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

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> *"The EFTA States party to the EEA Agreement must […] be distinguished from other States, such as the Swiss Confederation, which have not subscribed to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements between the European Union and its Member States in specific areas."*
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> *Court of Justice of the European Union in* projektart *(2011)*

Thesis

In **formulating its Draft Resolution**, the IMCO Committee should more explicitly take into account the difference between EEA law, on the one hand, and the sectoral agreements with Switzerland, on the other hand, with respect to the degree of the association to the Union's internal market for which these legal regimes provide.

In fact, there is an important **difference in the obstacles** to "the full implementation of the internal market" with respect to the EEA, on the one hand, and the sectoral agreements with Switzerland, on the other hand. Whilst in both cases, potential obstacles include in particular delays in updating the legal acquis and in the implementation in the national legal orders, plus problems relating to the interpretation and application of the law, in the case of the sectoral agreements with Switzerland there is an additional obstacle that relates to the very scope of the law. Different from EEA which fully covers all four freedoms of the Union's internal market (i.e. goods, persons, services and capital), the sectoral agreements taken together relate to three of these freedoms and, in addition, to certain aspects of these freedoms only.

Accordingly, given that the **sectoral agreements by definition are not a complete internal market regime**, "full implementation" can be aimed at only within the agreements' limited scope, which falls short of the Union's comprehensive internal market as covered by EEA law.

Discussion

Introduction: Switzerland as part of the Union's indivisible internal market?

The extension of the Union's internal market to the EFTA States has taken on new political relevance in the context of the popular vote in Switzerland on the so-called Mass Immigration Initiative, launched by the nationalist Swiss Peoples Party. On 9 February 2014, the Swiss voting population decided that in the future Switzerland shall decide independently on the immigration, that such movement shall be capped and that, further, the principle of national preference shall apply to all foreign nationals (rather than only to those not falling under a free movement agreement, as is the case under the present Swiss aliens law).

It is obvious that these new principles, introduced into the Swiss Federal Constitution through the vote with effect of 9 February 2014 and now to be implemented on the level of legislation,[1] are incompatible[2] with the sectoral Agreement on the Free Movement of Persons (FMP) concluded in 1999 by Switzerland, on the one hand, and the European Union and its Member States, on the other hand.[3]

The reactions of the European Union to this situation have taken different forms and expressions. Some of them pointed to the indivisibility of the Union's internal market.

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[1] The texts newly introduced into the Federal Constitution are Art. 121a and 197(11). Art. 121a, entitled „Control of immigration", reads:

„1 Switzerland shall control the immigration of foreign nationals autonomously.

2 The number of residence permits for foreign nationals in Switzerland shall be restricted by annual quantitative limits and quotas. The quantitative limits apply to all permits issued under legislation on foreign nationals, including those related to asylum matters. The right to permanent residence, family reunification and social benefits may be restricted.

3 The annual quantitative limits and quotas for foreign nationals in gainful employment must be determined according to Switzerland's general economic interests, while giving priority to Swiss citizens; the limits and quotas must include cross-border commuters. The decisive criteria for granting residence permits are primarily an application from an employer, ability to integrate, and adequate, independent means of subsistence.

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

5 The law shall regulate the details."

In the part with the transitional provisions, Art. 197(11) reads:

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

2 If 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."

[2] See Julia Hänni/Sebastian Heselhaus, 'Die eidgenössische Volksinitiative "Gegen Masseneinwanderung" (Zuwanderungsinitiative) im Lichte des Freizügigkeitsabkommens und der bilateralen Zusammenarbeit mit der EU', SZIER 2013, 19-64 (basierend auf einem Rechtsgutachten von 2011, siehe http://www.fdp.ch/images/stories/Dokumente/Medienkonferenzen/StudieBilaterale/20111010_FAC_Studie%20Bilaterale%20def_d.pdf); Christine Kaddous, Rechtsgutachten über die Vereinbarkeit der Initiative «gegen Masseneinwanderung» und der ECOPOP-Initiative «Stopp der Überbevölkerung – ja zur Sicherung der natürlichen Lebensgrundlagen» mit dem Personenfreizügigkeitsabkommen zwischen der Schweiz und der Europäischen Union (FZA), die Anwendung der «Guillotine»-Klausel und einer allfälligen Neuverhandlung des FZA, Genf 2013, http://www.economiesuisse.ch/de/SiteCollectionDocuments/Gutachten_Kaddous_20132111.pdf. See also European Parliament, parliamentary question E-010832-14 by MEP Sylvie Guillaume (S&D) of 16 December 2014: „The implementation of national, cantonal or communal 'preferences' for recruitment in Switzerland and the compatibility with the current agreement on the free movement of persons between the European Union and the Swiss Confederation.

[3] Agreement of 21 June 1999 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, OJ 2002 L 114/6.

Most notably, then Commission Vice President Viviane Reding was quoted in the Financial Times of 9 February 2014[4] as stating that: "The single market is not a Swiss cheese. You cannot have a single market with holes in it." The Financial Times commented: "Ms Reding, vice-president of the European Union, was not making some Eurocratic comment about the place of dairy products within the common agricultural policy. This was a serious point about the fallout from Switzerland's popular vote to cap immigration. [...] Although Switzerland is not a member of the European Union, its suite of bilateral agreements with the EU gives it access to the four-dimensional single market – in people, capital, goods and services. The Swiss vote to limit immigration undermines the first of these – covering free movement of people. But if the first is axed, the EU says it will curtail access to the other three. To complete Ms Reding's Swiss cheese analogy: "You cannot have a single market with holes in it.""

Similarly, the Council of Ministers in its conclusions on a homogeneous extended single market of December 2014 noted, in the specific context of the Swiss vote of 9 February 2014, that "the free movement of persons is a fundamental pillar of EU policy and that the internal market and its four freedoms are indivisible."[5]

Such statements imply that Switzerland is part of the full internal market and that, by the vote of 9 February 2014, the very indivisibility of this market is at issue. Similarly, the title of the Draft Resolution under discussion in the European Parliament's Committee on the Internal Market and Consumer Protection (IMCO), might be understood in the same manner.

However, in reality Switzerland is part of the Unions internal market only very selectively. In fact, it is integrated to a markedly lesser degree than are the EEA EFTA States Iceland, Liechtenstein and Norway. This fact should be taken into account by the Union in defining the manner in which it reacts to the Swiss vote and to the steps since taken by the Swiss Government in implementing this vote, including also through the Resolution under discussion in the IMCO. Whilst from a legal point of view it is entirely appropriate to refer to the "full implementation of the internal market" with respect to EEA law, the same is not true with respect to the EU-Swiss bilateral relations (though obviously this does not affect the parties' obligations, and in particular Switzerland following the vote of 9 February 2014, under the bilateral FMP Treaty).

EEA law and EU-Swiss bilateral law differ in many respects. Some of the relevant issues, which relate to the systems according to which these legal regimes function, are at the present under discussion in the negotiations on an institutional framework between the EU and Switzerland, namely the development of the acquis, its interpretation, supervision and dispute settlement.[6] As is well known, the EU in this context aims at an alignment of the system of the bilateral law to that of the EEA.[7]

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[4] 'Swiss clash with EU foreshadows tensions if UK votes to leave', Financial Times of 9 February 2014.

[5] Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, General Affairs Council meeting Brussels, 16 December 2014, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf, para. 46.

[6] The fact that such differences may lead to obstacles in the implementation of the law was already noted in an IMCO briefing paper: Christa Tobler, Jeroen Hardenbol & Balász Mellár, *Internal Market Beyond the EU: EEA and Switzerland*, Strasbourg/Brussels: EP 2010; available at http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf.

