E. Beyond the EU: The Expansion of Eurodac and Interoperability

The following part of this study examines a phenomenon that has been observable in connection with Eurodac for some time: the system's expansion to other countries. This development is shaped by political, legal, and practical considerations and has significant implications for access to justice in this context. The use of the Eurodac system, or the collection and exchange of Eurodac-compatible data, within a different legal framework may have considerable implications for the rights of data subjects.

Eurodac and the Interoperability Regulations form part of the Schengen/Dublin *acquis* and are implemented by countries that wish and are permitted to participate in these frameworks without being members of the EU. Such an association is particularly attractive for countries that, due to their geographical location, benefit from a certain degree of protection by other EU Member States against irregular migration, such as Norway, Liechtenstein, or Switzerland – and potentially someday the UK. Switzerland has maintained an extensive network of bilateral agreements with the EU for many years and is part of the Schengen/Dublin *acquis*. At the same time, Switzerland is not a member of the EU, and accordingly many core instruments of EU law – such as the GDPR or the CFR – are, in principle, not applicable. This gives rise to complex questions regarding the implementation of the Eurodac and Interoperability Regulations and the realisation of access to justice for data subjects in Switzerland. Switzerland thus serves as an interesting case study that offers insight into the challenges and chances the adoption of the Eurodac system poses in countries closely associated with the EU.

Moreover, the EU has a strategic interest in encouraging neighbouring third countries – often considered transit states for asylum seekers and migrants – to collect and process migrant data in systems that are compatible with Eurodac. This facilitates the return of such individuals to these countries and potentially provides the EU with valuable information through data exchange. While this does not amount to integration of these states into the Schengen/Dublin *acquis* – as in the case with Switzerland – it nevertheless represents a gradual expansion of the Eurodac system and a continuing externalisation and data-driven control of migration. These de-

velopments are continuously advanced. The EU funds projects, for example in the Western Balkans as well as in North and West African states. This study examines, by way of example, recent developments in the Western Balkans, commonly referred to as "Balkandac".

I. Schengen/Dublin-Associated Countries: The Case of Switzerland

1. Schengen/Dublin-Associated Countries

This study has primarily focused on EU law, referring to 'Member States' when discussing the states concerned with the Eurodac and Interoperability Regulations, in line with the terminology used in the regulations and directives examined. However, the legal landscape in which the issues addressed arise is more complex than such formulations may imply. Not all 26 EU Member States fully implement the Schengen *acquis*. Cyprus and Ireland are not part of the Schengen *acquis*.[1992] On the other hand, Iceland, Norway, Switzerland, and the Principality of Liechtenstein are associate members of the Schengen *acquis* but are not members of the EU.[1993] They are part of the EFTA and implement the Schengen *acquis* through specific agreements.[1994]

Some of the information systems, which will be linked through interoperability, are a development of the Schengen *acquis*, namely SIS, VIS, EES, and ETIAS. Other information systems, instead, are not part of the Schengen *acquis*, explicitly Eurodac and ECRIS-TCN. Because of this difference in participation in the underlying information systems of some Member States and the Schengen associated countries, it was necessary to provide for two Interoperability Regulations.[1995] All EU Member States, except Ireland, and the four Schengen associated countries Iceland, Liechtenstein, Norway, and Switzerland apply the Interoperability Regulations.[1996]

1992 Bulgaria and Romania joined the Schengen *acquis* on 31 March 2024.

1993 'The Schengen Area' (*EUR-Lex*, 16 January 2023) <https://eur-lex.europa.eu/EN/legal-content/summary/the-schengen-area.html>.

1994 For Switzerland see 'Bilaterale Abkommen II (2004)' (*EDA*, 5 September 2023) <https://www.eda.admin.ch/europa/de/home/bilateraler-weg/bilaterale-abkommen-2.html>; for other Agreements see 'The Schengen Area' (n 1993).

1995 'Interoperability' (*European Commission, Migration and Home Affairs*) <https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/interoperability_en>.

1996 ibid.

The Eurodac Regulation has historically been linked with the Dublin Agreement. It is therefore part of the Dublin/Eurodac *acquis*.[1997] All EU Member States and the four Schengen associated states are part of the Dublin/Eurodac *acquis*.[1998] Countries that take part in the Dublin/Eurodac *acquis* as well as the Schengen *acquis,* are all part of the so-called Schengen/Dublin *acquis* or 'Schengen/Dublin system'. This study has often referred to the Schengen Area, by which it means all the countries participating in the Schengen/Dublin system.

The Schengen and Dublin *acquis* have always been closely linked in legal terms. Now, they overlap even more due to interoperability. The first part of this chapter examines the particular issues and challenges that arise in connection with access to justice in countries that are not part of the EU but participate in the Schengen/Dublin *acquis* as associated states. The agreements that the EU has with these countries differ in key respects but also raise similar problems. This chapter focuses on one associated country, Switzerland, as an example.

2. Applicability of the Relevant EU Law in Switzerland

a) *Bilateral Agreements between the EU and Switzerland*

aa) Development of Bilateral Relations

Economic and legal cooperation between the EU and Switzerland has a long tradition. As early as the 1970s, the EFTA states initially negotiated bilateral free trade agreements with what was then called the European Economic Community (EEC). The free trade agreement between the EEC

1997 cf 'Eurodac" System' (*EUR-Lex*, 11 August 2010) <https://eur-lex.europa.eu/EN/legal-content/summary/eurodac-system.html>.

1998 2008/147/EC: Council Decision of 28 January 2008 on the Conclusion on Behalf of the European Community of the Agreement between the European Commuity and the Swiss Federation Concerning the Criteria and Mechanisms for Establishing the State Reponsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland [2008] OJ L53/3; 2001/258/EC: Council Decision of 15 March 2001 Concerning the Conclusion of an Agreement between the European Commuity and the Republic of Iceland the the Kingdom of Norway Concerning the Criteria and Mechanisms for Establishing the State Reponsible for Examining a Request for Asylum Lodged in a Member State or Iceland or Norway [2001] OJ L93/38.

and Switzerland dates back to 1972.[1999] However, it was only after Switzerland rejected accession to the European Economic Area (EEA), of which the EU and all other EFTA states are part, in a referendum in 1992, that negotiations for a further bilateral approach between Switzerland and the EU began.[2000] The Bilateral Agreements I were signed in 1999. These include seven agreements, which – with the exception of one research agreement – supplement the free trade agreement of 1972 (and the insurance agreement of 1989) through a gradual and controlled mutual market liberalisation.[2001] A second package of nine agreements was signed in 2004 under the title Bilateral Agreements II. These go beyond the mainly economic framework of the Bilateral Agreements I. Further, they include justice and home affairs, visas and asylum, environment, culture, and education.[2002]

As part of this second round of agreements, Switzerland and the European Community (EC) signed the Agreement between Switzerland, the EU, and the EC on Switzerland's association with the implementation, application, and development of the Schengen *acquis* (SAA).[2003] It entered into force in 2008 and enables Switzerland to participate in the Schengen *acquis* and its further development, similar to a Member State. Switzerland is associated with the activities of the EU in the areas covered by the

1999 Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Wirtschaftsgemeinschaft [1973] SR 0.632.401; cf also Matthias Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (EIZ Publishing 2020), no 19ff.

2000 Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 27 ff.

2001 ibid, no 27. The Bilateral II Agreements include agreements on: Schengen/Dublin, automatic exchange of information AEOI (former agreement on the taxation of savings income), combating fraud, processed agricultural products, creative Europe, environment, statistics, pensions, education, professional training, youth (see 'Bilaterale Abkommen II (2004)' (n 1994)).

2002 Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 29; the Bilateral I Agreements include agreements on: Free movement of persons, technical barriers to trade, public procurement, agriculture, research, air transport and land transport (see 'Bilaterale Abkommen I (1999)' (*EDA*, 21 August 2023) <https://www.eda.admin.ch/europa/de/home/bilateraler-weg/bilaterale-abkommen-1.html>).

2003 Abkommen zwischen der Europäischen Union, der Europäischen Gemeinschaft und der Schweizerischen Eidgenossenschaft über die Assoziierung dieses Staates bei der Umsetzung, Anwendung und Entwicklung des Schengen-Besitzstands [2008] SR 0.362.31 (Schengen Assoziierungs-Abkommen (SAA)); cf Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 244.

SAA.[2004] It is obliged to implement and apply the provisions of the Schengen *acquis* (listed in Annexes A and B), which apply to the EU Member States.[2005] With regard to Switzerland, the Interoperability Regulations were considered part of the Schengen *acquis*,[2006] even though, as stated above, not all of the databases linked with it are part of the Schengen *acquis*. Based on the SAA, Switzerland has undertaken to adopt all legal acts that the EU has adopted since the signing of the SAA, as a further development of the Schengen *acquis*, and to incorporate them into Swiss law where necessary.[2007] A special procedure has been created for this purpose.[2008] In this manner, Switzerland adopted the Interoperability Regulations.

In 2004, Switzerland and the European Community (EC) signed the Dublin Agreement on the criteria and mechanisms for determining the state responsible for examining an asylum application lodged in a Member State or Switzerland (DAA).[2009] It entered into force in 2008 and enables Switzerland to participate in the Dublin/Eurodac *acquis* and its further development, in a manner similar to a EU Member State. Switzerland is obliged to implement the regulations of the Dublin/Eurodac *acquis* and apply them in its relations with the EU Member States; the latter in turn apply

2004 SAA, Art 1.

2005 ibid, Art 2.

2006 Schweizerische Eidgenossenschaft, 'Erläuternder Bericht zur Übernahme und Umsetzung der Rechtsgrundlagen für die Herstellung der Interoperabilität zwischen EU-Informationssystemen in den Bereichen Grenze, Migration und Polizei (Verordnungen [EU] 2019/817 Und [EU] 2019/818) - Weiterentwicklung des Schengen-Besitzstands' (2019) 2: "Die beiden EU-Interoperabilitätsverordnungen wurden der Schweiz am 21. Mai 2019 als Weiterentwicklung des Schengen-Besitzstands notifiziert" (the two EU Interoperability Regulations were notified to Switzerland on 21 May 2019 as a further development of the Schengen *acquis*).

2007 SAA, Art 2(3); cf also 'Erläuternder Bericht zur Übernahme und Umsetzung der Rechtsgrundlagen für die Herstellung der Interoperabilität zwischen EU-Informationssystemen in den Bereichen Grenze, Migration Und Polizei (Verordnungen [EU] 2019/817 Und [EU] 2019/818) - Weiterentwicklung des Schengen-Besitzstands' (n 2006) 9.

2008 cf SAA, Art 7.

2009 Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Gemeinschaft über die Kriterien und Verfahren zur Bestimmung des zuständigen Staates für die Prüfung eines in einem Mitgliedstaat oder in der Schweiz gestellten Asylantrags [2008] SR 0.142.392.68 (Dublin-Assoziierungs-Abkommen (DAA)). As a pretext to this, in 2000 and 2003, the Eurodac Regulation 2000 and Dublin II Regulation entered into force. This laid the foundations for the current Dublin system.

these regulations in their relations with Switzerland.[2010] It is crucial for the proper functioning of the Dublin/Eurodac *acquis* that new Dublin-relevant EU legal acts are incorporated into the Dublin Agreement in a timely and straightforward manner. To this end, the agreement contains a mechanism for dynamically incorporating new legal acts into the annexes.[2011] Switzerland has adopted the recently revised Eurodac Regulation of 2024 (together with other regulations of the EU Asylum Pacts, such as the AMMR) and is in the process of implementing it.[2012]

The legal fates of the Schengen and Dublin Agreements are intertwined; one agreement is only applied if the other is as well.[2013] If Switzerland does not agree to the adoption of new legislation that is part of the Schengen/Dublin *acquis* and was notified to Switzerland by the EU, the situation will be as follows: if the Joint Committee[2014] does not reach a consensual solution within 90 days, the agreement in question will be deemed terminated. By virtue of the connection between the two agreements,[2015] the termination will also apply to the other agreement.[2016]

2010 DAA, Art 1.

2011 cf ibid, Art 4; also: Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 93ff and no 280.

2012 cf 'Vernehmlassung 2024/46 - Übernahme und Umsetzung der Rechtsgrundlagen zum EU-Migrations- und Asylpakt (Weiterentwicklungen des Schengen/Dublin-Besitzstands)' (*EDA*, 31 May 2024) <https://fedlex.data.admin.ch/eli/dl/proj/2024/46/cons_1>; 'Verordnungsanpassungen aufgrund der Übernahme des EU-Migrations- und Asylpakts; Eröffnung des Vernehmlassungsverfahrens. Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens' (*SEM*, June 2025) <https://www.sem.admin.ch/sem/de/home/sem/rechtsetzung/vo-anpassungen-eu-migrationspakt.html?utm.com>.

2013 cf Preamble of the SAA and DAA, and SAA, Art 15(4), DAA, Art 14(2); cf also Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 245.

2014 See on Joint Committees: DAA, Art 2 and SAA, Art 6 (quoting both legislations): "When drafting new legislation in an area covered by this Agreement, the Commission shall informally consult experts from Switzerland in the same way as it consults experts from the Member States for the preparation of its proposals."

2015 DAA, Art 14(2), SAA, Art 15(4).

2016 SAA, Art 7, DAA, Art 4. In 2009, a facultative referendum was held on the Schengen-related introduction of biometric passports and travel documents and the adoption of Council Regulation (EC) No 2252/2004 of 13 December 2004 on Standards for Security Features and Biometrics in Passports and Travel Documents Issued by Member States [2004] OJ L385/1; voters approved the proposal by a wafer-thin margin of 50.1 % of the votes cast. In 2019, a referendum was held against the adoption of Directive (EU) 2017/853 amending the Weapons Directive

bb) Applicability and Interpretation of the Bilateral Agreements

As part of the Schengen/Dublin *acquis*, i.e., the Bilateral Agreements II, the Eurodac Regulation and the Interoperability Regulations qualify as international law. Authorities applying these EU law regulations are required to interpret and apply them – as far as possible within the framework of the recognised methods of interpretation – taking into account the relevant international law.[2017] Interpretation in conformity with international law finds its normative basis in the international law principle of compliance with treaties, *pacta sunt servanda*, and in the international right to precedence over domestic law, according to Art. 26 and 27 Vienna Convention on the Law of Treaties (VCLT).[2018] These maxims of interpretation are also applicable in the context of the Bilateral Agreements.[2019]

aaa) *Schubert-Practice*

The application of international law and its relation to national law in Switzerland is complex and much debated, due to a provision in the Federal

91/477/EEC into the SAA; 63.7 % of voters voted in favour of the adoption and the implementing legislation.

2017 Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 54; cf also Gil Carlos Rodriguez Iglesias, 'Der EuGH und die Gerichte der Mitgliedstaaten - Komponenten der Richterlichen Gewalt in der Europäischen Union' 53 Neue juristische Wochenschrift 1889; Hans Christoph Grigoleit and Jörg Neuner (eds), 'Die Richtlinienkonforme Auslegung und Rechtsfortbildung im System der Juristischen Methodenlehre', *Claus-Wilhelm Canaris, Gesammelte Schriften* (De Gruyter 2012); Hofmann, Rowe and Türk, *Administrative Law and Policy of the EU* (n 1848); see also on the interpretation in conformity with international law in EU law, Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953, paras 11 - 18 and in Swiss law, Schweizerisches Bundesgericht (BGE), 94 I 669, Urteil vom 22. November 1968, 678.

2018 Vienna Convention on the Law of Treaties [1980] (VCLT).

2019 Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 54; Thomas Cottier and Erik Evtimov, 'Probleme des Rechtsschutzes bei der Anwendung der Sektoriellen Abkommen mit der EG' in Matthias Oesch (ed), *Die sektoriellen Abkommen Schweiz-EG - Ausgewählte Fragen zur Rezeption und Umsetzung der Verträge vom 21. Juni 1999 im schweizerischen Recht* (Stämpfli Verlag AG 2002) 188–189; Christa Tobler and Jacques Beglinger, *Grundzüge des Bilateralen (Wirtschafts-)Rechts Schweiz – EU. Systematische Darstellung in Text und Tafeln* (Dike Verlag 2013), para 100.

Constitution, Art. 190.[2020] In principle, however, it can be argued that international law takes precedence in Switzerland, as stated by the Vienna Convention.[2021] The federal legislator is, however, not prevented from intentionally deviating from an obligation under international law. In such cases, the authorities applying the law are required to accept the legislator's decision and prioritise the domestic provision that conflicts with international law, in accordance with the so-called 'Schubert-practice' (Schubert-*Praxis*).[2022] This option does not exist in two cases: human rights guarantees under international law, i.e., in particular the ECHR, take precedence over federal laws, in any case.[2023] Furthermore, the 'Schubert-practice' does not apply in relation to the obligations entered into by Switzerland under the Agreement on the Free Movement of Persons (AFMP).[2024] Even a deliberate disregard of the treaty obligations by the legislator does not change this, as the Federal Supreme Court explained in an *obiter dictum* in a judgment in 2015.[2025]

2020 The provision in the Federal Constitution of the Swiss Confederation [2000] SR 101, Art 190 states: "The Federal Supreme Court and the other judicial authorities apply the federal acts and international law." See for a discussion of Art. 190 of the Federal Constitution, Helen Keller, *Rezeption des Völkerrechts. Eine rechtsvergleichende Studie zur Praxis des U.S. Supreme Court, des Gerichtshofes der Europäischen Gemeinschaften und des schweizerischen Bundesgerichts in ausgewählten Bereichen* (Springer Berlin 2003) 13, 348ff; Thomas Scherrer, *Geschichte und Auslegung des Massgeblichkeitsgebots von Art. 190 BV* (Universität St Gallen, Institut für Rechtswissenschaft und Rechtspraxis 2001).

2021 cf Federal Constitution of the Swiss Confederation, Art 5(4), stating that: "The Confederation and the Cantons shall respect international law"; also: Giovanni Biaggini, 'Titel 1 - Allgemeine Bestimmungen', *Bundesverfassung der Schweizerischen Eidgenossenschaft - Kommentar* (2nd edn, Orell Füssli 2017), para 29 - 35.

