

Switzerland and the European Union

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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

Schriften zur Grenzüberschreitenden Zusammenarbeit

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Joel Günthardt

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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.

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Jona, 3 November 2020

Acknowledgments for this publication based on my doctoral thesis:

This updated study is based on my dissertation which was successfully defended on 17 December 2020 at Maastricht University (<https://doi.org/10.26481/dis.20201217jg>). It should be mentioned that this contribution describes the situation and case law up to 31 January 2020, and only occasionally after this date. Due to recent developments, I implemented some minor additions concerning Brexit. In addition, I also updated some other parts of this study.

Jona, 25 January 2021

Outline contents

Acknowledgements	V
Outline contents	VII
Table of contents	IX
Abbreviations	XXIII
1 Introduction	3
Part I: The institutional framework between Switzerland and the EU	25
2 The integration process between Switzerland and the EU	27
3 Status of the Agreement on the free movement of persons ('AFMP')	101
Part II: Free movement of persons between Switzerland and the EU	137
4 Free movement of persons between Switzerland and the EU	139
Part III: Mutual recognition of professional qualifications	185
5 Mutual recognition of professional qualifications	187
6 Mutual recognition under Directive 2005/36/EC	237
Part IV: Mutual recognition of professional qualifications of selected health and legal professions	339
7 Recognition for selected health professions under Directive 2005/36/EC and the application of the sectoral system	341
8 The legal profession	383
9 Summary, conclusions and recommendations	497
10 Samenvatting	517
11 Zusammenfassung	527
12 Résumé	537
13 Annex	545
14 References	551
List of tables	615
Index	617

Table of contents

Acknowledgements	V
Outline contents	VII
Table of contents	IX
Abbreviations	XXIII
1 Introduction	3
1.1 Background to this research	3
1.2 Purpose of this contribution, structure and research questions	12
1.3 Research methodology and terminology	16
1.4 Scope of this contribution, existing literature and restrictions	18
1.5 Institutional framework of Switzerland for the professional recognition	20
Part I: The institutional framework between Switzerland and the EU	25
2 The integration process between Switzerland and the EU	27
2.1 Introduction	27
2.2 The integration of Switzerland à la carte	28
2.2.1 Early integration of Switzerland	32
2.2.2 Further integration of Switzerland	35
2.2.3 Cherry picking and further sectoral agreements	38
2.2.4 Balancing Switzerland's constitutional tradition and Switzerland's European integration	46
2.3 Current institutional challenges	54
2.3.1 Current incorporation and updating of EU law by Switzerland and the EEA	56
2.3.1.1 Autonomous adaptation of EU law	56
2.3.1.2 The 'Cassis de Berne' principle	57
2.3.1.3 Updating of the AFMP by the Joint Committee of the AFMP	58
2.3.1.4 Adaptation of EU law under the Schengen acquis	59
2.3.1.5 Dynamic incorporation under EEA law and judicial dialogue between the CJEU and the EFTA Court	63

Table of contents

2.3.2	Earlier recommendations and inspirations for a future judicial and surveillance mechanism	68
2.3.2.1	Docking with the CJEU	72
2.3.2.2	Docking with the EFTA Court and EFTA-like solutions	74
2.3.2.3	Dispute settlement mechanisms	76
2.3.3	Draft Institutional Framework Agreement of 23 November 2018 between Switzerland and the EU	81
2.3.3.1	Surveillance under the Draft for an Institutional Framework Agreement	83
2.3.3.2	Horizontal Joint Committee	84
2.3.3.3	Continuous updating of EU law	85
2.3.3.4	Interpretation of EU law	87
2.3.3.5	Dispute settlement mechanism	88
2.3.3.5.1	Acte clair doctrine	90
2.3.3.5.2	Proportionality of retaliation measures	92
2.3.3.5.3	Technical aspects and functioning of the dispute settlement mechanism	93
2.3.3.5.4	Termination of the Draft Institutional Framework Agreement	95
2.4	Conclusion to Chapter 2	96
3	Status of the Agreement on the free movement of persons ('AFMP')	101
3.1	Introduction	101
3.2	Interpretation of International Agreements	102
3.2.1	<i>Polydor</i> case law	104
3.2.2	Early case law of the CJEU on association agreements	106
3.2.3	Return to the <i>Polydor</i> case law under the AFMP	107
3.3	The Ankara Agreement as an example for a mostly progressive interpretation of association agreements	111
3.3.1	Rights of Turkish workers	113
3.3.2	Decision No 1/80 of the Association Council	114
3.3.3	Decision No 3/80 of the Association Council	116
3.3.4	Return of the <i>Polydor</i> principle under the Ankara Agreement and other less progressive interpretations of the Ankara Agreement	117
3.4	Rules of interpretation under the AFMP and the applicability of EU law in Switzerland	118
3.4.1	CJEU case law on the interpretation of the AFMP	118

3.4.2	Applicability of EU law in Switzerland	121
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	124
3.4.4	Shortcomings of Article 16 AFMP – Homogeneity of the legal order	130
3.4.5	Legal nature of Article 16(2) AFMP	132
3.5	Conclusion to Chapter 3	134
Part II: Free movement of persons between Switzerland and the EU		137
4	Free movement of persons between Switzerland and the EU	139
4.1	Introduction	139
4.2	Freedom of establishment between Switzerland and the EU	140
4.2.1	Temporal and territorial scope	140
4.2.2	Personal and material scope	141
4.2.2.1	Direct and indirect discrimination	145
4.2.2.2	Reverse discrimination	145
4.2.2.3	Restrictions	146
4.2.2.4	Swiss case law on restrictions	149
4.2.2.5	Standstill clause under the AFMP	150
4.2.2.6	Justifications	151
4.2.2.7	The distinction between the fundamental freedoms relating to persons	152
4.2.3	Public service exception	155
4.3	Freedom of movement for workers and persons not pursuing an economic activity between Switzerland and the EU	158
4.3.1	Personal scope	158
4.3.2	Material scope: Discrimination, restrictions and the exercise of public authority	166
4.3.3	Horizontal effect of non-discrimination provisions	167
4.3.4	Persons not pursuing an economic activity and students	169
4.4	Freedom of services between Switzerland and the EU	173
4.4.1	Temporal and territorial scope	173
4.4.2	Personal and material scope	173
4.4.2.1	The freedom to provide services	174
4.4.2.2	The freedom to receive services	175
4.4.2.3	Applicability of the GATS	178

4.4.2.4	Justifications	179
4.4.2.5	Swiss flanking measures	180
4.5	Conclusion to Chapter 4	183
Part III: Mutual recognition of professional qualifications		185
5	Mutual recognition of professional qualifications	187
5.1	Introduction	187
5.1.1	Evolution of Directive 2005/36/EC	188
5.1.2	Decisions of the Joint Committee Switzerland/EU on the free movement of persons with regard to Annex III to the AFMP	194
5.1.3	Lack of implementation of Directives 2013/55/EU and 2018/958	197
5.2	Principle of mutual trust	200
5.2.1	Mutual recognition by means of primary law	201
5.2.2	Recent internal market case law of the CJEU with regard to primary law: <i>Brouillard</i>	205
5.2.3	Case law with regard to primary law under the <i>acquis suisse</i>	207
5.2.3.1	Case law of the CJEU: <i>Ettwein</i>	207
5.2.3.2	Early case law of the FAC	208
5.2.3.3	Cantonal case law	210
5.2.3.4	Current case law of the FAC	210
5.2.3.4.1	Partial recognition	210
5.2.3.4.2	Landmark case of the FAC concerning discrimination and equal treatment	211
5.2.3.4.3	Application of primary law for the unregulated professions?	211
5.2.3.5	Current case law of the Swiss Federal Court	211
5.2.3.5.1	Application of primary law	211
5.2.3.5.2	Laboratory doctor	212
5.2.4	Diploma as a restriction for non-regulated professions	212
5.2.5	Duty to take professional qualifications into account as a general principle of EU law?	214
5.2.6	Abuse of rights and zigzag recognition	216
5.2.6.1	First cluster of the abuse of rights concept	218
5.2.6.2	The second cluster of the abuse of rights concept	220
5.2.6.3	Third cluster of the abuse of rights concept	222

5.2.7	Burden of proof and consequences of an abuse of rights	222
5.2.8	Swiss case law for the abuse of rights	222
5.3	Academic versus professional recognition of diplomas	223
5.3.1	Academic recognition in Switzerland	227
5.3.2	Use of foreign academic titles in Switzerland	228
5.3.3	Case law	229
5.3.3.1	Case law of the CJEU: Kraus	229
5.3.3.2	Case law of the Swiss Federal Court	230
5.3.3.2.1	Admission to study law in Switzerland	230
5.3.3.2.2	Academic attestation of equivalence	231
5.3.3.2.3	Comic designer	231
5.3.3.2.4	Professor's title	232
5.3.3.3	Case law of the FAC	232
5.3.3.3.1	Regulation by title	232
5.3.3.3.2	Academic title of the host Member State	233
5.3.3.3.3	Swiss 'level certificates'	233
5.3.3.4	Cantonal case law	233
5.4	Conclusion to Chapter 5	234
6	Mutual recognition under Directive 2005/36/EC	237
6.1	Introduction	237
6.2	Scope of Directive 2005/36/EC	239
6.2.1	Personal scope	239
6.2.2	Application of the AFMP and the Professional Qualifications Directive for Swiss nationals	241
6.2.3	Territorial Scope	245
6.2.4	Material Scope	245
6.2.4.1	Regulated professions	247
6.2.4.2	Professional qualifications versus licences	250
6.2.4.3	Mutual recognition of unregulated professions in the home Member State where there is no regulated education and training	251
6.2.4.4	Access to the same profession	252
6.2.4.5	Competitive selection procedure case law ('concours')	253
6.2.4.6	Acquired rights under the Professional Qualifications Directive	254
6.2.4.7	Case law	256
6.2.4.7.1	Case law of the CJEU: Aranitis	256

	6.2.4.7.2 Case law of the Swiss Federal Court	257
	6.2.4.7.3 Case law of the FAC	257
6.2.5	Qualifications of third countries	260
	6.2.5.1 Recognition of recognised third country diplomas under secondary law	260
	6.2.5.2 Case law of the Swiss Federal Court	264
6.2.6	Temporal Scope	266
6.3	General concepts of the Professional Qualifications Directive	268
	6.3.1 Restricted exercise of activities	268
	6.3.2 Pursuit of the profession	269
	6.3.2.1 Language requirements	271
	6.3.2.2 Professional traineeship	275
	6.3.2.3 Use of professional titles	277
	6.3.2.4 Use of academic titles	278
	6.3.3 Case law	278
	6.3.3.1 Case law of the EFTA Court: Norwegian Appeal Board for Health Personnel	278
	6.3.3.2 Case law of the Swiss Federal Court: Undue suspension of the recognition process	282
	6.3.3.3 Case law of the FAC	282
	6.3.3.3.1 Undue delay of the federal authorities	282
	6.3.3.3.2 Submission of the correct documents	283
6.4	The general system of recognition (freedom of establishment)	283
	6.4.1 Levels of qualification	286
	6.4.2 Compensation measures	288
	6.4.3 Partial access to a profession	292
	6.4.4 Common training framework	296
	6.4.5 Common training tests	296
	6.4.6 Swiss case law	298
	6.4.6.1 Relevant diplomas for the assessment	298
	6.4.6.2 Professional experience does not suffice as a substitute for a diploma	298
	6.4.6.3 Legal basis for compensation measures	298
	6.4.6.4 Substantially different matters (Article 14 of the Professional Qualifications Directive)	299
	6.4.6.4.1 Teacher for the Spanish language and the principle of mutual trust	299
	6.4.6.4.2 Substantially different matters: definition	301

6.4.6.4.3	Compensation measures and ECTS points	301
6.4.6.5	Multiple choice aptitude test for opticians	302
6.4.6.6	Lower qualification level	302
6.4.6.6.1	Austrian teacher for the disabled	302
6.4.6.6.2	Social care worker	303
6.4.6.7	No legal remedy for professional organisations	303
6.4.6.8	Age requirements	303
6.5	Recognition based on professional experience (freedom of establishment)	304
6.5.1	Professions of the electricity sector	305
6.5.2	Swiss case law	306
6.5.2.1	Introduction	306
6.5.2.2	Partial access to the profession?	307
6.5.2.3	Proportionate compensation measures	309
6.6	The freedom to provide services under the Professional Qualifications Directive	309
6.6.1	Title II of the Professional Qualifications Directive	309
6.6.2	Declaration to be made in advance	313
6.6.3	Implementation of Title II of the Professional Qualifications Directive on a national level	315
6.7	Particularities of the <i>acquis suisse</i> for the professional recognition	320
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	320
6.7.2	Administrative cooperation	321
6.7.3	Fragmentation of rights due to bilateral agreements	323
6.7.4	Acquired rights under Article 23 AFMP	323
6.7.5	More favourable provisions of national law	329
6.7.6	Landmark case of 4 April 2017: Hierarchy of norms	331
6.8	Conclusion to Chapter 6	334
Part IV: Mutual recognition of professional qualifications of selected health and legal professions		339
7	Recognition for selected health professions under Directive 2005/36/EC and the application of the sectoral system	341
7.1	Introduction	341

Table of contents

7.2	Recognition under EU law	346
7.2.1	Recognition for doctors of medicine with basic training	346
7.2.2	Recognition for general practitioners	348
7.2.3	Recognition for specialised doctors	349
7.2.4	Recognition for dental practitioners and specialised dentists	351
7.2.5	Recognition for nurses for general care	354
7.2.6	Recognition for midwives	357
7.2.7	Recognition for pharmacists	359
7.3	Implementation of EU law in Switzerland	360
7.3.1	Recognition for doctors of medicine, general practitioners, specialised doctors, dental practitioners and specialised doctors	360
7.3.2	Recognition of nurses for general care	361
7.3.3	Recognition for midwives	364
7.3.4	Recognition for pharmacists	365
7.4	Application of the general system of recognition for the health professions	370
7.5	Indirect recognition for the health professions ('reconnaissance de la reconnaissance')	371
7.6	Recent case law of the CJEU	372
7.6.1	Repayment of financial contributions	372
7.6.2	Automatic recognition of evidence of formal qualifications	372
7.7	Recent case of law of the EFTA Court	373
7.8	Recent case law of Swiss courts	373
7.8.1	Nuclear Medicine	373
7.8.2	Experience in Switzerland for specialised doctors	373
7.8.3	Specialised doctor in gynaecology and endocrinology	376
7.8.4	Specialised medical doctor in 'vascular surgery'	380
7.9	Conclusion to Chapter 7	380
8	The legal profession	383
8.1	Introduction	383
8.2	Lawyers	385
8.2.1	Introduction	385
8.2.2	Consequences of (future) changes to include the Services Directive	388

8.2.3	Directive 98/5/EC or the ‘Facilitating Practice Directive’	389
8.2.3.1	Host Member State-title – integration of lawyers	392
8.2.3.2	Formalities	393
8.2.4	Directive 77/249/EEC or the ‘Facilitating Services Directive’	394
8.2.4.1	Scope of the Facilitating Services Directive	394
8.2.4.2	Substantive rules of the Facilitating Services Directive	396
8.2.4.3	Professional rules and conduct	397
8.2.4.4	Familiarisation with the host Member State’s legal system	399
8.2.5	Case law of the CJEU	399
8.2.5.1	Case law with regard to the integration of lawyers	399
8.2.5.1.1	Case C-118/09, Koller	399
8.2.5.1.2	Case C-359/09, Ebert	400
8.2.5.1.3	Joined cases C-58/13 and C-59/13, Torresi	400
8.2.5.1.4	Case C-431/17, Dikigorikos Syllogos Athinon	401
8.2.5.2	Aptitude test: Case 145/99, Commission v Italy	401
8.2.5.3	Language requirements: Case C-193/05, Commission v Luxembourg	401
8.2.5.4	Working in part-time public-service employment: Case C-229/05, Jakubowska	402
8.2.5.5	Co-involvement of domestic lawyers: Case C-472/85, Commission v France	403
8.2.5.6	Limit on the reimbursement of lawyers: Case C-289/02, AMOK	403
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	403
8.2.5.8	Authentication of services: Case C-342/15, Piringer	404
8.2.5.9	Interim conclusion	406
8.2.6	Case law of the EFTA Court with regard to the legal profession	407
8.2.6.1	Case E-1/07: Criminal proceedings against A	407
8.2.6.2	Case E-6/13: Metacom v Rechtsanwälte Zipper & Collegen	407
8.3	The regulation of lawyers on a national level	408
8.3.1	Enrolment of lawyers in the cantonal bar register	411
8.3.1.1	Personal requirements	411

8.3.1.2	Indemnity insurance	412
8.3.1.3	Use of professional titles for Swiss lawyers	412
8.3.1.4	Use of titles of certified specialised lawyers	415
8.3.1.5	Free movement within the EU for registered Swiss lawyers only	415
8.3.1.6	In-house counsel	416
8.3.2	Reserved activities	418
8.3.2.1	Representation	418
8.3.2.2	Legal advice	419
8.3.3	Swiss case law on the enrolment of lawyers	420
8.3.3.1	Loss certificates (Article 8 (1) lit. c BGFA)	420
8.3.3.2	Independence (Article 8(1) lit. d BGFA)	421
8.3.4	Establishment of EU lawyers in Switzerland	421
8.3.4.1	Use of titles and registration	422
8.3.4.2	Aptitude test (Article 30(1) lit. a BGFA)	423
8.3.4.3	Based on experience (Article 30(1) lit. b BGFA)	423
8.3.4.4	Setting-up a law firm	423
8.3.4.5	Deontology	424
8.3.5	Swiss case law on the establishment of EU lawyers	425
8.3.5.1	Article 1 of the Facilitating Practice Directive	425
8.3.5.2	Article 2 of the Facilitating Practice Directive	426
8.3.5.3	Article 3 of the Facilitating Practice Directive	430
8.3.5.4	Article 5 of the Facilitating Practice Directive	431
8.3.6	Provision of services	431
8.3.7	Swiss case law with regard to the provision of services	432
8.3.7.1	Case law of the Swiss Federal Court with regard to the provision of services	432
8.3.7.2	Case law of the FAC with regard to the provision of services	433
8.3.8	Cantonal case law with regard to the provision of services	436
8.3.9	Other Swiss case law for the legal profession	436
8.3.9.1	Single practice rule (Article 27 BGFA)	436
8.3.9.2	Enrolment in the register (Article 21(2) BGFA)	437
8.3.9.3	Postal address in Switzerland	438
8.3.9.4	Delivery of original documents to lawyers	438
8.4	Notaries	439
8.4.1	Introduction	439

8.4.2	The Federal Act on the Internal Market (BGBM)	441
8.4.2.1	Scope of the BGBM	442
8.4.2.2	Substantive provisions of the BGBM	442
8.4.2.3	Differences between the BGBM and the AFMP	444
8.4.3	Free movement of notaries	445
8.4.3.1	The COMCO Report and the application of the VMD	445
8.4.3.2	Judgment of the Bernese Administrative Court of 2014	448
8.4.3.3	Judgment of the High Court of the Canton of Aargau of 2018 (Chamber of administrative law)	449
8.5	Auditors and patent attorneys	450
8.5.1	Auditors	450
8.5.1.1	The right to practise the profession	450
8.5.1.2	Current discussion about the application of secondary law for auditors	452
8.5.1.3	Analysis of the case law	455
8.5.1.4	Interim conclusion	457
8.5.2	Patent attorney	457
8.5.2.1	Title protection	457
8.5.2.2	Representation	458
8.5.2.3	Education and curriculum	458
8.5.2.4	Aptitude test	459
8.5.2.5	Tasks of the joint patent attorney association	460
8.5.2.6	Services	460
8.5.2.7	Swiss case law	461
8.6	Free movement for legal trainees	462
8.6.1	Introduction	462
8.6.2	Free movement of legal trainees in the EU	464
8.6.3	Free movement of legal trainees between the EU and Switzerland	467
8.7	Legal trainees on a national level	469
8.7.1	Professional requirements	471
8.7.2	Introduction of the Bologna system in Switzerland for law students	474
8.7.2.1	Specific Master's degrees in Switzerland	476
8.7.2.1.1	Distance learning	476
8.7.2.1.2	Master's of Science in Wirtschaftsrecht	477

Table of contents

8.7.2.1.3	Legal studies without access to the bar	477
8.7.2.1.4	LL.M. degrees in Switzerland	478
8.7.3	Admission to legal traineeship in Switzerland	478
8.7.4	Representation by legal trainees and the issue with regulated professions	479
8.7.5	Problematic requirements before legal traineeship will be granted	481
8.7.5.1	Residency and nationality requirements	481
8.7.5.2	Exemptions based on exceptional academic merits	483
8.7.5.3	Experience required	484
8.7.6	Recognition based on academic recognition	486
8.7.7	Swiss <i>Morgenbesser</i> and similar case law	487
8.7.7.1	Cantonal case law	487
8.7.7.2	Case law of the Swiss Federal Court	488
8.7.7.2.1	Free movement of legal trainees from the EU	488
8.7.7.2.2	Training of legal trainees for lawyers of other cantons	490
8.7.8	Adaptation of the <i>Morgenbesser</i> case law in Switzerland	491
8.8	Conclusion to Chapter 8	492
9	Summary, conclusions and recommendations	497
9.1	Summary	497
9.1.1	The institutional framework between Switzerland and the EU (Part I)	497
9.1.2	Free movement of persons between Switzerland and the EU (Part II)	499
9.1.3	Mutual recognition of professional qualifications (Part III)	500
9.1.4	Mutual recognition of professional qualifications for selected health and legal professions (Part IV)	501
9.2	Conclusions	504
9.2.1	Introduction	504
9.2.2	Research Question 1	505
9.2.3	Research Question 2	506
9.2.4	Research Question 3	507
9.2.5	Research Question 4	508
9.2.6	Research Question 5	509
9.2.7	Research Question 6	510

9.3	Recommendations	512
9.3.1	Decide on the further evolution of the institutional framework in a timely manner	512
9.3.2	Establish a single point of interpretation	512
9.3.3	Determine the relevant concepts of EU law and the relevant case law of the CJEU	513
9.3.4	Update Annex III to the AFMP: Professional Qualifications Directive	513
9.3.5	Discuss and apply the relevant case law of the Court of Justice for the mutual recognition of professional qualifications	514
9.3.6	Increase the awareness of the core principles of mutual recognition and mutual trust	514
9.3.7	Clarify the legal basis for the recognition of the auditor's profession	515
9.3.8	Inform law students and legal trainees about the implications of the hardly known <i>Morgenbesser</i> case law	515
10	Samenvatting	517
10.1	Institutioneel kader tussen Zwitserland en de EU (deel I)	517
10.2	Vrij verkeer van personen tussen Zwitserland en de EU (deel II)	519
10.3	Erkenning van beroepskwalificaties (erkenning van diploma's; deel III)	521
10.4	Erkenning van beroepskwalificaties voor geselecteerde gezondheids- en juridische beroepen (deel IV)	522
11	Zusammenfassung	527
11.1	Institutioneller Rahmen zwischen der Schweiz und der EU (Teil I)	527
11.2	Personenfreizügigkeit zwischen der Schweiz und der EU (Teil II)	529
11.3	Anerkennung der beruflichen Qualifikationen (Diplomanerkennung; Teil III)	530
11.4	Anerkennung der beruflichen Qualifikationen für ausgewählte Gesundheits- und Rechtsberufe (Teil IV)	532
12	Résumé	537
12.1	Cadre institutionnel entre la Suisse et l'UE (Partie I)	537
12.2	Libre circulation des personnes entre la Suisse et l'UE (Partie II)	539
12.3	Reconnaissance des qualifications professionnelles (reconnaissance des diplômés ; partie III)	540

Table of contents

12.4	Reconnaissance des qualifications professionnelles pour certaines professions du domaine de la santé et du droit (Partie IV)	541
13	Annex	545
14	References	551
14.1	Literature	551
14.2	Reports, working papers, position papers and other sources	566
14.3	Newspaper Articles	577
14.4	Cases and Opinions of the Court of Justice	577
14.5	Cases of the General Court of the European Union	586
14.6	Cases of the EFTA Court	586
14.7	Published cases of the Swiss Federal Court	587
14.8	Not published cases of the Swiss Federal Court	589
14.9	Published and not published cases of the Federal Administrative Court	590
14.10	Other case law	592
14.11	Primary law and international agreements of the EU	594
14.12	Secondary law of the EU (in chronological order)	599
14.13	Swiss Federal Legislation	605
14.14	Internet links	608
	List of tables	615
	Index	617

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 (<i>Aargauische Gerichts- und Verwaltungsentscheide</i>)
AJP/PJA	Aktuelle Juristische Praxis (see PJA; Journal)
ALCP	see AFMP
AP	Additional Protocol
Art	Article
Arts	Articles
AS	Official Compilation of Federal Law (<i>Amtliche Sammlung des Bundesrechts</i>)
AVG	Federal Act on Employment Services (<i>Arbeitsvermittlungsgesetz; SR 823.11</i>)
BBG	Vocational and Professional Education and Training Act (<i>Bundesgesetz über die Berufsbildung; SR 412.10</i>)
BBI	Swiss Federal Gazette (<i>Bundesblatt</i>)
BBV	Vocational and Professional Education and Training Ordinance (<i>Berufsbildungsverordnung; SR 412.101</i>)
BGBM	Federal Act on the Internal Market (<i>Bundesgesetz über den Binnenmarkt; SR 943.02</i>)
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 (<i>Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte; SR 935.61</i>)
BGG	Federal Act on the Federal Court (<i>Bundesgesetz über das Bundesgericht; SR 173.110</i>)
BGMD	Swiss Federal Act on the declaration to be made in advance and the recognition of professional qualifications of service providers (<i>Bundesgesetz über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungs-erbringerin-</i>

Abbreviations

	<i>nen und -erbringern in reglementierten Berufen; SR 935.01).</i>
BV	Swiss Federal Constitution <i>(Schweizerische Bundesverfassung; SR 101)</i>
BVerfG	Constitutional Court of Germany <i>(Bundesverfassungsgericht)</i>
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 (<i>Wettbewerbskommission</i>)
CRUS	<i>Conférence des recteurs des universités suisses</i> (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 <i>(Swiss Conference of Cantonal Ministers of Education)</i>
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 (<i>Entsendegesetz</i> ; SR 823.20)
EntsV	Swiss Federal Ordinance on posted workers of 21 May 2003 (<i>Entsendeverordnung</i> ; SR 823.201)
EQF	European Qualifications Framework
ESA	EFTA Surveillance Authority
ESTI	Federal Inspectorate for Heavy Current Installations (<i>Eidgenössisches Starkstrominspektorat</i>)
ETH	Swiss Federal Institute of Technology (<i>Eidgenössische Technische Hochschule</i>)
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 (<i>Schweizerisches Bundesverwaltungsgericht</i>)
FMedV	Reproductive Medicine Ordinance (<i>Fortpflanzungsmedizinverordnung</i> ; SR 810.112.2)
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GesBG	Federal Act on health professions (<i>Gesundheitsberufegesetz</i> ; SR 811.21)
GDP	gross domestic product
Habil.	<i>Habilitation</i> (post-doctorate thesis)
HFKG	Federal Act on Funding and Coordination of the Swiss Higher Education Sector (<i>Hochschulförderungs- und -koordinationsgesetz</i> ; SR 414.20)
i.e.	id est
IKV	Intercantonal Agreement on the recognition of professional qualifications (<i>Interkantonale Vereinbarung über die Anerkennung von Ausbildungsabschlüsse</i>)
IMCO	Internal Market and Communications Committee
IMI	Internal Market Information System
IPRG	Federal Act on Private International Law (<i>Bundesgesetz über das Internationale Privatrecht</i> ; SR 291)

Abbreviations

ISCED	International Standard Classification on Education
ISIC	International Standard Industrial Classification of All Economic Activities
KVG	Federal Act on public health insurance (<i>Bundesgesetz über die Krankenversicherung; SR 832.10</i>)
LeGes	Gesetzgebung & Evaluation (Journal)
LLCA	see BGFA
LL.M.	Legum Magister (Master of Laws)
LTR	Long-term resident
MEBEKO	Commission on medical professions (<i>Medizinalberufekommission</i>)
MedBG	Federal Act on medical professions (<i>Medizinalberufegesetz; SR 811.11</i>)
MedBV	Federal Ordinance on medical professions (<i>Medizinalberufeverordnung; SR 811.112.0</i>)
MLaw	Master of Law
MRA	Mutual recognition agreement
NATO	North Atlantic Treaty Organization
NIV	Federal Ordinance on low-voltage installations (<i>Verordnung über elektrische Niederspannungsinstalltionen; SR 734.27</i>)
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 (<i>Obligationenrecht; SR 220</i>).
p.	page
pp.	pages
PAG	Federal Act on Patent Attorneys (<i>Bundesgesetz über die Patentanwältinnen und Patentanwälte, SR 935.62</i>)
PAV	Federal Ordinance on Patent Attorneys (<i>Patentanwaltsverordnung; SR 935.621</i>)
para.	paragraph
paras.	Paragraphs

PET	Professional education and training (<i>Höhere Fachschule</i>)
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 (<i>Bundesgesetz über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren; SR 221.302</i>)
RAV	Federal Ordinance on the admittance and supervision of auditors (<i>Verordnung über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren; SR 221.302.3</i>)
RBOG	Court Report of the higher Court of the Canton of Thurgau (<i>Rechenschaftsbericht des Obergerichts des Kantons Thurgau an den Grossen Rat</i>)
RSDIE	Revue suisse de droit international et européen (see SRIEL/SZIER; Journal)
SchKG	Federal Act on bankruptcy (<i>Bundesgesetz über Schuldbetreibung und Konkurs; SR 281.1</i>)
SchIT	Schlusstitel (see ZGB)
SECO	State Secretariat for Economic Affairs (<i>Staatssekretariat für Wirtschaft</i>)
SERI	State Secretariat for Research and Innovation (<i>Staatssekretariat für Bildung, Forschung und Innovation</i>)
SJZ	Schweizerische Juristen-Zeitung (Journal)
SR	Classified Compilation of Federal Law (<i>Systematische Rechtssammlung des Bundesrechts</i>)
SRIEL	Swiss Review of International and European Law (see SZIER/RSDIE; Journal)
StGB	Swiss Criminal Code (<i>Schweizerisches Strafgesetzbuch, SR 311.0</i>)
StPO	Swiss Criminal Procedure Code (<i>Strafprozessordnung; SR 312.0</i>)
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 (<i>Bundesgesetz über die technischen Handelshemmnisse; SR 946.51</i>)

Abbreviations

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 (<i>Verwaltungsgericht</i>)
VMD	Swiss Federal Ordinance on the declaration to be made in advance and the recognition of professional qualifications of service providers (<i>Verordnung über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungs-erbringenden und -erbringern in reglementierten Berufen; SR 935.011</i>)
Vol.	Volume
VwVG	Federal Act on public procedural law (<i>Bundesgesetz über das Verwaltungsverfahren; SR 172.021</i>)
VZAE	Federal Ordinance on admission, residence and gainful employment (<i>Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit; SR 142.201</i>)
WTO	World Trade Organization
ZBJV	Zeitschrift des Bernischen Juristenvereins (Journal)
ZBI	Schweizerische Zentralblatt für Staats- und Verwaltungsrecht (Journal)
ZESAR	Zeitschrift für europäisches Sozial- und Arbeitsrecht (Journal)
ZGB	Swiss Civil Code (<i>Schweizerisches Zivilgesetzbuch; SR 210</i>)
ZPO	Swiss Civil Procedure Code (<i>Schweizerische Zivilprozessordnung; SR 272</i>)
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 Commission¹

‘(...) 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 Union²

‘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 Court³

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

Andrea Ott
Professor at Maastricht University⁴

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' agreements⁷ (also known as 'sec-

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. Zoetewij-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.

toral agreements⁸) between Switzerland, the EU and its Member States. This unique situation of Switzerland has been referred to as a 'special status' ('Sonderstatus'⁹) or 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 Agreement¹³ – but was criticised by left- and right-wing politicians in Switzerland,¹⁴ while the EU was 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 per-

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.

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).

sons 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 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 arbitration boards) 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 be-

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.

tween 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 (TEU¹⁹). 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 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 post-

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.

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).

poned to 31 October 2019²⁴ and to 31 January 2020²⁵. While the UK finally left the EU on 31 January 2020, the outcome of the UK's withdrawal was uncertain for the future relationship with the EU until 24 December 2020 when the UK and the EU reached an agreement²⁶. Up until recently, the EU was faced with the dilemma how structure its future 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 line²⁷). 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.²⁸ 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.²⁹ The recent case *Tjebbes*

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 <<https://www.consilium.europa.eu/en/policies/eu-uk-negotiations-on-the-future-relationship/>> (last visited on 03.01.2021); *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*, OJ [2020] L444/14, 31.12.2020.

²⁷ 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.

²⁸ <<https://www.bk.admin.ch/ch/d/pore/va/20200927/index.html>> (last visited on 28.09.2020).

²⁹ 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.

*and Others*³⁰ shows how important non-discrimination can become for EU nationals with residence in Switzerland. In this case, the Dutch authorities 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.³¹ 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.³²

For Switzerland's access to the internal market the free movement of persons is in any case not negotiable.³³ 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.³⁴ 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 2018.³⁵ 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.

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

³¹ Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 14 et seq.

³² See Chapter 4.3.1 for a discussion of this case.

³³ See Council of the European Union, *supra* note 11, para. 10.

³⁴ <<https://www.handelszeitung.ch/beruf/was-die-schweiz-ohne-deutsche-arzte-ware>> (last visited on 28.06.2020).

³⁵ <<http://www.ehea.info/page-ministerial-declarations-and-communiques>> (last visited on 28.06.2020).

Professional recognition foresees the recognition for the *regulated professions*. *Regulated profession* means that access to the profession is governed by law.³⁶ 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 Switzerland. As of today, professional recognition is mostly safeguarded by relevant secondary law, notably Directive 2005/36/EC ('Professional Qualifications Directive'³⁷). 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.³⁸ *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*.³⁹ It relies mainly on the Lisbon Convention of the Council of Europe⁴⁰ because the EU does not have the competence to harmonise the area of education.⁴¹

³⁶ Art. 3(1)(a) of Directive 2005/36/EC (see for the full citation below note 37).

³⁷ *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.

³⁸ See preamble of the Professional Qualifications Directive.

³⁹ 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.

⁴⁰ *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.

⁴¹ 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,

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.⁴² However, the fundamental freedoms or even *academic* recognition might also be necessary to foster the free movement of professions that are non-regulated.

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'.⁴³ 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.⁴⁴

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

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.

⁴² 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.

⁴³ Case C-267/99, *Christiane Adam, épouse Urbing v Administration de l'enregistrement et des domaines*, ECLI:EU:C:2001:534, para. 39.

⁴⁴ See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringner*, ECLI:EU:C:2016:710, para. 24 et seq.

as a 'system of bits and pieces'.⁴⁵ 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.⁴⁶ However, the rights of free movement for the non-economically active, such as trainees and students are not unconditional.⁴⁷ 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.

Under the *acquis communautaire*, professionals who are not fully-qualified may rely on primary law according to the case law of *Morgenbesser*⁴⁸ and *Pešla*⁴⁹. 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.⁵⁰ 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 propor-

⁴⁵ 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).

⁴⁶ See for the standstill clause: Art. 13 AFMP and Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 35; see for the fundamental freedoms: Arts. 6, 12 and 17 of Annex I to the AFMP.

⁴⁷ See Art. 24 of Annex I to the AFMP.

⁴⁸ See Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612.

⁴⁹ See Case C-345/08, *Pešla*, ECLI:EU:C:2009:771.

⁵⁰ See Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193; see also Case C-319/92, *Haim I*, ECLI:EU:C:1994:47.

tionality.⁵¹ 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 agreements⁵². 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 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 Swit-

⁵¹ See Arts. 2 sentence 2 and 4f of the amended Directive 2005/36/EC which are currently not part of the *acquis suisse*.

⁵² 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.

zerland 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.⁵³ 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 standstill clauses⁵⁴ 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

⁵³ See Art. 28 of the *Agreement establishing an Association between the European Economic Community and Turkey*, OJ [1973] L361/1, 31.12.1977.

⁵⁴ There are two standstill clauses in Art. 13 of Decision No 1/80 and 41 para. 1 of the Additional Protocol which forbid the introduction of new restrictions of the exercise of the free movement of workers, the freedom of establishment and the freedom to provide services.

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 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/EU⁵⁵ 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.

⁵⁵ *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.

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*⁵⁶ provides a sensible direction in which to go in the context of the Swiss legal order. The above-mentioned case law of *Morgenbesser* and *Pešla*⁵⁷ shall therefore be examined and transferred to the current Swiss situation of legal 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.⁵⁸ 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 pro-

⁵⁶ See Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612.

⁵⁷ See Case C-345/08, *Pešla*, ECLI:EU:C:2009:771.

⁵⁸ 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.

profession is only regulated in a few cantons and the engineer's profession not at all.⁵⁹

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 AFMP⁶⁰?
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?

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.⁶¹ In addition, the method of interpretation of the Ankara Agree-

⁵⁹ 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.sbf.admin.ch/dam/sbf/de/dokumente/2017/02/ingenieure.pdf.download.pdf/ingenieur_d.pdf> (last visited on 28.06.2020).

⁶⁰ See supra note 52.

⁶¹ See now explicitly foreseen in Art. 11 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

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

Switzerland has four official languages (Art 4 BV:⁶² 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 jour-

⁶² *Bundesverfassung der Schweizerischen Eidgenossenschaft (BV) of 18.04.1999, SR 101.*

nal 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.⁶³ 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.⁶⁴

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*.

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.

⁶³ See note 1207 and Chapter 6.2.2 for references.

⁶⁴ See Chapter 6.2.2 for more detail.

The boundaries between academic and professional recognition sometimes overlap.⁶⁵ 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.⁶⁶

Whether free movement restrictions fall under the scope of the AFMP is still controversial. However, a doctoral thesis about this topic already exists.⁶⁷ Delli concludes that restrictions are covered not for legal but for pragmatic reasons because the CJEU does rarely distinguish between indirect discriminations and restrictions.⁶⁸ 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.⁶⁹ 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/>'.

⁶⁵ See Chapter 6.3.2.4.

⁶⁶ See Kortese, Maastricht, *supra* note 39, p. 10 et seq.

⁶⁷ 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).

⁶⁸ Delli, Basel, *supra* note 67, p. 325 et seq.

⁶⁹ 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.⁷⁰ 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'.⁷¹ 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',⁷² for the management of the Federal Institutes of Technology,⁷³ legislation on professional activities in the private sector,⁷⁴ legislation of 'basic and continuing education and training for family medicine professions and the requirements for practising these professions'⁷⁵. 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'.⁷⁶ Swiss cantons still enjoy a great degree of autonomy to regulate certain professions, such as the teaching, notary, and architecture professions.⁷⁷

⁷⁰ A. Aust, *Handbook of international law*, Cambridge (2010), p. 16; Kläser, Maastricht, *supra* note 9, p. 58.

⁷¹ Art. 42 BV in the translation provided by the Swiss government.

⁷² Art. 63(1) BV in the translation provided by the Swiss government.

⁷³ Art. 63a(1) BV.

⁷⁴ Art. 95(1) BV.

⁷⁵ Art. 117a(2) lit. a BV in the translation provided by the Swiss government.

⁷⁶ Art. 3(2) sentence 2 BV.

⁷⁷ See Diebold, Berne, *supra* note 69, para. 47 for a more detailed overview.

The three branches of the Swiss Confederation are the Federal Assembly with two Chambers, the Federal Council, and the Swiss Federal Court.⁷⁸ According to the Constitution, the Swiss Federal Court is ‘the supreme judicial authority’ in Switzerland.⁷⁹ 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.⁸⁰ In case of conflict, federal law takes precedence over cantonal law.⁸¹ 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).⁸² Cantons may enter into agreements with each other (so-called intercantonal agreements) and establish intercantonal bodies.⁸³ 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.).⁸⁴ Interestingly enough, violations of intercantonal law can be heard by the Swiss Federal Court.⁸⁵

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 recogni-

⁷⁸ See Arts. 148, 174 and 188 BV; see Kläser, Maastricht, *supra* note 9, p. 52 et seq. for a detailed overview.

⁷⁹ Art. 188(1) BV.

⁸⁰ Art. 46(1) BV.

⁸¹ Art. 49(1) BV.

⁸² Art. 95 of the *Bundesgesetz über das Bundesgericht (BGG) of 17.06.2005*, SR 173.110.

⁸³ Art. 48(1) BV.

⁸⁴ 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.

⁸⁵ Art. 95 lit. e BGG. Intercantonal law can only rarely be invoked by private parties.

tion regime, this also includes diplomas on the university level.⁸⁶ The SERI is also the competent authority for the declaration to be made in advance (see Chapter 6.6.3).⁸⁷ There are also other public bodies for the recognition of professional qualifications, such as the Federal Inspectorate for Heavy Current Installations (ESTI) for electricians⁸⁸ and the Commission on medical professions (MEBEKO) for pharmacists and doctors.⁸⁹ The supervision of lawyers is regulated by cantonal law.⁹⁰ The SERI published a (non-binding) list of the respective authorities for the regulated professions in Switzerland.⁹¹

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.⁹²

Decisions of the SERI⁹³ and the ESTI can be appealed before the Swiss Federal Administrative Court ('FAC').⁹⁴ Each canton has its own court system and

⁸⁶ 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/aner kennungsverfahren-bei-niederlassung.html>> (last visited on 28.06.2020).

⁸⁷ 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.

⁸⁸ 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.

⁸⁹ Art. 1(1) lit. d of the *Bundesgesetz über die universitären Medizinalberufe (MedBG) of 23.06.2006*, SR 811.11.

⁹⁰ See Art. 27 et seq. of the *Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (BGFA) of 23.06.2000*, SR 935.61.

⁹¹ <<https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html>> (last visited on 28.06.2020).

⁹² See Art. 177(3) BV and the VwVG.

⁹³ 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.

⁹⁴ See e.g. BVGer A-368/2014 of 06.06.2014.

must have a superior court.⁹⁵ Appeals against decisions of the superior cantonal courts, the FAC, and some other superior judicial bodies⁹⁶ can be appealed before the Swiss Federal Court unless it concerns the assessment of exams⁹⁷ (especially exams for school, professional training, and the ‘exercise of a profession’).⁹⁸ Decisions of the FAC that fall under the exception of Article 83 lit. t BGG cannot be appealed.⁹⁹ 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.¹⁰⁰

⁹⁵ Art. 75(2) BGG.

⁹⁶ E.g. ‘MEBEKO’ for doctors and ‘Rekurskommission EDK/GDK’ for teachers.

⁹⁷ Art. 83 lit. t BGG.

⁹⁸ Art. 86(1) lit. (a) and (d) BGG.

⁹⁹ Art. 113 BGG *a contrario*.

¹⁰⁰ 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.¹⁰¹ 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 follow-up of a ‘bilateral path’.¹⁰² 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,¹⁰³ 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:

¹⁰¹ 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.

¹⁰² 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.

¹⁰³ 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.

Switzerland's recent integration process:

Phase 1:

1956: Consultation Agreement between Switzerland and the ECSC (not in force)¹⁰⁴

1956: Agreement on Railroad tariffs (not in force)¹⁰⁵

1967: Agreement on tariffs of certain cheeses¹⁰⁶

Phase 2:

1986: Trade in non-agricultural and processed agricultural goods¹⁰⁷

1989: Insurance Agreement¹⁰⁸

1990: Simplification of inspections and formalities in respect to the carriage of goods¹⁰⁹

1992: Swiss Federal Council writes an application for negotiations about membership in the EU¹¹⁰

1992: Referendum on the accession of Switzerland to the EEA¹¹¹

¹⁰⁴ *Consultation Agreement between the Swiss Confederation and the High Authority of the European Coal and Steel Community*, OJ [1957] 7/85, 21.02.1957.

¹⁰⁵ *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.

¹⁰⁶ 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.

¹⁰⁷ *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.

¹⁰⁸ *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.

¹⁰⁹ *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.

¹¹⁰ See Swiss Confederation, *Parliamentary motion No 14.3219 of 21.03.2014*, <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20143219>> (last visited on 28.06.2020).

¹¹¹ 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:¹¹²

Free movement of persons, technical barriers to trade, public procurement, agriculture, land transport, civil aviation and research

2004: Bilaterals II:¹¹³

Schengen/Dublin¹¹⁴, 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 States¹¹⁵

2007: Free movement for persons of the EU-17 Member States: no quotas apply¹¹⁶

2009: Extension of the AFMP for Bulgaria and Romania¹¹⁷

¹¹² See OJ [2002] L114, 30.04.2002.

¹¹³ 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).

¹¹⁴ *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.

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 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.

¹¹⁶ See Art. 10 AFMP.

¹¹⁷ *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.

Phase 3:

2013: Agreement on co-operation to ensure effective enforcement of competition rules in cross-border matters¹¹⁸

2013: Cooperation agreement for the participation of Switzerland in the European programmes of satellite navigation¹¹⁹

2014: Association of Switzerland to the Horizon 2020 programme¹²⁰

2016: Arrangement between the European Union and the Swiss Confederation on the modalities of its participation in the European Asylum Support Office¹²¹

2016: Swiss Federal Council writes a letter to withdraw the application for negotiations about membership in the EU¹²²

2016: Implementation of Article 121a of the Swiss constitution with the obligation of employers in specific sectors to notify the employment agency¹²³

2016: Ratification of the Croatia Protocol¹²⁴

¹¹⁸ *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.

¹¹⁹ *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.

¹²⁰ *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.

¹²¹ *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.

¹²² <https://www.eda.admin.ch/content/dam/dea/fr/documents/bundesrat/160727-Lettre-retrait-adhesion-CH_fr.pdf> (last visited on 28.06.2020).

¹²³ See Art. 21a of the *Bundesgesetz über die Ausländerinnen und Ausländer und über die Integration (AIG) of 16.12.2005*, SR 142.20.

¹²⁴ *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*,

Phase 3:

2017: Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems¹²⁵

2018: Draft Institutional Framework published¹²⁶

2018: Agreement between Switzerland and the UK (Brexit)¹²⁷

Table 1: The bilateral path between Switzerland and the EU¹²⁸

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.¹²⁹ Nevertheless, it was one of the seven founding members of the European Free Trade Association (EFTA) in 1960.¹³⁰

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*.

¹²⁵ 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.

¹²⁶ Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

¹²⁷ 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 25.02.2019, provisional entry into force on 01.01.2021, SR 0.142.113.672.

¹²⁸ Based on the figures of Tobler & Beglinger, Zurich, supra note 101 Schnell, Zurich, supra note 101, p. 10; Tobler & Beglinger, Zurich, supra note 101, chart 8; M. Vahl & N. Grolimund, *Integration without membership: Switzerland's bilateral agreements with the European Union*, Brussels (2006), p. 23; for a detailed overview, see <<https://www.eda.admin.ch/dea/en/home/europapolitik/chronologie.html>> (last visited on 28.06.2020).

¹²⁹ R. Schwok, *Switzerland – European Union: An impossible membership?*, Brussels (2009), p. 94.

¹³⁰ Schnell, Zurich, supra note 101, 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 1972,¹³¹ the Free Trade Agreement (FTA) which removed trade barriers for industrial products,¹³² 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*.¹³³ 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.¹³⁴ Nonetheless, the Swiss Federal Council did state that the FTA ‘lays the foundation’

¹³¹ 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.

¹³² 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.

¹³³ BGE 105 II 49; BGE 104 IV 175.

¹³⁴ 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.

(*der erste Stein*) for bilateral relations between Switzerland and the EU.¹³⁵ The Swiss population voted for the FTA, with 72.5 % in favour.¹³⁶

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 suspended until 2016 due to the negative vote on the EEA.¹³⁷ 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.¹³⁸

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.¹³⁹ For similar reasons, Switzerland is also not a member of NATO (i.e. an inter-governmental defence treaty).¹⁴⁰ 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.¹⁴¹ With record voter participation of 78.7 %, the neg-

¹³⁵ Swiss Confederation, *supra* note 6, p. 6846.

¹³⁶ Swiss Confederation, *Bundesratsbeschluss über die Erhaltung 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)*.

¹³⁷ Vahl & Grolimund, Brussels, *supra* note 128, pp. 8–14.

¹³⁸ Swiss Confederation, *supra* note 110.

¹³⁹ Vahl & Grolimund, Brussels, *supra* note 128, pp. 7 et seq. and 10.

¹⁴⁰ Schwok, Brussels, *supra* note 129, p. 101.

¹⁴¹ Vahl & Grolimund, Brussels, *supra* note 128, p. 11.

ative outcome of the referendum in 1992 can certainly be seen as a step backwards in the integration process.¹⁴²

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'¹⁴³). 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.¹⁴⁴ 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.

In 2001, there was a popular initiative concerning Switzerland joining the EU integration process through accession to the EU.¹⁴⁵ It was unsuccessful, with 76.8 % of the Swiss voters in opposition.¹⁴⁶

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'.¹⁴⁷ Switzerland has been part of the Schengen area since 2008, and since 2009

¹⁴² Swiss Confederation, supra note 111.

¹⁴³ See Oesch (2019), supra note 16, p. 2.

¹⁴⁴ Vahl & Grolimund, Brussels, supra note 128, pp. 8–14 and 44 et seq.

¹⁴⁵ Swiss Confederation, *Bundesbeschluss über die Volksinitiative «Ja zu Europa!» of 23 June 2000 (BBl 2000 3540) of 23.06.2000.*

¹⁴⁶ Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 4 May 2001 (BBl 2001 2025) of 04.03.2001.*

¹⁴⁷ T. Jaag & J. Hänni, *Europarecht: Die europäischen Institutionen aus schweizerischer Sicht*, Zurich (2015), § 40 para. 4004; Vahl & Grolimund, Brussels, supra note 128, p. 13.

has extended that to airport controls. Border controls have therefore been lifted.¹⁴⁸

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.¹⁴⁹ 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.'¹⁵⁰

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.¹⁵¹ While it is certainly true that referendums are a possibility, it is doubtful 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.¹⁵²

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.¹⁵³ The EU Member

¹⁴⁸ Swiss-EU Schengen Agreement (see for the full citation supra note 114).

¹⁴⁹ See Kellenberger, supra note 131, p. 7 et seq.

¹⁵⁰ European Commission, *Communication from the Commission – future relations with Switzerland*, COM(1993) 486 final of 01.10.1993, pp. 1–3.

¹⁵¹ See Schwok, Brussels, supra note 129, p. 34 et seq. for a further reference.

¹⁵² See e.g. the so-called 'Guillotine' clause of Article 25(3) and (4) AFMP for the Bilateral I package.

¹⁵³ 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, *Bundesrats-*

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).¹⁵⁴ 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.¹⁵⁵ Lastly, the Protocol for Croatia was concluded in 2016.¹⁵⁶ With the extension of the AFMP to the new EU-8 and EU-2 Member States, Switzerland voted simultaneously for financial contributions (the so-called *Kohäsionsmilliarde* – one billion Swiss Francs) to foster the development of the new EU Member States.¹⁵⁷

beschluss über das Ergebnis der Volksabstimmung of 8 February 2009: Personenfreizügigkeit Schweiz-EU: Weiterführung des Abkommens und Ausdehnung auf Bulgarien und Rumänien (BBL 2009 1671).

¹⁵⁴ 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.

¹⁵⁵ 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.

¹⁵⁶ See Croatia Protocol (see for the full citation *supra* note 124); see further Swiss Confederation, *supra* note 124.

¹⁵⁷ Jaag & Hänni, Zurich, *supra* note 147, § 40 para 4007a.

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.¹⁵⁸ 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).¹⁵⁹

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.¹⁶⁰ Negotiations about an agricultural trade agreement came to a stop, due to a parliamentary motion in Switzerland in 2012.¹⁶¹ Another parliamentary motion unsuccessfully intended to exclude a potential agricultural trade agreement, even as a mere subject for further discussion with the EU.¹⁶² As stated above, the institutional framework needed to be concluded before the EU was willing to dis-

¹⁵⁸ *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.*

¹⁵⁹ 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](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.

¹⁶⁰ 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.

¹⁶¹ Swiss Confederation, *Parliamentary motion No 10.3818 of 01.10.2010*, <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20103818>> (last visited on 28.06.2020).

¹⁶² Swiss Confederation, *Parliamentary motion No 11.3464 of 14.04.2011*, <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20113464>> (last visited on 28.06.2020).

cuss further developments of the bilateral path. This was reiterated by a Resolution of the European Parliament in 2015.¹⁶³

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.¹⁶⁴ 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 and by preparatory documents of the Swiss Federal Council.¹⁶⁵ 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).¹⁶⁶ 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

¹⁶³ European Parliament, *supra* note 103, para. 16.

¹⁶⁴ 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).

¹⁶⁵ 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.

¹⁶⁶ 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.

clause.¹⁶⁷ 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 European Parliament intended to foster ‘a more transparent and predictable environment’.¹⁶⁸ 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.¹⁶⁹ 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 Justice¹⁷⁰; see for the term ‘docking’ footnote 143 and further: Chapters 2.3.2.1 and 2.3.2.2).¹⁷¹

¹⁶⁷ 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.

¹⁶⁸ European Parliament, *supra* note 167; 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).

¹⁶⁹ 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).

¹⁷⁰ 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.

¹⁷¹ See *infra* note 255; Baudenbacher, *supra* note 170, p. 3.

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.¹⁷² The European Commission also urged Switzerland to renegotiate further financial contributions for the Cooperation with Eastern States of Europe in 2014^{173, 174}

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 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.¹⁷⁵ 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.¹⁷⁶

Negotiations started again in 2014, but were suspended for new sectoral agreements¹⁷⁷ (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

¹⁷² <http://www.europa.eu/rapid/press-release_STATEMENT-14-32_en.pdf> (last visited on 28.06.2020).

¹⁷³ 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.

¹⁷⁴ Council of the European Union, *supra* note 12, para. 52; Council of the European Union, *supra* note 11, para. 11.

¹⁷⁵ See Art. 5(1) AFMP.

¹⁷⁶ Tobler, *supra* note 45.

¹⁷⁷ See for the current dossiers: <<https://www.eda.admin.ch/dea/de/home/verhandlungen-offene-themen/verhandlungen.html>> (last visited on 28.06.2020).

about the extension of the AFMP with Croatia would undermine Article 121a paragraph 4 BV (introduced by the popular initiative against mass immigration).¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰ Notwithstanding these challenges, State Secretary Mario Gattiker signed a third Protocol on the extension of the AFMP regarding the participation of Croatia in 2016.¹⁸¹

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 agreements (with some exceptions).¹⁸² The bilateral agreements were therefore characterised as a ‘fair-weather construction’.¹⁸³ This changed after the successful popular initiative against mass immigration in 2014, as the EU suspended the negotiations of 15 dossiers.¹⁸⁴ 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 tem-

¹⁷⁸ Swiss Confederation, *Parliamentary motion No 14.4078 of 08.12.2014 with parliamentary votes*, <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20144078>> (last visited on 28.06.2020).

¹⁷⁹ Art. 91a of the *Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit (VZAE) of 24.10.2007*, SR 142.201.

¹⁸⁰ European Parliament, *supra* note 103, para. 17; Council of the European Union, *supra* note 12, para. 47.