[7] See e.g. para. 31 of the Draft Council conclusions on EU relations with EFTA countries of 5 December 2008, 16651/1/08 REV 1, http://register.consilium.europa.eu/pdf/de/08/st16/st16651-re01.de08.pdf (available in the draft version only). On the new institutional framework, see e.g. Christa Tobler, 'Die Erneuerung des bilateralen Wegs: Eine wachsende Annäherung an den EWR in den zur Diskussion gestellten Modellen', *Jusletter* of 3 June 2013 (www.weblaw.ch/jusletter/JusLetter.asp) as well as 'Die flankierenden Massnahmen der Schweiz

However, there is also the additional fact that in terms of the internal market legislation, the two regimes differ markedly with respect to their very scope or field of application. This difference has nothing to do with the functioning of the systems.

In the following, the difference in scope between the two legal regimes is addressed briefly, before turning to the issues raised by the Swiss popular vote of 9 February 2014 against this background. The present position paper ends by summarising the suggestions to the IMCO Committee that follow from the findings of this paper.

EEA law: comprehensive association to the Union's internal market

According to its preamble, the EEA Agreement aims "to provide for the fullest possible realization of the free movement of goods, persons, services and capital" (as well as for strengthened and broadened cooperation in flanking and horizontal politics). In other words, the aim is to fully integrate the EEA EFTA States into the Union's internal market.

In line with this aim, the EEA Agreement extends the Union's fundamental rules on the internal market to the EEA EFTA States, covering the free movement of goods (Part II of the EEA Agreement) as well as the free movement of persons, services and capital (Part III of the EEA Agreement). Where the wording of the rules on a particular freedom does not fully correspond to that of EU law as it stands today (as is the case with the free movement of capital, where the Art. 40 EEA corresponds to the original regime of EEC law that was replaced with the present regime with effect of 1 January 1994), the Courts have held that their meaning is nevertheless the same (EFTA Court: e.g. *Íslandsbanki-FBA*,[8] para. 16; CJEU: e.g. *Rimbaud*,[9] para. 22).

Overall, the EEA Agreement gives full access to the EU's internal market, lifting these countries beyond the status of third states vis-à-vis the EU, whilst leaving them freedom of action in the fields of agriculture, foreign relations and monetary policy in particular. As the CJEU stated in its judgment on the *projektart* case (para. 37), "the EFTA States party to the EEA Agreement must, in fact, be distinguished from other States, such as the Swiss Confederation, which have not subscribed to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements between the European Union and its Member States in specific areas."[10]

Finally, it should be noted that, on the side of the then EEC, the EEA Agreement was formally concluded as an association agreement within the meaning of today's Art. 217 TFEU (then Art. 238 of the EEC Treaty).[11] According to the European Union's External Action Service,[12] such agreements have the aim of „setting up an all-embracing framework to conduct bilateral relations. These agreements normally provide for the progressive liberalisation of trade (to various degrees: Free Trade Area, Customs Union…)." This is entirely true for the EEA.

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in einem erneuerten System des bilateralen Rechts', *Jusletter* of 30 September 2013 (www.weblaw.ch/jusletter/JusLetter.asp), with further references.

[8] EFTA Court, Case E-1/00 *Íslandsbanki-FBA* [2000-2001] EFTA Ct. Rep. 8.

[9] CJEU, Case C-72/09 *Établissements Rimbaud SA v Directeur général des impôts and Directeur des services fiscaux d'Aix-en-Provence*, ECLI:EU:C:2010:645

[10] CJEU, Case C476/10 *projektart Errichtungsgesellschaft mbH, Eva Maria Pepic and Herbert Hilbe*, ECLI:EU:C:2011:422.

[11] Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, OJ 1994 L 1/1.

[12] See http://eeas.europa.eu/association/.

As will be seen below, the bilateral law with Switzerland is rather different.

