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INTERNAL MARKET BEYOND THE EU: EEA AND SWITZERLAND

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POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

INTERNAL MARKET AND CONSUMER PROTECTION

Internal Market beyond the EU: EEA and Switzerland

BRIEFING PAPER

Abstract

This briefing paper looks at the functioning of the extended Internal Market and examines two models of integration: the economic integration of the EU and Switzerland via sectoral bilateral agreements and the EEA agreement that governs relations between EU and the EEA states, Iceland, Norway and Liechtenstein.
The paper identifies challenges related to the agreements and points to ways to enhance the performance of the extended Internal Market.

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CONTENTS

LIST OF ABBREVIATIONS

ATA	Air Transport Agreement
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEA JPC	EEA Joint Parliamentary Committee
EC	European Community
EEC	European Economic Community
EESC	European Economic and Social Committee
EFTA	European Free Trade Association
ENISA	European Network and Information Security Agency
ERA	European Railway Agency
ESA	EFTA Surveillance Authority
ETS	Emission Trading System
EU	European Union
FMPA	Free Movement of Persons Agreement
FTA	Free Trade Agreement
IM	Internal Market
IMCO	Internal Market and Consumer Protection Committee of the European Parliament
IO	Swiss Integration Office
MRA	Mutual Recognition Agreement
TFUE	Treaty on the Functioning of the European Union
TUE	Treaty on the European Union
VAT	Value Added Tax

EXECUTIVE SUMMARY

There are several models of integration with the EU, with differing degrees of participation in the EU Internal Market. The most far-reaching form is that of the European Economic Area (EEA) which is largely parallel to EU law and interpreted in homogeneity with EU law. Another model is that of the EU and Switzerland. There are considerable institutional and practical differences between these two models of integration.

Functioning of the bilateral agreements with Switzerland

Relations between Switzerland and the EU are laid down in comprehensive sets of bilateral sectoral agreements. Each sectoral bilateral agreement is managed by a Joint or Mixed Committee which consist of representatives from the EU and Switzerland. Each Joint Committee is responsible for dispute settlement on issues related to the agreements and incorporating new legal provisions by altering the existing agreements via amending the agreement itself or by adding annexes. No surveillance authority is watching over the implementation of the agreements, nor is a court in place that guarantees unified interpretation of the agreements acting as last resort to settle disputes.

The EU-Swiss sectoral bilateral agreements still fall short of the level of integration that the EEA countries have reached with the EU. Sectoral bilateral agreements are more static in nature than the EEA Agreement. Their scope is also more limited, services for example are only partly covered. There are, however, areas where the scope is wider than that of the EEA agreement, e.g. the air transport agreement. There are several challenges observed in the extended Internal Market with Switzerland. Firstly, the management of the agreements is burdensome. Given the large number of Joint Committees communication between them is difficult. The agreements are non-dynamic with no built-in mechanisms to address future changes. Monitoring is hard as there is no official surveillance institution like ESA. Enforcement is also difficult, given that there are no official sanctions, no implementation deadlines and no court ruling over the sectoral bilateral agreements in a universal matter offering last resort settlements in all cases. Another complicating factor is the lack of information and notification of new EU legislation and a general lack of transparency. The Swiss experience difficulties with the fact that they can not participate in the decision making process and only have limited possibilities to shape decisions. There are also important temporal limits that prevent that bilateral law is in line with EU law on the Internal Market.

In sum, the material scope of the Swiss bilateral agreements that deal with aspects of the four freedoms are more limited than the scope of EU law on the internal market. Indeed, there appear to be important gaps in all areas except goods. The courts (both the Swiss courts and the Court of Justice) may interpret certain provisions of the bilateral agreements differently from EU law based on the argument that the bilateral law and the internal market are not comparable in that the internal market is more limited. The risk of divergent interpretations is inherent in the bilateral system, since there is no common supreme court or an otherwise common universal enforcement system.

Continuing the bilateral way and extending it to further areas is the likely way Swiss-EU relations will evolve in the near future. It seems inevitable however that some kind of dynamic element is included in the new agreements and the management of the Joint Committees is also likely to made less heavy. It is not unlikely that in the mid-term Switzerland would like to take the relationships to a next level and would join the EU.

Functioning of the EEA Agreement

The EEA EFTA states, Iceland, Norway and Liechtenstein are in principle a true part of the EU's Internal Market through the Agreement on the European Economic Area (EEA). Through this agreement, these countries also have participation rights in several EU programs and have representation in EU agencies. A unique feature of the EEA agreement is that it is highly dynamic, new EU Internal Market acquis is continuously being incorporated into the existing agreement. Decisions to incorporate EU legislation are taken in the EEA Joint Committee, consisting of representatives of the European Commission and their EEA EFTA counterparts coming from the standing committee. Compliance is monitored by the EFTA Surveillance Authority (ESA), and the EFTA court has competence concerning the implementation, application and interpretation of EEA rules.

In general, it is observed that the EEA agreement works well. Transposition deficits at 0.7% in these states can be considered to be relatively low, compared with the average transposition deficit in the EU Member States of 1.0%. Similarly, as regards to implementation, the situation is good and improving with a decrease in the number of infringement cases.

Challenges observed in the functioning of the extended Internal Market with the EEA states concern the fact that in general the management of the agreement is relatively cumbersome. Another challenge for the EEA is that new EU Internal Market legislation is often blurred with other policies that fall outside the scope of the EEA agreement. It was also observed that Parliaments and governments of the EEA countries are not informed and notified of new legislative proposals that fall in the scope of the EEA agreement. The fact that Iceland has applied for EU membership will pose a future challenge to the functioning of the agreement.

Recommendations in relation to Switzerland

The bilateral agreements should be updated and it should be explored to sign agreements in further areas. To improve relations and enhance the functioning of the sectoral bilateral agreements, there is a need to create political will, on the side of the EU as well as in Switzerland. Better cooperation and intensification of relations with all EU Institutions is necessary. The European Commission should notify the government and parliament of new legislative proposals that fall within the scope of the areas covered by the sectoral bilateral agreements and could also consider involving the Swiss more in the official EU decision shaping process. There is a need to ensure more transparency and to enhance communication, in particular between the Joint Committees. A common system of enforcement should be put in place. Lastly, Switzerland and the EU should look carefully at scenarios for future cooperation.

Recommendations in relation to EEA countries

To improve the functioning of the EEA Agreement, it is necessary to formalize the notification process of new legislative proposals that fall within the scope of the areas covered by the EEA Agreement. Involvement of Iceland, Norway and Liechtenstein in the decision shaping and the implementation phase should be enhanced. It could be considered to update the EEA agreement to take into account the extension of the EU Single Market into other areas.

1. INTRODUCTION

According to Art. 3(3) TEU, the European Union "shall establish an internal market" which, according to Art. 26(2) TFEU, "shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties". Further, according to Protocol No 27, "the internal market includes a system ensuring that competition is not distorted". The present briefing paper examines the question of how far the EU's internal market extends to the EEA EFTA countries, Iceland, Liechtenstein and Norway and to Switzerland.

The partial participation of Switzerland in the EU internal market is based on a large number of so-called "bilateral agreements"[1]. Such agreements are necessary because, in principle at least, the EU rules on the internal market deal with free movement within the EU only. Thus, there is no free importation of goods from third countries into the EU. Rather, the EU's external customs law (the Common Customs Tariff) as well as the EU's external trade law (the Common Commercial Policy law) apply. Further, EU law on the free movement of persons applies only to persons with the nationality of an EU Member State. Under these rules, persons with the nationality of a third country enjoy a right to access the employment or self-employment market in another Member State only if they are family members of EU nationals who themselves enjoy movement and residence rights. Outside this category, they might nevertheless be entitled to access the markets for employment and self-employment under unilateral EU legislation belonging to the area of freedom, security and justice (including e.g. the European Union Blue Card Directive).[2] As for the Treaty rules on the free movement of services, they apply to nationals of EU Member States only. The EU has so far not made use of the competence given to it under Art. 56(2) TFEU for the adoption of secondary law that would extend the provisions of the chapter on services to nationals of a third country who provide services and who are established within the EU. Indeed, it is only in relation to the free movement of capital that the Treaty rules are not limited to free movement within the EU but also include the movement of capital between the EU and third countries. However, the external dimension of the fourth freedom can only relate to obstacles arising on the side of the EU, to the exclusion of obstacles arising in a third country. Moreover, in relation to third countries EU law provides for the possibility of special safeguard measures, which may limit the right to free movement (Art. 64 TFEU).[3] Further, it may be that the centre of gravity of a particular case prevents the rules on the free movement of capital from being applicable.[4]

As a consequence of these limitations, where the EU and a third country wish a country to participate in the internal market, special rules will be necessary in the form of agreements to be concluded by the EU and the relevant country, or countries. In practice, several degrees of participation have developed. As is well known, the most far-reaching model is that of the European Economic Area (EEA) which is largely parallel to EU law and which, in particular due to the integrationist approach applied by the EFTA Court, is largely interpreted in homogeneity with EU law. Another important model is the Ankara Agreement between the EU and Turkey, which includes a customs union but much less far-reaching rules on persons and services. Considerably more modest are a number of partnership and cooperation agreements which do not grant market access rights but rather e.g. the right to equal treatment once persons have lawfully entered the market (e.g. the agreements between the EU and Morocco and Russia)[5].

[1] The widely accepted denomination is "bilateral agreements", but it should be noted that in addition to the European Communities (now European Union) and Switzerland, EU Member States are also parties to these agreements.
[2] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009 L 155/17.
[3] E.g. Case C-157/05 *Winfried L. Holböck v Finanzamt Salzburg-Land* [1997] ECR I-4051.
[4] E.g. Case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521.
[5] For more information, see the European Commission website on the external dimension of the internal market http://ec.europa.eu/internal_market/ext-dimension/index_en.htm

On the scale of different degrees of integration of third countries as just mentioned, the agreements concluded by the EU (and in some cases its Member States) and Switzerland are situated somewhere between the law of the EEA on the one hand and the Ankara Agreement on the other hand. Overall, they go less far than EEA law (though in some respects they go further, e.g. through the association of Switzerland with the Schengen acquis) and they go further than the Ankara Agreement (though in some respects they go less far, e.g. the bilateral law does not provide for a customs union between the EU and Switzerland). In relation to the EEA, it must be remembered that the Swiss Government had signed this agreement which, however, was voted down by the Swiss people in 1992. Against this background the Court of Justice of the European Union, in the recent case of Grimme[6] (para. 27) characterised the degree of integration reached through the agreements concluded by the EU and Switzerland in the following manner:

> "The Swiss Confederation, by its refusal to join the EEA, 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 Community and its Member States in specific areas. Therefore, 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 […]."

It is against this background that the present paper analyses the selective participation of Switzerland in the EU's Internal Market and the functioning of an extended Internal Market via another model, namely that taken by the EEA EFTA Countries, Iceland, Norway and Lichtenstein. In particular, the briefing paper will elaborate on the differences between these two models and underline the challenges observed within each form. The paper will also point to ways to enhance the functioning of an extended Internal Market in the case of Switzerland and the EEA states.

[6] Case C-351/08 *Christian Grimme v Deutsche Angestellten-Krankenkasse*, judgment of 12 November 2009, n.y.r.

2. EU RELATIONS WITH SWITZERLAND AND THE EEA STATES

2.1. Relevant agreements and the existing legal framework between Switzerland and the EU

Switzerland and the European Union (EU) have a special relationship. While Switzerland has chosen not to become a member of the EU, close economic integration between these two parties is apparent. Relations are laid down in comprehensive sets of bilateral sectoral agreements. These agreements concern mostly economic issues, although one can see a move towards including other fields like justice and home affairs as well. Located in the heart of the European Union, Switzerland is the fifth most important trading partner of the EU.[7] From the other side, the EU is the number one trading partner for the Swiss, accounting for almost 60% of total exports and 70% of imports.[8]

Despite a high level of economic integration framed by these bilateral agreements, it is clear that the Swiss value their independence and sovereignty. Since the end of the Second World War preservation of the neutrality status was the main aim of the Swiss government. The objective was to support the European integration process, while ensuring its neutrality and guaranteeing full sovereignty. .

Yet, there is no other third country that has concluded so many agreements with the EU as Switzerland. Some 120 bilateral agreements with the EU are in place of which 20 are decisive for the relations[9]. Contractual agreements date back to the 1950s, when a consultation agreement between the High Authority of the European Coal and Steel Community (ECSC) and the Swiss Federal government was signed. This agreement concerned the transportation of steel from the countries of the European Communities through Switzerland. The next agreement that should be noted here was the Free Trade Agreement of 1972. The aim of this free trade agreement between the European Economic Community and the Swiss confederation was "to consolidate and to extend, upon the enlargement of the European Economic Community, the Economic Relations existing between the Community and Switzerland and to ensure, with due regard for fair conditions of competition, the harmonious development of their commerce for the purpose of contributing to the work of constructing Europe…".[10] To realise this, parties agreed to progressively remove obstacles to free trade agreed upon in the agreement.

During the late 1980s and early 1990s the Swiss government steered towards further economic integration with surrounding countries by taking part in negotiations of the agreement on the European Economic Area (EEA). On 2 May 1992, the agreement was signed and with this gained momentum the Swiss government applied for accession to the European Communities. On 6 December 1992, however, this move towards further integration with Europe was halted by a "no vote" in a referendum on the ratification of the EEA agreement. As a reaction the Swiss government decided to postpone further EU accession talks. It should be noted though that this application is still open and valid.[11]

[7] European Commission (DG Trade). 22 September 2009. "Switzerland - EU bilateral trade and trade with the world".
[8] ibid.
[9] Swiss Integration Office. August 2009. Les principaux accords bilatéraux Suisse-UE, Schweizerische Eidgenossenschaft.
[10] EC Switzerland Free Trade Agreement (1972). Official journal no. L 300, 31/12/1972 p. 0189 http://trade.ec.europa.eu/doclib/docs/2007/january/tradoc_133045.pdf
[11] Source: A letter from Le Conseil Federal Suisse, Bern, 20 May 1992.