¹⁸¹ N. Nuspliger, ‘Schweiz will Forschungsk Kooperation retten’, *NZZ*, 7 March 2016.

¹⁸² 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.

¹⁸³ Oesch (2019), *supra* note 16, p. 11.

¹⁸⁴ 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.

porarily regarded as a third country with respect to these programmes.¹⁸⁵ On 6 April 2017, after the implementation of the popular initiative against mass immigration became clear, negotiations for the suspended dossiers continued.¹⁸⁶ In 2017, the EU increased the pressure by putting Switzerland on the list of non-cooperative jurisdictions for tax purposes.¹⁸⁷ 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 2019¹⁸⁸, the missing updates of the MRA between Switzerland and the EU¹⁸⁹ and the negotiations for a public health agreement¹⁹⁰. In addition, the Federal Act on Data Protection was recently under revision in Switzerland (entry into force unknown), which was influenced by the evolution of EU law even if it was not part of the negotiations for future relations between Switzerland and the EU.¹⁹¹

On 2 March 2018, the Swiss Federal Council decided to specify the mandate for the negotiations concerning a Draft Institutional Framework Agreement

¹⁸⁵ <https://ec.europa.eu/research/participants/data/ref/h2020/other/hi/h2020-hi-swiss-part_en.pdf> (last visited on 28.06.2020).

¹⁸⁶ Swiss Confederation, *supra* note 184, p. 3.

¹⁸⁷ 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).

¹⁸⁸ 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).

¹⁸⁹ *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.

¹⁹⁰ Tobler & Beglinger, *supra* note 188, question 158; <https://www.eda.admin.ch/dam/dea/en/documents/fs/03-FS-FHALGesA_en.pdf>.

¹⁹¹ *Bundesgesetz über den Datenschutz of 25.09.2020*, BBl 2020 7639; see Tobler & Beglinger, *supra* note 188, question 147 for further references.

with the EU.¹⁹² 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 2019.¹⁹³ 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 ‘Union Citizenship Directive’),¹⁹⁴ measures to protect Swiss wages, and certain state aid issues.¹⁹⁵

A negative outcome could have severe consequences, namely for the equivalence of the framework for the Swiss stock exchange that expired on 30 June 2019,¹⁹⁶ the missing updates of the MRA between Switzerland and the EU,¹⁹⁷

¹⁹² Swiss Confederation, *supra* note 184, p. 3.

¹⁹³ Council of the European Union, *supra* note 11, para. 9.

¹⁹⁴ *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.

¹⁹⁵ 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-Konsultationen-InstA-190607_de.pdf> (last visited on 28.06.2020).

¹⁹⁶ See <http://europa.eu/rapid/press-release_IP-18-6801_en.htm> (last visited on 25.06.2020).

¹⁹⁷ 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*

for the conclusion of a public health agreement¹⁹⁸ 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 mandate¹⁹⁹ 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 Coronavirus²⁰⁰) 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.²⁰¹ It was unsuccessful on 27 September 2020 with 61.71 % of the votes against it.²⁰²

A quick renegotiation of the Draft Institutional Framework Agreement (of the main text or by an accompanying common declaration²⁰³) was also rather

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 188, 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-where-to-draft-institutional-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).

¹⁹⁸ Tobler & Beglinger, supra note 188, question 158; <https://www.eda.admin.ch/dam/dea/en/documents/fs/03-FS-FHALGesA_en.pdf>.

¹⁹⁹ Swiss Confederation, supra note 184, p. 4.

²⁰⁰ <<https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-78485.html>> (last visited on 28.06.2020).

²⁰¹ 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).

²⁰² <<https://www.bk.admin.ch/ch/d/pore/va/20200927/index.html>> (last visited on 28.09.2020).

²⁰³ See Tobler, supra note 197, p. 2.

unlikely considering the dilemma with the Brexit.²⁰⁴ In light of the recent situation with Brexit, the former State Secretary Ambühl recently proposed an interim agreement to appease the EU and to prevent a negative referendum for the Draft Institutional Framework Agreement.²⁰⁵ 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.²⁰⁶

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.²⁰⁷ Several popular initiatives were launched to reintroduce quotas for migrants or to reduce the influence of public international law.²⁰⁸ One of those popular initiatives, the so-called ‘initiative against mass immigration’ was successful in 2014. Moreover, the popular initiative on self-determination (*Selbstbestimmungsinitiative*) was put to a vote in 2018, which would have placed the Swiss Constitution (BV) above

²⁰⁴ 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.

²⁰⁵ M. Ambühl & D. S. Scherer, ‘Wie sich das Rahmenabkommen retten lässt’, *NZZ*, 25 November 2019, p. 8.

²⁰⁶ <<https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=47818>> (last visited on 28.06.2020).

²⁰⁷ Same opinion: Jaag & Hänni, Zurich, supra note 147, § 40 para. 4121.

²⁰⁸ See Swiss Confederation, *Bekanntmachungen der Departemente und der Ämter: Eidgenössische Volksinitiative «Stopp der Überbevölkerung – zur Sicherung der natürlichen Lebensgrundlagen»*, Vorprüfung of 19 April 2011 (BBI 2011 3795); Swiss Confederation, *Bekanntmachungen der Departemente und der Ämter: Eidgenössische Volksinitiative «Gegen Masseneinwanderung» – Vorprüfung of 12 July 2011 (BBI 2011 6269)*.

public international law.²⁰⁹ It was not successful.²¹⁰ 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 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.²¹¹ 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.²¹² 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.²¹³ On 27 September 2020, the popu-

²⁰⁹ Swiss Confederation, *Bundesbeschluss über die Volksinitiative «Schweizer Recht statt fremde Richter of 15 June 2018 (Selbstbestimmungsinitiative)»* – (BBI 2018 3497).

²¹⁰ 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]);* (BBI 2019 5931).

²¹¹ Swiss Confederation, *Bundeskanzlei: Eidgenössische Volksinitiative «Für eine massvolle Zuwanderung (Begrenzungsinitiative)» – Vorprüfung of 29 December 2017 (BBI 2018 108).*

²¹² See Art. 25(3) and (4) AFMP.

²¹³ <<https://www.ejpd.admin.ch/ejpd/de/home/aktuell/mm.msg-id-78939.html>> (last visited on 02.08.2020).

lar initiative ‘for measured immigration (restriction initiative)’ was unsuccessful with 61.71 % of the votes against it.²¹⁴

The following list shows the most important recent popular votes in Switzerland with regard to Switzerland’s European integration²¹⁵:

- 1992: Referendum on the accession of Switzerland to the EEA (rejected by 50,3 %) ²¹⁶
- 1997: Popular initiative: ‘EU membership negotiations before the people!’ (rejected by 74,1 %) ²¹⁷
- 2001: Bilateral I package deal (approved by 67,2 %) ²¹⁸
- 2001: Popular initiative ‘Yes to Europe!’ which would have started negotiation for EU membership (rejected by 76,8 %) ²¹⁹
- 2005: Referendum on the Schengen / Dublin Association (Association is approved by 54,6 %) ²²⁰
- 2005: Extension of the AFMP to the ten new Member States (approved by 56 %) ²²¹

²¹⁴ <<https://www.bk.admin.ch/ch/d/pore/va/20200927/index.html>> (last visited on 28.09.2020).

²¹⁵ <<https://www.eda.admin.ch/dea/en/home/europapolitik/abstimmungen.html>> (last visited on 01.04.2020).

²¹⁶ Swiss Confederation, supra note 111.

²¹⁷ 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)*.

²¹⁸ Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 21 May 2000 (BBl 2000 3773)*.

²¹⁹ See Swiss Confederation, supra note 145.

²²⁰ Swiss Confederation, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung of 5 June 2005: Abkommen zu Schengen und Dublin; Partnerschaftsgesetz (BBl 2005 5183)*.

²²¹ 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)*.

- 2006: Federal Act on the Cooperation with Eastern Europe (approved by 53,4 %) ²²²
- 2009: Extension of the AFMP to Bulgaria and Romania (approved by 59,6 %) ²²³
- 2014: Popular initiative ‘against mass immigration’ (approved by 50,3 %) ²²⁴
- 2014: Stop overpopulation initiative – safeguard our natural environment, Ecopop initiative (rejected by 74,1 %) ²²⁵
- 2018: Popular initiative on self-determination (Selbstbestimmungsinitiative), which would have placed the Swiss Constitution (BV) above public international law ²²⁶ (rejected by 66,3 %) ²²⁷
- 2019: Referendum against the adoption of Directive 2017/853/EU on control of the acquisition and possession of weapons (Adoption approved by 63,7 %) ²²⁸

²²² 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)*.

²²³ Swiss Confederation, *supra* note 153.

²²⁴ 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)*.

²²⁵ 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)*.

²²⁶ Swiss Confederation, *supra* note 209.

²²⁷ Swiss Confederation, *supra* note 210.

²²⁸ 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 Umsetzung des 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)*.

- 2020: (popular vote postponed to 27 September 2020 due to the Corona-virus²²⁹): Popular initiative ‘for measured immigration (restriction initiative)’²³⁰

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:

‘Art. 121a Control of immigration

¹Switzerland shall control the immigration of foreign nationals autonomously.

²The 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.

³The 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.

⁴No international agreements may be concluded that breach this Article.

⁵The law shall regulate the details.

(...)

Art. 197 Transitional provisions following the adoption of the Federal Constitution of 18 April 1999

(...)

11. Transitional provision to Art. 121a (Control of immigration)

¹International agreements that contradict Article 121a must be renegotiated and amended within three years of its adoption by the People and the Cantons.

²If the implementing legislation for Article 121a has not come into force within three years of its adoption by the People and the Cantons, the Federal Council shall issue temporary implementing provisions in the form of an ordinance.’

²²⁹ <<https://www.ejpd.admin.ch/ejpd/de/home/aktuell/mm.msg-id-78939.html>> (last visited on 02.08.2020).

²³⁰ Swiss Confederation, *supra* note 201.

The initiative against mass immigration, which was adopted on 9 February 2014, was required to be implemented within three years.²³¹ 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,²³² but it was withdrawn in 2018.²³³ The Swiss Federal Council is responsible for managing negotiations on the sectoral agreements.²³⁴ 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.²³⁵ 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 of quotas clearly violates the fundamental freedoms in the AFMP.²³⁶ 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.²³⁷

²³¹ Art. 197(11) of the BV.

²³² Swiss Confederation, *Bundeskanzlei: Eidgenössische Volksinitiative «Raus aus der Sackgasse! Verzicht auf die Wiedereinführung von Zuwanderungskontingen-ten» of 11 November 2015 (BBI 2015 8337)*.

²³³ Swiss Confederation, *Bundeskanzlei: Eidgenössische Volksinitiative «Raus aus der Sackgasse! Verzicht auf die Wiedereinführung von Zuwanderungskontingen-ten». Rückzug of 9 January 2018 (BBI 2018 215)*.

²³⁴ Art. 54 BV in conjunction with Art. 174 BV.

²³⁵ 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/geschaefft?AffairId=20153557>> (last visited on 28.06.2020).

²³⁶ 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.

²³⁷ Swiss Confederation, *Botschaft zur Volksinitiative «Gegen Masseneinwanderung» of 7 December 2012 (BBI 2013 291)*, p. 317.

On 7 July 2014, a proposal for deliberations about revising the AFMP was made to the EU.²³⁸ 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.²³⁹ During the consultation for the implementation of Article 121a BV, several proposals for the introduction of a safeguard clause were made.²⁴⁰ 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.²⁴¹ The most prominent safeguard clause has been proposed by the former State Secretary Ambühl (as an expert for the Canton of Ticino²⁴²). 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.²⁴³ While the Swiss Federal Council favoured negotiations with the EU, it publicly stated in early 2016 that it would introduce a safeguard clause unilaterally in the event

²³⁸ <<https://www.sem.admin.ch/sem/de/home/aktuell/news/2014/2014-07-07.html>> (last visited on 28.06.2020).

²³⁹ <<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>>.

²⁴⁰ 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.

²⁴¹ 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/Personenfreizuegigkeit_Arbeitsbeziehungen/Observatorium_Freizuegigkeitsabkommen.html> (last visited on 15.06.2020), p. 16 et seq.

²⁴² See the press conference for the safeguard clause: <<https://www.news.admin.ch/newsd/event/attachments/43242.pdf>> (last visited on 28.06.2020).

²⁴³ 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.

that the EU did not agree to an amendment of the AFMP. The particularities of a unilateral safeguard clause were however still unclear.²⁴⁴

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.²⁴⁵

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.²⁴⁶ This implementation was in principle approved by the EU but it is not entirely unproblematic.²⁴⁷

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’.

²⁴⁴ 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).

²⁴⁵ <https://www.sem.admin.ch/sem/de/home/aktuell/news/2017/ref_2017-12-081.html> (last visited on 28.06.2020).

²⁴⁶ 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.

²⁴⁷ 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.

This catalogue of aims may result in conflict. In such a scenario, there is at least a political obligation to give a reasoned opinion.²⁴⁸ A Swiss law professor has suggested that Article 54 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.²⁴⁹

This view shows that it 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.

2.3 Current institutional challenges

This Subchapter gives an overview how EU law is currently implemented in Switzerland. It then 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.²⁵⁰ 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

²⁴⁸ 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.

²⁴⁹ M. Oesch, 'Ein neues Fundament für die Europapolitik', *NZZ*, 23 July 2016.

²⁵⁰ 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).

the AFMP was not able to solve the relevant issues.²⁵¹ 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 orders²⁵²) is not sufficient to guarantee the effectiveness of EU law by Switzerland.²⁵³ Today, 23 Joint Committees exist in total for all the sectoral agreements (see the table in the Annex to this study in Chapter 13).²⁵⁴ The Swiss Federal Council established a new mandate for negotiations on 18 December 2013.²⁵⁵ It was emphasised more recently in 2017 that the institutional framework should be finalised as soon as possible.²⁵⁶ This 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.²⁵⁷ 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 Coronavirus²⁵⁸).²⁵⁹

²⁵¹ See, e.g. European Parliament, *supra* note 167.

²⁵² See Oesch, *supra* note 6, p. 40; Oesch & Speck, *supra* note 15, pp. 258 and 263.

²⁵³ 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.

²⁵⁴ 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).

²⁵⁵ <<https://www.eda.admin.ch/dea/de/home/verhandlungen-offene-themen/verhandlungen/institutionelle-fragen.html>> (last visited on 28.06.2020).

²⁵⁶ Council of the European Union, *supra* note 246, 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*.

²⁵⁷ Council of the European Union, *supra* note 11, para. 9.

²⁵⁸ <<https://www.ejpd.admin.ch/ejpd/de/home/aktuell/mm.msg-id-78939.html>> (last visited on 02.08.2020).

²⁵⁹ Tobler & Beglinger, *supra* note 188, question 137; see also note 201.

According to the abovementioned resolutions, the following four key points have to be addressed (for the conclusion of future market access agreements in particular²⁶⁰):

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.²⁶¹

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 1992.²⁶² 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 1988.²⁶³ Laws can nevertheless be enacted contrary to EU law. The so-called autonomous adaptation of EU (*autonomer Nachvollzug*) law is however extremely influential. A study shows that approxi-

²⁶⁰ 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).

²⁶¹ 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.

²⁶² 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.

²⁶³ 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 129, p. 127.

mately 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.²⁶⁴ 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.²⁶⁵ In three of the existing sectoral agreements, Switzerland already envisages the dynamic adaptation of EU law.²⁶⁶ 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 2010.²⁶⁷ The princi-

²⁶⁴ S. Jenni, 'Direkte und indirekte Europäisierung der schweizerischen Bundesgesetzgebung', LeGes 2013, No 2, p. 492.

²⁶⁵ Tobler & Beglinger, *supra* note 188, 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.

²⁶⁶ 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 114); Arts. 1(3) and 4 of the Swiss-EU Dublin Agreement (see for the full citation *supra* note 114).

²⁶⁷ 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.

ple applies for many products stemming from the EU and the EEA, which are allowed based on the country of origin principle.²⁶⁸ There is also a provision for products in Switzerland which is in line with the rules of an EU or an EEA EFTA State to prevent reverse discrimination.²⁶⁹ The EU did not however add a similar rule for Swiss products.²⁷⁰ Thus, some authors called it the *Cassis de Berne* principle.²⁷¹ It can be viewed as a further step in reaching homogeneity, rather than by simply checking that there is compatibility with EU law.²⁷² This is also called the 'Brussels effect'²⁷³, 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,

pdf.download.pdf/Bericht_Auswirkungen_THG_Revision.pdf> (last visited on 28.06.2020), p. 64 et seq.

²⁶⁸ Art. 16a para. 1 THG.

²⁶⁹ Art. 16b THG.

²⁷⁰ 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.

²⁷¹ T. Cottier & D. Herren, 'Das Äquivalenzprinzip im schweizerischen Aussenwirtschaftsrecht: von Cassis de Dijon zu Cassis de Berne', in A. Epiney & N. Gamenthaler (eds.), *Schweizerisches Jahrbuch für Europarecht 2009/2010 / Annuaire suisse de droit européen 2009/2010*, Zurich (2010), p. 275.

²⁷² See E. Kohler, *Le rôle du droit de l'Union européenne dans l'interprétation du droit suisse*, Diss. Berne, Berne (2015), p. 27.

²⁷³ 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.

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.²⁷⁴ Annexes II and III have been amended to update developments in secondary legislation, namely the additions of Regulation No 883/2004²⁷⁵ and the Professional Qualifications Directive. The process of updating the 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.²⁷⁶

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.²⁷⁷ 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 im-

²⁷⁴ See *infra* note 276.

²⁷⁵ *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.

²⁷⁶ A. Epiney, 'Vertraglicher «Umsetzungsdruck» und «autonomer Anpassungszwang» aus Brüssel', *LeGes* 2014, No 3, p. 392.

²⁷⁷ See Swiss Confederation, *supra* note 113; Swiss-EU Schengen Agreement (see for the full citation *supra* note 114); Swiss-EU Dublin Agreement (see for the full citation *supra* note 114).

plement the relevant *acquis communautaire* in Switzerland.²⁷⁸ 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 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/EEC²⁷⁹ by Directive 2017/853/EU on control of the acquisition and possession of weapons²⁸⁰ needed to be accepted, which was unsuccessfully opposed by rifle associations.²⁸¹

²⁷⁸ 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.

²⁷⁹ 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.

²⁸⁰ 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.

²⁸¹ 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).

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.²⁸² This tailor-made derogation was unsuccessfully contested before the CJEU by an action for annulment of the Czech Republic on grounds of discrimination.²⁸³

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.²⁸⁴ 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).

This leads onto the next issue. Given that sovereignty plays a major role in Switzerland,²⁸⁵ 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-shap-

²⁸² Oesch (2019), supra note 16, p. 16 et seq.

²⁸³ Case C-482/17, *Czech Republic v Parliament and Council*, ECLI:EU:C:2019:1035, para. 164 et seq.

²⁸⁴ Art. 7(2) indent 2 of the Swiss-EU Schengen Agreement (see for the full citation supra note 114).

²⁸⁵ See Oesch (2017), supra note 281, p. 649.

ing as opposed to decision-making²⁸⁶). 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*.²⁸⁷ 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.²⁸⁸ 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 fundamental structure of constitu-

²⁸⁶ Oesch, Zurich, *supra* note 10, para. 95 et seq.; M. Oesch & C. Neier, 'Staat und Gesetzgebung / Etat et législation – Die Comitologie im Unionsrecht und die Schweiz', in E. M. Belsler & B. Waldmann (eds.), *Mehr oder weniger Staat?: Festschrift für Peter Hänni zum 65. Geburtstag*, Berne (2015), p. 67.

²⁸⁷ See Arts. 5, 89(2) and 92(2) of the EEA Agreement, in respect of Art. 118 of the EEA Agreement.

²⁸⁸ Oesch & Neier, *supra* note 286, 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.

tional 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.²⁸⁹ 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.²⁹⁰ Switzerland also participates in other Committees as listed in the AFMP or in the Swiss-EU Dublin Agreement.²⁹¹ 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.²⁹²

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.²⁹³ 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

²⁸⁹ In this sense: Oesch (2019), supra note 16, p. 19; Oesch (2017), supra note 281, p. 646 et seq.

²⁹⁰ See Art. 14 para. 3 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

²⁹¹ 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 114).

²⁹² See A. Glaser & L. Langer, ‘Die Institutionalisierung der Bilateralen Verträge: Eine Herausforderung für die schweizerische Demokratie’, SRIEL (SZIER/RSDIE) 2013, p. 563 et seq.

²⁹³ See Art. 1 of the EEA Agreement.

shows that the Contracting Parties were aware of the parallel and dynamic developments mirrored to the internal market.²⁹⁴

Contrary to the static sectoral agreements with Switzerland (with the exception of three sectoral agreements mentioned supra in note 266), the evolution of the EEA acquis can be described as a dynamic incorporation or continuous updating of the agreement.²⁹⁵ 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.²⁹⁶

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*

²⁹⁴ K. Almestadt, ‘The Notion of ‘Opting Out’’, in C. Baudenbacher (ed.), *The Handbook of EEA Law*, Cham (2016), p. 86.

²⁹⁵ See Tobler (2016), supra note 182, p. 589; see further Tobler & Baur, supra note 265, p. 347 et seq.

²⁹⁶ Art. 102 EEA has been invoked twice but no part has been suspended so far: Oesch (2019), supra note 16, p. 25.

*International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH*²⁹⁷ concerning the exhaustion of international rights was followed in *L'Oréal*,²⁹⁸ overruling *Maglite*²⁹⁹ and notwithstanding the fact that the EEA does not include the same level of integration.³⁰⁰ 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 Directive³⁰¹. The compromise resulted in the EEA Joint Commission Decision³⁰², which included the adoption of the Union Citizenship Directive but added a reservation concerning citizens' rights. This rationale can also be seen in the case law concerning the Union Citizenship 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*,³⁰³ *Wahl*,³⁰⁴ *Gunnarson*³⁰⁵, *Jabbi*³⁰⁶ and *Camp-*

²⁹⁷ Case C-355/96, *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH*, ECLI:EU:C:1998:374.

²⁹⁸ 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.

²⁹⁹ Case E-2/97, *Mag Instrument Inc v California Trading Company Norway, Ulsteen*, EFTA Court Report 1997, p. 127 et seq.

³⁰⁰ C. Tobler, 'Dispute Resolution under the EEA Agreement', in C. Baudenbacher (ed.), *The Handbook of EEA Law*, Cham (2016), p. 197.

³⁰¹ Directive 2004/38/EC (see for the full citation supra note 194).

³⁰² *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.

³⁰³ Case E-4/11, *Arnulf Clauder*, EFTA Court Report 2011, p. 216 et seq., para. 34.

³⁰⁴ Case E-15/12, *Jan Anfinn Wahl v íslenska ríkið*, EFTA Court Report 2013, p. 537 et seq., para. 74 et seq.

³⁰⁵ Case E-26/13, *Íslenska ríkið v Atli Gunnarsson*, EFTA Court Report 2014, p. 256 et seq., para. 68.

³⁰⁶ 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.

*bell*³⁰⁷.³⁰⁸ Notably, the reasoning in *Jabbi* concerning the rights of non-economically active persons and their family members interprets the Union Citizenship Directive as applicable by analogy distinctly from the CJEU in *O. and B*³⁰⁹. 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 Union Citizenship Directive by analogy, even though the CJEU explicitly stated that that Directive does not apply in that situation.³¹⁰ 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).³¹¹

The EFTA Court has regularly ruled before the CJEU has in certain noteworthy cases.³¹² This is hardly surprising due to the fact that the EFTA Court only has

³⁰⁷ Case E-4/19, *Campbell v the Norwegian Government*, not yet published, para. 54 et seq.

³⁰⁸ 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.; C. Neier, *The right to come home – within or outside the scope of the EEA Agreement? of 2020*, <<https://www.efta-studies.org/post/the-right-to-come-home>> (last visited on 29.12.2020).

³⁰⁹ Case C-456/12, *O. and B.*, ECLI:EU:C:2014:135, para. 43.

³¹⁰ Case C-456/12, *O. and B.*, ECLI:EU:C:2014:135, para. 43.

³¹¹ Tobler, *supra* note 308, p. 503; Tobler (2018), *supra* note 308, p. 1448.

³¹² See for details: Baudenbacher, *supra* note 134, p. 13.

one language of procedure³¹³ and is considered a ‘mini court’³¹⁴ 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’³¹⁵. To show its close ties to the CJEU, its former President referred to it as its ‘sister court’.³¹⁶ 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 Iceland³¹⁷) and *Kellogg’s* (application of the precautionary principle).³¹⁸

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 of EEA law. It is important to note that the judicial dialogue works both ways.³¹⁹ 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 signa-

³¹³ Art. 25 para. 1 of the rules of procedure of the EFTA Court.

³¹⁴ 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).

³¹⁵ See Oesch & Speck, *supra* note 15, footnote 19 thereof.

³¹⁶ Baudenbacher, *supra* note 134, p. 10.

³¹⁷ Baudenbacher, *supra* note 170, p. 39 for further reference.

³¹⁸ 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.

³¹⁹ Baudenbacher, *supra* note 134, p. 25.

ture.³²⁰ Furthermore, the EFTA Court follows the rationale of EU law. It interprets the law in conformity with the principle of effectiveness (the *effet utile*).³²¹ 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.³²²

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 heterogenous) 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.³²³ 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.³²⁴ 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 2018.³²⁵

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, homoge-

³²⁰ See P. Hreinsson, 'General Principles', in C. Baudenbacher (ed.), *The Handbook of EEA Law*, Cham (2016), p. 351.

³²¹ Hreinsson, *supra* note 320, 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.

³²² See Case C-897/19, *Ruska Federacija*, ECLI:EU:C:2020:262 and Chapter 3.2.3 for a brief description of this case.

³²³ 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.

³²⁴ Council of the European Union, *supra* note 12, para. 32.

³²⁵ Oesch (2019), *supra* note 16, p. 24 et seq.

neity of both legal orders could have been achieved with through EU membership and access to the CJEU. EU membership 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.³²⁶ 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 judge³²⁷;
 - b. CJEU without or with a Swiss judge (although the latter is highly unrealistic³²⁸),³²⁹
 - 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-like³³⁰).

³²⁶ W. Hummer, 'Integrationspolitische Alternativen der Schweiz', EuZ 2012, p. 133 et seq.

³²⁷ 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.

³²⁸ 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-enforce-ment-and-dispute-resolution/oral/79626.html>> (last visited on 25.04.2019)> (last visited on 28.06.2020); Baudenbacher, supra note 327, p. 837.

³²⁹ See Glaser & Langer (2013), supra note 292, p. 579.

³³⁰ See further Kläser, Maastricht, supra note 9, p. 119 et seq.

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.³³¹

In 2012, the option of a new two-pillar structure was suggested in a letter from the Swiss President Widmer-Schlumpf to President Barroso.³³² This proposal is a result of a well-known legal study by Thürer. The study concluded that the negotiations should follow the bilateral path as closely as possible.³³³ The two-pillar structure (comparable to the EEA situation³³⁴) 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.³³⁵

The Swiss Federal Council (and the Swiss Federal Court³³⁶) favoured a Swiss supervisory body which was comparable to the Swiss Competition Commission (COMCO) but rejected an EFTA Court solution.³³⁷ That system would have resulted in a two-pillar structure. The EU pointedly dismissed the idea

³³¹ Swiss Confederation, *Bericht des Bundesrates über die Evaluation der schweizerischen Europapolitik of 28 June 2006* ('Markwälderbericht'; *BBl* 2010 7239); see further Baudenbacher, *supra* note 327, p. 834 et seq.

³³² <<http://www.nzz.ch/neue-ueberwachungsbehoerde-fuer-eu-vertraege-1.16630945>> (last visited on 28.06.2020).

³³³ 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.

³³⁴ See Baudenbacher, *supra* note 134, p. 587.

³³⁵ Thürer, *supra* note 333, p. 42.

³³⁶ Thürer, *supra* note 333.

³³⁷ Cottier et al., Berne, *supra* note 160, para. 993.

of a Swiss supervisory body in a letter of 21 December 2012.³³⁸ 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.³³⁹

Academics, politicians and think-tanks have proposed several similar alternatives to the existing system so far.³⁴⁰ There is also a 'non-paper' from 2013 by the former State Secretary Rossier and Ambassador O'Sullivan, which proposed the following three alternatives.³⁴¹

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

³³⁸ 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).

³³⁹ 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 182, 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.

³⁴⁰ 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).

³⁴¹ See Y. Rossier & R. 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.

The non-paper of 2013 also contained certain red lines which cannot be crossed, such as the concept of EU citizenship.³⁴² Based on the non-paper of 2013, Switzerland and the EU have been engaged in numerous rounds of negotiations since 22 May 2014.³⁴³ Major progress was only made after the implementation of the popular initiative against mass immigration on 6 April 2017.³⁴⁴ Since 2 March 2018, the preferred model of the Swiss Federal Council seems to include a dispute settlement mechanism.³⁴⁵ 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).³⁴⁶

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’³⁴⁷). This approach has been followed to resolve disputes relating to the Air Transport Agreement³⁴⁸ and in the recent Financial Support for External Borders and Visa Agreement.³⁴⁹ 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

³⁴² Cottier et al., Berne, supra note 160, para. 992.

³⁴³ Oesch & Speck, supra note 15, p. 259.

³⁴⁴ Swiss Confederation, supra note 184, p. 2 et seq.

³⁴⁵ Tobler & Beglinger, supra note 188, question 113; Baudenbacher, supra note 170, p. 3.

³⁴⁶ Tobler & Beglinger, supra note 188, 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).

³⁴⁷ See footnote 143.

³⁴⁸ 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.

³⁴⁹ 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.

opposed by the Joint Committee,³⁵⁰ 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.³⁵¹ 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.³⁵² 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.³⁵³ This was however one of the most controversial points of the current negotiations.³⁵⁴ 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.³⁵⁵

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 1/91³⁵⁶ and 1/92³⁵⁷ about the EFTA Court, the more recent Opinion 1/09³⁵⁸ about a European and Community Patents Court³⁵⁹, and Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection

³⁵⁰ See C. Baudenbacher, 'Schweiz-EU: Von der Unfähigkeit zu kontextuellem Denken', ELR 2015, No 6, p. 200.

³⁵¹ <<http://www.srf.ch/news/schweiz/maurer-glaubt-volk-im-kampf-gegen-fremde-richter-geeint>> (last visited on 25.06.2020).

³⁵² Tobler, *supra* note 300, p. 199.

³⁵³ <https://www.eda.admin.ch/content/dam/dea/de/documents/fs/11-FS-Institutionelle-Fragen_de.pdf> (last visited on 25.06.2020).

³⁵⁴ Oesch & Speck, *supra* note 15, p. 260.

³⁵⁵ Tobler & Beglinger, *supra* note 188, question 114.

³⁵⁶ Opinion of the Court 1/91, ECLI:EU:C:1991:490, para. 35 et seq.

³⁵⁷ Opinion of the Court 1/92, ECLI:EU:C:1992:189, para. 13 et seq.

³⁵⁸ Opinion of the Court 1/09, ECLI:EU:C:2011:123.

³⁵⁹ See Kläser, Maastricht, *supra* note 9, pp. 114–117.

of Human Rights and Fundamental Freedoms^{360,361}. In essence, the CJEU stated that it is essential to safeguard the autonomy of the EU legal order.³⁶² Any supranational body would (most likely) have to pass the scrutiny of the CJEU through an Opinion, according to Article 218(11) TFEU.³⁶³ 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,³⁶⁴ 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.³⁶⁵ 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.³⁶⁶

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.³⁶⁷ 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 independent legal orders and several Joint Committees for each sectoral agree-

³⁶⁰ Opinion of the Court 2/13, ECLI:EU:C:2014:2454, para. 183.

³⁶¹ Same opinion: Baudenbacher (2015), supra note 350, p. 202.

³⁶² 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.

³⁶³ See Baudenbacher (2015), supra note 350, p. 200.

³⁶⁴ Case C-284/16, *Slovak Republic v Achmea BV*, ECLI:EU:C:2018:158, para. 39 et seq.

³⁶⁵ Opinion of the Court 1/17, ECLI:EU:C:2019:341, para. 120 et seq.

³⁶⁶ See further B. Pirker, 'Zum Schiedsgericht im Institutionellen Abkommen', Jusletter 3 June 2019, para. 22 et seq.

³⁶⁷ Oesch & Speck, supra note 15, p. 261 for further references; Baudenbacher, supra note 327, p. 837 et seq.; see also D. Thürer, 'Europa und die Schweiz: Status quo und Potenziale einer Partnerschaft', SJZ 2012, p. 483 et seq.

ment.³⁶⁸ Shortly after, on 15 June 2012, it favoured a solution similar to the EFTA Structure (two-pillar structure³⁶⁹) with a national supervisory body and a specialised chamber of the Swiss Federal Court based on the study of Thürer³⁷⁰.³⁷¹ The idea was subsequently dismissed by the Commission in December 2012.³⁷² It was therefore proposed that the Commission should exercise that supervision.³⁷³ This idea was rejected by the Swiss Confederation.³⁷⁴

Today, the Swiss Federal Council favours a solution without supranational supervision.³⁷⁵ 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 agreements³⁷⁶; 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.³⁷⁷

³⁶⁸ <<http://www.news.admin.ch/message/index.html?lang=de&msg-id=44298>> (last visited on 25.06.2020).

³⁶⁹ 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).

³⁷⁰ 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.

³⁷¹ Cottier et al., Berne, supra note 160, para. 990 et seq.

³⁷² Cottier et al., Berne, supra note 160, para. 991.

³⁷³ Tobler, supra note 300, p. 205.

³⁷⁴ Tobler (2016), supra note 182, p. 586.

³⁷⁵ Tobler & Beglinger, supra note 188, question 18.

³⁷⁶ 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).

³⁷⁷ <https://www.eda.admin.ch/content/dam/dea/de/documents/studien/Auslegung-BA-bundesgericht_juni_11_de.pdf> (last visited on 25.06.2020).

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 agreements have been concluded³⁷⁸). 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.³⁷⁹ Since March 2018, the preferred model of the Swiss Federal Council seems to be found in a particular form of a dispute settlement mechanism.³⁸⁰ The EU accepted this form of dispute settlement mechanism resembling the Ukrainian model, with a ‘reference procedure’³⁸¹ to the CJEU.³⁸² 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).³⁸³

Three existing agreements of the *acquis suisse* provide for arbitration boards.³⁸⁴ Unfortunately, these three existing sectoral agreements share the

³⁷⁸ 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 188, question 5, who counted the considerable amount of more than 100 agreements.

³⁷⁹ See Hummer (2012), *supra* note 326, p. 131 et seq.

³⁸⁰ Tobler & Beglinger, *supra* note 188, question 113.

³⁸¹ Not in the sense of preliminary reference procedures in the EU: see Art. 267 TFEU.

³⁸² 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).

³⁸³ Tobler & Beglinger, *supra* note 188, question 117.

³⁸⁴ 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

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.³⁸⁵

Dispute settlement mechanisms are common in international agreements. The Ukrainian Association Agreement even involves the jurisdiction of the CJEU ('reference procedure' of the arbitration body).³⁸⁶ Besides the Ukrainian Association Agreement³⁸⁷, the Georgian Association Agreement³⁸⁸, the Moldovan Association Agreement³⁸⁹, 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),³⁹⁰ contain similar dispute settlement mechanisms.³⁹¹ More importantly, a similar mechanism exists for the EEA Agreement in its Article 111.

Economic Community and the Swiss Confederation on direct insurance other than life assurance.

³⁸⁵ See C. Tobler, 'Schiedsgerichte im bilateralen Recht?', SRIEL (SZIER/RSDIE) 2012, No 1, p. 3 et seq.; Glaser & Dörig, *supra* note 52, p. 456.

³⁸⁶ Art. 322 para. 2 of the Ukraine Association Agreement.

³⁸⁷ See Art. 306 et seq. of the Ukraine Association Agreement.

³⁸⁸ 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.

³⁸⁹ 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.

³⁹⁰ Tobler, *supra* note 308, p. 24; European Parliament, *supra* note 339.

³⁹¹ 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.

This idea was brought up by the Swiss foreign ministry, after the initial study of Thürer in 2011 (not published³⁹²) 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*.³⁹³ If every other option fails, the EEA Joint Committee could be addressed. This 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.³⁹⁴ The

³⁹² See for details Tobler (03.06.2013), *supra* note 15, para. 1 et seq.

³⁹³ Baudenbacher (2015), *supra* note 350, p. 198 et seq.

³⁹⁴ 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-bo>

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.³⁹⁵ The EU counterpart in Article 259 TFEU has also been used only sporadically.³⁹⁶ 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 Chapter 2.3.3),³⁹⁷ even if it is highly unlikely that the Contracting Parties will ever agree to bring a case before the CJEU.³⁹⁸

dies/parliamentary-committee/jpc-resolutions/27May2002AnnualReportFunctioningEEA2001.pdf> (last visited on 25.06.2020), para. 7.

³⁹⁵ Tobler, supra note 300, 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.

³⁹⁶ 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.

³⁹⁷ 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).

³⁹⁸ 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.

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.³⁹⁹ 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).⁴⁰⁰ The dispute settlement mechanism in the Brexit Withdrawal Agreement does not replace the existing rules of EU law (including procedures before the CJEU) during the transition phase, but it is used for the interpretation of other provisions of the Brexit Withdrawal Agreement.⁴⁰¹ This dispute mechanism also signifies how a future dispute settlement mechanism between the UK and the EU would have likely been drafted if it involved the interpretation of EU law.⁴⁰² As of 1 January 2021, the EU-UK Trade and Cooperation Agreement provisionally entered into force which foresees a dispute settlement mechanism but does not involve a referral to the Court of Justice.⁴⁰³

³⁹⁹ 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.

⁴⁰⁰ See Chapter 2.3.3.

⁴⁰¹ See Art. 127 of the Brexit Withdrawal Agreement.

⁴⁰² Tobler (17.12.2018), *supra* note 398, para. 46 et seq.

⁴⁰³ See *Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information*, OJ [2020] L444/2, 31.12.2020; Art. INST.9 et seq. of the EU-UK Trade and Cooperation Agreement (see for the full citation *supra* note 26).

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)⁴⁰⁴.⁴⁰⁵ On 15 January 2019, a public hearing of experts took place.⁴⁰⁶ 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 2019.⁴⁰⁷ The equivalence of the framework for the Swiss stock exchange expired on 30 June 2019,⁴⁰⁸ and is *de facto* connected to the negotiations for a new institutional framework.⁴⁰⁹

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 agree-

⁴⁰⁴ See Protocol I (2) first indent of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁰⁵ <<https://www.srf.ch/news/schweiz/rahmenabkommen-mit-der-eu-so-ein-abkommen-kann-man-so-nicht-unterzeichnen>> (last visited on 25.06.2020).

⁴⁰⁶ 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).

⁴⁰⁷ Council of the European Union, *supra* note 246, para. 5; see also European Parliament, *supra* note 256; Tobler & Beglinger, *supra* note 188, question 137.

⁴⁰⁸ See <http://europa.eu/rapid/press-release_IP-18-6801_en.htm> (last visited on 25.06.2020).

⁴⁰⁹ 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 188, question 141 et seq.

ment – in the case of (an unanticipated) conflict.⁴¹⁰ It would establish the overarching Agreement on the Free Movement of Persons ('AFMP'), the Air Transport Agreement⁴¹¹, the Agreement for the Carriage of Goods and Passengers by Rail and Road⁴¹², the Agreement between the European Community and the Swiss Confederation on trade in agricultural products⁴¹³ and the Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment⁴¹⁴.⁴¹⁵ It would however also apply for future market access agreements between Switzerland and the EU.⁴¹⁶

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.⁴¹⁷ 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.⁴¹⁸ Three sepa-

⁴¹⁰ 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.

⁴¹¹ Swiss-EU Air Transport Agreement (see for the full citation supra note 348).

⁴¹² *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.

⁴¹³ *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.

⁴¹⁴ Mutual Recognition Agreement (see for the full citation supra note 189).

⁴¹⁵ Art. 2 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴¹⁶ Art. 2 para. 1 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴¹⁷ Art. 1 para. 3 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴¹⁸ Art. 1 para. 1 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

rate 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.⁴¹⁹ 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).⁴²⁰ Interestingly enough, another option was found for very small third countries where the Commission is responsible for surveillance.⁴²¹

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

⁴¹⁹ Art. 19 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴²⁰ Art. 6 et seq. of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴²¹ See *supra* note 339.

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'.⁴²² 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.⁴²³

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.'⁴²⁴ 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'.⁴²⁵

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.

⁴²² Baudenbacher, *supra* note 170, p. 41.

⁴²³ 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 170, p. 6 et seq. and p. 40 et seq.

⁴²⁴ Baudenbacher (2012), *supra* note 15, p. 588.

⁴²⁵ See Pirker (03.06.2019), *supra* note 366, 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,⁴²⁶ 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.⁴²⁷ Similar to the Schengen and Dublin Agreements (see Chapter 2.3.1.4)⁴²⁸ or similar to the updating under the EEA agreement,⁴²⁹ Switzerland would have a means of decision-shaping for the updating of the *acquis*.⁴³⁰ 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 subsidies⁴³¹, the revised rules for the posting of workers (namely Directives 2014/67/EU⁴³² and 2018/957/EU⁴³³) and the Union Citizenship Directive⁴³⁴.

⁴²⁶ See Oesch (2019), *supra* note 16, p. 11.

⁴²⁷ Arts. 5 and 12 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴²⁸ See Tobler (2017), *supra* note 278, p. 214 et seq.

⁴²⁹ See Art. 99 et seq. of the EEA Agreement.

⁴³⁰ Art. 12 para. 4 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴³¹ Art. 8 et seq. of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴³² *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.

⁴³³ *Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, OJ [2018] L173/16, 09.07.2018.

⁴³⁴ 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

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 Union Citizenship Directive would be mandatory or at least *de facto* required by the EU as only parts of it are currently covered by the AFMP.⁴³⁵ Future implementations of EU law, notably changes brought by the Union Citizenship 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 cannot be amended by the respective Joint Committee (contrary to Annexes II and III to the AFMP).⁴³⁶

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.⁴³⁷ Every decision for an update could then be subject to a referendum in Switzerland.⁴³⁸ If there is no consensus, or a negative result from a referendum, the EU could take proportionate retaliation measures.⁴³⁹ 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

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.

⁴³⁵ See C. Tobler, *Switzerland-EU: Whereto with the draft institutional agreement? of 2020*, <<https://www.liechtenstein-institut.li/publikationen/tobler-christa-2020-switzerland-eu-where-to-draft-institutional-agreement-blog-efta-studiesorg>> (last visited on 29.12.2020); see further Baudenbacher, *supra* note 170, p. 38.

⁴³⁶ Art. 18 AFMP; see further Epiney (17.12.2018), *supra* note 410, para. 29 et seq.

⁴³⁷ Art. 14 para. 3 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴³⁸ Swiss Confederation, *supra* note 184, p. 6; see Arts. 140 and 141 BV; see further Swiss Confederation, *supra* note 235, 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).

⁴³⁹ See Swiss Confederation, *supra* note 184, Annex C.1.

(see Chapter 2.3.3.5).⁴⁴⁰ 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).⁴⁴¹

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 signature.⁴⁴² In addition, the explanatory report of the Swiss Government mistakenly only mentions the case law of the CJEU.⁴⁴³ 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

⁴⁴⁰ Swiss Confederation, supra note 184, p. 7.

⁴⁴¹ Same opinion: Oesch (2019), supra note 16.

⁴⁴² Art. 4 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁴³ Swiss Confederation, supra note 184, p. 7.

its predecessor in Article 16(2) AFMP.⁴⁴⁴ 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.⁴⁴⁵ 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.⁴⁴⁶

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 to avert jurisdiction shopping.⁴⁴⁷ 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.⁴⁴⁸ If the Joint Committee does not find a solution within three months, dispute settlement can be requested by

⁴⁴⁴ 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.

⁴⁴⁵ Art. 17 para. 1 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018; Swiss Confederation, *supra* note 184, p. 7 et seq.

⁴⁴⁶ Art. 17 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁴⁷ Art. 9 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018; see Swiss Confederation, *supra* note 184, p. 8.

⁴⁴⁸ Art. 10 para. 1 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

Switzerland or the EU.⁴⁴⁹ 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.⁴⁵⁰ 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’.⁴⁵¹ 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.⁴⁵² 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 author⁴⁵³ (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.⁴⁵⁴ Pirker notes that the exemption for financial services⁴⁵⁵ or the pos-

⁴⁴⁹ Art. 10 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁵⁰ See Art. 170 of the Brexit Withdrawal Agreement; see *supra* note 384; Chapter 2.3.2.3.

⁴⁵¹ Loo, Leiden, *supra* note 339, p. 337 et seq.; Baudenbacher, *supra* note 170, p. 42.

⁴⁵² See Tobler (17.12.2018), *supra* note 398, para. 27.

⁴⁵³ See e.g. C. Baudenbacher, ‘Rechtsprechung: Rechtssicherheit als Standortfaktor’, in K. Gentinetta & G. Kohler (eds.), *Souveränität im Härtefall: Selbstbestimmung unter neuen Vorzeichen*, Zurich (2010), p. 272 et seq.

⁴⁵⁴ Art. 10 para. 3 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁵⁵ See Art. 22(3)(ii) of Annex I to the AFMP.

sibility to introduce quotas⁴⁵⁶ would qualify as provisions that do not contain concepts of EU law.⁴⁵⁷ Unlike the Withdrawal Agreement for Brexit,⁴⁵⁸ 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).⁴⁵⁹ With regard to the procedural rules, Switzerland is granted the same rights as a Member State before the CJEU.⁴⁶⁰

2.3.3.5.1 *Acte clair doctrine*

According to some scholars, Article 10(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 law⁴⁶¹.⁴⁶² 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.⁴⁶³ While the explanatory report of the Swiss Government also supports this reading (even if they are technically not considered *travaux préparatoires*),⁴⁶⁴ Baudenbacher

⁴⁵⁶ Art. 10(4) AFMP.

⁴⁵⁷ Pirker (03.06.2019), supra note 366, para. 13.

⁴⁵⁸ See Art. 174 para. 1 of the Brexit Withdrawal Agreement.

⁴⁵⁹ Same opinion: Tobler (17.12.2018), supra note 398, para. 24; Epiney (17.12.2018), supra note 410, para. 46.

⁴⁶⁰ Art. 10 para. 4 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁶¹ See Case C-283/81, *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:335.

⁴⁶² Tobler (17.12.2018), supra note 398, para. 24; Cottier (2019), supra note 17, p. 352.

⁴⁶³ Other opinion: S. Breitenmoser, 'Welche Ergänzungen für das Rahmenabkommen notwendig sind – und keine Neuverhandlungen benötigen', *NZZ*, 31 January 2019.

⁴⁶⁴ Swiss Confederation, supra note 184, 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.

sharply disagrees with the proposed assessment of the 'reference procedure'. In response to the *acte clair* doctrine,⁴⁶⁵ he submits that the CJEU has interpreted this exception narrowly in the past.⁴⁶⁶ Further, he argues that similar arbitration clauses with third countries, such as in the Ukraine Association 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.⁴⁶⁷

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.⁴⁶⁸ Oesch also agrees that the CJEU will rarely come into play.⁴⁶⁹ This (speculative) assessment seems perfectly rea-

⁴⁶⁵ See supra note 461.

⁴⁶⁶ Baudenbacher, supra note 170, p. 32.

⁴⁶⁷ Baudenbacher, supra note 170, 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).

⁴⁶⁸ Epiney (17.12.2018), supra note 410, para. 18.

⁴⁶⁹ 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).

sonable 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).⁴⁷⁰ The proportionality of this measure can be challenged before the Joint Committee and subsequently before the arbitration body.⁴⁷¹ 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.⁴⁷² 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.⁴⁷³ 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,⁴⁷⁴ unless one argued that ‘proportionality’ is a matter of EU law. A comparison with the internal market case law (preliminary reference procedures under Arti-

⁴⁷⁰ Art. 10 para. 6 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁷¹ Art. 10 para. 7 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁷² 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).

⁴⁷³ Swiss Confederation, *supra* note 184, p. 3. and Annexes C.1 and C.2.

⁴⁷⁴ Same opinion: Tobler & Beglinger, *supra* note 188, question 121.

cle 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).⁴⁷⁵

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.⁴⁷⁶ The notification to initiate an arbitration procedure may involve a statement as to whether the case should be referred to the CJEU.⁴⁷⁷ The arbitration body consists of three arbitrators, and five if requested by one of the Contracting Parties.⁴⁷⁸ Each 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.⁴⁷⁹ The horizontal Joint Committee will publish a list of recommended arbitrators.⁴⁸⁰ 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.⁴⁸¹ 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

⁴⁷⁵ 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.

⁴⁷⁶ Art. I.1 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁷⁷ Art. I.4 para. 4 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁷⁸ Art. II.1 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

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

⁴⁸⁰ Art. II.2 para. 3 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁸¹ Baudenbacher, *supra* note 170, p. 26 et seq.

CJEU.⁴⁸² 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.⁴⁸³

The arbitration body decides whether it is competent.⁴⁸⁴ 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.⁴⁸⁵ The procedure is suspended during a referral to the CJEU.⁴⁸⁶ 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.⁴⁸⁷ The arbitration body may not grant interim measures.⁴⁸⁸ Its decision-making is based on the majority of the votes if a unanimous decision cannot be reached.⁴⁸⁹ The decision is published.⁴⁹⁰

⁴⁸² Baudenbacher, *supra* note 170, p. 28 et seq.

⁴⁸³ See C. Baudenbacher, *Judicial independence: Memoirs of a European Judge*, Cham (2018), p. 45 et seq.

⁴⁸⁴ Art. III.6 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁸⁵ Art. III.9 para. 2 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁸⁶ Art. III.9 para. 2 sentence 2 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁸⁷ Art. III.9 para. 3 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁸⁸ Art. III.10 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁸⁹ Art. IV.1 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁴⁹⁰ Art. IV.2 para. 4 of Protocol III to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

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.⁴⁹¹

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 after the expiry period provided therein (i.e. six months for the five market access agreements currently covered⁴⁹²). The other two agreements of the Bilaterals I package (public procurement as well as scientific and technological cooperation) would then also be terminated due to the Guillotine clause in the agreements in Bilaterals I.⁴⁹³ The Swiss government is however of a different opinion. According to the Swiss government, the termination of the Draft Institutional Framework Agreement would not trigger the Guillotine clause in the agreements in Bilaterals I because the covered market access agreements would only cease to apply and would not be terminated.⁴⁹⁴

⁴⁹¹ See e.g. Art. 25(3) and (4) AFMP.

⁴⁹² See. e.g. Art. 25(4) AFMP.

⁴⁹³ 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.

⁴⁹⁴ Swiss Confederation, *supra* note 184, p. 15 ad Article 22 and Swiss Confederation, *Fragen und Antworten im Rahmen der Konsultationen des Bundesrates zum institutionellen Abkommen Schweiz-EU of June 2019*, <https://www.eda.admin.ch/dam/dea/de/documents/bericht_konsultationen_insta/Fragen-und-Antworten-der-Konsultationen_de.pdf> (last visited on 02.01.2021), question 59.

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.⁴⁹⁵ Even if there are similarities, the suspension of an agreement is however distinct from a termination 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.⁴⁹⁶ It should further be mentioned that even if the AFMP is terminated, acquired rights under the AFMP are protected.⁴⁹⁷

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

⁴⁹⁵ Ambühl & Scherer (04.02.2019), *supra* note 493, para. 14; T. Gafafer, ‘Die ewige Guillotine: Die neue Klausel im EU-Rahmenvertrag ruft Kritik hervor’, *NZZ*, 26 October 2020, p. 7.

⁴⁹⁶ See for possible measures that States can use for breaches of international law: Aust, Cambridge, *supra* note 70, p. 391 et seq.

⁴⁹⁷ See Art. 23 AFMP and Chapter 6.7.3.

accept for many Swiss people, as it crosses some of the predefined red lines (without the classic divide between right and left-wing politicians⁴⁹⁸). 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 Union Citizenship 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'.⁴⁹⁹ 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 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 interpre-

⁴⁹⁸ See D. Friedli, 'Zurück an den Anfang', *NZZ am Sonntag*, 27 September 2020, p. 13.

⁴⁹⁹ Baudenbacher, *supra* note 170, 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).

tation 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 cer-

tainty 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).⁵⁰⁰ The Contracting Parties do however have the power to agree on a special meaning of a term (Article 31(4) VCLT).⁵⁰¹ 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),⁵⁰² it is still applicable to the EU because it is a mere codification of customary international law (see Article 3(b) VCLT).⁵⁰³

Under EU law, there three forms of international agreements, specifically association agreements, cooperation agreements and free trade agreements.⁵⁰⁴ 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.⁵⁰⁵ The CJEU's rulings in the area of association agreements are, however, ambiguous.⁵⁰⁶ In the doctrine, three categories of agreements can be distinguished depending on the integration level: The first

⁵⁰⁰ *Vienna Convention on the Law of Treaties (VCLT; Wiener Übereinkommen über das Recht der Verträge)* of 23.05.1969, SR 0.111.

⁵⁰¹ See Case C-581/17, *Martin Wächter 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.

⁵⁰² Same Opinion: A. Epiney, 'Zur Bedeutung der Rechtsprechung des EuGH für Anwendung und Auslegung des Personenfreizügigkeitsabkommens', ZBJV 2005, p. 7 and footnote 13 thereof.

⁵⁰³ 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.

⁵⁰⁴ Ott (2015), supra note 444, p. 7.

⁵⁰⁵ See Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400 and Tobler (2017), supra note 278, 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.

⁵⁰⁶ See the following Chapters 3.2.1, 3.2.2, 3.2.3, 3.3.4 and 3.4.1.

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 contains the association agreements of candidate countries, such as Macedonia,⁵⁰⁷ and the last category is comprised of agreements with the African Caribbean and Pacific States (ACP States).⁵⁰⁸ 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.⁵⁰⁹

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.⁵¹⁰ The AFMP between Switzerland, the EU

⁵⁰⁷ *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.

⁵⁰⁸ D. Boos, 'Art. 217 AEUV', in C. O. Lenz & K.-D. Borchardt (eds.), *EU-Verträge Kommentar: EUV, AEUV, GRCh*, Köln (2013), para. 8.

⁵⁰⁹ 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.

⁵¹⁰ 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.

Member States, and the EU is a mixed agreement.⁵¹¹ 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.⁵¹²

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).⁵¹³ The parties invoked the similarly worded provisions of Articles 14 and 23 of the Association Agreement with Portugal⁵¹⁴ to prevent the other party from relying on their intellectual property rights (parallel imports).⁵¹⁵ 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.⁵¹⁶ 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.⁵¹⁷

⁵¹¹ Oesch, Berne, supra note 510, para. 788 *in fine*.

⁵¹² 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, Lesoochránárske zoskupenie VLK*, ECLI:EU:C:2010:436, para. 43 et seq.

⁵¹³ Case 270/80, *Polydor*, ECLI:EU:C:1982:43, para. 14.

⁵¹⁴ *Agreement between the European Economic Community and the Portuguese Republic*, OJ [1972] L301/165 31.12.1972.

⁵¹⁵ Case 270/80, *Polydor*, ECLI:EU:C:1982:43, para. 5.

