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Switzerland and the European Union

Citation for published version (APA):

Günthardt, J. A. (2020). *Switzerland and the European Union: the implications of the institutional framework and the right of free movement for the mutual recognition of professional qualifications*. [Doctoral Thesis, Maastricht University]. Maastricht University. https://doi.org/10.26481/dis.20201217jg

Document status and date:
Published: 01/01/2020

DOI:
10.26481/dis.20201217jg

Document Version:
Publisher's PDF, also known as Version of record

Please check the document version of this publication:

• A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
• The final author version and the galley proof are versions of the publication after peer review.
• The final published version features the final layout of the paper including the volume, issue and page numbers.

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Switzerland and the European Union:

The implications of the institutional framework and the right of free movement for the mutual recognition of professional qualifications

Joel A. Günthardt

Switzerland and the European Union:

The implications of the institutional framework and the right of free movement for the mutual recognition of professional qualifications

DISSERTATION

to obtain the degree of Doctor at the Maastricht University,
on the authority of the Rector Magnificus,
Prof. dr. Rianne M. Letschert
in accordance with the decision of the Board of Deans,
to be defended in public
on Thursday 17 December 2020 at 10.00 hours

by

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Acknowledgements

The idea and earliest research for this PhD dates back to my studies in Zurich and Maastricht in 2011 to 2013 when I had just written my Master's theses in Maastricht and Zurich, both in EU law. I always considered writing a PhD but did not begin immediately. More than four years ago, I finally embarked on this uncharted journey and started the writing process in earnest as an external PhD candidate at the University of Maastricht. I completed it in 2020, and it covers developments up to 31 January 2020. Developments after that date are only addressed occasionally.

First and foremost, I would like to thank my supervisor Prof. dr. Hildegard Schneider and Prof. dr. René de Groot for being so accommodating, as our discussions usually took place during their holidays. Even though I wrote this as an external PhD candidate, Prof. dr. Hildegard Schneider encouraged me to pursue my research, devoted time to discussing my thesis with me despite her busy schedule. For that I am deeply grateful. I would also like to thank Dr. Alexander Hoogenboom who gave me valuable feedback. Moreover, I would like to thank the members of the assessment committee (in alphabetical order) consisting of Prof. dr. Matthias Oesch, Prof. dr. Andrea Ott, Dr. Sarah Schoenmaekers, Prof. dr. Christa Tobler and Prof. dr. Bruno de Witte for their input, despite their full agendas.

While doing my research, I had the opportunity to work for the General Counsel of the City of St. Gallen and for the Federal Administrative Court ('FAC'). I would like to thank some of my former and current colleagues and superiors who asked regularly about my progress, even when some among them did not share my interest in EU law. I would also like to thank some of my colleagues at the FAC who were open-minded enough to discuss prior or current cases before the FAC. This kind of support and input gave me the necessary momentum to persevere.

Moreover, I would like to thank Anjum Shabbir for the language revision and everyone who helped me with the French as well as the Dutch summaries. Any mistakes that remain in this study are entirely my own. I would also like to thank my paranymphs for attending the ceremony in Maastricht.

Most importantly, I would like to thank all of those who are the closest to me for their warm-hearted support, in myriad ways, during the time I wrote this thesis. I would especially like to thank my wife Rahel and my daughter Emma, to whom I dedicate this thesis.

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Lastly, it should be mentioned that this contribution describes the situation and case law up to 31 January 2020, and occasionally after this date.

Jona, 3 November 2020

A commercial and an electronic open access edition based on this thesis will be published.

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Abbreviations

ACP (States)	African, Caribbean and Pacific (States)
AEUV	see TFEU
AFMP	Agreement on the free movement of persons
AG	Advocate General
AGVE	Court decisions and decisions of administrative authorities of the Canton of Aargau (*Aargauische Gerichts- und Verwaltungsentscheide*)
AJP/PJA	Aktuelle Juristische Praxis (see PJA; Journal)
ALCP	see AFMP
AP	Additional Protocol
Art	Article
Arts	Articles
AS	Official Compilation of Federal Law (*Amtliche Sammlung des Bundesrechts*)
AVG	Federal Act on Employment Services *(Arbeitsvermittlungsgesetz; SR 823.11)*
BBG	Vocational and Professional Education and Training Act *(Bundesgesetz über die Berufsbildung; SR 412.10)*
BBl	Swiss Federal Gazette (*Bundesblatt*)
BBV	Vocational and Professional Education and Training Ordinance *(Berufsbildungsverordnung; SR 412.101)*
BGBM	Federal Act on the Internal Market *(Bundesgesetz über den Binnenmarkt; SR 943.02)*
BGE	Leading case of the Swiss Federal Court
BGer	Swiss Federal Court (not published case law; available online)
BGFA	Federal Act on the free movement of lawyers *(Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte; SR 935.61)*
BGG	Federal Act on the Federal Court *(Bundesgesetz über das Bundesgericht; SR 173.110)*

BGMD	Swiss Federal Act on the declaration to be made in advance and the recognition of professional qualifications of service providers (*Bundesgesetz über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungs-erbringerinnen und -erbringern in reglementierten Berufen;* SR 935.01).
BV	Swiss Federal Constitution *(Schweizerische Bundesverfassung; SR 101)*
BVerfG	Constitutional Court of Germany *(Bundesverfassungsgericht*)
BVGE	Leading case of the Swiss Federal Administrative Court
BVGer	Swiss Federal Administrative Court (not published case law; available online)
BVR	Bernische Verwaltungsrechtsprechung (journal)
CaS	Causa Sport (Journal)
CCBE	The Council of Bars and Law Societies of Europe
CETA	Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review (Journal)
COMCO	Swiss Competition Commission (*Wettbewerbskommission*)
CRUS	*Conférence des recteurs des universités suisses* (now: swissuniversities)
CV	Curriculum Vitae
Diss.	Dissertation
DNotZ	Deutsche Notar-Zeitschrift (Journal)
EC	European Communities (now: EU)
ECJ	European Court of Justice (now CJEU, Court of Justice of the European Union)
ECSC	European Coal and Steel Community
ECTS	European Credit Transfer and Accumulation System
ed.	editors

EDK	Schweizerische Konferenz der kantonalen Erziehungsdirektoren (*Swiss Conference of Cantonal Ministers of Education*)
EEA	European Economic Area / EEA Agreement
EFTA	European Free Trade Association
EG	Europäische Gemeinschaften (see EC)
e.g.	exempli gratia
ELJ	European Law Journal (Journal)
ELR	European Law Reporter (Journal)
EntsG	Swiss Federal Act on posted workers *(Entsendegesetz; SR 823.20)*
EntsV	Swiss Federal Ordinance on posted workers of 21 May 2003 *(Entsendeverordnung; SR 823.201)*
EQF	European Qualifications Framework
ESA	EFTA Surveillance Authority
ESTI	Federal Inspectorate for Heavy Current Installations (*Eidgenössisches Starkstrominspektorat*)
ETH	Swiss Federal Institute of Technology (*Eidgenössische Technische Hochschule*)
et seq.	and following
EU	European Union
EuGH	see CJEU
EUV	see TEU
EuZ	Zeitschrift für Europarecht (Journal)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (Journal)
ff.	and the following (pages/articles)
FAC	Swiss Federal Administrative Court (*Schweizerisches Bundesverwaltungsgericht*)
FMedV	Reproductive Medicine Ordinance *(Fortpflanzungsmedizinverordnung; SR 810.112.2)*
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GesBG	Federal Act on health professions *(Gesundheitsberufegesetz; SR 811.21)*
GDP	gross domestic product
Habil.	*Habilitation* (post-doctorate thesis)

HFKG	Federal Act on Funding and Coordination of the Swiss Higher Education Sector (*Hochschulförderungs- und -koordinationsgesetz; SR 414.20*)
i.e.	id est
IKV	Intercantonal Agreement on the recognition of professional qualifications (*Interkantonale Vereinbarung über die Anerkennung von Ausbildungsabschlüsse*)
IMCO	Internal Market and Communications Committee
IMI	Internal Market Information System
IPRG	Federal Act on Private International Law *(Bundesgesetz über das Internationale Privatrecht; SR 291)*
ISCED	International Standard Classification on Education
ISIC	International Standard Industrial Classification of All Economic Activities
KVG	Federal Act on public health insurance *(Bundesgesetz über die Krankenversicherung; SR 832.10)*
LeGes	Gesetzgebung & Evaluation (Journal)
LLCA	see BGFA
LL.M.	Legum Magister (Master of Laws)
LTR	Long-term resident
MEBEKO	Commission on medical professions (*Medizinalberufekommission)*
MedBG	Federal Act on medical professions *(Medizinalberufegesetz; SR 811.11)*
MedBV	Federal Ordinance on medical professions *(Medizinalberufeverordnung; SR 811.112.0)*
MLaw	Master of Law
MRA	Mutual recognition agreement
NATO	North Atlantic Treaty Organization
NIV	Federal Ordinance on low-voltage installations *(Verordnung über elektrische Niederspannungs-installationen; SR 734.27)*
NJW	Neue Juristische Wochenschrift (Journal)
No	number
NQF	National Qualification Framework

NZZ	Neue Zürcher Zeitung (Newspaper)
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Cooperation
OR	Federal Act on the Amendment of the Swiss Civil Code (*Obligationenrecht*; SR 220).
p.	page
pp.	pages
PAG	Federal Act on Patent Attorneys *(Bundesgesetz über die Patentanwältinnen und Patentanwälte, SR 935.62)*
PAV	Federal Ordinance on Patent Attorneys *(Patentanwaltsverordnung; SR 935.621)*
para.	paragraph
paras.	Paragraphs
PET	Professional education and training (*Höhere Fachschule*)
PhD	Doctor of Philosophy
PJA/AJP	Pratique juridique actuelle (see AJP; Journal)
PKK	Kurdistan Workers' Party
RAG	Federal Act on the admittance and supervision of auditors (*Bundesgesetz über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren*; *SR 221.302)*
RAV	Federal Ordinance on the admittance and supervision of auditors (*Verordnung über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren; SR 221.302.3)*
RBOG	Court Report of the higher Court of the Canton of Thurgau (*Rechenschaftsbericht des Obergerichts des Kantons Thurgau an den Grossen Rat)*
RSDIE	Revue suisse de droit international et européen (see SRIEL/SZIER; Journal)
SchKG	Federal Act on bankruptcy (*Bundesgesetz über Schuldbetreibung und Konkurs; SR 281.1)*
SchlT	Schlusstitel (see ZGB)

SECO	State Secretariat for Economic Affairs (*Staatssekretariat für Wirtschaft*)
SERI	State Secretariat for Research and Innovation *(Staatssekretariat für Bildung, Forschung und Innovation)*
SJZ	Schweizerische Juristen-Zeitung (Journal)
SR	Classified Compilation of Federal Law *(Systematische Rechtssammlung des Bundesrechts)*
SRIEL	Swiss Review of International and European Law (see SZIER/RSDIE; Journal)
StGB	Swiss Criminal Code *(Schweizerisches Strafgesetzbuch, SR 311.0)*
StPO	Swiss Criminal Procedure Code *(Strafprozessordnung; SR 312.0)*
SZIER	Zeitschrift für internationales und europäisches Recht (see SRIEL/RSDIE; Journal)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
THG	Federal Act on technical barriers to trade *(Bundesgesetz über die technischen Handelshemmnisse; SR 946.51)*
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UAS	University of Applied Sciences
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of the Treaties
VG	Administrative court *(Verwaltungsgericht)*
VMD	Swiss Federal Ordinance on the declaration to be made in advance and the recognition of professional qualifications of service providers *(Verordnung über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungs-erbringerinnen und -erbringern in reglementierten Berufen; SR 935.011)*

Vol.	Volume
VwVG	Federal Act on public procedural law *(Bundesgesetz über das Verwaltungsverfahren; SR 172.021)*
VZAE	Federal Ordinance on admission, residence and gainful employment *(Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit; SR 142.201)*
WTO	World Trade Organization
ZBJV	Zeitschrift des Bernischen Juristenvereins (Journal)
ZBl	Schweizerische Zentralblatt für Staats- und Verwaltungsrecht (Journal)
ZESAR	Zeitschrift für europäisches Sozial- und Arbeitsrecht (Journal)
ZGB	Swiss Civil Code *(Schweizerisches Zivilgesetzbuch; SR 210)*
ZPO	Swiss Civil Procedure Code *(Schweizerische Zivilprozessordnung; SR 272)*
ZR	Blätter für Zürcherische Rechtsprechung (Journal)
ZSR	Zeitschrift für Schweizerisches Recht (Journal)

‘The single market is not a Swiss cheese. You cannot have a single market with holes in it.’

Viviane Reding

Former vice-president of the European Commission[1]

‘(...) the Swiss Confederation did not join the internal market of the Community the aim of which is the removal of all obstacles to create an area of total freedom of movement analogous to that provided by a national market (...)’

Court of Justice of the European Union[2]

‘Il sied également de rappeler, pour apprécier pleinement la portée que revêtent pour la Suisse les arrêts pertinents de la Cour de justice, que l'Accord sur la libre circulation des personnes s'insère dans une série de sept accords qui, non seulement sont sectoriels, mais encore ne portent que sur des champs d'application partiels des quatre libertés que sont la libre circulation des personnes, des marchandises, des capitaux et des services; il ne s'agit donc pas d'une participation pleine et entière au marché intérieur de la Communauté européenne.’

Swiss Federal Court[3]

‘The EU and Swiss relations in regard to free movement rights of workers are more complex, almost beyond comprehension.’

Andrea Ott

Professor at Maastricht University[4]

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1 D. Dunford, ‘EU referendum: Comparing Norway and Switzerland with the UK’, *The Telegraph,* 16 June 2016.

2 Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, ECLI:EU:C:2009:697, para. 27.

3 BGE 130 II 113, para. 6.2.

4 A. Ott, ‘Differentiation through Accession Law: Free Movement Rights in an Enlarged European Union’, in B. de Witte, A. Ott & E. Vos (eds.), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law: Maastricht Faculty of Law Working Paper No 2016-04* (2016), p. 21.

1 Introduction

1.1 Background to this research

It goes without saying that Switzerland and the EU are important partners in many areas. In particular, Switzerland is the EU's third largest trading partner whereas the EU is Switzerland's largest trading partner.[5] Switzerland and the EU also share common values.[6] Despite its close ties with the EU, Switzerland is not a Member State of the European Union. Instead of EU membership Switzerland chose a plethora of 'bilateral' agreements'[7] (also known as 'sectoral agreements'[8]) between Switzerland, the EU and its Member States. This unique situation of Switzerland has been referred to as a 'special status' ('Sonderstatus'[9]) or

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[5] Joint Statement on the *Draft Agreement 'Accord facilitant les relations bilatérales entre l'union européenne et la confédération suisse dans les parties du marché intérieur auxquelles la suisse participe' ('Swiss-EU Draft Institutional Framework Agreement') of 23.11.2018, published on 07.12.2018*, para. 2.

[6] M. Oesch, 'The Swiss Model of European Integration', in A. Biondi, P. Birkinshaw & M. Kendrick (eds.), *Brexit: The legal implications,* Alphen aan den Rijn (2019), p. 36; Swiss Confederation, *Europabericht 2006 of 28 June 2006 (BBl 2006 6815)*, p. 6846.

[7] This is the Swiss terminology: see e.g. C. Tobler, 'Context-related Interpretation of Association Agreements. The Polydor Principle in a Comparative Perspective: EEA Law, Ankara Association Agreements between Switzerland and the EU', in D. Thym & M. Zoeteweij-Turhan (eds.), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship,* Leiden (2015), p. 101. It should be noted that the *Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other on the free movement of persons (AFMP) of 21.06.1999,* OJ [2002] L114/6, 30.04.2002, entry in force 01.06.2002 and the *Cooperation Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests of 26.10.2004, entry into force pending,* OJ [2009] L46/8, 17.02.2009 are not 'bilateral' since they have been concluded between Switzerland, the EU and its Member States (mixed agreements). The *Agreement on scientific and technological cooperation between the European Community and the European Atomic Energy Community, of the one part, and the Swiss Confederation, of the other part of 25.06.2007, entry into force on 28.02.2008,* OJ [2007] L189/26, 20.07.2007 constitutes a mixed Agreement as well.

[8] This is mostly the EU terminology: see e.g. Council of the European Union, *Council conclusions on EU relations with EFTA countries of 20.12.2012,* <http://eeas.europa.eu/archives/docs/norway/docs/2012_final_conclusions_en.pdf> (last visited on 28.06.2020), para. 31.

[9] See, J. Kläser, *The Swiss Confederation and the European Union: Their constitutional systems, bilateral agreement-based constitutional cooperation and a Swiss company tax regime facing challenges of constitutional and legal feasibility,* Diss. Maastricht (2017), Maastricht (2017), pp. 1 and 47 et seq.

the 'king's way' ('Königsweg'[10]) or the 'bilateral approach'[11] when discussing the role of Switzerland in Europe. According to the EU, this special status in its current form has reached an end.[12]

A Draft for an institutional overhaul has been published in 2018 – the so-called Draft Institutional Framework Agreement[13] – but was criticised by left- and right-wing politicians in Switzerland,[14] while the EU is faced with the challenges of the Brexit at the same time. This thesis discusses the current search of Switzerland for a common framework, the free movement of persons and its implications on the recognition of professional qualifications for selected health and legal professions.

From an EU perspective, Switzerland's relations have become overly complex and difficult to manage. There is a plethora of agreements and annexes that implement bits and pieces of the *acquis communautaire*. The Council of the European Union reaffirmed its view that the institutional framework between Switzerland and the EU is not sufficient to guarantee the effectiveness of EU law in 2014. According to the Council of the European Union the following must be established: a dynamic adaptation of EU law, the uniform interpretation of EU law (guaranteeing homogeneity), a mechanism for ensuring compliance with EU law (in principle, a guardian of the bilateral agreements, the 'Bilaterals'), and a judicial

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10 M. Oesch, *Switzerland and the European Union: general Framework, bilateral agreements, autonomous adaptation,* Zurich (2018), p. 14.

11 Council of the European Union, *Council conclusions on EU relations with the Swiss Confederation of 19.02.2019,* <https://www.consilium.europa.eu/en/press/press-releases/2019/02/19/council-conclusions-on-eu-relations-with-the-swiss-confederation/> (last visited on 28.06.2020), para. 9.

12 Council of the European Union, supra note 11, para. 9; Council of the European Union, *Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries of 16.12.2014,* <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf> (last visited on 28.06.2020), para. 44; Council of the European Union, supra note 8, para. 30; Council of the European Union, *Council conclusions on EU relations with EFTA countries of 14.12.2010,* <https://eeas.europa.eu/sites/eeas/files/council_iceland.pdf> (last visited on 28.06.2020), para. 48 et seq.; Council of the European Union, *Draft Council conclusions on EU relations with EFTA countries of 05.12.2008,* <http://register.consilium.europa.eu/pdf/de/08/st16/st16651-re01.de08.pdf> (last visited on 28.06.2020).

13 See Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

14 <https://www.srf.ch/news/schweiz/rahmenabkommen-mit-der-eu-so-ein-abkommen-kann-man-so-nicht-unterzeichnen> (last visited on 25.06.2020).

mechanism or a dispute settlement mechanism.[15] The EU and Switzerland were negotiating since 2014 to reform the lack of party-common institutions (besides the Joint Committees) and to agree to an institutional agreement as a condition for further market access agreements (e.g. future agreements on electric energy or even services).[16]

From a Swiss perspective, access to the internal market and the conclusion of further (much desired) market access agreements need to be balanced between its interests in sovereignty and neutrality.[17] More recently the 'bilateral path' and in particular the free movement of persons were questioned by popular initiatives. To give an example, the popular initiative against mass immigration from 2014 created tensions but did not actually lead to the termination of the Agreement on the free movement of persons between Switzerland and the EU ('AFMP'[18]), instead adding another layer to the complex structure of the relationship between Switzerland and the EU, which is currently still under revision. In 2016 however, the special status of Switzerland and its search for a common framework with the EU has been overshadowed by the most recent and seminal turning point in the integration process of the EU. On 23 June 2016, the UK voted in a referendum to withdraw from the European Union in accordance with Article 50 of the Treaty on European Union (TEU[19]). Notwithstanding the fact that the vote was merely advisory and not legally binding on Parliament,[20] the European Union (Notification of Withdrawal) Act 2017 passed on 16 March

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15 Council of the European Union, supra note 12, para. 48 et seq.; see C. Tobler, 'Die Erneuerung des bilateralen Wegs: Eine wachsende Annäherung an den EWR in den zur Diskussion gestellten Modellen', Jusletter 3 June 2013, para. 5; C. Baudenbacher, 'Swiss Economic Law Facing the Challenges of International and European Law: Report to the Swiss Jurists Day 2012', ZSR 2012, p. 583 et seq.; M. Muser & C. Tobler, 'Schiedsgerichte in den Aussenverträgen der EU: Neue Entwicklungen unter Einbezug der institutionellen Verhandlungen Schweiz - EU', Jusletter 28 May 2018, para. 1; M. Oesch & G. Speck, 'Das geplante institutionelle Abkommen Schweiz-EU und der EuGH', in A. Epiney (ed.), *Schweizerisches Jahrbuch für Europarecht 2016/2017 - Annuaire suisse de droit européen 2016/2017,* Zurich (2017), p. 259.

16 See also M. Oesch, 'Switzerland-EU Bilateral Agreements, the Incorporation of EU Law and the Continuous Erosion of Democratic Rights', Yearbook of European Law 2019, p. 34 et seq.

17 This also poses the questions how the concept of sovereignty should be defined: see T. Cottier, 'Die Souveränität und das institutionelle Rahmenabkommen', SJZ 2019, No 115, p. 346 et seq.

18 See supra note 7.

19 *Consolidated version of the Treaty on European Union (TEU),* OJ [2016] C202/47, 07.06.2016.

20 P. P. Craig, 'Brexit: A Drama in Six Acts (11.07.2016).: Oxford Legal Studies Research Paper No 45/2016.', European Law Review August 2016, 41(4), p. 29.

2017.[21] Consequently, the Prime Minister triggered Article 50(2) TEU on 29 March 2017.[22] The domestic vote on the Brexit Withdrawal Agreement in the House of Commons was unsuccessful on several occasions,[23] and thus withdrawal from the EU has been postponed to 31 October 2019[24] and to 31 January 2020[25]. While the UK finally left the EU on 31 January 2020, the outcome of the UK's withdrawal is currently still uncertain for the future relationship with the EU. Now, the EU is faced with the dilemma how structure its relations with two highly developed (third) countries with close ties to the EU but countries that do intend to have a tailored solution for their relation with the EU and how to adapt the fundamental freedoms in this context.

In the aftermath of the recent Brexit, one of the most controversial topics in Europe remains the free movement of persons with the EU (prominently the UK's red line[26]). To give a recent example, the initiative 'for measured immigration (restriction initiative)', which demanded that Switzerland regulates immigration itself, was unsuccessful on 27 September 2020 with 61.71% of the votes against it.[27] Despite the technical complexity of this topic, the underlying principle of this study is in the end the principle of free movement and the principle of non-discrimination for those who have made use of their free movement rights. In the EU, it is guaranteed by the Charter of Fundamental Rights and also part of Union citizenship.[28] The recent case *Tjebbes and Others*[29] shows how important non-discrimination can become for EU nationals with residence in Switzerland. In this case, the Dutch authorities

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21 <http://www.legislation.gov.uk/ukpga/2017/9/pdfs/ukpga_20170009_en.pdf> (last visited on 28.06.2020).

22 <https://www.consilium.europa.eu/media/24079/070329_uk_letter_tusk_art50.pdf> (last visited on 28.06.2020).

23 <https://commonslibrary.parliament.uk/brexit/the-eu/a-meaningful-vote-cast-what-happened-and-what-next/> (last visited on 28.06.2020).

24 European Council, *European Council (Art. 50) conclusions, 10 April 2019,* <https://www.consilium.europa.eu/en/press/press-releases/2019/04/10/european-council-art-50-conclusions-10-april-2019/> (last visited on 28.06.2020), para. 2.

25 <https://www.consilium.europa.eu/media/41202/xt20025-re01-en19.pdf> (last visited on 28.06.2020).

26 See M. J. P. Crespo, 'After Brexit. . .The Best of Both Worlds? Rebutting the Norwegian and Swiss Models as Long-Term Options for the UK', Yearbook of European Law 2017, vol. 36, No 1 (2017), p. 101 et seq.

27 <https://www.bk.admin.ch/ch/d/pore/va/20200927/index.html> (last visited on 28.09.2020).

28 Art. 45 of the *Charter of Fundamental Rights of the European Union,* OJ [2016] C202/389, 07.06.2016; Arts. 20 and 21 of the *Consolidated version of the Treaty on the Functioning of the European Union (TFEU),* OJ [2016] C203/13, 07.06.2016.

29 Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189.

found that Ms Koopman had lost their Dutch nationality when she submitted a passport application because she stayed for an uninterrupted period of 10 years in Switzerland without declaring her intent on keeping Dutch nationality. She and consequently her daughter would thus have lost their Dutch nationality ex tunc if the Court of Justice (CJEU) had not required an individual examination with a proportionality test.[30] There is an argument to be made that this case could have been solved without recourse to Union citizenship simply by invoking the AFMP because this rule infringes upon the free movement rights granted by the AFMP. Neither the referring court nor the CJEU did however address this seminal topic.[31]

For Switzerland's access to the internal market the free movement of persons is in any case not negotiable.[32] It could however also be seen as a consequence rather than a prerequisite of Switzerland's European integration. Despite the constant political pressure to restrict free movement rights via popular initiatives, Switzerland is certainly dependent on a constant influx of qualified migrants, namely in the health sector.[33] For Switzerland as a country without many natural resources, the importance of education cannot be overlooked. This is also exemplified by the Bologna Process which was initiated to promote mobility of students within the European Education Area and will be further developed as stated in the Paris Communiqué in 2018.[34] There is thus certainly a need for *qualified* professionals in the EU as well as in Switzerland. In that context, inevitably the issue of the recognition of diplomas arises. The recognition of diplomas is divided in two major forms: *professional* and *academic* recognition.

Professional recognition foresees the recognition for the *regulated professions*. *Regulated profession* means that access to the profession is governed by law.[35] Needless to say that free movement rights without recognition of *professional* qualifications would be almost meaningless and go against the very spirit of the fundamental freedoms. Mutual recognition of professional qualifications gives the right to have access to and to pursue the same *profession* that is *regulated* in another EU Member State, an EEA EFTA State or

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30 Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 14 et seq.

31 See Chapter 4.3.1 for a discussion of this case.

32 See Council of the European Union, supra note 11, para. 10.

33 <https://www.handelszeitung.ch/beruf/was-die-schweiz-ohne-deutsche-arzte-ware> (last visited on 28.06.2020).

34 <http://www.ehea.info/page-ministerial-declarations-and-communiques> (last visited on 28.06.2020).

35 Art. 3(1)(a) of Directive 2005/36/EC (see for the full citation below note 36).

Switzerland. As of today, professional recognition is mostly safeguarded by relevant secondary law, notably Directive 2005/36/EC ('Professional Qualifications Directive'[36]). The legal basis for the Professional Qualifications Directive is found in Article 53 TFEU for the freedom of establishment, in Article 46 TFEU for the freedom of movement for workers, and in Article 62 TFEU for the freedom to provide services.[37] *Academic* recognition may foster first and foremost the free movement of students allowing them to study in another State by recognising a diploma or credits but it does not allow access to a *regulated profession*.[38] It relies mainly on the Lisbon Convention of the Council of Europe[39] because the EU does not have the competence to harmonise the area of education.[40]

Professional recognition must be distinguished from *de facto* professional recognition. *De facto professional recognition* concerns professions where access to a profession is not regulated. Thus, it is the labour market that decides in principle whether the applicant's training and education is sufficient.[41] However, the fundamental freedoms or even *academic* recognition might also be necessary to foster the free movement of professions that are non-regulated.

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36 *Directive 2005/36/EC of the European Parliament and of the Council ('Professional Qualifications Directive') of 07.09.2005,* OJ [2005] L255/22, 30.09.2005.

37 See preamble of the Professional Qualifications Directive.

38 Academic recognition can be subdivided into academic recognition by accumulation and recognition by substitution. The first category encompasses students that intend to continue their studies in another State. The latter category means that credits obtained abroad are recognised by the home State: L. Kortese, *The Recognition of Qualifications in the EU: Blurring the Lines of Competences between the Internal Market and Education,* Diss. Maastricht 2020, Maastricht (2020), p. 6 et seq.

39 *The Convention on the Recognition of Qualifications concerning Higher Education in the European Region (Lisbon Convention) of 11.04.1997, signed and ratified 24.03.1998 by Switzerland, entry into force on 01.02.1999,* SR 0.414.8.

40 Art. 165(3) and (4)(1) and Art. 166(3) and (4) TFEU; Art. 6(e) TFEU; see also S. Garben, *EU higher education law: The Bologna process and harmonization by stealth,* based on the author's doctoral thesis, Florence (2010), Alphen aan den Rijn (2011), pp. 133 and 136 et seq.; S. Garben, 'The Bologna Process: From a European Law Perspective', ELJ 2010, No 2, p. 191 et seq.; N. Gammenthaler, *Diplomanerkennung und Freizügigkeit: Unter besonderer Berücksichtigung der Richtlinie über die Anerkennung von Berufsqualifikationen 2005/36/EG und ihrer möglichen Umsetzung in der Schweiz,* Diss. Fribourg (2010), Zurich (2010), p. 102 et seq.; M. Herdegen, *Europarecht,* Munich (2018), § 26 para. 5.

41 See L. Kortese, 'Exploring professional recognition in the EU: a legal perspective', Journal of International Mobility 2016/1, No 4, p. 48; European Commission, *Communication from the Commission on recognition of qualifications for academic and professional purposes (COM(94)596) of 13.12.1994*, p. 5.

Among the most notable *regulated* professions are the *liberal* professions, which includes, among others, medical doctors but also notaries and lawyers. The liberal professions are characterised by the CJEU as professional activities which usually require 'high-level qualification and are subject to strict regulation'.[42] Both line of professions share the legitimate aim of the Member States to keep a high standard when it either comes to the protection of public health or the functioning of the judicial system. Especially this balancing of interests leads to rich, particularly interesting but also problematic case law. Despite the similarities of the high education standard, the professions differ however because there is only some free movement for the legal profession as opposed to a significant number of applicants for many professions in the health sector. This can be explained by the fact that there is no European concept of the legal profession.[43]

Whilst there is a right as well as a need for and a right of free movement within the EU, Switzerland's European integration can only be summarised as a 'system of bits and pieces'.[44] This complex institutional framework leads to unique technical problems when applying the regulatory framework for mutual recognition of professional qualifications which makes it sometimes even difficult for lawyers to find the applicable legislation or to apply certain concepts of EU law. In addition, in the context of the *acquis suisse* the fundamental freedoms have only partly evolved and contain the freedom of establishment, the freedom of workers and the freedom of services (partially) and a (rarely applied) standstill clause.[45] However, the rights of free movement for the non-economically active, such as trainees and students are not unconditional.[46] The lack of free movement and even non-discrimination provisions for non-economically active EU and Swiss nationals still clearly differentiates between students and professionals.

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42 Case C-267/99, *Christiane Adam, épouse Urbing v Administration de l'enregistrement et des domaines*, ECLI:EU:C:2001:534, para. 39.

43 See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, para. 24 et seq.

44 C. Tobler, *The EFTA States and the indivisibility of the internal market: A systematic look at the extension of the internal market to the EEA EFTA States and to Switzerland (Position paper) of 07.05.2015,* <https://europa.unibas.ch/fileadmin/user_upload/europa/News__Events/PDFs_News__Events/20150508_EP_Hearing_PosPaper_Tobler.pdf> (last visited on 28.06.2020).

45 See Art. 13 AFMP and Arts. 6, 12 and 17 of Annex I to the AFMP.

46 See Art. 24 of Annex I to the AFMP.

Under the *acquis communautaire*, professionals who are not fully-qualified may rely on primary law according to the case law of *Morgenbesser*[47] and *Peśla*[48]. This case law adapts the CJEU's famous *Vlassopoulou* decision for not fully-qualified professionals. The host Member State must take into consideration all professional qualifications and professional experience.[49] Even the status of trainees is evolving under secondary law and partial recognition also contributes to a more flexible approach in line with the principle of proportionality.[50] The situation of not fully-qualified professionals under the *acquis suisse* will be addressed for the legal trainees.

1.2 Purpose of this contribution, structure and research questions

Now it has been established that the constitutional issues of Switzerland, the search for a common framework, the interpretation of EU law, the free movement of persons and the recognition of professional qualifications between Switzerland and the EU are separate discussions but are still closely intertwined. Against this background, this study is divided into four layers moving from the institutional framework, to the more general free movement provisions, the fundamentals of mutual recognition and then to the specific professions.

In its Part I, this research intends to depict the legal order that was established between Switzerland and the EU. As both legal orders are independent the institutional questions are essential for the effectiveness of the bilateral agreements[51]. The integration process was ruptured by several Swiss referendums, including the successful popular initiative against mass immigration from 2014. The current setting makes it a daunting task to solve the institutional problems and to streamline but also to reform the complex *acquis suisse* needed for the follow-up of the bilateral path or even the conclusion of further market access

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47 See Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612.

48 See Case C-345/08, *Peśla*, ECLI:EU:C:2009:771.

49 See Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193; see also Case C-319/92, *Haim I*, ECLI:EU:C:1994:47.

50 See Arts. 2 sentence 2 and 4f of the amended Directive 2005/36/EC which are currently not part of the *acquis suisse*.

51 See for the principle of effectiveness: Art. 2 in conjunction with Art. 11 AFMP; A. Glaser & H. Dörig, 'Die Streitbeilegung in den Bilateralen Abkommen Schweiz - EU', in A. Epiney & L. Hehemann (eds.), *Schweizerisches Jahrbuch für Europarecht 2017/2018 / Annuaire suisse de droit européen 2017/2018,* Zurich (2018), p. 10 with further references; see e.g. BGE 128 V 315, para. 1.c.

agreements. For this purpose, the further evolution of relations between Switzerland and the EU, namely the Draft Institutional Framework Agreement and the application of EU law in Switzerland shall be discussed. There will be discussion of the institutional challenges that block further integration by Switzerland, such as the lacklustre association of Switzerland in the Horizon 2020 programme, which depended on the ratification of the Croatia Protocol.

As common-party institutions do not exist for the interpretation of the *acquis suisse*, the free movement provisions between Switzerland, the EU and its Member States have been interpreted by the Swiss courts and administrative authorities since the entry into force of the AFMP in 2002 without (much) direct guidance by the CJEU. It shall be explained, which rules the interpretation of the AFMP follows. Due to the fact that the CJEU only ruled in few cases concerning the AFMP, the method of interpretation for the Ankara Association Agreement ('Ankara Agreement') by the CJEU shall be investigated as a comparison. This Agreement established a cooperation which even contains the possibility for EU membership.[52] The interpretation of the AFMP shall be compared to the interpretation of the Ankara Agreement which was often interpreted broadly, despite the application of the Vienna Convention on the Law of the Treaties, and despite the low level of integration of Turkey given that the Ankara Agreement incorporates a standstill clause (which forbids the introduction of new restrictions of the freedom of establishment and the freedom to provide services) and the principle of non-discrimination. The method of interpretation of the Ankara Agreement is thus intended to give a valuable answer to the methods of interpretation of international agreements in general and in particular for the provisions of the AFMP.

The next layer (Part II) of this thesis brings us to the free movement provisions. With the correct method of interpretation as a foundation, it will move on to examine the free movement provisions of Annex I to the AFMP and the case law of the Court of Justice of the European Union (CJEU) and of the Swiss Federal Court. The problems of incorporating the *acquis communautaire* will also be covered. It shall be discussed whether there is an obligation to follow the case law of the CJEU under the AFMP. The applicable fundamental freedoms under the *acquis suisse* and its distinctions with the internal market case law shall be discussed. Finally, the situation of students under the *acquis suisse* shall be briefly compared to their situation under the *acquis communautaire.* This has ramifications for the

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[52] See Art. 28 of the *Agreement establishing an Association between the European Economic Community and Turkey,* OJ [1973] L361/1, 31.12.1977.

mobility of law students, which is closely connected to the free movement of the legal profession despite the fact that the concepts of academic and professional recognition are still distinguished and that the full education cycle has not yet been completed at that stage.

In Part III of this research, the aim is to show how the AFMP regulates the mutual recognition of professional qualifications through the application of primary law. The implementation of the professional qualifications regime is however still a patchy framework. For this purpose, the free movement provisions shall be explored and the correct method of interpretation shall be tested for selected health and legal professions by analysing the case law. The recognition of professional qualifications based on secondary law, namely under the Professional Qualifications Directive, shall also be discussed in detail. This includes a discussion of the relevant case law of the CJEU, the Swiss Federal Court and the Swiss Federal Administrative Court ('FAC') for the application of primary and secondary law in Switzerland under the AFMP. For the discussion of the Professional Qualifications Directive, emphasis will be laid on the case law of the Swiss Federal Administrative Court which has influenced the legal landscape in Switzerland and rendered many judgments in this field. Further, some of the changes that an implementation of Directive 2013/55/EU[53] would bring shall be briefly mentioned – even if the amendments have not been transposed by Switzerland (not yet part of the *acquis suisse*) and a date for the implementation by the Joint Committee is (still) not known.

The last Part IV of this research includes the recognition of professional qualifications for the legal and specific health professions. The respective case law of Swiss courts, the CJEU and occasionally of the EFTA Court is covered. The focus will therefore shift to the rich case law concerning the health professions in Switzerland, while the legal professions shall include the status of law students, legal trainees and lawyers. For legal trainees, it shall be discussed whether the case law of *Morgenbesser*[54] provides a sensible direction in which to go in the context of the Swiss legal order. The above-mentioned case law of *Morgenbesser* and *Peśla*[55] shall therefore be examined and transferred to the current Swiss situation of legal

53 *Directive 2013/55/EU of the European Parliament and the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') of 20.11.2013,* OJ [2013] L354/132, 28.12.2013.

54 See Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612.

55 See Case C-345/08, *Peśla*, ECLI:EU:C:2009:771.

trainees. In the light of the foregoing, the situation of law students and legal trainees shall be reassessed. The notarial profession and the patent attorney's profession will only briefly be addressed because for the first profession clarification is needed from the Swiss Federal Court on whether the case law of the CJEU shall be followed, whereas the latter profession is regulated by title alone. It shall be discussed whether secondary or primary law applies for the auditors' profession under the *acquis suisse* or whether free movement rules do not apply at all. The tax advisor's profession is not regulated in Switzerland and will not be discussed.[56] Rare legal professions shall not be discussed. While also other liberal professions could offer interesting points for discussions, the professions of architects and engineers will not be covered because the architect's profession is only regulated in a few cantons and the engineer's profession not at all.[57]

In light of the foregoing, the research questions are thus as follows:

1. How does the cooperation between Switzerland and the EU function and how will the institutional framework between Switzerland and the EU be altered in the near future?
2. Does the institutional framework suffice to guarantee the *effet utile* of the free movement provisions as foreseen by the AFMP[58]?
3. How is the EU law of the *acquis suisse* interpreted in conformity with the case law of the CJEU for the internal market?
4. What implications does the *acquis suisse* have for the free movement provisions and the recognition of professional qualifications?

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56 The host Member State may therefore in principle require that the applicant has pursued the profession for two (respectively one year under the revised Directive) of the previous ten years (Art. 13(2) of the Professional Qualifications Directive). These two years (or one under the revised Professional Qualifications Directive) can however not be required if the home Member State attests that the applicant followed regulated training or education to practice the profession as a tax consultant (Art 13(2) subpara. 2 of the revised Professional Qualifications Directive). Usually, tax consultants have followed a regulated *training* (see Art. 43 of the *Bundesgesetz über die Berufsbildung (BBG) of 13.12.2002,* SR 412.10 in conjunction with *Prüfungsordnung für die höhere Fachprüfung für Steuerexpertinnen und Steuerexperten of 20.06.2011).* See for practical problems in Germany: M. Neuhaus & R. Küttel, 'Meldepflicht für Schweizer Steuerberater in Deutschland: Ein Überblick über die derzeitige deutsche Gesetzeslage und deren Auslegung', Der Schweizer Treuhänder 2011, No 1-2, p. 67 et seq.

57 See J.-B. Zufferey, '§ 20 Der Beruf des Planers im öffentlichen Recht', in H. Stöckli (ed.), *Die Planerverträge: Verträge mit Architekten und Ingenieuren,* Zurich (2019), p. 926 et seq.; see also <https://www.sbfi.admin.ch/dam/sbfi/de/dokumente/2017/02/ingenieure.pdf.download.pdf/ingenieur_d.pdf> (last visited on 28.06.2020).

58 See supra note 51.

5. What are the current obstacles to the recognition of professional qualifications with regard to selected health and legal professions in Switzerland?
6. Does Swiss case law for the free movement of persons and for the recognition of professional qualifications reflect the case law of the CJEU?

1.3 Research methodology and terminology

In general, this thesis relies in most parts on a doctrinal approach. In parts one and two, this research relies on a legal analysis of the relevant legislation and doctrine. It also lays an emphasis on the case law of the CJEU, which is compared to the case law of the Swiss Federal Court for the interpretation of international agreements, as these courts ought to operate through judicial dialogue.[59] In addition, the method of interpretation of the Ankara Agreement is intended to give a valuable answer to the methods of interpretation of international agreements in general and in particular for the AFMP. However, the aim of this study is not to give a systematic overview of the Ankara Agreement but it will be analysed to see some of the essential steps in the evolution of the Ankara Agreement by the CJEU which serves as a preparation to set the developments of the *acquis suisse* in the right context. In considering the *acquis suisse*, the legal text and the existing academic literature will be drawn upon.

For the latter parts of this research, the case law of Divisions I, II and III of the FAC concerning the recognition of professional qualifications is addressed. For this topic, especially the Advocate Generals' Opinions are a valuable source as they often provide a very profound legal analysis for the application of secondary law, such as the Professional Qualifications Directive. They are often referred to in the reasoning of the CJEU without further discussion, which shows their standing and value for legal research.

Reference will be made principally to the EU but not to the EEC or the EC in this paper unless the (historical) context makes it necessary to do so. Switzerland will be referred to as a Member State for the purpose of the Professional Qualifications Directive (as stipulated by Annex III to the AFMP) unless stated otherwise for the sake of clarity. Further, the term *acquis suisse* describes the relevant EU law that applies between Switzerland and the EU (as

59 See now explicitly foreseen in Art. 11 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

opposed to the *acquis communautaire*) but without covering the domestic legislation of Switzerland implementing EU law.

Switzerland has four official languages (Art 4 BV:[60] German, French, Italian and Romansh). *De facto* three languages are mostly used in court on the federal and cantonal levels (German, French and Italian). For the purpose of this thesis, terms are used and explained in German if possible. As French is an official language, some French expressions are used. It should be noted that the author sometimes refers to the unofficial translation of Swiss Federal Court case law. These citations will appear as follows: BGE 133 V 624 para. 4.3.7 (= Pra 2008 No 125). The term in the brackets shows the citation of the journal where a German translation for leading cases of the Swiss Federal Court can be found.

For the sake of a coherent terminology, it should be clarified that in the literature reference is made interchangeably to a 'migrant' or 'applicant' in relation to the mutual recognition of professional qualifications, as EU, EEA EFTA or Swiss nationals may invoke their rights of free movement. This includes situations where nationals of a Contracting Party obtained an EU diploma and returned to their home Member State or their State of establishment. Obviously, this constitutes a cross-border situation and falls within the purview of EU law.[61] Notwithstanding this clear and precise rule founded in established case law (at least with regard to the recognition of professional qualifications), some courts still struggle with the distinction between internal situations and cross-border links.[62]

1.4 Scope of this contribution, existing literature and restrictions

The main goal of this research is to show how mutual recognition of professional qualifications is regulated between the EU and Switzerland for the selected professions and the case law of the Swiss courts. To achieve this aim, it is necessary to highlight the unique integration process of Switzerland and to discuss the relevant rules governing the free movement of persons. This allows some answers to be given about whether the free movement provisions of the *acquis suisse* allow the same level of free movement compared to the *acquis communautaire*.

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60 *Bundesverfassung der Schweizerischen Eidgenossenschaft (BV) of 18.04.1999,* SR 101.

61 See note 1197 and Chapter 6.2.2 for references.

62 See Chapter 6.2.2 for more detail.

This contribution focuses in parts III and IV on the legal landscape in Switzerland. It will touch on federal as well as cantonal legislation and sometimes even touch on intercantonal regulations. Some concepts shall be compared to others in a comparative fashion but the author does not intend to give an overview of other national regulations governing the recognition of professional qualifications.

The boundaries between academic and professional recognition sometimes overlap.[63] This will be hinted at but not be dealt with in depth. For further discussion of this overlap it can be referred to a very recent study.[64]

Whether free movement restrictions fall under the scope of the AFMP is still controversial. However, a doctoral thesis about this topic already exists.[65] Delli concludes that restrictions are covered not for legal but for pragmatic reasons because the CJEU does rarely distinguish between indirect discriminations and restrictions.[66] Doctrine seems however more eager to accept the concept of restrictions for the provision of services based on the wording of the respective Article of the AFMP.[67] Therefore, the dispute and the respective case law will be addressed insofar as it is necessary to understand the different positions and insofar as new developments have evolved in the meantime, or insofar as it is relevant for the recognition of professional qualifications, such as for the concept of partial recognition, the recognition of third country diplomas and for the auditor's profession.

EEA law will be addressed when it is of particular interest to the reader.

For practical purposes, it should be noted that Federal Acts can be found under 'https://www.admin.ch/', and that cantonal and intercantonal laws are easily compared on 'http://www.lexfind.ch/'. The case law of the Swiss Federal Court is available at 'http://www.bger.ch' and the case law of the FAC is available at 'http://www.bvger.ch/'. The decisions of the Joint Committee for the AFMP can be found at 'https://www.admin.ch/opc/de/european-union/joint-committees/007.000.000.000.000.000.html.ch/'.

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63 See Chapter 6.3.2.4.

64 See Kortese, Maastricht, supra note 38, p. 10 et seq.

65 C. Delli, *Verbotene Beschränkungen für Arbeitnehmende?: Überlegungen zur Tragweite des Personenfreizügigkeitsabkommens zwischen der Schweiz sowie der EG und ihren Mitgliedstaaten,* Diss. Basel (2008), Basel (2009).

66 Delli, Basel, supra note 65, p. 325 et seq.

67 N. F. Diebold, *Freizügigkeit im Mehrebenensystem: Eine Rechtsvergleichung der Liberalisierungsprinzipien im Binnenmarkt-, Aussenwirtschafts- und Europarecht,* Habil. Lucerne (2015), Berne (2016), para. 790.

1.5 Institutional framework of Switzerland for the professional recognition

This last introductory Subchapter gives a short summary of the institutional framework in Switzerland with regard to the professional recognition and notably its federal structure. Despite its misleading name ('Swiss Confederation'), Switzerland is considered to be a federation in modern times.[68] The Swiss Constitution ('BV') states with regard to the powers of federal government: 'The Confederation shall fulfil all the duties that are assigned to it by the Swiss Federal Constitution'.[69] The powers of the federal government are explicitly listed in the BV. Federal government is responsible for 'regulations on vocational and professional education and training',[70] for the management of the Federal Institutes of Technology,[71] legislation on professional activities in the private sector,[72] legislation of 'basic and continuing education and training for family medicine professions and the requirements for practising these professions'[73]. The Swiss Confederation may legislate in the field of professional activities in the private sector (Article 95(1) BV) and shall seek to create a unified Swiss economic area which guarantees that persons with academic or professional qualifications can practice their profession throughout Switzerland (Article 95(2) BV). It is also obliged to legislate in the field of medical care (Article 117a(2) BV). Article 117a(2) BV also affects public service employees. The cantons on the other hand, 'exercise all rights that are not vested in the Confederation'.[74] Swiss cantons still enjoy a great degree of autonomy to regulate certain professions, such as the teaching, notary, and architecture professions.[75]

The three branches of the Swiss Confederation are the Federal Assembly with two Chambers, the Federal Council, and the Swiss Federal Court.[76] According to the Constitution,

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68 A. Aust, *Handbook of international law,* Cambridge (2010), p. 16; Kläser, Maastricht, supra note 9, p. 58.

69 Art. 42 BV in the translation provided by the Swiss government.

70 Art. 63(1) BV in the translation provided by the Swiss government.

71 Art. 63a(1) BV.

72 Art. 95(1) BV.

73 Art. 117a(2) lit. a BV in the translation provided by the Swiss government.

74 Art. 3(2) sentence 2 BV.

75 See Diebold, Berne, supra note 67, para. 47 for a more detailed overview.

76 See Arts. 148, 174 and 188 BV; see Kläser, Maastricht, supra note 9, p. 52 et seq. for a detailed overview.

the Swiss Federal Court is 'the supreme judicial authority' in Switzerland.[77] It is however bound by Article 190 BV which requires the Swiss Federal Court to apply federal law even when in conflict with the BV (see Chapter 3.4.2 for exceptions).

Federal law is applied or implemented by the cantons if necessary.[78] In case of conflict, federal law takes precedence over cantonal law.[79] However, the task of interpreting cantonal law is left mainly for the cantonal high courts. This is because the violation of cantonal law cannot be invoked before the Swiss Federal Court as such, but only indirectly (usually when constitutional rights are violated).[80] Cantons may enter into agreements with each other (so-called intercantonal agreements) and establish intercantonal bodies.[81] This does not affect the selected professions which are considered in this study, but largely influences the recognition of teachers via intercantonal law which in general takes precedence over the Swiss law on the internal market (see Chapter 8.4.2 et seq.).[82] Interestingly enough, violations of intercantonal law can be heard by the Swiss Federal Court.[83]

The State Secretariat for Education, Research and Innovation (SERI) has been competent for the mutual recognition of professional qualifications for many professions and its coordination since 2017. With the revision of the recognition regime, this also includes diplomas on the university level.[84] The SERI is also the competent authority for the declaration to be made in advance (see Chapter 6.6.3).[85] There are also other public bodies for the recognition of professional qualifications, such as the Federal Inspectorate for Heavy

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77 Art. 188(1) BV.

78 Art. 46(1) BV.

79 Art. 49(1) BV.

80 Art. 95 of the *Bundesgesetz über das Bundesgericht (BGG) of 17.06.2005,* SR 173.110.

81 Art. 48(1) BV.

82 Art. 4(4) BGBM; see the *Interkantonale Vereinbarung über die Anerkennung von Ausbildungsabschlüssen* of 18 February 1993 (Intercantonal Agreement on the recognition of professional qualifications); see however, for exceptions to that, BGE 136 II 470 (= Pra 2011 No 37), para. 5.3.

83 Art. 95 lit. e BGG. Intercantonal law can only rarely be invoked by private parties.

84 Art. 68 BBG in conjunction with Art. 69a(1) of the *Verordnung über die Berufsbildung (BBV) of 19.11.2003,* SR 412.101, and Art. 70 para. 1 HFKG; see further Swiss Confederation, *Botschaft zur Förderung von Bildung, Forschung und Innovation in den Jahren 2017–2020 of 24 February 2016 (BBl 2016 3089)*, p. 3251 et seq.; see also <https://www.sbfi.admin.ch/sbfi/de/home/bildung/diploma/anerkennungsverfahren-bei-niederlassung.html> (last visited on 28.06.2020).

85 Art. 2(1) of the *Bundesgesetz über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungserbringerinnen und -erbringern in reglementierten Berufen (BGMD) of 14.12.2012,* SR 935.01.

Current Installations (ESTI) for electricians[86] and the Commission on medical professions (MEBEKO) for pharmacists and doctors.[87] The supervision of lawyers is regulated by cantonal law.[88] The SERI published a (non-binding) list of the respective authorities for the regulated professions in Switzerland.[89]

Article 11 AFMP guarantees a right to appeal to the competent authorities. In Switzerland, civil and criminal procedure laws have been regulated on a federal level since 2011. Public procedural law is still regulated by the cantons and the Swiss Confederation separately.[90]

Decisions of the SERI[91] and the ESTI can be appealed before the Swiss Federal Administrative Court ('FAC').[92] Each canton has its own court system and must have a superior court.[93] Appeals against decisions of the superior cantonal courts, the FAC, and some other superior judicial bodies[94] can be appealed before the Swiss Federal Court unless it concerns the assessment of exams[95] (especially exams for school, professional training, and the 'exercise of a profession').[96] Decisions of the FAC that fall under the exception of Article 83 lit. t BGG cannot be appealed.[97] Judgments of superior cantonal courts falling under the latter category can be appealed before the Swiss Federal Court, but only under more restrictive conditions than usual.[98]

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86 E.g. Art. 8(4) of the *Verordnung über elektrische Niederspannungsinstallationen (NIV) of 07.11.2001,* SR 734.27; *Bundesgesetz über das Verwaltungsverfahren (VwVG) of 20.12.1968,* SR 172.021.

87 Art. 1(1) lit. d of the *Bundesgesetz über die universitären Medizinalberufe (MedBG) of 23.06.2006,* SR 811.11.

88 See Art. 27 et seq. of the *Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (BGFA) of 23.06.2000,* SR 935.61.

89 <https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html> (last visited on 28.06.2020).

90 See Art. 177(3) BV and the VwVG.

91 An appeal can be made against decisions of the Swiss Red Cross to the SERI and subsequently to the FAC: see e.g. BVGer B-1229/2013 of 11.11.2013.

92 See e.g. BVGer A-368/2014 of 06.06.2014.

93 Art. 75(2) BGG.

94 E.g. 'MEBEKO' for doctors and 'Rekurskommission EDK/GDK' for teachers.

95 Art. 83 lit. t BGG.

96 Art. 86(1) lit. (a) and (d) BGG.

97 Art. 113 BGG *a contrario*.

98 See Arts. 113 and 116 BGG.

Part I: The institutional framework between Switzerland and the EU

2 The integration process between Switzerland and the EU

2.1 Introduction

This Chapter sheds some light on the democratic process in Switzerland and the nature of the relationship between Switzerland and the EU which includes a discussion of the most important popular initiatives, such as the popular initiative against mass immigration. For this purpose, the current incorporation of EU law under the bilateral agreements shall be observed. This detailed examination provides the reader with an understanding of how the updating of EU law under the bilateral agreements is currently functioning. It includes the autonomous adaptation of EU law by Switzerland and the dynamic updating of EU law under the Schengen Agreement. Then, Chapter 2 proceeds to show the dynamic incorporation and also the dynamic interpretation under the EEA Agreement. This discussion includes different options for the institutional mechanism for European integration and provides a good summary for the institutional overhaul of the bilateral system between Switzerland and the EU.

To complement this analysis, the most recent developments between Switzerland and the EU will be discussed because the bilateral path in its current form reached its end according to the EU. In particular, Chapter 2 examines the Draft Institutional Framework Agreement between Switzerland and the EU which should establish a dispute settlement mechanism for five market access agreements and would involve a two-pillar surveillance structure. It also includes the continuous updating of EU law. However, it is currently uncertain whether the Draft Institutional Agreement will be renegotiated in the near future.

2.2 The integration of Switzerland à la carte

To begin with, the evolution of that relationship can be separated into three phases.[99] The first phase covers the period from 1956 to 1972, the second phase started in 1972 and ended with a referendum result against EU-related membership in 1992. The third phase was triggered by a plethora of sectoral agreements in 1993, seen from the Swiss perspective as a

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[99] C. Tobler & J. Beglinger, *Grundzüge des bilateralen (Wirtschafts-)Rechts Schweiz - EU: Band 2, 70 Tafeln,* Zurich (2013), p. 11; C. Schnell, *Arbeitnehmerfreizügigkeit in der Schweiz: Ausgewählte rechtliche Aspekte zum Personenfreizügigkeitsabkommen,* Diss. Zurich (2010), Zurich (2010), p. 9.

follow-up of a 'bilateral path'.[100] Today one could also see the beginning of a possible new phase which began in 2008, mostly reflecting the search for an effective institutional framework,[101] which after four years of negotiations culminated in the Draft Institutional Framework Agreement between Switzerland and the EU in 2018 (see Chapter 2.3.3). The phases are illustrated in the following table:

Switzerland's recent integration process:

Phase 1
1956: Consultation Agreement between Switzerland and the ECSC (not in force)[102]
1956: Agreement on Railroad tariffs (not in force)[103]
1967: Agreement on tariffs of certain cheeses[104]
Phase 2:
1986: Trade in non-agricultural and processed agricultural goods[105]
1989: Insurance Agreement[106]
1990: Simplification of inspections and formalities in respect to the carriage of goods[107]
1992: Swiss Federal Council writes an application for negotiations about membership in the EU[108]
1992: Referendum on the accession of Switzerland to the EEA[109]

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100 C. Tobler, 'Der Acquis der rechtlichen Verbindung der Schweiz zur EG und EU – Eine unsichere Grösse?', in F. Breuss, T. Cottier & P.-C. Müller-Graf (eds.), *Die Schweiz im Europäischen Integrationsprozess,* Baden-Baden (2008), p. 13 et seq.

101 See European Parliament, *European Parliament resolution on EEA - Switzerland: Obstacles with regard to the full implementation of the internal market (2015/2061(INI)) of 09.09.2015*; Council of the European Union, supra note 12, para. 44; Council of the European Union, supra note 8, para. 30; Council of the European Union, supra note 12, para. 48 et seq.; Council of the European Union, supra note 12.

102 *Consultation Agreement between the Swiss Confederation and the High Authority of the European Coal and Steel Community,* OJ [1957] 7/85, 21.02.1957.

103 *Agreement on the setting of through international railway tariffs for the carriage of coal and steel in transit through Swiss territory* of 28.07.1956, OJ [1957] 17/223, 29.05.1957.

104 See *Tariff agreement with Switzerland negotiated under Article XXVIII of GATT on certain cheeses of the ex position 04,04 of the Common Customs Tariff, signed in Geneva on 29 June 1967,* OJ [1969] L257/5, 13.10.1969.

105 *Agreement in the form of exchange of letters covering the non-agricultural products and the processed agricultural products not covered by the agreement between the European Economic Community and the Swiss Confederation of 14.07.1986, entry into force on 03.01.1986,* OJ [1986] L328/39, 22.11.1986.

106 *Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance of 10.10.1989, entry into force on 01.01.1993,* OJ [1991] L205/3, 27.07.1991.

107 *Agreement between the European Economic Community and the Swiss Confederation relating to the facilitation of controls and of the formalities at the time of the transport of goods of 21.11.1990, entry into force on 07.01.1991,* OJ [1990] L116/19, 08.05.1990.

108 See Swiss Confederation, *Parliamentary motion No 14.3219 of 21.03.2014,* <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20143219> (last visited on 28.06.2020).

109 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 6 December 1992 (Europäischer Wirtschaftsraum [EWR]) of 28 January 1993 (BBl 1993 I 167).*

Phase 3:
1999: Bilaterals I:[110]
Free movement of persons, technical barriers to trade, public procurement, agriculture, land transport, civil aviation and research
2004: Bilaterals II:[111]
Schengen/Dublin[112], taxation of savings, fight against fraud, processed agricultural products, MEDIA, environment, statistics, pensions, education, vocational training and youth
2004: Extension of the AFMP for the ten new EU Member States[113]
2007: Free movement for persons of the EU-17 Member States: no quotas apply[114]
2009: Extension of the AFMP for Bulgaria and Romania[115]
2013: Agreement on co-operation to ensure effective enforcement of competition rules in cross-border matters[116]
2013: Cooperation agreement for the participation of Switzerland in the European programmes of satellite navigation[117]
2014: Association of Switzerland to the Horizon 2020 programme[118]

110 See OJ [2002] L114, 30.04.2002.

111 See Swiss Confederation, *Botschaft zur Genehmigung der bilateralen Abkommen zwischen der Schweiz und der Europäischen Union, einschliesslich der Erlasse zur Umsetzung der Abkommen of 1 October 2004; «Bilaterale II» (BBl 2004 5965)*; <http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=3820&countryName=Switzerland&countryFlag=treaties> (last visited on 28.06.2020).

112 *Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis of 26.10.2004, entry into force on 03.01.2008,* OJ [2008] L53/52, 27.02.2008; *Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland of 26.10.2004, entry into force on 03.01.2008,* OJ [2008] L53/5, 27.02.2008.

113 *Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons regarding the participation, as contracting parties, of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic pursuant to their accession to the European Union,* OJ [2006] L89/30, 28.03.2006.

114 See Art. 10 AFMP.

115 *Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, regarding the participation, as contracting parties of the Republic of Bulgaria and Romania pursuant to their accession to the European Union,* OJ [2009] L124/53, 20.05.2009.

116 *Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws of 17.05.2013,* OJ [2014] L347/3, 03.12.2014.

117 *Cooperation Agreement between the European Union and its Member States, of the one part, and the Swiss Confederation, of the other, on the European Satellite Navigation Programmes of 18.12.2013, applied provisionally since 01.01.2014,* OJ [2014] L15/3, 20.01.2014.

118 *Agreement for scientific and technological cooperation between the European Union and European Atomic Energy Community and the Swiss Confederation associating the Swiss Confederation to Horizon 2020 — the Framework Programme for Research and Innovation and the Research and Training Programme of the European Atomic Energy Community complementing Horizon 2020, and regulating the Swiss Confederation's participation in the ITER activities carried out by Fusion for Energy of 12.05.2014, entry into force on 08.10.2015,* OJ [2014] L370/3, 30.12.2014.

2016: Arrangement between the European Union and the Swiss Confederation on the modalities of its participation in the European Asylum Support Office[119]
2016: Swiss Federal Council writes a letter to withdraw the application for negotiations about membership in the EU[120]
2016: Implementation of Article 121a of the Swiss constitution with the obligation of employers in specific sectors to notify the employment agency[121]
2016: Ratification of the Croatia Protocol[122]
2017: Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems[123]
2018: Draft Institutional Framework published[124]
2018: Agreement between Switzerland and the UK (Brexit)[125]

Table 1: The bilateral path between Switzerland and the EU [126]

2.2.1 Early integration of Switzerland

Switzerland's approach in the first phase can be described as cautious possibly because it was spared by any wars in recent history and has therefore remained stable.[127] Nevertheless, it was one of the seven founding members of the European Free Trade Association (EFTA) in 1960.[128]

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119 *Arrangement between the European Union and the Swiss Confederation on the modalities of its participation in the European Asylum Support Office of 26.02.2016,* OJ [2016] L65/22, 11.03.2016.

120 <https://www.eda.admin.ch/content/dam/dea/fr/documents/bundesrat/160727-Lettre-retrait-adhesion-CH_fr.pdf> (last visited on 28.06.2020).

121 See Art. 21a of the *Bundesgesetz über die Ausländerinnen und Ausländer und über die Integration (AIG) of 16.12.2005,* SR 142.20.

122 *Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, regarding the participation of the Republic of Croatia as a Contracting Party, following its accession to the European Union of 03.04.2016, entry into force on 01.01.2017,* OJ [2017] L31/3, 04.02.2017; see further Swiss Confederation, *Botschaft zur Ausdehnung des Freizügigkeitsabkommens auf Kroatien (BBl 2016 2223) of 04.03.2016*.

123 *Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems of 23.11.2017, entry into force on 01.01.2020,* OJ [2017] L322/3, 07.12.2017.

124 Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

125 *Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on citizens' rights following the withdrawal of the United Kingdom from the European Union and the free movement of persons agreement of 19.12.2018*.

126 Based on the figures of Tobler & Beglinger, Zurich, supra note 99 Schnell, Zurich, supra note 99, p. 10; Tobler & Beglinger, Zurich, supra note 99, chart 8; M. Vahl & N. Grolimund, *Integration without membership: Switzerland's bilateral agreements with the European Union,* Brussels (2006), p. 23; for a detailled overview, see <https://www.eda.admin.ch/dea/en/home/europapolitik/chronologie.html> (last visited on 28.06.2020).

127 R. Schwok, *Switzerland - European Union: An impossible membership?,* Brussels (2009), p. 94.

128 Schnell, Zurich, supra note 99, pp. 10–15; even before this date Switzerland was one of the founding members of the Organisation for European Economic Cooperation (OEEC; now: OECD) in 1948.

An essential agreement between Switzerland and the EC (now EU) in 1972,[129] the Free Trade Agreement (FTA) which removed trade barriers for industrial products,[130] marked the second phase. The Swiss Federal Court however ruled that the provisions of the FTA lacked self-executing character in its judgments of *Omo* and *Stanley Adams.*[131] The cases concerned competition law and intellectual property law (in *Omo,* the case was about the parallel import of laundry detergents and *Stanley Adams* was about a whistle-blower who was convicted for sending a (confidential) letter to the EC indicating (unlawful) price-fixing on the vitamin market). In both cases, the parties invoked the FTA, but the court ruled that the FTA was not directly applicable.[132] Nonetheless, the Swiss Federal Council did state that the FTA 'lays the foundation' (*der erste Stein*) for bilateral relations between Switzerland and the EU.[133] The Swiss population voted for the FTA, with 72.5% in favour.[134]

Many European countries were joining the European Economic Area (EEA) or the EC in that period, but the Swiss population voted (in the third phase) against EEA membership through a referendum, with 50.3% of the votes against doing so in 1992. A request for EC membership however was launched a few weeks after signing the EEA application but was

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129 J. Kellenberger, 'Der politische und wirtschaftliche Stellenwert der sieben bilateralen sektoriellen Abkommen', in D. Felder & C. Kaddous (eds.), *Accords bilatéraux Suisse - UE: Bilaterale Abkommen Schweiz - EU: (erste Analysen),* Bâle (2001), p. 7.

130 The so-called 'Free Trade Agreement' consisting of two Agreements was originally concluded with the EEC and the ECSC: *Agreement between the European Economic Community and the Swiss Confederation - Protocol No 1 concerning the treatment applicable to certain products - Protocol No 2 concerning products subject to special arrangements to take account of differences in the cost of agricultural products incorporated therein - Protocol No 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation - Protocol No 4 concerning certain provisions relating to Ireland - Protocol No 5 concerning the treatment that may be applied by Switzerland to imports of certain products subject to the scheme for building up compulsory reserves of 22.07.1972, entry into force on 01.01.1973,* OJ [1972] L300/189, 31.12.1972 and *Agreement between the Member States of the European Coal and Steel Community and Swiss Confederation - final Act – Statement of 22.07.1972, entry into force on 01.01.1974,* OJ [1973] L350/13, 19.12.1973.

131 BGE 105 II 49; BGE 104 IV 175.

132 Baudenbacher sharply disagrees, stating that the Swiss Federal Court 'did not know what it was all about':
C. Baudenbacher, *The Judicial Dimension of the European Neighbourhood Policy of 2013,* <https://www.coleurope.eu/sites/default/files/uploads/event/edp-8-2013_baudenbacher.pdf> (last visited on 28.06.2020), p. 15.

133 Swiss Confederation, supra note 6, p. 6846.

134 Swiss Confederation, *Bundesratsbeschluss über die Erwahrung des Ergebnisses der Volksabstimmung vom 3. Dezember 1972 betreffend den Bundesbeschluss über die Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Wirtschaftsgemeinschaft sowie den Mitglied (BBl 1973 I 82).*

suspended until 2016 due to the negative vote on the EEA.[135] Then, on 1 March 2016 and 15 June 2016 respectively, both chambers of the Swiss Parliament approved a parliamentary proposal which ordered the Swiss Federal Council to withdraw that application despite the fact that this was considered rather a formality at this point in time.[136]

The referendum against joining the EEA in 1992 was a close call. There is no single explanation for its result, but rather a combination of several underlying issues. First, the Swiss are fond of the principles of sovereignty, independence and neutrality, and many viewed those values as being threatened.[137] For similar reasons, Switzerland is also not a member of NATO (i.e. an intergovernmental defence treaty).[138] It was considered that EEA membership would be the end of direct democracy. Second, the Federal Council formally applied for EC membership at almost the same time. Therefore, many Swiss people were of the opinion that EEA membership would be the first step towards EU membership.[139] With record voter participation of 78.7%, the negative outcome of the referendum in 1992 can certainly be seen as a step backwards in the integration process.[140]

2.2.2 Further integration of Switzerland

The third phase and the first step towards a comprehensive solution came in 1999. Switzerland and the EU agreed on an initial package of seven agreements that are called 'Bilaterals I'. This package refers to and incorporates EU law into the *acquis suisse* (also known as to 'dock' on EU law or 'docking'[141]). The Bilaterals I consist of rules on the free movement of persons, technical barriers to trade, public procurement, agriculture, overland transport, civil aviation and research.[142] One of the agreements of this package, the agreement on the free movement of persons between Switzerland and the EU (AFMP), lays down the institutional provisions, and Annex I thereof contains the core free movement provisions.

135 Vahl & Grolimund, Brussels, supra note 126, pp. 8–14.
136 Swiss Confederation, supra note 108.
137 Vahl & Grolimund, Brussels, supra note 126, pp. 7 et seq. and 10.
138 Schwok, Brussels, supra note 127, p. 101.
139 Vahl & Grolimund, Brussels, supra note 126, p. 11.
140 Swiss Confederation, supra note 109.
141 See Oesch (2019), supra note 16, p. 2.
142 Vahl & Grolimund, Brussels, supra note 126, pp. 8-14 and 44 et seq.

In 2001, there was a popular initiative concerning Switzerland joining the EU integration process through accession to the EU.[143] It was unsuccessful, with 76.8% of the Swiss voters in opposition.[144]

The second package of agreements was signed in 2004 ('Bilaterals II'). The second package consists of agreements on the Schengen zone/Dublin regulations, taxation of savings, measures against fraud, processed agricultural products, the media, environment, statistics, pensions and education, vocational training and youth. The topics are often characterised as 'leftovers'.[145] Switzerland has been part of the Schengen area since 2008, and since 2009 has extended that to airport controls. Border controls have therefore been lifted.[146]

It is noteworthy to mention that Switzerland's actions throughout this process were economically driven. This explains why there was support for Bilaterals I and II by the business sector, and an immense push for their success in the ensuing referendums.[147] The EU's interests had also changed after the referendum result against Switzerland joining the EEA in 1992. The Commission published a document stating that:

> 'It is proposed that negotiations be opened in a number of areas, with a view to the conclusion of new sectoral agreements between the Community and Switzerland on a basis of an overall balance of mutual advantage. (...) It would be inappropriate for Switzerland to obtain all advantages of an Agreement which it has rejected, and whose entry into force has been so long delayed as a result.'[148]

Schwok argues that sectoral agreements were concluded as a result of the positive advantage of being able to hold a referendum. Thus, he seems to imply that the Swiss delegation can influence the outcome of the negotiations with a view to future referendums.[149] While it is certainly true that referendums are a possibility, it is doubtful

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143 Swiss Confederation, *Bundesbeschluss über die Volksinitiative «Ja zu Europa!» of 23 June 2000 (BBl 2000 3540) of 23.06.2000*.

144 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 4 May 2001 (BBl 2001 2025) of 04.03.2001*.

145 T. Jaag & J. Hänni, *Europarecht: Die europäischen Institutionen aus schweizerischer Sicht,* Zurich (2015), § 40 para. 4004; Vahl & Grolimund, Brussels, supra note 126, p. 13.

146 Swiss-EU Schengen Agreement (see for the full citation supra note 112).

147 See Kellenberger, supra note 129, p. 7 et seq.

148 European Commission, *Communication from the Commission – future relations with Switzerland, COM(1993) 486 final of 01.10.1993*, pp. 1-3.

149 See Schwok, Brussels, supra note 127, p. 34 et seq. for a further reference.

whether this can be used advantageously in that way. It could also be considered as a drawback, as the EU has included strict rules on the termination of the agreements in Bilaterals I for this purpose.[150]

It is likely that the AFMP would have been terminated if it had not been renewed and extended to the new Member States, Romania and Bulgaria, in 2009, as the EU would not have accepted the status quo.[151] The EU Member States can be divided into four categories with respect to the year they have joined the EU and their conditions with regard to quotas and safeguard clauses. The first category combines the first 15-EU Member States (including Malta and Cyprus which were granted the same conditions from the very beginning even if they are part of a later Protocol for the EU-8 Member States; therefore, also called the EU-17 Member States). For the second and third categories, the EU-8 Member States and the EU-2 Member States (Romania and Bulgaria), separate Protocols were concluded in 2007 (with quotas and safeguard clauses).[152] That is because the AFMP is multilateral, and the territorial scope of an agreement to which Member States are also Contracting Parties cannot be extended automatically.[153] Lastly, the Protocol for Croatia was concluded in 2016.[154] With the extension of the AFMP to the new EU-8 and EU-2 Member States, Switzerland voted

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150 See e.g. the so-called 'Guillotine' clause of Article 25(3) and (4) AFMP for the Bilateral I package.

151 Swiss Confederation, *Botschaft zur Weiterführung des Freizügigkeitsabkommens sowie dessen Ausdehnung auf Bulgarien und Rumänien of 14 March 2008 (BBl 2008 2135) of 14.03.2008*, p. 2143 et seq. and Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 8 February 2009: Personenfreizügigkeit Schweiz-EU: Weiterführung des Abkommens und Ausdehnung auf Bulgarien und Rumänien (BBL 2009 1671)*.

152 See Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons regarding the participation, as contracting parties, of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic pursuant to their accession to the European Union, OJ [2006] L89/30, 28.03.2006; Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, regarding the participation, as contracting parties of the Republic of Bulgaria and Romania pursuant to their accession to the European Union, OJ [2009] L124/53, 20.05.2009.

153 A mechanism to extend the application by written notification to other countries exists for the Cooperation Agreement to combat fraud between Switzerland, the EU and its Member States pursuant to Art. 47(1) thereof.

154 See Croatia Protocol (see for the full citation supra note 122); see further Swiss Confederation, supra note 122.

simultaneously for financial contributions (the so-called *Kohäsionsmilliarde* – one billion Swiss Francs) to foster the development of the new EU Member States.[155]

2.2.3 Cherry picking and further sectoral agreements

Discussions about further agreements have become difficult in Switzerland. Since the inauguration of the bilateral path, several potential violations of the sectoral agreements, such as certain cantonal tax regimes were discussed between Switzerland and the EU, as those were regarded as state subsidies by the EU.[156] The Joint Committee for the AFMP had already noted a discrepancy between the provisions of the AFMP and EU law in 2006 (entry into force in 2002).[157]

Several efforts were launched by Switzerland to conclude further bilateral agreements in the fields of trade in electricity, chemical safety, free trade in agricultural goods, as well as food and product safety.[158] Negotiations about an agricultural trade agreement came to a stop, due to a parliamentary motion in Switzerland in 2012.[159] Another parliamentary motion unsuccessfully intended to exclude a potential agricultural trade agreement, even as a mere subject for further discussion with the EU.[160] As stated above, the institutional framework needed to be concluded before the EU was willing to discuss further developments of the bilateral path. This was reiterated by a Resolution of the European Parliament in 2015.[161]

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155 Jaag & Hänni, Zurich, supra note 145, § 40 para 4007a.

156 *Decision of the Commission of the European Communities of 13 February 2007 as regards the incompatibility of certain Swiss company tax regimes with the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, C(2007) 411 final*.

157 C. Tobler, J. Hardenbohl & B. Mellár, *Internal Market beyond the EU: EEA and Switzerland,* Briefing Paper IP/A/IMCO/NT/2009-13 PE 429.993 of January 2010, <http://www.europarl.europa.eu/RegData/etudes/note/join/2010/429993/IPOL-IMCO_NT(2010)429993_EN.pdf> (last visited on 28.06.2020), p. 18.

158 See <https://www.eda.admin.ch/dea/de/home/verhandlungen-offene-themen/verhandlungen.html> (last visited on 28.06.2020); T. Cottier et al., *Die Rechtsbeziehungen der Schweiz und der Europäischen Union,* Berne (2014), para. 997 for further examples; see also Baudenbacher (2012), supra note 15, p. 583.

159 Swiss Confederation, *Parliamentary motion No 10.3818 of 01.10.2010,* <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20103818> (last visited on 28.06.2020).

160 Swiss Confederation, *Parliamentary motion No 11.3464 of 14.04.2011,* <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20113464> (last visited on 28.06.2020).

161 European Parliament, supra note 101, para. 16.

To illustrate some earlier controversies, the invocation of the safeguard clause by Switzerland in 2012 should be recalled. The different safeguard clauses of Article 10 AFMP allowed the Contracting Parties to limit the number of new residence permits during a transitional period if certain residence permit thresholds were exceeded. As of June 2019, provisional quotas and the safeguard clause of Article 10(4) AFMP can only be applied for nationals from Croatia.[162] Switzerland applied the safeguard clause in 2012 only for the EU-8 States notwithstanding the fact that Article 10(4) AFMP did not explicitly foresee a partial invocation against some Member States but only mentioned the 'persons of the European Community'. A partial application of Article 10(4) AFMP is supported by the idea of distinctive temporary restrictive measures for each Protocol. This idea is supported by preparatory documents of the Swiss Federal Council.[163] It is however self-evident from the rules of public international law that those Swiss documents cannot be decisive when interpreting a Treaty (see further Chapter 3.2).[164] The European Parliament then issued a Resolution about the temporary reintroduction of quotas (only) for the EU-8 Member States in 2012 (invocation of the safeguard clause in Article 10(4) AFMP). The European Parliament argued that discrimination based on nationality could arise. Thus, an application based on the number of permits of the EU-8 Member States would not suffice for application of the safeguard clause.[165] However, the European Parliament not only reiterated the quotas but also stated other general *institutional concerns*. It aimed at a more effective form of integration between Switzerland and the EU. Namely, Parliament sought 'a more dynamic adaptation of the agreements in the internal-market-related areas to the evolution of the EU acquis' and an 'evolving acquis, a homogenous interpretation of the agreement'. Finally, the

[162] Art. 10(1)(c) and 3(c) and Art. 10(4)(c) AFMP; see further <https://www.dfae.admin.ch/dam/dea/de/documents/fs/04-FS-Personenfreizuegigkeit_de.pdf> (last visited on 25.06.2020).

[163] Swiss Confederation, *Botschaft des Bundesrates zur Genehmigung des Protokolls zum Freizügigkeitsabkommen zwischen der Schweiz und der EG of 1 October 2004 (BBl 2004 5891)*, p. 5899.

[164] According to a recent study, the Swiss Federal Court often relies on dispatches of the federal government without taking into account that of Switzerland's Contracting Party: O. Ammann, *Domestic Courts and the Interpretation of International Law: Methods and reasoning based on the swiss example,* Diss. Fribourg (2017), Leiden (2019), p. 243.

[165] European Parliament, *European Parliament Resolution on Swiss quotas on the number of residence permits granted to nationals of Poland, Lithuania, Latvia, Estonia, Slovenia, Slovakia, the Czech Republic and Hungary (2012/2661(RSP)) of 24.05.2012*, para. 2.

European Parliament intended to foster ‘a more transparent and predictable environment’.[166] Shortly after the Resolution of 2012, the Swiss Integration Office (now Directorate for European Affairs) published an official press release which reaffirmed its position that the existing framework suffices and has served its function to guarantee the full effectiveness of European law in Switzerland.[167] The Swiss government changed its position in 2013 with a mandate for negotiations, which started on 22 May 2014 (on the basis of docking with the CJEU at first which means incorporating EU law (without EU membership) in a way to have access to the Court of Justice[168]; see for the term ‘docking’ footnote 141 and further: Chapters 2.3.2.1 and 2.3.2.2).[169]

Besides its internal political struggles, Switzerland is often accused of cherry picking, as it is only fragmentally connected to the EU. In 2014, a Commissioner gave a speech to the European Parliament in response to the Swiss popular initiative against mass immigration, stating that fundamental freedoms are simply not negotiable.[170] The European Commission also urged Switzerland to renegotiate further financial contributions for the Cooperation with Eastern States of Europe in 2014[171].[172]

In this respect, it is noteworthy to mention a position paper by Tobler, an expert to the Internal Market and Communications Committee (IMCO), which was published in 2015. She

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[166] European Parliament, supra note 165; see further Directorate for European Affairs, *Umfrage zur Anwendung der bilateralen Abkommen zwischen der Schweiz und der EU,* <https://www.eda.admin.ch/content/dam/dea/de/documents/studien/Umfrage-BA-100201_de.pdf> (last visited on 28.06.2020).

[167] Directorate for European Affairs, *Statement of Position by the FDFA/FDEA Integration Office on the resolution of the European Parliament on the decision of the Federal Council to reintroduce quotas for the EU-8 countries as of 24 May 2012,* <https://www.eda.admin.ch/content/dam/dea/en/documents/publikationen_dea/stellungnahme-ib-kontingente-120524_en.pdf> (last visited on 28.06.2020).

[168] C. Baudenbacher, *Rechtsgutachten zur Streitentscheidungsregelung des InstA zu Handen der Kommission des Nationalrates für Wirtschaft und Abgaben WAK (Report with regard to the dispute settlement mechanism to the Economic Affairs and Taxation Committee of the National Council) of 06.02.2019,* <https://www.parlament.ch/centers/documents/de/rechtsgutachten-professor-carl-baudenbacher.pdf> (last visited on 28.06.2020), p. 11.

[169] See infra note 252; Baudenbacher, supra note 168, p. 3.

[170] <http://www.europa.eu/rapid/press-release_STATEMENT-14-32_en.pdf> (last visited on 28.06.2020).

[171] See *Bundesgesetz über die Zusammenarbeit mit den Staaten Osteuropas of 24.03.2006, SR 974.1 ('Federal Act on the Cooperation with the Eastern States of Europe‘)*. The Act was valid from 1 June 2006 until 31 May 2017.

[172] Council of the European Union, supra note 12, para. 52; Council of the European Union, supra note 11, para. 11.

distinguishes the situation of a single market with the EU, and the situation with Switzerland as a 'system of bits and pieces'. Her recommendation is that Switzerland be reminded of its obligations under the AFMP – Switzerland should refrain from introducing national preferences for its workers. However, she also pointed out the fragmented structure of the AFMP, which provides rules for only three of the fundamental freedoms and even then, only in part, with a temporal restriction of up to 90 days for services.[173] With regard to this specific legal order, she points out statements of some officials that the internal market as a whole is considered to be comprehensive and indivisible in nature.[174]

Negotiations started again in 2014, but were suspended for new sectoral agreements[175] (in particular market access agreements) until Switzerland signed the Protocol with Croatia extending the freedom of movement to that new Member State. While answering a parliamentary proposal in 2014 the Swiss Federal Council was still of the opinion that even signing a Protocol about the extension of the AFMP with Croatia would undermine Article 121a paragraph 4 BV (introduced by the popular initiative against mass immigration).[176] Switzerland extended the application of the AFMP to Croatian nationals as part of the autonomous adaptation of EU law on 1 July 2014 with temporary quotas.[177] The EU temporarily accepted the 'autonomous adaptation' of Switzerland, but the European Parliament and the Council of the EU emphasised that unilateral measures cannot substitute the ratification of Protocol III with Croatia.[178] Notwithstanding these challenges, State Secretary Mario Gattiker signed a third Protocol on the extension of the AFMP regarding the participation of Croatia in 2016.[179]

The reluctance for the conclusion of future agreements can at least partly be explained by the fact that there are currently no legal consequences for refusing to update the sectoral

173 See Art. 5(1) AFMP.

174 Tobler, supra note 44.

175 See for the current dossiers: <https://www.eda.admin.ch/dea/de/home/verhandlungen-offene-themen/verhandlungen.html> (last visited on 28.06.2020).

176 Swiss Confederation, *Parliamentary motion No 14.4078 of 08.12.2014 with parliamentary votes,* <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20144078> (last visited on 28.06.2020).

177 Art. 91a of the *Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit (VZAE) of 24.10.2007,* SR 142.201.

178 European Parliament, supra note 101, para. 17; Council of the European Union, supra note 12, para. 47.

179 N. Nuspliger, 'Schweiz will Forschungskooperation retten', *NZZ,* 7 March 2016.

agreements (with some exceptions).[180] The bilateral agreements were therefore characterised as a 'fair-weather construction'.[181] This changed after the successful popular initiative against mass immigration in 2014, as the EU suspended the negotiations of 15 dossiers.[182] The imminent implications of Switzerland's so-called cherry picking also concerned its status in respect of the association of Horizon 2020 and Erasmus+ after the popular initiative against mass immigration. Switzerland was temporarily regarded as a third country with respect to these programmes.[183] On 6 April 2017, after the implementation of the popular initiative against mass immigration became clear, negotiations for the suspended dossiers continued.[184] In 2017, the EU increased the pressure by putting Switzerland on the list of non-cooperative jurisdictions for tax purposes.[185] Moreover, there are also other unsolved dossiers that are *de facto* connected to the negotiations for a new institutional framework, such as the equivalence of the framework for the Swiss stock exchange expired on 30 June 2019[186], the missing updates of the MRA between Switzerland and the EU[187] and the negotiations for a public health agreement[188]. In addition, the Federal Act on Data Protection is currently under

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180 See C. Tobler, 'One of Many Challenges after 'Brexit': The Institutional Framework of an Alternative Agreement — Lessons from Switzerland and Elsewhere?', Maastricht Journal of European and Comparative Law 2016, No 4, p. 591.

181 Oesch (2019), supra note 16, p. 11.

182 Swiss Confederation, *Erläuterungen zum Institutionellen Abkommen Schweiz-EU of 16 January 2019,* <https://www.eda.admin.ch/dam/dea/de/documents/abkommen/InstA-Erlaeuterungen_de.pdf> (last visited on 28.06.2020), p. 2.

183 <https://ec.europa.eu/research/participants/data/ref/h2020/other/hi/h2020-hi-swiss-part_en.pdf> (last visited on 28.06.2020).

184 Swiss Confederation, supra note 182, p. 3.

185 See Council of the European Union, *Council conclusions on the EU list of non - cooperative jurisdictions for tax purposes of 05.12.2017,* <http://www.consilium.europa.eu/media/31945/st15429en17.pdf> (last visited on 28.06.2020).

186 See *Commission Implementing Decision (EU) 2017/2441 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council of 21.12.2017,* OJ [2017] L344/53, 23.12.2017; C. Tobler & J. Beglinger, *Brevier zum institutionellen Abkommen Schweiz - EU of 22.08.2020,* <http://www.brevier.eur-charts.eu/> (last visited on 21.09.2020), question 141 et seq. <http://europa.eu/rapid/press-release_IP-18-6801_en.htm> (last visited on 25.06.2020).

187 *Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment ('Mutual Recognition Agreement'),* OJ [2002] L114/6, 30.04.2002, entry in force 01.06.2002.

188 Tobler & Beglinger, supra note 186, question 158; <https://www.eda.admin.ch/dam/dea/en/documents/fs/03-FS-FHALGesA_en.pdf>.

revision in Switzerland, which will be influenced by the evolution of EU law even if it is not part of the negotiations for future relations between Switzerland and the EU.[189]

On 2 March 2018, the Swiss Federal Council decided to specify the mandate for the negotiations concerning a Draft Institutional Framework Agreement with the EU.[190] On 7 December 2018, the Swiss Federal Council decided to lead consultations of stakeholders in Switzerland for the Draft Institutional Framework Agreement with the EU (see Chapter 2.3.3). With the Council conclusions of 19 February 2019, the Council of the EU restated that the four freedoms are indivisible and that further 'financial contributions to the reduction of social and economic disparities' are expected. The Council regretted that Switzerland could not conclude the Draft Institutional Framework Agreement between Switzerland and the EU but that Switzerland decided to consult various stakeholders in early 2019.[191] The Swiss Federal Council published a report of the consultations on 7 June 2019 and sent a letter to President Juncker on the same day stating that Switzerland confirms its intention to find a solution, which is largely in the interests of Switzerland but that some points should be discussed, notably Directive 2004/38/EC (the 'Citizens' Rights Directive'), measures to protect Swiss wages, and certain state aid issues.[192]

A negative outcome could have severe consequences, namely for the equivalence of the framework for the Swiss stock exchange that expired on 30 June 2019,[193] the missing updates

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189 See Tobler & Beglinger, supra note 186, question 147 for further references.

190 Swiss Confederation, supra note 182, p. 3.

191 Council of the European Union, supra note 11, para. 9.

192 See the letter of the Swiss Federal Council: <https://www.fdfa.admin.ch/dam/dea/en/documents/bericht_konsultationen_insta/20190607_Lettre-CF-President-Commission-europeenne_en.pdf> (last visited on 28.06.2020), see further Swiss Confederation, *Bericht über die Konsultationen zum institutionellen Abkommen zwischen der Schweiz und der Europäischen Union of 7 June 2019,* <https://www.eda.admin.ch/dam/dea/de/documents/bericht_konsultationen_insta/BR-Bericht-Konsulationen-InstA-190607_de.pdf> (last visited on 28.06.2020).

193 See <http://europa.eu/rapid/press-release_IP-18-6801_en.htm> (last visited on 25.06.2020).

of the MRA between Switzerland and the EU,[194] for the conclusion of a public health agreement[195] and for future market access agreements.

The question is now whether the EU was or is willing to renegotiate the Draft Institutional Framework Agreement. Even if the EU had been willing to open new negotiations after the consultation, they would have realistically not begun early in 2020 because the EU delegation would have needed a new mandate[196] and because Switzerland intended to wait for the results of the vote on the popular initiative on 17 May 2020 (postponed to the 27 September 2020 due to the Coronavirus[197]) which was meant to control immigration autonomously as well as to prohibit the conclusion of and to ultimately to renegotiate or terminate all free movement agreements.[198] It was unsuccessful on 27 September 2020 with 61.71% of the votes against it.[199]

Currently, the renegotiation of the Draft Institutional Framework Agreement (of the main text or by an accompanying common declaration[200]) is rather unlikely considering the present dilemma with the Brexit.[201] In light of the current situation, the former State Secretary Ambühl recently proposed an interim agreement to appease the EU and to prevent a negative

194 See *Regulation 2017/745/EU of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation No 178/2002/EC and Regulation No 1223/2009/EC and repealing Council Directives 90/385/EEC and 93/42/EEC,* OJ [2017] L 117/1, 05.05.2017 which was only implemented partly in the *acquis suisse*; Tobler & Beglinger, supra note 186, question 152 et seq. ; C. Tobler, *Switzerland-EU: Whereto with the draft institutional agreement? of 19.02.2020,* <https://www.liechtenstein-institut.li/publikationen/tobler-christa-2020-switzerland-eu-whereto-draft-institu-tional-agreement-blog-efta-studiesorg> (last visited on 29.10.2020), p. 6; <https://www.swissmedic.ch/swissmedic/en/home/medical-devices/neue-eu-verordnungen-mdr-ivdr/umsetzung-mep-regulierung-update.html> (last visited on 21.09.2020).

195 Tobler & Beglinger, supra note 186, question 158; <https://www.eda.admin.ch/dam/dea/en/documents/fs/03-FS-FHALGesA_en.pdf>.

196 Swiss Confederation, supra note 182, p. 4.

197 <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-78485.html> (last visited on 28.06.2020).

198 Swiss Confederation, *Bundesbeschluss über die Eidgenössische Volksinitiative 'Für eine massvolle Zuwanderung of 20 December 2019 (Begrenzungsinitiative; BBl 2019 8651)*; <https://www.nzz.ch/schweiz/bruessel-und-bern-sind-sich-einig-der-rahmenvertrag-kann-warten-bis-im-mai-ld.1530061> (last visited on 28.06.2020).

199 <https://www.bk.admin.ch/ch/d/pore/va/20200927/index.html> (last visited on 28.09.2020).

200 See Tobler, supra note 194, p. 2.

201 See C. Tobler, 'Wie weiter mit dem Institutionellen Abkommen?: Varianten zum Umgang mit den drei heiklen Punkten', Jusletter 17 February 2020, para. 6 et seq.

referendum for the Draft Institutional Framework Agreement.[202] On 3 December 2019, the Swiss Parliament approved further 'financial contributions to the reduction of social and economic disparities' under the condition that the equivalence of the framework for the Swiss stock exchange is granted.[203]

2.2.4 Balancing Switzerland's constitutional tradition and Switzerland's European integration

Despite the successful creation of a (severely limited) single market, the political climate has dramatically changed in Switzerland over the last decade. With regard to liberalisation, a substantial part of the Swiss population is preoccupied by a fear of social dumping.[204] Several popular initiatives were launched to reintroduce quotas for migrants or to reduce the influence of public international law.[205] One of those popular initiatives, the so-called 'initiative against mass immigration' was successful in 2014. Moreover, the popular initiative on self-determination (*Selbstbestimmungsiniative*) was put to a vote in 2018, which would have placed the Swiss Constitution (BV) above public international law.[206] It was not successful.[207] In 2018, an initiative 'for measured immigration (restriction initiative)', which demanded that Switzerland regulates immigration itself, successfully collected enough signatures to be voted on in 2020. Additionally, the conclusion of free movement agreements concerning the free movement of persons would have been prohibited. Existing free movement agreements could not have been amended or extended contrary to this rule. The

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202 M. Ambühl & D. S. Scherer, 'Wie sich das Rahmenabkommen retten lässt', *NZZ,* 25 November 2019, p. 8.

203 <https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=47818> (last visited on 28.06.2020).

204 Same opinion: Jaag & Hänni, Zurich, supra note 145, § 40 para. 4121.

205 See Swiss Confederation, *Bekanntmachungen der Departemente und der Ämter: Eidgenössische Volksinitiative «Stopp der Überbevölkerung - zur Sicherung der natürlichen Lebensgrundlagen», Vorprüfung of 19 April 2011 (BBl 2011 3795)*; Swiss Confederation, *Bekanntmachungen der Departemente und der Ämter: Eidgenössische Volksinitiative «Gegen Masseneinwanderung» - Vorprüfung of 12 July 2011 (BBl 2011 6269).*

206 Swiss Confederation, *Bundesbeschluss über die Volksinitiative Schweizer Rechtstatt fremde Richter of 15 June 2018 (Selbstbestimmungsinitiative)» - (BBl 2018 3497).*

207 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 25 November 2018: (Volksinitiative «Für die Würde der landwirtschaftlichen Nutztiere[Hornkuh-Initiative]»; Volksinitiative «Schweizer Recht statt fremde Richter [Selbstbestimmungsinitiative]»; Änderung des Bundesgesetzes über den Allgemeinen Teil des Sozialversicherungsrechts [ATSG] [Gesetzliche Grundlage für die Überwachung von Versicherten]); (BBl 2019 5931).*

initiative further stated that the aim is to negotiate that the AFMP ceases to apply one year after the successful vote. Otherwise, the Federal Council would have been obliged to terminate the agreement within an additional 30 days.[208] The popular vote on this initiative was linked to the possible negotiations for the Draft Institutional Framework Agreement due to the so-called 'Guillotine' clause of the Bilateral I package.[209] That is to say if the AFMP were terminated, all the other agreements of the Bilateral I package would cease to apply six months after the receipt of termination. This would have rendered the Draft Institutional Framework Agreement meaningless because it covers five market access agreements of the Bilateral I package. The vote was originally to be held on 17 May 2020 but was postponed due to the Coronavirus.[210] On 27 September 2020, the popular initiative 'for measured immigration (restriction initiative)' was unsuccessful with 61.71% of the votes against it.[211]

The following list shows the most important recent popular votes in Switzerland with regard to Switzerland's European integration[212]:

- 1992: Referendum on the accession of Switzerland to the EEA (rejected by 50,3%)[213]
- 1997: Popular initiative: 'EU membership negotiations before the people!' (rejected by 74,1%)[214]
- 2001: Bilateral I package deal (approved by 67,2%)[215]
- 2001: Popular initiative 'Yes to Europe!' which would have started negotiation for EU membership (rejected by 76,8%)[216]
- 2005: Referendum on the Schengen / Dublin Association (Association is approved by 54,6%)[217]

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208 Swiss Confederation, *Bundeskanzlei: Eidgenössische Volksinitiative «Für eine massvolle Zuwanderung (Begrenzungsinitiative)» - Vorprüfung of 29 December 2017 (BBl 2018 108).*

209 See Art. 25(3) and (4) AFMP.

210 <https://www.ejpd.admin.ch/ejpd/de/home/aktuell/mm.msg-id-78939.html> (last visited on 02.08.2020).

211 <https://www.bk.admin.ch/ch/d/pore/va/20200927/index.html> (last visited on 28.09.2020).

212 <https://www.eda.admin.ch/dea/en/home/europapolitik/abstimmungen.html> (last visited on 01.04.2020).

213 Swiss Confederation, supra note 109.

214 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 8 June 1997 (Aufhebung des Pulverregals; Initiative «EU-Beitrittsverhandlungen vors Volk!»; Initiative «für ein Verbot der Kriegsmaterialausfuhr») vom 3. September 1997 (BBl 1997 IV 356).*

215 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 21 May 2000 (BBl 2000 3773).*

216 See Swiss Confederation, supra note 143.

217 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 5 June 2005: Abkommen zu Schengen und Dublin; Partnerschaftsgesetz (BBl 2005 5183).*

- 2005: Extension of the AFMP to the ten new Member States (approved by 56%)[218]
- 2006: Federal Act on the Cooperation with Eastern Europe (approved by 53,4%)[219]
- 2009: Extension of the AFMP to Bulgaria and Romania (approved by 59,6%)[220]
- 2014: Popular initiative 'against mass immigration' (approved by 50,3%)[221]
- 2014: Stop overpopulation initiative– safeguard our natural environment, Ecopop initiative (rejected by 74,1%)[222]
- 2018: Popular initiative on self-determination (*Selbstbestimmungsiniative*), which would have placed the Swiss Constitution (BV) above public international law[223] (rejected by 66,3%)[224]
- 2019: Referendum against the adoption of Directive 2017/853/EU on control of the acquisition and possession of weapons (Adoption approved by 63,7%)[225]
- 2020: (popular vote postponed to 27 September 2020 due to the Coronavirus[226]): Popular initiative 'for measured immigration (restriction initiative)'[227]

With regard to the successful popular initiative against mass immigration, the revised constitutional Article 121a BV in the (unofficial) English translation of the Swiss government states as follows:

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218 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 25 September 2005: Ausdehnung des Personenfreizügigkeitsabkommens auf die neuen EU-Staaten und Revision der flankierenden Massnahmen (BBl 2005 6903)*.

219 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 26 November 2006: Bundesgesetz über die Zusammenarbeit mit den Staaten Osteuropas; Bundesgesetz über die Familienzulagen (BBl 2007 451)*.

220 Swiss Confederation, supra note 151.

221 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 9 February 2014: Bundesbeschluss über die Finanzierung und den Ausbau der Eisenbahninfrastruktur; Volksinitiative «Abtreibungsfinanzierung ist Privatsache – Entlastung der Krankenversicherung durch Streichung der Kosten des Schwangerschaftsabbruchs aus der obligatorischen Grundversicherung»; Volksinitiative «Gegen Masseneinwanderung» (BBl 2014 4117)*.

222 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 30 November 2014: Volksinitiative «Schluss mit den Steuerprivilegien für Millionäre (Abschaffung der Pauschalbesteuerung)»; Volksinitiative «Stopp der Überbevölkerung – zur Sicherung der natürlichen Lebensgrundlagen»; Volksinitiative «Rettet unser Schweizer Gold (Gold-Initiative)» (BBl 2015 1813)*.

223 Swiss Confederation, supra note 206.

224 Swiss Confederation, supra note 207.

225 Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 19 May 2019: Bundesgesetz über die Steuerreform und die AHV-Finanzierung (STAF); Bundesbeschluss über die Genehmigung und die Umsetzungdes Notenaustauschs zwischen der Schweiz und der EU betreffend die Übernahme der Richtlinie [EU] 2017/853 zur Änderung der EU-Waffenrichtlinie (Weiterentwicklung des Schengen-Besitzstands; BBl 2019 4985)*.

226 <https://www.ejpd.admin.ch/ejpd/de/home/aktuell/mm.msg-id-78939.html> (last visited on 02.08.2020).

227 Swiss Confederation, supra note 198.

> ‘Art 121a Control of immigration
>
> [1] Switzerland shall control the immigration of foreign nationals autonomously.
> [2] The number of residence permits for foreign nationals in Switzerland shall be restricted by annual quantitative limits and quotas. The quantitative limits apply to all permits issued under legislation on foreign nationals, including those related to asylum matters. The right to permanent residence, family reunification and social benefits may be restricted.
> [3] The annual quantitative limits and quotas for foreign nationals in gainful employment must be determined according to Switzerland's general economic interests, while giving priority to Swiss citizens; the limits and quotas must include cross-border commuters. The decisive criteria for granting residence permits are primarily an application from an employer, ability to integrate, and adequate, independent means of subsistence.
> [4] No international agreements may be concluded that breach this Article.
> [5] The law shall regulate the details.’

The initiative against mass immigration, which was adopted on 9 February 2014, was required to be implemented within three years.[228] The aforementioned provision has not been implemented *expressis verbis* in Swiss legislation as explained below. One solution could simply have been the abolition of the newly adopted provision. For this goal, an initiative had been successfully initiated in 2015. It collected enough support to be deliberated on in Parliament,[229] but it was withdrawn in 2018.[230] The Swiss Federal Council is responsible for managing negotiations on the sectoral agreements.[231] Any agreement would have to be approved by Parliament. A referendum would not be mandatory for a sectoral agreement but it requires the signatures of 50,000 voters.[232] The Swiss Federal Council has been effectively trying to square the circle, namely to find a way to implement this provision without violating the AFMP. It was clear that a literal implementation could prove difficult as the introduction

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228 Art. 197(11) of the BV.

229 Swiss Confederation, *Bundeskanzlei: Eidgenössische Volksinitiative «Raus aus der Sackgasse! Verzicht auf die Wiedereinführung von Zuwanderungskontingenten» of 11 November 2015 (BBl 2015 8337).*

230 Swiss Confederation, *Bundeskanzlei: Eidgenössische Volksinitiative «Raus aus der Sackgasse! Verzicht auf die Wiedereinführung von Zuwanderungskontingenten». Rückzug of 9 January 2018 (BBl 2018 215).*

231 Art. 54 BV in conjunction with Art. 174 BV.

232 Art. 141 para. 1 lit. d BV; see however parliamentary motion No 15.3557 that intends to introduce compulsory referendums for Treaties with a ‘constitutional character’: Swiss Confederation, *Parliamentary motion No 15.3557 of 15.06.2015,* <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20153557> (last visited on 28.06.2020).

of quotas clearly violates the fundamental freedoms in the AFMP.[233] It is also interesting to note that the Swiss Federal Council stated in 2013 that it would 'most likely' have to terminate the AFMP in the event that the popular initiative against mass immigration were to be successful.[234]

On 7 July 2014, a proposal for deliberations about revising the AFMP was made to the EU.[235] On 24 July 2014, however, the EU stated that it was not in the interests of the EU to consider negotiations on the preferential treatment of nationals or quotas. The EU would nonetheless be willing to discuss practical implications of the sectoral agreements between Switzerland and the EU.[236] During the consultation for the implementation of Article 121a BV, several proposals for the introduction of a safeguard clause were made.[237] The situation of the Italian-speaking part of Switzerland (Canton of Ticino) has been central in proposing restrictive measures, as that canton has faced an increase in frontier workers over the last decade.[238] The most prominent safeguard clause has been proposed by the former State Secretary Ambühl (as an expert for the Canton of Ticino[239]). It foresees a 'bottom-up' safeguard-clause. It would have allowed regional restrictions if net migration in Switzerland were considerably higher than in the EU Member States.[240] While the Swiss Federal Council

233 See S. Heselhaus & J. Hänni, 'Die eidgenössische Volksinitiative "Gegen Masseneinwanderung" (Zuwanderungsinitiative) im Lichte des Freizügigkeitsabkommens und der bilateralen Zusammenarbeit mit der EU', SRIEL (SZIER/RSDIE) 2013, p. 62.

234 Swiss Confederation, *Botschaft zur Volksinitiative «Gegen Masseneinwanderung» of 7 December 2012 (BBl 2013 291)*, p. 317.

235 <https://www.sem.admin.ch/sem/de/home/aktuell/news/2014/2014-07-07.html> (last visited on 28.06.2020).

236 <https://web.archive.org/web/20160617180105/https://www.sem.admin.ch/content/dam/data/sem/eu/fza/personenfreizuegigkeit/umsetz-mei/20140725-schreiben-ashton.pdf> (last visited on 28.06.2020); see also S. Carrera, E. Guild & K. Eisele, *No Move Without Free Movement: The EU-Swiss Controversy Over Quotas for Free No Move Without Free Movement: The EU-Swiss of April 2015,* CEPS Policy Brief, No 331, <https://ssrn.com/abstract=2613327>.

237 Swiss Confederation, *Bericht über die Ergebnisse der Vernehmlassung zur Umsetzung von Artikel 121a BV, Steuerung der Zuwanderung (Änderung des Ausländergesetzes vom 11. Februar bis 28. Mai 2015),* <https://www.sem.admin.ch/dam/data/sem/aktuell/gesetzgebung/teilrev_aug_art-121a/ve-ber-ums-121a-d.pdf> (last visited on 28.06.2020), p. 11.

238 State Secretariat for Economic Affairs, *15. Bericht des Observatoriums zum Freizügigkeitsabkommen Schweiz – EU of 01.07.2019,* <https://www.seco.admin.ch/seco/de/home/Arbeit/Personenfreizugigkeit_Arbeitsbeziehungen/Observatorium_Freizuegigkeitsabkommen.html> (last visited on 15.06.2020), p. 16 et seq.

239 See the press conference for the safeguard clause: <https://www.newsd.admin.ch/newsd/event/attachments/43242.pdf> (last visited on 28.06.2020).

240 M. Ambühl & S. Zürcher, 'Immigration and Swiss-EU Free Movement of Persons: Question of a Safeguard Clause', Swiss Political Science Review 2015, No 1, pp. 76–98.

favoured negotiations with the EU, it publicly stated in early 2016 that it would introduce a safeguard clause unilaterally in the event that the EU did not agree to an amendment of the AFMP. The particularities of a unilateral safeguard clause were however still unclear.[241]

In 2016, the Swiss Parliament finally decided on the implementation of Article 121a BV. Subsequently, the Swiss Federal Council amended the respective ordinances in 2017. The implementation does not correspond to the article itself but rather addresses the *leitmotiv* of the article. Article 121a BV is meant to curb immigration. Thus, the Swiss Parliament decided to introduce legal obligations to inform the authorities of available job positions. This could alleviate the situation regarding the Swiss labour market as that measure aims at improving the situation of Swiss job seekers.[242]

It is however undisputable that the aforementioned implementation does not *expressis verbis* correspond with Article 121a BV. While this in itself is not unheard of, as several initiatives have not been implemented according to their wording, it is still far from ideal from a legal standpoint. It also puts the Swiss Federal Council in a difficult position when negotiating future agreements with the EU.[243] This implementation was in principle approved by the EU but it is not entirely unproblematic.[244]

From a Swiss perspective, it could be asked how Article 121a BV could be reconciled with the Swiss Constitution. To begin with, Article 54 BV sets the guidelines for current Swiss foreign policy. It stipulates that 'the Confederation shall ensure that the independence of Switzerland and its welfare is safeguarded; it shall in particular assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful co-existence of peoples as well as the conservation of natural resources'. This catalogue of aims may result in conflict. In such a scenario, there is at least a political obligation to give a reasoned opinion.[245] A Swiss law professor has suggested that Article 54

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241 See <https://www.eda.admin.ch/dea/de/home/aktuell/medienmitteilungen.html/content/dea/de/meta/news/2016/3/4/60871> (last visited on 28.06.2020).

242 <https://www.sem.admin.ch/sem/de/home/aktuell/news/2017/ref_2017-12-081.html> (last visited on 28.06.2020).

243 Council of the European Union, *Council conclusions on EU relations with the Swiss Confederation 2017 of 28.02.2017,* <http://www.consilium.europa.eu/en/press/press-releases/2017/02/28/conclusions-eu-swiss-confederation/> (last visited on 28.06.2020), para. 3.

244 See A. Epiney & D. Nüesch, 'Inländervorrang und Freizügigkeitsabkommen: Zu den Schranken des FZA für die sog. Inländervorränge bei der Anstellung', AJP/PJA 2018, p. 21.

245 B. Ehrenzeller & R. Portmann, 'Art. 54 BV', in B. Ehrenzeller et al. (eds.), *Die schweizerische Bundesverfassung: St. Galler Kommentar,* Zurich/St. Gallen (2014), para. 21.

of the Swiss Federal Constitution (BV) could be modified so it can be reconciled with Article 121a BV. A paragraph could be added to show Switzerland's objective for further European integration.[246]

This view shows that is possible to find a compromise between the constitutional tradition and the high regard for sovereignty in Switzerland on the one hand and the follow-up of the much desired 'bilateral path' on the other hand because of Switzerland's choice to remain a non-EU Member State.

[246] M. Oesch, 'Ein neues Fundament für die Europapolitik', NZZ, 23 July 2016.

2.3 Current institutional challenges

This Subchapter gives an overview how EU law is currently implemented in Switzerland. It than delves into the different options for an institutional overhaul as proposed by academics and governmental reports in the past. Lastly, the aim of this Subchapter is to discuss the Draft Institutional Framework Agreement which would become the overarching Agreement for several market access agreements.

Back in 2010, the Swiss Integration Office (now Directorate for European Affairs) proclaimed that the bilateral path is considered the best solution. Nonetheless, a working group would be installed to discuss further developments of the unsolved institutional issues.[247] Meanwhile, several institutional issues were questioned, namely by the European Parliament, in order to further extend the level of integration between Switzerland and the EU. A European Parliament Resolution of 2012 states that an effective enforcement mechanism as such, is lacking. It is proclaimed that the Joint Committee of the AFMP was not able to solve the relevant issues.[248] Further, the Council of the European Union expressed openly, since 2008, its view that the institutional framework (the existing two-pillar structure of two separate legal orders[249]) is not sufficient to guarantee the effectiveness of EU law by Switzerland.[250] Today, 23 Joint Committees exist in total for all the sectoral agreements (see the table in the Annex to this study in Chapter 14).[251] The Swiss Federal Council established a new mandate for negotiations on 18 December 2013.[252] It was emphasised more recently in 2017 that the institutional framework should be finalised as soon as possible.[253] This

247 Directorate for European Affairs, *Stellungnahme des Integrationsbüros EDA/EVD of 14.12.2010,* <https://www.eda.admin.ch/content/dam/dea/de/documents/publikationen_dea/stellungnahme-ib-eu-rat-101214_de.pdf> (last visited on 28.06.2020).

248 See. e.g. European Parliament, supra note 165.

249 See Oesch, supra note 6, p. 40; Oesch & Speck, supra note 15, pp. 258 and 263.

250 Council of the European Union, supra note 12, para. 44; Council of the European Union, supra note 8, para. 30; Council of the European Union, supra note 12, para. 48 et seq.; Council of the European Union, supra note 12.

251 Directorate for European Affairs, *Liste der Gemischten Ausschüsse Schweiz-EU of April 2019,* <https://www.eda.admin.ch/dam/dea/de/documents/publikationen_dea/cm-liste_de.pdf> (last visited on 28.06.2020).

252 <https://www.eda.admin.ch/dea/de/home/verhandlungen-offene-themen/verhandlungen/institutionelle-fragen.html> (last visited on 28.06.2020).

253 Council of the European Union, supra note 243, para. 5; see also European Parliament, *European Parliament resolution on EEA-Switzerland: Obstacles with regard to the full implementation of the internal market (2009/2176(INI)) of 07.09.2010*.

sentiment was recently reiterated by the Council of the EU on 19 February 2019: the Council of the EU urged the Swiss Federal Council to back up the negotiated text in light of the unprecedented public hearing.[254] In 2020, the Swiss President revealed to the President of the European Commission that Switzerland will wait for the results of the vote on the next popular initiative on 17 May 2020 against the free movement of persons (postponed to the 27 September 2020 due to the Coronavirus[255]).[256]

According to the abovementioned resolutions, the following four key points have to be addressed (for the conclusion of future market access agreements in particular[257]):

1. the dynamic adaptation of EU law,
2. the uniform interpretation of EU law (guaranteeing homogeneity),
3. a mechanism for ensuring compliance with EU law (in principle, a guardian of the bilateral agreements, the 'Bilaterals'), and
4. a judicial mechanism or a dispute settlement mechanism.[258]

2.3.1 Current incorporation and updating of EU law by Switzerland and the EEA

2.3.1.1 Autonomous adaptation of EU law

Switzerland opted voluntarily for a package called 'Eurolex', which became known as 'Swisslex' after the referendum result against joining the EEA in 1992.[259] This legislative package ensured the compatibility of Swiss laws with EU legislation, when just at the brink of joining the EEA. That is why Switzerland has been verifying that new laws are in accordance with EU legislation on an ongoing basis since 1988.[260] Laws can nevertheless be

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254 Council of the European Union, supra note 11, para. 9.

255 <https://www.ejpd.admin.ch/ejpd/de/home/aktuell/mm.msg-id-78939.html> (last visited on 02.08.2020).

256 Tobler & Beglinger, supra note 186, question 137; see also note 198.

257 See the hearing of the Justice Sub-Committee of the House of Lords of 27 February 2018, Q31, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-enforcement-and-dispute-resolution/oral/79626.html (last visited on 25.04.2019)> (last visited on 28.06.2020).

258 Council of the European Union, supra note 12, para. 48 et seq.; see Tobler (03.06.2013), supra note 15, para. 5; Baudenbacher (2012), supra note 15, p. 583 et seq.; Muser & Tobler (28.05.2018), supra note 15, para. 1; Oesch & Speck, supra note 15, p. 259.

259 See further S. Benesch, *Das Freizügigkeitsabkommen zwischen der Schweiz und der Europäischen Gemeinschaft: Ein Beitrag zum schweizerischen Europäisierungsprozess,* Diss. Giessen (2006), Tübingen (2007), p. 241 et seq.

260 Swiss Confederation, *Bericht des Bundesrates über die Stellung der Schweiz im europäischen Integrationsprozess of 24 August 1988 (BBl 1988 III 249)*, p. 380; see further Schwok, Brussels, supra note 127, p. 127.

enacted contrary to EU law. The so-called autonomous adaptation of EU (*autonomer Nachvollzug*) law is however extremely influential. A study shows that approximately one third of Swiss laws on a federal level are influenced by EU legislation. This includes 24% of the enacted federal laws in Switzerland that are inspired by EU Law due to the *autonomous* adaptation of Switzerland. This means that the implementation due to the European Integration only affects 9% of the federal laws enacted in Switzerland.[261] The autonomous adaptation of EU law thus plays a huge role when discussing Switzerland's level of integration. The current negotiations however concern the automatic or dynamic adaptation of EU law.[262] In three of the existing sectoral agreements, Switzerland already envisages the dynamic adaptation of EU law.[263] This point will further be elaborated for the Schengen Agreement in Chapter 2.3.1.4.

2.3.1.2 The 'Cassis de Berne' principle

Finally, there is one specific autonomous adaptation of EU law, which goes far beyond the pre-existing Swiss laws inspired by EU legislation. Switzerland unilaterally introduced the principle of *Cassis de Dijon* in 2010.[264] The principle applies for many products stemming from the EU and the EEA, which are allowed based on the country of origin principle.[265] There is also a provision for products in Switzerland which is in line with the rules of an EU

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261 S. Jenni, 'Direkte und indirekte Europäisierung der schweizerischen Bundesgesetzgebung', LeGes 2013, No 2, p. 492.

262 Tobler & Beglinger, supra note 186, question 29; see for the incoherent terminology C. Tobler & G. Baur, '"Automatische" vs. „dynamische" Rechtsübernahme. What's in a name?', in A. Epiney (ed.), *Schweizerisches Jahrbuch für Europarecht 2015/2016 / Annuaire suisse de droit européen 2015/2016,* Zurich (2016), p. 348.

263 Art. 22 of the *Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures of 25.06.2009, entry into force on 01.01.2011,* OJ [2009] L199/24, 31.07.2009; Arts. 2(3) and 7 of the Swiss-EU Schengen Agreement (see for the full citation supra note 112); Arts. 1(3) and 4 of the Swiss-EU Dublin Agreement (see for the full citation supra note 112).

264 Art. 16a of the *Bundesgesetz über die technischen Handelshemmnisse (THG) of 06.10.1995,* SR 946.51; the State Secretariat for Economic Affairs (SECO) published a report, which states that the revision of the THG was successful but that the *Cassis de Dijon* principle was not as successful as projected: State Secretariat for Economic Affairs, *Bericht des SECO zu den Auswirkungen der Revision des Bundesgesetzes über die technischen Handelshemmnisse (Einführung des «Cassis de Dijon»-Prinzips in der Schweiz) of April 2013,* <https://www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/Technische%20Handelshemmnisse/cassis_de_dijon/Bericht_Auswirkungen_THG_Revision.pdf.download.pdf/Bericht_Auswirkungen_THG_Revision.pdf> (last visited on 28.06.2020), p. 64 et seq.

265 Art. 16a para. 1 THG.

or an EEA EFTA State to prevent reverse discrimination.[266] The EU did not however add a similar rule for Swiss products.[267] Thus, some authors called it the *Cassis de Berne* principle.[268] It can be viewed as a further step in reaching homogeneity, rather than by simply checking that there is compatibility with EU law.[269] This is also called the 'Brussels effect'[270], which shows the influence of the EU's regulatory system. However, it is clear that a unilateral approach fails to grasp the inherent concept of the *Cassis de Dijon* principle, that there must be mutual recognition of national regulations. As Swiss products are still subject to multiple administrative hurdles in Switzerland and the EU, this goal has not been reached. Without the EU's cooperation, the results of Swiss law-making are severely restricted.

2.3.1.3 Updating of the AFMP by the Joint Committee of the AFMP

Currently, there is an existing updating mechanism in force for Annexes II and III of the AFMP. Pursuant to the second sentence of Article 18 of the AFMP, the Joint Committee of the AFMP has the power to amend Annexes II and III. Annex III concerns the mutual recognition of professional qualifications. The Joint Committee of the AFMP decides 'by mutual agreement' under Article 14(1) AFMP – which means that unanimity is required. The Commission has on several occasions insisted on updating the EU legislation listed in the Annexes of the AFMP by the Joint Committee.[271] Annexes II and III have been amended to update developments in secondary legislation, namely the additions of Regulation No 883/2004[272] and the Professional Qualifications Directive. The process of updating the

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[266] Art. 16b THG.

[267] See N. F. Diebold & M. Ludin, 'Das Cassis de Dijon-Prinzip in Praxis und Politik', in A. Epiney (ed.), *Schweizerisches Jahrbuch für Europarecht 2016/2017 - Annuaire suisse de droit européen 2016/2017,* Zurich (2017), p. 373 et seq.

[268] T. Cottier & D. Herren, 'Das Äquivalenzprinzip im schweizerischen Aussenwirtschaftsrecht: von Cassis de Dijon zu Cassis de Berne', in A. Epiney & N. Gammenthaler (eds.), *Schweizerisches Jahrbuch für Europarecht 2009/2010 / Annuaire suisse de droit européen 2009/2010,* Zurich (2010), p. 275.

[269] See E. Kohler, *Le rôle du droit de l'Union européenne dans l'interprétation du droit suisse,* Diss. Berne, Berne (2015), p. 27.

[270] A. Bradford, 'The Brussels Effect', Northwestern University Law Review 2012, No 107, p. 1 et seq.; P. Eeckhout, *Options after Brexit: study requested by the INTA Committee of March 2018: Future trade relations between the EU and the UK,* <https://doi.org/10.2861/395110> (last visited on 28.06.2020), p. 10 for a further reference; see also Oesch (2019), supra note 16, § 32 para. 938.

[271] See infra note 273.

[272] *Regulation No 883/2004/EC of the European Parliament and of the Council on the coordination of social security systems of 29.04.2004,* OJ [2004] L166/1, 30.04.2004.

Annexes is however slower than the evolution of EU law. In addition, it should be mentioned that it is not the judiciary but the European Commission that uses its influence to propose amendments for further homogeneity of both legal orders. To this end, the Commission usually requires certain implementation before it approves the amendment by decisions of the Joint Committee of one of the sectoral agreements between Switzerland and the EU.[273]

2.3.1.4 Adaptation of EU law under the Schengen acquis

To give an example, the adaptation of the Schengen / Dublin *acquis* should be recalled which forms part of the Bilateral II package.[274] Two separate forms of implementation can be distinguished for the Schengen Agreement:

On the one hand, Article 2(3) of the Swiss-EU Schengen Agreement stipulates that several acts required to be carried out by Annexes A and B have to be implemented by Switzerland. This can be described as the usual static implementation of EU law, which is agreed upon beforehand. It is needed to implement the relevant *acquis communautaire* in Switzerland.[275] On the other hand, Article 7(1) thereof provides that the competent EU institutions adopt new legislation with regard to the *Schengen acquis*. After notification by the Council of the EU, Switzerland in turn notifies the Council and the Commission within a period of 30 days. In the case of implementation with a referendum, Switzerland is given two years for implementation, with a provisional application of the amendment if possible. The EU may take proportionate measures against Switzerland in the event that there is a failure of provisional implementation according to Article 7(2)(b) indent 2 of the Swiss-EU Schengen Agreement. If Switzerland decided not to accept the contents of an act, or does not carry out the notification within 30 days or after the referendum deadline has expired, the agreement shall be considered terminated, unless the Joint Committee decides otherwise within 90 days (Art 7(4) thereof). Termination of this agreement shall take effect three months after the expiry of the 90-day period (second sentence of Article 7(4) of that agreement). The termination of the Swiss-EU Schengen Agreement automatically leads to

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[273] A. Epiney, 'Vertraglicher «Umsetzungsdruck» und «autonomer Anpassungszwang» aus Brüssel', LeGes 2014, No 3, p. 392.

[274] See Swiss Confederation, supra note 111; Swiss-EU Schengen Agreement (see for the full citation supra note 112); Swiss-EU Dublin Agreement (see for the full citation supra note 112).

[275] For the relevant *acquis* see C. Tobler, 'Homogenität im Rechtsbestand der Schengen- und Dublin-Abkommen: Übernimmt die Schweiz im Assoziationsrahmen nicht notifiziertes Asyl- und Datenschutzrecht der EU?', SRIEL (SZIER/RSDIE) 2017, p. 214.

the termination of the Swiss-EU Dublin Agreement and vice versa (Article 17(2) of the former agreement and Article 16(2) of the latter agreement). Switzerland is thus pressured to notify and adapt the Swiss legislation in time. Recently, the amendments of Directive 91/477/EEC[276] by Directive 2017/853/EU on control of the acquisition and possession of weapons[277] needed to be accepted, which was unsuccessfully opposed by rifle associations.[278] Nonetheless, Switzerland's decision-shaping (see Art. 6 of the Swiss-EU Schengen Agreement) did lead to the result that semi-automatic rifles were not entirely prohibited and that a tailor-made derogation was included in Article 6(6) of Directive 91/477/EC.[279] This tailor-made derogation was unsuccessfully contested before the CJEU by an action for annulment of the Czech Republic on grounds of discrimination.[280]

To sum up, Switzerland is essentially part of an *evolving* Schengen (and Dublin *acquis*). The underlying structure of the agreement does not allow for deviation – if that occurs, the Swiss-EU Schengen Agreement will be terminated. Even a failure to adopt law on a provisional basis may allow the EU to adopt retaliation measures against Switzerland.[281] The Swiss-EU Schengen Agreement thus reflects that Switzerland needs to implement and hold democratic decisions in Switzerland in high regard, namely through referendums. It could be argued that this concept of an evolving *acquis* could also be adapted for the other bilateral agreements considering that the Swiss constitutional procedures are upheld. In comparison with the new Draft Institutional Framework Agreement which includes a dispute settlement mechanism, the Swiss-EU Schengen Agreement leaves little room for deviation (see Chapter 2.3.3.3).

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276 *Council Directive 91/477/EEC on control of the acquisition and possession of weapons of 18.06.1991,* OJ [1991] L256/51, 13.09.1991.

277 *Directive 2017/853/EU of the European Parliament and of the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons,* OJ [2019] L137/22, 24.05.2017.

278 See M. Oesch, 'Die bilateralen Abkommen Schweiz-EU und die Übernahme von EU-Recht', AJP/PJA 2017, p. 645 et seq.; L. Mäder, 'Schützen drohen weiterhin mit Referendum wegen neuen Waffenrechts', *NZZ,* 2 March 2018; see for the results of the referendum: <https://www.bk.admin.ch/ch/d/pore/va/20190519/det628.html> (last visited on 28.06.2020).

279 Oesch (2019), supra note 16, p. 16 et seq.

280 Case C-482/17, *Czech Republic v Parliament and Council*, ECLI:EU:C:2019:1035, para. 164 et seq.

281 Art. 7(2) indent 2 of the Swiss-EU Schengen Agreement (see for the full citation supra note 112).

This leads onto the next issue. Given that sovereignty plays a major role in Switzerland,[282] how much influence Switzerland ought to have in the legislative process can be questioned. Under the EEA Agreement, the EEA EFTA States are granted participation through comitology committees (Article 100 of the Agreement on the European Economic Area, 'EEA Agreement'), programme committees (Article 81 EEA of the Agreement) and other committees in certain areas (Article 101 of the EEA Agreement). Switzerland intends to strengthen its influence by having a say in the deliberations (decision-shaping as opposed to decision-making[283]). As the time pressure under the Swiss-EU Schengen Agreement is quite high, the law-making process needs to be monitored closely for speedy incorporation of the new and evolving *acquis*.[284] To this effect, Switzerland takes part (without a right to vote) in the Comitology committees under the Schengen *acquis*, even though it is not entirely clear whether Article 3 to Article 7 of the Schengen Agreement even included the participation of Switzerland but this arrangement was later legally established.[285] Thus, the Swiss-EU Schengen Agreement offers more legal security, transparency and efficiency than the current mode of implementation of EU law which is static in nature but it comes with a catch. It does respect the democratic process in Switzerland but does not give room for deviation.

For the purpose of future models (see Chapter 2.3.3 for the published Draft for an Institutional Agreement), the Swiss-EU Schengen Agreement can therefore be brought forward as an example for reaching homogeneity of both legal orders without violating the

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282 See Oesch (2017), supra note 278, p. 649.

283 Oesch, Zurich, supra note 10, para. 95 et seq.; M. Oesch & C. Neier, 'Staat und Gesetzgebung / Etat et législation – Die Komitologie im Unionsrecht und die Schweiz', in E. M. Belser & B. Waldmann (eds.), *Mehr oder weniger Staat?: Festschrift für Peter Hänni zum 65. Geburtstag,* Berne (2015), p. 67.

284 See Arts. 5, 89(2) and 92(2) of the EEA Agreement, in respect of Art. 118 of the EEA Agreement.

285 Oesch & Neier, supra note 283, p. 67 et seq.; The arrangement for this participation was legally established by Council Decision No 2012/193/EU of 13 March 2012: *Council Decision 2012/193/EU on the conclusion, on behalf of the Union, of the Arrangement between the European Union and the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation on the participation by those States in the work of the committees which assist the European Commission in the exercise of its executive powers as regards the implementation, application and development of the Schengen acquis of 13.03.2012,* OJ [2012] L103/3, 13.04.2012; see the second last indent of the *Arrangement between the European Union and the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation on the participation by those States in the work of the committees which assist the European Commission in the exercise of its executive powers as regards the implementation, application and development of the Schengen acquis,* OJ [2012] L103/4, 13.03.2012.

fundamental structure of constitutional law in Switzerland but with one caveat. The existing model, with the Guillotine clause, could lead to a referendum with a negative result – not because of the agreement itself but due to frustration at not having a say.[286] It is not astonishing that a similar mechanism for updating the bilateral (market access) agreements now exists in the Draft Institutional Framework Agreement between Switzerland and the EU.[287] Switzerland also participates in other Committees as listed in the AFMP or in the Swiss-EU Dublin Agreement.[288] Finally, it could be asked whether this form of participation simply constitutes membership without voting rights. The decision-shaping influence should also not be given too much weight because the opinions of the Member States with voting rights bear more influence during discussions. Nevertheless, it is correct to question how the institutional mechanism should be altered to guarantee democratic participation.[289]

2.3.1.5 Dynamic incorporation under EEA law and judicial dialogue between the CJEU and the EFTA Court

To better understand other options, the European Economic Area (EEA) consisting of Norway, Iceland Liechtenstein which did not join the EU shall be mentioned. EEA law shall serve as an example for a dynamic incorporation of EU law and to show the link to the judicial dialogue between the CJEU and the EFTA Court. The idea behind the EEA is to promote a continuous and balanced strengthening of trade and economic relations based on the four fundamental freedoms.[290] The recital emphasises that the Contracting Parties are determined to the 'fullest realization of the free movement of goods, persons, services and capital within the whole European Economic Area' which shows that the Contracting Parties were aware of the parallel and dynamic developments mirrored to the internal market.[291]

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[286] In this sense: Oesch (2019), supra note 16, p. 19; Oesch (2017), supra note 278, p. 646 et seq.