In 1993, after the negative referendum, the Swiss government inquired about the possibility to open negotiations on sectoral agreements of interest to Switzerland. The EU accepted this, insisting however on a balanced approach and a link between the sectoral agreements by a guillotine clause (see below).[12] Agreements were reached in important areas as the free movement of persons, land transport and technical barriers to trade.[13] Further integration via sectoral integration was the direct consequence of the Swiss no vote to the EEA agreement.

In 1999 negotiations came to an end and agreements were signed in seven different areas. This combined package of sectoral bilateral agreements is often referred to as Bilateral I. An important element of this package is that these different agreements are linked with a termination-clause (or guillotine-clause), which refers to the fact that all agreements come in force at the same time and that if one of them is terminated, then so will the others. This element creates pressure for Switzerland to continuously implement and take over relevant Community legislation in the areas agreed upon.

Between 2001 and 2004, a new package of sectoral bilateral agreements was discussed, resulting in nine agreements and one declaration of intent referred to as Bilateral II. Amongst the areas covered, were environment, the Schengen acquis, the Dublin Declaration and pensions.[14] The Bilateral II package was signed in 2004, further enhancing cooperation and fuelling integration between Switzerland and the EU.

Each sectoral bilateral agreement is managed by a Joint or Mixed Committee which consist of representatives from the EU and Switzerland. The in total 27 Joint Committees make decisions on a technical level regarding the existing 120 bilateral agreements[15] by consensus.[16] Most of these Joint Committees meet once or twice a year, a minimum which is often laid down in the specific bilateral agreement. Some Joint Committees only meet upon request as for instance the Joint Committee that deals with the agreement on environment.[17] Agenda setting powers are with the chairmanship of the committee which rotates between Switzerland and the EU side. Although the tasks of these Joint Committees can slightly differ for the reason that they each have their own rules of procedure and specific provisions to their tasks, they are quite similar in practice. Their primary function is to ensure proper implementation of the sectoral bilateral agreements. This means resolving misunderstandings and differences in interpretation of the provisions of the agreement through diplomatic efforts.[18] It concerns not only dispute settlement on issues related to the agreements, but also the important task of incorporating new legal provisions by altering the existing agreements via amending the agreement itself or by adding annexes. As mentioned above, dispute settlement is also done in the Joint Committees via diplomatic efforts. In addition, it should be noted here that there is no surveillance authority watching over the implementation of the agreements, nor a court guaranteeing unified interpretation of the agreements or acting as last resort to settle long-lasting disputes.

[12] Communication from the Commission. Future relations with Switzerland, Brussels. October 1993. COM (93) 486 final.
[13] See Annex III. Overview of EU - Swiss bilateral agreements.
[14] ibid.
[15] For a list of all agreements in force on 1 April 2009 can be found on the website of the Swiss Integration Office; http://www.europa.admin.ch/dokumentation/00438/00464/index.html?lang=en; see also http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=3820&countryName=Switzerland.
[16] A list of the decisions of the various Joint Committees, including those changing the law, can be found on the website of the Swiss Integration Office, http://www.admin.ch/ch/d/eur/gemaus.html.
[17] Vahl, M. & Grolimund, N. (2006), Integration without Membership - Switzerland's bilateral agreements with the European Union, CEPS, Brussels, p. 34.
[18] Vahl, M. & Grolimund, N. (2006), Integration without Membership - Switzerland's bilateral agreements with the European Union, CEPS, Brussels, p. 37.

The Swiss Integration Office FDFA/FDEA (IO) was created in 1961 to monitor the European integration process and assess its likely consequences for Switzerland.[19] The IO is in charge of coordination of relations with the EU and takes part in all sectoral negotiations, in which its role can be compared to that of DG RELEX of the European Commission.[20] The IO also oversees whether new Swiss legislation is compatible with relevant EU law. This does not mean that Swiss new legislation *has* to be compatible with EU law.[21] In this task, the IO works closely together with the Swiss Department of Foreign Affairs and the Federal Department of Economic Affairs. Since 1988, the Federal Council decided this "acquis screening" has to be applied to every draft of new Swiss legislation.[22] For every new piece of Federal legislation this check has to be performed. In areas where bilateral agreements apply, the relevant Swiss Department has to show that the new legislation is in line with the sectoral agreements. In areas outside the scope of the bilaterals, this check is also obligatory. In this case, however, Swiss law may deviate from EU law, if there are valid reasons to do so (special features of economic actors or unique market circumstances for instance). It has to be noted here, that this compatibility check can also be executed by the Legal Services of the concerned Federal Departments. In addition, the IO provides information on Switzerland's European policy and European Integration.

Due to the bilateral nature of the relations between the EU and Switzerland, the Swiss have no say in the decision making process of the EU. Naturally, the Swiss are able to provide input in the decision shaping phase via some formal and informal channels. However, Switzerland does not have official participation rights via an observer status in the decision-making process or participation rights in EU agencies that for instance, the EEA EFTA countries, Iceland, Liechtenstein and Norway, do enjoy.

2.2. EU-EEA relations

While Switzerland is more and more integrated with the EU via the bilateral agreements, EEA EFTA states Iceland, Norway and Liechtenstein are in principle a true part of the EU's Internal Market through the Agreement on the European Economic Area (EEA). The Agreement that came into force on 1 January 1994 ensures the free movement of goods, services, people and capital between these countries and the EU. It also covers "flanking policies" such as consumer protection, social policy and some environmental policies. The EEA does not cover the EU's policies in the field of the customs union, trade, common foreign and security policy and the monetary union. It does also not cover Justice and Home Affairs, although it should be noted that the EFTA countries are a part of the Schengen area that does concern this field. The agreement also excludes common agricultural and fishery policies of the EU, although some provisions of trade in agricultural and fish products are included in the EEA agreement.[23] The EEA agreement also provides these countries with participation rights in several EU programs and representation in EU agencies.

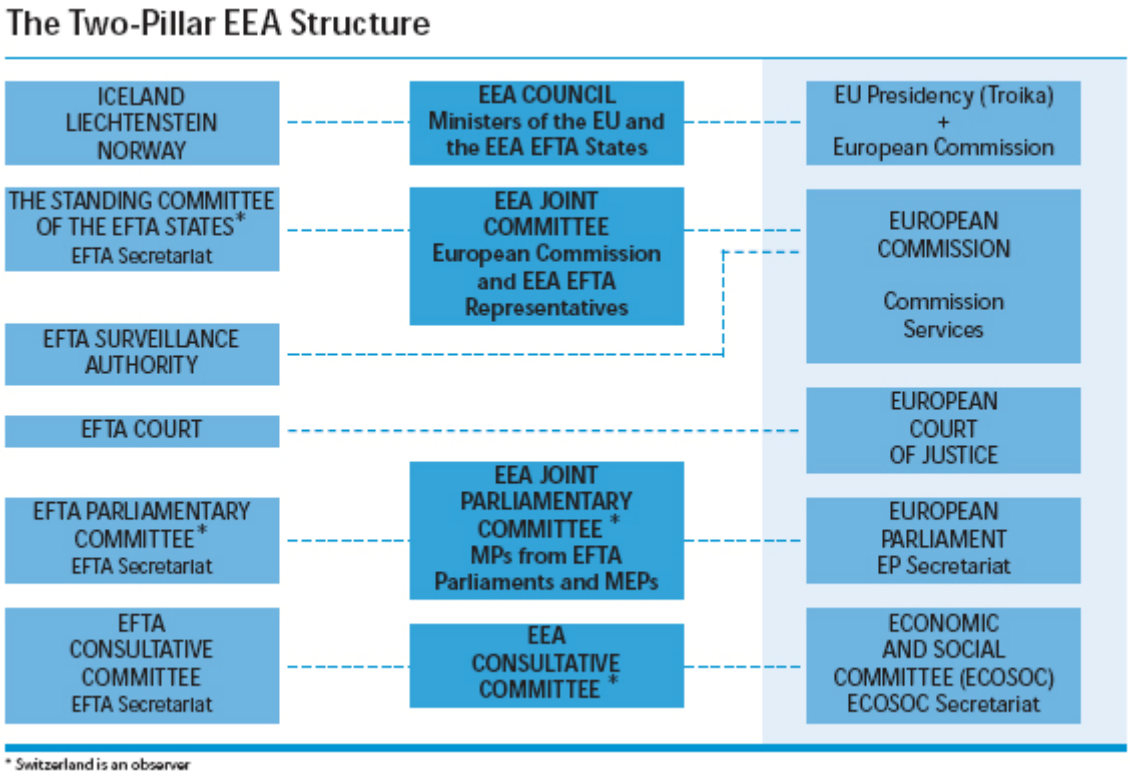
A unique feature of the EEA agreement is that it is highly dynamic. In order to ensure a homogenous Internal Market, new EU Internal Market acquis is continuously being incorporated into the existing agreement. In other words, the EEA agreement is "updated" unless either side should decide not to include new EU rules and regulations. Since the entry into force of the agreement in 1994, almost 6000 new legal acts have been incorporated by amending the many annexes and protocols.[24] In 2009, 284 new acts were incorporated in the EEA Agreement.[25]

[19] Website of the Swiss Integration Office. http://www.europa.admin.ch/index.html?lang=en
[20] Mr Tilman Renz. Swiss Integration Office, Bern.
[21] ibid.
[22] ibid.
[23] EFTA Secretariat, 2009. Retrieved from http://www.efta.int/content/eea/eea-agreement.
[24] EFTA Bulletin. Decision Shaping in the European Economic Area, 1 March 2009.
[25] Interview with Ms Tuula Nieminen (December 2009). EFTA Surveillance Authority.

Another special element of the EEA agreement is that it entails multilateral relations whereas relations between the EU and Switzerland are bilateral. The EEA EFTA states, i.e. Iceland, Norway and Liechtenstein and the EU have all to agree to an update of the existing agreement. This means that the national parliaments and government have to agree and it has to be ensured that the new legislation is compatible with the constitutional requirements. As all three countries have to agree and are required to speak with one voice, this agreement is similar to the model of a regular association agreement, the EU has with other neighbouring countries.[26]

Due to the dynamic nature of the EEA agreement, management is relatively cumbersome and many experts and institutions are involved. The management has a so-called two-pillar structure (Figure 1). The EEA Council, consisting of relevant ministers of the EU and the EEA EFTA states, meets twice a year and provides political impetus for the development of the Agreement and guidelines for the EEA Joint Committee. The Council of the EEA agreement has no formal decision making power, it only provides input for the Joint Committee, where the decisions on incorporating new EU internal market rules and regulations are taken. The Presidency of the Council rotates between the EU and the EEA EFTA states. To provide input for the guidelines offered by this Council, the EEA Joint Committee prepares a progress report on its activities for each meeting of the Council. For strategy formulations, the Council also takes into account input of the EEA Joint Parliamentary Committee and the EEA Consultative Committee, bodies which will be elaborated on below.

Figure 1.



Source: Website of the EFTA Secretariat.

[26] Vahl, M. & Grolimund, N. (2006), Integration without Membership - Switzerland's bilateral agreements with the European Union, CEPS, Brussels, p. 76.

When it comes to decision-making on incorporating EU rules and regulations into the EEA Agreement the sole competence lies with the EEA Joint Committee. In this Committee, representatives of the European Commission and EEA EFTA representatives coming from the standing committee, supported by the EFTA Secretariat, analyse and discuss new EU legislation and make the final decision whether to incorporate certain legislation or not. In Article 6 of the EEA Agreement it is underlined that relevant rulings of the ECJ prior to the date of signature of the Agreement will apply. ECJ case law subsequent to this date is not binding on the courts of the contracting parties.[27] The Joint Committee has the obligation to include this legislation by amending the annex of the EEA agreement. In the case of Switzerland, the relevant Joint Committee has the opportunity to consider including the new EU secondary legislation in the existing sectoral bilateral agreements.[28] These negotiations take place on a monthly basis. In this EEA Joint Committee, Switzerland has an observer status.

Input for this decision making process is provided by the EEA Joint Parliamentary Committee consisting of Members of the EFTA Parliaments and Members of the European Parliament. Information and consultation is also provided by the EEA Consultative Committee consisting of national experts and representatives from the European Economic and Social Committee (EESC). Administrative support during the whole process is provided by the Commission services, the EFTA Secretariat and the EU Council Secretariat.

Once an EU legislative acts is deemed relevant for the EEA Agreement, i.e. it relates to the Internal Market, a decision is adopted in the EEA Joint Committee and subsequently it is implemented by the Parties. In the case of failure to implement or refusal to implement, the EEA Joint Committee has a limited role. The only tangible sanction is provisional suspension of the affected part of the EEA agreement. However, this would be a very drastic measure and according to the knowledge of our interviewees, this has never happened and it is unlikely to happen in the future.[29] In the case of disagreement, the focus is rather on political solutions via diplomatic efforts. One can observe that opt-outs in general are avoided because the EEA EFTA states have an economic interest to preserve the homogeneity of the markets with the EU.

The two-pillar structure can also be seen in the implementation and monitoring phase. From the EU side the European Commission does the monitoring and the European Court of Justice ensures enforcement. The compliance of the EEA rules by Liechtenstein, Iceland and Norway is monitored by the EFTA Surveillance Authority (ESA). The ESA has a regular data exchange with the European Commission concerning inter alia the Internal Market Scoreboard. The EFTA court plays the same role as the European Court of Justice in the areas agreed upon in the EEA agreement.

[27] Harbo, Tor-Inge. (2009). The European Economic Area Agreement: A Case of Legal Pluralism. In Nordic Journal of International Law.
[28] This will be elaborated on further in Chapter 3.2.1
[29] Interview with Ms Tuula Nieminen (December 2009). EFTA Surveillance Authority.
Interview with Mr Lars Erik Nordgaard. (January 2010) EFTA Secretariat.