2022 The "Schubert-practice" was conceived in BGE 99 Ib 39, Urteil vom 2. März 1973, E. 3/4.

2023 So-called "PKK counter-exception", as stated in: BGE 125 II 417, Urteil vom 26. Juli 1999, E. 4d.

2024 So-called "AFMP counter-exception", as stated in: BGE 142 II 35, Urteil vom 26. November 2015, E. 3.2.

2025 ibid, E. 3.2. This is justified, among other things, by the argument that the law of the Bilateral Agreements in the EU Member States takes precedence over the respective national law due to the primacy of EU law (TEU, Art 4(3)). With reference to the decisions of the ECJ in Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] and Case 6-64 *Flaminio Costa v ENEL* [1964] ECR 1, the Federal Supreme Court states that even in individual cases a deviation is out of the question because the Bilateral Agreements on the realisation of the partially assumed fundamental

In 2022, the Federal Supreme Court extended the unconditional precedence of international law to a provision in the Dublin Association Agreement.[2026] In this case, the Federal Supreme Court declared a provision in the Foreign Nationals and Integration Act (FNIA),[2027] which stipulated a maximum detention period of three months for unruly behaviour, to be inapplicable. This decision was based on the fact that Art. 28(3) Dublin III Regulation allowed for a maximum detention period of only six weeks.[2028] The Federal Supreme Court stated that the exception, i.e., the 'Schubert-practice', does not apply from the outset if Switzerland's obligations under human rights (law) or the free movement of persons are in question – as, in this case, in the context of a deprivation of liberty. It further stated that, according to Art. 1 III in conjunction with I DAA – except for the procedure under Art. 4 DAA – the provisions of the Dublin III Regulation are "accepted, implemented and applied" by Switzerland. Accordingly, national provisions are to be interpreted in accordance with the requirements of Art. 28 Dublin III Regulation, taking into account the

freedoms are about an approximation of the legal system in the form of sectoral participation in the internal market.

2026 BGE 148 II 169, Urteil vom 11. März 2022; see for more on this Astrid Epiney, 'Ist die "Schubert-Rechtsprechung" noch aktuell? Zur Frage des Verhältnisses zwischen Völker- und Landesrecht' (2023) 6 Aktuelle Juristische Praxis (AJP) 703–707; Matthias Oesch, *Der EuGH und die Schweiz* (1st edn, EIZ Publishing 2023) 105, no 95ff.

2027 Bundesgesetz über die Ausländerinnen und Ausländer und über die Integration [2005] SR 142.20 (AIG) (Federal Act on Foreign Nationals and Integration - FNIA).

2028 BGE 148 II 169 (n 2026), E. 5.2ff.

practice of the CJEU.[2029] The application of Art. 76a IV FNIA contrary to Art. 28(3) Dublin III Regulation was therefore unlawful.[2030]

What is interesting in this case is that the Federal Supreme Court speaks of "obligations under human rights" and does not mention the ECHR. It remains unclear which human rights obligations in particular were relevant to the Federal Supreme Court's decision: Art. 28 Dublin III Regulation,

2029 ibid, E. 5.2: "Die entsprechende Auffassung verletzt Bundesrecht: In Übereinstimung mit Art. 27 des Wiener Übereinkommens vom 23. Mai 1969 über das Recht der Verträge gehen in der Rechtsanwendung völkerrechtliche Normen widersprechendem Landesrecht vor […]. Dieser Grundsatz könnte nach einer älteren - weitgehend nicht mehr anwendbaren - Rechtsprechung lediglich allenfalls eine Ausnahme erfahren, wenn der Gesetzgeber bewusst die völkerrechtliche Verpflichtung missachten und insofern die politische Verantwortung hierfür übernehmen will […]. Die Ausnahme gilt nach der Rechtsprechung jedoch von vornherein nicht, wenn - wie hier im Rahmen eines Freiheitsentzugs - menschen- oder freizügigkeitsrechtliche Verpflichtungen der Schweiz infrage stehen […]; diesfalls geht die völkerrechtliche Norm der abweichenden nationalen Regelung gemäss der Rechtsprechung auch dann vor, wenn der schweizerische Gesetzgeber davon abweichen wollte […]. Gemäss Art. 1 Abs. 3 i.V.m. Abs. 1 DAA werden - das Verfahren nach Art. 4 DAA vorbehalten - die Bestimmungen der Dublin-Verordnung von der Schweiz „akzeptiert, umgesetzt und angewendet" […]. Die nationalen Bestimmungen sind dementsprechend in Übereinstimmung mit den Vorgaben von Art. 28 Dublin-III-Verordnung in Berücksichtigung der Praxis des EuGH zu dieser Bestimmung auszulegen […]; ist dies nicht möglich, geht Art. 28 Dublin-III-Verordnung dem nationalen Recht vor; es verbleibt kein Raum für die Anwendung der "Schubert-Praxis" […]". (The corresponding view violates federal law: In accordance with Art. 27 of the Vienna Convention on the Law of Treaties of 23 May 1969, international law takes precedence over conflicting national law in the application of the law [...]. According to older case law - largely no longer applicable - this principle could only be subject to an exception if the legislator deliberately disregards the obligation under international law and thus wishes to assume political responsibility for this [...]. According to case law, however, the exception does not apply from the outset if - as in this case in the context of a deprivation of liberty - Switzerland's obligations under human rights or the free movement of persons are in question [...]; in this case, according to case law, the international law norm takes precedence over the deviating national regulation even if the Swiss legislator wanted to deviate from it [...]. Pursuant to Art. 1 para. 3 in conjunction with para. para. 1 DAA - subject to the procedure under Art. 4 DAA - the provisions of the Dublin Regulation are "accepted, implemented and applied" by Switzerland [...]. Accordingly, the national provisions must be interpreted in accordance with the requirements of Art. 28 Dublin III Regulation, taking into account the practice of the ECJ on this provision [...]; if this is not possible, Art. 28 Dublin III Regulation takes precedence over national law; there is no room for the application of the "Schubert-practice" [...].).

2030 BGE 148 II 169 (n 2026), E. 6.1.

which frequently references the CFR and ECHR in its recitals; Art. 6 CFR – cited by the ECJ in its landmark judgment in Khir Amayry[2031] while interpreting Art. 28 Dublin III Regulation; or Art. 5 ECHR. Art. 5 ECHR was relevant in the proceedings before the Administrative Court of the Canton of Thurgau, although it was not considered in the proceedings before the Federal Supreme Court, despite the fact that the preamble to the Dublin Agreement on Asylum (DAA) mentions the ECHR.[2032] This question will be analysed later in this chapter. For the time being, it should be noted that, in Switzerland, the DAA may take precedence over national law. The SAA takes precedence over national law insofar as fundamental rights entailed in the ECHR are at issue.

bbb) *Direct Applicability*

Administrative authorities and courts in Switzerland as well as in the EU affirm the direct applicability of an international treaty, provided that the nature and structure of the treaty do not preclude direct applicability, and the provision in question is sufficiently specific and unconditionally formulated; in short, the provision has to be justiciable.[2033]

The Bilateral Agreements form an integral part of the European and Swiss legal order; transformation acts are not necessary.[2034] The CJEU generously affirms the direct applicability of the Bilateral Agreements.[2035] The Swiss Federal Administrative Court has stated that it is up to Switzerland, through its courts, to resolve the question of the direct applicability of a particular provision of the Dublin Agreement or of a regulation referred to in it.[2036] The authorities in Switzerland apply the Dublin/Eurodac *acquis*

2031 Case C-60/16 *Mohammad Khir Amayry v Migrationsverket* [2017] OJ C 382/15.

2032 Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 96.

2033 ibid, no 56; In general on direct applicability in EU law: Keller, *Rezeption des Völkerrechts* (n 2020) 500, 608; Matthias Oesch, *Europarecht, Band I: Grundlagen, Institutionen, Verhältnis Schweiz-EU* (2nd edn, Stämpfli Verlag AG 2019), paras 809-817; in Swiss case law: BGE 136 II 297, Urteil vom 31. August 2010, E. 8.

2034 Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 51.

2035 ibid, no 57.

2036 Tribunal administratif fédéral suisse (TAF) E-6525/2009, Arrêt du 29 juin 2010, E. 5.3: "Il appartient à la Suisse, par l'entremise de ses tribunaux, de résoudre la question de l'applicabilité directe de telle ou telle disposition de l'AAD, respectivement d'un règlement auquel renvoie cet accord." (It is up to Switzerland,

or, rather, the Eurodac Regulation, directly.[2037] Implementation into national law is only done very selectively. The same goes for the Interoperability Regulations, which have been transposed more comprehensively into Swiss law, as will be discussed below; they are nevertheless directly applicable, insofar as their provisions are justiciable.[2038] Provisions translated into Swiss law must be interpreted in accordance with Switzerland's obligations under international law, within the meaning of the secondary law of the EU.[2039]

ccc) *Parallel Interpretation*

The Bilateral Agreements are, in general, interpreted on the basis of the methods of interpretation in accordance with Art. 31–33 VCLT. These provisions codify applicable customary international law.[2040] Various provisions of the Bilateral Agreements are worded similarly or identically to the parallel provisions in EU law. In this case, it should be clarified whether such parallel provisions should be interpreted in the same way as in the EU, or whether an autonomous interpretation should be adopted.

When interpreting free trade and association agreements between the EU and third countries, the CJEU has consistently emphasised that a parallel interpretation may be warranted. This is especially true when the purpose and context of the treaty provision – particularly regarding the depth of integration into the EU legal framework intended for Switzerland – are

through its courts, to resolve the question of the direct applicability of a particular provision of the DAA, or of a regulation referred to in that agreement.)

2037 'Botschaft zur Genehmigung der Bilateralen Abkommen zwischen der Schweiz und der Europäischen Union, einschliesslich der Erlasse zur Umsetzung der Abkommen ("Bilaterale II")' (2004) BBI 2004 5965, 6300.

2038 'Botschaft zur Genehmigung und Umsetzung der Notenaustausche zwischen der Schweiz Und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU-Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' (2020) BBI 2020 7983, 8022.

2039 BGE 142 II 35 (n 2024), E. 4.1.

2040 BGE 149 II 129, Urteil vom 21. Dezember 2022, E. 6.1; TAF 133 V 329, Arrêt du 4 juillet 2007, E. 8.4; BGE 132 V 53, Urteil vom 9. Januar 2006, E. 6.3; Case C-70/09 *Alexander Hengartner, Rudolf Gasser v Landesregierung Vorarlberg* [2010] OJ C 246/5, para 36; Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 77.

comparable to those of the relevant Community or EU law provision.[2041] If a bilateral standard or provision is worded in a similar or identical way to the parallel provision in EU law, and the purpose as well as context of the norms are comparable, the CJEU – at least with regard to its more recent practice – appears to presume a parallel interpretation.[2042] This is also evident in the practice of the Federal Supreme Court. The Court interprets the Bilateral Agreements, which are rooted in EU law and aim to integrate Switzerland into the Union legal framework. It does so by employing specific EU law interpretation methods and considering the precedents set by the CJEU regarding parallel Union provisions.[2043]

The Schengen/Dublin Association Agreements address the interpretation of secondary EU law directly but without stipulating a binding effect.[2044] The agreements state that the aim is to achieve an application and interpretation of the provisions it refers to that is as uniform as possible,[2045] and that case law from both sides will be exchanged for this purpose. These provisions are *leges speciales* in relation to Art. 31–33 VCLT. Switzerland submits, on a yearly basis, a report to the Joint Committees on how its authorities have interpreted and applied the provisions.[2046]

2041 BGE 139 II 393, Urteil vom 22. März 2013, 398, E. 4.1.1. This practice, which is now decades old goes back to the Polydor judgment, Case C-270/80 *Polydor Limited and RSO Records Inc v Harlequin Records Shops Limited and Simons Records Limited* [1982] ECR 329 (and is accordingly referred to as the Polydor principle); see for more on this Astrid Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' in Bernhard Altermatt and Gilbert Casasus (eds), *50 Jahre Engagement der Schweiz im Europarat 1963-2013* (2013) 147; Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 81; Astrid Epiney, Beate Metz and Benedikt Pirker, *Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz: ein Beitrag zur rechtlichen Tragweite der 'Bilateralen Abkommen'* (Schulthess 2012) 169ff.

2042 Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 82; similar but more cautious: Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 143 and 146ff.

2043 See in particular BGE 136 II 5, Urteil vom 29. September 2009, E. 3.4; also: BGE 139 II 393 (n 2041), E. 4.1.1; with regard to the Dublin Agreement see Schweizerisches Bundesverwaltungsgericht (BVGer) E-594/2015, Urteil vom 2. Juli 2015, E. 6.4; cf also Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 83; Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 147.

2044 SAA, Art 8 and 9; DAA, Art 5 and 6.

2045 SAA, Art 8; DAA, Art 5.

2046 SAA, Art 9; DAA, Art 6.

It is unclear whether this parallel interpretation, as provided for in the SAA and DAA, should also include the case law of the CJEU. According to the Swiss Federal Supreme Court, only the case law of the CJEU that arose prior to the signing of the agreements is to be regarded as binding. The Swiss Federal Supreme Court ruled that, according to Art. 16(2) AFMP, it shall not deviate lightly from the CJEU's interpretation of provisions of EU law relevant to the agreement, but only if there are "valid" reasons for doing so.[2047]

There is no obligation to follow newer case law of the CJEU, i.e., the case law after the signing of the agreement. The Court writes that, with regard to new developments, there is no obligation to comply with Art. 16 para. 2 AFMP, but at most a requirement to take account of these developments, in the sense that they should not be disregarded "without objective reasons".[2048] Instead of an obligation to comply, there is an imperative to ob-

2047 BGE 139 II 393 (n 2041), E. 4.1.1: "Gemäss Art. 16 Abs. 2 FZA ist für die Anwendung des Freizügigkeitsabkommens die einschlägige Rechtsprechung des EuGH vor dem Zeitpunkt der Unterzeichnung (21. Juni 1999) massgebend. […] weicht das Bundesgericht praxisgemäss von der Auslegung abkommensrelevanter unionsrechtlicher Bestimmungen durch den EuGH nicht leichthin, sondern nur beim Vorliegen "triftiger" Gründe ab […]". (According to Art. 16 para. 2 AFMP, the relevant case law of the CJEU prior to the date of signature (21 June 1999) is decisive for the application of the Agreement on the Free Movement of Persons. [...] in practice, the Federal Supreme Court does not deviate from the CJEU's interpretation of provisions of EU law relevant to the Agreement lightly, but only if there are 'valid' reasons [...].); cf also BGE 136 II 5 (n 1973), E. 3.4 and BGE 136 II 65, Urteil vom 1. Januar 2010, E. 3.1.

2048 BGE 139 II 393 (n 2041), E. 4.1.1: "Bezüglich "neuer" Entwicklungen besteht gestützt auf Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit [2002] SR 0.142.112.681 (Freizügigkeitsabkommen - FZA), Art 16(2), keine Befolgungspflicht, sondern höchstens ein Beachtungsgebot in dem Sinn, dass diese nicht ohne sachliche Gründe unbeachtet bleiben sollen, aber aus der Sicht der Vertragspartner auch nicht zu einer nachträglichen Änderung des Vertragsinhalts führen dürfen". (With regard to 'new' developments, based on the Agreement between the Swiss Confederation on the one hand and the European Community and its Member States on the Free Movement of Persons [2002] SR 0.142.112.681 (Agreement on the Free Movement of Persons - FMPA), Art 16(2), there is no obligation to comply, but at most a requirement to take account of them in the sense that they should not be disregarded without objective reasons, but from the point of view of the contracting parties they must not lead to a subsequent amendment of the content of the agreement').

serve.[2049] From the point of view of the contracting parties, developments after the agreement is signed must not lead to a subsequent amendment of the content of the agreement.[2050]

In the practice of the Swiss Federal Supreme Court, this so-called 'date limit', i.e., the distinction between old and new case law of the CJEU, plays a subordinate role. The Federal Supreme Court regularly takes into account new precedents of the CJEU. In a later judgment, it stated that there need to be "valid or objective reasons respectively" to deviate from the case law of the CJEU on questions that arise analogously in bilateral relations.[2051] As a result, a 'dynamic adoption of case law' by the CJEU takes place.[2052] Swiss courts sometimes deliberately wait to clarify a legal question in the Swiss context when the CJEU is about to rule on this question in the context of EU law.[2053] This is also due to the fact that the Swiss courts have no possibility to refer questions of interpretation to the CJEU by way of a preliminary ruling.[2054] Although the implementation of Bilateral Agreements is the responsibility of the Swiss cantons or the federal

2049 BGE 139 II 393 (n 2041), E. 4.1.1: "keine Befolgungspflicht, sondern höchstens ein Beachtungsgebot" ('no obligation to comply, but at most an obligation to observe').

2050 See fn 2048.

2051 BGE 142 II 35 (n 2024), E. 3.1: "triftige bzw. sachliche[r] Gründe" ('valid or objective reasons'); BGE 143 II 57, Urteil vom 20. Januar 2017; TAF 2C_743/2017, Arrêt du 15 janvier 2018, E. 4.1; cf also Astrid Epiney and Daniela Nüesch, 'Inländervorrang und Freizügigkeitsabkommen' *Aktuelle Juristische Praxis 1/2018* (2018) 6, 7ff; Andreas Glaser and Heidi Dörig, 'Die Streitbeilegung in den Bilateralen Abkommen Schweiz–EU' in Astrid Epiney and Lena Hehemann (eds), *Schweizerisches Jahrbuch für Europarecht 2017/2018* (Stämpfli Verlag AG 2018) 459ff; Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 85.

2052 Andreas Zünd, 'Grundrechtsverwirklichung ohne Verfassungsgerichtsbarkeit' (2013) 22 Aktuelle Juristische Praxis (AJP) 1357; Matthias Oesch and Tobias Naef, 'EU-Grundrechte, der EuGH und die Schweiz' *Zeitschrift für Schweizerisches Recht (ZSR)* (2017) 117, 124.

2053 Oesch, *Der EuGH und die Schweiz* (n 2026) 125 and 126, with reference to Case C-482/07 *AHP Manufacturing BV v Bureau voor de Industriële Eigendom* [2009] OJ C 256/3; Schweizerisches Bundesverwaltungsgericht (BVGE) 2010-8, Urteil vom 13. September 2010.

2054 According to DAA, Art 5(2), Switzerland may submit statements of case or written observations to the Court of Justice in cases where a court or tribunal of a Member State has referred a question to the Court of Justice for a preliminary ruling on the interpretation of a provision referred to in Article 1.

government, depending on the matter concerned,[2055] courts interpret the Bilateral Agreements, whose *ratio legis* is to create a parallel legal situation, as mentioned, based on the specific methods of interpretation under EU law and with a view to the precedents of the CJEU.[2056] For example, in the area of Bilateral Agreements, the Swiss Federal Supreme Court bases its interpretation of national organisational and procedural law on the guidelines developed by the CJEU under the principle of effectiveness under EU administrative law.[2057]

Nevertheless, the Federal Supreme Court clearly has the last word when it comes to the interpretation of the Bilateral Agreements in Switzerland, and as described above, is only to some degree bound by the CJEU's jurisprudence.[2058]

2055 Tobias Jaag and Magda Zihlmann, *Bilaterale Verträge I & II Schweiz - EU Handbuch* (Daniel Thürer, Rolf H Weber and Wolfgang Portmann eds, 2nd edn, Schulthess 2007), para 25.