[287] See Art. 14 para. 3 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

[288] Declaration on Swiss attendance of committees to the AFMP; Art. 2(6) of the Swiss-EU Dublin Agreement (see for the full citation supra note 112).

[289] See A. Glaser & L. Langer, 'Die Institutionalisierung der Bilateralen Verträge: Eine Herausforderung für die schweizerische Demokratie', SRIEL (SZIER/RSDIE) 2013, p. 563 et seq.

[290] See Art. 1 of the EEA Agreement.

[291] K. Almestadt, 'The Notion of 'Opting Out'', in C. Baudenbacher (ed.), *The Handbook of EEA Law,* Cham (2016), p. 86.

Contrary to the static sectoral agreements with Switzerland (with the exception of three sectoral agreements mentioned supra in note 263), the evolution of the EEA acquis can be described as a dynamic incorporation or continuous updating of the agreement.[292] It is clear that static agreements hamper a dynamic evolution of the *acquis suisse* and the integration of new fields (e.g. future agreements on electric energy or even services). The EEA and the EU have accepted the idea of homogeneity of the EEA (see Article 6, Article 3(2) and Article 102 of the EEA Agreement) with provisional suspension for the corresponding EU act in the event that the law is not updated (see Article 102(5) of the EEA Agreement), which has never happened.[293]

The dynamic incorporation is closely intertwined with the dynamic interpretation. One decisive driver for dynamic interpretation can be found in the case law of the EFTA Court. It must be recalled that pursuant to the wording of Article 6 of the EEA Agreement, only decisions of the CJEU given prior to the date of signature of that agreement are binding. Comparable to the corresponding the homogeneity rule in Article 16(2) of the AFMP (see below in Chapter 3.4), this provision did not have an impact on the progressive interpretation of EEA law. This reasoning is sound in the areas where EEA law is harmonised and therefore corresponds with EU law as stated *verbatim* in Article 6 of the EEA Agreement:

> '...in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties...'

The EFTA Court interpreted EEA law in conformity with EU law when the legal situation was distinctive. To illustrate this close dialogue, the case *Silhouette International Schmied GmbH & Co. KG* v *Hartlauer Handelsgesellschaft mbH* [294] concerning the exhaustion of international rights was followed in *L'Oréal*,[295] overruling *Maglite*[296] and notwithstanding

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[292] See Tobler (2016), supra note 180, p. 589; see further Tobler & Baur, supra note 262, p. 347 et seq.

[293] Art. 102 EEA has been invoked twice but no part has been suspended so far: Oesch (2019), supra note 16, p. 25.

[294] Case C-355/96, *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH*, ECLI:EU:C:1998:374.

[295] Joined Cases E-9/07 and E-10/07, *L'Oréal Norge AS/Aarskog Per AS and Others and Smart Club Norge*, EFTA Court Report 2008, p. 259 et seq., para. 21 et seq.

[296] Case E-2/97, *Mag Instrument Inc v California Trading Company Norway, Ulsteen*, EFTA Court Report 1997, p. 127 et seq.

the fact that the EEA does not include the same level of integration.[297] This decision to follow the case law of the CJEU is based on the rationale of the EFTA Court to reach homogeneity of the legal order where possible.

The EEA did not however adopt the Union Citizenship Directive[298]. The compromise resulted in the EEA Joint Commission Decision[299], which included the adoption of the Citizens' Right Directive but added a reservation concerning citizens' rights. This rationale can also be seen in the case law concerning the Citizens' Rights Directive where the EFTA Court closely followed in the steps of the CJEU with regard to the result, but not necessarily the reasoning, such as in the cases of *Clauder,*[300] *Wahl,*[301] *Gunnarson*[302] and *Jabbi*[303].[304] Notably, the reasoning in *Jabbi* concerning the rights of non-economically active persons and their family members interprets the Citizens' Rights Directive as applicable by analogy distinctly from the CJEU in *O. and B*[305]. Whereas the CJEU based its decision on Article 21(1) TFEU (Union citizenship), the EFTA Court applied Article 7(1)(b) and Article 7(2) of the Citizens' Rights Directive by analogy, even though the CJEU explicitly stated that

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297 C. Tobler, 'Dispute Resolution under the EEA Agreement', in C. Baudenbacher (ed.), *The Handbook of EEA Law,* Cham (2016), p. 197.

298 *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC,* OJ [2004] L158/77, 30.04.2004.

299 *Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement,* OJ [2008] L124/20, 08.05.2008.

300 Case E-4/11, *Arnulf Clauder*, EFTA Court Report 2011, p. 216 et seq., para. 34.

301 Case E-15/12, *Jan Anfinn Wahl v íslenska ríkið*, EFTA Court Report 2013, p. 537 et seq., para. 74 et seq.

302 Case E-26/13, *Íslenska ríkið v Atli Gunnarsson*, EFTA Court Report 2014, p. 256 et seq., para. 68.

303 Case E-28/15, *Yankuba Jabbi v the Norwegian Government, represented by the Immigration Appeals Board*, EFTA Court Report 2016, p. 573 et seq., para. 64 et seq.

304 See C. Tobler, 'Free Movement of Persons in the EU v. in the EEA: of Effect-Related Homogeneity and a Reversed Polydor Principle', in N. Cambien, D. Kochenov & E. Muir (eds.), *European citizenship under stress: social justice, Brexit, and other challenges,* Leiden, Boston (2020), p. 486 et seq. submits that only the cases *Gunarsson* and *Jabbi* have a particulate understanding of homogeneity because the CJEU had already ruled in its case law on these situations. C. Tobler, 'Free Movement of Persons in the EU v. in the EEA: Of Effect-related Homogeneity and a Reversed Polydor Principle', European Papers 2018, Vol. 3, No 3, p. 1438 et seq.; C. Tobler, *Free movement of persons in the EU vs. in the EEA - Workshop "EU citizenship in times of Brexit" Katholieke Universiteit Leuven (Belgium) of 30.03.2018,* <https://www.europa.unibas.ch/fileadmin/user_upload/europa/News__Events/PDFs_News__Events/20180406_Tobler_Leuven_March2018.pdf> (last visited on 28.06.2020), p. 9 et seq.

305 Case C-456/12, *O. and B.*, ECLI:EU:C:2014:135, para. 43.

that Directive does not apply in that situation.[306] In the end, the EFTA Court found a homogenous solution, but by interpreting EU law distinctly to how the CJEU interpreted it.

Tobler thus concluded that the EFTA Court invented a *reversed* version of the *Polydor* principle in order to preserve the homogeneity of EU and EEA law (see Chapter 3.3.4 for more on the *Polydor* principle).[307]

The EFTA Court has regularly ruled before the CJEU has in certain noteworthy cases.[308] This is hardly surprising due to the fact that the EFTA Court only has one language of procedure[309] and is considered a 'mini court'[310] with three permanent judges. This may invite lawyers to specifically request a preliminary ruling before the EFTA Court to test the waters, which often gives the EFTA Court the 'first mover advantage'[311]. To show its close ties to the CJEU, its former President referred to it as its 'sister court'.[312] The CJEU considers the case law of the EFTA Court on a regular basis, notwithstanding the fact that there is no legal obligation to do so. Some other famous and influential examples for the first mover advantage, where the EFTA Court shaped the legal landscape, can be found in the cases *Icesave* (responsibility for the Icelandic bank 'Landsbanki', which could have resulted in the insolvency of Iceland[313]) and *Kellogg's* (application of the precautionary principle).[314]

From the abovementioned case law, it can be seen that the EFTA Court established a more or less homogeneous situation of both legal orders due to its progressive interpretation

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306 Case C-456/12, *O. and B.*, ECLI:EU:C:2014:135, para. 43.

307 Tobler, supra note 304, p. 503; Tobler (2018), supra note 304, p. 1448.

308 See for details: Baudenbacher, supra note 132, p. 13.

309 Art. 25 para. 1 of the rules of procedure of the EFTA Court.

310 For the expression: Great Britain: House of Lords, *Dispute resolution and enforcement after Brexit of 03.05.2018,* HL Paper, No 130, para. 45. One expert for the relevant Sub-Committee of the House of Lords even stated: 'Personally I can see no benefit whatever in docking to the EFTA Court. It is a little poodle that goes yap, yap, yap along behind the Luxembourg court', hearing of the Justice Sub-Committee of the House of Lords of 20 March 2018, Q44, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-enforcement-and-dispute-resolution/oral/81054.html> (last visited on 28.06.2020).

311 See Oesch & Speck, supra note 15, footnote 19 thereof.

312 Baudenbacher, supra note 132, p. 10.

313 Baudenbacher, supra note 168, p. 39 for further reference.

314 Case E-16/11, *EFTA Surveillance Authority v Iceland*, EFTA Court Report 2013, p. 7 et seq.; Case E-3/00, *EFTA Surveillance Authority v the Kingdom of Norway*, EFTA Court Report 2000 - 2001, p. 73 et seq.; see C. Baudenbacher, 'The EFTA Court: An Actor in the European Judicial Dialogue', Fordham International Law Journal 2004, vol. 28, issue 2, p. 380 et seq.

of EEA law. It is important to note that the judicial dialogue works both ways.[315] This is not self-evident as the EFTA Court is much smaller than the CJEU. To adhere to this principle of homogeneity, the EFTA Court has taken a path where it *de facto* does not make a distinction between case law prior to the date of signature and after the date of signature.[316] Furthermore, the EFTA Court follows the rationale of EU law. It interprets the law in conformity with the principle of effectiveness (the *effet utile*).[317] At this point, it is also noteworthy to mention that the CJEU often reaches the same result with a different legal basis due to the aim of the EEA Agreement.[318]

Nevertheless, the structure of the EFTA Court and especially Article 111 of the EEA Agreement are reminiscent of the firm roots they have in public international law (see Chapter 2.3.2.3).

With an enlarged (and more heterogonous) European Union, the differentiated integration of the EEA EFTA countries will be more challenging than before and the EU is possibly less willing to adapt in their stand towards the EEA EFTA States.[319] The European Council stated in 2014 that legal certainty and homogeneity must be guaranteed considering the recent backlogs and delays incurred during the implementation process of the EEA EFTA States.[320] After revising the procures for implementing the relevant EU acts in 2014, the Council took a positive stance towards the functioning of the EEA Agreement in 2018.[321]

2.3.2 Earlier recommendations and inspirations for a future judicial and surveillance mechanism

This Subchapter focuses on the different solutions to amend the current two-pillar system, namely with a view to the judicial review. Naturally, homogeneity of both legal orders could have been achieved with through EU membership and access to the CJEU. EU membership

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315 Baudenbacher, supra note 132, p. 25.

316 See P. Hreinsson, ‘General Principles’, in C. Baudenbacher (ed.), *The Handbook of EEA Law,* Cham (2016), p. 351.

317 Hreinsson, supra note 316, p. 353; C. Baudenbacher, ‘The EFTA Court: Structure and Tasks’, in C. Baudenbacher (ed.), *The Handbook of EEA Law,* Cham (2016), p. 173 for further references.

318 See Case C-897/19, *Ruska Federacija*, ECLI:EU:C:2020:262 and Chapter 3.2.3 for a brief description of this case.

319 See C. Frommelt, *In Search of Effective Differentiated Integration: Lessons from the European Economic Area (EEA),* Diss. ETH Zurich 2017, Zurich (2017), pp. 90 and 136.

320 Council of the European Union, supra note 12, para. 32.

321 Oesch (2019), supra note 16, p. 24 et seq.

was and is not, however, a realistic option in Switzerland, so further possibilities should be analysed in this Chapter.

Distinguished scholars have also referred to the idea of an EU or an EEA membership 'light'. The concept of what an EEA membership 'light' contains differs considerably, to say the least.[322] Over the last few decades, many other proposals for an alternative institutional framework between Switzerland and the EU, such as a future judicial and surveillance mechanism, have been proposed by academics, think-tanks and politicians.

The possible outcomes are among the following options:

1. Judicial mechanism: Docking with another court or arbitration:
   a. EFTA-Court with or without a Swiss judge[323];
   b. CJEU without or with a Swiss judge (although the latter is highly unrealistic[324]);[325]
   c. Dispute settlement or arbitration bodies.
2. Surveillance mechanism: Monitoring the compliance of Switzerland:
   a. with the supervision of the ESA (European Surveillance Authority) to monitor the compliance;
   b. with the Commission as a surveillance body to monitor the compliance;
   c. with a national supervisory body in Switzerland (guardian of the sectoral agreements);
   d. Separate supranational or international body (possibly EFTA-like[326]).

Only a supranational or an international body could foster the homogeneity of the legal order. The latter of these options does not solve the issue of two independent courts with no common body to settle disputes.[327]

In 2012, the option of a new two-pillar structure was suggested in a letter from the Swiss President Widmer-Schlumpf to President Barroso.[328] This proposal is a result of a well-

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322 W. Hummer, 'Integrationspolitische Alternativen der Schweiz', EuZ 2012, p. 133 et seq.

323 C. Baudenbacher, 'Wie sollen Konflikte im Verhältnis Schweiz-EU gelöst werden?', in A. Heinemann et al. (eds.), *Kommunikation: Festschrift für Rolf H. Weber zum 60. Geburtstag,* Berne (2011), p. 821 et seq.; Oesch & Speck, supra note 15, p. 261 et seq. for further references.

324 See, among many others, hearing of the Justice Sub-Committee of the House of Lords of 27 February 2018, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-enforcement-and-dispute-resolution/oral/79626.html (last visited on 25.04.2019)> (last visited on 28.06.2020); Baudenbacher, supra note 323, p. 837.

325 See Glaser & Langer (2013), supra note 289, p. 579.

326 See further Kläser, Maastricht, supra note 9, p. 119 et seq.

327 Swiss Confederation, *Bericht des Bundesrates über die Evaluation der schweizerischen Europapolitik of 28 June 2006('Markwalderbericht'; BBl 2010 7239)*; see further Baudenbacher, supra note 323, p. 834 et seq.

328 <http://www.nzz.ch/neue-ueberwachungsbehoerde-fuer-eu-vertraege-1.16630945> (last visited on 28.06.2020).

known legal study by Thürer. The study concluded that the negotiations should follow the bilateral path as closely as possible.[329] The two-pillar structure (comparable to the EEA situation[330]) as stated in the report of Thürer was split into three options (without changing the role of the CJEU and the European Commission within the EU).

Study and recommendations by Thürer based on a two-pillar structure:

1. Docking with EEA institutions (EFTA-Court and ESA) for Swiss cases;
2. Creation of a Swiss supervision body and a specialised chamber of the Swiss Federal Court for Swiss cases;
3. Creation of an EFTA-like Swiss supervision body and a supranational or international body-reference procedure for Swiss cases.[331]

The Swiss Federal Council (and the Swiss Federal Court[332]) favoured a Swiss supervisory body which was comparable to the Swiss Competition Commission (COMCO) but rejected an EFTA Court solution.[333] That system would have resulted in a two-pillar structure. The EU pointedly dismissed the idea of a Swiss supervisory body in a letter of 21 December 2012.[334] For the smaller states Andorra, Monaco and San Marino, which are currently negotiating future association agreements, the two-pillar structure of the EEA was found to be too complex. Supervision could thus be enforced by the Commission instead.[335]

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329 D. Thürer, *Gutachten über mögliche Formen der Umsetzung und Anwendung der Bilateralen Abkommen,* <https://www.eda.admin.ch/content/dam/dea/de/documents/studien/Gutachten-ueber-moegliche-Formen-Umsetzung-u-Anwendung-BA_de.pdf> (last visited on 28.06.2020), p. 41 et seq.

330 See Baudenbacher, supra note 132, p. 587.

331 Thürer, supra note 329, p. 42.

332 Thürer, supra note 329.

333 Cottier et al., Berne, supra note 158, para. 993.

334 See the letter of the Commission, <https://www.eda.admin.ch/content/dam/dea/de/documents/eu/Brief-BXL-CH-20121221_de.pdf> (last visited on 25.06.2020).

335 European Parliament, *European Parliament recommendation of 13 March 2019 to the Council, to the Commission and to the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy on the association agreement between the EU and Monaco, Andorra and San Marino (2018/2246(INI))*; <https://www.consilium.europa.eu/en/press/press-releases/2016/12/13/conclusions-homogeneous-extended-single-market/> (last visited on 25.06.2020), para. 44; Tobler (2016), supra note 180, p. 584 for a further reference to the Communication of the Commission; see further G. van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration Without Membership,* based on the author's doctoral dissertation, Ghent (2014), Leiden (2016); p. 337 et seq.

Academics, politicians and think-tanks have proposed several similar alternatives to the existing system so far.[336] There is also a 'non-paper' from 2013 by the former State Secretary Rossier and Ambassador O'Sullivan, which proposed the following three alternatives.[337]

1. Docking with EEA EFTA institutions;
2. Creation of *ad hoc* institutions;
3. Enlarging the competence of the CJEU.

The non-paper of 2013 also contained certain red lines which cannot be crossed, such as the concept of EU citizenship.[338] Based on the non-paper of 2013, Switzerland and the EU have been engaged in numerous rounds of negotiations since 22 May 2014.[339] Major progress was only made after the implementation of the popular initiative against mass immigration on 6 April 2017.[340] Since 2 March 2018, the preferred model of the Swiss Federal Council seems to include a dispute settlement mechanism.[341] The EU finally accepted a dispute settlement mechanism for the Draft Institutional Framework Agreement (see further the Draft for an Institutional Agreement in Chapter 2.3.3).[342]

2.3.2.1 Docking with the CJEU

The first and most forward-looking approach (for solving the lack of common institutions) involves shifting the competence of interpretation to the CJEU despite the fact that Switzerland would remain a non-member State (the so-called 'docking'[343]). This

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336 See e.g. E. Gyger et al., *Die institutionellen Fragen zwischen der Schweiz und der EU,* foraus-Diskussionspapier of May 2012, No 11, <https://www.foraus.ch/themen/die-institutionellen-fragen-zwischen-der-schweiz-und-der-eu/> (last visited on 25.06.2020).

337 See Y. Rossier & D. O'Sullivan, Non-Paper, 'Elements de discussion sur les questions institutionnelles entre l'union européenne et la confédération helvétique', unpublished, 13.05.2013 in D. Högger, *«Gemeinsame» statt «fremde Richter»,* foraus-Diskussionspapier of December 2015, No 27, <https://www.foraus.ch/themen/gemeinsame-statt-fremde-richter/> (last visited on 25.06.2020), p. 2 et seq.; see also S. Lavanex & R. Schwok, 'The Swiss way: The nature of Switzerland's relationship with the EU', in E. O. Eriksen & J. E. Fossum (eds.), *The European Union's non-members: Independence under hegemony?,* London (2015), p. 47 et seq.

338 Cottier et al., Berne, supra note 158, para. 992.

339 Oesch & Speck, supra note 15, p. 259.

340 Swiss Confederation, supra note 182, p. 2 et seq.

341 Tobler & Beglinger, supra note 186, question 113; Baudenbacher, supra note 168, p. 3.

342 Tobler & Beglinger, supra note 186, questions 110 and 113 et seq.; <https://www.eda.admin.ch/dea/de/home/aktuell/medienmitteilungen.html/content/dea/de/meta/news/2018/7/4/71471> (last visited on 25.06.2020).

343 See footnote 141.

approach has been followed to resolve disputes relating to the Air Transport Agreement[344] and in the recent Financial Support for External Borders and Visa Agreement.[345] As the discussions about 'foreign judges' became political in nature, the former Swiss foreign minister Burkhalter proclaimed that decisions of the CJEU would not be binding but could be opposed by the Joint Committee,[346] whereas the former Swiss President Maurer even stated that decisions of the CJEU would only be regarded as mere opinions for further reference without any ensuing legal obligations.[347] It is however obvious from the fundamental construction of the internal market and the TFEU, and also the EEA Agreement, that the judgments of supranational courts must be followed.[348] Switzerland would certainly not be free to decide whether it follows judgments of the CJEU without repercussions. Otherwise, this would lead to an internal market that is (partially) not homogeneous. It would thus lead to disapplying the AFMP temporarily or even to its termination. Even the Swiss foreign ministry pointed out that this could be a potential consequence.[349] This was however one of the most controversial points of the current negotiations.[350] During the current negotiations (or past negotiations according to some statements of the EU), Switzerland and the EU seem now to agree that judgments of the CJEU would be binding.[351]

For the sake of completeness, the anachronistic idea of a joint CJEU with Swiss judges should be weighed and found wanting because the Opinions of the CJEU are clear in this regard, as seen by its well-known Opinions 1/91[352] and 1/92[353] about the EFTA Court, the

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344 See Art. 20 of the *Agreement between the European Community and the Swiss Confederation on Air Transport of 21.06.1999, entry into force on 06.01.2002,* OJ [2002] L114/73, 30.04.2002.

345 See Art. 5 of the *Agreement between the European Union and the Swiss Confederation on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund, for the period 2014 to 2020, of 15.03.2018,* OJ [2018] L165/3, 02.07.2018.

346 See C. Baudenbacher, 'Schweiz-EU: Von der Unfähigkeit zu kontextualem Denken', ELR 2015, No 6, p. 200.

347 <http://www.srf.ch/news/schweiz/maurer-glaubt-volk-im-kampf-gegen-fremde-richter-geeint> (last visited on 25.06.2020).

348 Tobler, supra note 297, p. 199.

349 <https://www.eda.admin.ch/content/dam/dea/de/documents/fs/11-FS-Institutionelle-Fragen_de.pdf> (last visited on 25.06.2020).

350 Oesch & Speck, supra note 15, p. 260.

351 Tobler & Beglinger, supra note 186, question 114.

352 Opinion of the Court 1/91, ECLI:EU:C:1991:490, para. 35 et seq.

353 Opinion of the Court 1/92, ECLI:EU:C:1992:189, para. 13 et seq.

more recent Opinion 1/09[354] about a European and Community Patents Court[355], and Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms[356].[357] In essence, the CJEU stated that it is essential to safeguard the autonomy of the EU legal order.[358] Any supranational body would (most likely) have to pass the scrutiny of the CJEU through an Opinion, according to Article 218(11) TFEU.[359] While the CJEU stated in 2018 that arbitration bodies whose decisions are binding for EU institutions may have an adverse effect on the autonomy of EU law,[360] the recent Opinion 1/17 on the compatibility of the CETA Agreement clarified (following the Advocate General's Opinion) that the dispute settlement mechanism (the 'investment tribunal') is in conformity with EU law as the 'investment tribunal' only interprets the provisions of the CETA without having any impact on EU law.[361] It will also be interesting to see the nature of conformity with EU law of the arbitration body of the Draft Institutional Framework Agreement between Switzerland and the EU.[362]

2.3.2.2 Docking with the EFTA Court and EFTA-like solutions

Another option for docking could be found under the auspices of the EFTA Court and presumably with a Swiss judge for matters concerning Switzerland.[363] This alternative would have the advantage that it allows a supranational body to rule upon the sectoral agreements. This approach was never considered viable by the Swiss government. The Swiss Federal Council declared in April 2012 that it was going to follow the path chosen with two

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354 Opinion of the Court 1/09, ECLI:EU:C:2011:123.

355 See Kläser, Maastricht, supra note 9, pp. 114 – 117.

356 Opinion of the Court 2/13, ECLI:EU:C:2014:2454, para. 183.

357 Same opinion: Baudenbacher (2015), supra note 346, p. 202.

358 Opinion of the Court 1/09, ECLI:EU:C:2011:123, para. 76; Opinion of the Court 2/13, ECLI:EU:C:2014:2454, para. 183.

359 See Baudenbacher (2015), supra note 346, p. 200.

360 Case C-284/16, *Slovak Republic v Achmea BV*, ECLI:EU:C:2018:158, para. 39 et seq.

361 Opinion of the Court 1/17, ECLI:EU:C:2019:341, para. 120 et seq.

362 See further B. Pirker, 'Zum Schiedsgericht im Institutionellen Abkommen', Jusletter 3 June 2019, para. 22 et seq.

363 Oesch & Speck, supra note 15, p. 261 for further references; Baudenbacher, supra note 323, p. 837 et seq.; see also D. Thürer, 'Europa und die Schweiz: Status quo und Potenziale einer Partnerschaft', SJZ 2012, p. 483 et seq.

independent legal orders and several Joint Committees for each sectoral agreement.[364] Shortly after, on 15 June 2012, it favoured a solution similar to the EFTA Structure (two-pillar structure[365]) with a national supervisory body and a specialised chamber of the Swiss Federal Court based on the study of Thürer[366].[367] The idea was subsequently dismissed by the Commission in December 2012.[368] It was therefore proposed that the Commission should exercise that supervision.[369] This idea was rejected by the Swiss Confederation.[370]

Today, the Swiss Federal Council favours a solution without supranational supervision.[371] An alternative offers the creation of a dispute settlement body or a single Joint Committee (with or without the reduction and a compilation of sectoral agreements[372]; see the Draft for an Institutional Agreement in Chapter 2.3.3).

Interestingly enough, the Swiss Federal Court clearly expressed before the negotiations (back in 2010) that it prefers to remain independent. Therefore, it suggested that a specialised body, such as the Competition Commission (COMCO), could be established. If the Swiss Federal Council opted for a supranational body, the Swiss Federal Court would have preferred the CJEU.[373]

2.3.2.3 Dispute settlement mechanisms

The sectoral agreements between Switzerland and the EU are numerous. Over 100 agreements exist (depending on the method of calculation, compilations of up to 206

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364 <http://www.news.admin.ch/message/index.html?lang=de&msg-id=44298> (last visited on 25.06.2020).

365 According to Art. 108 of the EEA Agreement, the EEA EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) and a corresponding mechanism for ‘judicial control’ for the EEA EFTA States (i.e. an EFTA Court).

366 See <https://www.eda.admin.ch/content/dam/dea/de/documents/studien/Gutachten-ueber-moegliche-Formen-Umsetzung-u-Anwendung-BA_de.pdf> (last visited on 25.06.2020); see further Chapter 4.

367 Cottier et al., Berne, supra note 158, para. 990 et seq.

368 Cottier et al., Berne, supra note 158, para. 991.

369 Tobler, supra note 297, p. 205.

370 Tobler (2016), supra note 180, p. 586.

371 Tobler & Beglinger, supra note 186, question 18.

372 For an extensive compilation with Protocols and diplomatic notes see <https://www.eda.admin.ch/dea/en/home/bilaterale-abkommen/abkommen-umsetzung/abkommenstexte/versicherungen.html> (last visited on 25.06.2020).

373 <https://www.eda.admin.ch/content/dam/dea/de/documents/studien/Auslegung-BA-bundesgericht_juni_11_de.pdf> (last visited on 25.06.2020).

agreements have been concluded[374]). Therefore, some authors have repeatedly argued that all the agreements should be replaced with a common framework agreement. This framework agreement would also introduce a single body for dispute settlement.[375] Since March 2018, the preferred model of the Swiss Federal Council seems to be found in a particular form of a dispute settlement mechanism.[376] The EU accepted this form of dispute settlement mechanism resembling the Ukrainian model, with a 'reference procedure'[377] to the CJEU.[378] The Swiss Federal Council supports the idea that the arbitration body would decide when cases are brought before the CJEU (see further the Draft for an Institutional Agreement in Chapter 2.3.3).[379]

Three existing agreements of the *acquis suisse* provide for arbitration boards.[380] Unfortunately, these three existing sectoral agreements share the problem that a decision cannot be brought before the CJEU. That is to say, they have only limited competence due to the autonomy of the EU legal order and are dependent on political decisions rather than on the rule of law. Up until the current day, there has been no initiation of an arbitration board as foreseen by the sectoral agreements.[381]

Dispute settlement mechanisms are common in international agreements. The Ukrainian Association Agreement even involves the jurisdiction of the CJEU ('reference procedure' of

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374 See <http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=3820&countryName=Switzerland&countryFlag=treaties> (last visited on 28.06.2020); see also Tobler & Beglinger, supra note 186, question 5, who counted the considerable amount of more than 100 agreements.

375 See Hummer (2012), supra note 322, p. 131 et seq.

376 Tobler & Beglinger, supra note 186, question 113.

377 Not in the sense of preliminary reference procedures in the EU: see Art. 267 TFEU.

378 See e.g. Art. 322 para. 2 of the *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part,* OJ [2014] L161/3, 29.05.2014 ('the Ukraine Association Agreement'); <https://www.eda.admin.ch/dea/de/home/aktuell/medienmitteilungen.html/content/dea/de/meta/news/2018/7/4/71471> (last visited on 25.06.2020).

379 Tobler & Beglinger, supra note 186, question 117.

380 Art. 29(3) of the Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures; Art. 17 of the *Cooperation Agreement between the European Atomic Energy Community and the Swiss Confederation in the field of controlled thermonuclear fusion and plasma physics,* OJ [1978] L242/2, 04.09.1978; Art. 38 of the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance.

381 See C. Tobler, '«Schiedsgerichte im bilateralen Recht?»', SRIEL (SZIER/RSDIE) 2012, No 1, p. 3 et seq.; Glaser & Dörig, supra note 51, p. 456.

the arbitration body).[382] Besides the Ukrainian Association Agreement[383], the Georgian Association Agreement[384], the Moldovan Association Agreement[385], as well as the existing agreements with Andorra, Monaco and San Marino foreseeing a partial European integration, which are also currently being negotiated for the adjustment of the *acquis communautaire* (for the conclusion of one or several association agreements),[386] contain similar dispute settlement mechanisms.[387] More importantly, a similar mechanism exists for the EEA Agreement in its Article 111. This idea was brought up by the Swiss foreign ministry, after the initial study of Thürer in 2011 (not published[388]) drawing up a model in the light of the EEA. The dispute settlement mechanism in Article 111(1) and (2) of the Agreement notably allows an EU or an EEA/EFTA State to bring a dispute concerning the interpretation or application of the EEA before the EEA Joint Committee for settlement.

Baudenbacher argues that the concept of an arbitration panel or dispute settlement comparable to the EEA comes with a crucial misunderstanding. In EEA law, there are two separate legal orders. The EFTA Surveillance Authority's (ESA) task consists of scrutinising the EEA EFTA States, while the Commission does likewise for the EU Member States. The EFTA Court deals with cases usually brought forward by the ESA in an infringement procedure. The system does therefore somehow correspond to the institutional system in the EU even though Article 111(1) EEA provides for a dispute settlement mechanism. From its nature, however, it becomes clear that this mechanism was installed as a measure only used *ultima ratio*.[389] If every other option fails, the EEA Joint Committee could be addressed. This

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382 Art. 322 para. 2 of the Ukraine Association Agreement.

383 See Art. 306 et seq. of the Ukraine Association Agreement.

384 See Art. 248 et seq. of the *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part,* OJ [2014] L261/4, 30.08.2014.

385 See Art. 384 et seq. of the *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part,* OJ [2014] L260/4, 30.08.2014.

386 Tobler, supra note 304, p. 24; European Parliament, supra note 335.

387 See Art. 18 of the *Agreement between the European Economic Community and the Principality of Andorra,* OJ [1990] L347/16, 31.12.1990; Art. 4 of the *Agreement between the European Community and the Principality of Monaco on the application of certain Community acts on the territory of the Principality of Monaco,* OJ [2003] L332/42, 19.12.2003 for a dispute settlement mechanism solely by the Joint Committee; Art. 24 of the *Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino,* OJ [2002] L84/43, 28.03.2002.

388 See for details Tobler (03.06.2013), supra note 15, para. 1 et seq.

389 Baudenbacher (2015), supra note 346, p. 198 et seq.

is extremely unlikely for several reasons. The EFTA Court is (today) an established institution. Any Contracting Party addressing the EEA Joint Committees would therefore risk creating a precedent for the functioning of the EEA Agreement itself. In other words, it could be argued that if the EFTA Court were considered to be incompetent to rule on legal issues in straightforward cases, how could it be competent to rule on complex matters. A court procedure can easily be distinguished from an EEA Joint Committee procedure. While the former follows rules of procedures and decides on EEA cases regularly, the latter only deals with specific legal questions without the formal representation of interveners or private parties.

The Commission acting for the EC (now EU) invoked Article 111(1) of the EEA Agreement for the first time concerning in the *Eurovignette* directive.[390] The EEA EFTA States however emphasised that that case did not account for such a drastic measure, but fell within the general competence of the ESA.

After having brought a case before the Joint Committee, the case may even be brought before the CJEU as well, if the Contracting Parties to the dispute agree to do so (in areas where EEA law corresponds to EU law) according to Article 111(3) of the EEA Agreement. Before invoking Article 111(3), a Member State may also bring a case before the EFTA Court as a direct infringement action according to Article 108(2)(c) of the EEA Agreement. The direct infringement procedure for an EU or an EEA EFTA State to bring a claim against another EEA EFTA State has never been used.[391] The EU counterpart in Article 259 TFEU has also been used only sporadically.[392] The second indent of Article 111(3) even gives the Contracting Parties the option of unilateral measures in certain situations. The bottom line of Article 111(3) for future dispute settlement mechanism is that the EU is not willing to set up arbitration bodies for the interpretation of EU law without the guidance of the CJEU (see

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390 EEA, *Report and Resolution of the EEA Joint Parliamentary Committee of 27 May 2002 on the Annual Report on the Functioning of the EEA Agreement in 2001, M/20/R/033,* <https://www.efta.int/sites/default/files/documents/advisory-bodies/parliamentary-committee/jpc-resolutions/27May2002AnnualReportFuncitioningEEA2001.pdf> (last visited on 25.06.2020), para. 7.

391 Tobler, supra note 297, p. 196; *C. Tobler, 'Zur Rolle des EuGH im Streitbeilegungsmechanismus in den sektoriellen Verträgen EU-Schweiz. Mit rechtsvergleichenden Bemerkungen zum EWR, zum Ankara-Assoziationsrecht und zu der in Verhandlung stehenden Assoziation mit den AMS-Staaten Andorra, San Marino und Monaco', in S. Lorenzmeier & H.-P. Folz (eds.), Recht und Realität: Festschrift für Christoph Vedder, Baden-Baden (2017),* p. 389.

392 E.g. Case C-591/17, *Austria v Germany*, ECLI:EU:C:2019:504; Case C-364/10, *Hungary v Slovak Republic*, ECLI:EU:C:2012:630.

Chapter 2.3.3),[393] even if it is highly unlikely that the Contracting Parties will ever agree to bring a case before the CJEU.[394]

The Withdrawal Agreement for Brexit also sets out a dispute mechanism, which includes a procedure where the interpretation of concepts of EU law is not decided by the arbitration panel but referred to the CJEU.[395] Contrary to this rule, the 'reference procedure' in the dispute mechanism of the Draft for an Institutional Agreement between Switzerland and the EU is only compulsory if the arbitration body finds it necessary to request a ruling (where EU law is relevant).[396] The dispute settlement mechanism in the Brexit Withdrawal Agreement will not replace the existing rules of EU law (including procedures before the CJEU) during the transition phase, but it will be used for the interpretation of other provisions of the Brexit Withdrawal Agreement.[397] This dispute mechanism also signifies how a future dispute settlement mechanism between the UK and the EU is likely to be drafted.[398]

2.3.3 Draft Institutional Framework Agreement of 23 November 2018 between Switzerland and the EU

On 7 December 2018, the Swiss Federal Council decided to hold consultations with stakeholders in Switzerland for the Draft Institutional Framework Agreement between Switzerland and the EU. The agreement is markedly criticised by left- and right-wing politicians as it crosses some so-called red lines, such as the eight-day waiting period for service providers (see Chapter 4.4.2.5)[399].[400] On 15 January 2019, a public hearing of experts

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393 Same opinion: C. Baudenbacher, *Written evidence of Professor Baudenbacher of 28 December 2017 to the Justice Sub-Committee of the House of Lords,* <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-enforcement-and-dispute-resolution/written/81660.html> (last visited on 25.06.2020).

394 Same opinion: C. Tobler, 'Streitbeilegung im Entwurf für den Brexit-Austrittsvertrag: Ein Schiedsgerichtsmodell ähnlich wie für das institutionelle Rahmenabkommen Schweiz-EU', Jusletter 17 December 2018, para. 25.

395 Art. 174 et seq. of the *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,* OJ [2020] L29/7, 31.01.2020.

396 See Chapter 2.3.3.

397 See Art. 127 of the Brexit Withdrawal Agreement.

398 Tobler (17.12.2018), supra note 394, para. 46 et seq.

399 See Protocol I (2) first indent of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

400 <https://www.srf.ch/news/schweiz/rahmenabkommen-mit-der-eu-so-ein-abkommen-kann-man-so-nicht-unterzeichnen> (last visited on 25.06.2020).

took place.[401] The EU emphasised that the institutional framework should be finalised as soon as possible, notably due to the end of the Commission's President Juncker tenure on 31 October 2019.[402] The equivalence of the framework for the Swiss stock exchange expired on 30 June 2019,[403] and is *de facto* connected to the negotiations for a new institutional framework.[404]

The Draft Institutional Framework Agreement would only be concluded between Switzerland and the EU, which implies that it is accepted that the EU assumes its competence in this matter, especially because the Draft Institutional Framework Agreement would take precedence over the covered market access agreements – even the AFMP, which constitutes a mixed agreement – in the case of (an unanticipated) conflict.[405] It would establish the overarching Agreement on the Free Movement of Persons ('AFMP'), the Air Transport Agreement[406], the Agreement for the Carriage of Goods and Passengers by Rail and Road[407], the Agreement between the European Community and the Swiss Confederation on trade in agricultural products[408] and the Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment[409].[410] It would however also apply for future market access agreements between Switzerland and the EU.[411]

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401 See the public hearing of Swiss experts for the Economic Affairs and Taxation Committee of the National Council of 15 January 2019, <https://www.youtube.com/watch?v=LODKvWROkxU> (last visited on 25.06.2020).

402 Council of the European Union, supra note 243, para. 5; see also European Parliament, supra note 253; Tobler & Beglinger, supra note 186, question 137.

403 See <http://europa.eu/rapid/press-release_IP-18-6801_en.htm> (last visited on 25.06.2020).

404 Commission Implementing Decision (EU) 2017/2441 of 21 December 2017 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council; Tobler & Beglinger, supra note 186, question 141 et seq.

405 Art. 17 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018; see also A. Epiney, 'Der Entwurf des Institutionellen Abkommens Schweiz – EU: Überblick und erste Einschätzung', Jusletter 17 December 2018, paras. 4 and 49 et seq. and footnote 6 thereof for further references.

406 Swiss-EU Air Transport Agreement (see for the full citation supra note 344).

407 *Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road of 21.06.1999, entry into force on 01.06.2002,* OJ [2002] L114/91, 30.04.2002.

408 *Agreement between the European Community and the Swiss Confederation on trade in agricultural products of 21.06.1999, entry in force 01.06.2002,* OJ [2002] L114/6, 30.04.2002.

409 Mutual Recognition Agreement (see for the full citation supra note 187).

410 Art. 2 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

411 Art. 2 para. 1 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

The main provisions of the Draft Institutional Framework Agreement are made up of 22 Articles and aim at governing the updating of the covered agreements, a uniform interpretation of the covered agreements, a surveillance of its application and a dispute settlement mechanism.[412] The purpose of the Draft Institutional Framework Agreement is to guarantee legal certainty and equal treatment for the Contracting Parties, economic actors and private individuals with regard to the internal market where Switzerland takes part. Lastly, it aims at establishing a level-playing field.[413] Three separate protocols, Annex X and three joint statements are also part of the Draft Institutional Framework Agreement. The three protocols of the Draft Institutional Framework Agreement contain several exceptions or general statements. They form an integral part of the Draft Institutional Framework Agreement.[414] Protocol I concerns the particularities of the Swiss labour market (provision of services, posted workers and the Internal Market Information System). Protocol II includes several exceptions for the updating of the *acquis suisse* for the respective market access agreements. Protocol III deals with the dispute settlement mechanism in great detail. The EU and Switzerland have also adopted three joint statements concerning the FTA, further financial contributions for the cohesion of the EU and the updating of the Air Transport Agreement with regard to state subsidies according to Annex X of the Draft Institutional Framework Agreement. Furthermore, there is a draft decision attached to the Draft Institutional Agreement which would extend the dispute settlement mechanism to the FTA if this decision were adopted by the Joint Committee for the FTA.

2.3.3.1 Surveillance under the Draft for an Institutional Framework Agreement

Under the Draft Institutional Framework Agreement, there would be no supranational institutions for the supervision but a two-pillar approach. Thus, the surveillance would be governed by the Commission and the respective Swiss institutions (to be determined).[415] Interestingly enough, another option was found for very small third countries where the Commission is responsible for surveillance.[416]

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412 Art. 1 para. 3 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

413 Art. 1 para. 1 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

414 Art. 19 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

415 Art. 6 et seq. of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

416 See supra note 335.

Baudenbacher prominently criticises that surveillance because the Commission could demand arbitration after three months of fruitless discussions in the Joint Committee pursuant to Article 10 paragraph 2 of the Swiss-EU Draft Institutional Framework Agreement. In his report for the Economic Affairs and Taxation Committee of the Swiss National Council, he argues that this solution would correspond to a *de facto* surveillance mechanism because the Commission could initiate the dispute settlement mechanism without Switzerland's views being heard, and ultimately require a binding decision by the CJEU – by the 'opposite side'.[417] He goes even further and states that the dispute settlement mechanism does not have any meaning ('a fig leaf') because it can only camouflage the influence of the CJEU.[418]

In this respect, it is interesting to note that Baudenbacher stated the following in 2012: 'The argument that with the European Commission and the ECJ, the EU too is monitoring itself, is not convincing. The ECJ is the common court of 27 states composed of judges from those 27 states and therefore has an outstanding position.'[419] According to the statements of Baudenbacher in 2012, the Commission and the CJEU thus play distinct roles. It cannot be stated that they are simply both on the 'opposite side' but it must be pointed out that the CJEU follows the logic of a court with judges of every Member State. In other words, the CJEU should be characterised as the 'court of the internal market'.[420]

2.3.3.2 Horizontal Joint Committee

Article 16 of the Draft Institutional Framework Agreement establishes a horizontal Joint Committee for the relationship between Switzerland and the EU. As a novelty, Article 16 of the Draft Institutional Framework Agreement would additionally introduce a Joint Parliamentary Committee, which ought to foster dialogue between Switzerland and the EU. Finally, Article 11 of the Draft Institutional Framework Agreement provides for judicial dialogue between the CJEU and the Swiss Federal Court, which is left to the courts to establish.

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417 Baudenbacher, supra note 168, p. 41.

418 See the public hearing of 15 January 2019 for the Economic Affairs and Taxation Committee of the National Council, at 54 minutes: <https://www.youtube.com/watch?v=LODKvWROkxU> (last visited on 25.06.2020); Baudenbacher, supra note 168, p. 6 et seq. and p. 40 et seq.

419 Baudenbacher (2012), supra note 15, p. 588.

420 See Pirker (03.06.2019), supra note 362, para. 36.

2.3.3.3 Continuous updating of EU law

While the current mechanism for updating EU law can only be described as a 'fair-weather construction' since it does not include consequences for the refusal to update secondary law,[421] the Draft Institutional Framework Agreement includes the continuous or so-called dynamic updating of EU law in the scope of the respective market access agreements.[422] Similar to the Schengen and Dublin Agreements (see Chapter 2.3.1.4)[423] or similar to the updating under the EEA agreement,[424] Switzerland would have a means of decision-shaping for the updating of the *acquis*.[425] The first step would be to determine the acts that are relevant for updating the *acquis suisse*. Several topics not implemented in EU law are politically sensitive in Switzerland, namely state subsidies[426], the revised posting of workers Directive 2014/67/EU[427], and the Citizens' Rights Directive[428]. The latter of the so-called red lines is not explicitly addressed in the Draft Institutional Framework Agreement (see Protocol II). It is thus uncertain whether full implementation of the Citizens' Rights Directive would be mandatory or at least *de facto* required by the EU as only parts of it are currently covered by the AFMP.[429] Future implementations of EU law, notably changes brought by the Citizens' Rights Directive, would also be more demanding considering that the core provisions of primary and secondary law are listed in Annex I to the AFMP and

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421 See Oesch (2019), supra note 16, p. 11.

422 Arts. 5 and 12 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

423 See Tobler (2017), supra note 275, p. 214 et seq.

424 See Art. 99 et seq. of the EEA Agreement.

425 Art. 12 para. 4 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

426 Art. 8 et seq. of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

427 *Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'),* OJ [2014] L159/11, 28.05.2014; see further A. Epiney & L. Hehemann, 'Die Tragweite des Institutionellen Abkommens im Bereich der Arbeitnehmerentsendung', Jusletter 8 April 2019.

428 See A. Epiney & S. Affolter, 'Das Institutionelle Abkommen und die Unionsbürgerrichtlinie', Jusletter 11 March 2019; C. Tobler, 'Personenfreizügigkeit mit und ohne Unionsbürgerrichtlinie: Reise- und Aufenthaltsrechte im Ankara-Abkommen, dem FZA Schweiz-EU und dem EWR-Recht', in A. Epiney & L. Hehemann (eds.), *Schweizerisches Jahrbuch für Europarecht 2017/2018 / Annuaire suisse de droit européen 2017/2018,* Zurich (2018), pp. 433-450; C. Tobler, 'Auswirkungen einer Übernahme der Unionsbürgerrichtlinie für die Schweiz - Sozialhilfe nach bilateralem Recht als Anwendungsfall des Polydor-Prinzips', in A. Epiney & T. Gordzielik (eds.), *Personenfreizügigkeit und Zugang zu staatlichen Leistungen: Libre circulation des personnes et accès aux prestations étatiques,* Basel (2015), pp. 55-82.

429 See e.g. Baudenbacher, supra note 168, p. 38.

cannot be amended by the respective Joint Committee (contrary to Annexes II and III to the AFMP).[430]

In a manner that is comparable to the Schengen and Dublin Agreements (see Chapter 2.3.1.4), Switzerland is given two years for the implementation and a further one year period in case a referendum is held.[431] Every decision for an update could then be subject to a referendum in Switzerland.[432] If there is no consensus, or a negative result from a referendum, the EU could take proportionate retaliation measures.[433] There is however no specific provision to govern any late implementation into national law. This situation would simply have to be addressed under Article 10 of the Draft Institutional Framework Agreement, which lays down rules for a dispute settlement mechanism (see Chapter 2.3.3.5).[434] In comparison with the EEA Agreement, this is the less drastic option than the suspension of an Agreement (see the so-called 'nuclear option' foreseen by Article 102 of the EEA Agreement).[435]

2.3.3.4 Interpretation of EU law

The Draft Institutional Framework Agreement includes Article 4 thereof, which is largely inspired by the rule of interpretation in Article 16(2) AFMP (see Chapter 3.4). It states that the case law of the 'CJEU' (note the specific meaning of this term according to Article 3(c) of the Draft Institutional Framework Agreement) must be taken into account for concepts of EU law (Article 4(2) of that agreement) in the market access agreements and EU law referred to (Article 4(1) of that agreement). Contrary to the wording of Article 16(2) AFMP, provisions of the respective market access agreements mentioned in Article 2 of the Draft Institutional Framework Agreement, which refer to concepts of EU law, would not only have to be interpreted according to the case law of the CJEU before but also *after* the date of

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430 Art. 18 AFMP; see further Epiney (17.12.2018), supra note 405, para. 29 et seq.

431 Art. 14 para. 3 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

432 Swiss Confederation, supra note 182, p. 6; see Arts. 140 and 141 BV; see further Swiss Confederation, supra note 232, which would foresee a compulsory referendum for Treaties with a 'constitutional character' and the explanatory report, <https://www.admin.ch/ch/d/gg/pc/documents/2978/Obligatorisches-Referendum_Erl.-Bericht_de.pdf> (last visited on 25.06.2020).

433 See Swiss Confederation, supra note 182, Annex C.1.

434 Swiss Confederation, supra note 182, p. 7.

435 Same opinion: Oesch (2019), supra note 16.

signature.[436] In addition, the explanatory report of the Swiss Government mistakenly only mentions the case law of the CJEU.[437] According to the definitions of Article 3(c) of the Draft Institutional Framework Agreement the term 'CJEU' also however includes the General Court of the CJEU. Thus, the case law of the General Court would matter for the interpretation of EU law concepts according to Article 4 of the Draft Institutional Framework Agreement. This is a further extension compared to Article 16(2) AFMP. However, the explanatory report also refers to the *Polydor* principle, which has been applied inter alia for the Air Transport Agreement and the AFMP by the CJEU (see Chapter 3.2.2). The interesting question is whether the *Polydor* principle is still applicable for market access agreements now that the integration seems to be more profound than before. The wording of Article 4 is stronger than its predecessor in Article 16(2) AFMP.[438] Since the Swiss Federal Court takes the case law before and *after* the date of signature for Article 16(2) AFMP into account (see Chapter 3.3.3), this rule is not revolutionary under the AFMP. It however speaks against a more flexible interpretation that the Draft Institutional Framework Agreement does not affect the wording of the market access agreements themselves, nor change the scope or content of the respective agreements – thus the context of the Draft Institutional Framework Agreement remains the same.[439] In the unlikely case that the provisions of the Draft Institutional Framework Agreement are in conflict with provisions of the respective agreement, the provisions of the Draft Institutional Framework Agreement prevail.[440]

2.3.3.5 Dispute settlement mechanism

Chapter 3 of the Draft Institutional Framework Agreement between Switzerland and the EU contains the dispute settlement mechanism which applies for the interpretation of the Draft Institutional Agreement and the market access agreements listed therein. The Contracting Parties agree that they are bound by this dispute settlement mechanism in order

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[436] Art. 4 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

[437] Swiss Confederation, supra note 182, p. 7.

[438] The wording of homogeneity clauses should however not be overstressed to determine their meaning, see A. Ott, 'The EU-Turkey Association and Other EU Parallel Legal Orders in the European Legal Space', Legal Issues of Economic Integration 42 2015, No 1, p. 22.

[439] Art. 17 para. 1 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018; Swiss Confederation, supra note 182, p. 7 et seq.

[440] Art. 17 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

to avert jurisdiction shopping.[441] Article 10 thereof contains the core provision of Draft Institutional Framework Agreement. The Joint Committee is consulted to find an acceptable solution if there is a dispute.[442] If the Joint Committee does not find a solution within three months, dispute settlement can be requested by Switzerland or the EU.[443] This rule of the dispute settlement mechanism is similar to the Withdrawal Agreement for Brexit and three existing dispute settlement mechanisms in bilateral agreements between Switzerland and the EU.[444] Finally, it should be stated that in the light of other association agreements, notably the Ukraine Association Agreement and the EEA, the EU is only willing to conclude further market access agreements with guidance from the CJEU. It is disputed that the Ukraine model suits Switzerland as a highly industrial country with a high level of integration because the Draft Institutional Framework Agreement is a horizontal agreement affecting existing bilateral agreements and not a preferential trade agreement and due to the fact that Switzerland would only accept a deal that contains 'sovereignty safeguards'.[445] While these arguments are valid, as far as the level of integration and the 'sovereignty safeguards' are concerned, the dispute settlement mechanism is in fact one of the few mechanisms to foster the homogeneity of the legal order. The only other feasible option which would be accepted by the EU and the CJEU would be docking with the EFTA Court.[446] This solution was however rejected by the Swiss Government before the start of the negotiations in 2014, on the basis that a supranational surveillance was not deemed satisfactory despite the *ceterum censeo* of one articulate author[447] (see above Chapter 2.3.2.2).

Subsequently, if the solution before the arbitration body depends on the interpretation of covered concepts of EU law, the case can be referred to the CJEU.[448] Pirker notes that the

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441 Art. 9 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018; see Swiss Confederation, supra note 182, p. 8.

442 Art. 10 para. 1 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

443 Art. 10 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

444 See Art. 170 of the Brexit Withdrawal Agreement; see supra note 380; Chapter 2.3.2.3.

445 Loo, Leiden, supra note 335, p. 337 et seq.; Baudenbacher, supra note 168, p. 42.

446 See Tobler (17.12.2018), supra note 394, para. 27.

447 See e.g. C. Baudenbacher, 'Rechtsprechung: Rechtssicherheit als Standortfaktor', in K. Gentinetta & G. Kohler (eds.), *Souveränität im Härtetest: Selbstbestimmung unter neuen Vorzeichen,* Zurich (2010), p. 272 et seq.

448 Art. 10 para. 3 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

exemption for financial services[449] or the possibility to introduce quotas[450] would qualify as provisions that do not contain concepts of EU law.[451] Unlike the Withdrawal Agreement for Brexit,[452] from the wording of its Article 10(3) in conjunction with Art III.9 paragraph 3 of Protocol 3 to the Swiss-EU Draft Institutional Framework Agreement, this referral can only be proposed by the Contracting Parties but is decided by the arbitration body, which may decide not to refer a (clear) case (see Chapter 2.3.3.5.1).[453] With regard to the procedural rules, Switzerland is granted the same rights as a Member State before the CJEU.[454]

2.3.3.5.1 Acte clair doctrine

According to some scholars, Article10(3) of the Draft Institutional Framework Agreement, which only requires a referral to the CJEU if necessary and only for EU law concepts, resembles the *acte clair* case law[455].[456] This would imply that the arbitration body enjoys a certain amount of discretion on whether it refers a case to the CJEU. Following this interpretation, the introduction of an additional procedure by a Joint Committee for clear cases is therefore redundant even if the decision touches on concepts of EU law.[457] While the explanatory report of the Swiss Government also supports this reading (even if they are technically not considered *travaux préparatoires*),[458] Baudenbacher sharply disagrees with the proposed assessment of the 'reference procedure'. In response to the *acte clair* doctrine,[459] he submits that the CJEU has interpreted this exception narrowly in the past.[460] Further, he argues that similar arbitration clauses with third countries, such as in the Ukraine Association

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449 See Art. 22(3)(ii) of Annex I to the AFMP.

450 Art. 10(4) AFMP.

451 Pirker (03.06.2019), supra note 362, para. 13.

452 See Art. 174 para. 1 of the Brexit Withdrawal Agreement.

453 Same opinion: Tobler (17.12.2018), supra note 394, para. 24; Epiney (17.12.2018), supra note 405, para. 46.

454 Art. 10 para. 4 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

455 See Case C-283/81, *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:335.

456 Tobler (17.12.2018), supra note 394, para. 24; Cottier (2019), supra note 17, p. 352.

457 Other opinion: S. Breitenmoser, 'Welche Ergänzungen für das Rahmenabkommen notwendig sind – und keine Neuverhandlungen benötigen', *NZZ,* 31 January 2019.

458 Swiss Confederation, supra note 182, Annex C.2; see also more explicitly worded for the future dispute settlement mechanism between the EU and the UK: European Council, *Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom*, para. 131 last sentence.

459 See supra note 455.

460 Baudenbacher, supra note 168, p. 32.

Agreement, must be interpreted in the same manner even if they are not similarly worded and that the arbitration body is not granted any discretion whatsoever when the referral to the CJEU is demanded by one of the Contracting Parties regardless of the wording, which seems to be more restrictive in French.[461]

While there is the argument to be made that the internal market case law and with it the *acte clair* case law cannot be automatically transposed to the Draft Institutional Framework Agreement after everything that will be said about the *Polydor* principle (see Chapter 3.2.1), the wording of Article 10(3) of the Draft Institutional Framework Agreement at least seems to leave some room for interpretation for clear cases.

Besides the legal implications when a referral to the CJEU is explicitly demanded by one of the Contracting Parties (see Chapter 2.3.3.5 in fine), the influence of the CJEU for the sectoral agreements also entails a political element. It largely depends on the Contracting Parties whether cases will be initiated before the arbitration board and brought before the CJEU. Epiney argues that the dispute settlement mechanism does have a political element and will rarely be requested because the Contracting Parties may decide not to follow the ruling. In her opinion, it would however help the Contracting Parties to overcome their differences.[462] Oesch also agrees that the CJEU will rarely come into play.[463] This (speculative) assessment seems perfectly reasonable because the Commission is likely to press only on crucial issues, while straightforward matters can be solved either by the Joint Committee or the arbitration board.

2.3.3.5.2 Proportionality of retaliation measures

As a matter of last resort, if the arbitration body rules that a measure is unlawful and a Contracting Party does not take measures to remedy the situation within a reasonable amount of time, the other Contracting Party of the dispute settlement may take retaliation measures up to the suspension of the respective agreement (see further Chapter 2.3.3.5.3).[464] The

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461 Baudenbacher, supra note 168, pp. 18, 21 et seq. and 25 et seq.; see the public hearing of 15 January 2019 for the Economic Affairs and Taxation Committee of the National Council, at 55 minutes: <https://www.youtube.com/watch?v=LODKvWROkxU> (last visited on 25.06.2020).

462 Epiney (17.12.2018), supra note 405, para. 18.

463 See the public hearing of 15 January 2019 for the Economic Affairs and Taxation Committee of the National Council, at 1 hour and 11 minutes: <https://www.youtube.com/watch?v=LODKvWROkxU> (last visited on 25.06.2020).

464 Art. 10 para. 6 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

proportionality of this measure can be challenged before the Joint Committee and subsequently before the arbitration body.[465] From the wording of Article 10(7) of the Draft Institutional Framework Agreement, it is not clear if the proportionality of a measure can be referred to the CJEU.[466] According to Article 10(7) of the Draft Institutional Framework Agreement, the arbitration body seems to be responsible for assessing the proportionality of a measure without referral to the CJEU (comparable to the situation for preliminary reference procedures under Article 267 TFEU). The explanatory report of the Swiss Government shares this opinion.[467] This question is however not explicitly addressed. Art III.9 of Protocol 3 to the Swiss-EU Draft Institutional Framework Agreement simply refers to Article 4 and Article 10 thereof for the invocation of the arbitration body. Even if a referral were allowed in a situation such as this, it would not be sensible because only the proportionality of the measure and not the interpretation of EU law is at stake,[468] unless one argued that ‘proportionality’ is a matter of EU law. A comparison with the internal market case law (preliminary reference procedures under Article 267 TFEU) shows that the proportionality of a measure is left to the national courts and not necessarily linked to EU law (even if ‘proportionality’ is also a general principle of EU law).[469]

2.3.3.5.3 Technical aspects and functioning of the dispute settlement mechanism

The registry of the Permanent Court of Arbitration functions as a secretariat for dispute settlement procedures.[470] The notification to initiate an arbitration procedure may involve a statement as to whether the case should be referred to the CJEU.[471] The arbitration body consists of three arbitrators, and five if requested by one of the Contracting Parties.[472] Each

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465 Art. 10 para. 7 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

466 See the public hearing of 15 January 2019 for the Economic Affairs and Taxation Committee of the National Council, at 2 hours and 41 minutes: <https://www.youtube.com/watch?v= LODKvWROkxU> (last visited on 25.06.2020).

467 Swiss Confederation, supra note 182, p. 3. and Annexes C.1 and C.2.

468 Same opinion: Tobler & Beglinger, supra note 186, question 121.

469 See e.g. Case C-217/19, *Commission v Finland*, ECLI:EU:C:2020:291, para. 67 or ‘the principle of proportionality’: Case C-438/05, *Viking*, ECLI:EU:C:2007:772, para. 46 et seq.

470 Art. I.1 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

471 Art. I.4 para. 4 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

472 Art. II.1 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

of the Contracting Parties elects one arbitrator or two arbitrators if there is an arbitration body with five arbitrators. The last and presiding arbitrator is then elected by these two (respectively four) arbitrators.[473] The horizontal Joint Committee will publish a list of recommended arbitrators.[474] Unlike the corresponding Article 253 TFEU for the election of the CJEU's judges, and unlike Article 171(2) of the Withdrawal Agreement for Brexit, Art II.2 of the Draft Institutional Framework Agreement does not exclude the appointment of government officials. In this context, Baudenbacher remarks that this rule is unusual and would diminish the reputation of the arbitration body.[475] Further, the ad-hoc nature of the arbitration body without experienced staff trained in EU law would in his opinion leave no room for refusal if asked to refer a case to the CJEU.[476] This argument of the ad-hoc nature of the arbitration body without experienced staff is not without merit, but does not take into account that the EFTA Court was a court without any cases in its early stages, after its reduction to three EEA EFTA States, and the fact that it was not made up only of judges with experience in EU law.[477]

The arbitration body decides whether it is competent.[478] The arbitration body may refer a case at any point of the arbitration procedure to the CJEU if the factual circumstance and the legal problems can be assessed.[479] The procedure is suspended during a referral to the CJEU.[480] As shown above, both Contracting Parties may ask the arbitration body for a referral to the CJEU but the decision lies with the arbitration body.[481] The arbitration body may not

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473 Art. II.2 para. 2 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

474 Art. II.2 para. 3 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

475 Baudenbacher, supra note 168, p. 26 et seq.

476 Baudenbacher, supra note 168, p. 28 et seq.

477 See C. Baudenbacher, *Judicial independence: Memoirs of a European Judge,* Cham (2018), p. 45 et seq.

478 Art. III.6 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

479 Art. III.9 para. 2 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

480 Art. III.9 para. 2 sentence 2 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

481 Art. III.9 para. 3 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

grant interim measures.[482] Its decision-making is based on the majority of the votes if a unanimous decision cannot be reached.[483] The decision is published.[484]

2.3.3.5.4 Termination of the Draft Institutional Framework Agreement

For the Bilaterals I (the first package of bilateral I agreements), a Guillotine clause applies. If Switzerland or the EU terminated one of the agreements in Bilaterals I, all the agreements in that package would cease to apply.[485]

Compared to other sectoral agreements, a slightly nuanced termination clause was included in the Draft Institutional Framework Agreement. According to its Article 22(2), the Contracting Parties may terminate the Agreement by notification. The Draft Institutional Framework Agreement and all future market access agreements would cease to apply within six months of the notification. Switzerland and the EU would then commence a consultation phase in the Joint Committee. If that consultation were not to be successful within three months, the existing five market access agreements, covered by the agreement, would be terminated within an additional six months. The other two agreements of the Bilaterals I package (public procurement and scientific and technological cooperation) would then also be terminated due to the Guillotine clause in the agreements in Bilaterals I.[486]

The aim of the Guillotine clause is to avoid cherry picking. From a political perspective, it might be questionable whether the Guillotine clause in Article 10(6) in Bilaterals I and the new Guillotine clause in Article 22(2) of the Draft Institutional Agreement are necessary in this form now that there is a dispute settlement mechanism which allows the suspension of an agreement as a retaliation measure which has *de facto* similar consequences.[487] Even if there are similarities, the suspension of an agreement is however distinct from a termination

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[482] Art. III.10 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

[483] Art. IV.1 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

[484] Art. IV.2 para. 4 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

[485] See Art. 25(3) and (4) AFMP.

[486] Same opinion: M. Ambühl & D. S. Scherer, 'Zum Entwurf des Institutionellen Abkommens: Auf der Suche nach einem Interessenausgleich', Jusletter 4 February 2019, para. 13 who argues that the Dublin and Schengen Agreement would also be terminated in such a scenario as they would have no purpose without rules on free movement of persons.

[487] Ambühl & Scherer (04.02.2019), supra note 486, para. 14; T. Gafafer, 'Die ewige Guillotine: Die neue Klausel im EU-Rahmenvertrag ruft Kritik hervor', *NZZ,* 26 October 2020, p. 7.

since the suspension addresses violations an agreement and not its termination. From a legal perspective, it should also be noted that the suspension of an agreement is inter alia already permissible under the rules of public international law if a Contracting Party is of the opinion that an agreement is violated.[488] It should further be mentioned that even if the AFMP is terminated, acquired rights under the AFMP are protected.[489]

488 See for possible measures that States can use for breaches of international law: Aust, Cambridge, supra note 68, p. 391 et seq.

489 See Art. 23 AFMP and Chapter 6.7.3.

2.4 Conclusion to Chapter 2

The integration process between Switzerland and the EU is also called 'the bilateral path'. This bilateral path, which has caused several controversies, consists of a complex web of over 100 so-called bilateral agreements. Whilst the *acquis suisse* is limited in its scope, the EU and its Member States have pushed the evolution of the internal market. The current challenges of the relationship between Switzerland and the EU are ongoing and there is no clear outcome. Several popular initiatives have been launched in Switzerland, which could have stopped the bilateral path. Even though the negotiations have come to a halt because the Draft Institutional Framework Agreement was under public consultation in Switzerland in spring 2019, the EU is interested in an evolution of the patched framework. The Draft Institutional Framework Agreement is the result of long-standing negotiations between Switzerland and the EU. It seems that the compromise may prove difficult to accept for many Swiss people, as it crosses some of the predefined red lines (without the classic divide between right and left-wing politicians[490]). Even supporters of the Draft Institutional Framework Agreement required some clarifications. Moreover, this institutional overhaul for the bilateral agreements would largely depend on the support of the Swiss population as it can be seen that direct democracy and sovereignty are essential principles in Switzerland from many recent popular initiatives. To guarantee legal certainty and transparency, it could be clarified before adoption which concepts of the Citizens' Rights Directive are relevant for further updates. In addition to the crossing of red lines, there is also opposition to the competence of the CJEU as it is considered by some as a court of the 'opposite side'.[491] Considering the extent of the foreseen 'reference procedure', the Draft Institutional Framework Agreement envisages that there should be a very moderate level of guidance from the CJEU similar to the Ukrainian model.

The question whether the adoption of the Ukraine model is feasible for Switzerland is more of a political than a legal question and is ultimately left to the Swiss population to decide. This is ultimately connected to the understanding of sovereignty and how the interests of sovereignty are still guaranteed by a court of the 'opposite side'. Opposed to some earlier

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490 See D. Friedli, 'Zurück an den Anfang', *NZZ am Sonntag,* 27 September 2020, p. 13.

491 Baudenbacher, supra note 168, p. 41. This term (in German) was also used by Baudenbacher during the public hearing of 15 January 2019 for the Economic Affairs and Taxation Committee of the National Council, at 1 hour and 25 minutes: <https://www.youtube.com/watch?v=LODKvWROkxU> (last visited on 25.06.2020).

comments of the Swiss government, Switzerland would not be free to decide whether to follow or disregard the judgments of the CJEU. A traditional concept of 'sovereignty' is thus in conflict with the reference procedure to the CJEU. From the few cases brought before the CJEU, it is difficult to anticipate whether the CJEU will be treating cases from Switzerland differently compared to cases from EU Member States.

A legal question is whether the principle of effectiveness, transparency, legal security and homogeneity, are achieved or at least fostered by the new dispute mechanism. Achieving homogeneity is not only a question of interpretation but it flows inherently from the chosen structure of the judicial mechanism. In other words, to guarantee a uniform interpretation of the law and to guarantee the principle of effectiveness, a single point of interpretation is needed. This single point of interpretation could be found in the proposed dispute settlement body with guidance from the CJEU when needed. In comparison with other options for an institutional overhaul, the dispute settlement mechanism in the Draft Institutional Framework Agreement offers a form that would allow the CJEU to rule in seminal cases with regard to the market access agreements and not just in some rather random preliminary reference procedures in EU Member States. A binding solution could help to ameliorate the situation when stalemates occur in the Joint Committees. This procedure stands and falls however with the willingness of the Contracting Parties to invoke the dispute settlement mechanism and to ask for referral to the CJEU. Even if no cases are referred to the CJEU in future, the introduction of this forum could however foster the finding of compromises. Unlike the wording of the respective provision in the Withdrawal Agreement for Brexit, the dispute settlement mechanism only requires a reference to be made in unclear cases where the interpretation of EU law is at stake. Several experts are of the opinion that it is unlikely that many cases will be referred to the CJEU.

As a matter of fact, if Switzerland intends to be part of the internal market, the EU is not willing to conclude further market access agreements without guidance from the CJEU. Switzerland as the smaller of both Contracting Parties, has a strong interest in achieving legal certainty in the event that a dispute needs to be settled in the near future. The only viable alternative which would solve the interpretation of EU law concepts without direct guidance from the CJEU and which could be accepted in light of the autonomy of the EU legal order would possibly be the docking at the EFTA Court.

Another positive aspect of the Draft Institutional Framework Agreement between Switzerland and the EU is that it stabilises the relations between Switzerland and the EU with

an institutional mechanism to fall back when the Joint Committee cannot find a solution. Switzerland would thus gain legal certainty because the EU could not refuse the updating of secondary law without giving reason. This would also allow to update many technical provisions without losing so much time for their implementation. This legal certainty usually benefits the smaller Contracting Party (that is Switzerland). This could mean that the Draft Institutional Framework Agreement could lead to a more homogeneous interpretation of EU law.

On the negative side, the Draft Institutional Framework Agreement also results in many uncertainties when it comes to the updating of contested secondary law. From a political and from a technical standpoint, it will require major amendments to the AFMP. This updating process could lead to negative referendum results in Switzerland at one point, simply due to the frustration of the Swiss people at having no direct say. This could lead to the suspension of an agreement or even to the termination of all market access agreements in the end. Switzerland is however granted some form of influence by means of decision-shaping. The lack of direct influence of Switzerland is somewhat remedied by three new forms of dialogues, namely the parliamentary dialogue, the judicial dialogue between the CJEU and the Swiss Federal Court, and dialogue with the new horizontal Joint Committee, which should also foster relations and future updates of the bilateral path.

To conclude, the Draft Institutional Framework Agreement seems to be the price that Switzerland must pay in order to get access to the internal market. The 'bilateral path' reached an end in its current forms and contains deficiencies when it comes to the updating of EU law but also from a political standpoint. The EU is currently able to put pressure on Switzerland by halting the negotiations for dossiers that are not connected to each other, such as the equivalence of the framework for the Swiss stock exchange, the missing updates of the MRA between Switzerland and the EU as well as the negotiations for a public health agreement. A procedure that ends with a judgment of the CJEU seems to be the better option than the goodwill of the EU even if it means that Switzerland involves the court of the 'opposite side'.

3 Status of the Agreement on the free movement of persons (‘AFMP’)

3.1 Introduction

Chapter 2 of this study explored the institutional framework and how it might evolve or be altered in the near future. First, the past and current integration process was analysed and how Switzerland is often accused of cherry picking favourable agreements with the EU. Second, the pragmatic implementation of the initiative against mass immigration was discussed. Finally, the focus shifted to the current Draft Institutional Agreement which could influence the interpretation of multiple market access agreement, notably the Agreement on the free movement of persons (‘AFMP’).

Before going into the particularities of the AFMP, the rules of interpretation for international agreements are essential to understand the implications of the free movement provisions and also of professional recognition based on primary law and secondary law. This Chapter shall address how provisions of international agreements are interpreted and shall also address the hierarchy of norms to some extent. For this purpose, the interpretation of the Ankara Agreement shall be used as a comparison. In addition, the rulings of the Swiss Federal Court shall be observed for the AFMP. This essentially serves as a preparation for the exploration of the fundamental freedoms and professional recognition under the *acquis suisse*.

As mentioned above, the EFTA Court opted for a close dialogue with the CJEU and applies a reversed *Polydor* principle (see Chapter 2.3.1.5). The examination of the case law relating to the Ankara Agreement and the AFMP reveals that the *Polydor* case law returned under the association agreements, namely under the Ankara Agreement and the AFMP (Chapter 3.3.4). This discussion is valuable for the discussion whether the free movement and non-discrimination provisions are interpreted *per analogiam* to the internal market case law.

3.2 Interpretation of International Agreements

International agreements have to be interpreted based on the ordinary meaning to be given to their terms, namely the wording, under Article 31 of the Vienna Convention on the Law of Treaties (VCLT).[492] The Contracting Parties do however have the power to agree on a special meaning of a term (Article 31(4) VCL).[493] The legislative history of the agreement is only taken into account if the wording is unclear. Even though the EU is not a state, and therefore cannot be a party to the VCLT (see Article 1 VCLT),[494] it is still applicable to the EU because it is a mere codification of customary international law (see Article 3(b) VCLT).[495]

Under EU law, there three forms of international agreements, specifically association agreements, cooperation agreements and free trade agreements.[496] Association agreements made under Article 217 TFEU have the most far-reaching framework for rules on a relationship between a third country and the EU.[497] The CJEU's rulings in the area of association agreements are, however, ambiguous.[498] In the doctrine, three categories of agreements can be distinguished depending on the integration level: The first includes the most far-reaching agreement, the EEA Agreement, which is closely followed in the degree of integration it allows by the sectoral agreements agreed between Switzerland and the EU, as they also cover agricultural products – and so that relationship sometimes even reflects an even more profound integration than that of the EU with the EEA. The second category

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492 *Vienna Convention on the Law of Treaties (VCLT; Wiener Übereinkommen über das Recht der Verträge) of 23.05.1969,* SR 0.111.

493 See Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 35 with reference to Case C-266/16, *Western Sahara Campaign UK*, ECLI:EU:C:2018:118, para. 70.

494 Same Opinion: A. Epiney, 'Zur Bedeutung der Rechtsprechung des EuGH für Anwendung und Auslegung des Personenfreizügigkeitsabkommens', ZBJV 2005, p. 7 and footnote 13 thereof.

495 Case C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, EU:C:2010:91, para. 40 et seq.; W. Vitzthum, 'Begriff, Geschichte und Rechtsquellen des Völkerrechts', in W. Vitzthum & A. Proelß (eds.), *Völkerrecht,* Berlin (2019), § 1 para. 115.

496 Ott (2015), supra note 438, p. 7.

497 See Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400 and Tobler (2017), supra note 275, p. 211 et seq. A strict legal assessment does not determine the fate of the agreement, see N. Tezcan, *Legal constraints on EU member states as primary law makers: A case study of the proposed permanent safeguard clause on free movement of persons in the EU negotiating framework for Turkey's accession,* Diss. Leiden (2015), Leiden (2015), p. 43.

498 See the following Chapters 3.2.1, 3.2.2, 3.2.3, 3.3.4 and 3.4.1.

contains the association agreements of candidate countries, such as Macedonia,[499] and the last category is comprised of agreements with the African Caribbean and Pacific States (ACP States).[500] To conclude, academics and scholarly literature consider that the EEA Agreement is the most far-reaching association agreement to have been agreed with supranational institutions, usually followed by Switzerland's sectoral agreements.[501]

For matters where the EU does not have the (express or implied) exclusive (internal or external) competence but only shared competence to conclude an international agreement, the Member States must also be Contracting Parties to the agreement. This is defined as a mixed agreement and common for most association agreements.[502] The AFMP between Switzerland, the EU Member States, and the EU is a mixed agreement.[503] The CJEU held in its ruling *Haegemann* that the CJEU has jurisdiction to interpret mixed agreements. This shows that not only does the CJEU interpret the areas in which the EU is competent, but that the CJEU has also extended its jurisdiction to give a ruling covering the scope of the whole agreement.[504]

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499 *Council and Commission Decision concerning the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part of 23.02.2004,* OJ [2004] L84/1, 20.03.2004.

500 D. Boos, 'Art. 217 AEUV', in C. O. Lenz & K.-D. Borchardt (eds.), *EU-Verträge Kommentar: EUV, AEUV, GRCh,* Köln (2013), para. 8.

501 C. Tobler & G. S. Baur, 'Der Binnenmarkt ist kein Schweizer Käse - Zum Assoziationsabkommen der Türkei, der EWR/EFTA-Staaten und der Schweiz, insb. mit Bezug auf den EU-Binnenmarkt', in A. Epiney, M. Kern & L. Hehemann (eds.), *Schweizerisches Jahrbuch für Europarecht, 2014/2015 / Annuaire suisse de droit européen 2014/2015,* Zurich (2015), pp. 332 and 344; R. Bieber, 'Die Auslegung der Rechtsprechung des Gerichtshofs der Europäischen Union für die Auslegung völkerrechtlicher Verträge', in A. Epiney, B. Metz & R. Mosters (eds.), *Das Personenfreizügigkeitsabkommen Schweiz - EU: Auslegung und Anwendung in der Praxis,* Zurich (2011), p. 7 et seq.; S. Breitenmoser, 'Sectoral Agreements between the EC and Switzerland: Contents and Content', CMLR 2003, p. 1185.

502 Art. 2 et seq. and Art. 217 TFEU; see also F. Erlbacher, 'Art. 217 TFEU', in M. Kellerbauer, M. Klamert & J. Tomkin (eds.), *The EU treaties and the charter of fundamental rights: A commentary,* Oxford (2019), para. 45 et seq.; see further M. Oesch, *Grundlagen, Institutionen, Verhältnis Schweiz-EU,* Berne (2019), para. 786.

503 Oesch, Berne, supra note 502, para. 788 *in fine*.

504 Case 181/73, *Haegeman v Belgian State*, ECLI:EU:C:1974:41, paras. 2-6 on the Agreement of Association between the EEC and Greece; see also the *Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-431/05, Merck Genéricos Produtos Farmacêuticos*, ECLI:EU:C:2007:48, para. 33 et seq. on the TRIPs Agreement, and the *Opinion of Advocate General Sharpston in Case C-240/09, Lesoochranárske zoskupenie VLK*, ECLI:EU:C:2010:436, para. 43 et seq.

3.2.1 *Polydor* case law

Association agreements are often tailored in a similar fashion to internal market case law: they often share the same wording and terminology as that used in CJEU case law. One of the most prominent cases about the interpretation of association agreements is the *Polydor* case. The provisions that were considered in the *Polydor* case adopted the same wording as the former Article 30 and Article 36 EEC (on the free movement of goods).[505] The parties invoked the similarly worded provisions of Articles 14 and 23 of the Association Agreement with Portugal[506] to prevent the other party from relying on their intellectual property rights (parallel imports).[507] The CJEU held that the similar wording was not sufficient to transpose the case law of the internal market, but that the context is decisive.[508] This case was notably followed by the *Metalsa* case, which also interprets the case law on association agreements restrictively, and relies heavily on the context (purpose and nature) of the association agreement.[509]

In this context, the Commission stated in *Polydor* that the doctrine of direct effect is unique to EU law.[510] International agreements are however considered part of *EU law*. Certain provisions therefore have direct effect in the EU if they are sufficiently precise.[511] This reasoning can be found in the early case law:

> '[A provision] must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.'[512]

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505 Case 270/80, *Polydor*, ECLI:EU:C:1982:43, para. 14.

506 *Agreement between the European Economic Community and the Portuguese Republic,* OJ [1972] L301/165 31.12.1972.

507 Case 270/80, *Polydor*, ECLI:EU:C:1982:43, para. 5.

508 Case 270/80, *Polydor*, ECLI:EU:C:1982:43, paras. 15-17.

509 Case C-312/91, *Metalsa*, ECLI:EU:C:1993:279, para. 11.

510 Case 270/80, *Polydor*, ECLI:EU:C:1982:43.

511 See B. de Witte, 'Direct effect, primacy, and the nature of the legal order', in G. de Búrca & P. P. Craig (eds.), *The evolution of EU law,* Oxford, New York (2011), p. 336 et seq.

512 Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, para. 14.

According to established CJEU case-law, non-discrimination provisions usually have direct effect in cooperation and association agreements (even without a homogeneity rule).[513] Still, some non-discrimination provisions cannot be applied directly. A disputed example can be found in Article 2 AFMP, which is reminiscent of Article 18 TFEU[514] (see further infra note 871).[515]

3.2.2 Early case law of the CJEU on association agreements

To begin with the early case law of the CJEU, the cases *Pabst and Richarz* and *Legros* belong to this cluster of case law on association agreements where the CJEU interpreted the law in a parallel fashion to its internal market case law.[516]

The earlier case *Pabst and Richarz* concerned the Association Agreement between the EEC and Greece (‘Association Agreement with Greece’)[517]. The question was, first, whether the German tax on spirits in question was in conformity with Article 95 EEC (now Article 110 TFEU). This was answered in the negative.[518] The national court was therefore also asking whether this outcome had an impact for the identical provision in the Association Agreement with Greece.[519] The CJEU then stated why this provision has the same meaning, despite its previous restrictive rulings in *Polydor*.[520] First, the provision has the same

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513 See Case C-97/05, *Gattoussi*, ECLI:EU:C:2006:780, para. 25; Case C-265/03, *Simutenkov*, ECLI:EU:C:2005:213; Case C-162/00, *Pokrzeptowicz-Meyer*, ECLI:EU:C:2002:57; see also Ott (2015), supra note 438, p. 23 et seq.

514 Suffice to say that according to some scholars Art. 2 AFMP can in principle only be applied in conjunction with another article as it refers to the Agreement and its Annexes. The Swiss Federal Court applied the provision on its own in some cases: see infra note 871 or noted the similarity between Art. 2 AFMP and Art. 12 EC: BGer 2C_319/2009 of 26.01.2010, para. 12.

515 Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, paras. 41-42. It could also be asked whether Art. 18 TFEU applies to third-country nationals: K. Eisele, *The External Dimension of the EU's Migration Policy - Different Legal Positions of Third-Country Nationals in the EU. A Comparative Perspective,* Diss. Maastricht (2013), Oisterwijk (2013), p. 163 et seq. and p. 374.

516 Case 17/81, *Pabst und Richarz KG v Hauptzollamt Oldenburg*, ECLI:EU:C:1982:129; Case C-163/90, *Legros*, ECLI:EU:C:1992:326.

517 *Agreement establishing an Association between the European Economic Community and Greece,* OJ [1963] L26/294, 18.02.1963.

518 Case 17/81, *Pabst und Richarz KG v Hauptzollamt Oldenburg*, ECLI:EU:C:1982:129, para. 24.

519 Case 17/81, *Pabst und Richarz KG v Hauptzollamt Oldenburg*, ECLI:EU:C:1982:129, para. 15.

520 Case 270/80, *Polydor*, ECLI:EU:C:1982:43.

wording. Second, it belongs to a group of provisions that are aimed to regulate the same subject area. Finally, the provisions prepare Greece for entry into the customs union.[521]

The later case *Legros* dealt with the Agreement between the EEC and Sweden ('Association Agreement with Sweden')[522], more specifically about the taxation of cars and whether a French tax bill had been issued in violation of Article 95 EEC (now Article 110 TFEU).[523] The Court concluded that, according to its settled case law, the measure at hand did not constitute internal taxation within the meaning of that article as it was levied at the import stage. However, the CJEU found that it had an equivalent effect to a customs duty because it was proportionate to its value (Article 3, Article 9 and Article 13 EEC, now Article 34 TFEU).[524] By its third question the national court was asking whether that interpretation could be transposed to the Association Agreement with Sweden, which was similarly worded. The Court held that, despite its ruling in *Polydor*, identical provisions must be analysed in the light of the objective and the purpose of the agreement in question and its context. It stated that otherwise the preamble and the *effet utile* would be deprived of effect by the article.[525] The second part of the ruling demonstrates how far the Association Agreement with Sweden pushed for integration. The principle of effectiveness is typically raised in the interpretation of *internal market case law* but not for interpretations pursuant to the Vienna Convention on the Law of the Treaties.

3.2.3 Return to the *Polydor* case law under the AFMP

Some authors argue that – as part of the context – the form of integration referred to above, notably future accession to the EU, is decisive when interpreting international agreements.[526] In contrast, Advocate General Pergola argues, at least with regard to the Association Agreement with Turkey (the 'Ankara Agreement')[527], that it should not be interpreted differently due to the possible future accession of Turkey. He agrees however, in

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521 Case 17/81, *Pabst und Richarz KG v Hauptzollamt Oldenburg*, ECLI:EU:C:1982:129, para. 26 et seq.

522 *Agreement between the European Economic Community and the Kingdom of Sweden,* OJ [1972] L300/97, 31.12.1972.

523 Case C-163/90, *Legros*, ECLI:EU:C:1992:326, paras. 10.

524 Case C-163/90, *Legros*, ECLI:EU:C:1992:326, paras. 11-13.

525 Case C-163/90, *Legros*, ECLI:EU:C:1992:326, paras. 23-26.

526 Tobler, supra note 7, p. 102 for further references; Bieber, supra note 501, p. 12 et seq.

527 Ankara Agreement (see for the full citation supra note 52).

conformity with the *Polydor* principle, that it is not the mere wording but the context that is decisive.[528] While it is true that the CJEU has repeatedly referred to the aim of the Ankara Agreement,[529] the CJEU has also stated that it will treat future accessions differently on certain occasions.[530]

What can be said about the sectoral agreements between Switzerland and the EU is interesting: some authors argue that the CJEU does not accept the concept of an ‘integration agreement’ for the AFMP.[531] Tobler already predicted in 2006, in light of the case *Fidium Finanz*[532], that the CJEU would return to its *Polydor* case law for the bilateral agreements between Switzerland and the EU (the ‘Bilaterals’).[533] As mentioned above, the CJEU held in *Polydor* and *Metalsa* that the case law of the internal market cannot simply be transposed to association agreements based on the sole fact that they have the same wording.[534] Thus, it can be concluded that the same wording of two provisions can have a different meaning depending on *the context*.

In the CJEU’s case law, it first explicitly mentioned an interpretation in the light of the *Polydor* case law in the case *Grimme*,[535] which can also be explained by the rather straightforward questions that the referring court submitted.[536] Tobler points out that the level of integration was not decisive in the CJEU’s reasoning in *Grimme*, but only used as a further argument by the CJEU, even though it was unnecessary.[537] The Swiss Government argued

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528 *Opinion of Advocate General La Pergola in Case C-262/96, Sürül*, ECLI:EU:C:1998:55, para. 10.

529 Case 270/80, *Polydor*, ECLI:EU:C:1982:43, para. 16.

530 Case C-416/96, *Eddline El-Yassini*, ECLI:EU:C:1999:107, paras. 49 et seq. and 58 et seq.; Case 17/81, *Pabst und Richarz KG v Hauptzollamt Oldenburg*, ECLI:EU:C:1982:129, para. 26.

531 L. M. Baudenbacher, ‘Das Personenfreizügigkeitsabkommen EU-Schweiz ist doch kein Integrationsvertrag’, ELR 2010, No 2, p. 37.

532 Case C-452/04, *Fidium Finanz*, ECLI:EU:C:2006:631.

533 C. Tobler, ‘Die Fidium Finanz-Entscheidung des EuGH: Ein Vorbote der Luxemburger Rechtsprechung zum bilateralen Recht?’, SRIEL (SZIER/RSDIE) 2006, pp. 397–401.

534 Case 270/80, *Polydor*, ECLI:EU:C:1982:43, paras. 14-16; see further Oesch & Speck, supra note 15, p. 264; C. Tobler, ‘Die EuGH-Entscheidung Grimme - Die Wiederkehr von Polydor und die Grenze des bilateralen Rechts’, in A. Epiney & N. Gammenthaler (eds.), *Schweizerisches Jahrbuch für Europarecht 2009/2010 / Annuaire suisse de droit européen 2009/2010,* Zurich (2010), p. 369 et seq.

535 Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, ECLI:EU:C:2009:697, para. 29.

536 Tobler, supra note 534, p. 381 et seq.

537 Tobler, supra note 534, p. 379.

that the *Polydor* principle applied to the Bilaterals and explicitly mentioned that principle in an explanatory report of 2019 for the Draft Institutional Framework Agreement.[538]

However, the *Polydor* case law is not explicitly mentioned in many of the CJEU's landmark cases and one could make the argument that the *Polydor* principle does not necessarily reflect the CJEU's standpoint towards Switzerland as such.[539] This can be witnessed by a more dynamic interpretation, as suggested in the recent Opinion of Advocate General Wathelet for the Grand Chamber case of *Wächtler*. He argued that any other interpretation would go against the 'spirit' of the AFMP.[540]

Some authors suggest that the situation might have improved if the courts of third countries, notably the Swiss Federal Court, had not been so restrictively in their early case law and that it caused the return of the *Polydor* case law (for example in the previously mentioned *Omo* case[541]).[542] This seems to be the reason why the EFTA Court placed importance on a homogenous interpretation, even if that was through a creative and result-oriented interpretation, and even if that meant contradicting CJEU jurisprudence to achieve the same level of protection (the so-called *reversed Polydor* principle[543]).

Even without stressing a particular homogeneity rule, a straightforward approach to the parallel interpretation of association agreements with internal market case law is demonstrated in the case *Commission* v *Austria,* concerning the EEA Agreement and freedom of movement for workers.[544] The CJEU in that case highlighted that the case was similar to an earlier ruling, *Wählergruppe Gemeinsam*,[545] and that there was nothing to prevent making an *analogy* between the non-discrimination provisions in the Ankara Agreement, the Poland

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538 Swiss Confederation, supra note 182, p. 7 et seq.

539 See Tobler, supra note 534, p. 380 et seq. for further references.

540 *Opinion of Advocate Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 66.

541 See BGE 105 II 49.

542 Baudenbacher (2012), supra note 15, p. 530 et seq.; Baudenbacher, supra note 132, p. 15; Tobler, supra note 7, p. 102 for a further reference; T. Cottier & N. Diebold, 'Warenverkehr und Freizügigkeit in der Rechtsprechung des Bundesgerichts zu den Bilateralen Abkommen: Zur Anwendung und Auslegung von nachvollzogenem Recht und Staatsverträgen unterschiedlicher Generation', Jusletter 2 February 2009, para. 37.

543 Tobler (2018), supra note 304, p. 1448.

544 Case C-465/01, *Commission v Austria*, ECLI:EU:C:2004:530.

545 See Case C-171/01, *Wählergruppe Gemeinsam*, ECLI:EU:C:2003:260.

Agreement,[546] the EEA Agreement and the TFEU. The CJEU openly uses the term 'analogy' in *Commission* v *Austria* to describe the incorporation of the non-discrimination principle found in Article 12 EC (now Article 18 TFEU) and Article 8(1) of Regulation No 1612/68/EEC to Article 28(2) of the EEA Agreement.[547] It restates that they have similar wording, and that the interpretation is clear from the context and the purpose of the EEA Agreement. The argument of the Austrian Government, that the CJEU interpreted Article 8(1) of Regulation No 1612/68/EEC as exclusively forming part of EU law, was rejected. It was held that the underlying principle of non-discrimination, which constitutes primary law, cannot be determined by the interpretation of secondary law.[548] Finally, it highlighted that an adequate non-discrimination law framework could only be achieved through the same interpretation of 'conditions at work' applied, due to the 'broad logic' of the EEA Agreement.[549]

This reasoning can also be seen in a very recent ruling relating to the EEA Agreement. On 2 April 2020, the CJEU even emphasised in a Grand Chamber judgment in the case *Ruska Federacija* that the reasoning of the judgment *Petruhhin*[550] based on Articles 18 and 21 TFEU must be applied by *analogy* to Article 36 EEC despite the fact that Union citizenship does not form part of EEA law. In the case *Petruhhin*, the CJEU found that extradition agreements concluded with a third country must also be applied for nationals of other EU Member States.[551] The CJEU also referred to the aim of the EEA Agreement in the legal context section of the *Ruska Federacija* ruling which is to create a homogenous European Economic Area.[552] The emphasis of the CJEU on the *context and the aim* of an agreement shall be further discussed under the Ankara Agreement in the next Subchapter, even if the *Polydor* case law was not explicitly mentioned until the more recent case law.

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546 *Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part,* OJ [1993] L348/2, 31.12.1993.

547 Case C-465/01, *Commission v Austria*, ECLI:EU:C:2004:530, paras. 47 and 52 et seq.

548 Case C-465/01, *Commission v Austria*, ECLI:EU:C:2004:530, paras. 43 and 51.

549 Case C-465/01, *Commission v Austria*, ECLI:EU:C:2004:530, para. 53.

550 Case C-182/15, *Petruhhin*, ECLI:EU:C:2016:630.

551 Case C-897/19, *Ruska Federacija*, ECLI:EU:C:2020:262, para. 75; see further M. Schmauch, *Op-Ed: "EEA nationals enjoy the same protection as EU citizens when they exercise the freedom of movement",* <https://eulawlive.com/op-ed-eea-nationals-enjoy-the-same-protection-as-eu-citizens-when-they-exercise-the-freedom-of-movement-by-magnus-schmauch/> (last visited on 25.06.2020).

552 Case C-897/19, *Ruska Federacija*, ECLI:EU:C:2020:262, para. 4.

3.3 The Ankara Agreement as an example for a mostly progressive interpretation of association agreements

Despite the fact that the Ankara Agreement 'pursues a solely economic purpose'[553] and represents a low level of integration, a very progressive interpretation can be seen in many judgments. The aim of this agreement between Turkey and the EU is:

> 'to promote the continuous and balanced strengthening of trade and economic relations between the contracting parties which includes, in relation to the workforce, the progressive securing of freedom of movement for workers (…) and facilitating the accession of Turkey to the Community (now: the Union) at a later date (…).'[554]

The accession of Turkey is divided into three stages, described in Article 2(3) of the Ankara Agreement as a preparatory stage, a transitional stage and a final stage.[555] The Preamble in recital one and two states:

> 'DETERMINED to establish ever closer bonds between the Turkish people and the peoples brought together in the European Economic Community; RESOLVED to ensure a continuous improvement in living conditions in Turkey and in the European Economic Community through accelerated economic progress and the harmonious expansion of trade, and to reduce the disparity between the Turkish economy and the economies of the Member States of the Community; (…).'

The Preamble and Article 2 show the profound degree of integration that was intended. Despite the unsuccessful negotiations and a lack of implementation of the Ankara Agreement by the Association Council (consisting of representatives of the Council and of the government of the associate state[556]), the CJEU has interpreted the Ankara Agreement, the Additional Protocol and the Decisions in a similar way to its internal market case law.[557] It is noteworthy to discuss the cases based on Decisions No 1/80 and No 3/80 to make a comparison with the AFMP. Decisions No 1/80 and No 3/80 form an integral part of the Ankara Agreement pursuant to Article 39 of that agreement.

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[553] Case C-371/08, *Nural Ziebell v Land Baden-Württemberg*, ECLI:EU:C:2011:809, para. 64; see further Chapter 3.3.4; see further Tezcan, Leiden, supra note 497, p. 100 et seq.

[554] Art. 2(1) of the Ankara Agreement.

[555] See further Tezcan, Leiden, supra note 497, pp. 43 et seq. and 56; Eisele, Oisterwiijk, supra note 515, p. 186 et seq.

[556] Tezcan, Leiden, supra note 497, p. 38 and footnote 151 as opposed to association committees which are consisting of Commission officials senior civil servants of the associate state.

[557] See e.g. Case C-171/01, *Wählergruppe Gemeinsam*, ECLI:EU:C:2003:260.

In 1970, the Additional Protocol (AP) was agreed upon as a part of the transitional stage.[558] Article 12 of the AP (free movement of workers) does not have direct effect. Turkish migrant workers do not have a right to entry and only have the limited rights that are referred to in the Ankara Agreement, the AP, and most importantly in Decisions No 1/80 and No 3/80.[559]

That being said about association agreements, it is remarkable to note that Decision No 1/80[560] has been interpreted in a very progressive way. The Court held that the provisions of the Ankara Agreement and the Decisions of the Association Council have to be interpreted in the light of the internal market provisions.[561] Furthermore, the CJEU acknowledged that many provisions in Decision No 1/80 are self-executing and can be applied directly.[562] Article 12 of the AP (free movement of workers) was held not to have direct effect,[563] but Article 37 of the AP (which prohibits discrimination on the grounds of nationality between Turkish workers and EU nationals concerning conditions of work and remuneration), the standstill clause in Article 41(1) of the AP (which forbids the introduction of new restrictions of the freedom of establishment and the freedom to provide services), and Article 59 of the AP (preventing more favourable treatment of Turkey than other Member States) were held to be directly applicable.[564] Finally, it was ruled that the non-discrimination provisions are self-executing (Article 9 of the Ankara Agreement and Article 3(1) of Decision No 3/80).[565] The CJEU also emphasised the standstill clause in Article 41(1) of the AP, which exclusively applies to rights in the AP. In *Soysal,* the standstill clause precluded the insertion of more stringent visa requirements for Turkish nationals.[566]

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558 *Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force - Final Act - Declarations (AP),* OJ [1972] L293/3 P, 29.12.1972.

559 See Eisele, Oisterwiijk, supra note 515, p. 187 et seq. and p. 246 et seq.

560 *Decision No 1/80 of the Association Council on the development of the Association of 19.09.1980,* not published.

561 E.g. Case C-171/01, *Wählergruppe Gemeinsam*, ECLI:EU:C:2003:260.

562 E.g. Case C-36/96, *Günaydin*, ECLI:EU:C:1997:445, para. 24.

563 Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, para. 25.

564 Case C-325/05, *Derin*, ECLI:EU:C:2007:442, paras. 37 and 59.

565 Case C-262/96, *Sürül*, ECLI:EU:C:1999:228, para. 64.

566 Case C-228/06, *Soysal and Savatli*, ECLI:EU:C:2009:101.

3.3.1 Rights of Turkish workers

The most remarkable rights that Turkish workers have been granted are set out in Article 6 of the Ankara Agreement despite the fact that no right of free movement was established. A worker has the right to renew his permit after one year of employment in the EU if the renewal is to work with the same employer, the right to respond to another offer of employment after three years of employment in the EU, but for which EU workers have priority, and then finally, a worker has free choice, namely the job market is completely accessible to him, after four years of lawful employment in the EU. The worker's family members have a right to respond to any offer after three years of lawful employment, and have free access to the employment market after five years (Article 7 of the Ankara Agreement).

In the case *Derin,* the CJEU stated that Mr Derin had a right to stay in the EU, as a worker, based on the first paragraph of Article 7 of Decision No 1/80 of the Association Council, even though he was only a child when he was allowed to enter Germany.[567] The only way he could lose his rights was set out in Article 14(1) of Decision No 1/80 of the of the Association Council. Article 14 resembles the former Directive 64/221 (now (the Union Citizenship) Directive 2004/38).[568] A Turkish worker can only lose his residence rights on grounds of public policy, public security or public health, or if he leaves the territory for a significant period of time without a legitimate reason. Most importantly, the CJEU held that Article 59 of the AP had been infringed because Decision No 1/80 had some shortcomings in comparison with Regulation No 1612/68/EEC.[569] However, it is noteworthy that the CJEU showed that it was well aware that they were similar. In *Wählergruppe Gemeinsam,* the national court asked whether Article 10(1) of Decision No 1/80 precludes a Member State from excluding Turkish workers from participating in a general assembly of workers. Article 10 is reminiscent of Article 8(1) of Regulation No 1612/68/EEC. The CJEU first referred to the doctrine of direct effect. Second, it stated that the underlying principle of non-discrimination is broad and not exclusively reserved to Article 8 of Regulation No 1612/68/EEC, even if it only relates to working conditions, because secondary law cannot

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[567] Case C-325/05, *Derin*, ECLI:EU:C:2007:442, para. 48.

[568] Case C-325/05, *Derin*, ECLI:EU:C:2007:442, para. 54.

[569] Case C-325/05, *Derin*, ECLI:EU:C:2007:442, para. 58 et seq.

influence the interpretation of primary law. Thus, the same principle of non-discrimination applied in the case at hand. The workers were therefore discriminated against.[570]

3.3.2 Decision No 1/80 of the Association Council

National law concerning permits for residence is certainly not decisive when relying on Decision No 1/80. This was confirmed by a series of judgments including *Bozkurt*, *Pehlivan*, *Hakan Er*, *Genc*, *Toprak*, *Kurz*, *Ertanir, Sahin* and *Ergat*.[571] In addition, 'worker' in Article 6(1) of Decision No 1/80 was held as having the same meaning as in Article 45 TFEU.[572] In other comparisons, imprisonment does not suffice for expulsion, but there needs to be a risk to public policy, public security or health,[573] and abuse of rights is definitely excluded, but interpreted very narrowly.[574]

Another comparison is that a worker who has a job financed by public funds is considered to be a worker if his work is 'genuine and effective'.[575] Nevertheless, the conditions of Article 6 of Decision No 1/80 still have to be fulfilled.[576] For those who are unemployed, a Turkish national is still considered to be a worker if he or she has been seeking employment for a reasonable amount of time, which is held to be around six months.[577] Decision No 1/80 even has horizontal effect in some cases.[578]

To conclude, Decision No 1/80 has been interpreted almost *identically* to the internal market case law. It is only the reliance on the free movement of workers that is a more

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570 Case C-171/01, *Wählergruppe Gemeinsam*, ECLI:EU:C:2003:260, paras. 54 and 94.

571 Case C-303/08, *Bozkurt*, ECLI:EU:C:2010:800; Case C-484/07, *Pehlivan*, ECLI:EU:C:2011:395; Case C-453/07, *Er*, ECLI:EU:C:2008:524, Case C-14/09, *Hava Genc v Land Berlin*, ECLI:EU:C:2010:57; Joined Cases C-300/09 and C-301/09, *Toprak and Oguz*, ECLI:EU:C:2010:756; Case C-188/00, *Kurz*, ECLI:EU:C:2002:694; Case C-98/96, *Ertanir*, ECLI:EU:C:1997:446; Case C-551/07, *Sahin*, ECLI:EU:C:2008:755; Case C-329/97, *Ergat*, ECLI:EU:C:2000:133.

572 Case C-14/09, *Hava Genc v Land Berlin*, ECLI:EU:C:2010:57, paras. 18-19; see further Eisele, Oisterwiijk, supra note 515, p. 247 et seq.

573 Case C-136/03, *Dörr and Ünal*, ECLI:EU:C:2005:340; Case C-373/03, *Aydinli*, ECLI:EU:C:2005:434; Case C-386/95, *Eker*, ECLI:EU:C:1997:257; Case C-340/97, *Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg*, ECLI:EU:C:2000:77; see also Tezcan, Leiden, supra note 497, p. 69 et seq.

574 Case C-285/95, *Kol v Land Berlin*, ECLI:EU:C:1997:280.

575 Case C-1/97, *Birden*, ECLI:EU:C:1998:568, para. 69.

576 Case C-4/05, *Güzeli*, ECLI:EU:C:2006:670.

577 Case C-171/95, *Tetik v Land Berlin*, ECLI:EU:C:1997:31.

578 Case C-152/08, *Real Sociedad de Fútbol and Kahveci*, ECLI:EU:C:2008:450, paras. 28-30.

difficult issue, as Turkish nationals have to be employed for four years before the job market is fully open to them, or wait five years to gain the preferable long-term residence ('LTR') status.[579] Most of the provisions are interpreted in the light of EU law without a rule of interpretation considering a parallel legal order. The CJEU's rulings in this context can be described as 'proactive'.[580]

3.3.3 Decision No 3/80 of the Association Council

A more nuanced example illustrates Article 3 of Decision No 3/80 of the Association Council.[581] Despite the fact that the Association Council[582] has not issued a decision[583] to implement the coordinating provisions of social security law, the distinction between technical and non-technical provisions has been narrowed in *Sürül* and *Akdas* in comparison with *Teflan-met*, as a result of a very progressive interpretation.[584] Only the provisions concerning social security coordination lack direct effect due to their technicality.[585] This is not different in the internal market. Thus, it is clear that most non-discrimination provisions are interpreted in the same fashion as in the internal market. The question remains as to what element determines whether EU law should be used as a source of interpretation, and which concepts can be transferred to the Ankara Agreement.

The aforementioned cases illustrate that the *aim and the context* of an agreement is decisive to interpret and analyse an association or a cooperation agreement. Although

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579 Art. 5 of *Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents of 25.11.2003,* OJ [2004] L16/44, 23.01.2004.

580 See Eisele, Oisterwiijk, supra note 515, p. 188.

581 *Decision No 3/80 of the Association Council of 19 September 1980 on the Application of the Social Security Schemes of the Member States of the European Communities to Turkish workers and members of their families,* not published.

582 The Association Council was established in accordance with Art. 6 of the Ankara Agreement. It has the task to 'ensure the implementation and the progressive development of the Association'. It has not passed all legal instruments that it should have in accordance with Decisions No 1/80 and No 3/80. This task is also difficult because unanimity is required.

583 The Association Council can issue a decision under Art. 22(1) of the Ankara Agreement; see further European Commission, *Proposal for a Council Decision on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey with regard to the provisions on the coordination of social security systems (COM/2012/0152 final)*.

584 Case C-485/07, *Akdas*, ECLI:EU:C:2011:346, para. 67.

585 Case C-485/07, *Akdas*, ECLI:EU:C:2011:346, para. 70.

agreements may be similarly worded, they might not share the same meaning. Therefore, it is essential to bear in mind the purpose of the agreement in question.

3.3.4 Return of the *Polydor* principle under the Ankara Agreement and other less progressive interpretations of the Ankara Agreement

The above cited progressive case law under the Ankara Agreement should not disguise the fact there have been some more recent examples where the CJEU has been more critical in its interpretation of the Ankara Agreement. While it acknowledged that the standstill clause (which forbids the introduction of new restrictions of the freedom of establishment and the freedom to provide services) forbids any form of ‘restriction’,[586] it applied the logic of the internal market case law to the standstill clauses.[587].[588] In the cases *Demir* and *Dogan*, it held that violations of the standstill clause can be justified by overriding reasons in the public interest.[589] In addition, many provisions of the Ankara Agreement lack direct effect.[590] It also denied the protection of those receiving services under the Ankara Agreement in the case *Demirkan*.[591] The CJEU definitely applied the logic of the *Polydor* principle in the cases *Ziebell*[592] and *Demirkan*[593].[594] The latter judgment explicitly refers to the *Polydor* case and the *Hengartner and Gasser* case, which denied the protection of those receiving services under the AFMP.[595] Academic literature however questioned whether the CJEU’s view that the Ankara Agreement is purely economic in nature is convincing considering the aim of the agreement.[596] It was also titled as a surprise considering the earlier case law of the CJEU.[597]

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586 E.g. Case C-225/12, *C. Demir v Staatssecretaris van Justitie*, ECLI:EU:C:2013:725, para. 34; see further C. Tobler & J. Beglinger, *Grundzüge des bilateralen (Wirtschafts-)Rechts Schweiz – EU: Band 1, Text,* Zurich (2013), para. 191; see further Tezcan, Leiden, supra note 497, p. 77 et seq.

587 There are two standstill clauses in Art. 13 of Decision No 1/80 and 41 para. 1 of the Additional Protocol.

588 See Tezcan, Leiden, supra note 497, p. 85 et seq.

589 Case C-225/12, *C. Demir v Staatssecretaris van Justitie*, ECLI:EU:C:2013:725, para. 40; Case C-138/13, *Naime Dogan v Germany*, ECLI:EU:C:2014:2066, para. 37.

590 Eisele, Oisterwiijk, supra note 515, p. 188 for further references.

591 Case C-221/11, *Leyla Ecem Demirkan v Germany*, ECLI:EU:C:2013:583; see also Tobler, supra note 7, p. 102 for further references.

592 Case C-371/08, *Nural Ziebell v Land Baden-Württemberg*, ECLI:EU:C:2011:809, para. 61.

593 Case C-221/11, *Leyla Ecem Demirkan v Germany*, ECLI:EU:C:2013:583, para. 44.

594 Same opinion: Tobler, supra note 7, p. 112 et seq.; Eisele, Oisterwiijk, supra note 515; p. 372.

595 Case C-221/11, *Leyla Ecem Demirkan v Germany*, ECLI:EU:C:2013:583, para. 44.

596 Eisele, Oisterwiijk, supra note 515, p. 261.

597 Tezcan, Leiden, supra note 497, p. 70.

Further, it was analysed in legal literature that a further development of the Ankara Agreement can only be accomplished by introducing new Association Council decisions or by drafting a *homogeneity* clause.[598]

To sum, up the *Polydor* case has undoubtedly been revived for the purpose of the Ankara Agreement which could indicate an interpretation in the light of the *Polydor* principle for other association agreements as well. This shall be investigated in the next Subchapter.

3.4 Rules of interpretation under the AFMP and the applicability of EU law in Switzerland

3.4.1 CJEU case law on the interpretation of the AFMP

The CJEU's case law on the interpretation of the AFMP got off to a bad start because the Court of Justice and the General Court of the European Union both adopted a narrow view of it in two of the first important judgments they ruled on concerning the sectoral agreements. The first case dealt with the Air Transport Agreement. German air traffic regulations were amended under national law. The General Court was asked whether these measures were in conformity with the general principles of non-discrimination and proportionality, and whether they formed part of the Air Transport Agreement. There was also the procedural admissibility issue of Switzerland's standing before the General Court. The Advocate General in the case proposed a narrow interpretation of the Air Transport Agreement, in the light of the VCLT.[599] The General Court held that the German rules did not violate the non-discrimination provision (Article 3 of the Air Transport Agreement). The Court also emphasised that the measure would in any case be justified by an overriding reason in the public interest. The Court however did not answer the question of whether the agreement also covers restrictions.[600] The CJEU upheld this decision.[601] This outcome is noteworthy as the Air Transport Agreement aims at the most profound level of integration of the seven agreements in the first Bilaterals package, including access to the General Court and to the

[598] Ott (2015), supra note 438, p. 28.

[599] *Opinion of Advocate General Jääskinen in Case C-547/10 P, Switzerland v Commission*, ECLI:EU:C:2012:565, para. 36.

[600] See Case T-319/05, *Switzerland v Commission*, ECLI:EU:T:2010:367.

[601] Case C-547/10 P, *Switzerland v Commission*, ECLI:EU:C:2013:139.

CJEU.[602] It can be seen as a return to the *Polydor* case law.[603] Kläser points out that this narrow reading of the Air Transport Agreement seems to go against the Commission's political plans for future relations between Switzerland and the EU.[604]

The second deviation from the internal market jurisprudence occurred in *Hengartner and Gasser* when the CJEU stated that because of the limited scope of the agreement, receivers of services are not protected (see below Chapter 3.4.2 for a discussion of those cases; see also for similar decisions under the Ankara Agreement: Chapter 3.3.4).[605] The case *Hengartner and Gasser* refers to the case *Grimme*, which cited the *Polydor* jurisprudence but it is not fully comparable because the CJEU simply refused to acknowledge that the freedom to receive services is protected under the scope of the agreement in that case at all. This line of reasoning was also used by the Swiss Federal Court in several cases about receivers of services (see Chapter 4.1.2 below). As a general rule, if the provisions are not intended to protect receivers of services, a rule of interpretation, as provided in Article 16(2) of the AFMP, cannot come into play.[606] The CJEU explicitly stated that the interpretation of internal market provisions 'cannot be automatically applied by analogy to the interpretation of the Agreement [on the free movement of persons], unless there are express provisions to that effect laid down by the Agreement itself.'[607]

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[602] Switzerland is not considered to be a Member State in the Agreement Air Transport and can therefore not directly rely on Article 259(1) TFEU; R. Dettling-Ott, 'Das bilaterale Luftverkehrsabkommen zwischen der Schweiz und der EG', in D. Thürer et al. (eds.), *Bilaterale Verträge I & II Schweiz - EU: Handbuch,* Zurich (2007), p. 498 et seq.; see also Tobler (2016), supra note 180, p. 583, with reference to a restrictive judgment of a Swiss district court, which does not take into account the CJEU's case law after the date of signature of the agreement. It should however be noted that it is only the AFMP that contains a rule of interpretation in the sense of Art. 16(2) AFMP.

[603] L. M. Baudenbacher, 'EuGH überträgt die Polydor-Rechtsprechung auch auf das Luftverkehrsabkommen', ELR 2015, No 5, p. 181.

[604] Kläser, Maastricht, supra note 9, p. 107.

[605] Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, paras. 41-42.

[606] The same opinion with regard to the reasoning that concepts of EU law must be determined first before the appropriate case law is taken into account can be found in A. Epiney, B. Metz & B. Pirker, *Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz: Ein Beitrag zur rechtlichen Tragweite der "Bilateralen Abkommen",* Zurich (2012), p. 11 et seq.

[607] Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, ECLI:EU:C:2009:697, para. 42.

The CJEU openly acknowledged the application of Article 16(2) AFMP in *Engel and Graf*.[608] Based on this judgment it is argued that the CJEU had already deviated from its *Polydor* case law and adopted an approach based on the internal market case law.[609] In *Ettwein*, the Advocate General only analysed the case law prior to the reference, because only that jurisprudence was deemed to be decisive. It was also doubted by the Advocate General whether paragraph 1 of Article 16 AFMP applies for provisions of primary law.[610] This reasoning was not followed by the CJEU.[611] In the recent Grand Chamber judgment *Wächtler*, the CJEU concluded (with reference to the Advocate General's Opinion) that the case law of the CJEU after the date of signature is taken into account to the extent that it only clarifies established principles of case law, pursuant to Article 16(2) AMFP.[612]

In the cases *Xhymshiti* and in *Bergström*, the CJEU ruled that Switzerland shall be considered 'a Member State' for the purposes of the regulations mentioned in Annex II to the AFMP (concerning social security coordination).[613] This reasoning was again reaffirmed in *United Kingdom v Council* (see Chapter 6.7 for a short discussion of this judgment with regard to the decisions of the Joint Committee of the AFMP).[614]

3.4.2 Applicability of EU law in Switzerland

Public international law is directly part of the Swiss legal order (monistic State).[615] Swiss courts can apply public international law if it is self-executing. Many provisions of the AFMP are self-executing, especially the non-discrimination provisions and provisions about compensation measures under the Professional Qualifications Directive.[616] It is still not entirely clear whether Article 2 AFMP can be invoked directly or only in conjunction with

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608 Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 26.

609 M. Sunde, *Freizügigkeitsabkommen und Steuerrecht: Auslegung im Spannungsfeld von nationalem Recht, Unionsrecht und Völkerrecht,* Diss. Munich (2017), Münster (2018), p. 49 et seq.

610 *Opinion of Advocate General Jääskinen in Case C-425/11, Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2012:650, paras. 45 and 52 et seq.

611 Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

612 Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39.

613 Case C-247/09, *Xhymshiti*, ECLI:EU:C:2010:698, para. 31; Case C-257/10, *Bergström*, ECLI:EU:C:2011:839, para. 31.

614 Case C-656/11, *United Kingdom v Council*, ECLI:EU:C:2014:97, para. 58.

615 Aust, Cambridge, supra note 68, p. 12.

616 BVGer B-5945/2018 of 14.01.2019, paras. 5.3 and 5.4.

another article of the AFMP (see Chapters 4.4.2 and 6.2.2).[617] Notably, the case *Hengartner and Gasser* is in favour of the latter interpretation.[618]

In principle, public international law precludes the application of federal and cantonal law or ordinances if they are in conflict. The Swiss Federal Court however has never ruled upon the issue whether public international law could prevail if it were to clash with the BV. Federal law would only prevail if it were intentionally enacted to apply in situations that are regulated by public international law (‘Schubert practice’).[619] However, federal laws (intentionally) violating human rights or the AFMP are not to be applied according to the Swiss Federal Court (the so-called ‘PKK practice’[620]). This had already been decided in 2012 by the first chamber for social security.[621] As the ruling was in Italian and concerned social security law, it did not get the media attention that it deserved, unlike another ruling in 2015, as explained below.

On 26 November of 2015, the Swiss Federal Court of Switzerland discussed the consequences of the popular initiative against mass immigration in a public hearing in BGE 142 II 35 (see above, Chapter 2.2.4). Only one of the five judges of the second chamber for public law was of the opinion that the initiative would preclude the applicability of the AFMP.[622] Interestingly enough, the Swiss Federal Court answered this question willingly in an *obiter dictum*.[623] This step itself speaks volumes because the hierarchy of norms could have been left unaddressed based on the reasoning of the Swiss Federal Court.[624] The Swiss

617 See Tobler & Beglinger, Zurich, supra note 586, para. 186 for further references to the case law; see also Delli, Basel, supra note 65, p. 24 et seq.

618 Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 39.

619 BGE 99 Ib 39 (= Pra 1973 No 106); BGE 112 II 1; BGE 125 II 417; see also A. Achermann, ‘Der Vorrang des Völkerrechts’, in T. Cottier et al. (eds.), *Der Staatsvertrag im schweizerischen Verfassungsrecht: Beiträge zu Verhältnis und methodischer Angleichung von Völkerrecht und Bundesrecht,* Berne (2001), p. 44 et seq.; see further Swiss Confederation, *Bericht des Bundesrates über das Verhältnis von Völkerrecht und Landesrecht of 5 March 2010 (BBl 2010 2263)*.

620 BGE 125 II 417, para. 4.d.

621 BGE 133 V 367 (= Pra 2008 No 71), paras. 11.4-11.6.

622 K. Fontana, ‘Das Bundesgericht und die Personenfreizügigkeit’, *NZZ,* 26 November 2015.

623 BGE 142 II 35, para. 3.2.

624 For a very critical analysis see G. Biaggini, ‘Die «Immerhin liesse sich erwägen»-Erwägung im Urteil 2C_716/2014: über ein problematisches höchstrichterliches obiter dictum’, ZBl 2016, No 117, p. 169 et seq.; for a less critical review see M. Oesch, ‘Urteilsbesprechung: Bundesgericht, II. öffentlich-rechtliche Abteilung, 26. November 2015, 2C_716/2014; zur Publikation in der amtlichen Sammlung vorgesehen.’, ZBl 2016, No 117, p. 197 et seq.

Federal Court however noted that (according to the aforementioned leading case[625]) a law violating the AFMP would not be applied (application of the PKK practice).[626] The Swiss Federal Court in essence argued that Article 121a BV is not directly applicable and is in need of implementation.[627] From a practical standpoint, it would also be unquestionably difficult to preclude the application of certain case law. The Swiss Federal Court restated its constant practice that it could deviate from the case law of the CJEU if there were 'good reasons'. Otherwise, it would be near impossible to determine the applicable case law, as the concept of non-discrimination affects a variety of diverse areas, such as migration, social security, taxes and the recognition of professional qualifications. It would be hard to argue that some discrimination through the means of quotas should be admissible, while in other areas that the case law should be followed.[628]

In the EU, international agreements form part of EU law without any further need for incorporation if they contain a clear and precise obligation.[629] It is accepted that provisions can be directly applied in the EU Member States – for example provisions of the EEA Agreement.[630] Thus, they also form part of the hierarchy of EU law. They prevail over secondary law but not over primary law.[631]

In the EEA EFTA States, the EEA Agreement does not per se have direct effect (but rather quasi-direct effect[632]). The case law of *Costa E.N.E.L.* and *van Gend en Loos* is not applied in this context.[633] EEA EFTA States are at least not required to grant the direct invocation of EEA law in court if it has been implemented in national law. The national courts have the task to ensure that there is an interpretation in conformity with EEA law if it

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625 BGE 133 V 367 (= Pra 2008 No 71), paras. 11.4-11.6.

626 BGE 142 II 35, para. 3.2.

627 BGE 142 II 35, para. 3.1.

628 Same opinion: M. Oesch, 'Der Einfluss des EU-Rechts auf die Schweiz – von Gerichtsdolmetschern, Gerichtsgutachtern und Notaren', ZBl 2016, No 112, p. 58 et seq.

629 Art. 216(2) TFEU; Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, para. 14.

630 Case T-115/94, *Opel Austria GmbH v Council of the European Union*, ECLI:EU:T:1997:3, para. 102; Baudenbacher (2012), supra note 15, p. 494.

631 Benesch, Tübingen, supra note 259, p. 68.

632 Baudenbacher (2012), supra note 15, p. 494.

633 Protocol 35 to the EEA Agreement; Case 28/62, *Da Costa en Schaake NV and Others v Administratie der Belastingen*, ECLI:EU:C:1963:6; Case 26/62, *Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1.

has been implemented (quasi-primacy[634]). EEA law may nevertheless be applied in the EU Member States as long as it is sufficiently clear and precise. Failure to implement directives or regulations in EEA law may lead to state liability.[635]

3.4.3 The Court of Justice and the Swiss Federal Court – a judicial dialogue? – before and after the Draft Institutional Framework Agreement between Switzerland and the EU

Article 16(2) of the AFMP sets out an obligation to follow the case law of the CJEU and to take into account concepts of EU law. However, the first sentence of Article 16(2) AFMP declares that it is the case law of the CJEU that is *prior to the date of its signature* that is binding for the Parties. This rule of interpretation can easily be reconciled with an interpretation in the light of the VCLT, as it constitutes *lex specialis*, but only where the context refers to concepts of EU law.[636] If it were otherwise, a parallel interpretation might not be intended. Sometimes it might even be disputed that a concept of EU law was intended to have been developed that way in the first place. This can be explained by the complex drafting of the AFMP. Article 16(2) AFMP remains vague and unclear.[637]

First, it is not clear if case law is 'new' or 'old', as some concepts were decided in earlier cases and therefore the case only clarifies or exemplifies a point of law. This problem will not be solved by the new Draft Institutional Framework Agreement between Switzerland and the EU.[638] Second, EU law is rapidly changing and brought along other rules attached to the concept of EU citizenship rights which are not part of the *acquis suisse* (e.g. Article 20 and Article 21 TFEU, and the Citizens' Rights Directive). If Swiss Courts are to decide whether to follow a case that relies on EU citizenship in its reasoning, they should take into account

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634 Baudenbacher (2012), supra note 15, p. 494.

635 Hreinsson, supra note 316, p. 383 et seq. and 386 et seq. for a further reference.

636 Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39; see also Oesch, Zurich, supra note 10, para. 73 et seq.; see further Ammann, Leiden, supra note 164, p. 241 et seq. for further references to the relevant case law of the Swiss Federal Court.

637 Same opinion: M. Maresceau, 'EU – Switzerland: Quo vadis?', Georgia Journal of International and Comparative Law 2011, No 3, p. 743.

638 Same opinion: Epiney (17.12.2018), supra note 405, para. 18; see further the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

that often the concepts are 'disguised', but later amended.[639] This mixture of primary law and secondary law makes it challenging to identify the correct interpretation of the AFMP (and to update the provisions of the AFMP). The Swiss Federal Court for instance acknowledged that the relevant interpretation of Directive No 1612/68/EEC in the case of *Baumbast*[640] was codified in the Citizens' Rights Directive.[641] Many provisions of the AFMP are based on Directive No 1612/68/EEC.

According to its established practice the Swiss Federal Court held that it will follow the case law of the CJEU *after* the date of signature as well.[642] The Swiss Federal Court will only deviate from the jurisprudence of the CJEU if 'good reasons' (*triftige Gründe*) to do so have been shown and it will not deviate 'lightly'.[643] However, it is not clear what 'good reasons' are.[644] In a similar fashion, Advocate General Wathelet stated that according to his Opinion in *Wächtler*, the case law of the CJEU should be taken account if it does not deviate from the principles established by the case law before the date of signature.[645] The CJEU followed the Advocate General's Opinion.[646] That jurisprudence would also be codified by the new Swiss-EU Draft Institutional Framework Agreement on 23 November 2018, which would make the case law of the CJEU[647] binding before and *after* the date of signature.[648]

Interestingly enough, Article 16(2) AFMP only sets out that the judgments of the *Court of Justice* should be taken into account (before the date of signature). Thus, it is not clear whether judgments of the General Court should also be taken into account.[649] This is

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639 Epiney (2005), supra note 494, pp. 16–26; see also Sunde, Münster, supra note 609, footnote 75 thereof with examples; C. Mazille, *L'institutionnalisation de la relation entre l'Union européenne et la Suisse,* Geneva (2018), p. 190 et seq.

640 Case C-413/99, *Baumbast and R*, ECLI:EU:C:2002:493.

641 BGE 136 II 177, para. 3.2.1.

642 Instead of many examples: BGE 142 II 35, para. 3.1.

643 BGE 140 II 112, para. 3.2.

644 It is argued that only constitutional reasons count as 'good reasons': M. J. Hahn, 'Die Kündigung des FZA als Voraussetzung für die Einführung von Kontingenten in Umsetzung des Art. 121a BV - Zugleich Anmerkung zum Entscheid des Bundesgerichts, II. öffentlich-rechtliche Abteilung, vom 26. November 2015, 2C_716/2014 (BGE 142 II 35)', in A. Epiney (ed.), *Schweizerisches Jahrbuch für Europarecht 2015/2016 / Annuaire suisse de droit européen 2015/2016,* Zurich (2016), p. 471.

645 *Opinion of Advocate Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 72.

646 Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39.

647 The term CJEU is defined as including the General Court: see infra note 651.

648 Art. 4 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

649 The General Court did not exist at that time.

especially because the term 'Court of Justice of the European Communities' under the Air Transport Agreement was found to include the General Court.[650] The expression 'Court of Justice' is now explicitly defined in the new Swiss-EU Draft Institutional Framework Agreement of 23 November 2018 as including both the Court of Justice and the General Court.[651] This is particularly interesting because the explanatory report of the Swiss Government mistakenly only mentions the case law of the CJEU.[652]

In addition, Article 16(2) AFMP does not make it binding for the CJEU to take the case law of the Swiss Federal Court into account. On the contrary, it would be rather surprising if the case law of a third country could be decisive when interpreting EU law, even when the wording is the same as in the internal market case law, due to the autonomy of the legal order. However, with regard to judicial dialogue with the EFTA Court (see Chapter 2.3.1.5), it could be questioned whether there is a similar dialogue with the highest Swiss court. The present author knows only of the case *Gambazzi* where the CJEU explicitly referred to the case law of the Swiss Federal Court with regard to the Lugano Convention.[653] Kläser points out that the CJEU followed the reasoning of the Swiss Federal Court in the case *Ettwein*[654].[655] The ruling of the Swiss Federal Court was not however mentioned in the case *Ettwein*.[656] From the nature of the different legal systems, it is clear that the Swiss Federal Court decides on more cases concerning the AFMP than the CJEU. To date, the Swiss Federal Court has mentioned the AFMP in around 890 judgments.[657] The new Swiss-EU Draft Institutional Framework Agreement of 23 November 2018 would explicitly lead to closer cooperation between the CJEU and the Swiss Federal Court in its Article 11. The format of the dialogue would be determined by the CJEU and the Swiss Federal Court.[658]

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650 Order of the Court of 14 July 2005 in Case C-70/04, *Switzerland v Commission*, ECLI:EU:C:2005:468, para. 18 et seq.

651 Art. 3(c) of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018; see also for the EU in Art. 19(1) TEU.

652 Swiss Confederation, supra note 182, p. 7.

653 Case C-394/07, *Marco Gambazzi*, ECLI:EU:C:2009:219, para. 35.

654 Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

655 BGE 136 II 241; Kläser, Maastricht, supra note 9, p. 132 and footnote 608 thereof for further references.

656 Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

657 Checked with the database of the Swiss Federal Court: <https://www.bger.ch/> (last visited on 14.10.2020).

658 Art. 11 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

It should be recalled that both legal orders are independent (Article 11(1) AFMP *a contrario*). It is not possible for courts in Switzerland to ask the CJEU for a preliminary ruling. Access to the CJEU is only granted in a cross-border situation involving an EU Member State (Article 267 TFEU). Switzerland may not, even in those cases, assist its nationals before the CJEU (Article 265 TFEU *a contrario* and Article 40 of the Statute of the Court of Justice *a contrario*[659]) unless this was already approved by the referring court (Article 97(1) of the Rules of Procedure of the Court of Justice[660]) and has no right to be informed (under the AFMP).[661] This would be amended for cases referred by the arbitration body under the new Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.[662]

The national procedure has to be equivalent, effective and non-discriminatory (Article 11 AFMP and Article 2 AFMP).[663] The concepts of effectiveness and equivalence are borrowed from EU law and adapted.[664] Under the AFMP, EU and Swiss citizens have a right of appeal. The appellate body has to be the competent national judicial body (Article 11(3) AFMP).[665]

So far, the Swiss Federal Court has followed the case law of the CJEU very closely. It accepted the *Akrich* ruling, and changed the case law when the case *Metock* was decided.[666] However, the Swiss Federal Court did not accept the *Kohll* and the *Müller-Fauré* rulings, but instead held that the AFMP does not grant receivers of services the right to equal treatment.[667] The CJEU came to the same conclusion. It followed the Opinion of the Advocate General in

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659 See *Order of the Court of First Instance (First Chamber) of 7 July 2006 in Case T-319/05*, ECLI:EU:T:2006:195, para. 21. It is different under the Schengen and Dublin Agreements: see Art. 8(2) of the Swiss-EU Schengen Agreement (see for the full citation supra note 112) and Art. 5(2) of the Swiss-EU Dublin Agreement (see for the full citation supra note 112); see further a list of cases where Switzerland was notified: <https://www.bj.admin.ch/dam/data/bj/sicherheit/schengen-dublin/uebersichten/vorabentscheidungsersuchen-d.pdf> (last visited on 25.06.2020).

660 See further Case C-61/14, *Orizzonte Salute*, ECLI:EU:C:2015:655, para. 32 et seq.

661 See e.g. Case C-428/08, *Monsanto Technology*, ECLI:EU:C:2010:402 where Argentina intervened before the national court and consequently before the CJEU.