⁵¹⁶ Case 270/80, *Polydor*, ECLI:EU:C:1982:43, paras. 15–17.

⁵¹⁷ Case C-312/91, *Metalsa*, ECLI:EU:C:1993:279, para. 11.

In this context, the Commission stated in *Polydor* that the doctrine of direct effect is unique to EU law.⁵¹⁸ International agreements are however considered part of *EU law*. Certain provisions therefore have direct effect in the EU if they are sufficiently precise.⁵¹⁹ 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.⁵²⁰

According to established CJEU case-law, non-discrimination provisions usually have direct effect in cooperation and association agreements (even without a homogeneity rule).⁵²¹ 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 TFEU⁵²² (see further *infra* note 882).⁵²³

⁵¹⁸ Case 270/80, *Polydor*, ECLI:EU:C:1982:43.

⁵¹⁹ 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.

⁵²⁰ Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, para. 14.

⁵²¹ 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 444, p. 23 et seq.

⁵²² 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 882 or noted the similarity between Art. 2 AFMP and Art. 12 EC: BGer 2C_319/2009 of 26.01.2010, para. 12.

⁵²³ 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.

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.⁵²⁴

The earlier case *Pabst and Richarz* concerned the Association Agreement between the EEC and Greece ('Association Agreement with Greece')⁵²⁵. 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.⁵²⁶ The national court was therefore also asking whether this outcome had an impact for the identical provision in the Association Agreement with Greece.⁵²⁷ The CJEU then stated why this provision has the same meaning, despite its previous restrictive rulings in *Polydor*.⁵²⁸ First, the provision has the same 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.⁵²⁹

The later case *Legros* dealt with the Agreement between the EEC and Sweden ('Association Agreement with Sweden')⁵³⁰, 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).⁵³¹ The Court concluded that, according to its settled case law, the measure at hand did not constitute internal tax-

⁵²⁴ 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.

⁵²⁵ *Agreement establishing an Association between the European Economic Community and Greece*, OJ [1963] L26/294, 18.02.1963.

⁵²⁶ Case 17/81, *Pabst und Richarz KG v Hauptzollamt Oldenburg*, ECLI:EU:C:1982:129, para. 24.

⁵²⁷ Case 17/81, *Pabst und Richarz KG v Hauptzollamt Oldenburg*, ECLI:EU:C:1982:129, para. 15.

⁵²⁸ Case 270/80, *Polydor*, ECLI:EU:C:1982:43.

⁵²⁹ Case 17/81, *Pabst und Richarz KG v Hauptzollamt Oldenburg*, ECLI:EU:C:1982:129, para. 26 et seq.

⁵³⁰ *Agreement between the European Economic Community and the Kingdom of Sweden*, OJ [1972] L300/97, 31.12.1972.

⁵³¹ Case C-163/90, *Legros*, ECLI:EU:C:1992:326, paras. 10.

tion 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).⁵³² 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.⁵³³ 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.⁵³⁴ In contrast, Advocate General Pergola argues, at least with regard to the Association Agreement with Turkey (the 'Ankara Agreement')⁵³⁵, that it should not be interpreted differently due to the possible future accession of Turkey. He agrees however, in conformity with the *Polydor* principle, that it is not the mere wording but the context that is decisive.⁵³⁶ While it is true that the CJEU has repeatedly referred to

⁵³² Case C-163/90, *Legros*, ECLI:EU:C:1992:326, paras. 11–13.

⁵³³ Case C-163/90, *Legros*, ECLI:EU:C:1992:326, paras. 23–26.

⁵³⁴ Tobler, *supra* note 7, p. 102 for further references; Bieber, *supra* note 509, p. 12 et seq.

⁵³⁵ Ankara Agreement (see for the full citation *supra* note 53).

⁵³⁶ *Opinion of Advocate General La Pergola in Case C-262/96, Sürül*, ECLI:EU:C:1998:55, para. 10.

the aim of the Ankara Agreement,⁵³⁷ the CJEU has also stated that it will treat future accessions differently on certain occasions.⁵³⁸

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.⁵³⁹ Tobler already predicted in 2006, in light of the case *Fidium Finanz*⁵⁴⁰, that the CJEU would return to its *Polydor* case law for the bilateral agreements between Switzerland and the EU (the 'Bilaterals').⁵⁴¹ 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.⁵⁴² 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*,⁵⁴³ which can also be explained by the rather straightforward questions that the referring court submitted.⁵⁴⁴ 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

⁵³⁷ Case 270/80, *Polydor*, ECLI:EU:C:1982:43, para. 16.

⁵³⁸ 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.

⁵³⁹ L. M. Baudenbacher, 'Das Personenfreizügigkeitsabkommen EU-Schweiz ist doch kein Integrationsvertrag', ELR 2010, No 2, p. 37.

⁵⁴⁰ Case C-452/04, *Fidium Finanz*, ECLI:EU:C:2006:631.

⁵⁴¹ C. Tobler, 'Die Fidium Finanz-Entscheidung des EuGH: Ein Vorbote der Luxemburger Rechtsprechung zum bilateralen Recht?', SRIEL (SZIER/RSDIE) 2006, pp. 397–401.

⁵⁴² 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. Gammethaler (eds.), *Schweizerisches Jahrbuch für Europarecht 2009/2010 / Annuaire suisse de droit européen 2009/2010*, Zurich (2010), p. 369 et seq.

⁵⁴³ Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, ECLI:EU:C:2009:697, para. 29.

⁵⁴⁴ Tobler, supra note 542, p. 381 et seq.

CJEU, even though it was unnecessary.⁵⁴⁵ The Swiss Government argued 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.⁵⁴⁶

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.⁵⁴⁷ 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.⁵⁴⁸

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* case⁵⁴⁹).⁵⁵⁰ 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* principle⁵⁵¹).

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*, concern-

⁵⁴⁵ Tobler, supra note 542, p. 379.

⁵⁴⁶ Swiss Confederation, supra note 184, p. 7 et seq.

⁵⁴⁷ See Tobler, supra note 542, p. 380 et seq. for further references.

⁵⁴⁸ *Opinion of Advocate General Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 66.

⁵⁴⁹ See BGE 105 II 49.

⁵⁵⁰ Baudenbacher (2012), supra note 15, p. 530 et seq.; Baudenbacher, supra note 134, 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.

⁵⁵¹ Tobler (2018), supra note 308, p. 1448.

ing the EEA Agreement and freedom of movement for workers.⁵⁵² The CJEU in that case highlighted that the case was similar to an earlier ruling, *Wählergruppe Gemeinsam*,⁵⁵³ and that there was nothing to prevent making an *analogy* between the non-discrimination provisions in the Ankara Agreement, the Poland Agreement,⁵⁵⁴ 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.⁵⁵⁵ 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.⁵⁵⁶ 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.⁵⁵⁷

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*⁵⁵⁸ 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

⁵⁵² Case C-465/01, *Commission v Austria*, ECLI:EU:C:2004:530.

⁵⁵³ See Case C-171/01, *Wählergruppe Gemeinsam*, ECLI:EU:C:2003:260.

⁵⁵⁴ *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.

⁵⁵⁵ Case C-465/01, *Commission v Austria*, ECLI:EU:C:2004:530, paras. 47 and 52 et seq.

⁵⁵⁶ Case C-465/01, *Commission v Austria*, ECLI:EU:C:2004:530, paras. 43 and 51.

⁵⁵⁷ Case C-465/01, *Commission v Austria*, ECLI:EU:C:2004:530, para. 53.

⁵⁵⁸ Case C-182/15, *Petruhhin*, ECLI:EU:C:2016:630.

Member States.⁵⁵⁹ 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.⁵⁶⁰ 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.

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'⁵⁶¹ 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 (...).'⁵⁶²

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.⁵⁶³ The Preamble in recital one and two states:

⁵⁵⁹ 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-free-dom-of-movement-by-magnus-schmauch/>> (last visited on 25.06.2020).

⁵⁶⁰ Case C-897/19, *Ruska Federacija*, ECLI:EU:C:2020:262, para. 4.

⁵⁶¹ 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 505, p. 100 et seq.

⁵⁶² Art. 2(1) of the Ankara Agreement.

⁵⁶³ See further Tezcan, Leiden, supra note 505, pp. 43 et seq. and 56; Eisele, Oosterwijk, supra note 523, p. 186 et seq.

‘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 state⁵⁶⁴), the CJEU has interpreted the Ankara Agreement, the Additional Protocol and the Decisions in a similar way to its internal market case law.⁵⁶⁵ 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.

In 1970, the Additional Protocol (AP) was agreed upon as a part of the transitional stage.⁵⁶⁶ 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 3/80.⁵⁶⁷

That being said about association agreements, it is remarkable to note that Decision No 1/80⁵⁶⁸ 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 mar-

⁵⁶⁴ Tezcan, Leiden, *supra* note 505, p. 38 and footnote 151 as opposed to association committees which are consisting of Commission officials senior civil servants of the associate state.

⁵⁶⁵ See e.g. Case C-171/01, *Wählergruppe Gemeinsam*, ECLI:EU:C:2003:260.

⁵⁶⁶ *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.

⁵⁶⁷ See Eisele, Oisterwijk, *supra* note 523, p. 187 et seq. and p. 246 et seq.

⁵⁶⁸ *Decision No 1/80 of the Association Council on the development of the Association of 19.09.1980*, not published.

ket provisions.⁵⁶⁹ Furthermore, the CJEU acknowledged that many provisions in Decision No 1/80 are self-executing and can be applied directly.⁵⁷⁰ Article 12 of the AP (free movement of workers) was held not to have direct effect,⁵⁷¹ 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.⁵⁷² 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).⁵⁷³ 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.⁵⁷⁴

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

⁵⁶⁹ E.g. Case C-171/01, *Wählergruppe Gemeinsam*, ECLI:EU:C:2003:260.

⁵⁷⁰ E.g. Case C-36/96, *Günaydin*, ECLI:EU:C:1997:445, para. 24.

⁵⁷¹ Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, para. 25.

⁵⁷² Case C-325/05, *Derin*, ECLI:EU:C:2007:442, paras. 37 and 59.

⁵⁷³ Case C-262/96, *Sürül*, ECLI:EU:C:1999:228, para. 64.

⁵⁷⁴ Case C-228/06, *Soysal and Savatli*, ECLI:EU:C:2009:101.

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.⁵⁷⁵ 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).⁵⁷⁶ 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.⁵⁷⁷ 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 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.⁵⁷⁸

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 in-

⁵⁷⁵ Case C-325/05, *Derin*, ECLI:EU:C:2007:442, para. 48.

⁵⁷⁶ Case C-325/05, *Derin*, ECLI:EU:C:2007:442, para. 54.

⁵⁷⁷ Case C-325/05, *Derin*, ECLI:EU:C:2007:442, para. 58 et seq.

⁵⁷⁸ Case C-171/01, *Wählergruppe Gemeinsam*, ECLI:EU:C:2003:260, paras. 54 and 94.

cluding *Bozkurt, Pehlivan, Hakan Er, Genc, Toprak, Kurz, Ertanir, Sahin* and *Ergat*.⁵⁷⁹ In addition, 'worker' in Article 6(1) of Decision No 1/80 was held as having the same meaning as in Article 45 TFEU.⁵⁸⁰ In other comparisons, imprisonment does not suffice for expulsion, but there needs to be a risk to public policy, public security or health,⁵⁸¹ and abuse of rights is definitely excluded, but interpreted very narrowly.⁵⁸²

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'.⁵⁸³ Nevertheless, the conditions of Article 6 of Decision No 1/80 still have to be fulfilled.⁵⁸⁴ 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.⁵⁸⁵ Decision No 1/80 even has horizontal effect in some cases.⁵⁸⁶

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 difficult issue, as Turkish nationals have to be employed for four years before the job market is fully open to them, or wait five

⁵⁷⁹ 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.

⁵⁸⁰ Case C-14/09, *Hava Genc v Land Berlin*, ECLI:EU:C:2010:57, paras. 18–19; see further Eisele, Oisterwijk, *supra* note 523, p. 247 et seq.

⁵⁸¹ 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 505, p. 69 et seq.

⁵⁸² Case C-285/95, *Kol v Land Berlin*, ECLI:EU:C:1997:280.

⁵⁸³ Case C-1/97, *Birden*, ECLI:EU:C:1998:568, para. 69.

⁵⁸⁴ Case C-4/05, *Güzeli*, ECLI:EU:C:2006:670.

⁵⁸⁵ Case C-171/95, *Tetik v Land Berlin*, ECLI:EU:C:1997:31.

⁵⁸⁶ Case C-152/08, *Real Sociedad de Fútbol and Kahveci*, ECLI:EU:C:2008:450, paras. 28–30.

years to gain the preferable long-term residence ('LTR') status.⁵⁸⁷ 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'.⁵⁸⁸

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.⁵⁸⁹ Despite the fact that the Association Council⁵⁹⁰ has not issued a decision⁵⁹¹ 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.⁵⁹² Only the provisions concerning social security coordination lack direct effect due to their technicality.⁵⁹³ 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

⁵⁸⁷ 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.

⁵⁸⁸ See Eisele, Oisterwijk, *supra* note 523, p. 188.

⁵⁸⁹ *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.

⁵⁹⁰ 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.

⁵⁹¹ 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)*.

⁵⁹² Case C-485/07, *Akdas*, ECLI:EU:C:2011:346, para. 67.

⁵⁹³ Case C-485/07, *Akdas*, ECLI:EU:C:2011:346, para. 70.

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 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 in Article 13 of Decision No 1/80 (which forbids the introduction of new restrictions of the exercise of the free movement of workers) forbids any form of 'restriction',⁵⁹⁴ it applied the logic of the internal market case law to the standstill clauses.^{595, 596} In the cases *Demir* and *Dogan*, it held that violations of the standstill clause can be justified by overriding reasons in the public interest.⁵⁹⁷ In addition, many provisions of the Ankara Agreement lack direct effect.⁵⁹⁸ It also denied the protection of those receiving services under the Ankara Agreement in the case

⁵⁹⁴ 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 505, p. 77 et seq.

⁵⁹⁵ There are two standstill clauses in Art. 13 of Decision No 1/80 and 41 para. 1 of the Additional Protocol.

⁵⁹⁶ See Tezcan, Leiden, supra note 505, p. 85 et seq.

⁵⁹⁷ 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.

⁵⁹⁸ Eisele, Oisterwijk, supra note 523, p. 188 for further references.

Demirkan.⁵⁹⁹ The CJEU definitely applied the logic of the *Polydor* principle in the cases *Ziebell*⁶⁰⁰ and *Demirkan*^{601, 602}. 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.⁶⁰³ 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.⁶⁰⁴ It was also titled as a surprise considering the earlier case law of the CJEU.⁶⁰⁵ 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.⁶⁰⁶

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

⁵⁹⁹ 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.

⁶⁰⁰ Case C-371/08, *Nural Ziebell v Land Baden-Württemberg*, ECLI:EU:C:2011:809, para. 61.

⁶⁰¹ Case C-221/11, *Leyla Ecem Demirkan v Germany*, ECLI:EU:C:2013:583, para. 44.

⁶⁰² Same opinion: Tobler, *supra* note 7, p. 112 et seq.; Eisele, Oisterwijk, *supra* note 523; p. 372.

⁶⁰³ Case C-221/11, *Leyla Ecem Demirkan v Germany*, ECLI:EU:C:2013:583, para. 44.

⁶⁰⁴ Eisele, Oisterwijk, *supra* note 523, p. 261.

⁶⁰⁵ Tezcan, Leiden, *supra* note 505, p. 70.

⁶⁰⁶ Ott (2015), *supra* note 444, p. 28.

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.⁶⁰⁷ 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.⁶⁰⁸ The CJEU upheld this decision.⁶⁰⁹ 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 CJEU.⁶¹⁰ It can be seen as a return to the *Polydor* case law.⁶¹¹ 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.⁶¹²

⁶⁰⁷ *Opinion of Advocate General Jääskinen in Case C-547/10 P, Switzerland v Commission*, ECLI:EU:C:2012:565, para. 36.

⁶⁰⁸ See Case T-319/05, *Switzerland v Commission*, ECLI:EU:T:2010:367.

⁶⁰⁹ Case C-547/10 P, *Switzerland v Commission*, ECLI:EU:C:2013:139.

⁶¹⁰ 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 182, 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.

⁶¹¹ L. M. Baudenbacher, 'EuGH überträgt die Polydor-Rechtsprechung auch auf das Luftverkehrsabkommen', ELR 2015, No 5, p. 181.

⁶¹² Kläser, Maastricht, supra note 9, p. 107.

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).⁶¹³ 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.⁶¹⁴ 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.'⁶¹⁵

The CJEU openly acknowledged the application of Article 16(2) AFMP in *Engel and Graf*.⁶¹⁶ 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.⁶¹⁷ In *Ettwein*, the Advocate General only analysed the case law prior to the reference, because only that jurisprudence was

⁶¹³ Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, paras. 41–42.

⁶¹⁴ 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.

⁶¹⁵ Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, ECLI:EU:C:2009:697, para. 42.

⁶¹⁶ Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 26.

⁶¹⁷ M. Sunde, *Freizügigkeitsabkommen und Steuerrecht: Auslegung im Spannungsfeld von nationalem Recht, Unionsrecht und Völkerrecht*, Diss. Munich (2017), Münster (2018), p. 49 et seq.

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.⁶¹⁸ This reasoning was not followed by the CJEU.⁶¹⁹ 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.⁶²⁰

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).⁶²¹ 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).⁶²²

3.4.2 Applicability of EU law in Switzerland

Public international law is directly part of the Swiss legal order (monistic State).⁶²³ 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.⁶²⁴ It is still not entirely clear whether Article 2 AFMP can be invoked directly or only in conjunction with another

⁶¹⁸ *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.

⁶¹⁹ Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

⁶²⁰ Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39.

⁶²¹ Case C-247/09, *Xhymshiti*, ECLI:EU:C:2010:698, para. 31; Case C-257/10, *Bergström*, ECLI:EU:C:2011:839, para. 31.

⁶²² Case C-656/11, *United Kingdom v Council*, ECLI:EU:C:2014:97, para. 58.

⁶²³ Aust, Cambridge, *supra* note 70, p. 12.

⁶²⁴ BVGer B-5945/2018 of 14.01.2019, paras. 5.3 and 5.4.

article of the AFMP (see Chapters 4.4.2 and 6.2.2).⁶²⁵ Notably, the case *Hengartner and Gasser* is in favour of the latter interpretation.⁶²⁶

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').⁶²⁷ 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'⁶²⁸). This had already been decided in 2012 by the first chamber for social security.⁶²⁹ 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.⁶³⁰ Interestingly enough, the Swiss Federal Court answered this question willingly in an *obiter dictum*.⁶³¹ This step itself speaks volumes because the hierarchy of norms could have been left unaddressed based on the reasoning of the Swiss Federal

⁶²⁵ See Tobler & Beglinger, Zurich, *supra* note 594, para. 186 for further references to the case law; see also Delli, Basel, *supra* note 67, p. 24 et seq.

⁶²⁶ Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 39.

⁶²⁷ 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)*.

⁶²⁸ BGE 125 II 417, para. 4.d.

⁶²⁹ BGE 133 V 367 (= Pra 2008 No 71), paras. 11.4–11.6.

⁶³⁰ K. Fontana, 'Das Bundesgericht und die Personenfreizügigkeit', *NZZ*, 26 November 2015.

⁶³¹ BGE 142 II 35, para. 3.2.

Court.⁶³² The Swiss Federal Court however noted that (according to the aforementioned leading case⁶³³) a law violating the AFMP would not be applied (application of the PKK practice).⁶³⁴ The Swiss Federal Court in essence argued that Article 121a BV is not directly applicable and is in need of implementation.⁶³⁵ 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.⁶³⁶

In the EU, international agreements form part of EU law without any further need for incorporation if they contain a clear and precise obligation.⁶³⁷ It is accepted that provisions can be directly applied in the EU Member States – for example provisions of the EEA Agreement.⁶³⁸ Thus, they also form part of the hierarchy of EU law. They prevail over secondary law but not over primary law.⁶³⁹

⁶³² 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.

⁶³³ BGE 133 V 367 (= Pra 2008 No 71), paras. 11.4–11.6.

⁶³⁴ BGE 142 II 35, para. 3.2.

⁶³⁵ BGE 142 II 35, para. 3.1.

⁶³⁶ 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.

⁶³⁷ Art. 216(2) TFEU; Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, para. 14.

⁶³⁸ 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.

⁶³⁹ Benesch, Tübingen, supra note 262, p. 68.

In the EEA EFTA States, the EEA Agreement does not per se have direct effect (but rather quasi-direct effect⁶⁴⁰). The case law of *Costa E.N.E.L. and van Gend en Loos* is not applied in this context.⁶⁴¹ 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 has been implemented (quasi-primacy⁶⁴²). 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.⁶⁴³

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.⁶⁴⁴ 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

⁶⁴⁰ Baudenbacher (2012), supra note 15, p. 494.

⁶⁴¹ 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.

⁶⁴² Baudenbacher (2012), supra note 15, p. 494.

⁶⁴³ Hreinsson, supra note 320, p. 383 et seq. and 386 et seq. for a further reference.

⁶⁴⁴ 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 166, p. 241 et seq. for further references to the relevant case law of the Swiss Federal Court.

explained by the complex drafting of the AFMP. Article 16(2) AFMP remains vague and unclear.⁶⁴⁵

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.⁶⁴⁶ 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 Union Citizenship 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 that often the concepts are 'disguised', but later amended.⁶⁴⁷ 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*⁶⁴⁸ was codified in the Union Citizenship Directive.⁶⁴⁹ 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.⁶⁵⁰ 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'.⁶⁵¹ However, it is not clear what 'good reasons' are.⁶⁵² In a sim-

⁶⁴⁵ Same opinion: M. Maresceau, 'EU – Switzerland: Quo vadis?', *Georgia Journal of International and Comparative Law* 2011, No 3, p. 743.

⁶⁴⁶ Same opinion: Epiney (17.12.2018), *supra* note 410, para. 18; see further the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁶⁴⁷ Epiney (2005), *supra* note 502, pp. 16–26; see also Sunde, Münster, *supra* note 617, 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.

⁶⁴⁸ Case C-413/99, *Baumbast and R*, ECLI:EU:C:2002:493.

⁶⁴⁹ BGE 136 II 177, para. 3.2.1.

⁶⁵⁰ Instead of many examples: BGE 142 II 35, para. 3.1.

⁶⁵¹ BGE 140 II 112, para. 3.2.

⁶⁵² 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

ilar 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.⁶⁵³ The CJEU followed the Advocate General's Opinion.⁶⁵⁴ 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 CJEU⁶⁵⁵ binding before and *after* the date of signature.⁶⁵⁶

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.⁶⁵⁷ This is especially because the term 'Court of Justice of the European Communities' under the Air Transport Agreement was found to include the General Court.⁶⁵⁸ 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.⁶⁵⁹ This is particularly interesting because the explanatory report of the Swiss Government mistakenly only mentions the case law of the CJEU.⁶⁶⁰

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 Europa-recht 2015/2016 / Annuaire suisse de droit européen 2015/2016*, Zurich (2016), p. 471.

⁶⁵³ *Opinion of Advocate General Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 72.

⁶⁵⁴ *Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39.

⁶⁵⁵ The term CJEU is defined as including the General Court: see *infra* note 659.

⁶⁵⁶ Art. 4 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁶⁵⁷ The General Court did not exist at that time.

⁶⁵⁸ 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.

⁶⁵⁹ 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.

⁶⁶⁰ Swiss Confederation, *supra* note 184, p. 7.

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.⁶⁶¹ Kläser points out that the CJEU followed the reasoning of the Swiss Federal Court in the case *Ettwein*^{662, 663} The ruling of the Swiss Federal Court was not however mentioned in the case *Ettwein*.⁶⁶⁴ 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 900 judgments.⁶⁶⁵ 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.⁶⁶⁶

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

⁶⁶¹ Case C-394/07, *Marco Gambazzi*, ECLI:EU:C:2009:219, para. 35.

⁶⁶² Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

⁶⁶³ BGE 136 II 241; Kläser, Maastricht, supra note 9, p. 132 and footnote 608 thereof for further references.

⁶⁶⁴ Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

⁶⁶⁵ Checked with the database of the Swiss Federal Court: <<https://www.bger.ch/>> (last visited on 24.01.2021).

⁶⁶⁶ Art. 11 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

a contrario and Article 40 of the Statute of the Court of Justice *a contrario*⁶⁶⁷) unless this was already approved by the referring court (Article 97(1) of the Rules of Procedure of the Court of Justice⁶⁶⁸) and has no right to be informed (under the AFMP).⁶⁶⁹ This would be amended for cases referred by the arbitration body under the new Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.⁶⁷⁰

The national procedure has to be equivalent, effective and non-discriminatory (Article 11 AFMP and Article 2 AFMP).⁶⁷¹ The concepts of effectiveness and equivalence are borrowed from EU law and adapted.⁶⁷² 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).⁶⁷³

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.⁶⁷⁴ However, the Swiss Federal Court did not accept the *Kohll* and the *Müller-Fauré* rulings, but instead held that the AFMP does not

⁶⁶⁷ 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 114) and Art. 5(2) of the Swiss-EU Dublin Agreement (see for the full citation supra note 114); 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).

⁶⁶⁸ See further Case C-61/14, *Orizzonte Salute*, ECLI:EU:C:2015:655, para. 32 et seq.

⁶⁶⁹ 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.

⁶⁷⁰ Art. 10 para. 4 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁶⁷¹ See also Case T-99/19, *Magnan v Commission*, ECLI:EU:T:2019:693, para. 65.

⁶⁷² 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.

⁶⁷³ BGE 131 II 352.

⁶⁷⁴ BGE 130 II 1; BGE 134 II 10.

grant receivers of services the right to equal treatment.⁶⁷⁵ The CJEU came to the same conclusion. It followed the Opinion of the Advocate General in the case *Hengartner and Gasser*.⁶⁷⁶ 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.^{677, 678} The principle of non-discrimination, which is enshrined in Article 2 AFMP, is crucial as the Union Citizenship 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 Union Citizenship Directive does not apply.⁶⁷⁹

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 concept⁶⁸⁰ of EU citizenship.⁶⁸¹ As an example, the Swiss Federal Court mentions the *Zambrano* and *Dereci* cases^{682, 683}. An interpretation in the light of the Union Citizenship 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

⁶⁷⁵ 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.

⁶⁷⁶ Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, paras. 35–43.

⁶⁷⁷ 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.

⁶⁷⁸ *Opinion of Advocate General Jääskinen in Case C-70/09, Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:289.

⁶⁷⁹ 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.

⁶⁸⁰ 'Kernbereichdoktrin'.

⁶⁸¹ BGE 139 II 393, para. 4.1.2.

⁶⁸² Case C-256/11, *Dereci*, ECLI:EU:C:2011:734; Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124.

⁶⁸³ BGE 139 II 393, para. 4.1.2.

Court in Chapter 2.3.1.5).⁶⁸⁴ It is therefore not astonishing that the Union Citizenship Directive is also a prominent discussion point for future agreements with the EU (the so-called ‘red line’).⁶⁸⁵

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:⁶⁸⁶

‘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.⁶⁸⁷ The AFMP refers to the ‘Joint Committee’⁶⁸⁸ 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 cer-

⁶⁸⁴ See in detail Tobler, *supra* note 434, p. 80.

⁶⁸⁵ See Oesch (2017), *supra* note 281, p. 641 et seq.

⁶⁸⁶ See other for other homogeneity clauses: Ott (2015), *supra* note 444, p. 18 et seq.

⁶⁸⁷ See Ott (2015), *supra* note 444, p. 21 et seq.

⁶⁸⁸ There are currently about 23 EU-Swiss (Joint) Committees: Directorate for European Affairs, *supra* note 254.

tain judgments has never been issued.⁶⁸⁹ 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.⁶⁹⁰ Even leading cases of the CJEU and fundamental concepts of EU law have sometimes been overlooked by Swiss courts.⁶⁹¹

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 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.⁶⁹² 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,⁶⁹³ Article 16(2) AFMP should in any

⁶⁸⁹ The same opinion: *Opinion of Advocate General Melchior Wathelet in Case C-581/17, Martin Wächter v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 71.

⁶⁹⁰ The same opinion: Mazille, Geneva, *supra* note 647, p. 242 et seq.

⁶⁹¹ 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.

⁶⁹² L. Kubli, 'Zum Grundsatz der Parallelität im Kartellrecht – eine rechtsvergleichende Auslegung?', AJP/PJA 2018, pp. 204 and 207. It should however be noted that a parallel legal order is distinct from comparative law: M. Oesch, *Schweiz – Europäische Union: Grundlagen, Bilaterale Abkommen, Autonomer Nachvollzug*, Zurich (2020), para. 337 et seq.

⁶⁹³ See A. Hoogenboom, *Balancing student mobility rights and national higher education autonomy in the European Union*, Osterwijk (2016), p. 48 et seq.

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*⁶⁹⁴. 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’⁶⁹⁵ and does not foresee ‘the free movement of criminal migrants’.⁶⁹⁶ 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.

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.⁶⁹⁷

⁶⁹⁴ Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138.

⁶⁹⁵ 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.

⁶⁹⁶ 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.

⁶⁹⁷ See instead of many others: M. Oesch, ‘Grundrechte als Elemente der Wertegemeinschaft Schweiz-EU: Zur Auslegung der bilateralen Verträge’, ZBl 2014,

The Swiss Federal Court declared in a leading case of 2013 with regard to 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*).⁶⁹⁸ Besides the above-mentioned statement in the *Wächtler* judgment⁶⁹⁹, the CJEU has not clarified the meaning of Article 16(2) AFMP.⁷⁰⁰ In contrast, it even referred to case law after the date of signature without further explanation.⁷⁰¹ The underlying problem is that the article remains 'relatively vague'.⁷⁰² This is explained by the fact that it is difficult if not impossible at times to distinguish between concepts and case law.⁷⁰³

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.⁷⁰⁴ Ott 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

No 115, p. 196 et seq. and footnotes 82–84 with further references; see also Epiney (2005), supra note 502, p. 26.

⁶⁹⁸ BGE 139 II 393, para. 4.1.1.

⁶⁹⁹ Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39.

⁷⁰⁰ Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 26.

⁷⁰¹ 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.

⁷⁰² *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.

⁷⁰³ See e.g. the concept of partial recognition in Chapter 6.4.3.

⁷⁰⁴ Ott (2015), supra note 444, p. 21.

the *Opel Austria* case⁷⁰⁵. 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.⁷⁰⁶

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, *Wächter*.⁷⁰⁷

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 *Wächter* of the CJEU and the case law of the

⁷⁰⁵ Case T-115/94, *Opel Austria GmbH v Council of the European Union*, ECLI:EU:T:1997:3, paras. 106–112.

⁷⁰⁶ Ott (2015), supra note 444, p. 25.

⁷⁰⁷ Case C-581/17, *Martin Wächter v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39.

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 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 suisse*. 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'.⁷⁰⁸

Annex II was amended by Decision No 1/2012 and declares that Regulation No 883/2004⁷⁰⁹ will be applicable to Switzerland from 1 April 2012.⁷¹⁰ More

⁷⁰⁸ Arts. 7(1) and 13(1) of Annex I to the AFMP.

⁷⁰⁹ See for the full citation *supra* note 275.

⁷¹⁰ *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*

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 Joint Committee Switzerland/EU and entered into force on 1 November 2011.⁷¹¹ 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).⁷¹² 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.⁷¹³

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)

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.

⁷¹¹ *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.*

⁷¹² Vahl & Grolimund, Brussels, supra note 128, p. 44 et seq.

⁷¹³ 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.

TEU, the latter referring to Article 355 TFEU for overseas territories.⁷¹⁴ 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 %.

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.⁷¹⁵ As of June 2019, provisional quotas and the safeguard clause of Article 10(4) AFMP can only be applied for nationals from Croatia.⁷¹⁶

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 AFMP⁷¹⁷). Article 9 of Annex I to the AFMP shows that the interpretation of the internal market case law is to be followed in princi-

⁷¹⁴ A separate Protocol for the Åland Islands also applies for the AFMP (see Annex III last paragraph).

⁷¹⁵ See Ott, *supra* note 4, p. 170 et seq.

⁷¹⁶ 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).

⁷¹⁷ 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, Oosterwijk, *supra* note 523, p. 162 et seq.

ple, and is granted direct effect.⁷¹⁸ 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.⁷¹⁹ It applies for ‘self-employed frontier workers’⁷²⁰ as well as for ‘self-employed workers’.⁷²¹

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.⁷²²

The freedom of establishment does not apply to legal persons in the AFMP.⁷²³ 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

⁷¹⁸ *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.

⁷¹⁹ Case C-506/10, *Rico Graf and Rudolf Engel v Landratsamt Waldshut*, ECLI:EU:C:2011:643, para. 26.

⁷²⁰ Art. 13(1) of Annex I to the AFMP.

⁷²¹ Art. 12(1) of Annex I to the AFMP.

⁷²² 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.

⁷²³ 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.

of Annex I to the AFMP).⁷²⁴ 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.⁷²⁵

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*,⁷²⁶ 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.⁷²⁷ 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'.⁷²⁸

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 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.⁷²⁹ It was however disputed

⁷²⁴ Case C-13/08, *Stamm and Hauser*, ECLI:EU:C:2008:774.

⁷²⁵ 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.

⁷²⁶ Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121, para. 35.

⁷²⁷ Case C-355/16, *Christian Picart v Ministre des Finances et des Comptes public*, ECLI:EU:C:2018:184, para. 19.

⁷²⁸ 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.

⁷²⁹ See for the definition of a 'self-employed person' based on the *travaux préparatoires* and the distinction between the fundamental freedoms: *Opinion of Advocate General Melchior Wathelet in Case C-581/17, Martin Wächtler v Fi-*

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*⁷³⁰) 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.⁷³¹ The Advocate General in that case went one step further and argued that another interpretation would go against the ‘spirit’ of the AFMP.⁷³²

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.⁷³³ 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.⁷³⁴

nanzamt Konstanz, ECLI:EU:C:2018:779, para. 41 et seq.; see also B. Pirker & L. Matter, ‘Europarecht: Schweiz – Europäische Union’, SRIEL (SZIER/RSDIE) 2019, p. 118 et seq. who note that the Advocate General’s Opinion in *Wächtler* (more particularly para. 54) can be understood as mild criticism of the more restrictive Case C-355/16, *Christian Picart v Ministre des Finances et des Comptes public*, ECLI:EU:C:2018:184.

⁷³⁰ 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.

⁷³¹ Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 51 et seq. This wording does not necessarily mean that free movement restrictions are covered by the AFMP: see B. Pirker & L. Matter, ‘Europarecht: Schweiz – Europäische Union’, SRIEL (SZIER/RSDIE) 2020, p. 88 for further references.

⁷³² *Opinion of Advocate General Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 66.

⁷³³ See D. Kremalis, *Freizügigkeit von Ärzten innerhalb der EU*, Diss. Munich (2008), Frankfurt am Main (2008), p. 224 et seq. for a further reference.

⁷³⁴ See *infra* note 1633.

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.⁷³⁵ Direct discrimination openly differentiates between the relevant actors on the grounds of nationality.⁷³⁶ Indirect discrimination, however, may occur when a rule is more likely to affect foreigners than nationals.⁷³⁷ Finally, restrictions are rules that are indistinctly applicable but hinder the freedom of establishment and consequently the creation of an internal market.⁷³⁸ 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.⁷³⁹ Truly indistinct measures are extremely rare.⁷⁴⁰

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.⁷⁴¹ The Swiss Federal Court held that Swiss migration law provisions on the family reunion of third country nationals constitute reverse discrimination. In prin-

⁷³⁵ Case 38/87, *Commission v Greece*, ECLI:EU:C:1988:407.

⁷³⁶ 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.

⁷³⁷ Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193, para. 15.

⁷³⁸ Case C-168/91, *Konstantinidis*, ECLI:EU:C:1993:115.

⁷³⁹ R. Zäch argues that this distinction should be abolished: R. Zäch, *Grundzüge des europäischen Wirtschaftsrechts*, Berlin (2005), para. 492.

⁷⁴⁰ 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.

⁷⁴¹ 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.

principle, only the Swiss Parliament has the power to amend it.⁷⁴² The AFMP only applies to Swiss nationals where a cross-border link exists.⁷⁴³ The Swiss Federal Court however also used the concept of reverse discrimination as an argument when deciding on the correct interpretation of the law.⁷⁴⁴

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.⁷⁴⁵ Even if the CJEU explicitly used the term 'restrictions' in *Wächtler*,⁷⁴⁶ the same wording does not mean that the term bears the same meaning after everything that has been discussed here about the *Polydor* principle.⁷⁴⁷ The answer to this question is therefore still unknown.⁷⁴⁸

⁷⁴² 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.

⁷⁴³ BGE 136 II 120, para. 3.2.

⁷⁴⁴ BGE 134 II 10, para. 3.5.4.

⁷⁴⁵ See Chapter 4.2.2.3 and Diebold, Berne, *supra* note 69, 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 594, para. 256 in conjunction with para. 213 et seq.

⁷⁴⁶ See Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, paras. 57 and 61; see further the *Opinion of Advocate General Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 58 et seq.

⁷⁴⁷ See further Chapter 3.2.1.

⁷⁴⁸ Same opinion: Pirker & Matter (2020), *supra* note 731, p. 88.

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.⁷⁴⁹ 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.⁷⁵⁰ 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 for the internal market (*before* the date of signature).⁷⁵¹ 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).⁷⁵² 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

⁷⁴⁹ 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.

⁷⁵⁰ For the same opinion, see: Epiney (2005), *supra* note 502, p. 8 et seq.

⁷⁵¹ See Case 279/80, *Webb*, ECLI:EU:C:1981:314; Case C-76/90, *Säger v Denemyer*, 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.

⁷⁵² 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 General 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 166, p. 241 et seq.

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.⁷⁵³ It is true that the CJEU has at times emphasised the extent to which an association agreement can reach.⁷⁵⁴ 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.⁷⁵⁵ 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).⁷⁵⁶ Therefore, Delli concludes that restrictions are covered not for legal but for *pragmatic reasons* because it would be too difficult to distinguish these concepts.⁷⁵⁷

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 compared to the more far-reaching 'reversed *Polydor* principle' developed by the EFTA Court.⁷⁵⁸ 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*.⁷⁵⁹ Even if the *Polydor* principle is applied in this context,⁷⁶⁰ it could be argued in line with the case law of the Swiss Federal

⁷⁵³ Delli, Basel, *supra* note 67, pp. 303–306.

⁷⁵⁴ Case 270/80, *Polydor*, ECLI:EU:C:1982:43; Case C-312/91, *Metalsa*, ECLI:EU:C:1993:279.

⁷⁵⁵ See Tobler & Beglinger, Zurich, *supra* note 101, chart 38.

⁷⁵⁶ Tobler, Antwerp, *supra* note 740, pp. 307–315; see e.g. recently in the *Opinion of Advocate General Bobek in Case C-218/19 Onofrei*, ECLI:EU:C:2020:716, para. 65.

⁷⁵⁷ Delli, Basel, *supra* note 67, p. 325 et seq.

⁷⁵⁸ See Tobler (2018), *supra* note 308, p. 1448.

⁷⁵⁹ See Chapter 3.2.3.

⁷⁶⁰ See Tobler et al., *supra* note 159, p. 24 et seq. and footnote 95 thereof.

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.⁷⁶¹ 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.⁷⁶² Advocate General Mengozzi openly rejected this idea for the interpretation of Article 15(1) of Annex I to the AFMP.⁷⁶³

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 explicitly refers to *Vlassopoulou*⁷⁶⁴ 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.⁷⁶⁵

⁷⁶¹ BGE 130 I 26.

⁷⁶² BGE 136 II 470 (= Pra 2011 No 37), para. 4.1; BGE 133 V 33, para. 9.4, see further for a short discussion of these cases Chapter 5.2.3.5; Diebold, Berne, *supra* note 69, para. 1116 et seq.; Oesch, Zurich, *supra* note 692, para. 174 *in fine*; COMCO, *Empfehlung zuhanden der Kantone und des Bundesrats betreffend Freizügigkeit für Notare und öffentliche Urkunden of 23.09.2013*, <<https://www.news.admin.ch/newsd/message/attachments/32316.pdf>> (last visited on 25.06.2020), para. 64 and footnote 33 thereof with further references.

⁷⁶³ *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.

⁷⁶⁴ BGE 140 II 112, para. 3.2.1.

⁷⁶⁵ See BGE 140 II 112, para. 3.6.3.

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.⁷⁶⁶

The High Court of the Canton of Basel-Land ruled that restrictions are covered by the AFMP as a general statement.⁷⁶⁷ 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.⁷⁶⁸ 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).⁷⁶⁹

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.’

⁷⁶⁶ BGE 140 II 141 (= Pra 2014 No 85), para. 7.

⁷⁶⁷ Decision of the Kantonsgericht (High Court) Basel-Landschaft, Abteilung Verfassungs- und Verwaltungsrecht 2016 (810 15 196) of 08.06.2016, para. 7.4.

⁷⁶⁸ 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.

⁷⁶⁹ Case C-581/18, *TÜV Rheinland LGA Products und Allianz IARD*, ECLI:EU:C:2020:453; see also infra note 870 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.⁷⁷⁰ 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.⁷⁷¹ As the standstill clause does not go further than the concept of indirect discrimination,⁷⁷² there was no reason to discuss the standstill clause in the abovementioned case.

Doctrine however argues for a broader interpretation, which includes restrictions.⁷⁷³ The decision of the CJEU in *Graf and Engel* could also be understood in this way.⁷⁷⁴ 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.⁷⁷⁵

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.⁷⁷⁶

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

⁷⁷⁰ BGE 130 I 26, para. 3.4.

⁷⁷¹ BGer 2P.134/2003 of 06.09.2004, para. 10.3.

⁷⁷² BGE 130 I 26, para. 3.4.

⁷⁷³ 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.

⁷⁷⁴ 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 69, para. 785.

⁷⁷⁵ See supra note 639 and Chapter 7.8.2.

⁷⁷⁶ 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.

I to the AFMP).⁷⁷⁷ Indirect discrimination and restrictions however may also be justified by overriding reasons in the public interest (see Chapter 4.4.2.4 for other possible reasons).⁷⁷⁸ 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.⁷⁷⁹ 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.⁷⁸⁰

4.2.2.7 The distinction between the fundamental freedoms relating to persons

The freedom of establishment requires a ‘stable and continuous basis’.⁷⁸¹ 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’.⁷⁸² The temporary character of services also allows the necessary infrastructure in the host Member State and is therefore

⁷⁷⁷ 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 696 and Epiney (19.08.2019), supra note 696; 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 740, p. 316 et seq.

⁷⁷⁸ 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.

⁷⁷⁹ See BGE 130 I 26, para. 3.2.3; see also Diebold, Berne, supra note 69, para. 644 et seq. for further references.

⁷⁸⁰ See also Diebold, Berne, supra note 69, 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*.

⁷⁸¹ Case C-70/95, *Sodemare*, ECLI:EU:C:1997:301, para. 24.

⁷⁸² Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411, para. 22.

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.⁷⁸³ 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*.⁷⁸⁴ Professional organisations are also precluded from denying a second enrolment to a professional body.⁷⁸⁵

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).⁷⁸⁶ 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.⁷⁸⁷ As in many EU countries, lawyers can often lack the means in Switzerland to be

⁷⁸³ See Art. 5(1) AFMP and Art. 17(a) of Annex I to the AFMP.

⁷⁸⁴ 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.

⁷⁸⁵ Case 96/85, *Commission v France*, ECLI:EU:C:1986:189.

⁷⁸⁶ 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.

⁷⁸⁷ BGer 2A.536/2003 of 09.08.2004.

able to advertise in conformity with the rules of professional conduct.⁷⁸⁸ 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.⁷⁸⁹ 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 are also prohibited under primary law.⁷⁹⁰ 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.⁷⁹¹ Nevertheless, the CJEU accepted consumer protection as an overriding reason in the public interest to justify a restriction of Article 49 TFEU.⁷⁹² 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

⁷⁸⁸ Art. 12(d) BFGA; see further F. Bohnet, *Droit des professions judiciaires: Avocat, notaire, juge*, Bâle (2014), para. 54.

⁷⁸⁹ BGer 2A.536/2003 of 09.08.2004, para. 4.3.

⁷⁹⁰ Case C-168/91, *Konstantinidis*, ECLI:EU:C:1993:115, para. 15.

⁷⁹¹ Case C-215/01, *Schnitzer*, ECLI:EU:C:2003:662, para. 36; Case C-58/98, *Corsten*, ECLI:EU:C:2000:527, para. 46.

⁷⁹² Case 220/83, *Commission v France*, ECLI:EU:C:1986:461, para. 20.

freedom of goods *mutatis mutandis*.⁷⁹³ Barnard concludes from the case law of the CJEU that only substantial hindrances are considered breaches of the Treaty and must be justified.⁷⁹⁴

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.⁷⁹⁵ 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’.⁷⁹⁶ The decisive element is the subordination, which means ‘a choice of that activity, working conditions and conditions of remuneration’. The remuneration has to be paid in full and directly to the self-employed person.⁷⁹⁷

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

⁷⁹³ Diebold, Berne, *supra* note 69, 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 741, para. 110 et seq.; see however Case C-591/17, *Austria v Germany*, ECLI:EU:C:2019:504, para. 128 et seq.

⁷⁹⁴ Barnard, Oxford, *supra* note 793, p. 220.

⁷⁹⁵ Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, ECLI:EU:C:2001:616.

⁷⁹⁶ Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, para. 31.

⁷⁹⁷ Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, para. 71.

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.⁷⁹⁸

The concept of public authority is narrow.⁷⁹⁹ 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.⁸⁰⁰ 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.⁸⁰¹ It highlighted in *Reyners* that there needs to be ‘a direct and specific connexion with the exercise of official authority’.⁸⁰² Official authorities must have the power to take the final decision and not have merely auxiliary and preparatory functions.⁸⁰³

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

⁷⁹⁸ 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.

⁷⁹⁹ 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.

⁸⁰⁰ Case 2/74, *Reyners v Belgian State*, ECLI:EU:C:1974:68, para. 52.

⁸⁰¹ Case C-42/92, *Thijssen v Controledienst voor de verzekeringen*, ECLI:EU:C: 1993: 304.

⁸⁰² Case 2/74, *Reyners v Belgian State*, ECLI:EU:C:1974:68, para. 45.

⁸⁰³ Case C-42/92, *Thijssen v Controledienst voor de verzekeringen*, ECLI:EU:C:1993: 304, para. 22.

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*,⁸⁰⁴ 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*.⁸⁰⁵

Finally, it remains disputed under the AFMP whether notaries use ‘privileges of official power’.⁸⁰⁶ The CJEU held in a series of cases that several countries failed to fulfil their obligations.⁸⁰⁷ 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.⁸⁰⁸ There is still an ongoing discussion concerning this among scholars. This will be addressed below for the notarial profession (see Chapter 8.4).⁸⁰⁹

⁸⁰⁴ Joined Cases C-372/09 and C-373/09, *Josep Peñarroja Fa*, ECLI:EU:C:2011:156, paras. 41–45.

⁸⁰⁵ BGE 140 II 112, para. 3.2.3.

⁸⁰⁶ *Opinion of Advocate General Mayras in Case 2/74, Reyners*, ECLI:EU:C:1974:59, para. 8.

⁸⁰⁷ 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.

⁸⁰⁸ BGE 128 I 280, para. 3.

⁸⁰⁹ Oesch (2016), supra note 636, 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 798, 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'.⁸¹⁰ 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'.⁸¹¹ Some minor exceptions apply to frontier workers.⁸¹²

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'.⁸¹³ 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.⁸¹⁴ To fall under the freedom of move-

⁸¹⁰ Art. 6 et seq. Annex I to the AFMP.

⁸¹¹ 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.

⁸¹² See Arts. 7 and 25(3) Annex I to the AFMP.

⁸¹³ 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.

⁸¹⁴ BGE 131 II 339 (= Pra 2006 No 39), para. 3.3.

ment 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'.⁸¹⁵ 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 genuine.⁸¹⁶ The same applies for a waitress working part-time, even if she cannot not support herself and two children.⁸¹⁷ The Swiss Federal Court also found that the profession of prostitute falls under the freedom of movement for workers.⁸¹⁸

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).⁸¹⁹ Dual nationals may in principle also invoke the freedom of establishment even vis-à-vis their own state.⁸²⁰ The Swiss Federal Court however followed *McCarthy*⁸²¹ in 2017⁸²² and confirmed that decision in the same year.⁸²³ 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'.⁸²⁴

⁸¹⁵ Case C-413/01, *Ninni-Orasche*, ECLI:EU:C:2003:600, para. 26; see further Kellerbauer & Martin, *supra* note 813, para. 13 et seq.

⁸¹⁶ BGE 131 II 339 (= Pra 2006 No 39), paras. 3.2 and 3.3.

⁸¹⁷ BGer 2C_813/2016 of 27.03.2017, para. 3.2.

⁸¹⁸ BGE 140 II 460, para. 4.1.

⁸¹⁹ 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.

⁸²⁰ See e.g. Borghi, *supra* note 677, para. 44 et seq.

⁸²¹ Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277, para. 56.

⁸²² BGE 143 II 57, paras. 3.5–3.7.

⁸²³ BGE 143 V 81, para. 8.3.3.2; see also BVGer F-5332/2016 of 27.04.2018, para. 8.2.

⁸²⁴ See Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277, para. 56.

To give a more recent example, the case *Tjebbes and Others*⁸²⁵ 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.⁸²⁶ According to Dutch law, Ms Duboux also automatically lost Netherlands nationality as a consequence of her mother's nationality loss.⁸²⁷

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'.⁸²⁸ Even if the Member States are competent for these rules, they must comply with EU law.⁸²⁹ In that case the CJEU found that the principle of proportionality must be applied for the withdrawal of naturalisation.⁸³⁰

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 propor-

⁸²⁵ Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189.

⁸²⁶ Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 14 et seq.

⁸²⁷ Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 10.

⁸²⁸ Case C-135/08, *Rottmann*, ECLI:EU:C:2010:104, para. 39.

⁸²⁹ 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.

⁸³⁰ Case C-135/08, *Rottmann*, ECLI:EU:C:2010:104, para. 55 et seq.

tionality test without considering the merits of each case.⁸³¹ 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.⁸³² It then went on to answer the question in the affirmative as long as the individual assessment of proportionality is ‘an ancillary issue’.⁸³³ 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.⁸³⁴ The CJEU found that Member States must take into account the fundamental rights of the Charter, 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.⁸³⁵ 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.⁸³⁶

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

⁸³¹ *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.

⁸³² Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 33.

⁸³³ Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, paras. 42 and 48.

⁸³⁴ 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).

⁸³⁵ Eijken (2019), supra note 831.

⁸³⁶ Groot, supra note 834.

heard but also for the careful balancing of interests.⁸³⁷ 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 Union Citizenship 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*).⁸³⁸ 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 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 Union Citizenship Directive.⁸³⁹

⁸³⁷ See Eijken (2019), *supra* note 831, 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.

⁸³⁸ 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.

⁸³⁹ 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.

In order to give an answer to this question, the *Tjebbes* case and the aforementioned 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.⁸⁴⁰ 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.⁸⁴¹ 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 workers where the CJEU stated: '(...) the fact that the applicant

⁸⁴⁰ Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189, para. 28.

⁸⁴¹ 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.

has acquired Italian nationality has no bearing on the application of the principle of non-discrimination'.⁸⁴²

With regard to the case law for the Ankara Agreement, it should however not be concealed that Article 6 et seq. of Decision No 1/80 refers to a 'Turkish worker duly registered as belonging to the labour force of a Member State' but does not contain free movement rights and does therefore not require the same conditions to apply.⁸⁴³ In addition, 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 of 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).⁸⁴⁴

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*⁸⁴⁵ and the adaptation for privileged third country nationals in *Kahveci and Inan*⁸⁴⁶ or the case law based on *McCarthy*⁸⁴⁷. 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 argument neglects however the importance of the fundamental freedoms foreseen by the AFMP which does not only consist of

⁸⁴² Case C-419/92, *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda*, ECLI:EU:C:1994:62, para. 8.

⁸⁴³ Art. 6 et seq. Decision No 1/80; Tezcan, Leiden, supra note 505, p. 67.

⁸⁴⁴ Case C-171/13, *Demirci and Others*, ECLI:EU:C:2015:8, paras. 66 et seq. and 72 et seq.

⁸⁴⁵ Case C-419/92, *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda*, ECLI:EU:C:1994:62, para. 8.

⁸⁴⁶ Joined Cases C-7/10 and C-9/10, *Staatssecretaris van Justitie v Tayfun Kahveci and Osman Inan*, ECLI:EU:C:2012:180.

⁸⁴⁷ Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277.

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 nationals.⁸⁴⁸ 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.⁸⁴⁹ This rule is directly discriminatory because it distinguishes between Dutch nationals with dual Dutch and Swiss nationality and Dutch nationals without any other nationality.⁸⁵⁰ 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.⁸⁵¹ In contrast, that nationals may in principle also invoke non-discrimination and equal treatment provisions against their State of origin is established

⁸⁴⁸ Case C-541/15, *Freitag*, ECLI:EU:C:2017:432, para. 38; Groot (2018), supra note 838, p. 1088 et seq.

⁸⁴⁹ See also Chapter 4.2.2 for a discussion of necessary cross-border elements under the AFMP.

⁸⁵⁰ Kochenov (2019), supra note 837, 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.

⁸⁵¹ Art. 13 AFMP; Boillet, supra note 776, 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.

case law even under the AFMP.⁸⁵² 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.⁸⁵³ 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.

4.3.2 Material scope: Discrimination, restrictions and the exercise of public authority

According to Article 9 of Annex I to the AFMP, equal treatment⁸⁵⁴ 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).⁸⁵⁵ 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.⁸⁵⁶ This

⁸⁵² Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 52.

⁸⁵³ 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.

⁸⁵⁴ See e.g. Case C-478/15, *Radgen v Finanzamt Ettlingen*, ECLI:EU:C:2016:705, para. 56.

⁸⁵⁵ 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 850, para. 12 et seq.; for free movement restrictions, see Tobler & Beglinger, *Zurich*, *supra* note 594, para. 213 et seq.

⁸⁵⁶ BGE 134 III 608, para. 2.6.5.

judgment shows a fundamental misunderstanding of the concept of indirect discrimination.⁸⁵⁷

Employment in public services may be refused if it involves the exercise of public authority.⁸⁵⁸ 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.⁸⁵⁹ 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.⁸⁶⁰ In *Dominguez*, the CJEU even ruled that a directive may be relied upon if the employer is a public law body.⁸⁶¹ 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.⁸⁶² In ad-

⁸⁵⁷ See also Diebold, Berne, *supra* note 69, paras. 524–526.

⁸⁵⁸ Art. 10 of Annex I to the AFMP.

⁸⁵⁹ Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, paras. 32–34.

⁸⁶⁰ 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.

⁸⁶¹ Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33.

⁸⁶² 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

dition, Boillet and Martenet are convincing in showing that the concept was developed earlier in case law and has to be followed.⁸⁶³ Articles 2, 9, 15 and 19 of Annex I to the AFMP have horizontal effect vis-à-vis associations,⁸⁶⁴ unions,⁸⁶⁵ and for Article 9 of Annex I to the AFMP, also vis-à-vis private parties pursuant to its wording.⁸⁶⁶ 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 2019.⁸⁶⁷

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

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.