2056 Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 74; according to DAA, Art 5(1), "[i]n order to achieve the objective of the Contracting Parties of applying and interpreting the provisions referred to in Article 1 as uniformly as possible, the Joint Committee shall keep under constant review the development of the relevant case law of the Court of Justice of the European Communities (hereinafter referred to as "the Court of Justice") and the development of the relevant case law of the competent Swiss courts. To this end, the Contracting Parties agree to ensure the prompt mutual transmission of these judicial decisions." In ibid, Art 6(1), it is stated that "Switzerland shall submit an annual report to the Joint Committee on how its administrative authorities and courts have applied and interpreted the provisions referred to in Article 1, where appropriate in accordance with the interpretation of the Court of Justice".

2057 BGE 142 II 35 (n 2024), E. 5.2; also: Andreas Glaser, 'Umsetzung und Durchführung des Rechts der Bilateralen Verträge in der Schweiz' in Lorenz Langer (ed), *Die Verfassungsdynamik der europäischen Integration und demokratische Partizipation* (Dike Verlag 2015) 144.

2058 It is worth mentioning that during this research negotiations were underway between Switzerland and the EU on a new model for the interpretation of the Bilateral Agreements and a new dispute settlement mechanism. It was agreed in 2025 – but has not yet been implemented – that the new dispute resolution mechanism will rely on an independent arbitration panel, with the ECJ deciding in questions of EU law.The introduction of a principle of uniform interpretation of bilateral law and EU law, whereby the interpretation of 'Union law terms' in bilateral law will be consistently based on CJEU case law makes sense against the background of the goal of a parallel legal situation between Switzerland and the EU. At the same time, strengthening the role of the CJEU, could jeopardise the contractual symmetry of the Bilateral Agreements. However, the SAA and DAA

cc) Dispute Resolution According to the Bilateral Agreements

If there is a significant divergence between the case law of the CJEU and that of the Swiss courts, or a significant divergence between the authorities of the Member States concerned and the Swiss authorities with regard to the application of the Eurodac Regulation or soon the Interoperability Regulations, this must be brought to the attention of the Mixed Committee. The Mixed Committee is composed of representatives of the contracting parties, e.g., Switzerland, the EU Council and the EU Commission.[2059] If the Mixed Committee is unable to ensure uniform application and interpretation within two months, the dispute resolution procedure laid down in Art. 7 DAA or Art. 10 SAA applies.[2060]

In the event of a dispute concerning the application of the Schengen or Dublin Agreement or a situation referred to in Art. 9(2) SAA or Art. 6(2) DAA, the matter is officially placed on the agenda of the Mixed Committee meeting as a dispute. This committee has 90 days to resolve the dispute, which may be extended by 30 days. If no agreement is reached during this period, the Schengen or Dublin Agreement respectively is deemed terminated. By virtue of the link between the two agreements, termination of the other agreement would follow.[2061] The history of the Mixed Committees shows that, on the one hand, there are hardly any disputes between

will not fall under this new arrangement, as it does not apply to all agreements between Switzerland and the EU.

2059 Decision No 1/2004 of the EU/Switzerland Mixed Committee established by the Agreement concluded between the European Union, the European Community and the Swiss Confederation concerning the latter's association in the implementation, application and development of the Schengen acquis of 26 October 2004 adopting its Rules of Procedure [2004] OJ C308/2, Art 1.

2060 DAA, Art 6(2).

2061 SAA, Art 15(4); DAA, Art 14(2).

Switzerland and the EU.[2062] Conversely, in the few disputes that have occurred, no agreement has been reached.[2063,2064]

dd) Differences for Data Subjects in Switzerland and the EU

Finally, the question arises: what does the above mean for a data subject located in Switzerland who has had to provide their data for storage in Eurodac? This section shows that data subjects in Switzerland, invoking bilateral law, have different options and will go through different procedures than data subjects in an EU Member State invoking EU law.

First, Swiss courts have neither the obligation nor the possibility to refer questions of interpretation to the CJEU for a preliminary ruling. They

2062 cf 'Rechtsammlung zu den sektoriellen Abkommen mit der EU - Register 9' (*EDA*) <https://www.fedlex.admin.ch/de/sector-specific-agreements/joint-committees-decisions-register/9> and 'Rechtsammlung zu den sektoriellen Abkommen mit der EU - Register 8' (*EDA*) <https://www.fedlex.admin.ch/de/sector-specific-agreements/joint-committees-decisions-register/8>.

2063 Glaser and Dörig, 'Die Streitbeilegung in den Bilateralen Abkommen Schweiz–EU' (n 2051) 456, referring to the example of the eight-day rule, according to which a posted employee may commence work at the earliest eight days after the assignment has been reported to the competent cantonal authority (Bundesgesetz über die flankierenden Massnahmen bei entsandten Arbeitnehmerinnen und Arbeitnehmern und über die Kontrolle der in Normalarbeitsverträgen vorgesehenen Mindestlöhne [2003] SR 823.20 (Entsendegesetz - EntsG), Art 6(3)). The EU considers this provision to be a direct discrimination and therefore incompatible with the FMPA and the European Parliament has also criticised this regulation (European Parliament, 'European Parliament Resolution of 7 September 2010 on EEA-Switzerland: Obstacles with Regard to the Full Implementation of the Internal Market (2009/2176(INI))' (2010) P7_TA(2010)0300, no 12). However, no agreement could be reached in the Joint Committee despite several consultations (Staatssekretariat für Migration, 'Schweiz-EU: Elftes Treffen des gemischten Ausschusses zum Freizügigkeitsabkommen' (2011)).

2064 A new dispute resolution mechanism has been agreed upon and will be implemented (see fn 2058). The newly agreed model is based on a classic arbitration approach, as is common practice in international commercial law. It is envisaged that the CJEU will act as a court of arbitration and decide on a dispute (cf Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 153; Astrid Epiney, 'Quadratur des Kreises gelungen' *Neue Zürcher Zeitung (NZZ)* (23 August 2013) <https://www.nzz.ch/articleEN1SE-ld.386182>. As mentioned, the SAA and the DAA will not be subject to this mechanism.

interpret the provisions in question independently.[2065] Whether a court in the EU refers a question to the CJEU is generally decided by the court itself.[2066] If a new legal question arises, courts against whose decisions there is no judicial remedy under national law are obliged to refer a question to the CJEU.[2067] The preliminary reference procedure is not an individual right and cannot be invoked as such by data subjects. It may, however, be requested by individuals within the EU whose cases are pending before a national court. Data subjects in Switzerland do not have this possibility.

The Swiss Federal Supreme Court can deviate from (old or new) case law of the CJEU if it sees valid or objective reasons respectively for doing so. In highly disputed cases, the Mixed Committees are called upon for diplomatic-political dispute resolution.[2068] No independent judicial body will decide.[2069] Accordingly, individuals – i.e., data subjects – have no means of challenging the decisions of the Mixed Committees, even where such decisions affect them in a manner equivalent to a judicial ruling or administrative order.[2070] Neither an action for annulment, according to Art. 263 TFEU, before the CJEU, nor an appeal before the Federal Supreme Court can be brought against orders issued by international bodies.[2071] Some legal scholars have suggested that an accessory judicial review might be considered,[2072] but this has not been tried so far.

2065 Glaser and Dörig, 'Die Streitbeilegung in den Bilateralen Abkommen Schweiz–EU' (n 2051) 452ff, with reference to BGE 130 II 113, Urteil vom 19. Dezember 2003, E. 6.1; BGE 138 V 258, Urteil vom 26. April 2014, E. 5.3.1; more on this in: Glaser, 'Umsetzung und Durchführung des Rechts der Bilateralen Verträge in der Schweiz' (n 2057) 133 and 156ff.

2066 TFEU, Art 267; TEU Art 19(3)(b); EU, 'Preliminary Ruling Proceedings – Recommendations to National Courts' (2022).

2067 Any other court may, but does not have to present a new legal question to the CJEU, according to TFEU, Art 267; TEU, Art 19(3)(b); 'Preliminary Ruling Proceedings – Recommendations to National Courts' (n 2066).

2068 Glaser and Dörig, 'Die Streitbeilegung in den Bilateralen Abkommen Schweiz–EU' (n 2051) 453.

2069 cf Daniel Felder, 'Appréciation Juridique et Politique du Cadre Institutionnel et des Dispositions Générales des Accords sectoriels' in Christine Kaddous (ed), *Accords bilatéraux Suisse - Union Européenne (Commentaires)* (2001) 117 and 135.

2070 Daniel Wüger and Samuele Scarpelli, 'Die Vernachlässigten Institutionellen Aspekte Der Bilateralen Verträge und die Aushandlung eines Rahmenabkommens' in Astrid Epiney (ed), *Schweizerisches Jahrbuch für Europarecht 2005/2006* (Stämpfli Verlag AG 2006) 307.

2071 Jaag and Zihlmann, *Bilaterale Verträge I & II Schweiz - EU Handbuch* (n 2055), para 65 (akzessorische Prüfung).

2072 ibid.

In practice, dispute-resolution proceedings are initiated only where Swiss courts significantly and systematically depart from the CJEU's interpretation. Minor divergences, particularly those arising in individual cases, are tolerated. It should equally be noted that even within the EU, infringement proceedings under Art. 258 and 259 TFEU are brought only in situations where Member States commit substantial violations of EU law. Thus, within the EU as well, the highest national courts may in theory depart from CJEU case law. In such circumstances, data subjects have no means of recourse.

There is no mechanism in either the SAA or the DAA enabling individuals to initiate the objective enforcement of treaty obligations. By contrast, persons falling under the AFMP may lodge a complaint with the competent authorities concerning the implementation of that Agreement.[2073] They may appeal to the competent national court against decisions on such complaints or against a failure to take a decision within a reasonable time.[2074] No equivalent complaint mechanism exists under the DAA or the SAA. This discrepancy concerns only the various categories of data subjects within Switzerland – namely, those subject to the AFMP as opposed to those subject to the SAA and DAA – and does not apply in relation to data subjects in the EU. The latter equally lack any ability to initiate infringement proceedings under Art. 258 or 259 TFEU. In both contexts, therefore, the objective enforcement of the Schengen and Dublin *acquis* remains outside the hands of the individuals concerned.

It can be added that according to Swiss scholars, the principle of cooperation in a spirit of trust (mutual trust), as derived from Art. 4 para. 3 TEU, also applies to Switzerland. This is why transnational administrative decisions based on the Bilateral Agreements are binding between the EU and Switzerland.[2075] The EU Member States must comply with a Swiss ruling on the basis of the Bilateral Agreements, if it has transnational effect.[2076] The court of an EU Member State is, in principle, not authorised to review the validity of a Swiss act, order, or judgment, unless specific circumstances

2073 Agreement on the Free Movement of Persons [2002] SR 0.142.112.681 (AFMP) Art 11(1).

2074 ibid, Art 11(3).

2075 Glaser and Dörig, 'Die Streitbeilegung in den Bilateralen Abkommen Schweiz–EU' (n 2051) 456; *Shamso Abdullahi v Bundesasylamt* (n 1433), para 52ff.

2076 Case C-620/15 *A-Rosa Flussschiff GmbH v Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) d'Alsace* [2017] OJ C 202/4, para 43.

occur.[2077] A Swiss judgment that deviates from the CJEU's case law must be applied in an EU Member State.

It must be underscored that a departure from CJEU case law by a Swiss court does not necessarily result in a lower level of protection for data subjects in Switzerland. Such divergence may occur in either direction – towards a higher or a lower standard of protection. As demonstrated above, Swiss courts generally align themselves with CJEU jurisprudence, even in circumstances where they are under no legal obligation to do so. As data subjects in the EU have no individual right to submit questions with regard to a preliminary ruling to the CJEU and cannot initiate infringement proceedings, their rights are also limited if a national supreme court of an EU Member State violates their rights under the Schengen/Dublin *acquis*. In this respect, and as outlined above, there are procedural differences but no substantive disadvantages for data subjects in Switzerland in terms of access to justice.

b) *Applicability of the Eurodac and the Interoperability Regulations*

As we will see in this section, there are some deviations from EU law when Switzerland transposes the Eurodac and Interoperability Regulations into Swiss law, which does not happen within the EU. This is due to a systemic difference to EU law: while regulations are directly applicable under EU law (and it is prohibited to transpose them for reasons of *effet utile*), directives must be transposed into national law.[2078] There is, however, no corresponding prohibition on transposition (regarding regulations) and no corresponding obligation to transpose (regarding directives) in the bilateral relationship.

2077 ibid, para 49; see chapter: The Right to an Effective Remedy.

2078 cf Roland Bieber, Astrid Epiney and Marcel Haag (eds), *Die Europäische Union - Europarecht und Politik* (10th edn, Nomos 2013), 86, para 31.

aa) Eurodac Regulation

The authorities in Switzerland apply the Dublin/Eurodac *acquis* directly.[2079] Transposition into state law is only done very selectively. This was confirmed for the implementation of the Eurodac Regulation 603/2013 in Switzerland in 2014.[2080] Only some of the revisions made then required transposition or adaptation in Swiss law. The same applies to the implementation of the new Eurodac Regulation; most of its provisions are directly applicable.[2081]

Data subjects who wish to invoke the Eurodac Regulation in Switzerland thus can, in most cases, refer directly to it. In the case of provisions that have been transposed into Swiss national law, these are applicable. The advantage of the direct applicability of most of the Eurodac Regulation's provisions is that it is likely that they will be applied uniformly throughout the EU and Switzerland. However, the partial transposition of the Eurodac Regulation into Swiss law carries a risk that some data subjects (or even legal advisers) might only familiarise themselves with the provisions in Swiss law and overlook the Eurodac Regulation. This can affect a case. The transposition of the Eurodac Regulation into Swiss law, in Art. 102a^{bis} ff. Asylum Act, has so far been very rudimentary. For example, among the rights in Art. 43 Eurodac Regulation, Swiss law only mentions the right to access, which is "governed by the federal and cantonal data protection provisions". It does not mention the rights to rectification and erasure, nor does it specify which data a data subject may access. The provision similarly fails to require that data subjects be informed of their rights or that they have a right to know how their data are being used. In short, the very general reference to federal and cantonal data protection laws does not

2079 'Botschaft zur Genehmigung der bilateralen Abkommen zwischen der Schweiz und der Europäischen Union, einschliesslich der Erlasse zur Umsetzung der Abkommen ("Bilaterale II")' (n 2037) 6300.

2080 'Botschaft über die Genehmigung und die Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) Nr. 603/2013 und (EU) Nr. 604/2013 (Weiterentwicklungen des Dublin/Eurodac-Besitzstands)' (2014) 2715.

2081 'Genehmigung und Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2024/1351, (EU) 2024/1359, (EU) 2024/1349, (EU) 2024/1358 und (EU) 2024/1356 (EU-Migrations- und Asylpakt) (Weiterentwicklungen des Schengen- und des Dublin-/Eurodac-Besitzstands) Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens' (*Schweizerische Eidgenossenschaft*, 14 August 2024), 144.

clarify which rights data subjects have in relation to their Eurodac data. This lack of clarity makes it more difficult for data subjects to exercise their rights and therefore constitutes an obstacle to accessing justice, particularly for those without legal representation. Data subjects may not realise that they must also consult the Eurodac Regulation, as the Swiss national law does not refer to it. The draft implementing legislation provides for a more detailed transposition of the new Eurodac Regulation in Art. 99 and 102a^{bis} ff. Asylum Act, as well as other statutes.[2082] With regard to the rights to information, access, rectification, and erasure of personal data, however, it seems that no changes will be made.[2083]

The Eurodac Regulation sets out the conditions under which law enforcement authorities may access data stored in the system.[2084] In contrast to the rest of the (asylum-related part of the) Regulation, these provisions are not considered a development of the Dublin *acquis*.[2085] The adoption process in accordance with the DAA was not activated for these provisions. Instead, the EU and the associated Dublin states have decided to adopt these provisions on the basis of a separate agreement. This way, Switzerland's law enforcement authorities will eventually be able to gain access to Eurodac for the purposes of law enforcement. The prerequisite for law enforcement access is that Switzerland becomes part of the so-called 'Prüm framework'.[2086] The agreement on participation in Prüm was signed in

2082 Staatssekretariat für Migration 'Bundesbeschluss Entwurf über die Genehmigung des Notenaustausches zwischen der Schweiz und der Europäischen Union betreffend die Übernahme der Eurodac-Verordnung (EU) 2024/1358 über die Einrichtung von Eurodac für den Abgleich biometrischer Daten (Weiterentwicklung des Dublin/Eurodac-Besitzstands)' 2024 [BBl 2025 1484].

2083 ibid 14 fn 2; see also 'Verordnungsanpassungen aufgrund der Übernahme des EU-Migrations- und Asylpakts; Eröffnung des Vernehmlassungsverfahrens Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens' (*SEM*, June 2025); 'Bundesbeschluss über die Genehmigung und die Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' 19 March 2021 [AS 2025 347].

2084 Eurodac Regulation 2024, Art 33(f).

2085 'Botschaft über die Genehmigung und die Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) Nr. 603/2013 Und (EU) Nr. 604/2013 (Weiterentwicklungen des Dublin/Eurodac-Besitzstands)' (n 2080) 2713.

2086 ibid; Council Decision 2008/615/JHA of 23 June 2008 on the Stepping up of Cross-Border Cooperation, Particularly in Combating Terrorism and Cross-Border Crime [2008] OJ L210/1 (Council Decision on Cross-Border Crime); cf Faus-

Brussels on 27 June 2019.[2087] It was ratified by Switzerland in 2022;[2088] and the draft implementing legislation provides for access to Eurodac for law enforcement authorities.[2089]

bb) Interoperability Regulations

The Interoperability Regulations include provisions that are directly applicable as well as provisions requiring further specification under national law.[2090] The federal ordinance on the authorisation and implementation of the Interoperability Regulations refers to provisions that need to be transposed into Swiss law, particularly those that must be in accordance with the Swiss Data Protection Law (DSG).[2091] The Swiss Federal Administration writes that, for example, the purposes of data processing, access rights, data transfer, and sanctions for improper data processing must be formally

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to Correia, 'Working Document on a Council Decision on the Stepping up of Cross-Border Cooperation, Particularly in Combating Terrorism and Cross-Border Crime' (LIBE Committee 2007).

2087 Schweizerische Eidgenossenschaft, 'Erläuternder Bericht zur Genehmigung des Abkommens zur Vertiefung der Grenzüberschreitenden Zusammenarbeit (Prümer Zusammenarbeit) und des Eurodac-Protokolls zwischen der Schweiz und der EU sowie des Abkommens mit den Vereinigten Staaten von Amerika zur Verhinderung und Bekämpfung schwerer Straftaten sowie zu deren Umsetzung (Anpassung des Strafgesetzbuchs, des DNA-Profil-Gesetzes und des Asylgesetzes)' (2019) 2.

2088 Eidgenössisches Departement für auswärtige Angelegenheiten, 'Polizeizusammenarbeit (Prümer Beschlüsse)' (2022)

2089 Staatssekretariat für Migration 'Bundesbeschluss Entwurf über die Genehmigung des Notenaustausches zwischen der Schweiz und der Europäischen Union betreffend die Übernahme der Eurodac-Verordnung (EU) 2024/1358 über die Einrichtung von Eurodac für den Abgleich biometrischer Daten (Weiterentwicklung des Dublin/Eurodac-Besitzstands)' (n 2082).