662 Art. 10 para. 4 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

663 See also Case T-99/19, *Magnan v Commission*, ECLI:EU:T:2019:693, para. 65.

664 See e.g. BGE 128 V 315, para. 1.c; BGE 130 V 132, paras. 3.1 and 4; Case C-120/97, *Upjohn Ltd*, ECLI:EU:C:1999:14.

665 BGE 131 II 352.

666 BGE 130 II 1; BGE 134 II 10.

667 For another opinion: E. Imhof, 'Das Freizügigkeitsabkommen EG-Schweiz und seine Auslegungsmethode - Sind die Urteile Bosman, Kohll und Jauch bei der Auslegung zu berücksichtigen? - Part 1', ZESAR 2007, No 4, p. 155 et seq.

the case *Hengartner and Gasser*.[668] The (former) AG Jääskinen merely referred to one opinion in the literature but did not address the question of what role Article 2 AFMP (non-discrimination) should play[669].[670] The principle of non-discrimination, which is enshrined in Article 2 AFMP, is crucial as the Citizens’ Rights Directive does not apply. The Swiss Federal Court and the FAC however have even followed the ruling in *Zhu and Chen* in other decisions, notwithstanding the fact that the Citizens’ Rights Directive does not apply.[671]

In a leading case of 2013, the Swiss Federal Court outlined the boundaries of how new case law could be adapted. Decisions of the CJEU are not to be followed if they are based on the fundamental concept[672] of EU citizenship.[673] As an example, the Swiss Federal Court mentions the *Zambrano* and *Dereci* cases[674].[675] An interpretation in the light of the Citizens’ Rights Directive would certainly change this jurisprudence due to Article 24 of that Directive, which set outs the right to equal treatment (see also the case law of EFTA Court in Chapter 2.3.1.5).[676] It is therefore not astonishing that the Citizens’ Rights Directive is also a prominent discussion point for future agreements with the EU (the so-called ‘red line’).[677]

3.4.4 Shortcomings of Article 16 AFMP – Homogeneity of the legal order

Similar to other association agreements, such as in Article 6 of the EEA Agreement, the AFMP contains a homogeneity clause in Article 16 AFMP:[678]

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668 Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, paras. 35-43.

669 See BGE 136 II 5; BGE 136 II 65; see further A. Borghi, ‘Art. 2 ALCP’, in A. Borghi (ed.), *Le libre circulation des personnes entre la Suisse et l'UE: Commentaire article par article de l'accord du 21 juin 1999,* Geneva (2010), para. 3.

670 *Opinion of Advocate General Jääskinen in Case C-70/09, Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:289.

671 BGer 2C_574/2010 of 15.11.2010, para. 2.2.2; see also BVGer C-8145/2010 of 18.04.2011, para. 5; Case C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639, paras. 42-47. The Case C-1/05, *Jia*, ECLI:EU:C:2007:1 was also followed: see BGer 2C_301/2016 of 19.07.2017, para. 3.

672 ‘Kernbereichdoktrin’.

673 BGE 139 II 393, para. 4.1.2.

674 Case C-256/11, *Dereci*, ECLI:EU:C:2011:734; Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124.

675 BGE 139 II 393, para. 4.1.2.

676 See in detail Tobler, supra note 428, p. 80.

677 See Oesch (2017), supra note 278, p. 641 et seq.

678 See other for other homogeneity clauses: Ott (2015), supra note 438, p. 18 et seq.

> '1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.
> 2. Insofar as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention. To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.'

The AFMP has some obvious shortcomings when it comes to the case law that is decisive due to the fact that the homogeneity clause is static, as is common in association agreements.[679] The AFMP refers to the 'Joint Committee'[680] to determine the relevant case law, but does not assure the homogeneity of both legal orders. In theory, the Joint Committee on the AFMP would also decide which CJEU case law is applicable after the date of signature if there is no clarity (last sentence of Article 16(2) AFMP). However, a decision which would render jurisprudence applicable or would disapply certain judgments has never been issued.[681] This means that without common institutions, one Contracting Party decides which case law shall be followed. This situation does not allow for legal certainty because every aspect/consequence of the case law cannot be known.[682] Even leading cases of the CJEU and fundamental concepts of EU law have sometimes been overlooked by Swiss courts.[683]

One author deduced from the case law of the Swiss courts, in the light of Article 16(2) AFMP, and the competition law cases (where such a provision is missing), that a comparative interpretation of EU and Swiss laws is an established form of interpretation. Swiss laws can be interpreted in conformity with EU law if that was intended by the drafters, if the concept was based on the idea of harmonising Swiss laws with EU law or from a systematic

679 See Ott (2015), supra note 438, p. 21 et seq.

680 There are currently about 23 EU-Swiss (Joint) Committees: Directorate for European Affairs, supra note 251.

681 The same opinion: *Opinion of Advocate Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 71.

682 The same opinion: Mazille, Geneva, supra note 639, p. 242 et seq.

683 E.g. Decision 10/2017/1 of the Obergericht (High Court) of the Canton of Schaffhausen of 20.02.2018, para. 7.3.1 which mistakes the concept of self-executing character (or in other words: direct effect) for the concept of horizontal effect despite the case law of the CJEU and the Swiss Federal Court; BVGer C-2281/2006 of 18.10.2007 (available online since 2019), para. 3.5: see the discussion of this case in Chapter 5.2.3.2; BGer 2C_775/2018 of 21.03.2019: Chapter 6.4.6.4.1 for a discussion of this case; see BGE 134 II 341 (= Pra 2009 No 52), para. 2.1: see for a discussion of this case Chapter 6.2.4.7.2.

interpretation if the law explicitly states that EU law should be taken into account. A parallel legal order is thus not only achieved by reference to Article 16(2) AFMP, but is an accepted practice, notably in competition law.[684] While one could also argue that that free movement of professionals but also the mobility of students should be valued on their own because it enriches their experience, contributes to better allocation of the workforce and leads to a greater sense of togetherness in Europe,[685] Article 16(2) AFMP should in any case lead to the application of the same concepts of free movement in the context of the *acquis suisse* as well as in the internal market as far as those concepts are part of the AFMP.

This principle is however questioned in recent judgments of the division for criminal law of the Swiss Federal Court in 2018 and 2019, which refers to the case law of the second division for public law of the Swiss Federal Court and to the decision of the CJEU in *Wächtler*[686]. That judgment of the SFC states the AFMP 'does not include provisions of criminal law', is 'not an agreement in the field of criminal law' but an 'economic agreement'[687] and does not foresee 'the free movement of criminal migrants'.[688] It was already noted that the return of the *Polydor* case law can be attributed to the restrictive case law of national courts (see Chapter 3.1.3). Without discussing its merits, it is obvious that this new line of case law of the Swiss Federal Court could have an influence on the future jurisprudence of the CJEU with regard to the AFMP.

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684 L. Kubli, 'Zum Grundsatz der Parallelität im Kartellrecht – eine rechtsvergleichende Auslegung?', AJP/PJA 2018, pp. 204 and 207.

685 See A. Hoogenboom, *Balancing student mobility rights and national higher education autonomy in the European Union,* Osterwijk (2016), p. 48 et seq.

686 Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138.

687 BGer 6B_378/2018 of 22.05.2019, paras. 3.4.4 and 3.6. with reference to BGE 140 II 112; BGE 145 IV 55, para. 3.3.

688 BGE 145 IV 55, para. 3.3; see for critical reviews of this jurisprudence: B. Fargahi et al., 'Die ersten Urteile des Bundesgerichts zur Landesverweisung (Art. 66a ff. StGB): Erste Erkenntnisse – erste Widersprüche', Jusletter 15 April 2019 and A. Epiney, 'Strafrechtliche Landesverweisung und FZA Anmerkung zum Urteil des Bundesgerichts 6B_378/2018 vom 22. Mai 2019', Jusletter 19 August 2019.

3.4.5 Legal nature of Article 16(2) AFMP

In the past, there was never-ending academic discussion in Switzerland on whether Article 16(2) AFMP established that there was a legal obligation to follow the case law of the CJEU, whether the words 'account shall be taken/*berücksichtigt*/*tenu compte*/*terrà conto*' are only an indication of a presumption or whether the wording is too 'soft' to lay down such a strong legal obligation.[689]

The Swiss Federal Court declared in a leading case of 2013 that Article 16(2) AFMP that the case law prior to the date of its signature is decisive but that it does not constitute a legal obligation to follow the case law of the CJEU after the date of signature. It should rather be considered as a 'guiding principle' (*Beachtungsgebot*).[690] Besides the above-mentioned statement in the *Wächtler* judgment[691], the CJEU has not clarified the meaning of Article 16(2) AFMP.[692] In contrast, it even referred to case law after the date of signature without further explanation.[693] The underlying problem is that the article remains 'relatively vague'.[694] This is explained by the fact that it is difficult if not impossible at times to distinguish between concepts and case law.[695]

At this point, it is important to note that the wording of the homogeneity clause in the AFMP should not be overemphasised even if for instance Article 6 of the EEA Agreement is worded distinctly from Article 16(2) AFMP as it requires the EFTA authorities and the EFTA Court to 'pay due account to the principles laid down by the relevant rulings by the Court of Justice'. However, the CJEU more recently returned to the *Polydor* principle for the interpretation of association agreement. Whether a provision can be interpreted by analogy to the internal market depends mainly on the *aim* and the *context* of the agreement.[696] Ott

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689 See instead of many others: M. Oesch, 'Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge', ZBl 2014, No 115, p. 196 et seq. and footnotes 82-84 with further references; see also Epiney (2005), supra note 494, p. 26.

690 BGE 139 II 393, para. 4.1.1.

691 Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39.

692 Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 26.

693 Case C-241/14, *Bukovansky*, ECLI:EU:C:2015:766, para. 37 et seq.; Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 32.

694 *Opinion of Advocate General Mengozzi in Case C-355/16, Christian Picart v Ministre des Finances et des Comptes public*, ECLI:EU:C:2017:610, para. 104.

695 See e.g. the concept of partial recognition in Chapter 6.4.3.

696 Ott (2015), supra note 438, p. 21.

pointed out that the CJEU has not discussed the differences between interpreting a provision by analogy or by applying a homogeneity clause. She mentions that this was dealt with by the General Court in the *Opel Austria* case[697]. The *homogeneity clause* was only one of the factors to determine the meaning of the EEA Agreement besides the high level of integration under the EEA Agreement and the two-pillar structure.[698]

[697] Case T-115/94, *Opel Austria GmbH v Council of the European Union*, ECLI:EU:T:1997:3, paras. 106-112.

[698] Ott (2015), supra note 438, p. 25.

3.5 Conclusion to Chapter 3

The Agreement on Free Movement of Persons ('AFMP') has been a cornerstone in the development of Switzerland's European integration process. The agreement is a complex document on the borderline of both European and public international law. Switzerland applies international law, which in the case of the AFMP would take precedence even if federal law were intentionally enacted in order to disapply provisions of the AFMP (the so-called 'PKK practice'). The AFMP is interpreted in the light of the VCLT primarily by its wording. The more specific rule of interpretation in Article 16(2) AFMP only applies for the case law before the reference date. However, the Swiss Federal Court follows the case law after the reference date, unless there are 'good reasons' to do otherwise. A similar reasoning was also proposed by the Advocate General and used by the CJEU in the Grand Chamber judgment of 26 February 2019, *Wächtler*.[699]

While the Swiss Federal Court follows the case law of the CJEU even if it is altered, the CJEU never openly followed the jurisprudence of the Swiss Federal Court. One of the Advocates General even doubted whether Article 16(1) AFMP applies for provisions of primary law, in the case *Ettwein*. A profound judicial dialogue similar to that between the EFTA Court and the CJEU does not currently take place between the Swiss Federal Court and the CJEU. The CJEU stated in *Grimme* for the first time under the Bilaterals I that the *Polydor* case law applies for the interpretation of the AFMP. The *Polydor* case law is possibly a result of restrictive judgments and a missing institutional structure. While the recent judgement *Wächtler* of the CJEU and the case law of the second division of the Swiss Federal Court follows a progressive interpretation, the criminal division of the Swiss Federal Court deviates from an interpretation based on the aim of the agreement in recent judgments. This could have consequences for the future jurisprudence of the CJEU and could lead to the return of the *Polydor* principle for the AFMP in general.

A comparison with the case law under the Ankara Agreement shows that the CJEU has interpreted association agreements extensively for a long time without having recourse to the *Polydor* case law. Even technical provisions have sometimes been interpreted in a broad manner. It is unclear however to what extent future membership would have an effect on the interpretation in the light of the internal market case law. Notwithstanding many progressive

[699] Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39.

decisions of the CJEU, the *Polydor* case law was revived in cases concerning the Ankara Agreement for the receivers of services, which are not protected under the Ankara Agreement. In addition, the CJEU ruled that violations of the standstill clause in the Ankara Agreement could be justified in the same manner as justifications for fundamental freedoms in the internal market case law.

Finally, it is also clear that a rule of interpretation can only be applied for concepts which form part of the AFMP. But there is no solution on how to determine the concepts that have been adopted by the *acquis suiss*e. The complex structure of the AFMP and the combination of primary and secondary law make finding out which concepts of EU law are also part of the AFMP a daunting task. A decision of the Joint Committee of the AFMP concerning the relevant case law was never issued. This issue will remain unsolved by the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

Part II: Free movement of persons between Switzerland and the EU

4 Free movement of persons between Switzerland and the EU

4.1 Introduction

Having examined the institutional setting and the interpretation of international agreements in Part I of this research, the following Chapter 4 aims to categorise the fundamental freedoms as far as they are developed under the *acquis suisse*. This includes the freedom of establishment, the free movement of workers and the freedom of services. This examination allows to analyse how far primary law applies in this context. It will serve as a preparation for the discussions about the professional recognition and the mobility of law students in Part III and IV of this study. With that said attention shall be paid to the Agreement on the Free Movement of Persons ('AFMP'), as it constitutes one of the most fundamental market access agreements.

The purpose of the AFMP, one of the agreements in that first package, was to create an internal market. Its first article provided for: '(...) a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay (...), to liberalise the provision of services of brief duration; to accord a right of entry into, and residence (...), to persons without an economic activity (...) to accord the same living, employment and working conditions as those accorded to nationals'. The AFMP consists of 25 articles and of three annexes. The main agreement lays down the institutional provisions, and Annex I contains the core free movement provisions. Unlike in the internal market of the EU, the freedom of establishment and the free movement of workers also includes separate provisions for 'frontier workers' and for 'self-employed frontier workers'.[700]

Annex II was amended by Decision No 1/2012 and declares that Regulation No 883/2004[701] will be applicable to Switzerland from 1 April 2012.[702] More importantly, Annex III lists the applicable legislation in the field of mutual recognition of professional qualifications. That annex was notably amended by Decision No 2/2011 of the respective

[700] Arts. 7(1) and 13(1) of Annex I to the AFMP.

[701] See for the full citation supra note 272.

[702] *Decision No 1/2012 of the EU-Swiss Joint Committee established under the Agreement between the European Community and its Member, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, replacing Annex II to that Agreement on the coordination of social security schemes of 31.03.2012, entry into force on 01.04.2012,* OJ [2012] L103/51, 13.04.2012.

Joint Committee Switzerland/EU and entered into force on 1 November 2011.[703] Directive 2005/36/EC (the ‘Professional Qualifications Directive’) on the mutual recognition of professional qualifications is therefore also applicable to Switzerland (see an overview of the Decisions of the Joint Committee for the AFMP in Chapter 5.1.2).

If Switzerland or the EU were to terminate one of the agreements in the first package (Bilaterals I), all the agreements in that package would cease to apply (the so-called ‘Guillotine’ clause of Article 25(3) and (4) AFMP). This mechanism, however, was only established for the first package (Bilaterals I).[704] The relationships between Switzerland, Liechtenstein, Iceland and Norway have been governed by the EFTA Convention since 2001, which has similar provisions to those in the AFMP.[705]

4.2 Freedom of establishment between Switzerland and the EU

4.2.1 Temporal and territorial scope

The territorial scope of the AFMP includes Switzerland and the territories of the EU pursuant to Article 24 AFMP in conjunction with Article 52(1) and (2) TEU, the latter referring to Article 355 TFEU for overseas territories.[706] As already mentioned (in Chapter 2.2.3), Additional Protocols were enacted for the EU-8 and EU-2 Member States and for Croatia (see Chapters 2.2.1 and 2.2.3 for further detail).

The option to reintroduce quotas is provided for in Article 10 AFMP. In particular, Article 10(4) AFMP stipulates that Switzerland can add quotas if the number of residence permits granted to employed and self-employed persons of the European Community (now the European Union) for more than four months (in conjunction with paragraph 1) exceed, in a given year, the number of residence permits issued over the last three years by at least 10%.

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703 *Decision No 2/2011 of the EU-Swiss Joint Committee established by Article 14 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, replacing Annex III (Mutual recognition of professional qualifications), (2011/702/EU) (except title II of Directive 2005/36/EC) of 30.09.2011, entry into force on 01.11.2011,* OJ [2011] L277/20, 22.10.2011.

704 Vahl & Grolimund, Brussels, supra note 126, p. 44 et seq.

705 See Art. 22 et seq. of the *EFTA Convention (Übereinkommen zur Errichtung der Europäischen Freihandelsassoziation) of 04.01.1960 and 21.06.2001; entry into force on 01.06.2002* and Annex K of the EFTA Convention.

706 A separate Protocol for the Åland Islands also applies for the AFMP (see Annex III last paragraph).

The Swiss Federal Council has used that option to reintroduce quotas for the EU-17, the EU-8 and the EU-2 Member States on several occasions.[707] As of June 2019, provisional quotas and the safeguard clause of Article 10(4) AFMP can only be applied for nationals from Croatia.[708]

4.2.2 Personal and material scope

The freedom of establishment incorporates the general principles of non-discrimination and equal treatment (Article 15(1) and (2) in conjunction with Article 9 of Annex I to the AFMP[709]). Article 9 of Annex I to the AFMP shows that the interpretation of the internal market case law is to be followed in principle, and is granted direct effect.[710] The substantive scope of the freedom of establishment is seemingly identical with Article 49 TFEU, as Article 16(2) AFMP refers to the case law of the CJEU.[711] It applies for 'self-employed frontier workers'[712] as well as for 'self-employed workers'.[713]

All self-employed persons and their family members have the right to entry and the right to exit (Article 1 of Annex I to the AFMP), the right to reside and to pursue an economic activity (Article 2 of Annex I to the AFMP) and the right to stay (Article 4 of Annex I to the AFMP). The freedom of establishment also gives self-employed persons geographical mobility (Article 14(1) of Annex I to the AFMP) which includes 'changes in the place of work and residence' (Article 14(2) of Annex I to the AFMP). For the status 'self-employed frontier worker', a residence permit is obviously not required to exercise a self-employed activity.[714]

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707 See Ott, supra note 4, p. 170 et seq.

708 Art. 10(1)(c) and 3(c) and Art. 10(4)(c) AFMP; see further <https://www.dfae.admin.ch/dam/dea/de/documents/fs/04-FS-Personenfreizuegigkeit_de.pdf> (last visited on 25.06.2020).

709 Art. 9 of Annex I to the AFMP is reserved for specific rights only, such as employment conditions, and resembles *Regulation No 492/2011/EU of the European Parliament and of the Council on freedom of movement for workers within the Union of 05.04.2011,* OJ [2011] L141/1, 27.05.2011; see for a comparison with other association agreements: Eisele, Oisterwiijk, supra note 515, p. 162 et seq.

710 *Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-339/05, Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol*, ECLI:EU:C:2006:370, para. 32 et seq.

711 Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 26.

712 Art. 13(1) of Annex I to the AFMP.

713 Art. 12(1) of Annex I to the AFMP.

714 Art. 12 of Annex I to the AFMP *a contrario*; see Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121, para. 37.

The freedom of establishment does not apply to legal persons in the AFMP.[715] Only natural persons in the territory of another Contracting Party can rely on it (Article 12(1) of Annex I to the AFMP):

> 'A national of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity (…)'

The CJEU has also held that a self-employed frontier worker may also rely on the freedom of establishment within the scope of the AFMP (see Article 13 of Annex I to the AFMP).[716] That case also established that a cross-border element must be present in order for the case to be covered by the scope of the freedom of establishment.[717]

Recently, the CJEU held in *Picart* – based on the wording of the aforementioned provision – that a person must pursue his self-employed activity in the territory of a Contracting Party other than that of which he is a national in order to be able to invoke Article 12(1) of Annex I to the AFMP for self-employed persons while maintaining a shareholding-management activity in their home Member State. Unlike the precedent set by the CJEU in *Ettwein*,[718] Mr Picart could not rely on Article 13(1) of Annex I to the AFMP either, as he was not returning to his State of origin at least once a week, every week.[719] It is noteworthy to mention at this point that some older decisions of the Swiss Federal Administrative Court ('FAC') in particular also refer to this extremely restrictive wording, but to show that there is a cross-border element, a diploma granted in another state for cross-border purposes, is deemed to be 'sufficient'.[720]

In the recent follow-up Grand Chamber judgment *Wächtler* of 26 February 2019, the reference procedure dealt with the question of whether Germany could tax Mr Wächtler, who

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715 See *Opinion of Advocate Mengozzi in Case C-135/17, X-GmbH v Finanzamt Stuttgart*, ECLI:EU:C:2018:389, footnote 9 sentence 2 for a reference to the Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, ECLI:EU:C:2009:697, paras. 37 and 39.

716 Case C-13/08, *Stamm and Hauser*, ECLI:EU:C:2008:774.

717 Case 204/87, *Bekaert*, ECLI:EU:C:1988:192; see further J. Tomkin, 'Art. 49 TFEU', in M. Kellerbauer, M. Klamert & J. Tomkin (eds.), *The EU treaties and the charter of fundamental rights: A commentary,* Oxford (2019), para. 10.

718 Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121, para. 35.

719 Case C-355/16, *Christian Picart v Ministre des Finances et des Comptes public*, ECLI:EU:C:2018:184, para. 19.

720 See for a restrictive interpretation e.g. BVGer C-2281/2006 of 18.10.2007 (available online since 2019), para. 3.4; BVGer C-89/2007 of 02.07.2007, para. 3.3.

was moving his domicile from Germany to Switzerland, for unrealised capital gains. The CJEU held that a managing director who owns 50% of the shares of an IT company could be considered a self-employed person because there was no subordination involved, even if he was technically employed by his own company. It was however disputed whether Mr Wächtler could rely on Article 12(1) of Annex I to the AFMP as he relied on arguments going against his State of origin. The CJEU concluded in *Wächtler* (based on its early decision in *Daily Mail* [721]) that a national who is established in another Member State may not only claim rights vis-à-vis their host Member State but also vis-à-vis their State of origin (despite the restrictive wording of Article 12(1) AFMP and its decision in *Picart*): otherwise the exercise of the free movement provisions would be hindered.[722] The Advocate General in that case went one step further and argued that another interpretation would go against the 'spirit' of the AFMP.[723]

Interestingly, Article 25 of Annex I to the AFMP guarantees nationals of a Contracting Party (Swiss and EU nationals) who have a right of residence and their main residence in the host state the same rights as their nationals for the purchase of immovable property. This provision shows that the material scope of the fundamental freedoms under the *acquis suisse* are not entirely identical. One author has claimed that this provision would violate the freedom of establishment.[724] This view is unconvincing because there is no situation where the AFMP and the TFEU would be contradictory, unless the correct legal basis is questioned.[725]

4.2.2.1 Direct and indirect discrimination

First, direct and indirect discrimination are certainly not allowed under the AFMP. Access to a profession subject to a nationality condition is direct discrimination.[726] Direct discrimination openly differentiates between the relevant actors on the grounds of

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[721] Case 81/87, *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, ECLI:EU:C:1988:456.

[722] Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 51 et seq.

[723] *Opinion of Advocate Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 66.

[724] See D. Kremalis, *Freizügigkeit von Ärzten innerhalb der EU,* Diss. Munich (2008), Frankfurt am Main (2008), p. 224 et seq. for a further reference.

[725] See infra note 1617.

[726] Case 38/87, *Commission v Greece*, ECLI:EU:C:1988:407.

nationality.[727] Indirect discrimination, however, may occur when a rule is more likely to affect foreigners than nationals.[728] Finally, restrictions are rules that are indistinctly applicable but hinder the freedom of establishment and consequently the creation of an internal market.[729] It is sometimes very difficult to distinguish between indirect discrimination and restrictions because restrictions often affect non-nationals in some way, or no problem would even arise in the first place.[730] Truly indistinct measures are extremely rare.[731]

4.2.2.2 Reverse discrimination

Reverse discrimination arises where a country treats its own citizens less favourably than other EU citizens, which is permissible under EU law.[732] The Swiss Federal Court held that Swiss migration law provisions on the family reunion of third country nationals constitute reverse discrimination. In principle, only the Swiss Parliament has the power to amend it.[733] The AFMP only applies to Swiss nationals where a cross-border link exists.[734] The Swiss Federal Court however also used the concept of reverse discrimination as an argument when deciding on the correct interpretation of the law.[735]

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727 Case 2/74, *Reyners v Belgian State*, ECLI:EU:C:1974:68; see also Case 305/87, *Commission v Greece*, ECLI:EU:C:1989:218, para. 21.

728 Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193, para. 15.

729 Case C-168/91, *Konstantinidis*, ECLI:EU:C:1993:115.

730 R. Zäch argues that this distinction should be abolished: R. Zäch, *Grundzüge des europäischen Wirtschaftsrechts,* Berlin (2005), para. 492.

731 C. Tobler, *Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under EC law,* Habil. Basel (2003), Antwerp (2005), p. 390 et seq. and p. 428 et seq.

732 E.g. Joined Cases 35 and 36/82, *Morson and Jhanjan v Staat der Nederlanden*, ECLI:EU:C:1982:368, para. 18. It is in general left to the Member States to prevent reverse discriminations: J. Tiedje, ‘Art. 49 AEUV’, in H. von der Groeben, J. Schwarze & A. Hatje (eds.), *Europäisches Unionsrecht: Vertrag über die Europäische Union - Vertrag über die Arbeitsweise der Europäischen Union - Charta der Grundrechte der Europäischen Union,* Baden-Baden (2015), para. 124 et seq.

733 See BGE 136 II 120, para. 3.5.3, which suggests that Art. 14 of the European Convention of Human Rights could be applied to prevent reverse discrimination if the legislator would have remained inactive.

734 BGE 136 II 120, para. 3.2.

735 BGE 134 II 10, para. 3.5.4.

4.2.2.3 Restrictions

Article 49(1) TFEU provides that restrictions on the freedom of establishment shall be prohibited. Article 15 of Annex I to the AFMP does not explicitly mention free movement restrictions but only equal treatment. An interpretation of the wording of Article 15(1) of Annex I to the AFMP in the light of the Vienna Convention on the Law of Treaties ('VCLT') seems to cover only discrimination. In addition, the subsidiary Article 2 AFMP also only refers to discrimination. The (unanswered) question is whether Article 15(2) of Annex I to the AFMP also prohibits free movement restrictions or only discrimination.[736] Even if the CJEU explicitly used the term 'restrictions' in *Wächtler*,[737] the same wording does not mean that the term bears the same meaning after everything that has been discussed here about the *Polydor* principle.[738] The answer to this question is therefore still unknown.

There are some good reasons, even without considering the recognition of professional qualifications, to argue that free movement restrictions fall within the scope of the AFMP and are therefore prohibited.[739] First, the AFMP aims at full integration in the internal market (context). The Preamble and Article 1 of the AFMP clearly intend to create a single market.[740] Furthermore, the first package of bilateral agreements have to be seen in the wider context and they establish a system that goes beyond the integration of any other association agreement except the EEA Agreement. Second, it establishes a framework, which incorporates the CJEU's case law (Article 16(2) AFMP). The CJEU made it patently clear that free movement restrictions are prohibited by the fundamental freedoms in its case law

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736 See Chapter 4.2.2.3 and Diebold, Berne, supra note 67, para. 781 et seq. for a further reference; see also O. Ammann, 'Sources du droit anti-discriminatoire – Sources of Non Discrimination Law / La non-discrimination, principe charnière d'interprétation : l'exemple de l'art. 2 ALCP', in S. Besson (ed.), *Egalite et non-discrimination en droit international et européen: Equality and non-discrimination in international and european law,* Zurich (2014), p. 64 et seq.; Tobler & Beglinger, Zurich, supra note 586, para. 256 in conjunction with para. 213 et seq.

737 See Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, paras. 57 and 61.

738 See further Chapter 3.2.1.

739 See e.g. B. Pirker & D. Nüesch, 'Europarecht: Schweiz - Europäische Union', SRIEL (SZIER/RSDIE) 2018, p. 123 for a further reference; E. Imhof, 'Das Freizügigkeitsabkommen EG-Schweiz und seine Auslegungsmethode: Ist das Beschränkungsverbot in seinem Rahmen anwendbar?', ZESAR 2008, No 10, pp. 425–435.

740 For the same opinion, see: Epiney (2005), supra note 494, p. 8 et seq.

for the internal market (*before* the date of signature).[741] In addition, Article 16(2) AFMP is a rule of interpretation and is therefore *lex specialis* according to the VCLT (see Article 31(4) VCLT).[742] It should also be recalled that Article 45 TFEU (on the freedom of movement for workers) does not use the term 'restrictions' but discrimination. Further, it should be noted that the text of Annex I to the AFMP is an adaptation of the TFEU and Regulation No 1612/68/EEC. Article 15(2) Annex I to the AFMP (freedom of establishment) simply refers to Article 9 of Annex I to the AFMP (freedom of workers), which repeats Article 7 et seq. of Regulation No 1612/68/EEC. This combination of primary and secondary law in one text is another issue that makes it a difficult task to interpret the AFMP.

As mentioned earlier, Delli argues that the interpretation of the Commission for the Air Transport Agreement could indicate that restrictions are not covered because the Commission applied the *Polydor* principle. Since the integration is more profound under the Air Transport Agreement it would in her opinion be doubtful whether restrictions are covered by the AFMP.[743] It is true that the CJEU has at times emphasised the extent to which an association agreement can reach.[744] If the CJEU is reluctant in one area where a profound level of integration exists, it should be *a fortiori* even more reluctant in a non-harmonised area. Nonetheless, it should be added that the CJEU has never openly declared that any association agreements with a third country contain a prohibition of restrictions.[745] However, the CJEU rarely distinguishes between indirect discrimination and restrictions (as there is no need to do so in the case law of the internal market).[746] Therefore, Delli concludes that restrictions

741 See Case 279/80, *Webb*, ECLI:EU:C:1981:314; Case C-76/90, *Säger v Dennemeyer*, ECLI:EU:C:1991:331 (freedom of services); Case 292/86, *Gullung*, ECLI:EU:C:1988:15 (freedom of establishment); see H. Schneider, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft,* Antwerp (1995), p. 54 et seq.

742 See Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 35 with reference to Case C-266/16, *Western Sahara Campaign UK*, ECLI:EU:C:2018:118, para. 70; see also the *Opinion of Advocate Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 44 et seq. for a further reference; see further Ammann, Leiden, supra note 164, p. 241 et seq.

743 Delli, Basel, supra note 65, pp. 303–306.

744 Case 270/80, *Polydor*, ECLI:EU:C:1982:43; Case C-312/91, *Metalsa*, ECLI:EU:C:1993:279.

745 See Tobler & Beglinger, Zurich, supra note 99, chart 38.

746 Tobler, Antwerp, supra note 731, pp. 307–315; see e.g. recently in the *Opinion of Adovcate General Bobek in Case C-218/19 Onofrei*, ECLI:EU:C:2020:716, para. 65.

are covered not for legal but for *pragmatic reasons* because it would be too difficult to distinguish these concepts.[747]

The present author is of the opinion that this *pragmatic* approach can be reconciled with the case law of the Swiss Federal Court which will be discussed in this study (see Chapter 5.2.3) and can also be can be compared to the more far-reaching 'reversed *Polydor* principle' developed by the EFTA Court.[748] On a closer look, the Swiss Federal Court seems to base the recognition of professional qualifications via primary law on the *principle of proportionality* or rather a *pragmatic approach*.[749] Even if the *Polydor* principle is applied in this context,[750] it could be argued in line with the case law of the Swiss Federal Court that the same level of protection under primary and secondary law should apply. This pragmatic approach avoids the above-mentioned pitfalls of the indirect discrimination versus free movement restrictions discussion.

4.2.2.4 Swiss case law on restrictions

Neither the CJEU nor the Swiss Federal Court have openly answered whether free movement restrictions are covered by the AFMP. In a leading case about notaries in 2003, the Swiss Federal Court did not answer whether restrictions are covered by the AFMP.[751] The Swiss Federal Court seems to have ruled at least implicitly in this sense in another leading case of 2010, as it accepted the recognition based on primary law but it seems to have based its reasoning on the principle of proportionality or on a pragmatic approach, as mentioned above.[752] Advocate General Mengozzi openly rejected this idea for the interpretation of Article 15(1) of Annex I to the AFMP.[753]

In a ruling of 2014 on certified court translators, the Swiss Federal Court recites the applicable provisions in EU law on restrictions. It is clear from the case that the residence requirement at hand constitutes indirect discrimination. However, the Swiss Federal Court

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[747] Delli, Basel, supra note 65, p. 325 et seq.

[748] See Tobler (2018), supra note 304, p. 1448.

[749] See Chapter 3.2.3.

[750] See Tobler et al., supra note 157, p. 24 et seq. and footnote 95 thereof.

[751] BGE 130 I 26.

[752] BGE 136 II 470 (= Pra 2011 No 37); see further Chapter 5.2.3.5.

[753] *Opinion of Advocate General Mengozzi in Case C-355/16, Christian Picart v Ministre des Finances et des Comptes public*, ECLI:EU:C:2017:610, para. 72 et seq.

explicitly refers to *Vlassopoulou*[754] and states that the freedom of establishment in EU law also forbids restrictions. It is unclear why the Swiss Federal Court elaborates this point. It is clear from the reasoning of the court that the Swiss Federal Court concludes that the measure at hand constitutes indirect discrimination.[755]

In another leading decision of 2014, the SFC still left the question undecided. However, it stated that academic literature is divided on this point but seems more inclined to accept that not only discrimination but also free movement restrictions are prohibited.[756]

The High Court of the Canton of Basel-Land ruled that restrictions are covered by the AFMP as a general statement.[757] The second President of a Bernese District Court held that restrictions are prohibited not only for the freedom of establishment but also for the subsidiary non-discrimination provision in Article 2 AFMP, which corresponds to Article 18 TFEU.[758] It is interesting to note that the Opinion of the Advocate General in the recent case *TÜV Rheinland LGA Products und Allianz IARD* before the CJEU raised the question whether Article 18 TFEU also prohibits restrictions (see Chapter 4.3.3 for a discussion of this case).[759]

4.2.2.5 Standstill clause under the AFMP

The AFMP also contains a standstill clause which forbids the adoption of any further 'restrictive measures'. Article 13 AFMP foresees a standstill clause that is worded as follows:

> 'The Contracting Parties undertake not to adopt any further restrictive measures vis-à-vis each other's nationals in fields covered by this Agreement.'

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754 BGE 140 II 112, para. 3.2.1.

755 See BGE 140 II 112, para. 3.6.3.

756 BGE 140 II 141 (= Pra 2014 No 85), para. 7.

757 Decision of the Kantonsgericht (High Court) Basel-Landschaft, Abteilung Verfassungs- und Verwaltungsrecht 2016 (810 15 196) of 08.06.2016, para. 7.4.

758 Decision of the second President, Gerichtskreis VIII Bern-Laupen, published in CaS 2008, pp. 332-347 of 13.06.2008; see for a more detailed account: A. Epiney, 'Zur Bedeutung des Freizügigkeitsabkommens im Amateursport - Anmerkung zu einem Entscheid des Gerichtskreis VIII Bern-Laupen v. 13. Juni 2008', AJP/PJA 2008, pp. 1233–1239.

759 Case C-581/18, *TÜV Rheinland LGA Products und Allianz IARD*, ECLI:EU:C:2020:453; see also infra note 859 for the Opinion of the Advocate General; see further A. Epiney, 'Art. 18 AEUV', in C. Calliess & M. Ruffert (eds.), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar,* Munich (2016), para. 40.

The Swiss Federal Court held that the standstill clause in Article 13 AFMP does not go further than the concept of indirect discrimination.[760] This is illustrated by a case of 2004 where it did not assess the standstill clause but simply stated that a violation of the standstill clause must be rejected as no discrimination could be found.[761] As the standstill clause does not go further than the concept of indirect discrimination,[762] there was no reason to discuss the standstill clause in the abovementioned case.

Doctrine however argues for a broader interpretation, which includes restrictions.[763] The decision of the CJEU in *Graf and Engel* could also be understood in this way.[764] It could be asked whether the standstill clause in Article 13 AFMP bears the same meaning as in the Ankara Agreement (see above Chapters 3.3 and 3.3.4). Swiss courts did not however answer whether violations of the standstill clause can be justified in a similar way to the case law of the CJEU concerning the Ankara Agreement.[765]

Finally, it should be noted that the wording of the standstill clause is restrictive and only applies vis-à-vis each other's nationals according to its wording. It does neither protect family members nor does it protect posted workers.[766]

4.2.2.6 Justifications

According to the prevailing opinion, direct discrimination can only be justified for reasons of public order, public security or public health (Article 5 of Annex I to the AFMP).[767] Indirect discrimination and restrictions however may also be justified by

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760 BGE 130 I 26, para. 3.4.

761 BGer 2P.134/2003 of 06.09.2004, para. 10.3.

762 BGE 130 I 26, para. 3.4.

763 See T. Cottier & R. Liechti, 'KVG-Teilrevision: Zur Vereinbarkeit mit dem bilateralen Freizügigkeitsabkommen Schweiz – EU', Jusletter 10 March 2013, para. 34 for a further reference.

764 See Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 35; for the same opinion see also: Diebold, Berne, supra note 67, para. 785.

765 See supra note 631 and Chapter 7.8.2.

766 V. Boillet, 'Art. 13 ALCP', in M. S. Nguyen & C. Amarelle (eds.), *Code annoté de droit des migrations: Accord sur la libre circulation des personnes (ALCP),* Berne (2014), para. 3.

767 BGer 6B_378/2018 of 22.05.2019, para. 3.4 et seq., para. 3.2; see further on public order: Fargahi et al. (15.04.2019), supra note 688 and Epiney (19.08.2019), supra note 688; for the internal market case law: e.g. Case C-264/96, *Imperial Chemical Industries v Colmer*, ECLI:EU:C:1998:370. Sometimes the internal market case law does not clearly differentiate between direct, indirect discrimination and restrictions: see Tobler, Antwerp, supra note 731, p. 316 et seq.

overriding reasons in the public interest (see Chapter 4.4.2.4 for other possible reasons).[768] Indirect discrimination can be justified by overriding reasons in the public interest for the freedom of establishment despite the restrictive wording of Article 5 of Annex I to the AFMP according to the Swiss Federal Court.[769] The corresponding provision for the provision of services in Article 22(4) of Annex I to the AFMP is clearer in its wording and certainly allows the justification based on overriding reasons in the general interest. As the case law of the CJEU must be followed, this distinction for the convergent fundamental freedoms would not however be sensible. In the opinion of the present author, the CJEU seems not have made a distinction based on the different wordings of the provisions for justification.[770]

4.2.2.7 The distinction between the fundamental freedoms relating to persons

The freedom of establishment requires a 'stable and continuous basis'.[771] The CJEU ruled in the well-known case *Gebhard* that not only is the duration crucial to distinguish the freedom of establishment from services but also 'regularity, periodicity and continuity'.[772] The temporary character of services also allows the necessary infrastructure in the host Member State and is therefore insufficient to show a stable basis. Unlike in the internal market of the EU, the distinction between the freedom of establishment and the freedom of services is essential, as services can only be provided for 90 days, whereas the freedom of establishment is not limited in time, but is not applicable to legal persons.[773] The case law also relies on the duration of 90 days as a decisive element for the distinction between the freedom of establishment and the freedom to provide services under the *acquis suisse*.[774]

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768 See, among many others, S. Theuerkauf & S. Ousmane, 'Art. 5 ALCP', in M. S. Nguyen & C. Amarelle (eds.), *Code annoté de droit des migrations: Accord sur la libre circulation des personnes (ALCP),* Berne (2014), para. 38 et seq.

769 See BGE 130 I 26, para. 3.2.3; see also Diebold, Berne, supra note 67, para. 644 et seq. for further references.

770 See also Diebold, Berne, supra note 67, para. 649 which also offers references to other opinions based on the decision in the Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643. The CJEU did however not have to assess this question in the case *Graf and Engel*.

771 Case C-70/95, *Sodemare*, ECLI:EU:C:1997:301, para. 24.

772 Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411, para. 22.

773 See Art. 5(1) AFMP and Art. 17(a) of Annex I to the AFMP.

774 BGer 2C_694/2011 of 19.12.2011, para. 4.4; Decision WBE.2018.36 of the Obergericht (High Court) of the Canton of Aargau of 21.08.2018, Chamber for administrative law, published in AGVE 2018, p. 303 et seq., para. 6.2.

Professional organisations are also precluded from denying a second enrolment to a professional body.[775]

The Swiss Federal Court held that a German lawyer who practiced law in Switzerland, and claimed that it was unlawful not to register him as a foreign lawyer in the public register, could not rely on the freedom of establishment. The Swiss Federal Court referred to the ruling in *Gebhard* and stated that an office may also be insufficient to constitute an establishment. The lawyer had no stable activity and it was therefore considered that he was providing services. In essence, the purpose of the public register of the bar association is to guarantee the integrity and quality of its members. Service providers are exempt from this obligation because it would create an undue burden in the freedom to provide services. The CJEU has previously ruled that service providers cannot, for example, be obliged to register on the trades register in Germany (other than automatically).[776] It is interesting to note that the motivation of the German lawyer in the abovementioned case before the Swiss Federal Court was based on a 'side effect' of registration. That is to say, the lawyer wished to register because he wanted to acquire additional clients.[777] As in many EU countries, lawyers can often lack the means in Switzerland to be able to advertise in conformity with the rules of professional conduct.[778] Thus, it could be argued that the Swiss law on the registration of EU lawyers puts those lawyers at a disadvantage with Swiss lawyers if they intend to provide *services*. The Swiss Federal Court merely points out that the rule also serves the purpose of protecting consumers, but without mentioning the terms 'discrimination' or 'restrictions'. Otherwise, the Swiss Federal Court states, consumers would have the impression that the lawyer is familiar with Swiss laws and the legal system.[779] The last part of the reasoning misses out the determining element: whether the non-registration constitutes a restriction or not. This could be answered in the affirmative because the non-registration rule does not hinder or make less attractive the *entry to the market* but rather the *exercise of a profession*. The CJEU stated in *Konstantinidis* that restrictions that hinder the *exercise* of a profession

775 Case 96/85, *Commission v France*, ECLI:EU:C:1986:189.

776 Case C-215/01, *Schnitzer*, ECLI:EU:C:2003:662, para. 36 et seq.; Case C-58/98, *Corsten*, ECLI:EU:C:2000:527, para. 46.

777 BGer 2A.536/2003 of 09.08.2004.

778 Art. 12(d) BFGA; see further F. Bohnet, *Droit des professions judiciaires: Avocat, notaire, juge,* Bâle (2014), para. 54.

779 BGer 2A.536/2003 of 09.08.2004, para. 4.3.

are also prohibited under primary law.[780] However, the CJEU accepted in *Schnitzer* and *Corsten* that service providers are to be treated differently because they should not bear the same procedure for only a short amount of time.[781] Nevertheless, the CJEU accepted consumer protection as an overriding reason in the public interest to justify a restriction of Article 49 TFEU.[782] The CJEU also gave Member States a wide margin of discretion when assessing the proportionality of sensitive areas.

Some authors disagree with this concept of justification and argue that the scope of the freedom of establishment should be restricted. A distinction should be made between *access* to a profession and *exercise* of a profession. The latter would fall outside the scope of Article 49 TFEU whilst only the access part of the process would be protected. This reasoning is based on an application of the *Keck* jurisprudence (certain selling arrangements) for the freedom of goods *mutatis mutandis*.[783] Barnard concludes from the case law of the CJEU that only substantial hindrances are considered breaches of the Treaty and must be justified.[784]

Finally, the freedom of establishment has also been distinguished from the freedom of movement for workers. The Court has clarified this distinction in the *Jany* case.[785] The Court held that an employed person performs for a 'certain period of time (…) services for and under the direction of another person in return for which he receives remuneration'.[786] The decisive element is the subordination, which means 'a choice of that activity, working

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780 Case C-168/91, *Konstantinidis*, ECLI:EU:C:1993:115, para. 15.

781 Case C-215/01, *Schnitzer*, ECLI:EU:C:2003:662, para. 36; Case C-58/98, *Corsten*, ECLI:EU:C:2000:527, para. 46.

782 Case 220/83, *Commission v France*, ECLI:EU:C:1986:461, para. 20.

783 Diebold, Berne, supra note 67, para. 913 et seq. and para. 922 et seq. for further references to the rich case law; H. Schneider & N. Wunderlich, 'Art. 45 AEUV', in J. Schwarze et al. (eds.), *EU-Kommentar,* Baden-Baden (2019), para. 45 et seq.; see also H. Schulte Westenberg, *Zur Bedeutung der Keck-Rechtsprechung für die Arbeitnehmerfreizügigkeit,* Diss. Münster (2008), Tübingen (2009), p. 30 et seq.; see also C. Barnard, *The substantive law of the EU: The four freedoms,* Oxford (2019), p. 217 et seq.; see also for a more critical view: Tiedje, supra note 732, para. 110 et seq.; see however Case C-591/17, *Austria v Germany*, ECLI:EU:C:2019:504, para. 128 et seq.

784 Barnard, Oxford, supra note 783, p. 220.

785 Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, ECLI:EU:C:2001:616.

786 Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, para. 31.

conditions and conditions of remuneration'. The remuneration has to be paid in full and directly to the self-employed person.[787]

4.2.3 Public service exception

Article 16 of Annex I to the AFMP provides that self-employed persons fall outside the scope of the freedom of establishment where their activity involves, 'even on an occasional basis, the exercise of public authority'. The term 'public authority' deviates from the term 'official authority' used in Article 51(1) TFEU. The German and French terms (*Ausübung hoheitlicher Gewalt* and *l'exercice de l'autorité publique*) are however the same in the AFMP and in the TFEU. The case law of the CJEU is binding according to Article 16(2) AFMP. The difference in terminology does not therefore influence the meaning of Article 16 of Annex I to the AFMP.[788]

The concept of public authority is narrow.[789] Lawyers do not fall under Article 16 of Annex I to the AFMP. In the internal market case law, the CJEU has held in *Reyners* that the 'most typical' activities of a lawyer (legal assistance and representation) do not fall under the umbrella of public authority because there is no connection between their activities and the exercise of judicial authority.[790] The CJEU did not accept the argument that regard should be had to national law in that respect. Officials have to be granted 'public authority' status to fall within the scope of the public authority exception.[791] It highlighted in *Reyners* that there needs to be 'a direct and specific connexion with the exercise of official authority'.[792] Official authorities must have the power to take the final decision and not have merely auxiliary and preparatory functions.[793]

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[787] Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, para. 71.

[788] A. Borghi, 'Art. 4 ALCP and Arts. 10, 16 and 22 Annexe I ALCP', in A. Borghi (ed.), *Le libre circulation des personnes entre la Suisse et l'UE: Commentaire article par article de l'accord du 21 juin 1999,* Geneva (2010), para. 179; M. Oesch, 'Niederlassungsfreiheit und Ausübung öffentlicher Gewalt im EU-Recht und im Freizügigkeitsabkommen Schweiz-EU', SRIEL (SZIER/RSDIE) 2011, p. 619 seq.; for another opinion see: R. Brazerol, 'Das schweizerische Notariat im Fokus der Freizügigkeit', Jusletter 28 October 2013, para. 32 et seq.

[789] P. Craig & G. de Búrca, *EU law: Text, cases, and materials,* Oxford (2015), p. 765 et seq.; see Case 33/88, *Allué*, ECLI:EU:C:1989:222.

[790] Case 2/74, *Reyners v Belgian State*, ECLI:EU:C:1974:68, para. 52.

[791] Case C-42/92, *Thijssen v Controledienst voor de verzekeringen*, ECLI:EU:C:1993:304.

[792] Case 2/74, *Reyners v Belgian State*, ECLI:EU:C:1974:68, para. 45.

[793] Case C-42/92, *Thijssen v Controledienst voor de verzekeringen*, ECLI:EU:C:1993:304, para. 22.

A leading case in Switzerland was about a Latvian national who applied for enrolment as an interpreter as well as a translator in the judicial registers in the Canton of Zurich. The competent body, and the body at the hierarchical level above that, refused the enrolment based on the fact that the applicant could not show that he had established himself in Switzerland. Therefore, he could not be available on short notice. This was necessary to satisfy the needs of the courts for interpreters and translators. Furthermore, it was argued that the applicant could not rely on the AFMP because the professions of public interpreter and translator would fall under the public service exception. The decision was appealed before the Swiss Federal Court.

The Swiss Federal Court referred to the case law in *Josep Peñarroja*,[794] which was decided after the date of signature. However, it concluded that this case only represented a clarification of the narrow concept of the public service exception the court adopted in *Reyners.*[795]

Finally, it remains disputed under the AFMP whether notaries use 'privileges of official power'.[796] The CJEU held in a series of cases that several countries failed to fulfil their obligations.[797] Fascinatingly, the Swiss Federal Court held in an *obiter dictum* in 2002 that residence requirements for notaries would not be in violation of the AFMP because they are exempt under the public authority exception.[798] There is still an ongoing discussion concerning this among scholars. This will be addressed below for the notarial profession (see Chapter 8.4).[799]

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794 Joined Cases C-372/09 and C-373/09, *Josep Peñarroja Fa*, ECLI:EU:C:2011:156, paras. 41-45.

795 BGE 140 II 112, para. 3.2.3.

796 *Opinion of Advocate General Mayras in Case 2/74, Reyners*, ECLI:EU:C:1974:59, para. 8.

797 Case C-54/08, *Commission v Germany*, ECLI:EU:C:2011:339; Case C-47/08, *Commission v Belgium*, ECLI:EU:C:2011:334; Case C-50/08, *Commission v France*, ECLI:EU:C:2011:335; Case C-51/08, *Commission v Luxembourg*, ECLI:EU:C:2011:336; Case C-52/08, *Commission v Portugal*, ECLI:EU:C:2011:337; Case C-53/08, *Commission v Austria*, ECLI:EU:C:2011:338; Case C-61/08, *Commission v Greece*, ECLI:EU:C:2011:340; see further S. Schill, 'Staatsangehörigkeitsvorbehalt für Notare und europäische Niederlassungsfreiheit: Der Anfang vom Ende eines Privilegs?', NJW 2007, p. 2014 et seq.

798 BGE 128 I 280, para. 3.

799 Oesch (2016), supra note 628, p. 58 et seq.; V. Boillet, *L' interdiction de discrimination en raison de la nationalité au sens de l'accord sur la libre circulation des personnes,* Diss. Lausanne (2009), Bâle (2010), p. 285 et seq.; see also the consequences for secondary law: M. Bengel, 'Das deutsche Notariat im Lichte der Berufsqualifikationsrichtlinie', DNotZ 2012, p. 26 et seq.; Oesch (2011), supra note 788, pp. 616-624.

4.3 Freedom of movement for workers and persons not pursuing an economic activity between Switzerland and the EU

The territorial scope is the same as described above for the freedom of establishment *mutatis mutandis* (see Chapter 4.2).

4.3.1 Personal scope

The freedom of movement for workers under the AFMP includes a worker ('employed person') and the subcategory of the 'employed frontier worker'.[800] A frontier worker 'has his residence in the territory of a Contracting Party and pursues an activity as an employed person in the territory of the other Contracting Party, returning to his place of residence as a rule every day, or at least once a week'.[801] Some minor exceptions apply to frontier workers.[802]

There is no legal definition of the term 'worker' in the AFMP, nor in the TFEU. In the light of the CJEU's settled case law: 'The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration'.[803] The freedom of movement for workers in Articles 6 and 7 of Annex I to the AFMP is interpreted in conformity with Article 45 TFEU by the Swiss Federal Court.[804] To fall under the freedom of movement for workers, 'a person must nevertheless pursue an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and accessory'.[805] The Swiss Federal Court relied directly on the CJEU's case law when it held that a part-time call centre agent may qualify as a worker as long as the work is effective and

800 Art. 6 et seq. Annex I to the AFMP.

801 Art. 7(1) of Annex I to the AFMP; see further Case C-355/16, *Christian Picart v Ministre des Finances et des Comptes public*, ECLI:EU:C:2018:184, para. 20 et seq. for the similar category of a 'self-employed frontier worker' under the freedom of establishment in Art. 13(1) of Annex I to the AFMP.

802 See Arts. 7 and 25(3) Annex I to the AFMP.

803 Case C-413/01, *Ninni-Orasche*, ECLI:EU:C:2003:600, para. 24; Case 53/81, *Levin v Staatssecretaris van Justitie*, ECLI:EU:C:1982:105, paras. 13 and 17; Case 344/87, *Bettray*, ECLI:EU:C:1989:226, para. 11 et seq. ; see also M. Kellerbauer & D. Martin, 'Art. 45 TFEU', in M. Kellerbauer, M. Klamert & J. Tomkin (eds.), *The EU treaties and the charter of fundamental rights: A commentary,* Oxford (2019), para. 16 et seq.

804 BGE 131 II 339 (= Pra 2006 No 39), para. 3.3.

805 Case C-413/01, *Ninni-Orasche*, ECLI:EU:C:2003:600, para. 26; see further Kellerbauer & Martin, supra note 803, para. 13 et seq.

genuine.[806] The same applies for a waitress working part-time, even if she cannot not support herself and two children.[807] The Swiss Federal Court also found that the profession of prostitute falls under the freedom of movement for workers.[808]

An individual may also rely on fundamental freedoms against his or her own state as long as there is a cross-border element (for example, where it concerns a person who has obtained a degree in another state).[809] Dual nationals may in principle also invoke the freedom of establishment even vis-à-vis their own state.[810] The Swiss Federal Court however followed *McCarthy*[811] in 2017[812] and confirmed that decision in the same year.[813] According to that case law, a national who has never exercised his rights of free movement may not invoke EU law as long as it does not deprive the national of 'the genuine enjoyment of its rights'.[814]

To give a more recent example, the case *Tjebbes and Others*[815] shows a cross-border situation for at least one minor (Ms Duboux) that has never exercised her free movement rights. In 2014, Ms Koopman and her daughter Ms Duboux who were both Dutch and Swiss dual nationals submitted an application for a new Dutch passport which was refused. The Dutch authorities found that Ms Koopman had lost Netherlands nationality *ex tunc* because she stayed for an uninterrupted period of 10 years in Switzerland without declaring her intent on keeping Netherlands nationality or submitting a passport application. It would have been possible for her to interrupt this 10-year period either by declaration, by staying for at least one year in the Netherlands or in an EU Member State or by applying for a passport or an identity card. Her daughter (Ms Duboux) was a minor, born in Switzerland who has never exercised her free movement rights.[816] According to Dutch law, Ms Duboux also

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806 BGE 131 II 339 (= Pra 2006 No 39), paras. 3.2 and 3.3.

807 BGer 2C_813/2016 of 27.03.2017, para. 3.2.

808 BGE 140 II 460, para. 4.1.

809 Case C-19/92, *Kraus*, ECLI:EU:C:1993:125; para. 15; W. Brechmann, 'Art. 45 AEUV', in C. Calliess & M. Ruffert (eds.), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar,* Munich (2016), para. 43.

810 See e.g. Borghi, supra note 669, para. 44 et seq.

811 Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277, para. 56.

812 BGE 143 II 57, paras. 3.5 – 3.7.

813 BGE 143 V 81, para. 8.3.3.2; see also BVGer F-5332/2016 of 27.04.2018, para. 8.2.

814 See Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277, para. 56.

815 Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189.

816 Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 14 et seq.

automatically lost Netherlands nationality as a consequence of her mother's nationality loss.[817]

This case is the follow-up case of *Rottmann* where the CJEU held that it is for each Member State 'to lay down the conditions for the acquisition and loss of nationality'.[818] Even if the Member States are competent for these rules, they must comply with EU law.[819] In that case the CJEU found that the principle of proportionality must be applied for the withdrawal of naturalisation.[820]

The Raad van State (Council of State, Netherlands) inter alia asked whether the measure is in conformity with Union citizenship and the principle of proportionality in the absence of an individual assessment. It is noteworthy to mention that the Advocate General Mengozzi proposed an abstract proportionality test without considering the merits of each case.[821] This reasoning was not followed by the CJEU. The CJEU first referred to the *Rottmann* case reaffirming that it is a legitimate aim to protect the special relationship between its nationals.[822] It than went on to answer the question in the affirmative as long as the individual assessment of proportionality is 'an ancillary issue'.[823] In other words, the CJEU asserted in this Grand Chamber judgment that a rule which would not permit an individual examination of the consequences of the withdrawal of nationality under EU law would be inconsistent with the principle of proportionality. Thus, the CJEU seems to have based its decision on the assumption that national law would provide for this individual examination.[824] The CJEU found that Member States must take into account the fundamental rights of the Charter,

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817 Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 10.

818 Case C-135/08, *Rottmann*, ECLI:EU:C:2010:104, para. 39.

819 Case C-135/08, *Rottmann*, ECLI:EU:C:2010:104, para. 41; see further C. Neier, *Der Kernbestandsschutz der Unionsbürgerschaft,* Diss. Zurich 2018, Baden-Baden (2019), p. 65 et seq.

820 Case C-135/08, *Rottmann*, ECLI:EU:C:2010:104, para. 55 et seq.

821 *Opinion of Advocate General Mengozzi in Case C-221/17, Tjebbes and Others*, ECLI:EU:C:2018:572, para. 88; H. van Eijken, 'Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, M.G. Tjebbes and others v Minister van Buitenlandse Zaken ECLI:EU:C:2019:189', European Constitutional Law Review 2019, No 4, p. 10 et seq. who mentions that proportionality tests for social rights are under less scrutiny.

822 Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 33.

823 Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, paras. 42 and 48.

824 Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 43. This is not the case, see G.-R. de Groot, *A follow-up decision by the Council of State of the Netherlands in the Tjebbes case,* <http://globalcit.eu/a-follow-up-decision-by-the-council-of-state-of-the-netherlands-in-the-tjebbes-case/> (last visited on 28.06.2020).

notably the right to respect for family life and serious risk because of the loss of consular protection. Thus, there must be a balancing of legitimate public versus private interests.[825] Consequently, the Raad van State (Council of State, Netherlands) found that Article 20 TFEU is violated because Dutch law does not permit a proportionality test. The Minister of Foreign Affairs was ordered to take new decisions assessing proportionality.[826]

The *Tjebbes and Others* decision of the CJEU has been discussed extensively in legal literature, namely for giving the Member States much discretion and also for the protection of other fundamental rights, such as the right to be heard but also for the careful balancing of interests.[827] The focus of this discussion shall however shift to the free movement of persons between the EU and Switzerland.

The question is whether Ms Koopman and Ms Duboux could rely on the AFMP considering the reasoning of the CJEU in *Tjebbes* and *McCarthy* and the other case law for dual nationals. However, there are some caveats: To begin with, it is difficult to argue that the more recent case law in *Lounes* case should be applied where the CJEU ruled that Article 21 TFEU and the Citizens' Rights Directive can be applied *per analogiam* for a Spaniard who made use of her free movement rights and obtained a dual nationality *mutatis mutandis* (since Union citizenship is not part of the *acquis suisse*).[828] Contrary to the *Lounes* case, Ms Koopman obtained Swiss nationality in 1988 and she did not make use of her free movement rights when the AFMP entered into force on 1 June 2002. More specifically, for dual nationals who rely on the AFMP, there is a negative answer of the Commission to Petition No 1184/2017 of the European Parliament on visa requirements for a non-European spouse of an Irish and Swiss dual national who has never exercised her freedom of movement but is residing in Switzerland. It simply states that the AFMP cannot be applied since neither the Citizens' Rights Directive nor the AFMP can be relied upon. It claims that the AFMP

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825 Eijken (2019), supra note 821.

826 Groot, supra note 824.

827 See Eijken (2019), supra note 821, p. 16; see for a very critical analysis: D. Kochenov, 'The Tjebbes Fail', European Papers 2019, Vol. 4, No 1, p. 319 et seq.; see also C. Vlieks, 'Tjebbes and Others v Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?', Tilburg Law Review 2019, No 2, p. 142 et seq.

828 Case C-165/16, *Lounes*, ECLI:EU:C:2017:862; D. W. Carter, *EU citizens who obtain the nationality of another member state can still rely on EU law,* <https://leidenlawblog.nl/articles/eu-citizens-who-obtain-the-nationality-of-another-member-state> (last visited on 26.09.2020); see also D. A. J. G. de Groot, 'Free Movement of Dual EU Citizens', European Papers 2018, Vol. 3, No. 3, p. 1103 et seq.

contains no clause for dual nationals, that the CJEU has never ruled on dual nationals relating to the AFMP and that the AFMP cannot go further than the Citizens' Rights Directive.[829]

In order to give an answer to this question, the *Tjebbes* case and the afore-mentioned brief legal assessment of the Commission for Petition No 1184/2017 must be reassessed in light of the previous free movement case law for privileged third country nationals. In *Tjebbes,* the Court was asked to answer to questions by the referring court whether Articles 20 or 21 TFEU are violated. The CJEU did not give an answer to Article 21 TFEU because it would not be apparent that the applicants had made use of their free movement rights.[830] In the present author's opinion, this statement should however be reassessed in light of the free movement case law and the status of Ms Koopman and Ms Dubroux as privileged third country nationals.

Considering the case law for privileged third country nationals, the case *Kahveci and Inan* which was decided under the Ankara Agreement (the Ankara Agreement was previously discussed in Chapter 3.3) is comparable to the situation in the *Tjebbes* case with regard to the situation of a privileged third country national. The State Secretary for Justice withdrew his residence permit after Mr Kahveci had been sentenced to six years of imprisonment. The Raad van State (Council of State, Netherlands) referred two questions to the CJEU. It asked whether Mr Kahveci as a family member could rely on Decision No 1/80 of the Association Council despite the fact that his wife was a Dutch national and it also referred the question whether the time the Turkish worker obtained the Dutch nationality would matter. The CJEU held that the aim Decision No 1/80 would be impeded if Mr Kahveci could not rely on it and that it would have 'the effect of undermining the legal status expressly conferred on Turkish nationals'. The CJEU did not state that the time of obtaining Dutch nationality would matter.[831] Following the reasoning of this case, it would not matter at what time Ms Koopman obtained Swiss nationality in 1988 before the entry into force of the AFMP. Thus, she and her minor child Ms Debroux could have relied on the AFMP. This line of reasoning also exists in the internal market case law, notably in the case *Scholz* for the free movement of

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829 European Parliament, *Petition No 1184/2017 by M. O. (Irish) on visa requirement for non-European spouses of European citizens of 30.07.2018*, p. 2 et seq.

830 Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 28.

831 Joined Cases C-7/10 and C-9/10, *Staatssecretaris van Justitie v Tayfun Kahveci and Osman Inan*, ECLI:EU:C:2012:180, para. 8 et seq.

workers where the CJEU stated: '(…) the fact that the applicant has acquired Italian nationality has no bearing on the application of the principle of non-discrimination'.[832]

With regard to the case law for the Ankara Agreement, it should however not be concealed that the CJEU denied the application of Decision No 3/80 of the Association Council concerning social security coordination in *Demirci* for Turkish and Dutch dual nationals who had left the Netherlands. The CJEU distinguished the cases *Kahveci* and *Demirci*. It held that the Turkish workers in *Demirci* would not forego their supplementary benefits since they could have chosen to stay in the Netherlands as Dutch nationals. Moreover, it was found that they would rely on Decision No 3/80 their own behalf. Finally, it was stated that it would contravene Article 59 of the AP (preventing more favourable treatment of Turkey than other Member States).[833]

From this analysis of the case law, it can be seen that the decisive question is whether the CJEU adapts the free movement case law for the fundamental freedoms for dual nationals in *Scholz*[834] and the adaptation for privileged third country nationals in *Kahveci and Inan*[835] or the case law based on *McCarthy*[836]. Further, according to the response of the Commission for Petition No 1184/2017 it would even matter whether the Citizen's Rights Directive applies. This neglects however the importance of the fundamental freedoms foreseen by the AFMP which does not only consist of secondary law, notably Regulation No 1612/68/EEC. Following this line of case law in *Kahveci and Inan* or *Scholz* would mean that the reasoning in the *Tjebbes* based on Article 20 TFEU cannot be decisive for the necessary cross-border element to fall in the scope of the *fundamental freedoms* provided by the AFMP.

Even if the application of the Citizen's Rights Directive were decisive *mutatis mutandis* for the reasoning whether the measure falls in the scope of the AFMP, it should be mentioned that the CJEU case law for the recognition of names is also more generous for dual

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[832] Case C-419/92, *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda*, ECLI:EU:C:1994:62, para. 8.

[833] Case C-171/13, *Demirci and Others*, ECLI:EU:C:2015:8, paras. 66 et seq. and 72 et seq.

[834] Case C-419/92, *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda*, ECLI:EU:C:1994:62, para. 8.

[835] Joined Cases C-7/10 and C-9/10, *Staatssecretaris van Justitie v Tayfun Kahveci and Osman Inan*, ECLI:EU:C:2012:180.

[836] Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277.

nationals.[837] Further, there is no corresponding Article in the AFMP similar to Article 59 of the AP which would prohibit more favourable treatment of Swiss nationals or Switzerland.

Under the assumption that there is a cross-border element and that the AFMP applies, the *Tjebbes* case could have been solved without recourse to the principle of proportionality enshrined in Union citizenship simply by invoking the AFMP because this rule infringes upon the free movement and non-discrimination rights granted by the AFMP. Neither the referring court nor the CJEU did however address this seminal topic.[838] This rule is directly discriminatory because it distinguishes between Dutch nationals with dual Dutch and Swiss nationality and Dutch nationals without any other nationality.[839] While non-discrimination should have played a role in the reasoning of the CJEU, it is sufficient to say that the standstill clause of the AFMP cannot be applied vis-à-vis the home Member State due to its restrictive wording.[840] In contrast, that nationals may in principle also invoke non-discrimination and equal treatment provisions against their State of origin is established case law even under the AFMP.[841] To find the relevant non-discrimination provisions of the AFMP, the status of Ms Koopman would have to be assessed. Regardless of her status (freedom of movement for workers, freedom of establishment or persons not pursuing an economic activity) Ms Koopman could have relied on Article 2 AFMP (in conjunction with the applicable fundamental freedom of the AFMP) and profited from non-discrimination and equal treatment provided by the AFMP.[842] In the light of the non-discrimination provisions of the AFMP, the courts would also have to assess the justification and proportionality of the measure under the AFMP. This element was however neither assessed directly nor as a part of the ancillary proportionality test prescribed by the CJEU.

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[837] Case C-541/15, *Freitag*, ECLI:EU:C:2017:432, para. 38; Groot (2018), supra note 828, p. 1088 et seq.

[838] See also Chapter 4.2.2 for a discussion of necessary cross-border elements under the AFMP.

[839] Kochenov (2019), supra note 827, p. 319 and p. 329 et seq.; see Arts. 9 and 15 of Annex I to the AFMP; see also A. Epiney & G. Blaser, 'Art. 7 ALCP', in M. S. Nguyen & C. Amarelle (eds.), *Code annoté de droit des migrations: Accord sur la libre circulation des personnes (ALCP),* Berne (2014), paras. 4 and 9 et seq.

[840] Art. 13 AFMP; Boillet, supra note 766, para. 3; see further Chapter 4.2.2.5; see however the *obiter dictum* in Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 35.

[841] Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 52.

[842] Case C-165/16, *Lounes*, ECLI:EU:C:2017:862, para. 51 et seq.; Case C-419/92, *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda*, ECLI:EU:C:1994:62, para. 8 et seq.

4.3.2 Material scope: Discrimination, restrictions and the exercise of public authority

According to Article 9 of Annex I to the AFMP, equal treatment[843] and the concept of non-discrimination described for the freedom of establishment also apply to the freedom of movement for workers (even if non-discrimination is not explicitly mentioned in Article 9 of Annex I to the AFMP).[844] The Swiss Federal Court argued, in a remarkable and seminal case (about a person who was not pursuing an economic activity), that it cannot be decisive whether Austrians are more likely to be affected by a specific Federal Act, as Swiss nationals in the opposite situation would be similarly affected.[845] This judgment shows a fundamental misunderstanding of the concept of indirect discrimination.[846]

Employment in public services may be refused if it involves the exercise of public authority.[847] For the freedom of movement for workers, the CJEU recently clarified that Member States may not invoke Article 45(4) TFEU (employment in the public service) to exclude their own nationals from the scope of the Treaty. A national who made use of his free movement rights and obtained a diploma abroad may rely on the free movement provisions.[848] This case law can be qualified as a helpful clarification of the existing case law for an existing concept of EU law. Therefore, the case law after the date of signature also applies for the *acquis suisse* (Article 16(2) AFMP, and see further Chapter 3.4.3).

4.3.3 Horizontal effect of non-discrimination provisions

The jurisprudence of the CJEU emphasises that the concept of horizontal effect is an integral part of EU law.[849] In *Dominguez,* the CJEU even ruled that a directive may be relied

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843 See e.g. Case C-478/15, *Radgen v Finanzamt Ettlingen*, ECLI:EU:C:2016:705, para. 56.

844 This is either explained by reference to Art. 2 AFMP or by the case law of the CJEU in the light of Art. 16(2) AFMP: see Epiney & Blaser, supra note 839, para. 12 et seq.; for free movement restrictions, see Tobler & Beglinger, Zurich, supra note 586, para. 213 et seq.

845 BGE 134 III 608, para. 2.6.5.

846 See also Diebold, Berne, supra note 67, paras. 524-526.

847 Art. 10 of Annex I to the AFMP.

848 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, paras. 32-34.

849 Case C-281/98, *Angonese*, ECLI:EU:C:2000:296, paras. 31-35; Case C-94/07, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV.*, ECLI:EU:C:2008:425, para. 45 et seq.; Case C-438/05, *Viking*, ECLI:EU:C:2007:772, paras. 40 and 72.

upon if the employer is a public law body.[850] According to the literature and certain Swiss court rulings, the non-discrimination and equal treatment provisions of the AFMP not only have direct but also horizontal effect (for example, Article 9(4) of Annex I to the AFMP). They can therefore be invoked in proceedings vis-à-vis another private party.[851] In addition, Boillet and Martenet are convincing in showing that the concept was developed earlier in case law and has to be followed.[852] Articles 2, 9, 15 and 19 of Annex I to the AFMP have horizontal effect vis-à-vis associations,[853] unions,[854] and for Article 9 of Annex I to the AFMP, also vis-à-vis private parties pursuant to its wording.[855] The answer as to whether Article 9(1) of Annex I to the AFMP has horizontal effect was however explicitly left open in two Swiss Federal Court rulings delivered in early 2019.[856]

It is also still uncertain whether Article 18 TFEU has horizontal effect. One author argues that the court hinted at the concept of horizontal effect in *Mangold* [857] for the interpretation

850 Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33.

851 Decision of the second President, Gerichtskreis VIII Bern-Laupen, published in CaS 2008, pp. 332-347 of 13.06.2008, para. 29 et seq.; BGer 4A_593/2009 of 05.03.2010, para. 1.3 (implicitly); K. Pärli, 'Neues beim arbeitsrechtlichen Diskriminierungsschutz – mit einem Seitenblick auf die Entwicklung in der Europäischen Union', Jusletter 7 February 2011, para. 17 et seq.; see also V. Martenet & V. Boillet, 'L'égalité dans les relations entre particuliers et l'Accord sur la libre circulation des personnes', in A. Epiney & T. Civitella (eds.), *Schweizerisches Jahrbuch für Europarecht 2007/2008 / Annuaire Suisse de droit européen 2007/2008,* Berne (2008), pp. 332–339; see for further references BGer 4A_230/2018 of 15.01.2019, para. 2.5.3.

852 Martenet & Boillet, supra note 851, pp. 332–339.

853 See for the internal market case law: Case 36/74, *Walrave und Koch*, ECLI:EU:C:1974:140, para. 26 et seq.; Case 13/76, *Gaetano Donà v Mario Mantero*, ECLI:EU:C:1976:115, para. 19; Case C-415/93, *Bosman*, ECLI:EU:C:1995:463, para. 14 et seq.; Joined Cases C-51/96 und C-191/97, *Deliège*, ECLI:EU:C:2000:199, para. 4; Case C-176/96, *Lehtonen*, ECLI:EU:C:2000:201, para. 4; Case C-519/04, *Meca-Medina and Majcen v Commission*, ECLI:EU:C:2006:492, para. 24.

854 See for the internal market case law: Case C-438/05, *Viking*, ECLI:EU:C:2007:772, para. 33; Case C-341/05, *Laval un Partneri*, ECLI:EU:C:2007:809, para. 98.

855 BGer 4A_593/2009 of 05.03.2010, para. 1.3 (implicitly); Decision 400 12 152 of the Kantonsgericht (High Court) Basel-Landschaft, Chamber for Civil law of 17.12.2012, para. 3; see further K. Pärli, 'Neues beim arbeitsrechtlichen Diskriminierungsschutz – mit einem Seitenblick auf die Entwicklung in der Europäischen Union', Jusletter 7 February 2011., para. 18.

856 BGer 4A_230/2018 of 15.01.2019, para. 2.6; BGer 4A_215/2017 of 15.01.2019, para. 5.3; see for a critical analysis: K. Pärli, 'Eurolohn: Berufung auf das Diskriminierungsverbot ist rechtsmissbräuchlich: Kritische Bemerkungen zum Urteil des Bundesgerichts 4A_230/2018 vom 15. Januar 2019', Jusletter 20 May 2019; see also the decision of the lower instance in Decision 10/2017/1 of the Obergericht (High Court) of the Canton of Schaffhausen of 20.02.2018, para. 7.3.1 which mistakes the concept of self-executing character for the concept of horizontal effect despite the case law of the CJEU and the Swiss Federal Court.

857 Case C-144/04, *Mangold*, ECLI:EU:C:2005:709, paras. 74-77.

of Article 12 EC (now Article 18 TFEU).[858] More importantly, Advocate General Bobek points out in great detail in a very recent Opinion in the case *TÜV Rheinland LGA Products and Allianz IARD* concerning a contract limiting the geographical extent of an insurance coverage that an extensive interpretation of Article 18 TFEU, such applying it horizontally, could be highly problematic as it could be utilised as a harmonising provision without limits.[859] On 11 June 2020, the CJEU did not answer in its Grand Chamber judgment whether Article 18 TFEU can be applied between private parties.[860] The CJEU referred to its previous case law according to which two conditions must be fulfilled. First, the situation must fall under EU law. Second, there must be no more specific rule in the Treaties which prohibits discrimination and is applicable to that situation. Consequently, the CJEU held that this situation does not fall under EU law and Article 18 TFEU could therefore not be applied horizontally in this case.[861]

4.3.4 Persons not pursuing an economic activity and students

Persons not pursuing an economic activity have a right to stay (second sentence of Article 24(4) of Annex I to the AFMP). Family members have derived rights,[862] which also apply for entry to university (Article 3(6) AFMP).[863] The prevailing view is that the AFMP

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858 R. Repasi, 'Europäischer Arbeitnehmerbegriff - Doktorandenstudium', EuZW 2008, No 17, p. 529 et seq.

859 *Opinion of Adovcate General Bobek in Case C-581/18, TÜV Rheinland LGA Products and Allianz IARD*, ECLI:EU:C:2020:77, para. 93 et seq.

860 Same Opinion: D. Sarmiento, *Op-Ed: "Can Article 18 TFEU fill in gaps in the Treaties in the name of equality among Europeans? After RB (C-581/18), the answer is no",* <https://eulawlive.com/op-ed-can-article-18-tfeu-fill-in-gaps-in-the-treaties-in-the-name-of-equality-among-europeans-after-rb-c-581-18-the-answer-is-no-by-daniel-sarmiento/> (last visited on 25.06.2020).

861 Case C-581/18, *TÜV Rheinland LGA Products und Allianz IARD*, ECLI:EU:C:2020:453, para. 29 et seq.

862 See Art. 3 Annex I to the AFMP; see further with regard to Art. 18 TFEU: Case C-544/07, *Rüffler*, ECLI:EU:C:2009:258, paras. 62-64; Case C-148/02, *Garcia Avello*, ECLI:EU:C:2003:539, paras. 26-31.

863 This provision corresponds to Art. 12 of *Regulation No 1612/68/EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community,* OJ [1968] L257/2, 19.10.1968; see for the interpretation of Regulation 1612/68/EEC: A. Wiesbrock, *Legal migration to the European Union,* Leiden (2010), p. 86 et seq.; see for the situation under the *acquis suisse*: K. Odendahl, 'Originäre Rechte von Drittstaatsangehörigen auf Zugang zu Hochschulen in der EG', in A. Epiney, A. Egbuna-Joss & M. Wyssling (eds.), *Schweizerisches*

excludes students from the scope of the AFMP for *access to university education* based on the last sentence of Article 24(4) of Annex I to the AFMP if they are not pursuing an economic activity:[864]

> 'This Agreement does not regulate access to vocational training or maintenance assistance given to the students covered by this Article.'

Thus, some Swiss universities require higher tuition fees for students from an EU Member State than for Swiss nationals,[865] which is (most likely) in conformity with the AFMP because the (non-economically active) students may not invoke Article 2 AFMP (non-discrimination provision for the AFMP and its Annexes)[866].[867] It should also be recalled that the CJEU's progressive case law on students applying for access to university education[868] does not apply to the *acquis suisse* as it is rather likely that Article 2 AFMP is not a subsidiary layer,

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Jahrbuch für Europarecht 2005/2006 / Annuaire Suisse de droit européen 2005/2006, Berne (2006), p. 366 et seq.; different opinion C. Tobler & D. Maritz, 'Zur bilateralen Dienstleistungsfreiheit', in A. Epiney & N. Gammenthaler (eds.), *Schweizerisches Jahrbuch für Europarecht / Annuaire suisse de droit européen 2008/2009,* Zurich (2009), p. 358 et seq.

864 See P. Richli, *Expertenbericht über die Möglichkeiten der Beschränkung der Zulassung von Studierenden mit ausländischen Vorbildungsausweisen an universitäre Hochschulen in der Schweiz (sic!) of 16.12.2010,* <https://edudoc.ch/record/99184/files/Expertenbericht_2010_d_f.pdf> (last visited on 28.06.2020), p. 13 et seq.; further Odendahl, supra note 863, p. 366 and B. Ehrenzeller, 'Studiengebührenerhöhung an der Universität St.Gallen aus rechtlicher Perspektive', in Staatskanzlei und Verwaltungsgericht des Kantons St. Gallen (ed.), *Festgabe Prof. Dr. Ulrich Cavelti: Präsident des Verwaltungsgerichts des Kantons St.Gallen 1992 bis 2012,* St. Gallen (2012), p. 124 et seq.

865 See Ehrenzeller, supra note 864, p. 106.

866 ‚Nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality.'

867 Ehrenzeller, supra note 864, p. 125; for another opinion: A. Epiney, 'Das Freizügigkeitsabkommen Schweiz - EU: Erfahrungen, Herausforderungen und Perspektiven', in A. Achermann et al. (eds.), *Jahrbuch für Migrationsrecht 2011/2012,* Berne (2012), p. 93 et seq.; Decision of the second President, Gerichtskreis VIII Bern-Laupen, published in CaS 2008, pp. 332-347 of 13.06.2008, para. 39.

868 See Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427; see further Hoogenboom, Osterwijk, supra note 685, p. 108 et seq.; S. Garben, 'European Higher Education in the Context of Brexit', in N. Cambien, D. Kochenov & E. Muir (eds.), *European citizenship under stress: social justice, Brexit, and other challenges,* Leiden, Boston (2020), p. 341 et seq.

considering the more recent case law[869] of protection, such as that on Article 18 TFEU.[870] The case law of the Swiss Federal Court is sometimes less clear in this regard.[871] The wording of Article 2 AFMP however seems rather restrictive and (probably) applies only in conjunction with Annexes I, II and III of the AFMP.[872] In legal literature it was stated that the wording which requires lawful establishment in the territory of another Contracting Party seems redundant and not entirely correct because illegal migrants would not fall under Annexes I, II or III of the AFMP.[873]

Even if it is now argued that persons not pursuing economic activities cannot invoke Art. 2 AFMP for access to university education, it is difficult to argue that students falling under the freedom of movement for workers are exempted by the AFMP for access to university education as the exemption is found in the last sentence of Article 24(4) of Annex I to the AFMP, and not the other exemptions in the AFMP that apply to the AFMP as such.[874] Thus, from the wording and from a systematic point of view, it is obvious that this interpretation only applies to students who are not economically active and must rely on Article 24(4) of Annex I.[875] It can be argued that (doctoral) students may invoke the freedom of movement for workers (if they are employed) and thus demand equal treatment and non-discrimination. This is in line with the CJEU's case law, in which it was held that in principle a researcher working on a doctoral thesis falls under the freedom of movement for workers but it was ultimately left for the national court to decide.[876] In the end, this results in an

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869 Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 39.

870 See also Ehrenzeller, supra note 864, p. 125; further Diebold, Berne, supra note 67, paras. 629 et seq.; other opinion: Epiney, supra note 867, p. 93 et seq.; Decision of the second President, Gerichtskreis VIII Bern-Laupen, published in CaS 2008, pp. 332-347 of 13.06.2008, para. 39.

871 See BGE 130 I 26, para. 3.2.2; BGE 130 II 76, para. 3.2; see further Tobler & Beglinger, Zurich, supra note 586, para. 186.

872 See Odendahl, supra note 863, p. 366 et seq.

873 Borghi, supra note 669, para. 55 et seq.

874 See in this sense the decision of the Administrative Court of the Canton of Zurich in Chapter 4.4.2.1.

875 A. Borghi, 'Art. 6 and Art. 24 Annexe I ALCP', in A. Borghi (ed.), *Le libre circulation des personnes entre la Suisse et l'UE: Commentaire article par article de l'accord du 21 juin 1999,* Geneva (2010), para. 333 et seq.

876 Case C-94/07, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV.*, ECLI:EU:C:2008:425, para. 32 et seq.; see further for the status as a 'student-worker' Hoogenboom, Osterwijk, supra note 685, p. 90 et seq.

uncertain position for doctoral students under the *acquis suisse* (without assessing the implementation of Switzerland or EU Member States).

To conclude, family members who rely on derived rights (Articles 3(6) and 9(2) of Annex I to the AFMP) or students who invoke the freedom of movement for workers enjoy the same rights of non-discrimination (Article 15(2) of Annex I to the AFMP).[877] This also includes access to university education.[878]

The four fundamental freedoms are convergent. Therefore, justifications are addressed for the freedom of establishment and the freedom of services (see Chapters 4.2.2.6 above and 4.4.2.4 below).

4.4 Freedom of services between Switzerland and the EU

4.4.1 Temporal and territorial scope

The territorial scope is the same as described above for the freedom of establishment *mutatis mutandis* (see Chapter 4.2). Article 17(a) of Annex I to the AFMP sets out that services are allowed if they are provided for up to 90 days. Thus, service providers are at a disadvantage in comparison with those who benefit from the freedom of establishment in the internal market. The distinction between the freedom of establishment and the freedom of services is therefore crucial (see Chapter 4.2.2.7 above).

4.4.2 Personal and material scope

The rights conferred by the freedom to provide services are the same as for the freedom of establishment *mutatis mutandis* (see above Chapter 4.2.2). Doctrine seems more eager to accept the concept of restrictions for the provision of services based on the wording of Article 17 of Annex I to the AFMP ('any restrictions') as opposed to the wording of Article 9 and Article 15 of Annex I to the AFMP.[879] It can be doubted whether the wording alone reflects the evolution of the case law and it should be borne in mind that the freedom of movement for workers and establishment of the AFMP stem from a combination of primary

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[877] See Borghi, supra note 875, para. 336.
[878] Odendahl, supra note 863, p. 366 et seq.
[879] Diebold, Berne, supra note 67, para. 790.

and secondary law.[880] That restrictions are prohibited for the provision of services is also supported by a singular leading case of the FAC which simply refers to the case law of the CJEU.[881]

Switzerland did not incorporate Directive 2006/123/EC (the 'Services Directive'[882]) into its own legal order. An adaptation of the Services Directive would significantly contribute to more legal certainty, as that Directive provides clear and precise deadlines (see its Article 13(3)).[883]

According to Article 57(2) TFEU activities of an industrial or commercial character, of craftsmen and of the profession are covered by the Treaty. The catalogue of activities listed in Article 57(2) TFEU is not exhaustive. The same applies for the freedom of services except for those parts that are exempt (see for example Article 22(3)(i) of Annex I to the AFMP).[884] The nature of the provider of services[885] or the service itself may present the necessary cross-border element.[886]

The freedom of services also applies to legal persons pursuant to Article 18 of Annex I to the AFMP. It is therefore the only fundamental freedom in the AFMP that covers legal persons. This could be of particular usefulness as the CJEU restricted the scope of the freedom of capital, which is also applicable to third countries, in the judgment *Fidium Finanz* (Article 63(2) TFEU).[887] In addition, financial services fall outside of the scope of Article 17(a) and Article 19 of Annex I to the AFMP if they require prior authorisation and 'prudential supervision' (Article 22(3)(ii) of Annex I to the AFMP).

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880 Art. 15(2) Annex I to the AFMP (freedom of establishment) simply refers to Art. 9 of Annex I to the AFMP (freedom of workers), which repeats Art. 7 et seq. of Regulation 1612/68/EEC.

881 See the Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 2.4.

882 *Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market of 12.12.2006,* OJ [2006] L376/36, 27.12.2006.

883 See further Y. Schleiss, *Zur Durchführung des EU-Rechts in Bundesstaaten: Ausgewählte Aspekte der Umsetzung der Dienstleistungsrichtlinie in Deutschland und Österreich,* Diss. Fribourg (2013), Zurich (2014), p. 316.

884 Tobler & Maritz, supra note 863, p. 341.

885 Case C-198/89, *Commission v Greece*, ECLI:EU:C:1991:79, paras. 9 and 16.

886 Case 155/73, *Sacchi*, ECLI:EU:C:1974:40, paras. 6-8.

887 Case C-452/04, *Fidium Finanz*, ECLI:EU:C:2006:631.

4.4.2.1 *The freedom to provide services*

The freedom to provide services is essential for posted workers where a legal person makes use of their right to send posted workers to another Member State or Switzerland, regardless of the nationality of those posted workers (see Article 17(b)(ii) of Annex I to the AFMP). Cross-border activities of employment agencies are prohibited in Switzerland.[888] These activities are not protected by the freedom of services as the AFMP does not affect the 'activities of temporary and interim employment agencies' pursuant to Article 22(3)(i) of Annex I to the AFMP. The Administrative Court of the Canton of Zurich followed this from this list of exemptions in Article 22(3) of Annex I to the AFMP: that taxi transportation is protected by the AFMP *a contrario*.[889] This reasoning can also be applied to the situation of students who do not completely fall outside of the scope of the AFMP, but only when they are not pursuing an economic activity, as the exemption is not added to the list of the other exemptions of the AFMP, but figures only in one article of the AFMP (Art. 24(4) last sentence of Annex I to the AFMP; see Chapter 4.3.3 for details).

4.4.2.2 *The freedom to receive services*

The freedom to receive services pursuant to primary law is not protected (for example, visiting a museum[890]). It only applies as far as it was adapted by Switzerland (e.g. necessary health care for tourists), namely by implementing Regulation No 883/2004.[891] The applicability of the non-discrimination principle in the AFMP provisions was denied by both

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888 Art. 12(2) *Bundesgesetz über die Arbeitsvermittlung und den Personalverleih (AVG) of 06.10.1989,* SR 823.11.

889 Decision VB.2013.00231 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 04.09.2014, para. 6.3.4.

890 See Joined Cases 286/82 and 26/83, *Luisi and Carbone*, ECLI:EU:C:1984:35, para. 10. Switzerland concluded a bilateral agreement with Italy for museum visits: Oesch, Zurich, supra note 10, para. 200 for further references.

891 See Decision No 1/2012 of the EU-Swiss Joint Committee for the AFMP and *Decision No 1/2014 of the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 28 November 2014 amending Annex II to that Agreement on the coordination of social security schemes,* OJ [2014] L367/122, 23.12.2014.

the CJEU and the Swiss Federal Court.[892] Nevertheless, the extent to which the subsidiary protection of non-discrimination in Article 2 AFMP reaches remains unknown.[893]

The leading case dealt with birth disabilities, which constitute an illness under Swiss law. Costs stemming from birth disabilities are only reimbursed if certain restrictive conditions are met.[894] The Swiss Federal Court emphasised the historical interpretation of the AFMP and denied application of the non-discrimination provisions to receivers of services.[895] The leading decision of the Swiss Federal Court has been criticised by several authors, who have stated in particular that the Swiss Federal Court did not refuse to take into account the relevant *acquis*.[896] The decisive interpretation should not merely be based on national implementation in social insurance law, but it should also be based on internal market case law. It is precisely this point that is stated by the Swiss Federal Court in another leading case as a general statement. The Swiss Federal Court held that the national transposition of the AFMP cannot be decisive for the correct interpretation of its provisions. The right of free movement of persons is to be interpreted on its own basis.[897] Moreover, the Swiss Integration Office (now Directorate for European Affairs) even states in its report of 2010 that a violation of the freedom to receive services could constitute a breach of the obligations under the AFMP.[898] Furthermore, the Swiss Federal Court argues in the aforementioned leading case that the

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892 Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430; BGE 133 V 624 (= Pra 2008 No 125).

893 See Diebold, Berne, supra note 67, para. 620 et seq.; Borghi, supra note 669, para. 79 et seq.; see further supra note 2279.

894 Art. 91(1) *Bundesgesetz über die Invalidenversicherung (IVG) of 19.06.1959,* SR 831.20 in conjunction with Art. 23bis (2) *Verordnung über die Invalidenversicherung (IVV) of 17.01.1961,* SR 831.201 respectively Art. 34 (2) *Bundesgesetz über die Krankenversicherung (KVG) of 18.03.1994,* SR 832.10 in conjunction with Art. 36 *Verordnung über die Krankenversicherung (KVV) of 27.06.1995,* SR 832.102.

895 BGE 133 V 624 (= Pra 2008 No 125), para. 4.3.3.

896 T. Burri & B. Pirker, 'Stromschnellen im Freizügigkeitsfluss: Von der Bedeutung von Urteilen des Europäischen Gerichtshofes im Rahmen des Personenfreizügigkeitsabkommens', SRIEL (SZIER/RSDIE) 2010, p. 172; A. Epiney & P. Zbinden, *Arbeitnehmerentsendung und Freizügigkeitsabkommen Schweiz-EG: zur Tragweite und Auslegung der Dienstleistungsfreiheit im Freizügigkeitsabkommen Schweiz-EG,* Fribourg (2009), p. 16; Tobler & Maritz, supra note 863, pp. 354–357.

897 'Für die Auslegung des Freizügigkeitsabkommens nicht massgeblich ist grundsätzlich die nationale Umsetzung des Freizügigkeitsrechts. Vielmehr ist das Freizügigkeitsrecht auf eigener Grundlage auszulegen': BGE 136 II 5, para. 3.6.1; BGE 136 II 65, para. 3.1.

898 Directorate for European Affairs, supra note 166, p. 24, Case 19. This opinion results in the application of Art. 24 of Annex I to the AFMP in conjunction with Art. 2 AFMP. If this were truly the case, Art. 2 AFMP in conjunction with Art. 23 Annex I to the AFMP must be applied as well; see Imhof (2007), supra note 667, p. 157.

freedom of services is only partially established between Switzerland and the EU.[899] This argument based on the Preamble and Article 1(b) in conjunction with Article 5(1) AFMP does not acknowledge that there is no temporal restriction for the receivers of services.[900] The CJEU and the Swiss Federal Court argue that receivers of servicers (see Article 23(1) of Annex I to the AFMP) may not invoke non-discrimination provisions.[901] It is interesting that the Swiss Federal Court emphasises the broad application of the non-discrimination principle but does not rely on it in this case.[902] This results in a situation where the fundamental freedoms are not convergent.

It should be noted that the lower instance court in this case relied upon Article 2 AFMP (comparable to Article 18 TFEU) and the *acquis communautaire* (for example, *Kohll, Smits and Peerbooms and Müller-Fauré* [903]), which were decided before the date of signature of the AFMP and have to be followed.[904] Even in EU law, the freedom to receive services has been developed by the CJEU.[905] In another decision, the Swiss Federal Court argued that health planning would constitute a justification.[906] This obviously requires a discriminatory measure or a restriction to have existed in the first place.

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899 BGE 133 V 624 (= Pra 2008 No 125), para. 4.3.7.

900 Epiney & Zbinden, Fribourg, supra note 896, p. 16; see also Tobler & Maritz, supra note 863, p. 341.

901 Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 43; BGE 133 V 624 (= Pra 2008 No 125), para. 4.3.7.

902 BGE 128 V 315, para. 1.c.

903 Case C-158/96, *Kohll*, ECLI:EU:C:1998:171, paras. 21 and 45 et seq.; Case C-157/99, *Smits und Peerbooms*, ECLI:EU:C:2001:404, para. 54 et seq.; Case C-385/99, *Müller Fauré*, ECLI:EU:C:2003:270, para. 103.

904 Decision IV.2003.00221 of the Sozialversicherungsgericht (High Court) of the Canton of Zurich, IV.2003.00221 of 19.02.2004, paras. 6.2-6.6; Decision KV.2005.00058 of the Sozialversicherungsgericht (High Court) of the Canton of Zurich of 16.05.2006, para. 6; BGE 133 V 624 (= Pra 2008 No 125); Decision KV.2007.00015 of the Sozialversicherungsgericht (High Court) of the Canton of Zurich of 31.03.2008, para. 6.3.

905 Tobler & Maritz, supra note 863, p. 355.

906 BGE 134 V 330 (= Pra 2009 No 70), para. 2.4.

4.4.2.3 *Applicability of the GATS*

Many scholars have asked whether the freedom to provide services, with the limit of 90 days, is in violation of Article II:2 of the General Agreement on Trade in Services (GATS).[907] According to the exemptions, Switzerland made reservations for natural persons from the EU who are providing services.[908] There is a strong academic consensus that Switzerland and the EU could not invoke the exception in Article V GATS because the integration in the single market does not go as far.[909] Natural persons are exempt from Article II GATS as set out in Article II:2 GATS. Contrary to what some authors have stated, the Swiss reservations mention *natural* persons.[910] The GATS is in any event not self-executing in Switzerland or in the EU.[911] However, Member States of the GATS could ask for liberalisation and negotiations about the recognition of diplomas, namely the Professional Qualifications Directive, in Switzerland and in the EU (Article VII GATS).[912]

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[907] T. Cottier & M. Panizzon, 'Die sektoriellen Abkommen und das Recht der WTO', in D. Felder & C. Kaddous (eds.), *Accords bilatéraux Suisse - UE: Bilaterale Abkommen Schweiz - EU: (erste Analysen),* Bâle (2001), p. 67: J.-G. Iken, *Personenfreizügigkeit: Tendenzen und Entwicklungen in den Rechtskreisen der Schweiz und der EU,* Diss. (2002), Zurich (2003), p. 136 et seq.; R. Weber, 'Verhältnis bilaterale Verträge zu EU-Recht und WTO-Recht', in D. Thürer et al. (eds.), *Bilaterale Verträge I & II Schweiz - EU: Handbuch,* Zurich (2007), para. 18 et seq.; Diebold, Berne, supra note 67, para. 334.

[908] *GATS/EL/83 of 15.04.1994*, Final List of Article II (MFN) Exemptions for Switzerland; see for the EU: *GATS/EL/31 of 15.04.1994.*

[909] Weber, supra note 907, para. 19; Cottier & Panizzon, supra note 907, p. 67; Iken, Zurich, supra note 907, p. 13; sceptical Diebold, Berne, supra note 67, para. 334.

[910] Diebold, Berne, supra note 67, paras. 334-337 and footnote 355 thereof argues – contrary to Iken, Zurich, supra note 907, p. 136 et seq. – that the AFMP is exempt from the scope of the GATS because of Switzerland's reservation (see supra note 908): 'measures based on bilateral agreements between the European Community and/or its Member States and/or EFTA States, and Switzerland, with the objective of providing for the movement of all categories of natural persons supplying services'.

[911] Case C-149/96, *Portugal v Council*, ECLI:EU:C:1999:574, para. 27; BGE 131 II 271, para. 10.6.

[912] The obligation means that Switzerland must at least enter into negotiations pursuant to Art. VII:2 GATS: M.-C. Krafft, *Die Auswirkungen des GATS auf das Bildungssystem der Schweiz,* Gutachten im Auftrag des Bundesamtes für Bildung und Wissenschaft, <https://www.ivr.uzh.ch /dam/jcr:00000000-2a24-73b9-ffff-ffff9f516274/gats-d.pdf> (last visited on 28.06.2020), p. 52; see further Diebold, Berne, supra note 67, para. 1198; see also Bohnet, Bâle, supra note 778, p. 8.

4.4.2.4 Justifications

Direct discrimination can – according to the prevailing opinion[913] – only be justified for reasons of public order, public security or public health (Article 5 of Annex I to the AFMP). Indirect discrimination and restrictions however may also be justified by overriding reasons in the public interest (Article 22(4) of Annex I to the AFMP).[914] For the recognition of qualifications, some overriding reasons in the public interest are the professional rules to protect the recipients of a service,[915] consumer protection,[916] prevention of unfair competition,[917] maintenance of the proper practice of the legal profession,[918] language requirements to protect the recipients of services,[919] preservation of the education system,[920] and the reliability and quality of the provision of medicinal products to the public[921].

As well as having a legitimate aim, measures must be proportionate, which means they must be 'suitable for securing the attainment of the objective which they pursue' and 'must not go beyond what is necessary in order to attain that objective'.[922] For the recognition of professional qualifications, the case law of the CJEU also emphasised that the host Member State must take into account that the applicant is already fully qualified in the State of origin.[923]

4.4.2.5 Swiss flanking measures

Switzerland enacted flanking measures to accompany the AFMP. These flanking measures are intended to mitigate side effects and to prevent social dumping, a race to the

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913 See e.g. Case C-264/96, *Imperial Chemical Industries v Colmer*, ECLI:EU:C:1998:370. Sometimes the case law does not clearly differentiate between direct discrimination, indirect discrimination, and restrictions: see Tobler, Antwerp, supra note 731, p. 316 et seq.

914 See, selected from many others, Theuerkauf & Ousmane, supra note 768, para. 38 et seq.

915 Case C-3/95, *Reisebüro Broede v Sandker*, ECLI:EU:C:1996:487, para. 38.

916 Case C-180/89, *Commission v Italy*, ECLI:EU:C:1991:78, para. 20.

917 Case C-60/03, *Wolff*, ECLI:EU:C:2004:610, para. 41.

918 Case C-309/99, *Wouters*, ECLI:EU:C:2002:98, para. 123.

919 Case C-424/97, *Haim II*, ECLI:EU:C:2000:357, paras. 57-61.

920 Case C-40/05, *Lyyski*, ECLI:EU:C:2007:10, para. 39; Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427, para. 61.

921 Joined Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes*, ECLI:EU:C:2009:316, para. 30.

922 Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411.

923 See instead of many others: Case C-514/03, *Commission v Spain*, ECLI:EU:C:2006:63, para. 55.

bottom, and unfair practice.[924] Swiss international private law stipulates that Swiss labour law applies if no choice has been made for posted workers (*lex loci laboris*) and it regulates minimum conditions covering collective agreements about salaries and working time legislation for posted workers.[925]

The eight-day waiting period for posted workers constitutes an essential flanking measure from a Swiss perspective, especially trade unions are of the opinion that is essential to prevent social dumping.[926] This rule imposes an obligation on service providers to give notification in advance when they intend to make use of their free movement rights. The notification has to be made eight days in advance and is only required when the service will last for more than eight days.[927] In some sectors, such as the construction industry, notification is compulsory from the first day.[928] There are only a few exceptions to this rule (for example, urgent repairs).[929] It should be noted that the eight-day waiting period has nothing in common with the declaration to be made in advance, which is found in Article 7(2) of the Professional Qualifications Directive. In December 2019, 45'760 service providers gave that advance notification and 61'050 service providers in July 2020.[930]

In the EU's opinion, the eight-day waiting period is not in conformity with the free movement of services. This was reiterated in the conclusions of the Council of the EU on 19 February 2019.[931] Switzerland however has a different opinion.[932]

The eight-day waiting period hinders the service providers from responding quickly to consumers and it does not place them on an equal footing with their Swiss competitors. The CJEU has ruled (for the internal market) that similar prior authorisation rules are prohibited

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924 See J. M. Tiefenthal, *Flankierende Massnahmen zum Schutz des schweizerischen Arbeitsmarktes,* Diss. Zurich (2008), Berne (2008), pp. 117–125.

925 See Art. 115 of the *Bundesgesetz über das Internationale Privatrecht (IPRG) of 18.12.1987,* SR 291 and Art. 2 et seq. of the *Bundesgesetz vom über die minimalen Arbeits- und Lohnbedingungen für in die Schweiz entsandte Arbeitnehmerinnen und Arbeitnehmer und flankierende Massnahmen (EntsG) of 08.10.1999,* SR 711; see further G. Thüsing, *Europäisches Arbeitsrecht,* Munich (2017), § 9 para. 10 et seq.

926 Tobler & Beglinger, supra note 186, question 56.

927 Art. 6 para. 1 of the *Verordnung über die in die Schweiz entsandten Arbeitnehmerinnen und Arbeitnehmer (EntsV) of 21.05.2003,* SR 823.201.

928 Art. 6 para. 2 EntsV.

929 Art. 6 para. 3 EntsV.

930 <https://www.sem.admin.ch/sem/de/home/publiservice/statistik/auslaenderstatistik/monitor.html> (last visited on 25.06.2020).

931 Council of the European Union, supra note 11, para. 13.

932 See Tobler, supra note 391, p. 383 for further references.

and cannot be justified.[933] Austrian measures, which required contractors to give guarantees in case of labour law violations, were found to violate the freedom of services in a recent decision.[934]

As explained above, no independent body, such as the Commission or the EFTA Surveillance Authority, has the power to commence proceedings. And a private party has little incentive to approach a Swiss court in this respect. The EU-Swiss Joint Committee on the AFMP did not come to a solution that would satisfy the European Parliament.[935] It is (or rather was) one of the so-called red lines of the Swiss Government for the current deliberations, which cannot be crossed to reach a compromise.[936] As a great surprise to the public, the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018 crosses the so-called red line of the Swiss Government and proposes a four-day waiting period.[937] It remains to be seen whether the Draft will be successful in the end.

Currently, there are several options for the evolution or the end of Switzerland's bilateral path. Either Switzerland chooses to ratify the Institutional Framework Agreement in its current form (possibly with reservations) or Switzerland refuses to update the status quo which could lead to the end of the bilateral path in its current form. It was pointed out that some authors have also brought up the idea of an interim agreement to appease the EU during the time that is needed to renegotiate the Institutional Framework Agreement. A quick renegotiation (of the main text or by an accompanying common declaration[938]) is however rather unlikely considering the current dilemma with the Brexit.[939]

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933 Case C-58/98, *Corsten*, ECLI:EU:C:2000:527, para. 47; see also Epiney & Zbinden, Fribourg, supra note 896, pp. 20–28 for further references to the rich case law concerning service providers.

934 See Case C-33/17, *Čepelnik d.o.o. v Michael Vavti*, ECLI:EU:C:2018:896, para. 50.

935 See European Parliament, supra note 253, para. 12.

936 See Tobler & Beglinger, supra note 186, question 23.

937 First indent of Protocol I (2) of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

938 See Tobler, supra note 194, p. 2.

939 See Tobler (17.02.2020), supra note 201, para. 6 et seq.

4.5 Conclusion to Chapter 4

The fundamental freedoms under the *acquis suisse* have only partially evolved. While the freedom of establishment only applies for natural persons, the provision of services is limited to 90 days per year. The provision of services is also hindered by the Swiss flanking measures, namely the eight-day waiting period. Originally, this eight-day-waiting period was one of the red lines of the Swiss government, which could not be crossed during negotiations. A four-day-waiting period was submitted for public consultation in Switzerland in spring 2019.

While direct and indirect discrimination are prohibited for all fundamental freedoms (freedom of workers, freedom of establishment and freedom of services) and have horizontal effect (left open in two Swiss Federal Court rulings delivered in early 2019), it is still disputed whether free movement restrictions are covered by the AFMP. Some lower courts have ruled on this, whereas the Swiss Federal Court did not take an open position but only ruled implicitly in favour of the recognition of professional qualifications based on primary law or rather a pragmatic approach. Even if the CJEU explicitly used the term 'restrictions' in *Wächtler*,[940] the same wording does not mean that the term bears the same meaning after everything that has been discussed here about the *Polydor* principle.[941] There are therefore currently no cases where the CJEU has stated that not only discrimination but also free movement restrictions are covered by any association agreement with a third country. In addition, the standstill clause of the AFMP does not go further than prohibiting indirect discrimination and cannot be applied vis-à-vis the State of origin, which could also indicate that violations of the standstill clause could be justified by overriding reasons in the public interest *per analogiam* to the CJEU's case law under the Ankara Agreement.

Despite the restrictive wording of the AFMP, a diploma granted in another state suffices to show that there is a cross-border element. The necessary cross-border element was also discussed for EU and Swiss dual nationals who did not make use of their free movement rights in the recent Grand Chamber judgment in the case *Tjebbes and Others*.

The concept of public authority under the *acquis suisse* is similar compared to the TFEU, notwithstanding some interpretations which emphasise a literal interpretation of these

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940 See Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, paras. 57 and 61.

941 See further Chapter 3.2.1.

provisions despite the rule of interpretation in Article 16(2) AFMP which makes the internal market case law applicable. In this respect, it has been shown that the case *Brouillard* also applies for the *acquis suisse* and allows Swiss and EU nationals to invoke the AFMP against their State of origin even if their activity involves the exercise of public authority.

Non-economically active persons, such as students, are most likely excluded from the scope of the AFMP for *access to university education* due the wording of Article 24(4) of Annex I to the AFMP. Even if the case law suggests that persons who are not economically active may not invoke Article 2 AFMP in this situation (similar to Article 18 TFEU as a form of subsidiary protection and contrary to the case law of lower Swiss courts), economically active students may in principle invoke the other fundamental freedoms, such as the free movement of workers in conjunction with Article 2 AFMP.

Finally, it was mentioned that Member States of the GATS could ask for liberalisation and negotiations on the recognition of diplomas in Switzerland and in the EU (Article VII:2 GATS).

Part III: Mutual recognition of professional qualifications

5 Mutual recognition of professional qualifications

5.1 Introduction

This Chapter 5 is dedicated to the evolution the professional recognition and it delves right into the topic by giving a brief overview of the history of the secondary law for the professional recognition from 1957 until now. It gives an introduction to the Swiss institutional framework relating to the professional recognition. Further, it shall also be discussed that the newest amendments to the Professional Qualifications Directive are still missing due to the fact that the Joint Committee of the AFMP did not adopt a decision concerning the most recent amendments.

In addition, it aims to establish some of the important principle for the professional recognition, notably the principles of *mutual recognition* and *mutual trust.* The first step towards an effective use of the fundamental freedoms and the professional recognition was the early case law in *Reyners*, *van Binsbergen and Thieffry* that established *direct effect* of primary law even in the absence of secondary law in the 70s.[942] Further, in the 90s the seminal case *Vlassopoulou* obliged the host Member State to take into account of the applicant's diplomas, certificates and other evidence of professional qualifications.[943] This combination of case law and the evolution of secondary law gave way to the layers of professional recognition that exist today. Secondary law foresees more procedural safeguards but primary law applies as a subsidiary layer for those situations where secondary law does not apply. While professional recognition is essential for the effective use of free movement rights, there is a legitimate interest of Member States to prevent the abuse of rights. This issue will also be elaborated in three distinct clusters of case law in this Chapter.

So far, this thesis concentrated on the *professional* recognition. However, the EU only has limited competences when it comes to the *academic* recognition as mentioned in the introduction to this thesis. It will be explained how the academic recognition functions in

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942 Case 2/74, *Reyners v Belgian State*, ECLI:EU:C:1974:68; Case C-33/74, *Van Binsbergen v Bedrijfsvereniging voor de Metaalnijverheid*, ECLI:EU:C:1974:131; Case 71/76, *Thieffry*, ECLI:EU:C:1977:65; see also M. Schlag, 'Art. 49 AEUV', in J. Schwarze et al. (eds.), *EU-Kommentar,* Baden-Baden (2019), para. 39.

943 Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

Switzerland. For this purpose, recent case law of the Swiss Federal Court and the Swiss Federal Administrative Court for the *academic* recognition shall be discussed.

5.1.1 Evolution of Directive 2005/36/EC

Originally, Article 57 of the Rome Treaty of 1957 established the EU's competence in the field of professional qualifications. In 1961, the legal basis for coordination of mutual recognition was enshrined in the Treaty under Article 54(1) in conjunction with Article 63 EEC and required the Council to adopt a general programme. On 18 December 1961, the 'general programme for the abolition of restrictions on freedom to provide services' was adopted. Title VI provided that the mutual recognition of professional qualifications based on Article 57(3) of the Treaty should be implemented.[944] Implementation was planned for the years 1964 to 1969 and included a *transitional* system.

As of today, the legal basis for Directive 2005/36/EC (the 'Professional Qualifications Directive') is found in Article 53 TFEU for the freedom of establishment, in Article 46 TFEU for the freedom of movement for workers, and in Article 62 TFEU for the freedom to provide services (and their respective predecessors).[945] Article 53(1) TFEU contains the rule that the ordinary legislative procedure (see Article 251 TFEU) must be followed to issue directives concerning the mutual recognition of professional qualifications. Article 53(2) TFEU, which foresees the progressive abolition of restrictions for the medical and pharmaceutical profession, is not relevant due to the direct effect of Article 45 and Article 49 TFEU and the extensive harmonisation of secondary law in the Professional Qualifications Directive.[946]

The evolution of the professional qualification regime can be divided into three phases according to the literature.[947]

In the 60s (first phase), the aim behind the sectoral approach for the liberal professions was the extensive harmonisation of rules governing the education system of a given profession. Until harmonisation was reached, the *transitional* system had rules on recognition based on professional experience for several industrial, commercial and small-craft industry

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944 *General Programme for the abolition of restrictions on freedom to provide services,* OJ P [1962] 2/32, 15.01.1962, pp. 3 and 6.

945 See preamble of the Professional Qualifications Directive.

946 M. Schlag, 'Art. 53 AEUV', in J. Schwarze et al. (eds.), *EU-Kommentar,* Baden-Baden (2019), para. 28.

947 See Kortese (2016/1), supra note 41, p. 47 et seq.

professions. The negotiations to agree on the secondary law were lengthy, due to the fact that education is a sensitive area in terms of sovereignty but also because there were regulatory gaps in the coordination of rules concerning the free movement of workers.[948]

With the accession of new Member States in 1973 (Ireland, Denmark and the United Kingdom), there were nine different Member States and nine different education systems. For example, the UK is known for having private bodies (chartered bodies) that govern access to a profession. The rules in the earlier directives assumed that there were *governmental* rules that govern access to a profession, such as typically found in Germany.[949]

Originally, the European Commission had proposed several drafts for new directives. All those directives shared the idea of extensive harmonisation. This was based on the idea that the recognition of professional qualifications requires equivalence. Thus, the goal was to create European professions which included detailed provisions about formal education, especially obligatory subjects and the duration of formal education.[950]

In 1971 (second phase), the harmonisation approach changed slowly to become a *vertical approach*. Without interfering with the formal education systems of the Member States, the aim was to set minimum conditions for the mutual recognition of diplomas. Between 1975 and 1985, several *vertical* Directives were introduced (usually in pairs) to harmonise rules in specific professions and to provide rules on mutual recognition, specifically for doctors[951],

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948 Schneider, Antwerp, supra note 741, p. 105 et seq.

949 Schneider, Antwerp, supra note 741, pp. 113-117.

950 Schneider, Antwerp, supra note 741, p. 114.

951 *Council Directive 75/362/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services of 16.06.1975,* OJ [1975] L167/1, 30.06.1975; *Council Directive 75/363/EEC concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors of 16.06.1975,* OJ [1975] L167/14, 30.06.1975.

nurses[952], dentists[953], veterinarians[954], midwives[955], pharmacists[956], and architects (without coordination[957]).[958] For the health professions, harmonisation was possible as the tasks required in many of those professions were similar, with the exception of nurses and midwives. While in some Member States education is very extensive or specialised, it is more general in others.[959] This difference cannot be assessed – only the duration and the correct diploma is assessed by the relevant directives of the so-called *vertical* system. The *vertical*

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952 *Council Directive 77/452/EEC concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of this right of establishment and freedom to provide services of 27.06.1977,* OJ [1977] L176/1, 15.07.1977; *Council Directive 77/453/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of nurses responsible for general care of 27.06.1977,* OJ [1977] L176/8, 15.07.1977.

953 *Council Directive 78/686/EEC concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services of 25.07.1978,* OJ [1978] L233/1, 24.08.1978; *Council Directive 78/687/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of dental practitioners of 25.07.1978,* OJ [1978] L233/10, 24.08.1978.

954 *Council Directive 78/1026/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services of 18.12.1978,* OJ [1978] L362, 23.12.1978; *Council Directive 78/1027/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of veterinary surgeons of 18.12.1978,* OJ [1978] L362/7, 23.12.1978.

955 *Council Directive 80/154/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in midwifery and including measures to facilitate the effective exercise of the right of establishment and freedom to provide services of 21.01.1980,* OJ [1980] L33/1, 11.02.1980; *Council Directive 80/155/EEC of 21 January 1980 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action relating to the taking up and pursuit of the activities of midwives of 21.01.1980,* OJ [1980] L33/8, 11.02.1980.

956 *Council Directive 85/432/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of certain activities in the field of pharmacy of 16.09.1985,* OJ [1985] L253/34, 24.09.1985; *Council Directive 85/433/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy of 16.09.1985,* OJ [1985] L253/37, 24.09.1985.

957 S. Schoenmaekers, *The regulation of architects in Belgium and the Netherlands: A comparative analysis,* Diss. Maastricht (2010), Antwerp (2010), p. 88.

958 *Council Directive 85/384/EEC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services of 10.06.1985,* OJ [1985] L223/15, 21.08.1985.

959 See Schneider, Antwerp, supra note 741, footnote 595.

approach was eventually found to be too cumbersome, as with the accession of new Member States, the complexity increased exponentially.[960]

The third phase towards the *horizontal approach* in secondary law started with a non-binding resolution in 1974 passed by the Ministers of Education.[961] The *horizontal approach* allows for the verification of a certain level of education and leads to a non-automatic recognition system, which was established earlier through case law. Unlike mere case law however, secondary law was and is quite detailed, technical, and very complex. It nevertheless offered migrants the advantage of legal certainty and of obtaining recognition of professional qualifications within a reasonable time.

In 1984, the European Council finally announced the creation of a new system without rules on the harmonisation of formal education and followed the initial resolution of 1974. In 1988, Directive 89/48/EEC (the 'General Recognition Directive'),[962] on a general system for the recognition of diplomas, was finally adopted. However, it only affected the equivalence and recognition of higher-education diplomas. As a compromise to appease the German authorities, the 'aptitude test' and 'the adaptation period' were introduced ('compensation measures').[963] The implementation deadline was on 4 January 1991. The follow-up was Directive 92/51/EEC[964] concerning diplomas and certificates other than those obtained through formal higher education. Implementation of the latter directive had to be completed by 18 April 1994. The last directive reflecting this horizontal approach, which was the basis for the subsequent consolidated general system, was Directive 1999/42/EC, which recognised the number of years of experience of an individual for certain professions.[965]

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960 Schneider, Antwerp, supra note 741, p. 161 et seq.

961 *Resolution of the Ministers of Education, meeting within the Council, of 6 June 1974 on cooperation in the field of education,* OJ [1974] C98/1, 20.08.1974.

962 *Council Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration of 21.12.1988,* OJ [1989] L19/16, 24.01.1989.

963 Schneider, Antwerp, supra note 741, p. 161 et seq.

964 *Council Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC of 18.06.1992,* OJ [1992] L209/25, 24.07.1992.

965 *Directive 1999/42/EC of the European Parliament and of the Council establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications of 07.06.1999,* OJ [1999] L201/77, 31.07.1999.

On 23 and 24 March 2000, the European Council asked the Commission to present a proposal for a 'more uniform, transparent and flexible regime of recognition of qualifications' aimed in particular at making the free provision of services within the Community as simple as it was within an individual Member State.[966] The purpose was also to foster a competitive labour market and to become more competitive in the internal market.[967] Several supplementing and amending directives were issued, including Directive 2001/19/EC, which reorganised certain provisions and added the recognition of third country diplomas.[968] Finally, in 2002, the Commission proposed a new draft for a single directive.[969] As of 2005, the three directives of the horizontal approach and the twelve directives of the vertical approach have been combined and replaced by Directive 2005/36/EC, the Professional Qualifications Directive.[970] That Directive provides not only for the freedom of establishment but also the freedom to provide services for the general and the sectoral system with a declaration to be made in advance under secondary law but without prior verification except in very strictly-defined cases where serious damage to public health or security is to be avoided.[971] The Professional Qualifications Directive was further amended with the enlargement of the EU to include Romania, Bulgaria, and Croatia.[972]

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[966] Recital 2 of the Professional Qualifications Directive.

[967] State Secretariat for Research and Innovation, *Erläuternder Bericht die - neue europäische Richtlinie über die Anerkennung von Berufsqualifikationen - RL 2005/36/EG - Anhörung - Erläuternder Bericht,* <https://www.admin.ch/ch/d/gg/pc/documents/1509/Bericht_.pdf> (last visited on 25.06.2020), p. 9.

[968] See recital 9 to the Professional Qualifications Directive; *Directive 2001/19/EC of the European Parliament and of the Council amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor of 14.05.2001,* OJ [2001] L206/1, 31.07.2001.

[969] European Commission, *Proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications, COM(2002) 119 final — 2002/0061,* OJ [2002] C181E, 30.07.2002, p. 183.

[970] See the Professional Qualifications Directive, recital 9.

[971] Art. 7(4) of the Professional Qualifications Directive.

[972] *Council Directive 2006/100/EC adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania of 20.11.2006,* OJ [2012] L363/141, 20.12.2006; *Council Directive 2013/25/EU adapting certain directives in the field of right of establishment and freedom to provide services, by reason of the accession of the Republic of Croatia of 13.05.2013,* OJ [2013] L158/368, 10.06.2013.

This legislative history shows that the Professional Qualifications Directive is a rather complex piece of work. This is also illustrated by the fact that it comes together with a User Guide, a document with frequently asked questions, and a Code of Conduct. Furthermore, a group of coordinators for the recognition of professional qualifications facilitates the implementation of the Professional Qualifications Directive. It also monitors the evolution of policies and establishes cooperation between Member States.[973] Every Member State (including Switzerland[974]) designates a coordinator to promote the uniform application of the Professional Qualifications Directive and supplies information for its application.[975] With the introduction of the Professional Qualifications Directive, the national coordinator is competent for the sectoral as well as the horizontal system, whereas before the coordinator was only responsible for coordination under the general system.[976] Problems concerning the recognition of professional qualifications arise quite often. At least 12.43% of all SOLVIT cases in recent years concern professional qualification issues – SOLVIT being an online service provided by the national governments of each EU and EEA EFTA State, which is offered for free and deals with all cross-border issues concerning the four fundamental freedoms.[977]

5.1.2 Decisions of the Joint Committee Switzerland/EU on the free movement of persons with regard to Annex III to the AFMP

Article 9 AFMP and Annex III to the AFMP regulate the mutual recognition of professional qualifications between Switzerland and the EU. Article 18 AFMP enables the Joint Committee to update Annex III of the AFMP. The relevant decisions of the respective Joint Committee are easily accessible online.[978] The decisions for the Joint Committee of the

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973 Art. 2 of *Commission Decision 2007/172/EC setting up the group of coordinators for the recognition of professional qualifications of 19.03.2007,* OJ [2007] L79/38, 20.03.2007.

974 See Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP, para. 2 in conjunction with Art. 56(4) of the Professional Qualifications Directive.

975 Art. 56(4) of the Professional Qualifications Directive.

976 Art. 56(4) of the Professional Qualifications Directive; see further State Secretariat for Research and Innovation, supra note 967, p. 45.

977 <https://ec.europa.eu/internal_market/scoreboard/_archives/2016/07/performance_by_governance_tool/solvit/index_en.htm> (last visited on 29.06.2020).

978 <https://www.admin.ch/opc/de/european-union/joint-committees/007.000.000.000.000.000.html> (last visited on 25.06.2020).

AFMP concerning professional recognition are prepared by a working group for the mutual recognition of professional qualifications.[979]

According to the amendment procedure of Article 18 of the AFMP, the EU-Swiss Joint Committee on the free movement of persons changed Annex III for the first time on 30 April 2004 with Decision No 1/2004. It amended the legal acts listed in Annex III to the AFMP. On 30 September 2011, Annex III was amended a second time. According to Article 1 of Decision No 2/2011 of the EU-Swiss Joint Committee, the references of Annex III are fully replaced by Decision No 2/2011. In 2015, some minor updates concerning Swiss titles of health professions were added to Annex III with Decision No 1/2015 of the EU-Swiss Joint Committee on the free movement of persons.[980]

Considering the updates, Annex III refers to the Professional Qualifications Directive, Directive 98/5/EC (the 'Facilitating Practice Directive'; lawyers on a permanent basis), Directive 77/249/EEC (the 'Facilitating Services Directive'; services by lawyers), Directive 77/556/EEC (trade in and distribution of toxic products)[981], Directive 74/557/EEC (intermediaries)[982] and Directive 86/653/EEC (self-employed commercial agents)[983]. The decision also lists the respective Swiss professional titles, which are not listed in the respective legal acts of the EU. Decision No 2/2012 has been in force since 1 November 2011 (on a provisional basis). It introduced Title II of the Professional Qualifications Directive,

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979 Two working groups for the Joint Committee on the AFMP were established by Decision No 1/2003 of 16 July 2003 (not published): see instead European Commission, *Proposal for a Council Decision on a Community Position regarding Decision No 1/2002 of the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the Free Movement of Persons, COM/2002/0476 final*; Art. 10 thereof establishes the basis for working groups and experts; Gammenthaler, Zurich, supra note 40, p. 306 et seq.

980 *Decision No 1/2015 of the Joint Committee established under Article 14 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons amending Annex III (Mutual recognition of professional qualifications) to that Agreement of 08.06.2015,* OJ [2015] L148/38, 13.06.2015.

981 *Council Directive 74/556/EEC of 4 June 1974 laying down detailed provisions concerning transitional measures relating to activities, trade in and distribution of toxic products and activities entailing the professional use of such products including activities of intermediaries,* OJ [1974] L307/1, 18.11.1974.

982 *Council Directive 74/557/EEC of 4 June 1974 on the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons and of intermediaries engaging in the trade and distribution of toxic products,* OJ [1974] L307/5, 18.11.1974.

983 *Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents,* OJ [1986] L382/17, 31.12.1986.

which sets out rules for the recognition of professional qualifications of service providers and implementation needed in national legislation.[984] That resulted in the Federal Act of 14 December 2012 on the Declaration Requirement and the Verification of Service Provider Qualifications in Regulated Professions, and the Ordinance of 26 June 2013 on the Declaration Requirement and the Verification of Service Provider Qualifications in Regulated Professions, which entered into force on 13 September 2013.

Some part of secondary law was adapted by Switzerland. The current state must be regularly checked since the decisions of the Joint Committees updated the applicable secondary law.[985] For example, Directive 2016/97/EU (insurance mediation), Directive 2006/43/EC (auditors)[986] and Directive 2008/106/EC (seafarers) are not part of the *acquis suisse*. However, to give some examples, Regulation No 1108/2009/EC (air traffic controller), Directive 216/2008/EC (persons working in civil aviation; in the EU amended by Regulation No 2018/1139/EU), Regulation No 1071/2009/EC (road transport operator) and form inter alia part of the *acquis suisse* due to other agreements of the Bilateral I package.[987]

A list of articles contained in Annex III, Section A (1b)(1) of Decision No 2/2012 does not apply between Switzerland and the EU. In general, it can be concluded from the provisions that the institutional mechanism is different. Therefore, the updating of Annexes and the Commission's information obligations are not identical under the AFMP. The Commission has the task to inform Member States of the details of the competent authorities in Switzerland and the Swiss coordinator.[988] The Swiss coordinator informs the Commission and the Joint Committee Switzerland/EU about the relevant Swiss legislation, which

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984 See Art. 4(2) of Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

985 See for a quick search of the relevant acquis: <https://www.admin.ch/opc/de/european-union/international-agreements/index.html> (last visited on 10.07.2019).

986 This is regulated by Art 727c of the *Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht [Code of Obligations]; OR) of 30.03.1911,* SR 220 and by the *Bundesgesetz über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren (RAG) of 16.12.2005,* SR 221.302.

987 Swiss-EU Air Transport Agreement (see for the full citation supra note 344); Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road (see for the full citation supra note 407); see further F. Berthoud, 'La libre prestation de services en application de la directive 2005/36/CE', SRIEL (SZIER/RSDIE) 2010, pp. 139-141.

988 Annex III to Section A (1.b)(2) AFMP (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

implemented, inter alia, the Professional Qualifications Directive, the Facilitating Practice Directive and the Facilitating Services Directive.[989]

5.1.3 Lack of implementation of Directives 2013/55/EU and 2018/958

In 2013, the Professional Qualifications Directive was amended by Directive 2013/55/EU and had a transposition deadline of 18 January 2016. A report by some academics seems to suggest that Article 16(1) AFMP – which obliges the Contracting Parties to take the necessary measures to implement decisions – requires Switzerland to adopt the amendments of Directive 2013/55/EU.[990] That opinion must be set in the context of the static *acquis suisse* which is also indirectly mentioned in this report. While the Contracting Parties shall take measures necessary to ensure that rights and obligations to those contained in the legal acts of the EU to which reference is made are applied in relations between them according Article 16(1) AFMP, clarifications of the case law can be followed based on Article 16(2) AFMP. However, new developments including the adoption of Directive 2013/55/EU must be based on a decision of the Joint Committee for the AFMP (which is usually prepared by the working group for the mutual recognition of professional qualifications[991]).[992] Currently Directive 2013/55/EU does not form part of the *acquis suisse*. Until the adoption of a new decision, Switzerland is thus again in a highly complicated situation.

The amendment to the Professional Qualifications Directive now expressly provides for the possibility of partial access to a profession in Article 4f of Directive 2013/55/EU. Partial access was developed by case law of the CJEU and is still governed on a case-by-case basis.

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989 See e.g. Para. 1(b) subpara. 4, para. 3(b) subpara. 2 and para. 2(b) subpara. 2 of Annex III, Section A to the AFMP (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

990 T. Cottier & R. Liechti, *Revision MedBG: Nachweis der Beherrschung einer Landessprache und Vereinbarkeit mit dem FZA of 2014,* <https://www.siwf.ch/files/pdf15/Kurzgutachten_Nachweis_Beherrschung_Landessprache1.pdf> (last visited on 02.08.2020), p. 6.

991 Two working groups for the Joint Committee on the AFMP were established by Decision No 1/2003 of the Joint Committee of 16 July 2003 (not published): see instead European Commission, supra note 979; Art. 10 thereof establishes the basis for working groups and experts; Gammenthaler, Zurich, supra note 40, p. 306 et seq.

992 See for the practical problems that arise from the amendments of Directive 2013/55/EU: Federal Office of Public Health, *Erläuternder Bericht zur Teilrevision der Verordnung vom 27. Juni 2017 über Diplome, Ausbildung, Weiterbildung und Berufsausübung in den universitären Medizinalberufen (Medizinalberufeverordnung) of February 2017,* <https://www.bag.admin.ch/dam/bag/de/dokumente/berufe-gesundheitswesen/medizinalberufe/revision-medbg/erlaeuternder-bericht-medbv.pdf.download.pdf/erlaeuternder-bericht-medbv.pdf> (last visited on 25.06.2020), p. 6.

Further, Directive 2013/55/EU adds the possibility of common training frameworks if at least one third of the Member States agree on a curriculum.[993] The development of common training frameworks shall be based at the levels of the European Qualification Frameworks.[994] There is also now the possibility to express the ECTS equivalent of diplomas awarded at university or higher education establishments.[995] In addition, the European Professional Card is a digital online procedure for five professions at present (general care nurses, physiotherapists, pharmacists, real estate agents and mountain guides), based on the Internal Market Information System (IMI).[996] It should be possible 'to monitor the career of professionals who establish themselves in various Member States'.[997] In this context, it is also essential to note that the Internal Market Information System Regulation ('IMI Regulation')[998] is not yet part of the *acquis suisse* because the EU blocked further negotiations after the successful popular initiative against mass immigration in 2014.[999] It would be introduced within three years after the entry into force of the Swiss-EU Draft Institutional Framework Agreement.[1000] 'The IMI is a software application accessible via the internet, (…) in order to assist Member States with the practical implementation of information exchange requirements laid down in Union acts by providing a centralised communication mechanism to facilitate cross-border exchange of information and mutual assistance'.[1001] The IMI only affects the procedure between Member States but does not directly affect the applicants. The Professional Qualifications Directive also refers to the Services Directive,[1002] which does not apply to Switzerland.