3. THE FUNCTIONING OF AN EXTENDED INTERNAL MARKET WITH SWITZERLAND

3.1. The material scope of bilateral law

Over time, the bilateral law that regulates the legal relationship between the EU (originally: the European Communities) and Switzerland has grown to a large number of agreements and related protocols, of which more than 120 are at present in force. Of these, 20 are considered to form the nucleus of the bilateral law.[30] In the following, the main agreements belonging to this nucleus that relate to the four freedoms are mentioned. It should be added that in some agreements the provisions on free movement are complemented by provisions on competition, both concerning the conduct of undertakings and state aid. Important examples are the Free Trade Agreement of 1972 (FTA)[31] and the two Transport Agreements of 1999, one on air transport[32] and the other on rail and road transport.[33] Accordingly, and unlike in EEA law, there is no encompassing system of competition law. Competition law is not further discussed in this paper.

3.1.1. Free movement of goods

In relation to the free movement of goods, the so-called Free Trade Agreement (FTA) of 1972 (FTA) is particularly important. According to its Art. 2, this agreement covers products originating in the EU or Switzerland which (i) fall within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System[34] (excluding the products listed in Annex I to the Agreement), (ii) which are specified in Annex II to the Agreement, and (iii) which are specified in Protocol No 2. The products covered are essentially industrial products, but also works of art, collectors pieces and antiques (chapter 97 of the Harmonized Commodity Description and Coding System). Processed agricultural goods were included through an Agricultural Agreement of 2004.[35] Other (non-processed) agricultural goods are covered by the Agreement on trade in agricultural products of 1999.[36] Further, the EU and Switzerland have recently closed negotiations on a new agreement on the protection of geographical origins in the field of agriculture and foodstuffs.[37] In view of the future, it should be noted that in 2008 the EU and Switzerland entered into negotiations concerning a new agreement on agriculture, food security, product security and public health.

[30] A list of all bilateral agreements in force on 1 April 2009 can be found on the website of the Swiss Integration Office; http://www.europa.admin.ch/dokumentation/00438/00464/index.html?lang=en; see also http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=3820&countryName=Switzerland.

[31] Agreement between the European Economic Community and the Swiss Confederation, OJ 1972 L 300/189.

[32] Agreement between the European Community and the Swiss Confederation on Air Transport, OJ 2002 L 114/73.

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

[34] For the nomenclature, see Regulation 948/2009/EC amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ 2009 L 287/1. The international nomenclature system has been established on the basis of the Convention on the Harmonized Commodity Description and Coding System, as elaborated under the auspices of the World Customs Organization.

[35] Agreement 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.

[36] Agreement between the European Community and the Swiss Confederation on trade in agricultural products, OJ 2002 L 114/132.

[37] See: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1953&format=HTML&aged=0&language=EN&guiLanguage=en.

Also, in the area of customs law there is a new Agreement on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures (Agreement on the Carriage of Goods).[38] Also relevant in the context of goods is the Agreement on conformity assessments.[39]

3.1.2. Free movement of persons

Natural persons

In relation to persons, the main instrument is the Agreement on the free movement of persons of 1999 (FMPA).[40] It covers in the first place natural persons in their capacity of workers, and the self-employed as well as family members of these persons, and further persons not exercising an economic activity (e.g. students). In the system of the bilateral law and as far as border controls are concerned, the rules on the free movement of natural persons are complemented by the Schengen Agreement of 2004[41] through which Switzerland is made part of the Schengen area. Finally, for one, rather particular and quite small group of persons, namely pensioners who are former officials of the EU and who reside in Switzerland, there is an Agreement on the avoidance of double taxation of 2004[42] which complements the general rules on free movement.

Legal persons: companies

Legal persons (i.e. companies) are not covered by the FMPA as far as the free movement of *persons* is concerned.[43] This is, of course, a major gap in the system as compared to EU law. However, to a limited degree, legal persons enjoy rights to establishment in other contexts of bilateral law. Thus, the Agreement on direct insurance of 1989[44] allows agencies and branches of undertakings whose head office is situated in the territory of one of the Contracting Parties to take up or pursue the self-employed activity of direct insurance other than life assurance, subject to the rules of the Agreement (which includes notably a system of compulsory authorisation).

Similarly, Art. 4 of the Air Transport Agreement of 1999 prohibits restrictions in the sector on the freedom of establishment of nationals of an EU Member State or Switzerland in the territory of any of these States, including in particular the rights to set up agencies, branches and subsidiaries as well as to manage undertakings, in particular companies or firms on a non-discriminatory basis. Practical examples are the participation in the capital of the (former) Belgian company Sabena by the (former) Swiss company Swissair and the participation in the capital of the Swiss company Swiss International Airlines by the German company Lufthansa. It should be noted that under EU law, such investments fall under the category of establishment only if they lead to a decisive influence (otherwise the rules on the free movement of capital apply).[45]

[38] 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).
[39] Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment, OJ 2002 L 114/369.
[40] 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, OJ 2002 L 114/6.
[41] 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, OJ 2008 L 53/52.
[42] Not published in the Official Journal, for Switzerland: Abkommen vom 26. Oktober 2004 zwischen dem Schweizerischen Bundesrat und der Kommission der Europäischen Gemeinschaften zur Vermeidung der Doppelbesteuerung von in der Schweiz ansässigen ehemaligen Beamten der Organe und Agenturen der Europäischen Gemeinschaften, SR 0.672.926.81.
[43] Regarding services, see below B.III.
[44] Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance, OJ 1991 L 205/3.
[45] See Chart 7 in Annex V to this paper.

Public service exemption

Similar to EU law, the parties to the FMPA are allowed to refuse non-nationals access to employment in the public service that involves the exercise of public power and is intended to protect the general interests of the state or other public bodies (Art. 10 of the Annex I attached to the FMPA). The same applies to the self-employed (Art. 16 of the Annex I attached to the FMPA).

3.1.3. Free movement of services

In the system of the bilateral law, the picture is most complex as far as the free movement of services is concerned. There is no general and encompassing agreement on the free movement of services. There were plans for negotiations on this matter, which, however, never materialised. As a result, the free movement of services is covered by the bilateral law only very selectively and under different instruments.

For certain particular sectors there are specific agreements, including in particular the already mentioned Transport Agreements of 1999 (air transport as well as rail and road transport). Though not directly dealing with free movement, the Media Agreement of 2004[46] and the Research Agreement[47] may also be relevant in this context.

Outside the scope of such specific agreements, the FMPA of 1999 covers services, though only in a limited manner. First, the right to provide services exists for a period not exceeding 90 days' of actual work in a calendar year and only in relation to the provision of services "in the territory of the other Contracting Party" (Art. 5 FMP). Art. 22(3) of Annex I attached to the FMPA excludes the parties' provisions in force at the time of the entry of the agreement in relation to (i) the activities of temporary and interim employment agencies and (ii) financial services where provision is subject to prior authorisation and the provider to prudential supervision. Also excluded are activities involving the exercise of public authority (Art. 22(1) of Annex I attached to the FMPA). The service provisions of the FMPA cover both natural and legal persons (i.e. companies), Art. 18 of Annex I attached to the FMPA). Further, the Agreement mentions both services providers and service recipients (Art. 17 FMPA et seq.; though it will be seen that it is debated how far the rights of the latter category extend).[48] Also relevant in the context of the provision of services is the Agreement on public procurement of 1999.[49]

3.1.4. Free movement of capital

Different from the other three freedoms, the free movement of capital is in principle not covered by the bilateral law. Notably, there are no provisions on capital investments in companies that do not lead to a decisive influence (which cases fall under the rules on the free movement of capital under EU law).[50] A minor element concerning the free movement of capital may be found in Art. 25 of Annex I attached to the FMPA, concerning the purchase of real estate, including holiday homes, which in some cases is not linked to the economic activity of the person in question (i.e. which allows for the purchase of such property merely as a form of investment, rather than as an element necessary for the exercise of the economic activity).

[46] Agreement between the European Community and the Swiss Confederation in the audiovisual field, establishing the terms and conditions for the participation of the Swiss Confederation in the Community programmes MEDIA Plus and MEDIA Training, OJ 2006 L 90/23.
[47] 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, OJ 2007 L 189/26.
[48] See below D.III.2.b.
[49] Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement, OJ 2002 L 114/430.
[50] See again Chart 7 in Annex V to this paper.

3.2. The temporal scope of bilateral law

The scope of the bilateral law as compared to EU law on the internal market is limited not only on the level of its material scope, but also in a temporal perspective: in principle, the bilateral law is static in nature, i.e. it reflects the state of EU law at the time when the relevant agreement was concluded. Further, in the specific case of the FMPA, there were, or still are, as the case may be, certain temporal limits concerning the application of the agreement or of certain of its provisions in relation to those EU Member States that acceded to the Union in 2004 and 2007, respectively.

3.2.1. The status of primary and secondary law

Where bilateral law was intended to be, in terms of its content, parallel to EU law (previously: EEC or EC law, as the case may be), as a rule the content of the primary law contained in the agreements themselves as well as of the secondary EU law that may be part of a given agreement through references to this legislation reflects the content of the corresponding EU law as it was in force at the time of the conclusion of the agreement. There is one notable exception to this, which, however, does not concern economic rights to free movement as such, namely the Schengen Agreement of 2004. Outside this exception, the general rule is that, unlike EEA law,[51] the bilateral law is not construed to develop in a dynamic manner alongside EU law. In some cases, limited adaptation possibilities are given to the Joint Committees that are in charge of the various agreements.[52] Examples can be found in Art. 23(4) in connection with Arts. 23(4) and 30(2) Air Transport Agreement (in relation to the Annex), Art. 18 FMPA (in relation to Annex II on social security and Annex III on professional qualifications, but not in relation to Annex I on free movement), Art. 39(6) of the Insurance Agreement (in relation to the provisions of the Agreement itself) and Art. 21(2) of the Agreement on the Carriage of Goods (in relation to both the Annexes and part of the agreement).

It should be noted that there is a qualitative difference in this regard between the bilateral law and the EEA Agreement. Under the latter, the Joint Committee is *obliged* to amend the Annex to the Agreement (Art. 102(1) EEA: "shall take a decision concerning an amendment of an Annex to this Agreement"), whilst under the bilateral law the Joint Committees are given the *possibility* to do so, without there being a legal obligation within the meaning of the EEA Agreement. It is for that reason that the bilateral law can be labelled as "in principle static" ("in principle" indicating that adaptations are nevertheless possible).It is obvious that this situation can lead to an uneven development of EU law and bilateral law.

First, adaptation mechanisms take time. For example, the Joint Committee in charge of the FMPA noted already in its meeting in 2006 a growing discrepancy between the provisions of the FMPA and the relevant provisions of Community (now: Union) law, which develops in a dynamic manner.[53] Four particularly important pieces of secondary EU law may serve as examples, namely Regulation 883/2004/EC on the coordination of the national social security systems,[54] Directive 2004/38/EC on movement and residence of EU citizens and their families,[55] Directive 2005/36/EC on the mutual recognition of professional qualifications[56] and Directive 2006/123/EC on services in the internal market[57] (the so-called Services Directive). Of these, only Regulation 883/2004/EC has formally been earmarked as relevant for Switzerland when it was published in the Official Journal.

[51] See Annex IV to this paper.
[52] A list of the decisions of the various Joint Committees, including those changing the law, can be found on the website of the Swiss Integration Office, http://www.admin.ch/ch/d/eur/gemaus.html.
[53] See http://www.news.admin.ch/dokumentation/00002/00015/index.html?lang=de&msg-id=6049.
[54] Regulation 883/2004/EC on the coordination of social security systems, OJ 2004 L 166/1.
[55] Directive 2004/38/EC 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 L 158/77.
[56] Directive 2005/36/EC on the recognition of professional qualifications, OJ 2005 L 255/22.
[57] Directive 2006/123/EC on services in the internal market, OJ 2006 L 376/36.

In fact, all of them except the Services Directive replace earlier legislation that is part of the FMPA, but so far none of them has been made part of the bilateral law. Regulation 883/2004/EC concerns Annex II to the FMPA. It will apply in the EU as of 1 May 2010 and has not yet formally been made part of the FMPA. Directive 2005/36/EC concerns the Annex III to the FMPA. The Swiss Government has decided to accept this new piece of legislation but the necessary adaptation of the relevant annex attached to the FMPA has yet to be effected.[58] Conversely, the Services Directive and Directive 2004/38/EC concern Annex I, in relation to which the Joint Committee has no competences. In addition, given that the bilateral law covers services only very selectively, it is unlikely that Switzerland would be willing to take it over. As for Directive 2004/38/EC, it is to some degree based on the legal concept of EU citizenship which, obviously, is not part of the bilateral law. Nonetheless, in practice Directive 2004/38/EC is particularly important because in various respects it goes further than the previous legislation on movement and residence and family members on which the FMPA is based. For example, Art. 2(2) of the directive expands the concept of family members to include, under certain conditions, same sex partners. Conversely, the same is not true under the bilateral law.

Second, a problematic situation of a different type may occur where the EU adopts new legislation which is not part of the bilateral law, without there being a formal adaptation mechanism. A good example is the EU's REACH legislation,[59] which has led to fears in Switzerland about new trade barriers in relation to goods.[60]

3.2.2. Temporal limits in relation to the interpretation of bilateral law

A further important element concerning the, in principle, static nature of the bilateral law relates to the interpretation of its provisions. Some agreements contain explicit provisions that state temporal limits in this respect. There are two prime examples, namely Art. 16(2) FMPA and Art. 1(2) of the Air Transport Agreement (ATA).

Temporal limits under the Air Transport Agreement

According to Art. 1(2) ATA, "the provisions laid down in this Agreement as well as in the regulations and directives specified in the Annex shall apply under the condition set out hereafter. Insofar as they are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice and the Commission of the European Communities given prior to the date of signature of this Agreement. The rulings and decisions given after the date of signature of this Agreement shall be communicated to Switzerland. At the request of one of the Contracting Parties, the implications of such latter rulings and decisions shall be determined by the Joint Committee in view of ensuring the proper functioning of this Agreement."

