sceptical view of their effectiveness and in order to prevent an information overload.[151]

146 See *supra* 2.3.4.
147 Honsell & Pietruszak, *AJP* 2001, 771; Huguenin & Meise, *SZW* 2015, pp. 280, 290; Huguenin & Hilty, *supra* note 2, para. 29.
148 Honsell & Pietruszak, *AJP* 2001, 771, 785: 'Geschwätzigkeit der EU-Richtlinien…'; Probst, *supra* note 6, p. 254.
149 Probst, *supra* note 6, p. 258.
150 Huguenin & Hilty, *supra* note 2, para. 48; Probst, *supra* note 6, p. 258.
151 Haidmayer, *SJZ* 112 (2016), 1, 8; Jörg & Arter, *AJP* 2002, 165, 182.