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993 Art. 49a of the Professional Qualifications Directive.

994 Art. 49a(2)(d) of the Professional Qualifications Directive.

995 See Art. 11(d) and (e) of the Professional Qualifications Directive.

996 <http://ec.europa.eu/growth/single-market/services/free-movement-professionals/european-professional-card_de> (last visited on 25.06.2020).

997 Recital 32 of the Professional Qualifications Directive.

998 *Regulation No 1024/2012/EU of the European Parliament and the European Council on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('IMI Regulation') of 25.10.2012,* OJ [2012] L316 of 14.11.2012.

999 See Swiss Confederation, *Parliamentary motion No 14.3729 of 17.09.2014,* <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20143729> (last visited on 25.06.2020); Swiss Confederation, supra note 182, p. 2.

1000 Para. 1 indent 3 of Protocol I to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

1001 Recital 2 of Regulation No 1024/2012 ('IMI Regulation').

1002 Directive 2006/123/EC ('Services Directive').

Another change can be found in Article 59 of the amended Professional Qualifications Directive, which obliges the Member States to notify the regulated professions and assess whether requirements regulating access are discriminatory, whether they are justified by overriding reasons in the public interest and whether they are proportionate. These reports are called national action plans and might lead to reforms.[1003]

On 28 June 2018, a new Directive 2018/958/EU was issued, which includes an ex-ante proportionality test for new provisions restricting access to the regulated professions (implementation on 31 July 2020 at the latest). National law must also ensure that an effective remedy is available for matters relating to this Directive.[1004] The Joint Committee for the AFMP did not issue a decision concerning this Directive.

5.2 Principle of mutual trust

Before the entry into force of relevant secondary law, the CJEU fostered the concepts of *mutual recognition* of professional qualifications in its case law. Driven by the creation of an internal market, the CJEU liberalised the recognition of many professions through the application of the four fundamental freedoms. The CJEU essentially ruled in *Vlassopoulou* that the fundamental freedoms preclude a Member State from denying an EU national from pursuing his profession in another Member State if he is allowed to practice in his home Member State without assessing the formal qualifications of the migrant.[1005] The underlying principle slowly evolved from a mere perspective on non-discrimination and on free movement restrictions to a comprehensive mutual recognition system.[1006] Unlike in international treaties where reciprocity is usually required, Member States in principle have to trust in the education levels of the other Member States even if they are different from their own. Apart from the *country of origin principle*, the principle of *mutual trust* constitutes a

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1003 See <https://ec.europa.eu/growth/single-market/services/free-movement-professionals/transparency-mutual-recognition_en> (last visited on 29.06.2020).

1004 See Arts. 4 and 9 of *Directive 2018/958/EU of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions,* OJ [2018] L173/25, 09.07.2018.

1005 Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

1006 See W. van Ballegooij, *The nature of mutual recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area,* Diss. Maastricht (2015), Cambridge (2015), p. 87; Diebold, Berne, supra note 67, para. 1116.

cornerstone of the system of mutual recognition of professional qualifications[1007] and is considered 'of fundamental importance in EU law'.[1008] This is also codified in Article 4 of the Professional Qualifications Directive. Member States must take into account the professional qualifications of migrants. It is certainly not permissible to require reciprocity as a further requirement for the recognition of professional recognition.[1009] Access to a profession may only be refused for specific reasons. The CJEU's case law on mutual recognition in general and with regard to professional qualifications is extensive and will be discussed in this study. Even now, the fundamental freedoms are still relevant in case secondary law is not applicable and acts as a subsidiary layer according to the case law.[1010]

At this point, it should be mentioned that access to a regulated profession creates a so-called *double burden* for migrants. A migrant must be fully qualified in his home Member State and in the host Member State to practice. In cases where migrants have (lawfully) been working for a long time in the host Member State (for example in a similar profession or in a federal State where the profession is only regulated in parts of this Member State) this requirement may become absurd. Access to a profession is only granted by reference to the acquired training and profession in the home Member State. It is debatable whether the concept of *double burden* constitutes (only) a restriction or even indirect discrimination.[1011] To give an example, a lawyer[1012] who wishes to pursue the profession of lawyer in the home Member State may be required to show knowledge of the host Member State's family law rules, even if the lawyer has been working in another field for 20 years and never intends to practice family law. The lawyer who wishes to integrate immediately in the host Member

1007 F. Berthoud, *La reconnaissance des qualifications professionnelles: Union européenne et Suisse - Union européenne,* Geneva (2016), p. 44 et seq.

1008 Opinion of the Court 2/13, ECLI:EU:C:2014:2454, para. 191.

1009 See e.g. Case 168/85, *Commission v Italy*, ECLI:EU:C:1986:381, para. 16.

1010 See e.g. Case C-31/00, *Dressen II*, ECLI:EU:C:2002:35.

1011 See Diebold, Berne, supra note 67, para. 541 et seq.; see Gammenthaler, Zurich, supra note 40, para. 54 et seq. for further references to the case law. Additional burdens also play a role in other fields of EU law, see Case C-591/17, *Austria v Germany*, ECLI:EU:C:2019:504.

1012 This profession falls under separate directives - *Directive 98/5/EC of the European Parliament and of the Council to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained ('Facilitating Practice Directive') of 16.02.1998,* OJ [1998] L77/36, 14.03.1998 and the *Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services ('Facilitating Services Directive') of 22.03.1977,* OJ [1977] L78/17, 26.03.1977.

State is required to take an aptitude test, which again tests knowledge of national law that the lawyer may never use again in his or her daily practice.

5.2.1 Mutual recognition by means of primary law

Advocate General van Gerven mentioned in his opinion in the seminal case *Vlassopoulou* that there is a *duty to take account of qualifications*, which directly flows from the fundamental freedoms.[1013] This is in essence the principle of mutual recognition based on primary law. It was also applied later in the case *Bobadilla.* In that case, the CJEU held that a Spanish national who obtained a UK degree and returned to Spain to work as a restorer of cultural property falls under the freedom of movement for workers. The professional body that has the power to make a decision about recognition is obliged to take into account the knowledge obtained by the individual in question, including through practical training and study.[1014]

It shall be noted that this seemingly trivial nuance starts an evolution in case law. In this line of case law, the shift was necessary because a highly restrictive interpretation of the concept of discrimination and free movement restrictions would mean that a fully qualified professional from another Member State would need to fulfil the same criteria as a national of the host Member State. In principle, this would mean that a migrant needed to re-enrol at a university in order to get a degree in the host Member State. The principle of mutual recognition evolved beyond its origins in the internal market case law. A Member State would refrain from requiring the same education as required in other Member States and impose on them a duty to take other qualifications into account. In other words, the burden of proof to show that the diploma does not suffice shifts to the host Member State.[1015]

Further, the *principle of mutual recognition* was mentioned in a wide array of cases but it was only stated in some CJEU cases and AG Opinions that is in fact a *general principle* of EU law with reference to secondary law (mostly concerning the recognition of driving

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[1013] *Opinion of Advocate General van Gerven in Case C-340/89, Vlassopoulou*, ECLI:EU:C:1990:426, para. 14.

[1014] Case C-234/97, *Bobadilla*, ECLI:EU:C:1999:367, paras. 30 and 33.

[1015] See Berthoud, Geneva, supra note 1007, p. 44 et seq.

licences).[1016] It is however pointed out that under the regime of primary law the *principle of mutual recognition* is rather a *conditional principle of mutual recognition* because measures can be justified (see further Chapter 5.2.5 which discusses whether there is a duty to take into account professional qualifications based on a general principle rather than on free movement rights).[1017] The principle of mutual recognition applies to all areas of substantive and procedural law. The principle can be applied in many areas of law, such as for the recognition of professional qualifications, for driving licences and for products in the food industry[1018]. Often, it is also combined with the *country of origin principle*.[1019]

It should be borne in mind that the CJEU pushed evolution of the internal market through a vehicle of 'negative integration'[1020] for historic reasons. Therefore, the concepts of direct and indirect discrimination and restrictions were applied extensively. Several scholars discussed abolishing the distinction between the concepts of restrictions and indirect discrimination.[1021] As the CJEU rarely distinguishes between restrictions and indirect discrimination,[1022] the question remains unanswered. In EU law, this question might remain academic in nature due to the fact that any hindrance of the free movement of persons is prohibited unless it is justified. As it is at least doubtful whether free movement restrictions are covered by the AFMP, some authors argue that the mutual recognition of diplomas is limited to the adaptation of secondary law, namely the Professional Qualifications

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1016 Case C-467/10, *Akyüz*, ECLI:EU:C:2012:112, para. 45, Case C-419/10, *Hofmann*, ECLI:EU:C:2012:240, para. 71, Case C-321/07, *Schwarz*, ECLI:EU:C:2009:104, para. 74 and Case C-1/07, *Weber*, ECLI:EU:C:2008:640, paras. 26 and 29 for driving licences; *Opinion of the Advocate General Bobek in Case C-672/15, Noria Distribution*, ECLI:EU:C:2016:961, para. 66 for food supplements, see however S. Weatherill, 'The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist', Oxford Legal Studies Research Paper Series 2017, No 43, p. 20 et seq.

1017 Weatherill (2017), supra note 1016, p. 20 et seq.

1018 E.g. *Council Directive 89/108/EEC on the approximation of the laws of the Member States relating to quick-frozen foodstuffs for human consumption of 21.12.1988,* OJ [1989] L40/34, 11.02.1989.

1019 See C. Janssens, *The principle of mutual recognition in EU law,* Diss. Antwerp (2011), Oxford (2013), p. 77 et seq. for further examples.

1020 For the expression 'negative integration' see: Craig & Búrca, Oxford, supra note 789, p. 9, p. 66 and p. 665; and C. Tobler, *Internetapotheken im europäischen Recht: Positive und negative Integration am Beispiel des grenzüberschreitenden Verkaufs von Arzneimitteln in der EU und in der Schweiz,* Basel (2009), p. 16 et seq.

1021 Zäch, Berlin, supra note 730, p. 492.

1022 Tobler, Antwerp, supra note 731, pp. 307–315.

Directive.[1023] Tobler pointed out that the CJEU could have based the crucial decision in the field of mutual recognition of diplomas on the concept of *indirect* discrimination but chose not to do so. This can either be explained by the fact that the CJEU did not find it desirable to overrule earlier case law. It would have needed to reassess the limits of the concept of indirect discrimination.[1024]

In EU law, the distinction between indirect discrimination and restrictions remains hypothetical at best, because both are prohibited and both can be justified by overriding reasons in the public interest.[1025] While one could argue that the cases are not mere free movement restrictions but indirect discrimination, the CJEU has commonly stated merely that the measure would be liable to 'hinder' or 'restrict' the free movement of persons. The term discrimination was not used. The prevailing view is that the requirement of having obtained a diploma should in most cases merely be considered a restriction because it is a legitimate aim of Member States to set standards for the exercise of certain professions.[1026] The situation is different when diplomas that can only be obtained in the host Member State are accepted. This is considered to be indirect discrimination.[1027]

As already mentioned above, the question is relevant under the *acquis suisse* because it is debatable whether restrictions are covered by the AFMP.[1028] The prevailing view among scholars and a memorandum of the Swiss Government supports the idea that the *Morgenbesser* ruling is only an reflection of the earlier case law.[1029] This case law dates back to the CJEU's famous *Vlassopoulou* decision.[1030] That view is supported by the case law of the Swiss Federal Court, as shown above in the reference to the case *Hocsman*, but is not

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1023 Tobler & Beglinger, Zurich, supra note 99, charts 38 and 51, pp. 49 and 62.

1024 Tobler, Antwerp, supra note 731, p. 382.

1025 See supra note 914.

1026 Gammenthaler, Zurich, supra note 40, p. 54 et seq.; Case C-345/08, *Peśla*, ECLI:EU:C:2009:771, para. 34.

1027 See B. Zaglmayer, *Anerkennung von Gesundheitsberufen in Europa,* Vienna (2016), para. 1.8 for further references.

1028 See Chapter 4.2.2.3.

1029 State Secretariat for Research and Innovation et al., *Note conjointe: Accès des ressortissants de l'UE au bénéfice d'un diplôme étranger en droit au stage d'avocat en Suisse,* (not published) of 10.09.2007; Berthoud, Geneva, supra note 1007, p. 368 et seq.; A. Epiney, R. Mosters & S. Theuerkauf, in A. Epiney & Theuerkauf (eds.), *Schweizerisches Jahrbuch für Europarecht 2003: Annuaire suisse de Droit européen 2003,* Berne (2004), p. 114; Bohnet, Bâle, supra note 778, p. 6 et seq.

1030 See Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193; see also Case C-319/92, *Haim I*, ECLI:EU:C:1994:47.

entirely satisfactory from the standpoint of a uniform doctrine because the Swiss Federal Court never openly stated whether restrictions are covered by the AFMP, but it certainly applied primary law for the recognition of professional qualifications based on a pragmatic line of reasoning.[1031]

From a dogmatic standpoint it is extremely difficult to solve the underlying issues, as the concepts of indirect discrimination, restrictions and their boundaries remain unclear.[1032] It should also be recalled that the CJEU stressed in its decisions under the regime of primary law that diplomas obtained from an institution in the EU should be assessed and compared with the level and content of those that are required. The CJEU does not require the unconditional recognition of professional qualifications for the fundamental freedoms to be effective, but rather an assessment of different diplomas, experience and training. The mere notion that foreign diplomas can be denied because they are not deemed equal to those obtained in the host Member State is certainly indirectly discriminatory.[1033]

One pragmatic way of dealing with the issue would simply be to ask how secondary law deals with the issue at hand. It could be argued that in cases where secondary law does not apply, the Member States have more leeway to determine the appropriate level of education. This argument however deprives the fundamental concept of free movement and its provisions of their usefulness. Secondary law has the advantage of providing *legal certainty* for the applicants, but it should not result in lowering the standards for those relying on the fundamental freedoms.

5.2.2 Recent internal market case law of the CJEU with regard to primary law: *Brouillard*

An interesting recent example of an unregulated profession which falls under primary law can be seen in one of the *Brouillard* cases. Mr Brouillard applied for the position of legal secretary at the *Cour de cassation* in Belgium. He was not admitted to the competition because he did not have a Belgian law degree, as required by Belgian law.[1034] The CJEU

1031 BGE 136 II 470 (= Pra 2011 No 37).

1032 Tobler, Antwerp, supra note 731, p. 395 et seq.; see Case C-168/91, *Konstantinidis*, ECLI:EU:C:1993:115, para. 16; Case C-171/02, *Commission v Portugal*, ECLI:EU:C:2004:270, para. 66.

1033 See Gammenthaler, Zurich, supra note 40, p. 54 et seq.

1034 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, paras. 12-19.

found that the situation was not purely internal because the applicant had obtained a French diploma. The CJEU held that the public service exception of Article 45(4) TFEU only applies to nationals of other Member States. It also stated however that the Article cannot be interpreted to exclude a Member States' own nationals if there is a cross-border element.[1035] The idea behind Article 45(4) TFEU stems from the fact that Member States have a legitimate interest to reserve certain job positions exclusively for their own nationals because those roles require the exercise of public authority. The second question raised the issue of whether the profession of legal secretary could be regarded as a regulated profession under the Professional Qualifications Directive. From the admission criteria, however, it was clear that no specific professional qualifications were required but rather a diploma that gives the holder a wide range of professional possibilities. Therefore, the CJEU concluded that the profession of legal secretary at the *Cour de Cassation* could not be considered to fall within the scope of Article 3(1) of the Professional Qualifications Directive.[1036]

By its last two questions, the *Cour de Cassation* asked whether under Article 45 TFEU it is mandatory for the national court to consider other diplomas when it examines an application and national law makes participation in the competition procedure conditional on having a Belgian diploma.[1037] The CJEU based its answers on the established line of case law, namely the decisions of *Vlassopoulou, Morgenbesser and Peśla*. It stressed the fact that even an *indiscriminate* application with regard to nationality may infringe the exercise of the free movement provisions.[1038] While Member States still have the possibility to reserve certain job positions exclusively for their own nationals, they are obliged to carry out a comparative assessment.[1039]

The judgment comes as a welcome clarification in the field of public service. It was established in the very early case law, such as the famous *Lawrie-Blum* case, that the public service is not per se exempt from the TFEU but only in the narrowly interpreted case that the

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1035 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 26.

1036 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 40.

1037 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 47.

1038 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 52.

1039 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, paras. 54-56 for further references to the following cases: Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193; Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612; Case C-345/08, *Peśla*, ECLI:EU:C:2009:771.

role requires the exercise of public authority.[1040] The *Brouillard* case clarifies that free movement provisions may also apply to the exercise of public authority, at least to the nationals of a Member State, as long as they have made use of their free movement rights. There is no reason why it should not apply for the *acquis suisse* based on Article 16(2) AFMP, because the CJEU expressly stated that case law after the date of signature is taken into account if it only clarifies concepts which were developed in case law before the date of signature.[1041]

5.2.3 Case law with regard to primary law under the *acquis suisse*

5.2.3.1 Case law of the CJEU: Ettwein

In the case *Ettwein*, Mr and Mrs Ettwein moved to Switzerland but continued their business activities in Germany. In the calculation of their taxable income, the German authorities refused to apply the more favourable 'splitting' method (joint taxation of spouses) because their residence was no longer in the EU or in the EEA. Consequently, the questions referred to the CJEU for a preliminary ruling concerned the conformity of this rule with the AFMP.[1042] Article 16(1) AMFP states:

> 'In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.'

The Advocate General in that case had doubts as to whether nationals may invoke provisions of primary law against their State of origin under Article 16(1) AFMP.[1043] This reasoning was not followed by the CJEU.[1044] According to the CJEU's ruling the claimants qualified as 'self-employed frontier workers' (Article 12(1) of Annex I to the AFMP), and to be able to invoke the provisions for self-employed frontier workers under the AFMP, must

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1040 See Case 66/85, *Lawrie-Blum*, ECLI:EU:C:1986:284.

1041 Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39 with reference to the *Opinion of Advocate Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 71 et seq.

1042 Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121, para. 29.

1043 *Opinion of Advocate General Jääskinen in Case C-425/11, Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2012:650, paras. 45 and 52 et seq.

1044 Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

not have a residence permit. The rule was thus considered to be violating Article 1(a) AFMP and Articles 9(2), 13(1), 15(2) of Annex I to the AFMP.[1045] To sum up, Article 16(1) AFMP also applies to provisions of primary law. This approach is sensible because it is sometimes difficult to determine whether provisions stem from primary and secondary law in Annex I to the AFMP. Moreover, it is the consequence of Switzerland's 'bilateral path' which also involves some free movement provisions of primary law in Annex I of the AFMP.

5.2.3.2 Early case law of the FAC

In 2007, the FAC simply refused the application of primary law in a decision where the conditions to benefit from acquired rights for a Czech (new Member State) national with a diploma as a medical doctor were not protected. The appellant invoked the decisions *Vlassopoulou* and *Dressen* and Article 16(2) AFMP. The FAC stated that the decision *Dressen* deals with the recognition of architects and the decision *Vlassopoulou* deals with the recognition of lawyers. For this reason, the FAC concluded that in those judgments the courts did not rule on comparable situations.[1046]

It is rather obvious from this reasoning that the FAC did not understand the implications of the above-cited case law of the CJEU, which had developed a principle of mutual recognition based on primary law in the TFEU or the corresponding articles of the AFMP (namely Article 15 of Annex I to the AFMP). It is certainly not exclusive to specific professions.[1047] Mutual recognition by primary law in the sense of the *Vlassopoulou* ruling has been extended to other professions, and covers architects[1048] and engineers[1049], notwithstanding the fact that secondary law generally regulates these professions. Directive 93/16/EEC[1050] was not applicable in this case as the diploma was not listed in Annex A, and

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[1045] Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

[1046] BVGer C-2281/2006 of 18.10.2007 (available online since 2019), para. 3.5.

[1047] See for the same opinion on the CJEU's case law: Zaglmayer, Vienna, supra note 1027, para. 3.19.

[1048] Case C-31/00, *Dressen II*, ECLI:EU:C:2002:35, para. 31; Case C-298/99, *Commission v Italy*, ECLI:EU:C:2002:194, paras. 37-40; see also Case C-447/93, *Dressen I*, ECLI:EU:C:1994:321.

[1049] Case C-330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos v Administración del Estado*, ECLI:EU:C:2006:45, paras. 28-31.

[1050] *Council Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications of 05.04.1993,* OJ [1993] L165/1, 07.07.1993.

the professional experience of at least three years for the protection of acquired rights according to Article 9a of Directive 93/16/EEC had not been met.[1051]

For a comparison with the current Professional Qualifications Directive, its Article 21 et seq. (sectoral system) cannot be invoked because of the reference date of the diploma and the missing accompanying certificate. Article 23 thereof (acquired rights) would also require professional experience of three years over the last five years. Today this case would fall under Article 10(b) of the Professional Qualifications Directive ('for specific and exceptional reasons'[1052]).[1053] Even if this were not the case, primary law would act as a subsidiary layer for the mutual recognition of professional qualifications.[1054]

In a similar fashion, the recognition of a medical doctors with Polish and Swiss nationality was denied in another case of 2007. Interestingly, it was argued that a document of the European Commission interpreting Article 9(1) of Directive 93/16/EEC of would not be considered of legal value for the interpretation of Swiss courts.[1055]

5.2.3.3 Cantonal case law

This case of the Administrative Court of the Canton of St. Gallen was only about the application for admission of an individual as a dentist, which was refused because the Bulgarian diploma had not been recognised. This decision in itself is unproblematic.[1056] The cantonal court however cited the opinion of the MEBEKO, which is competent for making decisions on the recognition of professional qualifications. The Professional Qualifications Directive was not in force in Bulgaria, but as of 1 June 2009 the provisions of the AFMP were in force.[1057] The MEBEKO found the implementation of the recognition of professional qualifications had not yet been agreed upon (notably the update for the relevant titles under

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[1051] BVGer C-2281/2006 of 18.10.2007 (available online since 2019), para. 3.6.

[1052] See for more detail Chapter 6.2.4.6.

[1053] See Zaglmayer, Vienna, supra note 1027, para. 5.16.

[1054] See Zaglmayer, Vienna, supra note 1027, para. 5.20.

[1055] BVGer C-89/2007 of 02.07.2007, para. 3.4.2; see also M. Oesch, 'Zulassung von ausländischen universitären Medizinalpersonen zum Markt', in T. Poledna & R. Jacobs (eds.), *Gesundheitsrecht im wettbewerblichen Umfeld* (2010), para. 12.

[1056] Decision B 2010/24 of the Verwaltungsgericht (Administrative Court) of the Canton of St. Gallen of 08.06.2010.

[1057] See Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, regarding the participation, as contracting parties of the Republic of Bulgaria and Romania pursuant to their accession to the European Union, OJ [2009] L124/53, 20.05.2009.

the Professional Qualifications Directive), but did not check whether primary law could be applied for the recognition of professional qualifications.[1058]

5.2.3.4 Current case law of the FAC

5.2.3.4.1 Partial recognition

In a recent case of 2018, the FAC discussed whether partial recognition is part of the current *acquis suisse*. The FAC judgment however left the question unanswered whether the concept constitutes old or new case law.[1059] From its reasoning it is clear that the FAC was not aware that the concept of partial recognition was already based on the assumption that primary law applies, as Article 4f of Directive 2013/55/EU amending the Professional Qualifications Directive does not currently apply under the *acquis suisse* (see Chapter 6.4.3 which covers this in detail).

5.2.3.4.2 Landmark case of the FAC concerning discrimination and equal treatment

In a landmark decision, the FAC referred to the case *Vlassopoulou* in 2017, but it did not consider whether the decision was based on primary or secondary law. It simply found that there was 'unlawful discrimination' in the sense of Article 15(1) of Annex I to the AFMP and Article 2 AFMP, which is the reason why Article 13 of the Professional Qualifications Directive must be applied (see for a detailed discussion of this case, Chapter 6.7.6).[1060] The FAC however remarked that Article 13 and Article 14 of the Professional Qualifications Directive applied and took precedence over provisions of national law.[1061]

5.2.3.4.3 Application of primary law for the unregulated professions?

In another decision of 2017, the FAC mentioned that according to the CJEU's rulings, the same principles apply for free movement in the context of unregulated professions. The

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[1058] Decision B 2010/24 of the Verwaltungsgericht (Administrative Court) of the Canton of St. Gallen of 08.06.2010, para. 2.5. The date of the MEBEKO's decision is not stated in the administrative court's decision, but from the MEBEKO's reasoning in that case it can be seen that the AFMP probably entered into force on the date of the decision.

[1059] BVGer B-3503/2016 of 19.03.2018, para. 5.6.

[1060] BVGer B-5372/2015 of 04.04.2017, para. 6.4.2.

[1061] BVGer B-5372/2015 of 04.04.2017, paras. 5.3 and 5.4.

reasoning explicitly states that the same principles would be applied even if secondary law were not applicable (see Chapter 7.8.3 for an in-depth discussion of this judgment).[1062]

5.2.3.5 Current case law of the Swiss Federal Court

5.2.3.5.1 Application of primary law

A leading case of 2010 concerned the interpretation of the Federal Act on the Internal Market (BGBM), which refers to rules of EU law. With a view to those rules in EU law, the Swiss Federal Court accepted the concept of mutual recognition based on primary law, following a pragmatic approach under the *acquis suisse*, even if it did not have an impact on the outcome of the case (Articles 9 and 16(2) AFMP).[1063]

5.2.3.5.2 Laboratory doctor

In a leading case of 2006 about a medical specialism (laboratory doctor) not listed in Directive 93/16/EEC[1064] (now the Professional Qualifications Directive), the Swiss Federal Court required the federal authorities to take into account the diploma based on the *Vlassopoulou* and *Hocsman* case law.[1065] Berthoud rightly points out that the Swiss Federal Court did not clarify several aspects, such as the criteria for a comparison, whether the applicant has a choice if compensation measures are necessary (between aptitude test and adaptation) and the applicable deadlines.[1066]

5.2.4 Diploma as a restriction for non-regulated professions

It is a rather intriguing question whether diplomas themselves could constitute a restriction or even that the granting of a diploma could be seen as discrimination of the free movement provisions (see also the discussion on double burdens in Chapter 5.2). The EU

[1062] BVGer B-3706/2014 of 28.11.2017, para. 6.3.3 in conjunction with para. 7.2.1.

[1063] BGE 136 II 470 (= Pra 2011 No 37), para. 4.1; Diebold, Berne, supra note 67, para. 1116 et seq.; COMCO, *Empfehlung zuhanden der Kantone und des Bundesrats betreffend Freizügigkeit für Notare und öffentliche Urkunden of 23.09.2013,* <https://www.newsd.admin.ch/newsd/message/attachments/32316.pdf> (last visited on 25.06.2020), para. 64 and footnote 33 thereof with further references.

[1064] Directive 93/16/EEC (see for the full citation supra note 1164).

[1065] BGE 133 V 33, para. 2.

[1066] Berthoud, Geneva, supra note 1007, p. 369.

does not have the competence to harmonise the area of education.[1067] Member States only have to respect the minimum standards for the professions under the sectoral recognition regime, with a minor exception for architects.[1068] The CJEU also ruled that the conditions for access to a profession are generally up to the Member States if applied in a non-discriminatory fashion.[1069]

In addition, the CJEU ruled that the requirement of passing an examination for entry to the public service per se could not be regarded as a hindrance to free movement. Rather, the peculiar application of this rule, which did not take into account the qualifications of fully qualified migrants, was considered to have the potential to hinder the free movement of persons (see Chapter 6.2.4.5).[1070]

This does not mean that each Member State is essentially free to require that an individual has any kind of diploma it wishes. Diplomas should obviously be required in a non-discriminatory fashion. It is clear from the case law that diplomas only awarded in a specific Member State are less likely to be obtained by foreigners than by nationals of that Member State. This is therefore considered as a classic illustration of indirect discrimination, as shown by case law on certain language certificates that were issued in a small region of a Member State.[1071]

Access to a profession cannot be unduly restricted because any kind of restriction of free movement is in principle prohibited. This means that the *Keck*-jurisprudence as discussed earlier[1072] does not apply to rules which govern access to a market, but only to those rules merely governing the economic activity as such if they could even be applied in this context at all.[1073] To give an example, in *Gullung,* a French notary was barred access to the profession of lawyers on disciplinary grounds. He relied upon his free movement rights and on his professional experience in Germany as a lawyer. In his opinion, France was obliged to allow

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1067 Art. 165(3) and (4)(1) and Art. 166(3) and (4) TFEU; see also Garben (2010), supra note 40, p. 191 et seq.; Gammenthaler, Zurich, supra note 40, p. 102 et seq.; Herdegen, Munich, supra note 40, § 26 para. 5.

1068 See infra note 1296.

1069 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 48.

1070 Case C-285/01, *Burbaud*, ECLI:EU:C:2003:432, paras. 96-101.

1071 Case C-281/98, *Angonese*, ECLI:EU:C:2000:296, paras. 40-42.

1072 See supra note 783 for further references.

1073 See the *Opinion of Advocate General Fennelly in Case C-190/98, Graf v Filzmoser*, ECLI:EU:C:1999:423, para. 33.

him to pursue the profession as he was lawfully working in Germany.[1074] The CJEU answered that Member States remain free to organise the system that is applicable to lawyers. Neither secondary law nor the freedom of establishment were violated because the disciplinary rules were not discriminatory or a restriction.[1075] This situation rarely poses a problem in Switzerland because such cases are usually solved by invoking Article 27 BV (the right to economic freedom).[1076]

On 28 June 2018, a new Directive 2018/958/EU was issued (not part of the *acquis suisse*), which includes an ex-ante proportionality test for new provisions restricting access to the regulated professions (implementation on 31 July 2020 at the latest). National law must also ensure that an effective remedy is available for matters relating to this Directive.[1077]

5.2.5 Duty to take professional qualifications into account as a general principle of EU law?

Based on the above-mentioned Swiss case law, it is interesting to ask whether the duty to take professional qualifications into account, or as it is known, the principle of mutual recognition, could also be based on other legal grounds, or whether it is linked solely to the fundamental freedoms. This step would be ideal as a dogmatic foundation to find another legal basis if free movement restrictions were not covered under the AFMP.

The principle of *mutual trust* applied in *Vlassopoulou* for the recognition of diplomas sets the cornerstone for a system that goes far beyond the classic non-discrimination concept which was also called a principle 'of fundamental importance in EU law'.[1078] It is therefore up to the Member States to enact a procedure that checks and compares diplomas under the regime of primary law whether they are comparable with a view to their knowledge and training.[1079] The principle of *mutual recognition* is closely connected to the *Cassis de Dijon* case law and is thus inherently linked to the fundamental freedoms.[1080] For the recognition of diplomas, the CJEU did apply the principle of mutual recognition based on the four

1074 Case 292/86, *Gullung*, ECLI:EU:C:1988:15, paras. 1-6.
1075 Case 292/86, *Gullung*, ECLI:EU:C:1988:15, paras. 29-32.
1076 See the opinion in: Berthoud, Geneva, supra note 1007, p. 207 et seq. for references.
1077 See Arts. 4 and 9 of Directive 2018/958/EU.
1078 Opinion of the Court 2/13, ECLI:EU:C:2014:2454, para. 191.
1079 Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193, paras. 17-21.
1080 See Berthoud, Geneva, supra note 1007, p. 44 et seq.

fundamental freedoms due to the fact that there was no secondary law to govern it for some time, despite the fact that former Article 43(1) EC (now Article 53(1) TFEU) state that there ought to be directives regulating that principle. In the early case *Thieffry* for example*,* the CJEU based its decision on the mutual *principle of sincere cooperation*[1081] (now the first indent of Article 4(3) TEU) and on the fundamental freedoms[1082]. The answer as to whether the principle of proportionality applied as a *general principle* for professional recognition (and not only as far as provided by primary or secondary law, such as for driving licences: see Chapter 5.2.1) was eventually provided in one of the *Brouillard* cases.[1083]

Mr Brouillard applied as a lawyer-linguist for the CJEU having obtained a vocational master's degree at a French university. He was subsequently excluded from the public tender due to the fact that he did not have the appropriate diplomas showing a full legal education. The General Court found that it was not in a position to compare the different technical and professional expertise of operators. In public procurement law, technical abilities of economic operators are their skills, efficiency, experience and reliability.[1084] More importantly, the General Court left its internal market case law aside due to the fact that the Professional Qualifications Directive does not bind the EU, but only the Member States.[1085] This decision was upheld on appeal by the Court of Justice.[1086]

Thus, it can be seen from the case law that the recognition of diplomas is only based on the internal market law and that no 'general concept' of diploma recognition exists as a general principle of EU law.

5.2.6 Abuse of rights and zigzag recognition

As we have seen above, an EU national may also rely vis-à-vis his own Member State on EU law if there is a cross-border element. This is also accepted for diplomas under the *acquis*

1081 The principle of sincere cooperation is however only binding on the Member States, even if the second indent of Article 4(3) enshrines the *pacta sunt servanda* principle (C. O. Lenz, 'Art. 4 TEU', in C. O. Lenz & K.-D. Borchardt (eds.), *EU-Verträge Kommentar: EUV, AEUV, GRCh,* Köln (2013), para. 11) and the principle of cooperation in good faith (see Case 251/89, *Athanasopoulos v Bundesanstalt für Arbeit*, ECLI:EU:C:1991:242, para. 57).

1082 Case 71/76, *Thieffry*, ECLI:EU:C:1977:65, para. 16 et seq.

1083 Case C-590/15 P, *Brouillard v CJEU*, ECLI:EU:C:2016:872, para. 51.

1084 See the current point (f) of Annex VII of *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement,* OJ [2014] L94/65, 28.03.2014.

1085 Case T-420/13, *Brouillard v CJEU*, ECLI:EU:T:2015:633, para. 86 et seq.

1086 Case C-590/15 P, *Brouillard v CJEU*, ECLI:EU:C:2016:872.

suisse.[1087] The question is whether an EU or Swiss national can also invoke the principle of mutual recognition of diplomas if he or she only aims at the lowest threshold for recognition. From the foregoing, one could have the impression that recognition of a diploma and taking into account the knowledge of applicants leads to a lowering of standards. The phenomena of *qualification shopping*[1088], could essentially lead to a *race to the bottom*[1089]. If EU nationals were allowed to recognise their diploma in a non-home Member State that is more generous and returned to their state of residence, this state, at least in theory, would have to accept the newly acquired rights attached to recognition in the host Member State (also known as 'zigzag recognition'[1090]). However, the recognition of professional qualifications is not unconditional. Under the regime of the general system, where differences are substantial, a Member State may refuse recognition when professions are not the same or when the qualification level of the applicant's diploma is too low (see further Chapter 6.4.1 for details), allow only partial recognition when the applicant would have to undergo another education programme and training,[1091] or require an aptitude test or an adaptation period as the least restrictive measure.[1092] Compensation measures are discussed below for secondary law (see Chapter 6.4.2).

It should at this point be clarified that the mere use of the free movement provisions per se does not suffice to be regarded as an abuse of rights. The rule against the abuse of rights is considered to be a general principle of EU law.[1093] However, the abuse of rights is obviously unprotected.

The concept of abuse of rights 'requires a combination of objective and subjective elements'.[1094] The objective criterion is fulfilled when the recognition would be in conformity with the respective EU rules but the aim of these rules cannot be achieved.[1095] The subjective

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[1087] See e.g. BVGer C-2281/2006 of 18.10.2007 (available online since 2019), para. 3.4; BVGer C-89/2007 of 02.07.2007, para. 3.3.

[1088] See Zaglmayer, Vienna, supra note 1027, para. 11.12 for the expression.

[1089] The use of the term 'race to the bottom' can be seen, among many others, in Diebold, Berne, supra note 67, para. 1452 et seq.

[1090] Berthoud (2010), supra note 987, p. 163.

[1091] Case C-330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos v Administración del Estado*, ECLI:EU:C:2006:45, paras. 24-26 and 36-39.

[1092] Berthoud, Geneva, supra note 1007, p. 50 et seq.

[1093] Case C-255/02, *Halifax*, ECLI:EU:C:2006:121, para. 37.

[1094] Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 44.

[1095] Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 45.

element requires that the applicant suffered an unfair advantage, sought by creating an artificial arrangement.[1096]

Even with this formula mentioned above, it is difficult to determine an 'abuse' for the recognition of professional qualifications objectively because there is no 'genuine economic activity' that can be compared to the advantage that the applicant gains.[1097] In comparison with the CJEU's case law for legal persons, the objective criterion can be better illustrated in the case *Cadbury Schweppes*. The so-called 'wholly artificial arrangements' are only aimed at circumventing legislation. It is also clear from this case that an *abuse of rights* has to be interpreted narrowly but was ultimately left for the national court to decide.[1098] The relevant case law shall be clustered into three groups to show the concept in more detail.

5.2.6.1 First cluster of the abuse of rights concept

The first cluster of cases with a view to the abuse of rights concept concerns the situation when professionals who are not fully qualified return to their home Member State having obtained a 'homologation' decision meaning their diploma is recognised (academic recognition) in the host Member State. To give an example, the CJEU decided in *Cavallera* that it is not sufficient to show that a homologation decision has been made and that there has been enrolment in a register when there is no evidence of an additional qualification.

Mr Cavallera, an Italian national, applied to the Spanish authorities for recognition of his Italian diploma in mechanical engineering. His diploma was approved and recognised as equivalent to the Spanish diploma in mechanical engineering. Subsequently, he applied for enrolment in the professional register in Spain. However, Mr Cavallera did not actually work in Spain, and returned to Italy. He claimed that he should be allowed to enrol in the Italian professional register based on the fact that he had been recognised by the Spanish authorities. The Italian system, however, provided that a second state examination for holders of university degrees in mechanical engineering and registration is also mandatory. At first, the

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[1096] Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 46; see also Case C-425/06, *Part Service*, ECLI:EU:C:2008:108, para. 62.

[1097] Same opinion: L. M. Baudenbacher, *Vom gemeineuropäischen zum europäischen Rechtsmissbrauchsverbot,* Diss. Zurich 2015, Zurich (2016), p. 485 et seq.

[1098] Case C-196/04, *Cadbury Schweppes*, ECLI:EU:C:2006:544, para. 51.

applicant was admitted to the Italian register, but the National Council of Engineers challenged his registration.[1099]

The national court referred two questions to the CJEU. It asked whether Mr Callavera could rely on the General Recognition Directive, and if the first question were answered in the affirmative, whether national law would be in accordance with that directive.[1100] The CJEU pointed out that the Spanish authorities attested solely the recognition of his diploma, but that the diploma of the host Member State did not amount to an 'additional qualification' because it was not based on an 'examination of the qualifications'.[1101]

It could also be argued that there is no cross-border element in this case because Mr Cavallera never left his home Member State or acquired any qualification in another Member State.[1102] It must however be stated more precisely that it is not necessary to leave the home Member State in the case of franchised institutions or long-distance learning.[1103] Similar to this problem to define when one can rely on a diploma to profit from professional recognition, the CJEU has an extensive jurisprudence relating to the necessary *cross-border* element to invoke EU law. While it is widely known that purely internal situations are outside the scope of EU law, it is still difficult to assess the boundaries of the concept 'purely internal situation' or when the residence is 'genuine', such as in the case *O. and B*.[1104] Considering this extensive type of case law *per analogiam*, Mr Cavallera could have relied on the recognition of professional qualifications if he had worked in Spain for a while and returned to Italy later.

To conclude, the CJEU prevented the abuse of rights, especially in *Cavallera*. Mutual recognition is meant to make free movement easier but not to foster unfair advantages that do not reflect the training and education of the professionals concerned. Unlike Advocate General Maduro,[1105] the CJEU did not use the term 'abuse of rights'.

1099 Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, paras. 33-42.

1100 Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, para. 43.

1101 Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, paras. 54-57.

1102 Zaglmayer, Vienna, supra note 1027, para. 11.14.

1103 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 29; Case C-153/02, *Neri*, ECLI:EU:C:2003:614, para. 39 et seq.; European Commission, *User guide - Directive 2005/36/EC - Everything you need to know about the recognition of professional qualifications of 2009,* <https://ec.europa.eu/docsroom/documents/15032> (last visited on 28.06.2020), p. 11 et seq.; BVGer B-166/2014 of 24.11.2014, para. 6.4.

1104 See Case C-456/12, *O. and B.*, ECLI:EU:C:2014:135; see more pointedly *Opinion of Advocate General Sharpston in Case C-34/09, Zambrano*, ECLI:EU:C:2010:560, para. 86.

1105 *Opinion of Advocate General Maduro in Case C-311/06, Cavallera*, ECLI:EU:C:2008:130, para. 37.

The same reasoning also applies with respect to applicants relying on current secondary law. Recital 12 of the Professional Qualifications Directive clearly incorporates the case law of the CJEU. Applicants may not rely on the Professional Qualifications Directive against their home Member State unless evidence of the acquisition of additional professional qualifications can be provided.[1106]

5.2.6.2 The second cluster of the abuse of rights concept

The second cluster encompasses professionals who are not fully qualified but who move to another Member State to become fully qualified professionals, and benefit from education and training which is less onerous than what may be required by the home Member State to obtain formal qualifications in the sense of the Professional Qualifications Directive.

In principle, without going into the detail of the three recognition systems under the Professional Qualifications Directive at this point (see further Chapter 6.4 et seq.), different durations of training must be accepted. This can be seen in the *Koller* case where an Austrian law graduate became a Spanish lawyer (*abogado*) and applied for registration in Austria without the five years of traineeship required in Austria (see Chapter 8.2.5.1.1).

Under Directive 98/5/EC[1107], the *Torresi* case was about Italian law graduates registering as lawyers in Spain. At that time in Spain, an individual only had to have a law degree to be added to the register of lawyers.[1108] The issue of the proceedings was now whether the Spanish lawyers could return to Italy and register as EU lawyers without obtaining any additional working experience. As we have seen above, the CJEU has held under the Professional Qualifications Directive in the case *Cavallera* that the possession of an additional qualification is needed to be allowed access to a profession in the home Member State and that the homologation of the engineering diploma in another Member State was not considered sufficient.[1109] A migrant may however use the free movement rights only to gain a formal qualification in another Member State without abusing his or her rights for the legal profession. It is certainly not necessary to have gained working experience as a fully-fledged

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[1106] See also European Commission, *Group of Coordinators for the Recognition of Professional Qualifications MARKT D/3418/6/2006-EN - Frequently asked questions*, p. 2.

[1107] The ‘Facilitating Practice Directive’ (see for the full citation supra note 1012).

[1108] See Schneider, Antwerp, supra note 741, p. 198.

[1109] Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, paras. 54-57.

professional.[1110] Even if the Facilitating Practice Directive does not actually regulate access to the same profession as in the home Member State, as there is no European concept of the legal profession, as Advocate General Szpunar rightly points out, 'activities of a lawyer' constitute a rather hybrid concept at best,[1111] and even if it is mentioned in the literature that the free movement of lawyers is based on mutual recognition of professional titles rather than professional qualifications,[1112] that reasoning can be applied for the Professional Qualifications Directive.[1113]

The situation is however distinct where professionals who are *not* fully qualified move to another Member State,[1114] obtain admission to a profession based on national law in the host Member State, obtain professional experience in the host Member State, and then return to the home Member State. This situation does not fall under the Professional Qualifications Directive, because there is no evidence that formal qualifications were obtained within the meaning of secondary law.[1115] Such cases must be judged solely by primary law according to the *Vlassopoulou* decision.[1116]

5.2.6.3 Third cluster of the abuse of rights concept

Finally, Member States may require specific documents according to Article 50(1) of the Professional Qualifications Directive in conjunction with Annex VII thereof. Forged documents or incorrect statements fall clearly under the abuse of rights concept (see Chapter 5.2.8).

1110 To become an Italian lawyer, a Spanish lawyer in that position with a law degree in Italy must therefore either pass an aptitude test or have three years of experience of practising Italian law. The CJEU therefore rightly held that Art. 3 of the Facilitating Practice Directive applies in this situation and that the Facilitating Practice Directive does not breach primary law: Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 56.

1111 See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, paras. 24-32.

1112 Schlag, supra note 946, para. 15.

1113 See also Zaglmayer, Vienna, supra note 1027, para. 11.19.

1114 The initial free movement right is not part of the new Art. 4(f) of the Professional Qualifications Directive.

1115 Art. 3(1)(c) of the Professional Qualifications Directive.

1116 See also Zaglmayer, Vienna, supra note 1027, para. 11.16 et seq., which also offers examples.

5.2.7 Burden of proof and consequences of an abuse of rights

The burden of proof to show an abuse of rights lies with the Member States. Applicants must have the possibility to show that they are not in fact abusing their rights. When an abuse of rights is proven, the respective EU law provision is in principle not applied.[1117] Thus, it first has to be established that EU law is applicable. In case there is no cross-border element, recourse to the abuse of rights is not necessary because EU law does not apply. In contrast to this methodological approach, some scholars see the abuse of rights doctrine rather as a means to justify restrictions or discrimination.[1118] The abuse of rights is not however expressly mentioned in the TFEU.[1119]

5.2.8 Swiss case law for the abuse of rights

In 2014, the FAC rejected an appeal against a revocation of recognition of a diploma as a specialised medical doctor. The decision was based on the burden of proof without an assessment of the Professional Qualifications Directive having been carried out. The FAC simply assumed that the appellant could not provide proof that her French diploma was authentic and that there were very serious doubts about the completion of her training as a specialised medical doctor.[1120]

5.3 Academic versus professional recognition of diplomas

The system of mutual recognition of professional qualification is also called the 'recognition of diplomas' and is mainly based on Article 53(1) and Article 62 TFEU. However, professional recognition is distinct from academic recognition of diplomas. It must be noted that the EU does not have the competence to harmonise the area of education according to the prevailing opinion.[1121] Sometimes the issue remains controversial as to whether a person seeks 'academic recognition' (recognition of academic qualifications) or

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1117 See Case C-212/97, *Centros v Erhvervs- og Selskabsstyrelsen*, ECLI:EU:C:1999:126, para. 23 et seq.

1118 Zaglmayer, Vienna, supra note 1027, paras. 11.26.

1119 Zaglmayer, Vienna, supra note 1027, paras. 11.2.

1120 See BVGer B-6573/2013 of 15.07.2014, para. 4.5.

1121 Art. 165(3) and (4)(1) and Art. 166(3) and (4) TFEU; Art. 6(e) TFEU; see also Garben, Alphen aan den Rijn, supra note 40, pp. 133 and 136 et seq.; Garben, supra note 868, p. 343; Garben (2010), supra note 40, p. 191 et seq.; Gammenthaler, Zurich, supra note 40, p. 102 et seq.; Herdegen, Munich, supra note 40, § 26 para. 5.

'professional recognition' (recognition of professional qualifications). Academic recognition allows the holder of a certain qualifications to commence studying at a higher education institution. For instance, it also allows holders of a Bachelor's degree to continue their studies at another university.[1122] Academic recognition does not allow access to a *regulated profession* but it may foster the free movement of students and workers. However, *academic recognition* might also be necessary to foster the free movement of professions that are non-regulated. *De facto professional recognition* concerns professions where access to a profession is not regulated. Thus, it is the labour market that decides in principle whether the applicant's training and education is sufficient.[1123] *Academic recognition* can be subdivided into academic recognition by *accumulation* and recognition by *substitution*. The first category encompasses students that intend to continue their studies in another State. The latter category means that credits obtained abroad are recognised by the home State.[1124]

Before the Bologna process, the Lisbon Convention[1125] was adopted in 1997 by the Council of Europe and UNESCO, which replaces the patched framework of different conventions for the academic recognition of diplomas.[1126] With the exception of Greece and Monaco, all Members of the Council of Europe have ratified the Lisbon Convention.[1127] The Lisbon Convention has *de facto* abolished the earlier Conventions[1128], which are still in force and are only applied to the two aforementioned countries which have not ratified the Lisbon Convention.

It is remarkable to note that the Lisbon Convention also relies on the principle of mutual trust. In general, diplomas have to be accepted unless a substantial difference between them

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[1122] See also BGE 136 II 470 (= Pra 2011 No 37), para. 4.2.

[1123] See Kortese (2016/1), supra note 41, p. 48; European Commission, supra note 41, p. 5.

[1124] Kortese, Maastricht, supra note 38, p. 6 et seq.

[1125] Lisbon Convention, SR 0.414.8.

[1126] Garben, Alphen aan den Rijn, supra note 40, p. 146.

[1127] <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/165/signatures> (last visited on 28.06.2020). Italy ratified the Lisbon Convention in late 2010.

[1128] *European Convention on the Academic Recognition of University Qualifications (Paris Convention) of 14.12.1959, signed and ratified on 25.04.1991, entry into force on 26.05.1991,* SR 0.414.5; *European Convention on the Equivalence of Diplomas leading to Admission to Universities of 11.12.1953, signed and ratified on 25.04.1991, entry into force on 25.04.1991,* SR 0.414.1; *European Convention on the General Equivalence of Periods of University Study of 06.11.1990, signed and ratified on 25.04.1991, entry into force on 01.06.1991,* SR 0.414.32; *Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region of 21.12.1979, signed on 06.03.1991 and ratified on 16.05.1991, entry into force on 16.06.1991,* SR 0.414.6.

can be shown. It essentially applies the country of origin rule unless the host Member State shows substantial differences for admission to universities.[1129] Member States may still limit access to certain programmes 'because of financial considerations, for reasons of capacity, to limit the number of practitioners of certain professions or for or other reasons without infringing on an individual's right to recognition of his or her qualifications giving access to higher education in general or to a specific higher education programme' and it should be non-discriminatory[1130].[1131]

The bilateral agreements of Switzerland with the neighbouring countries Germany, Austria, France and Italy are more far-reaching and generally prohibit further substantive checks.[1132] Unlike the Professional Qualifications Directive, the Lisbon Convention only encompasses higher education qualifications.[1133]

With the Bologna Declaration of 19 June 1999, the European Ministers of Education issued a Joint Declaration with the aim to adopt easily readable and comparable degrees, adopting a system based on two main cycles (undergraduate students and graduate students), to establish a system of credits (such as in the ECTS system[1134]), and to promote mobility by

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[1129] Art. VI.1 of the Lisbon Convention, SR 0.414.8; BGE 140 II 185, para. 5.1; see further F. Berthoud, *Etudier dans une université étrangère: L'équivalence académique des diplômes en application de la Convention de reconnaissance de Lisbonne et des conventions bilatérales conclues entre la Suisse et ses pays limitrophes,* Geneva (2012), p. 33 et seq.

[1130] Council of Europe, *Explanatory Reportto the Convention on the Recognition of Qualifications concerning Higher Education in the European Region,* <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ccde6> (last visited on 28.09.2020), p. 16.

[1131] Art. IV.6 of the Lisbon Convention, SR 0.414.8.

[1132] *Abkommen zwischen der Regierung der Schweizerischen Eidgenossenschaft und der Regierung der Bundesrepublik Deutschland über die gegenseitige Anerkennung von Gleichwertigkeiten im Hochschulbereich of 20.06.1994,* SR 0.414.991.361; *Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Republik Österreich über die gegenseitige Anerkennung von Gleichwertigkeiten im Hochschulbereich of 10.11.1993,* SR 0.414.991.631; *Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung der Italienischen Republik über die gegenseitige Anerkennung von Gleichwertigkeiten im Hochschulbereich of 07.12.2000,* SR 0.414.994.541; *Accord-cadre franco-suisse entre la Conférence des Présidents d'Université française (CPU), la Conférence des Directeurs des Ecoles Françaises d'Ingénieurs (CDEFI) et la Conférence des recteurs des universités suisses (CRUS), la Conférence des recteurs des hautes écoles spécialisées suisses (KFH) et la Conférence suisse des rectrices et recteurs des hautes écoles pédagogiques (COHEP) sur la reconnaissance des diplômes du 10 septembre 2008*, available at <https://www.swissuniversities.ch/fileadmin/swissuniversities/Dokumente/Lehre/ENIC/f-ch2000.pdf> (last visited on 25.06.2020).

[1133] Art. VI.1 of the Lisbon Convention, SR 0.414.8.

[1134] The European Credit Transfer System for higher education was developed by the Commission for the Erasmus programme: Garben, supra note 868, p. 344 and footnote 33.

overcoming obstacles to the effective exercise of free movement.[1135] The framework for qualifications of the European Higher Education Area developed under the Bologna Process distinguishes three cycles (Bachelor, Master and PhD). During this Bologna process, the Conference of European Ministers responsible for Higher Education established generic descriptors for each cycle in the Bergen Conference in 2005.[1136] It established an entirely separate system from the Lisbon Convention, though they are now intertwined. Notably, they both share a connection, which is use of the ECTS accumulation system developed under the Erasmus programme.[1137] There is also the similar Copenhagen process initiated by the EU for vocational education and training.[1138]

In this context, Council Resolution of 27 June 2002 on lifelong learning started the process towards the National Qualification Framework (NQF) and the European Qualifications Framework (EQF).[1139] In 2008, the recommendations of the European Parliament and Council to adopt the EQF were adopted, taking notice of the Bergen Communiqués.[1140] An implementation period running until 2010 was recommended to the Member States by referencing the levels and developing an NQF where appropriate, as well as to issue diplomas with reference to the EQF until 2012.[1141] The EQF for lifelong learning shares some of the descriptors developed under the framework for qualifications of the European Higher Education Area (Bachelor, Master and PhD levels).[1142] Separately from this development, the Professional Qualifications Directive has another system in its Article 11 to compare different levels of formal qualifications.[1143]

1135 European Ministers of Education, *Bologna Declaration of 19 June 1999*.

1136 Garben, Alphen aan den Rijn, supra note 40, p. 152.

1137 Garben, Alphen aan den Rijn, supra note 40, p. 147 et seq.; see for the overlaps of via number of supporting measures also Garben, supra note 868, p. 344.

1138 *Council Resolution of 19 December 2002 on the promotion of enhanced European cooperation in vocational education and training,* OJ [2003] C13/2, 18.01.2003.

1139 *Council Resolution of 27 June 2002 on lifelong learning,* OJ [2002] C163/1, 09.07.2002; see also Gammenthaler, Zurich, supra note 40, p. 316.

1140 *Recommendation of the European Parliament and of the Council on the establishment of the European Qualifications Framework for lifelong learning of 23.04.2008,* OJ [2008] C111/1, 06.05.2008.

1141 Recommendation of the European Parliament and of the Council on the establishment of the European Qualifications Framework for lifelong learning, paras. 2 and 3.

1142 See Garben, Alphen aan den Rijn, supra note 40, p. 152.

1143 European Commission, *MEMO/06/318: Frequently asked questions: why does the EU need a European Qualifications Framework?,* <http://europa.eu/rapid/press-release_MEMO-06-318_en.htm?locale=EN> (last visited on 28.06.2020).

It is also noteworthy to mention the supporting measures that the EU adopted to simplify the academic recognition, such as the Europass Decision.[1144] The Europass Decision includes several tools, such as the Europass-CV, which offers a possibility for individuals ‘to present in a clear and comprehensive way information on all their qualifications and competences’.[1145]

5.3.1 Academic recognition in Switzerland

For Switzerland, the Lisbon Convention mentioned in Chapter 5.3 mainly regulates academic recognition.[1146] Academic recognition in Switzerland is further governed by provisions of national law.[1147] The intercantonal body ‘swissuniversities’ also publishes general recommendations for the academic recognition of diplomas for universities. They are not binding.[1148] Admission to university is however assessed separately by the respective institution.[1149]

As shown above in Chapter 5.3, the recognition of professional qualifications is not necessary if the profession is non-regulated.[1150] Nevertheless, migrants may obtain ‘recommendations’ which attest an equivalent academic level of their diploma provided by the intercantonal body ‘swissuniversities’, which is the Conference of Deans of the Swiss Universities (formerly the CRUS), for diplomas of universities and *Fachhochschulen* (universities of applied sciences)[1151] and ‘level certificates’ provided by the SERI for

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1144 *Decision No 2018/646/EU of the European Parliament and of the Council of 18 April 2018 on a common framework for the provision of better services for skills and qualifications (Europass) and repealing Decision No 2241/2004/EC,* OJ [2018] L112/42, 02.05.2018; see further Kortese, Maastricht, supra note 38, p. 248 et seq.; see for further measures Garben, supra note 868, p. 344.

1145 Recital 10 and Art. 3(1)(a) of Decision No 2018/646/EU; see also in the previous Decision: Art. 5 of *Decision No 2241/2004/EC of the European Parliament and of the Council of 15 December 2004 on a single Community framework for the transparency of qualifications and competences (Europass),* OJ [2004] L390/6, 31.12.2004 (repealed).

1146 Lisbon Convention, SR 0.414.8.

1147 See Art. 68 BBG and Art. 69 BBV.

1148 See BGE 140 II 185, para. 3.1.

1149 See BGE 140 II 185, para. 5.1.

1150 Art. 69b BBV.

1151 See Swiss Confederation, supra note 84, p. 3251 et seq. It also functions as the National Information Centre for the Lisbon Convention, SR 0.414.8: Swiss Confederation, *Declaration contained in a letter from the Permanent Representative of Switzerland, dated 2 May 2001, registered at the Secretariat General on 9 May 2001*; see further <https://www.swissuniversities.ch/> (last visited on 25.06.2020).

diplomas in the scope of the BBG (vocational training).[1152] This was decided in the early case law of the FAC in 2008 that an applicant may also apply for a 'level certificate'. This is based on the reasoning that an applicant with an unregulated profession has a potential economic interest in obtaining a certificate.[1153] In practice, the scrutiny for the assessment seems to be distinct for the non-regulated und the regulated professions.[1154]

5.3.2 Use of foreign academic titles in Switzerland

According to Article 54 of the Professional Qualifications Directive the Member States shall ensure that migrants may use their academic titles. The use of (foreign) academic titles is in general permissible without the need for prior authorisation in Switzerland.[1155] Criminal sanctions for unlawful use of titles are regulated on the federal, intercantonal and cantonal levels.[1156]

5.3.3 Case law

5.3.3.1 Case law of the CJEU: Kraus

Even purely academic recognition may *de facto* be necessary, or it is at least considered an asset to pursue a profession. In the case *Kraus*, a German national obtained a postgraduate degree at the University of Edinburgh. Mr Kraus needed prior administrative authorisation to use his title. He sent a copy and later also a certified copy of his diploma to the authorities of Baden-Württemberg, but refused to make the required formal application. He argued that the freedom of movement for workers and the freedom of establishment preclude such a

1152 See Art. 69b BBV; see also BVGer B-5019/2016 of 06.02.2018, para. 3.2.

1153 BVGer B-6646/2008 of 19.03.2008, para. 2; Gammenthaler, Zurich, supra note 40, p. 289.

1154 See the interview with the SERI, in K. Beining & G. Aloisi, 'Berufliche Anerkennung', in C. Errass, M. Friesecke & B. Schindler (eds.), *Arbeitsmarkt Schweiz - EU: Rechtliche Aspekte der grenzüberschreitenden beruflichen Mobilität,* Zürich, St. Gallen (2019), p. 151.

1155 R. Schiess, 'Im Ausland erworbene akademische Titel', ZBl 2011, No 112, p. 470.

1156 Art. 62(2) of the *Bundesgesetz über die Förderung der Hochschulen und die Koordination im schweizerischen Hochschulbereich of 30.09.2011,* SR 414.20; see for more detail, Swiss Confederation, *Titelschutz im schweizerischen Hochschulbereich (2. ed.) of August 2016,* <https://www.sbfi.admin.ch/sbfi/de/home/hs/hochschulen/koordination-hochschulbereich/titelschutz-und-titelanerkennung.html> (last visited on 25.06.2020); see also <https://www.swissuniversities.ch/de/services/anerkennung-swiss-enic/titelfuehrung/> (last visited on 25.06.2020).

procedure because German diplomas are exempt from having to have administrative authorisation.[1157]

The CJEU ruled, first, that there was no harmonisation in this area of law. Therefore, the Member States were essentially free to regulate the use of foreign titles. Second, Member States had to comply with the free movement provisions. The CJEU recognised that a postgraduate degree was not required to pursue a profession, but was ‘an advantage’ on the labour market.[1158] Third, Germany granted the use of their titles automatically. Thus, the measure was indirectly discriminatory. However, it could be justified by reasons of public interest. The German Government is allowed to check and verify diplomas in order to protect the consumer. In the end, the CJEU found that the procedure must be ‘easily accessible’, the fees must not be excessive and the decision must be subject to judicial proceedings.[1159] The Administrative Court of Stuttgart (*Verwaltungsgericht Stuttgart*) found the costs not to be excessive. The Constitutional Court upheld this decision.[1160] The CJEU’s decision in *Kraus* can be categorised as a follow-up case to *Vlassopoulou*. It was clear from that point on that academic recognition needed to be examined under EU law. Despite the fact that there is no harmonisation in the field of education, the CJEU gave a very detailed answer to the preliminary question in the aforementioned decision.

5.3.3.2 Case law of the Swiss Federal Court

5.3.3.2.1 Admission to study law in Switzerland

In 2012, the University of Lucerne denied a German student admission to study law. He had previously been enrolled in Augsburg as a law student, where admission to the university had only required certain subjects to have previously been studied. The University of Lucerne argued that the applicant did not have the required minimum of having studied six subjects of general education in the last three years of high school. The cantonal authorities based their reasoning on cantonal law and argued that the Lisbon Convention was not self-

[1157] Case C-19/92, *Kraus*, ECLI:EU:C:1993:125, paras. 1-10.

[1158] It is questionable whether this measure constitutes indirect discrimination or a restriction: C. Delli & C. Tobler, ‘Beschränkungsverbot im Personenfreizügigkeitsabkommen? Systematischer Blick auf ein umstrittenes Konzept’, AJP/PJA 2007, p. 1372.

[1159] Case C-19/92, *Kraus*, ECLI:EU:C:1993:125, para. 42.

[1160] VG Stuttgart 8 K 3897/89 of 26.08.1993; BVerfG, 2 BvR 335/98 of 18.02.1999; see further Schneider, Antwerp, supra note 741, p. 79 et seq.

executing. The Swiss Federal Court found that reasoning to be incorrect. The relevant articles of the Lisbon Convention, namely Article IV.1, were held to be self-executing. Diplomas have to be accepted unless a substantial difference can be shown. The burden of proof is on the authorities.[1161] The applicant was not however successful in the end, as the cantonal authorities found that there were substantial differences, even in the light of the Lisbon Convention, and an appeal against this decision before the Swiss Federal Court was unsuccessful.[1162] This decision was the reason for a parliamentary motion which question whether this encroach on the sovereignty of Swiss universities. It was answered in the negative by the Swiss Federal Council since universities may not restrict admission unless substantial differences are shown but they may restrict access to certain programmes (see also the cantonal decision in Chapter 5.3.3.4).[1163]

5.3.3.2.2 Academic attestation of equivalence

The Swiss Federal Court had to decide a case about a Swiss doctor of Algerian origin who relied upon a French attestation of equivalence he had been given by the Ministry of Health in France for his Algerian diploma. It was, however, only an ‘attestation’. In essence, he was not entitled to work as a doctor of nuclear medicine in France. The Swiss Federal Court decided that the recognition of professional qualifications was not possible because the attestation only showed academic recognition. Therefore, Directive 93/16/EEC[1164] (now the Professional Qualifications Directive), was not applicable.[1165]

5.3.3.2.3 Comic designer

In a case of 2003, the Swiss Federal Court ruled that a Belgian comic designer with a degree, as a *‘graduat en arts plastiques, spécialisation bande dessinée’* could not rely on the mutual recognition of professional qualifications. The Swiss Federal Court stated that Article 9 AFMP only covers professional recognition.[1166] The applicant however had been

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1161 BGE 140 II 185, para. 4.2.

1162 BGer 2C_9/2016 of 22.08.2016.

1163 Swiss Confederation, *Parliamentary Motion No 14.3466,* <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20143466> (last visited on 28.09.2020).

1164 Directive 93/16/EEC (see for the full citation supra note 1164).

1165 BGE 132 II 135 (= Pra 96 2007 No 16), para. 7.

1166 BGer 2A.331/2002 of 24.01.2003, para. 6.1.

given access as a student to a teacher's college, which clearly showed that the applicant applied for academic recognition of her diploma. Therefore, her action for annulment was dismissed.[1167]

5.3.3.2.4 Professor's title

An Italian medical doctor specialised in psychiatry and psychotherapy who had taught at various institutions during part-time assignments sought recognition of his title 'Prof. dr. med. A.________, professor of psychopathological criminology at the Faculty of Medicine of the University of Ferrara'[1168]. The cantonal authorities and the Administrative Court of the Canton of Ticiono held that the appellant could only carry the title during the actual exercise of his teaching actitives and that for this specific title it would rather correspond to a 'Privatdozent' ('free lecturer') or 'Lehrbeauftragter' ('course supervisor'). He could therefore not be authorised to take the title of professor before that of doctor of medicine and his own name because he could mislead the public. He was however allowed to carry the title 'Professore a contratto presso la Scuola di specializzazione in medicina legale della Facoltà di medicina dell'Università di Ferrara per l'anno accademico 2004/2005' by the cantonal authorities.[1169]

The Swiss Federal Court stated that the dispute does neither fall under a bilateral agreement between Switzerland and Italy nor under Article 9 AFMP and Annex III because it does not apply for (academic) recognition of the title 'professor'.[1170]

5.3.3.3 Case law of the FAC

5.3.3.3.1 Regulation by title

A profession is regulated even if only the professional title is protected. This also applies to the profession of psychotherapist where only the professional title is protected in Switzerland.[1171] In a case before the FAC of 2017, the applicant applied for recognition of a

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1167 Interestingly enough, Belgium was not a Contracting Party to the Lisbon Convention, SR 0.414.8 at that time.

1168 'Prof. dr. med. A.________, docente di criminologia psicopatologica alla Facoltà di medicina dell'Università degli Studi di Ferrara'.

1169 BGer 2P.222/2005 of 13.06.2006.

1170 BGer 2P.222/2005 of 13.06.2006, para. 6.

1171 BVGer B-2680/2015 of 21.06.2017, para. 2.5.

German diploma in psychotherapy. The applicant could show professional experience as a high school teacher for psychology and completed studies in sociology with a minor in psychology. It was found that this diploma does not give access to the profession of psychotherapist in Germany and the appeal was therefore dismissed.[1172]

5.3.3.3.2 Academic title of the host Member State

In this case, a Luxembourgish diploma as a nurse ('Diplôme d'Etat d'infirmier') of a German national was recognised in 1999. In 2015, the applicant applied to carry the new Swiss title for nurses graduating from the university of applied sciences. It is however settled case law that the recognition of professional qualifications does not lead to the right to be granted an academic title of the host Member State.[1173]

5.3.3.3.3 Swiss 'level certificates'

Switzerland offers migrants the option to ask for a 'level certificate' for diplomas that do not give access to a regulated profession. The 'level certificate' attests the equivalence of a foreign diploma with the Swiss educational system.[1174] There is no legal basis for a translation of the title or the description of the job profile in this certificate.[1175]

For example, the occupation of industrial technician ('*Tecnico delle industrie meccaniche'*) is not regulated in Switzerland. Only regulated occupations fall under the Professional Qualifications Directive. What was in question in that case of 2008 was thus only the issuance of a 'level certificate' pursuant to national law.[1176]

5.3.3.4 Cantonal case law

In light of a leading case (see Chapter 5.3.3.2.1) ruled on in 2016,[1177] the Appeal Committee of the University of St. Gallen held that while Article IV.1 of the Lisbon Convention is self-executing for a British university entrance certificate, only access is guaranteed – not admission pursuant to that article. For Article IV.6 thereof it was argued

[1172] BVGer B-2680/2015 of 21.06.2017, paras. 2.6 and 3.3.
[1173] BVGer B-5120/2015 of 10.03.2017, paras. 5.3.4 and 6.1.2.
[1174] See, since 2015, Art. 69b para. 1 BBV.
[1175] BVGer B-192/2012 of 29.03.2012, para. 2.2.
[1176] BVGer B-6646/2008 of 19.03.2008, para. 2.
[1177] BGE 140 II 185.

that it can be restricted by non-discriminatory measures, which provide that no grade under C is permitted for subjects on general education. Even if Article IV.1 of the Lisbon Convention were applied, the applicant's grade D in economics would have been considered to be a substantial difference and admission would have been denied.[1178]

[1178] Decision No 39/2016 of the Appeal Committee of the University of St. Gallen of 05.12.2016.

5.4 Conclusion to Chapter 5

The evolution of the principles of *mutual trust* and the *country of origin* is based on the case law of the fundamental freedoms. This part of primary law was developed by the CJEU externally to and even before the entry into force of secondary law. From the wording of a leading case of the Swiss Federal Court, it can be seen that the Swiss Federal Court based its reasoning for the recognition of professional qualifications for diplomas not falling under secondary law on a pragmatic approach (possibly on the principle of proportionality) rather than on the fundamental freedoms. It was shown that the principle of proportionality does not suffice as a legal basis for the mutual recognition of professional qualifications but is only part of the justification, which means that the Swiss Federal Court at least implicitly accepted the recognition of professional qualifications based on primary law under the *acquis suisse*.

This solution for the recognition of professional qualifications based on primary law is however difficult to establish under the *acquis suisse* from a dogmatic standpoint. The internal market case law is based on the concept that it is not only direct and indirect discrimination but also free movement restrictions that are prohibited, it is still unclear whether free movement restrictions are covered by the fundamental freedoms of the AFMP. This legal dispute also has ramifications for the recognition of third country diplomas based on primary law (*Hocsman* case) if secondary law is not applicable and for the concept of partial recognition, which is not yet part of secondary law under the *acquis suisse*. It also affects some of the legal professions (auditors, notaries and legal trainees) which will be revealed in the Chapters below.

Despite the uncertain legal basis for the mutual recognition of professional qualifications based on primary law, the Swiss Federal Court and the FAC implicitly acknowledge this concept, and the Swiss government even openly acknowledges that the regime of recognition of professional qualifications based on the provisions of primary law also applies in Switzerland. This contradicts earlier and lesser known case law of the FAC, which refused to apply the case law of *Vlassopoulou* and *Dressen* as a subsidiary layer of protection when secondary law does not apply.

6 Mutual recognition under Directive 2005/36/EC

6.1 Introduction

Over the course of Chapter 5 it was established that Directive 2005/36/EC (the 'Professional Qualifications Directive') is the culmination of the three directives of the horizontal approach and the twelve directives of the vertical approach which have been combined and replaced.[1179] Besides the recognition of professional qualifications via more specific Directives for some professions, such as for lawyers, and via primary law as a subsidiary layer, this piece of legislation applies to most professions.

It is the aim in this Chapter to give an overview over the complex Professional Qualifications Directive. Whereas the Professional Qualifications Directive applies for the EU Member State, the EEA EFTA States and Switzerland, the focus will be shifted to the particularities of the *acquis suisse*, the case law of the EFTA Court as well as of Swiss courts. Further, the implications of the recent Brexit and the protection of acquired rights shall be discussed.

To begin with the Professional Qualifications Directive, there are three systems of mutual recognition under the Directive. First, there is the sectoral system. Second, there is the general system of recognition. Finally, there is the system of recognition based on professional experience.

Under the sectoral system, professions listed in Annex V to the Professional Qualifications Directive refer strictly to the principle of automatic recognition and recognition based on minimum training conditions. It follows from Title III that when a relevant diploma of the competent authority in the home Member State listed in Annex V is issued, access to the profession needs to be granted in the host Member State. Under the regime of the sectoral system, 'evidence of formal qualifications' is listed in Annex V with the relevant reference date of when the respective Member State joined the EU or when the respective directive's sectoral directives entered into force. For Switzerland, the relevant information can be found in the respective decisions of the Joint Committee of the AFMP.[1180]

[1179] See the Professional Qualifications Directive, recital 9.

[1180] See <https://www.admin.ch/opc/de/european-union/joint-committees/007.000.000.000.000.000.html> (last visited on 25.06.2020); e.g. Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

Exceptions can be made if the applicant was prohibited from practising in his or her home Member State (see Chapter 6.3.3.1). In principle, this leads to the effect that a diploma of Annex V leads to automatic recognition being granted, which is why this system is referred to as the system of automatic recognition.[1181] This so-called two-stage approach for the recognition of diplomas was discussed in the *Norwegian Appeal Board* case of the EFTA Court (see Chapter 6.3.3.1).

Another crucial system of recognition is the general system of recognition. An applicant may be granted access through the general system of recognition for professions, which is not covered by Chapters II and III of the Professional Qualifications Directive. That means that a broad range of diplomas fall under the general system of recognition. The host Member States may require specific professional qualifications for access to a certain profession. For this purpose, the five qualifications levels of Article 11 of the Professional Qualifications Directive are regulated under the general system. The migrant must show evidence that he or she has professional qualifications at least just below the level required (under the current *acquis suisse*).[1182] The situation is different when the home Member State of the migrant has not regulated the profession. Then the only requirement is that the applicant must have pursued the profession for at least two years on a full-time basis during the previous ten years (under the *acquis suisse*).[1183] Contrary to the sectoral system, compensation measures can be imposed on applicants under certain conditions (see Chapter 6.4.2).[1184]

When the conditions under one of the systems for recognition of professional qualifications as mentioned above have been met, Member States are generally obliged to give applicants full access to the regulated profession in the home Member State. After having been recognised, an applicant in principle may not be required to fulfil additional criteria to exercise his or her profession. Some non-discriminatory requirements to do so, such as the requirement to register with a professional association, are permissible to enable the freedom of establishment. This is self-evident, as burdensome restrictions would be contrary to the exercise of fundamental freedoms. The system of mutual recognition is built

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1181 See the title of Art. 21 of the Professional Qualifications Directive.

1182 Art. 13(1)(b) of the Professional Qualifications Directive.

1183 Art. 13(2) of the Professional Qualifications Directive.

1184 Art. 14 of the Professional Qualifications Directive.

on the fundamental freedoms.[1185] The different systems of recognition shall be closely examined below.

6.2 Scope of Directive 2005/36/EC

6.2.1 Personal scope

The Professional Qualifications Directive only applies to natural persons, and not to legal persons.[1186] Under the *acquis communautaire*, it applies to family members of EU nationals[1187], to long-term-residents[1188], refugees[1189], blue card holders[1190], researchers[1191], third country nationals falling under the Single Permit Directive[1192] and intra corporate transferees[1193].[1194] Apart from those family members, the directives covering the latter categories are not binding on all the Member States.[1195] Under the *acquis suisse*, the

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1185 Berthoud, Geneva, supra note 1007, pp. 46–48.

1186 Art. 2(1) of Directive 2006/36/EC; European Commission, supra note 1106, p. 2; see Gammenthaler, Zurich, supra note 40, p. 139 et seq. for highly theoretical exceptions.

1187 Arts. 3(1) and 24(1) of Directive 2004/38/EC.

1188 Art. 11(1)(c) Directive 2003/109/EC.

1189 Art. 28(1) of *Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted of 13.12.2011,* OJ [2011] L337, 20.12.2011.

1190 Recital 19 and Art. 14(1)(d) of *Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment,* OJ [2009] L155/17, 18.06.2009.

1191 Art. 22(1) of *Directive 2016/801/EU of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing,* OJ [2016] L132/21, 21.05.2016.

1192 Recital 23 and Art. 12(1)(d) of *Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State,* OJ [2011] L343/1, 23.12.2011.

1193 Art. 18(2)(b) of *Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer,* OJ [2014] L157/1, 27.5.2014.

1194 See further European Commission, supra note 1106, p. 14; European Commission, supra note 1103, p. 9; see further Kortese, Maastricht, supra note 38, p. 100 et seq.

1195 See for the United Kingdom, Ireland and Denmark: Recital 65 et seq. of Directive 2016/801/EU, recital 50 et seq. of Directive 2011/95/EU and recital 28 et seq. of Directive 2009/50/EC and recital 25 et seq. of Directive 2003/109/EC, with reference to Protocols No 21 and No 22.

Professional Qualifications Directive also applies to family members of EU and of Swiss nationals according to Article 3(5) of Annex I to the AFMP, but not to long-term residents and refugees as well as the other categories mentioned.[1196] According to the amended Annex III of the Directive, it also applies to persons of the Contracting Parties of the AFMP. Swiss nationals may also invoke the provisions of the Directive against their home State, provided that there is a cross-border link.[1197]

Interestingly enough, there is no mechanism for the recognition of professional qualifications creating a single market including Switzerland, the EU Member States and the EEA EFTA countries. The existing and relevant agreements are still separate and static in their nature. A national from Iceland, Liechtenstein or Norway, who chooses to work in Switzerland, obtains a diploma (in the sense of the Professional Qualifications Directive) and migrants to an EU Member State cannot invoke the provisions of the Professional Qualifications Directive amended by the AFMP, as the AFMP can only be invoked by Swiss and EU nationals, whereas the EEA Agreement only applies between the EEA and the EU. In such a scenario, a national from one of the three EEA EFTA countries can only rely on rules for third country diplomas, or more favourable provisions of national law (see further Chapter 6.7.3).[1198] It should however be noted that Appendix 3 of Annex K to the EFTA Convention mentions the diplomas in Annex III of the AFMP, EU diplomas and EEA EFTA diplomas which is relevant for Swiss and EEA EFTA nationals in Switzerland or in the EEA EFTA States.

6.2.2 Application of the AFMP and the Professional Qualifications Directive for Swiss nationals

The Federal Administrative Court ('FAC') has held in several decisions that Swiss nationals may invoke the provisions of the Professional Qualifications Directive and where relevant, the earlier directives.[1199] This view is also supported by doctrine.[1200] Those

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1196 See further Berthoud, Geneva, supra note 1007, p. 89; see for the situation under the Facilitating Practice Directive: Chapter 8.2.3.

1197 BVGer B-8630/2007 of 10.07.2008, para. 4.2; BVGer B-2158/2006 of 29.03.2007, para. 3.4.

1198 For the same opinion, see Zaglmayer, Vienna, supra note 1027, para. 9.4.

1199 BVGer B-8630/2007 of 10.07.2008, para. 4.2; BVGer B-2158/2006 of 29.03.2007, para. 3.4.

1200 Berthoud, Geneva, supra note 1007, p. 90.

decisions are based on the case law of the CJEU in *Vlassopoulu*[1201] *and Gebhard*[1202].[1203] It is interesting to note that these cases deal with primary law. From this clear and correct adoption of the CJEU case law, it should be obvious that the same reasoning needs to be adapted for primary law and for the non-discrimination provisions.

In some cases, the FAC (mistakenly) adopted a narrow view concerning Swiss nationals. In a case of 2011, the FAC ruled that Swiss nationals in possession of a foreign diploma cannot rely on Article 2 AFMP, even if it was argued that according to Article 9 AFMP in conjunction with Annex III that the relevant secondary law is applicable.[1204] This did not have an impact on the outcome of the case as the requirement to complete an adaptation period where matters covered were substantially different in the home and host Member States was well-founded, as that was allowed for by Article 4(1)(b) of the General Recognition Directive.[1205] To add to this cluster of case law, the FAC reasoned in a case from 2016 in an *obiter dictum* that Swiss nationals may not invoke the AFMP. This case mistakenly discusses a *reverse discrimination* despite the fact a Swiss applicant is in possession of a German diploma. Even so, in this case it did not have an impact on the outcome of the case because only the academic title was part of the proceedings.[1206]

These few cases contradict the constant jurisprudence of the Swiss Federal Court and the FAC. To begin with, the FAC ruled that the concept of discrimination requires that applicants who are either Swiss or EU nationals shall not be treated less favourably than nationals of the Contracting Party who applies the AFMP.[1207] This is evidently the correct formula as it covers Swiss nationals who made use of their free movement rights and returned to Switzerland.[1208] This is also in line with the case law of the Swiss Federal Court.[1209] These situations must not be mistaken for reverse discrimination where the AFMP cannot be

[1201] See Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

[1202] See Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411.

[1203] BVGer B-8630/2007 of 10.07.2008, para. 5.

[1204] BVGer B-7095/2010 of 05.05.2011, para. 4 states in German 'Art. 2 FZA (Diskriminierungsverbot aufgrund der Staatsangehörigkeit) ist vorliegend nicht einschlägig, da der Beschwerdeführer Schweizer Bürger ist.'

[1205] Now the Professional Qualifications Directive.

[1206] BVGer B-3360/2014 of 04.07.2016, para. 5.10.6.

[1207] BVGer A-368/2014 of 06.06.2014, para. 5.2; BVGer B-6467/2012 of 27.06.2013, para. 2.2 ; BVGer B-6825/2009 of 15.02.2010, para. 3.3.

[1208] See BVGer B-6825/2009 of 15.02.2010, para. 3.1 et seq.

[1209] BGE 131 V 209, para. 6.2; BGE 130 I 26, para. 3.2.2 et seq.

invoked.[1210] This case law is also in line with the application of Article 2 AFMP in general, despite the restrictive *wording* of Article 2 AFMP.[1211] Thus, a Swiss national may in general rely on the AFMP before Swiss courts if there is a cross-border situation.[1212] This is especially the case where qualifications were acquired in another Member State. Those nationals who decide to use their free movement rights and go back to their home Member State can rely on the AFMP against their home Member State. The use of the free movement right, having obtained a diploma in another Member State provides the decisive cross-border link. EU law covers a Member State's own nationals because it is driven by the fact that otherwise it could be a disincentive to migrants exercising their free movement rights.[1213] Considering the extensive case law of the Swiss Federal Court and the CJEU, these two judgments of the FAC that did not accept that there was a cross-border situation were not predictable rulings. To put it in other words, this interpretation would go against the 'spirit' of the AFMP.[1214] There are very few cases before the CJEU that concern internal situations: purely internal situations are outside the scope of EU law.[1215] It should not however be disregarded that the CJEU relied on the restrictive wording of the AFMP in the recent case *Picart*,[1216] where it found that a migrant could not rely on provisions for self-employed persons against his or her home Member State.[1217]

In a recent decision of 4 April 2017, the FAC openly ruled that Swiss nationals might be able to invoke Article 2 of the AFMP if there is discrimination (without using the term

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1210 See infra note 2204.

1211 E.g. BGE 129 II 249, para. 4.2; E. Kleber, *La discrimination multiple: Étude de droit international, suisse et européen,* Diss. Fribourg (2014), Geneva (2015), pp. 233–235.

1212 A. Epiney & G. Blaser, 'Art. 2 ALCP', in M. S. Nguyen & C. Amarelle (eds.), *Code annoté de droit des migrations: Accord sur la libre circulation des personnes (ALCP),* Berne (2014), para. 11.

1213 Case C-257/10, *Bergström*, ECLI:EU:C:2011:839, para. 28; European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Reaffirming the free movement of workers: rights and major developments, COM(2010)373 final of 13.07.2010*, p. 6.

1214 See for this argument, *Opinion of Advocate Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 66. He (successfully) argued that a national can invoke Art. 15(2) of Annex I to the AFMP against his State of origin.

1215 Case C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, para. 55 et seq.; Case 180/83, *Moser v Land Baden-Württemberg*, ECLI:EU:C:1984:233, para. 19; see also Kellerbauer & Martin, supra note 803, para. 91 et seq. for a further reference to a critical opinion.

1216 Case C-355/16, *Christian Picart v Ministre des Finances et des Comptes public*, ECLI:EU:C:2018:184, para. 23.

1217 See Chapter 4.2.2.

indirect discrimination). This decision is very interesting from a methodical point of view. The FAC stated that the Professional Qualifications Directive is applicable and that the Austrian diploma had to be compared to the Swiss diploma even if the regulated training was no longer offered in Switzerland, as the older diploma still allowed access to the regulated profession. The FAC then continued to state that this constituted discrimination and a violation of the right to equal treatment, a breach of Article 2 AFMP and Article 15 of Annex I to the AFMP.[1218]

First, the FAC did not have to answer the question of whether this measure constituted discrimination. It did not even state that it was in fact indirect discrimination, but simply that it was 'discrimination'. The FAC could have addressed the application of the Professional Qualifications Directive because the federal authorities did not apply that directive correctly, even though an equal treatment provision is expressly mentioned in Article 13(1) of that Directive. The judgment however lists all the legal bases that could be remotely applicable.

Second, from a dogmatic standpoint it is not entirely clear whether Article 2 AFMP can be applied on its own or whether it must be applied in conjunction with another article. The case law of the Swiss Federal Court is not consistent on this issue.[1219] A more conservative interpretation of Article 2 AFMP would only allow the application of Article 2 where a substantive provision of Annex I, II or III is concerned.[1220] In the present author's opinion, Article 2 AFMP is either applied in conjunction with another article of Annex I, II or III, or on its own when it reflects Article 18 TFEU but does not go beyond the material scope of its Annexes. This also seems to be the reasoning of the CJEU in the case *Hengartner and Gasser*.[1221]

This dogmatic problem also leads back to the first issue. Article 2 AFMP is applicable for Annex III to the AFMP and therefore also applies to the Professional Qualifications Directive. The FAC explicitly referred to the equal treatment provision in Article 15 of Annex I to the AFMP.[1222] However, the CJEU does not (usually) apply primary law when secondary law is applicable. Thus – in the present author's opinion – Swiss courts should

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1218 BVGer B-5372/2015 of 04.04.2017, para. 6.2; see further Diebold, Berne, supra note 67, para. 628.

1219 BGE 140 II 364, para. 6.1.

1220 In this sense, see Diebold, Berne, supra note 67, para. 630 et seq.

1221 See Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 39.

1222 BVGer B-5372/2015 of 04.04.2017, para. 6.1.

follow not only the result but also the methodology of the CJEU as closely as possible. If secondary law applies, there is apparently no need to rely on primary law.

6.2.3 Territorial Scope

According to Article 2 of the Professional Qualifications Directive, the Directive applies to cross-border situations within the EU. In addition, the EEA EFTA countries and Switzerland are included in the territorial scope due to the EEA Agreement and the AFMP (see Chapter 4.1.1 for details). It should be noted that the Directive does not bind the EU itself as it is only addressed to the Member States (even if the EU is technically a Contracting Party of the AFMP and its Annex III).[1223]

6.2.4 Material Scope

To fall within the scope of the Professional Qualifications Directive, several conditions have to be met. First, access to the profession has to be regulated ('regulated profession') pursuant to its first article. Second, the applicant has to show 'professional qualifications' were granted by the competent authority in the home Member State.[1224] Third, these qualifications must allow the holder to pursue the profession in his 'home Member State'. Pursuant to Article 1, the home Member State is not necessarily the country of origin, but the State where the holder obtained his or her qualification and is allowed to practice. Despite the wording, the concept of 'home and host Member State' also applies to Switzerland.[1225]

The recognition of diplomas is distinct from the pursuit of the profession. A doctor may apply for automatic recognition of his diploma but be denied the possibility to exercise his profession due to a lack of knowledge of an official language or due to disciplinary sanctions. The terminology is not coherent in this respect because access to and pursuit of a profession are used interchangeably in the Professional Qualifications Directive. Despite this minor oversight, its Title IV, entitled 'detailed rules for pursuing the profession', clearly

[1223] See Case T-420/13, *Brouillard v CJEU*, ECLI:EU:T:2015:633, para. 65.

[1224] As opposed to diplomas by private establishments and not recognised by a Member State: see further BVGer B-6722/2009 of 24.02.2009, para. 3.

[1225] Annex III (as amended by the respective decisions of the Joint Committee on the AFMP) sets out in paragraph 2 in conjunction with Section A that Switzerland is considered to be a Member State, namely under the Professional Qualifications Directive.

distinguishes between *access* and *pursuit* of the profession (the so-called two stage approach: see Chapter 6.3.3.1).[1226]

Most provisions of the Directive only apply to EU diplomas. Even if the diploma was awarded after completion of a distance-course or in a franchised institution it will still fall under this Directive.[1227]

For a diploma to be classed as an EU diploma under the Professional Qualifications Directive, ‘successful completion of professional training obtained mainly in the Community’ is required.[1228] It is not entirely clear whether this reasoning only applies for the general or also for the sectoral system. Before the adoption of Article 3(1)(c) of the Directive, the CJEU ruled under an earlier directive in the case *Tennah-Durez* for the *sectoral system*: Member States must also recognise diplomas if the training was not obtained mainly in the EU, as long as the diploma was awarded by an authority of an EU Member State.[1229] Berthoud argues – contrary to the position of the European Commission[1230] and contrary to Zaglmayer[1231] – that Article 3(1)(c) of the Directive was altered in full knowledge of the case law and also applies to the sectoral professions.[1232] The European Commission bases its reasoning on the fact that the legal basis for the sectoral system should now be found in Article 23(2) of the Directive, which would mean that the reasoning in *Tennah-Durez* is still valid.[1233]

6.2.4.1 Regulated professions

This contribution has shown that academic recognition is different to the recognition of professional qualifications. Pursuant to Article 3(1)(b) of the Professional Qualifications

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1226 See further Zaglmayer, Vienna, supra note 1027, para. 3.25 et seq.

1227 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 29; Case C-153/02, *Neri*, ECLI:EU:C:2003:614, para. 39 et seq.; European Commission, supra note 1103, p. 11 et seq.; BVGer B-166/2014 of 24.11.2014, para. 6.4.

1228 Art. 3(1) point c of the Professional Qualifications Directive.

1229 Case C-110/01, *Malika Tennah-Durez v Conseil national de l'ordre des médecins*, ECLI:EU:C:2003:357, para. 61.

1230 European Commission, *Transposition Guide - Directive 2005/36/EC on the recognition of professional qualifications with comments - MARKT D/3412/2/2006/EN of 02.08.2007*, and Art. 3(1)(c) of the Professional Qualifications Directive.

1231 Zaglmayer, Vienna, supra note 1027, paras. 3.32 and 3.48.

1232 Berthoud, Geneva, supra note 1007, p. 102 et seq. and footnote 247 thereof.

1233 European Commission, supra note 1230, ad Art. 3(1)(c) of the Professional Qualifications Directive.

Directive, the term 'professional qualifications' means 'evidence of formal qualifications, an attestation of competence and/or professional experience'. Under the general system of recognition, evidence of formal qualifications consists of diplomas awarded after the completion of post-secondary training or on completion of professional education and training of at least one year in duration, or in the case of university education, of at least three years in duration.[1234]

Recognition is relevant when professional activities are regulated in the host Member State. According to Article 3(1)(a) of the Professional Qualifications Directive, access to the profession must be regulated directly or indirectly 'by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications'.

The term 'regulated profession' is broad but it has to be distinguished from 'regulated training'.[1235] The Directive only requires a 'regulated profession' but not 'regulated training' (see Chapter 6.2.4.3 below for the exception). A profession may therefore include 'regulated training' but it may not be considered to be a 'regulated profession'. If the profession is not regulated, the invisible hand of the market decides upon success or failure, while a 'regulated profession' sets certain mandatory requirements.

In Switzerland, the State Secretariat for Education, Research, and Innovation (SERI)[1236] published a non-exhaustive and non-binding list of professions that are deemed to be regulated, and listed the corresponding competent institutions. The list contains several pages of regulated professions including common professions, such as doctors, pharmacists and teachers, but also some more recent professions (e.g. 'canyoning guides').[1237] The FAC often refers to this list in its judgments without providing further explanations as to whether the profession is regulated.[1238] The SERI's list of regulated professions for Switzerland has the same problems as Annex I to the Swiss Federal Ordinance on the declaration to be made in advance and the recognition of professional qualifications of service providers (VMD)

1234 Recital 14 of the Professional Qualifications Directive.

1235 Even the Swiss Federal Court intermingled these completely different concepts: BGE 134 II 341 (= Pra 2009 No 52), para. 2.1. What is not clear in this respect is BVGer A-368/2014 of 06.06.2014, para. 5.3, which discusses the regulated training but does not state whether the profession is regulated.

1236 'Staatssekretariat für Bildung, Forschung und Innovation'.

1237 <https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html> (last visited on 28.06.2020).

1238 See BVGer B-5129/2013 of 04.03.2015, para. 4.2; BVGer B-3738/2012 of 27.02.2013, para. 2.4.

(*Verordnung über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungserbringerinnen und -erbringern in reglementierten Berufen*) (see Chapter 6.6.2), that these lists of regulated professions cover some professions which are only regulated in some cantons but not in others, pursuant to the official reports of the cantons. This is an inherent issue in a federal system. Thus, the federal authorities rely on information provided by the cantonal authorities to regularly assess Annex I to the VMD.[1239] A more extensive database of the European Commission that was brought in on 2 October 2013 exists for all EU and EEA EFTA States, and guarantees transparency.[1240] Both databases (the Swiss and the EU database) are neither exhaustive nor legally binding.[1241] The Member States were obliged to supply renewed lists of regulated professions up to the date of 18 January 2016 and to justify regulations pursuant to Article 59(3) of the Professional Qualifications Directive.[1242] According to this data, Switzerland currently regulates 177 professions.[1243] Professions practised by members of an association listed in Annex I of that Directive are treated as regulated professions, which is especially relevant for the UK and Ireland.[1244]

To sum up, the following characteristics are sufficient to show that there is a regulated profession, according to Schneider:[1245]

- there is a legal monopoly (for certain activities);
- there is protection of the professional title under administrative or criminal law;
- there is regulation of the reimbursement of costs under social security law for that profession;
- there are regulations on private associations to be able to access a profession; and
- there are public law regulations on access to public service professions.

1239 In this sense see: State Secretariat for Research and Innovation, supra note 967, p. 8.

1240 <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=homepage> (last visited on 28.06.2020).

1241 See *Opinion of Advocate General Sharpston in Case C-298/14, Brouillard*, ECLI:EU:C:2015:408, para. 50.

1242 European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Evaluating national regulations on access to professions (COM(2013) 676 final) of 02.10.2013*; European Commission, *Communication from the Commission on reform recommendations for regulation in professional services (COM(2016) 820 final) of 10.01.2017*; see further Zaglmayer, Vienna, supra note 1027, p. 12.

1243 <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=regprofs&id_country=241&quid=1&mode=asc&maxRows=*#top> (last visited on 25.06.2020).

1244 Art. 3(2) of the Professional Qualifications Directive.

1245 Schneider, Antwerp, supra note 741, pp. 178–187.

6.2.4.2 *Professional qualifications versus licences*

The Professional Qualifications Directive defines the subject of recognition in Article 3. 'Professional qualifications' are either attested by 'evidence of formal qualifications', 'attestation of competence' or by 'professional experience'. Article 3(1)(c) then defines 'evidence of formal qualifications' as diplomas, certificates and other evidentiary documents issued by a Member State.

Apart from diplomas, Member States also provide for professional licences that are limited to a certain number of years and which must be renewed. According to the Opinion of Advocate General Alber, evidence of a particular type of training lasts a lifetime.[1246] Professional qualifications, including attestations of competence, are distinct from simple training or tests.[1247] The CJEU clarified in *Commission v Portugal* that certain private security certificates could not be classed as attestations of competence.[1248] Portugal required a 'professional certificate' from the General Secretary of the Interior for the exercise of private security activities for security personnel. From the broad wording of Article 3 of the Professional Qualifications Directive (or its predecessor Directive 92/51/EEC in this case), one could have the impression that a private security certificate for the exercise of the profession of security personnel suffices. Thus, the profession would be regulated in the sense of the Directive. However, the CJEU found (based on the reasoning of the Advocate General) that the 'certificate' is distinct from an attestation of competence under Directive 92/51/EEC (now the Professional Qualifications Directive) as it is limited for two years and must be renewed.[1249]

In the follow-up case *Commission v Spain* however, the CJEU highlighted that for the private detective's profession, 'an assessment of the personal qualities, aptitudes or knowledge which are essential for the applicant to have for the pursuit of the professions in

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[1246] *Opinion of Advocate General Alber in Case C-171/02, Commission v Portugal*, ECLI:EU:C:2003:465, para. 94.

[1247] *Opinion of Advocate General Alber in Case C-171/02, Commission v Portugal*, ECLI:EU:C:2003:465, para. 95.

[1248] Case C-171/02, *Commission v Portugal*, ECLI:EU:C:2004:270, para. 71 in conjunction with the *Opinion of Advocate General Alber in Case C-171/02, Commission v Portugal*, ECLI:EU:C:2003:465, paras. 92-95.

[1249] Case C-171/02, *Commission v Portugal*, ECLI:EU:C:2004:270, para. 71 in conjunction with the *Opinion of Advocate General Alber in Case C-171/02, Commission v Portugal*, ECLI:EU:C:2003:465, paras. 92-95.

question' is sufficient to qualify as evidence of formal qualifications (attestation of competence in this case) of Directive 92/51/EEC.[1250]

6.2.4.3 Mutual recognition of unregulated professions in the home Member State where there is no regulated education and training

Pursuant to the current Article 13(2) of the Professional Qualifications Directive (*acquis suisse*), applicants who come from a home Member State where the profession is not regulated must show proof that they have exercised the respective profession for two years during the last ten years if that profession is also unregulated in the host Member State. This can only be required of migrants who cannot show evidence of formal qualifications (regulated education and training).[1251]

The FAC ruled that the relevant working experience may also be obtained in Switzerland based on an interpretation of Article 3(b) of Directive 92/51/EEC.[1252] The decisive case law of the CJEU in this context is however based on primary law. The CJEU also recalled that taking into account work experience in a Member State in which the applicant is not authorised to practice in principle does not count.[1253] However, the relevant experience cannot be entirely disregarded, but must be taken into account.[1254] This CJEU precedent grants the authorities more discretion than the Swiss case law, which could however be explained by the distinct functions of the courts.

Interestingly, the intercantonal appeal committee for teachers had argued to the contrary until 2017. Fifteen years of professional experience in Switzerland were not considered to be sufficient. The profession of special needs care worker ('*Heilpädagoge*') was however also regulated in the host Member State.[1255] This practice was changed in October 2017 and

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1250 Case C-514/03, *Commission v Spain*, ECLI:EU:C:2006:63, para. 64.

1251 This provision was revised by Directive 2013/55/EU, which is still not applicable for Switzerland and now requires one year of working experience which was completed in the previous ten years.

1252 BVGer B-7059/2010 (BVGE 2012/29) of 14.08.2012, para. 7.1 et seq.

1253 Joined Cases C-422/09, C-425/09 and C-426/09, *Vandorou and Others*, ECLI:EU:C:2010:732, para. 62.

1254 Joined Cases C-422/09, C-425/09 and C-426/09, *Vandorou and Others*, ECLI:EU:C:2010:732, para. 71.

1255 Decision B1-2009 of the Rekurskommission (Appeal Committee) EDK/GDK of 10.11.2010, para. 6.

professional experience is now taken into account, even if it was acquired in Switzerland for applicants from home Member States where the profession is not regulated.[1256]

6.2.4.4 Access to the same profession

According to Article 4(1) of the Professional Qualifications Directive, the applicant is allowed access to the *same* profession as that for which he or she is qualified in his or her home Member State.[1257] It can be deduced from this that the criterion of the 'equivalence' of professions is a determining factor for the recognition of diplomas. This is explained by the fact that the Member States define the regulated activities, and that training is not harmonised under the general system of the Directive.[1258] The system of recognition is designed to recognise the qualifications of those who are already fully qualified professionals in their home Member State.

An exception to that can be found for the legal profession, where immediate access to the same profession is only possible via an aptitude test because national law is an essential part of a similar, but still separate, line of work (see Chapter 8.3.1.6).

Professionals who have worked as 'professionals covering a broad range of professional activities' may apply for recognition in the host Member State where the specific profession shares the same name but only covers certain elements of that profession in the home Member State, but it is more difficult the other way around (see Chapter 6.4.3 for the partial recognition of professional qualifications). It is clear from the latter scenario that a professional from a host Member State can have a compensation measure imposed on him or her (such as a three-year adaptation period or aptitude test – see Article 14 of the Directive), be admitted only partially in the other Member State, or even be refused recognition under the general system. This Chapter also clarifies that national authorities still have some room for discretion to decide whether professions are the same in different countries. This is particularly important when the applicant comes from a Member State where those professional activities are not regulated. In this respect, the CJEU held in *Toki* that even a research post as an environmental engineer might suffice to constitute the 'same profession',

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[1256] <https://www.edudoc.ch/static/web/arbeiten/diplanerk/ausl_lehrdipl_praxisaenderung_d.pdf> (last visited on 28.06.2020).

[1257] See BVGer B-6201/2011 of 06.03.2013, para. 5.5.

[1258] In practice, this is however less emphasised for professions where only the professional title is regulated, as the necessary skills are usually determined by a comparison of the formal education.

whereas assisting students or general research work could not be regarded as sufficient. It ruled that the relevant assessment was for the national court to carry out.[1259]

6.2.4.5 Competitive selection procedure case law ('concours')

Competitive selection procedures ('*concours*') are common in Member States such as France, Luxembourg, Italy, Portugal and Spain,[1260] and moreover used quite widely in some EU Member States.[1261] The case law on the topic of *concours* can be divided into two branches.

First, there is a branch of case law that considers the *concours* to be part of the training. The host Member State may, for example, require the migrant to be fully qualified in his home Member State. This was ruled upon by the CJEU in the *Burbaud* case. The CJEU found that a broad definition of the term 'regulated profession' applies based on the definition of EU law and not the legal classifications of national law.[1262] It was also held that administrative rules could directly or indirectly regulate a profession.[1263]

The second branch may simply concern circumstances in which there is a (comparative) selection procedure in recruitment for vacancies that are described as 'open positions'. This can be seen in the *Rubino* case. In that case the CJEU did not accept that there was a regulated profession where there were Italian selection procedures for academic posts at universities. The CJEU held that a competitive selection procedure does not mean a profession is regulated, as there was a *comparative* assessment involved. A regulated profession however meant that access to a profession was dependent on *absolute* criteria.[1264] Sometimes, it is a rather daunting task to determine the type of selection procedure. A Member State may opt for a mixture of both types.[1265]

[1259] Case C-424/09, *Christina Ioanni Toki v Ypourgos Ethnikis paideias kai Thriskevmaton*, ECLI:EU:C:2011:210, para. 38.

[1260] Schneider, Antwerp, supra note 741, pp. 376–378.

[1261] Berthoud, Geneva, supra note 1007, p. 38 et seq. and 197 et seq.

[1262] Case C-285/01, *Burbaud*, ECLI:EU:C:2003:432, para. 43.

[1263] Case C-285/01, *Burbaud*, ECLI:EU:C:2003:432, para. 58.

[1264] Case C-586/08, *Rubino*, ECLI:EU:C:2009:801, para. 35.

[1265] See Case C-285/01, *Burbaud*, ECLI:EU:C:2003:432.

6.2.4.6 *Acquired rights under the Professional Qualifications Directive*

Under the sectoral system, there are specific provisions that concern acquired rights.[1266] It is still a cornerstone rule because it allows for recognition of the professional qualifications of those who hold degrees and whose training started before the reference dates in Annex V. It is noteworthy to mention that applicants with a diploma from any EU Member State are automatically considered to have obtained a diploma within the EU, and even retroactively if the respective Member State was not part of the EU at the time when the education took place.[1267] This is not relevant for the sectoral professions because diplomas of an EU Member State are considered to be EU diplomas.[1268] For the sectoral professions, Article 23 of the Professional Qualifications Directive provides that diplomas must be recognised even if the training began before the reference date and if the diploma is accompanied by a certificate of the home Member State regardless of the more specific rules concerning acquired rights. This certificate must state that the holder has been 'effectively and lawfully engaged in the activities in question for at least three consecutive years during the five years preceding the award of the certificate'. Part-time pursuit of the profession extends the duration proportionately.[1269] The professional experience cannot be obtained abroad but only in the home Member State.[1270] In Annex V, only the most recent regulated training is listed. Thus, regulated training which is in conformity with the Professional Qualifications Directive but not listed in Annex V can only be recognised if accompanied by a certificate of the competent authority or body.[1271] Article 23(2) to (5) of the Directive also mentions countries that no longer exist, such as the former German Democratic Republic. If the conditions of the sectoral system have not been met, applicants may invoke the protection of acquired rights under the general system pursuant to Article 10 of the Directive. According to the case law of the CJEU in *Angerer*, applicants may rely on Article 10 of the Directive if they have no evidence of the formal qualifications listed in Annex V and if they demonstrate 'specific and

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[1266] Arts. 23, 27, 30, 33, 37, 39, 43 and 49 of the Professional Qualifications Directive.

[1267] Zaglmayer, Vienna, supra note 1027, paras. 3.32 and 3.48.

[1268] See the discussion in Chapter 6.2.4 and supra notes 1229, 1230 and 1231.

[1269] See Art. 3(1)(f) of the Professional Qualifications Directive *per analogiam*.

[1270] See Berthoud, Geneva, supra note 1007, p. 275.

[1271] Art. 23(6) of the Professional Qualifications Directive.

exceptional reasons' (see Chapter 7.8.3 for case law of the FAC on this).[1272] In its reasoning, the CJEU explicitly relied on the *travaux préparatoires.*[1273] Advocate General Szpunar argued that points (a) to (g) are distinct, which makes it hard to find 'specific and exceptional reasons' for points other than (g).[1274] As a further subsidiary form of protection, the recognition of professional qualifications based on the regime of primary law applies.[1275]

6.2.4.7 Case law

6.2.4.7.1 Case law of the CJEU: Aranitis

This distinction between regulated and non-regulated professions is sometimes exceptionally difficult,[1276] such as for legal trainees (see Chapter 8.7).

This issue was disputed in the case *Aranitis* before the CJEU. The applicant was a Greek geologist who had obtained a degree in Greece and applied to the German authorities for recognition of his diploma, as he sought to have the academic title '*Diplom-Geologe*' attached to the German diploma.[1277] In legal proceedings, the *Oberverwaltungsgericht Berlin* (higher administrative court) asked the CJEU whether the profession 'geologist' is a 'regulated profession' within the meaning of secondary law, considering that there was no German law provision governing that profession.[1278] The CJEU answered that it was clear that only 'regulated professions' fall under the 'General Recognition Directive (now the Professional Qualifications Directive). It was not sufficient that the German title is commonly seen on the labour market, as *de facto* regulations were not decisive.[1279] It ruled that the authorities nevertheless have to take into account (pursuant to the freedom of establishment

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1272 Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 38.

1273 Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 33.

1274 *Opinion of Advocate General Szpunar in Case C-477/13, Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2014:2338, para. 38.

1275 See Zaglmayer, Vienna, supra note 1027, para. 5.15 et seq.

1276 For examples see Berthoud, Geneva, supra note 1007, p. 174 et seq.

1277 Case C-164/94, *Georgios Aranitis v Land Berlin*, ECLI:EU:C:1996:23, para. 2.

1278 Case C-164/94, *Georgios Aranitis v Land Berlin*, ECLI:EU:C:1996:23, para. 15.

1279 Case C-164/94, *Georgios Aranitis v Land Berlin*, ECLI:EU:C:1996:23, paras. 17-24.

and the free movement of workers) knowledge, qualifications and other evidence, even for unregulated professions.[1280]

6.2.4.7.2 Case law of the Swiss Federal Court

In principle, it does not matter for the recognition of professional qualifications whether the training or education is regulated, but only whether access to the profession is regulated.[1281] Whether the training is regulated becomes relevant in the very specific case when the profession itself is not regulated in the home Member State: the host Member State may still require professional experience of two more years under the *acquis suisse* if training is not regulated in the home Member State.[1282]

Berthoud rightly points out that the Swiss Federal Court neglected that distinction in a judgment of 2008[1283].[1284] The Swiss Federal Court mentioned that the SERI issued an ordinance regulating the education and training of child supervisors. The Swiss Federal Court then added:

> 'Au moment où la recourante a déposé sa demande, soit en juin 2007, la profession d'assistante socio-éducative, orientation "accompagnement des enfants" était donc réglementée en Suisse. A ce titre, le système européen de reconnaissance des diplômes, tel qu'adopté par la Suisse depuis l'entrée en vigueur, (...), est directement applicable à la demande de reconnaissance du certificat d'auxiliaire de puériculture formée par la recourante.'[1285]

An ordinance that regulates the *training* of a profession is not sufficient to answer the question of whether a profession is regulated. That misunderstanding did not however change the outcome of the case.

1280 Case C-164/94, *Georgios Aranitis v Land Berlin*, ECLI:EU:C:1996:23, para. 31.

1281 See Arts. 1 and 2(1) of the Professional Qualifications Directive in conjunction with Art. 3(1)(a) of the Professional Qualifications Directive.

1282 See Art. 13(2)(3) of the Professional Qualifications Directive.

1283 See BGE 134 II 341 (= Pra 2009 No 52), para. 2.1.

1284 F. Berthoud, 'Tribunal fédéral, 2ème Cour de droit public, 30 octobre 2008, U.c. Office fédéral de la formation professionelle et de la technologie (2C_416/2008), recours en matière de droit public (ATF 134 II 341)', AJP/PJA 2009, p. 517 et seq.

1285 BGE 134 II 341 (= Pra 2009 No 52), para. 2.1.

6.2.4.7.3 Case law of the FAC

Apart from the professions which are listed in the database of regulated professions,[1286] there are numerous activities which are regulated but where it is not clear whether they are regulated under the Professional Qualifications Directive. The FAC ruled in 2017 on the equivalence of a diploma in 'medical physics', which is not listed in Annex V to the Professional Qualifications Directive.[1287] Until the end of 2017, this diploma was awarded by an association of private law. The curriculum required an academic degree (Bachelor's degree in physics or Master's degree in another discipline of natural sciences), including the writing of a thesis, and three years of practical experience. Its aim was to prepare candidates for the 'pursuit of the profession'. The diploma must be renewed every five years.[1288] According to the previous rules, licence holders for certain types of radioactive installations for medical purposes were obliged to check their installations regularly. The check had to be carried out by somebody with a diploma in 'medical physics'.[1289] The FAC did not answer the question whether this diploma should be considered a diploma within the meaning of Article 3 of the Professional Qualifications Directive, ruling that the diploma did not allow the pursuit of a profession in the first place. It concluded that this was a 'competence' that fell outside the scope of the Professional Qualifications Directive.

While this ruling deserves some merit, the corollary to it is not that obviously justified. Article 3(1)(a) of the Directive is open-worded. Even if the pursuit of the profession is only indirectly regulated, this is a regulated profession within the meaning of the diploma. Considering the case law of the CJEU, there is a distinction to be made between diplomas and licences. Licences which are regularly renewed and only test knowledge or physical capacity are not considered to be diplomas. The licence in the case *Commission v Portugal* was only valid for two years. Such diplomas must however be distinguished from particular professions where legitimate checks are carried out.[1290] The curriculum for a diploma in 'medical physics' is quite extensive when combined with a thesis. The check is only carried

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1286 <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=homepage> (last visited on 28.06.2020).

1287 BVGer B-1982/2016 of 14.12.2017.

1288 <http://ssrpm.ch/certification-for-medical-physicists/rules/> (last visited on 28.06.2020).

1289 Art. 74(4) of the *Strahlenschutzverordnung (StSV) of 22.06.1994,* AS 1994 1947.

1290 Case C-171/02, *Commission v Portugal*, ECLI:EU:C:2004:270, para. 71 in conjunction with the *Opinion of Advocate General Alber in Case C-171/02, Commission v Portugal*, ECLI:EU:C:2003:465, paras. 92-95.

out every five years. In the present author's opinion, the reasoning of the FAC on its own is not self-evident as the 'diploma' cannot be regarded as a licence in the sense of EU law. The federal authorities also argued that the diploma cannot be regarded as a diploma because it is only issued by a private association. This argument is not decisive as it is clearly recognised by the Federal Office of Public Health and is also the only diploma expressly mentioned in the Ordinance.[1291] According to the jurisprudence of the FAC, private diplomas and private specialisations are considered to be part of public law if they are awarded by an accredited institution.[1292] In general, this view is also supported by doctrine that private law leads to inherent problems when imposing compensation measures.[1293] Thus, the Professional Qualifications Directive could have been applied in principle. In June 2019, however, the Swiss Federal Court annulled this decision and stated that this specialisation is purely a matter of private law.[1294] Even if the Professional Qualifications Directive were not applied and even if the argument were made that the diploma does not qualify as a diploma, the free movement rights of persons with a diploma in medical physics would be hindered. From the case law of the CJEU and the FAC it is clear that even purely academic titles are protected by the free movement rules.[1295] There is a follow-up case, which will be discussed in Chapter 6.3.3.3 below.

6.2.5 Qualifications of third countries

6.2.5.1 Recognition of recognised third country diplomas under secondary law

For the sectoral professions, minimum training conditions have to be respected for the initial recognition of third country diplomas. The initial Member State cannot deviate from this condition when assessing third country diplomas (with minor exceptions).[1296] After

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1291 See supra note 1289.

1292 See BVGer B-3577/2016 of 06.10.2017, para. 2.1.

1293 See Berthoud, Geneva, supra note 1007, p. 195 et seq. who distinguishes between two theories, which are applied. The case law of the FAC developed in 2017 and also applies in some cases to specialisations of private diplomas: see BVGer B-3706/2014 of 28.11.2017. This decision was however annulled by the Swiss Federal Court in June 2019: see BGer 2C_39/2018 of 18.06.2019.

1294 BGer 2C_39/2018 of 18.06.2019, para. 7.

1295 Case C-19/92, *Kraus*, ECLI:EU:C:1993:125; BVGer B-3706/2014 of 28.11.2017, para. 6.3.3 in conjunction with para. 7.2.1.

1296 See the last sentence of Art. 2(2) of the Professional Qualifications Directive. There are exceptions for the profession of architects: see Art. 10(c) of the Professional Qualifications Directive; see further, State Secretariat for Research and Innovation, supra note 967, p. 27.

initial recognition in the home Member State, the recognition of the third country diploma in the host Member State takes place (‘*reconnaissance de la reconnaissance*’ or ‘indirect recognition’).[1297] It is distinct from ‘zigzag recognition’ (see Chapter 5.2.5).

Originally, according to the early case law of the CJEU, the host Member State was not required to follow the decision of the first Member State even if it concerned the sectoral professions. This is illustrated by the case *Tawil-Albertini* which concerned a French national who obtained a diploma in dental surgery in Lebanon. He was admitted to practice in Belgium, in Ireland, and in the UK, but not in France (based on acquired rights). The CJEU made it clear that the host Member State was not bound by the method of recognition of professional qualifications of other Member States, even for the sectoral professions.[1298]

The saga of cases continued with *Haim I*, which concerned a dentist whose Turkish diploma was approved of in Belgium. He had been working there for eight years before he moved to Germany and applied for admission as a practitioner under a social security scheme. Germany required preparatory training to have been undertaken in order for him to be appointed as a dentist under a social security scheme in line with Article 20 of Directive 78/687/EEC (now the Professional Qualifications Directive). That was found to be lawful because the diploma of the third country was not listed in the Annex, and Member States are not bound by the decision of the first Member State.

The saga concluded with *Hocsman,* which marks a seminal turning point in the case law.[1299] Mr Hocsman was an Argentinean national whose academic diploma in medicine was recognised as equivalent by Spain, which in turn allowed him to work as a general practitioner. He was also admitted to specialise in urology. Then he acquired Spanish and French nationality and was allowed to practise as a specialised doctor of urology. After having worked in France as an assistant doctor for several years, he applied to the French authorities for admission to the profession as a doctor of urology. His application was subsequently rejected.[1300]

The CJEU emphasised that the Treaty itself provides for recognition of diplomas and that secondary law was only an expression of that. Having said that, the CJEU extended its

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[1297] Berthoud (2010), supra note 987, p. 163; see also Schneider, Antwerp, supra note 741, pp. 80–84.

[1298] Case C-154/93, *Tawil-Albertini*, ECLI:EU:C:1994:51.

[1299] For the same opinion, see Kremalis, Frankfurt am Main, supra note 724, p. 160.

[1300] Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440, paras. 12-19.

Vlassopoulou-formula, which meant France had to compare 'all the formal qualifications (...) and his practical experience'.[1301] Even with the entry into force of the Professional Qualifications Directive, the *Hocsman* ruling applies for applicants who can show that they have a *recognised* third country diploma but cannot demonstrate three years of professional experience under Article 10(g) of that Directive (application of primary law as a subsidiary layer of protection).[1302]

To conclude, the initial assessment of third country diplomas law is still left to the Member States to carry out.[1303] The 'recognition of the recognition' in the subsequent Member State falls under the Professional Qualifications Directive. For professions in the *sectoral* and the *general* system, Article 10(g) of the Directive.[1304] According to Article 10(g) in conjunction with Article 3(3) of the Directive, 'evidence of formal qualifications issued by a third country shall be regarded as evidence of formal qualifications if the holder has three years professional experience of the Member State which recognised the diploma'. Article 14(3) of the Directive states that the host Member State may require either an aptitude test or an adaptation period *without* offering the applicant a choice between the measures. The rules in *Hocsman* case law and its (partial) codification[1305] in Article 10(g) in conjunction with Article 3(3) of the Directive are compulsory to follow. The latter provision must have been implemented by the Member States.[1306] The following table shows the different forms of recognition for third country diplomas:

1301 Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440, para. 36.

1302 See, in particular, among many others: Zaglmayer, Vienna, supra note 1027, para. 10.27.

1303 See recital 10 of the Professional Qualifications Directive.

1304 See further Zaglmayer, Vienna, supra note 1027, para. 10.24 et seq.

1305 For the codification of the *Hocsman* case law see N. Gammenthaler, 'Richtlinie 2005/36 über die Anerkennung von Berufsqualifikationen: Implikationen für die Schweiz', in A. Epiney & N. Gammenthaler (eds.), *Schweizerisches Jahrbuch für Europarecht 2009/2010 / Annuaire suisse de droit européen 2009/2010,* Zurich (2010), para. 344; Gammenthaler, Zurich, supra note 40, p. 340.

1306 European Commission, supra note 1230, and Art. 3 of the Professional Qualifications Directive.

Initial recognition of a third country diploma in an EU or EEA EFTA State or in Switzerland	
Professions under the sectoral system of recognition	Professions under the general system of recognition
Home Member State is encouraged or required by national law to recognise third country diplomas.[1307]	
Minimum training conditions have to be respected.[1308]	-
Indirect recognition of third country diplomas	
Both systems (general and sectoral)	Primary law
3 years of professional experience in the initial Member State.[1309]	Less or no experience in a Member State.
Check if the recognition of professional qualifications is in accordance with the Professional Qualifications Directive (minimum training conditions).	Holistic view of the skills.
Application of the general system. Member State is not bound by the decision of the initial Member State even under the sectoral system and may require compensation measures but must assesses the professional qualifications.[1310] No choice between compensation measures.[1311]	No choice between compensation measures.[1312]

Table 2: Recognition of third country diplomas [1313]

[1307] The Professional Qualifications Directive does not prohibit the recognition of third country diplomas pursuant to recital 10 and Art. 2(2) thereof.

[1308] See recital 10 of the Professional Qualifications Directive, with the exception of the profession of architects. See supra note 1296 for further references.

[1309] Art. 10(g) of the Professional Qualifications Directive.

[1310] See Zaglmayer, Vienna, supra note 1027, para. 10.23; Berthoud, Geneva, supra note 1007, p. 103 et seq.; Case C-319/92, *Haim I*, ECLI:EU:C:1994:47, para. 21.

[1311] Art. 14(3) of Directive in conjunction with Art. 10(g) and Art. 3(3) of the Professional Qualifications Directive.

[1312] Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440, para. 36.

[1313] Based on the figure of the State Secretariat for Research and Innovation, supra note 967, p. 14.

6.2.5.2 *Case law of the Swiss Federal Court*

Despite the fact that the *Haim* saga (see Chapter 6.2.5.1) is a mere clarification of the *Vlassopoulou*[1314] ruling, the Swiss Federal Court held in a noteworthy *obiter dictum* in *BGE 132 II 135* that the judgment *Hocsman*[1315] cannot be translated to apply to the *acquis suisse*. The judgment concerned a specialised French doctor who obtained a diploma in Algeria in nuclear medicine. The reasoning did not have an impact on the decision of the Swiss Federal Court because it was seen as academic recognition in France.[1316] The judgment is however debatable because it argued that *Hocsman* would not be applicable due to the fact that recital six of Directive 2001/19/EC (now the Professional Qualifications Directive) in particular would work against the application of the *Hocsman* ruling.[1317] Indeed, secondary law did not mention the recognition of third country diplomas at that time. However, the argument seems rather contrived due to the fact that the reasoning of the CJEU in *Hocsman* was explicitly based on primary and not on secondary law, and the CJEU addressed that issue in particular.[1318] In addition, the CJEU held on multiple occasions that the adoption of secondary law cannot influence the interpretation of primary law. The CJEU contended that secondary law is only an expression of primary law.[1319] In other words, the adoption of secondary cannot lead to the contradictory effect that it overrules primary law.

Remarkably, the Swiss Federal Court went one step forward in 2006. Without further explanation, it cited the decision in *Hocsman*.[1320] The case dealt with the recognition of a specialised doctor falling outside of the scope of secondary law as the attestation of his qualification(s) was not included in Directive 93/16/EEC[1321] (now the Professional Qualifications Directive). The Swiss Federal Court simply acknowledged that a comparison should have been drawn between the acquired and required education. Notwithstanding the fact that no third country diploma was concerned, the Swiss Federal Court seems to have

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1314 Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

1315 Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440.

1316 BGE 132 II 135 (= Pra 96 2007 No 16), para. 7.

1317 BGE 132 II 135 (= Pra 96 2007 No 16), para. 5.2.

1318 Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440, para. 33 et seq.

1319 See Case C-31/00, *Dressen II*, ECLI:EU:C:2002:35, para. 25 et seq.; Case 71/76, *Thieffry*, ECLI:EU:C:1977:65, para. 17.

1320 BGE 133 V 33.

1321 Directive 93/16/EEC (see for the full citation supra note 1164).

accepted that the judgments *Hocsman* and *Vlassopoulou* essentially bear the same meaning because they are mentioned in the same sentence.[1322]

In the present author's view, the rulings in the *Haim* saga (see Chapter 6.2.5.1) must be followed for the goals of the AFMP to be achieved. As a matter of principle, the Swiss Federal Court reiterated that it is the aim of Article 16 AFMP to create a 'parallel legal situation'.[1323] Only exceptional circumstances could allow a deviation.[1324] Article 16(2) AFMP states that there is a 'parallel legal context'[1325] or 'homogeneity'[1326]. Even the SERI refers in its recommendations to the *Hocsman* ruling and accepts it with the introduction of the Professional Qualifications Directive.[1327] Article 10(g) of the Directive clearly incorporates the *Hocsman* ruling (at least partially).[1328]

Nonetheless, it should again be pointed out that a Member State may also recognise a third country diploma of an EU national, a Swiss citizen, or of their family members under national rules as long as the minimum training conditions for certain professions have been respected. Member States are even invited to enable holders of third country diplomas to be granted access to the exercise of regulated professions.[1329]

6.2.6 Temporal Scope

The EU Member States were obliged to implement the Professional Qualifications Directive into national law by 20 October 2007, and then by the date of 18 January 2016 for

1322 BGE 133 V 33, para. 9.4.

1323 BGE 140 II 112, para. 3.6.2; BGE 136 II 5, para. 3.4; see however also BGer 6B_378/2018 of 22.05.2019, para. 3.6.

1324 For the same opinion see N. Gammenthaler, 'Die schweizerische Rechtsprechung zur Diplomanerkennung im Rahmen des Freizügigkeitsabkommens Schweiz – EG', in A. Epiney & N. Gammenthaler (eds.), *Schweizerisches Jahrbuch für Europarecht / Annuaire suisse de droit européen 2008/2009,* Zurich (2009), p. 430.

1325 See the *Opinion of Advocate General Jääskinen in Case C-425/11, Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2012:650, para. 32.

1326 See Epiney (2005), supra note 494, p. 6 et seq. For a different opinion see Mazille, Geneva, supra note 639, p. 252 et seq. who heavily relies on the *Polydor* case law and the different structure and wording of the sectoral agreements.

1327 State Secretariat for Research and Innovation, supra note 967, p. 13.

1328 For the same opinion see Gammenthaler, supra note 1305, p. 344; Gammenthaler, Zurich, supra note 40, p. 340; see further Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 43.

1329 Recital 10 of the Professional Qualifications Directive.

the amendments inserted by Directive 2013/55/EU. Decision No 2/2011[1330] of the Joint Committee which entered into force on 31 August 2013[1331] brought the Professional Qualifications Directive but not the amending Directive into the *acquis suisse*.

Even where provisions have not been implemented into national law, some provisions of the Professional Qualifications Directive are considered to be clear and precise enough to qualify as self-executing. This has been ruled as such in established case law of the FAC.[1332] Therefore, the Directive can be invoked directly before courts and administrative authorities in Switzerland. Switzerland is still obliged to take all measures necessary to implement the Professional Qualifications Directive.[1333] The last part is not a mere technicality but some provisions of national law on the recognition procedure are in direct breach of the Professional Qualifications Directive. For instance, Article 69a(1) lit. a BBV provides that only diplomas of an equivalent level may be recognised. This rule is in conflict with Article 13(1)(b) of the Directive. From the case law of the Swiss Federal Court, it is clear that the AFMP prevails in a case where a Federal Act and a Federal Ordinance contradict public international law. In a recent ruling, the FAC ruled in that way and cited the well-known case law of the Swiss Federal Court in this respect.[1334]

With a view to the updating of the Professional Qualifications Directive, one study suggests that, in the light of Article 16(1) AFMP, that Directive 2013/55/EU should be applied.[1335] The addition of Directive 2013/55/EU may serve as a welcome source of interpretation for the Professional Qualifications Directive.[1336] However, the bilateral agreements are static in nature. Amendments to Annex III must be put into effect by a decision of the Joint Committee on the AFMP further to Article 18 AFMP (see for the working group of the Joint Committee for the recognition of professional qualifications:

1330 Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

1331 *Notice of entry into force (Decision No 2/2011 of the EU-Swiss Joint Committee),* OJ [2014] C49/3, 21.02.2014.

1332 See BVGer B-5945/2018 of 14.01.2019, paras. 5.3; BVGer B-1300/2014 of 07.05.2015; Berthoud, Geneva, supra note 1007, p. 76 et seq.

1333 Art. 16(1) AFMP; Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

1334 See BVGer B-5372/2015 of 04.04.2017, para. 5.4.

1335 Cottier & Liechti, supra note 990, p. 6.

1336 For instance, the concepts of partial access and the recognition of professional traineeships are explicitly mentioned as a new purpose in the second indent of Art. 1 of the Professional Qualifications Directive and in the substantive Arts. 4f and 55a thereof, but are also part of primary law.

supra note 991).[1337] Switzerland intended to adopt Directive 2013/55/EU but the process was hindered by the popular initiative against mass immigration in 2014. It should have been finished by 2017.[1338] This slow and tedious process of the adoption of Directive 2013/55/EU is certainly part of the EU's strategy for ongoing discussions about a Draft Institutional Framework Agreement (see Chapter 2.2.3).[1339] It may endanger legal certainty because the relevant legal sources will be even more difficult to find if this becomes the norm in the future.[1340] Oesch argues that the late implementation of the amendments for the Professional Qualifications Directive in the past may not only jeopardize legal security but also the functioning of the Agreement itself.[1341]

6.3 General concepts of the Professional Qualifications Directive

6.3.1 Restricted exercise of activities

Member States may simply decide to restrict access to certain activities for certain professions.[1342] This practice is in conformity with the case law of the CJEU which has held that where access is restricted within a profession, that profession is not regulated under secondary law.[1343] The distinction between regulated professions and restricted professions is a delicate one. First, it is clear that when the law excludes access to an activity, the corresponding profession is not regulated. In the CJEU's case *Gräbner*, however, access to practice medicine was not completely prohibited, but the activities of the profession '*Heilpraktiker*' were reserved for qualified doctors. This case law essentially exempts certain professionals from the country of origin principle. Such a measure is nonetheless a hindrance to the fundamental freedoms. It needs to be justified for overriding reasons in the public

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[1337] See also Kremalis, Frankfurt am Main, supra note 724, p. 177 who even suggests that the second sentence of Art. 18 AFMP should be disapplied.

[1338] See <https://www.sbfi.admin.ch/dam/sbfi/de/dokumente/2019/07/richtlinie-2013-55-eu.pdf.download.pdf/sbfi-news_d.pdf> (last visited on 25.06.2020).

[1339] For the same opinion see Oesch (2017), supra note 278, p. 642.

[1340] Oesch (2017), supra note 278, p. 642 does argue that the situation is regrettable, but not problematic as it only affects exceptional situations.

[1341] Oesch (2019), supra note 16, p. 7 et seq.

[1342] Berthoud, Geneva, supra note 1007, p. 154 et seq.