[58] See http://www.news-service.admin.ch/NSBSubscriber/message/de/27496.

[59] Regulation 1907/2006/EC concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ 2006 L 396/1, and Directive 2006/121/EC amending Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances in order to adapt it to Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency, OJ 2006 L 396/850–856.

[60] See the discussions in the Joint Committee on this matter, http://www.news-service.admin.ch/NSBSubscriber/message/de/30503.

A first example in this context is provided by the Commission's decision concerning the dispute between Germany and Switzerland on air noise.[61] Here, the Commission refers to the Court of Justice's decision in the case *Malpensa* (2001),[62] according to which Art. 8 of Regulation 2408/92/EEC[63] prohibits not only discrimination on grounds of nationality in relation to air transport services but also restrictions in a broader sense, i.e. restrictions within the meaning of e.g. the Court's decisions in the cases *Säger* (1991)[64] and *Bosman* (1995).[65] However, according to the Commission this interpretation does not apply in the framework of the bilateral Air Transport Agreement due to the fact that the Court's decision in the case *Malpensa* was handed down *after* the signing of the Air Transport Agreement. An action for annulment of the Commission Decision brought by Switzerland, in which this issue may come up, has been pending at the General Court for some time.[66]
A second example concerns the rights of air passengers. On 19 November 2009, the Court of Justice held in *Sturgeon* (2009)[67] that the right to compensation under Regulation 261/2004/EC in the event of the cancellation of a flight also applies in the event of a delay of the flight, even though the wording of the regulation does not expressly say so. In 2009, Regulation 261/2004/EC has been made part of the bilateral law on air transport.[68] Nevertheless, it is quite conceivable that in a future case involving this issue in Switzerland the argument will be made that the Court's interpretation of the regulation in *Sturgeon* is not binding on Switzerland because the relevant case law dates from much later than the signature of the agreement (or than the inclusion of the Regulation into the system of the agreement).

Temporal limits under the Agreement on the Free Movement of Persons

In the FMPA, Art. 16(2) provides: "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 case law of the Swiss Federal Tribunal of the past years has shown that this court does not interpret in a formal manner the time limit indicated in Art. 16(2) FMPA. Rather, it will also consider, and follow, later case law of the Court of Justice if it contains no more than a clarification or specification of case law that was handed down before the signing of the FMPA. However, if compared with the markedly integrationist approach followed by the EFTA Court in relation to EEA law, the Federal Tribunal's approach is clearly more restrained.

However, in some cases the Federal Tribunal appears to be willing to consider even case law that has been handed down after the signing of the FMPA and that does contain an interpretation hitherto not evident from the Court's case law. An interesting example is provided by the case *Akrich* (2003)[69] where the Court held that a third-country national in the situation of Mr Akrich was not entitled under the then valid EC law on family rights to join his wife in the EU without previously having been lawfully resident in the EU.

[61] Directive 2005/36/EC on the recognition of professional qualifications, OJ 2005 L 255/22.
[62] Case C-361/98 *Italy v Commission* [2001] ECR I-385.
[63] Regulation 2408/92/EC of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ 1992 L 240/8.
[64] Case C-76/90 *Manfred Säger v Dennemeyer* [1991] ECR I-4221.
[65] Case C-415/93 *Union Royale Belge des Sociétés de Football v Jean-Marc Bosman* [1995] ECR I-4921.
[66] Case T-319/05 *Swiss Confederation v Commission*, pending.
[67] Joined cases C-402/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH* (C-402/07), *Stefan Böck and Cornelia Lepuschitz v Air France SA* (C-432/07), judgment of 19 November 2009, n.y.r.
[68] Decision of the Joint Committee of 7 July 2009, in force in Switzerland since 1 August 2009.
[69] Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607.

The Federal Tribunal[70] followed this interpretation, based on the argument that it was not appropriate to give the FMPA a broader meaning than the Court of Justice gave to the relevant EU law. After having kept to this approach for some time,[71] the Federal Tribunal changed its case law in September 2009,[72] in order to follow the Court of Justice's judgment in the more recent case *Metock* (2008),[73] which clarified that *Akrich* had not in fact set up a general requirement of previous lawful residence in the EU. In doing so, the Federal Tribunal stated that it was not obliged to follow *Metock* given the date of this judgment, but that it did so nevertheless in the interest of an area of free movement that is, as far as possible, legally uniform.[74]

Temporal arguments in other contexts

In practice, temporal aspects concerning alleged limits of a parallel interpretation are sometimes also argued in contexts where the relevant agreement does not contain any provision to this effect. An example is provided by the dispute on company taxation between the Commission and Switzerland. The dispute concerns the Commission's allegation that certain cantonal company tax regimes infringe Art. 23(1) (iii) FTA.[75] In Switzerland, this allegation was countered by the argument that when the Free Trade Agreement was signed in 1972 it was not yet clear that the rules of EEC primary law (i.e. the rules on free movement and competition, including state aid) also apply in the field of income taxation.

3.2.3. Entry into force of the Agreement on the free movement of persons in relation to the EU Member States that joined the Union in 2004 and 2007

A particularly important temporal limit in relation to the FMPA is due to the fact that its application to the Member States that joined the EU in 2004 and 2007, respectively, had to be secured through special Protocols that were attached to the Agreement (the so-called Protocols I[76] and II).[77] It is only with the entry into force of these Protocols that the FMPA also applied to the new Member States, i.e. as of 1 April 2006 in relation to the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, and as of 1 June 2006 in relation to Bulgaria and Romania. This situation not only meant that for some time after their accession the legal situation of the new Member States was different from that of other Member States, it also implied an unequal extension of the internal market in the relationship between the EU and Switzerland.

[70] See Federal Tribunal Decision 130 II 1.
[71] Federal Tribunal Decisions 134 II 10 and 2C_587/2008 of 4 December 2008.
[72] Federal Tribunal Decision 2C_196/2009 of 29 September 2009.
[73] Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.
[74] Federal Tribunal Decision 2C_196/2009 of 29 September 2009, para. 3.6.2.: "Es sind keine triftigen Gründe erkennbar, weshalb es innerhalb der Europäischen Gemeinschaft und in deren Verhältnis mit der Schweiz zwei unterschiedliche Freizügigkeitsregelungen geben sollte. Das Interesse an einer parallelen Rechtslage und mithin an einem möglichst einheitlichen Freizügigkeitsraum geht vielmehr vor."
[75] Commission Decision of 13 February 2007 on the incompatibility of certain Swiss company tax regimes with the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, http://ec.europa.eu/external_relations/switzerland/docs/c_2007-411_en.pdf.
[76] 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 L 89/30 (so-called Protocol I).
[77] 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 L 124/53 (so-called Protocol II).

Moreover and as will be seen later,[78] this also had consequences for the application in terms of time of the derogation grounds and safeguard clauses provided for under the Agreement.

3.3. The substantive meaning of free movement

3.3.1. General remarks

The substantive meaning of free movement under the various bilateral agreements depends, first, on the wording of the relevant provisions and, second, on their interpretation by the courts. As for the wording, an important starting point is that most important provisions on free movement in the bilateral agreements are parallel, and sometimes even identical to, the relevant provisions of EU law. Obviously, meaningful participation of Switzerland in the EU's internal market is achieved only if identical or parallel provisions are interpreted and applied in the same manner. As was already stated, the FMPA and the Air Transport Agreement indeed prescribe a parallel interpretation, but they do so within certain temporal limits. This may imply important limits to the degree of participation of Switzerland in the EU's internal market.

In cases where a given agreement does not contain any specific provisions on its interpretation, the general rules of public international law on such matters will apply. As a rule, the courts will find that parallel interpretation with EU law is called for unless specific characteristics of the agreement call for a different approach. Below, this is illustrated through a number of important examples from the areas of the free movement of goods and the free movement of persons and services under the FMPA.

3.3.2. Free movement of goods under the FTA

General remarks

The substantive rules in the FTA on the free movement of goods have evidently been modelled after the relevant rules of what was then the EEC. Accordingly, there are 1) prohibitions of the introduction of new customs duties and charges having equivalent effect as well as of quantitative restrictions and of measures having equivalent effect (standstill provisions) and 2) provisions regulating the abolition of such measures within a certain time frame (Art. 3 FTA et seq.). To take the example of quantitative restrictions, Art. 13(2) FTA provides that all quantitative restrictions on imports must be abolished by 1 January 1973 and all measures having equivalent effect must be abolished by 1 January 1975. As a result of these provisions, a prohibition of such measures has been in place since these dates. A similar provision on exports (Art. 13A FTA) was introduced 1989, with the date of 1 January 1990 for the abolition of quantitative restrictions and of measures having equivalent effect. As in EU law, these prohibitions are not absolute. Rather, Art. 20 FTA provides for the same derogation grounds as does EU law,[79] i.e. public morality, law and order or public security, the protection of life and health of humans, animals or plants, the protection of national treasures of artistic, historic or archaeological value, the protection of industrial and commercial property, plus rules relating to gold or silver. As in EU law,[80] the prohibition of customs duties is complemented by the prohibition of discriminatory national taxation of goods (Art. 18 FTA), but there is no prohibition of taxation that is protective.

[78] See below Chapter 3.3.3. under *Derogations and safeguard clauses*.
[79] See Chart 3 in Annex V to this paper.
[80] See Chart 1 in Annex V to this paper.

Quantitative restrictions on imports and exports

a, The Cassis de Dijon principle

The most notable limitation of the substantive meaning of the free movement of goods under the FTA concerns the interpretation of the term "measures having equivalent effect to a quantitative restriction" (so-called MEEQR). Under EU law and in the context of imports (Art. 34 TFEU), this term is defined through a number of important landmark decisions, namely *Dassonville*,[81] *Cassis de Dijon*,[82] *Keck*[83] and, most recently *Commission v Italy*.[84] The latter three of these concern so-called indistinctly applicable measures (i.e. national measures that apply to imported goods and domestically produced goods alike)[85] and are based on the important Cassis de Dijon principle.[86] According to this principle, a good lawfully produced in an EU Member State must in principle be accepted in the other Member States, in principle meaning unless there is a mandatory or imperative requirement and the measure taken in view of it is proportionate. The Cassis de Dijon principle is therefore based on the two elements of home state control and mutual recognition. More recently, the Court of Justice has held in *Gysbrechts and Santural*[87] that the Cassis de Dijon principle in relation to indistinctly applicable measures also applies in the context of quantitative restrictions on exports (Art. 35 TFEU).[88] However, the Swiss Federal Tribunal has not accepted the Cassis de Dijon principle as relevant for its interpretation of either Art. 13 FTA (imports) nor of Art. 13A FTA (exports).

As far as imports are concerned, Switzerland has recently amended its law on technical barriers to the trade in goods[89] (adoption by the Parliament on 12 June 2009; the revision is expected to enter into force in the middle of 2010). The main aim of the revision is what in Switzerland is often termed the "autonomous introduction of the Cassis de Dijon principle". According to this new approach, goods lawfully produced in the EU and in the EEA can be marketed in Switzerland (Art. 16a(1) of the revised law), with the exception of: a) products that are subject to authorisation (which includes in particular medicinal products), b) products that must be registered according to the legislation on chemicals, c) products for which a prior import licence is required, d) products whose importation is prohibited, e) and products in relation to which the Swiss Federal Government adopts an exception (Art. 16a(2)). As a result of this revision, at least within the limited field of application of the new approach there will be less obstacles to the market access for goods originating from the EU and the EEA (but of course not in the other direction, as there is no *mutual* recognition). It should be noted that, technically speaking, the new approach is not related to the bilateral law but rather is an example of what in Switzerland is termed "autonomous adaptation" of the national law to EU law.

[81] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.
[82] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
[83] Joined cases C-267/91 and C-268/91 *Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.
[84] Case C110/05 *Commission v Italy*, judgment of 10 February 2009, n.y.r.
[85] See Chart 2 in Annex V to this paper.
[86] See Chart 8 in Annex V to this paper.
[87] Case C-205/07 *Lodewijk Gysbrechts and Santurel Inter BVBA*, judgment of 16 December 2008, n.y.r.
[88] See Chart 4 in Annex V to this paper.
[89] For the revision text, see: http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=3820&countryName=Switzerland.

b, Derogations: the exhaustion principle

A further important point where the bilateral law is not parallel to EU law concerns the field of intellectual property. The Court of Justice interprets the derogation ground of the protection of industrial and commercial property as allowing the holder of an intellectual property right (e.g. a patent) to block the putting of the product on the market by a competitor only for so long as the holder of the right has not put the product on the market for the first time, the relevant market in this context being the EU (so-called regional exhaustion of the intellectual property right).[90] However, in its important decision in the case *OMO* (1979),[91] the Swiss Federal Tribunal refused to apply the same approach in the context of the FTA (in Switzerland, at that time there was a merely national exhaustion principle in the field of patent law). Whether this is in line with the case law of the Court of Justice may be debated. It is true that the Swiss approach was (implicitly) confirmed by the Court of Justice in *Polydor* (1982).[92] Here, the Court held in relation to the then existing Free Trade Agreement between the EEC and Portugal that the mere similarity of terms in the Agreement and in what was then EEC law was not a sufficient reason for an identical interpretation given that the Agreement did not have the same purpose as the EEC, i.e. the setting up of a single market. The Court therefore found that its case law on the exhaustion principle under EEC law did not apply to the Free Trade Agreement between the EEC and Portugal. However, in *Eurim-Pharm* (1993),[93] which concerned the Free Trade Agreement between the EEC and Austria, the Court did not accept the argument that a parallel interpretation with Community law was precluded in the context of a free-trade agreement, since the latter makes no provision either for harmonisation of legislation or for administrative cooperation in the sector in question (i.e. pharmaceutical products). In this case, the Court spoke of a mere "assumption" according to which the same interpretation does not apply.

