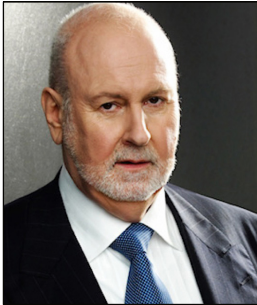


Switzerland–EU

Federal Council conceals power of EU court

If framework deal goes ahead, Brussels will have the final say – but Bern is glossing over this sensitive fact in its consultation process. Deceiving the people?

by Carl Baudenbacher*



Carl Baudenbacher
(Picture <https://baudenbacher-law.com>)

On 20 December 2024, the Swiss Federal Council approved a package of agreements with the *European Union* (EU) without fully knowing their content. However, the institutional features were clear.

The agreements provide for the dynamic adoption of EU law by Switzerland, de facto surveillance of Switzerland by the European Commission and the settlement of disputes by a pro forma arbitration tribunal under the supervision of the *Court of Justice of the European Union* (CJEU).

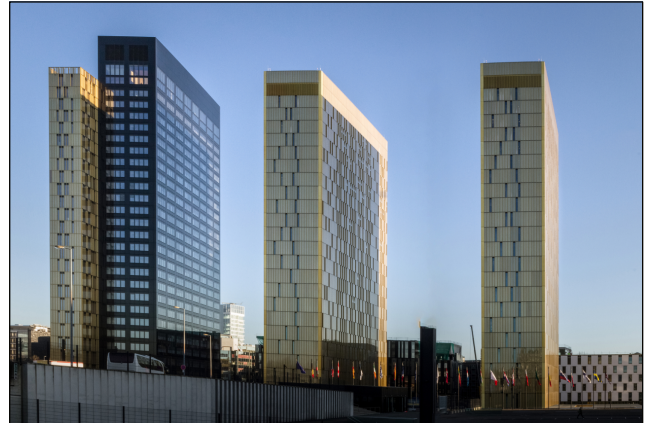
In return, Switzerland would secure preferential market access for its industry, but not for its service providers.

On 13 June 2025, after weeks of embarrassing secrecy, the treaties were presented to the public together with a 931-page ‘Explanatory Report’. In the summer of 2010 – I was President of the EFTA Court at the time – I had the honour of being consulted by the Federal Council in corpore on a future framework agreement.

In my consultation response of 22 September 2025, I expressed criticism on two issues: the institutional setting on the one hand and the communication of the federal government in Bern on the other.

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Far removed from the real world: the European Union would deprive the Swiss population of its decision-making rights through its jurisdiction. Building of the Court of Justice of the European Union (CJEU) in Luxembourg. (Picture European Union)

As far as the institutional provisions are concerned, I consider the approach of having the European Commission as the de facto unilateral supervisor of Switzerland and the *Court of Justice of the European Union* (CJEU) as the sole interpreter of EU law and agreement law with the same content to be fundamentally flawed.

According to Article 13 TEU, these two powerful institutions are obliged to enforce the values of the EU, pursue its objectives, serve its interests and those of its citizens and Member States, and ensure the coherence, efficiency and continuity of its policies and actions.

In other words, both institutions lack impartiality.

I have pointed out that the role that the Commission would play is not being discussed at all in Switzerland. This is a direct consequence of an incorrect assertion by the federal government, which has been made since 2013 and can also be found in the ‘Explanatory Report’:

It is said that the agreements are based on a ‘two-pillar’ model with an EU pillar and a Swiss pillar. Both pillars would monitor themselves and, at the same time, the other pillar.

In fact, however, there would only be one pillar, that of the EU. This is because any dispute settle-

ment procedure would always end up at the CJEU, regardless of who initiates it. A two-pillar system exists in the EEA, where the participating EFTA states have their own supervisory authority and their own court of justice.

One of the foremost experts on the subject, former EFTA Assistant Secretary-General *Georges Baur*, has rightly pointed out that there can be no question of a two-pillar structure in EU-Switzerland relations.

The federal government must change its misguided communication on this important issue and, in particular, analyse the increasing politicisation of the European Commission, which is at the expense of legal certainty and the rule of law.