[1343] Case C-294/00, *Gräbner*, ECLI:EU:C:2002:442, para. 36.

interest. It must also be proportionate to achieve the aim of protecting public health or other overriding reasons in the general interest.[1344]

This situation is less problematic in Switzerland because such cases usually include the problem of a lack of legal basis or are solved by invoking Article 27 BV in Switzerland (the right to economic freedom).[1345] Article 27 BV applies to Swiss nationals but also to foreigners that have a right of residence or foreigners who can rely on a Treaty which grants a right of residence.[1346]

6.3.2 Pursuit of the profession

Pursuant to Article 50(1) in Chapter IV of the Professional Qualifications Directive, national authorities may demand the documents and certificates listed in Annex VII. If there are justified doubts, the host Member State may require confirmation of the authenticity of relevant documents from the home Member State.[1347] With the insertion of Article 50(3a) and (3b) (added by Directive 2013/55/EU), it is now expressly stated that the host Member State may also check whether the applicant has been suspended or prohibited from the exercise of the profession in the home Member State. Confirmation about the authenticity might be more difficult to obtain without applying the Regulation on administrative cooperation through the Internal Market Information System (‘IMI Regulation’) due to language barriers and practical obstacles, because the IMI Regulation is not part of the *acquis suisse*: IMI is a software application that has been created for the exchange of information between Member States (see Chapter 6.2.1).[1348] The IMI will not however be introduced just yet, but rather within a period of three years after the entry into force of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.[1349]

The Directive also establishes procedural rules. Within a deadline of one month, the host Member State is obliged to acknowledge receipt of the application and to inform the applicant

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1344 Case C-294/00, *Gräbner*, ECLI:EU:C:2002:442, para. 39 et seq.

1345 See the opinion in Berthoud, Geneva, supra note 1007, p. 204 et seq. and 207 et seq. for further references.

1346 Vallender, Klaus, A., ‘Art. 27 BV’, in B. Ehrenzeller et al. (eds.), *Die schweizerische Bundesverfassung: St. Galler Kommentar,* Zurich/St. Gallen (2014), para. 47.

1347 Art. 50(2) and (3) of the Professional Qualifications Directive.

1348 Regulation No 1024/2012 ('IMI Regulation'); see also <http://ec.europa.eu/internal_market/imi-net/index_de.htm> (last visited on 28.06.2020).

1349 Protocol 1, para. 1, third indent of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

if there is any missing document that needs to be provided.[1350] In this respect, Articles 50(1) and 51(1) of the Professional Qualifications Directive have been declared clear and precise enough to be of direct application in Switzerland. The authorities must therefore ask the contact point, the competent authority, or any other relevant body in the home Member State if the applicant is able to provide the necessary document.[1351] Article 50(1) of the Directive stipulates that the competent authorities may demand the documents and certificates listed in Annex VII.

According to Annex VII Member States may *inter alia* require:

- proof of the nationality of the applicant;
- copies of attestation of professional competence or of the evidence of formal qualifications;
- proof of good character and good reputation (whether there has been bankruptcy or commission of a criminal offence);
- Proof of financial standing and insurance against professional liability (attestation by the banks and insurance undertaking of a Member State).

The procedure for examining an application to practise a regulated profession must be carried out as quickly as possible, but at least within three months of receipt of a completed application (with an extension of four months for cases under Chapters I and II of Title III[1352]).[1353] A failure to reach a decision within three months is subject to an appeal under national law.[1354] Unlike the deadline in Article 7(4) of the Professional Qualifications Directive for the freedom to provide services, this deadline does not lead to the automatic recognition of professional qualifications if there is no reasoned decision within three months after submission of the applicant's complete file. There are legal remedies in Swiss public procedural law to appeal if no decision has been taken.[1355]

The Professional Qualifications Directive does not regulate procedural costs. It is up to the Member States to regulate procedural costs in a non-discriminatory fashion and in light

[1350] Art. 51(1) of the Professional Qualifications Directive.

[1351] BVGer B-5129/2013 of 04.03.2015, para. 5.1.

[1352] General system of recognition and recognition of professional experience under the freedom of establishment.

[1353] Art. 51(2) of the Professional Qualifications Directive; see also BVGer B-3284/2018 of 16.11.2018, para. 5.1.

[1354] Art. 51(3) of the Professional Qualifications Directive.

[1355] See e.g. Art. 46a VwVG on the federal level.

of the principle of proportionality.[1356] According to the Code of Conduct which has been approved by a group of national coordinators, best practice would mean that no charges are levied. Currently, charges are levied for recognition of professional qualifications under the Directive. In theory, the recommendation could be achieved in Switzerland, if national law (BGBM) were applied rather extensively for EU nationals at least on a cantonal and communal level where the BGBM is applicable (see also Chapter 8.4.2.3). At least according to the case law before the revision of the BGBM however, foreign diplomas did not fall under the scope of the BGBM.[1357] Good practice means that the charges do not exceed the real costs of the service provided, that they are comparable to similar national charges, and that they do not make the rights conferred by the Directive implausibly difficult to invoke. In addition, flat-rate charges should reflect the costs of the application on a standard basis.[1358]

6.3.2.1 Language requirements

The CJEU had developed rich case law on language requirements,[1359] now codified in Article 53 of the Professional Qualifications Directive. Article 53(3) of the Directive in its amended version (not yet part of the *acquis suisse*) now clearly states that reviews may only be carried out after there has been recognition of professional qualifications. An exception applies for professions where language plays a major role in the profession itself, such as for speech therapists or language teachers.[1360] The case law of the EFTA Court also accepts the refusal to authorise professionals when the authorities already have serious doubts about

[1356] Berthoud, Geneva, supra note 1007, p. 351.

[1357] BGE 125 I 267, para. 3.e; see further N. Diebold, ‘Die Verwirklichung des Binnenmarktes in der Schweiz’, in T. Cottier & M. Oesch (eds.), *Allgemeines Aussenwirtschafts- und Binnenmarktrecht,* Basel (2020), para. 49, p. 501 who submits that the Swiss Federal Court did implicitly accept the indirect recognition of an EU diploma in a singular case; see also Diebold, Berne, supra note 67, para. 1023 et seq.

[1358] Group of Coordinators for Directive 2005/36/EC, *Code of conduct approved by the group of coordinators for the Directive 2005/36/EC on the recognition of professional qualifications, of 19.01.2016,* <https://ec.europa.eu/docsroom/documents/14981?locale=en> (last visited on 28.06.2020), p. 20.

[1359] Case C-379/87, *Groener v Minister for Education and City of Dublin Vocational Education Committee*, ECLI:EU:C:1989:599; Case C-424/97, *Haim II*, ECLI:EU:C:2000:357; Case C-281/98, *Angonese*, ECLI:EU:C:2000:296; Case C-193/05, *Commission v Luxembourg*, ECLI:EU:C:2006:588; Case C-506/04, *Wilson*, ECLI:EU:C:2006:587; Case C-317/14, *Commission v Belgium*, ECLI:EU:C:2015:63.

[1360] Group of Coordinators for Directive 2005/36/EC, supra note 1358, p. 20.

language skills and therefore would commence proceedings for withdrawal of the authorisation to practise.[1361]

Language requirements cannot be enacted in a discriminatory fashion. For example, it is discriminatory when languages can only be learnt in the territory of a Member State or when specific language certificates are required that can only be obtained in a small part of the Member State.[1362] In addition, it would be discriminatory to demand a particular certificate from an applicant.[1363] There is however a tool available, the European Language Portfolio, that allows the authorities to make a comparison between different levels of language skills.[1364]

Language requirements must be limited to requiring one administrative language of the host Member State that is also a language of the EU (see Article 53(2) of the Directive). That paragraph was inserted by Directive 2013/55/EU, which is not part of the *acquis suisse*. Notwithstanding the fact that Directive 2013/55/EU has not yet been implemented, it should be clear from the abovementioned case law that in general requiring knowledge of only one language is in conformity with the principle of proportionality. It would also be indirectly discriminatory to demand native-level knowledge of a language.[1365] Migrants cannot be required to have knowledge of the Swiss-German dialect.[1366] To give an example for Switzerland, it was at least debatable whether the current requirement of two official

1361 Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, EFTA Court Report 2011. p. 484 et seq.

1362 Case C-281/98, *Angonese*, ECLI:EU:C:2000:296.

1363 Case C-317/14, *Commission v Belgium*, ECLI:EU:C:2015:63, para. 35; see also European Commission, supra note 1106, p. 13.

1364 <http://www.coe.int/en/web/portfolio> (last visited on 28.06.2020).

1365 European Commission, supra note 1213, p. 10.

1366 For Switzerland, it could also be questioned whether it would be allowed to demand knowledge of the Swiss dialect, as the official German language is rarely used in spoken language. From the proportionality principle is quite clear that only what is necessary to attain an objective may be required. Therefore, knowledge of the Swiss German dialect cannot be made compulsory. This also applies to the teachers. Pupils in public school in the German speaking part of Switzerland are in any event taught in the official German language. In addition, Swiss German is not an official school subject. The respective case law with respect to the knowledge of the Irish language cannot be compared to a dialect. Unlike the Irish language, Swiss German is not an official language; see Case C-379/87, *Groener v Minister for Education and City of Dublin Vocational Education Committee*, ECLI:EU:C:1989:599; see Zaglmayer, Vienna, supra note 1027, para. 7.23.

languages for surveyors is proportionate, especially for the provision of services.[1367] The reasoning behind the requirement is twofold. First, official documents are in both languages. Second, the recognition of diplomas gives access to the profession of surveyor in Switzerland as a whole without territorial restriction.[1368] Even in Switzerland, most professionals would not consider working on a regular basis in both languages. This reasoning was taken into account. Switzerland only requires knowledge of one official language for surveyors who provide services.[1369]

The proportionality of language requirements might be different for the medical professions. Doctors have a high level of direct interaction with patients and must have a good command of an official language. Misunderstandings could endanger the well-being and health of the patients. Therefore, the measure is suitable, proportionate and does not go beyond what is necessary to achieve that aim.[1370] In *Haim II*, the German rule was therefore deemed to be in conformity with EU law to foster 'effective communication' of doctors with their patients. Nevertheless, the CJEU noted that it might be interesting to admit a few dentists with a good command of another language to treat foreigners.[1371] The precise wording in the revised version of Article 53(3) of the Professional Qualifications Directive, which names patient safety implications, strengthens this interpretation.

Until the end of 2017, prior language testing was still enforced in Switzerland for medical professionals under the Swiss Act on medical practitioners (MedBG). The recognition of medical professionals on a university level (such as general practitioners, veterinaries and pharmacists) is governed by the MedBG. Article 15(1) of the MedBG requires the applicant to be fluent in one of the official languages. It is obvious that it has to be an official language

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1367 See D. Kettiger & M. Oesch, *Die Auswirkungen des internationalen Rechts auf die amtliche Vermessung in der Schweiz / Les conséquences du droit international sur la mensuration officielle en Suisse,* Zurich (2013), p. 82.

1368 Kettiger & Oesch, Zurich, supra note 1367, p. 71.

1369 Swiss Confederation, *Eidgenössische Kommission für Ingenieur-Geometerinnen und -Geometer: Merkblatt über die Anerkennung eines ausländischen Berufsabschlusses zwecks Ausübung des Berufs «patentierte Ingenieur- Geometerin» resp. «patentierter Ingenieur-Geometer» in der Schweiz of 15 March 2018,* <https://www.sbfi.admin.ch/sbfi/de/home/bildung/diploma/anerkennungsverfahren-bei-niederlassung/zustaendige-diplomanerkennungsstellen/bereich-der-amtlichen-vermessung.html> (last visited on 26.06.2020).

1370 In practice an attestation of level B2 of the Common European Framework of Reference for Languages 'is required' for teachers. For teachers who want to give language lessons, an attestation of level C2 is mandatory; see <http://www.edudoc.ch/static/web/arbeiten/diplanerk/mb_sprachen_d.pdf> (last visited on 26.06.2020).

1371 Case C-424/97, *Haim II*, ECLI:EU:C:2000:357, para. 60.

that is actually spoken in the part of Switzerland where the applicant seeks work.[1372] As of 2011, the MedBG was under revision. While the Swiss Federal Council explicitly stated that the prior verification is not in conformity with Article 53 of the Professional Qualifications Directive, the cantons opposed a new article introducing a rule on language skills when medical practitioners are authorised to exercise their profession.[1373] Still, Articles 15 and 33a (1) MedBG were amended and entered into force on 1 January 2018.[1374] As mentioned above, the CJEU approved linguistic requirements for teachers.[1375] The CJEU however rejected a prior language test for lawyers in two cases from Luxembourg. It held that Article 3 of the 'Facilitating Practice Directive aims at full harmonisation and prohibits Member States from introducing additional requirements. A prior test of knowledge of the official languages cannot be regarded as proportionate as there are other means to achieve consumer protection and proper administration of justice.[1376] A prior testing of language skills is only allowed if the language is a crucial part of the profession. The process of recognition of diplomas should not be impeded or delayed due to a lack of language certificates.[1377]

Even private parties have to undertake non-discriminatory language tests. Although directives do not have horizontal effect (with some minor exceptions),[1378] the fundamental freedoms apply horizontally and a private party may only require a good command of languages if the test is non-discriminatory.[1379] The same is true for the AFMP according to Article 9(1) and (4) of Annex I to the AFMP, even though the abovementioned judgment was decided after the date of signature.[1380]

1372 A. Ayer & C. Hänggeli, 'Art 21 MedBG', in A. Ayer et al. (eds.), *Medizinalberufegesetz: (MedBG); Kommentar,* Basel (2009), para. 16.

1373 Swiss Confederation, *Botschaft zur Änderung des Medizinalberufegesetzes (MedBG) of 3 July 2013 (BBl 2013 6205)*, p. 6207.

1374 Swiss Confederation, *Bundesgesetz über die universitären Medizinalberufe (Medizinalberufegesetz, MedBG), Änderung of 20 March 2015, AS 2015 5081*, p. 5085.

1375 Case C-379/87, *Groener v Minister for Education and City of Dublin Vocational Education Committee*, ECLI:EU:C:1989:599.

1376 Case C-193/05, *Commission v Luxembourg*, ECLI:EU:C:2006:588, para. 41; Case C-506/04, *Wilson*, ECLI:EU:C:2006:587, para. 71.

1377 See Gammenthaler, Zurich, supra note 40, p. 238; European Commission, supra note 1106, p. 13.

1378 Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33, paras. 37-38.

1379 Case C-281/98, *Angonese*, ECLI:EU:C:2000:296, paras. 44-45.

1380 See supra note 855.

6.3.2.2 Professional traineeship

For several regulated professions, such as for pharmacists, for architects and for teachers, professional traineeships are necessary before official recognition of an individual as a fully-fledged professional is granted. According to the newly introduced Article 3(1)(j) of the Professional Qualifications Directive (that amendment not being applicable under the *acquis suisse*) the term 'professional traineeship' is defined as a 'period of professional practice carried out under supervision provided it constitutes a condition for access to a regulated profession, and which can take place either during or after completion of an education leading to a diploma'. With the introduction of Article 55a by Directive 2013/55/EU, recognition of professional traineeships should now be simpler in theory. Traineeships carried out in another Member State have to be recognised, which is in line with the case law of the CJEU in *Morgenbesser*, based on primary law.[1381] Even traineeships carried out in third countries have to be taken into account. Traineeships completed in the course of regulated training are not considered to be 'professional traineeships'.[1382] Unlike the Commission's draft for Article 3(1)(j) of the Professional Qualifications Directive, unpaid as well as paid traineeships fall under that Directive.[1383]

However, prospective trainees cannot invoke the provisions of the Professional Qualifications Directive when moving to another Member State. An application is only permissible vis-à-vis the home Member State. To this end, under Article 55a(2) of the Directive, the competent institution(s) of the respective Member State must have published guidelines on how traineeships operate. Article 55a(2) of the amended Directive however still allows Member States to require entrance examinations to be passed, such as state examinations for access to traineeships. Moving abroad for a traineeship, returning to the home Member State, and invoking Article 55a of the amended Directive does therefore not prohibit the home Member State from requiring that state examinations be passed before

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1381 See Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612.

1382 See Zaglmayer, Vienna, supra note 1027, para. 3.41.

1383 Committee on the Internal Market and Consumer Protection, *Report for a proposal for a directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System (COM(2011)0883 – C7-0512/2011 – 2011/0435(COD)) of 13.02.2013,* <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0038&language=EN> (last visited on 26.06.2020).

granting access to traineeships. Moreover, the home Member State may limit the duration of traineeships obtained in another Member State as long as this was fixed in advance, and this rule is applied in a non-discriminatory fashion.[1384] This interpretation seems to be heavily influenced by the *Morgenbesser* case law[1385] and the German implementation of this case law[1386] but it falls short to codify the *Morgenbesser* principle which also grants access to traineeships in another Member State.[1387]

The new provisions for traineeships (not part of the *acquis suisse*) should foster legal certainty for applicants. On the contrary, trainees under the *acquis suisse* face more difficulties when it comes to unpaid traineeships, as the freedom of movement for workers is not applicable. Unpaid trainees must therefore invoke Article 24 of Annex I to the AFMP, which is not unconditional (see Chapter 4.2.3).

6.3.2.3 Use of professional titles

Naturally, the use of professional titles is only relevant when they are regulated in the host Member State. Even when professional titles are regulated in the host Member State, for most professionals the use of titles is not essential for economic success in Switzerland. This applies even to professionals with a university degree, such as for teachers. It is more relevant for the liberal professions, for instance for architects and engineers. It is most important for professions which have advertising restrictions, such as the legal profession (see Chapter 8.2.1).

For the freedom of establishment, the migrant makes use of the professional title of the host Member State.[1388] Membership in associations or organisations can be declared a compulsory condition before a title can be used.[1389] For the freedom of services, the applicant makes use of the professional title of the state where it acquired that title.[1390] If the migrant

[1384] Zaglmayer, Vienna, supra note 1027, para. 3.41 et seq.

[1385] See Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612.

[1386] See §112a of Deutsches Richtergesetz.

[1387] Kortese, Maastricht, supra note 38, p. 180 et seq.

[1388] Art. 52(1) of the Professional Qualifications Directive.

[1389] Art. 52(2) of the Professional Qualifications Directive.

[1390] Art. 7(3) of the Professional Qualifications Directive.

is granted partial access to a profession, the applicant will use the professional title conferred by his home Member State (if required in the language of the home Member State).[1391]

6.3.2.4 Use of academic titles

Migrants may use the academic title granted in the home Member State.[1392] The concept of 'academic titles' does not only include university degrees but has a 'broad meaning'.[1393] The title is followed by the name and address of the establishment or examining board which awarded it, if this is required by the host Member State.[1394] Where there is a risk of confusion with an academic title in the host Member State, if it does not correspond to the training of the migrant, the home Member State may lay down rules for the use of the academic title.[1395] In the event that the academic and the professional title correspond, the migrant may use the title as established by the host Member State according to Article 52 of the Professional Qualifications Directive.[1396] The use of the academic title is one of the few areas where academic recognition and the recognition of professional qualifications overlap. This area is not only a mere formality but it fosters the free movement of professionals to pursue their activity with the respective academic title while protecting consumer interests at the same time.

6.3.3 Case law

6.3.3.1 Case law of the EFTA Court: Norwegian Appeal Board for Health Personnel

In the *Norwegian Appeal Board* case, the EFTA Court held that the Professional Qualifications Directive only provides for the automatic recognition of medical doctors 'in principle'. Member States may make authorisation to practise dependent upon knowledge of

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[1391] Under the amended Professional Qualifications Directive, Art. 4f of the Professional Qualifications Directive governs partial access to a profession: see Art. 4f(5) of the Professional Qualifications Directive (not part of the *acquis suisse*).

[1392] See the first sentence of Art. 54 of the Professional Qualifications Directive.

[1393] Art. 54 of the Professional Qualifications Directive; European Commission, supra note 1230, ad Art. 54.

[1394] See the second sentence of Art. 54 of the Professional Qualifications Directive.

[1395] See the third sentence of Art. 54 of the Professional Qualifications Directive.

[1396] See M. Kaufmann, *Anerkennung der Berufsqualifikation von Primarlehrpersonen,* Diss. Zurich (2015), Zurich (2015), p. 55, para. 103 for further references.

a language as long as this measure is proportionate.[1397] The case concerned a Bulgarian doctor who applied for 'authorisation' to practise medicine in Norway. Article 53 of the Norwegian Act on Health Personnel stated that authorisation may be revoked in certain cases of 'gross lack of professional insight'. The Bulgarian medical doctor had already been working in a hospital during her pre-practical training. It was found that her Norwegian language skills were improving but still inadequate to communicate with patients. In addition, the respective Registration Authority also stated that the applicant had insufficient medical knowledge and signs of poor insight as to her own abilities[1398]. Subsequently, her application for the recognition of professional qualifications as a medical doctor was denied and the applicant was only awarded authorisation to practise as a subordinate medical employee for one year.[1399]

The judgment is rather short so it is particularly interesting to assess the arguments brought forward by the interveners in this case. The European Commission argued that prior language testing is prohibited under the case law of the CJEU in *Haim II*[1400] and that the recognition of professional qualifications is automatic under Article 21 of the Professional Qualifications Directive for the sectoral system, or Article 23 for acquired rights. Recognition is therefore unconditional.[1401] However, the European Commission also submitted that according to national law, withdrawal is permissible and migrants are subject to the same rules of professional conduct. After the recognition of professional qualifications has been granted, Member States may take the necessary measures under national law and in light of Article 53 of that Directive.[1402]

The Spanish Government put forward some valid arguments. It referred to the Opinions of the Advocates General in *Haim II* and in *Hocsman*, that dealt with the predecessors of the Directive. In light of those Opinions, it argued that Article 23 of the Directive should still be

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1397 Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, EFTA Court Report 2011. p. 484 et seq., para. 69 et seq.

1398 Or in the words of the EFTA Court: 'signs of poor insight in her own functioning'.

1399 Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, EFTA Court Report 2011. p. 484 et seq., para. 4 et seq. and para. 44.

1400 Case C-424/97, *Haim II*, ECLI:EU:C:2000:357.

1401 Case E-1/11, *Norwegian Appeal Board for Health Personnel - appeal from A, Report for the Hearing*, EFTA Court Report 2011, p. 510 et seq., para. 91 et seq.

1402 Case E-1/11, *Norwegian Appeal Board for Health Personnel - appeal from A, Report for the Hearing*, EFTA Court Report 2011, p. 510 et seq., para. 60 et seq.

applied automatically as long as the relevant diploma listed in Annex V is shown to be held by the applicant.[1403]

The ESA argued that the Directive offers a 'two-stage' approach on the recognition of professional qualifications. First, there is the recognition phase which gives access to the professions. Second, there is the phase that regulates the pursuit of the profession.[1404] The ESA continued that even if the authorities become aware of any lack of competences, automatic recognition must be applied.[1405]

While the EFTA Court reiterates that automatic recognition is unconditional, it finds that in cases where the revocation of an authorisation is possible, Member States may also refuse the recognition of professional qualifications. This reasoning is based on Article 4(1) of the Professional Qualifications Directive, that the applicant gains access to the profession of the host Member State under the same conditions as its nationals. Restrictions are permissible if they are in the public interest and are justified. With reference to the decision in *Tennah-Durez*, the EFTA Court emphasises that recognition is unconditional in principle. It also mentions that the principle of proportionality must be upheld in light of the case law. In any case, the findings of the national authorities concerning the 'signs of poor insight as to her own abilities' would clearly not allow a denial as this substantive check is not subject to the discretion of the national authorities. The EFTA Court finally concluded that limited 'authorisation' is more proportionate than a refusal. EEA EFTA countries may therefore refuse 'authorisation' to practise if they could also withdraw the authorisation based on Article 53 of the Professional Qualifications Directive.[1406]

This reasoning goes beyond the existing case law of the CJEU. It is undebatable that a doctor who is not able to communicate with patients should not be allowed to practise medicine. In this particular case, the ruling is understandable but should have been based on the two-stage approach of the ESA. This case blurs the lines between recognition of professional qualifications and the authorisation to practise, as the parties and the EFTA

[1403] Case E-1/11, *Norwegian Appeal Board for Health Personnel - appeal from A, Report for the Hearing*, EFTA Court Report 2011, p. 510 et seq., para. 43 et seq.

[1404] Case E-1/11, *Norwegian Appeal Board for Health Personnel - appeal from A, Report for the Hearing*, EFTA Court Report 2011, p. 510 et seq., para. 57.

[1405] Case E-1/11, *Norwegian Appeal Board for Health Personnel - appeal from A, Report for the Hearing*, EFTA Court Report 2011, p. 510 et seq., para. 59.

[1406] Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, EFTA Court Report 2011. p. 484 et seq., para. 66 et seq.

Court use the term 'authorisation' to practise, which is not used in the Directive. As mentioned, the CJEU has consistently ruled that Member States may not make the recognition of professional qualifications dependent on additional criteria. Unfortunately, the judgment in *Norwegian Appeal Board* does not give an insight into how far Member States may go with restrictions but only hints that the statements of the respective Registration Authority have not been reasoned. It should not open the possibility for Member States to introduce other restrictions in cases where the diploma should be recognised automatically under the sectoral system. Prior refusals should only be applied when Member States have serious doubts about the professional conduct of the applicant. Based on the wording and the considerations of the EFTA Court, Member States might also deny 'authorisation' for applicants with addictions, or who have been declared bankrupt according to Annex VII of the Professional Qualifications Directive. Even if the EFTA Court held that the statements of the Registration Authority regarding the 'signs of poor insight' is incompatible unless this ground is given more substance, this reasoning is not precise.

Furthermore, it should be recalled that practising without proper knowledge of the necessary language constitutes a violation of professional conduct, which may, depending on the legislation, also lead to revocation of the authorisation to practise or damages. This aspect was also mentioned by the ESA.[1407] The arguments of the ESA that these two phases should be clearly distinguished and not intermingled is clearly more convincing than the more pragmatic approach which simply allows the refusal of 'authorisation' without interpreting whether the authorisation also affects the recognition or only the pursuit of the profession. In this specific case, the EFTA Court could have simply referred to the Norwegian legislation which allows for withdrawal of a licence. The two-stage approach would then have the same result, but with a more convincing reasoning, namely that Member States are still aware that the recognition must be unconditional in any case.

6.3.3.2 Case law of the Swiss Federal Court: Undue suspension of the recognition process

The federal authorities suspended the recognition procedure due to the fact that the correct compensation measures for nursery nurses were still unclear at that point in Switzerland. That

[1407] Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, EFTA Court Report 2011. p. 484 et seq., para. 55.

decision was upheld by the FAC. An appeal against that decision was successful. The Swiss Federal Court held that the federal authorities cannot suspend the recognition procedure when the necessary information for the recognition of diplomas is available. The suspension was thus found to breach the deadline of four months contained in Article 12(2) of Directive 92/51/EEC[1408] (now the Professional Qualifications Directive).[1409]

6.3.3.3 Case law of the FAC

6.3.3.3.1 Undue delay of the federal authorities

In 2018, the FAC ruled that the actions of the federal authorities could not be regarded as undue delay.[1410] That decision is questionable because it did not discuss whether the Professional Qualifications Directive applies. The law must be applied *ex officio*.[1411] In an earlier procedure of the same case, the FAC revoked the decision of the federal authorities because they had not assessed the equivalence of the applicant's diploma. The administrative authorities argued that 'only competences and not a profession' were at stake. The FAC left the question open as to whether the Directive could be applied.[1412] Even if this question could be left unanswered in the first procedure before the FAC, the FAC would have been required to assess in that specific case whether the Directive applied, as the procedure to examine that must be completed as quickly as possible, but in any case, within three months (Article 51(2) of the Professional Qualifications Directive). This is emphasised by the case law of the Swiss Federal Court, which is inflexible in this respect.[1413]

6.3.3.3.2 Submission of the correct documents

In 2013, the first division of the FAC ruled on the recognition of professional qualifications for an electrical engineer. The federal authorities required the applicant to submit, inter alia, evidence of formal qualifications giving access to the profession in question (attestation of professional experience as a self-employed electrician, proprietor or

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1408 Directive 92/51/EEC (see for the full citation 964).
1409 BGE 134 II 341 (= Pra 2009 No 52), para. 2.
1410 BVGer B-3919/2018 of 17.09.2018.
1411 Art. 62(4) VwVG.
1412 BVGer B-1982/2016 of 14.12.2017, para. 4.6.
1413 BGE 134 II 341 (= Pra 2009 No 52), para. 2.

manager) and a curriculum vitae. The applicant did not submit the correct documents, so the federal authorities refused to consider the application. The FAC however held with regard to the formalities that even lawyers who are not familiar with the Professional Qualifications Directive might struggle to understand it.[1414] It thus held that the federal authorities need to clarify specifically which documents must be submitted.[1415]

6.4 The general system of recognition (freedom of establishment)

The general system of recognition of professional qualifications applies to all the professions that are not covered by Chapters III or IV, and for other cases explicitly mentioned in Article 10(a) and (b) of the Professional Qualifications Directive and those originating from the former General Recognition Directive (on the recognition of higher-education diplomas) and Directive 92/51/EEC (recognition of professional education and training). The rules for the freedom of establishment (Chapter I) under the Professional Qualifications Directive encompass the free movement of self-employed and salaried migrants and is wider than the term ‘establishment’ might suggest.[1416] The conditions for recognition are listed in Article 13 of the Directive, which distinguishes between two situations: The first paragraph in Article 13 of the Directive refers to the situation where the profession is regulated in the home Member State as well as in the host Member State. The diploma must in principle be accepted if it is issued by the competent authority and attest a level at least equivalent to the level immediately prior to that required (under the *acquis suisse*). The second paragraph of Article 13 of the Directive describes the situation where the profession is only regulated in the host Member State. In this scenario, a Member State is obliged to grant access to the profession if the applicant has been working for at least two years in the last ten previous years on a full-time basis (under the current *acquis suisse*). Payslips or attestations from employers are sufficient to show proof of professional experience. A formal official attestation is not deemed necessary.[1417] It should be noted that professional experience is also one of the most important criteria under primary law for the

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1414 BVGer A-6542/2012 of 22.04.2013, para. 4.3 *in fine*:
‘Bei der zitierten Richtlinie handelt es sich um ein Regelwerk, welches selbst einem mit dieser Materie nicht befassten Juristen nur schwer erschliessbar ist.’

1415 BVGer A-6542/2012 of 22.04.2013, para. 4.4.

1416 Arts. 2 and 10 of the Professional Qualifications Directive.

1417 European Commission, supra note 1106, p. 5.

recognition of professional qualifications in general.[1418] However, the two years of professional experience cannot be required if the applicant can show evidence of formal qualifications. That evidence must have been issued by the competent institution, attest a level at least immediately prior to that required and prepare the individual for the pursuit of the profession.[1419]

The rationale behind this system of recognition is the concept of *mutual trust*.[1420] A Member State may not in principle refuse a diploma awarded by the competent institution. This also covers diplomas awarded by a franchised institution or even for distance-learning training courses.[1421] Diplomas of private institutions, which are not recognised for the purpose of allowing exercise of the relevant profession in the home Member State, are not sufficient.[1422] It does not matter whether the national law of the *host* Member State recognises these institutions from an academic standpoint but whether the respective diploma in the *home* Member State grants access to a regulated profession, or if the training is recognised when the profession is not regulated in the home Member State.[1423] In Switzerland, private diplomas are either recognised by the State or applicants are allowed to exercise the regulated activities without changing the private nature of the diploma. According to the academic literature, this second option could be problematic when a diploma cannot be recognised, as it might be difficult for the respective authorities to offer the applicant to choose between what compensation measure to impose (whether that is a three-year adaptation period or an aptitude test, as set out in Article 14 of the Directive) without the appropriate knowledge. That could in turn could lead to a lowering of standards because the diplomas would simply have to be accepted if compensation measures could not be imposed.[1424] At least the issue of a legal basis for compensation measures is now unproblematic in Switzerland, as the FAC recently held that the provisions about compensation measures in the Professional

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1418 See Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193, para. 17.

1419 Art. 13(2) of the Professional Qualifications Directive.

1420 Berthoud, Geneva, supra note 1007, p. 44 et seq.

1421 Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 29; Case C-153/02, *Neri*, ECLI:EU:C:2003:614, para. 39 et seq.; European Commission, supra note 1103, p. 11 et seq.; BVGer B-166/2014 of 24.11.2014, para. 6.4.

1422 Berthoud, Geneva, supra note 1007, pp. 96–101.

1423 Case C-84/07, *Commission v Greece*, ECLI:EU:C:2008:679, para. 27.

1424 Berthoud, Geneva, supra note 1007, p. 195 et seq.

Qualifications Directive are self-executing and do not need to be implemented in national law.[1425]

Member States may only require compensation measures if either the duration of training is at least one year shorter than required (Article 14(1)(a) of the Directive), the training ‘covers substantially different matters’ (Article 14(1)(b) of the Directive), or the regulated profession includes several activities that are regulated in the host Member State, which do not exist in the home Member State (Article 14(1)(c) of the Directive).[1426]

While Member States may not impose compensation measures if there are no substantial differences, they may require documents listed in Annex VII of the Professional Qualifications Directive. Applicants might therefore be granted recognition of their professional qualifications but be barred from actually practising the profession due to disciplinary sanctions (the so-called two-stage approach, see Chapter 6.3.3.1).[1427]

6.4.1 Levels of qualification

The general system does not set any common minimum standards for training but currently (under the *acquis suisse*) still allows a meaningful comparison of qualification levels, as recognition of professional qualifications is only established for diplomas of the same level or one level lower.[1428] For this purpose, Article 11 of the Professional Qualifications Directive differentiates between five levels of professional qualifications. The levels of the Directive do not correspond to the eight levels of the European Qualifications Framework (EQF).[1429] The Green Paper of 2011 mentions that the EQF might be confused with the levels referred to in the Directive.[1430] For practical purposes, Switzerland takes the levels of the EQF into account when assessing the levels of the Directive.[1431] This idea is also

1425 BVGer B-5945/2018 of 14.01.2019, para. 5.

1426 Art. 14 of the Professional Qualifications Directive, (a) to (c).

1427 Zaglmayer, Vienna, supra note 1027, p. 135.

1428 Art. 13(1)(b) of the Professional Qualifications Directive.

1429 Recommendation of the European Parliament and of the Council on the establishment of the European Qualifications Framework for lifelong learning; see further Kortese (2016/1), supra note 41, p. 48 et seq.

1430 European Commission, *Green Paper Modernising the Professional Qualifications Directive, COM(2011) 367 final of 22.06.2011*, p. 11.

1431 State Secretariat for Research and Innovation, *Erläuternder Bericht - Verordnung über den nationalen Qualifikationsrahmen für Abschlüsse der Berufsbildung,* <https://www.sbfi.admin.ch /sbfi/en/home/bildung/mobilitaet/nqf-vpet.html> (last visited on 28.06.2020), p. 12.

explicitly expressed by Directive 2013/55/EU.[1432] The FAC also makes comparisons with the levels of the ISCED of the UNESCO[1433].[1434]

The first level (Article 11(a) of the Directive) requires an attestation of competence – either a training course or general primary and secondary education, whilst the second level requires a certificate attesting to the successful completion of a secondary education course (Article 11(b) of the Directive). The third level refers to a diploma, which attests a post-secondary education level of at least one year and the completion of a secondary education course (usually required to obtain entry to university or higher education – Article 11(c) of the Directive). For the fourth level a diploma certifying successful completion of training at post-secondary education level of at least three and not more than four years' duration is required (Article 11(d) of the Directive). Finally, the highest level consists of a post-secondary education course of at least four years' duration (Article 11(e) of the Directive). In particular, the distinction between level four and five leaves room for ambiguity because level four (point d) requires training at post-secondary education level of at least three and not more than four years' duration, while level five requires a post-secondary education course of at least four years' duration (point e).

A different qualification level is unproblematic insofar as qualifications on a level 'at least equivalent to the level prior to that which is required' are to be accepted (under the current *acquis suisse*).[1435] The level of the professional qualification is still of some relevance given that Switzerland applies the Professional Qualifications Directive as part of the *acquis suisse* before the amendments of Directive 2013/55/EU were inserted.[1436] If the Joint Committee for the AFMP adopted the new Directive (as amended by Directive 2013/55/EU), this would also diminish the relevance of Article 12(1) of the Directive. According to Article 12(1) of the Directive, formal education that is treated as equivalent is also accepted, including the same level. On the one hand, this rule applies to formal education in the home Member State prior to an amendment that gives access to a profession (acquired rights) and

1432 Recital 11 of Directive 2013/55/EU.

1433 International Standard Classification of Education; see further <http://uis.unesco.org/en/topic/international-standard-classification-education-isced> (last visited on 28.06.2020).

1434 BVGer B-3522/2007 (BVGE 27/2008) of 28.05.2008, para. 3.7.3; BVGer B-3327/2015 of 25.01.2017, para. 4.3.3.

1435 Art. 13 of the Professional Qualifications Directive.

1436 See Annex III Section A para. 1 to the AFMP.

on the other hand, it applies to parallel formal education.[1437] If the home Member State raises the level of training required for admission to a profession, the former type of education is considered to fall under the level of professional qualifications according to Article 12(2) of the Directive if the applicant is granted acquired rights pursuant to national law.[1438]

Distinct levels for the same professions may exist, especially in Federal Member States. In those cases, the level of the relevant regulation is decisive.[1439] Applicants may not however make a comparison with regulated training in the *host* Member State, which is no longer available for *access* to a profession.[1440]

6.4.2 Compensation measures

Under the current Article 14 of the Professional Qualifications Directive (*acquis suisse*), compensation measures can be imposed in three instances. First, they can be imposed if the duration of training is at least one year shorter than required.[1441] Second, compensation measures can be imposed if the training covers substantially different matters.[1442] This requirement is interpreted restrictively by the FAC.[1443] Substantial differences are distinct from situations where the applicant does not exercise the same profession. When the 'differences between the fields of activity are so great that in reality the applicant should follow a full programme of education and training',[1444] the host Member State may decide to prohibit access to a profession. The latter situations fall outside the scope of the Directive.

1437 See Zaglmayer, Vienna, supra note 1027, para. 3.28.

1438 Case C-102/02, *Ingeborg Beuttenmüller v Land Baden-Württemberg*, ECLI:EU:C:2004:264, para. 45; see Zaglmayer, Vienna, supra note 1027, para. 3.28 in which it is argued that Member States are not prevented from discriminating between former training and newer training with lower remuneration for instance, as equivalence only affects the recognition procedure but not the pursuit of the profession. This does not make a difference as Art. 2 AFMP prohibits discrimination. This corresponds to the case law of the CJEU. Comparable professional experience, which is relevant for promotion in the public service must be taken into account: see Case C-15/96, *Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg*, ECLI:EU:C:1998:3, para. 27 et seq.

1439 Zaglmayer, Vienna, supra note 1027, para. 4.9, p. 59.

1440 BVGer B-1332/2014 of 07.05.2015, para. 5.3.

1441 Art. 14(1)(a) of the Professional Qualifications Directive.

1442 Art. 14(1)(b) of the Professional Qualifications Directive.

1443 See BVGer B-7059/2010 (BVGE 2012/29) of 14.08.2012, para. 5.4; BVGer B-655/2016 of 30.06.2017, para. 9.2.

1444 Case C-575/11, *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pronoias*, ECLI:EU:C:2013:430, para. 32.

Member States are obliged to take proportionate measures, especially when the applicant asks only for partial access to a profession (see Chapter 6.4.3).

Finally, according to Article 14(1)(c) of the Directive, compensation measures may be imposed if the regulated profession in the home Member State encompasses multiple regulated activities which do not exist in the home Member State (Article 14(1)(c) of the Directive is no longer included after the amendments inserted by Directive 2013/55/EU).

In the case of compensation measures, the choice between an adaptation period and an aptitude test is in principle left for the applicant to make,[1445] with notable exceptions: 'for professions whose pursuit requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity';[1446] and also for specific professions, such as for nurses, doctors and dental practitioners when recognitions are granted under the general system.[1447] The compensation measure may also take the form of an adaptation period. The adaptation period can be imposed for up to a maximum of three years.[1448]

Under the *acquis suisse*, Member States may derogate from Article 14(1) of the Directive (the choice between an aptitude test and adaptation period) without the consent of the Commission and information from the other Member States.[1449] Under a systematic interpretation, this derogation only affects the institutional mechanism, but does not change the unlawfulness of the competent authorities not offering a choice between an aptitude test and an adaptation period. They are essentially still bound by the CJEU's case law according to Article 16(2) AFMP[1450] and must provide justification. This means that the grounds listed in Article 14(a) to (c) of the Directive are exhaustive.[1451] Article 12 of the Directive provides that a diploma should be treated equally once it has been recognised, and that gives the same access to the profession concerned.

[1445] Art. 14(2) of the Professional Qualifications Directive; see also BVGer A-368/2014 of 06.06.2014, para. 5.2.

[1446] Art. 14(3) of the Professional Qualifications Directive.

[1447] Art. 14(3) subpara. 2 in conjunction with Article 10(b), (c), (d) and (f) of the Professional Qualifications Directive.

[1448] Art. 14(1) of the Professional Qualifications Directive.

[1449] Art. 1(b) para. 1, fourth indent of Section A of Annex III to the AFMP in conjunction with Art. 14(2) of the Professional Qualifications Directive.

[1450] See further Case C-197/06, *Confederatie van Immobiliën-Beroupen*, ECLI:EU:C:2008:229, para. 35 et seq. for the choice between an aptitude test and an adaptation period.

[1451] See Case C-274/05, *Commission v Greece*, ECLI:EU:C:2008:585, para. 44.

Even if an applicant can be required to submit all the relevant documents,[1452] the burden of proof is on the competent authority of the host Member State to show that training in the home Member State does not suffice to exercise the profession in the host Member State.[1453] This aspect is also emphasised by the case law of the CJEU, which states that it is the task of the national authorities to determine whether the professional activities of the applicant can be separated from the rest of the activities covered by that profession.[1454] The amended the Professional Qualifications Directive (by Directive 2013/55/EU) clarifies the procedural aspects. The decision dealing with compensation measures needs to be justified.[1455] The applicant is then at least provided with the following information. First, the level required by the host Member State and the level required in the home Member State. Second, the substantial differences and the reasons why those differences cannot be compensated by experience, training or through lifelong learning.[1456] Professional experience in the EU or a third country must be considered before a Member State may determine the relevant compensation measures.[1457] The competent authorities must also consider relevant practical experience which covers the professional activities in the host Member State partly or even in whole.[1458] In the event that compensation measures are imposed on the applicant and the applicant chooses to take an aptitude test, the host Member State shall carry out that aptitude test within six months of the decision on compensation measures.[1459]

The Professional Qualifications Directive does not state the format that the aptitude test should take, which means that it can be either in writing, orally or even both. To give an example, oral and written exams are required to become a driving instructor in Switzerland, which the FAC confirmed were lawful requirements.[1460] Member States may certainly limit the number of attempts made to pass the aptitude test. The limitation must however

[1452] Berthoud, Geneva, supra note 1007, p. 349 et seq.; see BVGer B-6452/2013 of 04.12.2014, para. 3.5; BVGer B-166/2014 of 24.11.2014, para. 6.4.

[1453] See BVGer B-166/2014 of 24.11.2014, para. 6.3.

[1454] Case C-575/11, *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pronoias*, ECLI:EU:C:2013:430, para. 34.

[1455] Art. 14(6) of the amended Professional Qualifications Directive.

[1456] Art. 14(6)(a) and (b) of the amended Professional Qualifications Directive.

[1457] Art. 14(5) of the Professional Qualifications Directive.

[1458] Joined Cases C-422/09, C-425/09 and C-426/09, *Vandorou and Others*, ECLI:EU:C:2010:732, paras. 69-71.

[1459] Art. 14(7) of the Professional Qualifications Directive.

[1460] See BVGer B-6467/2012 of 27.06.2013, para. B.

correspond to the number of attempts allowed under national law to obtain access to the regulated profession.[1461] The costs are not regulated but should not be higher than national charges according to the Code of Conduct approved by the group of coordinators for Directive 2005/36/EC on the recognition of professional qualifications.[1462]

In the revised Professional Qualifications Directive, Article 14(7) states that the applicant must have the opportunity to take the aptitude test within six months of the initial decision. This clearly limits the scope of an aptitude test. If more than six months were needed to prepare for an aptitude test, than either the aptitude test is too demanding or compensation measures were not sensible in the first place.[1463]

6.4.3 Partial access to a profession

Partial access has been expressly allowed by Article 4f of the Professional Qualifications Directive (as amended by Directive 2013/55/EU, which is not part of the *acquis suisse*). However, partial recognition only constitutes a codification of the case law.[1464] As developed by the case law of the CJEU, and as it is subject to the principle of proportionality,[1465] partial admission under secondary law is still governed on a case-by-case basis.[1466] Partial access does not apply the system of automatic recognition[1467] but the general system of recognition.[1468] Several conditions must be fulfilled to be granted partial access to a profession according to Article 4f of the amended Directive. First, the migrant needs to be a fully qualified professional in his home Member State.[1469] Second, compensation measures for access to the whole and regulated profession in the host Member State are so large that the application of compensation measures would amount to requiring the applicant to complete the full programme of education and training.[1470] Third, the professional activities

1461 Zaglmayer, Vienna, supra note 1027, para. 4.25.

1462 Group of Coordinators for Directive 2005/36/EC, supra note 1358, p. 20, point 13.

1463 Zaglmayer, Vienna, supra note 1027, para. 4.33.

1464 See Kortese, Maastricht, supra note 38, p. 163 et seq.

1465 See Case C-575/11, *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pronoias*, ECLI:EU:C:2013:430, paras. 24-27; Case C-330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos v Administración del Estado*, ECLI:EU:C:2006:45, para. 33.

1466 Art. 4f(1) of the Professional Qualifications Directive.

1467 Art. 4f(6) of the Professional Qualifications Directive.

1468 Art. 4(3), (4) and (6) of the Professional Qualifications Directive.

1469 Art. 4f(1)(a) of the Professional Qualifications Directive.

1470 Art. 4f(1)(b) of the Professional Qualifications Directive.

for which partial access is granted can be objectively separated from other regulated professions in the host Member State.[1471] Even if the criteria stated above are fulfilled, a Member State may refuse partial access due to overriding reasons in the general interest, as long as this measure is proportionate.[1472]

The difficult issue is to find a system which allows for the separation of common skills and thus would allow partial recognition. Advocate General Sharpston proposed in the case *Commission v France* that the test developed by the CJEU in the case *Colegio de Ingenieros de Caminos, Canales y Puertos* v *Administración del Estado* should be extended. In her opinion there are three categories to distinguish the 'narrower profession' from the 'wider profession'. The first category includes general knowledge. The second includes knowledge which is tailored for a certain profession. The third includes parts of the wider profession that have nothing in common with the narrower profession.[1473] Unlike in the case *Colegio de Ingenieros de Caminos, Canales y Puertos/Administración del Estado*, where the CJEU found that Member States are *entitled* to partially recognise diplomas, the Advocate General concluded that Member States are obliged to recognise diplomas when partial recognition is possible. As Advocate General Sharpston pointed out in her Opinion, this view is supported by the case *Beuttenmüller* which looks at the content of the qualifications, and by the fact that it would greatly impede the free movement of persons.[1474] It should be mentioned that free movement may therefore create new professions that did not exist in a Member State before partial admission rules existed. They must however still hold the professional title of their home Member State.[1475] This is also the reason why this rule is seen more as an application of the *Cassis de Dijon* principle than the principle of mutual recognition.[1476] To illustrate, the case *Commission v France* was rather straightforward because it is rather apparent that snowboard and skiing instructors have certain tasks in common, but teach clearly separate skills which go beyond those common skills. As France only regulated the

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1471 Art. 4f(1)(c) of the Professional Qualifications Directive.

1472 Art. 4f(2) of the Professional Qualifications Directive.

1473 *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476, para. 45 et seq.

1474 *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476, not reported, para. 85 and Case C-102/02, *Ingeborg Beuttenmüller v Land Baden-Württemberg*, ECLI:EU:C:2004:264, paras. 50-53.

1475 Art. 4f(5) of the Professional Qualifications Directive and Case C-575/11, *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pronoias*, ECLI:EU:C:2013:430, para. 25.

1476 Diebold, Berne, supra note 67, para. 1149.

profession of skiing instructor, snowboard instructors needed to be qualified as skiing instructors to gain access to their profession.[1477]

Under the *acquis suisse*, partial recognition is still governed by primary law. According to the literature, it is not clear if this concept should be considered new case law in the sense of Article 16(2) AFMP.[1478] No court decision of the Swiss Federal Court is known to the present author which *explicitly* clarifies this matter.[1479] From the case law of the Swiss Federal Court it can be seen that it accepts recognition based on primary law, where there is a pragmatic approach.[1480] *A maiore ad minus*, the concept of partial recognition ought to be accepted under the *acquis suisse*. In addition, the FAC discussed the possibility at least in an *obiter dictum*.[1481] With the extended homogeneity rule of Article 4 of the Draft Institutional Framework Agreement, this discussion would become obsolete since provisions of the respective market access agreements mentioned in Article 2 of the Draft Institutional Framework Agreement (including the AFMP), which refer to concepts of EU law, would not only have to be interpreted according to the case law of the CJEU before but also *after* the date of signature.[1482]

Member States are not obliged to grant partial recognition *ex officio* as stated by the CJEU.[1483] The appeal committee for the Swiss Conference of Ministers for Education also shared the opinion that partial recognition as an issue of public procedural law must be brought forward by the applicant.[1484] This reasoning for partial recognition of professional qualifications under primary law also overlaps with the wording of Article 4f(1) of the Directive: that the Member State for which 'partial access is sought' is the decision-maker. In addition, the case law might lead to the same conclusion as professional organisations opposed the recognition of professional qualifications and Member States offered partial

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[1477] *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476, para. 13 et seq.

[1478] Gammenthaler, Zurich, supra note 40, p. 346 et seq.; see also BVGer B-3503/2016 of 19.03.2018, paras. 5.6.2 for further references.

[1479] See however the *obiter dictum* in BVGer B-3503/2016 of 19.03.2018, para. 5.6.1 et seq.

[1480] BGE 136 II 470 (= Pra 2011 No 37), para. 4.1.

[1481] BVGer B-3503/2016 of 19.03.2018, para. 7.3.1.

[1482] Art. 4 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

[1483] Case C-125/16, *Malta Dental Technologists Association and Reynaud*, ECLI:EU:C:2017:707, para. 50; Berthoud, Geneva, supra note 1007, p. 50.

[1484] Decision B3-2016 of the Rekurskommission (Appeal Committee) EDK/GDK of 11.10.2017, para. 8.

recognition in some cases.[1485] Moreover, Article 1(2) of the Directive lists 'partial recognition' as a separate aim of the Directive. In the present author's opinion, there are good reasons for the authorities to give applicants at least some hints because the Professional Qualifications Directive is difficult to understand and partial access is not even part of the current Directive (*acquis suisse*) but still part of primary law. With the exception of the profession of teachers and electricians (see Chapter 6.5.1), it is difficult to think of a profession in Switzerland where partial access could be applied on a regular basis, but each case must be viewed and assessed separately. This can also be seen in the case law of the CJEU.

In *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pronoias*[1486] partial access was implicitly invoked – the applicant with a diploma as a 'medical masseur-hydrotherapist' sought access to the profession of 'physiotherapist'. However, his profession as a 'medical masseur-hydrotherapist' was not regulated in the home Member State, but only in the host Member State. Without the aid of the court in question, the applicant would probably have filed the wrong application.

In *Commission v France*,[1487] the applicants sought recognition of a diploma and access to the profession of the skiing instructor. It does make sense that applicants apply for access to an existing profession that is regulated, and not to a profession which might not even exist in the host Member State. Even in a situation where professions can be divided, it might be difficult to imagine partial access, as it was not codified until recently.

6.4.4 Common training framework

As a novelty of the amended the Professional Qualifications Directive, *automatic* recognition on the basis of common training principles is regulated by its Article 49a (which is not part of the *acquis suisse*). According to that Article 49a, a common training framework means 'a set of minimum knowledge, skills and competences necessary for the pursuit of a specific profession and is submitted by representative professional organisations'. Proposals

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1485 In the Case C-575/11, *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pronoias*, ECLI:EU:C:2013:430 it is not clear from the facts whether the referring court or the parties raised the issue of partial recognition.

1486 Case C-575/11, *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pronoias*, ECLI:EU:C:2013:430, para. 11 et seq.

1487 *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476.

are submitted to the Commission by professional organisations at the EU or national level.[1488] Common training frameworks must, among other conditions listed in Article 49a(2) of the amended Directive, enable more professionals to move between Member States. Common training frameworks may also be developed for specialisms in the sectoral professions.[1489] Member States are exempt from the obligation of introducing the common training framework if there are no training or education institutions available, if it would adversely affect 'the organisation of its system of education and professional training', 'there are substantial differences between the common training framework and the training required in its territory, which entail serious risks for public policy, public security, public health or for the safety of the service recipients or the protection of the environment'.[1490]

6.4.5 Common training tests

According to Article 49b of the amended the Professional Qualifications Directive (not part of the *acquis suisse*), a common training test means 'a standardised aptitude test available across participating Member States and reserved to holders of a particular professional qualification'. Proposals are submitted by professional organisations at the EU or national level or from one third of the Member States.[1491] The common training test must fulfil the following conditions: It 'enables more professionals to move across Member States', 'the profession to which the common training test applies is regulated, or the education and training leading to the profession concerned is regulated in at least one third of the Member States', 'the common training test has been prepared following a transparent due process, including the relevant stakeholders from Member States where the profession is not regulated' and 'the common training test permits nationals from any Member State to participate in such a test and in the practical organisation of such tests in Member States without first being required to be a member of any professional organisation or to be registered with such organisation'.[1492] A Member State may be exempted from automatic recognition if the profession is not regulated in its territory, due to serious risks for public

[1488] Art. 57c(2) in conjunction with Art. 49(3) of the Professional Qualifications Directive.
[1489] See <http://europa.eu/rapid/press-release_MEMO-13-867_de.htm> (last visited on 28.06.2020).
[1490] Art. 49a(5) of the Professional Qualifications Directive.
[1491] Art. 49b(3) of the Professional Qualifications Directive.
[1492] Art. 49b(2) of the Professional Qualifications Directive.

health or the safety of the service recipients, or if it would make the profession less attractive in its territory.[1493]

In 2019, a common training test for ski instructors was established. It was the result of a pilot project with nine Member States in 2012. It now foresees the automatic recognition of professional qualifications listed in Annex I of the Regulation for ski instructors (covering qualifications of 24 Member States).[1494] Switzerland's diploma(s) are not listed therein.

6.4.6 Swiss case law

6.4.6.1 Relevant diplomas for the assessment

Even if prior case law of the FAC gave the federal authorities a lot of discretion when assessing the equivalence of diplomas, the FAC explicitly states that this case law was overruled.[1495] According to the recent case law, authorities must take into account all diplomas which give access to the specific profession. If there are substantial differences, the federal authorities must assess the compensation measures that are to be imposed.[1496]

6.4.6.2 Professional experience does not suffice as a substitute for a diploma

For the profession of physiotherapist, it was held that professional experience on its own may usually not be regarded as sufficient to replace education or training considering the fact that it does not give insight into 'working methods'.[1497]

6.4.6.3 Legal basis for compensation measures

Compensation measures do not need to be implemented in national law because Article 14 of the Professional Qualifications Directive is self-executing, as held by a decision of the FAC.[1498]

1493 Art. 49b(5) of the Professional Qualifications Directive.

1494 *Commission Delegated Regulation (EU) 2019/907 of 14 March 2019 establishing a Common Training Test for ski instructors under Article 49b of Directive 2005/36/EC of the European Parliament and of the Council on the recognition of the professional qualifications,* OJ [2019] L145, 04.06.2019.

1495 BVGer B-3440/2015 of 17.08.2017, para. 3.6.3.

1496 BVGer B-3440/2015 of 17.08.2017, para. 13.

1497 BVGer B-4060/2019 of 11.11.2019, para. 4.4.

1498 BVGer B-5945/2018 of 14.01.2019, para. 5.

6.4.6.4 *Substantially different matters (Article 14 of the Professional Qualifications Directive)*

6.4.6.4.1 *Teacher for the Spanish language and the principle of mutual trust*

In 2017, a Spanish high school teacher who was allowed to practice her profession in Spain applied for recognition of professional qualifications in Switzerland and made an appeal to the Appeal Committee in 2018 and subsequently to the Swiss Federal Court in 2019. The appellant could only show that she had a diploma which stated that she had completed 480 of her 2,840 hours of education with regard to the Spanish language. The main part of her education concerned the subject of the German language. However, she was admitted to practice in Spain (i.e. to teach Spanish in high school) in Spain and her first language was Spanish. In Switzerland, at least 120 ECTS credits must obtained in the respective subject for high school teachers and 270 ECTS credits in total.[1499] In the end, the Swiss Federal Court simply found that the applicant did not possess a comparable diploma but a diploma mainly consisting of education for a German language teacher.[1500]

In its reasoning, the Swiss Federal Court stated that it did not matter whether the appellant was allowed to practice in Spain nor whether Spanish was her first language because Article 9 of Annex I to the AFMP in conjunction with Article 13 of the Professional Qualifications Directive meant that the same conditions that apply to Swiss nationals to exercise the profession apply.[1501]

This part of the Swiss Federal Court's reasoning is erroneous, for three reasons.
First, the Swiss Federal Court simply forgot to apply the principle of *mutual trust* codified in Article 13 of the Directive. According to that Article it is certainly decisive whether the appellant is allowed to practise in her home Member State as a Spanish language teacher, if she has professional experience and if she seeks to work as one in Switzerland. This is unanimously accepted by the courts and in the literature.[1502] It is essential to note that the underlying principle of *mutual trust* evolved from a mere perspective on non-discrimination

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[1499] BGer 2C_775/2018 of 21.03.2019, para. 3 et seq.
[1500] See BGer 2C_775/2018 of 21.03.2019, para. 6.2.1.
[1501] BGer 2C_775/2018 of 21.03.2019, para. 5.3.
[1502] See, among many others, Zaglmayer, Vienna, supra note 1027, para. 4.2 for further references.

and on free movement restrictions to a comprehensive mutual recognition system (see Chapter 5.2).

Second, the Swiss Federal Court finds that the applicant is not in possession of the necessary diploma with at least 270 ETCS credits (covering 120 ECTS credits in the respective subject concerned). This reasoning misses the important fact that the ECTS credits could offer an indication but that in the end the content of the education and training matters.[1503]

Third, the Swiss Federal Court used the German term *regulierte Berufe* instead of the correct German term *reglementierte Berufe* for the regulated professions used in the Professional Qualifications Directive. This is however only a question of using the correct terminology.[1504]

The question would have been whether substantial differences could have been balanced by a compensation measure and depending on the facts of the case even the qualification level could prove to be problematic.

It should also be noted that – despite the inconsistent wording of the Professional Qualifications Directive – the conditions 'to pursue' the professions ('*Berufsausübung*') are not the first decisive element of the recognition of professional qualifications. Access and the exercise of a profession are distinct (the so-called two-stage approach).[1505] First, a diploma must be recognised. Second, the exercise of a profession will be granted or refused (see Chapter 6.3.3.1).

6.4.6.4.2 Substantially different matters: definition

The term 'substantially different matters' is an undetermined legal notion, which gives the competent authorities some margin of appreciation (discretion), but it should not be too restrictive, in order to guarantee the proper functioning of the AFMP.[1506] The authorities have the burden of proof to show that there are 'substantial different matters'.[1507] According to two decisions of the FAC, a distance learning course cannot *per se* be considered a substantial

[1503] In this sense see: BVGer B-3284/2018 of 16.11.2018, para. 7.4.

[1504] BGer 2C_775/2018 of 21.03.2019, para. 6.3.

[1505] Zaglmayer, Vienna, supra note 1027, para. 3.25 et seq. and para. 3.70.

[1506] BVGer B-429/2014 of 24.11.2014, para. 5.2.

[1507] BVGer B-429/2014 of 24.11.2014, para. 5.1.

difference without an assessment of the diploma in question. The burden of proof lies with the authorities to show substantial differences.[1508]

6.4.6.4.3 Compensation measures and ECTS points

The profession of psychologist has been regulated in Switzerland since 2018, but only relating to the title. The FAC ruled that the federal authorities may not simply refer to missing ECTS credit points of the applicant, but must state why there is a substantial difference for each subject.[1509]

6.4.6.5 Multiple choice aptitude test for opticians

The FAC had to decide whether an aptitude test for opticians is compatible with the Professional Qualifications Directive. The aptitude test for one specific subject consisted of a multiple-choice exam of two hours' duration with 76 questions in total and four to six possible answers for each question. For wrong answers no points or minus points were awarded. A different test was given to candidates who had completed their training in Switzerland. They were assessed by way of a two-hour written exam of multiple choice and open questions, and a 30-minute oral test. For the latter exam the threshold to pass was 60% while the threshold for the aptitude test was 70%.[1510]

The FAC held that distinct thresholds for the aptitude test and the ordinary exam for the optician's profession were not unlawful. The FAC reasoned that the Swiss exam also contained open questions that were more difficult to answer than a multiple-choice test. Candidates for the aptitude test would get 16% to 25% of the points only by guessing the correct answer in the multiple-choice test.[1511]

[1508] BVGer B-429/2014 of 24.11.2014, para. 5.3.1; BVGer B-166/2014 of 24.11.2014, para. 6.4.

[1509] BVGer B-3284/2018 of 16.11.2018, para. 7.4.

[1510] See BVGer B-3738/2012 of 27.02.2013, para. 3.

[1511] See BVGer B-3738/2012 of 27.02.2013, para. 3.3.

6.4.6.6 Lower qualification level

6.4.6.6.1 Austrian teacher for the disabled

The FAC ruled on the recognition of professional qualifications of an Austrian teacher for the disabled (*Diplomierte Behindertenpädagogin*), which was not regulated in Austria. Austrian education fell two levels lower than what was required under Directive 92/51/EEC (now the Professional Qualifications Directive),[1512] and could not be substituted by professional experience according to the FAC. The competent authorities therefore lawfully refused the recognition of professional qualifications.[1513]

6.4.6.6.2 Social care worker

An Italian holding the diploma *Assistente per Comunità Infantili* (social care worker [for children]) applied for recognition of professional qualifications. According to an earlier FAC judgment, the federal authorities were obliged to furnish the necessary documents according to Annex VII and Articles 50 and 51 of the Professional Qualifications Directive.[1514] In this case, the authorities rejected the application based on the assessment that the Swiss profession '*éducateur de l'enfance ES'* was on level (d) in contrast to the applicant's diploma which was assessed as falling under level (b). The FAC however found with regard to the case law of the CJEU that the Swiss profession falls under level (c). Thus, the application could not be denied, and only compensation measures were allowed.[1515] This line of case law will become almost obsolete once Directive 2013/55/EU has been implemented in Switzerland (see Chapter 6.4.1 for details).

6.4.6.7 No legal remedy for professional organisations

The FAC ruled that professional organisations have no legal remedy against decisions for the recognition of professional qualifications unless explicitly stated in the law. This decision simply confirms the settled practice under public procedural law and does not come as a

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[1512] Art. 11(b) instead of (d) of the Professional Qualifications Directive.
[1513] BVGer B-3522/2007 (BVGE 27/2008) of 28.05.2008.
[1514] BVGer B-5129/2013 of 04.03.2015.
[1515] BVGer B-655/2016 of 30.06.2017, para. 8.

surprise.[1516] This seems to be distinct from EU Member States (such as France[1517] and Italy[1518]) because public procedural law is not harmonised.

6.4.6.8 Age requirements

The federal authorities may recognise a diploma but impose a (non-discriminatory) age requirement of 24 years for the pursuit of the profession of driving instructor without violating Article 2 AFMP.[1519]

In the present author's opinion, even if this were considered to be a restriction it could be argued that this restriction is justified for overriding reasons in the public interest, namely to protect consumers and the public from inexperienced instructors. Nevertheless, the FAC did not discuss whether restrictions are covered by the AFMP or whether an age requirement constitutes a restriction. There are many situations where age requirements or age limits are indeed problematic in EU law.[1520]

6.5 Recognition based on professional experience (freedom of establishment)

The system of recognition is based on the recognition of professional experience in Chapter II of the Professional Qualifications Directive, which is derived from Directive 99/42/EC. Directive 99/42/EC combines several directives which were only meant to provide a transitional regime.[1521] It applies to several industrial, commercial and small craft industry professions as listed in Annex IV. Its Article 17 applies to the professions mentioned in list I, Article 18 applies to those mentioned in list II, and Article 19 applies to the profession as stated in list III of Annex IV of the Professional Qualifications Directive. This system relies only on professional experience in professions according to the ISIC nomenclature of the

[1516] BVGer A-6566/2015 of 08.06.2016, para. 4.

[1517] *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476, para. 19.

[1518] Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, para. 40.

[1519] BVGer B-6467/2012 of 27.06.2013, para. 3.

[1520] See e.g. Kremalis, Frankfurt am Main, supra note 724, p. 229 et seq. who critically analyses age limits for medical doctors.

[1521] Schneider, Antwerp, supra note 741, p. 103.

UN.[1522] A diploma or regulated training is therefore not generally required as long as the required professional experience can be shown under Article 17(a) of the Directive. Where a combination of both is required, relevant regulated training has to be accepted even if the training was conducted in another Member State, but only if it was accepted by the home Member State.[1523] Relevant professional experience cannot be acquired in the host Member State before the applicant is qualified.[1524] The host Member may check the authenticity of attestations where it has justified doubts.[1525] Some authorities regularly require certified copies. The group of coordinators published best practice rules with regard to this issue.[1526] In Switzerland, recognition based on professional experience is relevant for the following professions:[1527]

- several professions of the electricity sector;
- building contractors (*Bauunternehmer/entrepreneurs en bâtiment*);
- funeral directors (*Betriebsleiter eines Bestattungsunternehmens/Directeurs d'entreprises de pompes funèbres*);
- technical director for cable cars (*Technischer Leiter von Seilbahnen/Spécialistes des installations de transport par câble*) ;
- inspector of weights and measures (*Vérificateur/Eichmeister*);
- chimney sweep (*Kaminfeger/Ramoneur*):
- farrier (*Hufschmied/Maréchaux-ferrants*);
- aesthetician (*Kosmetiker/Esthéticiens*).

6.5.1 Professions of the electricity sector

The establishing, modifying or servicing of electrical installations is regulated in Switzerland.[1528] In addition, the inspection of electrical installations is regulated.[1529] The drafting of electrical installations, activities concerning telematics, and mere administrative work are not regulated. The ESTI published an Annex with all the regulated activities and

[1522] International Standard Industrial Classification of All Economic Activities: see <https://unstats.un.org/unsd/classifications/> (last visited on 28.06.2020).

[1523] Case 130/88, *van de Bijl*, ECLI:EU:C:1989:349, paras. 28 to 32.

[1524] Berthoud, Geneva, supra note 1007, p. 254; implicitly in this sense: Decision B1-2009 of the Rekurskommission (Appeal Committee) EDK/GDK of 10.11.2010, para. 6.

[1525] Art. 50(3) of the Professional Qualifications Directive.

[1526] Group of Coordinators for Directive 2005/36/EC, supra note 1358 p. 20, points 5 and 6.

[1527] Berthoud, Geneva, supra note 1007, p. 257; see further the database on regulated professions, available at <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=homepage> (last visited on 28.06.2020).

[1528] Art. 2(1) NIV in conjunction with Art 6 NIV.

[1529] Art. 27 NIV.

Swiss permits in detail.[1530] The inspectorate is responsible for the recognition of diplomas according to the BBV *per analogiam*.[1531] While the BBV requires the same level of the diploma,[1532] the current Professional Qualifications Directive also allows the recognition of diplomas that are one level lower under the *acquis suisse*.[1533]

Article 16 et seq. of the Directive lists several possibilities for recognition based on professional experience, notably for the electrician's profession which belongs to Group 379 in list I of Annex IV of the Professional Qualifications Directive.[1534] They range from three to six years of professional experience as a manager or in a self-employed position (depending on the training and the position). Additionally, professional experience must have been lawfully acquired. Whenever a combination of formal qualifications and professional experience is required, the professional experience can also be obtained in a Member State other than that issuing the formal qualifications.[1535] Applicants who do not fulfil one of the abovementioned conditions fall under the general system of mutual recognition of professional qualifications.[1536]

6.5.2 Swiss case law

6.5.2.1 Introduction

The recognition of the profession of electricians would generally fall under the recognition based on professional experience. However, there is no case law known to the present author which discusses recognition based on professional experience. Thus, the recognition of the profession of electricians under the general system as a subsidiary layer for recognition shall be discussed.

[1530] <https://www.sbfi.admin.ch/dam/sbfi/en/dokumente/2017/08/elektrizitaet.pdf.download.pdf/electriciens_e.pdf> (last visited on 28.06.2020).

[1531] Arts. 8(4) and 10a(7) NIV.

[1532] Art. 69a(1) lit. a BBV.

[1533] Art. 13(2)(b) of the Professional Qualifications Directive.

[1534] See BVGer B-3503/2016 of 19.03.2018, para. 3.5.

[1535] Berthoud, Geneva, supra note 1007, p. 254.

[1536] Berthoud, Geneva, supra note 1007, p. 283.

6.5.2.2 Partial access to the profession?

Professions where tasks include the installation, modification, or servicing of electrical systems is regulated.[1537] Even if only a certain percentage of a company must be qualified to carry out those tasks, it does not change the fact that this is a regulated profession.[1538] Fully-qualified electricians are granted access to the professions of the electricity sector either for an installation, an inspection, or with a general or a limited permit.[1539] However, only Swiss nationals may obtain a *limited permit,* which they can do by passing a test if they have obtained a diploma in a similar field (see the corresponding case law in Chapter 6.5.2).[1540] Foreign nationals must ask for their diplomas to be recognised either under the system of professional experience, or under the general system without the option of taking a test to obtain a limited permit. To obtain a limited permit for in-house installations, candidates must have either completed a secondary course as *Elektromonteur oder -zeichner* (electrician fitter or electrician planner) and show proof that they have completed one-year of practical experience under the supervision of an expert. The other option is that the candidate must have completed a secondary education course in a related subject, and show proof of having completed two years of practical experience under the supervision of an expert.[1541] Only Swiss nationals are allowed to take this test.[1542]

In a case of 2018, the federal authorities rejected the application of a German national who was a qualified refrigeration technician, and who also had other certificates. He applied for a permit for the connection of electrical systems, requesting that his professional experience be taken into account, and in case his diploma and professional experience were not deemed to be equivalent, he offered to take an aptitude test.

1537 Art. 6 NIV.

1538 Berthoud, Geneva, supra note 1007, p. 191 et seq.

1539 Art. 7 et seq. NIV.

1540 <https://www.esti.admin.ch/inhalte/pdf/NIV_I/Deutsch/Publikationen/2016_2015/2016-02_eingeschr-bew_ausland-ausbildung_D.pdf> (last visited on 28.06.2020).

1541 Art. 3(2) of the *Verordnung des UVEK über elektrische Niederspannungsinstallationen,* SR 734.272.3.

1542 <https://www.esti.admin.ch/inhalte/pdf/NIV_I/Deutsch/Publikationen/2016_2015/2016-02_eingeschr-bew_ausland-ausbildung_D.pdf> (last visited on 28.06.2020).

That measure is directly discriminatory and there were clearly no reasons to justify it, so it is unlawful.[1543] The FAC held that those who held German diplomas are entitled to take this test based on Article 2 AFMP. It explicitly referred to the case law of partial recognition without ruling on whether partial access is part of the *acquis suisse*, but it concluded that the test for refrigeration technicians is comparable to an aptitude test.[1544]

This case can be classified as atypical because national law gives professionals who are not fully qualified professionals the opportunity to become 'electricians' with a limited permit. The skills held by a refrigeration technician and the other diplomas are, according to the administrative authorities, not comparable to those of an electrician. The FAC simply states that an aptitude test is about the same as the test for graduates of a secondary course in a related field. However, this applies only in this case, as the applicant explicitly requested an aptitude test if that was deemed necessary. This statement is too general. An applicant may not choose if the profession is not the same, as recognition may be denied. The application of the Professional Qualifications Directive could at least be argued in this case due to the other certificates the applicant held, while it is not arguable whether the secondary education course of the migrant was totally unrelated.[1545] Further, applicants who have compensation measures imposed on them may in principle choose between an adaptation period or an aptitude test.[1546] Applicants who have completed an unrelated course may only invoke the partial-access provision of national law for Swiss nationals in conjunction with Article 2 AFMP. This case law was even extended in another case of the FAC to the tests for permits concerning the connection of electrical equipment.[1547]

6.5.2.3 Proportionate compensation measures

In another case before the FAC of 2014 concerning electricians, a Portuguese electrician applied for recognition of his diploma. Training in Portugal took less than nine months.[1548] The competent authorities decided that eight years of professional experience should be

[1543] Art. 2 AFMP in conjunction with Art. 12 of Annex I to the AFMP and the equal treatment of Art. 8 BV.

[1544] BVGer B-3503/2016 of 19.03.2018, para. 7.3.1.

[1545] See BVGer B-748/2018 of 01.05.2018.

[1546] Art. 14(2) of the Professional Qualifications Directive.

[1547] BVGer B-748/2018 of 01.05.2018.

[1548] BVGer A-368/2014 of 06.06.2014, para. 6.1.

considered, but that there were substantial differences between the professions in Switzerland and Portugal.[1549] It offered the applicant a choice between an adaptation period of 18 months and an aptitude test of one and a half hours, which was found to be a proportionate measure.[1550]

6.6 The freedom to provide services under the Professional Qualifications Directive

The provision of services under the *acquis suisse* is limited to 90 days,[1551] but the freedom of services can be stretched to 180 days, if a migrant is providing his or her services at the end of a calendar year, and at the beginning of the next calendar year.[1552]

6.6.1 Title II of the Professional Qualifications Directive

Title II of the Professional Qualifications Directive regulates the provision of services. From a systematic standpoint, Title II is less clearly structured than its counterpart – the freedom of establishment in Title III, which provides that there can be recognition based on the three distinct systems of recognition under that Directive (general system, sectoral system, and system based on professional experience). Title II does not openly distinguish whether professionals who do not fall under Title III could rely on Title II of the Directive. Considering the fact that lawyers must provide services under the title obtained in the home Member State, and in some instances in conjunction with a domestic lawyer who is authorised to practise before the relevant court in the home Member State,[1553] this interpretation is not convincing from a systematic standpoint.[1554] Thus, Title II can only be applied to a profession that would also benefit from Title III of the Directive.[1555] The host

[1549] BVGer A-368/2014 of 06.06.2014, para. 6.3.

[1550] BVGer A-368/2014 of 06.06.2014, para. 7.2.

[1551] Art. 5(1) AFMP.

[1552] See Arts. 5(1) AFMP and 17(a) of Annex I to the AFMP.

[1553] Art. 5 of the Facilitating Services Directive; see Berthoud, Geneva, supra note 1007, p. 226 et seq.

[1554] State Secretariat for Research and Innovation, supra note 967, p. 12.

[1555] Lawyers may invoke the General Recognition Directive (corresponds to the Professional Qualifications Directive) but only when they intend to integrate themselves and practise under the title granted by the home Member State title.

Member State may only impose a prior check for regulated professions with public health or safety implications.[1556]

It was shown above that either the service or the service provider constitutes the necessary cross-border element (see Chapter 4.4.2).[1557] According to Article 5(2) of the Directive the only situations that fall within that Directive's scope are those where the service provider moves, whereby situations where the service provider remains in his home Member State are covered by the Directive on electronic commerce or the Services Directive.[1558] The latter Directives are not part of the *acquis suisse* but the abovementioned situations fall under primary law.

For the freedom to provide services, an extensive recognition procedure – as is provided for the freedom of establishment – would restrict the service providers. An ordinary recognition procedure for the freedom of establishment is bound to take place within three respectively within four months in some cases (Chapters I and II of Title III[1559]).[1560] Considering the fact that the provision of services is limited to 90 days (under the *acquis suisse*), the same recognition procedure would severely diminish the practicability of this procedure. Therefore, Title II of the Directive is evidently more favourable than Title III. The decision whether the application is to be checked and whether an aptitude test is required needs to be taken within one month of receipt of the application. Otherwise, if a certain difficulty arises, the difficulty needs to be resolved within one month, and the decision needs to be finalised within two months.[1561] Most importantly, if the host Member State does not react within the deadlines, the service may be provided.[1562] This rule is distinct from the freedom of establishment where a failure to reach a decision by a certain deadline only gives the applicant the possibility to make a claim for remedies under national law.[1563]

1556 Art. 7(4) of the Professional Qualifications Directive.

1557 Case 155/73, *Sacchi*, ECLI:EU:C:1974:40, paras. 6-8.

1558 *Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') of 08.06.2000,* OJ [2000] L178/43, 17.07.2000; Directive 2006/123/EC ('Services Directive'); see European Commission, supra note 1103, p. 15.

1559 General system of recognition and recognition of professional experience under the freedom of establishment.

1560 See Art. 51(2) of the Professional Qualifications Directive.

1561 Art. 7(4) subpara. 4 of the Professional Qualifications Directive.

1562 Art. 7(4) subpara. 5 of the Professional Qualifications Directive.

1563 See Art. 51(3) of the Professional Qualifications Directive.

Article 5 of the Directive lists the conditions for providing services in another Member State. 'The service provider is legally established in another Member State for the purpose of pursuing the same profession there'.[1564] Two conditions need to be fulfilled. First, according to some scholars, 'legally established' is to be interpreted as meaning 'having a right of residence'.[1565] A right of residence is not *expressis verbis* required in Article 5 of the Directive. It is certain that 'legally established' means that all conditions for the exercise of a profession must be met. Second, service providers must be admitted to practise in their home Member State or have two years of working experience during the last ten years (or one year under the *acquis communautaire*), except when the training is regulated in the home Member State.[1566] A ban due to professional misconduct for instance, even for a short period, is sufficient to fail this requirement of being admitted to practice.[1567]

It is an interesting question whether these two conditions are sufficient to safeguard public interests adequately. Some authors argue that the definition of service providers should be reserved to those who are not only established in their home Member State prior to providing services in the host Member State, but also those who have exercised their profession in their home Member State prior to providing services in another Member State.[1568] The CJEU distinguished the fundamental freedoms in its early case law. The difference between the freedom of establishment and the freedom of services depends on the 'regularity, periodicity and continuity',[1569] whereby services are restricted to 90 days when invoking the freedom of services under the *acquis suisse*, which makes this distinction less problematic.[1570] From the case law, it can be deduced that service providers need to be established while providing services in their home State. Establishment does not however necessarily mean that professional experience in the home Member State had to have been obtained. This is clear for seasonal workers (such as ski instructors) but also stems from the fact that applicants from Member States where the profession is not regulated must only show that they have relevant

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1564 Art. 5(1)(a) of the Professional Qualifications Directive.

1565 Gammenthaler, Zurich, supra note 40, p. 176.

1566 Art. 5(1)(b) of the Professional Qualifications Directive.

1567 European Commission, supra note 1103, p. 16; European Commission, supra note 1106, p. 3 et seq.

1568 See Berthoud, Geneva, supra note 1007, p. 230 who answers this question in the negative.

1569 Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411, para. 22.

1570 This is calculated per calendar year, meaning that a service provider could take 90 days at the end of the year and the next 90 days at the beginning of the next year to provide services for 180 days: see Art. 5(1) AFMP and Art 17(a) of Annex I to the AFMP.

working experience. Fully qualified professionals may therefore provide services even if they cannot show proof of working experience apart from through traineeships.[1571] Service providers who fulfil the conditions of Article 5 of the Directive referred to above are in principle admitted to practice without any prior check of their qualifications except for the situations mentioned below, under the declaration to be made in advance for professions which have health and safety risks and do not benefit from automatic recognition.[1572]

6.6.2 Declaration to be made in advance

One of the aims of the Professional Qualifications Directive was inter alia to facilitate the provision of services.[1573] As mentioned above, Member States may however demand a declaration be made in advance where the service provider first moves from one Member State to another Member State to safeguard their interests.[1574] Article 7 of the Directive requires the declaration to be made in advance. The declaration can be submitted by any means. Member States may request the name and address, the professional title, the establishment, professional experience if relevant, name and address of the professional association if relevant and information about the indemnity insurance.[1575] The documents Member States may require are listed in Article 7(2) of the Directive:

> '(a) proof of the nationality of the service provider;
> (b) an attestation certifying that the holder is legally established in a Member State for the purpose of pursuing the activities concerned and that he is not prohibited from practising, even temporarily, at the moment of delivering the attestation;
> (c) evidence of professional qualifications;
> (d) for cases referred to in Article 5(1)(b), any means of proof that the service provider has pursued the activity concerned for at least two years during the previous ten years;
> (e) for professions in the security sector, where the Member State so requires for its own nationals, evidence of no criminal convictions'

According to Article 5(1) of the Directive Member States may not restrict the freedom to provide services for any reason concerning professional qualifications. Member States may only check professional qualifications from service providers who do not benefit from

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1571 For the same opinion, see European Commission, supra note 1106, p. 4; Zaglmayer, Vienna, supra note 1027, para. 8.5; see however a different opinion: supra note 1568.

1572 Art. 7(4) of the Professional Qualifications Directive.

1573 Recital 6 of the Professional Qualifications Directive.

1574 Recital 7 of the Professional Qualifications Directive; Art. 7(1) of the Professional Qualifications Directive.

1575 See Zaglmayer, Vienna, supra note 1027, para. 8.10 for further references.

automatic recognition (under Title III, Chapter III) where public health or safety implications are concerned.[1576]

Member States must inform service providers 'within a maximum of one month of receipt of the declaration and accompanying documents'. The host Member State must decide within one month whether the service provider is allowed to provide services by checking, or without checking, the professional qualifications – or it must give the reason for the delay.[1577] This deadline only applies if the declaration and the accompanying documents were complete.[1578] Where there are substantial differences (health and safety implications) Member States may require compensation measures.[1579] If the deadlines are not met due to the absence of a response from the authorities, the service may be provided.[1580]

The service provider must abide by those rules of professional conduct of the host Member State that are directly linked to the professional qualifications and specifically to protect consumers pursuant to Article 5(3) of the Directive. The service provider is nevertheless still bound by the rules of his home Member State. The administrative or statutory rules must be *directly* linked 'to rules on the definition of the profession, the use of titles, and serious professional malpractice'. The CJEU held that Article 5(3) of the Directive regulates access to a profession but not the *exercise* of the profession. Consequently, the rules of professional conduct of the host Member State relating to fees and advertising for medical services were not considered to fall under Article 5(3).[1581] The Professional Qualifications Directive does not clarify the consequences of a breach of the rules of professional conduct according to Article 5(3) thereof. Even if this Article is not applicable, violations of the rules of professional conduct may be subject to sanctions within the limits set by primary law under the *acquis suisse* or the Services Directive under the *acquis communautaire*.[1582]

[1576] Art. 7(4) of the Professional Qualifications Directive.

[1577] Art. 7(4)(2) of the Professional Qualifications Directive.

[1578] Last sentence of Art. 7(4)(2) of the Professional Qualifications Directive.

[1579] Art. 7(4)(3) of the Professional Qualifications Directive.

[1580] Art. 7(4)(5) of the Professional Qualifications Directive.

[1581] The CJEU then continued to assess a restriction under primary law as it found that advertisement rules were only regulating the exercise of the profession: Case C-475/11, *Kostas Konstantinides*, ECLI:EU:C:2013:542, paras. 36-41.

[1582] See Zaglmayer, Vienna, supra note 1027, para. 8.25 et seq.

6.6.3 Implementation of Title II of the Professional Qualifications Directive on a national level

Title II of the Professional Qualifications Directive has been implemented by the Federal Act of 14 December 2012 on the Declaration Requirement and the Verification of Service Provider Qualifications in Regulated Professions (BGMD), and the Ordinance of 26 June 2013 on the Declaration Requirement and the Verification of Service Provider Qualifications in Regulated Professions (VMD).[1583] It applies to EU and EEA EFTA diplomas.[1584]

In Annex I to the VMD, all professions where the declaration to be made in advance is compulsory are listed. Some professions are not regulated in every canton but have been added to Annex I to the VMD, such as the profession of limousine driver, which is only regulated in the Canton of Geneva.[1585] From the official report of the federal authorities, it is clear that multiple cantons and associations made remarks concerning non-regulated professions that were added to Annex I of the Professional Qualifications Directive.[1586] According to the Bernese cantonal authorities, the profession of primary teacher should not be regarded as a regulated profession in the Canton of Berne as there is no official requirement to become a primary teacher. However, primary teachers who have a relevant diploma receive higher wages than teachers without an education in primary school teaching.[1587] The arguments made by the Bernese government show a typical misunderstanding of the concept of a regulated profession. Higher wages are sufficient to be considered a regulated profession.[1588] The profession is indirectly regulated by virtue of administrative provisions, which distinguish between primary teachers with a diploma and without a diploma. In contrast, lower wages for teachers with a foreign diploma (due to a

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1583 *Verordnung über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungserbringerinnen und -erbringern in reglementierten Berufen (VMD) of 26.06.2013,* SR 935.011.

1584 Art. 1(2) lit. c BGMD.

1585 See Annex I (5) to the VMD.

1586 <https://www.sbfi.admin.ch/dam/sbfi/de/dokumente/erlaeuternder_bericht.15.pdf.download.pdf/> (last visited on 10.07.2019).

1587 Letter of the Bernese Government to the Federal Government of 03.04.2016, <https://www.sbfi.admin.ch/dam/sbfi/de/dokumente/kanton_bern.10.pdf.download.pdf/kanton_bern.pdf> (last visited on 10.07.2019).

1588 See Berthoud, Geneva, supra note 1007, p. 201.

lower level qualification level) could not be considered in the light of the Directive, but rather under the non-discrimination provisions of the AFMP.[1589]

The BGMD states in Article 2 that the declaration is to be made in advance. Article 2(2) BGMD refers to Article 7 of the Directive, that allows Member States to require a 'written declaration to be made in advance including the details of any insurance coverage' and delegates the responsibility for regulating the details to the Swiss Federal Council. Annual renewal of the declaration is mandatory.[1590] Under Article 7(2) of the Directive (for the first provision or if there is a substantial change), Member States may ask for proof of nationality,[1591] an attestation that the provider is legally established and not barred from pursuing his or her profession,[1592] evidence of professional qualifications,[1593] proof of experience in certain cases,[1594] and – if applied in a non-discriminatory fashion – proof that he or she does not have any convictions.[1595] This possibility has been implemented in Article 3 VMD. The service provider is further required to send several documents concerning nationality, an attestation that the provider is legally established and not barred from pursuing his or her profession, showing proof of experience in certain cases and proof of not having any convictions for professions in the security sector (translated into one of the official languages in Switzerland) to the SERI pursuant to Article 3(a)-(f) VMD.[1596]

1589 See Zaglmayer, Vienna, supra note 1027, para. 3.7, p. 31.

1590 Art. 2(2) BGMD in conjunction with Art. 4(1)(a) VMD; Pursuant to Art. 7(1) of the Professional Qualifications Directive Member States may require that, where the service provider first moves from one Member State to another in order to provide services he shall inform the competent authority in the host Member State through a written declaration made in advance. That declaration must include the details of any insurance cover or other means of personal or collective protection with regard to professional liability. Such declaration shall be renewed once a year if the service provider intends to provide temporary or occasional services in that Member State in that year. The service provider may supply the declaration by any means.

1591 Art. 7(2)(a) of the Professional Qualifications Directive.

1592 Art. 7(2)(b) of the Professional Qualifications Directive.

1593 Art. 7(2)(c) of the Professional Qualifications Directive.

1594 Art. 7(2)(d) of the Professional Qualifications Directive.

1595 Art. 7(2)(e) of the Professional Qualifications Directive.

1596 Those documents include proof of nationality and recent evidence (through an original or certified copy) of the legal establishment in a Member State of the EU/EFTA in which the profession is exercised. The competent authority in the home state must certify that the applicant making a declaration may actually and lawfully perform the profession in question. This attestation must indicate the professional activity in question. This must also indicate that the applicant was not prohibited from exercising the activity either temporarily or permanently at the time the

This applies to every regulated profession according to Annex I to the VMD. Every regulated profession is listed in Annex I of the VMD with the exception of professions which involve the exercise of public authority or regulated professions that *de facto* only exist as salaried employees. The service provider is required to fill in some information about the service provider (Article 2(2) VMD).[1597]

The declaration has to be made to the SERI[1598] through the use of an online declaration system.[1599] The procedure to print the necessary form is easily accessible online. Service providers who do not have internet access may provide the necessary information via telephone. The SERI would print the necessary form in those cases.[1600]

The SERI coordinates the declarations. If an intercantonal body or a cantonal body is competent, as is the case for teachers,[1601] the SERI will inform them immediately about the declaration.[1602] The same applies for the other competent cantonal and federal bodies.[1603] The SERI also informs and sends the notification with the attached documents to the competent authority if public health or safety implications are concerned.[1604] The SERI also informs the

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declaration was made. Other documents include evidence (by a certified copy) of the relevant professional qualifications; evidence of professional indemnity insurance; if neither the pursuit of the profession nor the training of the profession are regulated in the home Member State, then the applicant must provide evidence that he or she has exercised the activity in question in the home Member State for at least two years in the last ten years; and a recent extract from register of convictions (original or certified copy) if the profession is in the security field (e.g. private detective, proprietor of a security firm).

1597 Surname and last name, gender, birth date, nationality, passport number, address, telephone number and email address; regulated profession in Switzerland; the canton where the service provider is providing services; start of service provision; insurance cover or other means of individual or collective protection with regard to professional liability; statement that he or she is not prohibited from practising, even temporarily, at the moment of delivering the attestation nor that proceedings which could lead to a prohibition from practising the regulated profession are pending.

1598 Staatssekretariat für Bildung, Forschung und Innovation (SERI).

1599 Art. 2(1) VMD.

1600 State Secretariat for Research and Innovation, *Erläuternder Bericht - Verordnung über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungserbringerinnen und –erbringern in reglementierten Berufen (Entwurf),* <https://www.sbfi.admin.ch/dam/sbfi/de/dokumente/erlaeuternder_bericht.15.pdf.download.pdf/> (last visited on 02.12.2018).

1601 See Art. 2(4) and Art. 13bis and Art. 13ter of the Reglement über die Anerkennung ausländischer Ausbildungsabschlüsse der schweizerischen Konferenz der kantonalen Erziehungsdirektoren (EDK); see further BGE 136 II 470 (= Pra 2011 No 37).

1602 Art. 4(1)(b) BGMD.

1603 Art. 4(1)(b) and (a) BGMD.

1604 Art. 3(1) BGMD.

cantonal body that is competent for the supervision of the exercise of the profession concerned.[1605]

Article 7(4) of the Professional Qualifications Directive mentions that professions not profiting from automatic recognition and having ‘public health or safety implications’ may be checked. Obviously, this rule does not apply to professions that are listed in Chapter III and are therefore granted automatic recognition. The term ‘safety implications’ covers professions where damage to the physical well-being of patients could occur. Mere financial implications are therefore not in the scope of paragraph 4 (therefore excluding, for example, an estate agent).[1606]

According to Article 3(2) BGMD the competent federal authority may impose an aptitude test ‘if there is a substantial difference between the professional qualifications of the service provider and the training required in the host Member State, to the extent that that difference is such as to be harmful to public health or safety, the host Member State shall give the service provider the opportunity to show, in particular by means of an aptitude test, that he or she has acquired the knowledge or competence that is lacking’.[1607]

Services may be provided if the competent authority has issued a positive decision[1608] or two months after the applicant submitted the declaration and the necessary documents (see further the case law for unlawful suspension in Chapter 6.3.3.2).[1609]

The profession is carried out under the title of the Member State of establishment.[1610] The service provider shall carry out the services under the professional title of the host Member State if his or her title has been verified according to Article 3(2) BGMD (notably with an aptitude test)[1611] or for professions referred to in Title III Chapter III of the Professional Qualifications Directive where the service provider possesses a right of automatic recognition.[1612] In all other cases, the service provider must use the title of the home Member

1605 Art. 8(2) VMD.

1606 See also Berthoud (2010), supra note 987, p. 145. The French term ‘*sécurité publique*’ and the German term ‘*öffentliche Sicherheit*’ are misleading as they are respectively used in the Treaty or in the AFMP (see e.g. Art. 5 of Annex I to the AFMP).

1607 This is also the wording of Art. 7(4)(3) of the Professional Qualifications Directive.

1608 Art. 5(1)(a) BGMD.

1609 Art. 5(1)(b) and (2) BGMD in conjunction with Art. 7(2) VMD in conjunction with Art. 7(4)(2) of the Professional Qualifications Directive.

1610 Art. 7(3) of the Professional Qualifications Directive and Art. 13 VMD.

1611 Art. 14 para. 1(a) VMD.

1612 Art. 14 para. 1(b) VMD.

State.[1613] If there is a risk of confusion, the service provider must put the home Member State in brackets.[1614] Even if the declaration to be made in advance is filled in, service providers are also required to follow the notification procedure at least eight days in advance (see above Chapter 4.4.2.5 and see Chapter 4.4.2.5 for the current negotiations with a four-day waiting period).

6.7 Particularities of the acquis suisse for the professional recognition

6.7.1 Challenging decisions of the Joint Committee Switzerland/EU on the free movement of persons with regard to Annex III to the AFMP before courts

As mentioned above (see Chapter 5.1.2), Article 9 AFMP and Annex III to the AFMP regulate the mutual recognition of professional qualifications between Switzerland and the EU. Article 18 AFMP enables the Joint Committee to update Annex III of the AFMP. The relevant decisions of the respective Joint Committee are easily accessible online.[1615] The decisions for the Joint Committee of the AFMP concerning professional recognition are prepared by a working group for the mutual recognition of professional qualifications.[1616]

The Swiss courts have never ruled on whether decisions of the Joint Committee for the AFMP can be (indirectly) challenged before the Swiss courts known to the present author. In *United Kingdom* v *Council*, the Joint Commission proposed an amendment of Annex II of the AFMP concerning social security coordination which was followed by Council Decision 2011/505/EU. The UK did not take part of the first proposal for a decision because they intended to reach an agreement with Switzerland which would exclude economically inactive persons. Since Switzerland did not agree to this proposition, the Joint Committee for the AFMP and consequently the Commission prepared a proposal for a Council Decision which would also cover economically active persons. After having been adopted against the votes of the UK and Ireland, the UK and Ireland requested the CJEU to annul the latter Council

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1613 Art. 14 para. 2 VMD.

1614 Last sentence of Art. 6(1) BGMD in conjunction with Art. 14 para. 2 VMD.

1615 <https://www.admin.ch/opc/de/european-union/joint-committees/007.000.000.000.000.000.html> (last visited on 25.06.2020).

1616 Two working groups for the Joint Committee on the AFMP were established by Decision No 1/2003 of 16 July 2003 (not published): see instead European Commission, supra note 979; Art. 10 thereof establishes the basis for working groups and experts; Gammenthaler, Zurich, supra note 40, p. 306 et seq.

decision. The CJEU pointed out that the Decision 2011/863/EU of 16 December 2011 implementing the decision of the Joint Committee is based on the correct legal basis (Article 48 TFEU) and not on Article 79 TFEU. The latter is among the provisions of Part III in Title V TFEU where the UK would not have been bound to follow Protocol 21.[1617] The judgment shows that decisions of the Joint Committees can be indirectly challenged before the CJEU by bringing an annulment action, as they are approved by Council decisions,[1618] which was answered earlier, in the negative, in academic literature.[1619]

6.7.2 Administrative cooperation

In the process of recognition of professional qualifications, the competent authorities play a major role. As multiple authorities of different Member States might be competent, the Professional Qualifications Directive provides for several mechanisms to address this issue. Article 56 stipulates that the competent authorities shall work in close collaboration and shall provide mutual assistance in order to facilitate the application of that Directive. According to the case law of the FAC, there is an obligation for national authorities to furnish the relevant information via administrative cooperation when the applicant cannot or is not able to provide the relevant information or documents,[1620] such as whether the profession is regulated in the home Member State.[1621]

Each Member State (including Switzerland[1622]) designates a coordinator for the uniform application of the Professional Qualifications Directive. According to Article 58 of the, the coordination group makes use of the comitology procedure. Switzerland takes part in the deliberation process but has no say in the vote (so-called decision-shaping).[1623] According to Article 56(4) of the Directive the coordinators have the task 'to promote the uniform

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[1617] Case C-656/11, *United Kingdom v Council*, ECLI:EU:C:2014:97, para. 58.

[1618] *Council Decision of 16 December 2011 on the position to be taken by the European Union in the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as regards the replacement of Annex II to that Agreement on the co-ordination of social security schemes,* OJ [2011] L341/1, 22.12.2011.

[1619] See Gammenthaler, Zurich, supra note 40, p. 297 for further references.

[1620] Annex VII of the Professional Qualifications Directive.

[1621] BVGer B-5129/2013 of 04.03.2015, para. 5.1 et seq.

[1622] See Annex III Section A (1.b)(2) AFMP (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

[1623] See State Secretariat for Research and Innovation, supra note 967, p. 45.

application of Directive 2005/36/EC' and 'to collect all the information which is relevant for application of this Directive, such as on the conditions for access to regulated professions in the Member States'. In addition, the Directive foresees the establishment of national contact points. The Swiss contact point is part of the SERI.[1624] Contact points of other Member States and applicants may ask the Swiss contact point for information. While migrants are usually better informed about their home Member States' education systems, the contact points provide information about 'the national legislation governing the professions and the pursuit of those professions, including social legislation, and, where appropriate, the rules of ethics'.[1625]

Directive 2013/55/EU also adds in Article 56(2) of the Directive a rule on the exchange of information for disciplinary and criminal sanctions between Member States. In addition, for several health professionals an alert mechanism is provided in Article 56a of the Directive. Article 57c(2) also brings in the delegation of acts to the European Commission, such as the updating of titles in Annex V to the Directive.[1626]

6.7.3 Fragmentation of rights due to bilateral agreements

The bilateral path established a unique situation for Switzerland for the recognition of professional qualifications. The fragmentation of EU law due to the different bilateral regimes might lead to complex situations, namely between EU law, EEA law and the Swiss-British bilateral agreements, as these frameworks are not complementary. In a situation where a Swiss national obtains an EEA diploma and is moving to an EU Member State, the Swiss national may only invoke the *acquis suisse* which does not regulate the recognition of EEA diplomas against EU Member States (without assessing bilateral Treaties between two States or favourable provisions of national law in this context).[1627] It is interesting to note in this

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1624 Art. 71(2) BBV.

1625 Art. 57 of the Professional Qualifications Directive.

1626 See European Commission, *Report from the Commission to the European Parliament and to the Council on the exercise of the power to adopt delegated acts conferred on the Commission pursuant to Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market information System ('the IMI Regulation') COM/2018/263 final*.

1627 For the same opinion see Zaglmayer, Vienna, supra note 1027, para. 9.4; for a different opinion, see State Secretariat for Research and Innovation, supra note 967, p. 12.

respect that the Withdrawal Agreement for Brexit[1628] includes the recognition of diplomas during a transition phase (including ongoing procedures started prior to the end of the transition phase).[1629] Otherwise, qualifications obtained in the UK as of the withdrawal date would be considered third country diplomas.[1630] Acquired rights are protected (Article 23 AFMP; see Chapter 6.7.4).

6.7.4 Acquired rights under Article 23 AFMP

The AFMP automatically ended for the UK when it leaves the EU because the mixed agreement is based on EU membership. There was no need to separately terminate the AFMP.[1631] This leads to the question of how acquired rights are protected under the regime of the AFMP. In this context (in particular for Swiss and UK nationals, their family members and/or diplomas), the UK and the EU are bound to apply the provisions of the AFMP during the transitional period until 31 December 2020.[1632] Switzerland is not however party to the Brexit Withdrawal Agreement.

Unlike other Treaties, the AFMP explicitly regulates this scenario in Article 23 AFMP. It is often compared to Article 102(6) of the EEA Agreement.[1633] The latter article however only applies when the application of the EEA Agreement has been suspended due to the dynamic adaptation of EEA law and would only apply to free movement rights (rights of residence) and diplomas that have already have been recognised.[1634] Contrary to Article 50(2) TEU, the case law of the CJEU,[1635] and public international law,[1636] which remain silent on the protection of acquired rights, Article 23 AFMP states:

1628 See Arts. 126 and 129 of the Brexit Withdrawal Agreement.

1629 See Art. 27 et seq. of the Brexit Withdrawal Agreement.

1630 See <https://ec.europa.eu/info/files/professional-qualifications_en> (last visited on 17.02.2020).

1631 Art. 1 of the Swiss-UK Brexit Agreement of 19 December 2018; A. Epiney, '«Brexit» und FZA: Zu den Perspektiven der Freizügigkeit zwischen der Schweiz und der EU im Gefolge des «Brexit»', Jusletter 20 March 2017, para. 11.

1632 Arts. 126 and 129 of the Brexit Withdrawal Agreement.

1633 A. Epiney & G. Blaser, 'Art. 9 ALCP', in M. S. Nguyen & C. Amarelle (eds.), *Code annoté de droit des migrations: Accord sur la libre circulation des personnes (ALCP),* Berne (2014), para. 7.

1634 See C. Tobler, 'Und wenn das Abkommen wegfällt? Erworbene Rechte nach Art. 23 FZA', in A. Achermann et al. (eds.), *Jahrbuch für Migrationsrecht 2015/2016 - Annuaire du droit de la migration 2015/2016,* Berne (2016), p. 56 for further references.

1635 See Tobler, supra note 1634, p. 51; Epiney (20.03.2017), supra note 1631, para. 14.

1636 Public international law only applies to States: see Art. 70 VCLT; see further Epiney (20.03.2017), supra note 1631, para. 15.

'In the event of termination or non-renewal, rights acquired by private individuals shall not be affected. The Contracting Parties shall settle by mutual agreement what action is to be taken in respect of rights in the process of being acquired.'

Article 23 AFMP distinguishes between 'acquired rights' and 'rights in the process of being acquired'. The latter category mostly concern rights acquired under social security law covered by Annex II to the AFMP. This is at least suggested by the more restrictive German term *Anwartschaften*.[1637] A definition of the categories is however missing and open to discussion.[1638] It is argued that not every right under the scope of the AFMP automatically falls under Article 23 AFMP. It can be considered as such in particular for existing employment relationships, which are protected by this provision, but it is difficult to argue that service providers may invoke acquired rights.[1639] Tobler asserts that some rights, such as equal treatment and non-discrimination, continue to apply to those with a continued right of residence and not only before the cancellation of the agreement.[1640] As the AFMP does not provide answers on how far the protection of acquired rights reaches,[1641] and leaves the rights in the process of being acquired to a mutual agreement of the Contracting Parties,[1642] it is rather desirable that the UK and Switzerland find a compromise.

Further, the exact moment when the acquired rights or rights in the process of being acquired are protected is not specified and at least ambiguous under the AFMP. Either the time of the notification for the cancellation of the agreement (or membership in the EU) is relevant, or the time when the AFMP ceases to apply.[1643] Academics tend to favour the time when the AFMP ceases to apply in order to guarantee legal certainty.[1644]

1637 C. Tobler, 'After 'Brexit': will rights acquired in the context of the free movement of persons be protected? A comparative perspective', Revista de Direito Constitucional e Internacional 2017, 25 (99), p. 358.

1638 A. Epiney, 'Brexit und die Schweiz: «Mind the Gap»', SRIEL (SZIER/RSDIE) 2019, p. 247.

1639 A. Borghi, 'Art. 23 ALCP', in A. Borghi (ed.), *Le libre circulation des personnes entre la Suisse et l'UE: Commentaire article par article de l'accord du 21 juin 1999,* Geneva (2010), para. 772.

1640 Tobler (2017), supra note 1637, p. 357.

1641 For the same opinion, see: G. Blaser, 'Art. 23 ALCP', in M. S. Nguyen & C. Amarelle (eds.), *Code annoté de droit des migrations: Accord sur la libre circulation des personnes (ALCP),* Berne (2014), para. 5 et seq.; Borghi, supra note 1639, para. 773.

1642 Second sentence of Art. 23 of the AFMP.

1643 Tobler (2017), supra note 1637, p. 357 et seq.; Epiney & Blaser, supra note 1633, para. 4; Borghi, supra note 1639, para. 772, subpara. 2.

1644 Epiney (20.03.2017), supra note 1631, para. 11; Tobler, supra note 1634, p. 45.

Without going into the minute detail, some parts of this uncertainty have now been clarified for the relationship between the UK and Switzerland by the Swiss-UK Brexit Agreement, which was approved on 19 December 2018 by the Swiss Federal Council, aiming at securing the acquired rights acquired under the AFMP.[1645]

Title I of Part 2 defines the scope of the agreement. It applies to Swiss and UK nationals as well as their family members.[1646] Non-discrimination is now *expressis verbis* stated in the Swiss-UK Brexit Agreement.[1647] In addition, Article 4 of the Swiss-UK Brexit Agreement states that persons falling under the scope of the Agreement shall enjoy the rights provided by the agreement for their lifetime unless the conditions are no longer met. The interpretation of the Swiss-UK Brexit Agreement follows the case law of the CJEU in the sense of Article 16(2) AFMP.[1648]

Title II of Part 2 regulates the right of exit, entry, residence as well as the fundamental freedoms of the AFMP (employed as well as self-employed persons, frontier workers, the provisions of services, the purchase and retention of immovable property, but allows restrictions of the right of residence or the right of entry of work based on national legislation after the specified date (after the transitional period).[1649] The provision of services ends five years after the specified date but can be extended every five years by the Joint Committee.[1650] Article 15 also addresses a change of status (such as between student, worker, self-employed person, economically inactive person and family member) which does not in principle hinder Swiss and UK nationals as well as their family members from invoking Part 2 of Title II.

While Part 3 of Title II addresses the coordination of social security systems, Part 4 of Title II of the Swiss-UK Brexit Agreement of 19 December 2018 covers the rules for the recognition of professional qualifications in the sense of the Professional Qualifications Directive as well as the Facilitating Practice Directive and Facilitating Services Directive.[1651] It is interesting to note that the auditor's profession (see Chapter 8.5.1.3) and the recognition based on primary law is not addressed by the Swiss-UK Brexit Agreement.

1645 Art. 1 of the Swiss-UK Brexit Agreement of 19 December 2018.

1646 Art. 10 of the Swiss-UK Brexit Agreement of 19 December 2018.

1647 Art. 7 of the Swiss-UK Brexit Agreement of 19 December 2018.

1648 Art. 4(5) of the Swiss-UK Brexit Agreement of 19 December 2018.

1649 Art. 17 and Art. 23(6) of the Swiss-UK Brexit Agreement of 19 December 2018; <https://europa.eu/newsroom/highlights/special-coverage/brexit_en> (last visited on 10.07.2019).

1650 Art. 23(1)(ii) and (2) of the Swiss-UK Brexit Agreement of 19 December 2018.

1651 Art. 29 of the Swiss-UK Brexit Agreement of 19 December 2018.

As mentioned, the Swiss-UK Brexit Agreement was only drafted for the relationship between Switzerland and the UK, that is to say it affects Swiss and UK nationals.[1652] The wording of Article 29 of the Swiss-UK Brexit Agreement should emphasise that Swiss and EU nationals are covered by the agreement regardless of their residence. A similar agreement ought to be concluded with the UK and the EEA.[1653] The personal scope also includes family members even if they are not explicitly mentioned under this Article pursuant to the explanatory report of the Swiss government.[1654]

The acquired rights are protected as can be seen in Articles 30 (recognised professional qualifications) and 30a (provision of services). It shall also apply for ongoing procedures that started before the specified date (after the transitional period).[1655]

The rights in the process of being acquired are protected according to Article 31. Persons who have either obtained professional qualifications (in the sense of the Professional Qualifications Directive) or a title according to the Facilitating Practice Directive or persons who have started training towards the relevant professional qualifications or title before a specified date but have not started the recognition procedure, are permitted to apply for a recognition decision (the Professional Qualifications Directive) or registration for lawyers (either under their home-Member State title or the host-Member State title according to the respective provisions of the Facilitating Practice Directive and for persons who started training as a lawyer) within four years of the specified date.[1656]

Besides the protection of acquired rights and rights in the process of being acquired, Article 32 goes even further than stipulated by Article 23 AFMP. It also foresees the

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1652 Art. 29 of the Swiss-UK Brexit Agreement of 19 December 2018.

1653 United Kingdom, *Draft for an Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union,* <https://www.gov.uk/government/publications/eea-efta-separation-agreement-and-explainer> (last visited on 23.12.2018).

1654 Art. 10(e) of the Swiss-UK Brexit Agreement of 19 December 2018; see State Secretariat for Migration, *Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens: Abkommen zwischen der Schweizerischen Eidgenossenschaft und dem Vereinigten Königreich von Grossbritannien und Nordirland über die Rechte der Bürgerinnen und Bürger infolge des Austritts des Vereinigten Königreichs aus der Europäischen Union und des Wegfalls des Freizügigkeitsabkommens,* <https://www.sem.admin.ch/dam/data/sem/aktuell/news/2019/2019-03-21/vn-ber-d.pdf> (last visited on 29.07.2019), p. 21, and Art. 29.

1655 Art. 31 of the Swiss-UK Brexit Agreement of 19 December 2018.

1656 Art. 32 of the Swiss-UK Brexit Agreement of 19 December 2018.

protection of recognition procedures that have not yet started as long as either the respective diploma or its training in the sense of Title III of the Professional Qualifications Directive (freedom of establishment) before the specified date.

Even third country diplomas in the sense of Article 2(2) of the Professional Qualifications Directive for persons who have submitted an application for a first recognition or first recognition decisions can be recognised within four years after the specified date.[1657] Not explicitly mentioned in the Swiss-UK Brexit Agreement is however the recognition of third country diplomas based on primary law despite the fact that third country diplomas under secondary law are included and the case law is referred to for the interpretation of the agreement in Article 4(5) of the Swiss-UK Brexit Agreement. Article 7 of the Swiss-UK Brexit Agreement only refers to discrimination and not to restrictions. According to the explanatory report of the Swiss government it should mirror Article 2 AFMP[1658] which does not answer the questions whether restrictions are covered by the agreement and thus whether recognition based on primary law is in the scope of the agreement or must rely on Article 23 AFMP.

Finally, it should be recalled that existing bilateral agreements between Switzerland and the UK could be invoked if the AFMP or a similar regime between Switzerland and the UK ceases to apply, such as the ancient Friendship Treaty between Switzerland and the UK[1659].

6.7.5 More favourable provisions of national law

To complicate the professional recognition of professional qualifications further, applicants may also invoke provisions of national law. Switzerland being a monistic State, public international law is considered part of national law (see Chapter 3.4.2). The AFMP does not preclude the application of more favourable provisions of national law.[1660] This was reiterated by a ruling of the Swiss Federal Court with regard to the rules of the BGBM.[1661]

1657 Art. 32(5) of the Swiss-UK Brexit Agreement of 19 December 2018.

1658 State Secretariat for Migration, supra note 1654, p. 12, and Art. 7.

1659 *Traité d'amité, de commerce et d'établissement réciproque entre la Confédération suisse et sa Majesté la Reine du Royaume-Uni de la Grande-Bretagne et d'Irlande of 06.09.1855, entry into force 06.03.1856,* SR 0.142.113.671; see also Epiney (2019), supra note 1638, p. 251 for further reference.

1660 Art. 12 AFMP.

1661 BGE 136 II 470 (= Pra 2011 No 37), para. 5.3.

The FAC has decided on the profession of opticians in numerous rulings.[1662] The Swiss authorities altered the education and the curriculum of opticians. Earlier opticians obtained a diploma of higher education in Switzerland, but today they hold a Bachelor's degree after successful completion of their studies (at the level of *Fachhochschulen* [universities of applied sciences]). The SERI has now refused to acknowledge the German diploma based on advanced vocational education and training (diploma as a 'master craftsman') under the Professional Qualifications Directive without imposing a choice of any compensation measures. It was argued that the qualifications should be considered one level below the newly educated opticians of Switzerland under the general system, but noted that there are substantial differences considering the duration and the subject-matter of the education.[1663] It is important to note that the Directive does not require a comparison with diplomas that no longer exist in a Member State.[1664] Under the general system, Member States may alter the requirements for the exercise of a profession. Professionals who were recognised prior to the amendment may invoke acquired rights (see Chapter 6.2.4.6), while qualifications of new applicants have to be compared to the amended requirements for access to a profession. In a leading case of 2015 concerning opticians however, the FAC did not apply the Professional Qualifications Directive, but it relied on the bilateral Agreement between Switzerland and Germany of 1937 and based its ruling on the *pacta sunt servanda* principle in customary public international law, as the Vienna Convention on the Law of the Treaties does not apply retroactively[1665].[1666] The bilateral Agreement between Germany and Switzerland allows the automatic recognition of professional qualifications for the optician's profession. This Agreement was therefore found to be applicable and more favourable. Compensation measures could not be demanded from the applicant who had a master craftsman's diploma.

[1662] See BVGer B-2158/2006 of 29.03.2007; BVGer B-2159/2006 of 28.03.2007; BVGer B-2160/2006 of 24.05.2007; BVGer B-2165/2006 of 31.05.2007; BVGer B-2168/2006 of 03.05.2007; BVGer B-2170/2006 of 28.03.2007; BVGer B-2171/2006 of 11.04.2007; BVGer B-2174/2006 of 24.05.2007; BVGer B-2180/2006 of 12.07.2007; BVGer B-2183/2006 of 28.08.2007; BVGer B-2185/2006 of 03.05.2007; BVGer B-2191/2006 of 15.05.2007; BVGer B-1884/2014 of 13.07.2015; BVGer B-2869/2014 (BVGE 2015/14) of 25.02.2015; BVGer B-2701/2016 of 18.12.2018.

[1663] BVGer B-2869/2014 (BVGE 2015/14) of 25.02.2015, para. C.

[1664] BVGer B-1332/2014 of 07.05.2015, para. 5.3.

[1665] *Agreement between Switzerland and Germany of 01.12.1937; partly cited in BBl 1937 III 491.*

[1666] BVGer B-2869/2014 (BVGE 2015/14) of 25.02.2015, para. 3.2.3.

The FAC ruled on a similar case with an Austrian diploma relying on the Professional Qualifications Directive instead of national law in 2017 (see the discussion in Chapter 6.7.6).

6.7.6 Landmark case of 4 April 2017: Hierarchy of norms

On 4 April 2017, the FAC had to decide whether a Swiss national could rely on his Austrian advanced vocational education and training in optometry (diploma as a 'master craftsperson'). Switzerland reformed the education of opticians. The Swiss authorities altered the education and the curriculum of opticians. While earlier opticians obtained a diploma of higher education in Switzerland, today they hold a bachelor's degree after successful completion of their studies at the level of *Fachhochschulen* (universities of applied sciences). The application was explicitly limited to the question whether the applicant's diploma is equivalent to a Swiss diploma of higher education. Subsequently, the SERI refused to assess the equivalence of the Austrian master craftsman's diploma with the Swiss diploma of higher education. It argued that the diploma of higher education is no longer offered in Switzerland. The applicant only asked for recognition in comparison with this diploma, so an assessment of equivalence was not carried out. This situation needs to be distinguished from the case law of the CJEU when a Member State recognises the equivalence of old and new diplomas to protect acquired rights.[1667]

The FAC overruled its previous case law with its decision of 17 August 2017. The appeal of the SERI before the Swiss Federal Court was unsuccessful.[1668] The FAC openly acknowledged that this judgment overrules a line of previous case law which gave the federal authorities more discretion when assessing diplomas.[1669] The FAC held that Article 2 AFMP as well as Articles 13 and 14 of the Professional Qualifications Directive require the authorities to take into account all of an applicant's diplomas when comparing the relevant diplomas.[1670] The rules on mutual recognition of professional recognition of the Professional Qualifications Directive overrule provisions of national law[1671] which provide that the

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[1667] See Case C-102/02, *Ingeborg Beuttenmüller v Land Baden-Württemberg*, ECLI:EU:C:2004:264, para. 45.

[1668] BGer 2C_472/2017 of 07.12.2017.

[1669] Overruling: BVGer B-342/2008 of 23.06.2009, BVGer B-6791/2009 of 08.11.2010 and BVGer B-5495/2012 of 04.06.2014.

[1670] BVGer B-5372/2015 of 04.04.2017, para. 6.4.2.

[1671] Art. 68 of the BBG in conjunction with Art. 69a BBV.

relevant diploma must be of the same level (Article 69a BBV).[1672] Even before these rulings, it was clear that Article 14 of the Directive is self-executing.[1673] The decision of the FAC is in principle well-founded and clearly structured. It states every possible source of law, which could apply to this case, including the rarely cited standstill clause in Article 13 AFMP which does however not apply against the state of origin (see Chapter 4.2.2.5).[1674] In the end, the FAC found that Article 15(1) Annex I to the AFMP (equal treatment) *and* Article 2 AFMP (non-discrimination – similar to and inspired by Article 18 TFEU[1675]) had been violated. It did not answer whether the measure should be regarded as direct or indirect discrimination. This decision was upheld by the Swiss Federal Court in this form.[1676] From the result, the decision is convincing. Nevertheless, the judgment would have been structured differently if it had been ruled by the CJEU. Considering the different function of the CJEU compared to a national court, this is not surprising. Nevertheless, the FAC could have relied solely on secondary law, namely on Article 13(1) of the Directive. The FAC even states that Article 13(1) of the Directive is clear and precise. This Article is self-executing and was not correctly implemented by the national authorities.[1677] The FAC however primarily relied on Article 2 AFMP (non-discrimination) and Article 15(1) of Annex I to the AFMP (equal treatment for self-employed workers). Article 2 AFMP corresponds with Article 18 TFEU.[1678] Unlike Article 18 TFEU, Article 2 AFMP can also be applied in conjunction with the fundamental freedoms. The case law of the Swiss Federal Court also applies Article 2 AFMP without another article in conjunction.[1679] Its material scope is however limited to Annexes I, II and III of the AFMP.[1680] The scope of Article 2 AFMP is also limited by case law.[1681]

1672 BVGer B-5372/2015 of 04.04.2017, para. 5.4.

1673 See Berthoud, Geneva, supra note 1007. p. 76.

1674 BVGer B-5372/2015, para. 6.2.

1675 See further Epiney & Blaser, supra note 1212, para. 2.

1676 BGer 2C_472/2017 of 07.12.2017, para. 3.4.

1677 BVGer B-5372/2015 of 04.04.2017, para. 5.4 for further references.

1678 See further Epiney & Blaser, supra note 1212, para. 2.

1679 See supra note 871; BGE 129 I 392, para. 3.2.3.

1680 The case law of the Swiss Federal Court is less clear on this point: see supra note 871 for further references.

1681 See Chapter 4.4.2.2; Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 39.

In the present author's opinion, the judgments of the Swiss courts when applying the AFMP should mirror the case law of the CJEU as closely as possible. The CJEU will usually only address the fundamental freedoms when secondary law is not applicable or when it is still useful for the national court. In the Grand Chamber judgment *Wächtler*, the CJEU only assessed a violation of Article 15(2) of Annex I to the AFMP without looking into Article 2 AFMP.[1682] Even if Article 2 AFMP can be applied when there is a more specific provision, it should only act on its own as a subsidiary lawyer when no specific free movement provision is applicable.[1683] Even if it is clear from the wording that Article 2 AFMP applies to all the Annexes of the AFMP, a parallel interpretation of the AFMP would make it easier to follow the case law of the CJEU in the future. Such interpretation should start by using the terminology of the CJEU. Thus, the FAC should have clearly stated that this measure constitutes indirect discrimination.

Finally, the standstill clause was only mentioned but not assessed, and would also have been violated given that (new) indirect discrimination was found to have occurred if it were an EU citizen in this case (which it was not). Due to the restrictive wording of the standstill clause (Article 13 AFMP; see the full citation in Chapter 4.2.2.5) Swiss nationals may however not invoke the standstill clause against their home Member State.[1684]

1682 Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138.

1683 In this sense: J. Kläser, 'Die Einwirkungen des Rechts der Europäischen Union auf die schweizerische Steuerrechtsordnung: Eine Bestandesaufnahme', Jusletter 2 May 2016, p. 11; COMCO, supra note 1063, para. 64.

1684 See Boillet, supra note 766, para. 3.

6.8 Conclusion to Chapter 6

This Chapter has illustrated the regime for the recognition of professional qualifications under Directive 2005/36/EC – the Professional Qualifications Directive – and the application of the principle of *mutual trust*. The scope of that Directive is almost the same as for the AFMP and also encompasses third country nationals with derived rights, such as family members according to Article 3(5) of Annex I to the AFMP. It does not however apply to long-term residents and refugees under the *acquis suisse*. The recognition of professional qualifications does not apply in situations where the rights are fragmented due to separate agreements of Switzerland with the EU Member States and the EEA EFTA countries existing (without assessing more favourable provisions of national law: see Chapters 6.2 and 6.7.3).

This Chapter shed some light on the relevant case law of the CJEU and Swiss courts:

- Contrary to the existing academic literature, the CJEU ruled that the decision of the EU-Swiss Joint Committee can be indirectly challenged before the CJEU by an annulment action, as they are approved by Council decisions.
- For the Professional Qualifications Directive, the CJEU had to decide in its earlier case law whether the training for the harmonised professions covered by Title III, Chapter III must be obtained mainly in the EU, similarly to what is prescribed by the rules of the general system. Contrary to the rules of the general system, it ruled in the case *Tennah-Durez* that under Directive 93/16/EEC Member States must also recognise EU diplomas where the training was mainly received in a third country, provided that the Member State awarding the diploma had checked the minimum training conditions, because only the Member State who issues the diploma is relevant. According to the European Commission, this case law developed in *Tennah-Durez* still applies under the current Directive. Third country diplomas must be recognised if the migrant shows that he or she has completed three years of professional experience in the Member State that recognised the diploma. The recognition falls under Article 10 of the Directive. If the migrant cannot show that he or she has three years of professional experience, the recognition based on primary law applies in the light of the *Hocsman* ruling even though it is disputed whether restrictions are covered by the AFMP. This seems to be the position of the Swiss

Government and is also supported by the pragmatic approach of the Swiss Federal Court with a view to the recognition under the regime of primary law (see Chapter 6.2.5).

- In practice, prior language requirements are inherently problematic according to the case law of the CJEU (see Chapter 6.3.2.1). Nevertheless, according to a decision of the EFTA Court, Member States may also refuse the recognition of professional qualifications and not only the exercise of a profession based on the lack of knowledge of languages. It is however more convincing to adopt a two-stage approach which is in conformity with the case law of the CJEU. The recognition of professional qualifications is in principle automatic, whereas the exercise of a profession can be blocked on the basis of a lack of language skills.
- A prominent case of the FAC, decided by five instead of the regular three judges in 2017, did not distinguish between primary and secondary law but relied in its reasoning on a combination of both when deciding on equal treatment and discrimination. It did not even distinguish whether the measure constitutes direct or indirect discrimination and mentioned but did not discuss the standstill clause of the AFMP (see Chapter 6.7.3).
- In a case of 2019, the Swiss Federal Court did not apply the principle of *mutual trust* to an applicant who was admitted to practice in her home Member State. Regardless of the outcome of this particular case, it is essential to note that the underlying principle of *mutual trust* evolved from a mere perspective on non-discrimination and on free movement restrictions to a comprehensive mutual recognition system.
- With the amendment Directive 2013/55/EU not having been implemented, the comparison of qualification levels still plays a role in the case law of Swiss courts, namely the FAC.
- Unlike some EU Member States, professional organisations have no legal remedy against decisions concerning professional qualifications in Switzerland as held by the FAC and according to settled practice under Swiss public procedural law.

It was shown in this Chapter that the *acquis suisse* is not always up to date. Recognition based on primary law is implicitly accepted by the Swiss Federal Court and the recent case

law of the FAC and openly by the Swiss Government: so there is no reason why the concept of partial recognition should not be part of the *acquis suisse* based on the provisions of primary law, notwithstanding the fact that Article 4f of the Professional Qualifications Directive is not yet applicable (see Chapter 6.4.3). The evolution of secondary law in this field was halted, inter alia, by the popular initiative against mass immigration. Even before that, the Directive was only transposed after a delay, and the Swiss titles have been introduced by decisions of the EU-Swiss Joint Committee of the AFMP (see Chapter 6.7).

With the withdrawal of the UK from the EU, the protection of acquired rights is explicitly provided for in Article 23 AFMP. It is distinct from Article 102(6) EEA. Article 23 AFMP remains relatively vague. For instance, the exact moment when the acquired rights or rights in the process of being acquired are protected is not specified but left to interpretation or preferably to a mutual agreement of the Contracting Parties. Some parts of this uncertainty have now been clarified for the relationship between the UK and Switzerland with a new Swiss-UK Brexit Agreement, which addresses the recognition of diplomas for ongoing procedures (acquired rights in the process of being acquired) and even for recognition procedures not yet started within four years of withdrawal which is not mentioned by Article 23 AFMP. The Swiss-UK Brexit Agreement remains unclear concerning the protection of recognition based on primary law, such as the recognition of third country diplomas. In addition, the auditor's profession is not mentioned in the agreement.

Finally, the national adaptation of the declaration to be made in advance was discussed in this Chapter. In principle, the implementation of the declaration to be made in advance in Switzerland is based on the Professional Qualifications Directive and is unproblematic. It was mentioned that the education and the exercise of several professions is regulated on cantonal or intercantonal level while the coordination of Title II of the Directive follows a federal approach. This approach requires a constant exchange of information by the respective authorities.

Part IV: Mutual recognition of professional qualifications of selected health and legal professions

7 Recognition for selected health professions under Directive 2005/36/EC and the application of the sectoral system

7.1 Introduction

This Chapter analyses several selected health professions. More specifically, it delves into the health professions of doctors of medicine with basic training, general practitioners, specialised doctors as well as dentists and pharmacists. Furthermore, the professions of nurses for general care and midwives are explored to some extent. Chapter 7 does not go into every detail of the selected health profession but is an overview, discussing the current case law of the courts in this area. It also explains how Switzerland implemented EU law in domestic legislation. These professions amount to a significant number of applicants in Switzerland each year as shown below and are thus highly relevant, namely to show the sectoral system of recognition, considering the rich case law of Swiss courts.

When focusing on Switzerland's domestic legislation for the selected health professions, two Federal Acts are relevant. First, the Swiss Act on medical practitioners ('MedBG') governs the recognition of medical professionals on a university level (such as general practitioners, veterinaries and pharmacists). Second, the Act on health care professionals ('GesBG') regulates the professional recognition from other health professions (university-level applied sciences or PET college), notably for nurses and midwives. For the selected health professions in this study, most recognition processes concern the (direct) recognition of EU diplomas. The most important home Member States for medical doctors in Switzerland are Germany, Italy, France, Austria and Romania.[1685] In 2014, 2015, 2016, 2017 and 2018 at least three times more diplomas in basic medical training were recognised than awarded in Switzerland (3,292 recognised diplomas in 2018).[1686] In Germany only 6,162 applications were made in 2018 for medical doctors[1687] despite the fact that Germany's population was

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1685 <https://www.bag.admin.ch/bag/de/home/zahlen-und-statistiken/statistiken-berufe-im-gesundheitswesen/statistiken-medizinalberufe1.html> (last visited on 26.06.2020).

1686 <https://www.bag.admin.ch/bag/de/home/zahlen-und-statistiken/statistiken-berufe-im-gesundheitswesen/statistiken-medizinalberufe1/statistiken-aller-medizinalberufe.html> (last visited on 26.06.2020).

1687 <https://www.anerkennung-in-deutschland.de/images/content/Medien/2018-statistik-bund.pdf> (last visited on 26.06.2020).

roughly over ten times larger than the Swiss population.[1688] The number and ratio per 100,000 inhabitants of practising 'physicians' as of 2016 is as follows:

Country	Switzerland	The Netherlands	Germany	Austria
Practising physicians	35,592	59,569	344,755	44,816
Ratio per 100,000 inhabitants	425.06	349.78	418.65	512.96
Country	France	Italy	Liechtenstein	
Practising physicians	223,724	239,642	124	
Ratio per 100,000 inhabitants	313.14	395.27	328.77	

Table 3: Practising physicians in Switzerland, its neighbouring countries, and the Netherlands in 2016 [1689]

In Switzerland, the recognition of professional qualifications for health professions under the MedBG are as follows:

Year of recognition	2014	2015	2016	2017	2018
Medical doctors	2576	3109	2948	2949	3292
Veterinary surgeons	81	93	74	95	160
Pharmacists	234	264	246	292	201
Dentists	479	459	347	400	341
Specialised dentists	48	52	48	56	36
Specialised medical doctors	1294	1677	1573	1528	1392

Table 4: Recognition of professional qualifications concerning health professions under the MedBG (EU and third country diplomas) in Switzerland [1690]

1688 See <https://ec.europa.eu/eurostat/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1> (last visited on 26.06.2020).

1689 <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=hlth_rs_phys&lang=en> (last visited on 26.06.2020) and <https://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00044> (last visited on 26.06.2020).