2090 'Botschaft zur Genehmigung und Umsetzung der Notenaustausche zwischen der Schweiz und der EU Betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU-Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' (n 2038) 8020.

2091 cf Staatssekretariat für Migration, Bundesbeschluss über die Genehmigung und Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU-Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands) 2020 [BBl 2020 7983].

regulated by (federal) law,[2092] meaning that regulation in an ordinance (Verordnung) would not be enough. The same goes for provisions that are necessary for data subjects to understand interoperability, such as the definition of interoperability components.[2093] Amendments were adopted to the FNIA, the Asylum Act, the Federal Act on the Information System for Foreign Nationals and Asylum (BGIAA),[2094] the Liability Act (VG)[2095] and the Federal Act on Federal Police Information Systems (BPI)[2096,2097] These amendments do not provide information on the right to information, access, rectification or erasure of data. However, in 2021 a preliminary draft ordinance (N-IOP Draft Ordinance),[2098] based on the FNIA and BPI, was also issued alongside an explanatory report by the Federal Department of Justice and Police (FDJP).[2099] This draft ordinance has not (yet) entered into force and remains subject to potentially significant changes. It nevertheless addresses aspects of the rights to information and access to data and is discussed here, notwithstanding its current lack of legal effect.

There are some differences between the Draft Ordinance and the Interoperability Regulations. Switzerland made certain concretisations that are not readily apparent from the EU Regulations. The explanatory report clarifies that the sBMS is not a data collection or "database" within the meaning

2092 'Botschaft zur Genehmigung und Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU-Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' (n 2038) 8020.

2093 ibid 8020.

2094 Bundesgesetz über das Informationssystem für den Ausländer- und den Asylbereich [2003] SR 142.51 (BGIAA).

2095 Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördemitglieder und Beamten [1958] SR 170.32 (Verantwortlichkeitsgesetz - VG).

2096 Bundesgesetz über die polizeilichen Informationssysteme des Bundes [2008] SR 361 (BPI).

2097 'Bundesbeschluss über die Genehmigung und die Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' (n 2083).

2098 Bundesamt für Polizei (fedpol), Vorentwurf, 'Verordnung über die Interoperabilität zwischen den Schengen/Dublin-Informationssystemen [2021] (N-IOP-Verordnung), gestützt auf das AIG sowie auf das BPI'.

2099 Bundesamt für Polizei (fedpol), 'Verordnung über die Interoperabilität zwischen den Schengen/Dublin-Informationssystemen, Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens' (November 2021).

of the old Art. 3(g) Data Protection Law (FADP) (which is no longer applicable), as no conclusions can be drawn about the data subjects from the biometric data stored in it, i.e., from the templates.[2100] The current, revised DSG no longer contains a definition of a database. Still, unlike this study, Switzerland does not qualify the sBMS as a database (the Interoperability Regulations do not qualify, if sBMS is a database or not). This may have an impact on the right of access of data subjects.

Art. 17 N-IOP Draft Ordinance provides a right to information regarding the CIR, but not for the sBMS or MID. This may result in data subjects being unaware of how their data are used within the sBMS or MID, or of their rights of access, rectification, and erasure. Art. 17 N-IOP Draft Ordinance also references Art. 47 of the Interoperability Regulations, which grants a comprehensive right to information for data in the CIR, sBMS, and MID, with reference to the GDPR. The implications of this for data subjects in Switzerland are discussed further below.[2101]

Conversely, the N-IOP Draft Ordinance seems to broaden data subjects' right of access relative to the Interoperability Regulation. According to Art. 29(2) N-IOP Draft Ordinance, "requests for access, rectification and erasure of data and links in the MID and data in the CIR shall be addressed

2100 ibid. 4; also: 'Erläuternder Bericht zur Übernahme und Umsetzung der Rechtsgrundlagen für die Herstellung der Interoperabilität zwischen EU-Informationssystemen in den Bereichen Grenze, Migration und Polizei (Verordnungen [EU] 2019/817 und [EU] 2019/818) - Weiterentwicklung des Schengen-Besitzstands' (n 2006) 11.

2101 Switzerland also states that through interoperability new functions will be integrated into existing and future information systems ('Erläuternder Bericht zur Übernahme und Umsetzung der Rechtsgrundlagen für die Herstellung der Interoperabilität zwischen EU-Informationssystemen in den Bereichen Grenze, Migration und Polizei (Verordnungen [EU] 2019/817 und [EU] 2019/818) - Weiterentwicklung des Schengen-Besitzstands' (n 2006) 11) but that neither access rights of the authorities to the underlying system would be extended, nor the purposes for which access exists be changed ('Botschaft zur Genehmigung und Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU-Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' (n 2038) 8020). However, as this study shows, the new interoperability functions, such as the detection of multiple identities by the MID, obviously change the purpose for which data can be accessed. Namely, precisely for the purpose of detecting multiple identities, which did not previously exist. As already mentioned, this purpose is not mentioned in the Eurodac Regulation 2024, which is problematic in view of the fact that the MID also processes and compares Eurodac data.

in writing to the SEM [Federal Secretariat for Migration]." The data subject may only request the rectification and deletion of links, according to Art. 29(4) N-IOP Draft Ordinance.[2102] This means that, unlike under the Interoperability Regulations, Swiss law may confer a right to access data in the CIR. This represents an expansion of access rights, which is desirable from an access-to-justice perspective. However, as interoperability is not yet operational, it remains uncertain whether data subjects in Switzerland will actually benefit from enhanced access rights in practice.

There is no mention of the right to an effective remedy in the N-IOP Draft Ordinance. Art. 29(2) N-IOP Draft Ordinance merely provides that a request for access may be submitted in writing to the SEM. The SEM is required to respond to such requests with a formal order in accordance with Art. 5 of the Administrative Procedural Act (APA),[2103] which must include instructions on the right to an appeal and available legal remedies. This decision can subsequently be challenged before the Swiss Federal Administrative Court.[2104] In this respect, although it is regrettable that the right to an effective remedy is not explicitly mentioned in the N-IOP Draft Ordinance, in practice the data subject should nonetheless be informed of it. However, if the SEM were to treat the information provided in response to an access request as an 'ordinary administrative action' or 'purely factual conduct' rather than a formal order under Art. 5 APA, the State would not be obliged to provide information on available remedies.[2105] In such a scenario, referring to the directly applicable Interoperability Regulation

2102 N-IOP-Verordnung, Art 29(2): "Gesuche um Auskunft, Berichtigung und Löschung von Daten und Verknüpfungen im MID und Daten im CIR sind schriftlich ans SEM zu richten. Nur bezüglich Verknüpfungen kann die betroffene Person um Berichtigung und Löschung ersuchen" (Requests for information, rectification and erasure of data and links in the MID and data in the CIR must be submitted in writing to the SEM. The data subject can only request rectification and erasure of links); cf also Bundesamt für Polizei (fedpol), 'Verordnung über die Interoperabilität zwischen den Schengen/Dublin-Informationssystemen, N-IOP-Verordnung - Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens' (2021) 24.

2103 "Verfügung" according to APA - Switzerland, Art 5.

2104 Bundesgesetz über das Bundesverwaltungsgericht [2005] SR 173.32 (VGG), Art 31.

2105 In general, information and guarantees by administrative authorities are considered administrative factual conduct ('Verwaltungsrealakte'), according to: Pierre Tschannen, Ulrich Zimmerli and Markus Müller, *Allgemeines Verwaltungsrecht* (3rd edn, Stämpfli Verlag AG Bern 2009), para 38 no 11. Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (n 1515) 77 also understands administration of information as factual conduct. However, there are also reasons to qualify provision of individualized personal data and information differently.

would also be of limited utility, as it does not specify the particular appeal mechanisms or national legal remedies.

The N-IOP Draft Ordinance does not mention the web portal. It states that requests for information, correction or deletion of links must be addressed to the SEM.[2106] The web portal is only mentioned in the explanatory report on the N-IOP Draft Ordinance.[2107] It is thus unclear how the web portal will be used in Switzerland.

Finally, Switzerland participates in the information systems SIS, VIS, EES and ETIAS, which are all part of the Schengen *acquis*.[2108] Switzerland has no access to the European Criminal Records Information System for third-country nationals (ECRIS-TCN).[2109] The ECRIS-TCN is not part of the Schengen *acquis*. Possible access via another agreement between Switzerland and the EU is currently being examined.[2110] Switzerland also currently has no direct access to Europol data. Based on Art. 8 and 9 of the 2004 agreement between Switzerland and Europol,[2111] Switzerland can submit a request to Europol to obtain information from the Europol Information System (EIS). Switzerland seeks to obtain direct access, and discussions are ongoing regarding whether Schengen- and Dublin-associated countries will be granted such access via ESP.[2112] Switzerland does, however, have access to the Interpol databases.[2113]

2106 N-IOP-Verordnung, Art 29(2).

2107 'Verordnung über die Interoperabilität zwischen den Schengen/Dublin-Informationssystemen, N-IOP-Verordnung - Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens' (n 2102) 15, 21 and 22.

2108 'Erläuternder Bericht zur Übernahme und Umsetzung der Rechtsgrundlagen für die Herstellung der In-teroperabilität zwischen EU-Informationssystemen in den Bereichen Grenze, Migration und Polizei (Verordnungen [EU] 2019/817 und [EU] 2019/818) - Weiterentwicklung des Schengen-Besitzstands' (n 2006) 12.

2109 ibid 9.

2110 ibid 13.

2111 Abkommen zwischen der Schweizerischen Eidgenossenschaft und dem Europäischen Polizeiamt [2006] SR 0.362.2.

2112 'Erläuternder Bericht zur Übernahme und Umsetzung der Rechtsgrundlagen für die Herstellung der Interoperabilität zwischen EU-Informationssystemen in den Bereichen Grenze, Migration und Polizei (Verordnungen [EU] 2019/817 und [EU] 2019/818) - Weiterentwicklung des Schengen-Besitzstands' (n 2006) 13; see 'Europol Programming Document 2024 – 2026. Adopted by the Management Board of Europol on 28 November 2023. Europol Public Information' (*Europol,* 18 December 2023), refers to the preparation of (limited) access options via the ESP.

2113 There are also temporary omissions in the Swiss laws and the N-IOP Ordinance with regards to some aspects of interoperability. First, there is to date no mention of the Eurodac Regulation in any Swiss provision on interoperability. This is due to

cc) Conclusions

The Eurodac and Interoperability Regulations are largely directly applicable in Switzerland, although certain provisions have been incorporated into national law. This incorporation results in some, often minor, deviations from EU law, which may nevertheless affect access to justice for data subjects in Switzerland – potentially expanding or limiting their rights. As discussed in the first part of this chapter, data subjects in Switzerland have limited options to challenge such deviations or seek clarification. The Federal Supreme Court is the ultimate authority for interpreting the Eurodac and Interoperability Regulations in Switzerland. Swiss courts are not bound by CJEU case law if they identify a valid or objective reason to deviate, before or after the adoption of the Regulations. In practice, however, Switzerland generally aligns itself with CJEU jurisprudence. Since Swiss courts cannot request preliminary rulings, any divergences in Swiss law cannot be clarified through the CJEU.

c) *Applicability of the General Data Protection Regulation*

As discussed in this study, many EU legal acts that regulate specific aspects in the areas of border control, asylum, and immigration contain data protection provisions. This is also the case for the Eurodac and the Interoperability Regulations. These Regulations are part of the Schengen/Dublin *acquis*. Accordingly, the data protection provisions contained in them are

the fact that the inclusion of Eurodac in the Swiss interoperability framework, will only be done after the new Eurodac Regulation has been issued, notified to and adopted by Switzerland ('Erläuternder Bericht zur Übernahme und Umsetzung der Rechtsgrundlagen für die Herstellung der Interoperabilität zwischen EU-Informationssystemen in den Bereichen Grenze, Migration und Polizei (Verordnungen [EU] 2019/817 und [EU] 2019/818) - Weiterentwicklung des Schengen-Besitzstands' (n 2006) 14). Also, Interoperability Regulation - Judicial Cooperation, Art 13, mentions all the types of data from which the templates for the sBMS are generated. Since within the SIS photographs are stored (in addition to facial images), these are part of the data types stored as templates in the sBMS, according to SIS III - Police Regulation, Art 20(2)(w)). However, Switzerland expects that it will take several years for the EU to include photographs in the sBMS. Accordingly, they are not included in the N-IOP Ordinance at present ('Verordnung über die Interoperabilität zwischen den Schengen/Dublin-Informationssystemen, N-IOP-Verordnung - Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens' (n 2102) 5).

binding for Switzerland. Some provisions in the Eurodac and Interoperability Regulations refer, however, directly to the GDPR. The question thus arises whether the GDPR in general and the provisions referred to in the Eurodac and Interoperability Regulations, in particular, are applicable in Switzerland.

When the SAA and DAA came into force in 2008, Switzerland's level of data protection was already largely aligned with that of the EU. The international legal basis for the Swiss national data protection law is the European Council Convention 108 and, since its ratification in September 2023, the modernised version, Convention 108+.[2114] The Data Protection Act (FADP) still had to be adapted in certain areas after the adoption of the SAA and DAA. In particular, the independence of the Federal Data Protection Commissioner had to be strengthened.[2115] With the far-reaching changes to data protection law in the EU evolving into the GDPR, and the deepened integration of Switzerland into the EU legal framework in recent years, it became clear that further adjustments to data protection law in Switzerland were necessary – including with the aim of making it EU-compatible.[2116] As a result, a new data protection law came into force in Switzerland on 21 September 2023.[2117]

One instrument with which the EU integrates third countries into the EU data protection standard is the so-called adequacy decision.[2118] With reference to Directive 95/46/EC, an adequacy decision was adopted in 2000

2114 Christa Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Obernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?' (2017) 27(2) Schweizerische Zeitschrift für internationales und europäisches Recht, 219.

2115 'Botschaft über die Genehmigung und die Umsetzung des Notenaustauschs zwischen der Schweiz und der EU betreffend die Übernahme des Rahmenbeschlusses 2008/977/JI vom 27. November 2008 über den Schutz von Personendaten im Rahmen der polizeilichen und justiziellen Zusammenarbeit in Strafsachen' (2009) 09.073, 6756.

2116 According to the Federal Office of Justice, the total revision should allow Switzerland to ratify the Council of Europe's revised data protection convention (Modernised Convention 108+) and implement the Schengen-relevant Police Directive. In addition, the revision is intended to bring Swiss data protection legislation as a whole closer to the requirements of the GDPR ('Stärkung des Datenschutzes - Totalrevision des Bundesgesetzes über den Datenschutz (DSG)' (*EDA*, 10 May 2023) <https://www.bj.admin.ch/bj/de/home/staat/gesetzgebung/archiv/datenschutzstaerkung.html>).

2117 Bundesgesetz über den Datenschutz [2023] SR 235.1 (Datenschutzgesetz, DSG) (Data Protection Act, FADP).

2118 Data Protection Directive 95/46/EC, Art 25(6); cf also GDPR, Art 45.

concerning Switzerland.[2119] This means that, for the purposes of Directive 95/46/EC, Switzerland is deemed to provide a level of data protection equivalent to that of the EU. In January 2024, the European Commission adopted a further adequacy decision regarding Switzerland, this time assessing its data protection standards under the GDPR. The Commission concluded once again that Swiss data protection law is compatible with EU standards.[2120] The Commission found that Switzerland further aligned its data protection framework with the GDPR and strengthened its laws. As a result, data can be freely exchanged between the EU and Switzerland.[2121]

As a second instrument, the EU integrates selected non-Member States into its data protection framework through association agreements, such as the SAA and DAA.

On 15 September 2017, the federal decree on the approval of the adoption of the Police Directive as part of the development of the Schengen *acquis* was adopted in Switzerland.[2122] The incorporation of the Police Directive into the association regime means that the EU no longer regards Switzerland as a third country in this respect but treats it as a Member State.[2123]

While it was undisputed that the new Police Directive would become part of a revised association *acquis*, things were less straightforward with regard to the GDPR.[2124] From a formal point of view, it belongs to the

2119 2000/518/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided in Switzerland (notified under document number C(2000)2304) (Text with EEA relevance) [2000] OJ L215/1.

2120 European Commission, 'Report from the Commission to the European Parliament and Council on the First Review of the Functioning of the Adequacy Decisions Adopted Pursuant to Article 25(6) of Directive 95/46/EC' (2024) COM(2024) 7 final 13.

2121 cf Data Protection Directive 95/46/EC, Art 25 and GDPR, Art 45.

2122 SEM, Bundesbeschluss über die Genehmigung des Notenaustausches zwischen der Schweiz und der EU betreffend die Übernahme der Richtlinie (EU) 2016/680 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten zum Zwecke der Verhütung, Ermittlung, Aufdeckung oder Verfolgung von Straftaten oder der Strafvollstreckung (Weiterentwicklung des Schengen-Besitzstands) [2017] BBl 2017 7277.

2123 Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Obernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?' (n 2114) 221.

2124 Astrid Epiney and Markus Kern, 'Zu den Neuerungen im Datenschutzrecht der Europäischen Union - Datenschutzgrundverordnung, Richtlinie zum Datenschutz in der Strafverfolgung und Implikationen für die Schweiz' in Daniela Nüesch (ed), *Die Revision des Datenschutzes in Europa und die Schweiz* (Schulthess 2016) 35;

EEA *acquis* but not to Switzerland's association *acquis* – even though it is the successor to the SAA- and DAA-relevant Data Protection Directive 95/46/EC.[2125] Switzerland argued that the GDPR should be considered relevant for its association; the Commission proposed this as well.[2126] During the legislative process, however, the EU Council of Ministers deleted this element.[2127] The GDPR is therefore not part of the association *acquis*. To some Swiss scholars, this does not mean that the GDPR is not applicable in Switzerland, as we will see.

According to Tobler, experts in the Office of the Federal Data Protection Commissioner (EDÖB) offices have privately argued that the GDPR is nonetheless binding for Switzerland, because references to Directive 95/46/EC in EU law will, in future, be interpreted as references to the GDPR under Art. 94(2) GDPR.[2128] The position is that where "the bilateral agreements between Switzerland and the EU refer to Directive 95/46/EC, reference is now automatically made to the new GDPR."[2129] The idea seems to be that without this reading, a kind of data protection loophole would be created in the Schengen/Dublin-association law.[2130] According to the Federal Supreme Court, it is permissible to refer to EU law that is not yet

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Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Obernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?' (n 2114) 221.

2125 Epiney and Kern, 'Zu den Neuerungen im Datenschutzrecht der Europäischen Union - Datenschutzgrundverordnung, Richtlinie zum Datenschutz in der Strafverfolgung und Implikationen für die Schweiz' (n 2124) 35; Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Obernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?' (n 2114) 221.