Sectoral law EU-Switzerland: a system of bits and pieces

The EU-Swiss bilateral law developed over several decennia in three phases (see ***Chart 8*** in the Annex to this document).[13] Different from the EEA Agreement, the bilateral law does not as a whole form an association regime within the meaning of Art. 217 TFEU. In fact, only the so-called "Bilateral I" package of 1999 is based on this provision (or, rather, its pre-Lisbon predecessor, Art. 310 EC).[14] This package includes a number of important market access agreements, i.e. agreements that provide access to selected aspects of the Union's internal market. This includes notably the FMP Treaty, already mentioned, and further the treaties on air transport,[15] land transport,[16] agricultural products[17] and conformity assessment.[18] All other bilateral market access agreements were concluded at different points in time and have different legal bases, including notably the agreement on trade in watches of 1967,[19] the Free Trade Agreement of 1972,[20] the Insurance Agreement of 1989,[21] the Agreement on processed agricultural products of 2004[22] and the Agreement on customs matters of 2009.[23]

In terms of content, the various market access agreements concern three out of the four freedoms of the internal market, namely the free movement of goods, persons and services, to the exclusion of the free movement of capital:

- The free movement of goods: the Watches Agreement, the Free Trade Agreement and the Agreements on agricultural products, processed agricultural products and customs matters;

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[13] Updated English translation from: Christa Tobler & Jacques Beglinger, Grundzüge des bilateralen (Wirtschafts-)Rechts. Systematische Darstellung in Text und Tafeln, 2 volumes, Zurich/St. Gallen: Dike 2013 (Text by Christa Tobler, Charts together with Jacques Beglinger).

[14] Decision of the Council, and of the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation, OJ 2002 L 114/1.

[15] Agreement of 21 June 1999 between the European Community and the Swiss Confederation on Air Transport, OJ 2002 L 114/73.

[16] Agreement of 21 June 1999 between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road, OJ 2002 L 114/91.

[17] Agreement of 21 June 1999 between the European Community and the Swiss Confederation on trade in agricultural products, OJ 2002 L 114/132.

[18] Agreement of 21 June 1999 between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment, OJ 2002 L 114/369.

[19] Agreement of 30 June 1967 concerning products of the clock and watch industry between the European Economic Community and its Member States and the Swiss Confederation, OJ 1969 L 257/3 and 1974 L 118/12.

[20] Agreement of 22 July 1972 between the European Economic Community and the Swiss Confederation, OJ 1972 L 300/189 (in the Dutch, French, German and Italian languages).

[21] Agreement of 10 October 1989 between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance, OJ 1991 L 205/3.

[22] Agreement of 26 October 2004 between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 as regards the provisions applicable to processed agricultural products, OJ 2005 L 23/19.

[23] Agreement of 25 June 2009 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, OJ 2009 L 199/24 (original agreement of 21 November 1990). On the EU legal basis of the bilateral law, see Georges Baur & Christa Tobler, '« Der Binnenmarkt ist (k)ein Schweizer Käse ». Zum Assoziationsstatus der Türkei, der EWR/EFTA-Staaten und der Schweiz in ausgewählten EU-Politikbereichen, insbes. dem EU-Binnenmarkt', in: Schweizerisches Jahrbuch für Europarecht 2015/2016 (forthcoming).

- The free movement of persons: parts of the FMP Treaty, the Insurance Agreement and parts of the Air Transport Agreement;
- The free movement of services: parts of the FMP Treaty and of the Air Transport Agreement, plus the Land Transport Agreement.

Further, in terms of the field of application of the bilateral law, none of these three freedoms is covered fully to the extent of its meaning under EU and EEA law. For present purposes, the free movement of persons and of services provide examples. As for the free movement of persons, with respect to its one sub-aspect, namely the free movement for workers, the scope of the bilateral law (more specifically: the FMP Treaty) is parallel to that of EU and EEA law. However, the bilateral law does not cover the other sub-aspect, namely freedom of establishment, to the same extent as EU and EEA law. Rather, companies and firms enjoy this freedom in very specific contexts only, through the Insurance and Air Transport Agreements. As for the FMP Treaty, it provides freedom of establishment for natural persons only. There is, in other words, no encompassing freedom of establishment for companies and firms under the bilateral law.