1690 <https://www.bag.admin.ch/bag/de/home/zahlen-und-statistiken/statistiken-berufe-im-gesundheitswesen/statistiken-medizinalberufe1/statistiken-aller-medizinalberufe.html> (last visited on 26.06.2020).

The rules laid down in Chapter III concern the automatic recognition of professional qualifications for the so-called sectoral professions. Compared to the general system, the method of recognition used in Chapter III follows very strict rules *inter alia* for nurses, midwifes, doctors (general practitioners and specialised doctors), dental practitioners, pharmacists, architects and veterinary surgeons. While the general system offers many options even if the professional qualifications of the applicant are not deemed equivalent, the sectoral system only deals with specific professions. To this end, the general system acts as a subsidiary layer for those who do not fulfil the rigid conditions for recognition of professional qualifications under Chapter III of the Professional Qualifications Directive.[1691] Chapter III not only sets out an automatic recognition regime but also provides for harmonisation of training requirements for specific professions, in the sense that the Directive lays down minimum standards.[1692]

The rules for the system of automatic recognition are laid down in Article 21 et seq. of that Directive. This Article obliges Member States to recognise the evidence of formal qualifications listed in Annex V to the Directive and give such evidence the same effect for the purpose of access and pursuit of the profession if the applicant fulfils the conditions of the respective professions. In principle, Member States may not make the recognition dependent on criteria that are additional to those listed in Article 21 et seq. of the Directive[1693] for recognition and Article 50 of the Directive for the pursuit of the profession. A Member State may check the authenticity of the certificates required. For this purpose, the competent authorities of the home Member State must confirm the evidence of formal qualifications.[1694] However, automatic recognition of professional qualifications does not mean that the *pursuit* of the profession is granted automatically even if the recognition of professional qualifications is carried out in the same step as the authorisation to practice (the so-called two-stage approach[1695]). It should be recalled that the CJEU has ruled on the inadmissibility of prior language testing (see Chapter 6.3.2.1).

1691 The method used in Chapter II under the general system is more flexible. Proof of knowledge and aptitude is required but a lack of training can be compensated by showing practice under the general system.

1692 Berthoud, Geneva, supra note 1007, p. 260 et seq.

1693 Arts. 24, 25, 31, 34, 35, 38 and 44 of the Professional Qualifications Directive for the health sector.

1694 Art. 50(2) of the Professional Qualifications Directive.

1695 Zaglmayer, Vienna, supra note 1027, paras. 3.25 et seq. and 3.70; see Chapter 6.3.3.1.

Annex V lists the evidence of formal qualifications in the respective national language, the body awarding the qualification, the certificate in the national language and the reference date. The reference date refers to the date by which the evidence of formal qualifications should have been implemented by the respective Member State (either by new secondary law or accession of a State to the EU).[1696] For applicants who have obtained a diploma where training started before the reference date, the protection of acquired rights allows the recognition of professional qualifications under certain circumstances (see Chapter 6.2.4.6). The following professions in Annex V shall be discussed in the subsequent Chapters:

Annex V, V.1, point 5.1.1	Basic medical training
Annex V, V.1, point 5.1.2	Specialised doctors
Annex V, V.1, point 5.1.3	Training course in specialised medicine
Annex V, V.1, point 5.1.4	General practitioners
Annex V, V.2, point 5.2.2	Nurses responsible for general care
Annex V, V.3, point 5.3.2	Dental practitioners
Annex V, V.3, point 5.3.3	Specialised dentists
Annex V, V.4, point 5.4.2	Veterinary surgeons
Annex V, V.5, point 5.5.2	Midwifes
Annex V, V.6, point 5.6.2	Pharmacists

Table 5: Medical professions listed in Annex V

Annex V is not exhaustive for several reasons. First, diplomas granted by EEA EFTA countries and Switzerland are not listed in Annex V but only in the respective association agreements and in the decisions of the Joint Committees between Switzerland and the EU or between the EEA and the EU.[1697] Second, Member States may change the bodies or the titles referred to in Annex V after having notified the European Commission according to Article 21(a) of the Professional Qualifications Directive. The amended title is then listed in Annex V but not the earlier versions. Holders of those certificates must therefore have a certificate which attests that they have the necessary evidence of formal qualifications

[1696] Zaglmayer, Vienna, supra note 1027, para. 5.4.
[1697] E.g. Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

according to Annex V but that the title does not correspond to the lists of Annex V.[1698] Third, diplomas of smaller Member States are listed in the Annex even if there is no training and education for a certain specialisation in a specific Member State.[1699] Finally, it should be recalled that the trainings for the specialisations were not entirely harmonised.[1700]

New medical specialisms in point 5.1.3 of Annex V are added if at least two-fifths of the Member States regulate this specialisation and agree to common provisions on training.[1701] Member States are therefore not obliged to take part in the harmonisation process of specialised doctors. Member States may lay down rules for medical specialisations which are not listed in point 5.1.3 of Annex V to the Professional Qualifications Directive, or they may list specialised titles even if they are not awarded in practice in their Member State.[1702] They may also agree between themselves on the recognition of other specialisms (for medical and dental specialisms) not listed in Annex V.[1703] From the wording it is clear that Article 21 of the Directive only allows holders of professional titles to recognise their diplomas in a host Member State which also regulates that kind of, for example, specialised doctor of medicine. In case the host Member State does not lay down rules for the same specialty, applicants must ask for recognition under the general system regime under Article 10(d) of the Directive.[1704] For the sectoral professions, the acquired rights also play a role, as described in Chapter 6.2.4.6.

7.2 Recognition under EU law

7.2.1 Recognition for doctors of medicine with basic training

The training of medical doctors is prescribed by Article 24 of the Professional Qualifications Directive. It states that admission to basic medical training requires the holding of a diploma which gives access to universities. Basic medical training consists of at

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1698 Zaglmayer, Vienna, supra note 1027, para. 5.3 et seq.

1699 Zaglmayer, Vienna, supra note 1027, para. 5.6 who refers to small Member States, such as Malta, Luxembourg and Iceland.

1700 Professional Qualifications Directive, recital 20.

1701 Art. 26 of the Professional Qualifications Directive.

1702 Zaglmayer, Vienna, supra note 1027 para. 5.6.

1703 Last sentence of recital 20 of the Professional Qualifications Directive; European Commission, supra note 1106, p. 12.

1704 Zaglmayer, Vienna, supra note 1027, para. 6.38.

least of six years of study and 5,500 hours of theoretical and practical training. With the amendments added by Directive 2013/55/EU, basic medical training comprises a total of at least five years. Basic medical training still consists of at least 5,500 hours of theoretical and practical training. Member States may now refer to the equivalent ECTS points according to the amended Directive.[1705] The substance of this provision however remains the same when compared with the amended Directive (not yet part of the *acquis suisse*).[1706] The study programme should provide 'adequate knowledge of the sciences in medicine', 'sufficient understanding of the structure, functions and behaviour of healthy and sick persons' and 'adequate knowledge of clinical disciplines and practices'.[1707] The necessary knowledge and skills for basic medical training are listed in Article 24(3) of the Directive.

There are two distinct systems for training doctors. Some countries opted for a system where practical training and theoretical education is combined ('combined system'), whereas in other Member States candidates must complete their theoretical training before starting their practical training ('separated system').[1708] This choice is reflected in point 5.1.1 of Annex V: Member States who follow the *combined system* have an empty column under the heading 'certificate accompanying the qualifications', while Member States who follow the *separated system* must issue a separate certificate for the practical training listed in Annex V.[1709] Switzerland opted for the *combined system* as shown in the following table. Both systems are equal. This also applies to the professional experience which was acquired during the training.[1710]

1705 Art. 24(2) of the amended Professional Qualifications Directive.

1706 See Art. 23(2) of Directive 93/16/EEC (see for the full citation supra note 1164).

1707 Art. 24(3) of the Professional Qualifications Directive.

1708 See Zaglmayer, Vienna, supra note 1027, para. 6.12.

1709 Art. 21(1)(2) of the Professional Qualifications Directive in conjunction with the Professional Qualifications Directive, point 5.1.1 of Annex V.

1710 See Zaglmayer, Vienna, supra note 1027, para. 6.15.

Country	Evidence of formal qualifications	Body awarding the evidence of qualifications	Certificate accompanying the qualifications	Reference date
Switzerland	Eidgenössisches Arztdiplom Diplôme fédéral de médecin Diploma federale di medico	Eidgenössisches Departement des Innern Département fédéral de l'intérieur Dipartimento federale dell'interno		1 June 2002[1711]

Table 6: Swiss titles and qualifications of doctors of medicine

Member States may still decide autonomously which professional activities doctors of medicine are allowed to pursue. They may prohibit medical doctors with basic training from practising independently or from pursuing their profession in a way that allows them to be reimbursed by the social security system.[1712]

7.2.2 Recognition for general practitioners

Specific training in general medical practice is regulated by Article 28 of the Professional Qualifications Directive and the issuance of a diploma is dependent on the completion of basic medical training in the sense of Article 24 of the Directive.[1713] The general practitioner is distinct from specialised doctors because only three years of full-time training is required.[1714] Pursuant to Article 28(5) of the Directive, Member States may even issue evidence of formal qualifications to a doctor who has not completed the training, but has completed distinct supplementary training, provided that the applicant has at least six months' experience in a general medical practice or a centre in which doctors provide primary health care.[1715]

[1711] Point 5.1.1 of Annex V to the Professional Qualifications Directive (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

[1712] Zaglmayer, Vienna, supra note 1027, para. 6.18.

[1713] Art. 28(4) of the Professional Qualifications Directive; six or respectively five years of study are required under the amended Professional Qualifications Directive; Art. 28(1) of the Professional Qualifications Directive.

[1714] Art. 28(2) of the Professional Qualifications Directive. Up to one year of practical training can be included for training carried out on or after 1 January 2006 (Art. 28(2)(2) of the Professional Qualifications Directive).

[1715] Art. 28(5) of the Professional Qualifications Directive.

Country	Evidence of formal qualifications	Professional title	Reference date
Switzerland	Diplom als praktischer Arzt/praktische Ärztin Diplôme de médecin praticien Diploma di medico generico	Praktischer Arzt Médecin praticien Medico generico	1 June 2002[1716]

Table 7: Swiss titles and qualifications of general practitioners

7.2.3 Recognition for specialised doctors

Every Member State in the EU requires that specialists have completed certain medical training. For the specialisms that have harmonised rules, Member States must respect the minimum training periods. Specialist training must consist of theoretical and practical training on a full-time basis at specific establishments.[1717] However, trainings for the specialisations were not entirely harmonised.[1718] Article 26(1) of the Professional Qualifications Directive (at least in the English and French versions[1719]) refers to the respective titles of points 5.1.2 and 5.1.3 of Annex V. Specialisms which were common to at least two Member States before the adoption of the Directive are listed in points 5.1.2 and 5.1.3 of Annex V.[1720] To add new entries to point 5.1.2 and 5.1.3 of Annex V, at least two-fifths of the Member States must have them in common.[1721] As there is no complete harmonisation regime for specialised medical doctors,[1722] Member States may still have different specialisations that are not mentioned in Annex V.[1723] In practice, many specialities or advanced training only exist in some Member States.[1724] A specialised doctor may in principle not invoke automatic recognition if the title is not listed in Annex V (see for exceptions supra note 1698). In particular, this affects doctors who have a specialisation that does not correspond to the specialisations of other Member States (see Article 10(d) of the

1716 Point 5.1.4 of Annex V to the Professional Qualifications Directive (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

1717 See the first sentence of Art. 25(3) of the Professional Qualifications Directive.

1718 Professional Qualifications Directive, recital 20.

1719 The German version of Art. 26(1) *in fine* refers solely to point 5.1.2.

1720 Professional Qualifications Directive, recital 20.

1721 Art. 26(2) MedBG.

1722 Professional Qualifications Directive, recital 20.

1723 See recital 20 of the Professional Qualifications Directive.

1724 See Kremalis, Frankfurt am Main, supra note 724, p. 168.

Directive).[1725] For Switzerland the diploma for specialised doctors is listed in point 5.1.2 of Annex V as follows:

Country	Evidence of formal qualifications	Body awarding the qualifications	Reference date
Switzerland	Diplom als Facharzt Diplôme de médecin spécialiste Diploma di medico specialista	Eidgenössisches Departement des Innern und Verbindung der Schweizer Ärztinnen und Ärzte Département fédéral de l'intérieur et Fédération des médecins suisses Dipartimento federale dell'interno e Federazione dei medici svizzeri	1 June 2002[1726]

Table 8: Swiss titles and qualifications of specialised doctors

The specialisms and the minimum period of training are listed in point 5.1.3 of Annex V to the Directive. Under the amended Directive (not part of the *acquis suisse*), partial exemptions are permissible by a Member State if an applicant already obtained part of a training course during another specialist training up to a maximum of half the amount of time and only for the covered parts.[1727] Specialised doctors who have completed part-time training before the adoption of the first Directive on medical doctors can be required to certify that they were effectively and lawfully engaged in the relevant (regulated) activities for at least three years during the five years preceding the issuance of that certificate.[1728] All the types of training of medical specialists listed in Annex V must be appropriately remunerated.[1729] Member States may also authorise part-time training for specialised doctors which must also be appropriately remunerated.[1730] *A contrario*, there is no obligation stemming from the Directive to remunerate trainees for specialisms that are not listed in Annex V.

1725 Zaglmayer, Vienna, supra note 1027, para. 6.33.

1726 Annex V to the Professional Qualifications Directive, point 5.1.2 according to the amendments of Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

1727 Last sentence of Art. 25(3a)(1) of the Professional Qualifications Directive.

1728 Art. 27(1) of the Professional Qualifications Directive.

1729 Last sentence of Art. 25(3) of the Professional Qualifications Directive.

1730 Art. 22(a) in conjunction with Art. 25 of the Professional Qualifications Directive; Zaglmayer, Vienna, supra note 1027, para. 6.36 for further references.

7.2.4 Recognition for dental practitioners and specialised dentists

In EU law, there is a clear separation between medical doctors and dental practitioners. Dentists are distinct from other general or specialised medical doctors.[1731] The case law lays emphasis on the fact that the professions of dental practitioners and other medical professions in Article 36(2) of the Directive are separate professions, at least for those mentioned in Annex V. Member States are barred from creating a hybrid medical and dentist profession, which benefits from the rules of the automatic recognition procedure.[1732] Member States may not introduce training for specialised courses which lead to a title listed in Annex V where the respective basic training is not required.[1733] The study programme for dental practitioners is listed in point 5.3.1 of Annex V to the Directive. The titles of dental practitioners are separately listed in point 5.3.2 of Annex V thereof. Similar to the recognition of specialised doctors, only diplomas of dentists whose titles are listed in point 5.3.2 Annex V to the Directive are automatically recognised. The basic training of dentists lasts for at least five years with theoretical and practical instruction at a university level on a full-time basis.[1734] The Swiss entry in Annex V, point 5.3.2 for dentists is as follows:

Country	Evidence of formal qualifications	Body awarding the evidence of qualifications	Certificate accompanying the evidence of qualifications	Professional title	Reference date
Switzerland	Eidgenössisches Zahnarztdiplom Diplôme fédéral de médecin-dentiste Diploma federale di medico-dentista	Eidgenössisches Departement des Innern Département fédéral de l'intérieur Dipartimento federale dell'interno		Zahnarzt	1 June 2002[1735]

Table 9: Swiss titles and qualifications of dental practitioners

[1731] Art. 36(2) of the Professional Qualifications Directive.

[1732] See Recital 21 of the Professional Qualifications Directive; Zaglmayer, Vienna, supra note 1027, para. 6.48 for further references; Case C-40/93, *Commission v Italy*, ECLI:EU:C:1995:157, para. 25.

[1733] Case C-492/12, *Conseil national de l'ordre des médecins*, ECLI:EU:C:2013:576, para. 40 et seq.

[1734] Art. 34(2) of the Professional Qualifications Directive.

[1735] Point 5.3.2 of Annex V to the Professional Qualifications Directive(amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

Specialist dental training consists of at least three years of training on a full-time basis.[1736] Unlike specialised doctors of medicine, there is no guarantee of appropriate remuneration for trainees who are specialising in dentistry.[1737] Pursuant to point 5.3.3 of Annex V to the Directive, the dentist specialisms are as follows:

Country	Evidence of formal qualifications	Body awarding the evidence of qualifications	Reference date
Switzerland	Diplom für Kieferorthopädie Diplôme fédéral d'orthodontiste Diploma di ortodontista	Eidgenössisches Departement des Innern und Schweizerische Zahnärzte-Gesellschaft Département fédéral de l'intérieur et Société Suisse d'Odonto-stomatologie Dipartimento federale dell'interno e Società Svizzera di Odontologia e Stomatologia	1 June 2002
Oralchirurgie/ Mundchirurgie			
Country Switzerland	Evidence of formal qualifications Diplom für Oralchirurgie Diplôme fédéral de chirurgie orale Diploma di chirurgia orale	Body awarding the evidence of qualifications Eidgenössisches Departement des Innern und Schweizerische Zahnärzte-Gesellschaft Département fédéral de l'intérieur et Société Suisse d'Odonto-stomatologie Dipartimento federale dell'interno e Società Svizzera di Odontologia e Stomatologia	Reference date 30 April 2004[1738]

Table 10: Swiss titles and qualifications of specialised dentists

7.2.5 Recognition for nurses for general care

Article 31(1) of the Professional Qualifications Directive requires, under the *acquis communautaire*:

- ‘completion of general education of 12 years, as attested by a diploma, certificate or other evidence issued by the competent authorities or bodies in a Member State or a certificate attesting success in an examination of an equivalent level and giving access to universities or to higher education institutions of a level recognised as equivalent; or’
- ‘completion of general education of at least 10 years, as attested by a diploma, certificate or other evidence issued by the competent authorities or bodies in a Member State or a certificate attesting success in an examination of an equivalent level and giving access to a vocational school or vocational training programme for nursing.’

[1736] Art. 35(2)(2) of the Professional Qualifications Directive.

[1737] See Art. 25(3) of the Professional Qualifications Directive.

[1738] Point 5.3.3 of Annex V to the Professional Qualifications Directive (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

Article 31(1) of the Directive sets out requirements under the *acquis suisse*:

- ‘Admission to training for nurses responsible for general care shall be contingent upon completion of general education of 10 years, as attested by a diploma, certificate or other evidence issued by the competent authorities or bodies in a Member State or by a certificate attesting success in an examination, of an equivalent level, for admission to a school of nursing.’

The training of nurses for general care consists of a full-time programme and encompasses at least the programme described in point 5.2.1 of Annex V.[1739] According to Article 31(3) of the Directive, ‘the training of nurses for general care consists of at least three years of study or 4,600 hours of theoretical and clinical training, the duration of the theoretical training representing at least one-third and the duration of the clinical training at least one half of the minimum duration of the training. Member States may grant partial exemptions to persons who have received part of their training on courses which are of at least an equivalent level’. Theoretical and clinical professional knowledge must be acquired by the trainee nurses as part of their training. The theoretical training takes place in nursing schools or universities while the clinical training takes place in hospitals or other health institutions under the responsibility of nursing teachers.[1740]

The recognition of nurses for general care is processed under the sectoral system of recognition under Article 21 et seq. of the Directive, whereas the recognition of specialised nurses is under the general system (Article 10(d), (e), and (f) of the Directive).[1741] For Switzerland, the respective entries of point 5.2.2 of Annex V were amended by the respective decisions of the Joint Committee, and are as follows:

[1739] Art. 31(2) of the Professional Qualifications Directive.

[1740] Art. 31(4) et seq. of the Professional Qualifications Directive.

[1741] For the recognition of nurses under the general system see Berthoud, Geneva, supra note 1007, p. 289 et seq. and Zaglmayer, Vienna, supra note 1027, para. 6.70 et seq.

Country	Evidence of formal qualifications	Body awarding the evidence of qualifications	Professional title	Reference date
Switzerland	1. Diplomierte Pflegefachfrau, diplomierter Pflegefachmann Infirmière diplômée et infirmier diplômé Infermiera diplomata e infermiere diplomato	Schulen, die staatlich anerkannte Bildungsgänge durchführen Écoles qui proposent des filières de formation reconnues par l'État Scuole che propongono dei cicli di formazione riconosciuti dallo Stato	Pflegefachfrau, Pflegefachmann Infirmière, infirmier Infermiera, infermiere	1 June 2002[1742]
	2. Bachelor of Science in nursing	Schulen, die staatlich anerkannte Bildungsgänge durchführen Écoles qui proposent des filières de formation reconnues par l'État Scuole che propongono dei cicli di formazione riconosciuti dallo Stato	Pflegefachfrau, Pflegefachmann Infirmière, infirmier Infermiera, infermiere	30 September 2011[1743]
	3. Diplomierte Pflegefachfrau HF, diplomierter Pflegefachmann HF Infirmière diplômée ES, infirmier diplômé ES Infermiera diplomata SSS, infermiere diplomato SSS	Höhere Fachschulen, die staatlich anerkannte Bildungsgänge durchführen Écoles supérieures qui proposent des filières de formation reconnues par l'État Scuole specializzate superiori che propongono dei cicli di formazione riconosciuti dallo Stato	Pflegefachfrau, Pflegefachmann Infirmière, infirmier Infermiera, infermier	1 June 2002[1744]

Table 11: Swiss titles and qualifications for nurses of general care

7.2.6 Recognition for midwives

To be allowed to train as a midwife, the Professional Qualifications Directive requires either 12 years (10 years under the *acquis suisse*) of general school education (route I) to have been completed, or to have 'evidence of formal qualifications of nurses for general care

[1742] Point 5.2.2 of Annex V to the Professional Qualifications Directive according Annex III to the AFMP (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

[1743] Point 5.2.2 of Annex V to the Professional Qualifications Directive according Annex III to the AFMP (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

[1744] Point 5.2.2 of Annex V to the Professional Qualifications Directive(amended by Decision No 1/2015 of the EU-Swiss Joint Committee).

referred to in Annex V, point 5.2.2' (route II).[1745] Article 43(1)(a) of the Directive provides transitional rules for midwives if the admission requirement was still 10 years of general education (route I) or if training for route II was completed before the reference date in point 5.2.2 of Annex V.

The training of midwives consists of at least three years of full-time training according to point 5.5.1 of Annex V (route I), or 18 months of full-time training according to a programme listed in point 5.5.1 of Annex V (route II).[1746] Automatic recognition for midwives is regulated by Article 41 in conjunction with Article 21 of the Directive. Diplomas are automatically recognised if one of the following criteria is satisfied:

- 'full-time training of at least three years as a midwife...';
- 'full-time training as a midwife of at least two years... contingent upon possession of evidence of a formal qualifications as a nurse responsible for general care referred to in Annex V, point 5.2.2';
- 'full-time training as a midwife of at least 18 months... contingent upon possession of evidence of formal qualifications as a nurse responsible for general care referred to in Annex V, point 5.2.2. and followed by one year's professional practice for which a certificate has been issued in accordance with paragraph 2'.

[1745] Art. 40(2)(a) of the Professional Qualifications Directive.

[1746] Art. 40(1) of the Professional Qualifications Directive.

Point 5.5.1 of Annex V to the Directive lists the following qualifications:

Country	Evidence of formal qualifications	Body awarding the evidence of qualifications	Professional title	Reference date
Switzerland	1. Diplomierte Hebamme Sage-femme diplômée Levatrice diplomata	Schulen, die staatlich anerkannte Bildungsgänge durchführen Écoles qui proposent des filières de formation reconnues par l'État Scuole che propongono dei cicli di formazione riconosciuti dallo Stato	Hebamme Sage-femme Levatrice	1 June 2002[1747]
	2. [Bachelor of Science [Name of the UAS] in Midwifery] "Bachelor of Science HES-SO de Sage-femme" (Bachelor of Science HES-SO in Midwifery) "Bachelor of Science BFH Hebamme" (Bachelor of Science BFH in Midwifery) "Bachelor of Science ZFH Hebamme" (Bachelor of Science ZHAW in Midwifery)	Schulen, die staatlich anerkannte Bildungsgänge durchführen Écoles qui proposent des filières de formation reconnues par l'État Scuole che propongono dei cicli di formazione riconosciuti dallo Stato	Hebamme Sage-femme Levatrice	1 June 2002[1748]

Table 12: Swiss titles and qualifications of midwives

7.2.7 Recognition for pharmacists

To be admitted to the training required to be part of the pharmacist's profession, the Professional Qualifications Directive requires a diploma giving access to the studies in question at universities or higher institutes.[1749] Article 44(2) of the Directive requires

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[1747] Point 5.5.2 of Annex V to the Professional Qualifications Directive (amended by Decision No 1/2015 of the EU-Swiss Joint Committee of the AFMP).

[1748] Point 5.5.2 of Annex V to the Professional Qualifications Directive (amended by Decision No 1/2015 of the EU-Swiss Joint Committee of the AFMP).

[1749] Art. 40(2)(a) of the Professional Qualifications Directive.

evidence of formal qualifications of at least five years, including at least four years of full-time and practical training and a traineeship of at least six months. As a particularity under the sectoral system for recognition, the pharmacist's profession is the only profession that allows Member States to require supplementary professional experience even if the conditions of Article 21 of the Directive have been met. The origin of this particular rule has not been clarified.[1750] Point 5.6.2 of Annex V to the Directive was amended as follows:

Country	Evidence of formal qualifications	Body awarding the evidence of qualifications	Certificate accompanying the evidence of qualifications	Reference date
Switzerland	Eidgenössisches Apothekerdiplom Diplôme fédéral de pharmacien Diploma federale di farmacista	Eidgenössisches Departement des Innern Diplôme fédéral de pharmacien Dipartimento federale dell'interno		1 June 2002[1751]

Table 13: Swiss titles and qualifications of pharmacists

7.3 Implementation of EU law in Switzerland

7.3.1 Recognition for doctors of medicine, general practitioners, specialised doctors, dental practitioners and specialised doctors

Today 5,500 hours of full-time theoretical and practical training are required to have been completed for basic medical training in Switzerland.[1752] Switzerland amended its law and now only provides for one form of training to admit an individual to practise as a general practitioner.[1753] The professions of medical doctors, general practitioners, specialised doctors, dentists and specialised dentists are regulated in Switzerland.[1754] The exercise of any

[1750] Berthoud, Geneva, supra note 1007, p. 265 et seq.

[1751] Point 5.6.2 of Annex V to the Professional Qualifications Directive (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

[1752] Art. 33a(2) MedBG in conjunction with Art. 11d lit. a of the *Verordnung über Diplome, Ausbildung, Weiterbildung und Berufsausübung in den universitären Medizinalberufen (MedBV) of 27.06.2007,* SR 811.112.0; see also for a further reference BVGer B-2601/2019 of 21.04.2020, para. 6.

[1753] Recital 5 of Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP; see Berthoud, Geneva, supra note 1007, p. 260 et seq. for further references.

[1754] <https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html> (last visited on 28.06.2020) and Art. 2 MedBV.

of the abovementioned professions in the private sector is subject to authorisation.[1755] Further, the independent exercise of the medical doctor's profession requires a specialised diploma of medicine irrespective of whether the doctor seeks the approval of the health insurance authorities.[1756] Pursuant to Articles 15 and 21 MedBG, diplomas for doctors of medicine, general practitioners, specialised doctors, dentists and specialised doctors are recognised if this is stipulated by a Treaty. The AFMP (with Annex III)[1757] and the EFTA Convention (with Annex K) are Treaties for the recognition of diplomas. A recognised diploma is considered to have the same effect as a Swiss diploma.[1758] The MEBEKO is competent for the recognition of professional qualifications.[1759] In principle, the universities are responsible for deciding which programmes lead to the respective diploma under the MedBG in accordance with the aim of its provisions.[1760] Universities must be accredited.[1761]

As of 1 January 2018, Switzerland has had a public database for all health professionals under the MedBG, namely for doctors, dentists, chiropractors, pharmacists and veterinary surgeons.[1762] Even service providers are registered in this database.[1763] A similar register exists inter alia for the professions of midwives, nurses and opticians.[1764]

7.3.2 Recognition of nurses for general care

The nurses' (*Pflegefachfrau / Pflegefachmann*) profession is regulated.[1765] The profession of *Pflegefachfrau / Pflegefachmann* will be governed by a new Act on health care professionals, *Bundesgesetz über die Gesundheitsberufe* (GesBG) as of 2020, on a federal

1755 Art. 34(1) MedBG.

1756 Art. 36(2) MedBG; see BGer 2C_668/2012 of 01.02.2013, para. 3.2.2.

1757 See B. Etter, 'Art.15 MedBG', in B. Etter (ed.), *Medizinalberufegesetz: Bundesgesetz vom 23. Juni 2006 über die universitären Medizinalberufe (MedBG),* Berne (2006), para. 2.

1758 Arts. 15(2) and 21(2) MedBG.

1759 Arts. 15(3) and 21(3) MedBG.

1760 Art. 16 MedBG.

1761 Art. 22 et seq. MedBG.

1762 Art. 35 MedBG in conjunction with Art. 5 MedBV.

1763 Art. 35 MedBG.

1764 Art. 12ter of the *Interkantonale Vereinbarung über die Anerkennung von Ausbildungsabschlüsse (IKV)* of 18 February 1993 (Intercantonal Agreement on the recognition of professional qualifications).

1765 <https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html> (last visited on 28.06.2020).

level.[1766] According to the Swiss Federal Council, the GesBG is already in line with the amended Directive, notwithstanding the fact that the amendments brought in by Directive 2013/55/EU are not (yet) part of the *acquis suisse*.[1767] The GesBG covers nurses from *Fachhochschulen* (universities of applied sciences) according to Article 2(1) lit. a GesBG. Graduates from PET colleges are not mentioned under Article 2 GesBG. They also fall under the purview of the GesBG and are allowed to pursue the profession independently pursuant to Article 12(2) lit. a GesBG. The training of nurses with a PET degree is however regulated by the BBG and not by the GesBG.[1768] Article 3 GesBG lists basic skills that are necessary for the pursuit of the profession. Article 4 GesBG specifies the necessary social and personal skills of selected health professionals. The Act regulates the exercise of the profession in an independent manner. According to the Swiss Federal Council, 'independent' means the applicant is not pursuing the profession under supervision of other colleagues of the same profession. To give an example, a nurse who is responsible for a division of nurses in a hospital would be considered to pursue the profession independently even if the nurse were supervised by medical doctors.[1769] While the first draft only addressed nurses who are pursuing the profession outside of the public sector,[1770] the final draft also covers any type of contract or public employment as long as the profession is pursued independently.[1771]

Mutual recognition of professional qualifications for nurses is governed by Article 10 GesBG. Foreign diplomas are either recognised if this is provided for by a Treaty or if the diploma is equivalent based on the level, duration, subjects and practical experience acquired during the professional qualification.[1772] The AFMP and the EFTA Convention qualify as Treaties. The recognition of third country diplomas will be governed by a separate ordinance.[1773] Once the diploma has been recognised, holders of a foreign diploma will be

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[1766] *Bundesgesetz über die Gesundheitsberufe (GesBG),* SR 811.21; see T. Gächter & P. Koller, 'Gesundheitsberufegesetz – Auswirkungen auf die Pflegeberufe', Pflegerecht 2018, p. 2.

[1767] Swiss Confederation, *Botschaft zum Bundesgesetz über die Gesundheitsberufe (BBl 2015 8715) of 18.11.2015*, p. 8777.

[1768] Swiss Confederation, supra note 1767, p. 8723; see further Gächter & Koller (2018), supra note 1766, p. 4.

[1769] Swiss Confederation, supra note 1767, p. 8748.

[1770] Swiss Confederation, supra note 1767, p. 8728 et seq.

[1771] Art. 1 lit. b and Art. 11 GesBG.

[1772] Art. 10(1) lit. b GesBG.

[1773] *Verordnung über die Anerkennung und die Gleichstellung von Bildungsabschlüssen in den Gesundheitsberufen nach dem GesBG (GesBAV) not entered into force*.

granted the same rights as holders of Swiss diplomas.[1774] The introduction of compensation measures is also governed by the GesBG.[1775] The recognition of foreign diplomas for the health professions under the GesBG was delegated to the Swiss Red Cross,[1776] which has also been responsible for the public register since 2015.[1777] The pursuit of the profession is however granted by the cantons, which check whether the applicant fulfils the conditions laid down in Article 12 GesGB.[1778] Service providers from EU Member States or EEA EFTA countries do not require cantonal admission but must make a declaration in advance.[1779] Unlike for other professions, such as lawyers (see Chapter 8.3.1.5), cantonal admissions are not automatically valid in other cantons. To avoid reverse discrimination with service providers from an EU Member State, services can be provided for up to 90 days per year in another canton.[1780] The respective canton adds the applicant to the register.[1781] As of 1 January 2015, the Swiss cantons have had a public database for several professions at the level of *Fachhochschulen* (universities of applied sciences) or PET college, such as for midwives, nurses and opticians.[1782] Even service providers are registered.[1783] A similar register exists for the health professions under the MedBG.[1784]

Applicants are admitted to pursue the profession of nurse independently if they have a 'Bachelor's of Science in Pflege FH/UH' or 'dipl. Pflegefachfrau HF / dipl. Pflegefachmann HF',[1785] if they are trustworthy,[1786] are physically and mentally able to pursue the

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1774 Art. 10(2) GesBG.

1775 Art.10(3) and (4) GesBG.

1776 Swiss Confederation, supra note 1767, p. 8732; see further Gammenthaler, Zurich, supra note 40, footnote 2257 for further references; see further the new Art. 2(1) GesBAV.

1777 Swiss Confederation, supra note 1767, p. 8725.

1778 Art. 11 GesBG.

1779 Art. 15(1) GesBG.

1780 Art. 15(2) GesBG.

1781 Art. 15(1) and (2) GesBG.

1782 Art. 12ter of the *Interkantonale Vereinbarung über die Anerkennung von Ausbildungsabschlüsse (IKV)* of 18 February 1993 (Intercantonal Agreement on the recognition of professional qualifications).

1783 Art. 12ter (1) of the *Interkantonale Vereinbarung über die Anerkennung von Ausbildungsabschlüsse (IKV)* of 18 February 1993 (Intercantonal Agreement on the recognition of professional qualifications).

1784 See Art. 51 MedBG.

1785 Art. 12(1) lit. a in conjunction with Art. 12(2) lit. a GesBG.

1786 Art. 12(1) lit. b GesBG.

profession[1787] and if they speak an official language of the canton in question.[1788] Trustworthiness could mean that the applicants can be required to hand in a criminal record and/or an excerpt of the debt collection register.[1789] According to the Swiss Federal Council, requiring a level B of the Common European Framework for Languages standard is proportionate and adequate.[1790] The canton which grants access to the independent pursuit of the profession is allowed to restrict the pursuit, namely temporal or territorial restrictions.[1791] The respective canton may also revoke the permit to practise if the conditions were not originally fulfilled.[1792] There are disciplinary sanctions for breaches of the GesBG listed in Article 19 GesGB, such as reprimands, fines of up to 20,000 Swiss Francs, and bans from pursuing the profession for six years independently, or *ultima ratio* a definitive ban from pursuing the profession in an independent manner. Bans on pursuing the profession independently take effect in all Swiss cantons.[1793] Today, many cantons require professional experience to be shown before allowing the independent pursuit of the nurse's profession. The Swiss Federal Council however explicitly refrained from adding a requirement because the automatic recognition procedure of the Professional Qualifications Directive would have led to the effect that Swiss nationals would have faced reverse discrimination.[1794]

7.3.3 Recognition for midwives

The midwife's profession (*Hebamme*) will be governed by the new GesBG and follows the same rules as for the nurses, as explained above (see Chapter 7.3.2). The training of midwives leads to the acquisition of a Bachelor's degree at *Fachhochschul*-level (university-level applied sciences) which comprises 180 ECTS points.[1795]

1787 Art. 12(1) lit. b GesBG.
1788 Art. 12(1) lit. c GesBG.
1789 Swiss Confederation, supra note 1767, p. 8748.
1790 Swiss Confederation, supra note 1767, p. 8748.
1791 Art. 13 GesBG.
1792 Art. 14(1) GesBG; see Swiss Confederation, supra note 1767, p. 8751.
1793 Art. 21(1) GesBG.
1794 Swiss Confederation, supra note 1767, p. 8749.
1795 See § 11 and § 13 Studienordnung für die Bachelorstudiengänge Ergotherapie, Physiotherapie, Hebammen, Pflege sowie Gesundheitsförderung und Prävention an der Zürcher Hochschule für Angewandte Wissenschaften of the Canton of Zurich of 24.05.2012.

7.3.4 Recognition for pharmacists

Recognition for pharmacists is in principle unproblematic according to Article 15 MedBG in conjunction with the AFMP. A new problem arises with the new addition of Article 36(2) MedBG as of 1 January 2018, which requires a specialised diploma for pharmacists if they exercise the pharmacist's profession independently in the private sector.[1796]

The new addition of Article 36(2) MedBG sets an additional diploma requirement during the admission phase even if the cantonal authorities are not competent for the recognition of specialised diplomas. It is not directed at the opening of new pharmacies but only at the pharmacist as a professional. The explanatory report simply forgot to address whether this measure is in conformity with EU law.[1797] A previous explanatory report of the Swiss Federal Council stated that exercise of the pharmacist's profession in an independent manner would be part of the AFMP.[1798] The MEBEKO states in the respective form that the 'general rules of recognition with the EU' are applied for the recognition of specialised diplomas in pharmacy.[1799]

As a general rule for the recognition under the sectoral system, Member States have no discretion when it comes to the evidence issued by other Member States.[1800] The question is now whether Switzerland is required to recognise diplomas and allow independent practice for holders of EU diplomas based on Article 44 of the Professional Qualifications Directive.

First, it should also be asked whether the Member States or the EU are competent in this matter.[1801] For medical and dental specialisms, Member States may also agree between themselves on the recognition of other specialisms not listed in Annex V.[1802] Article 168(7) TFEU allows Member States to establish their health policy (and their education according

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1796 See <https://www.fphch.org/Data/Allgemein/Flyer_FPH_d_Web.pdf> (last visited on 10.07.2019).

1797 See Swiss Confederation, supra note 1373.

1798 Swiss Confederation, *Botschaft zum Bundesgesetz über die universitären Medizinalberufe of 3 December 2004 (Medizinalberufegesetz, MedBG; BBl 2005 173)*, p. 226.

1799 <https://www.bag.admin.ch/bag/de/home/berufe-im-gesundheitswesen/auslaendische-abschluesse-gesundheitsberufe/diplome-der-medizinalberufe-aus-staaten-der-eu-efta/direkte-anerkennung-diplome.html> (last visited on 15.07.2019).

1800 Case C–675/17, *Ministero della Salute v Hannes Preindl*, ECLI:EU:C:2018:990, para. 36.

1801 See further Zaglmayer, Vienna, supra note 1027, para. 6.94 et seq.

1802 Last sentence of recital 20 of the Professional Qualifications Directive; European Commission, supra note 1106, p. 12.

to Article 165(4) TFEU and their vocational training according to Article 166(4) TFEU[1803]), organisation and delivery of health services and medical care. Recital 26 of the Professional Qualifications Directive states that Member States may restrict the geographical distribution and the opening of new pharmacies.

Under the current *acquis suisse*, Article 21(4) of the Professional Qualifications Directive allows Member States to ban fully qualified pharmacists from opening new pharmacies, including those pharmacies which have been open for less than three years. This rule is (indirectly) discriminatory and was thus amended by Directive 2013/55/EU and does not apply to pharmacists whose professional qualifications have been recognised for other purposes and have been effectively and lawfully engaged in that Member State for three years.[1804]

Recital 25 of the Directive also recalls that Member States may impose supplementary training conditions for activities not included in list of coordinated activities. The list in Article 44(3) of the Directive contains, inter alia, the preparation, the manufacture, testing and distribution of products. According to Articles 1 and 2 of the Directive, its aim is to establish rules on the recognition of professional qualifications for the employed and the self-employed. Recitals 26 and 27 do not give Member States the discretion to curb the freedom of establishment for the recognition of professional qualifications unless supplementary training is necessary. This system is evident for the ‘specialised pharmacist’ in a hospital in the Netherlands (*Ziekenhuisapotheker*). According to the non-binding database of the European Commission, this specialisation seems to follow the general system of recognition.[1805] Similar specialisations exist for other countries according to the database of the European Commission.[1806]

In the case *Commission v Spain* the CJEU declared that (the general system under) Directive 89/48/EEC (now: the General Recognition Directive) applies for specialised ‘hospital pharmacists’ despite the fact that this profession did not fall under the Directives

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1803 See *Opinion of Advocate General Mischo in Case C-294/00, Gräbner*, ECLI:EU:C:2001:700, para. 77 et seq.

1804 European Commission, supra note 1430, Chapter 4.5, p. 19; see further J. Ludwig, *Der europarechtliche Einfluss auf die Entwicklung des nationalen Heilberuferechts,* Diss. Kiel 2017, Berlin (2018), p. 167 et seq.

1805 <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=regprof&id_regprof=27226> (last visited on 18.06.2019).

1806 <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=regprof&id_regprof=27226> (last visited on 18.06.2019).

85/432/EEC and 85/432/EEC at that time.[1807] Additionally, the Commission commenced infringement proceedings against Portugal in 2006 for failure to implement Directive 89/48/EEC for the profession of 'pharmacist-biologists'.[1808] To conclude, EU law does not in principle forbid Member States from making rules for specialised pharmacists but specialised diplomas must be recognised under the general system of recognition. However, the new addition of the specialised diploma either in private practice or a hospital pharmacy concerns activities which could be considered to be part of the pharmacist's profession and it could be difficult to find a 'narrower' and a 'broader' profession[1809] (*mutatis mutandis*) and thus to distinguish the regulated activities of the two professions because only the exercise of the profession is different.

As a particularity under the sectoral system of recognition, the pharmacist's profession is the only profession that allows Member States to require supplementary professional experience even if the conditions of Article 21 of the Directive have been met according to the wording of Article 45(2) of the Directive. The origin of this particular rule has not been clarified.[1810] To give an example for an unproblematic requirement for professional experience, Austria requires five years of professional experience to have been completed before independent practice is allowed according to § 3 para. 2 *Apothekengesetz*. This requirement is clearly in conformity with Article 45(2) of the Directive.

Considering this specific provision of the Directive, some authors have asked whether 'professional experience' in this Article could be interpreted in a manner to allow such a requirement, which can obviously be answered in the negative.[1811] The aforementioned authors conclude that the explanatory report of the Swiss government remains silent on the conformity of this rule with EU law. They claim that no specialised diploma can be required for pharmacists with an EU diploma as pharmacists who exercise their profession

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1807 Case C-39/07, *Commission v Spain*, ECLI:EU:C:2008:265.

1808 <https://ec.europa.eu/commission/presscorner/detail/en/IP_06_1789> (last visited on 18.11.2019); see also M. Pithan, *Die Richtlinie 2005/36/EG: Anerkennung von Berufsqualifkationen in der Europäischen Union,* Diss. Vienna (2008), Vienna (2008), p. 160.

1809 See for the term 'narrower profession' *mutatis mutandis*: *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476, para. 46.

1810 Berthoud, Geneva, supra note 1007, p. 265 et seq.

1811 V. Rumetsch & T. Poledna, 'Eidgenössischer Weiterbildungstitel im Apothekerbereich – Umsetzungsprobleme', Jusletter 28 January 2019, para. 12 et seq.

independently but without management responsibility. Whether the rule is in conformity with EU law as such is not answered.[1812]

In the author's view, the aforementioned analysis should be followed. The following parts should however be further added to this analysis. Whether the measure is in conformity with EU law, is difficult to answer because it is at least disputable whether a separate activity is regulated that qualifies for a separate recognition. If the same activities are regulated than the recognition would have to be granted automatically for all pharmacists not only specialised pharmacists. Even if the narrower interpretation is however followed, the case law of the CJEU must be taken into account provided by the homogeneity clause in Article 16(2) AFMP. Thus, Switzerland must (at least) recognise specialised diplomas of pharmacists of other Member States in light of the aforementioned case of the CJEU under the general system of recognition for the independent practice with management responsibility.[1813]

Some other aspects are interesting to discuss: One could also argue that the measure only regulates the *pursuit of the profession*. This would mean that the measure does not per se constitute a restriction considering the *Keck* case law *per analogiam* (see Chapter 4.2.2.7). Similar to this train of thought, in the CJEU case *Gräbner*, access to medical practice was not completely barred but the activities of the profession *Heilpraktiker* were reserved for qualified doctors and training as a *Heilpraktiker* was forbidden, and thus held to be in conformity with EU law (see Chapter 6.3.1).

This line of reasoning was also brought forward by the Commission in a case of the EFTA court of 2014 concerning the 'dentist' and dental practitioner professions.[1814] The Austrian profession of 'dentist' allows a limited number of dental services but does not meet the minimum requirements under the Directive to be seen as a fully qualified dentist. The Liechtenstein Health Act required an authorised 'dentist' to exercise the profession in an employed capacity and under the supervision of a dental practitioner.

The EFTA Court found that this rule constitutes a restriction to the freedom of establishment that could be justified by overriding reasons in the public interest or on grounds of public health. The aim is to ensure that the 'dentists' only exercise those activities for which they are qualified. The EFTA Court found the measure to be disproportionate to its

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[1812] Rumetsch & Poledna (28.01.2019), supra note 1811, para. 22.

[1813] See supra note 1807.

[1814] Case E-17/14, *EFTA Surveillance Authority v the Principality of Liechtenstein*, EFTA Court Report 2015, p. 164 et seq., para. 33.

aim. It held that measures, such as supervision or reporting duties, are less restrictive regardless of whether the 'dentist' is employed or self-employed.[1815]

This judgment shows that even if it is argued that the Directive is either not applicable either due to the fact that only the *exercise* is restricted and not the recognition, or if it is argued that either the *Keck* case law *per analogiam* should be applied or that the *Gräbner* case is applicable, the measure must be justified.

To conclude, even if the general system of recognition is not applied, the measure must be non-discriminatory and justified (at least if free movement restrictions are covered by the AFMP or if the measure is considered to be indirect discrimination, as only a few Member States have similar diplomas, or if the pragmatic approach of the Swiss Federal Court is applied).[1816] For Switzerland, the justification of this measure could prove difficult because the training for a specialised diploma in a hospital pharmacy currently only seems to cover subjects which are marginally linked to the independent exercise of the profession.[1817]

7.4 Application of the general system of recognition for the health professions

Particularly for the health professions,[1818] Article 10 of the Professional Qualifications Directive and the general system of recognition apply when the conditions for recognition under the sectoral system have not been met. Those who are subject to this provision are applicants whose diplomas are not listed in Annex V for various reasons. The general system also applies, pursuant to Article 10(d), when only a specialism, which is not listed in Annex V, is recognised. Further, Article 10(e) of the Directive deals with recognition for specialists (nurses in general care and specialised nurses) in a host Member State where the profession is solely exercised by specialised nurses as general care nurses without training as general care nurses. Recognition for specialised nurses is more or less unproblematic, whereas the

1815 Case E-17/14, *EFTA Surveillance Authority v the Principality of Liechtenstein*, EFTA Court Report 2015, p. 164 et seq., para. 37 et seq.

1816 See e.g. Joined Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes*, ECLI:EU:C:2009:316.

1817 *Weiterbildungsprogramm FPH in Spitalpharmazie*, available at, <https://www.gsasa.ch/de/bildung-de/fph-spitalpharmazie/weiterbildung-fph/?oid=10147&lang=de> (last visited on 01.07.2019), para. 3.2.

1818 For doctors with basic training, specialised doctors, nurses responsible for general care, dental practitioners, specialised dental practitioners, veterinary surgeons, midwives and pharmacists.

nurse in general care will most certainly have to complete compensation measures.[1819] Finally, Article 10(f) of the Directive applies for the opposite situation: for specialised nurses who have not had training as a general care nurse and who seek recognition in another Member State.

According to the case law of the CJEU in *Angerer*, Article 10(a) to (g) of the Directive only applies if there are 'specific and exceptional' reasons why the applicant may not benefit from the sectoral system.[1820] The FAC however applied Article 10(d) without having recourse to this unanswered question and applies the general system as a subsidiary layer for the recognition of specialisms of private diplomas (see Chapter 7.8.3).[1821]

7.5 Indirect recognition for the health professions ('reconnaissance de la reconnaissance')

The Swiss Red Cross is responsible for the recognition of health professions within the scope of the GesBG.[1822] From the sheer number of recognitions, the recognition of recognised third country diplomas ('*reconnaissance de la reconnaissance*' or 'indirect recognition') is certainly prevalent among the health professions.[1823] It is therefore an interesting question whether indirect recognition is still left to the Member States with regard to the indirect recognition. For this purpose, the analysis in Chapter 6.2.5.1 can be referred to.

For the health professions within the scope of the MedBG, there is another option. Even if the diploma cannot be recognised under any other provision, the MEBEKO decides on a case-by-case basis how the diploma can be obtained.[1824] A specific exam or even a Swiss degree and a state examination (*eidgenössische Prüfung*) can be required.[1825]

1819 See Berthoud, Geneva, supra note 1007, p. 289 et seq.

1820 Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 27 et seq.

1821 BVGer B-3706/2014 of 28.11.2017, para. 6.3.4. This decision was however annulled by the Swiss Federal Court in June 2019: see BGer 2C_39/2018 of 18.06.2019.

1822 Swiss Confederation, supra note 1767, p. 8732.

1823 See <https://www.redcross.ch/de/srk-dienstleistungen/anerkennung-auslaendischer-ausbildungsabschluesse/zahlen-und-fakten-aus-dem> (last visited on 26.06.2020).

1824 Art. 15(4) MedBG; see further Oesch, supra note 1055, para. 18 et seq.

1825 Etter, supra note 1757, para. 16 et seq.; BVGer B-16/2013 of 13.05.2013, para. 3.

7.6 Recent case law of the CJEU

7.6.1 Repayment of financial contributions

The CJEU found a national measure which requires specialised doctors of medicine to repay up to 70% of their contribution for specialist training if they fail to undertake to practise for five years, in the Province of Bolzano in Italy, to be appropriate to protect the legitimate interests of public health and the financial equilibrium.[1826] The CJEU explicitly referred to the specific situation of the bilingual Province Bolzano.[1827]

7.6.2 Automatic recognition of evidence of formal qualifications

Under the sectoral system, Member States who prohibit enrolment in two full-time training courses (medical and dental training) at the same time must still recognise evidence of formal qualifications of other Member States automatically and unconditionally, even if the diploma was obtained by training carried out simultaneously.[1828] The host Member State does not have discretion to question the decision of the home Member State, except where there are justified doubts under Article 50(2) of the Professional Qualifications Directive.[1829]

7.7 Recent case of law of the EFTA Court

For a discussion about the case of the dental practitioner's profession and the similar profession of a 'dentist' in Liechtenstein[1830] see Chapter 7.3.4.

1826 Case C-419/16, *Sabine Simma Federspiel v Provincia autonoma di Bolzano und Equitalia Nord SpA*, ECLI:EU:C:2017:997, para. 51.

1827 Case C-419/16, *Sabine Simma Federspiel v Provincia autonoma di Bolzano und Equitalia Nord SpA*, ECLI:EU:C:2017:997, para. 49.

1828 Case C–675/17, *Ministero della Salute v Hannes Preindl*, ECLI:EU:C:2018:990, para. 35 et seq.

1829 Case C–675/17, *Ministero della Salute v Hannes Preindl*, ECLI:EU:C:2018:990, para. 38.

1830 See Case E-17/14, *EFTA Surveillance Authority v the Principality of Liechtenstein*, EFTA Court Report 2015, p. 164 et seq.

7.8 Recent case law of Swiss courts

7.8.1 Nuclear Medicine

For a decision of the Swiss Federal Court concerning a doctor with a third country diploma in nuclear medicine[1831] see Chapter 6.2.5.2.

7.8.2 Experience in Switzerland for specialised doctors

Article 55a(2) KVG (added in 2001, extended until 30 June 2021) in its current version states that doctors must not be approved by health insurance funds unless they show that they have three years of practical experience in Switzerland.[1832] For the assessment of whether this rule is conformity with EU law, the Swiss Federal Council pointed out in the *travaux préparatoires* that this measure could be difficult to justify in the light of the case law of the CJEU.[1833]

In 2018, the FAC found Article 55a(2) KVG to be indirectly discriminatory.[1834] Nonetheless, the FAC concluded that the measure is justified by overriding reasons in the general interest, namely the protection of public health pursuant to Article 5 of Annex I to the AFMP.[1835] It also held that this measure does not violate Article 55 of the Directive,[1836] which states:

> 'Without prejudice to Article 5(1) and Article 6, first subparagraph, point (b), Member States which require persons who acquired their professional qualifications in their territory to complete a preparatory period of in-service training and/or a period of professional experience in order to be approved by a health insurance fund, shall waive this obligation for the holders of evidence of professional qualifications of doctor and dental practitioner acquired in other Member States.'

[1831] BGE 132 II 135 (= Pra 96 2007 No 16).

[1832] BVGer C-4852/2015 (BVGE 2018 V/1) of 08.03.2018 and BVGer C-6425/2013 of 19.03.2018.

[1833] Swiss Confederation, *Parlamentarische Initiative. Verlängerung von Artikel 55a KVG. Bericht der Kommission für soziale Sicherheit und Gesundheit des Nationalrates of 24 February 2016. Stellungnahme des Bundesrates (BBl 2016 3525)*, p. 3528 et seq. This is a new standpoint: see the less critical earlier *travaux préparatoires,* Swiss Confederation, *Botschaft zur Änderung des Bundesgesetzes über die Krankenversicherung of 18 February 2015 (Steuerung des ambulanten Bereichs; BBl 2015 2317)*, p. 2340 et seq.

[1834] See further A. Epiney, 'Vorübergehende Wiedereinführung der bedarfsabhängigen Zulassung frei praktizierender Ärzte', Jusletter 22 April 2013, para. 26 who argues that restrictions would also be forbidden.

[1835] BVGer C-4852/2015 (BVGE 2018 V/1) of 08.03.2018, para. 9.6.4.

[1836] BVGer C-4852/2015 (BVGE 2018 V/1) of 08.03.2018, para. 9.3.2.

The reason is that the Article would not be applicable in the case of mere restrictions and in the light of the Swiss Federal Court case law[1837] despite the fact that the measure was then found to be indirectly discriminatory under Article 2 AFMP.

Considering the fact that the reasoning behind this Article is unclear,[1838] this interpretation of Article 55 is rather surprising based on its wording. In the legal literature, it is argued that any prior professional experience can simply not be required and that Article 55a(2) KVG can therefore not be applied.[1839] At least, from a literal interpretation in the light of the Article 31 of the VCLT one could come to the conclusion that this rule forbids some (specific) form of restriction or indirect discrimination. It could also be asked whether provisions should not be interpreted in a way that they are not superfluous.[1840] One author thinks that this rule hints at some possible restrictions for the free movement for medical doctors.[1841] This interpretation would not however exclude grounds for justification. Thus, at first glance, this judgment seems to be in line with the case law of the CJEU, which allows the restrictions of the four freedoms if they are justified. It is true that the CJEU allowed the justification with a view to maintaining a balanced high-quality medical service that is open to all.[1842] In addition, the CJEU in principle also allowed Member States to require a real and effective degree of connection to the host Member States before allowances could be granted.[1843] Generally speaking, limits to the number of pharmacists based on population density were accepted by the CJEU.[1844] The justification is the crucial part, showing that the judgment of the FAC is less intricate than the case law of the CJEU. For an example of a justification, the CJEU had required Austria to give evidence about the number of students registering for courses to assess whether an Austrian measure restricting access to Austrian universities was proportionate.[1845] It has shown that it is undoubtable that Member States

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1837 See BGE 130 I 26, para. 3.

1838 See Berthoud, Geneva, supra note 1007, p. 359; see also European Commission, supra note 1230, and Art. 55 of the Professional Qualifications Directive.

1839 Diebold, Berne, supra note 67, para. 1194.

1840 At least for the interpretation of Swiss law, this rule is common practice: see BGE 112 II 167, para. 2.b.

1841 Kremalis, Frankfurt am Main, supra note 724, p. 222.

1842 Case C-73/08, *Bressol*, ECLI:EU:C:2010:181, para. 62.

1843 Case C-224/98, *D'Hoop*, ECLI:EU:C:2002:432, para. 38; see Epiney (22.04.2013), supra note 1834, footnote 36 for further references.

1844 Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, ECLI:EU:C:2010:300, para. 113.

1845 Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427, para. 66.

have discretion where public health is at stake.[1846] The CJEU has however been stricter when it comes to the assessment of discriminatory measures.[1847] In this sense, Epiney proposed that there needs to be some empirical evidence for the connection with the host Member State (see the previous, similar rule of the KVG) and she also recalls that the Professional Qualifications Directive regulates the recognition which makes it hard to refer to reasons of public health in general. Thus, the reasons for justifications could for example be seen in the familiarity with the Swiss public health system.[1848] In essence, the FAC did not give a clear insight into why this measure was proportionate as it left the decision entirely at the discretion of the federal authorities.[1849]

Finally, the judgment is lacking a critical assessment of the standstill clause, even if one agrees that the standstill clause only forbids direct and indirect discrimination (see Chapter 4.2.2.5), because the FAC clearly held that the measure at hand constitutes indirect discrimination. The cited leading case of the Swiss Federal Court only addresses the issue of restrictions.[1850] Considering the more recent case law of the CJEU concerning the standstill clause in the Ankara Agreement,[1851] it was not addressed whether violations of the standstill clause of Article 13 AFMP can be justified similarly to the case law under the Ankara Agreement (see Chapter 3.3.4).

7.8.3 Specialised doctor in gynaecology and endocrinology

Swiss courts have consistently held that diplomas awarded by private institutions are considered to be part of public law if the relevant institutions are accredited as required by Swiss law. This also applies to specialised doctors of medicine.[1852] In a decision of 2017, the FAC went even further and held that a private diploma showing a specialisation in endocrinology (*Weiterbildung für den Schwerpunkt Reproduktionsmedizin und*

1846 Case C-125/16, *Malta Dental Technologists Association and Reynaud*, ECLI:EU:C:2017:707, para. 60.

1847 Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427, para. 62 et seq.; for the same opinion see also: Epiney (22.04.2013), supra note 1834, p. 8.

1848 Epiney (22.04.2013), supra note 1834, para. 16 et seq.

1849 BVGer C-4852/2015 (BVGE 2018 V/1) of 08.03.2018, para. 9.8.

1850 BGE 130 I 26, para. 3.4.

1851 See Case C-225/12, *C. Demir v Staatssecretaris van Justitie*, ECLI:EU:C:2013:725, para. 40; Case C-138/13, *Naime Dogan v Germany*, ECLI:EU:C:2014:2066, para. 37.

1852 See instead of many BVGer B-3577/2016 of 06.10.2017, para. 2.1.

gynäkologische Endokrinologie) is part of public law as a specialisation in the sense of Article 55(1) lit. d MedBG (overruling existing case law of the FAC[1853]) and must be assessed based on Article 10(d) of the Professional Qualifications Directive.[1854] Very recently in June 2019, the Swiss Federal Court annulled this decision and stated that this specialisation is purely a matter of private law.[1855]

Article 2 of the Reproductive Medicine Ordinance[1856] states that 'any person who uses assisted reproductive techniques requires the Swiss obstetrics and gynaecology specialist title with the gynaecological endocrinology and reproductive medicine specialty or an equivalent recognised foreign specialist title'. The diploma is awarded by a private institution but required by federal law. Thus, it falls under the Directive. As the diploma is not listed in Annex V, it cannot automatically be recognised. It should be noted that some medical specialities are only common in some Member States.[1857] The diploma in 'gynaecological endocrinology and reproductive medicine' was required *in addition* to the diploma as a specialised doctor in gynaecology. The diploma as a specialised doctor in gynaecology had already been recognised in this case before the FAC.[1858] Following this logic, applicants must therefore apply for recognition of their diploma in basic medicine, for their specialised diploma in gynaecology and for the private diploma in endocrinology to be allowed to use assisted reproductive medicine in Switzerland. The Swiss Federal Court has now clarified that this rule lacks a legal basis (it is only required by an ordinance and not by a federal act), and a diploma for the use of assisted reproductive techniques can thus not be required.[1859] It is nonetheless interesting to discuss the case of the FAC as the questions remain relevant for future cases when the requirement is correctly stated in federal law.

In its judgment, the FAC mistakenly refers to the database of regulated professions subject to the requirement to make a declaration in advance where neither the gynaecologist nor the endocrinologist are listed. This database is not about the freedom to provide services and thus the reference to the list for the advance declaration is therefore incorrect to begin

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1853 BVGer B-2848/2013 of 27.08.2014 and BVGer B-2964/2008 of 09.09.2008.

1854 BVGer B-3706/2014 of 28.11.2017, para. 6.3.4.

1855 BGer 2C_39/2018 of 18.06.2019, para. 7.

1856 *Fortpflanzungsmedizinverordnung (FMedV) of 04.12.2000,* SR 810.112.2.

1857 Recital 20 of the Professional Qualifications Directive.

1858 BVGer B-3706/2014 of 28.11.2017, para. A.

1859 BGer 2C_39/2018 of 18.06.2019, para. 4.4 *in fine*.

with.[1860] From this reference, the FAC seems to assume on the one hand that the profession of *gynaecologist* is the relevant profession and regulated profession at hand.[1861] With its further reasoning, it states on the other hand that the private diploma constitutes a ‘specialised diploma’ under the meaning of the relevant Swiss law.[1862]

The unanswered question is whether the ‘endocrinologist’ constitutes a separate profession from the gynaecologist’s profession. The specialisation in endocrinology does not appear as a specialisation listed in Annex V. If the FAC decided that the profession of gynaecologist is decisive and regulated, it would have to accept the Austrian diploma in principle, as the applicant would have been access to the same profession. Additional diplomas could only have been required if the FAC concluded that the ‘endocrinologist’ either qualifies as a specialisation that is not listed in Annex V or if the FAC came to the conclusion that an ‘endocrinologist’ rather requires a licence not falling under the Directive (see Chapter 6.2.4.2). The ‘endocrinologist’ is not however listed as a separate profession in the database of regulated professions, and the reference to the database of regulated professions would have been mistaken for this reason.[1863] Notably, the FAC also states that the same principles would apply for access to an unregulated profession with reference to the case *Bobadilla*.[1864] If this reasoning of the FAC is followed, the concept of recognition based on primary law would have to be accepted, a broad term for indirect discrimination would have to be used, or a *pragmatic* approach for recognition would have to be adopted (see Chapter 5.2.3).

Nevertheless, the FAC states that Article 10(d) of the Directive is applicable as the diploma was acquired for the purpose of a specialisation.[1865] The FAC however points out that the professional experience and the non-discrimination provision in Article 2 AFMP must be considered regardless of the legal basis.[1866] Even if one follows this reasoning, there is a second problem that was not addressed in this decision.

1860 BVGer B-3706/2014 of 28.11.2017, para. 6.3.3 subpara. 2; see <https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html> (last visited on 28.06.2020).

1861 BVGer B-3706/2014 of 28.11.2017, para. 6.3.3.

1862 BVGer B-3706/2014 of 28.11.2017, para. 2.1.2.2.

1863 BVGer B-3706/2014 of 28.11.2017, para. 7.2.

1864 BVGer B-3706/2014 of 28.11.2017, para. 6.3.3 in conjunction with para. 7.2.1.

1865 BVGer B-3706/2014 of 28.11.2017, para. 6.3.4.

1866 BVGer B-3706/2014 of 28.11.2017, paras. 7.2.2 and 7.2.3.

The second problem is that the purview of Article 10 of the Directive is not entirely clear. More particularly, it is at least not obvious whether Article 10(d) is the appropriate legal basis for the recognition of the private diploma in endocrinology. This Article is worded openly and from the wording the meaning of this Article is unclear. Some scholars thus argue that every diploma that does not fall under the more specific recognition of experience or the sectoral system falls under the scope of Article 10 of the Directive.[1867] This practice might suggest that the application of Article 10(d) is almost automatic in the sense that Article 10(d) of the Directive acts as a subsidiary layer. This problem was decided in the case *Angerer*.

Whereas Advocate General Szpunar argued that no additional elements are required to apply Article 10 for professions which do not fall under Chapters II and III of the Directive,[1868] the CJEU held in *Angerer* that Article 10(c) only applies if two conditions are fulfilled. First, the automatic system is not applicable (Articles 21 and 23 of the Directive). Second, there must be 'specific and exceptional reasons' as stated in Article 10.[1869]

From the *travaux préparatoires* it can be deduced that Article 10 and especially the notion of 'specific and exceptional reasons' was added later on at the initiative of the Council of the European Union.[1870] The CJEU however rightly pointed out that this would in any case not change the applicability of primary law.[1871] To sum up, the FAC forgot to discuss the applicability of Article 10(d) of the Directive. Even if the FAC were of the opinion that the case law of the CJEU were not to be followed, it would have to give 'good reasons' to disapply that case law.[1872] This means that the outcome of this case would not have changed.

7.8.4 Specialised medical doctor in 'vascular surgery'

An Italian doctor in biology with a postgraduate degree as a laboratory manager applied for his qualifications to be attested as equivalent. The profession is regulated according to social security law. The FAC ruled in 2013 that a diploma as a specialised medical doctor in

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[1867] Berthoud, Geneva, supra note 1007, p. 285 et seq.

[1868] *Opinion of Advocate General Szpunar in Case C-477/13, Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2014:2338, para. 34 et seq.

[1869] Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 38.

[1870] Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 33.

[1871] Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 41 et seq.

[1872] See BGE 134 II 10.

'vascular surgery' cannot be recognised under Article 21 et seq. or under Article 10(d) of the Professional Qualifications Directive either, as this diploma does not exist in Switzerland. This judgment meticulously analyses the two groups of specialised doctors. There are specialisations which are common to all Member States, whereas other specialisations only apply between the respective Member States who have rules on this specialisation.[1873] This reasoning is based on the case law of the CJEU.[1874] This is also seen in the formulation of Article 21 of the Directive, which only applies to diplomas of the host Member State 'which it itself issues'.

[1873] BVGer B-4857/2012 of 05.12.2013, para. 4.

[1874] Case C-492/12, *Conseil national de l'ordre des médecins*, ECLI:EU:C:2013:576; Case C-16/99, *Erpelding*, ECLI:EU:C:2000:445.

7.9 Conclusion to Chapter 7

This Chapter focused on the relevant case law, notably the case law of the FAC:

- In principle, only diplomas issued by an authority in a Member State (including Switzerland) fall under the Professional Qualifications Directive. Swiss courts have also consistently held that diplomas awarded by private institutions are considered to be part of public law if the relevant institutions are accredited as required by Swiss law. This also applies to specialised doctors of medicine. The FAC however also takes into account specialisations granted by private diplomas if required by federal law, according to a ruling handed down in 2017. It was also held *obiter dictum* that the recognition principles would even apply for the non-regulated professions. Very recently, in June 2019, the Swiss Federal Court annulled that ruling and stated that this specialisation is purely a matter of private law, and that a diploma for the use of assisted reproductive techniques cannot be required by the Swiss Confederation without a legal basis.
- Specialised doctors fall under the general system for recognition if their job title is not listed in Annex V (see supra note 1698 for exceptions). Recognition based on Article 10 of the Directive is however only allowed for specific and exceptional reasons according to the CJEU's case *Angerer*. In a case dated 2017, the FAC forgot to discuss whether the case of *Angerer* must be followed under the *acquis suisse* for the application of Article 10 of the Directive and required the federal authorities to apply the general system without discussing this issue even. The outcome would not have changed with the application of the *Angerer* case law (see Chapter 7.8.3).
- A measure which stipulates that doctors must not be approved by health insurance funds unless they show that they have three years of practical experience in Switzerland was found to be indirectly discriminatory by the FAC, but justified. The FAC held that the meaning of Article 55 of the Directive[1875] was not sufficiently clear to be applied in case of mere restrictions and in the

[1875] 'Without prejudice to Article 5(1) and Article 6, first subparagraph, point (b), Member States which require persons who acquired their professional qualifications in their territory to complete a preparatory period of in-service training and/or a period of professional experience in order to be approved by a health insurance fund, shall waive this obligation for the holders of evidence of professional qualifications of doctor and dental practitioner acquired in other Member States'.

light of the Swiss Federal Court case law despite the fact that the measure was found to be indirectly discriminatory. The standstill clause of the AFMP was not assessed despite the fact that the measure was found to be indirectly discriminatory as opposed to the cited leading case of the Swiss Federal Court. It was never answered whether violations of the standstill clause in the AFMP can be justified *per analogiam* to the case law of the CJEU for the standstill clause under the Ankara Agreement.

- The FAC discussed in an *obiter dictum* whether partial recognition of professional qualifications could be allowed. This reasoning seems to indicate that the FAC implicitly acknowledges the recognition based on primary law or a pragmatic approach like the Swiss Federal Court based on the principle of proportionality (because otherwise it would not have had to discuss whether the concept constitutes new or old case law) but ultimately it left the question unanswered whether partial recognition constitutes new or old case law. This discussion would become obsolete with the extended homogeneity rule of Article 4(2) of the Draft Institutional Framework Agreement since the case law before and after the date of signature would have to be taken into account (see Chapter 6.4.3).
- From the case law of the CJEU it can be seen that the recognition of specialised pharmacist diplomas in principle falls under the general system of recognition. Even if it is argued that the diploma for ‘specialised pharmacist’ does not fall in the scope of the Professional Qualifications Directive due to the fact that only the exercise is restricted (application of the *Keck* case law *per analogiam* or the *Gräbner* case law), or if it is argued that the measure is in conformity with the Directive, the measure qualifies either as an indirect discrimination or more likely as a restriction which must be justified (if free movement restrictions are covered by the AFMP). This view is also supported by the relevant case law of the EFTA Court.

8 The legal profession

8.1 Introduction

This last substantive Chapter 8 analyses the legal profession based on the observations made earlier under the Professional Qualifications Directive (see Part III of this research). The legal profession is different from most other professions because national law is an essential part of a similar, but still separate, line of work. This leads to unique problems and interesting case law that will be explored in this Chapter. In particular, how the legal professions are governed under national law shall be examined in this Chapter. As Switzerland is a federal State[1876] cantonal law and practice will be discussed where relevant. The State Secretariat for Education, Research and Innovation (SERI) lists the following as regulated legal professions in Switzerland:

- Lawyer;
- Patent Attorney;[1877]
- Notary;[1878]
- Legal agent;[1879]
- Certified translator;[1880]
- and other representatives before courts.[1881]

The following legal professions are also regulated in Switzerland but will not be discussed in this Chapter: certified bailiff;[1882] and registrar/keeper of public records;[1883] travelling salesman;[1884] certified commercial agent;[1885] registry official;[1886] and secretary of state in a municipality.[1887]

1876 Despite its misleading official name: ‘the Swiss Confederation’.

1877 Patentanwalt/Conseiller en brevets.

1878 Notar/Notaire.

1879 Rechtsagent/Agent juridique.

1880 Vereidigter Übersetzer/Traducteur juré.

1881 Vertreter in Steuer- und Sozialversicherungssachen vor dem Obergericht/Représentation des parties dans les causes fiscales et assurances sociales devant le Tribunal cantonal.

1882 Betreibungsbeamter/Commissaire LP.

1883 Grundbuchverwalter/Administrateur du registre foncier.

1884 Handelsagent/Agent/e d'affaires.

1885 Sachwalter SchKG/Agent d'affaires.

1886 Zivilstandsbeamter/Officier de l'état civil.

1887 Gemeindeschreiber/Secrétaire communal.

Auditors[1888] and insurance mediators[1889] are regulated by separate directives that have not been implemented into the *acquis suisse*. This Chapter will discuss auditors (see Chapter 8.5), but not insurance mediators.

It shall be noted that the professions referred to below are in general exempt from the application of the AFMP due to the exercise of public authority pursuant to the list of regulated professions of the SERI. However, it is a common misconception that the public authority applies in general. The public authority exception only applies to nationals of other Member States, as stated by the CJEU in the case *Brouillard*.[1890] Swiss nationals with an EU diploma may invoke the provisions of the AFMP because the judgment of the CJEU in *Brouillard* is only a clarification. Thus, it should be followed pursuant to Article 16(2) AFMP.

- Judges:[1891]
- Hunting inspectors;[1892]
- Court bailiffs;[1893]
- Police officers.[1894]

The profession of manager of a temporary and interim employment agency is exempt from the application of the AFMP.[1895]

1888 See *Directive 2006/43/EC of the European Parliament and of the Council on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC of 17.05.2006,* OJ [2006] L157/87, 09.06.2006.

1889 See further *Directive 2016/97/EU of the European Parliament and of the Council of 20 January 2016 on insurance distribution,* OJ [2016] L26/19, 02.02.2016.

1890 See Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 31 for further references.

1891 Richter/Juge.

1892 Jagdaufseher/Garde-faune. This profession only exists in the Canton of Geneva in this form. In the other cantons, hunting is part of a leisurely activity carried out either by individuals or by associations.

1893 Gerichtsvollzieher/Huissier de justice. This profession only exists in Geneva.

1894 Polizist/Policier. In some cantons, Swiss nationality is not required.

1895 Art. 22 para. 3(i) of Annex I to the AFMP.

8.2 Lawyers

8.2.1 Introduction

Lawyers have a wide range of tasks. They provide legal advice to clients, draft legal documents, and represent clients in courts. They also work in related fields, such as mediation or arbitration. The profession is, moreover, renowned, for its integral role in the justice system and upholding the rule of law. This is one of the reasons why many Member States and Switzerland regulate the legal profession, other reasons being found in the historical concept of a civil servant,[1896] and consumer protection.[1897] Regulation can sometimes lead to only one or several types of legal profession being established in a Member State.[1898]

The recognition of professional qualifications for the free movement of lawyers is treated distinctly when looking at the recognition of professional qualifications of other professions. This is because lawyers were never the main subject of a separate legal regime under free movement law. The 'vertical' directives also differ, such as those for architects, as lawyers are still educated and trained specifically and predominantly in the functioning of their own domestic legal systems – with some notable exceptions, such as several courses offered by the University of Maastricht.[1899] Currently, therefore, there is no such thing as a European lawyer because every lawyer is primarily educated and trained in the law of a certain Member State. Lawyers who are fully integrated in a profession in their own and another Member State have gone through the arduous process of dual qualification. There are thus obvious obstacles for lawyers wishing to be mobile and to practice in a host Member State.

First, lawyers must have an excellent command of the language of the other Member State. Legal language can even be difficult for native speakers at times. Prior language testing is inadmissible.[1900] Nevertheless, this is not an issue as lawyers would not generally provide

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1896 See BGE 103 Ia 426, para. 4.

1897 S. J. F. J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers,* MARKT/2011/071/E (Panteia/Maastricht report), <http://ccbe.eu/fileadmin/speciality_distribution/public/documents/FREE_MOVEMENT_OF_LAWYERS/FML_Reports___studies/EN_FML_20131125_Study_on_the_Evaluation_of_the_Legal_Framework_for_the_Free_Movement_of_Lawyers__PanteiaMaastricht_University_.pdf> (last visited on 26.06.2020), p. 4.

1898 See S. J. F. J. Claessens, *Free movement of lawyers in the European Union,* Diss. Maastricht (2008), Nijmegen (2008), p. 78 et seq.

1899 See Claessens et al., supra note 1897, p. 44.

1900 See Chapter 6.3.2.1.

services in a foreign language for indemnity purposes and due to potential disciplinary sanctions that could arise. Second, lawyers must have enough knowledge of the law of the host Member State or they will face disciplinary sanctions, fines, or worse, tarnish their reputation. Third, there might be an impact on social security premiums if a person is established in multiple Member States. Fourth, the studies on the Report on Evaluation of the Legal Framework for the Free Movement of Lawyers lists client 'suspicion' of foreigners as another obstacle for free movement.[1901]

The lawyer's profession is defined under EU law as including those professionals who are listed by their professional titles in the Annex to the only two relevant Directives: 98/5/EC, which applies to permanent residents (freedom of establishment and free movement for workers[1902]) (the 'Facilitating Practice Directive'), and 77/249/EEC (the 'Facilitating Services Directive'), for lawyers who want to provide services, albeit limited to 90 days per calendar year (under the *acquis suisse*).[1903] In-house lawyers do not fall under those Directives if they are not allowed to practise as lawyers in their home Member State,[1904] but in some countries (such as Ireland), lawyers may be fully qualified without having obtained a law degree.[1905] Third country nationals may in principle rely on those two Directives if they have a right to invoke EU law, such as if they are family members of an EU national.[1906] Under the *acquis suisse*, family members of EU or Swiss nationals may invoke Article 3(5) of Annex I to the AFMP in conjunction with Annex III and those two Directives in a cross-border setting.[1907]

In addition to the above two Directives, there is an alternative, more general, directive which can apply to lawyers. The General Recognition Directive on the recognition of higher-education diplomas with three years' professional education and training (now replaced by the Professional Qualifications Directive on the recognition of professional qualifications, even though the Facilitating Practice Directive still refers to the General Recognition

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1901 Claessens et al., supra note 1897, p. 74.

1902 See Art. 8 of Facilitating Practice Directive.

1903 See Art. 5(1) AFMP.

1904 See in detail Claessens et al., supra note 1897, p. 96.

1905 See Claessens, Nijmegen, supra note 1898, p. 87.

1906 Claessens et al., supra note 1897, p. 44.

1907 Berthoud, Geneva, supra note 1007, p. 89 for the application of the Professional Qualifications Directive; other opinion: Decision ATA/583/2017 of the Cour de Justice (High Court) of the Canton of Geneva of 23 May 2017, para. 3 et seq.

Directive) can be invoked by a lawyer who wishes to pursue his or her profession under the title granted to him or her by the home Member State, and therefore gain full access to the profession of EU-lawyer before having obtained three years of practical experience if the home Member State does not require that.[1908]

Some Swiss explanatory documents or materials give the impression that these rules are exclusively designed for EU nationals.[1909] However, the Facilitating Practice Directive, Facilitating Services Directive and the General Recognition Directive (the latter corresponding to the Professional Qualifications Directive) also apply to Swiss nationals who are fully qualified EU lawyers.[1910] This distinction might seem trivial at first glance, as most law students and prospective lawyers practise in the Member State they are most familiar with. It was however of practical relevance for a large number of Italian lawyers (around 3,295) who benefited from being able to access the profession of lawyer in Spain simply by showing that they had an academic diploma under Italian law, and then returning to Italy to be granted access to the lawyer's profession there too.[1911]

8.2.2 Consequences of (future) changes to include the Services Directive

Since the Facilitating Services Directive was established, early in 1977, the *acquis communautaire* has expanded. In 2006, Directive 2006/123/EC ('the Services Directive') was adopted.[1912] An incorporation of the Services Directive into the *acquis suisse* would not have major consequences for the legal profession. Any changes would have a minor effect because the Facilitating Services Directive is *lex specialis* and therefore takes precedence over the Services Directive.

However, the latter regulates some areas that are not covered by the Facilitating Services Directive.[1913] Article 6 of the Services Directive, for example, provides for single contact points, the idea being to have 'one stop shops' ensuring that service providers can complete

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1908 State Secretariat for Research and Innovation, supra note 967, p. 12.

1909 See Canton of St. Gallen, *Botschaft und Entwurf der Regierung des Kantons St. Gallen vom 4. Dezember 2001 zum II. Nachtragsgesetz zum Anwaltsgesetz*, para. 1.2.

1910 Art. 3(5) AFMP.

1911 See Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088; see further CCBE Lawyers' Statistics 2015 (11.03.2015) for Italy: <http://www.ccbe.eu/actions/statistics/> (last visited on 26.06.2020); see Schneider, Antwerp, supra note 741, p. 198 for further references.

1912 Directive 2006/123/EC ('Services Directive').

1913 Claessens et al., supra note 1897, p. 66.

all the relevant formalities and procedures to enable access to the service. Article 7 of the Services Directive is another example – it regulates the right to information for service providers which are also provided by the single contact points. Other areas that are not covered by the Facilitating Services Directive include the prohibition on total bans on commercial communication under Article 24 of the Services Directive.

Multi-disciplinary partnerships (for example where tax consultants are shareholders) however have been left untouched.[1914]

8.2.3 Directive 98/5/EC or the 'Facilitating Practice Directive'

The Facilitating Practice Directive aims at the freedom of movement of workers and the freedom of establishment, and establishes the right for lawyers to practise in a host Member State using the title granted by the home Member State.[1915]

The draft version of this Directive was developed by the Council of Bars and Law Societies of Europe (CCBE), as the European Commission was of the opinion back in 1975 that a proposal for a sectoral directive should be drafted by members of the legal profession.[1916] CCBE delegates however had different views on how access to the profession of lawyer should be regulated. The first CCBE draft was discussed in 1992, and was liberal in many aspects. The European Commission's proposal differed, as it required a temporal limit to be set for how long free movement rights could be invoked under the home-Member State title. That proposed limit was ultimately rejected by the European Parliament.[1917]

For an overview of the version that finally came into effect in 1998, a good starting point is the purpose of the Facilitating Practice Directive, stated in its first article: 'to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained'.

Article 2 then lists the different ways the profession can be accessed:

1914 See E. Seela, *Die Freizügigkeit der Rechtsanwälte in der Europäischen Union unter besonderer Berücksichtigung der Umsetzung des Unionsrechts in Polen,* Diss. Hamburg 2015, Hamburg (2015), p. 94.

1915 Art. 2(1) of the Facilitating Practice Directive.

1916 Seela, Hamburg, supra note 1914, p. 68.

1917 Claessens, Nijmegen, supra note 1898, pp. 39–49.

One way is to practise under the home-Member State title, for which the rules in Article 5 of the Directive must be followed. Another way is to practise under the host-Member State title, and thus in a situation of full integration, for which the rules of Article 10 of the Directive must be followed.

Under Article 5 of the Directive, access is possible in Member States where the provision of legal advice is regulated. It explains what kind of legal service may be provided – lawyers may give legal advice on the law of their home Member State, and on EU law, EEA law and international law, but also on the law of their host Member State. The Maastricht/Panteia report, which evaluated the legal framework for the free movement of lawyers, shows that lawyers mostly give legal advice on the law of their home Member State, with the exception of Italy where a large number of Italian nationals made use of their free movement rights, went to Spain to become fully qualified lawyers and returned to Italy to practise as Spanish lawyers.[1918] It also had rules on cooperation with a national lawyer. That requirement however has almost no meaning now, due to developments in the CJEU's case law (see Chapter 8.2.5.1). Article 4 of the Directive reminds lawyers that they must use their home-Member State title if they intend to practise without integrating in the host Member State. They may be required to indicate the respective professional body or judicial authority before which they are entitled to practise.

In terms of its personal scope, according to Article 3 of the Directive, only lawyers registered with the competent authority will be covered by the Directive and therefore benefit from its free movement provisions. This includes all the additional requirements of the home Member State, such as indemnity insurance, and in some Member States, that lawyers must be members of a lawyers' association.

Rules on professional conduct are found in Article 6. Unlike similar provisions in the Facilitating Services Directive, Article 6 of the Facilitating Practice Directive states that the rules of the host Member State apply irrespective of the rules on professional conduct of the home Member State. This statement has a slight nuance because the focus shifts to the professional rules of the host Member State. In the end, the result should however be the same, because with the application of the cumulative-rules principle in Article 4 of the Facilitating Services Directive, the host Member States' provisions are applied when there is a conflict. For disciplinary proceedings, Article 7 sets out the procedure to follow.

[1918] See supra note 1911 and Claessens et al., supra note 1897, p. 138.

The subsequent Article 8 leaves it to the host Member State whether to allow lawyers to work as a salaried lawyer in the employ of another lawyer, for an association or firm of lawyers, or for a public or private undertaking under conditions regulated by the host Member State.

Pursuant to Article 9, the host Member State must provide reasoned statements and provide legal remedies when deciding on the scope of Article 3 (registration with the competent authority) or when imposing disciplinary measures.

Article 11 states the rules for joint practice. According to its first paragraph, lawyers practising in a grouping in their home Member State may also practise in a branch or in an agency in the home Member State. If there are conflicting rules with regard to groupings, the rules of the host Member States apply insofar as they are justified by public interest in protecting third parties or clients. Paragraph 2 allows joint practice for lawyers under their home-Member State title. Paragraph 3 also sets out rules on joint practice by local lawyers and EU lawyers. Paragraph 4 requires lawyers to inform the respective authorities about the fact that they belong to a grouping. Paragraph 5 deals with multi-disciplinary practices. The host Member State may prohibit multi-disciplinary practice, which means the exercise of a lawyer in a grouping in which some members are not lawyers. This also covers situations where the capital of the grouping is held entirely or partly, or the name under which it practises is used, or the decision-making power in that grouping is exercised, *de facto* or *de jure*, by individuals who do not have the status of a lawyer. This also applies for the setting-up of branches or agencies without the need for justification, as mentioned in the second sentence of the first paragraph. Article 12 of the Directive also addresses the name of the grouping. The host Member State may require that they be kept informed of the legal form the grouping takes.

The remaining articles of the Facilitating Practice Directive concern cooperation and implementation, and are therefore not relevant under the *acquis suisse*. Unlike the General Recognition Directive, the Facilitating Practice Directive does not stipulate a deadline for the authorities to recognise professional qualifications.

8.2.3.1 Host Member State-title – integration of lawyers

To practise as a lawyer in the host Member State under the host-Member State title, there are three main ways to become fully integrated.

First, a lawyer can complete any compensation measures that have been imposed for direct integration into the legal profession.[1919] Member States are allowed to propose that an adaptation period or an aptitude test be taken, without giving the applicant a choice in the matter, because in the lawyer's profession 'precise knowledge of national law' is necessary.[1920] Many Member States have opted for the aptitude test.[1921] Recital 3 of the Facilitating Practice Directive however states that this is *inter alia* a way of becoming integrated quickly according to the relevant provisions of the General Recognition Directive. It is clear from the nature of compensation measures that prior knowledge and experience of the applicants must be taken into account when drafting the aptitude test. It is also self-explanatory that a test which is more in-depth than the bar exam for nationals who want to qualify as a lawyer does go beyond what is necessary (see the case law referred to in Chapter 8.2.5.1).

Second, a lawyer may become integrated under the title of the host Member State if he or she effectively and regularly pursues the legal profession for a period of at least three years in the host Member State, in the laws of that Member State. The lawyer must furnish the competent authorities with all the relevant information about his or her professional experience.[1922]

Finally, a lawyer may have access to the legal profession by means of an assessment (interview) if he or she has effectively and regularly pursued a professional activity in the host Member State for a period of at least three years, but for a shorter period in the law of that Member State.[1923]

8.2.3.2 Formalities

As mentioned above, applicants need to register with the competent authority under Article 3 of the Facilitating Practice Directive. The host Member State may require a certificate of registration with the competent authority of the home Member State to be

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1919 Art. 10(2) of the Facilitating Practice Directive in conjunction with the General Recognition Directive (corresponds to the Professional Qualifications Directive).

1920 See Art. 14(3) of the Professional Qualifications Directive.

1921 Claessens, Nijmegen, supra note 1898, p. 31 et seq. and p. 250 et seq.

1922 Art. 10(1) of the Facilitating Practice Directive.

1923 Art. 10(3) of the Facilitating Practice Directive.

provided. It may also require a certificate that is no more than three months old.[1924] Where Member States publish the names of lawyers who are admitted to practise, there is also an obligation to publish a list of EU lawyers.[1925] Member States may not prohibit lawyers from establishing themselves in different Member States (so-called single practice rule).[1926]

It should be stressed at this point that Article 3 of that Directive leads to a full harmonisation of the conditions.[1927] This also corresponds to requirements for the recognition of professional qualifications as listed in Article 50(1) of the Professional Qualifications Directive in conjunction with Annex VII of the Professional Qualifications Directive (even if the latter Directive does not currently apply to the lawyer's profession). Applicants can be required to show proof of indemnity insurance (with the correct coverage) and EU, EEA EFTA or Swiss nationality. This is self-explanatory as only EU and Swiss nationals fall under the AFMP and in conjunction with Annex III to the AFMP under the Facilitating Practice Directive and Facilitating Services Directive. In addition, it must be indicated if there is joint practice.[1928]

Migrants are subject to the same rules of professional conduct as lawyers who are practising in the same jurisdiction of the host Member State.[1929] They are also still subject to rules of professional conduct in their home Member State.[1930] Member States may require lawyers take out professional indemnity insurance or for them to become a member of a guarantee fund.[1931]

The requirement to follow the rules of professional conduct in the host and the home Member State is known as 'double deontology'. This principle is enshrined in Article 6 et seq. of the Facilitating Practice Directive as well as in Article 4(2) and Article 7(2) of the Facilitating Services Directive. The Panteia/Maastricht report study has listed some potential issues with double deontology (Article 6 of the Facilitating Practice Directive). At least one

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1924 Art. 3(2) of the Facilitating Practice Directive.

1925 Art. 3(4) of the Facilitating Practice Directive.

1926 See, as a selection from many, Case E-4/00, *Dr Johann Brändle*, EFTA Court Report 2000 - 2001, p. 123 et seq. for further references.

1927 Claessens et al., supra note 1897, p. 54 with reference to Case C-193/05, *Commission v Luxembourg*, ECLI:EU:C:2006:588.

1928 Claessens et al., supra note 1897, p. 88.

1929 Art. 6(1) and Art. 7(1) of the Facilitating Practice Directive.

1930 Art. 7(2) of the Facilitating Practice Directive.

1931 Art. 6(3) of the Facilitating Practice Directive.

fifth of the lawyers reported difficulties in applying both regimes.[1932] One unsolved issue is how to address contradictory rules and whether there is a hierarchy of rules or not.[1933]

Disciplinary sanctions for failure to fulfil the respective rules are possible.[1934] The Internal Market Information System Regulation (IMI; see Chapter 5.1.3) does not apply for the lawyer's profession. Besides, the IMI is not yet part of the *acquis suisse*. This leads to a more demanding situation when applying disciplinary sanctions. The competent authorities must inform the authorities of the home Member State before taking disciplinary measures.[1935]

8.2.4 Directive 77/249/EEC or the 'Facilitating Services Directive'

8.2.4.1 Scope of the Facilitating Services Directive

It is essential to know who (personal scope) and what activities (material scope) are covered by the Facilitating Services Directive. This Directive applies to lawyers who wish to provide services in another Member State. The prevailing view is that in order to be covered by the Directive, the service provider needs to move from one Member State to another.[1936] This fits with the wording of its first article, but neglects the fact that the Facilitating Services Directive was drafted before electronic communication became ubiquitous.[1937] Directive 2000/31/EC on electronic communication[1938] does not form part of the *acquis suisse*. The latter e-communication Directive applies when lawyers provide legal advice via email or an online service. It does not however apply for the representation of a client and defence of his or her interests before the court.[1939]

Usually, legal terms in directives form part of EU law unless reference is made to national law. From the Facilitating Services Directive however it is clear that the term 'lawyer' is a

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[1932] Claessens et al., supra note 1897, p. 45.

[1933] Claessens et al., supra note 1897, p. 98.

[1934] Art. 7 of the Facilitating Practice Directive.

[1935] Art. 7(2) of the Facilitating Practice Directive.

[1936] *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, para. 18.

[1937] See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, para. 22.

[1938] Directive 2000/31/EC ('Directive on electronic commerce').

[1939] Art. 1(5) of Directive 2000/31/EC ('Directive on electronic commerce').

mere reference to the title granted by each Member State.[1940] Advocate General Szpunar pointed out in a recent Opinion that 'activities of a lawyer' is a hybrid concept at best. Member States are still mostly free when it comes to the regulation of lawyers. The activities relating to the representation of clients are mentioned in Article 4(1) of the Facilitating Services Directive and are carried out under the conditions laid down by the host Member State. Providing legal services may or may not be reserved for lawyers.[1941] The preparation of formal documents 'for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land' is explicitly mentioned in the Directive as falling outside the scope of its application.[1942] The preparation of formal documents was at the time of its drafting only relevant for the United Kingdom and for Ireland as notarial services were still seen as an exercise of public authority. From the drafting history of this Directive therefore, Advocate General Szpunar concluded that the authentication of documents does not fall under it.[1943] The CJEU followed this reasoning and clearly stated that neither secondary nor primary law preclude Member States from reserving the authentication of signatures that are necessary for the transfer or creation of rights to property to the notarial profession.[1944]

8.2.4.2 Substantive rules of the Facilitating Services Directive

According to Article 1 of the Facilitating Services Directive, lawyers are allowed to practise under their home-Member State title.[1945] Lawyers use the home-Member State title and give an indication of the respective professional organisation or the court of admission which granted that title.[1946] The Directive does not set out a nationality requirement and third country nationals who can rely on EU law are covered by it.[1947] Family members of EU or

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[1940] See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, para. 27 for further references.

[1941] *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, paras. 24-32.

[1942] Art. 1 of the Facilitating Services Directive.

[1943] *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, para. 39.

[1944] Case C-342/15, *Leopoldine Gertraud Piringer*, ECLI:EU:C:2017:196, paras. 47 and 71.

[1945] Art. 2 of the Facilitating Services Directive.

[1946] Art. 3 of the Facilitating Services Directive.

[1947] Claessens et al., supra note 1897, p. 44.

Swiss nationals may invoke Article 3(5) of Annex I to the AFMP in conjunction with Annex III and the Facilitating Services Directive in a cross-border setting.[1948]

Article 4 of the Directive allows representation of clients before public authorities or in legal proceedings under the conditions set by the host Member State. The host Member State may not however require residence or registration with a professional organisation according to Article 4(1). Article 4(2) of the Directive governs the principle of ‘double deontology’. The rules of professional conduct of the host and of the home Member State apply cumulatively. This means that lawyers who choose to establish themselves are subject to the rules of conduct of their home Member State and cumulatively also to the rules of the host Member State. It is generally accepted that where there is a conflict, the rules of the host Member State apply. The article can however be interpreted differently according to the respective language.[1949] Article 4(4) is a reminder to lawyers that they remain subject to the rules of the Directive even if they are providing other services, and not only by providing the service of representing clients.

Article 5 of the Directive governs the introduction of lawyers to the president of the relevant bar or the presiding judge. There is also the requirement to work in conjunction with a domestic lawyer where representation is mandatory pursuant to its Article 5(2).

According to Article 6 of the Directive, salaried employees of a private or public undertaking can be prohibited from working as lawyers as long as that rule is applied in a non-discriminatory manner.

Article 7 allows the authorities of the host Member State to demand proof of the professional qualifications of the lawyer. The authorities of the host Member State decide upon non-compliance with the rules set in Article 4 thereof, namely professional conduct. The competent authority informs the respective authority of the home Member State of its decision. The decision needs to be submitted confidentially.[1950]

The remainder of the provisions of the Facilitating Services Directive deal with the implementation mechanism in the Member States and are not directed at Switzerland.

[1948] See note 1907 for references under the Professional Qualifications Directive, respectively for another opinon under the Facilitating Practice Directive.

[1949] Claessens et al., supra note 1897, pp. 45 and 116.

[1950] Art. 7(2) of the Facilitating Services Directive.

8.2.4.3 Professional rules and conduct

One of the possible hindrances to free movement of lawyers can still be seen under the rule of 'double deontology' of Article 4 of the Facilitating Services Directive.[1951] This has been named as one of the major remaining challenges for lawyers by the Panteia/Maastricht report.[1952] This concept is to be understood as the two sets of rules with regard to professional conduct in the host and the home Member State, which apply to EU lawyers who are providing services.[1953] The basic rules are clear. A lawyer must check whether the representation of clients before courts or public authorities is regulated in the host Member State, and must abide by the professional rules with the exception of residence requirements or registration with a professional body.[1954] When the rules of professional conduct in the host Member State are in conflict with the rules of the home Member State, the rules of the host Member State prevail.[1955] Article 4(4) of the Directive also applies to all other activities of a lawyer in the host Member State. Conditions and rules with regard to the professional conduct of the host and home Member States apply. Rules of the host Member State concerning 'professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity' are only disapplied if they cannot be followed and constitute an undue burden for the EU lawyer.

The CCBE published a model code of conduct, in particular to eliminate any issues arising from the rule of 'double deontology'.[1956] The most crucial differences concern professional secrecy and reporting obligations for money laundering and organised crime.[1957] It is also unclear which rules apply when two lawyers meet in a third Member State to discuss a case set in yet another Member State, or which rules apply to individuals who have successfully passed multiple bar exams or aptitude tests and are therefore qualified in multiple Member

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1951 The problem also exists under Art. 7(2) of the Facilitating Practice Directive. However, a lawyer who establishes himself is usually more inclined to acquaint him or herself with the applicable professional conduct in the host Member State.

1952 Claessens et al., supra note 1897, p. 173.

1953 Claessens et al., supra note 1897, pp. 41–43.

1954 Art. 4(1) of the Facilitating Services Directive.

1955 Art. 4(2) of the Facilitating Services Directive; Claessens et al., supra note 1897, p. 45.

1956 Charter of core principles of the European legal profession and code of conduct for European lawyers, p. 26 et seq., <http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf> (last visited on 26.06.2020).

1957 Claessens et al., supra note 1897, p. 102 et seq.

States.[1958] From a systematic point of view, it should depend on the title the respective lawyer is using. Double deontology is usually not an issue for larger law firms because they usually have a stricter code of conduct.[1959]

8.2.4.4 Familiarisation with the host Member State's legal system

For a lawyer practising under the home-Member State title, Article 5 of the Facilitating Services Directive provides two possibilities for Member States to familiarise themselves with the functioning of the host Member State's legal system. Member States may set out rules for introduction to the presiding judge or they may require EU lawyers to work in conjunction with a domestic lawyer who practises before the judicial authority in question.[1960] Thus, one could understand from this Directive that access for lawyers under the title of the home Member State is quite openly restricted. This is not the case, as will be seen in the case law below (see Chapter 8.2.5).

8.2.5 Case law of the CJEU

8.2.5.1 Case law with regard to the integration of lawyers

8.2.5.1.1 Case C-118/09, Koller

In *Koller*, the respective Austrian authorities made a preliminary ruling request to the CJEU, mainly asking whether the General Recognition Directive (which corresponds to the Professional Qualifications Directive) was applicable to the facts of the case.[1961] An Austrian national had completed the degree of *Magister der Rechtswissenschaften* at the University of Graz (Austria). The applicant then moved to Spain where he enrolled in the courses that were necessary for the homologation of his diploma. At that time, Spain allowed holders of an academic degree in law to become lawyers without any prior experience or practice. The

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[1958] Whilst large international law firms may have even stricter rules concerning professional conduct than stipulated by law, smaller law firms simply do not have international meetings on a regular basis. Smaller law firms lack the institutional mechanisms to check potential conflicts of interests. Finally, a more regular problem arises when a lawyer is travelling while still working on a case of his home Member State. It is obvious that this could not have been meant to be encompassed by the Facilitating Services Directive. Claessens et al., supra note 1897, p. 101 et seq.

[1959] Claessens et al., supra note 1897, p. 102.

[1960] See Art. 5 of the Facilitating Services Directive.

[1961] Case C-118/09, *Robert Koller*, ECLI:EU:C:2010:805, paras. 12-20.

applicant's degree was therefore recognised as equivalent to the Spanish degree entitled *Licenciado en Derecho*, and consequently to use the title *abogado*. Mr Koller then applied for admission to take the aptitude test in Austria after acquiring five months of practical experience. There are strict requirements under Austrian law to become a lawyer, and legal trainees must show that they have five years of experience before they are allowed to take the bar exam, which should be taken into account when considering the CJEU's ruling.[1962]

The CJEU found the General Recognition Directive (corresponding to the Professional Qualifications Directive) to be applicable. It ruled that the purpose of the aptitude test is to ensure that applicants are capable of exercising the profession concerned.[1963] An additional requirement in national law was held not to be foreseen in that Directive.[1964]

8.2.5.1.2 Case C-359/09, Ebert

In the case *Ebert,* the CJEU made it clear that the General Recognition Directive (corresponding to the Professional Qualifications Directive) as well as the Facilitating Practice Directive offer two complementary ways to access the lawyer's profession in a host Member State under the title of the host Member State.[1965]

8.2.5.1.3 Joined cases C-58/13 and C-59/13, Torresi

In *Torresi*, the CJEU held that Article 3 of the Facilitating Practice Directive applies for Italian lawyers who are permitted to practise as an *abogado* in Spain and who then return to Italy to practise, and that this Directive does not infringe primary law (see Chapter 5.2.6 for a detailed discussion of this case).[1966]

8.2.5.1.4 Case C-431/17, Dikigorikos Syllogos Athinon

In the recent case *Dikigorikos Syllogos Athinon,* the CJEU emphasised that Article 3(2) of the Facilitating Practice Directive is unconditional. This also includes the registration of a monk who is qualified as a lawyer in Cyprus. Greece questioned the independence vis-à-vis

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1962 Case C-118/09, *Robert Koller*, ECLI:EU:C:2010:805, para. 11.

1963 Case C-118/09, *Robert Koller*, ECLI:EU:C:2010:805, para. 35 et seq.

1964 Case C-118/09, *Robert Koller*, ECLI:EU:C:2010:805, para. 39.

1965 Case C-359/09, *Donat Cornelius Ebert v Budapesti Ügyvédi Kamara*, ECLI:EU:C:2011:44, paras. 27-35.

1966 Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 56.

the ecclesiastical authorities. Member States may however not prohibit the registration even if they are allowed to forbid the exercise of the profession according to Article 6(1) in conjunction with Article 7(1) due to failure to comply with the obligations of the host Member State.[1967]

8.2.5.2 Aptitude test: Case 145/99, Commission v Italy

In this case, the CJEU held that legal certainty is essential when the aptitude test is required to be taken by a lawyer. A Member State which does not determine the subjects for the examination but leaves an examination panel the choice of three subjects from ten possible subjects on a case-by-case basis was found not to be implementing the spirit of the General Recognition Directive sufficiently (corresponding to the Professional Qualifications Directive). It is noteworthy to mention that the bar exam for domestic lawyers was favourably regulated in this case.[1968]

8.2.5.3 Language requirements: Case C-193/05, Commission v Luxembourg

Prior testing of languages was held by the CJEU to be an infringement of Article 3 of the Facilitating Practice Directive, which fixes the conditions for the free movement lawyers in *Commission v Luxembourg*.[1969] The case law with regard to prior language requirements has already been covered above in detail (see Chapter 6.3.2).[1970] The CJEU did however go one-step further in *Wilson*. Under the Facilitating Practice Directive, lawyers may choose to practise under their home-Member State title without integrating into the legal profession of the host Member State.[1971] They can however be required to work in conjunction with a lawyer who is authorised to practise before the judicial authority in question. Member States may only prescribe co-involvement of a domestic lawyer who is authorised to practise when representation by a lawyer is mandatory under national law.[1972] Nonetheless, the CJEU found

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1967 Case C-431/17, *Monachos Eirinaios v Dikigorikos Syllogos Athinon*, ECLI:EU:C:2019:368, para. 22 et seq.

1968 Case C-145/99, *Commission v Italy*, ECLI:EU:C:2002:142, paras. 53-55.

1969 See Case C-193/05, *Commission v Luxembourg*, ECLI:EU:C:2006:588, para. 36 et seq.

1970 See Case C-506/04, *Wilson*, ECLI:EU:C:2006:587.

1971 Art. 4(1) of the Facilitating Practice Directive.

1972 Art. 5(3) of the Facilitating Practice Directive.

that a domestic lawyer sufficiently compensates for any lack of knowledge of languages.[1973] The judgments in *Wilson* and *Commission v Luxembourg* are extremely important because the CJEU stressed that Articles 3 and 5 of the Facilitating Practice Directive are exhaustive.[1974] There are however some exceptions that are tolerated in practice.[1975] This case law does not mean that lawyers may work without any knowledge of the official languages. First of all, most lawyers will not move to another Member State or accept cases due to liability concerns. Second, handling cases without knowledge of relevant languages is not covered by the rules of professional conduct. Finally, reputation is at stake. As a source for reference, the CCBE published a 'charter of core principles of the European legal profession and code of conduct for European lawyers'.[1976]

8.2.5.4 Working in part-time public-service employment: Case C-229/05, Jakubowska

The CJEU decided in the case *Jakubowska* that, pursuant to the wording of Article 8 of the Facilitating Practice Directive, it is for the host Member State to decide whether lawyers can simultaneously be registered as lawyers and, at the same time, work as civil servants as long as the measure is proportionate.[1977] This decision of the CJEU is self-explanatory. The outcome respects the clear reservation made in Article 8 of that Directive.

8.2.5.5 Co-involvement of domestic lawyers: Case C-472/85, Commission v France

Germany and France required the co-involvement of a lawyer (in the late 80s) who was admitted before the respective court (or in the words of the EFTA Court a 'national lawyer'[1978]) in an oral hearing. That was notwithstanding the fact that it allowed representation also to be entrusted to a person who is not a lawyer, as long as that person was 'not acting in a professional capacity'. The CJEU held in this case that Member States might

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[1973] Case C-506/04, *Wilson*, ECLI:EU:C:2006:587, para. 73; Case C-193/05, *Commission v Luxembourg*, ECLI:EU:C:2006:588, paras. 39-43.

[1974] Case C-193/05, *Commission v Luxembourg*, ECLI:EU:C:2006:588, para. 59 et seq.; Case C-506/04, *Wilson*, ECLI:EU:C:2006:587, para. 66.

[1975] Claessens et al., supra note 1897, p. 53 et seq.

[1976] Charter of core principles of the European legal profession and code of conduct for European lawyers, p. 26 et seq., available at <http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf> (last visited on 26.06.2020).

[1977] Case C-225/09, *Jakubowska*, ECLI:EU:C:2010:729, para. 57 et seq.

[1978] See Case E-1/07, *Criminal proceedings against A*, EFTA Court Report 2007, p. 246 et seq., para. 24.

not require EU lawyers to work in conjunction with another lawyer where no representation by a lawyer is prescribed under national law.[1979]

8.2.5.6 Limit on the reimbursement of lawyers: Case C-289/02, AMOK

The CJEU held in *AMOK* that national law could limit the reimbursement of lawyers. This rule does not constitute a restriction. The Facilitating Services Directive does however preclude a limitation on the reimbursement of legal fees for the domestic lawyer needed pursuant to that Directive from the unsuccessful party. Otherwise, service providers would be deterred from providing services, as in the best-case scenario their clients could only recover the legal fees for the EU lawyer but would have to pay for the legal fees of the domestic lawyer which was mandatory in some cases.[1980]

8.2.5.7 Regulation of legal fees: Joined cases C-94/04 and C-202/04, Cipolla and Case C-565/08, Commission v Italy

Italian law stipulated a minimum and maximum fee for legal services. In the case *Cipolla* the CJEU held that this rule constitutes a restriction with regard to the minimum fee because it makes access to the profession and the provision of services more burdensome. Considering the *Keck* case law,[1981] this decision shows a narrow reading of the concept of restrictions as the legal fees apply to everyone and it is questionable whether an EU lawyer might have better access to the legal profession simply by offering lower fees. As the CJEU rightly noted, it might lead to lower fees in general. Notwithstanding the fact that the CJEU accepts that the quality of legal services might be affected without minimum legal fees, there must be a causal link between the measures and the grounds for justification, such as consumer protection.[1982]

The Commission argued in another case concerning a maximum fee that the additional cost 'from the application of the Italian fee system' could deter service providers from

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1979 Case C-427/85, *Commission v France*, ECLI:EU:C:1988:98, para. 13 ; Case C-294/89, *Commission v France*, ECLI:EU:C:1991:302, paras. 35-37.

1980 Case C-289/02, *AMOK Verlags GmbH v A & R Gastronomie GmbH*, ECLI:EU:C:2003:669, paras. 31 and 36-41.

1981 See supra note 783.

1982 Joined Cases C-94/04 and C-202/04, *Federico Cipolla, Rosaria Fazari, née Portolese, and Stefano Macrino, Claudia Capodarte v Roberto Meloni*, ECLI:EU:C:2006:758, paras. 55-70.

providing services in Italy. The CJEU did not follow this argument. It held that maximum fees cannot be regarded as a restriction.[1983]

8.2.5.8 Authentication of services: Case C-342/15, Piringer

In a recent judgment of 2017, the CJEU decided whether the Facilitating Services Directive would be applicable for the authentication of signatures, which is necessary for the creation, or transfer of right to property. More precisely the first question of the referring court was whether the exemption of the second subparagraph of Article 1(1) of that Directive could be applied, which reserves the drafting of formal documents creating or transferring interests in land to notaries.

Under Austrian law, creation or transfer of property by entering it on the land register is only permissible if a court or notary has authenticated the signature. Ms Piringer obtained such authentication in the Czech Republic and applied to make an entry to the land register in Austria. The respective Austrian district court refused the request because the authentication had not been done by a notary or approved by a district court.[1984]

The CJEU first noted that the notion 'activities of lawyers' is not defined in the Facilitating Services Directive. In the Opinion to the ruling, Advocate General Szpunar mentioned that 'activities of lawyers' is essentially a hybrid concept, as the Member States define some elements of this concept. This also covers legal advice, representation of clients in court and authentication of signatures.[1985]

Secondly, the CJEU discussed whether the freedom of services applied, as Ms Piringer travelled to the Czech Republic and obtained authentication of her signature by a Czech lawyer. The CJEU recalled that the freedom of services encompasses not only the freedom to provide services but also to receive services. Therefore, it found that the situation fell under the scope of the Facilitating Services Directive. The CJEU noted that the historic interpretation of that Directive shows that the exemption was added due to the existence of different categories of lawyers in the United Kingdom. Therefore, the exemption was held not to apply in the case at hand. It then answered the second question and found that the

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[1983] Case C-565/08, *Commission v Italy*, ECLI:EU:C:2011:188, paras. 45-54.

[1984] Case C-342/15, *Leopoldine Gertraud Piringer*, ECLI:EU:C:2017:196, para. 11 et seq.

[1985] See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, paras. 24-32.

Austrian provision constituted a restriction of Article 56 TFEU, but that it could be justified due to overriding reasons in the public interest, namely in guaranteeing the legality and legal certainty of documents concluded between individuals. The measure was found to be proportionate to achieve this aim.

For the *acquis suisse*, one could argue that the reasoning did not have to go so far, because the CJEU mentions in para. 34 et seq. that receivers of services are also protected by Article 56 TFEU (with reference to the case *Demirkan*[1986] under the Ankara Agreement[1987] where receivers are not protected).[1988] For this reason, the Facilitating Services Directive must include cases where either the provider or the recipient of services goes to another Member State. As was explained above, the freedom to receive services is not part of the *acquis suisse*.[1989]

8.2.5.9 Interim conclusion

It is obvious that in comparison with the internal market, the Facilitating Practice and Facilitating Services Directives for lawyers have hardly produced any CJEU case law. This is not surprising considering the fact that the free movement of lawyers is still considered an exotic animal in some Member States and those disciplinary sanctions – where involvement of the respective disciplinary authority of the home Member State is possible – are a measure of last resort. The *Piringer* case raises interesting questions for the *acquis suisse*. It shows that there are cases where the rulings of the CJEU cannot be incorporated into the *acquis suisse*. It is also interesting to see the difference between the Facilitating Services and General Recognition Directives (the latter corresponding to the Professional Qualifications Directive). Certainly, this very sensitive area might have contributed to the findings of the CJEU. Nevertheless, the CJEU stressed that the activity of authentication does not fall under the exercise of official authority. Therefore, it cannot be excluded from the application of Article 56 TFEU. Compared to the case law on notaries,[1990] this hardly comes as a surprise. Moreover, the Czech Republic itself stated during the preliminary reference procedure that a

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[1986] Case C-221/11, *Leyla Ecem Demirkan v Germany*, ECLI:EU:C:2013:583, para. 35 et seq.

[1987] See Chapter 3.3.4.

[1988] Same opinion: C. Tobler, 'Freizügigkeit der Anwaltschaft im europäischen Kontext', in dubio 2017, No 3, p. 172 et seq.

[1989] See Chapter 4.4.2.

[1990] See infra note 2154.

signature of a Czech lawyer does not have the same legal value as an authentication by a notary. As there is no harmonisation in this area, the CJEU might be reluctant to impose a certain approach or system.

8.2.6 Case law of the EFTA Court with regard to the legal profession

8.2.6.1 Case E-1/07: Criminal proceedings against A

The EFTA Court ruled in 2007 on the issue of whether an EEA State might require service providers to work in conjunction with a domestic lawyer. It simply adopted the ruling of the leading case of the CJEU,[1991] stating that a lawyer may not be required to work in conjunction with a domestic lawyer where representation by a lawyer is not compulsory.[1992]

8.2.6.2 Case E-6/13: Metacom v Rechtsanwälte Zipper & Collegen

Article 59 of the Liechtenstein Lawyers Act required a lawyer to give prior notification to the Chamber of Lawyers before commencing cross-border activities. That notification also had to be accompanied by a certificate establishing the individual's qualification as a lawyer, proof of EU or EEA nationality, and professional indemnity insurance. Under this set of rules, service providers can only claim lawyers' fees if they act in accordance with Article 59 of the Liechtenstein Lawyers Act. The notification must be renewed on an annual basis.[1993] In *Metacom*, the EFTA Court highlighted that this measure goes beyond what is required under Article 3 of the Facilitating Practice Directive for the freedom of establishment. From the very concept of EU law, it is clear that rules for the provision of services that are stricter than those for the freedom of establishment are not permitted, because otherwise a migrant who only chose to provide cross-border services would be unduly restricted.

The EFTA Court did not distinguish whether this measure should be regarded as a restriction or indirect discrimination but it assessed the proportionality of the measure, which without doubt goes beyond what is required from service providers who usually carry an

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[1991] Case C-427/85, *Commission v France*, ECLI:EU:C:1988:98, para. 13.

[1992] Case E-1/07, *Criminal proceedings against A*, EFTA Court Report 2007, p. 246 et seq., para. 30.

[1993] Case E-6/13, *Metacom AG v Rechtsanwälte Zipper & Collegen*, Court Report 2013, p. 856 et seq., para. 14 et seq.

identification card issued by their respective bar association.[1994] Articles 3 to 7 of the Facilitating Services Directive are considered to guarantee legitimate concerns about public policy objectives.[1995]

8.3 The regulation of lawyers on a national level

As of the present day the Swiss market for legal advice is still in transformation. In Switzerland, large law firms have only evolved recently. Many smaller law firms are still operating with non-specialised lawyers who handle every area of law from divorce to criminal law. This is an important aspect for EU lawyers when moving to Switzerland. It is much more difficult for specialised lawyers to move to another country than for general practitioners for reasons that are twofold. First, an applicant who intends to take the aptitude test will be asked general questions. Second, applicants must invest time and effort to re-specialise under the law of the host Member State. Working in conjunction with local specialists however might affect either the costs, if the client is willing to pay for additional costs, or the earnings of the EU lawyer who needs more time than a domestic lawyer to work on a case.[1996]

While lawyers traditionally not only represent parties before courts but also offer legal advice, some companies employ qualified legal professionals themselves. In addition, banks and insurance companies also provide legal advice to private parties. In some countries, online-based legal advice is offered by lawyers. Similar forms of legal advice by telephone or the internet are offered by consumer organisations and by legal insurance companies in Switzerland. The entry barriers for giving legal advice are low as the capital investment involved in setting-up a law firm is low.[1997]

In addition, the legal profession is not harmonised across the EU. This diversification of the legal profession also creates additional obstacles to free movement. While in some Member States in-house counsels are lawyers, in other Member States in-house counsels are

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[1994] Case E-6/13, *Metacom AG v Rechtsanwälte Zipper & Collegen*, Court Report 2013, p. 856 et seq., para. 47 and 62 et seq.

[1995] Case E-6/13, *Metacom AG v Rechtsanwälte Zipper & Collegen*, Court Report 2013, p. 856 et seq., para. 51.

[1996] This was also mentioned as one of the relevant barriers in the report of Panteia and the University of Maastricht: Claessens et al., supra note 1897, p. 82.

[1997] See B. Mascello, ‘Anwalt 2020: Megatrends, Auswirkungen und Reaktionen’, Anwaltsrevue 2012, No 9, p. 402 et seq.

not allowed to enrol in the bar register. Not only foreign but also local in-house counsels are usually reluctant to commence proceedings due to the potential for liability actions and simply because they lack the necessary experience. In-house counsels are therefore only marginally affected.[1998] The ratio of the number of lawyers to inhabitant varies between EU Member States.

	Switzerland	**Germany**	**France**
Lawyers[1999]	9,925 (31.12.2017)	164,406 (01.01.2017)	65,480 (01.01.2017)
Established EU Lawyers[2000]	573 (31.12.2017)	629 (01.01.2017)	1,142 (01.01.2017)
Inhabitants[2001]	8,484,130 (01.01.2018)	82,521,653 (01.01.2017)	66,804,121 (01.01.2017)
Ratio of lawyers per inhabitant	1:855	1:502	1:1020
	Austria	**Italy**	**The Netherlands**
Lawyers[2002]	6,325 (31.12.2017)	246,786 (11.03.2015)	17,672 (31.12.2017)
Established EU Lawyers[2003]	87 (31.12.2017)	4,521 (11.03.2015)	66 (31.12.2017)
Inhabitants[2004]	8,822,267 (01.01.2018)	60,665,551 (01.01.2016)	17,181,084 (01.01.2018)
Ratio	1:1.395	1:246	1:972

Table 14: Number of lawyers in Switzerland and in neighbouring countries

1998 Claessens et al., supra note 1897, p. 96 with reference to the Prada Report.

1999 CCBE Lawyers’ Statistics 2018 and CCBE Lawyers’ Statistics 2015 (11.03.2015) for Italy, available at <http://www.ccbe.eu/actions/statistics/> (last visited on 26.06.2020).

2000 CCBE Lawyers’ Statistics 2018 and CCBE Lawyers’ Statistics 2015 (11.03.2015) for Italy, available at <http://www.ccbe.eu/actions/statistics/> (last visited on 26.06.2020).

2001 <https://ec.europa.eu/eurostat/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1> (last visited on 26.06.2020).

2002 CCBE Lawyers’ Statistics 2018 and CCBE Lawyers’ Statistics 2015 (11.03.2015) for Italy, available at <http://www.ccbe.eu/actions/statistics/> (last visited on 26.06.2020).

2003 CCBE Lawyers’ Statistics 2018 and CCBE Lawyers’ Statistics 2015 (11.03.2015) for Italy, available at <http://www.ccbe.eu/actions/statistics/> (last visited on 26.06.2020).

2004 <https://ec.europa.eu/eurostat/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1> (last visited on 26.06.2020).

On a federal level, the Act on the free movement of lawyers, *Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte,* (BGFA) guarantees the free movement of lawyers within Switzerland, between Switzerland and the EU Member States as well as between Switzerland and the EFTA countries.[2005] It also stipulates the requirements for enrolment in the cantonal register and foresees the conditions governing the practice of the legal profession in Switzerland.[2006] The BGFA was pending revision and so the Swiss Bar Association published a draft in 2012. Neither the original nor the revised versions of the draft are openly available anymore. The original draft of the Swiss Bar Association is however still available through other publications.[2007] The main amendments would have laid down rules for setting-up law firms. In 2018, the revision was brought to a halt by its initiators – the Swiss Bar Association. The most pressing issues were decided by several rulings of the Swiss Federal Court in the interim,[2008] so the Swiss Bar Association clarified that it was no longer interested in a revision. This position was supported by the Swiss Federal Council[2009] and followed by Parliament.[2010] The Swiss Federal Council also mentioned that the draft would have caused problems in the training of future lawyers in the Canton of Zurich. If traineeships in law firms became obligatory, law graduates would find it difficult to take the bar exam because law firms do not offer enough traineeships for all bar exam candidates.[2011]

8.3.1 Enrolment of lawyers in the cantonal bar register

8.3.1.1 *Personal requirements*

Article 8 BGFA lists the personal requirements that lawyers must fulfil in order to enrol in a cantonal bar register. Lawyers must be

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2005 Arts. 2 and 4 BGFA.

2006 Art. 6 et seq. BGFA.

2007 See for a Draft of the new Act on the free movement of lawyers in French : J. Gurtner, *La réglementation des sociétés d'avocats en Suisse: Entre protectionnisme et libéralisme : étude de droit comparé,* Diss. Neuchâtel (2016), Basel (2016), Annex 9.

2008 See BGE 138 II 440; BGer 2C_560/2015 of 11.01.2016, para. 3.1 and BGer 2C_1054/2016 of 15.12.2017.

2009 Swiss Confederation, *Bericht zur Abschreibung der Motion Vogler 12.3372 «Erlass eines umfassenden Anwaltsgesetzes» of 11 April 2018 (BBl 2018 2301)*.

2010 <https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=45738> (last visited on 26.06.2020).

2011 Swiss Confederation, supra note 2009, p. 2303.

- capable of acting (lit. a),
- show that they have not been criminally convicted of a crime which cannot be tolerated for the lawyer's profession unless it is erased from the criminal record (lit. b),
- show that they do not have loss certificates (showing debts after unsuccessful seizure or bankruptcy; lit. c),
- show that they practise the legal profession independently. They may only be employed by lawyers who are enrolled in a cantonal bar register (lit. d).[2012]

The conditions are cumulative. The abovementioned catalogue is not however exhaustive, as lawyers who are barred from practice may not enrol in any cantonal bar register.[2013]

8.3.1.2 *Indemnity insurance*

Article 8 BGFA does not prescribe indemnity insurance as a personal requirement for enrolment in the bar register but as a rule of professional conduct. Violations thus lead to disciplinary sanctions.[2014] Nevertheless, lawyers must have professional indemnity insurance with a coverage of at least one million Swiss Francs per year or equivalent securities. Some cantons have stricter rules and require proof when enrolling in the bar register[2015] or when the insurance is altered.[2016] Compared to other Member States, the Swiss rules are very strict. Only a few Member States, such as Belgium, France, Ireland, the United Kingdom and Wales, require more onerous insurance policies.[2017]

8.3.1.3 *Use of professional titles for Swiss lawyers*

Professional titles are essential as the Facilitating Practice Directive and Facilitating Services Directive only refer to lawyers by means of the title. It is for the Member States to determine the requirements for becoming a fully qualified lawyer due to the hybrid concept

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[2012] There is an exception for lawyers representing non-profit organisations according to Art. 8(2) BGFA.

[2013] Art. 17(1) BGFA.

[2014] In this sense see: W. Fellmann, 'Art. 12 BGFA', in W. Fellmann, G. G. Zindel & T. Baumgartner (eds.), *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA),* Zurich (2011), para. 141.

[2015] Art. 23(2) lit. f of the *Kantonales Anwaltsgesetz* (Lawyers' Act) of the Canton of Berne of 28.03.2006.

[2016] Art. 10 lit. b of the *Kantonales Anwaltsgesetz* (Lawyers' Act) of the Canton of Berne of 28.03.2006.

[2017] Claessens et al., supra note 1897, p. 163 et seq.

of this profession. The use of titles is left to cantonal laws,[2018] and Swiss lawyers use colourful titles of the canton in which they are called to the bar. In most cantons, this also applies even if a lawyer chooses not to enrol themselves in the register of lawyers. Some cantons have different titles or distinct registers for practising and non-practising lawyers.

In the Canton of Geneva for instance, non-registered lawyers may use the title *titulaire du brevet d'avocat* but they may not call themselves lawyer unless enrolled in the register.[2019] Lawyers in the Canton of Berne may choose between the titles *Rechtsanwalt*, *Anwalt*, *avocat* or the ancient title of *Fürsprecher*. The drawback is certainly that German (and even Swiss) clients are not familiar with the title *Fürsprecher*. The same applies *a fortiori* for the ancient title *Fürsprech*[2020] but not for the titles *Anwalt* and *Rechtsanwalt*.[2021] A lawyer may also obtain the Italian title *avvocato*[2022] in the Cantons of Tessin and Graubünden. In the latter canton the Romansh title *Advocat/Advocata* can also be acquired. Finally, in Basel-Stadt and Basel-Landschaft the title *Advokat*[2023] can be acquired. To complicate things, a lawyer may choose to use his *intercantonal free movement rights* and may either use choose the title acquired or the title of the canton where he or she is registered.[2024]

All these titles, except the Romansh title *Advocat/Advocata*, have been added to the Facilitating Practice Directive and Facilitating Services Directive through the implementation of Decision No 2/2011 of the EU-Swiss Joint Committee.[2025]

German titles	**French title**	**Italian title**
Advokat, Rechtsanwalt, Anwalt, Fürsprecher, Fürsprech	Avocat	Avvocato

Table 15: Swiss titles for the lawyer's profession

[2018] Art. 3 para. 1 BGFA.

[2019] Art. 5(1) and (2) of the *Loi sur la profession d'avocat* (Lawyers' Act) of the Canton of Geneva of 26.04.2002.

[2020] See Arts. 2(b)(1) and 3(b)(1) of Annex III of the AFMP.

[2021] Art. 1(2) of the *Kantonales Anwaltsgesetz* (Lawyers' Act) of the Canton of Berne of 28.03.2006.

[2022] Art. 11 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton Graubünden of 14.02.2006; Art. 10 of the *Legge sull'avvocatura* (Lawyers' Act) of the Canton of Ticino of 13.02.2012.

[2023] § 10 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Basel-Landschaft of 25.10.2001; § 10(1) of the *Advokaturgesetz* (Lawyers' Act) of the Canton of Basel-Stadt of 15.05.2002.

[2024] Art. 11(1) BFGA.

[2025] Arts. 2(b)(1) and 3(b)(1) of Annex III of the AFMP.

Many Member States allow enrolment in the register only when there is no confusion with the titles awarded by its national authorities. For instance, German law states that an EU lawyer may not use the professional title *Europäischer Rechtsanwalt* but must use his home-country title (unless there is a risk of confusion).[2026] A Bernese lawyer could simply register in Germany as *Fürsprecher*[2027] as there is no risk of confusion with the German professional title *Rechtsanwalt*.[2028] A lawyer enrolled in the register with the French title *avocat* may not even speak French if he or she made use of the intercantonal free movement rights in Switzerland. However, the CJEU held that the Facilitating Practice Directive precludes prior testing of knowledge of languages. Article 4(1) of that Directive only requires a title in one of the official languages. Nevertheless, due to liability a lawyer will not relocate to France if he or she does not have a good command of French. In addition, representing clients before courts without sufficient knowledge of the working language is considered a breach of the rules of professional conduct.[2029]

8.3.1.4 Use of titles of certified specialised lawyers

In Switzerland, there are also certified specialist lawyers for labour law, construction and real estate law, family law, tort law, inheritance law and criminal law. The titles for the certified specialist lawyers are awarded by the Swiss Bar Association and are not issued by Switzerland. It is however also clear from the concept of highly specialised lawyers that the recognition of professional qualifications would not be sensible. The title of certified specialist lawyers *Fachanwalt SAV* is registered as a collective mark in the Swiss trade mark register.[2030]

[2026] § 5 para. 2 of the *Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland* (Law regulating the activity of European lawyers in Germany) of 9 March 2000.

[2027] Art. 1(2) of the *Kantonales Anwaltsgesetz* (Lawyers' Act) of the Canton of Berne of 28.03.2006. The Canton of Berne allows lawyers to choose one of the Swiss titles except Advokat and the Romansh titles Advocat/Advocata.

[2028] See § 5 para. 1 of the *Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland* (Law regulating the activity of European lawyers in Germany) of 9 March 2000.

[2029] See Decision KF110428 of the Obergericht (High Court) of the Canton of Zurich, Aufsichtskommission über die Anwältinnen und Anwälte, ZR 111/2012, pp. 221-224 of 06.09.2012, para. 9.

[2030] See collective mark No 557791.

8.3.1.5 Free movement within the EU for registered Swiss lawyers only

A lawyer who successfully passed the bar exam in a Swiss canton is not obliged to register in his home canton.[2031] In other words, there is no need for prior registration after admission to the bar to enjoy intercantonal free movement rights.[2032] The non-practising lawyer may not however benefit from free movement within the EU because he or she is not registered.[2033] As stated, everyone who has passed a Swiss bar exam[2034] and who fulfils the personal requirements may apply for enrolment in any cantonal bar register of Switzerland. Registration in one canton allows representation before all courts in Switzerland.[2035] Multiple enrolments in several cantonal bar registers are not permitted according to the case law of the Swiss Federal Court.[2036] Some cantons also have a separate list of lawyers (*Anwaltszverzeichnis*) who are not registered but only give legal advice under the title of *Rechtsanwalt*.[2037] Others do not have a separate list for non-registered lawyers but they nonetheless apply some provisions of the respective Lawyers Act, such as disciplinary provisions.[2038] In the Canton of Zurich for instance, this also applies to EU lawyers who simply provide legal advice.[2039] In theory, cantons are still allowed to let individuals who are admitted to the bar represent parties before the courts of this canton even if the conditions of the BGFA are not fulfilled.[2040] This leads to the following three categories of lawyers in Switzerland (in practice):

- Lawyers admitted to the bar who fulfil the conditions of the BGFA and are enrolled in a cantonal register (not necessarily the canton that awarded the bar exam);
- EU or EEA EFTA lawyers enrolled in the BGFA register;
- Lawyers admitted to the bar but not enrolled in a BGFA register.