2126 cf Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data [2012] COM(2012)11 final (Proposal for a General Data Protection Regulation), para 137.

2127 Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Obernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?' (n 2114) 221, suggests that this may have been motivated by domestic political considerations, aiming to prevent a potential special status for the UK and Ireland.

2128 ibid 223.

2129 ibid; the same argument was also discussed by: Astrid Epiney, 'Verweise auf EU-Sekundärrecht im bilateralen Recht' (*Jusletter,* 11 September 2017) <https://jusletter.weblaw.ch/juslissues/2017/905/verweise-auf-eu-seku_18149b8a34.html>.

2130 ibid.

in force or has already been repealed.[2131] Accordingly, the repealed Data Protection Directive 95/46/EC continues to have effect for the purposes of Swiss law.[2132]

A reference in EU secondary law, such as the Eurodac Regulation – communicated to Switzerland as a development of the Schengen/Dublin association agreements – to another secondary regulation, like the GDPR, can be interpreted as a cascading reference.[2133] Cascading references are considered static references to EU law, which in turn dynamically refer to other EU law.[2134] With regard to the applicability of cascading references, Mader and Kropf state that if the referral provision itself does not comment on further referrals, the relevance of the cascading reference must be determined by interpretation. As a rule, it can be assumed that the Swiss legislator only intends to apply the reference and not any further references.[2135] However, if a cascading reference refers to a provision of material content, the provision usually only makes sense for Switzerland if the further reference is taken into account. Otherwise, there would be a legal loophole.[2136] This argument does not apply here, as a loophole would not be created, since the Data Protection Directive 95/46/EC is still applicable. The above-mentioned assumption, i.e., that the legislator did not intend to adopt the GDPR when adopting the Eurodac and Interoperability Regulations, might still apply here.

Tobler advances a similar argument. In her view, only law which is materially part of the Schengen/Dublin *acquis*, has been formally notified to Switzerland and has actually been accepted by Switzerland, can be relevant within the framework of the Schengen/Dublin-association relationship.[2137] This, she argues, does not create a legal loophole requiring closure

2131 cf e.g., BGE 136 I 316, Urteil vom 19. Juli 2010, E. 2.4.1ff.

2132 Luzius Mader and Catherine Kropf, 'Verweisungen auf das Recht der Europäischen Union in der Bundesgesetzgebung - vom Fotografieren und Filmen' in Institut für Europarecht der Universität Freiburg (ed), *Die Schweiz und die europäische Integration: 20 Jahre Institut für Europarecht* (Schulthess 2015) 73.

2133 ibid 91ff.

2134 Mader and Kropf, 'Verweisungen auf das Recht der Europäischen Union in der Bundesgesetzgebung - vom Fotografieren und Filmen' (n 2132) 91.

2135 ibid 92.

2136 ibid 92.

2137 Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Obernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?' (n 2114) 224; Epiney and Kern, 'Zu den Neuerungen im Datenschutzrecht der Europäischen Union - Datenschutzgrundverordnung,

through autonomous interpretation; rather, references to the GDPR are simply understood as references to the former Data Protection Directive 95/46/EC.[2138] The fact that the directive is no longer in force within the EU is not regarded as decisive for bilateral law.[2139] She argues that, if the EU had intended to impose more comprehensive data protection, it would have needed to declare the GDPR Schengen-relevant for Switzerland and formally notify it – a step it deliberately did not take.[2140] This finding does, however, not change the fact that the GDPR and the case law of the CJEU are and will continue to be relevant for Switzerland.[2141]
Epiney acknowledges this argument but does not rule out the possibility that, in certain constellations, the interpretation of EU secondary law applicable in Switzerland may lead to the application of a provision that has not been formally notified to Switzerland, *in casu* the GDPR.[2142]

In summary, Switzerland has not formally adopted the GDPR within the bilateral framework, as it is not considered part of the Schengen/Dublin *acquis*. Whether Switzerland has implicitly incorporated the provisions referenced in the Eurodac or Interoperability Regulations remains disputed, and the Swiss Federal Supreme Court has not yet ruled on the matter. As noted above, some transpositions of Eurodac and Interoperability law refer to Swiss data protection legislation, even when the directly applicable EU law refers to the GDPR. This divergence may complicate the issues discussed here and will be examined further below.

Richtlinie zum Datenschutz in der Strafverfolgung und Implikationen für die Schweiz' (n 2124) 35.

2138 Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Obernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?' (n 2114) 224ff; cf also Mader and Kropf, 'Verweisungen auf das Recht der Europäischen Union in der Bundesgesetzgebung - vom Fotografieren und Filmen' (n 2132) 73.

2139 Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Obernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?' (n 2114) 224; Mader and Kropf, 'Verweisungen auf das Recht der Europäischen Union in der Bundesgesetzgebung - vom Fotografieren und Filmen' (n 2132) 73.

2140 Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Obernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?' (n 2114) 225.

2141 Epiney and Kern, 'Zu den Neuerungen im Datenschutzrecht der Europäischen Union - Datenschutzgrundverordnung, Richtlinie zum Datenschutz in der Strafverfolgung und Implikationen für die Schweiz' (n 2124) 36.

2142 Epiney, 'Verweise auf EU-Sekundärrecht im bilateralen Recht' (n 2129).

However, it is unclear whether this plays a relevant role from an access to justice perspective. As was explained above regarding the interpretation of the Bilateral Agreements, the Federal Supreme Court largely adheres to the case law of the CJEU. It is likely to take account of judgments concerning GDPR provisions to which the Eurodac or Interoperability Regulations refer. Conversely, if Switzerland's official stance is not to apply the GDPR – despite references to it in the Eurodac and Interoperability Regulations, opting instead for the Data Protection Directive 95/46/EC – Swiss courts may choose to disregard case law related to the GDPR. The argument that the GDPR is not applicable because it was deliberately not included in the EU *acquis* is convincing. With regard to GDPR case law, one may ask: would GDPR case law be understood as a further development and interpretation of the corresponding provisions of the Data Protection Directive 95/46/EC? That does not seem plausible. Therefore, not applying the GDPR where the Eurodac and Interoperability Regulations make reference to it may ultimately lead to some standstill in the development of data protection, because the EU will only further develop the GDPR jurisdiction, not that of the Data Protection Directive 95/46/EC.

In a dynamic field such as data protection law, which will continue to evolve in the coming years, it is important that Switzerland keeps pace with developments to ensure a parallel legal framework and, consequently, the same rights for all data subjects. Switzerland has demonstrated a willingness to pursue its own path in data protection, as illustrated by its approach to data retention, where it has still not fully aligned with the EU.[2143] It is therefore conceivable that differing interpretations may also arise in connection with Eurodac and interoperability.

Similar questions arise in the next section concerning fundamental rights under the CFR. Switzerland has not adopted the CFR, yet the Eurodac and Interoperability Regulations make reference to it. In this context, it has been argued that Swiss law virtually merges with EU fundamental rights within the scope of the SAA and DAA, and should therefore be considered applicable. The expansion of EU information systems under the interoperability framework creates a close interdependence between Switzerland and the EU, a process reinforced by digitalisation in other areas

2143 cf 'Vorratsdatenspeicherung in Der Schweiz steht vor der Beurteilung durch den Europäischen Gerichtshof für Menschenrechte' (*Digitale Gesellschaft*, 10 February 2023) <https://www.digitale-gesellschaft.ch/2023/02/10/vorratsdatenspeicherung-in-der-schweiz-steht-vor-der-beurteilung-durch-den-europaeischen-gerichtshof-fuer-menschenrechte-ausstehender-entscheid-von-bedeutung/>.

(see, e.g., the Prüm II framework). This raises the question: at what point, in the context of data protection, does disentanglement become impossible? In other words, when does the alignment between Swiss and EU data protection law become so extensive that the GDPR must be applied in Switzerland?

d) *Applicability of the Charter of Fundamental Rights of the European Union*

The CFR is applicable, according to its Art. 51(1), by Member States, when implementing the law of the Union. Under the broad interpretation of the CJEU, the CFR is also applicable where Member States exercise the discretion afforded by Union law.[2144] However, the rights it enshrines do not appear to extend to Schengen/Dublin-associated countries such as Switzerland, which is not a Member State and has not incorporated the CFR into the bilateral agreements. Nonetheless, the question arises whether the CFR – or elements of it – may nonetheless be applicable in Switzerland in the context of the application and interpretation of bilateral law. This issue will be examined in the following section.

aa) Differences between the ECHR and the CFR

Firstly, the question arises as to whether the fact that Switzerland is not bound by the CFR is at all relevant to the individual rights of data subjects. Switzerland has ratified the ECHR and is therefore obliged to comply with the catalogue of fundamental rights contained in this convention. The CFR is strongly modelled on the ECHR. For this reason, it could be assumed that the latter offers not only sufficient but very similar protection of fundamental rights. Still, the CFR goes, in certain respects, far beyond the minimum standards of the ECHR. For example, in addition to human dignity and the classic rights to freedom, equality, civil and procedural rights, Chapter IV of the CFR, "Solidarity", also contains fundamental

2144 Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041 149, referencing Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689; also cf Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet och andra* [2007] OJ C 51/9.

social rights, which are partly individual rights and partly programmatic provisions.[2145]

In connection with this study, the main difference between the CFR and the ECHR lies in the right to an effective legal remedy. As seen in previous chapters,[2146] this right under the CFR grants rights that are not covered by the ECHR – in particular the right to a tribunal. Unlike under the ECHR, a remedy before a non-judicial authority is not sufficient according to Art. 47(1) CFR.[2147] Unlike Art. 6(1) ECHR, the right to a fair trial under Art. 47(2) CFR is not limited to disputes concerning civil rights and obligations or criminal charges. It extends to all proceedings falling within the scope of EU law, including administrative proceedings.[2148]

Other differences can be found in the rights to data protection and the right to information. The CFR, unlike the ECHR, provides two rights protecting the right to privacy as well as data in Art. 7 and 8. The CFR is unique, as an international human rights instrument, in recognising the right to data protection as a right separate from the right to privacy.[2149] The CFR also enshrines the right to good administration in Art. 41, which has no counterpart in the ECHR, while Art. 42 CFR specifically protects the right of access to documents.

These differences are significant: data subjects relying solely on the ECHR may enjoy fewer rights than those who can invoke the CFR. Accordingly, it is important to determine whether data subjects in Switzerland benefit from the protection of CFR rights. The following section examines

2145 cf Bernd Hüpers and Birgit Reese, 'Vorbemerkungen - Titel IV: Solidarität' in Jürgen Meyer and Sven Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union* (5th edn, Nomos 2019), para 28ff.

2146 See in particular chapter: The Right to an Effective Remedy; also chapter: The Right to Access Personal Data and Information and The Right to Rectification, Completion, Erasure and Restriction of Processing of Data.

2147 EU, 'Explanations Relating to the Charter of Fundamental Rights' (n 79), Article 47 - Right to an Effective Remedy and to a Fair Trial; Lock and Martin, 'Article 47 CFR' (n 885), para 4; Rauchegger, 'Article 47 - Right to an Effective Remedy and to a Fair Trial' (n 1524), para 47.17; cf e.g., *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* (n 1530), para 52. On the meaning of 'rights or freedoms guaranteed by the law of the Union' in Art 47, cf *État luxembourgeois v B and État luxembourgeois v B, C, D and FC*, Opinion of AG Kokott (n 1530).

2148 EU, 'Explanations Relating to the Charter of Fundamental Rights' (n 79), Article 47 - Right to an Effective Remedy and to a Fair Trial. Note that the explanation refers only to civil rights and obligations and omits criminal charges.

2149 Kranenborg, 'Article 8 – Protection of Personal Data' (n 537), no 8.30.

whether, in the context of the SAA and DAA, data subjects in Switzerland are entitled to such protection.

bb) References to the CFR in the Eurodac and Interoperability Regulations

None of the agreements concluded between Switzerland and the EU refer directly to the CFR. This is despite the fact that some agreements do cover areas relevant to fundamental rights, in particular the SAA and DAA.[2150] Nevertheless, the preambles to the two association agreements on Schengen and Dublin point out that cooperation between Switzerland and the EU in these areas is "based on the principles of liberty, democracy, the rule of law and respect for human rights, as guaranteed in particular by the [ECHR]".[2151] This confirms that, at a minimum, the agreements are grounded in human rights and the ECHR.

In addition, several EU regulations and directives, which are binding for Switzerland, refer to international fundamental rights instruments and the CFR. Among them are the Eurodac and Interoperability Regulations.[2152] The Interoperability Regulations state in Recital 40 that data processing as provided in the Regulations constitutes an interference with Art. 7 and 8 CFR. In Recital 83, it is stipulated that the Regulations respect the funda-

2150 cf Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 142; Matthias Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge' (2014) 115 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBl) 171, 178.

2151 "[…] auf den Grundsätzen der Freiheit, der Demokratie, der Rechtsstaatlichkeit und der Achtung der Menschenrechte, wie sie insbesondere in der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950 gewährleistet sind, beruht" (SAA; DAA).

2152 Anther examples is the Dublin II Regulation, Recital 2. The Dublin II Regulation clarifies that the CEAS is based on the full and inclusive application of the 1951 Geneva Convention relating to the Status of Refugees. Dublin II Regulation, Recital 15, further states: "The Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it aims to ensure full respect for the right to asylum enshrined in Article 18." The Dublin II Regulation also expressly applies in bilateral relations by virtue of a reference in the DAA. Similarly, as another example, the Return Directive refers to the CFR. Return Directive, Recital 24 makes clear that when applying the directive, "the fundamental rights and principles enshrined in particular in the CFR must be observed. ibid, Art 1 and 8, repeat the obligation to interpret and apply the standards and procedures, including any coercive measures, in accordance with fundamental rights. The Return Directive is also binding for Switzerland by virtue of the reference in the SAA.

mental rights and observe the principles recognised in particular by the CFR and should be applied in accordance with those rights and principles. The CFR is referenced twelve times in the Eurodac Regulation. For instance, Recital 33 notes that Eurodac was initially established to facilitate the application of the Dublin Convention, while access to Eurodac for preventing, detecting, or investigating terrorist offences or other serious criminal offences is described as a further development of its original purpose. The Regulation explains that any limitation on the exercise of the fundamental right to respect for private life must comply with Art. 52(1) CFR. Recitals 52 and 53 require that detention and the taking of fingerprints by means of coercion conform to the CFR. Recital 90 further stipulates that Eurodac's performance should be regularly monitored and evaluated, including whether law enforcement access has led to indirect discrimination against applicants for international protection, as highlighted in the Commission's evaluation of the Regulation's compliance with the CFR. Similarly, Recital 32 holds that requests for comparison of Eurodac data by Europol should be allowed only in specific cases, under specific circumstances and under strict conditions, in line with the principles of necessity and proportionality enshrined in Art. 52(1) CFR and as interpreted by the Court of Justice of the European Union. Recital 94 states that the Eurodac Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter. The Regulation seeks to ensure full respect for the protection of personal data and for the right to seek international protection, as well as to promote the application of Art. 8 and 18 CFR. Also, Art. 1(2) Eurodac Regulation states that it fully respects human dignity and fundamental rights. It observes the principles recognised by the CFR. The CFR (and the ECHR) is again specifically mentioned in Art. 13(6) Eurodac Regulation, with regard to the taking of biometric data.

cc) Practice of the Courts in Switzerland and the EU

aaa) *Highest Courts in Switzerland*

The Eurodac and Interoperability Regulations, as noted, contain numerous references to the CFR and emphasise that their provisions must be interpreted in accordance with it. Nevertheless, EU fundamental rights, including the CFR, do not form part of the *acquis communautaire* incorporated into the bilateral agreements. At first glance, this could suggest that the

CFR is irrelevant in Switzerland when applying bilateral law, including the Eurodac and Interoperability Regulations. Accordingly, fundamental rights obligations for Switzerland would appear to derive solely from the ECHR and the Swiss Constitution. Yet, as this section will show, the CFR has been cited and applied in certain cases in Switzerland, although the highest courts do not follow a completely uniform practice.

First, the practice of the Swiss Federal Supreme Court and the Swiss Federal Administrative Court demonstrates that they do not hesitate to rely on the ECHR when interpreting the bilateral agreements.[2153] With regard to the CFR, the Swiss Federal Supreme Court expressly stated in a 2003 ruling that the fundamental rights recognised by the CJEU as unwritten general principles of law have no effect within the bilateral relations,[2154] and that rulings by the CJEU based on fundamental rights are in principle not binding for Swiss courts.[2155] Switzerland has also highlighted in submissions to the CJEU, in cases concerning the interpretation of the Schengen/Dublin *acquis*, that it does not provide comments on the interpretation of the CFR, as the Charter is "not binding for Switzerland."[2156]

However, in the 2003 case cited above, the Swiss Federal Supreme Court held that this reservation is unfounded whenever the CJEU relies on fundamental rights to interpret a provision containing a concept of Union law within the meaning of Art. 16(2) AFMP. In such a case, the fundamental

2153 E.g. BGE 136 II 177, Urteil vom 2. Februar 2010 or BGE 130 II 1, Urteil vom 4. November 2003; BVGE 2010-45, Urteil vom 31. August 2010 or more recently BVGer E-3427/2021 und E-3431/2021, Urteil vom 28. März 2022.

2154 BGE 130 II 113 (n 2065) 123, E. 6,4: "[…] les droits fondamentaux consacrés par la Cour de justice n'entrent en principe pas dans l'acquis communautaire que la Suisse s'est engagée à reprendre" ([...] the fundamental rights enshrined by the Court of Justice do not in principle form part of the acquis communautaire which Switzerland has undertaken to adopt); cf also Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge' (n 2150) 178.

2155 BGE 130 II 113 (n 2065) 123, E. 6.5 : "[…] les arrêts de la Cour de justice dont la solution repose sur la prise en compte de droits fondamentaux ne lient en principe pas le juge suisse" ([…] rulings by the Court of Justice which are based on the consideration of fundamental rights are not, in principle, binding on the Swiss courts).

2156 Oesch and Naef, 'EU-Grundrechte, der EuGH und die Schweiz' (n 2052) 119, fn 7, referring to a written declaration by Switzerland with regards to Joined Cases *N. S. v Secretary of State for the Home Department and M E and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (n 1436) (Bundesamt für Justiz, 'Schriftliche Erklärung Der Schweiz Betreffend Verbundene Rechtssache C-411/10 Und C-493/10' (2011), para 4).

rights in question merge with the concept of Union law that they serve to clarify, and the interpretation that results from them must, in principle, be regarded as forming part of the *acquis communautaire* that Switzerland has undertaken to adopt, provided that the case law in question predates the date on which the agreement was signed.[2157] This decision is interesting insofar as the Court assumes a merger, i.e., an inseparable link between fundamental rights and bilateral law in certain cases, but limits this to the time before the agreement in question was concluded.