⁸⁶³ Martenet & Boillet, supra note 862, pp. 332–339.

⁸⁶⁴ 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, *Delière*, 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.

⁸⁶⁵ 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.

⁸⁶⁶ 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.

⁸⁶⁷ 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.

*Mangold*⁸⁶⁸ for the interpretation of Article 12 EC (now Article 18 TFEU).⁸⁶⁹ 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.⁸⁷⁰ On 11 June 2020, the CJEU did not answer in its Grand Chamber judgment whether Article 18 TFEU can be applied between private parties.⁸⁷¹ 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.⁸⁷²

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

⁸⁶⁸ Case C-144/04, *Mangold*, ECLI:EU:C:2005:709, paras. 74–77.

⁸⁶⁹ R. Repasi, 'Europäischer Arbeitnehmerbegriff – Doktorandenstudium', EuZW 2008, No 17, p. 529 et seq.

⁸⁷⁰ *Opinion of Advocate General Bobek in Case C-581/18, TÜV Rheinland LGA Products and Allianz IARD*, ECLI:EU:C:2020:77, para. 93 et seq.

⁸⁷¹ 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).

⁸⁷² Case C-581/18, *TÜV Rheinland LGA Products und Allianz IARD*, ECLI:EU:C:2020:453, para. 29 et seq.

rights,⁸⁷³ which also apply for entry to university (Article 3(6) AFMP).⁸⁷⁴ The prevailing view is that the AFMP 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:⁸⁷⁵

‘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,⁸⁷⁶ 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

⁸⁷³ 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.

⁸⁷⁴ 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 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.

⁸⁷⁵ 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 874, 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.

⁸⁷⁶ See Ehrenzeller, supra note 875, p. 106.

Annexes)^{877, 878} It should also be recalled that the CJEU's progressive case law on students applying for access to university education⁸⁷⁹ does not apply to the *acquis suisse* as it is rather likely that Article 2 AFMP is not a subsidiary layer, considering the more recent case law⁸⁸⁰ of protection, such as that on Article 18 TFEU.⁸⁸¹ The case law of the Swiss Federal Court is sometimes less clear in this regard.⁸⁸² 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.⁸⁸³ 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.⁸⁸⁴

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

⁸⁷⁷ ,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.'

⁸⁷⁸ Ehrenzeller, *supra* note 875, 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.

⁸⁷⁹ See Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427; see further Hoogenboom, Osterwijk, *supra* note 693, 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.

⁸⁸⁰ Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 39.

⁸⁸¹ See also Ehrenzeller, *supra* note 875, p. 125; further Diebold, Berne, *supra* note 69, paras. 629 et seq.; other opinion: Epiney, *supra* note 878, 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.

⁸⁸² See BGE 130 I 26, para. 3.2.2; BGE 130 II 76, para. 3.2; see further Tobler & Beglinger, Zurich, *supra* note 594, para. 186.

⁸⁸³ See Odendahl, *supra* note 874, p. 366 et seq.

⁸⁸⁴ Borghi, *supra* note 677, para. 55 et seq.

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.⁸⁸⁵ 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.⁸⁸⁶ 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.⁸⁸⁷ In the end, this results in an 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).⁸⁸⁸ This also includes access to university education.⁸⁸⁹

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).

⁸⁸⁵ See in this sense the decision of the Administrative Court of the Canton of Zurich in Chapter 4.4.2.1.

⁸⁸⁶ 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.

⁸⁸⁷ 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 693, p. 90 et seq.

⁸⁸⁸ See Borghi, supra note 886, para. 336.

⁸⁸⁹ Odendahl, supra note 874, p. 366 et seq.

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.⁸⁹⁰ 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 and secondary law.⁸⁹¹ 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.⁸⁹²

⁸⁹⁰ Diebold, Berne, supra note 69, para. 790.

⁸⁹¹ 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.

⁸⁹² See the Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 2.4.

Switzerland did not incorporate Directive 2006/123/EC (the ‘Services Directive’⁸⁹³) 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)).⁸⁹⁴

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).⁸⁹⁵ The nature of the provider of services⁸⁹⁶ or the service itself may present the necessary cross-border element.⁸⁹⁷

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).⁸⁹⁸ 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).

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 em-

⁸⁹³ 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.

⁸⁹⁴ 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.

⁸⁹⁵ Tobler & Maritz, *supra* note 874, p. 341.

⁸⁹⁶ Case C-198/89, *Commission v Greece*, ECLI:EU:C:1991:79, paras. 9 and 16.

⁸⁹⁷ Case 155/73, *Sacchi*, ECLI:EU:C:1974:40, paras. 6–8.

⁸⁹⁸ Case C-452/04, *Fidium Finanz*, ECLI:EU:C:2006:631.

ployment agencies are prohibited in Switzerland.⁸⁹⁹ 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*.⁹⁰⁰ 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 AFMP gives recipients of services explicitly the right of entry and residence.⁹⁰¹ The freedom to receive services is however not protected similar to the internal market law (for example, visiting a museum⁹⁰²). It only applies as far as it was adapted by Switzerland (e.g. necessary health care for tourists), namely by implementing Regulation No 883/2004.⁹⁰³ The applicability of the non-discrimination principle in the AFMP provisions was denied by

⁸⁹⁹ Art. 12(2) *Bundesgesetz über die Arbeitsvermittlung und den Personalverleih (AVG) of 06.10.1989*, SR 823.11.

⁹⁰⁰ Decision VB.2013.00231 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 04.09.2014, para. 6.3.4.

⁹⁰¹ Art. 5(3) AFMP; see also *Opinion of Advocate General Cruz Villalón in Case C-221/11 Leyla Ecem Demirkan v Germany*, ECLI:EU:C:2013:237, para. 57.

⁹⁰² 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.

⁹⁰³ 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.

both the CJEU and the Swiss Federal Court for recipients of services.⁹⁰⁴ Nevertheless, the extent to which the subsidiary protection of non-discrimination in Article 2 AFMP reaches remains unknown.⁹⁰⁵

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.⁹⁰⁶ The Swiss Federal Court emphasised the historical interpretation of the AFMP and denied application of the non-discrimination provisions to receivers of services.⁹⁰⁷ 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*.⁹⁰⁸ 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.⁹⁰⁹

⁹⁰⁴ 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).

⁹⁰⁵ See Diebold, Berne, *supra* note 69, para. 620 et seq.; Borghi, *supra* note 677, para. 79 et seq.; see further *supra* note 2299.

⁹⁰⁶ Art. 91(1) *Bundesgesetz über die Invalidenversicherung (IVG) of 19.06.1959*, SR 831.20 in conjunction with Art. 23^{bis} (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.

⁹⁰⁷ BGE 133 V 624 (= Pra 2008 No 125), para. 4.3.3.

⁹⁰⁸ 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 874, pp. 354–357.

⁹⁰⁹ '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.

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.⁹¹⁰ Furthermore, the Swiss Federal Court argues in the aforementioned leading case that the freedom of services is only partially established between Switzerland and the EU.⁹¹¹ 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.⁹¹² The CJEU and the Swiss Federal Court argue that receivers of services (see Article 23(1) of Annex I to the AFMP) may not invoke non-discrimination provisions.⁹¹³ 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.⁹¹⁴ 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*⁹¹⁵), which were decided before the date of signature of the AFMP and have to be followed.⁹¹⁶

⁹¹⁰ Directorate for European Affairs, *supra* note 168, 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 675, p. 157.

⁹¹¹ BGE 133 V 624 (= Pra 2008 No 125), para. 4.3.7.

⁹¹² Epiney & Zbinden, Fribourg, *supra* note 908, p. 16; see also Tobler & Maritz, *supra* note 874, p. 341.

⁹¹³ 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.

⁹¹⁴ BGE 128 V 315, para. 1.c.

⁹¹⁵ 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.

⁹¹⁶ 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

Even in EU law, the freedom to receive services has been developed by the CJEU.⁹¹⁷ In another decision, the Swiss Federal Court argued that health planning would constitute a justification.⁹¹⁸ This obviously requires a discriminatory measure or a restriction to have existed in the first place.

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).⁹¹⁹ According to the exemptions, Switzerland made reservations for natural persons from the EU who are providing services.⁹²⁰ 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.⁹²¹ 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.⁹²² The GATS is in any event

KV.2007.00015 of the Sozialversicherungsgericht (High Court) of the Canton of Zurich of 31.03.2008, para. 6.3.

⁹¹⁷ Tobler & Maritz, *supra* note 874, p. 355.

⁹¹⁸ BGE 134 V 330 (= Pra 2009 No 70), para. 2.4.

⁹¹⁹ 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 69, para. 334.

⁹²⁰ *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*.

⁹²¹ Weber, *supra* note 919, para. 19; Cottier & Panizzon, *supra* note 919, p. 67; Iken, Zurich, *supra* note 919, p. 13; sceptical Diebold, Berne, *supra* note 69, para. 334.

⁹²² Diebold, Berne, *supra* note 69, paras. 334–337 and footnote 355 thereof argues – contrary to Iken, Zurich, *supra* note 919, p. 136 et seq. – that the AFMP is exempt from the scope of the GATS because of Switzerland's reservation (see *supra* note 920): 'measures based on bilateral agreements between the European Community and/or its Member States and/or EFTA States, and Switzerland, with

not self-executing in Switzerland or in the EU.⁹²³ 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).⁹²⁴

4.4.2.4 Justifications

Direct discrimination can – according to the prevailing opinion⁹²⁵ – 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).⁹²⁶ For the recognition of qualifications, some overriding reasons in the public interest are the professional rules to protect the recipients of a service,⁹²⁷ consumer protection,⁹²⁸ prevention of unfair competition,⁹²⁹ maintenance of the proper practice of the legal profession,⁹³⁰ language requirements to protect the recipients of services,⁹³¹ preservation of

the objective of providing for the movement of all categories of natural persons supplying services’.

⁹²³ Case C-149/96, *Portugal v Council*, ECLI:EU:C:1999:574, para. 27; BGE 131 II 271, para. 10.6.

⁹²⁴ 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 69, para. 1198; see also Bohnet, Bâle, supra note 788, p. 8.

⁹²⁵ 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 740, p. 316 et seq.

⁹²⁶ See, selected from many others, Theuerkauf & Ousmane, supra note 778, para. 38 et seq.

⁹²⁷ Case C-3/95, *Reisebüro Broede v Sandker*, ECLI:EU:C:1996:487, para. 38.

⁹²⁸ Case C-180/89, *Commission v Italy*, ECLI:EU:C:1991:78, para. 20.

⁹²⁹ Case C-60/03, *Wolff*, ECLI:EU:C:2004:610, para. 41.

⁹³⁰ Case C-309/99, *Wouters*, ECLI:EU:C:2002:98, para. 123.

⁹³¹ Case C-424/97, *Haim II*, ECLI:EU:C:2000:357, paras. 57–61.

the education system,⁹³² and the reliability and quality of the provision of medicinal products to the public⁹³³.

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'.⁹³⁴ 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.⁹³⁵

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 bottom, and unfair practice.⁹³⁶ 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.⁹³⁷

The eight-day waiting period for posted workers constitutes an essential flanking measure from a Swiss perspective, especially trade unions are of the

⁹³² 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.

⁹³³ Joined Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes*, ECLI:EU:C:2009:316, para. 30.

⁹³⁴ Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411.

⁹³⁵ See instead of many others: Case C-514/03, *Commission v Spain*, ECLI:EU:C:2006:63, para. 55.

⁹³⁶ See J. M. Tiefenthal, *Flankierende Massnahmen zum Schutz des schweizerischen Arbeitsmarktes*, Diss. Zurich (2008), Berne (2008), pp. 117–125.

⁹³⁷ 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.

opinion that is essential to prevent social dumping.⁹³⁸ 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.⁹³⁹ In some sectors, such as the construction industry, notification is compulsory from the first day.⁹⁴⁰ There are only a few exceptions to this rule (for example, urgent repairs).⁹⁴¹ 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 2020.⁹⁴²

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 2019.⁹⁴³ Switzerland however has a different opinion.⁹⁴⁴

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 and cannot be justified.⁹⁴⁵ Austrian measures, which required contractors to give guarantees in case of

⁹³⁸ Tobler & Beglinger, supra note 188, question 56.

⁹³⁹ Art. 6 para. 1 of the *Verordnung über die in die Schweiz entsandten Arbeitnehmerinnen und Arbeitnehmer (EntsV) of 21.05.2003*, SR 823.201.

⁹⁴⁰ Art. 6 para. 2 EntsV.

⁹⁴¹ Art. 6 para. 3 EntsV.

⁹⁴² <<https://www.sem.admin.ch/sem/de/home/publiservice/statistik/auslaenderstatistik/monitor.html>> (last visited on 25.06.2020).

⁹⁴³ Council of the European Union, supra note 11, para. 13.

⁹⁴⁴ See Tobler, supra note 395, p. 383 for further references.

⁹⁴⁵ Case C-58/98, *Corsten*, ECLI:EU:C:2000:527, para. 47; see also Epiney & Zbinden, Fribourg, supra note 908, pp. 20–28 and J. Dimitrijewitsch, *Scheinselbständigkeit im grenzüberschreitenden Dienstleistungsverkehr: Eine Analyse des Unionsrechts und des bilateralen Rechts Schweiz-EU*, Diss. Zurich (2020), Zurich (2020), p. 178 and footnote 603 thereof for further references to the rich case law concerning service providers.

labour law violations, were found to violate the freedom of services in a recent decision.⁹⁴⁶

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.⁹⁴⁷ 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.⁹⁴⁸ 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.⁹⁴⁹ 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 renegotiation (of the main text or by an accompanying common declaration⁹⁵⁰) is however still uncertain. It was also rather unlikely until the dilemma with Brexit had been resolved.⁹⁵¹

⁹⁴⁶ See Case C-33/17, *Čepelnik d.o.o. v Michael Vavti*, ECLI:EU:C:2018:896, para. 50.

⁹⁴⁷ See European Parliament, *supra* note 256, para. 12.

⁹⁴⁸ See Tobler & Beglinger, *supra* note 188, question 23.

⁹⁴⁹ First indent of Protocol I (2) of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

⁹⁵⁰ See Tobler, *supra* note 197, p. 2.

⁹⁵¹ See Tobler (17.02.2020), *supra* note 204, 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*,⁹⁵² the same wording does not mean that the term bears the same meaning after everything that has been discussed here about the *Polydor* principle.⁹⁵³ 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

⁹⁵² See Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, paras. 57 and 61.

⁹⁵³ See further Chapter 3.2.1.

did or 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 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.⁹⁵⁴ 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.⁹⁵⁵ 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.

⁹⁵⁴ 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.

⁹⁵⁵ Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

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 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.⁹⁵⁶ 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).⁹⁵⁷ 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

⁹⁵⁶ *General Programme for the abolition of restrictions on freedom to provide services*, OJ P [1962] 2/32, 15.01.1962, pp. 3 and 6.

⁹⁵⁷ See preamble of the Professional Qualifications Directive.

effect of Article 45 and Article 49 TFEU and the extensive harmonisation of secondary law in the Professional Qualifications Directive.⁹⁵⁸

The evolution of the professional qualification regime can be divided into three phases according to the literature.⁹⁵⁹

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 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.⁹⁶⁰

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.⁹⁶¹

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.⁹⁶²

In 1971 (second phase), the harmonisation approach changed slowly to become a *vertical approach*. Without interfering with the formal education sys-

⁹⁵⁸ M. Schlag, 'Art. 53 AEUV', in J. Schwarze et al. (eds.), *EU-Kommentar*, Baden-Baden (2019), para. 28.

⁹⁵⁹ See Kortese (2016/1), *supra* note 42, p. 47 et seq.

⁹⁶⁰ Schneider, Antwerp, *supra* note 751, p. 105 et seq.

⁹⁶¹ Schneider, Antwerp, *supra* note 751, pp. 113–117.

⁹⁶² Schneider, Antwerp, *supra* note 751, p. 114.

tems 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 doctors⁹⁶³, nurses⁹⁶⁴, dentists⁹⁶⁵, veterinarians⁹⁶⁶, midwives⁹⁶⁷,

⁹⁶³ *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.

⁹⁶⁴ *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.

⁹⁶⁵ *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.

⁹⁶⁶ *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.

⁹⁶⁷ *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*

pharmacists⁹⁶⁸, and architects (without coordination⁹⁶⁹).⁹⁷⁰ 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.⁹⁷¹ 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 approach* was eventually found to be too cumbersome, as with the accession of new Member States, the complexity increased exponentially.⁹⁷²

The third phase towards the *horizontal approach* in secondary law started with a non-binding resolution in 1974 passed by the Ministers of Education.⁹⁷³ 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.

and pursuit of the activities of midwives of 21.01.1980, OJ [1980] L33/8, 11.02.1980.

⁹⁶⁸ *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.

⁹⁶⁹ S. Schoenmaekers, *The regulation of architects in Belgium and the Netherlands: A comparative analysis*, Diss. Maastricht (2010), Antwerp (2010), p. 88.

⁹⁷⁰ *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.

⁹⁷¹ See Schneider, Antwerp, *supra* note 751, footnote 595.

⁹⁷² Schneider, Antwerp, *supra* note 751, p. 161 et seq.

⁹⁷³ *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.

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'),⁹⁷⁴ 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').⁹⁷⁵ The implementation deadline was on 4 January 1991. The follow-up was Directive 92/51/EEC⁹⁷⁶ 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.⁹⁷⁷

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.⁹⁷⁸ The purpose was also to foster a competitive labour market and to become more competitive in the internal market.⁹⁷⁹ Several supple-

⁹⁷⁴ 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.

⁹⁷⁵ Schneider, Antwerp, *supra* note 751, p. 161 et seq.

⁹⁷⁶ 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.

⁹⁷⁷ 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.

⁹⁷⁸ Recital 2 of the Professional Qualifications Directive.

⁹⁷⁹ State Secretariat for Research and Innovation, *Erläuternder Bericht die – neue europäische Richtlinie über die Anerkennung von Berufsqualifikationen – RL*

menting and amending directives were issued, including Directive 2001/19/EC, which reorganised certain provisions and added the recognition of third country diplomas.⁹⁸⁰ Finally, in 2002, the Commission proposed a new draft for a single directive.⁹⁸¹ 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.⁹⁸² 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.⁹⁸³ The Professional Qualifications Directive was further amended with the enlargement of the EU to include Romania, Bulgaria, and Croatia.⁹⁸⁴

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 ques-

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.

⁹⁸⁰ 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.

⁹⁸¹ 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.

⁹⁸² See the Professional Qualifications Directive, recital 9.

⁹⁸³ Art. 7(4) of the Professional Qualifications Directive.

⁹⁸⁴ *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.

tions, 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.⁹⁸⁵ Every Member State (including Switzerland⁹⁸⁶) designates a coordinator to promote the uniform application of the Professional Qualifications Directive and supplies information for its application.⁹⁸⁷ 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.⁹⁸⁸

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.⁹⁸⁹ 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.⁹⁹⁰

⁹⁸⁵ 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.

⁹⁸⁶ 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.

⁹⁸⁷ Art. 56(4) of the Professional Qualifications Directive.

⁹⁸⁸ Art. 56(4) of the Professional Qualifications Directive; see further State Secretariat for Research and Innovation, *supra* note 979, p. 45.

⁹⁸⁹ <<https://www.admin.ch/opc/de/european-union/joint-committees/007.000.000.000.000.000.html>> (last visited on 25.06.2020).

⁹⁹⁰ 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 be-*

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.⁹⁹¹

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)⁹⁹², Directive 74/557/EEC (intermediaries)⁹⁹³ and Directive 86/653/EEC (self-employed commercial agents)⁹⁹⁴. 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

tween 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 41, p. 306 et seq.

⁹⁹¹ *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.*

⁹⁹² *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.*

⁹⁹³ *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.*

⁹⁹⁴ *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.*

a provisional basis). It introduced Title II of the Professional Qualifications Directive, which sets out rules for the recognition of professional qualifications of service providers and implementation needed in national legislation.⁹⁹⁵ 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.⁹⁹⁶ For example, Directive 2016/97/EU (insurance mediation), Directive 2006/43/EC (auditors)⁹⁹⁷ 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.⁹⁹⁸

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.

⁹⁹⁵ See Art. 4(2) of Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

⁹⁹⁶ 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).

⁹⁹⁷ 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.

⁹⁹⁸ Swiss-EU Air Transport Agreement (see for the full citation supra note 348); 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 412); see further F. Berthoud, 'La libre prestation de services en application de la directive 2005/36/CE', SRIEL (SZIER/RSDIE) 2010, pp. 139–141.

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.⁹⁹⁹ The Swiss coordinator informs the Commission and the Joint Committee Switzerland/EU about the relevant Swiss legislation, which implemented, inter alia, the Professional Qualifications Directive, the Facilitating Practice Directive and the Facilitating Services Directive.¹⁰⁰⁰

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.¹⁰⁰¹ 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

⁹⁹⁹ Annex III to Section A (1.b)(2) AFMP (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

¹⁰⁰⁰ 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).

¹⁰⁰¹ 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.

qualifications¹⁰⁰²).¹⁰⁰³ 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. 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.¹⁰⁰⁴ The development of common training frameworks shall be based at the levels of the European Qualification Frameworks.¹⁰⁰⁵ There is also now the possibility to express the ECTS equivalent of diplomas awarded at university or higher education establishments.¹⁰⁰⁶ 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).¹⁰⁰⁷ It should be possible 'to monitor the career of professionals who establish themselves in various Member States'.¹⁰⁰⁸ In this context, it is also essential to note that the Internal Market

¹⁰⁰² 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 990; Art. 10 thereof establishes the basis for working groups and experts; Gammenthaler, Zurich, *supra* note 41, p. 306 et seq.

¹⁰⁰³ 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.

¹⁰⁰⁴ Art. 49a of the Professional Qualifications Directive.

¹⁰⁰⁵ Art. 49a(2)(d) of the Professional Qualifications Directive.

¹⁰⁰⁶ See Art. 11(d) and (e) of the Professional Qualifications Directive.

¹⁰⁰⁷ <http://ec.europa.eu/growth/single-market/services/free-movement-professionals/european-professional-card_de> (last visited on 25.06.2020).

¹⁰⁰⁸ Recital 32 of the Professional Qualifications Directive.

Information System Regulation ('IMI Regulation')¹⁰⁰⁹ is not yet part of the *acquis suisse* because the EU blocked further negotiations after the successful popular initiative against mass immigration in 2014.¹⁰¹⁰ It would be introduced within three years after the entry into force of the Swiss-EU Draft Institutional Framework Agreement.¹⁰¹¹ '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'.¹⁰¹² 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,¹⁰¹³ which does not apply to Switzerland.

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.¹⁰¹⁴

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). Na-

¹⁰⁰⁹ 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.

¹⁰¹⁰ See Swiss Confederation, *Parliamentary motion No 14.3729 of 17.09.2014*, <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20143729>> (last visited on 25.06.2020); Swiss Confederation, *supra* note 184, p. 2.

¹⁰¹¹ Para. 1 indent 3 of Protocol I to the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

¹⁰¹² Recital 2 of Regulation No 1024/2012 ('IMI Regulation').

¹⁰¹³ Directive 2006/123/EC ('Services Directive').

¹⁰¹⁴ See <https://ec.europa.eu/growth/single-market/services/free-movement-professionals/transparency-mutual-recognition_en> (last visited on 29.06.2020).

tional law must also ensure that an effective remedy is available for matters relating to this Directive.¹⁰¹⁵ 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.¹⁰¹⁶ The underlying principle slowly evolved from a mere perspective on non-discrimination and on free movement restrictions to a comprehensive mutual recognition system.¹⁰¹⁷ 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 cornerstone of the system of mutual recognition of professional qualifications¹⁰¹⁸ and is considered ‘of fundamental importance in EU law’.¹⁰¹⁹ This is also codified in Article 4 of the Professional Qualifications Directive. Member States must take into account the professional qualifica-

¹⁰¹⁵ 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.

¹⁰¹⁶ Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

¹⁰¹⁷ 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 69, para. 1116.

¹⁰¹⁸ F. Berthoud, *La reconnaissance des qualifications professionnelles: Union européenne et Suisse – Union européenne*, Geneva (2016), p. 44 et seq.

¹⁰¹⁹ Opinion of the Court 2/13, ECLI:EU:C:2014:2454, para. 191.

tions of migrants. It is certainly not permissible to require reciprocity as a further requirement for the recognition of professional recognition.¹⁰²⁰ 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.¹⁰²¹

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.¹⁰²²

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.¹⁰²³ 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

¹⁰²⁰ See e.g. Case 168/85, *Commission v Italy*, ECLI:EU:C:1986:381, para. 16.

¹⁰²¹ See e.g. Case C-31/00, *Dressen II*, ECLI:EU:C:2002:35.

¹⁰²² See Diebold, Berne, *supra* note 69, para. 541 et seq.; see Gammenthaler, Zurich, *supra* note 41, 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.

¹⁰²³ *Opinion of Advocate General van Gerven in Case C-340/89, Vlassopoulou*, ECLI:EU:C:1990:426, para. 14.

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.¹⁰²⁴

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.¹⁰²⁵

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 licences).¹⁰²⁶ 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).¹⁰²⁷ The principle of mutual recognition

¹⁰²⁴ Case C-234/97, *Bobadilla*, ECLI:EU:C:1999:367, paras. 30 and 33.

¹⁰²⁵ See Berthoud, Geneva, *supra* note 1018, p. 44 et seq.

¹⁰²⁶ 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.

¹⁰²⁷ Weatherill (2017), *supra* note 1026, p. 20 et seq.

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 industry¹⁰²⁸. Often, it is also combined with the *country of origin principle*.¹⁰²⁹

It should be borne in mind that the CJEU pushed evolution of the internal market through a vehicle of 'negative integration'¹⁰³⁰ 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.¹⁰³¹ As the CJEU rarely distinguishes between restrictions and indirect discrimination,¹⁰³² 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 Directive.¹⁰³³ 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.¹⁰³⁴

¹⁰²⁸ 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.

¹⁰²⁹ See C. Janssens, *The principle of mutual recognition in EU law*, Diss. Antwerp (2011), Oxford (2013), p. 77 et seq. for further examples.

¹⁰³⁰ For the expression 'negative integration' see: Craig & Búrca, Oxford, supra note 799, 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.

¹⁰³¹ Zäch, Berlin, supra note 739, p. 492.

¹⁰³² Tobler, Antwerp, supra note 740, pp. 307–315.

¹⁰³³ Tobler & Beglinger, Zurich, supra note 101, charts 38 and 51, pp. 49 and 62.

¹⁰³⁴ Tobler, Antwerp, supra note 740, p. 382.

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.¹⁰³⁵ 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.¹⁰³⁶ 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.¹⁰³⁷

As already mentioned above, the question is relevant under the *acquis suisse* because it is debatable whether restrictions are covered by the AFMP.¹⁰³⁸ 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.¹⁰³⁹ This case law dates back to the CJEU’s famous *Vlassopoulou* decision.¹⁰⁴⁰ That view is supported by the case law of the Swiss Federal Court, as shown above in the reference to the case *Hoczman*, but is not entirely satisfactory from the standpoint of a uniform doctrine because the Swiss Federal Court never openly stated whether restrictions are covered

¹⁰³⁵ See supra note 926.

¹⁰³⁶ Gammenthaler, Zurich, supra note 41, p. 54 et seq.; Case C-345/08, *Pešla*, ECLI:EU:C:2009:771, para. 34.

¹⁰³⁷ See B. Zaglmayer, *Anerkennung von Gesundheitsberufen in Europa*, Vienna (2016), para. 1.8 for further references.

¹⁰³⁸ See Chapter 4.2.2.3.

¹⁰³⁹ 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 1018, 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 788, p. 6 et seq.

¹⁰⁴⁰ See Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193; see also Case C-319/92, *Haim I*, ECLI:EU:C:1994:47.

by the AFMP, but it certainly applied primary law for the recognition of professional qualifications based on a pragmatic line of reasoning.¹⁰⁴¹

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.¹⁰⁴² 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.¹⁰⁴³

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 de-

¹⁰⁴¹ BGE 136 II 470 (= Pra 2011 No 37), para. 4.1.

¹⁰⁴² Tobler, Antwerp, *supra* note 740, 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.

¹⁰⁴³ See Gammenthaler, Zurich, *supra* note 41, p. 54 et seq.

gree, as required by Belgian law.¹⁰⁴⁴ The CJEU 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.¹⁰⁴⁵ 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.¹⁰⁴⁶

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.¹⁰⁴⁷ The CJEU based its answers on the established line of case law, namely the decisions of *Vlassopoulou*, *Morgenbesser* and *Pešla*. It stressed the fact that even an *indiscriminate* application with regard to nationality may infringe the exercise of the free movement provisions.¹⁰⁴⁸ 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.¹⁰⁴⁹

¹⁰⁴⁴ Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, paras. 12–19.

¹⁰⁴⁵ Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 26.

¹⁰⁴⁶ Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 40.

¹⁰⁴⁷ Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 47.

¹⁰⁴⁸ Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 52.

¹⁰⁴⁹ 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, *Pešla*, ECLI:EU:C:2009:771.

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 role requires the exercise of public authority.¹⁰⁵⁰ 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.¹⁰⁵¹

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.¹⁰⁵² 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 Arti-

¹⁰⁵⁰ See Case 66/85, *Lawrie-Blum*, ECLI:EU:C:1986:284.

¹⁰⁵¹ Case C-581/17, *Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2019:138, para. 39 with reference to the *Opinion of Advocate General Melchior Wathelet in Case C-581/17, Martin Wächtler v Finanzamt Konstanz*, ECLI:EU:C:2018:779, para. 71 et seq.

¹⁰⁵² Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121, para. 29.

cle 16(1) AFMP.¹⁰⁵³ This reasoning was not followed by the CJEU.¹⁰⁵⁴ 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 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.¹⁰⁵⁵ 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.¹⁰⁵⁶

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.¹⁰⁵⁷ Mutual recognition by

¹⁰⁵³ *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.

¹⁰⁵⁴ *Case C-425/11, Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

¹⁰⁵⁵ *Case C-425/11, Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2013:121.

¹⁰⁵⁶ BVGer C-2281/2006 of 18.10.2007 (available online since 2019), para. 3.5.

¹⁰⁵⁷ See for the same opinion on the CJEU's case law: Zaglmayer, Vienna, *supra* note 1037, para. 3.19.

primary law in the sense of the *Vlassopoulou* ruling has been extended to other professions, and covers architects¹⁰⁵⁸ and engineers¹⁰⁵⁹, notwithstanding the fact that secondary law generally regulates these professions. Directive 93/16/EEC¹⁰⁶⁰ was not applicable in this case as the diploma was not listed in Annex A, and 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.¹⁰⁶¹

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”¹⁰⁶²).¹⁰⁶³ Even if this were not the case, primary law would act as a subsidiary layer for the mutual recognition of professional qualifications.¹⁰⁶⁴

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 Di-

¹⁰⁵⁸ 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.

¹⁰⁵⁹ Case C-330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos v Administración del Estado*, ECLI:EU:C:2006:45, paras. 28–31.

¹⁰⁶⁰ *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.

¹⁰⁶¹ BVGer C-2281/2006 of 18.10.2007 (available online since 2019), para. 3.6.

¹⁰⁶² See for more detail Chapter 6.2.4.6.

¹⁰⁶³ See Zaglmayer, Vienna, *supra* note 1037, para. 5.16.

¹⁰⁶⁴ See Zaglmayer, Vienna, *supra* note 1037, para. 5.20.

rective 93/16/EEC of would not be considered of legal value for the interpretation of Swiss courts.¹⁰⁶⁵

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.¹⁰⁶⁶ 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.¹⁰⁶⁷ 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 the Professional Qualifications Directive), but did not check whether primary law could be applied for the recognition of professional qualifications.¹⁰⁶⁸

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 un-

¹⁰⁶⁵ 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.

¹⁰⁶⁶ Decision B 2010/24 of the Verwaltungsgericht (Administrative Court) of the Canton of St. Gallen of 08.06.2010.

¹⁰⁶⁷ 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.

¹⁰⁶⁸ 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.

answered whether the concept constitutes old or new case law.¹⁰⁶⁹ 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).¹⁰⁷⁰ The FAC however remarked that Article 13 and Article 14 of the Professional Qualifications Directive applied and took precedence over provisions of national law.¹⁰⁷¹

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 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).¹⁰⁷²

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

¹⁰⁶⁹ BVGer B-3503/2016 of 19.03.2018, para. 5.6.

¹⁰⁷⁰ BVGer B-5372/2015 of 04.04.2017, para. 6.4.2.

¹⁰⁷¹ BVGer B-5372/2015 of 04.04.2017, paras. 5.3 and 5.4.

¹⁰⁷² BVGer B-3706/2014 of 28.11.2017, para. 6.3.3 in conjunction with para. 7.2.1.

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).¹⁰⁷³

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/EEC¹⁰⁷⁴ (now the Professional Qualifications Directive), the Swiss Federal Court required the federal authorities to take into account the diploma based on the *Vlassopoulou* and *Hoczman* case law.¹⁰⁷⁵ 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.¹⁰⁷⁶

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 does not have the competence to harmonise the area of education.¹⁰⁷⁷ Member States only have to respect the minimum standards for the professions under the sectoral recognition regime, with a minor exception for architects.¹⁰⁷⁸ The CJEU also ruled that the

¹⁰⁷³ BGE 136 II 470 (= Pra 2011 No 37), para. 4.1; Diebold, Berne, supra note 69, para. 1116 et seq.; Oesch, Zurich, supra note 692, para. 174 *in fine*; COMCO, supra note 762, para. 64 and footnote 33 thereof with further references.

¹⁰⁷⁴ Directive 93/16/EEC (see for the full citation supra note 1174).

¹⁰⁷⁵ BGE 133 V 33, para. 9.4.

¹⁰⁷⁶ Berthoud, Geneva, supra note 1018, p. 369.

¹⁰⁷⁷ Art. 165(3) and (4)(1) and Art. 166(3) and (4) TFEU; see also Garben (2010), supra note 41, p. 191 et seq.; Gammenthaler, Zurich, supra note 41, p. 102 et seq.; Herdegen, Munich, supra note 41, § 26 para. 5.

¹⁰⁷⁸ See *infra* note 1307.

conditions for access to a profession are generally up to the Member States if applied in a non-discriminatory fashion.¹⁰⁷⁹

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).¹⁰⁸⁰

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.¹⁰⁸¹

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 earlier¹⁰⁸² 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.¹⁰⁸³ 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 him to pursue the profession as he was lawfully working in Germany.¹⁰⁸⁴ The CJEU answered that Member States remain free to organise the system that is applicable to lawyers. Neither secondary

¹⁰⁷⁹ Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 48.

¹⁰⁸⁰ Case C-285/01, *Burbaud*, ECLI:EU:C:2003:432, paras. 96–101.

¹⁰⁸¹ Case C-281/98, *Angonese*, ECLI:EU:C:2000:296, paras. 40–42.

¹⁰⁸² See supra note 793 for further references.

¹⁰⁸³ See the *Opinion of Advocate General Fennelly in Case C-190/98, Graf v Filzmoser*, ECLI:EU:C:1999:423, para. 33.

¹⁰⁸⁴ Case 292/86, *Gullung*, ECLI:EU:C:1988:15, paras. 1–6.

law nor the freedom of establishment were violated because the disciplinary rules were not discriminatory or a restriction.¹⁰⁸⁵ This situation rarely poses a problem in Switzerland because such cases are usually solved by invoking Article 27 BV (the right to economic freedom).¹⁰⁸⁶

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.¹⁰⁸⁷

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'.¹⁰⁸⁸ 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.¹⁰⁸⁹ The principle of *mutual recognition* is closely connected to the *Cassis de Dijon* case law and is thus inherently linked to the fundamental free-

¹⁰⁸⁵ Case 292/86, *Gullung*, ECLI:EU:C:1988:15, paras. 29–32.

¹⁰⁸⁶ See the opinion in: Berthoud, Geneva, supra note 1018, p. 207 et seq. for references.

¹⁰⁸⁷ See Arts. 4 and 9 of Directive 2018/958/EU.

¹⁰⁸⁸ Opinion of the Court 2/13, ECLI:EU:C:2014:2454, para. 191.

¹⁰⁸⁹ Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193, paras. 17–21.

doms.¹⁰⁹⁰ For the recognition of diplomas, the CJEU did apply the principle of mutual recognition based on the four 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*¹⁰⁹¹ (now the first indent of Article 4(3) TEU) and on the fundamental freedoms¹⁰⁹². 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.¹⁰⁹³

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.¹⁰⁹⁴ More importantly, the General Court left its internal market case law aside due to the fact that the Professional Qualifications Directive does not bind

¹⁰⁹⁰ See Berthoud, Geneva, supra note 1018, p. 44 et seq.

¹⁰⁹¹ 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).

¹⁰⁹² Case 71/76, *Thieffry*, ECLI:EU:C:1977:65, para. 16 et seq.

¹⁰⁹³ Case C-590/15 P, *Brouillard v CJEU*, ECLI:EU:C:2016:872, para. 51.

¹⁰⁹⁴ 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.

the EU, but only the Member States.¹⁰⁹⁵ This decision was upheld on appeal by the Court of Justice.¹⁰⁹⁶

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 suisse*.¹⁰⁹⁷ 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*¹⁰⁹⁸, could essentially lead to a *race to the bottom*¹⁰⁹⁹. 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’¹¹⁰⁰). 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 edu-

¹⁰⁹⁵ Case T-420/13, *Brouillard v CJEU*, ECLI:EU:T:2015:633, para. 86 et seq.

¹⁰⁹⁶ Case C-590/15 P, *Brouillard v CJEU*, ECLI:EU:C:2016:872.

¹⁰⁹⁷ 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.

¹⁰⁹⁸ See Zaglmayer, Vienna, *supra* note 1037, para. 11.12 for the expression.

¹⁰⁹⁹ The use of the term ‘race to the bottom’ can be seen, among many others, in Diebold, Berne, *supra* note 69, para. 1452 et seq.

¹¹⁰⁰ Berthoud (2010), *supra* note 998, p. 163.

cation programme and training,¹¹⁰¹ or require an aptitude test or an adaptation period as the least restrictive measure.¹¹⁰² 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.¹¹⁰³ However, the abuse of rights is obviously unprotected.

The concept of abuse of rights ‘requires a combination of objective and subjective elements’.¹¹⁰⁴ 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.¹¹⁰⁵ The subjective element requires that the applicant suffered an unfair advantage, sought by creating an artificial arrangement.¹¹⁰⁶

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.¹¹⁰⁷ 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.¹¹⁰⁸ The relevant case law shall be clustered into three groups to show the concept in more detail.

¹¹⁰¹ 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.

¹¹⁰² Berthoud, Geneva, supra note 1018, p. 50 et seq.

¹¹⁰³ Case C-255/02, *Halifax*, ECLI:EU:C:2006:121, para. 37.

¹¹⁰⁴ Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 44.

¹¹⁰⁵ Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 45.

¹¹⁰⁶ 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.

¹¹⁰⁷ Same opinion: L. M. Baudenbacher, *Vom gemeineuropäischen zum europäischen Rechtsmissbrauchsverbot*, Diss. Zurich 2015, Zurich (2016), p. 485 et seq.

¹¹⁰⁸ Case C-196/04, *Cadbury Schweppes*, ECLI:EU:C:2006:544, para. 51.

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 applicant was admitted to the Italian register, but the National Council of Engineers challenged his registration.¹¹⁰⁹

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.¹¹¹⁰ 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’.¹¹¹¹

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 quali-

¹¹⁰⁹ Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, paras. 33–42.

¹¹¹⁰ Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, para. 43.

¹¹¹¹ Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, paras. 54–57.

fication in another Member State.¹¹¹² 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.¹¹¹³ 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.*¹¹¹⁴ 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,¹¹¹⁵ the CJEU did not use the term ‘abuse of rights’.

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 evi-

¹¹¹² Zaglmayer, Vienna, *supra* note 1037, para. 11.14.

¹¹¹³ 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.

¹¹¹⁴ 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.

¹¹¹⁵ *Opinion of Advocate General Maduro in Case C-311/06, Cavallera*, ECLI:EU:C:2008:130, para. 37.

dence of the acquisition of additional professional qualifications can be provided.¹¹¹⁶

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/EC¹¹¹⁷, 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.¹¹¹⁸ 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.¹¹¹⁹ A migrant may how-

¹¹¹⁶ See also European Commission, *Group of Coordinators for the Recognition of Professional Qualifications* MARKT D/3418/6/2006-EN – *Frequently asked questions*, p. 2.

¹¹¹⁷ ‘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’.

¹¹¹⁸ See Schneider, Antwerp, *supra* note 751, p. 198.

¹¹¹⁹ Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, paras. 54–57.

ever 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 professional.¹¹²⁰ 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,¹¹²¹ 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,¹¹²² that reasoning can be applied for the Professional Qualifications Directive.¹¹²³

The situation is however distinct where professionals who are *not* fully qualified move to another Member State,¹¹²⁴ 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.¹¹²⁵ Such cases must be judged solely by primary law according to the *Vlassopoulou* decision.¹¹²⁶

¹¹²⁰ 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, *Torresí*, ECLI:EU:C:2014:2088, para. 56.

¹¹²¹ See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, paras. 24–32.

¹¹²² Schlag, *supra* note 958, para. 15.

¹¹²³ See also Zaglmayer, Vienna, *supra* note 1037, para. 11.19.

¹¹²⁴ The initial free movement right is not part of the new Art. 4(f) of the Professional Qualifications Directive.

¹¹²⁵ Art. 3(1)(c) of the Professional Qualifications Directive.

¹¹²⁶ See also Zaglmayer, Vienna, *supra* note 1037, para. 11.16 et seq., which also offers examples.

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).

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.¹¹²⁷ 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.¹¹²⁸ The abuse of rights is not however expressly mentioned in the TFEU.¹¹²⁹

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.¹¹³⁰

¹¹²⁷ See Case C-212/97, *Centros v Erhvervs- og Selskabsstyrelsen*, ECLI:EU:C:1999:126, para. 23 et seq.

¹¹²⁸ Zaglmayer, Vienna, supra note 1037, paras. 11.26.

¹¹²⁹ Zaglmayer, Vienna, supra note 1037, paras. 11.2.

¹¹³⁰ See BVGer B-6573/2013 of 15.07.2014, para. 4.5.

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.¹¹³¹ Sometimes the issue remains controversial as to whether a person seeks ‘academic recognition’ (recognition of academic qualifications) or ‘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.¹¹³² 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.¹¹³³ *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.¹¹³⁴

¹¹³¹ 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 41, pp. 133 and 136 et seq.; Garben, supra note 879, p. 343; Garben (2010), supra note 41, p. 191 et seq.; Gammenthaler, Zurich, supra note 41, p. 102 et seq.; Herdegen, Munich, supra note 41, § 26 para. 5.

¹¹³² See also BGE 136 II 470 (= Pra 2011 No 37), para. 4.2.

¹¹³³ See Kortese (2016/1), supra note 42, p. 48; European Commission, supra note 42, p. 5.

¹¹³⁴ Kortese, Maastricht, supra note 39, p. 6 et seq.

Before the Bologna process, the Lisbon Convention¹¹³⁵ 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.¹¹³⁶ With the exception of Greece and Monaco, all Members of the Council of Europe have ratified the Lisbon Convention.¹¹³⁷ The Lisbon Convention has *de facto* abolished the earlier Conventions¹¹³⁸, 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 can be shown. It essentially applies the country of origin rule unless the host Member State shows substantial differences for admission to universities.¹¹³⁹ 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 other reasons without infringing on an individual's right to recognition of his or her

¹¹³⁵ Lisbon Convention, SR 0.414.8.

¹¹³⁶ Garben, Alphen aan den Rijn, supra note 41, p. 146.

¹¹³⁷ <<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.

¹¹³⁸ *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.*

¹¹³⁹ 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.

qualifications giving access to higher education in general or to a specific higher education programme' and it should be non-discriminatory^{1140, 1141}.

The bilateral agreements of Switzerland with the neighbouring countries Germany, Austria, France and Italy are more far-reaching and generally prohibit further substantive checks.¹¹⁴² Unlike the Professional Qualifications Directive, the Lisbon Convention only encompasses higher education qualifications.¹¹⁴³

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 system¹¹⁴⁴), and to promote mobility by overcoming ob-

¹¹⁴⁰ Council of Europe, *Explanatory Report to 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.

¹¹⁴¹ Art. IV.6 of the Lisbon Convention, SR 0.414.8.

¹¹⁴² *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).

¹¹⁴³ Art. VI.1 of the Lisbon Convention, SR 0.414.8.

¹¹⁴⁴ The European Credit Transfer System for higher education was developed by the Commission for the Erasmus programme: Garben, *supra* note 879, p. 344 and footnote 33.

stacles to the effective exercise of free movement.¹¹⁴⁵ 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 2005.¹¹⁴⁶ 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.¹¹⁴⁷ There is also the similar Copenhagen process initiated by the EU for vocational education and training.¹¹⁴⁸

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).¹¹⁴⁹ In 2008, the recommendations of the European Parliament and Council to adopt the EQF were adopted, taking notice of the Bergen Communiqués.¹¹⁵⁰ 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 2012.¹¹⁵¹ 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).¹¹⁵² Separately from this development, the Professional Qualifications Directive

¹¹⁴⁵ European Ministers of Education, *Bologna Declaration of 19 June 1999*.

¹¹⁴⁶ Garben, Alphen aan den Rijn, supra note 41, p. 152.

¹¹⁴⁷ Garben, Alphen aan den Rijn, supra note 41, p. 147 et seq.; see for the overlaps of via number of supporting measures also Garben, supra note 879, p. 344.

¹¹⁴⁸ *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.

¹¹⁴⁹ *Council Resolution of 27 June 2002 on lifelong learning*, OJ [2002] C163/1, 09.07.2002; see also Gammenthaler, Zurich, supra note 41, p. 316.

¹¹⁵⁰ *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.

¹¹⁵¹ Recommendation of the European Parliament and of the Council on the establishment of the European Qualifications Framework for lifelong learning, paras. 2 and 3.

¹¹⁵² See Garben, Alphen aan den Rijn, supra note 41, p. 152.

has another system in its Article 11 to compare different levels of formal qualifications.¹¹⁵³

It is also noteworthy to mention the supporting measures that the EU adopted to simplify the academic recognition, such as the Europass Decision.¹¹⁵⁴ 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'.¹¹⁵⁵

5.3.1 Academic recognition in Switzerland

For Switzerland, the Lisbon Convention mentioned in Chapter 5.3 mainly regulates academic recognition.¹¹⁵⁶ Academic recognition in Switzerland is further governed by provisions of national law.¹¹⁵⁷ The association 'swissuniversities' also publishes general recommendations for the academic recognition of diplomas for universities. They are not binding.¹¹⁵⁸ Admission to university

¹¹⁵³ 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).

¹¹⁵⁴ *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 39, p. 248 et seq.; see for further measures Garben, supra note 879, p. 344.

¹¹⁵⁵ 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).

¹¹⁵⁶ Lisbon Convention, SR 0.414.8.

¹¹⁵⁷ See Art. 68 BBG and Art. 69 BBV; Art. 70 *Bundesgesetz über die Förderung der Hochschulen und die Koordination im schweizerischen Hochschulbereich of 30.09.2011*, SR 414.20 and Art. 56 *Verordnung zum Hochschulförderungs- und -koordinationsgesetz of 23.11.2016*, SR 414.201.

¹¹⁵⁸ See BGE 140 II 185, para. 3.1.

is however assessed separately by the respective institution based on applicable laws.¹¹⁵⁹

As shown above in Chapter 5.3, the recognition of professional qualifications is not necessary if the profession is non-regulated.¹¹⁶⁰ 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)¹¹⁶¹ and ‘level certificates’ provided by the SERI for diplomas in the scope of the BBG (vocational training).¹¹⁶² 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.¹¹⁶³ In practice, the scrutiny for the assessment seems to be distinct for the non-regulated und the regulated professions.¹¹⁶⁴

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

¹¹⁵⁹ See BGE 140 II 185, para. 5.1.

¹¹⁶⁰ Art. 69b BBV.

¹¹⁶¹ See Swiss Confederation, *supra* note 86, 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).

¹¹⁶² See Art. 69b BBV; see also BVGer B-5019/2016 of 06.02.2018, para. 3.2.

¹¹⁶³ BVGer B-6646/2008 of 19.03.2008, para. 2; Gammenthaler, Zurich, *supra* note 41, p. 289.

¹¹⁶⁴ 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.

prior authorisation in Switzerland.¹¹⁶⁵ Criminal sanctions for unlawful use of titles are regulated on the federal, intercantonal and cantonal levels.¹¹⁶⁶

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 procedure because German diplomas are exempt from having to have administrative authorisation.¹¹⁶⁷

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.¹¹⁶⁸ 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 di-

¹¹⁶⁵ R. Schiess, ‘Im Ausland erworbene akademische Titel’, ZBl 2011, No 112, p. 470.

¹¹⁶⁶ Art. 62(2) HFKG; see for more detail, Swiss Confederation, *Titelschutz im schweizerischen Hochschulbereich (2. ed.) of August 2016*, <<https://www.sbf.admin.ch/sbf/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).

¹¹⁶⁷ Case C-19/92, *Kraus*, ECLI:EU:C:1993:125, paras. 1–10.

¹¹⁶⁸ 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.

plomas 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.¹¹⁶⁹ The Administrative Court of Stuttgart (*Verwaltungsgericht Stuttgart*) found the costs not to be excessive. The Constitutional Court upheld this decision.¹¹⁷⁰ 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-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.¹¹⁷¹ 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.¹¹⁷² This decision was the reason for a parliamentary motion which question whether this encroach on the sovereignty of

¹¹⁶⁹ Case C-19/92, *Kraus*, ECLI:EU:C:1993:125, para. 42.

¹¹⁷⁰ 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 751, p. 79 et seq.

¹¹⁷¹ BGE 140 II 185, para. 4.2.

¹¹⁷² BGer 2C_9/2016 of 22.08.2016.

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).¹¹⁷³

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/EEC¹¹⁷⁴ (now the Professional Qualifications Directive), was not applicable.¹¹⁷⁵

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.¹¹⁷⁶ The applicant however had been 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.¹¹⁷⁷

¹¹⁷³ Swiss Confederation, *Parliamentary Motion No 14.3466*, <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20143466>> (last visited on 28.09.2020).

¹¹⁷⁴ Directive 93/16/EEC (see for the full citation supra note 1174).

¹¹⁷⁵ BGE 132 II 135 (= Pra 96 2007 No 16), para. 7.

¹¹⁷⁶ BGer 2A.331/2002 of 24.01.2003, para. 6.1.

¹¹⁷⁷ Interestingly enough, Belgium was not a Contracting Party to the Lisbon Convention, SR 0.414.8 at that time.

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' (translated by the present author)¹¹⁷⁸. The cantonal authorities and the Administrative Court of the Canton of Ticino held that the appellant could only carry the title during the actual exercise of his teaching activities 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.¹¹⁷⁹

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'.¹¹⁸⁰

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.¹¹⁸¹ In a case before the FAC of 2017, the applicant applied for recognition of a 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

¹¹⁷⁸ 'Prof. dr. med. A. _____, docente di criminologia psicopatologica alla Facoltà di medicina dell'Università degli Studi di Ferrara'.

¹¹⁷⁹ BGer 2P.222/2005 of 13.06.2006.

¹¹⁸⁰ BGer 2P.222/2005 of 13.06.2006, para. 6.

¹¹⁸¹ BVerfG B-2680/2015 of 21.06.2017, para. 2.5.

was found that this diploma does not give access to the profession of psychotherapist in Germany and the appeal was therefore dismissed.¹¹⁸²

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.¹¹⁸³

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.¹¹⁸⁴ There is no legal basis for a translation of the title or the description of the job profile in this certificate.¹¹⁸⁵

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.¹¹⁸⁶

5.3.3.4 **Cantonal case law**

In light of a leading case (see Chapter 5.3.3.2.1) ruled on in 2016,¹¹⁸⁷ 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.

¹¹⁸² BVGer B-2680/2015 of 21.06.2017, paras. 2.6 and 3.3.

¹¹⁸³ BVGer B-5120/2015 of 10.03.2017, paras. 5.3.4 and 6.1.2.

¹¹⁸⁴ See, since 2015, Art. 69b para. 1 BBV.

¹¹⁸⁵ BVGer B-192/2012 of 29.03.2012, para. 2.2.

¹¹⁸⁶ BVGer B-6646/2008 of 19.03.2008, para. 2.

¹¹⁸⁷ BGE 140 II 185.

For Article IV.6 thereof it was argued 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.¹¹⁸⁸

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 (*Hocsmann* case) if secondary law is not applicable and for the concept of partial recognition, which is not yet part of secondary law

¹¹⁸⁸ Decision No 39/2016 of the Appeal Committee of the University of St. Gallen of 05.12.2016.

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.¹¹⁸⁹ 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

¹¹⁸⁹ See the Professional Qualifications Directive, recital 9.

Joint Committee of the AFMP.¹¹⁹⁰ 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.¹¹⁹¹ 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*).¹¹⁹² 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*).¹¹⁹³ Contrary to the sectoral system, compensation measures can be imposed on applicants under certain conditions (see Chapter 6.4.2).¹¹⁹⁴

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

¹¹⁹⁰ See <<https://www.admin.ch/opc/de/european-union/joint-committees/007.000.000.000.000.html>> (last visited on 25.06.2020); e.g. Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

¹¹⁹¹ See the title of Art. 21 of the Professional Qualifications Directive.

¹¹⁹² Art. 13(1)(b) of the Professional Qualifications Directive.

¹¹⁹³ Art. 13(2) of the Professional Qualifications Directive.

¹¹⁹⁴ Art. 14 of the Professional Qualifications Directive.

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 on the fundamental freedoms.¹¹⁹⁵ 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.¹¹⁹⁶ Under the *acquis communautaire*, it applies to family members of EU nationals¹¹⁹⁷, to long-term-residents¹¹⁹⁸, refugees¹¹⁹⁹, blue card holders¹²⁰⁰, researchers¹²⁰¹, third country nationals falling under the Sin-

¹¹⁹⁵ Berthoud, Geneva, supra note 1018, pp. 46–48.

¹¹⁹⁶ Art. 2(1) of Directive 2006/36/EC; European Commission, supra note 1116, p. 2; see Gammenthaler, Zurich, supra note 41, p. 139 et seq. for highly theoretical exceptions.

¹¹⁹⁷ Arts. 3(1) and 24(1) of Directive 2004/38/EC.

¹¹⁹⁸ Art. 11(1)(c) Directive 2003/109/EC.

¹¹⁹⁹ 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.

¹²⁰⁰ 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.

¹²⁰¹ 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.

gle Permit Directive¹²⁰² and intra corporate transferees^{1203, 1204}. Apart from those family members, the directives covering the latter categories are not binding on all the Member States.¹²⁰⁵ Under the *acquis suisse*, the 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.¹²⁰⁶ 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.¹²⁰⁷

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. The EEA countries are thus considered Member States for the purpose of applying the Professional Qualifications Directive.¹²⁰⁸

¹²⁰² 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.

¹²⁰³ 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.

¹²⁰⁴ See further European Commission, *supra* note 1116, p. 14; European Commission, *supra* note 1113, p. 9; see further Kortese, Maastricht, *supra* note 39, p. 100 et seq.

¹²⁰⁵ 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.