2031 See Art. 6 BGFA.

2032 Art. 6 para. 1 BGFA.

2033 Art. 3(1) of the Facilitating Practice Directive and Art. 27 para. 1 BGFA.

2034 The admittance to the bar must be in accordance with Art. 7 BGFA.

2035 Art. 4 BGFA.

2036 BGE 131 II 639.

2037 Art. 16 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Zurich of 17 November 2003.

2038 Art. 1 of the *Act on the exercise of the Lawyers profession of the Canton of Obwalden (GDB 134.4)*; see further Decision of the Anwaltskommission (Commission on Lawyers) of the Canton of Obwalden of 27.03.2012, para. 1.3.2.

2039 Art. 16 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Zurich of 17 November 2003.

2040 See Art. 3 para. 2 BGFA and Art. 95 para. 1 BV; BGE 141 II 280, para. 7.1; Decision GE.2018.0215 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 20.02.2019, para. 4.b; H. Nater, 'Art. 3 BGFA', in W. Fellmann, G. G. Zindel & T. Baumgartner (eds.), *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA),* Zurich (2011), para. 4 et seq.

8.3.1.6 In-house counsel

There is currently no separate law for corporate lawyers or in-house counsel or for lawyers working for the authorities, courts or non-governmental organisations. Swiss lawyers who wish to benefit from free movement have to enrol in the bar register.[2041] Lawyers working full-time under an employment relationship (except for law firms and some multi-disciplinary partnerships) are not usually considered independent in the sense of Article 8 BGFA and may not enrol in the bar register.[2042] The same applies for part-time employment if there is a connection between that employment relationship and practice as a lawyer.[2043]

In principle, only lawyers enrolled in any cantonal bar register or enrolled according to Article 28 BGFA or EU lawyers according to Article 21 BGFA may profit from professional secrecy rules.[2044] This is a crucial issue, especially in criminal and competition law cases. Some clients might be dissuaded from working with lawyers or legal counsels who do not benefit from secrecy rules.[2045]

In 2010, the Federal Council presented a draft act that would have allowed in-house counsel to register. This would have helped law graduates and lawyers who are working on international level in particular, as in-house counsel do not benefit from the professional secrecy rules that lawyers benefit from. The draft act was considered to be too bureaucratic by many cantons. The Federal Council proposed to the Parliament not to follow the parliamentary motion. Consequently, the parliamentary motion was not followed.[2046]

2041 Art. 4 BGFA.

2042 See Arts. 8 para. 1 lit. d and 12 lit. b BGFA; see E. Staehelin & C. Oetiker, 'Art. 8 BGFA', in W. Fellmann, G. G. Zindel & T. Baumgartner (eds.), *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA),* Zurich (2011), para. 45 et seq.

2043 See Staehelin & Oetiker, supra note 2042, para. 39 et seq.

2044 Art. 13 BGFA and Art. 321 *Schweizerisches Strafgesetzbuch (StGB; Swiss Criminal Code) of 21.12.1937,* SR 311.0; see further H. Nater & G. G. Zindel, 'Art. 13 BGFA', in W. Fellmann, G. G. Zindel & T. Baumgartner (eds.), *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA),* Zurich (2011), para. 24 et seq.

2045 Nater & Zindel, supra note 2044, para. 33 et seq.

2046 Swiss Confederation, *Parliamentary motion No 07.3281 of 11.05.2007,* <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20073281> (last visited on 27.06.2019); Swiss Confederation, *Bericht zur Abschreibung der Motion 07.3281 der Kommission für Rechtsfragen des Nationalrats of 4 June 2010 (BBl 2010 4095).*

8.3.2 Reserved activities

8.3.2.1 Representation

Enrolment in a cantonal register according to the BGFA or enrolment in the register for EU lawyers (Article 28 BGFA) is compulsory for lawyers who seek to represent clients before courts as part of their profession. Lawyers may only enrol in one cantonal bar register, even in situations where lawyers are practising in multiple cantons.[2047] The draft act on the free movement of lawyers had rules for single enrolment in a (centralised) bar register, which would have been kept by the federal authorities.[2048]

Registered lawyers are allowed to represent clients before all the courts in Switzerland.[2049] Representing clients before courts where the language skills of the lawyer are not good enough constitutes a violation of the rules of professional conduct.[2050] Federal law provides for *professional* representation as a part of the reserved activities of lawyers in civil and criminal proceedings, while cantonal law often includes *professional* representation in administrative proceedings before courts.[2051] Occasional representation is not reserved to lawyers, which is a feature (possibly) unique to Switzerland.[2052] Even in criminal law, parties may in principle be represented by whomever has the capacity to act and is trustworthy.[2053] The defence of the accused is however reserved to lawyers (including lawyers who are admitted to the bar in an EU Member State and presumably legal trainees if allowed for by cantonal law) with the exception of contraventions where cantonal law may deviate.[2054]

2047 BGE 131 II 639, para. 3.

2048 Arts. 14(1) and 15 of the Draft Act on the free movement of lawyers; see supra note 2007.

2049 Art. 4 BGFA.

2050 Decision KF110428 of the Obergericht (High Court) of the Canton of Zurich, Aufsichtskommission über die Anwältinnen und Anwälte, ZR 111/2012, pp. 221-224 of 06.09.2012, para. 7.

2051 See Art. 2 of the *loi sur la profession d'avocat* of the canton Vaud. Parties may only be represented by lawyers in expropriation procedures (Art. 2(3) thereof); see further H. Nater & M. Tuchschmid, 'Die internationale Freizügigkeit nach dem Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte', in D. Thürer et al. (eds.), *Bilaterale Verträge I & II Schweiz - EU: Handbuch,* Zurich (2007), para. 31.

2052 See BGE 140 III 555, para. 2; Bohnet, Bâle, supra note 778, para. 33.

2053 Art. 127(4) *Schweizerische Strafprozessordnung (StPO) of 05.10.2007,* SR 312.0.

2054 Art. 127(5) StPO. This paragraph should (probably) not be interpreted as excluding legal trainees: V. Lieber, 'Art. 127', in A. Donatsch, T. Hansjakob & V. Lieber (eds.), *Kommentar zur Schweizerischen Strafprozessordnung (StPO),* Zurich (2014).

Representation in civil or criminal law before the Swiss Federal Court is reserved to lawyers.[2055]

Mandatory representation by a registered lawyer is rare and foreseen for certain criminal law issues where the offence of the accused is serious or where the accused is under arrest for more than ten days.[2056] Further, when parties are not able to appear and have not named a representative, the court shall appoint a representative (i.e. a lawyer).[2057]

8.3.2.2 Legal advice

Unlike in many European countries, such as Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Italy, Luxembourg, Poland, Portugal, Romania and Slovakia,[2058] it is not mandatory to be admitted to the bar in order to give legal advice in Switzerland. However, this does not mean that legal advice would not be regulated for lawyers who fall within the scope of the BGFA. Rules of professional conduct apply for all activities that are connected with the legal profession.[2059] It is also important to mention that the provision of legal advice is only regulated for lawyers who are registered in accordance with the BGFA.[2060] Only representation as part of the legal profession is mentioned in the BGFA due to the fact that providing legal advice is *not* regulated on a federal level,[2061] but it is sometimes regulated on a cantonal level.[2062] A monopoly for legal advice might violate the right to economic freedom enshrined in Article 27 BV.[2063]

2055 Art. 40(1) BGG.

2056 See Art. 130 StPO; see further Art. 69 *Schweizerische Zivilprozessordnung (ZPO) of 19.12.2008,* SR 272 and Art. 41 BGG, when parties are not able to appear and will not be naming a representative, the court shall appoint a representative or a lawyer according to the wording of the BGG.

2057 Arts. 69 ZPO and 41 BGG. The meaning of Art. 69 is identical to Art. 41, even if the word 'representative' instead of lawyer is used: see Swiss Confederation, *Botschaft zur Schweizerischen Zivilprozessordnung (ZPO) of 28 June 2006 (BBl 2006 7221)*, p. 7280 (Art. 67 of the Draft Act).

2058 Claessens et al., supra note 1897, pp. 41–43.

2059 Art. 12 BGFA; see further M. Rauber & H. Nater, 'Anwaltstätigkeit im Sinne des BGFA', SJZ 2010, p. 559 et seq.

2060 Art. 21 para. 1 BGFA.

2061 F. Bohnet & V. Martenet, *Droit de la profession d'avocat,* Berne (2009), para. 816.

2062 See § 2 lit. a of the *Gesetz über die Geschäftsagenten, Liegenschaftenvermittler und Privatdetektive* which does not regulate the profession prior to providing legal advice but only foresees a ban to practise *ex ante*.

2063 See Bohnet, Bâle, supra note 778, para. 29.

As stated above, only lawyers and some other legal professionals may represent parties as part of their profession. It is also noteworthy to add that there is a practice among many Swiss courts to award higher indemnities for the winning party when represented by a fully qualified lawyer as opposed to representation by a legal trainee or even an individual who is not a professional.[2064] This is another financial incentive to be recognised as a fully-fledged lawyer in Switzerland and not merely as a legal trainee.

8.3.3 Swiss case law on the enrolment of lawyers

8.3.3.1 *Loss certificates (Article 8 (1) lit. c BGFA)*

According to Article 95(1) and (2) BV and also Article 3(1) BGFA, the cantons remain free to determine rules on admission to the Bar. The Canton of Lucerne simply decided to refer to the requirements of federal law in Article 8 BGFA for enrolment in the bar register. Notably, Article 8 BGFA requires that applicants must not have any loss certificates (showing debts after unsuccessful seizure or bankruptcy). This reference to federal law may have serious consequences if the personal requirements are no longer met. The respective lawyer not only loses the right to enrol on the bar register but also admission to the bar (*Anwaltspatent*). In a case of 2016, the respective authorities decided to withdraw not only enrolment in the register but also admission to the bar (*Anwaltspatent*). This decision was upheld by the Swiss Federal Court.[2065]

8.3.3.2 *Independence (Article 8(1) lit. d BGFA)*

In a recent leading case, the Swiss Federal Court ruled that a German lawyer who has successfully passed the Zurich bar exam could be rightfully barred from registering in the bar register of the Canton of Geneva as long as she continued to work for a global law firm (A) incorporated in Delaware. This law firm was part of a holding (B), which consisted of several limited partnerships and general partnerships that were incorporated in the USA and in Australia. Law firm A not only had offices in several cities in the US and in Australia, but also in several countries in Asia and in Europe. Whilst the partners of law firm A and holding

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[2064] See, chosen from many decisions: Decision B 2011/088 of the Verwaltungsgericht (Administrative Court) of the Canton of St. Gallen of 18.10.2011, para. 2.3.1.

[2065] See BGer 2C_897/2015 of 25.05.2016, para. 6.2.

B were not enrolled in a Swiss bar register, all the partners in law firm A and holding B were admitted to the bar in their respective countries. Moreover, the respective lawyers were all subject to rules of professional conduct that are equivalent to the Swiss rules of professional conduct. However, the Swiss Federal Court held that the articles of association of holding B did not prevent persons who are not enrolled in a bar register from becoming partners. The appellant brought forward the argument that EU lawyers are not subject to the same rules as Swiss lawyers, which discriminates against Swiss lawyers. The Swiss Federal Court however upheld the decision and stated that EU lawyers who enrol in the bar register in Switzerland must also be 'independent' in the sense of Article 8(1) lit. d BGFA.[2066]

8.3.4 Establishment of EU lawyers in Switzerland

The following Chapter shall cover how Switzerland has implemented the Facilitating Practice Directive. The Swiss legislature implemented both the Facilitating Practice and Facilitating Services Directives through the (BGFA). This Act not only covers the freedom of establishment (Articles 27 to 33 BGFA) and the freedom of services (Articles 21 to 26 BGFA), but it also sets minimum training conditions for *intercantonal* free movement of persons that are admitted to the bar in Switzerland (Article 7 BGFA).

From their restrictive wording one could interpret Articles 21 to 33 BGFA (for example in Article 21(1) BGFA: 'Nationals of EU or EEA EFTA States…') as only applying to EU or EEA nationals who are enrolled in the bar register in an EU or an EEA EFTA State. However, according to Article 1(3) BGFA, those provisions also apply to Swiss nationals who are enrolled in an EU or an EEA bar register, notwithstanding the fact that they are not mentioned in the respective articles. This legislation is obviously counterintuitive. Any other interpretation of the BGFA excluding Swiss nationals who made use of their free movement rights from the scope of the BGFA would be in violation of the Facilitating Practice Directive and the Facilitating Services Directive.

2066 BGE 140 II 102.

8.3.4.1 Use of titles and registration

To practise as a lawyer, enrolment in the register of the home Member State is required.[2067] The host Member State then checks the certificate attesting registration in the home Member State.[2068] There is a separate register for lawyers who are admitted to the bar in an EU or an EEA State (so-called 'BGFA 28 Register').[2069] As mentioned above, professional titles are essential for lawyers. Without a relevant title under the Facilitating Practice Directive, a lawyer may not benefit from free movement according to secondary law.[2070]

Article 33 BGFA allows registered lawyers to hold their home Member State title and the title of the canton of registration (both titles). Swiss lawyers who make use of their intercantonal free movement rights may not have both titles but must choose between the professional title of their home canton and (one of) the professional title(s) of their host canton.[2071]

8.3.4.2 Aptitude test (Article 30(1) lit. a BGFA)

For direct access to the legal profession, a lawyer may be asked to take an aptitude test.[2072] The aptitude test has not been used very often.[2073] Tested subjects vary from canton to canton. Most cantonal laws refer to the bar exam but with an emphasis on cantonal law and procedural aspects.[2074]

2067 See e.g. BGer 2C_874/2016 of 23.12.2016 for a solicitor who was not allowed to practice in his State of origin.

2068 Art. 2(2) of the Facilitating Practice Directive.

2069 Art. 28(1) BGFA.

2070 Art. 1(2) of the Facilitating Practice Directive.

2071 Art. 11(1) BGFA; see further A. Kellerhals & T. Baumgartner, 'Art. 33 BGFA', in W. Fellmann, G. G. Zindel & T. Baumgartner (eds.), *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA),* Zurich (2011), p. 486.

2072 Art. 30(1)(a) and Art 30 BFGA.

2073 B. Ehle & D. Seckler, 'Die Freizügigkeit europäischer Anwälte in der Schweiz', Anwaltsrevue 2005, No 6-7, p. 272.

2074 See § 7(4) of the Verordnung des Obergerichts über das Anwaltswesen of the Canton of Schaffhausen; § 7 of the Richtlinie über die in der «Verordnung über das Anwaltspraktikum und die für die Ausübung des Anwaltsberufes erforderlichen Prüfungen» vorgesehenen Examen of the Canton of Lucerne.

8.3.4.3 Based on experience (Article 30(1) lit. b BGFA)

Another option is 'access based on experience' in the host Member State. If a lawyer has been working 'regularly and effectively' *in the law of that Member State* in the host-Member State for at least three years, he or she is exempt from an aptitude test.[2075] If a lawyer has been giving advice on the law of the host Member State for a shorter period than on the law of the home Member State, a lawyer may apply for enrolment in the register of EU lawyers if he or she passes an assessment. The assessment is carried out through an oral debate.[2076]

8.3.4.4 Setting-up a law firm

In the well-known case *Wouters,* the Dutch rules concerning professional conduct stipulated that multi-disciplinary partnerships between members of the bar and accountants are not permissible.[2077] First, the CJEU held that Member States are not precluded from regulating the legal profession including measures concerning professional conduct. Second, even if the measure constituted a restriction, it would be justified.[2078]

Under the *acquis suisse*, the freedom of establishment between Switzerland and the EU does not include legal persons.[2079] The organisation of law firms is not regulated by the BGFA. The question is whether lawyers are free to set up a law firm in the form of a limited company or whether this infringes the independence of lawyers. Originally, lawyers were barred from setting up limited companies in some cantons. The respective authorities argued that it would contravene the independence of lawyers as they would no longer be held personally responsible. In their opinion, for legal persons it would not be possible to revoke admission to the bar because of the inexistence of loss certificates (showing debts after unsuccessful seizure or bankruptcy) due to a lack of personal liability.[2080] The Swiss Federal Court clarified that it is permissible to set up limited companies.[2081] Multi-disciplinary

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[2075] Art. 10 of the Facilitating Practice Directive in conjunction with Art. 14(1) of the Professional Qualifications Directive; Art. 30(2) BFGA.

[2076] Gespräch zur Prüfung der beruflichen Fähigkeiten; Art. 31(1) lit. b (1) BGFA.

[2077] Case C-309/99, *Wouters*, ECLI:EU:C:2002:98, paras. 15-23.

[2078] Case C-309/99, *Wouters*, ECLI:EU:C:2002:98, paras. 119-123.

[2079] See Arts. 12 to 16 of Annex I to the AFMP.

[2080] BGE 138 II 440, para. 20.

[2081] BGE 138 II 440; see further Bohnet, Bâle, supra note 778, p. 53 with references to cantonal judgments.

partnerships (for example where tax consultants are shareholders) are however still inadmissible according to a Swiss Federal Court ruling of December 2017.[2082]

8.3.4.5 Deontology

Registered lawyers have to follow the rules of professional conduct. This also applies to registered EU lawyers.[2083] As explained above, double deontology might lead to unsolvable situations for lawyers from other Member States. The rules of conduct of the CCBE have been accepted by the Swiss Bar Associations and all cantonal bar associations. However, the CCBE rules do not apply directly within the country as part of public law. The professional rules of the bar associations are only applicable for the respective members.[2084]

Article 12 BGFA exhaustively regulates the rules of professional conduct on a federal level. There are still strict rules with regard to advertisements and professional secrecy.[2085] According to Article 12(1) lit. a, BGFA lawyers practise their profession diligently and thoroughly. Cantonal rules of professional conduct are still applied if they are part of a general view in Switzerland.[2086] EU lawyers must familiarise themselves with the rules of professional conduct of public law. They cannot claim that they were not aware of the rules of professional conduct as a defence.[2087] It should be noted that cross-border litigation is inherently risky. Even slight negligence that might result in violations of the rules of professional conduct may lead to liability issues.[2088]

8.3.5 Swiss case law on the establishment of EU lawyers

8.3.5.1 Article 1 of the Facilitating Practice Directive

In 2016, a Canadian national married to a UK national and registered in the bar register of Paris applied for enrolment in the BGFA register of the Canton of Geneva which was

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2082 BGer 2C_1054/2016 and 2C_1059/2016 of 15.12.2017; see also for an earlier and more liberal approach before the Swiss Federal Court ruling: Decision of the Aufsichtskommission über die Anwältinnen und Anwälte of the Canton of Zurich, ZR 105/2006 of 05.10.2006, p. 302, para. 3.3.2.

2083 Art. 12 BGFA.

2084 See Bohnet, Bâle, supra note 778, para. 35.

2085 See Bohnet, Bâle, supra note 778, paras. 54 and 56.

2086 BGE 130 II 270, para. 3.1.1; BGE 131 I 223, para. 3.4.

2087 See e.g. BGer 2C_247/2010 of 16.02.2011, para. 6.

2088 See e.g. BGer 4A_83/2008 of 11.04.2008, para. 2.

denied. The High Court (*Cour de Justice*) of the Canton of Geneva upheld this decision in 2017. It argued that Article 1(2) of the Facilitating Practice Directive and the implementation in domestic law only refers to nationals of EU Member States. Thus, it came to the conclusion that family members may not rely on the Facilitating Practice Directive.[2089]

This decision is erroneous. While it is true that family members are not expressly mentioned in the Facilitating Practice Directive, it is obvious that family members can rely on the Directive. It can either be said that the Facilitating Practice Directive does not foresee a nationality requirement or it can be argued that family members have a guarantee to be treated equally and must therefore be treated in a way that results in the same position as an EU or Swiss national who can rely on the Directive.[2090] In any case, family members of EU nationals must be treated in the same way as nationals of EU Member States.

8.3.5.2 Article 2 of the Facilitating Practice Directive

The Administrative Court of the Canton of Zurich ruled on the issue whether a Spanish national who was admitted to the Spanish bar but had obtained his law degree in Venezuela could be admitted to the list of EU lawyers pursuant to Article 28 BGFA. The applicant relied on the Facilitating Practice Directive, that a lawyer in the sense of Article 1(2) of that Directive is generally admitted to practise except where there are disciplinary reasons not to allow admission.[2091]

The Administrative Court of the Canton of Zurich argued that the decisive element should be whether the applicant is allowed to carry the Spanish title as a lawyer (*abogado*) as the Facilitating Practice Directive only applies to lawyers. As we have seen above, the concept of ‘lawyer’ in the sense of the Facilitating Practice Directive is a hybrid concept.[2092] It is still up to the Member States to determine the conditions for admission to the bar.

The administrative appeal was approved based on the grounds that the cantonal authorities should verify whether the appellant was authorised to practise as a lawyer under

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[2089] Decision ATA/583/2017 of the Cour de Justice (High Court) of the Canton of Geneva of 23 May 2017, para. 3 et seq.

[2090] Art. 3 of Annex I to the AFMP; Claessens et al., supra note 1897, para. 44; Berthoud, Geneva, supra note 1007, p. 89 for family members under the Professional Qualifications Directive with reference to Art. 3 of Annex I to the AFMP.

[2091] See BGer 2A.536/2003 of 09.08.2004, para. 4.2.

[2092] See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, paras. 24-32.

the title of *abogado*.[2093] The Administrative Court of the Canton of Zurich was uncertain about the title of a Spanish lawyer who was registered as a lawyer in Spain and whether he could be admitted to the bar or not. According to the facts of the case, the appellant argued that his law degree was equivalent to a Spanish law degree (*Licenciado en Derecho*) and that he could therefore be admitted to the bar.[2094] According to the *Consejo General de la Abogacía Española* Spanish law provides that foreign graduates may have access to the profession of lawyers in Spain through the academic recognition of their degrees (homologation). Such lawyers therefore apply for academic recognition of their university degrees in law. Certain ‘complementary training requirements’ may be required of the applicants, in particular an aptitude test. They subsequently become fully fledged Spanish lawyers under the title of *abogado*.[2095]

The Administrative Court mentioned a press statement concerning the *Torresi* case but only discussed Swiss legal literature (which provides no answer to this problem). According to the academic literature in English, the Facilitating Practice Directive also applies in a situation like this.[2096] The recognition procedure reflected the Spanish system until 2011 (the facts of the case are not entirely clear on this matter[2097]) which allowed access to the lawyers' profession without actual practical experience but with a law degree.[2098] There was no mandatory traineeship required. This has been seen above for the prominent CJEU case of *Torresi*.[2099] After the homologation of his diploma, the appellant was subsequently allowed to enrol as a non-practising lawyer in Spain. While the first recognition can be classified as purely academic recognition, enrolment in the register qualifies the appellant as a Spanish lawyer under the title of *abogado*. Lawyers and *procuradores de los tribunals* were the only legal professionals in Spain who were admitted to practise without any prior professional

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[2093] Decision VB.2016.00490 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 08.12.2016, para. 4.6.

[2094] Decision VB.2016.00490 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 08.12.2016, para. 4.

[2095] Decision VB.2016.00490 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 08.12.2016, para. 2.3.

[2096] Claessens, Nijmegen, supra note 1898, p. 72 et seq.

[2097] Decision VB.2016.00490 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 08.12.2016, para. 4.3.

[2098] See L. Carballo Piñeiro, ‘Legal education in Spain: challenges and risks in devising access to the legal professions’, in E. Katvan et al. (eds.), *Too many lawyers?: The future of the legal profession,* London (2017), p. 217 et seq.

[2099] See Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088.

check. The law degree was not however designed to train lawyers but relied on a very theoretical approach.[2100]

With the introduction of a new system, a law degree is now no longer sufficient to become a fully qualified lawyer. A bar candidate must have completed and passed six months of a traineeship and a bar exam, which applies all across Spain. Academic recognition alone of a third country diploma would not however bind other Member States for the recognition of professional qualifications.[2101]

The *Torresi* case highlights that the use of the free movement provisions against the home Member State does not imply an abuse of rights. The Facilitating Practice Directive simply applies the country of origin principle. The CJEU also stated in *Torresi* that 'the right of nationals of a Member State to choose, on the one hand, the Member State in which they wish to acquire their professional qualifications and, on the other, the Member State in which they intend to practise their profession is inherent in the exercise, in a single market, of the fundamental freedoms guaranteed by the Treaties'.[2102] The aim of secondary law is based on the creation of a single market. Third country diplomas are only affected by free movement rules if the provisions clearly state that third country diploma also benefit from free movement rules.[2103]

The Administrative Court of the Canton of Zurich did not have to discuss the correlation between the Facilitating Practice Directive and General Recognition Directive (corresponding to the Professional Qualifications Directive). This case raises an interesting issue not answered by the CJEU in recent cases, such as the *Koller* case.[2104] As mentioned above, Article 1(2) of the Facilitating Practice Directive only refers to the national titles without consideration of the formal qualification. Recital 2 of that Directive states that it does not intend to modify the regulation of the profession in the host Member State or to exclude lawyers from the scope of the General Recognition Directive (corresponding to the Professional Qualifications Directive).[2105] The General Recognition Directive (corresponding to the Professional Qualifications Directive) and Facilitating Practice

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[2100] Carballo Piñeiro, supra note 2098, p. 222 et seq.

[2101] See BGE 132 II 135 (= Pra 96 2007 No 16), para. 7.

[2102] Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 87.

[2103] See Art. 3(3) of the Professional Qualifications Directive.

[2104] See Case C-359/09, *Donat Cornelius Ebert v Budapesti Ügyvédi Kamara*, ECLI:EU:C:2011:44.

[2105] Respectively, its predecessor the General Recognition Directive.

Directive regulate different forms of accession to the profession of lawyers as was stressed by the CJEU in the case *Ebert*. Article 1(1) of the Facilitating Practice Directive specifies its aim. It states that 'the purpose of this Directive is to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained'.

Distinct from the country of origin principle under the Facilitating Practice Directive, Article 3(1)(c) of the Professional Qualifications Directive only defines an EU diploma under certain conditions as an EU diploma in the sense of secondary law. Diplomas must have been mainly obtained in the EU. The Professional Qualifications Directive defines 'professional qualifications' in Article 3(1)(b) as 'qualifications attested by evidence of formal qualifications'. Evidence of formal qualifications is defined in Article 3(1)(c) of the Professional Qualifications Directive as 'diplomas, certificates and other evidence issued by an authority in a Member State designated pursuant to legislative, regulatory or administrative provisions of that Member State and certifying successful completion of professional training obtained mainly in the Community'. Article 3(1)(c) of the Professional Qualifications Directive clearly states that the formal education must be obtained mainly in the EU. For the Professional Qualifications Directive, the CJEU had to decide in its early case law whether the training for the harmonised professions covered by Title III, Chapter III must be obtained mainly in the EU. It ruled in the case *Tennah-Durez* under Directive 93/16/EEC that Member States must also recognise EU diplomas where the training was mainly received in a third country provided that the Member State awarding the diploma checks the minimum training conditions.[2106] At least according to the European Commission, this case law also applies under the current Professional Qualifications Directive for the general *and* the sectoral system.[2107]

8.3.5.3 Article 3 of the Facilitating Practice Directive

The High Court of the Canton of Zurich (*Obergericht*) held in 2012 with reference to the CJEU's case *Wilson* that Article 3 of the Facilitating Practice Directive harmonised all prior

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[2106] Case C-110/01, *Malika Tennah-Durez v Conseil national de l'ordre des médecins*, ECLI:EU:C:2003:357, para. 61.

[2107] European Commission, supra note 1230, ad Art. 3 para. 1(c) of the Professional Qualifications Directive; other opinion: Berthoud, Geneva, supra note 1007, p. 102 et seq. and footnote 247 thereof.

conditions for the exercise of the lawyer's profession.[2108] Thus, prior language tests are strictly forbidden as a prior condition for enrolment in the BGFA register pursuant to Article 28 BGFA.[2109] The High Court of the Canton of Zurich (*Obergericht*) however stressed that the exercise of the legal profession without the necessary language skills would constitute a clear violation of the rules of professional conduct pursuant to Article 12 lit. a BGFA.[2110]

In another case of 2009, a Romanian national and lawyer was allowed to practice in Malta (certificate to practice) based on an (academic) homologation of his diploma but not under one of the titles 'Avukat/Prokuratur Legali'. The High Court (*Cour de Justice*) of the Canton of Geneva found that the applicant could not profit from free movement because the registration pursuant to the Facilitating Practice Directive only foresees the registration for the lawyers with professional titles listed in the Directive. For the free movement of lawyers from Malta this only applies to the titles 'Avukat/Prokuratur Legali'.[2111]

This case of 2009 shows that the recognition of lawyers leads to formalistic results because it is a mere recognition by titles. This decision was held before the adoption of Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP which also includes the Romanian title for lawyers.[2112] Today, if the applicant were registered in Romania under the title 'Avocat', he could invoke the Facilitating Practice Directive in Switzerland.

8.3.5.4 Article 5 of the Facilitating Practice Directive

The chamber responsible for the commencement of criminal prosecution of the Canton of St. Gallen (*Anklagekammer*) had to decide whether mandatory representation in criminal law (commonly called criminal defence lawyers) ought to be reserved for Swiss nationals. Criminal defence is reserved for registered lawyers pursuant to the BGFA with the exception

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2108 See Case C-506/04, *Wilson*, ECLI:EU:C:2006:587, para. 71.

2109 Decision KF110428 of the Obergericht (High Court) of the Canton of Zurich, Aufsichtskommission über die Anwältinnen und Anwälte, ZR 111/2012, pp. 221-224 of 06.09.2012, para. 6.

2110 Decision KF110428 of the Obergericht (High Court) of the Canton of Zurich, Aufsichtskommission über die Anwältinnen und Anwälte, ZR 111/2012, pp. 221-224 of 06.09.2012, para. 9.

2111 Decision ATA/584/2009 of the Cour de Justice (High Court) of the Canton of Geneva of 10 November 2009.

2112 Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

of contraventions where representation is regulated by cantonal law.[2113] When choosing a defence lawyer, the respective official must take into consideration the preference of the accused if possible. Criminal defence is not reserved to local lawyers of the home canton but to all lawyers who are registered in Switzerland. If there are specific reasons, the suggested criminal defence lawyer might not be appointed. Conflicts of interest, lack of time, or missing qualifications are specific reasons.[2114]

8.3.6 Provision of services

Articles 21 to 27 BGFA describe the provision of services for EU or EEA nationals. Article 21(1) BGFA only mentions EU and EEA nationals. Article 21(1) BGFA must be interpreted in conjunction with Article 2(3) BGFA and applies to Swiss nationals who are also admitted to the bar in an EU Member State. In addition, third country nationals, namely family members of EU nationals or of Swiss nationals, may invoke the Facilitating Services Directive under Article 3(5) of Annex I to the AFMP.

Lawyers who are providing services are not enrolled in the bar register according to Article 21(2) BGFA.

Article 22 BGFA states that cantonal and federal courts may require proof of professional qualifications when lawyers are representing clients before them. In addition, supervisory bodies may also demand proof of professional qualifications.

Article 23 BGFA states that lawyers are required to work in conjunction with a national lawyer when representation is mandatory. It should be noted that the case law of the CJEU restricted the possibility tremendously.[2115] This provision is reduced to a postal address requirement but only for procedures where representation is mandatory.[2116]

Article 24 BGFA provides that service providers provide services under their home-Member State title.

2113 Art. 127(5) StPO.

2114 Decision AK.2014.361 of the Anklagekammer (High Court for prosecution) of the Canton of St. Gallen of 03.02.2015.

2115 Case C-427/85, *Commission v France*, ECLI:EU:C:1988:98; see also supra note 1973.

2116 See D. Dreyer, 'Art. 23 BGFA', in W. Fellmann, G. G. Zindel & T. Baumgartner (eds.), *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA),* Zurich (2011), para. 6.

Art 25 BGFA establishes that the rules of professional conduct apply for service providers with the exception of the provisions about representation under the legal aid scheme and for (mandatory) criminal defence.

The supervisory authority of the host Member State informs the respective authority of the home Member State about disciplinary measures pursuant to Article 26 BGFA.

8.3.7 Swiss case law with regard to the provision of services

8.3.7.1 Case law of the Swiss Federal Court with regard to the provision of services

In a case of 2008, the Swiss Federal Court did not acknowledge a restriction. The case was about an Austrian lawyer who claimed that Swiss procedural laws about legal deadlines constituted a restriction because they made it more difficult for him to provide legal cross-border services. The Swiss Federal Court denied a violation of the fundamental freedoms based on the fact that he could have submitted his documents to an embassy or to a consulate in Austria.[2117]

8.3.7.2 Case law of the FAC with regard to the provision of services

In 2016, the third Division of the FAC discussed whether a German lawyer may represent a client under a legal aid scheme (*unentgeltliche Verbeiständung*). Representation and thus legal aid in cases dealing with social security law is handled restrictively when it is absolutely necessary to protect the interests of the clients.[2118] According to Article 12 lit. g BGFA, Swiss lawyers can even be obliged to work under legal aid schemes. Lawyers who are admitted to the bar in an EU or an EEA EFTA State are exempt from this obligation regardless of whether they have established themselves or whether they provide services.[2119]

The legal practice with regard to Swiss lawyers who are registered in another canton and who would like to work under the legal aid scheme of another canton (intercantonal free movement) is still restrictive. In principle, there is no obligation for courts to admit lawyers who are not enrolled in the bar register of their canton, unless there is either an existing

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[2117] BGer 4A_83/2008 of 11.04.2008.

[2118] Art. 61 lit. f *Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts (ATSG) of 06.10.2000,* SR 830.1.

[2119] Art. 25 BGFA in conjunction with Art. 12 lit. g BGFA or Art. 27(2) BGFA in conjunction with Art. 25 BGFA in conjunction with Art. 12 lit. g BGFA respectively.

professional relationship and trust in a specific lawyer, or if the client is not able to understand the language of the lawyer who would be appointed.[2120]

The third Division of the FAC resorted to the *travaux préparatoires* of the Swiss legislature, which gave no answer as to whether EU lawyers may benefit from legal aid schemes or not. Nevertheless, the FAC argues the provisions governing legal aid that do not apply for EU lawyers indicate that the Swiss legislature deemed its knowledge to be insufficient and minimal standards must be guaranteed.[2121]

This judgment is unexpected considering the fact that the FAC previously accepted EU lawyers under the legal aid scheme and that the FAC is aware of that. The FAC also notes that there are different academic opinions concerning this question.[2122]

The FAC states that the profession does not fall under the public authority exception (Article 22(1) Annex I AFMP) but states that the measure (obligation to enrol in the bar register) is justified due to overriding reasons in the public interest. At the same time, the FAC finds that 'there could be an (indirect) discrimination if the restriction is not justified'[2123].[2124] This reasoning obviously leaves it open as to whether there is indirect discrimination and does not differentiate between discrimination and restriction (if free movement restrictions are even covered by the AFMP). According to the judgment, the FAC accepts that restrictions are covered by the AFMP for the freedom to provide services without an analysis of the *acquis suisse*.[2125]

The FAC brings forward several reasons for the justification of this measure.

First, the supervision of EU lawyers is not guaranteed in the same way as for Swiss lawyers. The FAC elaborates with regard to the Swiss Federal Court case law that the authorities of the host canton are better informed than the authorities of the home canton.[2126]

2120 Art. 29(1) BV; BGer 2C_79/2013 of 26.08.2013, paras. 2.13 and 3.7.

2121 Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, paras. 3.2.2 and 5.

2122 Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 3.3.4.2.

2123 Translated into English by the present author.

2124 Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 3.8.3.

2125 Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 2.4.

2126 Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 2.13.

This argument does not discuss the fact that EU lawyers must abide by the rules of the host and the home Member State (so called double deontology: see Chapter 8.2.4.2). Administrative cooperation can be carried out with another canton or when making use of the free movement rights.[2127] In addition, the potential for reverse discrimination is not an issue before the FAC as every Swiss lawyer enrolled in any bar register may work under the legal aid scheme and represent parties before the FAC.

Second, it is argued that representation by *unregistered lawyers* does not suffice to protect the legitimate interests of the clients as non-registered lawyers may terminate their contract. It should also be noted that the 'obligation' to work under legal aid schemes is currently highly theoretical because working under the legal aid scheme is desirable for smaller and even medium-sized law firms. Legal aid is regulated by cantonal law but it needs to be adequate. In recent decades the Swiss Federal Court has had to decide on multiple occasions whether 80 or 120 Swiss Francs per hour is still an adequate form of compensation.[2128] In the Canton of Zurich, legal aid is compensated by 150 to 350 Swiss Francs per hour.[2129]

Third, the third Division of the FAC mentions that the courts have an obligation to guarantee the fairness of the administrative procedure. Social security law should be regarded as an extremely complex matter of law which requires a lawyer who is specialised and in that area,[2130] and that Swiss lawyers are at least familiar with the procedural and substantive law.[2131] In that reasoning, the FAC also mentions that the situation would lead to reverse discrimination since Swiss lawyers do not usually have a right to work under the legal aid scheme if they are not enrolled in the respective bar register.[2132] Further, the FAC assumes that any persons enrolled in a bar register of an EU Member State is unfamiliar with Swiss law, while Swiss lawyers automatically have knowledge of social security law. Social

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2127 See Art. 15 et seq. and Art. 26 BGFA.

2128 In 1996, the Swiss Federal Court declared that the legal aid scheme of the Canton of Geneva, which foresaw a tariff of 120 Swiss Francs per hour, violated federal law (see BGE 132 I 201, para. 7.4.2 for further references). It should also be noted that Art. 122(2) StPO only provides for adequate compensation but does not provide for compensation in full.

2129 § 3 of the *Verordnung über die Anwaltsgebühren (AnwGebV)* of the Canton of Zurich.

2130 Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 2.12.

2131 Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 3.6.1.

2132 Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 3.8.3.2.

security law is not however part of the bar exam in many cantons or is only tested on an irregular basis. It usually encompasses the mere 'basics' of social security law. In addition, social security law is also not compulsory at every Swiss university. Furthermore, it is primarily for the courts to apply the provisions of procedural law, even more so in social security law.

Despite some criticism of this judgment, the result is understandable as the court must guarantee the fairness of the procedure. Courts must have the option to replace lawyers who do not have the requisite legal knowledge, and it is understandable that the FAC upheld a minimum standard. One could argue that this could also be decided on a case-by-case basis when a lawyer is clearly not able to represent clients in a particular field of law. This would be a more proportionate measure. This *obiter dictum* now stands as a precedent for future case law and was recited in another judgment of Division III of the FAC.[2133] The SFC left this question unanswered.[2134]

8.3.8 Cantonal case law with regard to the provision of services

8.3.9 Other Swiss case law for the legal profession

8.3.9.1 Single practice rule (Article 27 BGFA)

A decision of the High Court of Aargau of 2018 concerns the distinction between the provision of services and establishment (Articles 21 and 27 BGFA).[2135] The reasoning of the lower authorities and the facts are not published in its entirety. According to the published facts of this case, an Austrian lawyer applied for enrolment in the register of EU lawyers and intended to open-up a secondary establishment. With reference to a judgment of the Swiss Federal Court,[2136] the High Court concluded that the existence of infrastructure, such as an office, does not suffice to allow a lawyer to be covered by the freedom of establishment. The High Court found that the decisive element for the distinction under the *acquis suisse* was that provision of services exceeds 90 days, as established by the limit of the AFMP, and the

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[2133] BVGer C-6527/2016 of 05.01.2017, para. 5.3.

[2134] BGer 9C_315/2018 of 05.03.2019, para. 9.4.1.

[2135] Decision WBE.2017.393 of the Obergericht (High Court) of the Canton of Aargau of 21 August 2018, Chamber for administrative law, published in AGVE 2018, p. 293 et seq.

[2136] BGer 2A.536/2003 of 09.08.2004.

fact that the applicant intended to open-up a secondary establishment. It referred to Article 11 of the Facilitating Practice Directive to demonstrate that a single-practice rule is not legitimate because the Directive should be considered as an element of interpretation according to the High Court's view. A residence permit is not required according to the ruling because that would require residence first, which would create a category of lawyers who are unable to benefit from free movement.[2137]

This judgment shows that, despite freedom of establishment for legal persons not being covered by the AFMP, that a single-practice rule[2138] is in violation of the AFMP and the respective secondary law. It should however be noted that some of the provisions of the Facilitating Practice Directive are in principle self-executing and not simply elements for the interpretation of Swiss law. This was already decided for provisions of the General Recognition Directive (see Chapter 6.7.6).

8.3.9.2 Enrolment in the register (Article 21(2) BGFA)

A cantonal court had to decide whether a lawyer needed to enrol in the bar register. The opposing party argued that the lawyer was no longer providing services but should be established given that he was involved in seven legal proceedings.[2139] Unsurprisingly, the respective cantonal court did not follow the arguments of the opposing party as the lawyer those seven proceedings had been spread out over many years. It is also painstakingly clear that a lawyer is neither allowed nor obliged to enrol in the bar register when providing services.[2140]

8.3.9.3 Postal address in Switzerland

Several provisions of public and private procedural law require parties to declare a postal address in Switzerland. The highest court of the Canton of Thurgau however ruled that a German lawyer providing services cannot be obliged to declare a postal address within

[2137] Decision WBE.2017.393 of the Obergericht (High Court) of the Canton of Aargau of 21 August 2018, Chamber for administrative law, published in AGVE 2018, p. 293 et seq., para. 6.2.

[2138] See for the term 'single-practice rule', instead of many other examples: Case E-4/11, *Arnulf Clauder*, EFTA Court Report 2011, p. 216 et seq.

[2139] Decision BR.2016.24 of the Obergericht (High Court) of the Canton of Thurgau, RBOG 2016 No 36 of 19.05.2016, para. 1.

[2140] Decision BR.2016.24 of the Obergericht (High Court) of the Canton of Thurgau, RBOG 2016 No 36 of 19.05.2016, para. 2.

Switzerland.[2141] It is understandable that a lawyer can be required to provide a postal address when he is representing clients in criminal proceedings where representation is mandatory pursuant to Article 127(5) of the Criminal Procedural Code.[2142] *De facto*, the domestic lawyer only serves as a postal address in Switzerland for the EU lawyer where mandatory representation is required.[2143] It should be mentioned that the requirement to provide a postal address was considered a violation of the freedom of services (Article 17 of Annex I to the AFMP) by a working group of the Swiss Government.[2144]

8.3.9.4 Delivery of original documents to lawyers

Swiss courts are allowed but not obliged to send original documents to registered lawyers. This requires a great amount of trust between lawyers and courts. A cantonal court argued that there is no obligation for the courts to send original documents. First, courts may send copies of the necessary documents. Second, courts may grant access to the necessary documents at the court itself. The cantonal court stated that other neighbouring Member States are more restrictive when it comes to providing original documents. It further argued that as other Member States are more restrictive and 'due to the principle of reciprocity', Switzerland could restrict the delivery of any documents to lawyers in any EU or EEA EFTA State if this would require time and effort.[2145] Many courts never lend original documents, as copies are usually sufficient and inexpensive in modern times. With the possible introduction of electronic filing at courts in Switzerland,[2146] this issue will become obsolete. Nevertheless, the principle of reciprocity cannot be decisive when assessing potential restrictions.

2141 Decision ZR.2005.96 of the President of the Obergericht (High Court) of the Canton of Thurgau, RBOG 2005 No 38 of 30.11.2005.

2142 Decision UH150139 of the Obergericht (High Court) of the Canton of Zurich, III. Criminal Law Chamber, ZR 115/2016, p. 131 et seq. of 26.08.2015, para. 3.

2143 Swiss Confederation, *Botschaft zum Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte of 28 April 1999 (BBl 1999 6013)*, p. 6013 et seq. and p. 6064.

2144 Swiss Confederation, *Botschaft zur Genehmigung und zur Umsetzung der Übereinkommen Nr. 94 und Nr. 100 des Europarates über die grenzüberschreitende Verwaltungszusammenarbeit of 30. August 2017 (BBl 2017 5947)*, p. 5950.

2145 Decision ZR.2005.96 of the President of the Obergericht (High Court) of the Canton of Thurgau, RBOG 2005 No 38 of 30.11.2005, para. 2.d.

2146 See P. Tschümperlin, 'Die Justiz auf dem Weg zum elektronischen Dossier', SJZ 2018, No 13, p. 313 et seq.

8.4 Notaries

8.4.1 Introduction

The profession of notaries will be briefly discussed. This section serves as an overview of the current legal debate on the profession of notaries. There is already wide coverage of this profession in the legal literature.[2147]

Each canton is responsible for the organisation and regulation of the profession of notaries.[2148] Three types can be distinguished. A minority of two cantons provide that only public authorities can provide notarial services. Twelve other cantons have a mixed system of public authorities and a liberal profession depending on the area of law, while the remaining dozen cantons allow this to be carried out by a liberal profession.[2149] The education level of notaries varies between cantons. Cantons who foresee a liberal profession usually require that the individual has a Master's degree in law (and has passed the bar exam).[2150]

The Swiss Federal Court ruled in a leading case in 2002 that the profession of notaries involves the exercise of public authority under the AFMP and under the Federal Act on the Internal Market (*Bundesgesetz über den Binnenmarkt*) ('BGBM'). In addition, notaries may not invoke the right to economic freedom of Article 27 BV.[2151] This decision was confirmed by the Swiss Federal Court in 2005 and in 2007.[2152] However, the Swiss Federal Court interpreted the public authority exception for certified translators in the same way as the CJEU did for the TFEU in 2014.[2153]

The case law of notaries in the EU is well known. The CJEU ruled that the General Recognition Directive cannot be applied because the obligation was not entirely clear at the time of the proceedings but that the profession of notaries does not generally include the

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2147 See Oesch (2011), supra note 788, pp. 583-606; R. Pfäffli & F. A. Liechti, 'Der Notar und das Freizügigkeitsabkommen: Entwicklungen', Jusletter 20 April 2015; Oesch (2016), supra note 628, p. 58 et seq.; Boillet, Bâle, supra note 799, p. 285 et seq.; see also the consequences for secondary law: Bengel (2012), supra note 799, p. 26 et seq.; Brazerol (28.10.2013), supra note 788.

2148 Art. 3 BV and Art. 55 SchlT *Schweizerisches Zivilgesetzbuch (ZGB) of 10.12.1907,* SR 210.

2149 COMCO, supra note 1063.

2150 See R. Sethe, 'Die juristische Ausbildung an den Universitäten der Schweiz: Probleme und Herausforderungen.', ZSR 2017, II, p. 15 et seq. for further references.

2151 BGE 128 I 280.

2152 BGE 131 II 639, para. 6.1; BGE 133 I 259, para. 2.2.

2153 BGE 140 II 112, para. 3.2.4.

exercise of official authority in the sense of Article 51(1) TFEU for regulation in Germany, Belgium, France, Luxembourg, Portugal, Austria and Greece and thus primary law can be applied.[2154] In 2015, the CJEU also restated for the regulation of Latvia that the exception of Article 51 TFEU cannot be applied even if notarial activities are excluded by the Professional Qualifications Directive with the amendment brought by Directive 2013/55/EU.[2155]

The Swiss competition commission (COMCO) issued a detailed recommendation in 2013, which essentially stated that the notarial profession neither encompasses the exercise of official authority under the AFMP (freedom of establishment and freedom to provide services)[2156] nor under the BGBM.[2157] To discuss the consequences of this report, the BGMB shall be briefly discussed.

8.4.2 The Federal Act on the Internal Market (BGBM)

Before the entry into force of the Federal Act on the Internal Market (BGBM),[2158] the respective cantonal laws for market access of Swiss nationals with a diploma from another canton were often strict. The aim of the BGBM was to attain a homogenous legal order in Switzerland and to prevent reverse discrimination of Swiss nationals. It was clear that the mutual recognition of professional recognition under the AFMP would otherwise be less burdensome than the applicable Swiss provisions.[2159] The scope of the BGBM was therefore

2154 See Case C-47/08, *Commission v Belgium*, ECLI:EU:C:2011:334; Case C-50/08, *Commission v France*, ECLI:EU:C:2011:335; Case C-51/08, *Commission v Luxembourg*, ECLI:EU:C:2011:336; Case C-52/08, *Commission v Portugal*, ECLI:EU:C:2011:337; Case C-53/08, *Commission v Austria*, ECLI:EU:C:2011:338; Case C-54/08, *Commission v Germany*, ECLI:EU:C:2011:339; Case C-61/08, *Commission v Greece*, ECLI:EU:C:2011:340.

2155 Case C-151/14, *Commission v Latvia*, ECLI:EU:C:2015:577, para. 75.

2156 See Art. 10 of Annex I to the AFMP for the freedom of movement for workers, Art. 16 of Annex I to the AFMP for the freedom of establishment, and Art. 22(1) of Annex I to the AFMP for the freedom of services.

2157 COMCO, supra note 1063, paras. 53 and 62.

2158 *Bundesgesetz über den Binnenmarkt (BGBM; Federal Act on the Internal Market) of 06.10.1995,* SR 943.02.

2159 See Swiss Confederation, *Botschaft über die Änderung des Binnenmarktgesetzes of 24 November 2004 (BBl 2005 465)*, p. 479; Diebold, Berne, supra note 67, para. 341.

intentionally enacted to be congruent with the applicability of the AFMP.[2160] This also applies for the public authority exception.[2161]

8.4.2.1 Scope of the BGBM

Only situations that are either intercantonal or intercommunal fall under the BGBM.[2162] That means that a cross-border situation of multiple cantons or of multiple municipalities is required. Constitutional rights govern situations within a single canton or within a single municipality. Self-employed persons may invoke the right to economic freedom in the BV,[2163] while employed persons may rely on the right of equality before the law.[2164]

Only persons who pursue an economic activity fall within the scope of the BGBM. Access to professions for educational purposes (training of medical doctors or legal trainees[2165]) or purely leisurely activities[2166] do not fall under this Act. The BGBM applies to natural persons established in Switzerland. It also applies to migrants if they are lawfully residing in Switzerland.[2167] Legal persons are also covered by the BGBM if they are established in Switzerland.[2168] The scope *ratione personae* is thus the same as for the economic freedom in Article 27 BV but distinct from the Professional Qualifications Directive.[2169]

2160 Swiss Confederation, supra note 2159, p. 484; Art. 4 para. 3bis BGBM.

2161 See Arts. 10, 16 and 22(1) of Annex I to the AFMP and Art. 1 para. 3 BGBM; see Diebold, Berne, supra note 67, para. 170 for further references; for another opinion: Decision VGE 100.2013.232 of the Verwaltungsgericht (Administrative Court) of the Canton of Berne of 5 November 2014, published in BVR 2016, p. 147 et seq., para. 3.2.3.

2162 Arts. 2(1) and (4) BGBM; Diebold, Berne, supra note 67, para. 186.

2163 Art. 27 BV.

2164 Art. 8(1) BV.

2165 See Art. 4 para. 1 BGBM; Diebold, Berne, supra note 67, para. 156.

2166 Diebold, Berne, supra note 67, para. 488 et seq.; see BGer 2P.191/2004 of 10.08.2005, para. 6.2.

2167 Art. 1 para. 1 BGBM.

2168 Diebold, Berne, supra note 67, para. 653. It is not entirely clear whether foreign legal persons can rely on the BGBM. Companies established in the EU may invoke the economic freedom long as it is also part of the AFMP: See M. Oesch & T. Zwald, ‘Art 1. BGBM’, in M. Oesch, R. H. Weber & R. Zäch (eds.), *Wettbewerbsrecht II: Kommentar,* Zurich (2011), para. 7 for further references.

2169 See N. Gammenthaler, *Die Auslegung des Bundesgesetzes über den Binnenmarkt (BGBM) im Vergleich zum europäischen Binnenmarktrecht,* Fribourg (2011), p. 6; Oesch & Zwald, supra note 2168, para. 7.

8.4.2.2 Substantive provisions of the BGBM

To begin with, the BGBM regulates market access in Articles 2 to 5. Articles 3(1) lit. a, 3(3), 2(7) and Article 5 BGBM regulate access to the internal market (protection against direct discrimination). Article 3(3) BGBM establishes subsidiary protection (protection against indirect discrimination). Access to the internal market is also granted by the *Cassis de Dijon principle* or based on a cantonal or communal decision in Article 2(1) to (4) BGBM.[2170] The BGBM is based on the presumption that communal and cantonal regulations for market access are equivalent. The host canton must first prove the opposite.[2171] Direct and indirect discrimination[2172] can be justified. 'Restrictions' need to be non-discriminatory, proportionate and necessary and in the public interest.[2173] According to Diebold, the BGBM also covers restrictions in the sense of EU law, which would again indicate that the AFMP also encompasses restrictions.[2174] Measures are in particular not proportionate when the regulation of the home Member State guarantees sufficient protection for the public interests of the host Member State, the formalities and securities of the home Member State are regarded as sufficient to protect public interests, the host Member State requires the incorporation of a legal person or the establishment of a natural person, or when the practical experience in the home Member State is sufficient to guarantee the public interests of the host Member State.[2175] 'Restrictions' under the BGBM must be dealt with through a simple, rapid and free procedure.[2176]

For the recognition of cantonal and communal diplomas (or diplomas recognised by a canton), Article 4 BGBM regulates the recognition of a 'certificate of competence'. A 'certificate of competence' is interpreted in a broad manner. Not only cantonal and communal diplomas but also certificates, such as taxi driver admissions, fall under Article 4 BGBM.[2177]

[2170] Diebold, Berne, supra note 67, para. 148.

[2171] Art. 2 para. 5 BGBM; see further Diebold, Berne, supra note 67, para. 189.

[2172] Diebold, Berne, supra note 67, para. 496 et seq.; the term 'indirect discrimination' is not used in Art. 3(1) BGBM but is still covered: see Diebold, Berne, supra note 67, para. 666.

[2173] Art. 3 para. 1 BGBM.

[2174] Diebold, Berne, supra note 67, paras. 148 and 732.

[2175] Art. 3 para. 2 BGBM.

[2176] Art. 3 para. 4 BGBM.

[2177] Diebold, Berne, supra note 67, para. 1004 for further references.

At least according to the case law before the revision of the BGBM however, foreign diplomas did not fall under the scope of the BGBM.[2178]

Article 4(3)^{bis} BGBM was introduced to apply the rules of the Professional Qualifications Directive for Swiss diplomas covered by Professional Qualifications Directive within Switzerland and thus to prevent reverse discrimination.[2179] More favourable rules of public international law are also applicable due to Article 6(1) BGBM, for any person resident in Switzerland.

8.4.2.3 Differences between the BGBM and the AFMP

Some distinctions in the rules of internal market law are noteworthy. Compared to the case law of the CJEU, which allows the prohibition of certain specific activities so they can only be carried out by a very narrow group of professionals, Article 4(1) BGBM does not apply for professions that do not exist or are not similar to the profession in the home canton. In this case, recognition could be granted by Article 2(1) to (4) BGBM (*Cassis de Dijon principle*) or Article 4(3)^{bis} BGBM which refers to the Professional Qualifications Directive according to literature.[2180] To give an example, *Zahnprothetiker* (dental prosthetists are roughly comparable to dental technicians) who only exist in one canton could therefore apply for the exercise of their profession in another canton notwithstanding the fact that these activities are reserved for doctors in the host canton (see Chapter 6.3.1 for the distinct situation on an EU level).[2181] While indirect recognition diplomas ('reconnaissance de la reconnaissance') are regulated by Professional Qualifications Directive,[2182] it is not clear whether Article 4 BGBM provides for indirect recognition diplomas ('*reconnaissance de la reconnaissance*').[2183]

Unlike the recognition of a diploma under Professional Qualifications Directive, the recognition under the BGBM attests the *personal* requirements and *professional* skills of the

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2178 BGE 125 I 267, para. 3.e; see further Diebold, supra note 1357, para. 49, p. 501 who submits that the Swiss Federal Court did implicitly accept the indirect recognition of an EU diploma in a singular case; see also Diebold, Berne, supra note 67, para. 1023 et seq.

2179 Diebold, Berne, supra note 67, para. 1188 et seq.; see further Swiss Confederation, supra note 2159, p. 6221 et seq.

2180 See Diebold, Berne, supra note 67, paras. 1028 and 1235.

2181 See Diebold, Berne, supra note 67, para. 1235 et seq. for further references.

2182 See Art. 3(3) of the Professional Qualifications Directive; see further Chapter 6.2.5.

2183 Diebold, Berne, supra note 67, para. 1021.

applicant.[2184] This means that the authorities of the host canton may not require proof of personal requirements (such as trustworthiness),[2185] which is still allowed under the Professional Qualifications Directive.[2186]

Finally, the host canton must apply the most favourable rules for persons who fall within the scope of the BGBM and cannot simply adhere to the rules of the Professional Qualifications Directive.[2187] Further, to avoid indirect discrimination of EU nationals, one author raises the idea that EU nationals may choose an 'imaginary' canton where they are first admitted to rely on the BGBM to avoid indirect discrimination.[2188] This would affect the fees for recognition of professional qualifications in particular, as access to the market within the scope of the BGBM is free according to Article 3(4) BGBM (notwithstanding the fact that such a measure could possibly be justified).[2189]

8.4.3 Free movement of notaries

8.4.3.1 The COMCO Report and the application of the VMD

As mentioned above, the Swiss competition commission (COMCO) issued a detailed recommendation in 2013, which essentially stated that the notarial profession does not include the exercise of official authority either under the AFMP (freedom of establishment and freedom of services)[2190] or the BGBM.[2191] The notarial profession is still listed in Annex I to the VMD (for the declaration to be made in advance), whereas the Professional Qualifications Directive has been amended by Directive 2013/55/EU with the insertion of Article 2(4), which states that the Directive shall not apply to the profession of notaries. It could at least be argued whether secondary law before its revision would apply without the

2184 Diebold, Berne, supra note 67, para. 1029.

2185 BGE 123 I 313, para. 4d.

2186 Art. 50 of the Professional Qualifications Directive.

2187 BGE 136 II 470 (= Pra 2011 No 37), para. 5.3.

2188 Diebold, Berne, supra note 67, para. 1475.

2189 Kaufmann, Zurich, supra note 1396, para. 426 et seq.

2190 See Art. 10 of Annex I to the AFMP for the freedom of movement for workers, Art. 16 of Annex I to the AFMP for the freedom of establishment, and Art. 22(1) of Annex I to the AFMP for the freedom of services.

2191 COMCO, supra note 1063, paras. 53 and 62.

provisions of the VMD under the *acquis suisse* considering the case law of the CJEU.[2192] In its report, the COMCO came to the conclusion that the Swiss legislator included the profession in the national implementation of Title II of the Professional Qualifications Directive (Annex I of the VMD). This means that the notarial profession is a regulated profession in the sense of the Professional Qualifications Directive also for the purposes of establishment.[2193] As a subsidiary layer, primary law should be applied according to the report of the COMCO.[2194] This report was criticised.[2195]

Some authors, notably notaries, argue that the VMD should be amended[2196] or that the VMD should even be disapplied for the profession of notaries.[2197] This argument however neglects the static nature of the sectoral agreements. Amendments of Annex III must be carried out by a decision of the Joint Committee on the AFMP according to Article 18 AFMP (see further Chapter 6.2.6).[2198] Politically, this area is sensitive, which has led to parliamentary proposals to amend the VMD.[2199] The Swiss Federal Council gave an answer to a parliamentary motion that the recognition based on secondary law should be favoured over the recognition based on primary law as the issuance of compensation measures is clearly structured in the Professional Qualifications Directive.[2200] Even if it were removed from the VMD, the Swiss Federal Council stated in this response to a parliamentary motion that Switzerland would be obliged to apply primary law.[2201] In addition, the application of

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2192 A. Spickhoff, 'Zur Zukunft des Notariats in Europa – aus deutscher Perspektive', Jusletter 28 October 2013, para. 16 et seq.; from many examples, see: Case C-53/08, *Commission v Austria*, ECLI:EU:C:2011:338, para. 145.

2193 COMCO, supra note 1063, para. 65.

2194 COMCO, supra note 1063, paras. 64 and 69 et seq.

2195 Brazerol (28.10.2013), supra note 788; S. Wolf, 'Urteil des Verwaltungsgerichts (Verwaltungsrechtliche Abteilung) vom 5. November 2014 i.S. Notar X. gegen JGK (VGE 100.2013.232)', BVR 2016, p. 147 et seq.

2196 Pfäffli & Liechti (20.04.2015), supra note 2147, para. 13.

2197 Pfäffli & Liechti (20.04.2015), supra note 2147, p. 4 and footnote 16 thereof; Wolf (2016), supra note 2195, p. 163 who raises doubts as to whether the VMD is in violation of the BV.

2198 See also Kremalis, Frankfurt am Main, supra note 724, p. 177 who even suggests that the second sentence of Art. 18 AFMP should be disapplied.

2199 Swiss Confederation, *Parliamentary motion No 15.3728 of 19.06.2015,* <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20153728> (last visited on 30.06.2019).

2200 Swiss Confederation, supra note 2199.

2201 <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20153728> (last visited on 30.06.2019).

primary law is not precluded by the Professional Qualifications Directive.[2202] This was also restated by the CJEU in *Commission v Latvia* with the amendment of the Professional Qualifications Directive for the notarial profession.[2203] Furthermore, reverse discrimination does not violate EU law but it is primarily the task of the legislator or the courts of the respective Member State to prevent reverse discrimination.[2204]

It is also argued by some Swiss authors that the public service exception of Article 16 of Annex I to the AFMP should be interpreted differently due to its wording as interpreted in the light of the VCL.[2205] This argument is not convincing. The judgments of the CJEU are explicitly based on similar concepts of the public service exception.[2206] Thus, they are to be followed even after the date of signature because there are no good reasons to deviate from this case law. The rule of interpretation according to Article 16(2) AFMP constitutes *lex specialis* in comparison with the interpretation according to the wording in the sense of Article 31(1) VCL as this was intended by the Contracting Parties (see Article 31(4) VCL).[2207] Article 16 Annex I to the AFMP is thus to be interpreted in the sense of Article 51(1) TFEU.[2208]

8.4.3.2 Judgment of the Bernese Administrative Court of 2014

An interesting case of 2014 from the Administrative Court of the Canton of Berne shows the relationship between national internal market case law and the *acquis suisse*. As the case did not involve a cross-border element with the EU, only the interpretation of the BGBM was at stake.

2202 Case T-185/14, *José Freitas v European Parliament and Council of the European Union*, ECLI:EU:T:2015:14, para. 48.

2203 Case C-151/14, *Commission v Latvia*, ECLI:EU:C:2015:577, para. 75.

2204 BGE 136 II 120, para. 3.2; see however BGE 136 II 120, para. 3.5.3, which suggests that Art. 14 of the European Convention of Human Rights could be applied to prevent reverse discrimination if the legislator would have remained inactive.

2205 Brazerol (28.10.2013), supra note 788, para. 34.

2206 See COMCO, supra note 1063, para. 48 et seq. for further references.

2207 See Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, paras. 35–39 for further reference; see Ammann, Leiden, supra note 164, p. 241 et seq. for further references to the relevant case law of the Swiss Federal Court.

2208 Borghi, supra note 788, para. 179; Oesch (2011), supra note 788, p. 619 et seq.; for another opinion: Brazerol (28.10.2013), supra note 788, para. 32 et seq.

From the *travaux préparatoires*, it can be seen that the Swiss Federal Council intended to create a parallel legal order of the *acquis suisse* (BGMD and VMD).[2209] This position is also supported by doctrine and the COMCO.[2210] The Administrative Court of the Canton of Berne however argues that the wording of the public authority clause in the BGBM was implemented to be clear and not to achieve a parallel legal order.[2211] Thus, there is no right of free movement pursuant to the BGBM. The Administrative Court of the Canton of Berne however states that the situation might be distinct in a cross-border setting with the EU.[2212]

Unlike the Administrative Court of the Canton of Berne, the Swiss Federal Court argued in a different context as a general statement in a leading case that it also supports an interpretation of Swiss nationals not being discriminated against.[2213] In any case, reverse discrimination should usually lead to a harmonised approach initiated either by the courts or by the legislator.[2214]

8.4.3.3 Judgment of the High Court of the Canton of Aargau of 2018 (Chamber of administrative law)

More recently in 2018, the High Court of the Canton of Aargau ruled on the free movement of a Swiss notary with a cantonal diploma. It reiterated that according to previous practice, notaries may not invoke the right to economic freedom pursuant to Article 27 BV.[2215] The applicant questioned this line of reasoning based on the case law of the CJEU (see Chapter 8.4.1). This case law led to the COMCO report (see Chapter 8.4.3.1). The applicant then invoked Article 4(3)^{bis} BGBM on the recognition of professional qualifications based on the AFMP. The High Court in principle found that the case law of the CJEU after

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2209 Swiss Confederation, supra note 2159, p. 484; see also Kaufmann, Zurich, supra note 1396, para. 193.

2210 COMCO, supra note 1063, para. 62 with reference to N. Diebold, ‘Entscheidbesprechungen. Bundesgericht, II. öffentlich-rechtliche Abteilung, Urteil vom 9. August 2011 betreffend Verordnung des Kantons Zürich über psychiatrische und psychologische Gutachten in Straf- und Zivilverfahren, 2C_121/2011.’, AJP/PJA 2012, p. 1166 et seq.

2211 Decision VGE 100.2013.232 of the Verwaltungsgericht (Administrative Court) of the Canton of Berne of 5 November 2014, published in BVR 2016, p. 147 et seq., para. 3.2.3.

2212 Decision VGE 100.2013.232 of the Verwaltungsgericht (Administrative Court) of the Canton of Berne of 5 November 2014, published in BVR 2016, p. 147 et seq., para. 3.2.2.

2213 BGE 134 II 10, para. 3.5.4.

2214 See supra note 733.

2215 Decision WBE.2018.36 of the Obergericht (High Court) of the Canton of Aargau of 21.08.2018, Chamber for administrative law, published in AGVE 2018, p. 303 et seq., para. 3.1.

the date of signature must be followed as the ‘good reasons’ against their application (only partially) convinced the court.[2216] It did not however answer the question whether notaries are exempt from the scope of the AFMP due to the exercise of public authority. It then stated that the Professional Qualifications Directive was amended by Directive 2013/55/EU and no longer applied to notaries. It referred to the COMCO report on relying on primary law in such a scenario (without using the term primary law). It concluded that the provisions of the VMD had no legal basis because recognition based on primary law did not foresee the same procedure as provided under secondary law.[2217]

Finally, it allowed the applicant to take a shorter exam for notaries based on the principle of equality before the law without imposing a traineeship as an additional requirement (Article 8(1) BV).[2218]

It is noteworthy that the High Court mistakes the legal situation under EU law for the relevant legal situation under the *acquis suiss*e. This view is incorrect. Directive 2013/55/EU does not yet apply under the *acquis suisse*. A decision of the Joint Committee for the AFMP is necessary to update the Professional Qualifications Directive, and it is still missing. Thus, the relevant case law of the CJEU before the adoption of Directive 2013/55/EU should have been discussed and whether the notarial profession falls under the Professional Qualifications Directive or not. Even if this line of reasoning were however not followed, primary law must be applied because the profession does not fall under the public authority clause.[2219]

[2216] Decision WBE.2018.36 of the Obergericht (High Court) of the Canton of Aargau of 21.08.2018, Chamber for administrative law, published in AGVE 2018, p. 303 et seq., para. 3.4.

[2217] Decision WBE.2018.36 of the Obergericht (High Court) of the Canton of Aargau of 21.08.2018, Chamber for administrative law, published in AGVE 2018, p. 303 et seq., para. 3.4.

[2218] Decision WBE.2018.36 of the Obergericht (High Court) of the Canton of Aargau of 21.08.2018, Chamber for administrative law, published in AGVE 2018, p. 303 et seq., paras. 5 and 6.

[2219] See COMCO, supra note 1063, paras. 65 et seq. and 69 et seq.; see for the relevant case law of the CJEU: note 2154.

8.5 Auditors and patent attorneys

8.5.1 Auditors

8.5.1.1 The right to practise the profession

The auditor's profession (*Revisor*) has become more important given that the market for accounting firms is large. In 2016, the five largest auditing firms in Switzerland generated a turnover of 2.75 billion Swiss Francs.[2220] Article 727 et seq. of the Code of Obligations lists the regulated activities for the auditor's profession while the Swiss Audit Supervision Act (RAG; SR 221.302) stipulates the personal and professional requirements for admission as an auditor in Switzerland. There are three types of admissions that allow one to exercise the profession. According to Article 4 et seq. of RAG and Article 9a RAG, natural persons may be 'licensed' as auditors, audit experts and also as 'lead auditors'. To be admitted as an expert auditor pursuant to Article 4(2) RAG, applicants must be:

- certified accountants;
- certified fiduciary experts, Swiss certified tax consultants, and accounting and controlling experts who hold the federal diploma, provided they have at least five years' professional experience;
- graduates in business, economics or law followed at a Swiss university or university of applied sciences, be specialists in finance and accounting who hold a federal certificate, and fiduciaries who hold a federal certificate, provided they each have at least 12 years of professional experience.

Individuals who hold foreign qualifications comparable to those stated above can also be admitted if they have corresponding professional experience and can demonstrate the necessary knowledge of Swiss law, in so far as this is provided for in a Treaty where the country of origin or the country of origin grants reciprocity.[2221]

Auditors must have a diploma according to Article 4(2) RAG, but only need to show one year of professional experience.[2222] In addition, expert auditors and auditors must fulfil the personal requirement of having an 'impeccable reputation' under Article 4(1) RAG or Article 5(1) RAG respectively. To assess the 'impeccable reputation' the criminal record and

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[2220] C. Schmutz, 'Wie die vier wichtigsten Wirtschaftsprüfer in der Schweiz gross wurden', *NZZ,* 18 May 2017.

[2221] Art. 4(2) lit. d RAG.

[2222] Art. 5(1) RAG.

the loss certificates (showing debts after unsuccessful seizure or bankruptcy) of the applicant are taken into account.[2223]

8.5.1.2 Current discussion about the application of secondary law for auditors

Under the *acquis communautaire*, the auditor's profession is governed by Directive 2006/43/EC (amended by Directive 2014/56/EU) which sets educational minimum standards and personal requirements for auditors but also foresees the mutual recognition of professional qualifications by reference to Article 3(1)(g) and (h) of the Professional Qualifications Directive (adaptation period or aptitude test).[2224] More importantly, it sets rules concerning the statutory audit of annual and consolidated accounts.[2225]

For the *acquis communautaire*, it is clear that Professional Qualifications Directive does not apply directly for the auditor's profession as it is regulated by the more specific Directive 2006/43/EC, especially Article 14 of Directive 2006/43/EC, which refers to the aptitude test of the Professional Qualifications Directive. Article 14(1) and (2) of Directive 2006/43/EC stipulates that Member States may require an aptitude test which shall only cover the law that is necessary for audits.

As stated above, Directive 2006/43/EC is not part of the *acquis suisse*.[2226] There are therefore, expectedly, some differences in the registration requirements of third country auditors.[2227] The question is now whether the Professional Qualifications Directive or primary law have to be respected in this context as a subsidiary layer for the mutual recognition of professional qualifications.

Interestingly enough, the SERI and Berthoud claim that auditors do not fall under the mutual recognition of professional qualifications.[2228] Berthoud also points out that it is

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[2223] Art. 4(2) of the *Verordnung über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren (RAV) of 22.08.2007*.

[2224] Art. 14 of Directive 2006/43/EC.

[2225] Art. 1 of Directive 2006/43/EC.

[2226] An adoption of Directive 2006/43/EC was at least a point for discussions according to the Swiss Government: see State Secretariat for Research and Innovation, supra note 967, p. 12.

[2227] See *Commission Decision 2011/30/EU on the equivalence of certain third country public oversight, quality assurance, investigation and penalty systems for auditors and audit entities and a transitional period for audit activities of certain third country auditors and audit entities in the European Union of 19.01.2011,* OJ [2011] L15/12, 20.01.2011.

[2228] <https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html> (last visited on 28.06.2020); Berthoud, Geneva, supra note 1007, pp. 143–146 and footnotes 402 and 406 thereof.

difficult to know for certain why certain directives have become part of Annex III while others have not. For the profession of auditors, Switzerland and the EU could not agree on implementation as this profession is closely connected to the free movement of legal persons, which is not part of the *acquis suisse*. If the Professional Qualifications Directive were applied in the context of the *acquis suisse*, it would have a broader scope than it would between the EU Member States themselves.[2229] This argument does not however explain why the profession was not explicitly exempt from the application of the AFMP like other professions mentioned in Article 22(3) of Annex I to the AFMP.[2230] In addition, Directive 2006/43/EC only marginally considers the recognition of professional qualifications, by making a broad reference to the Professional Qualifications Directive in its Article 14. Furthermore, there is no specific provision in the AFMP which would prohibit a broader scope.[2231]

According to the legal advice of the European Commission and of the Federal Audit Oversight Authority – supposedly given to an applicant before the SERI – the Professional Qualifications Directive also applies under the *acquis suisse*.[2232] It is obvious that this advice (if it was actually given) was wrong at that time because Annex III was not updated by a decision of the Joint Committee.[2233] Due to the static nature of the AFMP, the preceding General Recognition Directive could however have been applied if one followed this (supposedly given) opinion.

The reasoning that auditors do not fall under the *acquis suisse* is sensible as the case law of the FAC is not entirely clear in this regard. There are only three judgments known to the present author that deal with the application of secondary law for the profession of auditors under the *acquis suisse*.[2234]

In a case of 2008, the FAC was of the opinion that the auditor's profession is not regulated because it is not listed in the list of the SERI.[2235] Gammenthaler assumes that the auditor's

[2229] Berthoud, Geneva, supra note 1007, pp. 143–146 and footnotes 402 and 406 thereof.

[2230] See for the same reasoning for taxi transports: Decision VB.2013.00231 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 04.09.2014, para. 6.3.4.

[2231] See however for the Ankara Agreement: Art. 59 of the AP.

[2232] BVGer B-93/2008 of 05.11.2008, para. E.

[2233] See Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

[2234] BVGer B-93/2008 of 05.11.2008, para. E.

[2235] BVGer B-93/2008 of 05.11.2008, paras. 2.3.2 and 3.2.

profession is not regulated in Switzerland based on the FAC's reasoning.[2236] In the present author's opinion, this assumption cannot be upheld as the FAC only stated that the activities which the applicant worked in are not regulated. The newest list of the SERI explicitly mentions the auditor's profession as a regulated profession, which is governed by directives that are not part of the *acquis suisse*.[2237] In this case, the applicant not only applied for admission as an auditor but also required an assessment of whether his diploma is equivalent to other diplomas listed in the RAG based on his diploma as a *Diplomverwaltungwirt FH* and professional experience. The applicant neither qualified for the auditor's profession in his home Member State Germany (*Wirtschaftsprüfer*), nor were his professional activities as a public service accountant regulated in Switzerland.[2238] In addition, the SERI is not responsible for the admission of auditors but only to check whether the applicant's diploma is equivalent to other diplomas.[2239] The FAC emphasised that the Federal Audit Oversight Authority is responsible for the admission of auditors pursuant to Article 15 RAG in conjunction with Article 28(1) and (2) RAG.[2240] As only the latter application (equivalence under national law) was part of the administrative proceedings before the FAC, this could serve as an indication that secondary law could still be applied in another case.

The second case of the FAC of 2010 mentions secondary law without stating whether it is in general applicable for the auditor's profession – the applicant was clearly not admitted to practice as an auditor in his home Member State.[2241]

In a very recent judgment of October 2019, the FAC left the question (again) unanswered whether auditor's profession either falls under the AFMP or under the Professional Qualifications Directive because the applicant was not admitted to practice in his home Member State.[2242]

The Federal Audit Oversight Authority which is competent for the *admission* of auditors now states on its website that national law provides rights conferred by the AFMP that EU

2236 For another opinion, see Gammenthaler, Zurich, supra note 40, p. 359.

2237 <https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html> (last visited on 28.06.2020).

2238 BVGer B-93/2008 of 05.11.2008, para. 2.3.1 et seq. and para. 3.2.

2239 Art. 15 para. 1 RAG; Art. 69 BBV; BVGer B-93/2008 of 05.11.2008, para. 3.3.1.

2240 See BVGer B-93/2008 of 05.11.2008, para. 1.3.2 for further references to BVGer B-3393/2008 of 24.09.2008, para. 4.1 respectively BVGer B-1940/2008 of 10.06.2008, para. 2.5.

2241 BVGer B-4875/2009 of 04.01.2010, para. 2.3.1.

2242 BVGer B-207/2019 of 16.10.2019, para. 2.1.4.

and EEA nationals may invoke.[2243] Unlike the legal advice of the Federal Audit Oversight Authority cited in the abovementioned judgment,[2244] the Federal Audit Oversight Authority does not explicitly mention the application of secondary law for auditors but simply refers to the AFMP as such.

8.5.1.3 Analysis of the case law

It is unclear whether the recognition of professional qualifications follows primary or secondary law under the *acquis suisse*.

In the present author's opinion, the FAC case of 2008 does not *a contrario* answer whether secondary law applies to the auditor's profession.[2245] The FAC found that the applicant does not apply for the exercise of regulated activities and thus an assessment of equivalence must only be carried out according to provisions of national law. In addition, the FAC clearly states that the Federal Audit Oversight Authority would be responsible for the aptitude test.[2246] Even if secondary law were not applicable, Switzerland is bound by the AFMP and by primary law itself. This principle has been clearly developed by the CJEU.[2247] This concept only constitutes a clarification of the *Vlasopoulou* case law and therefore has to be followed by the Swiss courts.[2248] Fully-fledged audit experts and auditors may apply for recognition of professional qualifications if they are admitted in their home Member State and if they show knowledge of Swiss law based on primary law. According to the relevant online information,[2249] the Federal Audit Oversight Authority now compares foreign diplomas to the requirements laid down by national law if 'provided by a Treaty' or 'based on reciprocity' due to provisions of national law because the AFMP constitutes a Treaty in the sense of Article 4(2) RAG. It is clear from the evolution of the mutual recognition idea that 'reciprocity' and mutual recognition are not the same principle. The principle of reciprocity does not reflect the spirit of the Professional Qualifications Directive, which is among the principles of mutual trust based on the country of origin principle (*Cassis de Dijon*

2243 <https://www.rab-asr.ch/#/page/101> (last visited on 30.06.2019).

2244 BVGer B-93/2008 of 05.11.2008, para. D.

2245 Other opinion: Berthoud, Geneva, supra note 1007, p. 145 and footnote 407 thereof.

2246 BVGer B-93/2008 of 05.11.2008, para. 3.1.

2247 Case C-31/00, *Dressen II*, ECLI:EU:C:2002:35.

2248 Art. 16 para. 2 AFMP.

2249 See <https://www.rab-asr.ch/#/page/101> (last visited on 30.06.2019).

principle).[2250] According to the Federal Audit Oversight Authority, if an applicant is admitted in his home Member State and shows proof of knowledge of Swiss law, the migrant is admitted to practice as an auditor or expert auditor. Proof of relevant practical experience must be provided and may be obtained abroad as long as it is deemed equivalent.[2251]

8.5.1.4 Interim conclusion

The case law of the FAC does not clarify whether the Professional Qualifications Directive applies to the auditor's profession. Even if the Professional Qualifications Directive does not apply to the auditor's profession, auditors may rely on primary law.

8.5.2 Patent attorney

Patent attorneys assist with patent applications, represent clients and give advice on patent law.[2252] As of July 2019, 504 patent attorneys have been recorded as enrolled in the register, whether they are working independently or in an employed position.[2253] Compared to 575 European Patent Attorneys who are located in Switzerland as of July 2019,[2254] this figure is rather low (considering that both admissions can be obtained concurrently).

8.5.2.1 Title protection

The profession of patent attorney is regulated in the Patent Attorney Act. According to Article 1 of the Patent Attorney Act, the use of the titles *Patentanwältin/Patentanwalt, conseil en brevet, consulente in brevetti, patent attorney, europäische Patentanwältin, europäischer Patentanwalt, conseil en brevets européens, consulente in brevetti europei and european patent attorney* are protected by this Act. The Patent Attorney Act is applicable to

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2250 See Berthoud, Geneva, supra note 1007, p. 32 et seq. and p. 36.

2251 <https://www.rab-asr.ch/#/page/101> (last visited on 30.06.2019).

2252 <https://www.ige.ch/en/protecting-your-ip/patents/before-you-apply/patent-attorneys.html> (last visited on 30.06.2019).

2253 <https://www.ige.ch/en/protecting-your-ip/patents/before-you-apply/patent-attorneys/the-swiss-patent-attorney-register.html> (last visited on 30.06.2019).

2254 <https://www.epo.org/applying/online-services/representatives.html> (last visited on 30.06.2019).

persons who use the aforementioned titles.[2255] Unlawful use of one of the aforementioned titles is sanctioned by a fine of up to 10,000 Swiss Francs.[2256]

8.5.2.2 Representation

Patent attorneys may represent parties before the Swiss Federal Institute of Intellectual Property and before the FAC. They are not allowed to represent clients before the Swiss Federal Court because professional representation in civil proceedings is reserved exclusively to fully qualified lawyers.[2257]

8.5.2.3 Education and curriculum

To have the title of a European Patent Attorney (*europäische Patentanwältin / europäischer Patentanwalt, conseil en brevets européens / consulente in brevetti europei, european patent attorney*), registration with the European Patent Agency is necessary. The European Patent Attorney exam is considered a rather difficult and time-consuming exam according to the Association of Swiss Patent and Trademark Attorneys.[2258]

To become a Swiss patent attorney, the following is required: a recognised degree in natural or scientific sciences, the federal patent attorney exam, or an equivalent foreign patent attorney exam, practical experience, postal address in Switzerland and enrolment in the register for patent attorneys.[2259] Unlike for the lawyer's profession, where a Master's degree is required, to become a patent attorney a Bachelor's degree in natural or scientific sciences at an accredited Swiss university or the recognition of a diploma is sufficient.[2260]

The Swiss Federal Council appoints the competent authority for the academic recognition of diploma for holders of foreign degrees.[2261] The Federal Council also appoints the

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2255 Art. 2 para 1 *Bundesgesetz über die Patentanwältinnen und Patentanwälte (PAG) of 20.03.2009,* SR 935.62.

2256 Art. 16 PAG in conjunction with Art. 106 StGB.

2257 Art. 41 para. 1 BGG; see further BGer 4A_161/2007 of 18.07.2007, para. 3.

2258 <http://www.vsp.ch/de/verband-patentanwalt-markenanwalt/ausbildung-zum-patentanwalt.html> (last visited on 30.06.2019).

2259 Art. 2 PAG.

2260 Art. 4 para. 2 PAG.

2261 Art. 5 para. 2 PAG.

competent authority for the mutual recognition of professional qualifications in the field of patent attorneys.[2262]

8.5.2.4 Aptitude test

Foreign patent attorneys may establish themselves or provide services under the title of their home Member State. The regulation only affects the protection of the title of patent attorneys, so in principle this is unproblematic.

Patent attorneys might however want to have the professional title granted by Switzerland. For this purpose, an applicant needs to apply for mutual recognition of professional qualifications. Article 7(1) of the Patent Attorney Act provides that 'a foreign patent attorney exam' is recognised if there is an agreement which provides for the recognition of diplomas and if this is proven for the applicant.

The competent authority needs to state the conditions for recognition of diploma in case the application is dismissed.[2263] Article 25 of the Ordinance on Patent Attorneys provides for an aptitude test for foreign patent attorneys. Applicants are admitted to the aptitude test if they have completed a higher education qualification of at least three years' duration (full-time) or part-times studies of an equivalent duration. A minimum of 80% of the subjects must be devoted to natural sciences or engineering.[2264] [2265]

The applicant must show knowledge of Swiss law. General knowledge of foreign law is not sufficient. Knowledge of Swiss law covering the subjects of parts 3 and 4 of the Patent Attorney exam are required.[2266]

Each part of the exam costs 600 Swiss Francs. Parts 1 and 2 as well as parts 3 and 4 can be completed together, which reduces the exam fee to 900 Swiss Francs.[2267] The fees for the

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2262 Art. 7 para. 2 PAG.

2263 Art. 7 para. 3 of the PAG.

2264 According to Art. 2 para. 2 of the Ordinance on the patent attorney, the following subjects are considered natural sciences or engineering subjects: 'civil engineering, biochemistry, biology, biotechnology, chemistry, electronics, electrical engineering, information technology, mechanical engineering, mathematics, medicine, pharmacy and physics'.

2265 Art. 2 para. 1 of the *Patentanwaltsverordnung (PAV) of 11.05.2011,* SR 935.621.

2266 See Art. 8 paras. 3 and 4 PAV.

2267 Art. 3 of the *Gebührenordnung der Prüfungskammer für Patentanwältinnen und Patentanwälte of 23.11.2010,* SR 935.621.31.

aptitude test amount to 800 Swiss Francs.[2268] An application for the academic or professional recognition of diploma costs 200 Swiss Francs whether or not the application was successful.[2269]

8.5.2.5 Tasks of the joint patent attorney association

The Federal Council delegated several tasks to the Joint Association of the Organisations of Patent Attorneys of Switzerland (*Verein der Verbände der Patentanwälte der Schweiz*). The examination board (*Prüfungskammer*) is responsible for organising the patent attorney exam, for the recognition of professional qualifications, and to decide upon the successful completion or recognition of a patent attorney exam.[2270] It appoints the examiners and regulates the fees for the exam and submits those regulations on fees to the Federal Council for approval. The examination board (*Prüfungskammer*) is also responsible for governing the permanent office. The tasks with regard to the organisation of the exam were delegated to the exam committee (*Prüfungskommission*).[2271]

8.5.2.6 Services

The profession of patent attorney is listed in Annex I to the VMD for the declaration to be made in advance. The exercise of the profession is not regulated, only the use of titles is. Service providers have to use the title of the home Member State. The examination board (*Prüfungskammer*) and the examination committee (*Prüfungskommission*) are of the opinion that this profession should thus be removed from Annex I to the VMD. In their opinion, making a declaration in advance is not sensible.[2272] Member States may not introduce a prior check before the first provision of services for this profession.[2273]

[2268] Art. 3 of the Gebührenordnung der Prüfungskammer für Patentanwältinnen und Patentanwälte in conjunction with Art. 25 para. 1 PAV.

[2269] Art. 3 of the Gebührenordnung der Prüfungskammer für Patentanwältinnen und Patentanwälte in conjunction with Art. 23 PAV.

[2270] Art. 8 para. 1 of the PAG in conjunction with Art. 3 para. 1 PAV and Art. 5 para. 2 PAG in conjunction with Art. 23 PAV.

[2271] Art. 3 para. 3 PAV.

[2272] <https://www.sbfi.admin.ch/dam/sbfi/de/dokumente/pruefungskammer_ pruefungskommission.pdf> (last visited on 26.06.2020).

[2273] Art. 7(4) of the Professional Qualifications Directive.

8.5.2.7 Swiss case law

The FAC made a decision in 2014 on the mutual recognition of professional qualifications of a patent attorney.[2274] An applicant with a degree as a metalworker with a specialisation in the field of mechanics *(Maschinenschlosser Fachrichtung Mechanik)* applied for recognition of professional qualifications as a patent attorney. The FAC applied the Professional Qualifications Directive before the amendments by Directive 2013/55/EU were added, but which are still not part of the *acquis suisse*, and stated that the profession of patent attorney falls under Article 11(d) of the Professional Qualifications Directive. The profession of metalworker however was considered to fall even *below* Article 11(c) of the Professional Qualifications Directive. That means that it fell at least more than one level below the required level. Article 13(1)(b) of the Professional Qualifications Directive (without the amendments brought in by Directive 2013/55/EU) provides that mutual recognition of professional qualifications is only to be granted under the conditions that at least a level immediately below that in the host Member State has been acquired. The appeal before the FAC was therefore unsuccessful.

The outcome of the case would have been different with the amended Professional Qualifications Directive. It could not have resulted in a short review of the qualification levels. Applicants may only be refused the recognition of professional qualifications outright (based on the different levels of qualifications) if the highest level of Article 11(e) of the Professional Qualifications Directive is required, and they show only education which falls under Article 11(a) of the Professional Qualifications Directive.[2275]

8.6 Free movement for legal trainees

8.6.1 Introduction

The profession of lawyers is closely connected to the education of lawyers, and the mobility of lawyers is closely connected to the curriculum and to the mobility of students. Academic and professional recognition of diplomas are however still separate. Students from abroad obtaining Swiss degrees and returning to their country of origin might be faced with

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[2274] See Joined Cases BVGer B-1129/2013 and B-4336/2013 of 25.02.2014.

[2275] See the new wording of Art. 13(4) of the Professional Qualifications Directive.

either academic or professional recognition of professional qualifications. The education of law students is largely a matter of the cantons.[2276]

However, some rights for non-economically active students cannot be compared to the internal market law due to the static nature of the *acquis suisse*. It should be recalled that the progressive case law of the CJEU with regard to students applying for access to university education[2277] (most likely) does not apply to the *acquis suisse* as Article 2 AFMP (probably) does not act as a subsidiary layer considering the more recent case law,[2278] of protection, such as Article 18 TFEU.[2279] The wording of Article 2 AFMP is restrictive and applies only in conjunction with Annexes I, II and III of the AFMP.[2280] Access to vocational training is therefore not protected by the AFMP for students who are not economically active (except 'student workers' and family members: see Chapter 4.3.3 above). Vocational training includes both higher education and university education.[2281] This is especially crucial when considering the case law, which discusses measures establishing quotas for access to university.[2282] Some Swiss universities established quotas that are based on competitive exams.[2283] Moreover, tuition fees are higher for foreign students at some Swiss universities.[2284]

There are certain areas where both forms of recognition overlap, namely the famous *Kraus* case. In principle, academic and professional recognition of diploma can be separated. This is also crucial due to the limited competences of the EU in the area of academic recognition. Recent legal literature emphasises this distinction,[2285] while it is stated by the

2276 See Art. 63a BV.

2277 See Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427.

2278 Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 39.

2279 See also Ehrenzeller, supra note 864, p. 125; other opinion: Epiney, supra note 867, p. 93 et seq.; Decision of the second President, Gerichtskreis VIII Bern-Laupen, published in CaS 2008, pp. 332-347 of 13.06.2008, para. 39.

2280 See Odendahl, supra note 863, p. 366 et seq.

2281 Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427, para. 33; Case C-73/08, *Bressol*, ECLI:EU:C:2010:181.

2282 Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427; Case C-73/08, *Bressol*, ECLI:EU:C:2010:181; Case C-65/03, *Commission v Belgium*, ECLI:EU:C:2004:402.

2283 See Reglement über die Zulassung von Studienbewerbenden mit einem ausländischen Reifezeugnis an die Universität St.Gallen vom 2. November 2015.

2284 See Ehrenzeller, supra note 864, p. 106 for further references.

2285 Berthoud, Geneva, supra note 1007, p. 28.

doctrine that both forms overlap and that some cases fall in between the gaps, such as the famous *Morgenbesser* case.[2286]

In most countries a legal trainee is a law graduate from university (with some exceptions[2287]). Legal trainees are not considered to be part of a 'regulated profession' under the meaning of the Professional Qualifications Directive.[2288] Primary law is therefore applicable for legal trainees if they are considered workers,[2289] which can be unclear for trainees with low wages in the light of the case law.[2290]

It is important to emphasise that the General Recognition Directive (corresponding to the Professional Qualifications Directive) only applies for fully-fledged lawyers who want to establish themselves (see Chapter 8.6.2). Some authors argue that the Professional Qualifications Directive should be considered relevant for comparing the levels of applicants.[2291] From the case law, it is however clear that the Professional Qualifications Directive does not apply for legal trainees (see Chapter 8.6.2). While other scholars have raised the idea of reversing or differentiating the case law of the CJEU. It is argued that legal trainees who are allowed to undertake a legal traineeship in their home Member State should fall under the Professional Qualifications Directive, whereas candidates with a degree that does not allow access to legal traineeship do not fall under the Professional Qualifications Directive. This is clear because their degree, which does not give access to a regulated profession, cannot be regarded as a diploma under the Professional Qualifications Directive. In the Netherlands, the diploma, which gives access to the lawyer's profession, is known as a law degree with *civiel effect*.[2292] It is also mentioned by the CCBE in response to the Panteia

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2286 Schneider, Antwerp, supra note 741, p. 108; H. Schneider & K. Lubina, 'Freizügigkeit von Rechtsanwälten in der Europäischen Union: ein Beispiel für andere Berufsgruppen?', in K. Odendahl (ed.), *Europäische (Bildungs-)Union?,* Berlin (2011), p. 310 et seq.

2287 See Claessens, Nijmegen, supra note 1898, p. 85 et seq.

2288 Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612, para. 55; State Secretariat for Research and Innovation et al., supra note 1029, p. 2.

2289 Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612, para. 67.

2290 See supra note 876 for a reference.

2291 See P. Meier & C. M. Reiser, 'Art. 7 LLCA', in M. Valticos, C. M. Reiser & B. Chappuis (eds.), *Loi sur les avocats: Commentaire de la loi fédérale sur la libre circulation des avocats (Loi sur les avocats, LLCA),* Bâle (2010), para. 30 who assume that the qualification levels of the General Recognition Directive should be applied.

2292 Claessens et al., supra note 1897, p. 63.

report that it is primarily a task for the Member States to guarantee clarity and legal certainty for 'non-fully qualified professionals'.[2293]

8.6.2 Free movement of legal trainees in the EU

In the seminal case *Morgenbesser,* a French national with a French degree (which did not give her access to a legal traineeship) living in Italy applied to be registered as a *praticanti* (trainee). Her application was rejected. She appealed to the *Consiglio Nazionale Forense* but was still refused admission to the bar on grounds that she lacked the necessary Italian evidence of professional qualifications and was not admitted to practice as a lawyer in France. Further, the *Consiglio Nazionale Forense* argued based on the Facilitating Practice Directive that she could only ask for recognition of her diploma if she had been allowed to practice as a lawyer in the Member State in which she had received her diploma.[2294] In the meantime, Ms Morgenbesser also sought academic recognition of her diploma, which would have been granted if she had completed a course of two years, passed 13 exams and written a thesis.[2295]

The CJEU accepted this reading of the Facilitating Practice Directive and ruled that the General Recognition Directive (corresponding to the Professional Qualifications Directive) does not apply to this situation as a trainee may not be regarded as being part of a regulated profession in the sense of the General Recognition Directive. However, the CJEU found that the freedom of movement of workers applied to the case. It argued that the refusal to accept a French trainee might hinder the free movement right. Therefore, the authorities had to consider the relevant skills already gained in France. They not only had to compare the course (*maîtrise en droit*) but also the professional experience. Lastly, it held that the host Member State remains free to require the legal trainee to acquires skills that he or she still may not have.[2296] The judgment in *Morgenbesser* reformed the case law. Member States must make a comparison with the requirements on a case-by-case basis even if the individual concerned

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[2293] CCBE, *Position Paper on the Morgenbesser case law of 11.09.2015,* <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TRAINING/TR_Position_papers/EN_TR_20150911_CCBE_Position_on_the_Morgenbesser_case_law.pdf> (last visited on 26.06.2020).

[2294] Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612, paras. 25-31.

[2295] Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612, para. 28.

[2296] Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612, paras. 63-72.

is not fully qualified in their State of origin. However, the *Morgenbesser* case did not clarify exactly how recognition should be for legal trainees who are not fully qualified as lawyers and when it should be given.

The more recent case *Peśla* illustrates the concept of recognition under the regime of primary law. A Polish national studied in Germany and Poland and obtained a Master's degree in 'German and Polish Law'. Master's degrees are still uncommon in the German system of education for several regulated professions, including lawyers (except foreign and postgraduate degrees). According to German law, students are required to pass the first state examination (*1. Staatsexamen*) which consists of a university examination and an examination by the state (*Bundesland*). If a graduate seeks work in a regulated profession, such as for the judge's profession, he or she needs to pass the second state examination (*2. Staatsexamen*). Before a law graduate (*Diplom-Jurist*) can take the second state examination, a traineeship of (*Referent*) two years is mandatory. Only law graduates who passed the first state examination are permitted to work as a trainee pursuant to German law.[2297]

Mr Peśla claimed that he should be able to work as a legal trainee in Mecklenburg-Western Pomerania because his study and legal practice were comparable. Interestingly enough, the authorities offered him the opportunity to take an aptitude test so he could demonstrate his skills. He refused to take that test, instead relying on the case *Morgenbesser*. Mainly, he claimed that the authorities should not only have compared his academic courses but also his work experience as a tutor and assistant at the university.[2298]

The national court referred three questions to the CJEU. By its first two questions, it asked whether Article 45 TFEU precluded the authorities from requiring equivalent knowledge compared to the subjects of the examination. Consequently, by its third question it asked whether an infringement of the freedom of movement of workers would force the authorities to lower the requirements.[2299]

First, the CJEU agreed that a trainee falls within the scope of Article 45 TFEU and that a legal trainee does not fall under the exception of employment in the public service (Article 45(4) TFEU). The CJEU noted that Mr Peśla was neither admitted to the bar in Germany, nor to the bar in Poland. Secondary law (the Facilitating Practice Directive) applied

[2297] Case C-345/08, *Peśla*, ECLI:EU:C:2009:771, paras. 3-12.

[2298] Case C-345/08, *Peśla*, ECLI:EU:C:2009:771, paras. 12-14.

[2299] Case C-345/08, *Peśla*, ECLI:EU:C:2009:771, para. 19.

only to lawyers who are allowed to carry out their profession in the home Member State. The CJEU stated that Mr Peśla's reasoning was 'based on an incorrect interpretation of the case-law on which it relies'. His argument was that a young professional would never have the opportunity to use his free movement rights because German law is only taught in Germany. The applicant raised paragraphs 68 and 70 of *Morgenbesser* in this respect. Those paragraphs state that a Member State must carry out a comparison on an objective basis and compare the level of knowledge. The CJEU made it clear that the subjects, as well as the level of education, were relevant in that respect. In the end, the CJEU answered the third question in the affirmative. A Member State must not lower its standards. Doing so would be an obstruction to the education of the trainees. Applicants ought to have prior knowledge in German law. The rejection of *unrestricted* access to a traineeship was therefore lawful.[2300]

To conclude, the judgment reveals that Member States are still competent to regulate the training of future lawyers. Although non-harmonisation has almost never been a decisive factor before the CJEU in other non-harmonised areas, such as tax law or company law,[2301] the CJEU accepts that education is somehow different. Especially in the areas of law which still differ considerably between the Member States.

However, one could also argue that Mr Peśla was barred from carrying out a legal profession in Germany because employers *de facto* also require the second state examination to have been passed. This could theoretically be seen as a restriction (see Chapter 5.2.1) but is certainly justified by an overriding reason in the general interest to protect consumers and to protect the effective functioning of the judiciary.

8.6.3 Free movement of legal trainees between the EU and Switzerland

The federal authorities issued a joint statement of the SERI, the Integration Office (now Directorate for European Affairs), the Directorate for public international law and the Federal Department of Justice in 2007 stating that, in their opinion, the case law of *Morgenbesser*

[2300] Case C-345/08, *Peśla*, ECLI:EU:C:2009:771, paras. 57–65.

[2301] Case C-293/06, *Deutsche Shell GmbH*, ECLI:EU:C:2008:129, paras. 41-45; Case C-290/04, *FKP Scorpio Konzertproduktionen*, ECLI:EU:C:2006:630, para. 54; Case C-374/04, *Test Claimants*, ECLI:EU:C:2006:773, para. 52; Case C-231/05, *Oy AA*, ECLI:EU:C:2007:439, para. 52; see also for the importance of conventions Case C-208/00, *Überseering*, ECLI:EU:C:2002:632, para. 87.

must be applied in Switzerland.[2302] This position is also supported by some authors.[2303] In principle, it was also accepted in two recent cases of the SFC as well as by the case law of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud even if the appeals were dismissed.[2304] However, Tobler doubts that the *Morgenbesser* case law applies from a dogmatic standpoint because it is unclear whether restrictions are covered by the AFMP and the standstill clause in Article 13 AFMP does not go further than the concept of indirect discrimination (see Chapter 4.2.2.5).[2305]

The joint statement of the Swiss federal authorities lists several interesting points which are noteworthy to mention. First, the joint statement recalled that federal law neither imposes any obligations for the cantons with regard to the education of legal trainees nor does it in principle prevent the cantons from recognising foreign diplomas.[2306] It does however stipulate the conditions for access to the bar register. A lawyer only benefits from free movement with a 'Master's diploma from a Swiss university' or with an equivalent diploma of another country. Second, the joint statement discusses the obligation under Article 16(2) AFMP. As shown, the case law of the CJEU has to be followed except when there are 'good reasons' to do otherwise.[2307] The federal authorities therefore recommended considering all the relevant competences of the applicant, including the applicant's professional experience. The joint statement highlights that a holistic assessment of all the relevant professional experience and skills of the applicant must be carried out.[2308] This means that not *a priori* only ECTS points in Swiss law are relevant but that practical experience also counts, no matter where that experience has been acquired.[2309] Third, the competent authorities must

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2302 State Secretariat for Research and Innovation et al., supra note 1029.

2303 Gammenthaler, Zurich, supra note 40, p. 343 et seq.; Berthoud, Geneva, supra note 1007, p. 139 et seq.

2304 This case law will be discussed below in Chapter 8.7.7.2: BGer 2C_300/2019 of 31.01.2020; BGer 2C_831/2015 of 25.05.2016; Decision GE.2019.0180 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 03.03.2020; Decision GE.2018.0215 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 20.02.2019; Decision GE.2015.0041 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 17.08.2015; Decision GE.2014.0130 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 24.11.2014.

2305 Tobler (2017), supra note 1988, p. 175 et seq.

2306 State Secretariat for Research and Innovation et al., supra note 1029, p. 1.

2307 See BGE 134 II 10.

2308 State Secretariat for Research and Innovation et al., supra note 1029, p. 3, para. 1.

2309 State Secretariat for Research and Innovation et al., supra note 1029, p. 3, para. 2.

clearly state which subjects are necessary for the legal traineeship. As access to the legal traineeship in Switzerland *de iure* requires only a Bachelor of Law,[2310] this list should cover only subjects from the Bachelor's programme.[2311] Lastly, the joint statement mentions that if the competent authority finds the qualifications of the applicants not to be equivalent to the catalogue of subjects, a reasoned decision must clarify how the applicant may acquire the missing skills or experience.[2312]

8.7 Legal trainees on a national level

While the bar exam is *de iure* only compulsory for a few legal professionals in Switzerland,[2313] (even judges of the Swiss Federal Court or the FAC are at least *de iure* not required to have any legal qualification but must only be eligible to vote[2314]) it is *de facto* necessary for many legal professions.[2315] The cantons are in principle still competent to set the conditions for traineeship and access to the bar exam.[2316] In some courts or public administrations, legal trainees more or less perform the duties of regular employees, while in others legal trainees are working under the close guidance of senior lawyers. In addition, with the notable exception of the Canton of Graubünden,[2317] non-lawyers may educate legal trainees who then become fully fledged lawyers. In prominent law firms, legal trainees are often working in a single area of law which does not prepare them for the bar exam or prepare them for general practice either.[2318] Unlike in other countries, such as Germany, many

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2310 Art. 7 para. 3 of the BGFA.

2311 State Secretariat for Research and Innovation et al., supra note 1029, p. 4, para. 3.

2312 State Secretariat for Research and Innovation et al., supra note 1029, p. 4, para. 4.

2313 In some cantons the bar exam is required in order to become judge: see e.g. § 9 of the Act on the organisation of the courts and public authorities for civil, criminal and public procedures of the Canton of Lucerne of 10 May 2010 *(Gesetz über die Organisation der Gerichte und Behörden in Zivil-, Straf- und verwaltungsgerichtlichen Verfahren)*. Other cantons do not provide any conditions for becoming a judge or only require a 'Master of Law'; see § 8 para. 2 of the Act on the organisation of public authorities and courts in civil and criminal procedures of the Canton of Zurich of 10 May 2010 *(Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess)*.

2314 Arts. 143 BV and Art. 5 para. 2 *Bundesgesetz über das Bundesverwaltungsgericht (VGG) of 17.06.2005,* SR 173.32.

2315 Art. 95 para. 1 BV and Art. 3 para. 1 BGFA; Sethe (2017), supra note 2150, p. 14; Diebold, Berne, supra note 67, para. 1081; see further BGer 2C_610/2007 of 08.11.2007, para. 2.2.

2316 Art. 95 BV and Art. 3 para. 1 BGFA.

2317 Art. 8 para. 1 of the *Anwaltsgesetz* of the Canton Graubünden of 14.02.2006.

2318 See U. Haegi, 'Aus- und Weiterbildung der Anwältinnen und Anwälte', ZSR 2017, No II, p. 111.

cantons allow a broad range of legal traineeships which give access to the bar exam. To sum up, there is no common curriculum for legal trainees in Switzerland. Generally speaking, the conditions for access to the bar exam and for enrolment in the bar register are the same as candidates who do not fulfil the conditions laid down by federal law and would be barred from enrolment in the register and from intercantonal free movement within Switzerland. In addition, they would also be barred from free movement within the EU because they are not allowed to register in the BGFA register.[2319] The cantons could also tighten standards for their bar exam as the rules governing the traineeship and the bar exam are still within their competence.[2320] Any additional condition must however pass the scrutiny of the right to economic freedom (Article 27(2) BV)[2321] and Article 2 and Article 9 of the AFMP in cross-border situations. Admission to legal traineeships in other cantons must not be recognised based on Article 4(1) BGBM,[2322] but according to doctrine based on Article 3(1) BGBM.[2323] The Swiss Federal Court however stated that there is no room for the BGBM due to Article 3(1) BGFA which states the competence of the cantons in this matter.[2324]

It is interesting to note that unlike the second state examination in Germany, the grades of the bar exam (if points or grades are even awarded) are usually not decisive for the professional career of the successful candidates. The professional career initially depends *de facto* mainly on the grades of the Bachelor's degree as some law firms and academics have repeatedly criticised the higher average grades of Master's degrees compared to the old system (*Lizentiat*).[2325]

8.7.1 Professional requirements

While the cantons are competent to set the requirements for the bar exam,[2326] professional requirements for the enrolment in the bar register pursuant to federal law are listed in Article 7 BGFA. Candidates must have passed a 'law programme' *(juristisches Studium)*

2319 Art. 3(1) of the Facilitating Practice Directive.

2320 Art. 3 para. 1 BGFA and Art. 95 BV; BGer 2C_610/2007 of 08.11.2007, para. 2.2.

2321 BBl 1999 6075 et seq.; see also Sethe (2017), supra note 2150, p. 14.

2322 BGE 125 II 315, para. 2.b.

2323 Diebold, Berne, supra note 67, para. 1018.

2324 BGer 2C_610/2007 of 08.11.2007, para. 2.2.; see also Diebold, Berne, supra note 67, para. 1081.

2325 J. Schwarz, 'Einige Gedanken zur Juristenausbildung', in J. Schmid (ed.), *Hommage für Peter Gauch,* Zurich (2016), p. 210 et seq.

2326 Art. 95 BV and Art. 3 para. 1 BGFA.

which was successfully completed with a 'Master of Law' or a licentiate (*Lizentiat*).[2327] In theory, the BGFA allows access to the legal traineeship with a Bachelor's degree pursuant to Article 7 (3) BGFA, while candidates for the bar exam must have a Master's of Law.[2328] In practice, legal traineeships are almost exclusively offered to graduates with a Master's of Law. Some cantons have even added more restrictive provisions for trainees with a Bachelor's degree.[2329] A Swiss doctorate degree of the law faculty in conjunction with a Swiss licentiate degree of the philosophical faculty was not considered to fulfil this requirement.[2330]

According to the wording of Article 7(1) lit. a the BGFA, candidates with a Swiss Master's of Law or an equivalent foreign degree must be granted access to the bar register notwithstanding the fact that they might not have any knowledge of Swiss law. The BGFA certainly prohibits the assessment of curricula awarded by Swiss universities.[2331] For foreign diplomas, it allows an assessment of whether it is equivalent with a Swiss Master's of Law based on a strictly academic evaluation.[2332] Some authors argue that the Professional Qualifications Directive (corresponding to the Professional Qualifications Directive) should be consulted for the assessment.[2333]

While all undergraduate law programmes in Switzerland cover the essential subjects of Swiss law,[2334] a Master's of Law does not guarantee knowledge of Swiss law. First, foreign students might request access to a law programme solely based on academic recognition. This is less problematic as the universities may or may not recognise ECTS credit points acquired abroad based on academic recognition.

[2327] Art. 7 para. 1 lit. a BGFA.

[2328] Art. 7 para. 1 lit. a BGFA; see further BBl 2005 6632.

[2329] The *Anwaltsgesetz* (Lawyers' Act) of the Canton of St. Gallen of 11.11.1993 stipulates that legal traineeships by candidates with a Bachelor's degree only count for 50% of the duration of the traineeship: Art 4bis of the Exam regulations on lawyers and legal agents of the Canton of St. Gallen of 22 April 1994 (Prüfungs- und Bewilligungsreglement für Rechtsanwälte und Rechtsagenten [PBR]); sGS 963.73).

[2330] Decision WBE.2016.385 of the Obergericht (High Court) of the Canton of Aargau of 18 January 2017, Chamber for administrative law of 18.01.2017, published in AGVE 2017, p. 237 et seq.

[2331] E. Staehelin & C. Oetiker, 'Art. 7 BGFA', in W. Fellmann, G. G. Zindel & T. Baumgartner (eds.), *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA),* Zurich (2011), para. 5.

[2332] Meier & Reiser, supra note 2291, para. 34; see the discussion of the relevant case law in Chapter 8.7.7.

[2333] Staehelin & Oetiker, supra note 2331, para. 7.

[2334] See for a more detailed overview: Sethe (2017), supra note 2150, p. 31 et seq.

Second, there are exceptional Master's programmes. A student could for instance obtain a Master's of Law at the University of Basel without any knowledge of Swiss law. [2335] The explanatory report of the Federal Council states that only the Master's degree is decisive when assessing access to bar register. Still, a student could have (in theory) access to the bar register with a Bachelor's degree in a subject other than law, notwithstanding the fact that a Bachelor's degree in economics, for example, does not allow access to a legal traineeship on its own.[2336] This problematic issue has now been clarified by a very recent leading case of the Swiss Federal Court which allowed the cantonal authorities of the Canton of Vaud to require a Swiss Bachelor of Law or an equivalent foreign diploma for access to traineeship even if the applicant is in possession of a Swiss Master's degree in Law. (see Chapter 8.7.7.2.1 for a discussion of this case).[2337]

Bar candidates must also have at least one year of practical experience (traineeship).[2338] The duration of the legal traineeship and the specifics of it are determined by cantonal law. Most cantons require that at least six months of practice has been completed in their canton. As mentioned above, the BGFA was under revision, which was halted. The draft of the Chamber of Lawyers had as a requirement practical experience of at least 18 months and at least six months in the canton where the trainee was to take the bar exam.[2339] This would have affected a large number of cantons that only require a one-year long traineeship. In addition, the draft would also have restricted traineeship possibilities as practical experience with a lawyer would have been declared mandatory.[2340] An exception for small cantons was made in the draft.[2341] Nevertheless, this rule would have led to problematic situations in many

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2335 The Universities of Basel, Freiburg and Strasbourg offer a 'tri-national' degree that offers the opportunity to complete 3 Master's degrees. The credits amount to only 60 divided between the three universities. For students who make an application to the University of Freiburg, 60 credits have to be completed: (§ 4(1) and § 5 of the *Studien- und Prüfungsordnung für den trinationalen EUCOR-Masterstudiengang Rechtswissenschaft* of the University Freiburg of 13 May 2008). For students who enrol at the University of Basel, 90 credits have to be completed for a Master of Laws (§ 5 and § 9 of the *Ordnung für das EUCOR Masterstudium der Juristischen Fakultät der Universität Basel, der Juristischen Fakultät der Albert-Ludwigs-Universität Freiburg i.Br. und der Universität Robert Schuman in Strasbourg of 2 February 2006*).

2336 BBl 2005 6631; Staehelin & Oetiker, supra note 2331, para. 4a.

2337 BGer 2C_300/2019 of 31.01.2020, para. 4.5.

2338 Art. 7 para. 1 lit. b BGFA.

2339 Art. 10 of the Draft on a new BGFA.

2340 Art. 10 para. 2 of the Draft on a new BGFA.

2341 Art. 10 para. 2 of the Draft on a new BGFA.

cantons. Nowadays, many bar candidates have practical experience as legal trainees in courts of first instance or in the public administration. This amendment would probably have resulted in unpaid traineeships. Currently, the Canton of Vaud already restricts the number of *stagiaires* (trainees).[2342]

8.7.2 Introduction of the Bologna system in Switzerland for law students

It is worth discussing how the case law of the CJEU can be adapted for the *acquis suisse*. For this reason, it is necessary to discuss the relevant diploma required to enrol in the bar register and for access to the bar exam. Since the introduction of the Bologna system, the necessary diploma is the 'Master of Law'. Contrary to the rather uniform German system, Switzerland opted for a different approach based on the Bologna process. Consequently, the CRUS has required all Swiss universities to implement their studies in accordance with this new system, namely to introduce undergraduate (180 ECTS credit points) and graduate degrees (90 to 120 ECTS credit points).[2343] Every university in Switzerland offers different Master's degrees that may differ considerably. The Rectors' Conference of the Swiss Universities published regulations and recommendations for Bachelor's degrees as part of their coordination task. According to the relevant recommendation, at least 60 ECTS points should be acquired in the respective field of study.[2344]

In 2001, the universities of St. Gallen and Lucerne were the first universities in Switzerland to introduce Bachelor's and Master's degrees for law students. As of the semester 2006/2007, all Swiss universities had introduced the Bologna system for their law courses.[2345] Before the introduction of the Bologna system, those law courses consisted of two parts. At the university of Zurich, the first part for examinations took place after three semesters (the so-called *Lizentiat I* exams). The second part (*Lizentiat II* exams) could be completed after at least four additional semesters.[2346] Previously, therefore, the law course

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2342 Art. 22 para. 3 of the *Loi sur la profession d'avocat* (Lawyers' Act) of the Canton of Vaud of 9 June 2015.

2343 Sethe (2017), supra note 2150, p. 18 et seq.

2344 Regelung der CRUS zur Festlegung der Studienrichtungen sowie für die Zuordnung der Bachelorstudiengänge of 11 November 2005.

2345 Swiss Confederation, *Botschaft zur Änderung des Bundesgesetzes über die Freizügigkeit der Anwältinnen und Anwälte of 26 October 2005 (BBl 2005 6621)*, p. 6624.

2346 R. Sethe, 'Vom Lizenziats- zum Bologna-System: Auswirkungen auf das Prüfungsgeschehen', in J. Brockmann & A. Pilniok (eds.), *Prüfen in der Rechtswissenschaft: Probleme, Praxis und Perspektiven,* Baden-Baden (2013), p. 98 et seq.

was similar to the state examinations in Germany. Under the Bologna system, the curriculums of the eight public Swiss universities who offer a law course leading to the regulated profession of a lawyer[2347] differs considerably from one university to another. Some universities offer a range of choice for students to specialise in some subjects. This affects the Master's degree courses in particular – choice in the Bachelor's degree courses is still restricted.[2348]

The following is an impression of the law students enrolled at universities in Switzerland:

	Licentiate	Bachelor	Master's	Doctorate
1980	6,433	-	-	908
1985	7,543	-	-	1,380
1990	8,037	-	-	1,478
1995	9,635	-	-	796
2000	9,214	-	-	1,151
2005	4,770	5,427	1,038	1,491
2010	665	8,477	3,290	1,737
2015	15	8,938	4,584	1,960
2016	13	9,035	4,503	2,013
2017	15	8,804	4,437	1,939
2018	16	8,680	4,457	1,963
2019	17	8,690	4,545	2,026

Table 16: Law students enrolled at university level in Switzerland [2349]

2347 Universities of Basel, Berne, Fribourg, Geneva, Lausanne, Lucerne, Neuchâtel, St. Gallen and Zurich.

2348 The Bachelor's courses in Switzerland encompass all the relevant aspects of the law. This includes the Tort Law, the Civil Code, Administrative Law, Criminal and Procedural Law. These subjects are, with some minor exceptions, covered in all Bachelor's courses currently offered in Switzerland. The Master's programme now allows substantial deviations. Many universities offer different specialisations, such as a Master of Laws in Legal Practice or a Master of Laws in Public Law. Some universities also offer hybrid law courses, such as a Master of Law and Economics. The latter course is considered to give access to the profession of lawyer. Specialisations are usually not mandatory. Most universities allow an almost unrestricted choice of subjects in their Master's programmes. A student might consider specialising only in legal history, sociology and related subjects without taking an exam in substantive law. Alternatively, one might want to pick only foreign laws including EU law, US law and WTO law. In both cases, the candidate would be admitted to the bar exam after about one year of traineeship. Compared to other countries, mandatory subjects for access to the bar exam are not foreseen by federal or by cantonal law. See further Sethe (2017), supra note 2150, p. 21 et seq.

2349 Data according to the data of the Federal Statistical Office: <https://www.bfs.admin.ch/bfs/de/home/statistiken/bildung-wissenschaft/personen-ausbildung/tertiaerstufe-hochschulen.assetdetail.7666455.html> (last visited on 02.08.2020).

8.7.2.1 Specific Master's degrees in Switzerland

8.7.2.1.1 Distance learning

A distant learning course is also offered by the *Fernuniversität Schweiz.*[2350] It is recognised under the Federal Act on Funding and Coordination of the Swiss Higher Education Sector.[2351] Admission to the bar exam merely requires the holding of a 'Master's' degree in law from a university,[2352] so graduates with a 'Master of Law' from the distance learning university of Brig have a diploma that is sufficient in the sense of the BGFA.[2353]

8.7.2.1.2 Master's of Science in Wirtschaftsrecht

The 'Bachelor's' and 'Master's of Science (BSc) ZFH in Wirtschaftsrecht' from the University of Applied Sciences in Winterthur ('Fachhochschule') does not allow access to the bar exam.[2354] Law graduates who wish to practise as a lawyer usually have to obtain an additional Master's degree from the University of Lucerne or Neuchâtel, which partially recognise the acquired ECTS points for graduates of the *Fachhochschulen*.[2355] This allows students to gain a Master's of Law at a university level without necessarily having obtained the highest level of a high school diploma (*gymnasiale Maturität*) because the *Fachhochschulen* (universities of applied sciences) also accept other forms of high school diploma (such as *Berufsmaturität*).

[2350] See <http://fernuni.ch/law/> (last visited on 26.06.2020).

[2351] HFKG (see for the full citation supra note 1156); see <https://www.swissuniversities.ch/de/hochschulraum/anerkannte-schweizer-hochschulen/> (last visited on 26.06.2020).

[2352] Swiss Confederation, *Official statement of the Swiss Federal Department of Justice of 7 August 2007, in Anwalts-Revue 9/2007*, p. 415.

[2353] This is also the position of the Universitäre Fernstudien Schweiz: <http://fernuni.ch/law/master/perspektiven/> (last visited on 26.06.2020).

[2354] Swiss Confederation, supra note 2352, p. 415; Sethe (2017), supra note 2150, p. 15.

[2355] Wegleitung Zulassung zum Masterstudium unter Auflage («Passerelle») vom 13. November 2017, available at: <https://www.unilu.ch/fileadmin/fakultaeten/rf/0_Dekanat_RF/Dok/reglemente/Wegleitung_Passerelle_2016.pdf (last visited 15.10.2020)> (last visited on 15.10.2020); Sethe (2017), supra note 2150, p. 20 and footnote 58 thereof.

8.7.2.1.3 Legal studies without access to the bar

Universities in Switzerland may introduce new law courses,[2356] and according to the official information of certain universities, some forms have developed which do not allow access to the profession of lawyer. This diversification is also based on the fact that neither the Swiss Confederation nor the cantons clearly structured a clear-cut concept for the legal profession.[2357]

To give an example, the ‘Master’s of legal studies’ is for professionals who have a non-legal background. This means that students choose from subjects taught at Bachelor’s and Master’s levels. The aim of the course is therefore to teach some basic legal knowledge, which might assist the student in his or her chosen career path.

8.7.2.1.4 LL.M. degrees in Switzerland

Many Swiss universities now offer LL.M. degrees. LL.M. courses are usually accessible only to postgraduates and are often pricy. LL.M. courses in Switzerland usually count for around 60 ECTS points. As they are offered to postgraduates, access to the bar is not usually an issue.

This distinction between Master’s of Law (MLaw) and Master of Laws (LL.M.) is a Swiss peculiarity, which is not known in most other countries. Some LL.M. courses in other countries, such as the Netherlands, are not considered to be post-graduate courses but allow access to the legal profession. Moreover, many LL.M. courses are made up of 60 ECTS points.

8.7.3 Admission to legal traineeship in Switzerland

Legal traineeships not are usually provided by the cantons but have to be organised by the law graduates themselves in a law firm, at a court[2358] or in public administration.[2359].[2360]

[2356] See for the Bologna requirements: Sethe (2017), supra note 2150, p. 18 et seq.

[2357] See Sethe (2017), supra note 2150, p. 16.

[2358] Most Swiss courts offer traineeship positions. This typically includes the district courts, some cantonal high courts, the Swiss Federal Administrative Court and (less well-known) the Swiss Federal Court also offers trainee positions.

[2359] See e.g. § 7 of the ordinance on the aptitude for the profession of lawyer of the Canton of Zurich (Verordnung über die Fähigkeit zum Anwaltsberuf des Kantons Zurich).

[2360] See §§ 10-12 of Lawyers’ Act of the Canton of Zurich (Anwaltsgesetz).

One canton has a rule which could make traineeships mandatory.[2361] It is doubtful, to say the least, whether such a rule could even be applied in the light of the right to economic freedom (Article 27 BV). For access to a traineeship, a Swiss Bachelor of Law or an equivalent degree is sufficient.[2362] The competent cantonal authorities may not check the substance of a Swiss 'Master of Law'.[2363] While the details of the bar exam differ tremendously in every canton, three distinct clusters of legal traineeships and bar exams can be distinguished.

The most typical bar exam requires registration for the bar exam with the competent cantonal authority after having completed the traineeship. Depending on the number of candidates, the applicant may be faced with a waiting period before taking the exams.[2364] The second model requires registration and admission with the respective authorities before entering into a traineeship. This model is sometimes combined with specific requirements for the respective lawyers who are supervising legal trainees.[2365]

The Canton of Geneva introduced an innovative model. This model combines the legal traineeship with a bar school for legal trainees. Applicants may either complete the bar school course before or after their traineeship. The traineeship only lasts for 18 months if the candidates opt for the bar school first and take an entry exam. Otherwise, legal trainees need to complete 24 months of traineeship. In the end, the bar school exam will replace the former bar exam.[2366]

8.7.4 Representation by legal trainees and the issue with regulated professions

Legal trainees may represent parties before courts under the conditions of the respective canton (at least where federal law does not have stricter rules[2367]). In some cantons, legal trainees are allowed to represent clients in courts for up to five years.[2368]

[2361] § 8 para. 2 of the Act on Lawyers of the Canton of Solothurn (Gesetz über die Rechtsanwälte und Rechtsanwältinnen (Anwaltsgesetz, AnwG vom 10. Mai 2000; 127.10).

[2362] Art. 7 para. 3 BGFA; see further BGer 2C_300/2019 of 31.01.2020, para. 4.5.

[2363] Staehelin & Oetiker, supra note 2331, para. 5.

[2364] See, among many, the bar exam of the Canton of Zurich: § 3 lit. b of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Zurich of 17 November 2003.

[2365] § 3 para. 4 of the Act on Lawyers of the Canton of Lucerne (Anwaltsgesetz).

[2366] Arts. 30A and 31 of the *Loi sur la profession d'avocat* of the Canton of Geneva.

[2367] See e.g. Art. 68 para. 2 ZPO for civil law.

[2368] See e.g. Art. 8 para. 2 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Graubünden of 14.02.2006.

The Draft Act on the free movement of lawyers considered that representation is limited to two years but is in principle renewable.[2369] They would fall within the scope of Article 3 of the Professional Qualifications Directive as a regulated profession in the absence of the CJEU's case law (see Chapter 8.6.2). Despite the case law of the CJEU, it is difficult to understand why legal trainees, who are actually working as *de facto* lawyers, are not considered as part of a regulated profession.[2370] The CJEU did however state in *Morgenbesser* that Italian trainees are only employed for up to six years in their position even if they do not pass the bar exam. This would again indicate that the Swiss cantons that provide for short durations of legal traineeships did not create a separate profession, but that it simply forms part of the legal training. It could however be argued that Switzerland allows for a broad range of professions, unlike the Italian traineeship. The same can be said of the German training system.

This line of argument was mentioned with regard to the *Lubina case.* The *Lubina* case dealt with acceptance of legal trainees (*Referendariat*) in Germany. *Katja Lubina* obtained a Master's degree from the University of Maastricht, which meant that she could be a legal trainee in the Netherlands. The case was finally settled by the respective German administrative court. The administrative court did not entirely clarify whether the situation should be solved under the regime of primary or secondary law. The administrative court intermingled both concepts. The case was settled but the administrative court held that a legal trainee can be viewed as a worker under Article 45 TFEU and that the profession of legal trainee is regulated in Germany.[2371]

From the very concept, it is clear that if a profession is regulated that the regime of the Professional Qualifications Directive must be applied. In the case *Peśla*, the CJEU simply referred to the *Morgenbesser* decision.[2372] It can be concluded from the case law that legal trainees are still regarded as being part of a profession that is not regulated. This is in line with the case law of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud which left the question undecided but only applied the *Peśla* case law.[2373]

[2369] Art. 13 para. 2 of the Draft BGFA.

[2370] See further Schneider & Lubina, supra note 2286.

[2371] Schneider & Lubina, supra note 2286, p. 332 with reference to the (unpublished) settlement in footnote 96 (*Vergleich vom 04.01.2006 vor dem VG Düsseldorf*).

[2372] Case C-345/08, *Peśla*, ECLI:EU:C:2009:771, para. 36 et seq.

[2373] Decision GE.2014.0130 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 24.11.2014, para. 1.c.

There are convincing arguments however in favour of applying the spirit of the Professional Qualifications Directive under the regime of primary law. This means that the principle of mutual trust should be applied in principle. It is only if this is not considered sufficient that compensation measures or an aptitude test should be carried out to enable one to be hired as a legal trainee. This would increase legal certainty tremendously.

Nowadays, depending on the diploma and the Swiss university as well as the canton of admission, it is better advice for candidates to acquire a Master's of Law in Switzerland than to take the uncertain path of the *Morgenbesser* decision if the respective university is generous in its academic recognition. This is the case more often than not, as diplomas have to be accepted unless substantial differences are shown according to Article IV.1 of the Lisbon Convention.[2374] With the recent leading decision of the SFC of 31 January 2020, it must however be noted that even a Swiss Master's degree can be regarded as insufficient by the authorities if the applicant is not in possession of a Swiss Bachelor's degree and cannot show knowledge of Swiss laws (see Chapter 8.7.7.2).

8.7.5 Problematic requirements before legal traineeship will be granted

8.7.5.1 Residency and nationality requirements

Several cantons still impose a residency requirement for admission to the bar exam.[2375] In light of the consistent case law of the CJEU and in light of the fundamental status of the non-discrimination principle, it is rather startling to find such direct discrimination in current legislation. Article 5 of the Lawyers Act of the Canton of Basel-Stadt and of the Canton of Basel-Land are clearly in violation of Article 2 of the AFMP.[2376] The High Court of the Canton of Basel-Land ruled that a residency or nationality requirement for legal trainees

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[2374] See BGE 140 II 185, para. 4.2; see however also BGer 2C_9/2016 of 22.08.2016; see further Chapter 5.3.1.

[2375] See e.g. § 5 lit. h of the of the of the *Verordnung des Obergerichts über die Fähigkeitsprüfung für den Anwaltsberuf* (Ordinance on the bar exam of the Canton of Zurich) of 21 June 2006, Art. 10 lit. a of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Graubünden of 14.02.2006, Art. 5 of the *Advokaturgesetz* (Lawyers' Act) of the Canton of Basel-Stadt of 15.05.2002, § 5 of the Lawyers Act of the Canton Basel-Land, Art. 9 para. 3 of the *Kantonales Anwaltsgesetz* (Lawyers' Act) of the Canton of Nidwalden of 6 May 2003.