Finally, it is worth reiterating the 2022 case in which the Swiss Federal Supreme Court extended the principle of the unconditional precedence of international law over Swiss national law to Art. 28 of the Dublin III Regulation.[2158] The Court justified its decision with "obligations under human rights or the free movement" without clarifying which fundamental rights it meant. If the Swiss Federal Supreme Court had meant the ECHR with its reference to human rights, it would probably have said so or referred to it as an exception from the 'Schubert-practice'. Moreover, the EU has not ratified the ECHR, so interpreting Union law in light of it is not an obvious choice. Art. 28 Dublin III Regulation does not explicitly incorporate human rights, and its obligations do not directly derive from them. There is thus reason to suggest that, in referring to "obligations under human rights," the Federal Supreme Court was implicitly alluding to the CFR.[2159]

2157 BGE 130 II 113 (n 2065) 123, E. 6.5: "Cette réserve n'est cependant pas fondée lorsque la Cour de justice recourt aux droits fondamentaux pour interpréter une norme contenant une notion de droit communautaire au sens de l'art. 16 al. 2 ALCP. En ce cas, les droits fondamentaux concernés se confondent en effet avec la notion de droit communautaire qu'ils servent à éclairer et l'interprétation qui en découle doit, en principe, être considérée comme faisant partie de l'acquis communautaire que la Suisse s'est engagée à reprendre, sous réserve que la jurisprudence en cause soit antérieure à la date de signature de l'Accord" (This reservation is unfounded, however, when the Court of Justice uses fundamental rights to interpret a provision containing a concept of Community law within the meaning of Article 16(2) of the FMPA. In such cases, the fundamental rights in question merge with the concept of Community law that they serve to clarify, and the interpretation that results from them must, in principle, be regarded as forming part of the acquis communautaire that Switzerland has undertaken to adopt, provided that the case law in question predates the date of signature of the Agreement).

2158 BGE 148 II 169 (n 2026); cf Oesch, *Der EuGH und die Schweiz* (n 2026) 105ff, no 95ff; cf Epiney, 'Ist die "Schubert-Rechtsprechung" noch aktuell? Zur Frage des Verhältnisses zwischen Völker- und Landesrecht' (n 2026) 703–707.

2159 This interpretation was first implied by Prof. Matthias Oesch (cf also Oesch, *Der EuGH und die Schweiz* (n 2026) 105ff, no 95), but has been rejected in an oral conversation by Thomas Hugi Yar, the law clerk who wrote the judgment.

As noted above, the purpose of the bilateral agreements in certain areas is to "integrate" Switzerland into the EU legal framework and create a parallel legal situation. In instances where an agreement seeks to incorporate Switzerland into parts of the Union legal system, the case law demonstrates a relatively extensive alignment with EU law and its interpretation.[2160] In 2012, the Swiss Federal Administrative Court stated that it would prioritise teleological interpretation but would not necessarily accord the European principle of effet utile – which seeks to ensure that European law is given full effect by considering the factors of legal integration – the same weight as the EU's internal judicial bodies.[2161] Furthermore, in the context of the Dublin *acquis*, the Court observed that the practice of EU Member States on several points is neither fully transparent nor entirely uniform. Consequently, it seeks to incorporate, as far as possible, elements of European case law (where available), and even the case law of certain Member States, to ensure a parallel legal situation, provided there are no "valid reasons" for a different approach.[2162]

This means that in cases where European case law or case law of certain Member States invokes and interprets CFR fundamental rights, Switzerland might in practice incorporate these rights into its case law to ensure a parallel situation, at least in the context of the Dublin *acquis*. The question then arises as to the extent of this parallel interpretation and whether it implies that CFR rights relevant to the bilateral law should still be considered, even after the signing of an agreement. According to Epiney, the relevance of EU fundamental rights law cannot be dismissed merely because they are not explicitly mentioned in the bilateral agreements. If the CJEU refers to terms, principles, or concepts absent from the bilateral agreements, at least parts of such judgments may be pertinent for interpreting provisions of the bilateral agreements, particularly where parallel rights are involved.[2163]

2160 The "adoption" of provisions of EU law in the Bilateral Agreements with Switzerland takes place - insofar as the existing acquis is affected - in the currently existing agreements either by means of a direct reference to acts of EU law or by basing the wording of provisions of agreement law on provisions of EU law (Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 143); similar also: Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge' (n 2150) 177.

2161 TAF E-6525/2009 (n 2036), E. 5.3.2.

2162 ibid, E. 5.3.2.

2163 Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 148.

Which specific rights or aspects of EU law are relevant must, in this view, be determined on a case-by-case basis through interpretation.[2164]

An example of case law where Swiss courts might rely on EU fundamental rights arises in matters concerning the transfer of an asylum seeker. This is particularly relevant where there is a risk of inhuman or degrading treatment due to systemic deficiencies in the receiving country's asylum system. In such instances, Art. 3(2) Dublin III Regulation (now replaced by Art. 16(3) AMMR), in conjunction with Art. 4 CFR, may be invoked. In a judgment from 2015, the Swiss Federal Administrative Court stated, based on the recitals of the Dublin III Regulation, that the Dublin III Regulation must be interpreted in light of the ECHR and, for Switzerland as a non-EU Member State somewhat oddly, with the CFR.[2165] The Court assumed without further ado that Art. 4 CFR is applicable when examining whether it is justifiable to transfer an asylum applicant to another state, i.e., an EU Member State.[2166] In a later judgment in 2019, the Court referred to the same issue of systemic failures that give rise to a risk of inhuman or degrading treatment within the meaning of Art. 4 CFR. It added that although this provision is not, as such, applicable to Switzerland, its essential content is included in Art. 3 ECHR.[2167] In other rulings, the Swiss Federal Administrative Court has found that EU Member States no longer fulfil their international law obligations concerning their asylum systems. In

2164 ibid.

2165 BVGE 2015-41, Urteil vom 3. Dezember 2015, E. 5.3.3; cf also BVGer D-5756/2015, Urteil vom 29. September 2015; or TAF F-7195/2018, Arrêt du 11 février 2020; In a more recent judgment, BVGer E-1488/2020, Urteil vom 22. März 2023, E. 7.6, the Federal Administrative Court also referred to CFR, Art 19, in a case regarding questions of collective push-backs by Croatia. The Court did not, however, invoke this provision in its judgment. For more also: Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug* (n 1999), no 282.

2166 Implicit in BVGE 2015-41 (n 2166), E. 5.3.3, and explicit in D-5756/2015 (n 2166).

2167 TAF E-962/2019, Arrêt du 14 février 2019, E. 4: "Si cette disposition n'est certes pas, en tant que telle, applicable à la Suisse, pays non-membre de l'Union européenne, son contenu essentiel est toutefois repris à l'art. 3 CEDH. […]. Du reste, ce n'est pas tant la source du risque qui importe, mais plutôt l'existence de motifs sérieux et avérés de croire que l'individu court un risque réel d'être soumis à un traitement inhumain ou dégradant en cas de transfert." (Although this provision is not, as such, applicable to Switzerland, which is not a member of the European Union, its essential content is nevertheless included in Article 3 of the ECHR. [...]. Moreover, it is not so much the source of the risk that is important, but rather the existence of serious and proven grounds for believing that the individual runs a real risk of being subjected to inhuman or degrading treatment in the event of transfer).

doing so, it primarily relied on ECHR case law[2168] and based its judgment on Arts. 3 and 13 ECHR, rather than the CFR.[2169]

In summary, the highest Swiss courts appear to adopt a somewhat contradictory approach. On one hand, they generally hold that the CFR is not applicable in Switzerland, relying instead on the ECHR or the Swiss Federal Constitution for fundamental rights matters. On the other hand, they recognise that EU fundamental rights and bilateral law are effectively "merging," particularly in immigration and asylum matters. In at least one case concerning the DAA, EU law has been given precedence over Swiss law with reference to fundamental rights, potentially those encompassed in the CFR. Moreover, as noted above, the guideline that only case law existing at the time of an agreement's conclusion (or amendment) should be considered is not strictly followed, with Swiss courts also taking later CJEU case law into account.

bbb) *Court of Justice in the EU*

With regard to the Schengen/Dublin *acquis*, the N.S. case of the ECJ[2170] is quite insightful for understanding the applicability of Union fundamental rights. In this case, the Court addresses the principle of mutual trust within the context of the CEAS and outlines its limits when there are serious concerns about systemic failures in a Member State's asylum system, which may result in a risk of violating Art. 4 CFR.[2171] The Court declared that

2168 *M.S.S v Belgium and Greece* (n 1468); also *TI v the United Kingdom* [2000] ECHR 2000-III; *KRS v the United Kingdom* App no 32733/08 (ECtHR, 2 December 2008).

2169 The Federal Administrative Court decided in BVGE 2011-35, Urteil vom 16. August 2011, E. 4.11, that in the case of Greece, the presumption that the Member State is fulfilling its obligations under international law no longer applies. With regard to Malta, it decided in BVGE 2012-27, Urteil vom 2. Oktober 2012, that the presumption that Malta adequately respects the fundamental rights of the persons concerned in the Common European Asylum System cannot be upheld without further ado. The newest case in this regard is BVGer F-5675/2021 (n 1469), regarding Croatia, in which the Federal Administrative Court stated that returns are only possible in individual cases.

2170 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (n 1436).

2171 ibid, para 79ff; Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 151.

the principle of mutual trust also applies to Schengen/Dublin-associated countries.[2172] By making mutual trust dependent on a possible violation of Art. 4 CFR, the CJEU seems to have tacitly assumed that the CFR is also binding for those states.[2173] This line of thinking has been confirmed in later CJEU cases.[2174]

Moreover, the CJEU has consistently reviewed international treaties and their implementation in EU law to ensure compatibility with EU fundamental rights, and has required their application in conformity with those rights.[2175] It has, however, done so in relation to the bilateral agreements only once: in the aircraft noise dispute between Switzerland and Germany.[2176] In that case, the Court concluded that no violation of fundamental rights had occurred, without examining the role of such rights within the bilateral framework.[2177]

In summary, the CJEU does not appear to hold a clear position on the applicability of EU fundamental rights law in Schengen/Dublin-associated states. What can be stated generally, however, is that if the CFR were to apply to such countries, including Switzerland, CJEU case law would have to be fully observed in relation to the areas of law governed by the bilateral agreements, such as the SAA and DAA.[2178] This would, it could be reasoned, lead to Switzerland being integrated into the EU *acquis* in a way

2172 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (n 1436), para 78; later, also in: *Shamso Abdullahi v Bundesasylamt* (n 1433), no 52ff; cf Glaser and Dörig, 'Die Streitbeilegung in den Bilateralen Abkommen Schweiz–EU' (n 2051) 456.

2173 Sarah Progin-Theuerkauf, 'Entwicklungen im EU-Asylrecht und ihre Implikationen für die Schweiz' in Stephan Breitenmoser, Sabine Gless and Otto Lagodny (eds), *Rechtsschutz bei Schengen und Dublin* (Dike Verlag 2013) 231, 239; cf also Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge' (n 2150) 187; Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 151.

2174 In particular, *Shamso Abdullahi v Bundesasylamt* (n 1433).

2175 The leading case in this regard is *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (n 1849); see for more on this case Oesch, *Der EuGH und die Schweiz* (n 2026) 43, no 37; also Opinion 1/15 on the Draft Canada-EU PNR Agreement, (n 541); Case T-512/12 *Front Polisario v Council* [2015] OJ C 68/26.

2176 Case C-547/10 P *Swiss Confederation v European Commission, Federal Republic of Germany, Landkreis Waldshut* [2013] OJ C 123/2.

2177 ibid, paras 82 and 83.

2178 This would apply both to questions of the interpretation of EU secondary law and to questions of the fulfilment of the room for discretion granted by Union law

that was not envisaged by the parties and would go far beyond the subject matter of the bilateral agreements.[2179] However, as we will see in the next section, there are also arguments in favour of taking the CFR into account when interpreting the Schengen/Dublin *acquis*.

dd) Arguments by Legal Scholars

In Switzerland, the prevailing scholarly view has long been that, insofar as Switzerland accepts EU law on a sectoral basis, it also implicitly adopts the corresponding fundamental rights framework, namely the CFR.[2180] Oesch argued that references to EU rights, terms or concepts in the bilateral agreements automatically include the associated EU fundamental rights,[2181] referring to the above-mentioned phrasing of the Swiss Federal Supreme Court that EU fundamental rights "merge" with the concepts of the *acquis communautaire*.[2182] Oesch and Epiney further contend that EU fundamental rights are not only an inherent part of EU substantive law but also form an integral component of bilateral treaties that extend EU law to the bilateral relationship, such as the Schengen and Dublin Association Agreements. These agreements – or individual provisions therein – are based on EU law, modelled literally or analogously on the relevant EU legislation, or make reference to EU secondary law, and are intended to create a parallel legal framework to ensure Switzerland's integration into the European legal system.[2183] Accordingly, it is argued that this parallel framework must incorporate the associated fundamental rights. In consequence, the CFR is applicable in as far as it serves to interpret concepts or rights that are enshrined in the bilateral agreements, including the Eurodac and Interoperability Regulations.

(Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 153ff).

2179 ibid 154.

2180 Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge' (n 2150); Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041).

2181 Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge' (n 2150) 193; Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 154ff.

2182 BGE 130 II 113 (n 2065) 124, E. 6.5.

2183 Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge' (n 2150) 193; Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 155.

Finally, it is worth noting that it has been argued that, when interpreting bilateral law that refers to other legal acts not formally part of the agreements, those acts may still be relevant for the interpretation of the bilateral law in question.[2184] In essence, this would mean that when the Eurodac or Interoperability Regulation refer to the GDPR, the provisions concerned need to be interpreted in light of, and with due regard to, the case law regarding the GDPR.

ee) Conclusions

It can be concluded from the above that, despite Switzerland's official stance to the contrary, there are considerable arguments suggesting that the fundamental rights enshrined in the CFR are applicable in Switzerland to the extent that bilateral treaties reference or implicitly incorporate them, particularly if a legal situation parallel to that of the EU is established in the relevant area of law. This is the case with regard to the Schengen/Dublin *acquis*. The practice under the Dublin III Regulation has shown how interconnected Switzerland and the EU are when migrants and information are transferred back and forth daily – and that in a human rights-sensitive field like this, coherent (or parallel) application and interpretation of the law is important. Under the new Eurodac and Interoperability Regulations, the constant flux of data and information between the EU Member States and Switzerland will be even greater. It is hence of imminent importance that the bilateral parties harmonise (to some degree) the application of the law, set binding minimal standards for all data subjects concerned, and thus create a parallel situation for the data exchange and the asylum systems to function on each side.

On the other hand, directly applying the CFR in Switzerland, without reference to or consideration of the bilateral agreements and their specific interpretive context, is not feasible.[2185] This study argues that data subjects can invoke rights under the CFR only when claiming that a provision within the Schengen/Dublin *acquis*, such as the Eurodac or Interoperability Regulations, requires interpretation in line with the CFR. An EU-compatible, parallel interpretation of these Regulations implies that Swiss admin-

2184 Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 155.

2185 ibid 155.

istrative authorities and courts should not depart from CJEU precedent without a "valid" reason.[2186] As is already the practice in Switzerland, this should also apply to recent case law that postdates the adoption of the new Eurodac and Interoperability Regulations.[2187] As shown, numerous fundamental-rights issues arise in connection with these Regulations, some of which will be clarified by EU courts in the future. In general, case law in the area of data processing and EU information systems will continue to evolve substantially. The strong interdependence between Switzerland and the EU in this domain necessitates uniform legal protection to ensure the proper functioning of information systems and to guarantee equal protection and access to justice for all data subjects.

3. Access to Justice Rights in Switzerland

As shown above, numerous questions remain unresolved concerning bilateral law, and, consequently, the application of the Eurodac and Interoperability Regulations in Switzerland. These uncertainties are particularly pronounced when the Eurodac and Interoperability Regulations refer to other laws that have not been adopted by Switzerland, namely the GDPR and CFR. Conversely, questions arise when Swiss law that implements directly applicable Eurodac and Interoperability Regulation provisions in turn refers to other Swiss law, which also occurs, as we will see in this section. This section shall therefore discuss the theoretical issues examined above on the basis of the specific rights this study has analysed.

2186 TAF E-6525/2009 (n 2036), E. 5.3.2; also: Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge' (n 2150) 194.

2187 cf Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge' (n 2150) 194; similar also: Epiney, 'Zur Verbindlichkeit der EU-Grundrechte in der und für die Schweiz' (n 2041) 154–156; Zünd, 'Grundrechtsverwirklichung ohne Verfassungsgerichtsbarkeit' (n 2052) 1349 and 1356 - 1357; Constantin Hruschka, 'Grundrechtsschutz in Dublin-Verfahren' in Stephan Breitenmoser, Sabine Gless and Otto Lagodny (eds), *Rechtsschutz bei Schengen und Dublin* (Dike Verlag 2013) 153 and 159.

a) *The Right to Information*

Switzerland is one of the countries that mainly uses its own leaflets to inform data subjects about their rights, instead of the leaflets provided by the EU. The leaflets provided by the EU are only used in connection with irregularly staying persons or migrants who have irregularly crossed an external Schengen border. This leaflet is available in digital form in the computer application that provides the results of the biometric comparison of fingerprints done when a person is apprehended.[2188] Hence, police, customs, and border security authorities are expected to use the leaflets when collecting the biometric data of data subjects to inform them of their rights. Nevertheless, it remains unclear in which cases, if any, this actually occurs. In practice, the leaflet is not provided on paper; the information is given only after the biometric data have already been collected.[2189] As can be seen in the chapter on the right to information, this constitutes a violation of the right to information in the sense of Art. 29 Eurodac Regulation 603/2013 (replaced by Art. 42 Eurodac Regulation) and Art. 4 Dublin III Regulation (replaced by Art. 19 AMMR) (as well as, arguably, Art. 8 ECHR, Art. 7 and 8 CFR).[2190] What follows from this will be discussed in more detail below.

For informing asylum seekers, Switzerland uses its own leaflets. These still correspond to Art. 29 of Eurodac Regulation 603/2013, rather than the revised Eurodac Regulation. There is one leaflet for adults and another for unaccompanied minors. The Swiss adult leaflet is clearer and shorter than the EU version. However, it does not explain that fingerprints are generally the decisive factor in determining which country is responsible for processing an asylum application: "Your fingerprints are stored in the European fingerprint database Eurodac and compared with the fingerprints transmitted by other Dublin states and already stored in Eurodac in accordance with the applicable legal provisions. This makes it possible to quickly determine which Member State is usually responsible for your asylum procedure."[2191] Also, this is all the information data subjects receive on Eurodac. Asylum seekers are neither told how long their data will be stored, nor who can access them or for what purposes. Neither the identity nor the contact address of the controller is provided, nor the contact details of the national

2188 Oral information by P. Moser-Noger, Staatsekretariat für Migration on 11 January 2023.
2189 ibid.
2190 See chapter: The Right to Information.
2191 SEM, 'Merkblatt Asylverfahren' (2018) 3.

data protection authority. Data subjects are not informed of their right to access the data and how they can do so, or that they can make a request for rectification or erasure.[2192]

The leaflet for unaccompanied minors provides no information on Eurodac. These minors are entirely dependent on their assigned legal representative, who is also meant to act as a confidant, to inform them about Eurodac and their data protection rights.[2193]

The Swiss leaflets omit a substantial portion of the information that the law requires to be provided to data subjects. The SEM has confirmed that asylum seekers receive information on Eurodac through these leaflets, and only in the case of minors may additional information be provided by their legal representative.