¹²⁰⁶ See further Berthoud, Geneva, *supra* note 1018, p. 89; see for the situation under the Facilitating Practice Directive: Chapter 8.2.3.

¹²⁰⁷ BVGer B-8630/2007 of 10.07.2008, para. 4.2; BVGer B-2158/2006 of 29.03.2007, para. 3.4.

¹²⁰⁸ See State Secretariat for Research and Innovation, *supra* note 979, p. 12.

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 migrates to an EU Member State (e.g. to Austria) cannot invoke the provisions of the Professional Qualifications Directive in this EU Member State 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 (without assessing bilateral Treaties between two States or favourable provisions of national law in this context). 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).¹²⁰⁹

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.¹²¹⁰ This view is also supported by doctrine.¹²¹¹ Those decisions are based on the case law of the CJEU in *Vlassopoulou*¹²¹² and *Gebhard*¹²¹³.¹²¹⁴ 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

¹²⁰⁹ For the same opinion, see Zaglmayer, Vienna, *supra* note 1037, para. 9.4.

¹²¹⁰ BVGer B-8630/2007 of 10.07.2008, para. 4.2; BVGer B-2158/2006 of 29.03.2007, para. 3.4.

¹²¹¹ Berthoud, Geneva, *supra* note 1018, p. 90.

¹²¹² See Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

¹²¹³ See Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411.

¹²¹⁴ BVGer B-8630/2007 of 10.07.2008, para. 5.

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.¹²¹⁵ 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.¹²¹⁶ 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.¹²¹⁷

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.¹²¹⁸ This is evidently the correct formula as it covers Swiss nationals who made use of their free movement rights and returned to Switzerland.¹²¹⁹ This is also in line with the case law of the Swiss Federal Court.¹²²⁰ These situations must not be mistaken for reverse discrimination where the AFMP cannot be invoked.¹²²¹ This case law is also in line with the application of Article 2 AFMP in general, despite the restrictive *wording* of Article 2

¹²¹⁵ 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.’

¹²¹⁶ Now the Professional Qualifications Directive.

¹²¹⁷ BVGer B-3360/2014 of 04.07.2016, para. 5.10.6.

¹²¹⁸ 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.

¹²¹⁹ See BVGer B-6825/2009 of 15.02.2010, para. 3.1 et seq.

¹²²⁰ BGE 131 V 209, para. 6.2; BGE 130 I 26, para. 3.2.2 et seq.

¹²²¹ See *infra* note 2224.

AFMP.¹²²² Thus, a Swiss national may in general rely on the AFMP before Swiss courts if there is a cross-border situation.¹²²³ 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.¹²²⁴ 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.¹²²⁵ There are very few cases before the CJEU that concern internal situations: purely internal situations are outside the scope of EU law.¹²²⁶ It should not however be disregarded that the CJEU relied on the restrictive wording of the AFMP in the recent case

¹²²² 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.

¹²²³ 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.

¹²²⁴ 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.

¹²²⁵ See for this argument, *Opinion of Advocate General Melchior Wathelet in Case C-581/17, Martin Wächter 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.

¹²²⁶ 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 813, para. 91 et seq. for a further reference to a critical opinion.

Picart,¹²²⁷ where it found that a migrant could not rely on provisions for self-employed persons against his or her home Member State.¹²²⁸

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 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.¹²²⁹

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.¹²³⁰ 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.¹²³¹ 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

¹²²⁷ Case C-355/16, *Christian Picart v Ministre des Finances et des Comptes public*, ECLI:EU:C:2018:184, para. 23.

¹²²⁸ See Chapter 4.2.2.

¹²²⁹ BVGer B-5372/2015 of 04.04.2017, para. 6.2; see further Diebold, Berne, *supra* note 69, para. 628.

¹²³⁰ BGE 140 II 364, para. 6.1.

¹²³¹ In this sense, see Diebold, Berne, *supra* note 69, para. 630 et seq.

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*.¹²³²

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.¹²³³ However, the CJEU does not (usually) apply primary law when secondary law is applicable. Thus – in the present author’s opinion – Swiss courts should 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).¹²³⁴

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 author-

¹²³² See Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 39.

¹²³³ BVGer B-5372/2015 of 04.04.2017, para. 6.1.

¹²³⁴ See Case T-420/13, *Brouillard v CJEU*, ECLI:EU:T:2015:633, para. 65.

ity in the home Member State.¹²³⁵ 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.¹²³⁶

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 distinguishes between *access* and *pursuit* of the profession (the so-called two stage approach: see Chapter 6.3.3.1).¹²³⁷

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.¹²³⁸

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.¹²³⁹ 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

¹²³⁵ 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.

¹²³⁶ 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.

¹²³⁷ See further Zaglmayer, Vienna, *supra* note 1037, para. 3.25 et seq.

¹²³⁸ 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 1113, p. 11 et seq.; BVGer B-166/2014 of 24.11.2014, para. 6.4.

¹²³⁹ Art. 3(1) point c of the Professional Qualifications Directive.

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.¹²⁴⁰ Berthoud argues – contrary to the position of the European Commission¹²⁴¹ and contrary to Zaglmayer¹²⁴² – that Article 3(1)(c) of the Directive was altered in full knowledge of the case law and also applies to the sectoral professions.¹²⁴³ 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.¹²⁴⁴

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 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.¹²⁴⁵

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

¹²⁴⁰ Case C-110/01, *Malika Tennah-Durez v Conseil national de l'ordre des médecins*, ECLI:EU:C:2003:357, para. 61.

¹²⁴¹ 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.

¹²⁴² Zaglmayer, Vienna, supra note 1037, paras. 3.32 and 3.48.

¹²⁴³ Berthoud, Geneva, supra note 1018, p. 102 et seq. and footnote 247 thereof.

¹²⁴⁴ European Commission, supra note 1241, ad Art. 3(1)(c) of the Professional Qualifications Directive.

¹²⁴⁵ Recital 14 of the Professional Qualifications Directive.

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’.¹²⁴⁶ 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)¹²⁴⁷ 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’).¹²⁴⁸ The FAC often refers to this list in its judgments without providing further explanations as to whether the profession is regulated.¹²⁴⁹ 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) (*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

¹²⁴⁶ 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.

¹²⁴⁷ ‘Staatssekretariat für Bildung, Forschung und Innovation’.

¹²⁴⁸ <<https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html>> (last visited on 28.06.2020).

¹²⁴⁹ See BVGer B-5129/2013 of 04.03.2015, para. 4.2; BVGer B-3738/2012 of 27.02.2013, para. 2.4.

federal authorities rely on information provided by the cantonal authorities to regularly assess Annex I to the VMD.¹²⁵⁰ 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.¹²⁵¹ Both databases (the Swiss and the EU database) are neither exhaustive nor legally binding.¹²⁵² 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.¹²⁵³ According to this data, Switzerland currently regulates 177 professions.¹²⁵⁴ Professions practised by members of an association listed in Annex I of that Directive are treated as regulated professions, which is (or was) especially relevant for the UK and Ireland.¹²⁵⁵

To sum up, the following characteristics are inter alia sufficient to show that there is a regulated profession, according to Schneider:¹²⁵⁶

- 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;

¹²⁵⁰ In this sense see: State Secretariat for Research and Innovation, *supra* note 979, p. 8.

¹²⁵¹ <<http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=homepage>> (last visited on 28.06.2020).

¹²⁵² See *Opinion of Advocate General Sharpston in Case C-298/14, Brouillard*, ECLI:EU:C:2015:408, para. 50.

¹²⁵³ 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 1037, p. 12.

¹²⁵⁴ <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).

¹²⁵⁵ Art. 3(2) of the Professional Qualifications Directive.

¹²⁵⁶ Schneider, Antwerp, *supra* note 751, pp. 178–187.

- 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.

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.¹²⁵⁷ Professional qualifications, including attestations of competence, are distinct from simple training or tests.¹²⁵⁸ The CJEU clarified in *Commission v Portugal* that certain private security certificates could not be classed as attestations of competence.¹²⁵⁹ 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 compe-

¹²⁵⁷ *Opinion of Advocate General Alber in Case C-171/02, Commission v Portugal*, ECLI:EU:C:2003:465, para. 94.

¹²⁵⁸ *Opinion of Advocate General Alber in Case C-171/02, Commission v Portugal*, ECLI:EU:C:2003:465, para. 95.

¹²⁵⁹ 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.

tence under Directive 92/51/EEC (now the Professional Qualifications Directive) as it is limited for two years and must be renewed.¹²⁶⁰

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 question' is sufficient to qualify as evidence of formal qualifications (attestation of competence in this case) of Directive 92/51/EEC.¹²⁶¹

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).¹²⁶²

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.¹²⁶³ 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.¹²⁶⁴ However, the relevant experience cannot be entirely

¹²⁶⁰ 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.

¹²⁶¹ Case C-514/03, *Commission v Spain*, ECLI:EU:C:2006:63, para. 64.

¹²⁶² 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.

¹²⁶³ BVGer B-7059/2010 (BVGE 2012/29) of 14.08.2012, para. 7.1 et seq.

¹²⁶⁴ Joined Cases C-422/09, C-425/09 and C-426/09, *Vandorou and Others*, ECLI:EU:C:2010:732, para. 62.

disregarded, but must be taken into account.¹²⁶⁵ 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 (*‘Heilpädagogin’*) was however also regulated in the host Member State.¹²⁶⁶ This practice was changed in October 2017 and 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.¹²⁶⁷

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.¹²⁶⁸ 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.¹²⁶⁹ 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

¹²⁶⁵ Joined Cases C-422/09, C-425/09 and C-426/09, *Vandorou and Others*, ECLI:EU:C:2010:732, para. 71.

¹²⁶⁶ Decision B1-2009 of the Rekurskommission (Appeal Committee) EDK/GDK of 10.11.2010, para. 6.

¹²⁶⁷ <https://www.edudoc.ch/static/web/arbeiten/diplanerk/ausl_lehrdipl_praxisaenderung_d.pdf> (last visited on 28.06.2020).

¹²⁶⁸ See BVGer B-6201/2011 of 06.03.2013, para. 5.5.

¹²⁶⁹ 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.

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’, 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.¹²⁷⁰

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,¹²⁷¹ and moreover used quite widely in some EU Member States.¹²⁷² 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

¹²⁷⁰ Case C-424/09, *Christina Ioanni Toki v Ypourgos Ethnikis paideias kai Thriskevmaton*, ECLI:EU:C:2011:210, para. 38.

¹²⁷¹ Schneider, Antwerp, *supra* note 751, pp. 376–378.

¹²⁷² Berthoud, Geneva, *supra* note 1018, p. 38 et seq. and 197 et seq.

‘regulated profession’ applies based on the definition of EU law and not the legal classifications of national law.¹²⁷³ It was also held that administrative rules could directly or indirectly regulate a profession.¹²⁷⁴

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.¹²⁷⁵ 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.¹²⁷⁶

6.2.4.6 Acquired rights under the Professional Qualifications Directive

Under the sectoral system, there are specific provisions that concern acquired rights.¹²⁷⁷ 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.¹²⁷⁸ This is not relevant for the sectoral professions because diplomas of an EU Member State are considered to be EU diplomas.¹²⁷⁹ For the sectoral professions, Article 23 of the Professional

¹²⁷³ Case C-285/01, *Burbaud*, ECLI:EU:C:2003:432, para. 43.

¹²⁷⁴ Case C-285/01, *Burbaud*, ECLI:EU:C:2003:432, para. 58.

¹²⁷⁵ Case C-586/08, *Rubino*, ECLI:EU:C:2009:801, para. 35.

¹²⁷⁶ See Case C-285/01, *Burbaud*, ECLI:EU:C:2003:432.

¹²⁷⁷ Arts. 23, 27, 30, 33, 37, 39, 43 and 49 of the Professional Qualifications Directive.

¹²⁷⁸ Zaglmayer, Vienna, *supra* note 1037, paras. 3.32 and 3.48.

¹²⁷⁹ See the discussion in Chapter 6.2.4 and *supra* notes 1240, 1241 and 1242.

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.¹²⁸⁰ The professional experience cannot be obtained abroad but only in the home Member State.¹²⁸¹ 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.¹²⁸² 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 exceptional reasons’ (see Chapter 7.8.3 for case law of the FAC on this).¹²⁸³ In its reasoning, the CJEU explicitly relied on the *travaux préparatoires*.¹²⁸⁴ 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

¹²⁸⁰ See Art. 3(1)(f) of the Professional Qualifications Directive *per analogiam*.

¹²⁸¹ See Berthoud, Geneva, *supra* note 1018, p. 275.

¹²⁸² Art. 23(6) of the Professional Qualifications Directive.

¹²⁸³ Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 38.

¹²⁸⁴ Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 33.

(g).¹²⁸⁵ As a further subsidiary form of protection, the recognition of professional qualifications based on the regime of primary law applies.¹²⁸⁶

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,¹²⁸⁷ 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.¹²⁸⁸ 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.¹²⁸⁹ 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.¹²⁹⁰ It ruled that the authorities nevertheless have to take into account (pursuant to the freedom of establishment and the free movement of workers) knowledge, qualifications and other evidence, even for unregulated professions.¹²⁹¹

¹²⁸⁵ *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.

¹²⁸⁶ See Zaglmayer, Vienna, *supra* note 1037, para. 5.15 et seq.

¹²⁸⁷ For examples see Berthoud, Geneva, *supra* note 1018, p. 174 et seq.

¹²⁸⁸ Case C-164/94, *Georgios Aranitis v Land Berlin*, ECLI:EU:C:1996:23, para. 2.

¹²⁸⁹ Case C-164/94, *Georgios Aranitis v Land Berlin*, ECLI:EU:C:1996:23, para. 15.

¹²⁹⁰ Case C-164/94, *Georgios Aranitis v Land Berlin*, ECLI:EU:C:1996:23, paras. 17–24.

¹²⁹¹ Case C-164/94, *Georgios Aranitis v Land Berlin*, ECLI:EU:C:1996:23, para. 31.

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.¹²⁹² 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.¹²⁹³

Berthoud rightly points out that the Swiss Federal Court neglected that distinction in a judgment of 2008¹²⁹⁴.¹²⁹⁵ 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.’¹²⁹⁶

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.

6.2.4.7.3 Case law of the FAC

Apart from the professions which are listed in the database of regulated professions,¹²⁹⁷ there are numerous activities which are regulated but where it

¹²⁹² See Arts. 1 and 2(1) of the Professional Qualifications Directive in conjunction with Art. 3(1)(a) of the Professional Qualifications Directive.

¹²⁹³ See Art. 13(2)(3) of the Professional Qualifications Directive.

¹²⁹⁴ See BGE 134 II 341 (= Pra 2009 No 52), para. 2.1.

¹²⁹⁵ F. Berthoud, ‘Tribunal fédéral, 2ème Cour de droit public, 30 octobre 2008, U.c. Office fédéral de la formation professionnelle et de la technologie (2C_416/2008), recours en matière de droit public (ATF 134 II 341)’, AJP/PJA 2009, p. 517 et seq.

¹²⁹⁶ BGE 134 II 341 (= Pra 2009 No 52), para. 2.1.

¹²⁹⁷ <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=home_page> (last visited on 28.06.2020).

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.¹²⁹⁸ 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.¹²⁹⁹ 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’.¹³⁰⁰ 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.¹³⁰¹ The curriculum for a diploma in ‘medical physics’ is quite extensive when combined with a thesis. The check is only carried out every five years. In the pre-

¹²⁹⁸ BVGer B-1982/2016 of 14.12.2017.

¹²⁹⁹ <<http://ssrpm.ch/certification-for-medical-physicists/rules/>> (last visited on 28.06.2020).

¹³⁰⁰ Art. 74(4) of the *Strahlenschutzverordnung (StSV) of 22.06.1994*, AS 1994 1947.

¹³⁰¹ 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.

sent 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.¹³⁰² 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.¹³⁰³ In general, this view is also supported by doctrine that private law leads to inherent problems when imposing compensation measures.¹³⁰⁴ 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.¹³⁰⁵ 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.¹³⁰⁶ There is a follow-up case, which will be discussed in Chapter 6.3.3.3 below.

¹³⁰² See supra note 1300.

¹³⁰³ See BVGer B-3577/2016 of 06.10.2017, para. 2.1.

¹³⁰⁴ See Berthoud, Geneva, supra note 1018, 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.

¹³⁰⁵ BGer 2C_39/2018 of 18.06.2019, para. 7.

¹³⁰⁶ 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.

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).¹³⁰⁷ After 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').¹³⁰⁸ 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.¹³⁰⁹

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

¹³⁰⁷ 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 979, p. 27.

¹³⁰⁸ Berthoud (2010), *supra* note 998, p. 163; see also Schneider, Antwerp, *supra* note 751, pp. 80–84.

¹³⁰⁹ Case C-154/93, *Tawil-Albertini*, ECLI:EU:C:1994:51.

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.¹³¹⁰ 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.¹³¹¹

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 *Vlassopoulou*-formula, which meant France had to compare 'all the formal qualifications (...) and his practical experience'.¹³¹² 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).¹³¹³

To conclude, the initial assessment of third country diplomas law is still left to the Member States to carry out.¹³¹⁴ 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.¹³¹⁵ 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

¹³¹⁰ For the same opinion, see Kremalis, Frankfurt am Main, *supra* note 733, p. 160.

¹³¹¹ Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440, paras. 12–19.

¹³¹² Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440, para. 36.

¹³¹³ See, in particular, among many others: Zaglmayer, Vienna, *supra* note 1037, para. 10.27.

¹³¹⁴ See recital 10 of the Professional Qualifications Directive.

¹³¹⁵ See further Zaglmayer, Vienna, *supra* note 1037, para. 10.24 et seq.

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 *Hocsmán* case law and its (partial) codification¹³¹⁶ 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.¹³¹⁷ The following table shows the different forms of recognition for third country diplomas:

¹³¹⁶ For the codification of the *Hocsmán* 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 41, p. 340.

¹³¹⁷ European Commission, *supra* note 1241, 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. ¹³¹⁸	
Minimum training conditions have to be respected. ¹³¹⁹	–
Indirect recognition of third country diplomas	
Both systems (general and sectoral)	Primary law
3 years of professional experience in the initial Member State. ¹³²⁰	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. ¹³²¹ No choice between compensation measures. ¹³²²	No choice between compensation measures. ¹³²³

Table 2: Recognition of third country diplomas¹³²⁴

¹³¹⁸ The Professional Qualifications Directive does not prohibit the recognition of third country diplomas pursuant to recital 10 and Art. 2(2) thereof.

¹³¹⁹ See recital 10 of the Professional Qualifications Directive, with the exception of the profession of architects. See supra note 1307 for further references.

¹³²⁰ Art. 10(g) of the Professional Qualifications Directive.

¹³²¹ See Zaglmayer, Vienna, supra note 1037, para. 10.23; Berthoud, Geneva, supra note 1018, p. 103 et seq.; Case C-319/92, *Haim I*, ECLI:EU:C:1994:47, para. 21.

¹³²² Art. 14(3) of Directive in conjunction with Art. 10(g) and Art. 3(3) of the Professional Qualifications Directive.

¹³²³ Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440, para. 36.

¹³²⁴ Based on the figure of the State Secretariat for Research and Innovation, supra note 979, 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*¹³²⁵ ruling, the Swiss Federal Court held in a noteworthy *obiter dictum* in *BGE 132 II 135* that the judgment *Hocsman*¹³²⁶ 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.¹³²⁷ 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.¹³²⁸ 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.¹³²⁹ 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.¹³³⁰ 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*.¹³³¹ 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/EEC¹³³² (now the Professional Qualifications Directive). The Swiss Fed-

¹³²⁵ Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

¹³²⁶ Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440.

¹³²⁷ BGE 132 II 135 (= Pra 96 2007 No 16), para. 7.

¹³²⁸ BGE 132 II 135 (= Pra 96 2007 No 16), para. 5.2.

¹³²⁹ Case C-238/98, *Hocsman*, ECLI:EU:C:2000:440, para. 33 et seq.

¹³³⁰ 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.

¹³³¹ BGE 133 V 33, para. 9.4.

¹³³² Directive 93/16/EEC (see for the full citation supra note 1174).

eral 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 accepted that the judgments *Hocsman* and *Vlassopoulou* essentially bear the same meaning because they are mentioned in the same sentence.¹³³³

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'.¹³³⁴ Only exceptional circumstances could allow a deviation.¹³³⁵ Article 16(2) AFMP states that there is a 'parallel legal context'¹³³⁶ or 'homogeneity'¹³³⁷. Even the SERI refers in its recommendations to the *Hocsman* ruling and accepts it with the introduction of the Professional Qualifications Directive.¹³³⁸ Article 10(g) of the Directive clearly incorporates the *Hocsman* ruling (at least partially).¹³³⁹

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

¹³³³ BGE 133 V 33, para. 9.4.

¹³³⁴ 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.

¹³³⁵ 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.

¹³³⁶ See the *Opinion of Advocate General Jääskinen in Case C-425/11, Katja Ettwein v Finanzamt Konstanz*, ECLI:EU:C:2012:650, para. 32.

¹³³⁷ See Epiney (2005), *supra* note 502, p. 6 et seq. For a different opinion see Mazille, Geneva, *supra* note 647, p. 252 et seq. who heavily relies on the *Polydor* case law and the different structure and wording of the sectoral agreements.

¹³³⁸ State Secretariat for Research and Innovation, *supra* note 979, p. 13.

¹³³⁹ For the same opinion see Gammenthaler, *supra* note 1316, p. 344; Gammenthaler, Zurich, *supra* note 41, p. 340; see further Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 43.

invited to enable holders of third country diplomas to be granted access to the exercise of regulated professions.¹³⁴⁰

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 the amendments inserted by Directive 2013/55/EU. Decision No 2/2011¹³⁴¹ of the Joint Committee which entered into force on 31 August 2013¹³⁴² 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.¹³⁴³ 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.¹³⁴⁴ 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 in-

¹³⁴⁰ Recital 10 of the Professional Qualifications Directive.

¹³⁴¹ Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

¹³⁴² *Notice of entry into force (Decision No 2/2011 of the EU-Swiss Joint Committee)*, OJ [2014] C49/3, 21.02.2014.

¹³⁴³ See BVGer B-5945/2018 of 14.01.2019, paras. 5.3; BVGer B-1300/2014 of 07.05.2015; Berthoud, Geneva, *supra* note 1018, p. 76 et seq.

¹³⁴⁴ Art. 16(1) AFMP; Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

ternational 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.¹³⁴⁵

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.¹³⁴⁶ The addition of Directive 2013/55/EU may serve as a welcome source of interpretation for the Professional Qualifications Directive.¹³⁴⁷ 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: supra note 1002).¹³⁴⁸ 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 2017.¹³⁴⁹ 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).¹³⁵⁰ 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.¹³⁵¹ 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.¹³⁵²

¹³⁴⁵ See BVGer B-5372/2015 of 04.04.2017, para. 5.4.

¹³⁴⁶ Cottier & Liechti, supra note 1001, p. 6.

¹³⁴⁷ 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.

¹³⁴⁸ See also Kremalis, Frankfurt am Main, supra note 733, p. 177 who even suggests that the second sentence of Art. 18 AFMP should be disapplied.

¹³⁴⁹ 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).

¹³⁵⁰ For the same opinion see Oesch (2017), supra note 281, p. 642.

¹³⁵¹ Oesch (2017), supra note 281, p. 642 does argue that the situation is regrettable, but not problematic as it only affects exceptional situations.

¹³⁵² Oesch (2019), supra note 16, p. 7 et seq.

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.¹³⁵³ 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.¹³⁵⁴ 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 interest. It must also be proportionate to achieve the aim of protecting public health or other overriding reasons in the general interest.¹³⁵⁵

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).¹³⁵⁶ 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.¹³⁵⁷

¹³⁵³ Berthoud, Geneva, supra note 1018, p. 154 et seq.

¹³⁵⁴ Case C-294/00, *Gräbner*, ECLI:EU:C:2002:442, para. 36.

¹³⁵⁵ Case C-294/00, *Gräbner*, ECLI:EU:C:2002:442, para. 39 et seq.

¹³⁵⁶ See the opinion in Berthoud, Geneva, supra note 1018, p. 204 et seq. and 207 et seq. for further references.

¹³⁵⁷ Vallender, Klaus, A., 'Art. 27 BV', in B. Ehrenzeller et al. (eds.), *Die schweizerische Bundesverfassung: St. Galler Kommentar*, Zurich/St. Gallen (2014), para. 47.

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.¹³⁵⁸ 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).¹³⁵⁹ 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 2018.¹³⁶⁰

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 if there is any missing document that needs to be provided.¹³⁶¹ 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.¹³⁶² Article 50(1) of the Directive stipulates that the compe-

¹³⁵⁸ Art. 50(2) and (3) of the Professional Qualifications Directive.

¹³⁵⁹ 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).

¹³⁶⁰ Protocol 1, para. 1, third indent of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

¹³⁶¹ Art. 51(1) of the Professional Qualifications Directive.

¹³⁶² BVGer B-5129/2013 of 04.03.2015, para. 5.1.

tent 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 III¹³⁶³).¹³⁶⁴ A failure to reach a decision within three months is subject to an appeal under national law.¹³⁶⁵ 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.¹³⁶⁶

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 of the principle of proportionality.¹³⁶⁷ 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 Di-

¹³⁶³ General system of recognition and recognition of professional experience under the freedom of establishment.

¹³⁶⁴ Art. 51(2) of the Professional Qualifications Directive; see also BVGer B-3284/2018 of 16.11.2018, para. 5.1.

¹³⁶⁵ Art. 51(3) of the Professional Qualifications Directive.

¹³⁶⁶ See e.g. Art. 46a VwVG on the federal level.

¹³⁶⁷ Berthoud, Geneva, *supra* note 1018, p. 351.

rective. 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.¹³⁶⁸ 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.¹³⁶⁹

6.3.2.1 Language requirements

The CJEU had developed rich case law on language requirements,¹³⁷⁰ 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.¹³⁷¹ The case law of the EFTA Court also accepts the refusal to authorise professionals when the authorities al-

¹³⁶⁸ 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 Aus-senwirtschafts- 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 69, para. 1023 et seq.

¹³⁶⁹ 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.

¹³⁷⁰ 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.

¹³⁷¹ Group of Coordinators for Directive 2005/36/EC, supra note 1369, p. 20.

ready have serious doubts about language skills and therefore would commence proceedings for withdrawal of the authorisation to practise.¹³⁷²

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.¹³⁷³ In addition, it would be discriminatory to demand a particular certificate from an applicant.¹³⁷⁴ There is however a tool available, the European Language Portfolio, that allows the authorities to make a comparison between different levels of language skills.¹³⁷⁵

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.¹³⁷⁶ Migrants cannot be required to have knowledge of the Swiss-German dialect.¹³⁷⁷ To give an example for Switzerland, it was at least debat-

¹³⁷² Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, EFTA Court Report 2011. p. 484 et seq.

¹³⁷³ Case C-281/98, *Angonese*, ECLI:EU:C:2000:296.

¹³⁷⁴ Case C-317/14, *Commission v Belgium*, ECLI:EU:C:2015:63, para. 35; see also European Commission, *supra* note 1116, p. 13.

¹³⁷⁵ <<http://www.coe.int/en/web/portfolio>> (last visited on 28.06.2020).

¹³⁷⁶ European Commission, *supra* note 1224, p. 10.

¹³⁷⁷ 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.

able whether the current requirement of two official languages for surveyors is proportionate, especially for the provision of services.¹³⁷⁸ 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.¹³⁷⁹ 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.¹³⁸⁰

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.¹³⁸¹ 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

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 1037, para. 7.23.

¹³⁷⁸ 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.

¹³⁷⁹ Kettiger & Oesch, Zurich, supra note 1378, p. 71.

¹³⁸⁰ 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.sbf.admin.ch/sbfi/de/home/bildung/diploma/anerkennungsverfahren-beiniederlassung/zustaendige-diplomanerkennungsstellen/bereich-der-amtlichen-vermessung.html>> (last visited on 26.06.2020).

¹³⁸¹ 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.edoc.ch/static/web/arbeiten/diplanerk/mb_sprachen_d.pdf> (last visited on 26.06.2020).

interesting to admit a few dentists with a good command of another language to treat foreigners.¹³⁸² 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 that is actually spoken in the part of Switzerland where the applicant seeks work.¹³⁸³ 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.¹³⁸⁴ Still, Articles 15 and 33a (1) MedBG were amended and entered into force on 1 January 2018.¹³⁸⁵ As mentioned above, the CJEU approved linguistic requirements for teachers.¹³⁸⁶ 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 con-

¹³⁸² Case C-424/97, *Haim II*, ECLI:EU:C:2000:357, para. 60.

¹³⁸³ A. Ayer & C. Hänggeli, 'Art 21 MedBG', in A. Ayer et al. (eds.), *Medizinalberufegesetz: (MedBG); Kommentar*, Basel (2009), para. 16.

¹³⁸⁴ Swiss Confederation, *Botschaft zur Änderung des Medizinalberufegesetzes (MedBG) of 3 July 2013 (BBl 2013 6205)*, p. 6207.

¹³⁸⁵ Swiss Confederation, *Bundesgesetz über die universitären Medizinalberufe (Medizinalberufegesetz, MedBG), Änderung of 20 March 2015, AS 2015 5081*, p. 5085.

¹³⁸⁶ Case C-379/87, *Groener v Minister for Education and City of Dublin Vocational Education Committee*, ECLI:EU:C:1989:599.

sumer protection and proper administration of justice.¹³⁸⁷ 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.¹³⁸⁸

Even private parties have to undertake non-discriminatory language tests. Although directives do not have horizontal effect (with some minor exceptions),¹³⁸⁹ the fundamental freedoms apply horizontally and a private party may only require a good command of languages if the test is non-discriminatory.¹³⁹⁰ 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.¹³⁹¹

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.¹³⁹² Even traineeships carried out in

¹³⁸⁷ 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.

¹³⁸⁸ See Gammenthaler, Zurich, *supra* note 41, p. 238; European Commission, *supra* note 1116, p. 13.

¹³⁸⁹ Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33, paras. 37–38.

¹³⁹⁰ Case C-281/98, *Angonese*, ECLI:EU:C:2000:296, paras. 44–45.

¹³⁹¹ See *supra* note 866.

¹³⁹² See Case C-313/01, *Christine Morgenbesser v Consiglio dell’Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612.

third countries have to be taken into account. Traineeships completed in the course of regulated training are not considered to be ‘professional traineeships’.¹³⁹³ 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.¹³⁹⁴

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 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.¹³⁹⁵ This interpretation seems to be heavily influenced by the *Morgenbesser* case law¹³⁹⁶ and the German implementation of this case law¹³⁹⁷ but it falls short to codify the

¹³⁹³ See Zaglmayer, Vienna, supra note 1037, para. 3.41.

¹³⁹⁴ 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).

¹³⁹⁵ Zaglmayer, Vienna, supra note 1037, para. 3.41 et seq.

¹³⁹⁶ See Case C-313/01, *Christine Morgenbesser v Consiglio dell’Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612.

¹³⁹⁷ See §112a of Deutsches Richtergesetz.

Morgenbesser principle which also grants access to traineeships in another Member State.¹³⁹⁸

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.¹³⁹⁹ Membership in associations or organisations can be declared a compulsory condition before a title can be used.¹⁴⁰⁰ For the freedom of services, the applicant makes use of the professional title of the state where it acquired that title.¹⁴⁰¹ If the migrant 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).¹⁴⁰²

¹³⁹⁸ Kortese, Maastricht, supra note 39, p. 180 et seq.

¹³⁹⁹ Art. 52(1) of the Professional Qualifications Directive.

¹⁴⁰⁰ Art. 52(2) of the Professional Qualifications Directive.

¹⁴⁰¹ Art. 7(3) of the Professional Qualifications Directive.

¹⁴⁰² 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*).

6.3.2.4 Use of academic titles

Migrants may use the academic title granted in the home Member State.¹⁴⁰³ The concept of ‘academic titles’ does not only include university degrees but has a ‘broad meaning’.¹⁴⁰⁴ 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.¹⁴⁰⁵ 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.¹⁴⁰⁶ 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.¹⁴⁰⁷ 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 a language as long as this measure is proportionate.¹⁴⁰⁸ The case concerned a Bulgarian doctor who applied for

¹⁴⁰³ See the first sentence of Art. 54 of the Professional Qualifications Directive.

¹⁴⁰⁴ Art. 54 of the Professional Qualifications Directive; European Commission, *supra* note 1241, ad Art. 54.

¹⁴⁰⁵ See the second sentence of Art. 54 of the Professional Qualifications Directive.

¹⁴⁰⁶ See the third sentence of Art. 54 of the Professional Qualifications Directive.

¹⁴⁰⁷ See M. Kaufmann, *Anerkennung der Berufsqualifikation von Primarlehrpersonen*, Diss. Zurich (2015), Zurich (2015), p. 55, para. 103 for further references.

¹⁴⁰⁸ 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.

‘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 abilities¹⁴⁰⁹. 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.¹⁴¹⁰

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*¹⁴¹¹ 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.¹⁴¹² 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.¹⁴¹³

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 applied automatically as long as

¹⁴⁰⁹ Or in the words of the EFTA Court: ‘signs of poor insight in her own functioning’.

¹⁴¹⁰ 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.

¹⁴¹¹ Case C-424/97, *Haim II*, ECLI:EU:C:2000:357.

¹⁴¹² 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.

¹⁴¹³ 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.

the relevant diploma listed in Annex V is shown to be held by the applicant.¹⁴¹⁴

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.¹⁴¹⁵ The ESA continued that even if the authorities become aware of any lack of competences, automatic recognition must be applied.¹⁴¹⁶

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.¹⁴¹⁷

¹⁴¹⁴ 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.

¹⁴¹⁵ 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.

¹⁴¹⁶ 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.

¹⁴¹⁷ 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.

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 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.¹⁴¹⁸ 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

¹⁴¹⁸ Case E-1/11, *Norwegian Appeal Board for Health Personnel – appeal from A*, EFTA Court Report 2011. p. 484 et seq., para. 55.

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 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/EEC¹⁴¹⁹ (now the Professional Qualifications Directive).¹⁴²⁰

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.¹⁴²¹ That decision is questionable because it did not discuss whether the Professional Qualifications Directive applies. The law must be applied *ex officio*.¹⁴²² 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.¹⁴²³ 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

¹⁴¹⁹ Directive 92/51/EEC (see for the full citation 976).

¹⁴²⁰ BGE 134 II 341 (= Pra 2009 No 52), para. 2.

¹⁴²¹ BVGer B-3919/2018 of 17.09.2018.

¹⁴²² Art. 62(4) VwVG.

¹⁴²³ BVGer B-1982/2016 of 14.12.2017, para. 4.6.

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.¹⁴²⁴

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 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.¹⁴²⁵ It thus held that the federal authorities need to clarify specifically which documents must be submitted.¹⁴²⁶

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 Qualifica-

¹⁴²⁴ BGE 134 II 341 (= Pra 2009 No 52), para. 2.

¹⁴²⁵ 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.'

¹⁴²⁶ BVGer A-6542/2012 of 22.04.2013, para. 4.4.

tions Directive encompass the free movement of self-employed and salaried migrants and is wider than the term 'establishment' might suggest.¹⁴²⁷ 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.¹⁴²⁸ It should be noted that professional experience is also one of the most important criteria under primary law for the recognition of professional qualifications in general.¹⁴²⁹ 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.¹⁴³⁰

The rationale behind this system of recognition is the concept of *mutual trust*.¹⁴³¹ 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.¹⁴³² Diplomas of private institutions, which are not recognised for the purpose of allowing exer-

¹⁴²⁷ Arts. 2 and 10 of the Professional Qualifications Directive.

¹⁴²⁸ European Commission, *supra* note 1116, p. 5.

¹⁴²⁹ See Case C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193, para. 17.

¹⁴³⁰ Art. 13(2) of the Professional Qualifications Directive.

¹⁴³¹ Berthoud, Geneva, *supra* note 1018, p. 44 et seq.

¹⁴³² 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 1113, p. 11 et seq.; BVGer B-166/2014 of 24.11.2014, para. 6.4.

cise of the relevant profession in the home Member State, are not sufficient.¹⁴³³ 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.¹⁴³⁴ 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 lead to a lowering of standards because the diplomas would simply have to be accepted if compensation measures could not be imposed.¹⁴³⁵ 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 Qualifications Directive are self-executing and do not need to be implemented in national law.¹⁴³⁶

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).¹⁴³⁷

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

¹⁴³³ Berthoud, Geneva, *supra* note 1018, pp. 96–101.

¹⁴³⁴ Case C-84/07, *Commission v Greece*, ECLI:EU:C:2008:679, para. 27.

¹⁴³⁵ Berthoud, Geneva, *supra* note 1018, p. 195 et seq.

¹⁴³⁶ BVGer B-5945/2018 of 14.01.2019, para. 5.

¹⁴³⁷ Art. 14 of the Professional Qualifications Directive, (a) to (c).

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).¹⁴³⁸

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.¹⁴³⁹ 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).¹⁴⁴⁰ The Green Paper of 2011 mentions that the EQF might be confused with the levels referred to in the Directive.¹⁴⁴¹ For practical purposes, Switzerland takes the levels of the EQF into account when assessing the levels of the Directive.¹⁴⁴² This idea is also explicitly expressed by Directive 2013/55/EU.¹⁴⁴³ The FAC also makes comparisons with the levels of the ISCED of the UNESCO^{1444, 1445}.

¹⁴³⁸ Zaglmayer, Vienna, supra note 1037, p. 135.

¹⁴³⁹ Art. 13(1)(b) of the Professional Qualifications Directive.

¹⁴⁴⁰ 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 42, p. 48 et seq.

¹⁴⁴¹ European Commission, *Green Paper Modernising the Professional Qualifications Directive*, COM(2011) 367 final of 22.06.2011, p. 11.

¹⁴⁴² State Secretariat for Research and Innovation, *Erläuternder Bericht – Verordnung über den nationalen Qualifikationsrahmen für Abschlüsse der Berufsbildung*, <<https://www.sbf.admin.ch/sbf/en/home/bildung/mobilitaet/nqf-vpet.html>> (last visited on 28.06.2020), p. 12.

¹⁴⁴³ Recital 11 of Directive 2013/55/EU.

¹⁴⁴⁴ International Standard Classification of Education; see further <<http://uis.unesco.org/en/topic/international-standard-classification-education-isced>> (last visited on 28.06.2020).

¹⁴⁴⁵ BVerfG B-3522/2007 (BVG 27/2008) of 28.05.2008, para. 3.7.3; BVerfG B-3327/2015 of 25.01.2017, para. 4.3.3.

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*).¹⁴⁴⁶ 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.¹⁴⁴⁷ 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 on the other hand, it applies to parallel formal education.¹⁴⁴⁸ 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 profes-

¹⁴⁴⁶ Art. 13 of the Professional Qualifications Directive.

¹⁴⁴⁷ See Annex III Section A para. 1 to the AFMP.

¹⁴⁴⁸ See Zaglmayer, Vienna, *supra* note 1037, para. 3.28.

sional qualifications according to Article 12(2) of the Directive if the applicant is granted acquired rights pursuant to national law.¹⁴⁴⁹

Distinct levels for the same professions may exist, especially in Federal Member States. In those cases, the level of the relevant regulation is decisive.¹⁴⁵⁰ 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.¹⁴⁵¹

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.¹⁴⁵² Second, compensation measures can be imposed if the training covers substantially different matters.¹⁴⁵³ This requirement is interpreted restrictively by the FAC.¹⁴⁵⁴ 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

¹⁴⁴⁹ Case C-102/02, *Ingeborg Beuttenmüller v Land Baden-Württemberg*, ECLI:EU:C:2004:264, para. 45; see Zaglmayer, Vienna, *supra* note 1037, 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.

¹⁴⁵⁰ Zaglmayer, Vienna, *supra* note 1037, para. 4.9, p. 59.

¹⁴⁵¹ BVGer B-1332/2014 of 07.05.2015, para. 5.3.

¹⁴⁵² Art. 14(1)(a) of the Professional Qualifications Directive.

¹⁴⁵³ Art. 14(1)(b) of the Professional Qualifications Directive.

¹⁴⁵⁴ 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.

applicant should follow a full programme of education and training’,¹⁴⁵⁵ the host Member State may decide to prohibit access to a profession. The latter situations fall outside the scope of the Directive. 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,¹⁴⁵⁶ 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’;¹⁴⁵⁷ and also for specific professions, such as for nurses, doctors and dental practitioners when recognitions are granted under the general system.¹⁴⁵⁸ 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.¹⁴⁵⁹

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.¹⁴⁶⁰ Under a systematic interpretation, this derogation only

¹⁴⁵⁵ Case C-575/11, *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pro-noias*, ECLI:EU:C:2013:430, para. 32.

¹⁴⁵⁶ Art. 14(2) of the Professional Qualifications Directive; see also BVGer A-368/2014 of 06.06.2014, para. 5.2.

¹⁴⁵⁷ Art. 14(3) of the Professional Qualifications Directive.

¹⁴⁵⁸ Art. 14(3) subpara. 2 in conjunction with Article 10(b), (c), (d) and (f) of the Professional Qualifications Directive.

¹⁴⁵⁹ Art. 14(1) of the Professional Qualifications Directive.

¹⁴⁶⁰ 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.

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) AFMP¹⁴⁶¹ and must provide justification. This means that the grounds listed in Article 14(a) to (c) of the Directive are exhaustive.¹⁴⁶² 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.

Even if an applicant can be required to submit all the relevant documents,¹⁴⁶³ 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.¹⁴⁶⁴ 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.¹⁴⁶⁵ 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.¹⁴⁶⁶ 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.¹⁴⁶⁷ Professional experience in the EU or a third country must be considered before a

¹⁴⁶¹ 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.

¹⁴⁶² See Case C-274/05, *Commission v Greece*, ECLI:EU:C:2008:585, para. 44.

¹⁴⁶³ Berthoud, Geneva, *supra* note 1018, 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.

¹⁴⁶⁴ See BVGer B-166/2014 of 24.11.2014, para. 6.3.

¹⁴⁶⁵ Case C-575/11, *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pro-noias*, ECLI:EU:C:2013:430, para. 34.

¹⁴⁶⁶ Art. 14(6) of the amended Professional Qualifications Directive.

¹⁴⁶⁷ Art. 14(6)(a) and (b) of the amended Professional Qualifications Directive.

Member State may determine the relevant compensation measures.¹⁴⁶⁸ The competent authorities must also consider relevant practical experience which covers the professional activities in the host Member State partly or even in whole.¹⁴⁶⁹ 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.¹⁴⁷⁰

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.¹⁴⁷¹ Member States may certainly limit the number of attempts made to pass the aptitude test. The limitation must however correspond to the number of attempts allowed under national law to obtain access to the regulated profession.¹⁴⁷² 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.¹⁴⁷³

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.¹⁴⁷⁴

¹⁴⁶⁸ Art. 14(5) of the Professional Qualifications Directive.

¹⁴⁶⁹ Joined Cases C-422/09, C-425/09 and C-426/09, *Vandorou and Others*, ECLI:EU:C:2010:732, paras. 69–71.

¹⁴⁷⁰ Art. 14(7) of the Professional Qualifications Directive.

¹⁴⁷¹ See BVGer B-6467/2012 of 27.06.2013, para. B.

¹⁴⁷² Zaglmayer, Vienna, supra note 1037, para. 4.25.

¹⁴⁷³ Group of Coordinators for Directive 2005/36/EC, supra note 1369, p. 20, point 13.

¹⁴⁷⁴ Zaglmayer, Vienna, supra note 1037, para. 4.33.

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.¹⁴⁷⁵ As developed by the case law of the CJEU, and as it is subject to the principle of proportionality,¹⁴⁷⁶ partial admission under secondary law is still governed on a case-by-case basis.¹⁴⁷⁷ Partial access does not apply the system of automatic recognition¹⁴⁷⁸ but the general system of recognition.¹⁴⁷⁹ 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.¹⁴⁸⁰ 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.¹⁴⁸¹ Third, the professional activities for which partial access is granted can be objectively separated from other regulated professions in the host Member State.¹⁴⁸² 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.¹⁴⁸³

The difficult issue is to find a system which allows for the separation of common skills and thus would allow partial recognition. Advocate General Sharp-

¹⁴⁷⁵ See Kortese, Maastricht, *supra* note 39, p. 163 et seq.

¹⁴⁷⁶ 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.

¹⁴⁷⁷ Art. 4f(1) of the Professional Qualifications Directive.

¹⁴⁷⁸ Art. 4f(6) of the Professional Qualifications Directive.

¹⁴⁷⁹ Art. 4(3), (4) and (6) of the Professional Qualifications Directive.

¹⁴⁸⁰ Art. 4f(1)(a) of the Professional Qualifications Directive.

¹⁴⁸¹ Art. 4f(1)(b) of the Professional Qualifications Directive.

¹⁴⁸² Art. 4f(1)(c) of the Professional Qualifications Directive.

¹⁴⁸³ Art. 4f(2) of the Professional Qualifications Directive.

ston 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.¹⁴⁸⁴ 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.¹⁴⁸⁵ 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.¹⁴⁸⁶ 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.¹⁴⁸⁷ 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 regu-

¹⁴⁸⁴ *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476, para. 45 et seq.

¹⁴⁸⁵ *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.

¹⁴⁸⁶ 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.

¹⁴⁸⁷ Diebold, Berne, *supra* note 69, para. 1149.

lated the profession of skiing instructor, snowboard instructors needed to be qualified as skiing instructors to gain access to their profession.¹⁴⁸⁸

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.¹⁴⁸⁹ No court decision of the Swiss Federal Court is known to the present author which *explicitly* clarifies this matter.¹⁴⁹⁰ 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.¹⁴⁹¹ *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*.¹⁴⁹² 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.¹⁴⁹³

Member States are not obliged to grant partial recognition *ex officio* as stated by the CJEU.¹⁴⁹⁴ The appeal committee for the Swiss Conference of Ministers for Education also shared the opinion that partial recognition as an issue of

¹⁴⁸⁸ *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476, para. 13 et seq.

¹⁴⁸⁹ Gammenthaler, Zurich, *supra* note 41, p. 346 et seq.; see also BVGer B-3503/2016 of 19.03.2018, paras. 5.6.2 for further references.

¹⁴⁹⁰ See however the *obiter dictum* in BVGer B-3503/2016 of 19.03.2018, para. 5.6.1 et seq.

¹⁴⁹¹ BGE 136 II 470 (= Pra 2011 No 37), para. 4.1; BGE 133 V 33, para. 9.4, see further for a short discussion of these cases Chapter 5.2.3.5; Diebold, Berne, *supra* note 69, para. 1116 et seq.; Oesch, Zurich, *supra* note 692, para. 174 *in fine*; COMCO, *supra* note 762, para. 64 and footnote 33 thereof with further references.

¹⁴⁹² BVGer B-3503/2016 of 19.03.2018, para. 7.3.1.

¹⁴⁹³ Art. 4 para. 2 of the Swiss-EU Draft Institutional Framework Agreement of 23 November 2018.

¹⁴⁹⁴ Case C-125/16, *Malta Dental Technologists Association and Reynaud*, ECLI:EU:C:2017:707, para. 50; Berthoud, Geneva, *supra* note 1018, p. 50.

public procedural law must be brought forward by the applicant.¹⁴⁹⁵ 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 recognition in some cases.¹⁴⁹⁶ 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*¹⁴⁹⁷ 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*,¹⁴⁹⁸ 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

¹⁴⁹⁵ Decision B3-2016 of the Rekurskommission (Appeal Committee) EDK/GDK of 11.10.2017, para. 8.

¹⁴⁹⁶ 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.

¹⁴⁹⁷ Case C-575/11, *Eleftherios-Themistoklis Nasiopoulos v Ypourgos Ygeias kai Pronoias*, ECLI:EU:C:2013:430, para. 11 et seq.

¹⁴⁹⁸ *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476.

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 are submitted to the Commission by professional organisations at the EU or national level.¹⁴⁹⁹ 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.¹⁵⁰⁰ 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’.¹⁵⁰¹

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 re-

¹⁴⁹⁹ Art. 57c(2) in conjunction with Art. 49(3) of the Professional Qualifications Directive.

¹⁵⁰⁰ See <http://europa.eu/rapid/press-release_MEMO-13-867_de.htm> (last visited on 28.06.2020).

¹⁵⁰¹ Art. 49a(5) of the Professional Qualifications Directive.

served 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.¹⁵⁰² 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'.¹⁵⁰³ A Member State may be exempted from automatic recognition if the profession is not regulated in its territory, due to serious risks for public health or the safety of the service recipients, or if it would make the profession less attractive in its territory.¹⁵⁰⁴

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).¹⁵⁰⁵ Switzerland's diploma(s) are not listed therein.

¹⁵⁰² Art. 49b(3) of the Professional Qualifications Directive.

¹⁵⁰³ Art. 49b(2) of the Professional Qualifications Directive.

¹⁵⁰⁴ Art. 49b(5) of the Professional Qualifications Directive.

¹⁵⁰⁵ *Commission Delegated Regulation 2019/907/EU 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.

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.¹⁵⁰⁶ 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.¹⁵⁰⁷

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’.¹⁵⁰⁸

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.¹⁵⁰⁹

¹⁵⁰⁶ BVGer B-3440/2015 of 17.08.2017, para. 3.6.3.

¹⁵⁰⁷ BVGer B-3440/2015 of 17.08.2017, para. 13.

¹⁵⁰⁸ BVGer B-4060/2019 of 11.11.2019, para. 4.4.

¹⁵⁰⁹ 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 Spaniard who was allowed to practice her profession in Spain – presumably a high school teacher¹⁵¹⁰ for the Spanish language – applied for recognition of professional qualifications in Switzerland as a high school teacher for the Spanish language and made an appeal to the relevant 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 as a teacher and her first language was Spanish. In Switzerland, at least 120 ECTS credits must be obtained in the respective subject for high school teachers and 270 ECTS credits in total.¹⁵¹¹ In the end, the Swiss Federal Court simply found that the applicant did not possess the required diploma and did not sufficiently substantiate to be in possession of a comparable diploma.¹⁵¹²

In its reasoning, the Swiss Federal Court stated that it did not matter whether the appellant was allowed to practice in Spain as a teacher 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.¹⁵¹³ In addition, it stated that the appellant did not claim that an obligation under intercantonal law exists to impose compensation measures.¹⁵¹⁴

These parts of the Swiss Federal Court's reasoning are erroneous, for four reasons.

¹⁵¹⁰ This was submitted by the appellant. It is not explicitly stated by the Swiss Federal Court whether she was admitted as a teacher or more specifically as a *high school* teacher.

¹⁵¹¹ BGer 2C_775/2018 of 21.03.2019, para. 3 et seq.

¹⁵¹² See BGer 2C_775/2018 of 21.03.2019, para. 6.2.1.

¹⁵¹³ BGer 2C_775/2018 of 21.03.2019, para. 5.3.

¹⁵¹⁴ BGer 2C_775/2018 of 21.03.2019, para. 6.4 *in fine*.

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 (under the assumption that she has professional experience as a *high school teacher* in Spain) and if she seeks to work as one in Switzerland. This is unanimously accepted by the courts and in the literature.¹⁵¹⁵ 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 (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.¹⁵¹⁶

Third, compensation measures according to Article 14 of the Professional Qualifications Directive are self-executing¹⁵¹⁷ and public international law must not be invoked by the appellant (contrary to intercantonal law¹⁵¹⁸) but applied *ex officio* by the Swiss Federal Court.¹⁵¹⁹

Fourth, the Swiss Federal Court used the German term *regulierte Berufe* instead of the correct German term *reglementierte Berufe* for the regulated professions defined by the Professional Qualifications Directive. This is however only a question of using the correct terminology.¹⁵²⁰

To conclude, the decisive question would have been whether substantial differences could have been balanced by a compensation measure and depend-

¹⁵¹⁵ See, among many others, Zaglmayer, Vienna, *supra* note 1037, para. 4.2 for further references.

¹⁵¹⁶ In this sense see: BVGer B-3284/2018 of 16.11.2018, para. 7.4.

¹⁵¹⁷ BVGer B-5372/2015, para. 5.4; Berthoud, Geneva, *supra* note 1018, p. 76.

¹⁵¹⁸ Art. 106(2) BGG.

¹⁵¹⁹ Art. 106(1) BGG.

¹⁵²⁰ BGer 2C_775/2018 of 21.03.2019, para. 6.3.

ing 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).¹⁵²¹ 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.¹⁵²² The authorities have the burden of proof to show that there are ‘substantial different matters’.¹⁵²³ According to two decisions of the FAC, a distance learning course cannot *per se* be considered a substantial difference without an assessment of the diploma in question. The burden of proof lies with the authorities to show substantial differences.¹⁵²⁴

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.¹⁵²⁵

¹⁵²¹ Zaglmayer, Vienna, *supra* note 1037, para. 3.25 et seq. and para. 3.70.

¹⁵²² BVGer B-429/2014 of 24.11.2014, para. 5.2.

¹⁵²³ BVGer B-429/2014 of 24.11.2014, para. 5.1.

¹⁵²⁴ BVGer B-429/2014 of 24.11.2014, para. 5.3.1; BVGer B-166/2014 of 24.11.2014, para. 6.4.

¹⁵²⁵ BVGer B-3284/2018 of 16.11.2018, para. 7.4.

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 %.¹⁵²⁶

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.¹⁵²⁷

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),¹⁵²⁸ and could not be substituted by professional experience according to the FAC. The competent authorities therefore lawfully refused the recognition of professional qualifications.¹⁵²⁹

¹⁵²⁶ See BVGer B-3738/2012 of 27.02.2013, para. 3.

¹⁵²⁷ See BVGer B-3738/2012 of 27.02.2013, para. 3.3.

¹⁵²⁸ Art. 11(b) instead of (d) of the Professional Qualifications Directive.

¹⁵²⁹ BVGer B-3522/2007 (BVGE 27/2008) of 28.05.2008.

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.¹⁵³⁰ 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.¹⁵³¹ 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 surprise.¹⁵³² This seems to be distinct from EU Member States (such as France¹⁵³³ and Italy¹⁵³⁴) 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.¹⁵³⁵

¹⁵³⁰ BVGer B-5129/2013 of 04.03.2015.

¹⁵³¹ BVGer B-655/2016 of 30.06.2017, para. 8.

¹⁵³² BVGer A-6566/2015 of 08.06.2016, para. 4.

¹⁵³³ *Opinion of Advocate General Sharpston in Case C-200/08, Commission v France*, ECLI:EU:C:2009:476, para. 19.

¹⁵³⁴ Case C-311/06, *Cavallera*, ECLI:EU:C:2009:37, para. 40.

¹⁵³⁵ BVGer B-6467/2012 of 27.06.2013, para. 3.

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.¹⁵³⁶

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.¹⁵³⁷ 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 UN.¹⁵³⁸ 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.¹⁵³⁹ Relevant professional experience cannot be acquired in the host Member State before the applicant

¹⁵³⁶ See e.g. Kremalis, Frankfurt am Main, supra note 733, p. 229 et seq. who critically analyses age limits for medical doctors.

¹⁵³⁷ Schneider, Antwerp, supra note 751, p. 103.

¹⁵³⁸ International Standard Industrial Classification of All Economic Activities: see <<https://unstats.un.org/unsd/classifications/>> (last visited on 28.06.2020).