Similarly, there is no encompassing regime for the free movement of services. Even though the FMP Treaty in that respect covers both natural persons and legal persons, it is only for activities up to 90 days per calendar year, a limit that does not exist under EU and EEA law. In addition, there are grandfather clauses with respect to e.g. financial services. Only for the specific sectors of air and land transport are there more far-reaching systems under the respective treaties.

Within the range of the different EU-Swiss bilateral market access agreements, the Air Transport Agreement is undoubtedly the most far-reaching.[24] The Swiss Federal Government perceives it as an integration agreement, as opposed to so-called liberalisation agreements such as the FMP Treaty.[25] However, according to the Court of Justice of the European Union, the differences between the EU-Swiss bilateral law, on the one hand, and EU and EEA law, on the other hand, are so marked that this has consequences even in the case of this particular agreement. According to the Court, this difference means that the Air Transport Agreement does not in fact provide for the free movement of services within the meaning of EU and EEA law. As the Court stated in the *Air Noise* judgment[26] (para. 78-80):

> "It should be noted at the outset that the EC-Switzerland Air Transport Agreement, which forms part of a series of seven sectoral agreements between the same contracting parties, was signed on 21 June 1999 after the rejection by the Swiss Confederation, on 6 December 1992, of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) and that, by its refusal, the Swiss Confederation did not subscribe to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements between the European Union and its Member States in specific areas […].
>
> Therefore, the Swiss Confederation did not join the internal market of the European Union, 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, which includes inter alia the freedom to provide services […].
>
> Consequently, the interpretation given to the provisions of European Union law concerning the internal market cannot be automatically applied by analogy to the interpretation of the EC-

[24] The Schengen Association Agreement goes further (Agreement of 26 October 2004 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, OJ 2008 L 53/52). However, though building, in terms of its content, on the free movement of persons, it is not in itself a market access agreement.

[25] See on this issue the Memorandum of Understanding of the Swiss Federal Government on the Bilateral I package; Botschaft zur Genehmigung der sektoriellen Abkommen zwischen der Schweiz und der EG vom 23. Juni 1999, BBl. 1999 6128, S. 6156.

[26] CJEU, Case C-547/10 P *Switzerland v Commission*, ECLI:EU:C:2013:139.

> Switzerland Air Transport Agreement, unless there are express provisions to that effect laid down in the Agreement itself […]."

Against the background of the finding that Switzerland is in fact not part of the project of an economically integrated entity with a single market, the Court also noted that, within this framework, Switzerland is equated to the EU Member States only for the purposes and within the limits of the relevant bilateral agreement (e.g. *UK v Council*,[27] para. 56-58, in the context of the coordinating social security law which is part of the FMP Treaty). This is, therefore, very different from the EEA EFTA States which are fully equated to the EU Member States for the purposes of the internal market.

Putting the challenge posed by the vote of 9 February 2014 in context

As the Council of Ministers has rightly stated,[28] "by participating in parts of the EU's internal market and policies, Switzerland is not only engaging in a bilateral relation but becomes a participant in a multilateral project." However, the very limitation to "parts of the EU's internal market" implies that full implementation of this market as a whole in Switzerland is not conceivable within the framework of the present bilateral law. This remains a fact even in the event of the alignment of the bilateral system to that of the EEA, as discussed in the negotiations on a new institutional framework for the bilateral market access law.

Against this background, it is submitted that it is not helpful if some (members of) Union institutions in their reaction to the Swiss vote of 9 February 2014 refer to the comprehensive nature of its internal market and to the indivisibility of this market. Instead, if the Union wishes to make its position clear and understandable to Switzerland and its voting population, it is preferable that it relies on the importance of the free movement of persons within the limited system of the bilateral law and on the importance for the Union of the principles underlying the free movement of persons.