The latter requires particular attention because the CJEU often rules in favour of the Commission.

The second topic I focused on in my consultation response is the dispute settlement procedure. The *explanatory report* attempts to convince voters that the 'arbitration tribunal' has decisive powers.

It states that the 'arbitration tribunal' decides independently whether to refer the matter to the CJEU or "consult" it, that the CJEU cannot intervene in the proceedings before the 'arbitration tribunal' and that the final decision rests solely with the 'arbitration tribunal'.

All of this is biased and misleading. The idea that the second most powerful court in the world after the *US Supreme Court* could act as an auxiliary body to an ad hoc arbitration tribunal is downright bizarre.

In fact, the treaties contain very specific provisions regarding the obligation to refer cases to and comply with the rulings of the CJEU.

I am not aware of any independent foreign expert who shares the claim that the arbitration tribunal is independent. On the contrary, I know countless specialists from the EU and other EFTA states, including many practitioners, who see the arbitration tribunal for what it is: a means of disguising the ECJ.

Foreign commentators have characterised it as follows: the 'arbitration tribunal' as a 'fig leaf'; the 'arbitration tribunal' as a 'letterbox' and 'rubber stamp'; the 'arbitration tribunal' as a 'Trojan horse with the CJEU in its belly'. 'Concealment of submission to the CJEU'; 'judicial imperialism'; 'extraterritorial extension of the jurisdiction of the CJEU'; 'poor man's EEA'.

It is incorrect that the CJEU would have to stand idly by and watch what the 'arbitration

tribunal' does. It has already issued judgments in connection with the 1972 Free Trade Agreement ('Polydor') and the 1992 EEA Agreement ('Rimbaud'), in which it responded to what it considered to be an unsatisfactory legal situation under third country agreements.

The CJEU would have no shortage of opportunities to respond to undesirable developments in relations between Switzerland and the EU.

In its *explanatory report*, the federal government then concealed the principle of the autonomy of EU law (the 'crucial question' of EU law) and the prohibition on arbitration tribunals interpreting agreement law that is identical in content to EU law.

It has posted graphics online in which the Commission and the CJEU have been retouched out. The origin of the dispute settlement mechanism in the EU's treaties with the post-Soviet developing and emerging countries of Armenia, Georgia, Moldova and Ukraine has also been suppressed.

The proposed dispute settlement model, with the European Commission as the de facto supervisor of Switzerland and the Court of Justice of the European Union as the sole interpreter of EU law and agreement law with identical content, is heavily weighted in favour of the EU and differs fundamentally from the situation in the EEA/EFTA states.

In Iceland and Norway, the chosen dispute settlement mechanism, which would give all power to the Commission and the ECJ, would be unconstitutional.

One may want this as a first step towards EU accession, but the federal government must provide truthful, objective and factual information so that the people and the cantons can form an unbiased opinion.

Incorrect or half-truths about the role of the Commission, the arbitration tribunal and the CJEU, the omission of necessary information and selective quoting of literature and case law are not compatible with Article 34 of the Federal Constitution.

In view of the enormous human resources available to the federal government and the fact that the Federal Council already accepted the post-Soviet model in March 2018, it cannot be assumed that the administration is incapable of doing its job. Rather, what appears to be the case is what is known in the Anglo-Saxon world as 'biased writing'.

Finally, when drafting my opinion, I noticed that the federal government feels compelled to conduct the consultation process by means of guided questions. In doing so, it addresses minor issues in great detail, but there are no specific inquiries into the core of the treaty package, namely the institutional innovations.

Bearing all this in mind, the question arises as to whether the federal government in Bern is serious about the new agreements. Or whether the Federal Council, which has been dragging its

feet on the issue since 2013, is only pushing ahead with the dossier out of deference to Brussels.

The French ambassador, expressed a similar suspicion almost a year ago. The shrewd Swiss could ultimately tell the EU that they tried, but unfortunately the people and the cantons did not follow suit.

Source: <https://insideparadeplatz.ch/2025/09/28/bundesrat-verheimlicht-macht-des-eu-gerichts/>,
28 September 2025 (English translation by the author.)