¹⁵³⁹ Case 130/88, *van de Bijl*, ECLI:EU:C:1989:349, paras. 28 to 32.

is qualified.¹⁵⁴⁰ The host Member may check the authenticity of attestations where it has justified doubts.¹⁵⁴¹ Some authorities regularly require certified copies. The group of coordinators published best practice rules with regard to this issue.¹⁵⁴² In Switzerland, recognition based on professional experience is relevant for the following professions:¹⁵⁴³

- 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/Specialistes 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.¹⁵⁴⁴ In addition, the inspection of electrical installations is regulated.¹⁵⁴⁵ 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 Swiss permits in de-

¹⁵⁴⁰ Berthoud, Geneva, supra note 1018, p. 254; implicitly in this sense: Decision B1-2009 of the Rekurskommission (Appeal Committee) EDK/GDK of 10.11.2010, para. 6.

¹⁵⁴¹ Art. 50(3) of the Professional Qualifications Directive.

¹⁵⁴² Group of Coordinators for Directive 2005/36/EC, supra note 1369 p. 20, points 5 and 6.

¹⁵⁴³ Berthoud, Geneva, supra note 1018, p. 257; see further the database on regulated professions, available at <<http://ec.europa.eu/growth/tools-databases/reg-prof/index.cfm?action=homepage>> (last visited on 28.06.2020).

¹⁵⁴⁴ Art. 2(1) NIV in conjunction with Art 6 NIV.

¹⁵⁴⁵ Art. 27 NIV.

tail.¹⁵⁴⁶ The inspectorate is responsible for the recognition of diplomas according to the BBV *per analogiam*.¹⁵⁴⁷ While the BBV requires the same level of the diploma,¹⁵⁴⁸ the current Professional Qualifications Directive also allows the recognition of diplomas that are one level lower under the *acquis suisse*.¹⁵⁴⁹

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.¹⁵⁵⁰ 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.¹⁵⁵¹ Applicants who do not fulfil one of the abovementioned conditions fall under the general system of mutual recognition of professional qualifications.¹⁵⁵²

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.

¹⁵⁴⁶ <https://www.sbf.admin.ch/dam/sbf/en/dokumente/2017/08/elektrizitaet.pdf.download.pdf/electriciens_e.pdf> (last visited on 28.06.2020).

¹⁵⁴⁷ Arts. 8(4) and 10a(7) NIV.

¹⁵⁴⁸ Art. 69a(1) lit. a BBV.

¹⁵⁴⁹ Art. 13(2)(b) of the Professional Qualifications Directive.

¹⁵⁵⁰ See BVGer B-3503/2016 of 19.03.2018, para. 3.5.

¹⁵⁵¹ Berthoud, Geneva, *supra* note 1018, p. 254.

¹⁵⁵² Berthoud, Geneva, *supra* note 1018, 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.¹⁵⁵³ 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.¹⁵⁵⁴ 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.¹⁵⁵⁵ 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).¹⁵⁵⁶ 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.¹⁵⁵⁷ Only Swiss nationals are allowed to take this test.¹⁵⁵⁸

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

¹⁵⁵³ Art. 6 NIV.

¹⁵⁵⁴ Berthoud, Geneva, supra note 1018, p. 191 et seq.

¹⁵⁵⁵ Art. 7 et seq. NIV.

¹⁵⁵⁶ <https://www.est.admin.ch/inhalte/pdf/NIV_I/Deutsch/Publikationen/2016_2015/2016-02_ingeschr-bew_ausland-ausbildung_D.pdf> (last visited on 28.06.2020).

¹⁵⁵⁷ Art. 3(2) of the *Verordnung des UVEK über elektrische Niederspannungsinstallationen*, SR 734.272.3.

¹⁵⁵⁸ <https://www.est.admin.ch/inhalte/pdf/NIV_I/Deutsch/Publikationen/2016_2015/2016-02_ingeschr-bew_ausland-ausbildung_D.pdf> (last visited on 28.06.2020).

his diploma and professional experience were not deemed to be equivalent, he offered to take an aptitude test.

That measure is directly discriminatory and there were clearly no reasons to justify it, so it is unlawful.¹⁵⁵⁹ 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.¹⁵⁶⁰

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.¹⁵⁶¹ Further, applicants who have compensation measures imposed on them may in principle choose between an adaptation period or an aptitude test.¹⁵⁶² 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.¹⁵⁶³

¹⁵⁵⁹ Art. 2 AFMP in conjunction with Art. 12 of Annex I to the AFMP and the equal treatment of Art. 8 BV.

¹⁵⁶⁰ BVGer B-3503/2016 of 19.03.2018, para. 7.3.1.

¹⁵⁶¹ See BVGer B-748/2018 of 01.05.2018.

¹⁵⁶² Art. 14(2) of the Professional Qualifications Directive.

¹⁵⁶³ BVGer B-748/2018 of 01.05.2018.

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.¹⁵⁶⁴ The competent authorities decided that eight years of professional experience should be considered, but that there were substantial differences between the professions in Switzerland and Portugal.¹⁵⁶⁵ 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.¹⁵⁶⁶

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,¹⁵⁶⁷ 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.¹⁵⁶⁸

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

¹⁵⁶⁴ BVGer A-368/2014 of 06.06.2014, para. 6.1.

¹⁵⁶⁵ BVGer A-368/2014 of 06.06.2014, para. 6.3.

¹⁵⁶⁶ BVGer A-368/2014 of 06.06.2014, para. 7.2.

¹⁵⁶⁷ Art. 5(1) AFMP.

¹⁵⁶⁸ See Arts. 5(1) AFMP and 17(a) of Annex I to the AFMP.

a domestic lawyer who is authorised to practise before the relevant court in the home Member State,¹⁵⁶⁹ this interpretation is not convincing from a systematic standpoint.¹⁵⁷⁰ Thus, Title II can only be applied to a profession that would also benefit from Title III of the Directive.¹⁵⁷¹ The host Member State may only impose a prior check for regulated professions with public health or safety implications.¹⁵⁷²

It was shown above that either the service or the service provider constitutes the necessary cross-border element (see Chapter 4.4.2).¹⁵⁷³ 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.¹⁵⁷⁴ 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

¹⁵⁶⁹ Art. 5 of 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; see Berthoud, Geneva, *supra* note 1018, p. 226 et seq.

¹⁵⁷⁰ State Secretariat for Research and Innovation, *supra* note 979, p. 12.

¹⁵⁷¹ 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.

¹⁵⁷² Art. 7(4) of the Professional Qualifications Directive.

¹⁵⁷³ Case 155/73, *Sacchi*, ECLI:EU:C:1974:40, paras. 6–8.

¹⁵⁷⁴ *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 1113, p. 15.

cases (Chapters I and II of Title III¹⁵⁷⁵).¹⁵⁷⁶ 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.¹⁵⁷⁷ Most importantly, if the host Member State does not react within the deadlines, the service may be provided.¹⁵⁷⁸ 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.¹⁵⁷⁹

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'.¹⁵⁸⁰ Two conditions need to be fulfilled. First, according to some scholars, 'legally established' is to be interpreted as meaning 'having a right of residence'.¹⁵⁸¹ 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.¹⁵⁸² A ban

¹⁵⁷⁵ General system of recognition and recognition of professional experience under the freedom of establishment.

¹⁵⁷⁶ See Art. 51(2) of the Professional Qualifications Directive.

¹⁵⁷⁷ Art. 7(4) subpara. 4 of the Professional Qualifications Directive.

¹⁵⁷⁸ Art. 7(4) subpara. 5 of the Professional Qualifications Directive.

¹⁵⁷⁹ See Art. 51(3) of the Professional Qualifications Directive.

¹⁵⁸⁰ Art. 5(1)(a) of the Professional Qualifications Directive.

¹⁵⁸¹ Gammenthaler, Zurich, *supra* note 41, p. 176.

¹⁵⁸² Art. 5(1)(b) of the Professional Qualifications Directive.

due to professional misconduct for instance, even for a short period, is sufficient to fail this requirement of being admitted to practice.¹⁵⁸³

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.¹⁵⁸⁴ 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',¹⁵⁸⁵ whereby services are restricted to 90 days when invoking the freedom of services under the *acquis suisse*, which makes this distinction less problematic.¹⁵⁸⁶ 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 working experience. Fully qualified professionals may therefore provide services even if they cannot show proof of working experience apart from through traineeships.¹⁵⁸⁷ 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

¹⁵⁸³ European Commission, *supra* note 1113, p. 16; European Commission, *supra* note 1116, p. 3 et seq.

¹⁵⁸⁴ See Berthoud, Geneva, *supra* note 1018, p. 230 who answers this question in the negative.

¹⁵⁸⁵ Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411, para. 22.

¹⁵⁸⁶ 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.

¹⁵⁸⁷ For the same opinion, see European Commission, *supra* note 1116, p. 4; Zaglmayer, Vienna, *supra* note 1037, para. 8.5; see however a different opinion: *supra* note 1584.

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.¹⁵⁸⁸

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.¹⁵⁸⁹ 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.¹⁵⁹⁰ 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.¹⁵⁹¹ 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 qualifi-

¹⁵⁸⁸ Art. 7(4) of the Professional Qualifications Directive.

¹⁵⁸⁹ Recital 6 of the Professional Qualifications Directive.

¹⁵⁹⁰ Recital 7 of the Professional Qualifications Directive; Art. 7(1) of the Professional Qualifications Directive.

¹⁵⁹¹ See Zaglmayer, Vienna, *supra* note 1037, para. 8.10 for further references.

cations. Member States may only check professional qualifications from service providers who do not benefit from automatic recognition (under Title III, Chapter III) where public health or safety implications are concerned.¹⁵⁹²

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.¹⁵⁹³ This deadline only applies if the declaration and the accompanying documents were complete.¹⁵⁹⁴ Where there are substantial differences (health and safety implications) Member States may require compensation measures.¹⁵⁹⁵ If the deadlines are not met due to the absence of a response from the authorities, the service may be provided.¹⁵⁹⁶

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).¹⁵⁹⁷ 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

¹⁵⁹² Art. 7(4) of the Professional Qualifications Directive.

¹⁵⁹³ Art. 7(4)(2) of the Professional Qualifications Directive.

¹⁵⁹⁴ Last sentence of Art. 7(4)(2) of the Professional Qualifications Directive.

¹⁵⁹⁵ Art. 7(4)(3) of the Professional Qualifications Directive.

¹⁵⁹⁶ Art. 7(4)(5) of the Professional Qualifications Directive.

¹⁵⁹⁷ 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.

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*.¹⁵⁹⁸

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).¹⁵⁹⁹ It applies to EU and EEA EFTA diplomas.¹⁶⁰⁰

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.¹⁶⁰¹ 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.¹⁶⁰² 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

¹⁵⁹⁸ See Zaglmayer, Vienna, *supra* note 1037, para. 8.25 et seq.

¹⁵⁹⁹ *Verordnung über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungserbringerinnen und -erbringern in reglementierten Berufen (VMD) of 26.06.2013*, SR 935.011.

¹⁶⁰⁰ Art. 1(2) lit. c BGMD.

¹⁶⁰¹ See Annex I (5) to the VMD.

¹⁶⁰² <https://www.sbf.admin.ch/dam/sbf/de/dokumente/erlaeuternder_bericht.15.pdf.download.pdf/> (last visited on 10.07.2019).

than teachers without an education in primary school teaching.¹⁶⁰³ 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.¹⁶⁰⁴ 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 lower level qualification level) could not be considered in the light of the Directive, but rather under the non-discrimination provisions of the AFMP.¹⁶⁰⁵

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.¹⁶⁰⁶ 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,¹⁶⁰⁷ an attestation that the provider is legally established and not barred from pursuing his or her profession,¹⁶⁰⁸ evidence of professional

¹⁶⁰³ Letter of the Bernese Government to the Federal Government of 03.04.2016, <https://www.sbf.admin.ch/dam/sbf/de/dokumente/kanton_bern.10.pdf.download.pdf/kanton_bern.pdf> (last visited on 10.07.2019).

¹⁶⁰⁴ See Berthoud, Geneva, *supra* note 1018, p. 201.

¹⁶⁰⁵ See Zaglmayer, Vienna, *supra* note 1037, para. 3.7, p. 31.

¹⁶⁰⁶ 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.

¹⁶⁰⁷ Art. 7(2)(a) of the Professional Qualifications Directive.

¹⁶⁰⁸ Art. 7(2)(b) of the Professional Qualifications Directive.

qualifications,¹⁶⁰⁹ proof of experience in certain cases,¹⁶¹⁰ and – if applied in a non-discriminatory fashion – proof that he or she does not have any convictions.¹⁶¹¹ 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.¹⁶¹²

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).¹⁶¹³

¹⁶⁰⁹ Art. 7(2)(c) of the Professional Qualifications Directive.

¹⁶¹⁰ Art. 7(2)(d) of the Professional Qualifications Directive.

¹⁶¹¹ Art. 7(2)(e) of the Professional Qualifications Directive.

¹⁶¹² 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 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).

¹⁶¹³ 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

The declaration has to be made to the SERI¹⁶¹⁴ through the use of an online declaration system.¹⁶¹⁵ 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.¹⁶¹⁶

The SERI coordinates the declarations. If an intercantonal body or a cantonal body is competent, as is the case for teachers,¹⁶¹⁷ the SERI will inform them immediately about the declaration.¹⁶¹⁸ The same applies for the other competent cantonal and federal bodies.¹⁶¹⁹ The SERI also informs and sends the notification with the attached documents to the competent authority if public health or safety implications are concerned.¹⁶²⁰ The SERI also informs the cantonal body that is competent for the supervision of the exercise of the profession concerned.¹⁶²¹

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

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.

¹⁶¹⁴ Staatssekretariat für Bildung, Forschung und Innovation (SERI).

¹⁶¹⁵ Art. 2(1) VMD.

¹⁶¹⁶ 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.sbf.admin.ch/dam/sbf/de/dokumente/erlaeuternder_bericht.15.pdf.download.pdf/> (last visited on 02.12.2018).

¹⁶¹⁷ See Art. 2(4) and Art. 13^{bis} and Art. 13^{ter} 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).

¹⁶¹⁸ Art. 4(1)(b) BGMD.

¹⁶¹⁹ Art. 4(1)(b) and (a) BGMD.

¹⁶²⁰ Art. 3(1) BGMD.

¹⁶²¹ Art. 8(2) VMD.

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).¹⁶²²

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'.¹⁶²³

Services may be provided if the competent authority has issued a positive decision¹⁶²⁴ 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).¹⁶²⁵

The profession is carried out under the title of the Member State of establishment.¹⁶²⁶ 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)¹⁶²⁷ 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.¹⁶²⁸ In all other cases, the service provider must use the title of the home Member State.¹⁶²⁹ If there is a risk of confusion, the service provider must

¹⁶²² See also Berthoud (2010), *supra* note 998, 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).

¹⁶²³ This is also the wording of Art. 7(4)(3) of the Professional Qualifications Directive.

¹⁶²⁴ Art. 5(1)(a) BGMD.

¹⁶²⁵ 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.

¹⁶²⁶ Art. 7(3) of the Professional Qualifications Directive and Art. 13 VMD.

¹⁶²⁷ Art. 14 para. 1(a) VMD.

¹⁶²⁸ Art. 14 para. 1(b) VMD.

¹⁶²⁹ Art. 14 para. 2 VMD.

put the home Member State in brackets.¹⁶³⁰ 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.¹⁶³¹ 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.¹⁶³²

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 proposi-

¹⁶³⁰ Last sentence of Art. 6(1) BGMD in conjunction with Art. 14 para. 2 VMD.

¹⁶³¹ <<https://www.admin.ch/opc/de/european-union/joint-committees/007.000.000.000.000.000.html>> (last visited on 25.06.2020).

¹⁶³² 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 990; Art. 10 thereof establishes the basis for working groups and experts; Gammenthaler, Zurich, *supra* note 41, p. 306 et seq.

tion, 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 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 21.¹⁶³³ 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,¹⁶³⁴ which was answered earlier, in the negative, in academic literature.¹⁶³⁵

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 docu-

¹⁶³³ Case C-656/11, *United Kingdom v Council*, ECLI:EU:C:2014:97, para. 58.

¹⁶³⁴ *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.

¹⁶³⁵ See Gammenthaler, Zurich, *supra* note 41, p. 297 for further references.

ments,¹⁶³⁶ such as whether the profession is regulated in the home Member State.¹⁶³⁷

Each Member State (including Switzerland¹⁶³⁸) designates a coordinator for the uniform application of the Professional Qualifications Directive. According to Article 58 of the Directive, 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).¹⁶³⁹ According to Article 56(4) of the Directive the coordinators have the task 'to promote the uniform 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.¹⁶⁴⁰ 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'.¹⁶⁴¹

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.¹⁶⁴²

¹⁶³⁶ Annex VII of the Professional Qualifications Directive.

¹⁶³⁷ BVGer B-5129/2013 of 04.03.2015, para. 5.1 et seq.

¹⁶³⁸ See Annex III Section A (1.b)(2) AFMP (amended by Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP).

¹⁶³⁹ See State Secretariat for Research and Innovation, *supra* note 979, p. 45.

¹⁶⁴⁰ Art. 71(2) BBV.

¹⁶⁴¹ Art. 57 of the Professional Qualifications Directive.

¹⁶⁴² 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/*

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 national from Iceland, Liechtenstein or Norway, who chooses to work in Switzerland, obtains a diploma (in the sense of the Professional Qualifications Directive) and migrates to an EU Member State (e.g. to Austria) cannot invoke the provisions of the Professional Qualifications Directive in this EU Member State 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 (without assessing bilateral Treaties between two States or favourable provisions of national law in this context).¹⁶⁴³

It is interesting to note in this respect that the Withdrawal Agreement for Brexit¹⁶⁴⁴ includes the recognition of diplomas during a transition phase (including ongoing procedures started prior to the end of the transition phase).¹⁶⁴⁵ Otherwise, qualifications obtained in the UK as of the withdrawal date would be considered third country diplomas.¹⁶⁴⁶ 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 sepa-

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.

¹⁶⁴³ For the same opinion see Zaglmayer, Vienna, *supra* note 1037, para. 9.4.

¹⁶⁴⁴ See Arts. 126 and 129 of the Brexit Withdrawal Agreement.

¹⁶⁴⁵ See Art. 27 et seq. of the Brexit Withdrawal Agreement.

¹⁶⁴⁶ See <https://ec.europa.eu/info/files/professional-qualifications_en> (last visited on 17.02.2020).

rately terminate the AFMP.¹⁶⁴⁷ Switzerland and the UK agreed on a Services Mobility Agreement which desires to uphold the free movement rights for service provider and entered provisionally into force on 1 January 2021.¹⁶⁴⁸ It also aims at facilitating the recognition of professional qualifications in the future and establishes a working group for this purpose.¹⁶⁴⁹ The working group is tasked to pursue discussions about the negotiations of a comprehensive agreement or arrangement on professional recognition.¹⁶⁵⁰

This setting 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 were bound to apply the provisions of the AFMP during the transitional period until 31 December 2020.¹⁶⁵¹ 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.¹⁶⁵² 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.¹⁶⁵³ Contrary to Article 50(2) TEU,

¹⁶⁴⁷ Art. 1 of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672; A. Epiney, '«Brexite» und FZA: Zu den Perspektiven der Freizügigkeit zwischen der Schweiz und der EU im Gefolge des «Brexite»', Jusletter 20 March 2017, para. 11.

¹⁶⁴⁸ See the recitals and Art. 12 of the *Temporary agreement between the Swiss Confederation and the United Kingdom of Great Britain and the Northern Ireland on Services Mobility of 14.12.2020, provisional entry into force on 01.01.2021*, SR 0.946.293.671.2.

¹⁶⁴⁹ Art. 15 et seq. of the Swiss-UK Services Mobility Agreement, SR 0.946.293.671.2.

¹⁶⁵⁰ Art. 16 of the Swiss-UK Services Mobility Agreement, SR 0.946.293.671.2.

¹⁶⁵¹ Arts. 126 and 129 of the Brexit Withdrawal Agreement.

¹⁶⁵² 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.

¹⁶⁵³ 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.

the case law of the CJEU,¹⁶⁵⁴ and public international law,¹⁶⁵⁵ which remain silent on the protection of acquired rights, Article 23 AFMP states:

‘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*.¹⁶⁵⁶ A definition of the categories is however missing and open to discussion.¹⁶⁵⁷ 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.¹⁶⁵⁸ 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.¹⁶⁵⁹ As the AFMP does not provide answers on how far the protection of acquired rights reaches,¹⁶⁶⁰ and leaves the rights in the process of being acquired to a mutual agreement of the Con-

¹⁶⁵⁴ See Tobler, *supra* note 1653, p. 51; Epiney (20.03.2017), *supra* note 1647, para. 14.

¹⁶⁵⁵ Public international law only applies to States: see Art. 70 VCLT; see further Epiney (20.03.2017), *supra* note 1647, para. 15.

¹⁶⁵⁶ 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.

¹⁶⁵⁷ A. Epiney, ‘Brexit und die Schweiz: «Mind the Gap»’, *SRIEL (SZIER/RSDIE)* 2019, p. 247.

¹⁶⁵⁸ 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.

¹⁶⁵⁹ Tobler (2017), *supra* note 1656, p. 357.

¹⁶⁶⁰ 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 1658, para. 773.

tracting Parties,¹⁶⁶¹ 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.¹⁶⁶² Academics tend to favour the time when the AFMP ceases to apply in order to guarantee legal certainty.¹⁶⁶³

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 of 25 February 2019 aiming at securing the acquired rights acquired under the AFMP.¹⁶⁶⁴

Title I of Part 2 defines the scope of the agreement. It applies to Swiss and UK nationals as well as their family members.¹⁶⁶⁵ Non-discrimination is now *expressis verbis* stated in the Swiss-UK Brexit Agreement.¹⁶⁶⁶ 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.¹⁶⁶⁷

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

¹⁶⁶¹ Second sentence of Art. 23 of the AFMP.

¹⁶⁶² Tobler (2017), *supra* note 1656, p. 357 et seq.; Epiney & Blaser, *supra* note 1652, para. 4; Borghi, *supra* note 1658, para. 772, subpara. 2.

¹⁶⁶³ Epiney (20.03.2017), *supra* note 1647, para. 11; Tobler, *supra* note 1653, p. 45.

¹⁶⁶⁴ Art. 1 of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

¹⁶⁶⁵ Art. 10 of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

¹⁶⁶⁶ Art. 7 of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

¹⁶⁶⁷ Art. 4(5) of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

(after the transitional period).¹⁶⁶⁸ The provision of services ends five years after the specified date but can be extended every five years by the Joint Committee.¹⁶⁶⁹ 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.¹⁶⁷⁰ 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.

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.¹⁶⁷¹ The wording of Article 29 of the Swiss-UK Brexit Agreement should emphasise that Swiss and UK nationals are covered by the agreement regardless of their residence. A similar agreement was concluded with the UK and the EEA.¹⁶⁷² The personal scope also includes family members even if

¹⁶⁶⁸ Art. 17 and Art. 23(6) of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672; <https://europa.eu/newsroom/highlights/special-coverage/brexit_en> (last visited on 10.07.2019).

¹⁶⁶⁹ Art. 23(1)(ii) and (2) of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

¹⁶⁷⁰ Art. 29 of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

¹⁶⁷¹ Art. 29 of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

¹⁶⁷² United Kingdom, *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 of 28.01.2020*, <<https://www.gov.uk/government/publications/agreement-on-arrangements-between-iceland-liechtenstein-norway-and-uk-following-the-withdrawal-of-uk-from-the-eu-the-eea-agreement-and-other-agre>> (last visited on 10.01.2021).

they are not explicitly mentioned under this Article pursuant to the explanatory report of the Swiss government.¹⁶⁷³

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).¹⁶⁷⁴

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.¹⁶⁷⁵

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 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.

¹⁶⁷³ Art. 10(e) of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672; 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.

¹⁶⁷⁴ Art. 31 of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

¹⁶⁷⁵ Art. 32 of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

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.¹⁶⁷⁶ 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 AFMP¹⁶⁷⁷ 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 as of 1 January 2021 because the AFMP ceased to apply,¹⁶⁷⁸ such as the ancient Friendship Treaty between Switzerland and the UK.¹⁶⁷⁹

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 fa-

¹⁶⁷⁶ Art. 32(5) of the Swiss-UK Brexit Agreement of 25 February 2019, SR 0.142.113.672.

¹⁶⁷⁷ State Secretariat for Migration, supra note 1673, p. 12, and Art. 7.

¹⁶⁷⁸ See footnotes 1647 and 1651.

¹⁶⁷⁹ *Traité d'amitié, 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 1657, p. 251 for further reference.

avourable provisions of national law.¹⁶⁸⁰ This was reiterated by a ruling of the Swiss Federal Court with regard to the rules of the BGBM.¹⁶⁸¹

The FAC has decided on the profession of opticians in numerous rulings.¹⁶⁸² 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.¹⁶⁸³ It is important to note that the Directive does not require a comparison with diplomas that no longer exist in a Member State.¹⁶⁸⁴ 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,

¹⁶⁸⁰ Art. 12 AFMP.

¹⁶⁸¹ BGE 136 II 470 (= Pra 2011 No 37), para. 5.3.

¹⁶⁸² 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.

¹⁶⁸³ BVGer B-2869/2014 (BVGE 2015/14) of 25.02.2015, para. C.

¹⁶⁸⁴ BVGer B-1332/2014 of 07.05.2015, para. 5.3.

as the Vienna Convention on the Law of the Treaties does not apply retroactively¹⁶⁸⁵.¹⁶⁸⁶ 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. 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 craftsman'). 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.¹⁶⁸⁷

¹⁶⁸⁵ *Agreement between Switzerland and Germany of 01.12.1937; partly cited in BBl 1937 III 491.*

¹⁶⁸⁶ BVGer B-2869/2014 (BVGE 2015/14) of 25.02.2015, para. 3.2.3.

¹⁶⁸⁷ See Case C-102/02, *Ingeborg Beuttenmüller v Land Baden-Württemberg*, ECLI: EU:C:2004:264, para. 45.

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.¹⁶⁸⁸ The FAC openly acknowledged that this judgment overrules a line of previous case law which gave the federal authorities more discretion when assessing diplomas.¹⁶⁸⁹ 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.¹⁶⁹⁰ The rules on mutual recognition of professional recognition of the Professional Qualifications Directive overrule provisions of national law¹⁶⁹¹ which provide that the relevant diploma must be of the same level (Article 69a BBV).¹⁶⁹² Even before these rulings, it was clear that Article 14 of the Directive is self-executing.¹⁶⁹³ 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).¹⁶⁹⁴ 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 TFEU¹⁶⁹⁵) 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.¹⁶⁹⁶ 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 Arti-

¹⁶⁸⁸ BGer 2C_472/2017 of 07.12.2017.

¹⁶⁸⁹ 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.

¹⁶⁹⁰ BVGer B-5372/2015 of 04.04.2017, para. 6.4.2.

¹⁶⁹¹ Art. 68 of the BBG in conjunction with Art. 69a BBV.

¹⁶⁹² BVGer B-5372/2015 of 04.04.2017, para. 5.4.

¹⁶⁹³ See Berthoud, Geneva, *supra* note 1018, p. 76.

¹⁶⁹⁴ BVGer B-5372/2015, para. 6.2.

¹⁶⁹⁵ See further Epiney & Blaser, *supra* note 1223, para. 2.

¹⁶⁹⁶ BGer 2C_472/2017 of 07.12.2017, para. 3.4.

cle 13(1) of the Directive is clear and precise. This Article is self-executing and was not correctly implemented by the national authorities.¹⁶⁹⁷ 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.¹⁶⁹⁸ 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.¹⁶⁹⁹ Its material scope is however limited to Annexes I, II and III of the AFMP.¹⁷⁰⁰ The scope of Article 2 AFMP is also limited by case law.¹⁷⁰¹

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 *Wächter*, the CJEU only assessed a violation of Article 15(2) of Annex I to the AFMP without looking into Article 2 AFMP.¹⁷⁰² 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.¹⁷⁰³ 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.

¹⁶⁹⁷ BVGer B-5372/2015 of 04.04.2017, para. 5.4 for further references.

¹⁶⁹⁸ See further Epiney & Blaser, *supra* note 1223, para. 2.

¹⁶⁹⁹ See *supra* note 882; BGE 129 I 392, para. 3.2.3.

¹⁷⁰⁰ The case law of the Swiss Federal Court is less clear on this point: see *supra* note 882 for further references.

¹⁷⁰¹ 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.

¹⁷⁰² Case C-581/17, *Martin Wächter v Finanzamt Konstanz*, ECLI:EU:C:2019:138.

¹⁷⁰³ 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 762, para. 64.

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.¹⁷⁰⁴

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

¹⁷⁰⁴ See Boillet, *supra* note 776, para. 3.

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 *Hocsmán* 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.¹⁷⁰⁵ In 2014, 2015, 2016, 2017, 2018 and 2019 about three times more diplomas in basic medical training were recognised than awarded in Switzerland (around 3'000 recognised diplomas each year (except for

¹⁷⁰⁵ <<https://www.bag.admin.ch/bag/de/home/zahlen-und-statistiken/statistiken-berufe-im-gesundheitswesen/statistiken-medizinalberufe1.html>> (last visited on 26.06.2020).

2014): see *infra* Table 4).¹⁷⁰⁶ In Germany only 6,162 applications were made in 2018 for medical doctors¹⁷⁰⁷ despite the fact that Germany's population was roughly over ten times larger than the Swiss population.¹⁷⁰⁸ 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*¹⁷⁰⁹

¹⁷⁰⁶ <<https://www.bag.admin.ch/bag/de/home/zahlen-und-statistiken/statistiken-berufe-im-gesundheitswesen/statistiken-medizinalberufe1/statistiken-aller-medizinalberufe.html>> (last visited on 10.01.2021).

¹⁷⁰⁷ <<https://www.anerkennung-in-deutschland.de/images/content/Medien/2018-statistik-bund.pdf>> (last visited on 26.06.2020).

¹⁷⁰⁸ 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).

¹⁷⁰⁹ <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).

In Switzerland, the recognition of professional qualifications for health professions under the MedBG are as follows:

Year of recognition	2014	2015	2016	2017	2018	2019
Medical doctors	2575	3109	2948	2948	3291	2940
Veterinary surgeons	81	93	74	95	160	187
Pharmacists	234	264	246	292	201	182
Dentists	480	459	347	400	341	341
Specialised dentists	48	52	48	56	36	39
Specialised medical doctors	1295	1677	1573	1527	1392	1366

Table 4: Recognition of professional qualifications concerning health professions under the MedBG (EU and third country diplomas) in Switzerland¹⁷¹⁰

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, midwives, 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.¹⁷¹¹ Chapter III not only sets out an automatic recognition regime but also provides for harmonisation of training

¹⁷¹⁰ <<https://www.bag.admin.ch/bag/de/home/zahlen-und-statistiken/statistiken-berufe-im-gesundheitswesen/statistiken-medizinalberufe1/statistiken-aller-medizinalberufe.html>> (last visited on 10.01.2021).

¹⁷¹¹ 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.

requirements for specific professions, in the sense that the Directive lays down minimum standards.¹⁷¹²

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 Directive¹⁷¹³ 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.¹⁷¹⁴ 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 approach¹⁷¹⁵). It should be recalled that the CJEU has ruled on the inadmissibility of prior language testing (see Chapter 6.3.2.1).

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).¹⁷¹⁶ 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 circum-

¹⁷¹² Berthoud, Geneva, supra note 1018, p. 260 et seq.

¹⁷¹³ Arts. 24, 25, 31, 34, 35, 38 and 44 of the Professional Qualifications Directive for the health sector.

¹⁷¹⁴ Art. 50(2) of the Professional Qualifications Directive.

¹⁷¹⁵ Zaglmayer, Vienna, supra note 1037, paras. 3.25 et seq. and 3.70; see Chapter 6.3.3.1.

¹⁷¹⁶ Zaglmayer, Vienna, supra note 1037, para. 5.4.

stances (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	Midwives
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.¹⁷¹⁷ 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 according to Annex V but that the title does not correspond to the lists of Annex V.¹⁷¹⁸ 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.¹⁷¹⁹ Finally, it should be recalled that the trainings for the specialisations were not entirely harmonised.¹⁷²⁰

¹⁷¹⁷ E.g. Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

¹⁷¹⁸ Zaglmayer, Vienna, *supra* note 1037, para. 5.3 et seq.

¹⁷¹⁹ Zaglmayer, Vienna, *supra* note 1037, para. 5.6 who refers to small Member States, such as Malta, Luxembourg and Iceland.

¹⁷²⁰ Professional Qualifications Directive, recital 20.

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.¹⁷²¹ 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.¹⁷²² They may also agree between themselves on the recognition of other specialisms (for medical and dental specialisms) not listed in Annex V.¹⁷²³ 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.¹⁷²⁴ 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 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

¹⁷²¹ Art. 26 of the Professional Qualifications Directive.

¹⁷²² Zaglmayer, Vienna, *supra* note 1037 para. 5.6.

¹⁷²³ Last sentence of recital 20 of the Professional Qualifications Directive; European Commission, *supra* note 1116, p. 12.

¹⁷²⁴ Zaglmayer, Vienna, *supra* note 1037, para. 6.38.

points according to the amended Directive.¹⁷²⁵ The substance of this provision however remains the same when compared with the amended Directive (not yet part of the *acquis suisse*).¹⁷²⁶ 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’.¹⁷²⁷ 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’).¹⁷²⁸ 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.¹⁷²⁹ 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.¹⁷³⁰

¹⁷²⁵ Art. 24(2) of the amended Professional Qualifications Directive.

¹⁷²⁶ See Art. 23(2) of Directive 93/16/EEC (see for the full citation *supra* note 1174).

¹⁷²⁷ Art. 24(3) of the Professional Qualifications Directive.

¹⁷²⁸ See Zaglmayer, Vienna, *supra* note 1037, para. 6.12.

¹⁷²⁹ Art. 21(1)(2) of the Professional Qualifications Directive in conjunction with the Professional Qualifications Directive, point 5.1.1 of Annex V.

¹⁷³⁰ See Zaglmayer, Vienna, *supra* note 1037, 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 ¹⁷³¹

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.¹⁷³²

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.¹⁷³³ The general practitioner is distinct from specialised doctors because only three years of full-time training is required.¹⁷³⁴ Pursuant to Ar-

¹⁷³¹ 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).

¹⁷³² Zaglmayer, Vienna, *supra* note 1037, para. 6.18.

¹⁷³³ 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.

¹⁷³⁴ 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).

ticle 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.¹⁷³⁵

Country	Evidence of formal qualifications	Professional title	Reference date
Switzerland	Diplom als raktischer Arzt/praktische Ärztin	Praktischer Arzt	1 June 2002 ¹⁷³⁶
	Diplôme de médecin praticien	Médecin praticien	
	Diploma di medico generico	Medico generico	

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.¹⁷³⁷ However, trainings for the specialisations were not entirely harmonised.¹⁷³⁸ Article 26(1) of the Professional Qualifications Directive (at least in the English and French versions¹⁷³⁹) 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.¹⁷⁴⁰ To add new entries to point 5.1.2 and

¹⁷³⁵ Art. 28(5) of the Professional Qualifications Directive.

¹⁷³⁶ 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).

¹⁷³⁷ See the first sentence of Art. 25(3) of the Professional Qualifications Directive.

¹⁷³⁸ Professional Qualifications Directive, recital 20.

¹⁷³⁹ The German version of Art. 26(1) *in fine* refers solely to point 5.1.2.

¹⁷⁴⁰ Professional Qualifications Directive, recital 20.

5.1.3 of Annex V, at least two-fifths of the Member States must have them in common.¹⁷⁴¹ As there is no complete harmonisation regime for specialised medical doctors,¹⁷⁴² Member States may still have different specialisations that are not mentioned in Annex V.¹⁷⁴³ In practice, many specialities or advanced training only exist in some Member States.¹⁷⁴⁴ A specialised doctor may in principle not invoke automatic recognition if the title is not listed in Annex V (see for exceptions *supra* note 1718). 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 Directive).¹⁷⁴⁵ 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 ¹⁷⁴⁶

Table 8: Swiss titles and qualifications of specialised doctors

¹⁷⁴¹ Art. 26(2) MedBG.

¹⁷⁴² Professional Qualifications Directive, recital 20.

¹⁷⁴³ See recital 20 of the Professional Qualifications Directive.

¹⁷⁴⁴ See Kremalis, Frankfurt am Main, *supra* note 733, p. 168.

¹⁷⁴⁵ Zaglmayer, Vienna, *supra* note 1037, para. 6.33.

¹⁷⁴⁶ 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.

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.¹⁷⁴⁷ 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.¹⁷⁴⁸ All the types of training of medical specialists listed in Annex V must be appropriately remunerated.¹⁷⁴⁹ Member States may also authorise part-time training for specialised doctors which must also be appropriately remunerated.¹⁷⁵⁰ *A contrario*, there is no obligation stemming from the Directive to remunerate trainees for specialisms that are not listed in Annex V.

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.¹⁷⁵¹ 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 proce-

¹⁷⁴⁷ Last sentence of Art. 25(3a)(1) of the Professional Qualifications Directive.

¹⁷⁴⁸ Art. 27(1) of the Professional Qualifications Directive.

¹⁷⁴⁹ Last sentence of Art. 25(3) of the Professional Qualifications Directive.

¹⁷⁵⁰ Art. 22(a) in conjunction with Art. 25 of the Professional Qualifications Directive; Zaglmayer, Vienna, *supra* note 1037, para. 6.36 for further references.

¹⁷⁵¹ Art. 36(2) of the Professional Qualifications Directive.

dure.¹⁷⁵² 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.¹⁷⁵³ 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.¹⁷⁵⁴ 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 Zahnarzt Diplom 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 ¹⁷⁵⁵

Table 9: Swiss titles and qualifications of dental practitioners

¹⁷⁵² See Recital 21 of the Professional Qualifications Directive; Zaglmayer, Vienna, supra note 1037, para. 6.48 for further references; Case C-40/93, *Commission v Italy*, ECLI:EU:C:1995:157, para. 25.

¹⁷⁵³ Case C-492/12, *Conseil national de l'ordre des médecins*, ECLI:EU:C:2013:576, para. 40 et seq.

¹⁷⁵⁴ Art. 34(2) of the Professional Qualifications Directive.

¹⁷⁵⁵ 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.¹⁷⁵⁶ Unlike specialised doctors of medicine, there is no guarantee of appropriate remuneration for trainees who are specialising in dentistry.¹⁷⁵⁷ 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	Evidence of formal qualifications	Body awarding the evidence of qualifications	Reference date
Switzerland	Diplom für Oralchirurgie Diplôme fédéral de chirurgie orale Diploma di chirurgia orale	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	30 April 2004 ¹⁷⁵⁸

Table 10: Swiss titles and qualifications of specialised dentists

¹⁷⁵⁶ Art. 35(2)(2) of the Professional Qualifications Directive.

¹⁷⁵⁷ See Art. 25(3) of the Professional Qualifications Directive.

¹⁷⁵⁸ 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).

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.’

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.¹⁷⁵⁹ 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

¹⁷⁵⁹ Art. 31(2) of the Professional Qualifications Directive.

training takes place in hospitals or other health institutions under the responsibility of nursing teachers.¹⁷⁶⁰

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).¹⁷⁶¹ 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:

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 ¹⁷⁶²

¹⁷⁶⁰ Art. 31(4) et seq. of the Professional Qualifications Directive.

¹⁷⁶¹ For the recognition of nurses under the general system see Berthoud, Geneva, supra note 1018, p. 289 et seq. and Zaglmayer, Vienna, supra note 1037, para. 6.70 et seq.

¹⁷⁶² 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).

Country	Evidence of formal qualifications	Body awarding the evidence of qualifications	Professional title	Reference date
	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 ¹⁷⁶³
	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, infirmier	1 June 2002 ¹⁷⁶⁴

Table 11: Swiss titles and qualifications for nurses of general care

¹⁷⁶³ 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).

¹⁷⁶⁴ Point 5.2.2 of Annex V to the Professional Qualifications Directive(amended by Decision No 1/2015 of the EU-Swiss Joint Committee).

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 referred to in Annex V, point 5.2.2’ (route II).¹⁷⁶⁵ 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).¹⁷⁶⁶ 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’.

¹⁷⁶⁵ Art. 40(2)(a) of the Professional Qualifications Directive.

¹⁷⁶⁶ 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	Schulen, die staatlich anerkannte Bildungsgänge durchführen	Hebamme	1 June 2002 ¹⁷⁶⁷
	Sage-femme diplômée	Écoles qui proposent des filières de formation reconnues par l'État	Sage-femme	
	Levatrice diplomata	Scuole che propongono dei cicli di formazione riconosciuti dallo Stato	Levatrice	
	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 ¹⁷⁶⁸

Table 12: Swiss titles and qualifications of midwives

¹⁷⁶⁷ 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).

¹⁷⁶⁸ 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).

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.¹⁷⁶⁹ Article 44(2) of the Directive requires 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.¹⁷⁷⁰ 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 ¹⁷⁷¹

Table 13: Swiss titles and qualifications of pharmacists

¹⁷⁶⁹ Art. 40(2)(a) of the Professional Qualifications Directive.

¹⁷⁷⁰ Berthoud, Geneva, *supra* note 1018, p. 265 et seq.

¹⁷⁷¹ 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).

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.¹⁷⁷² Switzerland amended its law and now only provides for one form of training to admit an individual to practise as a general practitioner.¹⁷⁷³ The professions of medical doctors, general practitioners, specialised doctors, dentists and specialised dentists are regulated in Switzerland.¹⁷⁷⁴ The exercise of any of the abovementioned professions in the private sector is subject to authorisation.¹⁷⁷⁵ 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.¹⁷⁷⁶ 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)¹⁷⁷⁷ 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.¹⁷⁷⁸ The MEBEKO is competent for the recognition of professional

¹⁷⁷² 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.

¹⁷⁷³ Recital 5 of Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP; see Berthoud, Geneva, supra note 1018, p. 260 et seq. for further references.

¹⁷⁷⁴ <<https://www.sbf.admin.ch/sbf/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html>> (last visited on 28.06.2020) and Art. 2 MedBV.

¹⁷⁷⁵ Art. 34(1) MedBG.

¹⁷⁷⁶ Art. 36(2) MedBG; see BGer 2C_668/2012 of 01.02.2013, para. 3.2.2.

¹⁷⁷⁷ 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.

¹⁷⁷⁸ Arts. 15(2) and 21(2) MedBG.

qualifications.¹⁷⁷⁹ 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.¹⁷⁸⁰ Universities must be accredited.¹⁷⁸¹

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.¹⁷⁸² Even service providers are registered in this database.¹⁷⁸³ A similar register exists inter alia for the professions of midwives, nurses and opticians.¹⁷⁸⁴

7.3.2 Recognition of nurses for general care

The nurses' (*Pflegefachfrau / Pflegefachmann*) profession is regulated.¹⁷⁸⁵ 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 level.¹⁷⁸⁶ 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*.¹⁷⁸⁷ The GesBG covers nurses from *Fachhochschulen* (universities of applied sciences) according to Article 2(1) lit. a

¹⁷⁷⁹ Arts. 15(3) and 21(3) MedBG.

¹⁷⁸⁰ Art. 16 MedBG.

¹⁷⁸¹ Art. 22 et seq. MedBG.

¹⁷⁸² Art. 35 MedBG in conjunction with Art. 5 MedBV.

¹⁷⁸³ Art. 35 MedBG.

¹⁷⁸⁴ Art. 12^{ter} of the *Interkantonale Vereinbarung über die Anerkennung von Ausbildungsabschlüsse (IKV)* of 18 February 1993 (Intercantonal Agreement on the recognition of professional qualifications).

¹⁷⁸⁵ <<https://www.sbfi.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html>> (last visited on 28.06.2020).

¹⁷⁸⁶ *Bundesgesetz über die Gesundheitsberufe (GesBG) of 30.09.2016*, SR 811.21; see T. Gächter & P. Koller, 'Gesundheitsberufegesetz – Auswirkungen auf die Pflegeberufe', *Pflegerecht* 2018, p. 2.

¹⁷⁸⁷ Swiss Confederation, *Botschaft zum Bundesgesetz über die Gesundheitsberufe (BBl 2015 8715) of 18.11.2015*, p. 8777.

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.¹⁷⁸⁸ 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.¹⁷⁸⁹ While the first draft only addressed nurses who are pursuing the profession outside of the public sector,¹⁷⁹⁰ the final draft also covers any type of contract or public employment as long as the profession is pursued independently.¹⁷⁹¹

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.¹⁷⁹² The AFMP and the EFTA Convention qualify as Treaties. The recognition of third country diplomas will be governed by a separate ordinance.¹⁷⁹³ Once the diploma has been recognised, holders of a foreign diploma will be granted the same rights as holders of Swiss diplomas.¹⁷⁹⁴ The introduction of compensation measures is also governed by the GesBG.¹⁷⁹⁵ The recognition

¹⁷⁸⁸ Swiss Confederation, supra note 1787, p. 8723; see further Gächter & Koller (2018), supra note 1786, p. 4.

¹⁷⁸⁹ Swiss Confederation, supra note 1787, p. 8748.

¹⁷⁹⁰ Swiss Confederation, supra note 1787, p. 8728 et seq.

¹⁷⁹¹ Art. 1 lit. b and Art. 11 GesBG.

¹⁷⁹² Art. 10(1) lit. b GesBG.

¹⁷⁹³ *Verordnung über die Anerkennung und die Gleichstellung von Bildungsabschlüssen in den Gesundheitsberufen nach dem GesBG (GesBAV)* not entered into force.

¹⁷⁹⁴ Art. 10(2) GesBG.

¹⁷⁹⁵ Art.10(3) and (4) GesBG.

of foreign diplomas for the health professions under the GesBG was delegated to the Swiss Red Cross,¹⁷⁹⁶ which has also been responsible for the public register since 2015.¹⁷⁹⁷ The pursuit of the profession is however granted by the cantons, which check whether the applicant fulfils the conditions laid down in Article 12 GesBG.¹⁷⁹⁸ Service providers from EU Member States or EEA EFTA countries do not require cantonal admission but must make a declaration in advance.¹⁷⁹⁹ 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.¹⁸⁰⁰ The respective canton adds the applicant to the register.¹⁸⁰¹ 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.¹⁸⁰² Even service providers are registered.¹⁸⁰³ A similar register exists for the health professions under the MedBG.¹⁸⁰⁴

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',¹⁸⁰⁵ if they are trustworthy,¹⁸⁰⁶ are physically and

¹⁷⁹⁶ Swiss Confederation, supra note 1787, p. 8732; see further Gammenthaler, Zurich, supra note 41, footnote 2257 for further references; see further the new Art. 2(1) GesBAV.

¹⁷⁹⁷ Swiss Confederation, supra note 1787, p. 8725.

¹⁷⁹⁸ Art. 11 GesBG.

¹⁷⁹⁹ Art. 15(1) GesBG.

¹⁸⁰⁰ Art. 15(2) GesBG.

¹⁸⁰¹ Art. 15(1) and (2) GesBG.

¹⁸⁰² Art. 12^{ter} of the *Interkantonale Vereinbarung über die Anerkennung von Ausbildungsabschlüsse (IKV)* of 18 February 1993 (Intercantonal Agreement on the recognition of professional qualifications).

¹⁸⁰³ Art. 12^{ter} (1) of the *Interkantonale Vereinbarung über die Anerkennung von Ausbildungsabschlüsse (IKV)* of 18 February 1993 (Intercantonal Agreement on the recognition of professional qualifications).

¹⁸⁰⁴ See Art. 51 MedBG.

¹⁸⁰⁵ Art. 12(1) lit. a in conjunction with Art. 12(2) lit. a GesBG.

¹⁸⁰⁶ Art. 12(1) lit. b GesBG.

mentally able to pursue the profession¹⁸⁰⁷ and if they speak an official language of the canton in question.¹⁸⁰⁸ Trustworthiness could mean that the applicants can be required to hand in a criminal record and/or an excerpt of the debt collection register.¹⁸⁰⁹ According to the Swiss Federal Council, requiring a level B of the Common European Framework for Languages standard is proportionate and adequate.¹⁸¹⁰ The canton which grants access to the independent pursuit of the profession is allowed to restrict the pursuit, namely temporal or territorial restrictions.¹⁸¹¹ The respective canton may also revoke the permit to practise if the conditions were not originally fulfilled.¹⁸¹² There are disciplinary sanctions for breaches of the GesBG listed in Article 19 GesBG, 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.¹⁸¹³ 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.¹⁸¹⁴

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 de-

¹⁸⁰⁷ Art. 12(1) lit. b GesBG.

¹⁸⁰⁸ Art. 12(1) lit. c GesBG.

¹⁸⁰⁹ Swiss Confederation, *supra* note 1787, p. 8748.

¹⁸¹⁰ Swiss Confederation, *supra* note 1787, p. 8748.

¹⁸¹¹ Art. 13 GesBG.

¹⁸¹² Art. 14(1) GesBG; see Swiss Confederation, *supra* note 1787, p. 8751.

¹⁸¹³ Art. 21(1) GesBG.

¹⁸¹⁴ Swiss Confederation, *supra* note 1787, p. 8749.

gree at *Fachhochschul*-level (university-level applied sciences) which comprises 180 ECTS points.¹⁸¹⁵

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.¹⁸¹⁶

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.¹⁸¹⁷ 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.¹⁸¹⁸ 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.¹⁸¹⁹

¹⁸¹⁵ 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.

¹⁸¹⁶ See <https://www.fphch.org/Data/Allgemein/Flyer_FPH_d_Web.pdf> (last visited on 10.07.2019).

¹⁸¹⁷ See Swiss Confederation, *supra* note 1384.

¹⁸¹⁸ Swiss Confederation, *Botschaft zum Bundesgesetz über die universitären Medizinalberufe of 3 December 2004 (Medizinalberufegesetz, MedBG; BBl 2005 173)*, p. 226.

¹⁸¹⁹ <<https://www.bag.admin.ch/bag/de/home/berufe-im-gesundheitswesen/auslaendische-abschluesse-gesundheitsberufe/diplome-der-medizinalberufe-ausstaaten-der-eu-efta/direkte-erkennung-diplome.html>> (last visited on 15.07.2019).

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.¹⁸²⁰ 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.¹⁸²¹ For medical and dental specialisms, Member States may also agree between themselves on the recognition of other specialisms not listed in Annex V.¹⁸²² Article 168(7) TFEU allows Member States to establish their health policy (and their education according to Article 165(4) TFEU and their vocational training according to Article 166(4) TFEU¹⁸²³), 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.¹⁸²⁴

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,

¹⁸²⁰ Case C-675/17, *Ministero della Salute v Hannes Preindl*, ECLI:EU:C:2018:990, para. 36.

¹⁸²¹ See further Zaglmayer, Vienna, supra note 1037, para. 6.94 et seq.

¹⁸²² Last sentence of recital 20 of the Professional Qualifications Directive; European Commission, supra note 1116, p. 12.

¹⁸²³ See *Opinion of Advocate General Mischo in Case C-294/00, Gräbner*, ECLI:EU:C:2001:700, para. 77 et seq.

¹⁸²⁴ European Commission, supra note 1441, Chapter 4.5, p. 19; see further J. Ludwig, *Der europarechtliche Einfluss auf die Entwicklung des nationalen Heilberufes*, Diss. Kiel 2017, Berlin (2018), p. 167 et seq.

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.¹⁸²⁵ Similar specialisations exist for other countries according to the database of the European Commission.¹⁸²⁶

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 85/432/EEC and 85/432/EEC at that time.¹⁸²⁷ Additionally, the Commission commenced infringement proceedings against Portugal in 2006 for failure to implement Directive 89/48/EEC for the profession of ‘pharmacist-biologists’.¹⁸²⁸ 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’ profession¹⁸²⁹ (*mutatis mutandis*) and thus to

¹⁸²⁵ <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=regprof&id_regprof=27226> (last visited on 18.06.2019).

¹⁸²⁶ <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=regprof&id_regprof=27226> (last visited on 18.06.2019).

¹⁸²⁷ Case C-39/07, *Commission v Spain*, ECLI:EU:C:2008:265.

¹⁸²⁸ <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 Berufsqualifikationen in der Europäischen Union*, Diss. Vienna (2008), Vienna (2008), p. 160.

¹⁸²⁹ 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.

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.¹⁸³⁰ 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.¹⁸³¹ 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 independently but without management responsibility. Whether the rule is in conformity with EU law as such is not answered.¹⁸³²

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)

¹⁸³⁰ Berthoud, Geneva, supra note 1018, p. 265 et seq.

¹⁸³¹ V. Rumetsch & T. Poledna, 'Eidgenössischer Weiterbildungstitel im Apothekerbereich – Umsetzungsprobleme', Jusletter 28 January 2019, para. 12 et seq.

¹⁸³² Rumetsch & Poledna (28.01.2019), supra note 1831, para. 22.

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.¹⁸³³

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 *Gräßner*, 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.¹⁸³⁴ 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 aim. It held that measures, such as supervision or reporting duties, are less restrictive regardless of whether the ‘dentist’ is employed or self-employed.¹⁸³⁵

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

¹⁸³³ See supra note 1827.

¹⁸³⁴ Case E-17/14, *EFTA Surveillance Authority v the Principality of Liechtenstein*, EFTA Court Report 2015, p. 164 et seq., para. 33.

¹⁸³⁵ Case E-17/14, *EFTA Surveillance Authority v the Principality of Liechtenstein*, EFTA Court Report 2015, p. 164 et seq., para. 37 et seq.

the recognition, or if it is argued that either the *Keck* case law *per analogiam* should be applied or that the *Grübner* 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).¹⁸³⁶ 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.¹⁸³⁷

7.4 Application of the general system of recognition for the health professions

Particularly for the health professions,¹⁸³⁸ 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 nurse in gen-

¹⁸³⁶ See e.g. Joined Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes*, ECLI:EU:C:2009:316.

¹⁸³⁷ *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.

¹⁸³⁸ For doctors with basic training, specialised doctors, nurses responsible for general care, dental practitioners, specialised dental practitioners, veterinary surgeons, midwives and pharmacists.

eral care will most certainly have to complete compensation measures.¹⁸³⁹ 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.¹⁸⁴⁰ 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).¹⁸⁴¹

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.¹⁸⁴² 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.¹⁸⁴³ 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 ob-

¹⁸³⁹ See Berthoud, Geneva, supra note 1018, p. 289 et seq.

¹⁸⁴⁰ Case C-477/13, *Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 27 et seq.

¹⁸⁴¹ 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.

¹⁸⁴² Swiss Confederation, supra note 1787, p. 8732.

¹⁸⁴³ See <<https://www.redcross.ch/de/srk-dienstleistungen/anererkennung-auslaendischer-ausbildungsabschluesse/zahlen-und-fakten-aus-dem>> (last visited on 26.06.2020).

tained.¹⁸⁴⁴ A specific exam or even a Swiss degree and a state examination (*eidgenössische Prüfung*) can be required.¹⁸⁴⁵

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.¹⁸⁴⁶ The CJEU explicitly referred to the specific situation of the bilingual Province Bolzano.¹⁸⁴⁷

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.¹⁸⁴⁸ 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.¹⁸⁴⁹

¹⁸⁴⁴ Art. 15(4) MedBG; see further Oesch, *supra* note 1065, para. 18 et seq.