Again, to a certain degree a remedy for the difference in the bilateral law (as interpreted in Switzerland) and in EU law has been adopted under Swiss national law, namely through the revision of the Swiss patent law and the change from the national to the regional (EU and EEA) exhaustion principle (Art. 9a of the revised law; the revision entered into force on 1 July 2009).[94] However, the new approach does not apply to medicinal products, which means that in this important area obstacles to the free movement of goods (in particular to parallel trade) remain.

3.3.3. Free movement of persons and services under the FMPA

Market access: non-discrimination and freedom from restrictions?

The central substantive issue under the FMPA is the meaning of market access. Under EU law on the free movement of persons and services, market access implies both a right to non-discrimination on grounds of nationality and – based on the Court of Justice's case law[95] - a right not be restricted in other ways, subject to the derogation grounds of public policy, public security and public health.

In relation to the market access rights, the FMPA in the context of the free movement of natural persons mentions equal treatment and non-discrimination on grounds of nationality, though in the context of services the term "restrictions" also appears.

[90] E.g. Case 15/74 *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc.* [1974] ECR 1147, Case 119/75 *Terrapin (Overseas) Ltd. v Terranova Industrie C.A. Kapferer & Co.* [1976] ECR 1039.
[91] Federal Tribunal Decision 105 II 49. The texts of the Federal Tribunal's decisions can be found at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm.
[92] Case 270/80 *Polydor Limited und RSO Records Inc. v Harlequin Record Shops Limited und Simons Records Limited* [1982] ECR 329.
[93] Case C-207/91 *Eurim-Pharm v Bundesgesundheitsamt* [1993] ECR I-3723.
[94] For the text of the revised law, see http://www.admin.ch/ch/d/sr/2/232.14.de.pdf.
[95] It should be remembered that under EU law, the Court of Justice originally interpreted the right to free movement in relating to persons and services as implying exclusively a prohibition of discrimination on grounds of nationality. The prohibition of restrictions was added only later, through the Court's case law.

In relation to discrimination, it is undisputed in Switzerland that the prohibitions of discrimination on grounds of nationality under the FMPA include both direct and indirect discrimination.[96]

Conversely, it is debated whether, beyond discrimination on grounds of nationality, the FMPA also prohibits non-discriminatory restrictions on free movement. Essentially, the debate centres around the question of whether the different aim of the FMPA as compared to the EU's rules on the internal market militates against a parallel interpretation of the two legal systems. As was stated earlier, the Court in the recent case of *Grimme* (2009) emphasised this difference. It went on to state that "the interpretation given to the provisions of Community law concerning the internal market cannot be automatically applied by analogy to the interpretation of the Agreement, unless there are express provisions to that effect laid down by the Agreement itself" (para. 29, with a reference to *Polydor*). However, it should be noted that this statement is of a general nature and was not made in the specific content of the question of whether restrictions are prohibited under the FMPA. Further, and as was also mentioned, the Commission argues that under the bilateral law there is no prohibition of restrictions under the bilateral law on air transport. However, the relevant case is still pending and it is therefore open whether or not the Court will pronounce itself on this matter and, if so, in what manner.

In the absence of relevant case law either on the FMPA or on another agreement with which the FMPA could be compared, the question remains open for the time being. It should, however, be clear that an interpretation excluding the prohibition of restrictions would have far-reaching consequences, as in this case non-discriminatory measures would not be caught by the bilateral law.

Derogations and safeguard clauses

a, Permanent and transitional derogation grounds

As was already noted, under EU law the right to free movement is not absolute but is subject to the derogation grounds of public policy, public security and public health.[97] The FMPA contains a very similar provision, which mentions the derogation grounds of public order, public security and public health (Art. 5 of Annex I).In addition, and unlike EU law, the FMPA contains certain transitional provisions which allow for derogations from the provisions on free movement.[98] However, some of these, namely the restrictions provided for in Arts. 10(1) and (2) FMPA, are only of limited practical relevance, as they were limited in time and the relevant time period has passed, except in relation to Bulgaria and Romania.

Certain additional transitional derogation grounds in respect of the purchase of land and secondary residences in a number of countries (i.e. the Czech Republic, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia) are set out in Annex I to the Protocol concerning the participation in the Agreement of the Member States that joined the EU in 2004.

b, Safeguard clauses

In addition to the above mentioned transitional derogation grounds, the FMPA contains certain transitional safeguard clauses. The most important of these is Art. 10(4) FMPA. It applies where the number of new residence permits issued in a given year to employed and self-employed persons of the EU exceeds the average for the three preceding years by more than 10 %.

[96] See e.g. Federal Tribunal Decision B 18/02 of 24 October 2002.
[97] See Charts 5 and 6 in Annex V to this paper.
[98] It should be noted that very similar transitional derogations on the free movement of persons and capital exist between old and new Member States of the EU as well.

In practice, Switzerland has so far not invoked the safeguard clause under Art. 10(4) FMPA, even though this was discussed some months ago against the background of the ongoing economic crisis. At this point in time (beginning of 2010), there is a widespread feeling in Switzerland – which is shared e.g. by the present president of the Swiss Federal Government – that it might have been helpful to invoke the safeguard clause in the spring of 2009.[99]

Specifically: services

A number of specific issues arise in the context of the meaning of free movement under the FMPA in relation to services, both for service providers and service recipients.

a, Market access of service providers

Service providers are mentioned in Art. 5 FMPA and in Arts. 17 et seq. of Annex I to the FMPA. It should be noted that the Annex I to the FMPA makes to important reservations to the right to market access which do not appear in other contexts. First, Art. 22(2) reserves national laws, regulations and administrative practices for the application of working and employment conditions to employed persons posted for the purpose of providing a service and in this context makes reference to the Posted Workers Directive.[100] In so far, it provides for the same approach, as does EU law. Second, Art. 22(4) reserves national laws, regulations and administrative practices required by imperative requirements in the public interest. This appears to be different from EU law, where imperative requirements can be invoked only in the context of measures that do not directly discriminate (i.e. either indirect discrimination or restrictions).[101]

Against this background, the Swiss Government has adopted a number of supporting measures, which gradually have been made stricter and on whose enforcement yearly reports have been published.[102] The supporting measures are applied by the Swiss Cantons and monitored by Federal and Cantonal tripartite commissions involving authorities, management and labour. Some of these measures have led to discussions in the Joint Committee in charge of the FMPA,[103] including in particular an eight day notification requirement for undertakings from the EU wishing to provide services in Switzerland which appears to be particular burdensome for small and medium enterprises. As there is no such requirement for Swiss service providers, this measure would appear to amount to discrimination on grounds of nationality against foreign service providers. However, in the view of Switzerland this requirement is justified under the provisions of Annex I, in particular Art. 22(2). This implies that, according to Switzerland, the requirement concerns working and employment conditions for posted workers, i.e. the checking of such conditions. However, even if that were the case, it may - assuming that the proportionality requirement applies in this context – still be open to discussion whether the eight day notification requirement is also proportionate. In this latter context, it should be noted that the Commission has argued in the already mentioned decision on air noise that, due to the different nature of EU law and the Air Transport Agreement, the general principle of proportionality does not apply in the context of the latter (a view that the present writer does not find convincing).

[99] See the interview with President Doris Leuthard, Weltwoche of 23 December 2009, 30-33, at p. 32.
[100] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18/1.
[101] See again Chart 6 in Annex V to this paper.
[102] See http://www.seco.admin.ch/themen/00385/00448/00449/index.html?lang=de.
[103] See http://www.news-service.admin.ch/NSBSubscriber/message/de/19585.

One important aspect of the supporting measures concerns the declaration that a collective agreement is made universally applicable within the meaning of Art. 3 of the Posted Workers Directive. Art. 3(1) of the Posted Workers Directive mentions the possibility of applying rules set up by collective agreements that have been declared universally applicable in relation to agreements "insofar as they concern the activities referred to in the Annex" (i.e. all building work relating to the construction, repair, upkeep, alteration or demolition of buildings) and insofar as they relate to terms and conditions of employment to be guaranteed to posted workers covering a limited number of matters, namely: a) maximum work periods and minimum rest periods, b) minimum paid annual holidays, c) the minimum rates of pay, including overtime rates, d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings, e) health, safety and hygiene at work, f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people and g) equality of treatment between men and women and other provisions on non-discrimination.

In Switzerland, the Posted Workers Directive has been implemented through the Law on posted workers (German: *Entsendegesetz*), which also states the possibility of declaring collective agreements universally applicable. In this context, the law also mentions the possibility that a collective agreement imposes the obligation to pay a deposit (Art. 2ter). The aim of the deposit in question is to have money ready at hand that can be used in the event of financial claims that arise in the context of the enforcement of the law. An actual example of this can be found in the Canton Basel-Landschaft, which imposes an obligation on the provider of the works in certain parts of the construction industry to pay a deposit of 20'000 CHF (which corresponds roughly to EUR 13,500).[104] It should be noted that under this agreement the obligation to pay a deposit is applied in a non-discriminatory manner, i.e. it also applies to Swiss employers.[105] According to the Government of the Canton Basel-Landschaft, the basis for this a collective agreement for the relevant part of the construction industry that has been declared universally applicable. [106]

Further, under the legislation of the Canton Basel-Landschaft there is also the rule that foreign service providers must contribute to the enforcement costs of tripartite commissions. Again, the background to this is Federal legislation, namely Art. 8a of the Regulation on posted workers (*Entsendeverordnung*).[107] It should be noted that Swiss workers must also contribute to the costs for implementing and enforcing the collective agreement applicable to them. Therefore, should this obligation be applied in a non-discriminatory manner both in the domestic context and in the context of the posting of workers, then it would not appear to be problematic under the FMPA.

However, in both cases (deposit and enforcement costs), there is, again, the reservation that these rules might be contrary to the proportionality principle (assuming that it applies in this context). Finally, it should be noted that in so far as the measures in question indeed fall within the scope of Art. 22(2) and given that this provision is much more specific, there would appear to be no room for arguing that they amount to a restriction on the free movement of services, even assuming that there is a prohibition of restriction under the bilateral law, as already discussed.

The Joint Committee discussed not only measures taken on the Swiss side, but also measures taken by certain EU Member States, namely German legislation on the secondment of workers which requires a contribution to the German leave fund for the construction sector ("Urlaubs- and Lohnausgleichskasse der Bauwirtschaft") and Italian rules on contributions to the leave funds ("Casse edili"). A further issue is the obligation in France to subscribe to an insurance with a French insurance company for buildings built in France, in order to ensure that there is a ten year guarantee ("garantie décennale" for the buildings).

[104] See http://www.baselland.ch/Newsdetail-Volkswirtschaft-Gesundheit.309169+M56e1d4cad61.0.html.
[105] See http://www.zpkbl.ch/data/ZPK_Merkblatt_Kaution.pdf.
[106] See also Box I in Chapter 5.2.1.
[107] Verordnung über die in die Schweiz entsandten Arbeitnehmerinnen und Arbeitnehmer.

As far as the present writer can see, different from the Swiss measures discussed above, these are not issues related to the protection of posted workers under Art. 22(2) of Annex I to the FMPA. Accordingly, they must be assessed in the context of the general rules on the free movement of services (i.e. market access rules). In the context of EU law, it would be logical to argue that such rules, even if applied in a non-discriminatory manner, amount to restrictions to the free movement of services, and then to apply the Court's case law according to which such rules are acceptable only if they protect, in a proportionate manner, a general interest that is not already protected in the state of origin of the service provider (i.e. the contributions to the leave fund would not be acceptable if the workers already had a right to leave under the law of the other State and if they did not obtain additional rights under the French insurance).[108] However, as was already stated, it is not established that the FMPA goes further than a prohibition of discrimination on grounds of nationality. As for discrimination, it is difficult to see how this could be argued if the rules in question apply to all employers/builders alike. The Swiss argument that a great deal of administrative effort is involved for the companies concerned would appear to be of use only if it could be shown that in fact the administrative rules are applied in a discriminatory manner to domestic and foreign companies. However, in such a case it would still be open for the states in question to argue imperative requirements in the public interest within the meaning of Art. 22(4) of Annex I (a possibility, it should be repeated, that they would not have under EU law).

b, Rights of services recipients

In EU law, service recipients enjoy both rights to movement and residence and, based on the Court of Justice's case law, market access rights.[109] In the FMPA, service recipients are mentioned in Art. 5(3) FMPA and in Art. 23 of the Annex I to the FMPA but only in the context of movement and residence. Against this background, it is debated in Switzerland whether service recipients enjoy only movement and residence rights or also rights of market access. An important example concerns medical services. In a number of decisions, the Social Security Court of the Canton Zurich decided in favour of market access rights of recipients of medical services.[110] However, this court had to change its case law when the Swiss Federal Tribunal held, as of 2008, that the FMPA does not include market access rights of recipients of medical services.[111] Again, this means that there is an important discrepancy between EU law and bilateral law on this point.

In the field of tourism, issues arising between Italy and Switzerland in the context of discriminatory entry prices of Italian tourist sites were dealt with on the basis of a specific agreement between the two countries[112] (rather than on the basis of the FMPA).

Specifically: students

Finally, it should be noted that under the FMPA students who are not family members under the agreement enjoy less rights than under EU law. Art. 24(4) of Annex I states explicitly that the Agreement does not regulate access to vocational training or maintenance assistance, but only residence rights. This is markedly different from EU law where students may enjoy rights either under Art. 18 TFEU and Directive 2004/38/EC. However, Leiden University in the Netherlands is an example for an institution that applies the same study fees to students from EU and EEA countries and to students from Switzerland.