Under Swiss Data Protection Law (FADP), Art. 19 requires providing less information than the corresponding Art. 29 Eurodac 603/2013 (now Art. 42 Eurodac Regulation). Swiss law stipulates only that individuals are informed of the identity and contact details of the controller, the purpose of processing, and the recipients of personal data when data are submitted. Even this minimal information is not included in the Swiss leaflet. The right to information under the Eurodac Regulation has not been transposed into national law – and according to the current implementation draft, it will not be. The right is sufficiently specific, unconditionally formulated, and directly applicability is not precluded, meaning it is justiciable. Data subjects can therefore rely directly on the Eurodac Regulation and assert a violation of their right to information if the leaflets are insufficient.

The situation differs slightly regarding the right to information under Art. 47 Interoperability Regulation. This right has not been transposed into Swiss federal law but is mentioned in Art. 17 of the N-IOP Draft Ordinance, [2194] which refers back to Art. 47 Interoperability Regulation. Accordingly, Art. 47 is applicable to data subjects in Switzerland. Art. 47,

2192 ibid.

2193 SEM, 'Merkblatt für unbegleitete Minderjährige Asylverfahren' (2023).

2194 According to 'Botschaft zur Genehmigung und Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU-Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' (n 2038) 8038, however, the right to information will be guaranteed according to the Swiss FADP ("Auf ähnliche Weise ist das Recht auf die Abänderung oder Löschung der Daten im DSG geregelt. Dasselbe gilt bezüglich des Informationsrechts."). This would likely mean a reference is made in the FNIA to FADP, Art 19. This contradicts, however, the reference now already made in the N-IOP Ordinance, Art 17.

in turn, refers to Arts. 13 and 14 GDPR, raising the question of whether this reference should be interpreted as a reference to Art. 10 of Directive 95/46/EC or to Art. 13 and 14 GDPR. If, as was argued above, the reference in Art. 47 Interoperability Regulation is to be understood as one to the Data Protection Directive 95/46/EC, data subjects in Switzerland will have fewer information rights than data subjects in the EU. A whole list of information that must be provided to the data subject under Art. 13 and 14 GDPR is not included in Art. 10 Data Protection Directive 95/46/EC (contact details of the data protection officer; the legal basis for the processing; the legitimate interests pursued by the controller or by a third party, where processing is necessary for such purposes; where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission; the period for which the personal data will be stored; the right to lodge a complaint with a supervisory authority; the existence of automated decision-making).

If, in the future, Switzerland provides only the information set out in Art. 10 Data Protection Directive 95/46/EC, a data subject could claim a violation of their right to information under fundamental rights provisions. The question then arises as to which fundamental rights would apply: Art. 8 ECHR or Arts. 7 and 8 CFR. Since the CFR provides a more robust conception of privacy and data protection, it is possible that, under this regime, the right to information would be interpreted more expansively than under the ECHR. Invoking the Swiss Constitution, in contrast, would not confer an equally extensive right; Art. 19 FADP – which also provides less information than the GDPR – is likely consistent with the Constitution. Consequently, data subjects in Switzerland may be afforded a narrower right to information under the Interoperability Regulation than their counterparts in the EU.

b) *The Right to Access, Rectification and Erasure*

As stated above, the Eurodac Regulation is, in principle, directly applicable in Switzerland. Still, some Eurodac provisions have been implemented in Art. 102a ff. of the Swiss Asylum Act (AsylG), including the right of access to data and information.[2195] Art. 102e AsylA states that the right of access

2195 Asylgesetz [1999] SR 142.31 (AsylG) (Asylum Act - AsylA).

is governed by the data protection provisions of the Confederation or the Cantons; this provision will not change with the implementation of the new Eurodac Regulation.[2196] At federal level, this refers to Art. 25 FADP.

The question arises as to whether bilateral law, i.e., the Eurodac Regulation, or the Swiss FADP (or the corresponding cantonal data protection law) applies to a request for access to data and information submitted in Switzerland. As explained above, in general, international law takes precedence over national law according to the Vienna Convention and, if it is justiciable, does not have to be transposed into national law in Switzerland. The right of access enshrined in Art. 43 Eurodac Regulation is sufficiently specific and unconditionally formulated and direct applicability is not precluded. The right is thus justiciable. This is further evidenced by the fact that Switzerland has not transposed the rights of rectification and erasure of data into national law under the Eurodac Regulation 603/2013 and, as the draft legislation indicates, will not do so under the new Eurodac Regulation.[2197] Accordingly, the rights to rectification and erasure are to be exercised directly in accordance with the Eurodac Regulation. If bilateral law is nevertheless transposed into Swiss law, the latter is applicable, unless it infringes the preceding bilateral law.[2198]

The introduction of Art. 102e AsylA in conjunction with Art. 25 FADP does not cause this issue because the right of access to data and information

2196 Staatssekretariat für Migration 'Bundesbeschluss Entwurf über die Genehmigung des Notenaustausches zwischen der Schweiz und der Europäischen Union betreffend die Übernahme der Eurodac-Verordnung (EU) 2024/1358 über die Einrichtung von Eurodac für den Abgleich biometrischer Daten (Weiterentwicklung des Dublin/Eurodac-Besitzstands)' (n 2082) 14 fn 2; see also 'Verordnungsanpassungen aufgrund der Übernahme des EU-Migrations- und Asylpakts; Eröffnung des Vernehmlassungsverfahrens Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens' (*SEM*, June 2025); 'Bundesbeschluss über die Genehmigung und die Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)'(n 2083).

2197 Staatssekretariat für Migration 'Bundesbeschluss Entwurf über die Genehmigung des Notenaustausches zwischen der Schweiz und der Europäischen Union betreffend die Übernahme der Eurodac-Verordnung (EU) 2024/1358 über die Einrichtung von Eurodac für den Abgleich biometrischer Daten (Weiterentwicklung des Dublin/Eurodac-Besitzstands)' (n 2082).

2198 cf applicability of international law in Switzerland, Keller, *Rezeption des Völkerrechts* (n 2020), 348 ff; Judith Wyttenbach, *Umsetzung von Menschenrechtsübereinkommen in Bundesstaaten: Gleichzeitig ein Beitrag zur Grundrechtlichen Ordnung im Föderalismus* (Dike Verlag - Nomos 2017) 289ff.

under Art. 25 FADP is almost identical in wording to that in the Eurodac Regulation and even goes beyond it in some respects. For example, Art. 25(1)(c) FADP, unlike Art. 42 Eurodac Regulation, explicitly requires that the purpose of the data processing be communicated to the data subject (Art. 30 Eurodac Regulation 603/2013 also included this requirement).In addition, the Swiss right of access stipulates that no one can waive this right in advance and that information is provided free of charge and generally within 30 days.[2199]

Accordingly, in this case, the question of which law applies remains largely theoretical. The aforementioned judgment on Art. 28(3) Dublin III Regulation[2200] suggests that, where Swiss law conflicts with the Eurodac Regulation, the latter would take precedence. As noted in the preceding section, this could occur notwithstanding the existence of a Commission adequacy decision regarding Swiss data protection law. Certain rights – such as the right to information – are less extensive in Switzerland, while others are more extensive. However, as this is not the case with respect to the right of access, it may be assumed that Swiss law is applicable. In general, directly applicable EU norms are transposed into national law only where the Swiss legislator seeks to clarify particular aspects or to confer more or less extensive rights than those provided under international law. This approach has been followed in the present instance with regard to access to data and information.

The right to access, rectification, and erasure in Art. 48 Interoperability Regulations has not been transposed into Swiss federal law. The official federal report on the implementation of the Interoperability Regulations states that the right to access data and information, provided for in Art. 111f Federal Act on Foreign Nationals and Integration (FNIA), will refer in particular to the FADP and the cantonal laws on data protection.[2201] The provision was adopted but subsequently repealed,[2202] with the result that access rights continue to be governed by the FADP. Similarly, the right

2199 FADP, Art 25(5), (6) and (7).

2200 BGE 148 II 169 (n 2026), E. 5.2ff.

2201 'Botschaft zur Genehmigung und Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU-Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' (n 2038) 8038.

2202 Repealed by Annex 1 No 1 of the 'Bundesbeschluss über die Genehmigung und die Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung

to rectify or erase data is regulated in the FADP.[2203] At the same time, Art. 29(2) N-IOP Draft Ordinance states that requests for information, rectification, as well as erasure of links and data in the MID and of data in the CIR must be submitted in writing to the SEM. Paragraph four further specifies that, with respect to links stored in the MID, the data subject may request rectification or erasure in accordance with Art. 48 Interoperability Regulations. Consequently, it remains unclear from the outset which law is applicable.

The question arises as to the applicable law where a justiciable norm under bilateral law – here, Art. 48 of the Interoperability Regulations – is transposed into national law, and the implementing ordinance makes reference to the bilateral instrument. As noted above, in practice, Swiss law prevails so long as it does not contravene the Interoperability Regulations. While the N-IOP Draft Ordinance explicitly refers to Art. 48 Interoperability Regulations, data subjects may invoke this provision. However, given that the ordinance constitutes subordinate legislation, the FADP would prevail in the event of a conflict, being higher-ranking federal law. Moreover, even assuming the provision applies, a further interpretative issue arises: Art. 48 Interoperability Regulations refers to the GDPR. In the Swiss context, this may need to be construed as a reference to the Data Protection Directive 95/46/EC. Art.12 Directive 95/46/EC essentially confers equivalent rights to those in Art. 16 GDPR, albeit without the broader right to erasure (the "right to be forgotten") under Art. 17 GDPR, and without the procedural guarantees set out in Art. 12 GDPR.

If, as is likely in practice, national law – specifically the FNIA – is applied in conjunction with the FADP, a question arises as to whether the rights of access, rectification, and erasure under national law are as comprehensive as those afforded by the GDPR. As noted above, this can be affirmed in

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eines Rahmens für die Interoperabilität zwischen EU Informationssystemen' (n 2083), with effect from 15 June 2025.

2203 This has been stated in 'Botschaft zur Genehmigung und Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU-Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' (n 2038) 8038; and is confirmed by the fact that no specific rectification or erasure provision was adopted in relation to the Interopability Regulations in'Bundesbeschluss über die Genehmigung und die Umsetzung der Notenaustausche zwischen der Schweiz und der EU betreffend die Übernahme der Verordnungen (EU) 2019/817 und (EU) 2019/818 zur Errichtung eines Rahmens für die Interoperabilität zwischen EU-Informationssystemen (Weiterentwicklungen des Schengen-Besitzstands)' (n 2083).

respect of the right of access. With regard to data processed by federal authorities, as is the case for data processing under Eurodac and the Interoperability Regulations, the rights to rectification and erasure are governed by Art. 41 FADP. However, this provision differs significantly from the corresponding provisions in Art. 16 et seq. GDPR. Under Art. 41 FADP, a legitimate interest (*schutzwürdiges Interesse*) in rectification or erasure must be demonstrated. There is no right to completion of data. Furthermore, unlike Art. 12 GDPR, there is no statutory time limit for responding to a request, nor is it stipulated that rectification and erasure must be effected free of charge. There is also no analogue to Art. 19 GDPR, which requires that changes and deletions be communicated to all recipients of the data. Reliance on the national FADP could therefore restrict the rights of data subjects in Switzerland. It will thus be of particular interest to observe how a Swiss court might adjudicate a case in which a violation of Art. 48 Interoperability Regulation is alleged in conjunction with Art. 16, 12, or 19 GDPR, where Art.41 FADP has been applied in response to a rectification request concerning interoperability data.

These practical examples further demonstrate that there are compelling reasons for references to the GDPR to be given effect in Switzerland, even if it has not been formally adopted. Reliance on the FADP or on the Data Protection Directive 95/46/EC introduces legal uncertainty and, in certain cases, gaps in protection, which should be avoided when seeking to ensure a parallel legal situation.

c) *Invoking Swiss Rights in the EU*

In certain matters, the reverse question arises, namely: can a data subject in an EU Member State invoke rights that a data subject in Switzerland enjoys? As seen above, this question could arise in at least one case, i.e., in connection with the right of access to data in the CIR. As seen in the previous chapter,[2204] Art. 48 Interoperability Regulations does not provide a right of access to data in the CIR. Nonetheless, as noted above, this is provided for under Art. 29(2) N-IOP Draft Ordinance.

In principle, a data subject outside of Switzerland cannot invoke Art. 29(2) N-IOP Draft Ordinance, because Swiss law is not applicable in the EU. In this specific case, it may however be possible to submit a

2204 See chapter: The Right to Access Personal Data and Information.

request for access in Switzerland, even if the data subject is not located there. The Interoperability Regulations refer to Art. 15 GDPR for the right of access, which stipulates that a request for access must be submitted to the controller. Switzerland will not be considered the controller if the data subject has not provided its data in Switzerland, and it was not processed by Swiss authorities. Accordingly, Swiss authorities would not process the request (but would forward it to the Member State considered to be the controller). However, Art. 48(1) Interoperability Regulation states that the data subject may "address himself or herself to the competent authority of any Member State". The obligation to contact the responsible Member State if Switzerland is not responsible for the manual verification only applies to rectification and erasure requests in accordance with Art. 48(3) Interoperability Regulation. A request for access would therefore probably be processed by Switzerland itself and in accordance with Art. 29(2) N-IOP Draft Ordinance. Data subjects located in an EU Member State therefore may submit an access request in Switzerland and gain access to data in the CIR, without having to request access to each of the underlying information systems. It remains to be seen whether this will actually be possible in practice.

d) *Conclusions*

The application of the Eurodac and Interoperability Regulations in Switzerland reveals a complex interplay between bilateral agreements, Union law, and Swiss national laws. This complexity is evident when examining the rights to information, access, rectification, and erasure. The Eurodac and Interoperability Regulations refer to EU law, such as the GDPR and the CFR, which Switzerland has not adopted, creating uncertainties in the rights of data subjects.

Switzerland's use of its own leaflets for informing data subjects about their rights under the Eurodac Regulation demonstrates significant shortcomings. The leaflets do not provide comprehensive information required by the Eurodac Regulation, such as the duration of data storage, identity of the data controller, or how to exercise rights of access, rectification, and erasure. This deficiency constitutes a violation of the right to information as outlined in both the Eurodac Regulation and the Dublin III Regulation, as well as potentially infringing on fundamental rights under the ECHR (and CFR). Despite this, the Eurodac Regulation's direct applicability means

data subjects can assert their rights even in the face of inadequate national implementation.

With respect to the rights of access, rectification, and erasure, Swiss law presents a mixed picture. While the right of access under Swiss law is largely consistent with the Eurodac Regulation, the rights to rectification and erasure are less comprehensive. The Swiss FADP provides mechanisms to safeguard these rights, but they remain limited in certain respects, particularly as regards procedural guarantees. The transposition of the Interoperability Regulations into Swiss law – primarily through the FNIA and the N-IOP Draft Ordinance –introduces an additional layer of complexity. References to the GDPR within the Interoperability Regulations give rise to further ambiguity, particularly where such references must be understood as referring instead to Directive 95/46/EC. Consequently, data subjects in Switzerland may enjoy fewer rights than their counterparts in the EU, especially regarding the scope and procedural protections associated with the right to rectification.

Finally, there is an intriguing possibility that data subjects in the EU might seek to invoke rights under Swiss law, in particular the right of access to data held in the CIR. Although Swiss law is not directly applicable within the EU, the mechanisms established for cross-jurisdictional data access under the Interoperability Regulations could, in principle, allow EU data subjects to rely on Swiss provisions to secure broader access rights.

Overall, this chapter highlights the need for careful clarification of data protection laws between Switzerland and the EU, to ensure that the rights of data subjects are consistently upheld across jurisdictions. The disparities and ambiguities identified herein may be taken as an impetus for further legal harmonisation and show the potential for conflicts in this area. It is essential to bear in mind that the ultimate objective must always be to safeguard compliance with overarching human rights standards, even in complex and rapidly evolving legal contexts.

II. Beyond the Schengen Area: The Example of Balkandac

1. How Eurodac and Interoperability Are Expanded beyond the Schengen Area

When considering the Eurodac and Interoperability Regulations and the challenges that may impede the realisation of data subjects' rights, it must be borne in mind that, even with the adoption of these Regulations, the information systems themselves remain far from complete.[2205] To gain insight into the broader security and migration context of the interoperable EU information systems, particularly Eurodac, it is essential to briefly examine a parallel process: the expansion of Eurodac and interoperability beyond the EU and the Schengen Area, which is expected to continue in the coming years. It is important to understand this context in order to assess the significance of human dignity within the complex interplay of security, migration surveillance, and administrative processes. It also underscores the urgent need for transparency and the effective realisation of the rights examined in this study with regard to data sharing and processing within these systems. This expansion is most evident in the development of the so-called Balkandac, which serves as an illustrative example what has occurred to date and indicates what is likely to occur in the future of interoperable information systems.

The Western Balkan states make up key transit countries along the so-called Balkan route. Increased transit along this route in recent years has prompted a corresponding increase in the deployment of EU Agency staff, specifically EBCG, along with financial resources to fortify the borders and manage movement through the countries.[2206] One significant development is the introduction of biometric data collection systems modelled on Eurodac, designed to enable seamless future interoperability.[2207] Balkan countries have been equipped with systems to improve data collection and

2205 The evolvement of information systems into more and more comprehensive ones, can also be seen in other EU information systems, such as SIS, which over the years has seen a considerable expansion of the amount and types of data stored and its functionalities, described as a "transformation from a simple information-sharing tool to a full-blown investigative database" by Leese and Ugolini, 'Politics of creep: Latent development, technology monitoring, and the evolution of the Schengen Information System' (n 35).

2206 BVMN 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 1.

2207 ibid 2.

sharing, with the dual objective of avoiding multiple asylum applications in different countries and facilitating the deportation of irregular migrants.[2208] Various European Council documents refer to the objective of "stimulating the development by Western Balkan partners of national biometric registration/data-sharing systems on asylum applicants and irregular migrants".[2209] The documents specify that these systems must be compatible both with each other and with Eurodac in order to guarantee their future interconnection and interoperability.