¹⁸⁴⁵ Etter, *supra* note 1777, para. 16 et seq.; BVGer B-16/2013 of 13.05.2013, para. 3.

¹⁸⁴⁶ Case C-419/16, *Sabine Simma Federspiel v Provincia autonoma di Bolzano und Equitalia Nord SpA*, ECLI:EU:C:2017:997, para. 51.

¹⁸⁴⁷ Case C-419/16, *Sabine Simma Federspiel v Provincia autonoma di Bolzano und Equitalia Nord SpA*, ECLI:EU:C:2017:997, para. 49.

¹⁸⁴⁸ Case C-675/17, *Ministero della Salute v Hannes Preindl*, ECLI:EU:C:2018:990, para. 35 et seq.

¹⁸⁴⁹ Case C-675/17, *Ministero della Salute v Hannes Preindl*, ECLI:EU:C:2018:990, para. 38.

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 Liechtenstein¹⁸⁵⁰ see Chapter 7.3.4.

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 medicine¹⁸⁵¹ 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.¹⁸⁵² 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.¹⁸⁵³

¹⁸⁵⁰ See Case E-17/14, *EFTA Surveillance Authority v the Principality of Liechtenstein*, EFTA Court Report 2015, p. 164 et seq.

¹⁸⁵¹ BGE 132 II 135 (= Pra 96 2007 No 16).

¹⁸⁵² BVGer C-4852/2015 (BVGE 2018 V/1) of 08.03.2018 and BVGer C-6425/2013 of 19.03.2018.

¹⁸⁵³ 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.

In 2018, the FAC found Article 55a(2) KVG to be indirectly discriminatory.¹⁸⁵⁴ 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.¹⁸⁵⁵ It also held that this measure does not violate Article 55 of the Directive,¹⁸⁵⁶ 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.’

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 law¹⁸⁵⁷ 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,¹⁸⁵⁸ 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.¹⁸⁵⁹ 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.¹⁸⁶⁰ One author thinks that this rule hints at some possible restrictions for the

¹⁸⁵⁴ 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.

¹⁸⁵⁵ BVGer C-4852/2015 (BVGE 2018 V/1) of 08.03.2018, para. 9.6.4.

¹⁸⁵⁶ BVGer C-4852/2015 (BVGE 2018 V/1) of 08.03.2018, para. 9.3.2.

¹⁸⁵⁷ See BGE 130 I 26, para. 3.

¹⁸⁵⁸ See Berthoud, Geneva, *supra* note 1018, p. 359; see also European Commission, *supra* note 1241, and Art. 55 of the Professional Qualifications Directive.

¹⁸⁵⁹ Diebold, Berne, *supra* note 69, para. 1194.

¹⁸⁶⁰ At least for the interpretation of Swiss law, this rule is common practice: see BGE 112 II 167, para. 2.b.

free movement for medical doctors.¹⁸⁶¹ 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.¹⁸⁶² 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.¹⁸⁶³ Generally speaking, limits to the number of pharmacists based on population density were accepted by the CJEU.¹⁸⁶⁴ 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.¹⁸⁶⁵ It has shown that it is undoubtable that Member States have discretion where public health is at stake.¹⁸⁶⁶ The CJEU has however been stricter when it comes to the assessment of discriminatory measures.¹⁸⁶⁷ 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.¹⁸⁶⁸ In essence, the FAC did not give a clear insight into why this measure

¹⁸⁶¹ Kremalis, Frankfurt am Main, *supra* note 733, p. 222.

¹⁸⁶² Case C-73/08, *Bressol*, ECLI:EU:C:2010:181, para. 62.

¹⁸⁶³ Case C-224/98, *D'Hoop*, ECLI:EU:C:2002:432, para. 38; see Epiney (22.04.2013), *supra* note 1854, footnote 36 for further references.

¹⁸⁶⁴ Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, ECLI:EU:C:2010:300, para. 113.

¹⁸⁶⁵ Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427, para. 66.

¹⁸⁶⁶ Case C-125/16, *Malta Dental Technologists Association and Reynaud*, ECLI:EU:C:2017:707, para. 60.

¹⁸⁶⁷ 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 1854, p. 8.

¹⁸⁶⁸ Epiney (22.04.2013), *supra* note 1854, para. 16 et seq.

was proportionate as it left the decision entirely at the discretion of the federal authorities.¹⁸⁶⁹

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.¹⁸⁷⁰ Considering the more recent case law of the CJEU concerning the standstill clause in the Ankara Agreement,¹⁸⁷¹ 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.¹⁸⁷² 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 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 FAC¹⁸⁷³) and must be assessed based on Article 10(d) of the Professional Qualifications Directive.¹⁸⁷⁴ Very recently in June 2019, the Swiss Federal Court annulled this decision and stated that this specialisation is purely a matter of private law.¹⁸⁷⁵

¹⁸⁶⁹ BVGer C-4852/2015 (BVGE 2018 V/1) of 08.03.2018, para. 9.8.

¹⁸⁷⁰ BGE 130 I 26, para. 3.4.

¹⁸⁷¹ See Case C-225/12, *C. Demir v Staatssecretaris van Justitie*, ECLI:EU:C:2013:725, para. 40; Case C-138/13, *Naima Dogan v Germany*, ECLI:EU:C:2014:2066, para. 37.

¹⁸⁷² See instead of many BVGer B-3577/2016 of 06.10.2017, para. 2.1.

¹⁸⁷³ BVGer B-2848/2013 of 27.08.2014 and BVGer B-2964/2008 of 09.09.2008.

¹⁸⁷⁴ BVGer B-3706/2014 of 28.11.2017, para. 6.3.4.

¹⁸⁷⁵ BGer 2C_39/2018 of 18.06.2019, para. 7.

Article 2 of the Reproductive Medicine Ordinance¹⁸⁷⁶ 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.¹⁸⁷⁷ 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.¹⁸⁷⁸ 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.¹⁸⁷⁹ 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 with.¹⁸⁸⁰ 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.¹⁸⁸¹

¹⁸⁷⁶ Fortpflanzungsmedizinverordnung (FMedV) of 04.12.2000, SR 810.112.2.

¹⁸⁷⁷ Recital 20 of the Professional Qualifications Directive.

¹⁸⁷⁸ BVGer B-3706/2014 of 28.11.2017, para. A.

¹⁸⁷⁹ BGer 2C_39/2018 of 18.06.2019, para. 4.4 *in fine*.

¹⁸⁸⁰ BVGer B-3706/2014 of 28.11.2017, para. 6.3.3 subpara. 2; see <<https://www.sbf.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html>> (last visited on 28.06.2020).

¹⁸⁸¹ BVGer B-3706/2014 of 28.11.2017, para. 6.3.3.

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.¹⁸⁸²

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.¹⁸⁸³ Notably, the FAC also states that the same principles would apply for access to an unregulated profession with reference to the case *Bobadilla*.¹⁸⁸⁴ 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.¹⁸⁸⁵ 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.¹⁸⁸⁶ Even if one follows this reasoning, there is a second problem that was not addressed in this decision.

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 Arti-

¹⁸⁸² BVGer B-3706/2014 of 28.11.2017, para. 2.1.2.2.

¹⁸⁸³ BVGer B-3706/2014 of 28.11.2017, para. 7.2.

¹⁸⁸⁴ BVGer B-3706/2014 of 28.11.2017, para. 6.3.3 in conjunction with para. 7.2.1.

¹⁸⁸⁵ BVGer B-3706/2014 of 28.11.2017, para. 6.3.4.

¹⁸⁸⁶ BVGer B-3706/2014 of 28.11.2017, paras. 7.2.2 and 7.2.3.

cle 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.¹⁸⁸⁷ 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,¹⁸⁸⁸ 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 10.¹⁸⁸⁹

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.¹⁸⁹⁰ The CJEU however rightly pointed out that this would in any case not change the applicability of primary law.¹⁸⁹¹ 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.¹⁸⁹² This means that the outcome of this case would not have changed.

¹⁸⁸⁷ Berthoud, Geneva, supra note 1018, p. 285 et seq.

¹⁸⁸⁸ *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.

¹⁸⁸⁹ *Case C-477/13, Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 38.

¹⁸⁹⁰ *Case C-477/13, Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 33.

¹⁸⁹¹ *Case C-477/13, Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer*, ECLI:EU:C:2015:239, para. 41 et seq.

¹⁸⁹² See BGE 134 II 10.

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 ‘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.¹⁸⁹³ This reasoning is based on the case law of the CJEU.¹⁸⁹⁴ 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’.

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

¹⁸⁹³ BVGer B-4857/2012 of 05.12.2013, para. 4.

¹⁸⁹⁴ 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.

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 1718 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 Directive¹⁸⁹⁵ 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 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

¹⁸⁹⁵ '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'.

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 State¹⁸⁹⁶ 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,¹⁸⁹⁷
- Notary,¹⁸⁹⁸
- Legal agent,¹⁸⁹⁹
- Certified translator,¹⁹⁰⁰
- and other representatives before courts.¹⁹⁰¹

The following legal professions are also regulated in Switzerland but will not be discussed in this Chapter: certified bailiff,¹⁹⁰² and registrar/keeper of pub-

¹⁸⁹⁶ Despite its misleading official name: ‘the Swiss Confederation’.

¹⁸⁹⁷ Patentanwalt/Conseiller en brevets.

¹⁸⁹⁸ Notar/Notaire.

¹⁸⁹⁹ Rechtsagent/Agent juridique.

¹⁹⁰⁰ Vereidigter Übersetzer/Traducteur juré.

¹⁹⁰¹ Vertreter in Steuer- und Sozialversicherungssachen vor dem Obergericht/Représentation des parties dans les causes fiscales et assurances sociales devant le Tribunal cantonal.

¹⁹⁰² Betreibungsbeamter/Commissaire LP.

lic records,¹⁹⁰³ travelling salesman;¹⁹⁰⁴ certified commercial agent;¹⁹⁰⁵ registry official;¹⁹⁰⁶ and secretary of state in a municipality.¹⁹⁰⁷

Auditors¹⁹⁰⁸ and insurance mediators¹⁹⁰⁹ 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*.¹⁹¹⁰ 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.¹⁹¹¹
- Hunting inspectors;¹⁹¹²
- Court bailiffs;¹⁹¹³
- Police officers.¹⁹¹⁴

¹⁹⁰³ Grundbuchverwalter/Administrateur du registre foncier.

¹⁹⁰⁴ Handelsagent/Agent/e d'affaires.

¹⁹⁰⁵ Sachwalter SchKG/Agent d'affaires.

¹⁹⁰⁶ Zivilstandsbeamter/Officier de l'état civil.

¹⁹⁰⁷ Gemeindeschreiber/Secrétaire communal.

¹⁹⁰⁸ 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.

¹⁹⁰⁹ 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.

¹⁹¹⁰ See Case C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 31 for further references.

¹⁹¹¹ Richter/Juge.

¹⁹¹² 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.

¹⁹¹³ Gerichtsvollzieher/Huissier de justice. This profession only exists in Geneva.

¹⁹¹⁴ Polizist/Policier. In some cantons, Swiss nationality is not required.

The profession of manager of a temporary and interim employment agency is exempt from the application of the AFMP.¹⁹¹⁵

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,¹⁹¹⁶ and consumer protection.¹⁹¹⁷ Regulation can sometimes lead to only one or several types of legal profession being established in a Member State.¹⁹¹⁸

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.¹⁹¹⁹ Currently, therefore,

¹⁹¹⁵ Art. 22 para. 3(i) of Annex I to the AFMP.

¹⁹¹⁶ See BGE 103 Ia 426, para. 4.

¹⁹¹⁷ 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__Panteia_Maastricht_University_.pdf> (last visited on 26.06.2020), p. 4.

¹⁹¹⁸ See S. J. F. J. Claessens, *Free movement of lawyers in the European Union*, Diss. Maastricht (2008), Nijmegen (2008), p. 78 et seq.

¹⁹¹⁹ See Claessens et al., *supra* note 1917, p. 44.

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.¹⁹²⁰ Nevertheless, this is not an issue as lawyers would not generally provide 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.¹⁹²¹

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 workers¹⁹²²) (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*).¹⁹²³ In-house lawyers do not fall under those Directives if they are not allowed to practise as lawyers in their home Member State,¹⁹²⁴ but in some countries (such as Ireland), lawyers may be fully qualified without having obtained a law degree.¹⁹²⁵ Third country nationals may

¹⁹²⁰ See Chapter 6.3.2.1.

¹⁹²¹ Claessens et al., supra note 1917, p. 74.

¹⁹²² See Art. 8 of Facilitating Practice Directive.

¹⁹²³ See Art. 5(1) AFMP.

¹⁹²⁴ See in detail Claessens et al., supra note 1917, p. 96.

¹⁹²⁵ See Claessens, Nijmegen, supra note 1918, p. 87.

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.¹⁹²⁶ 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.¹⁹²⁷

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 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.¹⁹²⁸

Some Swiss explanatory documents or materials give the impression that these rules are exclusively designed for EU nationals.¹⁹²⁹ 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.¹⁹³⁰ 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 di-

¹⁹²⁶ Claessens et al., supra note 1917, p. 44.

¹⁹²⁷ Berthoud, Geneva, supra note 1018, 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.

¹⁹²⁸ State Secretariat for Research and Innovation, supra note 979, p. 12.

¹⁹²⁹ 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.

¹⁹³⁰ Art. 3(5) AFMP.

ploma under Italian law, and then returning to Italy to be granted access to the lawyer's profession there too.¹⁹³¹

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.¹⁹³² 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.¹⁹³³ 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 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.¹⁹³⁴

¹⁹³¹ See Joined Cases C-58/13 and C-59/13, *Torresj*, 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 751, p. 198 for further references.

¹⁹³² Directive 2006/123/EC ('Services Directive').

¹⁹³³ Claessens et al., *supra* note 1917, p. 66.

¹⁹³⁴ 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.

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.¹⁹³⁵

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.¹⁹³⁶ 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.¹⁹³⁷

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:

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

¹⁹³⁵ Art. 2(1) of the Facilitating Practice Directive.

¹⁹³⁶ Seela, Hamburg, *supra* note 1934, p. 68.

¹⁹³⁷ Claessens, Nijmegen, *supra* note 1918, pp. 39–49.

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.¹⁹³⁸ 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.

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

¹⁹³⁸ See *supra* note 1931 and Claessens et al., *supra* note 1917, p. 138.

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.¹⁹³⁹ 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.¹⁹⁴⁰ Many Member States have opted for the aptitude test.¹⁹⁴¹ 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.¹⁹⁴²

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.¹⁹⁴³

¹⁹³⁹ Art. 10(2) of the Facilitating Practice Directive in conjunction with the General Recognition Directive (corresponds to the Professional Qualifications Directive).

¹⁹⁴⁰ See Art. 14(3) of the Professional Qualifications Directive.

¹⁹⁴¹ Claessens, Nijmegen, *supra* note 1918, p. 31 et seq. and p. 250 et seq.

¹⁹⁴² Art. 10(1) of the Facilitating Practice Directive.

¹⁹⁴³ Art. 10(3) of the Facilitating Practice Directive.

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 provided. It may also require a certificate that is no more than three months old.¹⁹⁴⁴ 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.¹⁹⁴⁵ Member States may not prohibit lawyers from establishing themselves in different Member States (so-called single practice rule).¹⁹⁴⁶

It should be stressed at this point that Article 3 of that Directive leads to a full harmonisation of the conditions.¹⁹⁴⁷ 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.¹⁹⁴⁸

Migrants are subject to the same rules of professional conduct as lawyers who are practising in the same jurisdiction of the host Member State.¹⁹⁴⁹ They are also still subject to rules of professional conduct in their home Mem-

¹⁹⁴⁴ Art. 3(2) of the Facilitating Practice Directive.

¹⁹⁴⁵ Art. 3(4) of the Facilitating Practice Directive.

¹⁹⁴⁶ 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.

¹⁹⁴⁷ Claessens et al., supra note 1917, p. 54 with reference to Case C-193/05, *Commission v Luxembourg*, ECLI:EU:C:2006:588.

¹⁹⁴⁸ Claessens et al., supra note 1917, p. 88.

¹⁹⁴⁹ Art. 6(1) and Art. 7(1) of the Facilitating Practice Directive.

ber State.¹⁹⁵⁰ Member States may require lawyers take out professional indemnity insurance or for them to become a member of a guarantee fund.¹⁹⁵¹

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 fifth of the lawyers reported difficulties in applying both regimes.¹⁹⁵² One unsolved issue is how to address contradictory rules and whether there is a hierarchy of rules or not.¹⁹⁵³

Disciplinary sanctions for failure to fulfil the respective rules are possible.¹⁹⁵⁴ 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.¹⁹⁵⁵

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

¹⁹⁵⁰ Art. 7(2) of the Facilitating Practice Directive.

¹⁹⁵¹ Art. 6(3) of the Facilitating Practice Directive.

¹⁹⁵² Claessens et al., supra note 1917, p. 45.

¹⁹⁵³ Claessens et al., supra note 1917, p. 98.

¹⁹⁵⁴ Art. 7 of the Facilitating Practice Directive.

¹⁹⁵⁵ Art. 7(2) of the Facilitating Practice Directive.

provider needs to move from one Member State to another.¹⁹⁵⁶ 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.¹⁹⁵⁷ Directive 2000/31/EC on electronic communication¹⁹⁵⁸ 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.¹⁹⁵⁹

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 mere reference to the title granted by each Member State.¹⁹⁶⁰ 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.¹⁹⁶¹ 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.¹⁹⁶² 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, Advo-

¹⁹⁵⁶ *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, para. 18.

¹⁹⁵⁷ See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, para. 22.

¹⁹⁵⁸ Directive 2000/31/EC (‘Directive on electronic commerce’).

¹⁹⁵⁹ Art. 1(5) of Directive 2000/31/EC (‘Directive on electronic commerce’).

¹⁹⁶⁰ See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, para. 27 for further references.

¹⁹⁶¹ *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, paras. 24–32.

¹⁹⁶² Art. 1 of the Facilitating Services Directive.

cate General Szpunar concluded that the authentication of documents does not fall under it.¹⁹⁶³ 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.¹⁹⁶⁴

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.¹⁹⁶⁵ 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.¹⁹⁶⁶ The Directive does not set out a nationality requirement and third country nationals who can rely on EU law are covered by it.¹⁹⁶⁷ Family members of EU or 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.¹⁹⁶⁸

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

¹⁹⁶³ *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, para. 39.

¹⁹⁶⁴ *Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2017:196, paras. 47 and 71.

¹⁹⁶⁵ Art. 2 of the Facilitating Services Directive.

¹⁹⁶⁶ Art. 3 of the Facilitating Services Directive.

¹⁹⁶⁷ Claessens et al., *supra* note 1917, p. 44.

¹⁹⁶⁸ See note 1927 for references under the Professional Qualifications Directive, respectively for another opinion under the Facilitating Practice Directive.

however be interpreted differently according to the respective language.¹⁹⁶⁹ 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.¹⁹⁷⁰

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.

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.¹⁹⁷¹ This has been named as one of the major remaining challenges for lawyers by the Panteia/Maastricht report.¹⁹⁷² This concept is to be understood as the two sets of rules with regard to professional conduct in the host

¹⁹⁶⁹ Claessens et al., *supra* note 1917, pp. 45 and 116.

¹⁹⁷⁰ Art. 7(2) of the Facilitating Services Directive.

¹⁹⁷¹ 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.

¹⁹⁷² Claessens et al., *supra* note 1917, p. 173.

and the home Member State, which apply to EU lawyers who are providing services.¹⁹⁷³ 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.¹⁹⁷⁴ 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.¹⁹⁷⁵ 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’.¹⁹⁷⁶ The most crucial differences concern professional secrecy and reporting obligations for money laundering and organised crime.¹⁹⁷⁷ 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 States.¹⁹⁷⁸ From a systematic point of view, it should de-

¹⁹⁷³ Claessens et al., *supra* note 1917, pp. 41–43.

¹⁹⁷⁴ Art. 4(1) of the Facilitating Services Directive.

¹⁹⁷⁵ Art. 4(2) of the Facilitating Services Directive; Claessens et al., *supra* note 1917, p. 45.

¹⁹⁷⁶ Charter of core principles of the European legal profession and code of conduct for European lawyers, p. 26 et seq., <http://www.cbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf> (last visited on 26.06.2020).

¹⁹⁷⁷ Claessens et al., *supra* note 1917, p. 102 et seq.

¹⁹⁷⁸ 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

pend 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.¹⁹⁷⁹

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.¹⁹⁸⁰ 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.¹⁹⁸¹ 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 applicant's degree was therefore recog-

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 1917, p. 101 et seq.

¹⁹⁷⁹ Claessens et al., supra note 1917, p. 102.

¹⁹⁸⁰ See Art. 5 of the Facilitating Services Directive.

¹⁹⁸¹ Case C-118/09, *Robert Koller*, ECLI:EU:C:2010:805, paras. 12–20.

nised 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.¹⁹⁸²

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.¹⁹⁸³ An additional requirement in national law was held not to be foreseen in that Directive.¹⁹⁸⁴

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.¹⁹⁸⁵

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).¹⁹⁸⁶

¹⁹⁸² Case C-118/09, *Robert Koller*, ECLI:EU:C:2010:805, para. 11.

¹⁹⁸³ Case C-118/09, *Robert Koller*, ECLI:EU:C:2010:805, para. 35 et seq.

¹⁹⁸⁴ Case C-118/09, *Robert Koller*, ECLI:EU:C:2010:805, para. 39.

¹⁹⁸⁵ Case C-359/09, *Donat Cornelius Ebert v Budapesti Ügyvédi Kamara*, ECLI:EU:C:2011:44, paras. 27–35.

¹⁹⁸⁶ Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 56.

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 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.¹⁹⁸⁷

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.¹⁹⁸⁸

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*.¹⁹⁸⁹ The case law with regard to prior language requirements has already been covered above in detail (see Chapter 6.3.2).¹⁹⁹⁰ The CJEU did however go one-step further in *Wilson*. Under the Facilitating Practice Directive, lawyers may choose to prac-

¹⁹⁸⁷ Case C-431/17, *Monachos Eirinaios v Dikigorikos Syllogos Athinon*, ECLI:EU:C:2019:368, para. 22 et seq.

¹⁹⁸⁸ Case C-145/99, *Commission v Italy*, ECLI:EU:C:2002:142, paras. 53–55.

¹⁹⁸⁹ See Case C-193/05, *Commission v Luxembourg*, ECLI:EU:C:2006:588, para. 36 et seq.

¹⁹⁹⁰ See Case C-506/04, *Wilson*, ECLI:EU:C:2006:587.

tise under their home-Member State title without integrating into the legal profession of the host Member State.¹⁹⁹¹ 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.¹⁹⁹² Nonetheless, the CJEU found that a domestic lawyer sufficiently compensates for any lack of knowledge of languages.¹⁹⁹³ 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.¹⁹⁹⁴ There are however some exceptions that are tolerated in practice.¹⁹⁹⁵ 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’.¹⁹⁹⁶

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 proportion-

¹⁹⁹¹ Art. 4(1) of the Facilitating Practice Directive.

¹⁹⁹² Art. 5(3) of the Facilitating Practice Directive.

¹⁹⁹³ 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.

¹⁹⁹⁴ 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.

¹⁹⁹⁵ Claessens et al., supra note 1917, p. 53 et seq.

¹⁹⁹⁶ 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).

ate.¹⁹⁹⁷ 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’¹⁹⁹⁸) 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 not require EU lawyers to work in conjunction with another lawyer where no representation by a lawyer is prescribed under national law.¹⁹⁹⁹

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.²⁰⁰⁰

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

¹⁹⁹⁷ Case C-225/09, *Jakubowska*, ECLI:EU:C:2010:729, para. 57 et seq.

¹⁹⁹⁸ See Case E-1/07, *Criminal proceedings against A*, EFTA Court Report 2007, p. 246 et seq., para. 24.

¹⁹⁹⁹ 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.

²⁰⁰⁰ Case C-289/02, *AMOK Verlags GmbH v A & R Gastronomie GmbH*, ECLI:EU:C:2003:669, paras. 31 and 36–41.

to the minimum fee because it makes access to the profession and the provision of services more burdensome. Considering the *Keck* case law,²⁰⁰¹ 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.²⁰⁰²

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 providing services in Italy. The CJEU did not follow this argument. It held that maximum fees cannot be regarded as a restriction.²⁰⁰³

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

²⁰⁰¹ See supra note 793.

²⁰⁰² 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.

²⁰⁰³ Case C-565/08, *Commission v Italy*, ECLI:EU:C:2011:188, paras. 45–54.

district court refused the request because the authentication had not been done by a notary or approved by a district court.²⁰⁰⁴

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.²⁰⁰⁵

Secondly, the CJEU discussed whether the freedom of services applied, as Ms Piringner 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 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*²⁰⁰⁶ under the Ankara Agreement²⁰⁰⁷ where receivers are not pro-

²⁰⁰⁴ Case C-342/15, *Leopoldine Gertraud Piringner*, ECLI:EU:C:2017:196, para. 11 et seq.

²⁰⁰⁵ See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringner*, ECLI:EU:C:2016:710, paras. 24–32.

²⁰⁰⁶ Case C-221/11, *Leyla Ecem Demirkan v Germany*, ECLI:EU:C:2013:583, para. 35 et seq.

²⁰⁰⁷ See Chapter 3.3.4.

tected).²⁰⁰⁸ 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*.²⁰⁰⁹

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,²⁰¹⁰ this hardly comes as a surprise. Moreover, the Czech Republic itself stated during the preliminary reference procedure that a 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.

²⁰⁰⁸ Same opinion: C. Tobler, 'Freizügigkeit der Anwaltschaft im europäischen Kontext', in *dubio* 2017, No 3, p. 172 et seq.

²⁰⁰⁹ See Chapter 4.4.2.

²⁰¹⁰ See *infra* note 2174.

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,²⁰¹¹ stating that a lawyer may not be required to work in conjunction with a domestic lawyer where representation by a lawyer is not compulsory.²⁰¹²

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.²⁰¹³ 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 identification card issued by their re-

²⁰¹¹ Case C-427/85, *Commission v France*, ECLI:EU:C:1988:98, para. 13.

²⁰¹² Case E-1/07, *Criminal proceedings against A*, EFTA Court Report 2007, p. 246 et seq., para. 30.

²⁰¹³ Case E-6/13, *Metacom AG v Rechtsanwälte Zipper & Collegen*, Court Report 2013, p. 856 et seq., para. 14 et seq.

spective bar association.²⁰¹⁴ Articles 3 to 7 of the Facilitating Services Directive are considered to guarantee legitimate concerns about public policy objectives.²⁰¹⁵

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.²⁰¹⁶

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.²⁰¹⁷

²⁰¹⁴ Case E-6/13, *Metacom AG v Rechtsanwälte Zipper & Collegen*, Court Report 2013, p. 856 et seq., para. 47 and 62 et seq.

²⁰¹⁵ Case E-6/13, *Metacom AG v Rechtsanwälte Zipper & Collegen*, Court Report 2013, p. 856 et seq., para. 51.

²⁰¹⁶ 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 1917, p. 82.

²⁰¹⁷ See B. Mascello, 'Anwalt 2020: Megatrends, Auswirkungen und Reaktionen', *Anwaltsrevue* 2012, No 9, p. 402 et seq.

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 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.²⁰¹⁸ The ratio of the number of lawyers to inhabitant varies between EU Member States.

	Switzerland	Germany	France
Lawyers ²⁰¹⁹	9,925 (31.12.2017)	164,406 (01.01.2017)	65,480 (01.01.2017)
Established EU Lawyers ²⁰²⁰	573 (31.12.2017)	629 (01.01.2017)	1,142 (01.01.2017)
Inhabitants ²⁰²¹	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

²⁰¹⁸ Claessens et al., supra note 1917, p. 96 with reference to the Prada Report.

²⁰¹⁹ 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).

²⁰²⁰ 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).

²⁰²¹ <<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).

	Austria	Italy	The Netherlands
Lawyers ²⁰²²	6,325 (31.12.2017)	246,786 (11.03.2015)	17,672 (31.12.2017)
Established EU Lawyers ²⁰²³	87 (31.12.2017)	4,521 (11.03.2015)	66 (31.12.2017)
Inhabitants ²⁰²⁴	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

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.²⁰²⁵ It also stipulates the requirements for enrolment in the cantonal register and foresees the conditions governing the practice of the legal profession in Switzerland.²⁰²⁶ 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.²⁰²⁷

²⁰²² 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).

²⁰²³ 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).

²⁰²⁴ <<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).

²⁰²⁵ Arts. 2 and 4 BGFA.

²⁰²⁶ Art. 6 et seq. BGFA.

²⁰²⁷ 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.

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,²⁰²⁸ so the Swiss Bar Association clarified that it was no longer interested in a revision. This position was supported by the Swiss Federal Council²⁰²⁹ and followed by Parliament.²⁰³⁰ 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.²⁰³¹

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

- 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),

²⁰²⁸ 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.

²⁰²⁹ Swiss Confederation, *Bericht zur Abschreibung der Motion Vogler 12.3372 «Erlass eines umfassenden Anwaltsgesetzes» of 11 April 2018 (BBl 2018 2301)*.

²⁰³⁰ <<https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=45738>> (last visited on 26.06.2020).

²⁰³¹ Swiss Confederation, *supra* note 2029, p. 2303.

- 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).²⁰³²

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.²⁰³³

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.²⁰³⁴ 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 register²⁰³⁵ or when the insurance is altered.²⁰³⁶ 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.²⁰³⁷

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 of this profession. The use of titles is

²⁰³² There is an exception for lawyers representing non-profit organisations according to Art. 8(2) BGFA.

²⁰³³ Art. 17(1) BGFA.

²⁰³⁴ 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.

²⁰³⁵ Art. 23(2) lit. f of the *Kantonales Anwaltsgesetz* (Lawyers' Act) of the Canton of Berne of 28.03.2006.

²⁰³⁶ Art. 10 lit. b of the *Kantonales Anwaltsgesetz* (Lawyers' Act) of the Canton of Berne of 28.03.2006.

²⁰³⁷ Claessens et al., *supra* note 1917, p. 163 et seq.

left to cantonal laws,²⁰³⁸ 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.²⁰³⁹ 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*²⁰⁴⁰ but not for the titles *Anwalt* and *Rechtsanwalt*.²⁰⁴¹ A lawyer may also obtain the Italian title *avvocato*²⁰⁴² 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*²⁰⁴³ 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.²⁰⁴⁴

All these titles, except the Romansh title *Advocat/Advocata*, have been added to the Facilitating Practice Directive and Facilitating Services Directive

²⁰³⁸ Art. 3 para. 1 BGFA.

²⁰³⁹ Art. 5(1) and (2) of the *Loi sur la profession d'avocat* (Lawyers' Act) of the Canton of Geneva of 26.04.2002.

²⁰⁴⁰ See Arts. 2(b)(1) and 3(b)(1) of Annex III of the AFMP.

²⁰⁴¹ Art. 1(2) of the *Kantonales Anwaltsgesetz* (Lawyers' Act) of the Canton of Berne of 28.03.2006.

²⁰⁴² 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.

²⁰⁴³ § 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.

²⁰⁴⁴ Art. 11(1) BFGA.

through the implementation of Decision No 2/2011 of the EU-Swiss Joint Committee.²⁰⁴⁵

German titles	French title	Italian title
Advokat, Rechtsanwalt, Anwalt, Fürsprecher, Fürsprech	Avocat	Avvocato

Table 15: Swiss titles for the lawyer's profession

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).²⁰⁴⁶ A Bernese lawyer could simply register in Germany as *Fürsprecher*²⁰⁴⁷ as there is no risk of confusion with the German professional title *Rechtsanwalt*.²⁰⁴⁸ 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

²⁰⁴⁵ Arts. 2(b)(1) and 3(b)(1) of Annex III of the AFMP.

²⁰⁴⁶ § 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.

²⁰⁴⁷ 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.

²⁰⁴⁸ 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.

clients before courts without sufficient knowledge of the working language is considered a breach of the rules of professional conduct.²⁰⁴⁹

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.²⁰⁵⁰

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.²⁰⁵¹ In other words, there is no need for prior registration after admission to the bar to enjoy intercantonal free movement rights.²⁰⁵² The non-practising lawyer may not however benefit from free movement within the EU because he or she is not registered.²⁰⁵³ As stated, everyone who has passed a Swiss bar exam²⁰⁵⁴ 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.²⁰⁵⁵ Multiple enrolments in several cantonal bar registers are not permitted according to the case law of the Swiss Federal

²⁰⁴⁹ 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.

²⁰⁵⁰ See collective mark No 557791.

²⁰⁵¹ See Art. 6 BGFA.

²⁰⁵² Art. 6 para. 1 BGFA.

²⁰⁵³ Art. 3(1) of the Facilitating Practice Directive and Art. 27 para. 1 BGFA.

²⁰⁵⁴ The admittance to the bar must be in accordance with Art. 7 BGFA.

²⁰⁵⁵ Art. 4 BGFA.

Court.²⁰⁵⁶ Some cantons also have a separate list of lawyers (*Anwaltsverzeichnis*) who are not registered but only give legal advice under the title of *Rechtsanwalt*.²⁰⁵⁷ 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.²⁰⁵⁸ In the Canton of Zurich for instance, this also applies to EU lawyers who simply provide legal advice.²⁰⁵⁹ 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.²⁰⁶⁰ 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.

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.²⁰⁶¹ Lawyers working full-time under an employment

²⁰⁵⁶ BGE 131 II 639.

²⁰⁵⁷ Art. 16 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Zurich of 17 November 2003.

²⁰⁵⁸ 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.

²⁰⁵⁹ Art. 16 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Zurich of 17 November 2003.

²⁰⁶⁰ 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.

²⁰⁶¹ Art. 4 BGFA.

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.²⁰⁶² The same applies for part-time employment if there is a connection between that employment relationship and practice as a lawyer.²⁰⁶³

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.²⁰⁶⁴ 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.²⁰⁶⁵

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.²⁰⁶⁶

²⁰⁶² 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.

²⁰⁶³ See Staehelin & Oetiker, *supra* note 2062, para. 39 et seq.

²⁰⁶⁴ 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.

²⁰⁶⁵ Nater & Zindel, *supra* note 2064, para. 33 et seq.

²⁰⁶⁶ 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 (BBI 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.²⁰⁶⁷ 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.²⁰⁶⁸

Registered lawyers are allowed to represent clients before all the courts in Switzerland.²⁰⁶⁹ Representing clients before courts where the language skills of the lawyer are not good enough constitutes a violation of the rules of professional conduct.²⁰⁷⁰ 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.²⁰⁷¹ Occasional representation is not reserved to lawyers, which is a feature (possibly) unique to Switzerland.²⁰⁷² Even in criminal law, parties may in principle be represented by whomever has the capacity to act and is trustworthy.²⁰⁷³ The defence of the accused is however reserved to lawyers (including lawyers who are admitted to the bar in an EU

²⁰⁶⁷ BGE 131 II 639, para. 3.

²⁰⁶⁸ Arts. 14(1) and 15 of the Draft Act on the free movement of lawyers; see *supra* note 2027.

²⁰⁶⁹ Art. 4 BGFA.

²⁰⁷⁰ 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.

²⁰⁷¹ 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. Tuchschnid, '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.

²⁰⁷² See BGE 140 III 555, para. 2; Bohnet, Bâle, *supra* note 788, para. 33.

²⁰⁷³ Art. 127(4) *Schweizerische Strafprozessordnung (StPO)* of 05.10.2007, SR 312.0.

Member State and presumably legal trainees if allowed for by cantonal law) with the exception of contraventions where cantonal law may deviate.²⁰⁷⁴ Representation in civil or criminal law before the Swiss Federal Court is reserved to lawyers.²⁰⁷⁵

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.²⁰⁷⁶ Further, when parties are not able to appear and have not named a representative, the court shall appoint a representative (i.e. a lawyer).²⁰⁷⁷

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,²⁰⁷⁸ 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.²⁰⁷⁹ 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.²⁰⁸⁰ Only representation as

²⁰⁷⁴ 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).

²⁰⁷⁵ Art. 40(1) BGG.

²⁰⁷⁶ 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.

²⁰⁷⁷ 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).

²⁰⁷⁸ Claessens et al., *supra* note 1917, pp. 41–43.

²⁰⁷⁹ Art. 12 BGFA; see further M. Rauber & H. Nater, 'Anwaltstätigkeit im Sinne des BGFA', SJZ 2010, p. 559 et seq.

²⁰⁸⁰ Art. 21 para. 1 BGFA.

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,²⁰⁸¹ but it is sometimes regulated on a cantonal level.²⁰⁸² A monopoly for legal advice might violate the right to economic freedom enshrined in Article 27 BV.²⁰⁸³

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.²⁰⁸⁴ 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

²⁰⁸¹ F. Bohnet & V. Martenet, *Droit de la profession d'avocat*, Berne (2009), para. 816.

²⁰⁸² 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*.

²⁰⁸³ See Bohnet, Bâle, *supra* note 788, para. 29.

²⁰⁸⁴ 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.

to the bar (*Anwaltspatent*). This decision was upheld by the Swiss Federal Court.²⁰⁸⁵

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 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.²⁰⁸⁶

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

²⁰⁸⁵ See BGer 2C_897/2015 of 25.05.2016, para. 6.2.

²⁰⁸⁶ BGE 140 II 102.

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.

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.²⁰⁸⁷ The host Member State then checks the certificate attesting registration in the home Member State.²⁰⁸⁸ 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’).²⁰⁸⁹ 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.²⁰⁹⁰

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.²⁰⁹¹

²⁰⁸⁷ 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.

²⁰⁸⁸ Art. 2(2) of the Facilitating Practice Directive.

²⁰⁸⁹ Art. 28(1) BGFA.

²⁰⁹⁰ Art. 1(2) of the Facilitating Practice Directive.

²⁰⁹¹ 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*:

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.²⁰⁹² The aptitude test has not been used very often.²⁰⁹³ 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.²⁰⁹⁴

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.²⁰⁹⁵ 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.²⁰⁹⁶

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.²⁰⁹⁷ First, the CJEU held that Member States are not precluded from regulating the legal profession includ-

Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA), Zurich (2011), p. 486.

²⁰⁹² Art. 30(1)(a) and Art 30 BFGA.

²⁰⁹³ B. Ehle & D. Seckler, ‘Die Freizügigkeit europäischer Anwälte in der Schweiz’, *Anwaltsrevue* 2005, No 6–7, p. 272.

²⁰⁹⁴ 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.

²⁰⁹⁵ Art. 10 of the *Facilitating Practice Directive* in conjunction with Art. 14(1) of the *Professional Qualifications Directive*; Art. 30(2) BFGA.

²⁰⁹⁶ *Gespräch zur Prüfung der beruflichen Fähigkeiten*; Art. 31(1) lit. b (1) BGFA.

²⁰⁹⁷ Case C-309/99, *Wouters*, ECLI:EU:C:2002:98, paras. 15–23.

ing measures concerning professional conduct. Second, even if the measure constituted a restriction, it would be justified.²⁰⁹⁸

Under the *acquis suisse*, the freedom of establishment between Switzerland and the EU does not include legal persons.²⁰⁹⁹ 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.²¹⁰⁰ The Swiss Federal Court clarified that it is permissible to set up limited companies.²¹⁰¹ Multi-disciplinary partnerships (for example where tax consultants are shareholders) are however still inadmissible according to a Swiss Federal Court ruling of December 2017.²¹⁰²

8.3.4.5 Deontology

Registered lawyers have to follow the rules of professional conduct. This also applies to registered EU lawyers.²¹⁰³ 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

²⁰⁹⁸ Case C-309/99, *Wouters*, ECLI:EU:C:2002:98, paras. 119–123.

²⁰⁹⁹ See Arts. 12 to 16 of Annex I to the AFMP.

²¹⁰⁰ BGE 138 II 440, para. 20.

²¹⁰¹ BGE 138 II 440; see further Bohnet, Bâle, *supra* note 788, p. 53 with references to cantonal judgments.

²¹⁰² 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.

²¹⁰³ Art. 12 BGFA.

apply directly within the country as part of public law. The professional rules of the bar associations are only applicable for the respective members.²¹⁰⁴

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.²¹⁰⁵ 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.²¹⁰⁶ 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.²¹⁰⁷ 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.²¹⁰⁸

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 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.²¹⁰⁹

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 ar-

²¹⁰⁴ See Bohnet, Bâle, supra note 788, para. 35.

²¹⁰⁵ See Bohnet, Bâle, supra note 788, paras. 54 and 56.

²¹⁰⁶ BGE 130 II 270, para. 3.1.1; BGE 131 I 223, para. 3.4.

²¹⁰⁷ See e.g. BGer 2C_247/2010 of 16.02.2011, para. 6.

²¹⁰⁸ See e.g. BGer 4A_83/2008 of 11.04.2008, para. 2.

²¹⁰⁹ Decision ATA/583/2017 of the Cour de Justice (High Court) of the Canton of Geneva of 23 May 2017, para. 3 et seq.

gued 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.²¹¹⁰ 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.²¹¹¹

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.²¹¹² 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 the title of *abogado*.²¹¹³ 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

²¹¹⁰ Art. 3 of Annex I to the AFMP; Claessens et al., *supra* note 1917, para. 44; Berthoud, Geneva, *supra* note 1018, p. 89 for family members under the Professional Qualifications Directive with reference to Art. 3 of Annex I to the AFMP.

²¹¹¹ See BGer 2A.536/2003 of 09.08.2004, para. 4.2.

²¹¹² See *Opinion of Advocate General Szpunar in Case C-342/15, Leopoldine Gertraud Piringer*, ECLI:EU:C:2016:710, paras. 24–32.

²¹¹³ Decision VB.2016.00490 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 08.12.2016, para. 4.6.

law degree was equivalent to a Spanish law degree (*Licenciado en Derecho*) and that he could therefore be admitted to the bar.²¹¹⁴ 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*.²¹¹⁵

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.²¹¹⁶ The recognition procedure reflected the Spanish system until 2011 (the facts of the case are not entirely clear on this matter²¹¹⁷) which allowed access to the lawyers’ profession without actual practical experience but with a law degree.²¹¹⁸ There was no mandatory traineeship required. This has been seen above for the prominent CJEU case of *Torresi*.²¹¹⁹ 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

²¹¹⁴ Decision VB.2016.00490 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 08.12.2016, para. 4.

²¹¹⁵ Decision VB.2016.00490 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 08.12.2016, para. 2.3.

²¹¹⁶ Claessens, Nijmegen, *supra* note 1918, p. 72 et seq.

²¹¹⁷ Decision VB.2016.00490 of the Verwaltungsgericht (Administrative Court) of the Canton of Zurich of 08.12.2016, para. 4.3.

²¹¹⁸ 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.

²¹¹⁹ See Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088.

without any prior professional check. The law degree was not however designed to train lawyers but relied on a very theoretical approach.²¹²⁰

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.²¹²¹

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’.²¹²² 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.²¹²³

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.²¹²⁴ 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

²¹²⁰ Carballo Piñeiro, supra note 2118, p. 222 et seq.

²¹²¹ See BGE 132 II 135 (= Pra 96 2007 No 16), para. 7.

²¹²² Joined Cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 87.

²¹²³ See Art. 3(3) of the Professional Qualifications Directive.

²¹²⁴ See Case C-359/09, *Donat Cornelius Ebert v Budapesti Ügyvédi Kamara*, ECLI:EU:C:2011:44.

to exclude lawyers from the scope of the General Recognition Directive (corresponding to the Professional Qualifications Directive).²¹²⁵ The General Recognition Directive (corresponding to the Professional Qualifications Directive) and Facilitating Practice 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.²¹²⁶ At least according to the European Commission, this

²¹²⁵ Respectively, its predecessor the General Recognition Directive.

²¹²⁶ Case C-110/01, *Malika Tennah-Durez v Conseil national de l’ordre des médecins*, ECLI:EU:C:2003:357, para. 61.

case law also applies under the current Professional Qualifications Directive for the general *and* the sectoral system.²¹²⁷

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 conditions for the exercise of the lawyer's profession.²¹²⁸ Thus, prior language tests are strictly forbidden as a prior condition for enrolment in the BGFA register pursuant to Article 28 BGFA.²¹²⁹ 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.²¹³⁰

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'.²¹³¹

²¹²⁷ European Commission, *supra* note 1241, ad Art. 3 para. 1(c) of the Professional Qualifications Directive; other opinion: Berthoud, Geneva, *supra* note 1018, p. 102 et seq. and footnote 247 thereof.

²¹²⁸ See Case C-506/04, *Wilson*, ECLI:EU:C:2006:587, para. 71.

²¹²⁹ 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.

²¹³⁰ 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.

²¹³¹ Decision ATA/584/2009 of the *Cour de Justice* (High Court) of the Canton of Geneva of 10 November 2009.

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.²¹³² 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 of contraventions where representation is regulated by cantonal law.²¹³³ 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.²¹³⁴

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.

²¹³² Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

²¹³³ Art. 127(5) StPO.

²¹³⁴ Decision AK.2014.361 of the Anklagekammer (High Court for prosecution) of the Canton of St. Gallen of 03.02.2015.

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.²¹³⁵ This provision is reduced to a postal address requirement but only for procedures where representation is mandatory.²¹³⁶

Article 24 BGFA provides that service providers provide services under their home-Member State title.

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

²¹³⁵ Case C-427/85, *Commission v France*, ECLI:EU:C:1988:98; see also supra note 1993.

²¹³⁶ 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.

that he could have submitted his documents to an embassy or to a consulate in Austria.²¹³⁷

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.²¹³⁸ 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.²¹³⁹

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 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.²¹⁴⁰

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.²¹⁴¹

²¹³⁷ BGer 4A_83/2008 of 11.04.2008.

²¹³⁸ Art. 61 lit. f *Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts (ATSG) of 06.10.2000*, SR 830.1.

²¹³⁹ 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.

²¹⁴⁰ Art. 29(1) BV; BGer 2C_79/2013 of 26.08.2013, paras. 2.13 and 3.7.

²¹⁴¹ Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, paras. 3.2.2 and 5.

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.²¹⁴²

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’²¹⁴³.²¹⁴⁴ 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*.²¹⁴⁵

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.²¹⁴⁶ 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.²¹⁴⁷ In addition, the potential for reverse discrimination is

²¹⁴² Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 3.3.4.2.

²¹⁴³ Translated into English by the present author.

²¹⁴⁴ Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 3.8.3.

²¹⁴⁵ Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 2.4.

²¹⁴⁶ Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 2.13.

²¹⁴⁷ See Art. 15 et seq. and Art. 26 BGFA.

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.²¹⁴⁸ In the Canton of Zurich, legal aid is compensated by 150 to 350 Swiss Francs per hour.²¹⁴⁹

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,²¹⁵⁰ and that Swiss lawyers are at least familiar with the procedural and substantive law.²¹⁵¹ 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.²¹⁵² 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

²¹⁴⁸ 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.

²¹⁴⁹ § 3 of the *Verordnung über die Anwaltsgebühren (AnwGebV)* of the Canton of Zurich.

²¹⁵⁰ Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 2.12.

²¹⁵¹ Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 3.6.1.

²¹⁵² Partial decision BVGer C-4032/2014 and C-7520/2014 (BVGE 2016/37) of 03.11.2016, para. 3.8.3.2.

have knowledge of social security law. Social 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.²¹⁵³ The SFC left this question unanswered.²¹⁵⁴

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).²¹⁵⁵ 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,²¹⁵⁶ the High Court concluded that the existence of infra-

²¹⁵³ BVGer C-6527/2016 of 05.01.2017, para. 5.3.

²¹⁵⁴ BGer 9C_315/2018 of 05.03.2019, para. 9.4.1.

²¹⁵⁵ 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.

²¹⁵⁶ BGer 2A.536/2003 of 09.08.2004.

structure, 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 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.²¹⁵⁷

This judgment shows that, despite freedom of establishment for legal persons not being covered by the AFMP, that a single-practice rule²¹⁵⁸ 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.²¹⁵⁹ 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 law-

²¹⁵⁷ 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.

²¹⁵⁸ 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.

²¹⁵⁹ Decision BR.2016.24 of the Obergericht (High Court) of the Canton of Thurgau, RBOG 2016 No 36 of 19.05.2016, para. 1.

yer is neither allowed nor obliged to enrol in the bar register when providing services.²¹⁶⁰

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 Switzerland.²¹⁶¹ 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.²¹⁶² *De facto*, the domestic lawyer only serves as a postal address in Switzerland for the EU lawyer where mandatory representation is required.²¹⁶³ 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.²¹⁶⁴

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

²¹⁶⁰ Decision BR.2016.24 of the Obergericht (High Court) of the Canton of Thurgau, RBOG 2016 No 36 of 19.05.2016, para. 2.

²¹⁶¹ 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.

²¹⁶² 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.

²¹⁶³ 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.

²¹⁶⁴ 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.

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.²¹⁶⁵ 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,²¹⁶⁶ this issue will become obsolete. Nevertheless, the principle of reciprocity cannot be decisive when assessing potential restrictions.

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.²¹⁶⁷

Each canton is responsible for the organisation and regulation of the profession of notaries.²¹⁶⁸ 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

²¹⁶⁵ 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.

²¹⁶⁶ See P. Tschümperlin, ‘Die Justiz auf dem Weg zum elektronischen Dossier’, SJZ 2018, No 13, p. 313 et seq.

²¹⁶⁷ See Oesch (2011), supra note 798, pp. 583–606; R. Pfäffli & F. A. Liechti, ‘Der Notar und das Freizügigkeitsabkommen: Entwicklungen’, Jusletter 20 April 2015; Oesch (2016), supra note 636, p. 58 et seq.; Boillet, Bâle, supra note 809, p. 285 et seq.; see also the consequences for secondary law: Bengel (2012), supra note 809, p. 26 et seq.; Brazerol (28.10.2013), supra note 798.

²¹⁶⁸ Art. 3 BV and Art. 55 SchlT *Schweizerisches Zivilgesetzbuch (ZGB) of 10.12.1907*, SR 210.

this to be carried out by a liberal profession.²¹⁶⁹ 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).²¹⁷⁰

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.²¹⁷¹ This decision was confirmed by the Swiss Federal Court in 2005 and in 2007.²¹⁷² 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 2014.²¹⁷³

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 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.²¹⁷⁴ 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.²¹⁷⁵

²¹⁶⁹ COMCO, supra note 762.

²¹⁷⁰ See R. Sethe, 'Die juristische Ausbildung an den Universitäten der Schweiz: Probleme und Herausforderungen.', ZSR 2017, II, p. 15 et seq. for further references.

²¹⁷¹ BGE 128 I 280.

²¹⁷² BGE 131 II 639, para. 6.1; BGE 133 I 259, para. 2.2.

²¹⁷³ BGE 140 II 112, para. 3.2.4.

²¹⁷⁴ 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.

²¹⁷⁵ Case C-151/14, *Commission v Latvia*, ECLI:EU:C:2015:577, para. 75.

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)²¹⁷⁶ nor under the BGBM.²¹⁷⁷ 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),²¹⁷⁸ 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.²¹⁷⁹ The scope of the BGBM was therefore intentionally enacted to be congruent with the applicability of the AFMP.²¹⁸⁰ This also applies for the public authority exception.²¹⁸¹

²¹⁷⁶ 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.

²¹⁷⁷ COMCO, *supra* note 762, paras. 53 and 62.

²¹⁷⁸ *Bundesgesetz über den Binnenmarkt (BGBM; Federal Act on the Internal Market) of 06.10.1995*, SR 943.02.

²¹⁷⁹ See Swiss Confederation, *Botschaft über die Änderung des Binnenmarktgesetzes of 24 November 2004 (BBl 2005 465)*, p. 479; Diebold, Berne, *supra* note 69, para. 341.

²¹⁸⁰ Swiss Confederation, *supra* note 2179, p. 484; Art. 4 para. 3^{bis} BGBM.

²¹⁸¹ See Arts. 10, 16 and 22(1) of Annex I to the AFMP and Art. 1 para. 3 BGBM; see Diebold, Berne, *supra* note 69, 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.

8.4.2.1 Scope of the BGBM

Only situations that are either intercantonal or intercommunal fall under the BGBM.²¹⁸² 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,²¹⁸³ while employed persons may rely on the right of equality before the law.²¹⁸⁴

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 trainees²¹⁸⁵) or purely leisurely activities²¹⁸⁶ 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.²¹⁸⁷ Legal persons are also covered by the BGBM if they are established in Switzerland.²¹⁸⁸ The scope *ratione personae* is thus the same as for the economic freedom in Article 27 BV but distinct from the Professional Qualifications Directive.²¹⁸⁹

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

²¹⁸² Arts. 2(1) and (4) BGBM; Diebold, Berne, supra note 69, para. 186.

²¹⁸³ Art. 27 BV.

²¹⁸⁴ Art. 8(1) BV.

²¹⁸⁵ See Art. 4 para. 1 BGBM; Diebold, Berne, supra note 69, para. 156.

²¹⁸⁶ Diebold, Berne, supra note 69, para. 488 et seq.; see BGer 2P.191/2004 of 10.08.2005, para. 6.2.

²¹⁸⁷ Art. 1 para. 1 BGBM.

²¹⁸⁸ Diebold, Berne, supra note 69, 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.

²¹⁸⁹ See N. Gammenthaler, *Die Auslegung des Bundesgesetzes über den Binnenmarkt (BGBM) im Vergleich zum europäischen Binnenmarktrecht*, Fribourg (2011), p. 6; Oesch & Zwald, supra note 2188, para. 7.

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.²¹⁹⁰ 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.²¹⁹¹ Direct and indirect discrimination²¹⁹² can be justified. ‘Restrictions’ need to be non-discriminatory, proportionate and necessary and in the public interest.²¹⁹³ According to Diebold, the BGBM also covers restrictions in the sense of EU law, which would again indicate that the AFMP also encompasses restrictions.²¹⁹⁴ 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.²¹⁹⁵ ‘Restrictions’ under the BGBM must be dealt with through a simple, rapid and free procedure.²¹⁹⁶

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.²¹⁹⁷ At least according to the

²¹⁹⁰ Diebold, Berne, supra note 69, para. 148.

²¹⁹¹ Art. 2 para. 5 BGBM; see further Diebold, Berne, supra note 69, para. 189.

²¹⁹² Diebold, Berne, supra note 69, 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 69, para. 666.

²¹⁹³ Art. 3 para. 1 BGBM.

²¹⁹⁴ Diebold, Berne, supra note 69, paras. 148 and 732.

²¹⁹⁵ Art. 3 para. 2 BGBM.

²¹⁹⁶ Art. 3 para. 4 BGBM.

²¹⁹⁷ Diebold, Berne, supra note 69, para. 1004 for further references.

case law before the revision of the BGBM however, foreign diplomas did not fall under the scope of the BGBM.²¹⁹⁸

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.²¹⁹⁹ 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.²²⁰⁰ 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).²²⁰¹ While indirect recognition diplomas ('reconnaissance de la reconnaissance') are regulated by Professional Qualifications Directive,²²⁰² it

²¹⁹⁸ BGE 125 I 267, para. 3.e; see further Diebold, *supra* note 1368, 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 69, para. 1023 et seq.

²¹⁹⁹ Diebold, Berne, *supra* note 69, para. 1188 et seq.; see further Swiss Confederation, *supra* note 2179, p. 6221 et seq.