[108] E.g. Case C-154/89 *Commission v France* [1991] ECR I-659.
[109] Case 286/82 *Graziana Luisi and Giuseppe Carbone v Ministero dello Tesoro* [1984] ECR 377.
[110] Social Security Court of the Canton of Zurich, decisions in the cases IV.2003.00221 of 19 February 2004, KV.2005.00058 of 16 May 2006 and IV.2005.00827 of 22 January 2007.
[111] See in particular Federal Tribunal Decision 133 V 624.
[112] Nota verbale of 31 July 2007, Italian Ministero degli Affari Esteri.

3.4. Enforcement

Finally, a further important element of the bilateral law must be mentioned, namely the lack of a common enforcement (including: interpretation) system. In fact, only the Air Transport Agreement provides in some respects for such a common system (Arts. 18(2) and 20), which is why it is often referred to as a "partial integration agreement", rather than a mere liberalisation agreement (which label fits most of the other agreements).

In the case of other agreements that are of interest in the present context, the starting point is that interpretation and enforcement of the bilateral law is in the hands of the parties' different *national* authorities and courts. On the side of the EU, the European Court of Justice may be applied to for e.g. preliminary rulings on the interpretation of provisions of the bilateral law (examples are provided by the cases *Stamm and Hauser*[113] and *Grimme*, already mentioned) and on the validity of secondary measures of the institutions under Art. 263 TFEU (an example is provided by the *Champagne* case).[114]. Further, there is the possibility of enforcement proceedings under Art. 260 TFEU. Conversely, the same possibilities do not exist if a conflict arises in Switzerland, where exclusively the national courts will be in charge. This means in particular that there is no common superior instance that could rule on e.g. divergent interpretations of provisions of the bilateral law. Rather, the dispute resolution system provided for by the bilateral agreements is that of Joint Committees for the individual agreements that operate on a purely diplomatic level. The already mentioned dispute between the Commission and Switzerland concerning company taxation provides a vivid example for the fact that in some cases this will quite simply make the finding of a solution impossible, at least on the legal level.

A further important point concerning the enforcement of the bilateral law is the possibility for individuals, before a national court and in a situation where the bilateral law gives them rights that national law does not grant them (in other words, in a situation of conflict between the bilateral law and the national law), to directly rely on the relevant provision of the bilateral law. In Switzerland, the direct effect of the relevant provisions of the FMPA has been recognised by the Federal Tribunal in numerous decisions.[115] However, the same is not true in relation to important provisions of the FTA. For example, the Federal Tribunal held in *Adams* (1978)[116] that Art. 23 FTA on competition does not contain any prohibition or legal obligation, with the consequence that individuals cannot rely on it (in Switzerland, the same argument was brought up in the context of the already mentioned dispute on company taxation). The Federal Tribunal in *OMO* (1979)[117] and in *Physiogel* (2006)[118] also denied direct effect of Art. 13 FTA, concerning quantitative restrictions on imports, and Art. 20 FTA, concerning derogations. In order to avoid conflicts between the national law and the FTA, the Federal Tribunal applies the method of treaty-conform interpretation.[119] However, as has been seen above, where the Federal Tribunal applies an interpretation that is different from that of the Court of Justice, a discrepancy between the bilateral law and EU law as well as a lesser degree of legal protection of individuals under the former legal system remains. (However, it should be added that certain other courts have decided differently).[120]

[113] Case C-13/08 *Erich Stamm and Anneliese Hauser*, judgment of 22 December 2008, n.y.r.
[114] Case T-212/02 *Commune de Champagne and Others v Council and Commission* [2007] ECR II-2017.
[115] E.g. Federal Tribunal Decision 129 II 249.
[116] Federal Tribunal Decision 104 IV 175.
[117] Federal Tribunal Decision 105 II 49.
[118] Federal Tribunal Decision 2A.593/2005 of 6 September 2006.
[119] E.g. Federal Tribunal Decision 1A.71/2004 of 8 March 2005.
[120] Decision of the *Eidgenössische Rekurskommission für Infrastruktur und Umwelt* of 20 October 2005 (Case H-2004-174, Postwesen – Vorzugstarife für die Beförderung von Presseerzeugnissen), concerning both Arts. 13 and 23 FTA.

4. THE FUNCTIONING OF AN EXTENDED INTERNAL MARKET WITH THE EEA STATES

In general, it is observed that the EEA agreement works well. National parliaments of the EEA EFTA states are eager to incorporate new EU Internal Market legislation for obvious economic reasons. Transposition deficits in these states are relatively low. The Internal Market Scoreboard published by the EFTA Surveillance Authority (ESA) shows that the average transposition deficit of the EEA EFTA States decreased to 0.7%, while the average transposition deficit of the EU Member States remains at 1.0%.[121]

Also, as regards to implementation after the transposition process, the situation is good and improving. On 1 May 2009, a total of 94 infringement cases were being pursued by the ESA. This represents a decrease of 81 cases from December 2008.[122] Most cases concern non-timely transposition of Regulations[123], other cases relate to non-timely transposition of directives or incorrect implementation or application of Internal Market rules.[124]

The ESA, besides asking for clarification on implementation processes when appropriate, carries out so-called *systematic conformity assessments*. Due to limited resources, about one third of all implemented legislation is screened, the focus being on dossiers that seem to be the most interesting and perhaps troublesome. ESA hopes to benefit in the future from the risk based transposition plans of the Commission that would accompany new proposals. This would make it possible to focus on individual provisions of the Directives that are judged to be the most challenging to transpose and implement. Problems that are identified are usually solved before going to court by political means.[125]

Proper transposition and implementation is also guaranteed by the EFTA Court. However, it should be noted here that the number of cases brought to the EFTA court is rather limited. In 2009, there were 3 cases brought by ESA before the EFTA court. In 2008 5 cases were brought by ESA before this court.[126] In general, the EFTA court follows the European Court of Justice decisions very carefully, not only due to the fact that these provide good examples, but also to ensure compatibility between national laws. Judges seek universal and homogenous rulings.[127]

A problem mentioned[128] is that new EU Internal Market legislation is often blurred with other policies that fall outside the scope of the EEA agreement. An example is the Data Retention Directive[129], which entails that phone companies keep records to help law enforcement institutions to fight crime. This seems to be security policy, but if phone operators in the EEA countries do not have this same obligation, it can distort the market as operators would move to these countries to reduce data storage costs. From this perspective it does concern the Internal Market. Should the EEA countries then take over parts of this security policy? The root of this problem is the fact that the EEA agreement was based on the EU as it stood after the implementation of the Single European Act of 1986. The EU Single Market has evolved at a fast pace since then and the EU gained new competences in various policy areas. The integration of the EU internal market is thus much more extensive than that of the EEA countries.

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[121] EFTA Surveillance Authority - EEA EFTA States *Internal Market Scoreboard*, July 2009.
[122] ibid.
[123] A specificity is that Norway and Iceland is required to transpose also Regulations and not only Directives. A challenge here - in particular for Iceland - has been the translation of the texts.
[124] Interview with Ms Tuula Nieminen (December 2009). EFTA Surveillance Authority.
[125] ibid.
[126] In 2009: Case E-7/09, judgment on 1/12/09, Case E-5/09, judgment on 1/12/09 and Case E-3/09, judgment on 1/12/09. In 2008, Case E-1/09, (two cases referred jointly, decision for the referral was made at the end of 2008 but the actual referral only took place in 2009), judgment on 6/1/10, Case E-6/08, judgment on 13/5/09, Case E-3/08, judgment on 29/10/08 and Case E-2/08, judgment on 29/10/08.
[127] Interview with Ms Tuula Nieminen (December 2009). EFTA Surveillance Authority.
[128] Interview with Mr Lars Erik Nordgaard (January 2010). EFTA Secretariat
129 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

A question to be answered is how big problems this discrepancy creates and whether as a consequence the EEA agreement needs to be updated. This question might gain more importance as a consequence of the entry into force of the Lisbon Treaty and in case the EU decides to deepen integration as a consequence of the re-launch of the Single Market[130] .

[130] http://ec.europa.eu/commission_barroso/president/pdf/release_20091020_en.pdf

5. AN EXTENDED INTERNAL MARKET – CHALLENGES AND FUTURE PROSPECTS

5.1. The EEA and Switzerland: Two different models of integration

The EEA EFTA Member States Iceland, Liechtenstein and Norway have a different approach towards integration with the EU than Switzerland. The Swiss are very careful not too lose control and sovereignty, an attitude and strategy that is a heritage of their approach to the early days of European integration. While Switzerland has integrated notably with the EU over the last decades via Bilaterals I, II and the Free Trade Agreement, it still falls short of the level of integration that the EEA have reached with the EU. Besides the fact that the sectoral bilateral agreements are more static in nature than the EEA Agreement, their scope is also more limited, although there are exceptions, as for instance the air transport agreement.[131] The most notable difference can be seen in the field of services, where the EEA EFTA countries are taking over much of the Community Acquis, while Switzerland has not (yet) reached an all-encompassing agreement[132]. This can be partly explained by the Swiss hesitance to take over EU Competition law and European Company law. It is indeed true that the EEA states have more obligations to the EU, simply because they participate in a larger part of the EU's extended internal market. On the other hand, the EEA states enjoy more official rights, for instance in the decision-shaping phase of new EU rules and regulations. In addition, the EEA states are granted the right to participate in some EU programs like the Lifelong Learning Programme or the Consumer Programme 2007-2013[133] and several EU agencies, as for instance the European Environment Agency, the European Railway Agency (ERA) and the European Network and Information Security Agency (ENISA)[134].

Although the two approaches are different from an institutional and conceptual perspective, they both seek to benefit from an extended EU Internal Market, while aiming to at least partly stay in control concerning the Community Acquis that is taken over.

5.2. The future EU relations with Switzerland

5.2.1. Challenges

During the analysis of EU-Swiss relations and in particular the functioning of the sectoral bilateral agreements, several challenges were identified. The main challenges will be shortly addressed:

Switzerland has (political) elements that complicate issues but also make relations with the EU unique. Examples are the element of direct democracy in the form of referenda and the federal structure involving the cantons in implementing legislation and deciding on issues on local and regional level.

Some interviewees from the EU side indicated that for Switzerland the sectoral bilateral approach is a business-model. The taken approach is often not very appreciated by the European Commission. In some views, Switzerland is aiming at grasping all the benefits of the Internal Market while being shy to take on board other policies that complete the market as for instance EU company law, state aid and competition policy.

[131] Vahl, M. & Grolimund, N. (2006), Integration without Membership - Switzerland's bilateral agreements with the European Union, CEPS, Brussels, p. 90.
[132] Services are in part covered by a number of bilateral agreements, see Chapter 3.1.3 and 3.3.3
[133] For a full list of EU programmes with EEA participation see http://www.efta.int/content/eea/eu-programmes
[134] For a full list of EU Agencies with EEA representation see http://www.efta.int/content/eea/eu-programmes/eu-agencies

The special federal structure of cantons in Switzerland can also potentially complicate relations with the EU and act as barriers to trade in itself. One can observe that cantons tend to harmonize legislation for economic reasons, some special privileges for companies or tax regimes are however hard to change. Although inter-cantonal pressure is also existent, in some cases cantons do not want to change or direct democracy prevents them from doing so. This is not only an extra difficulty in negotiations with the EU for the Swiss government; it can also pose barriers to trade. An example from the Canton Basel Landschaft[135] illustrates that cantons can have their own policies that can affect the freedom of services. From the perspective of the canton however, the introduced policy aims to correct other imperfections on the market. (See box I).

Box I: Example of a cantonal measure affecting the functioning of the market

As a flanking measure to the free movement of persons, the collective agreement for the finishing-construction sector (Ausbaugewerbe) is asking for a security deposit up to 20'000 Swiss Francs (ca. 13'000 €) from any entrepreneur (Swiss or foreign) for any work being done inside the territory of the canton of Basel-Landschaft in order to ensure the payment of minimum wages and social security contributions to all workers employed for this job. The measure was introduced in 2008 after inspection of the sector revealed that over 40% of foreign entrepreneurs did not respect the minimum wages and social security requirements in place when working on the territory of the canton. Furthermore, after leaving the Swiss territory, foreign entrepreneurs would go unpunished because it was impossible to prosecute an entrepreneur not established in Switzerland as claims based on Swiss legislation would not be received by the courts at the place of business. The canton has declared the collective agreement generally applicable to the sector (This declaration had to be notified to and accepted by the State Secretary for Economic Affairs SECO). Since the introduction of this measure, violations of the minimum wages and social security contribution requirements have greatly diminished.
The requirement treats Swiss and foreign entrepreneurs equally. But foreign entrepreneurs mainly from neighbouring Germany deemed it to be an excessive barrier to trade. In order to ease the burden for foreign entrepreneurs, it is now also possible to deposit the security in a trusted bank in the entrepreneur's country, in Swiss Francs or in Euro.
The cantonal Court of Basel-Landschaft has made a decision on 28 October 2009 abolishing this deposit requirement. The decision and the reasoning by the Court is yet to be published.[136]

Interviewees from the Swiss side have indicated that in general, the sectoral bilateral agreements function quite well. At the same time, it was also underlined by several experts that the whole process and administrative system surrounding the management of these agreements is burdensome.

The sheer number of Joint Committees, 27 in total, managing the agreements leads to difficulties, in particular concerning the communication between them. In some cases it has proven to be a challenge to determine under which committee a certain sectoral agreement falls.

[135] Zentrale Paritätische Kontrollstelle Basellandschaft, Merkblatt zur Stellung einer Kaution (GAV Ausbaugewerbe)
[136] Interview with Mr Daniel Klingele (December 2009). Swiss Mission to the EU.

An example of such legislation is recognition of a drivers license. It was unclear whether this would fall under the free movement of persons or under land transport.[137] Other examples are customs formalities in relation to provision of services or standards for wooden containers.[138] In some cases when the delineation a case is unclear, agreements are delayed as the topic is insufficiently discussed or partly covered by more than one committee.

As most Joint Committees meet once or twice a year, this could cause delays in updating agreements Also, they tend to be little aware of what is discussed in the other committees. This can lead to a lack of coverage of certain issues or to duplication of work, leading to more management costs.