[2376] See, among many, Berthoud, Geneva, supra note 1007, para. 545.

violates Article 2 of the AFMP.[2377] This is hardly surprising when the first measure clearly constitutes indirect and the latter direct discrimination. There is obviously no justification for these measures. It is however surprising that the High Court of the Canton of Basel-Landschaft states that AFMP not only forbids discrimination but also free movement restrictions.[2378]

The requirements of the Canton of Zurich state that either working experience or residency in their canton is mandatory for taking the bar exam. Swiss nationals without a cross-border link obviously cannot rely on the AFMP. They may only rely on the right to economic freedom (Article 27 BV). The Swiss Federal Court did hold early in its case law (before the entry into force of the AFMP) that nationality requirements are not allowed due to the economic freedom guaranteed by Article 27 BV.[2379] The requirements must be in the public interest. The question is whether domestic experience should still be decisive. On 1 January 2011, the first Swiss Civil Procedural Code and the first Swiss Criminal Procedure Code entered into force.[2380] Cantonal private law has become extremely rare and cantonal criminal law in practice is mostly irrelevant. The major differences between the cantonal laws therefore only affect the public and public procedural law. The High Court of the Basel-Landschaft also discussed whether the right to economic freedom is restricted and whether a residence requirement is necessary for high quality of legal services and also for consumer protection. It follows that a domestic experience requirement also aims at ensuring that bar exam candidates are integrated vis-à-vis the local customs and the cantonal law. Consumer protection might suffice as a ground for justification (Article 36 BV).[2381] A residency requirement does not however guarantee knowledge of local law, whereas domestic working experience is at least suitable for this aim. Many cantons require *domestic experience* of between six and 12 months in their canton. In the present author's opinion, this measure does not go beyond what is needed as cantonal law is still relevant for public law purposes.

[2377] Decision of the Kantonsgericht (High Court) Basel-Landschaft, Abteilung Verfassungs- und Verwaltungsrecht 2016 (810 15 196) of 08.06.2016, para. 7.5.

[2378] Decision of the Kantonsgericht (High Court) Basel-Landschaft, Abteilung Verfassungs- und Verwaltungsrecht 2016 (810 15 196) of 08.06.2016, para. 7.4.

[2379] BGE 119 Ia 35.

[2380] ZPO (see for the full citation supra note 2056)and StPO (see for the full citation supra note 2053).

[2381] Decision of the Kantonsgericht (High Court) Basel-Landschaft, Abteilung Verfassungs- und Verwaltungsrecht 2016 (810 15 196) of 08.06.2016, para. 6.

Residence requirements in *one canton* on the other hand are highly questionable and can hardly be justified.

8.7.5.2 Exemptions based on exceptional academic merits

The rule in the Canton of Zurich that exempts candidates from a part of the oral exam is indirectly discriminatory. Only candidates who have graduated from a *Swiss University* and obtained their doctorate, *Lizenziat*, or Master's degree with *summa cum laude* and passed the written exam with *summa cum laude* are exempt.[2382] Exemptions are however very rare as *summa cum laude* is rarely awarded in the written bar exam.[2383] With the Bologna system, a Master's degree, as explained above, does not guarantee knowledge of Swiss law. Other cantons do not even award grades for the bar exam. In addition, a doctorate degree does not guarantee knowledge of Swiss law. The measure constitutes indirect discrimination and there is no justification for this measure. Applicants with foreign degrees who were awarded their Master's or doctorate degrees *with distinction* can therefore benefit from the exemption as well (Article 2 AFMP).

8.7.5.3 Experience required

Relevant experience may only be acquired in Switzerland pursuant to the clear wording of Article 7(1) lit. b BGFA. The Professional Qualifications Directive does not apply for legal trainees, and the amended Article 1(2) and Article 2(1) of the Professional Qualifications Directive for trainees do not currently form part of the *acquis suisse* in any case, so this measure needs to be assessed under the scrutiny of primary law.

For example, the Canton of St. Gallen requires applicants with an EU diploma in law to have three years of legal experience in Switzerland.[2384] At least one year of experience within the Canton of St. Gallen is required.[2385] Six months of experience working with a domestic

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[2382] § 15 of the Ordinance on the bar exam of the Canton of Zurich *(Verordnung über die Fähigkeitsprüfung zum Anwaltsberuf)*.

[2383] See <http://www.caselaw.ch/wp-content/uploads/2018/09/statistik-anwp.pdf> (last visited on 24.06.2019).

[2384] Art. 4 para. 2 of the Regulation on Lawyers and Legal Agents of the Canton of St. Gallen *(Prüfungs- und Bewilligungsreglement für Rechtsanwälte und Rechtsagenten)*.

[2385] Art. 4 para. 2 of the Regulation on Lawyers and Legal Agents of the Canton of St. Gallen *(Prüfungs- und Bewilligungsreglement für Rechtsanwälte und Rechtsagenten)*.

lawyer or at a domestic court in the Canton of St. Gallen are also mandatory.[2386] In addition, applicants are required to show that their diploma is equivalent (in an academic sense).

According to some legal scholars, three years of experience could still be considered proportionate in the light of the right to economic freedom (Article 27 BV).[2387] There is no current case law on additional cantonal requirements for access to legal traineeship. In an old and leading case, the Swiss Federal Court ruled that the requirement of courses in philosophy at high school are not a proportionate measure for the protection of the consumer.[2388] Regardless of whether a requirement of experience of three years can still be considered a legitimate aim, the aforementioned rule of the Canton of St. Gallen contradicts the very spirit of the *Morgenbesser* case law. The rule does not give room for the applicants to show that other forms of experience have been acquired (without considering the application of this provision in practice, which might be more lenient). The CJEU however highlighted that a holistic approach is necessary. The skills of the applicant have to be compared to those required by legal trainees with a Swiss diploma. The situation would be different if the Canton of St. Gallen required legal traineeships of three years' duration for every legal trainee.

To give an example, academics might have experience of Swiss law based on their area of expertise. Lawyers might have experience in drafting legal documents and opinions. In both cases, experience acquired abroad would have to be compared to the knowledge required for Swiss candidates. Candidates with a Swiss diploma only need to have one year of working experience. To conclude, the measure of the Canton of St. Gallen might be too strict in some cases and does not allow a proportionate comparison of the skills acquired by the candidates. Candidates with working experience abroad or relevant academic records must be admitted to the bar exam with less than three years of working experience in Switzerland in some cases. Finally, this holistic approach is also the correct approach due to the fact that candidates must still pass the bar exam. Therefore, they must show that they have sufficient knowledge of Swiss law.

[2386] Ar.t 4 para. 2 of the Regulation on Lawyers and Legal Agents of the Canton of St. Gallen *(Prüfungs- und Bewilligungsreglement für Rechtsanwälte und Rechtsagenten).*

[2387] F. Bohnet, S. Othenin-Girard & B. Chappuis, 'Art. 3 LLCA', in M. Valticos, C. M. Reiser & B. Chappuis (eds.), *Loi sur les avocats: Commentaire de la loi fédérale sur la libre circulation des avocats (Loi sur les avocats, LLCA),* Bâle (2010), para. 9 et seq.

[2388] See BGE 73 I 1, para. 5.

The Canton of Zurich offers exemptions for candidates who have had a fulfilling professional experience at a court or within a public administration in the Canton of Zurich.[2389] It should be noted that the practice of the High Court of the Canton of Zurich is extremely restrictive.[2390] Unlike the residence requirement, this measure hardly qualifies as a restriction or it could at least be justified. This is different for exemptions that treat foreigners differently in a comparable situation, such as in the very recent Opinion of the Advocate General Bobek in *Onofrei*.[2391]

Some cantons only require experience which is relevant and gained in the respective canton. There is no doubt that domestic experience for a limited amount of time is certainly expected from lawyers. For instance, Article 8(3) of the Lawyers Ordinance of the Canton of Berne stipulates that experience stretching back more than ten years does not count for access to the bar exam. This requirement is in principle unproblematic. Even if it were considered a restriction, it could possibly be justified. Otherwise candidates who are not aware of recent developments in the legal field could have access to the bar exam.[2392]

8.7.6 Recognition based on academic recognition

A large number of cantons refer solely to the academic recognition of a diploma without checking the substance of the diploma.[2393] A comparison of academic degrees is generally unproblematic and usually more favourable for applicants.[2394] It can however be decisive, as shown in the following case of the Canton of Uri of 2004.

2389 § 3 para. 2 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Zurich of 17 November 2003.

2390 With regard to the former § 3 para. 2 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Zurich of 17 November 2003, there was a long-held practice that the only candidates who could benefit from this rule were those no longer working for the Canton of Zurich, or only an amount of less than 50%. BGer 2P.46/2004 of 18.08.2004.

2391 *Opinion of Adovcate General Bobek in Case C-218/19 Onofrei*, ECLI:EU:C:2020:716, para. 56 et seq.

2392 See however Decision WBE.2018.36 of the Obergericht (High Court) of the Canton of Aargau of 21.08.2018, Chamber for administrative law, published in AGVE 2018, p. 303 et seq., paras. 5 and 6 concerning the unlawful requirement of a cantonal traineeship for a fully-qualified notary (based on the principle of equality before the law; Art. 8(1) BV).

2393 The authorities of the Canton of Zurich recognise the first state examination of Germany (*1. Staatsexamen*) and the Magister degree of Austria: <http://www.gerichte-zh.ch/fileadmin/user_upload/Dokumente/obergericht/APK/APK_> (last visited on 30.06.2019); see for the Canton of Basel-Land: <http://www.baselland.ch/fileadmin/baselland/files/docs/gerichte/anwaltspruefungen_merkbl.pdf> (last visited on 30.06.2019).

2394 The exceptions are Ireland, England, Scotland, Wales and Northern Ireland: see Claessens, Nijmegen, supra note 1898, p. 85 et seq.

8.7.7 Swiss *Morgenbesser* and similar case law

8.7.7.1 Cantonal case law

In 2004, a graduate with a Bachelor of Law from the University of Kent in Canterbury applied for a legal traineeship in the Canton of Uri. The cantonal court made an assessment for purely academic recognition. It took into account the European Convention on the Academic Recognition of University Qualifications, the Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region and the European Convention on the Equivalence of Periods of University Study[2395].[2396]

This approach would be correct only if academic equivalence were decisive when granting a legal traineeship. While academic recognition is in most cases favourable for applicants, it puts candidates from Ireland, England, Scotland, Wales and Northern Ireland[2397] at a disadvantage (see also Chapter 6.7.3 for the status of UK diplomas after the withdrawal). With a Bachelor of Law, the candidate has obtained a degree, which led to him or her being admitted to the profession of solicitor and barrister in his home Member State. The *Morgenbesser* case law was thus, erroneously, not applied. There is no doubt that this judgment would have been decided differently if applying Article 7(3) BGFA, which was adopted later and provides access to traineeships for graduates with a Bachelor of Law.

The cantonal case law of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud with regard to the *Peśla*[2398] case law will be discussed below in the next Subchapter.

8.7.7.2 Case law of the Swiss Federal Court

8.7.7.2.1 Free movement of legal trainees from the EU

As mentioned above, Article 7(3) BGFA provides access to legal traineeships for graduates with a Bachelor of Law. On 31 January 2020, the Swiss Federal Court held in a

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[2395] See supra notes 1146 and 1128 for further reference.

[2396] Decision AN 03 11 of the Obergericht (High Court) of the Canton of Uri of 21.05.2004.

[2397] See Claessens, Nijmegen, supra note 1898, p. 85 et seq.

[2398] Case C-345/08, *Peśla*, ECLI:EU:C:2009:771.

decision with five instead of the regular three judges (to be published as a leading decision) that a Swiss Bachelor of Law or an equivalent foreign diploma is required for access to legal traineeship in the Canton of Vaud even if the applicant is in possession of a Swiss Master's degree and other foreign degrees as well as a short amount of practical professional experience. From a methodical standpoint, the Swiss Federal Court interpreted the Article 7(3) BGFA for access to legal traineeship in a teleological manner.[2399]

The SFC briefly reasoned (mainly based on the facts determined by the lower instance) that the refusal to register the applicant cannot be deemed an obstacle to free movement considering the fact the applicant lacked some core subjects, namely private law, contract law, debt collection law, criminal law, constitutional law, international private law and private procedural law (except for a thesis worth two credits).[2400] The decision of the lower instance[2401] was upheld. This precedent cannot be however understood in a way that the *Morgenbesser* case law would not apply because the Swiss Federal Court specifically referred to the *Peśla*[2402] judgment.[2403] It also pointed out that it would otherwise lead to the paradoxical result that applicants must be admitted to a legal traineeship but would not be allowed to take the bar exam. Contrary to other cantons, the Canton of Vaud requires bar exam candidates to be in possession of a Swiss Bachelor and Master of Law or an equivalent diploma to take the bar exam.[2404]

This line of reasoning can also be witnessed in a similar case of the SFC of 2016 with an applicant who had inter alia obtained a Master of Arts in Law of the University Szczecin (Poland). The lower instance stated that an assessment of the applicant's knowledge (who invoked the *Peśla*[2405] judgment) of Swiss law would neither contradict the AFMP nor the BGFA. Consequently, it assessed the applicant's knowledge of Swiss law.[2406] The applicant had obtained a Master's degree of a European University with a comparable length of study.

[2399] BGer 2C_300/2019 of 31.01.2020, para. 4.4.5.

[2400] BGer 2C_300/2019 of 31.01.2020, para. 3.1 et seq.

[2401] Decision GE.2018.0215 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 20.02.2019.

[2402] Case C-345/08, *Peśla*, ECLI:EU:C:2009:771.

[2403] BGer 2C_300/2019 of 31.01.2020, para. 3.1.

[2404] BGer 2C_300/2019 of 31.01.2020, para. 4.7.

[2405] Case C-345/08, *Peśla*, ECLI:EU:C:2009:771.

[2406] Decision GE.2015.0041 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 17.08.2015, para. 2 et seq.

It was however deemed not to be sufficient because the applicant had only obtained minor knowledge of Swiss laws. The Swiss Federal Court upheld the decision of the lower instance.[2407]

In a similar judgment of 2020, the same *ratio decidendi* was also applied by the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud for an applicant who had obtained French diploma (Master) and with professional experience between October 1995 and July 2014 in France. It was reasoned that the professional experience had not been obtained in Switzerland and the appeal was consequently dismissed.[2408] This decision is noteworthy to mention because according to the joint statement of the SERI and other federal authorities professional experience must be taken into account in light of the *Morgenbesser* case law regardless where it was obtained. Considering this joint statement, it could be questioned whether the assessment should not have been more detailed when the applicant possesses many years of professional experience.[2409]

Further, in the afore-mentioned judgment of 2020 and also in an earlier judgment of 2014 the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud discussed whether the profession of legal trainees is regulated and falls under the Professional Qualifications Directive. It left the question undecided with reference to the *Peśla* and *Morgenbesser* case law.[2410] This view that this question could be left unanswered is however mistaken because the application of the Professional Qualifications Directive would certainly have implications with the application of the *mutual recognition principle* (see for a discussion about the application of secondary or primary law for legal trainees, Chapter 8.7.4).

8.7.7.2.2 Training of legal trainees for lawyers of other cantons

In a leading case of the Swiss Federal Court with regard to the intercantonal free movement rules under the BGBM, a prospective legal trainee applied for enrolment in the register of legal trainees of the Canton of Vaud. In this canton, the training of legal trainees

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2407 BGer 2C_831/2015 of 25.05.2016, para. 3 et seq.

2408 Decision GE.2019.0180 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 03.03.2020, para. 4.d.

2409 State Secretariat for Research and Innovation et al., supra note 1029, p. 3.

2410 Decision GE.2019.0180 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 03.03.2020, para. 3.c; Decision GE.2014.0130 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 24.11.2014, para. 1.c.

is regulated. The respective cantonal law stipulated that only a lawyer who shows that he or she has completed at least five years of practice in the Canton of Vaud is allowed to supervise legal trainees. Lawyers with experience outside of the Canton of Vaud were therefore barred from training legal trainees. The Swiss Federal Court deemed that the measure constituted a 'restriction'[2411] and that it could not be justified because the measure went beyond what was needed to attain its objectives (Article 3(1) lit. c BGBM) as a Swiss lawyer may practise in any canton, and a lawyer is expected to familiarise himself with the applicable legislation in the host Member State.[2412] It should also be noted that with the revision of some provisions of the BGBM, there is no strict rule for the application of the BGFA or the BGBM because the BGFA could be considered *lex specialis*, but the BGBM could have precedence as *lex posterior.* There is no clear rule of interpretation on which would of these two would take precedence.[2413]

This case is particularly interesting considering that the BGMB copied the internal market case law. Thus, the reasoning in this case can be transferred for the interpretation of the AFMP *per analogiam* (see Chapter 8.4.2).

8.7.8 Adaptation of the *Morgenbesser* case law in Switzerland

In practice, many cantons simply require academic recognition of a foreign law degree to be granted a legal traineeship and be allowed to take the bar exam. There is the exception of the Canton of Geneva, which requires 120 ECTS points in Swiss law to have been obtained. The Canton of Geneva requires a Swiss 'Master of Law' or 120 ECTS points in Swiss law to have been obtained. Notwithstanding the CJEU's ruling in *Peśla* that emphasised a Member State does not have to lower its standards, the situation in Switzerland is different. A uniform Master's degree-curriculum is non-existent. Every university in Switzerland offers different Master's degrees that may differ considerably. The Rectors' Conference of the Swiss Universities published regulations and recommendations for Bachelor's courses, as part of their coordination task. The relevant recommendation states that at least 60 ECTS points

[2411] The BGBM does not distinguish between indirect discrimination and restrictions based on its wording.

[2412] BGE 134 II 329, para. 6.2.3.

[2413] Bohnet, Bâle, supra note 778, para. 22 with reference to BGer 2A.443/2003 of 29.03.2004.

should be acquired in the respective field of study.[2414] For example, the Canton of Vaud stipulates in Article 32(1) of the Lawyers Act of the Canton of Vaud that a Bachelor and a Master of Swiss law are required in order to be able to take the bar exam. In light of Article 3(1) BGFA, the cantons may impose stricter regulations than those foreseen by federal law. Excessive criteria must however stand the scrutiny of the right to economic freedom and the principle of proportionality.[2415]

As we have seen, the *Morgenbesser* case law finds that there should be a holistic view taken of all relevant experience and academic subjects of the applicants. It is the task of the competent authority to compare the subjects of the candidates with the Swiss curriculum, as recommended by the official statement. The comparison should focus on the skills acquired by the students. The national authorities may require compensation measures similar to what secondary law requires when the training covers substantially different subjects.[2416] There is currently no legal basis in federal law requiring Swiss law graduates to have passed certain subjects of law in order to become fully-fledged lawyers. Swiss law graduates may never have had a profound understanding of debt enforcement and bankruptcy law in their entire academic career. It is up to the bar candidates to fill those gaps before taking the exam.[2417] It can however be seen that the Bachelor's courses are quite similar. The basics of procedural law and the core subjects are almost the same at any Swiss university. This means that in principle, the comparison of the applicant's skills should be focused on the Bachelor's course. Moreover, work experience abroad should also be taken into account (see also Chapter 8.7.5.2). In the present author's opinion, a strict requirement of ECTS, such as the Geneva system, might not be unlawful but is difficult to reconcile with the spirit of the *Morgenbesser* case law.[2418] Arguably, the newest leading case of the SFC of 2020 gives the cantonal authorities a wide margin of discretion, as mentioned above, as long as the academic and professional experience is evaluated but it explicitly refers to the *Peśla* judgment (see Chapter 8.7.7.2). Nevertheless, as long as the core subjects are covered by the applicant and he or she has access to the legal profession in his or her home Member State, the applicant

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2414 Regelung der CRUS zur Festlegung der Studienrichtungen sowie für die Zuordnung der Bachelorstudiengänge of 11 November 2005.

2415 See Arts. 27 and 36 BV.

2416 Art. 14(1)(b) of the Professional Qualifications Directive.

2417 Staehelin & Oetiker, supra note 2331, p. 7.

2418 See for a similar reasoning under the secondary law: BVGer B-3284/2018 of 16.11.2018, para. 7.4.

should in principle be allowed to be able to do a legal traineeship and eventually to take the bar exam (on a case-by-case basis).

8.8 Conclusion to Chapter 8

The Facilitating Practice Directive and Facilitating Services Directive refer to the hybrid concept of lawyers educated in the laws of a given Member State. This illustrated by a case in Switzerland, which is a follow-up to *Torresi*. In that case, the Administrative Court of the Canton of Zurich held that a migrant with third-country training but with the Spanish title *abogado* must (in principle) be enrolled in the bar register (under his home-Member State title). Thus, the country of origin and mutual trust principles are essential and the decision is not at the discretion of the host Member State. In general, the application of secondary law for lawyers is unproblematic in Switzerland. One cantonal court decision erroneously claims that the Facilitating Practice Directive does not apply to family members. Other case law on the lawyers' profession concerns insignificant free movement restrictions, which might be covered by the AFMP.

Further, the auditor's profession was analysed. Under the *acquis suisse*, the rules for the recognition of professional qualifications for the auditor's profession are unclear. It is especially unclear whether the recognition follows the regimes of primary or of secondary law. This situation could be remedied by a new decision of the Joint Committee that clarifies that the Professional Qualifications Directive also applies for the auditor's profession, which is rather unlikely to happen in practice. The outcome is however the same. Even if the auditor's profession did not fall under secondary law, mutual recognition of professional qualifications according to primary law would still apply since the case law of the CJEU must be followed even after the reference date. The absence of secondary law would however result in a disadvantageous situation for applicants as there are deadlines under the Professional Qualifications Directive as opposed to primary law.

In addition, the profession of patent attorney was briefly analysed. This profession is unproblematic in Switzerland due to the fact that only the title of the profession is protected. It is not surprising to see that hardly any cases on this matter exist.

More importantly, the notary's profession was discussed. The case law of the Swiss Federal Court offers no clarification with regard to the free movement of notaries. While the free movement based on the BGBM throughout Switzerland, which resembles the free movement between Switzerland and the EU, is not allowing free movement of notaries under Swiss case law according to the previously prevailing view, the COMCO argues to the contrary. Thus, from the BGBM no conclusive finding can be inferred for the interpretation

of the AFMP. The BGBM, which was proposed as a means to avoid reverse discrimination of Swiss nationals within Switzerland (recognition of Swiss diplomas), brings with it potential for further indirect discrimination since the free movement for Swiss nationals according to the BGBM must be free of charge, whereas the recognition procedure under the Professional Qualifications Directive does not have to be. Whilst the EU clarified, through the amendments brought by Directive 2013/55/EU, that notaries may not invoke secondary law within the EU, the CJEU held that this does not exclude the application of primary law for notaries. For Switzerland, national law and the Professional Qualifications Directive before the amendment of Directive 2013/55/EU still apply. This does however not entirely clarify whether notaries may invoke the Professional Qualifications Directive in Switzerland. The report of the COMCO supports this view based on the national implementation in the VMD, while the judgment of the Bernese Administrative Court at least hints in this direction in its *obiter dictum*. While the application of secondary law is disputable, the free movement of notaries would at least fall under primary law as a subsidiary layer. The recognition of professional qualifications must however be assessed for each canton and each regulated activity separately. Finally, the free movement of Swiss nationals with an EU diploma may in any case not be restricted because the public authority exception does not apply for Switzerland's own nationals due to the *Brouillard* case law. For the *acquis suisse*, the public authority exception must be read in the light of the case law of the CJEU. There is no good reason to disapply the case law of the CJEU concerning notaries despite a slightly nuanced wording of the public authority exception due to the rule of homogeneity foreseen in Article 16(2) AFMP.

For law students in Switzerland, the Rectors' Conference of the Swiss Universities laid down recommendations and regulations concerning the structure of law courses. Due to the autonomy of each university, the format of law courses at Swiss universities is diverse. This leads to distinct courses and some 'Master of Law' courses where no 'Bachelor of Law' is necessary. Most of these courses lead to a 'Master of Law' from a Swiss university, which is necessary for access to the bar exam and enrolment in the bar register. This problematic issue has now been clarified by a very recent leading case of the Swiss Federal Court which allowed the cantonal authorities of the Canton of Vaud to require a Swiss Bachelor of Law or an equivalent foreign diploma for access to traineeship even if the applicant is in possession of a Swiss Master's degree in Law.

The free movement of law students does not however correlate with the free movement of legal trainees. On the one hand, free movement of students is still severely restricted due to the patchwork structure of the *acquis suisse*. On the other hand, the free movement of prospective legal trainees under the meaning of the *Morgenbesser (and Peśla*) case law is part of the *acquis suisse* pursuant to the statement of the Swiss Government, despite the fact that restrictions might not be protected against. This allows access to a legal traineeship and to take the bar exam for legal trainees in Switzerland. Recently, the Swiss Federal Court upheld a cantonal decision that applied the lessons of the *Peśla* judgment but which did not grant access to legal traineeship in the specific case.[2419]

For graduates with foreign law degrees, the approach of some cantonal authorities where only the academic equivalence is assessed is in most cases even more favourable than prescribed by the *Morgenbesser* case law and therefore unproblematic. The current situation for legal trainees is however unnecessarily complex due to the various models established by the Swiss cantons. Even though secondary law cannot be applied for legal trainees, it would be a more convincing route than through the vague *Morgenbesser* case law. In the light of secondary law, the competent authorities can however require compensation measures as foreseen by secondary law *per analogiam*. Students with a foreign degree could be allowed to take an aptitude test to then be able to do a legal traineeship.

Some professions, such as that of judges, which involve the exercise of public authority, come within the exception clause of the AFMP. However, from Swiss doctrine and practice one could assume that this exception would mean that the AFMP ceases to apply. This is only correct insofar as EU nationals are concerned. Swiss nationals may rely on the AFMP against their own State and the exception of the public authority clause does not apply to Switzerland's own nationals.

[2419] BGer 2C_300/2019 of 31.01.2020; see also for an earlier decision of the SFC with reference to the *Peśla* judgment, BGer 2C_831/2015 of 25.05.2016.

9 Summary, conclusions and recommendations

9.1 Summary

This research analysed the *acquis suisse* for the mutual recognition of professional qualifications, or in other words the recognition of diplomas between Switzerland and the EU, looking particularly at selected health and legal professions. This research not only examines the applicable secondary law, namely the Professional Qualifications Directive, but also examined whether primary law applies in this context between Switzerland and the EU. For this purpose, the institutional mechanism which is inherently linked to this topic was discussed because future relations between Switzerland and the EU, as reflected in the Draft Institutional Framework Agreement, could have a large impact on the interpretation of the *acquis suisse*.

9.1.1 The institutional framework between Switzerland and the EU (Part I)

This study began with Part I looking at the institutional mechanism between Switzerland, the EU and its Member States, and how this mechanism will be altered in the future. It shows that challenges, such as the popular initiative against mass immigration, have not hindered the so-called bilateral path between Switzerland and the EU. It also considers the current institutional challenges in the search for a common body of interpretation for the bilateral agreements.

The Draft Institutional Framework Agreement was under public consultation in spring 2019. It would create an arbitration body where a 'referral' to the CJEU would be permissible for certain market access agreements. Considering the extent of the foreseen 'reference procedure', the Draft Institutional Framework Agreement indicates that a very moderate level of guidance would be requested from the CJEU for most bilateral market access agreements, and possibly lead to being in conformity with the autonomy of the EU legal order. In a comparison with similar dispute settlement mechanisms, it was briefly discussed whether the arbitration body has been left any discretion not to refer a case to the CJEU, which can be answered in the affirmative (with the application of the *acte clair* doctrine).

The Draft Institutional Framework Agreement is a compromise between the EU and Switzerland. It seems that the compromise may prove difficult to accept for many Swiss

people, as it crosses some so-called red lines, such as the eight-day waiting period for service providers (without the classic divide between right and left-wing politicians). In addition to the crossing of red lines, there is also opposition to the competence of the CJEU, as it is considered by some as a court of the 'opposite side', and which implies that the CJEU is not impartial.

Importantly, the interpretation of association agreements and in particular of the Agreement on the Free Movement of Persons ('AFMP') was explored. While the CJEU's interpretation of the Ankara Agreement is similar to the progressive case law of the internal market in numerous cases, it was shown that it explicitly returned to the *Polydor* principle for the interpretation of the Ankara Agreement in the case *Demirkan* and for the AFMP in the case *Grimme*. It was even once doubted by an Advocate General whether primary law forms part of the AFMP or only the listed secondary legislation in the Annexes of the AFMP in the case *Ettwein*. It was also explained that according to scholars this return to the *Polydor* case law could have been caused by the restrictive judgments of some national courts. It was therefore noted that, in particular, recent criminal law judgments of the Swiss Federal Court could lead to a more extensive return of the *Polydor* case law under the AFMP because the interpretation of the CJEU depends largely on the context of the respective international agreements. Despite the return of the *Polydor* case law, it was also indicated that the Swiss Federal Court follows the case law of the CJEU, even if it is later altered. The CJEU has never openly followed the jurisprudence of the Swiss Federal Court (with one exception). It was shown that the type of judicial dialogue that exists between the EFTA Court and the CJEU does not take place between the Swiss Federal Court and the CJEU. The judicial dialogue is explicitly mentioned in the Draft Institutional Framework Agreement between Switzerland and the EU. It has been explained that the EFTA Court has even gone beyond judicial dialogue and introduced a reversed *Polydor* principle aiming for the same result as in the internal market, regardless of the CJEU's interpretation.

Finally, it is clear that a rule of interpretation can only be applied for concepts which are part of the AFMP. But how to determine the concepts that have been adopted by the *acquis suisse* has not been solved. The complex structure of the AFMP and the combination of primary and secondary law make finding out which concepts of EU law are also part of the AFMP a daunting task. This issue will remain unsolved by the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

9.1.2 Free movement of persons between Switzerland and the EU (Part II)

Part II discussed the fundamental freedoms which have partly developed under the *acquis suisse*. While direct and indirect discrimination are prohibited (if they are not justified) for all applicable fundamental freedoms (freedom of workers, freedom of establishment and freedom of services) and have horizontal effect (left unanswered in some recent cases of the Swiss Federal Court), it is still disputed whether free movement restrictions are covered by the AFMP. There is currently no case law where the CJEU has expressly stated that not only discrimination but also free movement restrictions are covered by the AFMP (or any other association agreement).[2420] The Swiss Federal Court did not take an open position but only ruled implicitly in favour of the recognition of professional qualifications based on primary law, or rather a pragmatic approach (possibly based on the principle of proportionality).

While in the recent Grand Chamber judgment *Picart* the CJEU interpreted the AFMP by its wording and held that a self-employed person 'must pursue his self-employed activity in the territory of a Contracting Party other than which he is a national', it held in another Grand Chamber judgment, *Wächtler,* that 'restrictions' on the free movement provisions from the State of origin are prohibited. For the recognition of professional qualifications, the Swiss courts have almost consistently ruled that the cross-border situation is deemed 'sufficient'.

It was also pointed out that non-economically active persons (e.g. students) are most likely excluded from the scope of the AFMP for access to university education due the wording of Article 24(4) of Annex I to the AFMP. Even if the case law suggests that persons who are not economically active may also not invoke Article 2 AFMP in this situation (similar to Article 18 TFEU as a form of subsidiary protection and contrary to the case law of lower Swiss courts), economically active students may in principle invoke the fundamental freedoms, such as the free movement of workers in conjunction with Article 2 AFMP.

9.1.3 Mutual recognition of professional qualifications (Part III)

In Part III it became clear how the mutual recognition of professional qualifications and its fundamental principles were developed. The evolution of the principles of *mutual trust*

[2420] The term 'restriction' has been used by the CJEU in this context: e.g. Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 67. Even if the CJEU explicitly used the term 'restrictions' in *Wächtler*, the same wording as in the internal market does not mean that the term bears the same meaning after everything that has been discussed about the *Polydor* principle in this study.

and *country of origin* is based on the case law of the fundamental freedoms. It was again emphasised, with regard to the respective case law, that the Swiss Federal Court in particular implicitly acknowledges the concept of recognition of professional qualifications based on a pragmatic approach (possibly on the principle of proportionality), while the Swiss government even openly acknowledges the regime of recognition of professional qualifications based on the *Hocsman* and *Morgenbesser* case law. The discussion of the electrician's profession also showed that the FAC seems to accept this concept because partial recognition under secondary law is not yet part of the *acquis suisse*. It was demonstrated that, from a dogmatic standpoint, the recognition of professional qualifications could either be based on primary law or on a pragmatic approach (similar to the reversed *Polydor* principle of the EFTA Court) but not solely on the principle of proportionality. This would have an impact for the recognition of third country diplomas as well as partial recognition based on primary law. It contradicts earlier and lesser known case law of the FAC which refused to apply the case law of *Vlassopoulou* and *Dressen* as a subsidiary layer of protection when secondary law does not apply.

In this context, it was also explored for third country diplomas that the case law of *Tennah-Durez* which states that Member States must also recognise diplomas even if the training was not mainly obtained in the EU, as long as the diploma is awarded by an authority of an EU Member State, still applies for the sectoral system of recognition according to the European Commission.

With the withdrawal of the UK from the EU, the protection of acquired rights was discussed, as explicitly foreseen in Article 23 AFMP. Some of the legal uncertainties have now been clarified with a new Swiss-UK Brexit Agreement that apply on the withdrawal of the UK. This agreement protects acquired rights, rights in the process of being acquired and even certain persons who have not obtained a diploma. Further, the recognition of third country diplomas is regulated. Recognitions based on primary law and the auditor's profession are not mentioned in the agreement.

9.1.4 Mutual recognition of professional qualifications for selected health and legal professions (Part IV)

In Part IV, the relevant case law of the CJEU, the EFTA Court and Swiss courts was discussed for selected health and legal professions. For the pursuit of the profession of a medical doctor in the host Member State, an interesting decision of the EFTA Court was

explained, allowing the host Member State to refuse recognition if the migrant does not have the necessary linguistic knowledge. In the present author's opinion, it is however more convincing to adopt a *two-stage approach* which is in conformity with the case law of the CJEU. By application of the two-stage approach, the recognition of professional qualifications is in principle automatic, while the exercise of the profession can be prohibited due to a lack of linguistic knowledge.

Swiss courts have consistently held that diplomas awarded by private institutions are considered to be part of public law if the relevant institutions are accredited as required by Swiss law. This also applies to specialised doctors of medicine. In an important decision with five judges, in 2017, the FAC ruled that even a private diploma showing a specialisation in endocrinology must be recognised if required by federal law based on the general system. It was revealed that the FAC did not discuss in this case whether the *Angerer* case law must be followed for a medical specialty not listed in Annex V of the Professional Qualifications Directive under the *acquis suisse,* despite the fact that Article 10 of the Professional Qualifications Directive only applies for specific and exceptional reasons. This can be answered in the affirmative. The application of this case law would therefore have led to the same result. It was also held *obiter dictum* referring to the decision of the CJEU in *Bobadilla* that the recognition principles would even apply for the non-regulated professions but without giving a reasoning. In the end, the decision was recently annulled by the Swiss Federal Court on grounds of a lack of legal basis of the requirement in June 2019.

In another important leading case of the FAC of 2018, a measure which stipulates that doctors must not be approved by health insurance funds unless they show that they have three years of practical experience in Switzerland was found to be indirectly discriminatory by the FAC, but justified. Division III of the FAC held that the meaning of Article 55 of the Directive[2421] was not sufficiently clear to be applied in case of mere restrictions and in the light of the Swiss Federal Court case law despite the fact that the measure was found to be indirectly discriminatory. The standstill clause of the AFMP was not assessed despite the fact that the measure was found to be indirectly discriminatory as opposed to the cited leading

[2421] 'Without prejudice to Article 5(1) and Article 6, first subparagraph, point (b), Member States which require persons who acquired their professional qualifications in their territory to complete a preparatory period of in-service training and/or a period of professional experience in order to be approved by a health insurance fund, shall waive this obligation for the holders of evidence of professional qualifications of doctor and dental practitioner acquired in other Member States'.

case of the Swiss Federal Court. It was never answered whether violations of the standstill clause in the AFMP can be justified *per analogiam* to case law of the CJEU for the standstill clause under the Ankara Agreement.

Concerning the health professions, the new provision for pharmacists which requires a specialised diploma for independent practise was assessed. From the case law of the CJEU it can be seen that the recognition of specialised pharmacist diplomas falls under the general system of recognition. Even if it is argued that the diploma for ‘specialised pharmacist’ does not fall under the scope of the Professional Qualifications Directive due to the fact that only the exercise is restricted, or if it is argued that the measure is in conformity with the Directive, the measure qualifies either as indirect discrimination or more likely as a free movement restriction which must be justified if free movement restrictions are covered by the AFMP or a pragmatic approach is applied. This view is also supported by the relevant case law of the EFTA Court.

While the implementation of the lawyer’s and the patent attorney’s professions in Switzerland was shown to be largely unproblematic with the exception of a cantonal judgment that erroneously exempts family members from the scope of the Facilitating Practice Directive, the legal situation for the notarial profession is unsatisfactory, as the courts did not clarify whether they can benefit from free movement under the *acquis suisse*.

Since at least primary law applies for the notarial profession but according to the Swiss Competition Commission even secondary law applies based on the national implementation of Title II of the Professional Qualifications Directive and the application of the Qualifications Directive before its revision, free movement should in principle be allowed for notaries under the *acquis suisse*. For the notarial profession, it was explored that the public authority exception to the AFMP must be interpreted according to the case law of the CJEU. There is no good reason to disapply the case law of the CJEU concerning notaries despite a slightly nuanced wording of the public authority exception due to the rule of homogeneity foreseen in Article 16(2) AFMP. This means that notaries generally do not fall under this exception. It was also highlighted that Swiss nationals and nationals from EU Member States may rely on the AFMP against their State of origin even if a profession falls under the public authority exception according to the *Brouillard* decision of the CJEU.

In addition, it was noted that the FAC has not clarified whether auditors fall under secondary or primary law under the *acquis suisse* at all. It was claimed that it is unconvincing

that they cannot profit from free movement because this profession is not mentioned under the exemptions of the AFMP.

Finally, the last part of this study showed the situation concerning free movement of legal trainees within the meaning of the *Morgenbesser* (and *Peśla*) case law, and that it is part of the *acquis suisse* pursuant to the statement of the Swiss Government, and that the Swiss authorities must apply a holistic view when assessing the free movement of legal trainees. This view is also supported by recent case law of the Swiss Federal Court. On 31 January 2020, the Swiss Federal Court upheld a cantonal decision that applied the lessons of the *Peśla* judgment but which did not grant access to legal traineeship in the specific case.

9.2 Conclusions

9.2.1 Introduction

In this study, the numerous recommendations for the evolution of the bilateral path were discussed, notably the Draft Institutional Framework Agreement. Apart from this topical examination in Part I, it was analysed in Part II how the institutional setting has implications for the free movement provisions under the *acquis suisse* and the professional recognition. For the interpretation of the AFMP, it was shown that the return of the *Polydor* principle can be confirmed in the case law of the CJEU for association agreements, in particular for the Ankara Agreement as well as for the AFMP. The method of interpretation for the AFMP determines whether free movement restrictions fall under the AFMP which could indicate that free movement restrictions are not covered by the AFMP. Despite the fact that it is disputed that free movement restrictions fall under the AFMP, there are good practical reasons to apply primary law in the context of professional recognition because indirect discriminations and restrictions can often not be distinguished. Further, it should be applied in light of the *reversed* Polydor principle applied by the EFTA Court. This finding is not a mere dogmatical issue in the context of the *acquis suisse* but is essential to apply the concepts of *partial recognition*, to some extent the recognition of *third country diplomas* (as far as it is not in the scope of secondary law), for the free movement of auditors (if they do not fall under secondary law), most likely for the free movement of notaries (if they do not fall under secondary law or its implementation in Switzerland) and for the free movement of legal trainees.

Overall, the case law of the CJEU and the Swiss courts concerning the recognition of professional qualifications was analysed in Part III but also more specifically for selected health and legal professions in Part IV. Ultimately, the objective was to find whether the case law of the Swiss courts matches the case law of the CJEU.

Six research questions were raised to meet this objective:

1. How does the cooperation between Switzerland and the EU function and how will the institutional framework between Switzerland and the EU be altered in the near future?
2. Does the institutional framework suffice to guarantee the *effet utile* of the free movement provisions as foreseen by the AFMP[2422]?
3. How is the EU law of the *acquis suisse* interpreted in conformity with the case law of the CJEU for the internal market?
4. What implications does the *acquis suisse* have for the free movement provisions and the recognition of professional qualifications?
5. What are the current obstacles to the recognition of professional qualifications with regard to selected health and legal professions in Switzerland?
6. Does Swiss case law for the free movement of persons and for the recognition of professional qualifications reflect the case law of the CJEU?

9.2.2 Research Question 1

To give an answer to the first research question, the current framework of the *acquis suisse* will probably come to an end in the near future, in its current form, with a web of over a hundred so-called bilateral agreements. It is still unclear whether the Draft for an Institutional Agreement between Switzerland and the EU will be successful. It could help to stabilise relations between Switzerland and the EU but it would not change the late updates of secondary law given the time needed for implementation and potential referendums. One of the key elements of the arbitration body is the 'reference procedure' which allows cases to be referred to the CJEU. In essence, the arbitration body must refer a case to the CJEU when concepts of EU law have to be interpreted (certainly in unclear cases). The procedure stands and falls with the willingness of the Contracting Parties to invoke the dispute settlement mechanism and to make referrals to the CJEU. Even if no cases are referred to the CJEU however, the dispute mechanism could foster the finding of compromises. However, the idea of an arbitration body with a 'reference procedure' has received much criticism in Switzerland (also by some academics) because the impartiality of the CJEU is questioned

[2422] See supra note 51.

despite the fact that this proposition currently proves to be the only realistic solution for a judicial mechanism besides *docking* at the CJEU or at the EFTA Court.

To conclude, the Draft Institutional Framework Agreement seems to be the price that Switzerland must pay in order to get access to the internal market. The EU is currently able to put pressure on Switzerland by halting the negotiations for dossiers that are not connected to each other, such as the equivalence of the framework for the Swiss stock exchange, the missing updates of the MRA between Switzerland and the EU as well as the negotiations for a public health agreement. A procedure that ends with a judgment of the CJEU seems to be the better option than the goodwill of the EU even if it means that Switzerland involves the court of the 'opposite side'.

9.2.3 Research Question 2

In this study, it was demonstrated that the connection between the Swiss Federal Court and the CJEU is not as close as the ties and the judicial dialogue between the CJEU and the EFTA Court, which could possibly be remedied by the Draft Institutional Framework Agreement. It was also noted that the EFTA Court fosters parallel interpretation by a reversed *Polydor principle*. That is to say that the EFTA Court interprets provisions distinctly in EEA law to achieve the same result as in the internal market.

Some authors have rightly pointed out that the mutual recognition of professional qualifications was one of the areas between Switzerland and the EU, where the continuous updating of secondary law is hindered. For the legal profession, the updates are less problematic as lawyers fall under the Facilitating Practice Directive and the Facilitating Services Directive. But for most professions that fall under the Professional Qualifications Directive, this is at least inconvenient if not problematic at times, as some concepts, such as the concept of partial recognition, recognition of third country diplomas (if not in the scope of secondary law) and the status of trainees, are not yet part of secondary law under the *acquis suisse*. The non-updated version of the *acquis suisse* also makes it more complex to assess the relevant law and to follow the case law of the CJEU. This can also be seen in the case law concerning the auditor's profession where the FAC did not answer whether secondary law affects auditors, as it is unclear whether they fall under the Professional Qualifications Directive, or whether they even fall in the purview of the AFMP at all.

Under the current institutional setting, the EU-Swiss Joint Committee could have disapplied certain judgments of the *acquis suisse* after the date of signature by unanimity.

Such a decision has however never been taken. To guarantee a uniform interpretation of the law and to guarantee the *principle of effectiveness*, a single point of interpretation is thus needed. This is also one of the goals of the European Commission. The current proposal for a dispute settlement system with referral to the CJEU in the Draft Institutional Framework Agreement will not however change the fact that the 'reference procedure' *de facto* only applies at the behest of the Contracting Parties (formally by the arbitration body) but not at the initiation of Swiss courts or individuals. However, the Draft Institutional Framework Agreement foresees an *extended homogeneity rule*. Concepts of EU law would not only have to be interpreted according to the case law of the CJEU before but also *after* the date of signature of the agreement. In addition, the expression 'Court of Justice' would be defined as both the Court of Justice and the General Court.

Contrary to the relevant academic literature, it was clarified by a lesser known judgment of the CJEU that the decisions of the EU-Swiss Joint Committees can be indirectly challenged before the CJEU by an annulment action, as they are approved by Council decisions.

9.2.4 Research Question 3

Whilst the CJEU did not refer to the *Polydor* case law in many judgments concerning association agreements, it finally returned to this line of case law under the AFMP in the case *Grimme*. The internal market case law can therefore not automatically be applied to the AFMP, but it is largely dependent on the context. The CJEU has never cited Swiss Federal Court rulings (with one exception) but the Swiss Federal Court follows the case law of the CJEU closely. It was emphasised by several judgments of the CJEU and the Swiss Federal Court that Switzerland chose not be part of the internal market, despite its high level of integration. This grants an almost parallel legal order but without a judicial dialogue between the CJEU and the Swiss Federal Court. Nevertheless, the rulings of the Swiss Federal Court present a diverse picture. On the one hand, the Swiss Federal Court progressively followed the case law even after the date of signature except for 'good reasons', there seem to exist different opinions within the Swiss Federal Court how far a parallel legal order reaches. One division of the Swiss Federal Court argued in a recent case, that the AFMP is simply an 'economic agreement' with reference to the *Wächtler* case of the CJEU. Recently in 2019, another division of the Swiss Federal Court left the question unanswered whether Article 9(1) of Annex I to the AFMP has horizontal effect.

Finally, this study indicated that the decisions of the EU-Swiss Joint Committee for the AFMP do not play a role for the interpretation of the AFMP but for the updates of Annex III concerning the recognition of professional qualifications.

9.2.5 Research Question 4

This study revealed that the distinction of the different recognition regimes under secondary or primary law was never assessed by Swiss courts. The FAC and the Swiss Federal Court apply a mixture of primary and secondary law (sometimes due to the hybrid structure of the AFMP) at times but implicitly seem to accept mutual recognition based on primary law. This pragmatic reasoning seemingly based on the principle of proportionality rather than the concept of restrictions is problematic as it is not clarified whether partial recognition (the amendment of Directive 2013/55/EU is not applicable) and the recognition of third country diplomas are part of the *acquis suisse*. The latter is however supported by an explanatory report of the Swiss Government. Further, the FAC ruled in an *obiter dictum* that partial recognition of professional qualifications could be allowed depending on the question whether it constitutes new or old case law. This reasoning seems to indicate that the FAC implicitly acknowledges the recognition based on primary law (because otherwise it would not have had to discuss whether the concept constitutes new or old case law) but ultimately it left the question unanswered whether partial recognition constitutes new or old case law.

It is still disputed whether restrictions are covered by the AFMP. While it can be argued that free movement restrictions are covered by the Agreement on the Free Movement of Persons because it aims to achieve a single market, this study showed that the recognition of professional qualifications under the regime of primary law must be based either on the concept of restrictions due to a *pragmatic* approach or it must be based on a *pragmatic* approach alone (similar to the reversed *Polydor* principle). This can also be seen by the fact that the case law of the CJEU has to be followed before the date of signature pursuant to Article 16(2) AFMP except for ‘good reasons’. To conclude, the rulings of the CJEU with regard to the application of primary law for the recognition of professional qualifications are to be followed after the date of signature. Even if the concept of restrictions is disputed from a dogmatic standpoint, recognition based on the regime of primary law due to a pragmatic approach is the only sound explanation in the light of the Swiss case law of the Swiss Federal Court without overextending the concept of indirect discrimination. For instance, the Swiss Federal Court referred to the *Hocsman* judgment in a leading case which applies under the

acquis suisse. This judgment is also mentioned by an explanatory report of the Swiss government. According to another statement of the Swiss government the case law in *Peśla* and *Morgenbesser* apply for the recognition of professional qualifications based on primary law under the *acquis suisse*. These judgments require a holistic view of the knowledge and skills of legal trainees. They are only clarifications of the case law for the *unregulated professions*. This view is also in line with a recent leading case of the Swiss Federal Court in January 2020 which explicitly referred to the *Peśla* case law.

9.2.6 Research Question 5

Despite its importance, the auditor's profession was simply not addressed in the *acquis suisse*. Even if it were argued that auditors are not covered by the Professional Qualifications Directive, primary law would however apply as a subsidiary layer for the auditor's profession.

For the lawyer's profession the influx of applicants with EU diplomas is marginal, and the case law is largely unproblematic with the notable exception of a judgment that erroneously exempts family members from the scope of the Facilitating Practice Directive. An interesting Swiss case similar to the *Torresi* case even showed that the free movement for lawyers with a third country diploma is generous due to the hybrid nature of the lawyers' profession.

The discussion for the free movement of notaries has commenced in Switzerland due to the rulings of the CJEU and the amendment of the Professional Qualifications Directive. Currently, the respective secondary law is still applicable for notaries under the *acquis suisse* according to the view of the COMCO. But even if this is controversial, primary law must at least be applied notwithstanding the slightly nuanced wording of the provision in the AFMP with regard to the exercise of public authority.

For the selected health professions, the current and most recent revisions are in general unproblematic. Irrespective of whether the introduction of specialisations for pharmacists in Switzerland is in conformity with the Professional Qualifications Directive, the new measure which regulates the independent exercise of the profession must be justified which could prove to be difficult.

The very recent leading cases of the Swiss Federal Court and the Swiss Federal Administrative Court with regard to the recognition of private diplomas for medical specialisms showed the different layers of recognition (sectoral and general system) in light

of the *Angerer* case law (which was not discussed by the FAC). It was also mentioned *obiter dictum* that the recognition of diplomas applies even for the non-regulated professions.

9.2.7 Research Question 6

The case law of the Swiss courts mostly refers to the case law of the CJEU. However, it seems that secondary law is extremely complex which is explicitly stated by the FAC. Even the Swiss Federal Court confused the concepts of 'regulated profession' and 'regulated training' in a leading case of 2008. To give some further examples, it was revealed in a case of 2019 that the Swiss Federal Court did not apply the principle of mutual trust, stating that it would not matter whether the appellant is allowed to practice in the home Member State. In an early case of 2007, landmark decisions and fundamental concepts of EU law have been left aside by the FAC as it stated that the decisions *Vlassopoulou* and *Dressen* are only relevant for architects and lawyers, and cannot be applied by analogy to medical doctors. In a decision of 2017, the FAC did not discuss whether the *Angerer* case law should be followed under the AFMP when discussing Article 10 of the Professional Qualifications Directive. It should also be noted that the FAC seemed reluctant to rule on the question whether primary or secondary law applies for the auditor's profession and with regard to the concept of partial recognition.

In addition, Swiss courts seem to follow a distinct methodical approach compared to many decisions of the CJEU. Considering the few cases with regard to the interpretation of the AFMP before the CJEU in EU Member States, the Swiss courts are decisive for the application and evolution of the free movement of persons and the mutual recognition of professional qualifications under the *acquis suisse*. This can be witnessed by a landmark case of the FAC where it applied the non-discrimination provision of Article 2 AFMP in conjunction with provisions of the AFMP despite the fact that the provisions on equal treatment in Articles 13 and 14 of the Professional Qualifications Directive could have been applied (which were discussed). Alternatively, the FAC also mentioned the standstill clause of the AFMP which could however not have been applied against the State of origin. From the structure of the agreement as public international law, this decision is not wrong but it does not distinguish clearly between primary and secondary law. Moreover, the FAC obviously did not use the terminology of EU law. Finally, the FAC does not regularly assess what constitutes a regulated profession but simply follows the list of regulated professions provided by the Swiss Government.

9.3 Recommendations

In the light of the final conclusions, I would like to propose the following recommendations to improve the *acquis suisse*:

9.3.1 Decide on the further evolution of the institutional framework in a timely manner

Currently, the proverbial elephant remains the unsolved institutional framework between Switzerland and the EU. Arguably, the decision is in the end more a political than a legal one. However, the effectiveness of the free movement provisions and the professional recognition depend on the homogeneity of the legal order. The current system has become overly complex. Over 23 Joint Committees exist in total.[2423] Moreover, it is undisputable that the EU is not any longer willing to give access to the internal market without a streamlined institutional framework. There were several solutions presented in the past ranging from EFTA-like institutions, to docking at the CJEU or the EFTA Court or concluding an interim agreement to appease the EU. It could prove difficult to negotiate a new agreement while the EU is tasked with finding a solution for the relations with the UK. Regardless of Switzerland's choice, making no choice is not an option and will not bring back the bilateral path of the past. This is inter alia shown by the equivalence of the framework for Swiss stock exchange which expired on 30 June 2019, the missing updates of the MRA between Switzerland and the EU as well as by the negotiations for a public health agreement.

9.3.2 Establish a single point of interpretation

This dissertation has shown that a single point of interpretation is essential in being part of the single market. Switzerland should at some point decide whether it would like to opt for a docking (CJEU or EFTA Court) or for an arbitration solution for integration in the internal market, as the EU does not seem to be willing to follow the current system with over 100 distinct agreements without a single point of interpretation. Other options are not available due to the autonomy of the EU legal order. The current system depends on the willingness of the Swiss Federal Court to foster a parallel interpretation of the AFMP with

[2423] Directorate for European Affairs, supra note 251.

the internal market case law wherever possible, which could be hindered by different opinions of the different divisions of the Swiss Federal Court.

9.3.3 Determine the relevant concepts of EU law and the relevant case law of the CJEU

In EU law, concepts and the case law of the CJEU are sometimes indistinguishable. This leads to difficulties when Swiss courts apply the rule for homogeneity in Article 16(2) AFMP and take into account the relevant case law of the CJEU. The Joint Committee could either determine the implications of the case law, or a future update of the AFMP could establish a common understanding of the concepts in the AFMP since case law and concepts are often intertwined or indistinguishable. This decision could solve the unanswered problem whether free movement restrictions are covered by the AFMP and whether the recognition of professional qualifications based on primary law applies under the *acquis suisse* without overextending the concept of indirect discrimination. It would thus strengthen legal certainty for all applicants who apply for professional recognition.

9.3.4 Update Annex III to the AFMP: Professional Qualifications Directive

Many updates for the Professional Qualifications Directive have not occurred under the *acquis suisse*. The lack of ongoing updating leads to it being very difficult to legally assess the situation as shown by the case law of Swiss courts. Even if the missing updates are closely connected to the questions about the future institutional framework, Annex III to the AFMP should be replaced with the newest updates of the Professional Qualifications Directive to guarantee legal certainty. Notably, it would establish the concept of partial recognition based on secondary law rather than (possibly) on the uncertain grounds of primary law. It is clear that this largely depends on the willingness of the EU to agree to an update that had been planned since 2014 but was stopped as part of the strategy for current negotiations on future relations between Switzerland and the EU.

9.3.5 Discuss and apply the relevant case law of the Court of Justice for the mutual recognition of professional qualifications

Judgments of Swiss courts concerning the recognition of professional qualifications often discuss and apply some case law of the CJEU. It was however noted that the Federal

Administrative Court (FAC) forgot to discuss case law of the CJEU in multiple cases. In one particular case of 2007, the FAC neglected the importance of the fundamental *Vlassopoulou* decision.[2424] According to the rule for homogeneity provided by Article 16(2) AFMP, the case law must however be applied unless good reasons exist to deviate from the case law of the CJEU. It would therefore be important to discuss systematically whether primary law applies in the context of the *acquis suisse*.

9.3.6 Increase the awareness of the core principles of mutual recognition and mutual trust

A recent case of the Swiss Federal Court (SFC) from 2019 but also some cantonal case law for lawyers shows that the principle of mutual recognition which is a fundamental principle is not applied.[2425] This case law often discusses aspects of reciprocity or checks whether the foreign diploma is equivalent to the Swiss diploma. This approach obviously contradicts the principles of *mutual recognition* and *mutual trust*. This could be simply remedied if the core principle were adequately taught for professionals. It is clearly not necessary to understand the complex Professional Qualifications Directive in every detail but it is important to raise the awareness for its functioning.

9.3.7 Clarify the legal basis for the recognition of the auditor's profession

It has been shown that the auditor's profession was probably forgotten by the Contracting Parties, or at least not directly addressed. Therefore, it is unclear whether the auditor's profession falls under secondary or under primary law under the *acquis suisse*. It is even disputed whether this profession falls under the AFMP at all. For the sake of clarity, it should be clarified by the Contracting Parties whether this profession falls under the *acquis suisse.*

[2424] BVGer C-2281/2006 of 18.10.2007 (available online since 2019); para. 3.5; see Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

[2425] BGer 2C_775/2018 of 21.03.2019.

9.3.8 Inform law students and legal trainees about the implications of the hardly known *Morgenbesser* case law

For legal trainees, free movement is unnecessarily complex due to the CJEU's rulings in *Morgenbesser* and *Peśla*.[2426] Even if many scholars have addressed this problem, it is not likely that the CJEU will deviate from its jurisprudence. Legal trainees do not fall under secondary law but can only invoke the provisions of primary law. It was shown that, from a dogmatic standpoint, recognition based on the provisions of primary law also applies under the *acquis suisse* for pragmatic reasons. The Swiss Government published guidelines that should be followed and made transparent by the respective cantonal authorities.[2427] On 31 January 2020, the Swiss Federal Court upheld a cantonal decision that applied the lessons of the *Peśla* judgment but which did not grant access to legal traineeship in the specific case.[2428] Most cantonal authorities responsible for legal traineeships have not published guidelines for legal trainees with a foreign law degree which would foster legal certainty. Finally, it should be mentioned that for many trainees, academic recognition might even be more favourable, which means that this case law will only affect very few trainees in the foreseeable future.

[2426] Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612; Case C-345/08, *Peśla*, ECLI:EU:C:2009:771.

[2427] State Secretariat for Research and Innovation et al., supra note 1029.

[2428] BGer 2C_300/2019 of 31.01.2020; BGer 2C_831/2015 of 25.05.2016.

10 Samenvatting

Deze studie beschrijft en analyseert het *acquis suisse* met betrekking tot de wederzijdse erkenning van beroepskwalificaties, met andere woorden de erkenning van diploma's, tussen Zwitserland en de EU. Daarbij wordt de focus gelegd op bepaalde beroepen in de gezondheidszorg en in de juridische beroepen. In deze studie wordt daarnaast niet alleen het toepasselijke secundaire recht geanalyseerd, zoals met name Richtlijn 2005/36/EG ("Beroepserkenningsrichtlijn"), maar ook de vraag onderzocht of de beginselen inzake wederzijdse erkenning zoals deze zijn gelezen in het primaire EU recht ook van toepassing zijn in de rechtsrelatie tussen Zwitserland en de EU. Daartoe wordt het institutionele kader, dat nauw verband houdt met dit onderwerp, en de ontwikkelingen in de betrekkingen tussen Zwitserland en de EU, en met name de kaderovereenkomst, uiteengezet omdat deze een belangrijke invloed kunnen hebben op de toekomstige interpretatie van het *acquis*.

10.1 Institutioneel kader tussen Zwitserland en de EU (deel I)

Deel I van deze studie gaat over het institutionele kader dat de relaties tussen Zwitserland en de EU beheerst, de geschiedenis ervan en de mogelijke wijzigingen in de toekomst. Dit gedeelte toont aan dat de verschillende struikelblokken, zoals het initiatief voor massale immigratie (*Masseneinwanderungsinitiative*), de ontwikkeling van de zogenaamde ‘bilaterale weg’ tussen Zwitserland en de EU niet hebben tegengehouden. Daarnaast werden ook de huidige institutionele uitdagingen met betrekking tot het vinden van een geschikte (rechterlijke) instantie voor de uniforme interpretatie van de bilaterale overeenkomsten geanalyseerd.

In het voorjaar van 2019 werd over de ontwerp-kaderovereenkomst tussen Zwitserland en de EU een openbare raadpleging gehouden. Deze kaderovereenkomst zou een scheidsgerecht in het leven roepen met de mogelijkheid om prejudiciële vragen te stellen aan het Hof van Justitie van de Europese Unie (HvJ-EU) voor bepaalde markttoegangsovereenkomsten. Gezien de wijze van inkadering van de deze verwijzingsprocedure in de ontwerp-kaderovereenkomst wordt duidelijk dat de invloed van het Hof van Justitie op de interpretatie van deze markttoegangsovereenkomsten relatief bescheiden zou zijn en tegelijkertijd de vorm van geschillenbeslechting mogelijk ook in overeenstemming met de autonomie van het recht van de Unie zou zijn. Er wordt daarnaast

kort geanalyseerd of het scheidsgerecht een discretionaire bevoegdheid heeft om vragen aan het Hof van Justitie van de Europese Unie voor te leggen, hetgeen kan worden bevestigd op basis van vergelijking met andere mechanismen voor geschillenbeslechting, het (toepassing van de zogenaamde *acte clair*-doctrine).

De ontwerp-kaderovereenkomst is een compromis tussen Zwitserland en de Europese Unie. Niettemin zal deze mogelijk voor veel Zwitsers moeilijk te aanvaarden zal zijn omdat het bepaalde zogenaamde 'rode lijnen' overschrijdt, zoals met betrekking tot de 8-dagenregel voor dienstverleners (een kritiek die zowel van links als rechts klinkt). Naast het overschrijden van de rode lijnen is er het bezwaar dat het Hof van Justitie een rechterlijke instantie is van de EU, voor sommigen dus een gerecht van 'de andere kant', waarmee geïmpliceerd wordt dat het Hof niet onpartijdig zou oordelen.

Daarnaast is de interpretatie van internationale verdragen en met name de interpretatie van de Overeenkomst over het Vrije Verkeer van Personen tussen Zwitserland en de EU (OVVP) onderzocht. Hoewel het Hof van Justitie van de Europese Union (HvJ-EU) in veel gevallen een progressieve interpretatie toepast en interne marktbeginselen heeft geïmporteerd uit het EU-recht in zowel de rechtsrelatie EU-Zwitserland, maar ook in het kader van de Associatieovereenkomst EU-Turkije (de 'Overeenkomst van Ankara') heeft het in recente rechtspraak, zoals *Demirkan* onder de Overeenkomst van Ankara en in de zaak *Grimme* onder de OVVP, teruggegrepen naar het *Polydor*-principe. De advocaat-generaal in de zaak *Ettwein* vroeg zich zelfs af of het primaire EU-recht deel überhaupt uitmaakt van de OVVP of dat alleen het uitdrukkelijk genoemde secundaire recht deel uitmaakt van het *acquis suisse*. In dit deel komen daarnaast de opvattingen van enkele auteurs aan bod die de terugkeer naar het *Polydor*-principewijten is aan een aantal restrictieve uitspraken van nationale rechtbanken. Indien juist, is het goed denkbaar dat het *Polydor*-principe in toenemende mate zal worden toegepast, in het licht van een aantal recente restrictieve uitspraken van de afdeling strafrecht van het Zwitserse Federale Hof (het *Bundesgericht)*, nu de interpretatie van het Hof van Justitie nu eenmaal in grote mate afhangt van de context van de desbetreffende overeenkomst.

Echter, ondanks de terugkeer naar het *Polydor-principe* toont een analyse van de rechtspraak aan dat het Bundesgericht het Hof van Justitie volgt, ook als deze zijn jurisprudentie later heeft gewijzigd. Het Hof van Justitie heeft daarentegen nooit expliciet het Bundesgericht gevolgd, op één uitzondering na. Ook is gebleken dat de samenwerking tussen de rechtbanken of de justitiële dialoog, zoals die tussen het Hof van Justitie en het EVA-Hof bestaat, niet plaatsvindt tussen het Bundesgericht en het HvJ-EU. De justitiële dialoog is

echter wel expliciet opgenomen in de kaderovereenkomst. Er is daarnaast uiteengezet dat het EVA-Hof zelfs verder gaat dan slechts een justitieel dialoog en een omgekeerd *Polydor*-principe heeft ontwikkeld. Deze komt op neer komt dat het de EER-overeenkomst (ongeacht van de precieze interpretatie van het Hof van Justitie) op een wijze interpreteert opdat hetzelfde resultaat wordt bereikt als in het EU interne marktrecht.

Het is duidelijk dat de door het Hof van Justitie ontwikkelde interpretatieregels alleen van toepassing kunnen zijn op de begrippen die daadwerkelijk deel uitmaken van de OVVP. Dit betekent dat nog geen oplossing is gevonden voor de interpretatie van de begrippen die deel uitmaken van het *acquis suisse*. De complexe structuur van de OVVP en de combinatie van primaire en secundaire recht maken het niet eenvoudig om te bepalen welke EU-rechtelijke concepten ook onderdeel zijn van de OVVP. De EU-Zwitserland kaderovereenkomst van 23 november 2018 verhelpt dit probleem ook niet.

10.2 Vrij verkeer van personen tussen Zwitserland en de EU (deel II)

In deel II worden de fundamentele vrijheden besproken, die slechts gedeeltelijk in het *acquis suisse* zijn ontwikkeld. Hoewel zowel geaccepteerd is dat zowel directe als indirecte discriminatie (tenzij gerechtvaardigd) verboden zijn voor alle toepasselijke fundamentele vrijheden (werknemers, vestiging en diensten), en deze vrij verkeersrechten rechtstreekse horizontale werking hebben (overigens recent door het Bundesgericht opengelaten), wordt nog steeds betwist of de OVVP ook een verbod op beperkingen van vrij verkeersrechten omvat. Uit de analyse blijkt dat er geen enkel oordeel van het Hof van Justitie is dat expliciet een verbod op beperkingen voor de OVVP (of voor een andere associatieovereenkomst) bevestigt.[2429] Het Bundesgericht heeft niet openlijk, maar wel impliciet steun uitgesproken voor zo een interpretatie waar het erkenning van diploma’s op basis van het primaire recht betreft. Dit uitspraak betreft echter geen principieel maar eerder een pragmatisch standpunt (mogelijk ingegeven door het proportionaliteitsbeginsel).

Terwijl het Hof in het recente arrest *Picart* (Grote kamer) de OVVP restrictief uitlegt op basis van de bewoordingen, namelijk dat een onderdaan van Zwitserland of de EU als

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[2429] De term "beperking" is door het Hof van Justitie gebruikt: zie zaak C-581/17, *Martin Wächtler/Finanzamt Konstanz*, ECLI:EU:C:2019:138, paragraaf 67. Hoewel het Hof van Justitie de term "beperking" heeft gebruikt, kan het gebruik van deze formulering - volgens wat in deze studie over het *Polydor-principe* is geschreven - niet automatisch leiden tot de conclusie dat de term dezelfde betekenis heeft als in het interne marktrecht.

zelfstandige op het grondgebied van de andere overeenkomstsluitende partij moet verblijven, oordeelde datzelfde Hof in de zaak *Wächtler* (Grote kamer) dat belemmeringen van het vrije verkeer van personen geïntroduceerd door de staat van herkomst verboden zijn. Wat de erkenning van diploma's betreft, hebben de Zwitserse rechtbanken in de grotendeels consistente jurisprudentie besloten dat een grensoverschrijdend element voldoende is voor de toepassing van de OVVP en de richtlijn inzake de erkenning van beroepskwalificaties.

In dit deel wordt ook vermeld dat personen die geen economische activiteit uitoefenen (bijvoorbeeld studenten) waarschijnlijk buiten het toepassingsgebied van de OVVP vallen als gevolg van de formulering van artikel 24, lid 4, van bijlage I bij de OVVP, waar het de toegang tot het hoger onderwijs betreft. Personen in deze situatie kunnen zich waarschijnlijk niet beroepen op artikel 2 van de OVVP (non-discriminatie naar analogie van artikel 18 VWEU, overigens een opvatting die door lagere rechters niet altijd wordt gedeeld). Economisch actieve studenten kunnen zich vanwege deze status echter in beginsel wel beroepen op de fundamentele vrijheden in verband met artikel 2 van de OVVP.

10.3 Erkenning van beroepskwalificaties (erkenning van diploma's; deel III)

Deel III belicht het ontstaan van de basisprincipes van de wederzijdse erkenning van diploma's. De ontwikkeling van de beginselen van wederzijds vertrouwen en het ‘land van herkomst’-beginsel is gebaseerd op de jurisprudentie met betrekking tot de fundamentele vrijheden. In dit deel wordt behalve de al eerdere genoemde pragmatische erkenning van het diploma’s door het Bundesgericht (ingegeven door het evenredigheidsbeginsel) er ook aan herinnerd dat de Zwitserse federale overheid zich openlijk heeft uitgesproken voor de rechtsprincipes met betrekking tot de erkenning van diploma’s zoals deze voortvloeit uit de jurisprudentie in de zaken *Hocsman* en *Morgenbesser*. Uit de bespreking van de jurisprudentie over het beroep van elektricien lijkt ook de Federale Administratieve Rechtbank deze aanpak te volgen, aangezien de secundaire wetgeving inzake gedeeltelijke erkenning momenteel nog geen deel uitmaakt van het *acquis suisse*. Daarnaast wordt beargumenteerd dat erkenning van diploma’s óf op basis van een lezing van het primaire recht in de Zwitserse context gebaseerd kan worden of op een pragmatische aanpak (gestoeld op het omgekeerde *Polydor*-principe van het EVA-Hof), maar niet slechts op het evenredigheidsbeginsel. Deze opvatting heeft zowel gevolgen voor de erkenning van

diploma's van derde landen en de gedeeltelijke erkenning vandiploma’s en is in tegenspraak met eerdere en weinig bekende jurisprudentie van de Federale Administratieve Rechtbank, dat weigerde de jurisprudentie in *Vlassopoulou* en *Dressen* toe te passen als subsidiair regime waar de Richtlijn niet van toepassing was.

In dit verband werd ook de jurisprudentie in de zaak *Tennah-Durez* onderzocht, waarin het Hof van Justitie oordeelde dat de lidstaten in het kader van het sectorale stelsel voor diploma-erkenning ook diploma's moeten erkennen die niet gebaseerd zijn op een overwegend in de Unie gevolgde beroepsopleiding, zolang het diploma door een EU-lidstaat is afgegeven. De Commissie is van mening dat deze jurisprudentie ook relevant is in het kader van de huidige richtlijn inzake beroepskwalificaties.

Met het oog op het vertrek van het Verenigd Koninkrijk uit de EU, werden de bescherming van verworven rechten en aanspraken besproken zoals voorzien in Artikel 23 OVVP. Sommige juridische onduidelijkheden konden worden verduidelijkt door de ontwerpovereenkomst tussen Zwitserland en het Verenigd Koninkrijk over de rechten van burgers in geval van opheffing van de Overeenkomst over het Vrije Verkeer van Personen (OVVP). Deze overeenkomst beschermt verworven rechten met betrekking tot de erkenning van diploma's, evenals verworven rechten en zelfs bepaalde personen die nog geen diploma hebben. Ook de erkenning van diploma's van derde landen is geregeld. De overeenkomst bevat geen bepalingen over de erkenning op grond van het primaire recht. Ten slotte wordt in de overeenkomst het beroep van auditor (opleiding tot auditor, fiduciair of belastingdeskundige) niet erkend.

10.4 Erkenning van beroepskwalificaties voor geselecteerde gezondheids– en juridische beroepen (deel IV)

In dit vierde deel van het proefschrift werd de relevante jurisprudentie van Hof van Justitie van de Europese Unie (HvJ-EU), het EVA-Hof en de Zwiterse rechtbanken met betrekking tot geselecteerde gezondheidszorgberoepen en juridische beroepen geanalyseerd. Een interessant besluit van het EVA-Hof werd becommentarieerd met betrekking tot de beroepsuitoefening van een vrouwelijke arts, op grond waarvan de ontvangende lidstaat de erkenning van het diploma kan weigeren in geval van onvoldoende talenkennis. Naar de mening van auteur dezes zou het overtuigender zijn om te kiezen voor een tweestappenbenadering, die in overeenstemming is met de jurisprudentie van het Hof van

Justitiet. Bij de tweestappenbenadering is de *erkenning* van diploma's in het kader van het sectorale stelsel automatisch, terwijl de *beroepsuitoefening* kan worden geweigerd op grond van onvoldoende talenkennis.

Zwitserse rechtbanken zijn er altijd van uitgegaan dat door particuliere instellingen afgegeven diploma's als publiekrechtelijk worden beschouwd indien de desbetreffende instellingen zijn geaccrediteerd in overeenstemming met de Zwitserse wet. Dit is ook van belang voor specialisaties van artsen. In een belangrijke uitspraak van de Federaal Administratieve Rechtbank uit 2017, geveld door een meervoudige kamer, oordeelde deze instantie dat de titels van een privaatrechtelijke voortgezette opleiding voor artsen ('voortgezette opleiding voor de specialisatie reproductieve geneeskunde en gynaecologische endocrinologie') ook onderworpen waren aan de regels inzake de erkenning van diploma's. De Federale Administratieve Rechtbank besprak echter niet of de beginselen uit de zaak *Angerer* diende te worden gevolgd voor een specialiteit niet opgenomen in bijlage V van de richtlijn betreffende de erkenning van beroepskwalificatie onder de acquis suisse, niettegenstaande het feit dat artikel 10 slechts kan worden toegepast in specifieke en uitzonderlijke situaties. In dit deel werd deze vraag bevestigend beantwoord. De toepassing van deze rechtspraak zou overigens tot het zelfde resultaat hebben geleid, namelijk de toepasselijkheid van het algemene stelsel. Obiter dictum verwees de rechtbank overigens nog naar de uitspraak van het Hof van Justitie in *Bobadilla*, en stelde dat de regels voor de erkenning van diploma's ook van toepassing zouden zijn op niet-gereglementeerde beroepen zonder dit echter nader te motiveren. Uiteindelijk is het besluit recent (juni 2019) in beroep vernietigd door de Bundesgericht wegens het ontbreken van een rechtsgrondslag voor dit vereiste

In een mijlpaalbeslissing van de Bundesgericht in 2018 werd een regeling die stelt dat artsen drie jaar praktijkervaring in Zwitserland nodig hebben voordat zij erkend mogen worden door zorgverzekeraars, geclassificeerd als indirect discriminerend door de Federaal Adminstratieve Rechtbank, maar gerechtvaardigd. De betreffende kamer oordeelde dat de formulering van artikel 55 van de richtlijn[2430] betreffende de erkenning van

[2430] 'Onverminderd artikel 5, lid 1, en artikel 6, eerste alinea, onder b), verlenen de lidstaten die van degenen die op hun grondgebied hun beroepskwalificaties hebben verworven, eisen dat zij een voorbereidende stage volbrengen en/of een periode van beroepservaring doorlopen om bij een ziektekostenverzekering te kunnen worden gecontracteerd, vrijstelling van deze verplichting aan de houders van in een andere lidstaat verworven beroepskwalificaties van arts of beoefenaar van de tandheelkunde.'

beroepskwalificaties niet duidelijk genoeg was om te worden toegepast in het licht van de jurisprudentie van het Bundesgericht inzake beperkingen, niettegenstaande het feit dat de rechter de maatregel indirect discriminerend achtte. De standstill-clausule van de OVVP werd niet onderzocht, hoewel er, in tegenstelling tot de situatie onderliggende de genoemde uitspraak van het Bundesgericht, sprake was van indirecte discriminatie. Het is onduidelijk of schendingen van de standstill-clausule kunnen worden gerechtvaardigd naar analogie van de jurisprudentie van het Hof van Justitie in het kader van de Overeenkomst van Ankara.

Met betrekking tot de beroepen in de gezondheidszorg is de nieuwe regeling voor apothekers kort besproken dat een gespecialiseerd diploma vereist voor zelfstandige beroepsbeoefening. Volgens de jurisprudentie van het Hof van Justitie valt een dergelijke specialisatie onder het algemene stelsel van diploma-erkenning. Ongeacht de vraag of dit systeem al dan niet in overeenstemming is met de bepalingen van de richtlijn betreffende de erkenning van beroepskwalificaties, gezien alleen de uitoefening van het beroep gereglementeerd is, vormt dit vereiste ofwel indirecte discriminatie ofwel een beperking van het recht op vrij verkeer die gerechtvaardigd moet worden (indien beperkingen onder de OVVP vallen). Dit wordt ondersteund door de relevante jurisprudentie van het EVA-Hof.

Hoewel de in dit deel verrichte analyse aantoont dat de Zwitserse implementatie met betrekking tot de beroepen van advocaat en octrooigemachtigde grotendeels onproblematisch is, met uitzondering van een uitspraak die weigerde familieleden van EU-burgers toe te staan zich op de vestigingsrichtlijn voor advocaten te beroepen, is de juridische situatie voor het beroep van notaris momenteel onbevredigend, aangezien de rechtbanken op dit punt nog geen duidelijkheid hebben kunnen verschaffe of deze beroepsgroep zich op vrij verkeer kan beroepen in de context van de acquis suisse.

Volgens de mededingingscommissie is het secundaire recht op grond van het *acquis suisse* – door de omzetting van titel II van de richtlijn inzake de erkenning van beroepskwalificaties in nationaal recht en de toepassing van de richtlijn vóór de herziening ervan – nog steeds van toepassing op notarissen. Het staat daarnaast vast dat het primaire recht in ieder geval subsidiair van toepassing is op notarissen. Bijgevolg moet het vrije verkeer van notarissen ook in het kader van het *acquis suisse* worden toegepast. Voor het notariaat werd ook vastgesteld dat de uitzondering met betrekking tot de uitoefening van het openbaar gezag moet worden begrepen in het licht van de jurisprudentie van het Hof van Justitie. Er geen goede reden om op basis van kleine taalkundige verschillen een van het interne marktrecht afwijkende interpretatie van de deze uitzondering gezien het

concordantiebeginsel vervat in artikel 16, lid 2, OVVP. Dit betekent dat de activiteiten van notarissen niet onder de uitzondering 'bekleed met openbaar bezag' vallen. Er werd ook op gewezen dat Zwitserse onderdanen en onderdanen van EU-lidstaten – onder verwijzing naar het oordeel van het Hof van Justitie in *Brouillard* – zich op de OVVP konden beroepen tegenover hun lidstaat van oorsprong wat betreft een eventuele weigering tot toelating vanwege de 'openbaar gezag'-uitzondering.

Bovendien is in dit deel opgemerkt dat de Federaal Administratieve Rechtbank niet heeft verduidelijkt of auditors überhaupt onder het secundaire of primaire recht onder het *acquis suisse* vallen. Het is naar de mening van auteur dezes niet overtuigend dat zij niet zouden kunnen profiteren van vrij verkeer, omdat dit beroep niet wordt genoemd in de uitzonderingen met betrekking tot de reikwijdte van de OVVP.

Tot slot werd de positie van de juristen die nog geen beroepskwalificatie (e.g. titel van advocaat) hebben onderzocht. Er werd aangetoond dat, volgens de uitleg van de Zwitserse federale overheid en op basis van de jurisprudentie van het Hof van Justitie van de Europese Unie in de zaak *Morgenbesser* (en *Peśla*), een holistische visie moet worden gehanteerd, d.w.z. een holistische kijk op het kennisniveau van stagiairs bij de erkenning van diploma's en de toelating tot een stage in Zwitserland. Dit standpunt wordt ook ondersteund door de jurisprudentie van het Bundesgericht. Het Bundesgericht heeft de *Peśla*-jurisprudentie in principe gevolgd in overeenstemming met een recente mijlpaalbeslissing van januari 2020, ook al leidde dit *in casu* niet tot toelating tot de beroepsopleiding.

11 Zusammenfassung

Diese Studie zeigt die gegenseitige Anerkennung von beruflichen Qualifikationen, in anderen Worten die Diplomanerkennung, zwischen der Schweiz und der EU, namentlich für ausgewählte Gesundheits- und Rechtsberufe. Diese Arbeit behandelt nicht nur das anwendbare Sekundärrecht, insbesondere die Richtlinie 2005/36/EG ('Berufsanerkennungsrichtlinie'), sondern sie untersucht auch, ob Primärrecht zwischen der Schweiz und der EU Anwendung findet. Für diesen Zweck wurde der institutionelle Rahmen, welcher mit diesem Thema eng verknüpft ist, dargestellt. Die zukünftigen Beziehungen zwischen der Schweiz und der EU, namentlich das Rahmenabkommen, könnten nämlich die zukünftige Auslegung des *acquis suisse* massgeblich beeinflussen.

11.1 Institutioneller Rahmen zwischen der Schweiz und der EU (Teil I)

In Teil I behandelt diese Untersuchung den institutionellen Rahmen zwischen der Schweiz und der EU und wie dieser in Zukunft geändert werden soll. Es werden im ersten Teil die Stolpersteine aufgezeigt, die bisher den sogenannten bilateralen Weg nicht gestoppt haben, namentlich die Masseneinwanderungsinitiative. Dies beinhaltet auch die momentanen Herausforderungen zur Suche eines geeigneten Gremiums für die einheitliche Auslegung der bilateralen Abkommen.

Im Frühling 2019 war der Entwurf für ein Rahmenabkommen zwischen der Schweiz und der EU in der öffentlichen Vernehmlassung. Dieses Rahmenabkommen würde ein Schiedsgericht schaffen, das es ermöglichen würde, dem Europäischen Gerichtshof (EuGH) für bestimmte Marktzugangsabkommen Fragen vorzulegen. Bei genauerer Betrachtung zeigt sich, dass die Einflussnahme des EuGH für die Auslegung dieser Marktzugangsabkommen relativ moderat ausfällt. Dabei wäre diese Form der Streitschlichtung wohl auch im Einklang mit der Autonomie des Unionsrechts. An dieser Stelle wurde auch im Vergleich mit anderen Streitschlichtungsmechanismen andiskutiert, ob das Schiedsgericht einen Ermessensspielraum besitzt, um Fragen dem Europäischen Gerichtshof vorzulegen, was bejaht werden kann (Anwendung der *acte clair*-Doktrin).

Der Entwurf für das Rahmenabkommen stellt einen Kompromiss zwischen Anliegen der Schweiz und der EU dar, welcher für viele Schweizer schwierig zu akzeptieren sein wird, da er bestimmte rote Linien überschreitet, insbesondere die 8-Tage-Regelung für

Dienstleistungserbringer (ohne ein klassische Schere zwischen Politikern des linken und rechten Flügels). Zusätzlich zur Überschreitung der roten Linien gibt es den Einwand, dass es sich beim EuGH, um ein Gericht der Gegenseite handelt, womit unterstellt wird, dass dieser nicht unparteiisch entscheidet.

Zudem wurde die Auslegung von internationalen Verträgen und insbesondere die Auslegung des Freizügigkeitsabkommens zwischen der Schweiz und der EU (FZA) erforscht. Während der Europäische Gerichtshof (EuGH) im Ankara-Abkommen in vielen Fällen ähnlich progressiv wie im Binnenmarktrecht entschieden hat, wurde darauf hingewiesen, dass der EuGH im Ankara-Abkommen im Fall *Demirkan* und auch unter dem FZA im Fall *Grimme* zum *Polydorprinzip* zurückgekehrt ist. So wurde etwa von einem Generalanwalt im Fall *Ettwein* sogar angezweifelt, ob Primärrecht Teil des FZA sei, oder ob nur das ausdrücklich erwähnte Sekundärrecht unter dem *acquis suisse* Anwendung finde. Es wurde an dieser Stelle auch darauf hingewiesen, dass nach einigen Autoren die Rückkehr zum *Polydorprinzip* auf einige restriktive Urteile von nationalen Gerichten zurückzuführen ist. Angesichts der kürzlich ergangenen restriktiven Urteile der strafrechtlichen Abteilung des Schweizer Bundesgerichts ist es durchaus vorstellbar, dass das *Polydorprinzip* in der Rechtsprechung des EuGH vermehrt zum Tragen kommen wird, da die Auslegung massgeblich vom Kontext des jeweiligen Abkommens abhängt. Trotz der Rückkehr zum *Polydorprinzip* unter dem FZA wurde gezeigt, dass das Bundesgericht dem EuGH folgt, auch wenn letzterer seine Rechtsprechung ändert. Der EuGH dagegen ist dem Bundesgericht mit einer Ausnahme noch nie ausdrücklich gefolgt. Dabei wurde auch gezeigt, dass die Zusammenarbeit zwischen den Gerichten bzw. der richterliche Dialog, wie er zwischen dem EuGH und dem EFTA-Gerichtshof zu beobachten ist, zwischen dem Bundesgericht und dem EuGH nicht stattfindet. Der richterliche Dialog ist ausdrücklich im Rahmenabkommen enthalten. Es wurde dabei erklärt, dass der EFTA-Gerichtshof über diesen richterlichen Dialog hinausgeht und ein umgekehrtes *Polydorprinzip* entwickelt hat. Dieses hat zur Folge, dass der EFTA-Gerichtshof auch eine andere Auslegung einer Gesetzesbestimmung als der EuGH befürwortet, sofern das gleiche Resultat erreicht wird wie im Binnenmarktrecht.

Klar erscheint, dass eine Auslegungsregel nur für diejenigen Konzepte Geltung erlangen kann, welche überhaupt Bestandteil des FZA bilden. Es ist indessen nicht gelöst, wie die Konzepte bestimmt werden, die Bestandteil des *acquis suisse* sind. Die komplexe Struktur des FZA und die Kombination aus primär- sowie sekundärrechtlichen Bestimmungen macht

es jedenfalls nicht leicht, um die anwendbaren Konzepte herauszuschälen. Diese Problematik wird auch durch das Rahmenabkommen nicht entschärft.

11.2 Personenfreizügigkeit zwischen der Schweiz und der EU (Teil II)

Teil II diskutiert die Grundfreiheiten, welche im *acquis suisse* nur teilweise verwirklicht sind. Während die direkte als auch die indirekte Diskriminierung für alle anwendbaren Grundfreiheiten (unter dem Vorbehalt der Rechtfertigung) verboten sind (Arbeitnehmer, Niederlassung und Dienstleistungen) und Drittwirkung zeitigen (kürzlich wurde letzteres höchstrichterlich auch offengelassen), ist es immer noch umstritten, ob das FZA ein Beschränkungsverbot enthält. Es gibt zurzeit keine Entscheidung des EuGH, die ein Beschränkungsverbot für das FZA (oder für ein anderes Assoziierungsabkommen) ausdrücklich bejahen würde.[2431] Das Bundesgericht hat sich nicht offen dazu geäussert, aber implizit sich dafür ausgesprochen, indem es die primärrechtliche Anerkennung von Diplomen (basierend auf einem eher pragmatischen Ansatz bzw. wohl gestützt auf das Verhältnismässigkeitsprinzip) bejaht hat.

Während sich der EuGH im kürzlich ergangenen Urteil *Picart* (Grosse Kammer) das FZA streng nach seinem Wortlaut ausgelegt hat, wonach ein Staatsangehöriger der Schweiz oder der EU als Selbständiger Wohnsitz im Hoheitsgebiet der anderen Vertragspartei haben muss, hat der EuGH in der Rechtssache *Wächtler* (Grosse Kammer) festgehalten, dass auch Behinderungen der Freizügigkeit verboten sind, die vom betroffenen Herkunftsstaat ausgehen. Für die Diplomanerkennung haben die Schweizer Gerichte in weitgehend konstanter Rechtsprechung und im Einklang mit dem Binnenmarktrecht entschieden, dass ein grenzüberschreitender Bezug für die Anwendung des FZA und der Berufsanerkennungsrichtlinie genüge.

Im Übrigen wurde auch erwähnt, dass Personen, die keine Erwerbstätigkeit ausüben (z.B. Studenten) wegen dem Wortlaut von Artikel 24 Absatz 4 von Anhang I FZA insbesondere für den *Zugang zur Hochschulbildung* wohl nicht in den Geltungsbereich des FZA fallen. Selbst wenn Personen, die keine Erwerbstätigkeit ausüben, sich in dieser Situation nach der

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[2431] Der Begriff 'Beschränkung' wurde durch den EuGH benutzt: siehe Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 67. Obschon der EuGH den Begriff 'Beschränkung' benutzte, kann – nach dem in dieser Studie zum *Polydorprinzip* Gesagten – aus demselben Wortlaut nicht automatisch dieselbe Bedeutung eines Begriffs wie im Binnenmarktrecht abgeleitet werden.

Rechtsprechung auch nicht auf Artikel 2 FZA (Nichtdiskriminierung analog zu Artikel 18 AEUV und entgegen den Entscheiden unterer Gerichte) berufen können, so können sich etwa wirtschaftlich aktive Studenten grundsätzlich auf die Grundfreiheiten in Verbindung mit Artikel 2 FZA berufen.

11.3 Anerkennung der beruflichen Qualifikationen (Diplomanerkennung; Teil III)

Teil III erhellt die Entstehung der grundlegenden Prinzipien der Diplomanerkennung. Die Entwicklung der Prinzipien des gegenseitigen Vertrauens und des Herkunftslandsprinzip beruhen auf der Rechtsprechung zu den Grundfreiheiten. Es wurde anhand der einschlägigen Rechtsprechung erneut hervorgehoben, dass namentlich das Schweizer Bundesgericht implizit die primärrechtliche Anerkennung von Diplomen basierend auf einem pragmatischen Ansatz (wohl gestützt auf den Verhältnismässigkeitsgrundsatz) befürwortet, während die Schweizer Bundesverwaltung sich sogar offen für die primärrechtliche Anerkennung gestützt auf die Rechtsprechung in Sachen *Hocsman* und *Morgenbesser* ausgesprochen hat. Die Erörterung der Rechtsprechung zum Beruf des Elektrikers zeigt, dass auch das Bundesverwaltungsgericht implizit diesem Ansatz folgen könnte, da die sekundärrechtliche Regelung zur Teilanerkennung zurzeit noch nicht Bestandteil des *acquis suisse* ist. Es wurde indessen gezeigt, dass dogmatisch betrachtet eine primärrechtliche Anerkennung nicht nur auf den Verhältnismässigkeitsgrundsatz, sondern entweder auf das Beschränkungsverbot oder aber auf einen rein pragmatischen Ansatz gestützt werden kann (ähnlich dem umgekehrten *Polydorprinzip* des EFTA-Gerichtshofes). Diese Auseinandersetzung hätte Einfluss auf die (primärrechtliche Anerkennung) von Drittstaatsdiplomen sowie die (primärrechtliche) Teilanerkennung von Diplomen. Dies widerspricht früherer und wenig bekannter Rechtsprechung des Bundesverwaltungsgerichts, welche die (primärrechtliche) Anerkennung gemäss der Rechtsprechung in *Vlassopoulou* und *Dressen* ausdrücklich ablehnte.

In diesem Zusammenhang wurde auch die Rechtsprechung in der Sache *Tennah-Durez* untersucht, in welcher der EuGH entschieden hat, dass Mitgliedsstaaten unter dem sektoriellen System auch Diplome anerkennen müssen, welche nicht auf einer überwiegend in der Gemeinschaft absolvierten Berufsausbildung beruhten, solange das Diplom von einem

EU-Mitgliedsstaat ausgestellt ist, wobei nach Auffassung der Kommission diese Rechtsprechung auch unter der aktuellen Berufsanerkennungsrichtlinie einschlägig ist.

Mit Blick auf den Austritt des Vereinigten Königreichs aus der EU wurde der Schutz von erworbenen Rechten sowie Anwartschaften erörtert. Einige der rechtlichen Unklarheiten konnten durch den Entwurf für ein Abkommen zwischen der Schweiz und Grossbritannien über die Rechte der Bürgerinnen und Bürger beim Wegfall des Freizügigkeitsabkommens geklärt werden. Dieses schützt in Bezug auf die Diplomanerkennung erworbene Rechte und auch Anwartschaften und sogar bestimmte Personen, die noch nicht über ein Diplom verfügen. Ebenso ist die Anerkennung von Drittstaatsdiplomen geregelt. Nicht im Abkommen enthalten sind Regelungen über die primärrechtliche Anerkennung. Schliesslich fehlt in diesem Abkommen die Anerkennung für den Beruf des Revisionsexperten (Ausbildung als Wirtschaftsprüfer, Treuhandexperte oder Steuerexperte).

11.4 Anerkennung der beruflichen Qualifikationen für ausgewählte Gesundheits- und Rechtsberufe (Teil IV)

In diesem vierten Teil der Dissertation wurde auch grosses Gewicht auf die Auseinandersetzung mit der einschlägigen Rechtsprechung des EuGH sowie des EFTA-Gerichtshofes insbesondere für ausgewählte Gesundheits- und Rechtsberufe gelegt. Für die Berufsausübung einer Ärztin wurde eine interessante Entscheidung des EFTA-Gerichtshofes kommentiert, welche es dem Aufnahmemitgliedsstaat erlaubt, die Diplomanerkennung bei mangelnden Sprachkenntnissen zu verweigern. Nach der hier vertretenen Ansicht wäre es überzeugender, einen zweistufigen Ansatz zu wählen, welcher im Einklang mit der EuGH-Rechtsprechung steht und so auch von der Kommission in diesem Verfahren vorgebracht wurde. Mit dem zweistufigen Ansatz ist die Anerkennung von Diplomen unter dem sektoralen System automatisch, während die Berufsausübung mangels genügender Sprachkenntnisse verweigert werden kann.

Bei der Rechtsprechung des Bundesverwaltungsgerichts wurde auf einen sehr bedeutsamen Entscheid in Fünferbesetzung von 2017 hingewiesen, der kürzlich im Juni 2019 vom Bundesgericht aufgehoben wurde. Das Bundesverwaltungsgericht hatte zum ersten Mal entschieden, dass auch privatrechtliche Weiterbildungstitel für Ärzte (‘Weiterbildung für den Schwerpunkt Reproduktionsmedizin und gynäkologische Endokrinologie’) den Regeln der Diplomanerkennung unterliegen. Da die Spezialisierung nicht im Anhang V der

Berufsanerkennungsrichtlinie aufgeführt ist, kam subsidiär Artikel 10 der Berufsanerkennungsrichtlinie dafür zur Anwendung. Dabei hat das Bundesverwaltungsgericht allerdings nicht diskutiert, ob besondere und aussergewöhnliche Gründe vorliegen, obschon die Rechtsprechung des EuGH in *Angerer* dies auch für die Anerkennung von Spezialisierungen verlangt, wobei dies konkret zum gleichen Ergebnis, nämlich zur Anwendbarkeit des allgemeinen Systems, führen würde. Schliesslich erwähnte das Bundesverwaltungsgericht mit Verweis auf den Entscheid des EuGH in *Bobadilla obiter dictum*, dass die Regeln der Diplomanerkennung auch bei nicht reglementierten Berufen zur Anwendung gelangen würden, wobei diese Aussage dogmatisch nicht näher erläutert wurde.

In einem wichtigen Leitentscheid des Bundesverwaltungsgerichtes von 2018 wurde eine Regelung, welche besagt, dass Ärzte drei Jahre praktische Erfahrung in der Schweiz benötigen als indirekt diskriminierend aber als gerechtfertigt eingestuft. Die Abteilung III urteilte, dass der Wortlaut von Artikel 55 der Berufsanerkennungsrichtlinie[2432] zu wenig klar sei, um im Lichte der Rechtsprechung des Bundesgerichts zu Beschränkungen angewandt zu werden, obschon das Gericht die Massnahme als indirekt diskriminierend beurteilte. Die Standstill-Klausel wurde nicht geprüft, obwohl entgegen des zitierten Bundesgerichtsentscheids eine indirekte Diskriminierung vorlag. Es ist ungeklärt, ob Verletzungen der Standstill-Klausel in Analogie zur Rechtsprechung des EuGH unter dem Ankara-Abkommen gerechtfertigt werden können.

Zu den Gesundheitsberufen wurde die neue Regelung für Apotheker kurz behandelt, welche einen Weiterbildungstitel für Apotheker in eigener fachlicher Verantwortung verlangt. Gemäss der Rechtsprechung des EuGH fällt eine solche Spezialisierung unter das allgemeine System der Diplomanerkennung. Ungeachtet der Frage, ob diese Regelung entweder im Einklang mit den Vorgaben der Berufsanerkennungsrichtlinie steht oder aber nicht darunterfällt, weil nur die Ausübung des Berufes reglementiert wird, handelt es sich entweder um eine indirekte Diskriminierung oder um eine Beschränkung, welche gerechtfertigt sein muss (sofern Beschränkungen überhaupt unter das FZA fallen). Dies wird durch die einschlägige Rechtsprechung des EFTA-Gerichtshofes gestützt.

[2432] 'Unbeschadet des Artikels 5 Absatz 1 und des Artikels 6 Absatz 1 Buchstabe b gilt Folgendes: Mitgliedstaaten, die den Personen, die ihre Berufsqualifikationen in ihrem Hoheitsgebiet erworben haben, nur dann eine Kassenzulassung erteilen, wenn sie einen Vorbereitungslehrgang absolviert und/oder Berufserfahrung erworben haben, befreien die Personen, die ihre Berufsqualifikationen als Arzt bzw. Zahnarzt in einem anderen Mitgliedstaat erworben haben, von dieser Pflicht.'

Während die schweizerische Umsetzung zu den Berufen des Anwalts und des Patentanwaltes sich mit Ausnahme eines Urteils, das Familienangehörigen von EU-Bürgern die Anrufung der Niederlassungsrichtlinie für Rechtsanwälte verweigerte, als weitgehend unproblematisch erweist, ist die rechtliche Situation für den Beruf des Notars momentan unbefriedigend, da die Gerichte diesbezüglich noch nicht für Klarstellung sorgen konnten.

Nach Ansicht der Wettbewerbskommission ist unter dem *acquis suisse* – aufgrund der Umsetzung von Titel II der Berufsanerkennungsrichtlinie im nationalen Recht und der Anwendung der Richtlinie vor der Revision – noch das Sekundärrecht für die Notare anwendbar. Es wurde festgestellt, dass subsidiär jedenfalls das Primärrecht für die Notare anwendbar ist. Somit ist die Freizügigkeit für die Notare auch unter dem *acquis suisse* zu gewähren. Für den Beruf des Notars wurde auch festgestellt, dass die Bereichsausnahme zur Ausübung hoheitlicher Gewalt im Lichte der spezifischen Auslegungsregel von Artikel 16 Absatz 2 FZA verstanden werden muss, was bedeutet, dass geringfügige sprachliche Differenzen entgegen vereinzelter Literaturmeinungen nicht zu einer vom Binnenmarktrecht abweichenden Auslegung der Bereichsausnahme führen können. Mit Blick auf die Bereichsausnahme wurde erforscht, dass angesichts der Rechtsprechung des EuGH in *Brouillard* diese Bereichsausnahme Schweizer Staatsangehörigen und Staatsangehörigen von Mitgliedsstaaten der EU von ihrem Herkunftsstaat nicht vorgehalten werden kann, wobei diesem Umstand in der Literatur bisher wenig Beachtung geschenkt wurde.

Für den Beruf des Revisors bzw. des Revisionsexperten (Ausbildung als Wirtschaftsprüfer, Treuhandexperte oder Steuerexperte) wurde auch für den Anwendungsbereich des FZA untersucht, dass bis heute unklar ist, ob dieser Beruf im Geltungsbereich des *acquis suisse* überhaupt unter das sekundärrechtliche oder das primärrechtliche Anerkennungsregime fällt. Schliesslich wurde auch darauf hingewiesen, dass es nicht überzeugt, zu behaupten, der Beruf des Revisionsexperten falle nicht in den Anwendungsbereich des FZA, da dieser sonst wohl in den Ausnahmebestimmungen aufgeführt wäre.

Letztlich wurde die Stellung von Rechtspraktikanten beleuchtet. Es wurde gezeigt, dass gemäss den Erläuterungen der schweizerischen Bundesverwaltung und gestützt auf die Rechtsprechung des EuGH im Fall *Morgenbesser* (und *Peśla*) eine holistische, d.h. eine gesamtheitliche Betrachtung, des Kenntnisstandes von Praktikanten bei der Diplomanerkennung und Zulassung zum Praktikum in der Schweiz erfolgen muss. Diese Ansicht wird auch durch die Rechtsprechung des Bundesgerichts gestützt. Das Bundesgericht

ist der Rechtsprechung in Sachen *Peśla* gemäss einem kürzlich ergangenen Leitentscheid vom Januar 2020 im Grundsatz gefolgt, auch wenn es den konkreten Fall abschlägig beurteilte.

12 Résumé

Cette étude présente la reconnaissance mutuelle des qualifications professionnelles, c'est-à-dire la reconnaissance des diplômes, entre la Suisse et l'UE, en particulier pour certaines professions du domaine de la santé et du droit. Cette étude ne traite pas seulement du droit secondaire applicable, en particulier la Directive 2005/36/CE (‘Directive relative à la reconnaissance professionnelle’), mais examine également si le droit primaire est applicable entre la Suisse et l'UE. À cette fin, le cadre institutionnel, qui est étroitement lié à ce sujet, a été présenté. Les futures relations entre la Suisse et l'UE, en particulier l'accord-cadre, pourraient en effet avoir une influence significative sur l'interprétation future de l'acquis suisse.

12.1 Cadre institutionnel entre la Suisse et l'UE (Partie I)

La première partie de cette étude porte sur le cadre institutionnel entre la Suisse et l'UE et sur la manière dont celui-ci doit être modifié dans l'avenir. Dans la première partie, on identifie les pierres d'achoppement, qui n'ont pas encore arrêté la voie dite bilatérale, à savoir l'initiative d'immigration de masse. Cela inclut également les défis actuels pour trouver un organe approprié pour l'interprétation uniforme des accords bilatéraux.

Au printemps 2019, la consultation publique pour le projet d'accord-cadre entre la Suisse et l'UE a été lancée. Cet accord-cadre créerait un tribunal d'arbitrage qui permettrait de soumettre des questions à la Cour de justice de l'Union Européenne (CJUE) pour certains accords d'accès au marché. En y regardant de plus près, il apparaît clairement que l'influence de la CJUE sur l'interprétation de ces accords d'accès au marché est relativement modérée. En même temps, cette forme de règlement des différends serait probablement aussi compatible avec l'autonomie du droit de l'Union. À ce stade, il a également été discuté, en comparaison avec d'autres mécanismes de règlement des différends, si le tribunal arbitral dispose d'un pouvoir discrétionnaire pour soumettre des questions à la Cour de Justice de l'Union Européenne, ce qui peut être affirmé (application de la doctrine de l'acte clair).

Le projet d'accord-cadre représente un compromis entre les préoccupations de la Suisse et de l'UE, qui sera difficile à accepter pour de nombreux Suisses car il franchit certaines lignes rouges, notamment la règle des 8 jours pour les prestataires de services (sans les clivages classiques entre les politiciens de gauche et de droite). En plus de franchir les lignes

rouges, il y a l'objection selon laquelle la CJUE est un tribunal de l'autre partie, ce qui implique qu'elle ne juge pas de manière impartiale.

En outre, l'interprétation des traités internationaux et en particulier l'interprétation de l'Accord sur la Libre Circulation des Personnes entre la Suisse et l'UE (ALCP) a été étudiée. Alors que la Cour de Justice de l'Union Européenne (CJUE) dans l'accord d'Ankara a, dans de nombreux cas, rendu des décisions tout aussi progressistes que dans le droit du marché intérieur, il a été souligné que la CJUE est revenue au *Polydorprinzip* (i.e. la jurisprudence de *Polydor*) dans l'affaire *Demirkan* (dans le contexte de l'accord d'Ankara) et également dans l'affaire *Grimme* (dans le contexte de l'ALCP).

Ainsi, dans l'affaire *Ettwein*, un Avocat-Général s'est même demandé si le droit primaire faisait partie de l'ALCP ou si seul le droit secondaire expressément mentionné était applicable en vertu de l'acquis suisse. A ce stade, il a également été souligné que, selon certains auteurs, le retour au *Polydorprinzip* est dû à certains jugements restrictifs des tribunaux nationaux. Au vu des récents arrêts restrictifs de la division du droit pénal du Tribunal Fédéral Suisse, il est tout à fait concevable que le *Polydorprinzip* soit de plus en plus appliqué dans la jurisprudence de la CJUE, puisque l'interprétation dépend largement du contexte de l'accord respectif. Malgré le retour au *Polydorprinzip* dans le cadre de l'ALCP, il a été démontré que le Tribunal Fédéral suit la CJUE, même si cette dernière modifie sa jurisprudence. En revanche, la CJUE n'a jamais explicitement suivi le Tribunal Fédéral, à une exception près. Il a également été démontré que la coopération entre les tribunaux ou le dialogue judiciaire, comme on peut l'observer entre la CJUE et la Cour AELE, n'a pas lieu entre le Tribunal Fédéral et la CJUE. Cependant, le dialogue judiciaire est explicitement inclus dans l'accord-cadre. Il a été constaté que la Cour de l'AELE va au-delà de ce dialogue judiciaire et a développé un *Polydorprinzip* inverse. En conséquence, la Cour de l'AELE soutient également une interprétation d'une disposition juridique différente de celle de la CJUE, à condition que le même résultat soit obtenu que dans le droit du marché intérieur.

Il semble évident qu'une règle d'interprétation ne peut s'appliquer qu'aux concepts qui font effectivement partie de l'ALCP. Toutefois, la question de savoir comment déterminer les concepts qui font partie de l'acquis suisse n'a pas été résolue. En tout état de cause, la structure complexe de l'ALCP et la combinaison de dispositions de droit primaire et de droit secondaire ne permettent pas de facilement identifier les concepts applicables. L'accord-cadre n'atténue pas non plus ce problème.

12.2 Libre circulation des personnes entre la Suisse et l'UE (Partie II)

La deuxième partie traite des libertés fondamentales, qui ne sont que partiellement mises en œuvre dans l'acquis suisse. Si les discriminations directes et indirectes (sous réserve de justification) sont interdites pour toutes les libertés fondamentales applicables (travailleurs, établissement et services) et ont des effets à l'égard des tiers (ce dernier point a récemment été laissé en suspens par la plus haute juridiction), il est toujours contesté que l'ALCP contienne une interdiction de restrictions. Il n'existe actuellement aucune décision de la CJUE qui affirmerait explicitement une interdiction de restrictions pour l'ALCP (ou pour tout autre accord d'association).[2433] Le Tribunal Fédéral ne s'est pas ouvertement prononcé sur ce point, mais a implicitement exprimé son soutien en affirmant la reconnaissance des diplômes en droit primaire selon une approche plutôt pragmatique (probablement fondée sur le principe de proportionnalité).

Alors que dans le récent arrêt *Picart* (Grande Chambre), la CJUE a interprété l'ALCP strictement en fonction de sa formulation, selon laquelle un ressortissant de la Suisse ou de l'UE doit résider en tant qu'indépendant sur le territoire de l'autre partie contractante, la CJUE dans l'arrêt *Wächtler* (Grande Chambre) a jugé que les obstacles à la libre circulation des personnes émanant de l'État d'origine concerné sont interdits. En ce qui concerne la reconnaissance des diplômes, les tribunaux suisses ont décidé, dans une jurisprudence largement cohérente et conformément au droit du marché intérieur, qu'un aspect transfrontalier est suffisant pour l'application de l'ALCP et de la Directive relative à la reconnaissance professionnelle.

En outre, il a également été mentionné que les personnes n'exerçant pas d'activité économique (par exemple les étudiants) sont susceptibles de ne pas relever du champ d'application de l'ALCP en raison du libellé de l'article 24, paragraphe 4, de l'annexe I de l'ALCP, notamment pour l'accès à l'enseignement supérieur. Donc, les personnes n'exerçant pas d'activité économique ne peuvent pas, selon la jurisprudence, invoquer l'article 2 de l'ALCP (non-discrimination analogue à l'article 18 du TFUE ; et contrairement aux décisions

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[2433] Le terme "restriction" a été utilisé par la CJUE : voir l'affaire C-581/17, Martin Wächtler contre Finanzamt Konstanz, ECLI:EU:C:2019:138, paragraphe 67. Bien que la CJUE ait utilisé le terme "restriction", la même formulation ne peut - selon ce qui a été dit dans cette étude sur le *Polydorprinzip* - donner automatiquement la même signification à un terme que dans le droit du marché intérieur.

des juridictions inférieures). Cependant, les étudiants économiquement actifs, par exemple, peuvent en principe invoquer les libertés fondamentales en rapport avec l'article 2 de l'ALCP.

12.3 Reconnaissance des qualifications professionnelles (reconnaissance des diplômes ; partie III)

La troisième partie met en lumière l'émergence des principes de base de la reconnaissance des diplômes. Le développement des principes de confiance mutuelle et du principe du pays d'origine est basé sur la jurisprudence relative aux libertés fondamentales. Il a été rappelé, sur la base de la jurisprudence pertinente, que le Tribunal Fédéral soutient implicitement la reconnaissance des diplômes au titre du droit primaire sur la base d'une approche pragmatique (probablement fondée sur le principe de proportionnalité), tandis que l'administration fédérale suisse s'est même ouvertement déclarée en faveur de la reconnaissance au titre du droit primaire sur la base de la jurisprudence dans les affaires *Hocsman* et *Morgenbesser*. La discussion de la jurisprudence relative à la profession d'électricien montre que le Tribunal Administratif Fédéral pourrait également suivre implicitement cette approche, car le droit secondaire sur la reconnaissance partielle ne fait actuellement pas encore partie de l'acquis suisse. Toutefois, il a été démontré que, d'un point de vue dogmatique, la reconnaissance au titre du droit primaire peut être fondée non seulement sur le principe de proportionnalité, mais aussi soit sur l'interdiction des restrictions, soit sur une approche purement pragmatique (semblable au *Polydorprinzip* inverse de la Cour de l'AELE). Ce différend aurait un impact sur la reconnaissance (de droit primaire) des diplômes de pays tiers et la reconnaissance partielle (de droit primaire) des diplômes. Cela contredit la jurisprudence antérieure et peu connue du Tribunal Administratif Fédéral, qui a explicitement rejeté la reconnaissance (primaire) conformément à la jurisprudence dans l'affaire *Vlassopoulou* et *Dressen*.

Dans ce contexte, la jurisprudence dans l'affaire *Tennah-Durez* a également été examinée, dans laquelle la CJUE a jugé que les États membres doivent également reconnaître dans le cadre du système sectoriel les diplômes qui ne sont pas fondés sur une formation professionnelle acquise de manière prépondérante dans l'Union, pour autant que le diplôme soit délivré par un État membre de l'UE. La Commission considère que cette jurisprudence est également pertinente dans le cadre de la Directive actuelle relative aux qualifications professionnelles.

La protection des droits acquis a été discutée dans la perspective du retrait du Royaume-Uni de l'UE. Certaines des ambiguïtés juridiques ont été clarifiées par le projet d'accord entre la Suisse et le Royaume-Uni sur les droits des citoyens en cas de retrait de l'Accord sur la Libre Circulation des Personnes (ALCP). Cet accord protège les droits acquis en matière de reconnaissance des diplômes, ainsi que les droits acquis et voire même certaines personnes qui n'ont pas encore de diplôme. La reconnaissance des diplômes de pays tiers est également réglementée. L'accord ne contient pas de dispositions sur la reconnaissance en vertu du droit primaire. Enfin, l'accord ne reconnaît pas la profession d'expert en audit (formation d'auditeur, d'expert fiduciaire ou d'expert fiscal).

12.4 Reconnaissance des qualifications professionnelles pour certaines professions du domaine de la santé et du droit (Partie IV)

Dans cette quatrième partie de la thèse, l'accent a été mis sur l'examen de la jurisprudence pertinente de la Cour de Justice de l'Union Européenne (CJUE) ainsi que de la Cour de l'AELE, en particulier pour certaines professions de la santé et du droit. Une décision intéressante de la Cour de l'AELE a été commentée concernant la pratique professionnelle d'une femme-médecin, qui permet à l'État membre d'accueil de refuser la reconnaissance du diplôme en cas de compétences linguistiques insuffisantes. Selon le point de vue exprimé ici, il serait plus convaincant d'adopter une approche en deux étapes, qui est conforme à la jurisprudence de la CJUE et a donc également été proposée par la Commission dans cette procédure. Avec l'approche en deux étapes, la reconnaissance des diplômes dans le cadre du système sectoriel est automatique, tandis que la pratique professionnelle peut être refusée en raison de compétences linguistiques insuffisantes.

Dans la jurisprudence du Tribunal Administratif Fédéral, il est fait référence à une décision très importante prise en 2017 par une formation de cinq membres, qui a été annulée par le Tribunal Fédéral en juin 2019. Le Tribunal Administratif Fédéral avait jugé pour la première fois que les titres de formation continue des médecins de droit privé ('formation continue pour la spécialisation en médecine de la reproduction et en endocrinologie gynécologique') étaient également soumis aux règles de reconnaissance des diplômes. Comme la spécialisation ne figure pas dans l'annexe V de la Directive relative à la reconnaissance des qualifications professionnelles, l'article 10 de la Directive a été appliqué de manière subsidiaire. Toutefois, le Tribunal Administratif Fédéral n'a pas examiné la

question de savoir s'il existe des motifs spéciaux et exceptionnels, bien que la jurisprudence de la Cour de justice de l'Union Européenne dans l'affaire *Angerer* l'exige également pour la reconnaissance des spécialisations, bien que cela conduirait précisément au même résultat, à savoir l'applicabilité du système général. Enfin, le Tribunal Administratif Fédéral, se référant à la décision de la CJUE dans l'*obiter dictum* de *Bobadilla*, a mentionné que les règles de reconnaissance des diplômes s'appliqueraient également aux professions non réglementées, bien qu'aucune motivation soit donnée d'un point de vue dogmatique.

Dans une décision importante du Tribunal Administratif Fédéral en 2018, un règlement qui stipule que les médecins doivent avoir trois ans d'expérience pratique en Suisse a été classé comme indirectement discriminatoire mais justifié. La Cour III a jugé que le libellé de l'article 55 de la Directive relative aux qualifications professionnelles[2434] n'était pas suffisamment clair pour être appliqué à la lumière de la jurisprudence du Tribunal Fédéral en matière de restrictions, bien que le Tribunal ait estimé que la mesure était indirectement discriminatoire. La clause de standstill n'a pas été examinée, même si, contrairement à la décision citée du Tribunal Fédéral, il existe une discrimination indirecte. Il n'est pas clair si les violations de la clause de standstill peuvent être justifiées par analogie avec la jurisprudence de la CJUE dans le cadre de l'accord d'Ankara.

En ce qui concerne les professions du domaine de la santé, le nouveau règlement pour les pharmaciens, qui exige un titre de formation continue pour les pharmaciens indépendants, a été brièvement discuté. Selon la jurisprudence de la CJUE, cette spécialisation relève du système général de reconnaissance des diplômes. Indépendamment de la question de savoir si ce système est conforme ou non aux dispositions de la Directive relative à la reconnaissance des qualifications professionnelles, parce que seul l'exercice de la profession est réglementé, il constitue soit une discrimination indirecte, soit une restriction qui doit être justifiée (si les restrictions sont couvertes par l'ALCP). Ceci est étayé par la jurisprudence pertinente de la Cour de l'AELE.

Si la transposition suisse concernant les professions d'avocat et de conseil en brevets ne pose pas de problème majeur, à l'exception d'un arrêt qui a refusé aux membres de la famille

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[2434] Sans préjudice de l'article 5, paragraphe 1, et de l'article 6, premier alinéa, point b), les États membres qui exigent des personnes ayant acquis leurs qualifications professionnelles sur leur territoire l'accomplissement d'un stage préparatoire et/ou une période d'expérience professionnelle pour être conventionnés d'une caisse d'assurance-maladie dispensent de cette obligation les titulaires des qualifications professionnelles de médecin et de praticien de l'art dentaire acquises dans un autre État membre.

de citoyens de l'UE d'invoquer la Directive sur l’établissement pour les avocats, la situation juridique pour la profession de notaire est actuellement insatisfaisante, car les tribunaux n'ont pas encore pu fournir de précisions à cet égard.

Selon la commission de la concurrence, en vertu de l'acquis suisse – en raison de la transposition du titre II de la Directive relative à la reconnaissance professionnelle en droit national et de l'application de la Directive avant sa révision – le droit secondaire est toujours applicable aux notaires. Il a été établi que le droit primaire est en tout état de cause subsidiairement applicable aux notaires. Par conséquent, la libre circulation des notaires doit également être accordée en vertu de l'acquis suisse. Pour la profession de notaire, il a également été établi que l'exception pour l'exercice de l'autorité souveraine doit être comprise à la lumière de la règle d'interprétation spécifique de l'article 16, paragraphe 2, de l'ALCP, ce qui signifie que, contrairement aux opinions isolées dans la littérature, des différences linguistiques mineures ne peuvent pas conduire à une interprétation de l'exception qui s'écarte du droit du marché intérieur. En ce qui concerne l'exception sectorielle, les analyses ont montré que, compte tenu de la jurisprudence de la CJUE dans l'affaire *Brouillard*, cette exception sectorielle ne peut pas être opposée aux ressortissants suisses et aux ressortissants des États membres de l'UE par leur pays d'origine, bien que cette circonstance ait jusqu'ici reçu peu d'attention dans la littérature.

En ce qui concerne la profession de l'auditeur ou de l'expert réviseur (formation d'auditeur, d'expert fiduciaire ou d'expert fiscal), il a également été examiné pour le champ d'application de l'ALCP qu'il n'est toujours pas clair si cette profession, relevant du champ d'application de l'acquis suisse, relève du régime de reconnaissance du droit secondaire ou du droit primaire. Enfin, il a également été souligné qu'il n'est pas convaincant d'affirmer que la profession d'expert en audit ne relève pas du champ d'application de l'ALCP, car sinon elle serait probablement répertoriée dans les dispositions d'exemption.

Enfin, la situation des stagiaires du domaine du droit a été examinée. Il a été démontré que, selon les explications de l'administration fédérale suisse et sur la base de la jurisprudence de la Cour de Justice de l'Union Européenne dans l'affaire *Morgenbesser* (et *Peśla*), il faut adopter une vision globale, c'est-à-dire une vue d'ensemble du niveau de connaissances des stagiaires en matière de reconnaissance des diplômes et d'admission aux stages en Suisse. Cette opinion est également soutenue par la jurisprudence du Tribunal Fédéral. Le Tribunal Fédéral a en principe appliqué la jurisprudence sur *Peśla* conformément à une récente décision historique de janvier 2020, même si la décision a été négative ans le cas spécifique.

13 Valorisation addendum

This addendum covers the valorisation relating to this thesis.

13.1 Societal impact of this thesis

This study presented a wider view of relations between the EU and a third country with a high level of integration. It showed the practical difficulties that emerge when adapting internal market case law to a third country when there are no common supranational institutions. Hindrances to further integration of Switzerland were also depicted, and it was shown that this model is functioning, but is outdated.

Another aspect that was illustrated was the *mutual recognition principle,* which is taken for granted by many Swiss and EU nationals, even if there are large gaps in what the sectoral agreements cover. The mobility of students, trainees and professionals is not afforded the same level of protection as in the internal market.

These principles of automatic recognition relying on the *country of origin principle,* and driven by the evolution of an ever more progressive internal market case law, will be debated more the larger the European Union grows. Switzerland is considered to be a Member State for the purposes of Annex III to the AFMP and thus for the application of the Professional Qualifications Directive. To put it in other words, the Swiss cannot afford to have no opinion about the mutual recognition of diplomas. It affects many professions, such as teachers, lawyers and doctors.

Even if the recognition of diplomas is taken for granted for many professions, public opinion is sensitive when it comes to the health professions, but remains almost silent with regard to the free movement of the legal profession (with the exception of notaries). Language requirements for doctors and requirements for apothecaries are the result of a heated debate about patient safety. Some decisions, such as a decision of the EFTA Court, have begun a journey which intermingles concepts of the recognition and pursuit of a profession (so-called two stage view). This development stands in stark contrast to the underlying principles of *mutual trust and mutual recognition*.

This large-scale societal debate is also measured by the decisions of the Swiss courts and administrative authorities. It will be required that the courts take a stand on a case-by-case basis when assessing justification measures, such as measures to protect public health.

13.2 Target groups

Part I and II of this research are valuable for any lawyer who is delving into the area of the sectoral agreements between Switzerland and the EU, the interpretation of international agreements in general and the fundamental freedoms in the context of the *acquis suisse*. They show the relevant case law of the CJEU as well as the rich case law of the Swiss Federal Court, which (with one negligible exception), has never been cited by the CJEU.

In Part III and IV, this study also serves as a source for practitioners interested in the internal market case law of a third country with a focus on the mutual recognition of professional qualifications. Therefore, it emphasises the case law of the Swiss courts to show the practical application of the AFMP and its Annex III for the professional recognition, as the CJEU rarely delivers rulings on this subject. It is however also interesting to see for academics that the Swiss courts have adopted a very *pragmatic approach* which seems understandable when it is still disputed whether free movement restrictions are covered by the AFMP.

13.3 Translation of the research

A commercial and an electronic open access edition of this study will be published. It will be discussed with colleagues and superiors at the Swiss Federal Administrative Court. The research will also be publicly defended at Maastricht University.

13.4 Innovation

This study shows that some concepts which are considered self-evident under the *acquis communautaire* are not clear for the bilateral relationship between Switzerland and the EU. Even fundamental concepts of the recognition regimes are not clear, such as whether free movement restrictions are covered by the AFMP. This would mean that primary law was less extensive than secondary law.

The recognition of professional qualifications based on primary law must however be clear before it can be discussed whether Switzerland must follow the jurisprudence of the CJEU, as the relevant case law can only be determined when the underlying concepts have been made clear.

While the Swiss Federal Court proposes a pragmatic adaptation of recognition through primary law, it was shown that the reversed *Polydor* principle developed by the EFTA Court might offer a creative solution to this delicate problem.

For the professions of auditors and notaries, this discussion is exceptionally important because they either fall under secondary law or they at least fall under primary law, even if this has never been decided by a Swiss court.

Lastly, this problem also affects the concepts of partial access and the recognition of third country diplomas under the regime of primary law which should be considered part of the *acquis suisse,* even if there are only implicit rulings by the Swiss Federal Court and FAC in this sense.

14 Annex

Table of the Agreements encompassing EU-Swiss Joint Committees or similar mechanisms[2435]:

No	Agreement	Relevant provisions
1	Agreement concerning products of the clock and watch industry between the European Economic Community and its Member States and the Swiss Confederation[2436]	Arts. 9-11
2	Free Trade Agreement between Switzerland and the EU of 1972 for industrial products[2437]	Arts. 29-31
3	Scientific and technical cooperation framework agreement between the European Communities and the Swiss Confederation and the Horizon 2020 Agreement between Switzerland and the EU[2438]	Arts. 10-11, respectively Art. 5 of the Horizon 2020 Agreement
4	Convention between the European Economic Community, the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation on the simplification of formalities in trade in goods[2439]	Art. 10-11

[2435] Based on the table provided by the Swiss government: Directorate for European Affairs, supra note 251.

[2436] *Agreement concerning products of the clock and watch industry between the European Economic Community and its Member States and the Swiss Confederation of 30.06.1967, entry into force on 01.01.1968,* SR 0.632.290.13; see also *Additional Agreement to the Agreement concerning products of the clock and watch industry between the European Economic Community and its Member States and the Swiss Confederation of 20.07.1972, entry into force on 01.01.1973,* OJ [1974] L118/12, 30.04.1974.

[2437] Free Trade Agreement between Switzerland and the EU of 1972 for industrial products (see for the full citation supra note 130).

[2438] *Scientific and technical cooperation framework agreement between the European Communities and the Swiss Confederation of 08.01.1986, entry into force on 17.07.1987,* OJ [1985] L313/6, 22.11.1985; Agreement for scientific and technological cooperation between the European Union and European Atomic Energy Community and the Swiss Confederation (Horizon 2020) (see for the full citation supra note 118).

[2439] *Convention between the European Economic Community, the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation on the simplification of formalities in trade in goods of 20.05.1987, entry into force on 01.01.1988,* OJ [1987] L134/2, 22.05.1987.

No	Agreement	Relevant provisions
5	Convention between the European Economic Community, the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, on a common transit procedure[2440]	Arts. 14-15
6	Cooperation agreement on terminology in the form of exchange of letters between the Swiss Confederation, represented by the Swiss Federal Council, and the European Economic Community (EEC), the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (EAEC), represented by the Commission of the European Communities[2441]	Art. 5
7	Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than the life insurance[2442]	Art. 37
8	Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures[2443]	Art. 19
9	Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement[2444]	Art. 11
10	Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment[2445]	Art. 10

2440 *Convention between the European Economic Community, the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, on a common transit procedure of 20.05.1987, entry into force on 01.01.1988,* OJ [1987] L226/2, 13.08.1987.

2441 *Cooperation agreement on terminology in the form of exchange of letters between the Swiss Confederation, represented by the Swiss Federal Council, and the European Economic Community (EEC), the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (EAEC), represented by the Commission of the European Communities of 13.11.1987, entry into force on 13.11.1987,* OJ [1988] L46/34, 19.02.1988.

2442 *Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than the life insurance - Protocol n° 1: the solvency margin - Protocol n°2: the work programme - Protocol n°3: relation between the ECU and the Swiss franc - Protocol n°4: Agencies and branches falling within the competence of companies the registered office of which is located out of the territories to which this agreement is applicable of 10.10.1989, entry into force on 01.01.1993,* OJ [1991] L205/3, 27.07.1991.

2443 Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures (see for the full citation supra note 263).

2444 *Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement of 21.06.1999, entry into force on 01.06.2002,* OJ [2002] L114/430, 30.04.2002.

2445 Mutual Recognition Agreement (see for the full citation supra note 187).

No	Agreement	Relevant provisions
11	Agreement between the European Community and the Swiss Confederation on trade in agricultural products[2446]	Art. 6
12	Agreement between the European Community and the Swiss Confederation on trade in agricultural products[2447]	Art. 19 of Annex 11
13	Agreement between the European Community and the Swiss Confederation on Air Transport[2448]	Art. 21-22
14	Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road[2449]	Art. 51
15	Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other on the free movement of persons (AFMP)[2450]	Art. 14
16	Agreement between the European Community and the Swiss Confederation concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network[2451]	Art. 16
17	Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics[2452]	Art. 3
18	Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland[2453]	Art. 3
19	Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis[2454]	Arts. 3-5

[2446] Agreement between the European Community and the Swiss Confederation on trade in agricultural products (see for the full citation supra note 408).

[2447] Agreement between the European Community and the Swiss Confederation on trade in agricultural products (see for the full citation supra note 408).

[2448] Swiss-EU Air Transport Agreement (see for the full citation supra note 344).

[2449] Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road (see for the full citation supra note 407).

[2450] AFMP (see for the full citation supra note 7).

[2451] *Agreement between the European Community and the Swiss Confederation concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network of 26.10.2004, entry into force on 01.04.2006,* OJ [2006] L90/37, 28.03.2006.

[2452] *Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics of 26.10.2004, entry into force on 01.01.2007,* OJ [2006] L90/2, 28.03.2006.

[2453] Swiss-EU Dublin Agreement (see for the full citation supra note 112).

[2454] Swiss-EU Schengen Agreement (see for the full citation supra note 112).

No	Agreement	Relevant provisions
20	Cooperation Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests[2455]	Art. 39
21	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention)[2456]	Art. 4 of Protocol 2
22	Cooperation Agreement between the European Union and its Member States, of the one part, and the Swiss Confederation, of the other, on the European Satellite Navigation Programmes[2457]	Art. 20
23	Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems[2458]	Arts. 12-13

Table 17: Agreements encompassing EU-Swiss Joint Committees or similar mechanisms

[2455] Cooperation Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests (see for the full citation supra note 7).

[2456] *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) of 30.10.2007, entry into force on 01.01.2010,* OJ [2007] L339/3, 21.12.2007.

[2457] Cooperation Agreement between the European Union and its Member States, of the one part, and the Swiss Confederation, of the other, on the European Satellite Navigation Programmes (see for the full citation note 117).

[2458] Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems (see for the full citation supra note 123).

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15.11 Primary law and international agreements of the EU

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15.12 Secondary law of the EU (in chronological order)

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Council Directive 77/452/EEC concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of this right of establishment and freedom to provide services of 27.06.1977, OJ [1977] L176/1, 15.07.1977.

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15.13 Swiss Federal Legislation

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Curriculum Vitae

Joel Andreas Günthardt was born in Switzerland in 1988. After obtaining his high school diploma in 2007, he commenced his studies in law at the University of St. Gallen (Bachelor Degree; B.A. HSG in Law in 2010) and continued his studies at the European Law School of Maastricht (Master of Laws, LL.M. in 2012) and at the University of Zurich (Master of Law, MLaw in March 2013). He participated in the European Law Moot Court Competition in Lucerne in 2012 in which his team was qualified as the second-best team of the Regional Final. In 2013, he took part in a study of the University of Maastricht as a national reporter. After graduating in spring 2013, he started working as a trainee in a business law firm in Zurich and for the Canton of Schaffhausen. In late 2015 and in early 2016, he passed the bar exams of the Canton of Schaffhausen. From April 2016 to May 2017 he was working as a lawyer for the General Counsel of the City of St. Gallen. In June 2017, he joined the Swiss Federal Administrative Court as a judicial law clerk in a permanent position.