²²⁰⁰ See Diebold, Berne, *supra* note 69, paras. 1028 and 1235.

²²⁰¹ See Diebold, Berne, *supra* note 69, para. 1235 et seq. for further references.

²²⁰² See Art. 3(3) of the Professional Qualifications Directive; see further Chapter 6.2.5.

is not clear whether Article 4 BGBM provides for indirect recognition diplomas (*reconnaissance de la reconnaissance*).²²⁰³

Unlike the recognition of a diploma under Professional Qualifications Directive, the recognition under the BGBM attests the *personal* requirements and *professional* skills of the applicant.²²⁰⁴ This means that the authorities of the host canton may not require proof of personal requirements (such as trustworthiness),²²⁰⁵ which is still allowed under the Professional Qualifications Directive.²²⁰⁶

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.²²⁰⁷ 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.²²⁰⁸ 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).²²⁰⁹

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

²²⁰³ Diebold, Berne, supra note 69, para. 1021.

²²⁰⁴ Diebold, Berne, supra note 69, para. 1029.

²²⁰⁵ BGE 123 I 313, para. 4d.

²²⁰⁶ Art. 50 of the Professional Qualifications Directive.

²²⁰⁷ BGE 136 II 470 (= Pra 2011 No 37), para. 5.3.

²²⁰⁸ Diebold, Berne, supra note 69, para. 1475.

²²⁰⁹ Kaufmann, Zurich, supra note 1407, para. 426 et seq.

the AFMP (freedom of establishment and freedom of services)²²¹⁰ or the BGBM.²²¹¹ 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 provisions of the VMD under the *acquis suisse* considering the case law of the CJEU.²²¹² 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.²²¹³ As a subsidiary layer, primary law should be applied according to the report of the COMCO.²²¹⁴ This report was criticised.²²¹⁵

Some authors, notably notaries, argue that the VMD should be amended²²¹⁶ or that the VMD should even be disapplied for the profession of notaries.²²¹⁷ 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

²²¹⁰ 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.

²²¹¹ COMCO, supra note 762, paras. 53 and 62.

²²¹² 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.

²²¹³ COMCO, supra note 762, para. 65.

²²¹⁴ COMCO, supra note 762, paras. 64 and 69 et seq.

²²¹⁵ Brazerol (28.10.2013), supra note 798; 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.

²²¹⁶ Pfäffli & Liechti (20.04.2015), supra note 2167, para. 13.

²²¹⁷ Pfäffli & Liechti (20.04.2015), supra note 2167, p. 4 and footnote 16 thereof; Wolf (2016), supra note 2215, p. 163 who raises doubts as to whether the VMD is in violation of the BV.

Chapter 6.2.6).²²¹⁸ Politically, this area is sensitive, which has led to parliamentary proposals to amend the VMD.²²¹⁹ 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.²²²⁰ 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.²²²¹ In addition, the application of primary law is not precluded by the Professional Qualifications Directive.²²²² This was also restated by the CJEU in *Commission v Latvia* with the amendment of the Professional Qualifications Directive for the notarial profession.²²²³ 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.²²²⁴

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.²²²⁵ This argument is not convincing. The judgments of the CJEU are explicitly based on similar concepts of the public service exception.²²²⁶ Thus, they are to be followed even after

²²¹⁸ See also Kremalis, Frankfurt am Main, *supra* note 733, p. 177 who even suggests that the second sentence of Art. 18 AFMP should be disappplied.

²²¹⁹ Swiss Confederation, *Parliamentary motion No 15.3728 of 19.06.2015*, <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20153728>> (last visited on 30.06.2019).

²²²⁰ Swiss Confederation, *supra* note 2219.

²²²¹ <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20153728>> (last visited on 30.06.2019).

²²²² Case T-185/14, *José Freitas v European Parliament and Council of the European Union*, ECLI:EU:T:2015:14, para. 48.

²²²³ Case C-151/14, *Commission v Latvia*, ECLI:EU:C:2015:577, para. 75.

²²²⁴ BGE 136 II 120, para. 3.2; see however BGE 136 II 120, para. 3.5.3, which suggests that Art. 8 in conjunction with Art. 14 of the European Convention of Human Rights could be applied to prevent reverse discrimination if the legislator would have remained inactive.

²²²⁵ Brazerol (28.10.2013), *supra* note 798, para. 34.

²²²⁶ See COMCO, *supra* note 762, para. 48 et seq. for further references.

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).²²²⁷ Article 16 Annex I to the AFMP is thus to be interpreted in the sense of Article 51(1) TFEU.²²²⁸

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.

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).²²²⁹ This position is also supported by doctrine and the COMCO.²²³⁰ 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.²²³¹ Thus, there is no right of free movement pursuant to the BGBM. The Administrative Court of the Canton of

²²²⁷ 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 166, p. 241 et seq. for further references to the relevant case law of the Swiss Federal Court.

²²²⁸ Borghi, *supra* note 798, para. 179; Oesch (2011), *supra* note 798, p. 619 et seq.; for another opinion: Brazerol (28.10.2013), *supra* note 798, para. 32 et seq.

²²²⁹ Swiss Confederation, *supra* note 2179, p. 484; see also Kaufmann, Zurich, *supra* note 1407, para. 193.

²²³⁰ COMCO, *supra* note 762, para. 62 with reference to N. Diebold, 'Entscheidbeprehungen. 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.

²²³¹ 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.

Berne however states that the situation might be distinct in a cross-border setting with the EU.²²³²

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.²²³³ In any case, reverse discrimination should usually lead to a harmonised approach initiated either by the courts or by the legislator.²²³⁴

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.²²³⁵ 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 the date of signature must be followed as the ‘good reasons’ against their application (only partially) convinced the court.²²³⁶ 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

²²³² 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.

²²³³ BGE 134 II 10, para. 3.5.4.

²²³⁴ See supra note 742.

²²³⁵ 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.

²²³⁶ 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.

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.²²³⁷

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).²²³⁸

It is noteworthy that the High Court mistakes the legal situation under EU law for the relevant legal situation under the *acquis suisse*. 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.²²³⁹

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

²²³⁷ 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.

²²³⁸ 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.

²²³⁹ See COMCO, supra note 762, paras. 65 et seq. and 69 et seq.; see for the relevant case law of the CJEU: note 2174.

Switzerland generated a turnover of 2.75 billion Swiss Francs.²²⁴⁰ 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.²²⁴¹

Auditors must have a diploma according to Article 4(2) RAG, but only need to show one year of professional experience.²²⁴² 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 the loss certificates (showing debts after unsuccessful seizure or bankruptcy) of the applicant are taken into account.²²⁴³

²²⁴⁰ C. Schmutz, 'Wie die vier wichtigsten Wirtschaftsprüfer in der Schweiz gross wurden', *NZZ*, 18 May 2017.

²²⁴¹ Art. 4(2) lit. d RAG.

²²⁴² Art. 5(1) RAG.

²²⁴³ Art. 4(2) of the *Verordnung über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren (RAV)* of 22.08.2007.

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).²²⁴⁴ More importantly, it sets rules concerning the statutory audit of annual and consolidated accounts.²²⁴⁵

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*.²²⁴⁶ There are therefore, expectedly, some differences in the registration requirements of third country auditors.²²⁴⁷ 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.

²²⁴⁴ Art. 14 of Directive 2006/43/EC.

²²⁴⁵ Art. 1 of Directive 2006/43/EC.

²²⁴⁶ 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 979, p. 12.

²²⁴⁷ 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.

Interestingly enough, the SERI and Berthoud claim that auditors do not fall under the mutual recognition of professional qualifications.²²⁴⁸ Berthoud also points out that it is 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 (possibly) 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.²²⁴⁹ 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.²²⁵⁰ 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.²²⁵¹ Finally, after everything that has been said in this study about the *reversed Polydor principle* (see Chapter 2.3.1.5), it would also be possible to argue that the Professional Qualifications Directive should be applied to reach the same result as under internal market law.

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*.²²⁵² It is obvious that this advice (if it was actually given) was wrong at

²²⁴⁸ <<https://www.sbf.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 1018, pp. 143–146 and footnotes 402 and 406 thereof.

²²⁴⁹ Berthoud, Geneva, supra note 1018, pp. 143–146 and footnotes 402 and 406 thereof.

²²⁵⁰ 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.

²²⁵¹ See however for the Ankara Agreement: Art. 59 of the AP.

²²⁵² BVGer B-93/2008 of 05.11.2008, para. E.

that time because Annex III was not updated by a decision of the Joint Committee.²²⁵³ 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*.²²⁵⁴

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.²²⁵⁵ Gammenthaler assumes that the auditor's profession is not regulated in Switzerland based on the FAC's reasoning.²²⁵⁶ 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*.²²⁵⁷ 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 *Diplomverwaltungswirt 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.²²⁵⁸ 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.²²⁵⁹ The FAC emphasised that the Federal Audit Oversight Authority is responsible for the

²²⁵³ See Decision No 2/2011 of the EU-Swiss Joint Committee of the AFMP.

²²⁵⁴ BVGer B-93/2008 of 05.11.2008, para. E.

²²⁵⁵ BVGer B-93/2008 of 05.11.2008, paras. 2.3.2 and 3.2.

²²⁵⁶ For another opinion, see Gammenthaler, Zurich, supra note 41, p. 359.

²²⁵⁷ <<https://www.sbf.admin.ch/sbfi/en/home/bildung/recognition-of-foreign-qualifications/regulated-occupations-and-professions.html>> (last visited on 28.06.2020).

²²⁵⁸ BVGer B-93/2008 of 05.11.2008, para. 2.3.1 et seq. and para. 3.2.

²²⁵⁹ Art. 15 para. 1 RAG; Art. 69 BBV; BVGer B-93/2008 of 05.11.2008, para. 3.3.1.

admission of auditors pursuant to Article 15 RAG in conjunction with Article 28(1) and (2) RAG.²²⁶⁰ 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.²²⁶¹

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.²²⁶²

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 and EEA nationals may invoke.²²⁶³ Unlike the legal advice of the Federal Audit Oversight Authority cited in the abovementioned judgment,²²⁶⁴ 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*.

²²⁶⁰ 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.

²²⁶¹ BVGer B-4875/2009 of 04.01.2010, para. 2.3.1.

²²⁶² BVGer B-207/2019 of 16.10.2019, para. 2.1.4.

²²⁶³ <<https://www.rab-asr.ch/#/page/101>> (last visited on 30.06.2019).

²²⁶⁴ BVGer B-93/2008 of 05.11.2008, para. D.

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.²²⁶⁵ 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.²²⁶⁶ 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.²²⁶⁷ This concept only constitutes a clarification of the *Vlasopoulos* case law and therefore has to be followed by the Swiss courts.²²⁶⁸ 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,²²⁶⁹ 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* principle).²²⁷⁰ 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.²²⁷¹

²²⁶⁵ Other opinion: Berthoud, Geneva, *supra* note 1018, p. 145 and footnote 407 thereof.

²²⁶⁶ BVGer B-93/2008 of 05.11.2008, para. 3.1.

²²⁶⁷ Case C-31/00, *Dressen II*, ECLI:EU:C:2002:35.

²²⁶⁸ Art. 16 para. 2 AFMP.

²²⁶⁹ See <<https://www.rab-asr.ch/#/page/101>> (last visited on 30.06.2019).

²²⁷⁰ See Berthoud, Geneva, *supra* note 1018, p. 32 et seq. and p. 36.

²²⁷¹ <<https://www.rab-asr.ch/#/page/101>> (last visited on 30.06.2019).

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.²²⁷² 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.²²⁷³ Compared to 575 European Patent Attorneys who are located in Switzerland as of July 2019,²²⁷⁴ 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 *Patent-anwältin/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 persons who use the aforementioned titles.²²⁷⁵ Unlawful use of one of the aforementioned titles is sanctioned by a fine of up to 10,000 Swiss Francs.²²⁷⁶

²²⁷² <<https://www.ige.ch/en/protecting-your-ip/patents/before-you-apply/patent-attorneys.html>> (last visited on 30.06.2019).

²²⁷³ <<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).

²²⁷⁴ <<https://www.epo.org/applying/online-services/representatives.html>> (last visited on 30.06.2019).

²²⁷⁵ Art. 2 para 1 *Bundesgesetz über die Patentanwältinnen und Patentanwälte (PAG) of 20.03.2009*, SR 935.62.

²²⁷⁶ Art. 16 PAG in conjunction with Art. 106 StGB.

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.²²⁷⁷

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.²²⁷⁸

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.²²⁷⁹ 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.²²⁸⁰

The Swiss Federal Council appoints the competent authority for the academic recognition of diploma for holders of foreign degrees.²²⁸¹ The Federal Council also appoints the competent authority for the mutual recognition of professional qualifications in the field of patent attorneys.²²⁸²

²²⁷⁷ Art. 41 para. 1 BGG; see further BGer 4A_161/2007 of 18.07.2007, para. 3.

²²⁷⁸ <<http://www.vsp.ch/de/verband-patentanwalt-markenanwalt/ausbildung-zum-patentanwalt.html>> (last visited on 30.06.2019).

²²⁷⁹ Art. 2 PAG.

²²⁸⁰ Art. 4 para. 2 PAG.

²²⁸¹ Art. 5 para. 2 PAG.

²²⁸² Art. 7 para. 2 PAG.

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.²²⁸³ 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.^{2284 2285}

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.²²⁸⁶

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

²²⁸³ Art. 7 para. 3 of the PAG.

²²⁸⁴ 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’.

²²⁸⁵ Art. 2 para. 1 of the *Patentanwaltsverordnung (PAV) of 11.05.2011*, SR 935.621.

²²⁸⁶ See Art. 8 paras. 3 and 4 PAV.

Francs.²²⁸⁷ The fees for the aptitude test amount to 800 Swiss Francs.²²⁸⁸ An application for the academic or professional recognition of diploma costs 200 Swiss Francs whether or not the application was successful.²²⁸⁹

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.²²⁹⁰ 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*).²²⁹¹

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,

²²⁸⁷ Art. 3 of the *Gebührenordnung der Prüfungskammer für Patentanwältinnen und Patentanwälte* of 23.11.2010, SR 935.621.31.

²²⁸⁸ Art. 3 of the *Gebührenordnung der Prüfungskammer für Patentanwältinnen und Patentanwälte* in conjunction with Art. 25 para. 1 PAV.

²²⁸⁹ Art. 3 of the *Gebührenordnung der Prüfungskammer für Patentanwältinnen und Patentanwälte* in conjunction with Art. 23 PAV.

²²⁹⁰ 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.

²²⁹¹ Art. 3 para. 3 PAV.

making a declaration in advance is not sensible.²²⁹² Member States may not introduce a prior check before the first provision of services for this profession.²²⁹³

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.²²⁹⁴ 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.²²⁹⁵

²²⁹² <https://www.sbf.admin.ch/dam/sbf/de/dokumente/pruefungskammer_pruefungskommission.pdf> (last visited on 26.06.2020).

²²⁹³ Art. 7(4) of the Professional Qualifications Directive.

²²⁹⁴ See Joined Cases BVGer B-1129/2013 and B-4336/2013 of 25.02.2014.

²²⁹⁵ See the new wording of Art. 13(4) of the Professional Qualifications Directive.

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 either academic or professional recognition of professional qualifications. The education of law students is largely a matter of the cantons.²²⁹⁶

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 education²²⁹⁷ (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,²²⁹⁸ of protection, such as Article 18 TFEU.²²⁹⁹ The wording of Article 2 AFMP is restrictive and applies only in conjunction with Annexes I, II and III of the AFMP.²³⁰⁰ 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.²³⁰¹ This is especially crucial when considering the case law, which discusses measures establishing quotas for access to univer-

²²⁹⁶ See Art. 63a BV.

²²⁹⁷ See Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427.

²²⁹⁸ Case C-70/09, *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg*, ECLI:EU:C:2010:430, para. 39.

²²⁹⁹ See also Ehrenzeller, *supra* note 875, p. 125; other opinion: Epiney, *supra* note 878, 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.

²³⁰⁰ See Odendahl, *supra* note 874, p. 366 et seq.

²³⁰¹ Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427, para. 33; Case C-73/08, *Bressol*, ECLI:EU:C:2010:181.

sity.²³⁰² Some Swiss universities established quotas that are based on competitive exams.²³⁰³ Moreover, tuition fees are higher for foreign students at some Swiss universities.²³⁰⁴

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,²³⁰⁵ while it is stated by the doctrine that both forms overlap and that some cases fall in between the gaps, such as the famous *Morgenbesser* case.²³⁰⁶

In most countries a legal trainee is a law graduate from university (with some exceptions²³⁰⁷). Legal trainees are not considered to be part of a 'regulated profession' under the meaning of the Professional Qualifications Directive.²³⁰⁸ Primary law is therefore applicable for legal trainees if they are considered workers,²³⁰⁹ which can be unclear for trainees with low wages in the light of the case law.²³¹⁰

It is important to emphasise that the General Recognition Directive (corresponding to the Professional Qualifications Directive) only applies for fully-

²³⁰² Case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427; Case C-73/08, *Bresol*, ECLI:EU:C:2010:181; Case C-65/03, *Commission v Belgium*, ECLI:EU:C: 2004: 402.

²³⁰³ See Reglement über die Zulassung von Studienbewerbenden mit einem ausländischen Reifezeugnis an die Universität St.Gallen vom 2. November 2015.

²³⁰⁴ See Ehrenzeller, supra note 875, p. 106 for further references.

²³⁰⁵ Berthoud, Geneva, supra note 1018, p. 28.

²³⁰⁶ Schneider, Antwerp, supra note 751, 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.

²³⁰⁷ See Claessens, Nijmegen, supra note 1918, p. 85 et seq.

²³⁰⁸ 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 1039, p. 2.

²³⁰⁹ Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612, para. 67.

²³¹⁰ See supra note 887 for a reference.

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.²³¹¹ 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*.²³¹² It is also mentioned by the CCBE in response to the Panteia report that it is primarily a task for the Member States to guarantee clarity and legal certainty for 'non-fully qualified professionals'.²³¹³

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.

²³¹¹ See P. Meier & C. M. Reiser, 'Art. 7 LLCA', in M. Valticos, C. M. Reiser & B. Chapuis (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.

²³¹² Claessens et al., *supra* note 1917, p. 63.

²³¹³ 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).

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.²³¹⁴ 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.²³¹⁵

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 acquire skills that he or she still may not have.²³¹⁶ 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 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 *Peśła* 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 pro-

²³¹⁴ Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612, paras. 25–31.

²³¹⁵ Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612, para. 28.

²³¹⁶ Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612, paras. 63–72.

fessions, 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.²³¹⁷

Mr Peśła 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.²³¹⁸

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.²³¹⁹

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 Peśła was neither admitted to the bar in Germany, nor to the bar in Poland. Secondary law (the Facilitating Practice Directive) applied only to lawyers who are allowed to carry out their profession in the home Member State. The CJEU stated that Mr Peśła's reasoning was 'based on an incorrect interpretation of the case-law on which it relies'. His argument was that a young professional would

²³¹⁷ Case C-345/08, *Peśła*, ECLI:EU:C:2009:771, paras. 3–12.

²³¹⁸ Case C-345/08, *Peśła*, ECLI:EU:C:2009:771, paras. 12–14.

²³¹⁹ Case C-345/08, *Peśła*, ECLI:EU:C:2009:771, para. 19.

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.²³²⁰

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,²³²¹ 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 Pešla 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 in-

²³²⁰ Case C-345/08, *Pešla*, ECLI:EU:C:2009:771, paras. 57–65.

²³²¹ 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.

ternational law and the Federal Department of Justice in 2007 stating that, in their opinion, the case law of *Morgenbesser* must be applied in Switzerland.²³²² This position is also supported by some authors.²³²³ 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.²³²⁴ 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).²³²⁵

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.²³²⁶ 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.²³²⁷ The federal authorities therefore recommended considering all the relevant competences of the applicant, including the applicant's professional experience.

²³²² State Secretariat for Research and Innovation et al., supra note 1039.

²³²³ Gammenthaler, Zurich, supra note 41, p. 343 et seq.; Berthoud, Geneva, supra note 1018, p. 139 et seq.

²³²⁴ 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.

²³²⁵ Tobler (2017), supra note 2008, p. 175 et seq.

²³²⁶ State Secretariat for Research and Innovation et al., supra note 1039, p. 1.

²³²⁷ See BGE 134 II 10.

The joint statement highlights that a holistic assessment of all the relevant professional experience and skills of the applicant must be carried out.²³²⁸ 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.²³²⁹ Third, the competent authorities must 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,²³³⁰ this list should cover only subjects from the Bachelor's programme.²³³¹ 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.²³³²

8.7 Legal trainees on a national level

While the bar exam is *de iure* only compulsory for a few legal professionals in Switzerland,²³³³ (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

²³²⁸ State Secretariat for Research and Innovation et al., supra note 1039, p. 3, para. 1.

²³²⁹ State Secretariat for Research and Innovation et al., supra note 1039, p. 3, para. 2.

²³³⁰ Art. 7 para. 3 of the BGFA.

²³³¹ State Secretariat for Research and Innovation et al., supra note 1039, p. 4, para. 3.

²³³² State Secretariat for Research and Innovation et al., supra note 1039, p. 4, para. 4.

²³³³ 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 verwaltungsgewerrechtlichen 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*).

eligible to vote²³³⁴) it is *de facto* necessary for many legal professions.²³³⁵ The cantons are in principle still competent to set the conditions for traineeship and access to the bar exam.²³³⁶ 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,²³³⁷ 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.²³³⁸ Unlike in other countries, such as Germany, many 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.²³³⁹ 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.²³⁴⁰ Any additional condition must however pass the scrutiny of the right to economic freedom (Article 27(2) BV)²³⁴¹ and Article 2 and Article 9 of the AFMP in cross-border situations. Admission to legal traineeships in other cantons must not

²³³⁴ Arts. 143 BV and Art. 5 para. 2 *Bundesgesetz über das Bundesverwaltungsgericht (VGG) of 17.06.2005*, SR 173.32.

²³³⁵ Art. 95 para. 1 BV and Art. 3 para. 1 BGFA; Sethe (2017), *supra* note 2170, p. 14; Diebold, Berne, *supra* note 69, para. 1081; see further BGer 2C_610/2007 of 08.11.2007, para. 2.2.

²³³⁶ Art. 95 BV and Art. 3 para. 1 BGFA.

²³³⁷ Art. 8 para. 1 of the *Anwaltsgesetz* of the Canton Graubünden of 14.02.2006.

²³³⁸ See U. Haegi, 'Aus- und Weiterbildung der Anwältinnen und Anwälte', ZSR 2017, No II, p. 111.

²³³⁹ Art. 3(1) of the Facilitating Practice Directive.

²³⁴⁰ Art. 3 para. 1 BGFA and Art. 95 BV; BGer 2C_610/2007 of 08.11.2007, para. 2.2.

²³⁴¹ BBl 1999 6075 et seq.; see also Sethe (2017), *supra* note 2170, p. 14.

be recognised based on Article 4(1) BGBM,²³⁴² but according to doctrine based on Article 3(1) BGBM.²³⁴³ 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.²³⁴⁴

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*).²³⁴⁵

8.7.1 Professional requirements

While the cantons are competent to set the requirements for the bar exam,²³⁴⁶ 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*) which was successfully completed with a 'Master of Law' or a licentiate (*Lizentiat*).²³⁴⁷ 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.²³⁴⁸ 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.²³⁴⁹ A Swiss doctor-

²³⁴² BGE 125 II 315, para. 2.b.

²³⁴³ Diebold, Berne, supra note 69, para. 1018.

²³⁴⁴ BGer 2C_610/2007 of 08.11.2007, para. 2.2.; see also Diebold, Berne, supra note 69, para. 1081.

²³⁴⁵ J. Schwarz, 'Einige Gedanken zur Juristenausbildung', in J. Schmid (ed.), *Homage für Peter Gauch*, Zurich (2016), p. 210 et seq.

²³⁴⁶ Art. 95 BV and Art. 3 para. 1 BGFA.

²³⁴⁷ Art. 7 para. 1 lit. a BGFA.

²³⁴⁸ Art. 7 para. 1 lit. a BGFA; see further BBI 2005 6632.

²³⁴⁹ 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

ate degree of the law faculty in conjunction with a Swiss licentiate degree of the philosophical faculty was not considered to fulfil this requirement.²³⁵⁰

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.²³⁵¹ 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.²³⁵² Some authors argue that the Professional Qualifications Directive (corresponding to the Professional Qualifications Directive) should be consulted for the assessment.²³⁵³

While all undergraduate law programmes in Switzerland cover the essential subjects of Swiss law,²³⁵⁴ 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.

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

for 50 % of the duration of the traineeship: Art 4^{bis} 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).

²³⁵⁰ 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.

²³⁵¹ 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.

²³⁵² Meier & Reiser, *supra* note 2311, para. 34; see the discussion of the relevant case law in Chapter 8.7.7.

²³⁵³ Staehelin & Oetiker, *supra* note 2351, para. 7.

²³⁵⁴ See for a more detailed overview: Sethe (2017), *supra* note 2170, p. 31 et seq.

knowledge of Swiss law.²³⁵⁵ 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.²³⁵⁶ 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).²³⁵⁷

Bar candidates must also have at least one year of practical experience (traineeship).²³⁵⁸ 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.²³⁵⁹ 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

²³⁵⁵ 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).

²³⁵⁶ BBI 2005 6631; Staehelin & Oetiker, *supra* note 2351, para. 4a.

²³⁵⁷ BGer 2C_300/2019 of 31.01.2020, para. 4.5.

²³⁵⁸ Art. 7 para. 1 lit. b BGFA.

²³⁵⁹ Art. 10 of the Draft on a new BGFA.

mandatory.²³⁶⁰ An exception for small cantons was made in the draft.²³⁶¹ Nevertheless, this rule would have led to problematic situations in many 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).²³⁶²

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’.²³⁶³ 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).²³⁶⁴ 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.²³⁶⁵

²³⁶⁰ Art. 10 para. 2 of the Draft on a new BGFA.

²³⁶¹ Art. 10 para. 2 of the Draft on a new BGFA.

²³⁶² Art. 22 para. 3 of the *Loi sur la profession d’avocat* (Lawyers’ Act) of the Canton of Vaud of 9 June 2015.

²³⁶³ Art. 7 para. 1 lit. a BGFA. Since 1 January 2020 the title ‘Master of Law’ is also stipulated by Art. 11(1)(b)(3) of the *Verordnung des Hochschulrates über die Koordination der Lehre an den Schweizer Hochschulen of 29.11.2019*, SR 414.205.1.

²³⁶⁴ Sethe (2017), *supra* note 2170, p. 18 et seq.

²³⁶⁵ Regelung der CRUS zur Festlegung der Studienrichtungen sowie für die Zuordnung der Bachelorstudiengänge of 11 November 2005.

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.²³⁶⁶ 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.²³⁶⁷ Previously, therefore, the law course 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 lawyer²³⁶⁸ 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.²³⁶⁹

²³⁶⁶ Swiss Confederation, *Botschaft zur Änderung des Bundesgesetzes über die Freizügigkeit der Anwältinnen und Anwälte of 26 October 2005 (BBl 2005 6621)*, p. 6624.

²³⁶⁷ R. Sethe, 'Vom Lizentiats- 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.

²³⁶⁸ Universities of Basel, Berne, Fribourg, Geneva, Lausanne, Lucerne, Neuchâtel, St. Gallen and Zurich.

²³⁶⁹ 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. Most universities allow an almost unrestricted choice of subjects in their Master's programmes. See further Sethe (2017), *supra* note 2170, p. 21 et seq.

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 Switzerland²³⁷⁰

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*.²³⁷¹ It is recognised under the Federal Act on Funding and Coordination of the Swiss Higher Education Sector.²³⁷² Admission to the bar exam merely requires the holding of a 'Master's' degree in law from a university,²³⁷³ so graduates with

²³⁷⁰ 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).

²³⁷¹ See <<http://fernuni.ch/law/>> (last visited on 26.06.2020).

²³⁷² HFKG (see for the full citation supra note 1166); see <<https://www.swissuniversities.ch/de/hochschulraum/anerkannte-schweizer-hochschulen/>> (last visited on 26.06.2020).

²³⁷³ Swiss Confederation, *Official statement of the Swiss Federal Department of Justice of 7 August 2007*, in *Anwalts-Revue* 9/2007, p. 415.

a 'Master of Law' from the distance learning university of Brig have a diploma that is sufficient in the sense of the BGFA.²³⁷⁴

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.²³⁷⁵ 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*.²³⁷⁶ 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*).

8.7.2.1.3 *Legal studies without access to the bar*

Universities in Switzerland may introduce new law courses,²³⁷⁷ 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.²³⁷⁸

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

²³⁷⁴ This is the position of the Universitäre Fernstudien Schweiz: <<http://fernuni.ch/law/master/perspektiven/>> (last visited on 26.06.2020).

²³⁷⁵ Swiss Confederation, supra note 2373, p. 415; Sethe (2017), supra note 2170, p. 15.

²³⁷⁶ *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 on 15.10.2020); Sethe (2017), supra note 2170, p. 20 and footnote 58 thereof.

²³⁷⁷ See for the Bologna requirements: Sethe (2017), supra note 2170, p. 18 et seq.

²³⁷⁸ See Sethe (2017), supra note 2170, p. 16.

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 are not usually provided by the cantons but have to be organised by the law graduates themselves in a law firm, at a court²³⁷⁹ or in public administration.^{2380, 2381} One canton has a rule which could make traineeships mandatory.²³⁸² 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.²³⁸³ The competent cantonal authorities may not check

²³⁷⁹ 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.

²³⁸⁰ 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).

²³⁸¹ See §§ 10–12 of Lawyers' Act of the Canton of Zurich (Anwaltsgesetz).

²³⁸² § 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).

²³⁸³ Art. 7 para. 3 BGFA; see further BGer 2C_300/2019 of 31.01.2020, para. 4.5.

the substance of a Swiss ‘Master of Law’.²³⁸⁴ 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.²³⁸⁵ 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.²³⁸⁶

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.²³⁸⁷

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 rules²³⁸⁸). In some cantons, legal trainees are allowed to represent clients in courts for up to five years.²³⁸⁹

²³⁸⁴ Staehelin & Oetiker, *supra* note 2351, para. 5.

²³⁸⁵ 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.

²³⁸⁶ § 3 para. 4 of the Act on Lawyers of the Canton of Lucerne (*Anwaltsgesetz*).

²³⁸⁷ Arts. 30A and 31 of the *Loi sur la profession d’avocat* of the Canton of Geneva.

²³⁸⁸ See e.g. Art. 68 para. 2 ZPO for civil law.

²³⁸⁹ 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.²³⁹⁰ 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.²³⁹¹ 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.²³⁹²

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 *Pešla*, the CJEU simply referred to the *Morgenbesser* decision.²³⁹³ 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

²³⁹⁰ Art. 13 para. 2 of the Draft BGFA.

²³⁹¹ See further Schneider & Lubina, *supra* note 2306.

²³⁹² Schneider & Lubina, *supra* note 2306, p. 332 with reference to the (unpublished) settlement in footnote 96 (*Vergleich vom 04.01.2006 vor dem VG Düsseldorf*).

²³⁹³ Case C-345/08, *Pešla*, ECLI:EU:C:2009:771, para. 36 et seq.

the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud which left the question undecided but only applied the *Pešla* case law.²³⁹⁴

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.²³⁹⁵ 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.²³⁹⁶ In light of the consistent case law of the CJEU and in light of the

²³⁹⁴ 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.

²³⁹⁵ 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; see also Art. 7 of the Verordnung des Hochschulrates über die Koordination der Lehre an den Schweizer Hochschulen, SR 414.205.1.

²³⁹⁶ See e.g. § 5 lit. h of the of the of the of the *Verordnung des Obergerichts über die Fähigkeitsprüfung für den Anwaltsberuf* (Ordinance on the bar exam of the Can-

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.²³⁹⁷ The High Court of the Canton of Basel-Land ruled that a residency or nationality requirement for legal trainees violates Article 2 of the AFMP.²³⁹⁸ 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.²³⁹⁹

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.²⁴⁰⁰ 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.²⁴⁰¹ 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

ton 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.

²³⁹⁷ See, among many, Berthoud, Geneva, *supra* note 1018, para. 545.

²³⁹⁸ Decision of the Kantonsgericht (High Court) Basel-Landschaft, Abteilung Verfassungs- und Verwaltungsrecht 2016 (810 15 196) of 08.06.2016, para. 7.5.

²³⁹⁹ Decision of the Kantonsgericht (High Court) Basel-Landschaft, Abteilung Verfassungs- und Verwaltungsrecht 2016 (810 15 196) of 08.06.2016, para. 7.4.

²⁴⁰⁰ BGE 119 Ia 35.

²⁴⁰¹ ZPO (see for the full citation *supra* note 2076) and StPO (see for the full citation *supra* note 2073).

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).²⁴⁰² 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. 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.²⁴⁰³ Exemptions are however very rare as *summa cum laude* is rarely awarded in the written bar exam.²⁴⁰⁴ 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).

²⁴⁰² Decision of the Kantonsgericht (High Court) Basel-Landschaft, Abteilung Verfassungs- und Verwaltungsrecht 2016 (810 15 196) of 08.06.2016, para. 6.

²⁴⁰³ § 15 of the Ordinance on the bar exam of the Canton of Zurich (*Verordnung über die Fähigkeitsprüfung zum Anwaltsberuf*).

²⁴⁰⁴ See <<http://www.caselaw.ch/wp-content/uploads/2018/09/statistik-anwp.pdf>> (last visited on 24.06.2019).

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.²⁴⁰⁵ At least one year of experience within the Canton of St. Gallen is required.²⁴⁰⁶ Six months of experience working with a domestic lawyer or at a domestic court in the Canton of St. Gallen are also mandatory.²⁴⁰⁷ 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).²⁴⁰⁸ 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.²⁴⁰⁹ Regardless of whether a requirement of experience of three years can still be considered a legitimate aim, the aforementioned rule of the Can-

²⁴⁰⁵ 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*).

²⁴⁰⁶ 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*).

²⁴⁰⁷ 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*).

²⁴⁰⁸ 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.

²⁴⁰⁹ See BGE 73 I 1, para. 5.

ton 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.

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.²⁴¹⁰ It should be noted that the practice of the High Court of the Canton of Zurich is extremely restrictive.²⁴¹¹ 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

²⁴¹⁰ § 3 para. 2 of the *Anwaltsgesetz* (Lawyers' Act) of the Canton of Zurich of 17 November 2003.

²⁴¹¹ 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.

in a comparable situation, such as in the very recent Opinion of the Advocate General Bobek in *Onofrei*.²⁴¹²

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.²⁴¹³

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.²⁴¹⁴ A comparison of academic degrees is generally unproblematic and usually more favourable for applicants.²⁴¹⁵ It can however be decisive, as shown in the following case of the Canton of Uri of 2004.

²⁴¹² *Opinion of Advocate General Bobek in Case C-218/19 Onofrei*, ECLI:EU:C:2020:716, para. 56 et seq.

²⁴¹³ 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).

²⁴¹⁴ 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.basel-land.ch/fileadmin/basel-land/files/docs/gerichte/anwaltspruefungen_merkbl.pdf> (last visited on 30.06.2019).

²⁴¹⁵ The exceptions are Ireland, England, Scotland, Wales and Northern Ireland: see Claessens, Nijmegen, *supra* note 1918, 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 Study²⁴¹⁶ ²⁴¹⁷.

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 Ireland²⁴¹⁸ 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 *Pešla*²⁴¹⁹ case law will be discussed below in the next Subchapter.

²⁴¹⁶ See supra notes 1156 and 1138 for further reference.

²⁴¹⁷ Decision AN 03 11 of the Obergericht (High Court) of the Canton of Uri of 21.05.2004.

²⁴¹⁸ See Claessens, Nijmegen, supra note 1918, p. 85 et seq.

²⁴¹⁹ Case C-345/08, *Pešla*, ECLI:EU:C:2009:771.

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 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.²⁴²⁰

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).²⁴²¹ The decision of the lower instance²⁴²² 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*²⁴²³ judgment.²⁴²⁴ 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.²⁴²⁵

²⁴²⁰ BGer 2C_300/2019 of 31.01.2020, para. 4.4.5.

²⁴²¹ BGer 2C_300/2019 of 31.01.2020, para. 3.1 et seq.

²⁴²² Decision GE.2018.0215 of the Cour administrative du Tribunal cantonal (High Court) of the Canton of Vaud of 20.02.2019.

²⁴²³ Case C-345/08, *Peśla*, ECLI:EU:C:2009:771.

²⁴²⁴ BGer 2C_300/2019 of 31.01.2020, para. 3.1.

²⁴²⁵ BGer 2C_300/2019 of 31.01.2020, para. 4.7.

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*²⁴²⁶ judgment) of Swiss law would neither contradict the AFMP nor the BGFA. Consequently, it assessed the applicant's knowledge of Swiss law.²⁴²⁷ The applicant had obtained a Master's degree of a European University with a comparable length of study. 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.²⁴²⁸

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.²⁴²⁹ 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.²⁴³⁰

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

²⁴²⁶ Case C-345/08, *Peśla*, ECLI:EU:C:2009:771.

²⁴²⁷ 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.

²⁴²⁸ BGer 2C_831/2015 of 25.05.2016, para. 3 et seq.

²⁴²⁹ 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.

²⁴³⁰ State Secretariat for Research and Innovation et al., supra note 1039, p. 3.

law.²⁴³¹ 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 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’²⁴³² 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.²⁴³³ 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.²⁴³⁴

²⁴³¹ 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.

²⁴³² The BGBM does not distinguish between indirect discrimination and restrictions based on its wording.

²⁴³³ BGE 134 II 329, para. 6.2.3.

²⁴³⁴ Bohnet, Bâle, *supra* note 788, para. 22 with reference to BGer 2A.443/2003 of 29.03.2004.

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 *Pešić* 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 should be acquired in the respective field of study.²⁴³⁵ 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.²⁴³⁶

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 stu-

²⁴³⁵ Regelung der CRUS zur Festlegung der Studienrichtungen sowie für die Zuordnung der Bachelorstudiengänge of 11 November 2005.

²⁴³⁶ See Arts. 27 and 36 BV.

dents. The national authorities may require compensation measures similar to what secondary law requires when the training covers substantially different subjects.²⁴³⁷ 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.²⁴³⁸ 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.²⁴³⁹ 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 *Pešla* 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 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 mi-

²⁴³⁷ Art. 14(1)(b) of the Professional Qualifications Directive.

²⁴³⁸ Staehelin & Oetiker, *supra* note 2351, p. 7.

²⁴³⁹ See for a similar reasoning under the secondary law: BVGer B-3284/2018 of 16.11.2018, para. 7.4.

grant 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 Pešla)* 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 *Pešla* judgment but which did not grant access to legal traineeship in the specific case.²⁴⁴⁰

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.

²⁴⁴⁰ BGer 2C_300/2019 of 31.01.2020; see also for an earlier decision of the SFC with reference to the *Pešla* 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 discre-

tion 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. 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).²⁴⁴¹ 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

²⁴⁴¹ 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.

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* 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 *Hocsmann* 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 Directive²⁴⁴² 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 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

²⁴⁴² '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'.

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 *Pešlá*) 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 *Pešla* 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 AFMP²⁴⁴³?
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 settle-

²⁴⁴³ See supra note 52.

ment 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 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 to 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 *Wächter* 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 *Pešla* 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 *Pešla* 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 *Vlas-sopoulou* 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.²⁴⁴⁴ 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 agree-

²⁴⁴⁴ Directorate for European Affairs, supra note 254.

ments 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 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.²⁴⁴⁵ 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.²⁴⁴⁶ 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.

²⁴⁴⁵ 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.

²⁴⁴⁶ BGer 2C_775/2018 of 21.03.2019.

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*.

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 *Pešla*.²⁴⁴⁷ 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.²⁴⁴⁸ On 31 January 2020, the Swiss Federal Court upheld a cantonal decision that applied the lessons of the *Pešla* judgment but which did not grant access to legal traineeship in the specific case.²⁴⁴⁹ 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.

²⁴⁴⁷ Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, ECLI:EU:C:2003:612; Case C-345/08, *Pešla*, ECLI:EU:C:2009:771.

²⁴⁴⁸ State Secretariat for Research and Innovation et al., supra note 1039.

²⁴⁴⁹ 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. 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 Unie (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*-principewijzen 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 Zwits-

erse 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.²⁴⁵⁰ 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 principiële maar eerder een pragmatische 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 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.

²⁴⁵⁰ 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.

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 *Hoczman* en *Morgenbesser*. Uit de bespreking van de jurisprudentie over het beroep van elektriciens 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 wor-

den 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 Zwitserse 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 Justitie. 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-gereguleerde 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 Administratieve Rechtbank, maar gerechtvaardigd. De betreffende kamer oordeelde dat de formulering van artikel 55 van de richtlijn²⁴⁵¹ betreffende de erkenning van 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

²⁴⁵¹ ‘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.’

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 gereguleerd 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 verschaffen 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 ar-

tikel 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’-uitsondering.

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 *Pešla*), 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 *Pešla*-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 Euro-

päischen 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. 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-Ge-

richtshof 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.²⁴⁵² 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

²⁴⁵² Der Begriff 'Beschränkung' wurde durch den EuGH benutzt: siehe Case C-581/17, *Martin Wächter 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.

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 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 *Hoczman* 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 primär-

rechtliche 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 *Tenah-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 beruhen, 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 Berufsankennungsrichtlinie²⁴⁵³ 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 Berufsankennungsrichtlinie 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.

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 Situ-

²⁴⁵³ '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.'

ation 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 Berufsankennungsrichtlinie 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 *Pešić*) 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 *Pešla* gemäss einem kürzlich ergangenen Leitscheid 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. 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).²⁴⁵⁴ 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 éma-

²⁴⁵⁴ 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.

nant 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 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 *Hoczman* 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 professionnelles²⁴⁵⁵ 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 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 révi-

²⁴⁵⁵ 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.

sion – 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 *Pešla*), 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 *Pešla* conformément à une récente décision historique de janvier 2020, même si la décision a été négative dans le cas spécifique.

13 Annex

Table of the Agreements encompassing EU-Swiss Joint Committees or similar mechanisms²⁴⁵⁶:

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 ²⁴⁵⁷	Arts. 9–11
2	Free Trade Agreement between Switzerland and the EU of 1972 for industrial products ²⁴⁵⁸	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 ²⁴⁵⁹	Arts. 10–11, respectively Art. 5 of the Horizon 2020 Agreement

²⁴⁵⁶ Based on the table provided by the Swiss government: Directorate for European Affairs, *supra* note 254.

²⁴⁵⁷ *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.

²⁴⁵⁸ Free Trade Agreement between Switzerland and the EU of 1972 for industrial products (see for the full citation *supra* note 132).

²⁴⁵⁹ *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 120).

No	Agreement	Relevant provisions
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 ²⁴⁶⁰	Art. 10–11
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 ²⁴⁶¹	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 ²⁴⁶²	Art. 5
7	Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than the life insurance ²⁴⁶³	Art. 37

²⁴⁶⁰ *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.*

²⁴⁶¹ *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.*

²⁴⁶² *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.*

²⁴⁶³ *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*

No	Agreement	Relevant provisions
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 ²⁴⁶⁴	Art. 19
9	Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement ²⁴⁶⁵	Art. 11
10	Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment ²⁴⁶⁶	Art. 10
11	Agreement between the European Community and the Swiss Confederation on trade in agricultural products ²⁴⁶⁷	Art. 6
12	Agreement between the European Community and the Swiss Confederation on trade in agricultural products ²⁴⁶⁸	Art. 19 of Annex 11
13	Agreement between the European Community and the Swiss Confederation on Air Transport ²⁴⁶⁹	Art. 21–22
14	Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road ²⁴⁷⁰	Art. 51

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.

²⁴⁶⁴ 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 266).

²⁴⁶⁵ *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.*

²⁴⁶⁶ Mutual Recognition Agreement (see for the full citation supra note 189).

²⁴⁶⁷ Agreement between the European Community and the Swiss Confederation on trade in agricultural products (see for the full citation supra note 413).

²⁴⁶⁸ Agreement between the European Community and the Swiss Confederation on trade in agricultural products (see for the full citation supra note 413).

²⁴⁶⁹ Swiss-EU Air Transport Agreement (see for the full citation supra note 348).

²⁴⁷⁰ 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 412).

No	Agreement	Relevant provisions
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) ²⁴⁷¹	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 ²⁴⁷²	Art. 16
17	Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics ²⁴⁷³	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 ²⁴⁷⁴	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 ²⁴⁷⁵	Arts. 3–5
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 ²⁴⁷⁶	Art. 39

²⁴⁷¹ AFMP (see for the full citation supra note 7).

²⁴⁷² *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.

²⁴⁷³ *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.

²⁴⁷⁴ Swiss-EU Dublin Agreement (see for the full citation supra note 114).

²⁴⁷⁵ Swiss-EU Schengen Agreement (see for the full citation supra note 114).

²⁴⁷⁶ 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).

No	Agreement	Relevant provisions
21	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) ²⁴⁷⁷	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 ²⁴⁷⁸	Art. 20
23	Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems ²⁴⁷⁹	Arts. 12–13

Table 17: Agreements encompassing EU-Swiss Joint Committees or similar mechanisms

²⁴⁷⁷ *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.*

²⁴⁷⁸ *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 119).*

²⁴⁷⁹ *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 125).*

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14.12 Secondary law of the EU (in chronological order)

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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.

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.

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.

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.

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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.

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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.

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

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.

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.

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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.

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.

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.

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.

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.

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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.

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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.

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.

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.

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.

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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.

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Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ [2018] L173/16, 09.07.2018.

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Commission Delegated Regulation 2019/907/EU 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.

Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, OJ [2020] L444/2, 31.12.2020.

14.13 Swiss Federal Legislation

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.

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.

Agreement between Switzerland and Germany of 01.12.1937; partly cited in BBI 1937 III 491.

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 25.02.2019, provisional entry into force on 01.01.2021, SR 0.142.113.672.

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.

Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht [Code of Obligations]; OR) of 30.03.1911, SR 220.

Bundesgesetz über das Bundesgericht (BGG) of 17.06.2005, SR 173.110.

Bundesgesetz über das Bundesverwaltungsgericht (VGG) of 17.06.2005, SR 173.32.

Bundesgesetz über das Internationale Privatrecht (IPRG) of 18.12.1987, SR 291.

Bundesgesetz über das Verwaltungsverfahren (VwVG) of 20.12.1968, SR 172.021.

Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts (ATSG) of 06.10.2000, SR 830.1.

Bundesgesetz über den Binnenmarkt (BGBM; Federal Act on the Internal Market) of 06.10.1995, SR 943.02.

Bundesgesetz über den Datenschutz of 25.09.2020, BBI 2020 7639.

Bundesgesetz über die Arbeitsvermittlung und den Personalverleih (AVG) of 06.10.1989, SR 823.11.

Bundesgesetz über die Ausländerinnen und Ausländer und über die Integration (AIG) of 16.12.2005, SR 142.20.

Bundesgesetz über die Berufsbildung (BBG) of 13.12.2002, SR 412.10.

Bundesgesetz über die Förderung der Hochschulen und die Koordination im schweizerischen Hochschulbereich of 30.09.2011, SR 414.20.

Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (BGFA) of 23.06.2000, SR 935.61.

Bundesgesetz über die Gesundheitsberufe (GesBG) of 30.09.2016, SR 811.21.

Bundesgesetz über die Invalidenversicherung (IVG) of 19.06.1959, SR 831.20.

Bundesgesetz über die Krankenversicherung (KVG) of 18.03.1994, SR 832.10.

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

Bundesgesetz über die Patentanwältinnen und Patentanwälte (PAG) of 20.03.2009, SR 935.62.

- Bundesgesetz über die technischen Handelshemmnisse (THG) of 06.10.1995, SR 946.51.*
- Bundesgesetz über die universitären Medizinalberufe (MedBG) of 23.06.2006, SR 811.11.*
- Bundesgesetz über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren (RAG) of 16.12.2005, SR 221.302.*
- 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').*
- 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.*
- Bundesverfassung der Schweizerischen Eidgenossenschaft (BV) of 18.04.1999, SR 101.*
- 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.*
- 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.*
- EFTA Convention (Übereinkommen zur Errichtung der Europäischen Freihandelsassoziation) of 04.01.1960 and 21.06.2001; entry into force on 01.06.2002.*
- 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.*
- Fortpflanzungsmedizinverordnung (FMedV) of 04.12.2000, SR 810.112.2.*
- GATS/EL/83 of 15.04.1994.*
- Gebührenordnung der Prüfungskammer für Patentanwältinnen und Patentanwälte of 23.11.2010, SR 935.621.31.*
- Patentanwaltsverordnung (PAV) of 11.05.2011, SR 935.621.*
- Schweizerische Strafprozessordnung (StPO) of 05.10.2007, SR 312.0.*
- Schweizerische Zivilprozessordnung (ZPO) of 19.12.2008, SR 272.*
- Schweizerisches Strafgesetzbuch (StGB; Swiss Criminal Code) of 21.12.1937, SR 311.0.*
- Schweizerisches Zivilgesetzbuch (ZGB) of 10.12.1907, SR 210.*
- Strahlenschutzverordnung (StSV) of 22.06.1994, AS 1994 1947.*
- Temporary agreement between the Swiss Confederation and the United Kingdom of Great Britain and the Northern Ireland on Services Mobility of 14.12.2020, provisional entry into force on 01.01.2021, SR 0.946.293.671.2.*

Traité d'amitié, 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.

Verordnung des Hochschulrates über die Koordination der Lehre an den Schweizer Hochschulen of 29.11.2019, SR 414.205.1.

Verordnung des UVEK über elektrische Niederspannungsinstallationen, SR 734.272.3.

Verordnung über die Anerkennung und die Gleichstellung von Bildungsabschlüssen in den Gesundheitsberufen nach dem GesBG (GesBAV) not entered into force.

Verordnung über die Berufsbildung (BBV) of 19.11.2003, SR 412.101.

Verordnung über die in die Schweiz entsandten Arbeitnehmerinnen und Arbeitnehmer (EntsV) of 21.05.2003, SR 823.201.

Verordnung über die Invalidenversicherung (IVV) of 17.01.1961, SR 831.201.

Verordnung über die Krankenversicherung (KVV) of 27.06.1995, SR 832.102.

Verordnung über die Meldepflicht und die Nachprüfung der Berufsqualifikationen von Dienstleistungserbringerinnen und -erbringern in reglementierten Berufen (VMD) of 26.06.2013, SR 935.011.

Verordnung über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren (RAV) of 22.08.2007.

Verordnung über Diplome, Ausbildung, Weiterbildung und Berufsausübung in den universitären Medizinalberufen (MedBV) of 27.06.2007, SR 811.112.0.

Verordnung über elektrische Niederspannungsinstallationen (NIV) of 07.11.2001, SR 734.27.

Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit (VZAE) of 24.10.2007, SR 142.201.

Verordnung zum Hochschulförderungs- und -koordinationsgesetz of 23.11.2016, SR 414.201.

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

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List of tables

Table 1:	The bilateral path between Switzerland and the EU	32
Table 2:	Recognition of third country diplomas	263
Table 3:	Practising physicians in Switzerland, its neighbouring countries, and the Netherlands in 2016	342
Table 4:	Recognition of professional qualifications concerning health professions under the MedBG (EU and third country diplomas) in Switzerland	343
Table 5:	Medical professions listed in Annex V	345
Table 6:	Swiss titles and qualifications of doctors of medicine	348
Table 7:	Swiss titles and qualifications of general practitioners	349
Table 8:	Swiss titles and qualifications of specialised doctors	350
Table 9:	Swiss titles and qualifications of dental practitioners	352
Table 10:	Swiss titles and qualifications of specialised dentists	353
Table 11:	Swiss titles and qualifications for nurses of general care	356
Table 12:	Swiss titles and qualifications of midwives	358
Table 13:	Swiss titles and qualifications of pharmacists	359
Table 14:	Number of lawyers in Switzerland and in neighbouring countries	410
Table 15:	Swiss titles for the lawyer's profession	414
Table 16:	Law students enrolled at university level in Switzerland	476
Table 17:	Agreements encompassing EU-Swiss Joint Committees or similar mechanisms	549

Index

- abuse of rights 217
- academic recognition 227
- acquired rights 254, 324
- age requirements 303
- auditors 450
- autonomous adaptation of EU law 56
- common training tests 296
- compensation measures 288
 - self-executing character 298
 - substantial differences 285, 301
- concours 253
- discrimination
 - direct discriminations 145
 - indirect discriminations 145, 204
 - reverse discriminations 145
- docking with the EFTA-Court 74
- Dual nationals 159
- dynamic incorporation of EU law 64
- Facilitating Practice Directive 386
- Facilitating Services Directive 386
- flanking measures 180
- free movement of legal trainees 464
- freedom of services
 - freedom to provide services 174
 - freedom to receive services 175
- GATS 178
- General Recognition Directive 283
- horizontal effect 167
- Joint Committees 130
- judicial dialogue 64, 124
- language requirements 271
- lawyers 385
- monism 121
- notaries 439
- partial access to a profession 292
- patent attorneys 457
- persons not pursuing an economic activity 169
- Polydor principle 104
- popular initiative against mass immigration 46
- Professional Qualifications Directive 240
- professional traineeships 275
- protection of acquired rights *See acquired rights*
- public authority 155, 440
- qualification shopping 216
- race to the bottom 216
- recognition of professional qualifications
 - based on primary law 201
 - based on secondary law
 - Directive 2005/36/EC 237
 - general system 283
 - recognition based on professional experience 304
 - sectoral system 343

- licenses as opposed to diplomas 250
- zigzag recognition 216
- restrictions 147
 - as opposed to indirect discriminations 204
 - diploma as restriction? 212
- standstill clause
 - AFMP 151
 - Ankara Agreement 117
- third country diplomas 261
- use of titles
 - academic titles 228, 278
 - professional titles 277

This study analyses the sectoral agreements for the mutual recognition of professional qualifications between Switzerland and the EU, looking particularly at selected health and legal professions. This research not only examines the applicable secondary law but also examines whether primary law applies in this context between Switzerland and the EU. For this purpose, it discusses the case law of the Swiss courts, the Court of Justice and the EFTA Court.

To complete this analysis, the institutional mechanism which is inherently linked to this topic is 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 agreement on the free movement of persons (AFMP), which refers to EU legislation on professional recognition.

This research is valuable for any lawyer or academic interested in the recent case law for the AFMP and for the recognition of professional qualifications.

Eine erfolgreiche grenzüberschreitende Zusammenarbeit, die sich mit Verkehr, Umweltschutz, Sicherheit, Gesundheit, Raumplanung, Arbeitsmarkt oder Bildung auseinandersetzt, ist für transnationale Regionen von eminenter Bedeutung. Trotz seiner hohen Relevanz mangelt es diesem Rechtsgebiet im Schnittpunkt von Staats-, Verwaltungs-, Völker- und Europarecht an einer systematischen Dokumentation und einer breiten wissenschaftlichen Aufarbeitung. Ziel der Schriftenreihe ist es, diese Lücke zu schliessen und eine Verbindung von Wissenschaft und Praxis herzustellen. Dementsprechend vereint sie Werke aus beiden Bereichen, unterteilt in die Sektionen «Wissenschaft» und «Praxis».

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