Concerning the areas covered by the some 120 sectoral bilateral agreements between the EU and Switzerland, services are only partially covered. There is no general and encompassing agreement on the free movement of services. There were plans for negotiations on this matter, which, however, never materialised. As a result, the free movement of services is covered by the bilateral law only very selectively and under different instruments. Economically there seem to be great potential benefits for both sides. In Switzerland and in the EU services account for around 70% of GDP.[139] [140]. Results of study done in 2005 on the impact of the Services Directive, show that in case the Swiss would take over this legislation, exports of commercial services to the EU could increase by 40 to 84 per cent, while EU services exports to Switzerland may rise by 41 to 85 per cent. In both cases, foreign direct investment stocks would almost double.[141] The study was based on the original Commission proposal and as the country of origin principle has been removed and several areas exempted from the scope of the final Directive, the actual figures would likely be smaller, but still significant.

The agreements are static: they reflect the directives as they were originally adopted, but have no built-in mechanisms to address future changes. This can lead to contradictions, when later on, the EU acquis is altered by ECJ rulings, or the directive is modified or otherwise updated, while the Swiss legislation remains unchanged.[142] Several experts consulted for this study have indicated that the Free Movement of Persons (FMPA) agreement, the agreements on statistics, Schengen, Dublin and air transport are behind in updating

Monitoring is a difficult challenge as there is no official surveillance institution like the EFTA Surveillance Authority that monitors the implementation of Community Acquis incorporated in the EEA Agreement. The EU is simply not allowed to send a group of investigators to Switzerland to check implementation of IM rules on the ground. Switzerland is a sovereign country and this would be in breach of international law.

Enforcement of the sectoral bilateral agreements is a big challenge due to the fact that no court that guarantees unified interpretation rules over these agreements. Only international law applies here as a minimum. Disagreements on the precise delineation of the scope of the agreements and in particular the Swiss derogations are hard to resolve as this can only be done via diplomatic efforts in the Joint Committee.

[137] Interview with Mr Ulrich Trautmann (December 2009). DG RELEX. European Commission
[138] ibid
[139] Swiss Main economic indicators. European Commission 2008.
http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113450.pdf
[140] European Commission Economic Paper (2007) "Steps towards a deeper economic integration: the Internal Market in the 21st century. A contribution to the Single Market Review".
[141] Study conducted in 2005 by CPB Memorandum "Liberalisation of the European services market and its impact on Switzerland - Assessing the potential impacts of following the EU's 2004 Services Directive", CPB Netherlands Bureau for Economic Policy Analysis.
[142] Interview with Mr Tom Diderich, DG MARKT, European Commission. (December 2009).

This is especially the case with Bilateral I.[143] There are no sanctions, no implementation deadlines concerning the agreed areas. There is no real mechanism to oversee and enforce implementation. The only last resort sanction, the suspension of the respective agreement, is practically unusable as it entails unbinding the sectoral bilateral agreements. There is no official institution to interpret the sectoral bilateral agreements in a universal manner. This creates legal uncertainty and poses a potential barrier to trade.

Despite the fact that it is hard to judge attitudes in these restricted diplomatic relations, it has become clear that skepticism towards intentions of both parties does not make the management of these sectoral bilateral agreements much easier.

In some cases, the diplomatic efforts of the Joint Committees are unable to resolve issues and there is no last resort in the form of a Court ruling over these bilateral sectoral agreements.

One can observe a general lack of transparency, especially concerning negotiations and the status of updating agreements.

The European Commission indicated that there is a danger of "cherry picking" by the Swiss. As the agreements are static in nature they give the Swiss government the opportunity to take over Community Acquis, only in the areas where Switzerland benefits (This is of course limited by the Swiss bargaining power and the EU side insists more and more on linking agreements and including flanking measures). This goes hand in hand with an atmosphere of light skepticism towards the strategy of the Swiss.

Several experts have indicated that the Swiss are cautious of further integration with the EU and a general loss of control that lies behind this process. It was underlined that the Swiss are very much focused on the protection of their national identity and preservation of sovereignty. The common EU Integration strategy of power pooling via supranational institutions directly opposes the Swiss line of thinking. In addition, the Swiss are in general satisfied with their economic well-being. Indeed wages are high compared to the EU average as well as GDP per capita with $67,385.[144] (For comparison, the EU average is $30,393). In addition, agriculture subsidies in Switzerland are very high, further integration would force an abolition of these subsidies.[145] A VAT of only 7.6%[146] would likely to be balanced out with the European average VAT of 17%[147] in the case of further integration. Other interviewees, on the other hand, underline that the approach of the European Commission complicates relations between the EU and Switzerland as they observe a growing tendency that the European Commission is becoming less practical and pragmatic, it is more and more principle based and formal.

Lack of information on and notification of new EU legislative proposals that involves the fields covered in the bilateral agreements limit the possibilities of the Swiss in participating in the decision shaping process and could result in delays in updating the agreements.

The Swiss don't participate in the decision making process and only have limited access to decision shaping, although some formal and informal channels exist. The result of the fact that the Swiss are not involved in the practical aspects of EU decision making is that certain developments go unseen for the national administration. This is different from the EEA states as they sit around the table. The Swiss experts are in general not allowed to sit in on EU comitology processes.

[143] Vahl, M. & Grolimund, N. (2006), Integration without Membership - Switzerland's bilateral agreements with the European Union, CEPS, Brussels
[144] Taken from http://www.globalpropertyguide.com/Europe/Switzerland/gdp-per-capita (2010).
[145] Organization of Economic Cooperation and Development (OECD). *Agricultural Policies in OECD Countries: Monitoring and Evaluation.* Paris: OECD, 2009. *Highlights: http://www.oecd.org/dataoecd/33/27/35016763.pdf*
[146] http://www.taxation.ch/index.cfm/fuseaction/drucken/path/1-541.htm
[147] http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/rates/index_en.htm

Overall the Free Movement of Persons Agreement has proven to be a very valuable instrument. One million Europeans live in Switzerland out of a population of about 7.7 million people. Especially high-skilled workers are attracted by Switzerland to work there. Medical centers would have a huge problem if this agreement did not exist as approximately 30% of the nursing staff and doctors are foreign[148];

of which many are French and German. In Swiss Universities more than a third of the teaching staff, are EU citizens.[149] This agreement has boosted the Swiss economy and provided jobs for many Europeans. The FMPA is accompanied by flanking measures in Switzerland which protect against wage and social dumping. In 2008 controls have been carried out that affected 29576 posted workers. According to the State Secretariat for Economic Affairs, these controls are effective in protecting workers[150]. This view is also shared by Travail.Suisse, the second biggest trade union[151] A challenge highlighted is to ascertain wage dumping in sectors where there are no minimum wage requirements. Furthermore, there is a risk that as a consequence of the financial crisis, the budget for controls might decrease[152].

As outlined in Chapter 3.2, there are important temporal limits that prevent that the bilateral law is in line with EU law on the internal market, even within its limited material scope. The nature of the bilateral system as essentially static rather than dynamic has important consequences for the stage of development of the bilateral law, notably on the level of secondary law, which increasingly remains behind the rapidly evolving body of secondary EU law. The temporal scope of the bilateral law can lead to an uneven development of EU law and bilateral law. Challenges occur as adaption mechanisms take time. Secondly, a problematic situation may occur where the EU adopts new legislation which is not part of the bilateral law, without there being a formal adaption mechanism. A good example is the EU's REACH legislation, which has led to fears in Switzerland about new trade barriers in relation to goods.[153] In sum, problems may occur where bilateral law is not parallel to EU law.

5.2.2. An outlook on Swiss-EU policy

According to all interviewees, it is difficult to predict the form of future relations Switzerland will have with the EU. Despite this observation, it seems useful to identify the possible scenarios.

A) Breaking off some of the contacts with the EU. Put a halt to further integration, or stop with the sectoral bilateral agreements

One of the options for the Swiss is regaining total independence by breaking off the sectoral bilateral agreements and put a halt to further integration. This would ensure full sovereignty and guarantee that the market in Switzerland is regulated according to the views of the federal government. However, this option seems a very unrealistic one.

[148] Spitallandschaft Schweiz, Aktualisierte Kennzahlen des schweizerischen Gesundheitswesens aus der Sicht der Spitäler, December 2009, . http://www.hplus.ch/fileadmin/user_upload/H__Politik/Fakten_Zahlen_Daten/Spitallandschaft_Schweiz_Dezember_2009_de.pdf.

[149] Vahl, M. & Grolimund, N. (2006), Integration without Membership - Switzerland's bilateral agreements with the European Union, CEPS, Brussels, p. 6.

[150] http://www.seco-cooperation.admin.ch/aktuell/00154/00575/index.html?lang=en&msg-id=26537

151 Interview with Ms Susanne Blank (January 2010). Travail.Suisse

[152] ibid.

[153] Regulation 1907/2006/EC concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ 2006 L 396/1, and Directive 2006/121/EC amending Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances in order to adapt it to Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency, OJ 2006 L 396/850–856.

The Swiss economy has become very much interconnected with and partly dependent on the EU markets. As mentioned above, the EU is the number one trading partner for the Swiss, accounting for almost 60% of total exports and 70% of imports.[154]

B) Maintaining the existing legal framework

From the analysis and the indicated challenges as regards the functioning of the sectoral bilateral agreements, one can conclude that the status quo is far from perfect. The management of the existing agreements has proven to be relatively burdensome and a complicated administrative process in its own right. In addition, a lack of transparency and information sharing and different interests of the EU, Switzerland and the cantons can complicate relations. The static nature of the bilateral agreements poses several problems to the compatibility with EU law, especially in the long term and reaching agreements on new areas of cooperation has proven a difficult task. Often political will for change and awareness of the potential benefits from further cooperation is missing or insufficient.

C) Reaching new bilateral agreements in other sectors and/or signing a framework agreement that would ease decision making or introduce dynamic elements

Switzerland and the EU are indeed looking at new areas of cooperation. Above we underlined that in 2008 the EU and Switzerland entered into negotiations concerning a new agreement on agro-food[155], electricity and public health[156]. Switzerland is currently also undertaking a dialogue with the European Commission concerning canton-level tax regimes.[157] Cooperation in new areas would be subject to solutions found during further negotiations.[158] Regarding Swiss participation in the emission trading schemes (ETS) and Galileo, the Swiss are waiting for a negotiation mandate to be developed by the Council.[159] [160]As regards the REACH Regulation, the Swiss are voluntarily taking over policy in some areas to enhance the functioning of the Internal Market, however, the option of an agreement on this is still to be reached.[161] In areas where Switzerland and the EU see benefits of economic integration and the political will to reach an agreement exist, new opportunities may arise. However, from both sides it has become apparent that creating political momentum remains a challenge and certain sectors, most notably services will likely not be included in a bilateral agreement in the near future.

Concerning the introduction of a dynamic clause in existing agreements, Switzerland seems hesitant as it does not want to give up sovereignty and wants to stay in full control concerning applying new EU Internal Market rules and regulations. It might however be possible to conclude a framework agreement that would e.g. streamline the functioning of the Joint Committees or introduce a dispute settlement mechanism. This possibility is also underlined in the 2009 Swiss Foreign Policy Report, issued by the Swiss Federal Department of Foreign Affairs, as it states that:" The Federal Council is pursuing the defined objectives with regard to the EU which foresee the implementation of the existing agreements and the further development and consolidation of our relations (possibly in the form of a common framework agreement)".[162]

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[154] European Commission (DG Trade). 22 September 2009. "Switzerland - EU bilateral trade and trade with the world".

[155] European Commission, Press Release, 4 November 2008. http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1625

[156] http://www.evd.admin.ch/themen/00433/00439/00475/index.html?lang=de

[157] Interview with Mr Jacques de Watteville, Swiss Ambassadeur to the EU, conducted by Tanguy Verhoosel for EUROPOLITICS, 4 November 2009.

[158] Interview with Mr Daniel Klingele (December 2009). Swiss Mission to the EU.

[159] ibid.

[160] Swiss Integration Office (2009). Integrationsbüro EDA/EVD, Bern. Schweizerische Europapolitik - nächste Schritte.

[161] Interview with Mr Daniel Klingele (December 2009). Swiss Mission to the EU

[162] Swiss Federal Department of Foreign Affairs - FDFA. (2009). Swiss Foreign Policy Report - Rapport sur la politique extérieure 2009.

D) Joining the EEA

For this research several experts were consulted on the option for Switzerland to start talks on signing up to the EEA Agreement. Unfortunately, but logically as this concerns a very politically sensitive and complex matter, our interviewees did not share the same views on this approach.

Some experts indicated that the EEA agreement is "out of sight" as the level of integration between the EU and Iceland, Liechtenstein and Norway has far surpassed that between the EU and Switzerland. For the Swiss to sign up for so much more EU Internal Market rules and regulations would not only be unrealistic, but also very unlikely as the model in general would be too dynamic, steering towards a loss of control.

On the other hand, some experts have argued that this model would be applicable to Switzerland, despite the fact that Switzerland is not comparable to the EEA countries, coming from a different legal tradition and having a unique strategy to European integration. These experts argue that in theory under the EEA Agreement, the Swiss would still be able to determine what legislation would be taken up in the Joint Committee and in the phase of national ratification, of which the referenda are a vital element. In practice due to political realities this approach in our view is not likely to work, and if Switzerland decides for a closer integration, EU membership might be a better solution.

E) Joining the EU

The experts that were consulted for this research are unsure if and when Switzerland would join the EU. Opinions on this scenario differ, although it became clear that most of the interviewees did not expect Switzerland to join the EU in the near future. Whether or not this path is taken is not only in the hands of politicians and experts, this will naturally also be put to a referendum. Looking at the most recent opinion polls, more than one third of the Swiss is still very much against joining the EU. In 2005, an opinion poll was conducted among the Swiss, with the main question, if you would go to a referendum on joining the EU now, what would you vote? The poll showed that 21% would vote in favour, 16% likely in favour, 20% likely to vote against and 34% would vote against[163]. Approximately 9% of the Swiss people are indifferent. It has to be noted here that this opinion poll is from winter 2005, nevertheless it can be concluded that if the Swiss government and the EU decide to move towards this scenario, getting the majority support of the Swiss citizens will be a challenge.