The interoperability of the biometric databases represents a critical milestone in the EU's trajectory towards border externalisation, streamlining the process of returns.[2210] Experts in Balkan and borders studies have argued that the EU has long treated the Balkan region as though it were its own backyard, where border-related policies have been tried and tested for decades.[2211] In this context, it is important to remember that while the Western Balkan countries are regarded as 'safe' and are candidates for EU membership, they have not yet joined the EU. As a result, they are not subject to the same safeguards as Member States regarding reception conditions, asylum and return procedures, and border management operations.[2212] In this manner, EU Member States can return people on the move to "safe third countries"[2213] in the Western Balkans, which, in turn, are empowered to return them to their countries of origin. This entire process is undergoing digitalisation through interoperable databases to enhance the efficiency of these operations.[2214]

The question arises: how, specifically, are the EU and its agencies involved in the recent developments concerning the digitalisation of biometric data collection in the Western Balkans? How are EU information systems integrated into this process, and what data are shared, and with whom?

2208 Nidžara Ahmetašević and others, 'Repackaging Imperialism: The EU – IOM Border Regime in the Balkans' (Transnational Institute 2023) 70.

2209 E.g., 5754/20 from Presidency, Council of the European Union, 'Combating Migrant Smuggling: Current Operational Needs and Enhancing Cooperation with the WBs' (14 February 2020).

2210 BVMN 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 2.

2211 Ahmetašević and others, 'Repackaging Imperialism: The EU – IOM Border Regime in the Balkans' (n 2209) 3.

2212 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 17.

2213 EUAA, 'Asylum Report 2023', 4.3.2.

2214 ibid 17.

According to the Border Violence Monitoring Network (BVMN), which conducted field studies between 2016 and 2023 in the Western Balkans, practices of gathering biometric data are well underway in a number of Western Balkan states which have accession status and receive funds to develop national Eurodac-compatible biometric databases.[2215] This initiative, known as Balkandac (Database Accession Candidate), aimed to align these countries' systems with EU standards despite not yet being Schengen Area members. In 37 testimonies collected of individuals who were pushed back from North Macedonia to Greece, respondents recount how their fingerprints, biographical information, and facial images were collected prior to being returned.[2216] In both legal and practical terms, the collection of biometric data from the individuals interviewed was not accompanied by the safeguards mandated by the GDPR. Specifically, there was a lack of information provided about what data were being collected, the purposes of the collection, who would have access to the data, and the details of their storage, including where and for how long they would be retained.[2217] Although Eurodac-compatible, such databases are not (yet) connected to Eurodac; the data in them cannot, in theory, be accessed by EU or Member States authorities. However, in a detailed report, the BVMN showed how such data may still be funnelled into the EU information cycle on migrants.

The first step towards a potential data exchange was the funding of biometric data systems modelled on and compatible with Eurodac and

2215 ibid 30; also: 14062/22 from Martine Deprez, 'Recommendation for a COUNCIL DECISION Authorising the Opening of Negotiations on a Status Agreement between the European Union and Montenegro on Operational Activities Carried out by the European Border and Coast Guard Agency in Montenegro' (26 October 2022) <https://www.statewatch.org/media/3549/eu-frontex-status-agreement-com-recommendation-montenegro-14062-22.pdf>; European Commission, 'Commission Staff Working Document: Serbia 2022 Report, Accompanying the Document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2022 Communication on EU Enlargement Policy' (2022) SWD(2022)338 final; BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685), Annex 5 - Regular IPA II assistance on Migration & Border Control; 'Bosnia and Herzegovina - Financial Assistance under IPA' (*European Neighbourhood Policy and Enlargement Negotiations (DG NEAR)*) <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/overview-instrument-pre-accession-assistance/bosnia-and-herzegovina-financial-assistance-under-ipa_en>.

2216 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685), Annex I: Testimonials from the Border Violence Monitoring Network.

2217 ibid 31.

allocation of biometric registration equipment by the EU. For Bosnia and Herzegovina, Montenegro, Serbia and Kosovo, the EU procured the necessary IT and communication infrastructure to develop identification and registration of third-country nationals and provided capacity building and training.[2218]

Secondly, the EU's EBCG Agency, commonly known as Frontex, is present in several Western Balkan States providing operational support through working agreements.[2219] The EBCG Agency is the main actor responsible for developing and implementing Eurodac-compatible biometric databases.[2220] The Agency has access to a broad range of data pertaining to migration and asylum processes in the Western Balkans; clauses in the EBCG Agency's Status Agreements with the Western Balkan countries lay out provisions for the consultation of national databases.[2221] Depending on the agreement, the EBCG Agency may even communicate personal data "to other bodies" with prior authorisation of the communicating authority.[2222] Alternatively, it may process and communicate personal data in accordance with EU data protection law.[2223] The EBCG Agency also has access to the

2218 'EU Increases Support for Border and Migration Management in the Western Balkans' *European Commission - Press Release* (25 October 2022); cf BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 34.

2219 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 35; 'Beyond EU Borders' (*Frontex*) <https://www.frontex.europa.eu/what-we-do/beyond-eu-borders/our-international-projects/>.

2220 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 35.

2221 ibid.

2222 Agreement between the European Union and the Republic of North Macedonia on Operational Activities Carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia [2023] OJ L61/3, Art 16(1)(i); Agreement between the European Union and Montenegro on Operational Activities Carried out by the European Border and Coast Guard Agency in Montenegro [2023] OJ L140/4, Art 16(1)(i).

2223 Status Agreement between the European Union and the Republic of Serbia on Actions Carried out by the European Border and Coast Guard Agency in the Republic of Serbia [2020] OJ L202/3, Art 10(3) and (4).

SIS,[2224] EES[2225] and VIS.[2226] Through the Interoperability Regulations, it will be able to use the ESP, CIR, and MID, accessing certain data "for the purpose of carrying out risk analyses and vulnerability assessments."[2227] The agency is also responsible for operating the Central Unit of the ETIAS,[2228] giving it a "key role in the EU's emerging 'travel intelligence' architecture"[2229], may collect data for the Eurodac system[2230] and has access to statistics created with Eurodac data.[2231] The BVMN points out that with the EBCG Agency able to access both national databases and Eurodac for the purpose of their operations, and a lack of clarity regarding the ways in which data might be shared, it is possible that proxy links are already being created.[2232]

Third, European Migration Liaison Officers (EMLOs), deployed by the EU in various regions, including Western Balkan countries, assist with policymaking and operational responses. They are authorised to process biometric and biographical data, particularly in migration and international protection contexts.[2233] Moreover, they are mandated to do so in the context of the implementation and enforcement of return decisions.[2234] Furthermore, liaison officers can share personal data gathered in the course of their duties with Member States, including law enforcement agencies, as well as within the network of Migration Liaison Officers. Such data sharing aims

2224 Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the Use of the Schengen Information System (SIS) for the Return of Illegally Staying Third-Country Nationals [2018] OJ L312/1 (SIS III - Return Regulation), Art 16; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the Establishment, Operation and use of the Schengen Information System (SIS) in the Field of Border Checks [2018] OJ L312/14 (SIS III - Borders Regulation), Art 60; SIS III - Police Regulation, Art 50 and 74.

2225 EES Regulation, Art 63.

2226 Revised VIS Regulation 2021, Art 45(2).

2227 Interoperability Regulation - Judicial Cooperation, Art 62(4).

2228 ETIAS Regulation, Art 7.

2229 Chris Jones, Romain Lanneau and Yasha Maccanico, 'Frontex and Interoperable Databases - Knowledge as Power?' (Statewatch 2023).

2230 Eurodac Regulation 2024, Art 15(3), 22(8), 24(8) and 26(5).

2231 ibid, Art 12(3), (4) and (6).

2232 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 36.

2233 Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the Creation of a European Network of Immigration Liaison Officers (recast) [2019] OJ L198/88, Art 10.

2234 ibid, Art 10(3)(a).

to prevent irregular migration and to support the prevention, investigation, detection, and prosecution of smuggling and trafficking.[2235] This allows for the sharing of biometric data, especially on migrants, between the EU or EU Member States and many third countries.

In addition to these concrete examples, where the exchange of personal data of migrants beyond the EU is possible, there is a growing infrastructure that collects data on migrants and migration movements. Broader infrastructures of border surveillance and control operating between the EU and third countries, namely in relation to the European Integrated Border Management (EIBM) and the European Border Surveillance System (EUROSUR), have been put in place over the years.[2236] The core goal of the EIBM is to "manage the crossing of the external borders efficiently and address migratory challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension and ensuring a high level of internal security within the Union."[2237] The use of biometric data systems is a key element at many levels of this model.[2238] The EBCG Agency, again, is the main actor tasked with the implementation of the EIBM.[2239] Similarly, EUROSUR functions as a framework for information exchange and cooperation between Member States and the EBCG Agency to "improve situational awareness and increase reaction capability at the external borders."[2240]

In addition to these more migration-oriented agencies and information systems, more security-focused ones exist, too. The link between migration and security within the interoperable EU information systems thus leads to an expansion of data exchange on migrants beyond EU borders. This can be illustrated with Europol and the Prüm II framework.

Europol databases are linked to the interoperability system[2241] and are, e.g., searched during security checks under the Screening Regulation[2242]

2235 ibid, Art 3(6) and 10(2).
2236 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 27ff.
2237 EBCG Regulation 2016, Recital 2.
2238 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 27.
2239 EBCG Regulation 2016, Art 1.
2240 'Eurosur' (*European Commission - Migration and Home Affairs*) <https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing/eurosur_en>.
2241 cf Interoperability Regulation - Judicial Cooperation, Art 3(2).
2242 Screening Regulation, Art 15(2).

and the Schengen visa process.[2243] Europol also has access to Eurodac.[2244] Changes to the SIS II legislation in 2022, referred to here as SIS III, have given Europol the power to propose that Member States create "information alerts on third-country nationals in the interests of the Union" in the SIS.[2245] In June 2023, changes to the Europol Regulation came into force that loosen restrictions on international data transfers.[2246] The Europol Management Board is now able to directly authorise transfers of personal data to third countries and international organisations, so long as "appropriate safeguards with regard to the protection of personal data are provided for in a legally binding instrument," or where there is no law in place but Europol has assessed all the circumstances surrounding the transfer of personal data and concludes "that appropriate safeguards exist with regard to the protection of personal data."[2247] Europol also has working agreements or arrangements with Albania, North Macedonia, Montenegro, Serbia and Kosovo. It is involved in other cooperations with Western Balkan countries.[2248]

The Prüm Convention takes the interconnecting of security, migration, and travel databases a step further. It is a cornerstone of European law

2243 Amendment to the VIS Regulation 2021, Art 9(a)(3) and Art 22(b)(2).

2244 Eurodac Regulation 2024, Art 7.

2245 Regulation (EU) 2022/1190 of the European Parliament and of the Council of 6 July 2022 amending Regulation (EU) 2018/1862 as Regards the Entry of Information Alerts into the Schengen Information System (SIS) on Third-Country Nationals in the Interest of the Union [2022] OJ L185/1 (Amended SIS III - Police Regulation 2022).

2246 Jane Kilpatrick and Chris Jones, 'Empowering the Police, Removing Protections: The New Europol Regulation' (Statewatch 2022); cf also Amended Europol Regulation.

2247 Amended Europol Regulation, Art 1(18)(c); also, the amendments to the Europol Regulation envisage Europol as a "hub for information exchange," (ibid) and the use of big data, including the personal data of people with no established link to criminal activity, for analytical purposes. In particular, ibid, Art 74(a) and 74(b), retroactively legalise the practice of processing large volumes of individuals' personal data who have no connection to criminal investigations, which the EDPS has found to be in breach of the Europol Regulation, "seriously undermining legal certainty for individuals' personal data and threaten the independence of the EDPS" ('EDPS Takes Legal Action as New Europol Regulation Puts Rule of Law and EDPS Independence under Threat' (*European Data Protection Supervisor*, 22 September 2022) <https://www.edps.europa.eu/press-publications/press-news/press-releases/2022/edps-takes-legal-action-new-europol-regulation-puts-rule-law-and-edps-independence-under-threat_en>.

2248 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 38.

enforcement collaboration, first signed in 2005 by seven initial Member States.[2249] This agreement paved the way for the Prüm Decisions of 2008, integrating aspects of cross-border police and judicial cooperation into EU law.[2250] The decision aims to step up "cross-border collaboration, particularly in combating terrorism, cross-border crime, and illegal migration".[2251] The Prüm framework facilitates automated data exchange between its Member States to inquire about DNA, dactyloscopy (fingerprints), and vehicle registration data in other national databases for the above-listed purposes.[2252] It allowed for the removal of barriers for the circulation of specific categories of information.[2253] By 2020, most EU Member States had implemented these decisions, though operational effectiveness varied significantly.[2254] In December 2023, the EU proposed Prüm II, a successor agreement expanding data categories to include facial images, driver's licenses, and police records of suspected as well as convicted criminals, allowing for automated biometric matching of facial images, biometric data, and police records.[2255] Under Prüm II, Member State law enforcement authorities are afforded the possibility to automatically check third country-sourced biometric data held at Europol. Europol could also check third country-sourced data against Member States' national databases.[2256] Under the new Europol Regulation, information on matches with these databases could be shared with third countries.[2257] NGOs have pointed out that these new features entail dangers like racial bias and mismatching people of colour, risking discrimination and violation of civil liberties or

2249 Treaty of Prüm was signed on 27 May 2005 in Prüm (Germany) by seven Member States (Belgium, Germany, France, Luxembourg, the Netherlands, Austria and Spain) and entered into force in Austria and Spain on 1 November 2006 and in Germany on 23 November 2006: 10900/05 from Council Secretariat, 'Prüm Convention' (7 July 2005) <https://data.consilium.europa.eu/doc/document/ST-10900-2005-INIT/en/pdf>.

2250 Council Decision on Cross-Border Crime.

2251 ibid.

2252 ibid, Art 1.

2253 Niovi Vavoula, 'Police Information Exchange - The Future Developments Regarding Prüm and the API Directive' (EU Parliament, LIBE comittee 2020) PE 658.542.

2254 ibid.

2255 Proposal for a Regulation of the European Parliament and of the Council on Automated Data Exchange for Police Cooperation (Prüm II) [2021] COM(2021)784 final (Proposed Prüm II Regulation).

2256 ibid, Proportionality.

2257 Amended Europol Regulation, Art 1(18)(c).

the persecution of political dissidents through the search and comparison of third country-sourced biometric data.[2258]

Crucial in the context of this study is the fact that the router of Prüm II will be directly linked to the ESP[2259] and connected with the European Police Records Index System (EPRIS),[2260] ensuring interoperability of Prüm with other EU information systems.

Concerning Western Balkan countries, it should be added that Prüm-like agreements have been concluded in some of these countries, thus making them ready for future interoperability.[2261] At a conference in 2018 in Vienna, a Prüm-like agreement was signed by Albania, Austria, Bulgaria, Hungary, Moldova, Montenegro, North Macedonia, Romania, Serbia, and Slovenia.[2262] Similar to the EU Prüm Decisions, this allows for the exchange of all participating states to query each other's biometric data (DNA, fingerprints, and vehicle registration).[2263] The agreement obliges the parties to align the principles relating to the processing of personal data with the EU directives, based on the principles and standards of the Police Directive along with the relevant conventions and recommendations of the Council of Europe.[2264] The conference was attended by ministers from the Western Balkans but also EU Member States, the EBCG Agency, EASO (now EUAA), and Europol.[2265]

If one really wants to understand what data collection and processing means within interoperable EU information systems, the interrelationships and data exchange mechanisms highlighted above cannot be ignored. There

2258 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 27; Access Now and others, 'Respecting Fundamental Rights in the Cross-Border Investigation of Serious Crimes - A Position Paper by the European Digital Rights (EDRi) Network on the EU's Proposed Regulation on Automated Data Exchange for Police Cooperation (Prüm II)' (EDRi 2022).

2259 Proposed Prüm II Regulation, Recital 16 and Art 35.

2260 ibid, Art 42.

2261 cf BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 41.

2262 'Conference on Security and Migration – Promoting Partnership and Resilience' (*EU at 2018*, 2018) <https://www.eu2018.at/latest-news/news/09-13-Westbalkan-Konferenz--Pr-m-Abkommen-f-r-S-dosteuropa-unterzeichnet-.html>.

2263 Agreement Between the Parties to the Police Cooperation Convention for Southeast Europe on the Au-tomated Exchange of DNA Data, Dactyloscopic Data and Vehicle Registration Data [2018] (PCC SEE DBN Agreement).

2264 ibid, Art. 12 and 18.

2265 BVMN, 'Decoding Balkandac: Navigating the EU's Biometric Blueprint' (n 685) 41.

is, furthermore, a distinct concern related to Eurodac. As one NGO has put it, given the rapid adoption of data-collection technologies in the Balkans, the question arises as to whether these will be used to set up an "extended Dublin mechanism", allowing EU Member States to send back to the Balkans anyone whose fingerprints were collected before their entry to an EU country.[2266] The fear is that the extension of Eurodac into this region, before these countries become EU Member States, would allow authorities to know which countries people on the move previously crossed during their migratory journey. These countries would then be responsible for examining the person's asylum application or, if the application is rejected, for returning the person to their country of origin.[2267] Against the background of the EU's massive externalisation efforts, this idea is not far-fetched and, apart from that, does not only concern the Western Balkans but also some African countries that are considered transit countries on the way to Europe.

2. Conclusions

In examining the implementation of the Eurodac and Interoperability Regulations, it is crucial to recognise that these systems are not yet finalised and will continue to expand beyond EU borders. Ongoing legislative and operational developments will continue to shape the broader security and migration context.

The Western Balkans serve as a key example: increased EU engagement has led to the development of Eurodac-compatible biometric data systems. This initiative aims to enhance data collection and sharing to gather more information on migrants and migrant routes, combat irregular migration and crime, as well as facilitate deportations. The introduction of Eurodac-compatible databases and information sharing beyond EU borders marks a significant step in the EU's efforts to externalise border management and to streamline the return process.

EU agencies such as the EBCG Agency and Europol play central roles in these developments: the EBCG Agency by advancing information-shar-

2266 Ahmetašević and others, 'Repackaging Imperialism: The EU – IOM Border Regime in the Balkans' (n 2209) 71.

2267 cf Sophie-Anne Bisiaux and Lorenz Naegeli, 'Blackmail in the Balkans: how the EU is Externalising its Asylum Policies' (*Statewatch*, 1 June 2021) <https://www.statewatch.org/analyses/2021/blackmail-in-the-balkans-how-the-eu-is-externalising-its-asylum-policies/>.

ing systems and practices, and Europol by strengthening cross-border data exchange. In parallel, Prüm-like agreements in the Balkans serve to harmonise data-processing standards with those of the EU, specifically in security contexts.

Understanding these interrelationships is essential to evaluating the protection of human dignity, access to justice, and data rights within this evolving framework. A particular concern is the prospect of an 'extended Dublin mechanism,' whereby EU Member States could return migrants on the basis of biometric data collected in the Balkans, underscoring the need for strong human rights safeguards and transparency.