As for the latter, the Resolution could more explicitly reaffirm the stance taken in the letter to the Swiss Government of July 2014 by then High Representative of the Union for Foreign Affairs and Security Policy, Lady Ashton, where she wrote: "The principle of non-discrimination, including equal treatment of all Member States, the right to exercise an economic activity and reside on the territory of the other party and the standstill clause constitute *the essential basis of the consent of the European Union to be bound by the agreement*. Renegotiating these principles with the objective of introducing quantitative limits and quotas, combined with the preference for Swiss nationals would be in fundamental contradiction to the objective of the Agreement on the free movement of persons." (emphasis added).

As for the former (i.e. the importance of the free movement of persons within the limited system of the bilateral law), this is indeed suggested in the text (though not in the title) of the Draft Resolution, when it states that "the free movement of persons is one of the fundamental freedoms and a pillar of the Single Market and that it always has been *an inseparable part of and precondition for the bilateral approach* between the EU and Switzerland" (para. 15; emphasis added; though: the "bilateral approach" is older than the FMP Treaty).

However, the draft text of the Resolution also states "that the question of migration of citizens from third countries should not be confused with the free movement of persons as enshrined in the Treaties" (para. 14). This distinction is fundamental in

[27] CJEU, Case C-656/11 *UK v Council*, ECLI:EU:C:2014:97.

[28] Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, General Affairs Council meeting Brussels, 16 December 2014, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf, para. 44.

the framework of EU law and is based on this law, where it refers to the two distinct policy areas of the internal market (free movement), on the one hand, and the Area of Freedom, Security and Justice (immigration), on the other hand.

Again, it is submitted that extending this distinction to the bilateral relations with Switzerland is not helpful for the political dialogue with that country and its voting population. However appropriate in the framework of EU law, the distinction reflects a terminology that is not used in Switzerland where the concern of the part of the population that voted in favour of the Mass Immigration Initiative was very generally that of too much "movement" into Switzerland, independent of the origin of the persons concerned. According to the most recent figures, net immigration into Switzerland in this general sense amounted to about 80'000 persons in the year 2014 (which corresponds to the number of inhabitants of one of the larger cities of Switzerland and which brings the total of foreigners up to one quarter of the overall population, i.e. at present more than 2 million foreigners out of total population of roughly 8 million people living in Switzerland).[29]

In fact, it was the declared aim of the Mass Immigration Initiative to end the different and preferential treatment under the free movement rules with the EU and the other EFTA States. Indeed, the new provision of the Federal Constitution as introduced through the vote generally speaks about "immigration" (German: *Zuwanderung*, French: *immigration*, Italian: *immigrazione*, Rumantsch: *immigraziun*), without making a distinction between treaty-based free movement rules and unilateral Swiss rules on immigration from other countries. Similarly, the present attempts in Switzerland to ease the tensions surrounding the internal political debate through the discussion of the introduction of a safeguard clause into the FMP Treaty do not make a distinction between different types of movement into the country.[30]

It should perhaps be added that the idea of a single market is generally less enshrined in Switzerland than in the EU and the EEA. With respect to free movement inside the country, Switzerland has adopted a Single Market Act in 1995 only.[31] With respect to the free movement of persons within the bilateral law and the EFTA Convention, it would seem that even on a high political level many fail to understand the true meaning of free movement. This is evidenced by the recent appeal of three central-right parties to the Swiss employers (private and public) to practice an approach of national preference already now, i.e. before formal implementation of the

[29] See e.g. ‚Ausländerstatistik 2014. Erneut fast 80'000 Zuwanderer', Neue Zürcher Zeitung of 23 April 2015.

[30] Such safeguard clauses have been suggested in academia (Michael Ambühl & Sibylle Zürcher, 'Eine Schutzklausel bei der Zuwanderung', NZZ of 22 December 2014; Michael Ambühl & Sibylle Zürcher, ‚Immigration and Swiss-EU Free Movement of Persons: Question of a Safeguard Clause', Swiss Political Science Review 2015, 76–98) as well as by economic associations (see media release of Swissmem, scienceindustries Switzerland, Schweizerischer Arbeitgeberverband und economiesuisse of 8 January 2015, 'Zuwanderung: Wirtschaft fordert Schutzklausel und Anstrengungen der privaten und staatlichen Arbeitgeber', avaible e.g. via http://www.fasmed.ch/fileadmin/images/Medienkonferenz_DE.pdf, as well as economiesuisse, Neue Migrationspolitik: Beitrag der Schweizer Wirtschaft. Diskussionspapier zur Jahresmedienkonferenz vom 2. Februar 2015 in Bern, http://www.economiesuisse.ch/de/SiteCollectionDocuments/Dossier_Jahresmedienkonferenz_2015.pdf, as of p. 22 of the pdf document). For a general discussion on safeguard clauses in free movement law with the EU, see Christa Tobler, 'Schutzklauseln in der Personenfreizügigkeit mit der EU', *Jusletter* of 16 February 2015 (www.weblaw.ch/jusletter/JusLetter.asp). – The fact that the EU is contemplating a safeguard clause in view of the accession of Turkey (see Narin Tedzcan, 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, PhD thesis to be defended at Leiden University on 27 May 2015) has raised hopes in certain circles of Switzerland that the EU might agree to such a clause also in its relations with Switzerland.

[31] Swiss Domestic Market Act: Bundesgesetz über den Binnenmarkt (Binnenmarktgesetz, BGBM) vom 6. Oktober 1995, SR 943.02.

vote, in order to limit immigration (*„Die Wirtschaft und die öffentliche Hand müssen den Inländervorrang sofort freiwillig umsetzen [...]"*)[32] – even though shortly before this appeal was launched, the High Representative of the Union for Foreign Affairs and Security Policy, Federica Mogherini, had emphasised that such an approach is contrary to the FMP Agreement[33] and even though Art. 9(4) of Annex I to the FMP Agreement explicitly states that "[a]ny clause in a collective or individual agreement or in any other collective arrangements concerning access to employment, employment, pay and other terms of employment and dismissal, shall be automatically void insofar as it provides for or authorises discriminatory conditions with respect to foreign employed persons who are nationals of the Contracting Parties."

Against this background, it is suggested that rather than urging the EU distinction between free movement and immigration, the proposed Resolution address the issue of national preference.

Conclusion and suggestions to the IMCO Committee

Overall, it follows from the above that the legal context with respect to the implementation of internal market legislation is different for the EEA, on the one hand, and the EU-Swiss sectoral agreements, on the other hand.

With respect to the EEA, there is clear legal framework of full extension of the Union's internal market to the EEA EFTA States. The obstacles and challenges arising in this context are well understood.

With respect to the EU-Swiss sectoral agreements, the legal framework is less clear-cut and, in particular, more limited with respect to the extension of the Union's internal market. Against this background, it is the suggestion of the present writer that the IMCO Committee, with respect to the Draft Resolution under discussion and in relation to Switzerland:

- Make clearer than at present in the title and the text of the Resolution that, in terms of the scope of the EU-Swiss bilateral law, the Union's internal market is not fully extended to Switzerland;
- Do not urge the EU-based distinction between free movement and immigration but rather emphasise the obligations of the partners under the FMP Treaty and the place of that agreement in the larger context of the bilateral relations;
- Address the issue of national preference that is demanded by certain Swiss political parties.

Annex:

Updated English translation of ***Chart 8*** *from* Christa Tobler & Jacques Beglinger, Grundzüge des bilateralen (Wirtschafts-)Rechts. Systematische Darstellung in Text und Tafeln, 2 volumes (Text and Charts), Zurich/St. Gallen: Dike 2013 (Charts together with Jacques Beglinger, Text by Christa Tobler), see www.eur-charts.eu.

[32] See e.g. 'Bürgerlicher Schulterschluss. Inländervorrang birgt rechtliche Gefahren' as well as ‚Heikler Aufruf zum Inländervorrang. Rückfragen nach dem bürgerlichen Schulterschluss zur Stärkung des Standortes Schweiz', Neue Zürcher Zeitung of 31 March 2015.

[33] 'Inländervorrang. Mogherini ermahnt die Schweiz', NZZ am Sonntag of 22 March 2015.