On the other hand, since 1992 the Swiss people have voted 8 times in favor of the bilateral approach. The latest confirmations are the extension of the Free Movement of Persons Agreement to Romania and Bulgaria, where on 8 February 2009 59.6% of the Swiss voters approved the extension in despite the already difficult economic situation. [164] Moreover, in the last ten years all referendums on bilateral agreements between the EU and Switzerland have been successful. This perhaps gives hope to the ones that are of the opinion that Switzerland should steer towards this scenario.

Conclusion

From the above analysis it is clear that continuing the bilateral way and extending it to further areas is the likely way Swiss-EU relations will evolve in the near future. It seems inevitable however that some kind of dynamic element is included in the new agreements and the management of the Joint Committees is also likely to made less heavy (it has already been agreed not to set up new committees, but to make existing committees responsible for the management of new agreements).

[163] GFS.bern, November 2005, Europa-Barometer, p. 5. http://www.polittrends.ch/pub/europa-122005.pdf
[164] http://www.admin.ch/ch/d/pore/va/20090208/index.html

It is not unlikely that in the mid-term Switzerland would like to take the relationships to a next level and would join the EU. This is also underlined in the 2009 Swiss Foreign Policy Report, issued by the Swiss Federal Department of Foreign Affairs, as it states that: If in the future, whether for political or economic reasons, there is need for a further step towards integration, the question will then be raised concerning the most suitable instrument, including possible membership".[165]

5.3. The future EU relations with the EEA States

5.3.1. Challenges

A challenge for the EEA agreement seems to be the structure itself. As the management of the agreement is relatively cumbersome and requires an administrative process in its own right to support this process. The question that remains however, is whether it is possible to simplify the procedures that seem to be functioning already without much problem.

Timing is also a challenge. There is often a considerable gap between entry into force of secondary legislation in the EU and in the EEA states. Despite intensive monitoring, current deficits concerning incorporations of legislation are still too high (Nieminen, 2009), although lower than the EU average. This is partly caused by language reasons that lead to long translation delays (sometimes as long as 2 years). There can be delays in decision-making due to national procedures. An example of a serious delay is the Food Package, where there is still a delay of 2 years due to the fact that Iceland fails to transpose and implement. Reasons for the delay are a lack of capacity and also political reasons.

Specific challenges arise concerning the implementation of the Services Directive, especially as it entails the obligation to screen legislation, similar to the task that the EU member states have to carry out.

The management of the EEA agreement could pose a challenge should countries leave or join. Iceland has applied for EU membership, which would decrease the number of EEA stated to 2. Theoretically, a minimum of 2 countries is needed in order to let the agreement function, the EEA will thus continue to function as it is.[166] However, one would have to look at the possibility of downscaling the operations. It should be noted that in the future new states might wish to join the EEA agreement which would also likely require the adaptation of the structure.

New EU Internal Market legislation is often blurred with other policies that fall outside the scope of the EEA agreement. Sometimes it is difficult to determine what falls within the scope. An example is the Data Retention Directive[167], which requires phone companies to keep records to help law enforcement institutions fight crime. This seems to be security policy, but if phone operators in the EEA countries do not have this same obligation, it can distort the market as EU operators would move to these countries to reduce data storage costs. From this perspective it does concern the Internal Market. Should the EEA countries then take over parts of this security policy? It does not fully fall under the EEA agreement. It is important for future operations that it is clear what new rules and regulations concern the EEA[168].

[165] Swiss Federal Department of Foreign Affairs - FDFA. (2009). Swiss Foreign Policy Report - Rapport sur la politique extérieure 2009.
[166] Interview with Mr Lars Erik Nordgaard (January 2010). EFTA Secretariat.
[167] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.
[168] Interview with Mr Lars Erik Nordgaard (January 2010). EFTA Secretariat

The entry into force of the Lisbon Treaty would further blur the lines between the EEA relevant Internal Market and other policies.[169]

The EEA agreement has been written and agreed at the time of the signature of the Single European Act in 1986. In other words, the wording of agreement is relatively old, meaning that in some cases the text can be "outdated", i.e. not taking into account significant developments. The EU Single Market has evolved at a fast pace since 1986 and the EU gained new competences in various policy areas. In addition, the EU has widened from 12 to 27 members and vital developments, such as the introduction of the Euro have occurred. Partners in the EEA experience challenges to close the gap between the Single Market of 1986 and the Internal Market as we know it today.

Parliaments and governments of the EEA countries are not informed of new legislative proposals that fall in the scope of the EEA agreement. In a press statement of the Joint Parliamentary Committee on the European Economic Area of 26 March 2009, Members call on the European Commission to provide the national parliaments of the EEA EFTA States with legislative proposals which are sent to the national parliaments of the EU Member States for consultation, in cases where these regard matters of the Internal Market.

As highlighted by the Joint Parliamentary Committee, EEA EFTA States also seem to encounter problems in participating in EU agencies and programmes.[170]

[169] Resolution on Future Perspectives for the EEA adopted on 4 November 2008 during the 31st meeting of the EEA Joint Parliamentary Committee (EEA JPC)

[170] Press statement of the Joint Parliamentary Committee on the European Economic Area of 26 March 2009 http://www.europarl.europa.eu/document/activities/cont/200903/20090330ATT52937/20090330ATT52937EN.pdf

6. CONCLUSIONS

6.1. The EU and Switzerland: A legal framework of bilateral agreements

Overall, the impression that emerges from the above is that the system of the bilateral law is one of bits and pieces.

The *material scope* of the bilateral agreements that deal with aspects of the four freedoms more limited than the scope of EU law on the internal market. Indeed, there appear to be important gaps in all areas except goods. The free movement of capital is essentialy left out. The free movement of services is covered only to a limited degree (only up to 90 calendar days, and to the exclusion of notably financial services). Finally, in the field of the free movement of persons, legal persons are not covered.

There are important *temporal limits* that prevent that the bilateral law is in line with EU law on the internal market, even within its limited material scope. The nature of the bilateral system as essentially static rather than dynamic has important consequences for the stage of development of the bilateral law, notably on the level of secondary law, which increasingly remains behind the rapidly evolving body of secondary EU law. Sometimes, adaptation through decisions by the Joint Committee is a matter of time (e.g. the legislation on professional qualifications), but in other cases the powers of the Joint Committee do not allow for it (provisions on the free movement of persons and services on matters other than professional qualifications and social security, e.g. on movement and residence, family rights – Directive 2004/38/EC – and services - the Services Directive). It may also be that there is no secondary law that could be updated (e.g. the free movement of goods and the REACH legislation). Temporal limits also have consequences for the interpretation of the bilateral law by the courts, notably the Swiss courts which might not always be willing to follow the case law of the Court of Justice, even independent of explicit rules on temporal limits in a given agreement (e.g. in the context of the free movement of goods, where the Cassis de Dijon principle has not been accepted by the Swiss Federal Tribunal).

The *nature* of the EU's internal market and of the bilateral law plays an important role. It has been seen that the courts (both the Swiss courts and the Court of Justice) may interpret certain provisions of the bilateral agreements differently from EU law based on the argument that the bilateral law and the internal market are not comparable in that the internal market is more limited. This point is essential, as it leads to legal insecurities. Important legal questions are open (e.g.: what rights do services providers have? In relation to the free movement of persons and services, do the agreements only prohibit discrimination on grounds of nationality or also restrictions?). The answers to such questions are necessary in order to judge the legality of certain national measures. Given the present insecurities, it is very difficult to conclude with any certainty that there is deficient implementation or application of the bilateral law.

The risk of divergent interpretations is inherent in the bilateral system, since there is *no common supreme court or an otherwise common enforcement system*. Indeed, there are actual instances where the mere diplomatic efforts of the Joint Committees have not been able to deal with divergent interpretations and solve conflicts (e.g. in the context of competition law related to the free movement of goods, the dispute on company taxation).

It is obvious that through such a system only a certain degree of approximation to the EU's internal market can be achieved. Indeed, there is a marked difference on this point if compared to EEA law,171 which difference seems to be inherent in the system of bilateral law as such, rather than its mode of implementation or application.

This leads to the question of what steps could be taken to improve the situation. In theory, the easiest manner of dealing with at least some of the problems indicated above is to revise the system of bilateral law in such a manner that 1) its material scope becomes more encompassing and 2) it is more dynamic in nature, rather than in principle static, for example by applying the system of EEA law in this regard, both in relation to the adaptation to new secondary EU law and in relation to new case law from the Court of Justice. (Though, as far as enforcement is concerned, a common system would in the present writer's opinion only be possible if Switzerland were to become a Member State of the EU.)

However, revising the system requires that the Contracting Parties agree on such changes. At this point of time, this does not seem very likely. On the one side, the EU has expressed interest in a framework agreement that would span the system of bilateral law (or at least of a number of the bilateral agreements), provided that such an agreement would make the system dynamic.172 On the other hand, the Swiss Federal Government has stated quite emphatically that it is not willing to accept a dynamic system, and in particular automatic adaptation of the secondary law.173 In addition, it must be remembered that under the Swiss legal system any decision taken by the Federal Government is subject to the possibility of a popular vote.

6.2. The EU and the EEA EFTA Countries: A dynamic system of EU law incorporation

Overall, the EEA agreement seems to function well. All parties in the agreement benefit from economic opportunities provided by an extended internal market.

The dynamic model of the EEA Agreement is a good example of integration without membership. It cannot be excluded that in the future more countries will sign up to this agreement, while there is a chance that Iceland might leave taking into account its recent application for EU membership.

The main challenge with the agreement is that the administrative process behind and the management of the agreement is relatively cumbersome. In addition, it was observed as a challenge that in some cases, countries have to wait before new EU internal market rules and regulations can be applied until all states of the EEA agreement have ratified the new legislation through national processes and a compatibility assurance with the constitution. Iceland for instance, has greatly delayed the adoption of the Food Package.

[171] See Annex IV to this paper.
[172] See http://register.consilium.europa.eu/pdf/de/08/st16/st16651-re01.de08.pdf, para. 24 et seq.
[173] See the Swiss Government's external policy report of 2009, BBl 2009, 6291.

6.3. The impact of the Lisbon Treaty

Finally, as far as the EU is concerned, it should be noted that since the entry into force of the Lisbon Treaty, the legal situation for the conclusion of agreements with third countries has changed. First, where the competence to do so used to lie with the European Community, it is now with the European Union (Art. 216(1) TFEU). This is due to the fact that the EC no longer exists but has been integrated in to the EU. Second, the procedure for the negotiation and conclusion of international agreements has been revised (Art. 218 TFEU). Most notably, the influence of the European Parliament has been strengthened through the Lisbon revision. Except where an agreement relates exclusively to the Common Foreign and Security Policy, the Council adopts the decision concluding the agreement after obtaining the consent of the European Parliament in the case of, among others, association agreements and agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required (Art. 218(6) TFEU).

7. RECOMMENDATIONS

To enhance the well-functioning of an extended Internal Market in the case of the EEA EFTA Countries and the EU and Switzerland and the EU, the following can be done:

The EU and Switzerland

1. Create political will, on the side of the EU as well as in Switzerland, for better cooperation and intensification of relations. This does not necessarily need to lead to further integration, rather to a better functioning of cooperation in areas that fall under the sectoral bilateral agreements. Make all the parties involved aware of the potential (economic) benefits of removing existing borders. A precondition for political will is the creation of awareness.

2. Switzerland and the EU should look carefully at future scenarios for cooperation (e.g. joining the EU, signing the EEA Agreement or signing more sectoral bilateral agreements in areas not yet covered, as for instance in the field of services). Both sides should consider the strengths, weaknesses, opportunities and threats of each of the scenarios discussed in this paper.

3. In general, ensure more transparency throughout the process on both sides. This can be done by enhancing communication.

4. The European Commission should consider to involve the Swiss more in the official EU decision shaping process. In the case that Switzerland has the opportunity to give recommendations and share views, it can result in a mutual learning process. Naturally, not being and EU Member State, Switzerland will have an observer status with limited rights. It would in particular be beneficial if communication and contact between (legal) experts of both sides is intensified. Sharing "Best-practice" and exchange of views can improve the mutual understanding and contribute to early problem solving.

5. Enhance the communication between the Joint Committees. During our analysis it became clear that the Joint Committees are often not aware of each other's activities and unclear delineation of areas covered can lead to duplication of work or lack of sufficient coverage. To enhance communication, the Joint Committees could post their main issues on the table and decisions taken in a brief report. This report would be sent around periodically to inform relevant officials and experts. By doing this, duplication of work or insufficient coverage can be avoided.

6. The Joint Committees could meet more often to increase efforts to resolve challenges in specific problem areas.

7. The Joint Committees should strengthen relations with other European institutions than the European Commission, for instance with the European Parliament or the Committee of the Regions. This could fuel political will and create awareness of existing challenges for the well-functioning of the extended internal market. European Institutions should do the same to strengthen relations and create awareness, for instance by inviting a Swiss delegation of national experts and officials in the Internal Market and Consumer Protection Committee (IMCO) of the European Parliament.

8. The observation was made that problems may occur where bilateral law is not parallel to EU law. The European Commission should consider the notification of legislative proposals that fall within the scope of the areas covered by the sectoral bilateral agreements. The proposals could be forwarded to parliament and government in a similar way as it is done for national parliaments of the EU via the IPEX database[174]. By doing this, the time gap between the adoption of new legislation on EU level and the potential take up of the same rules in Switzerland can be decreased.

[174] www.ipex.eu

This contributes to the faster realisation of the renewed level-playing field, i.e. competition is less distorted by minimising differences in the legal frameworks of the two parties.

9. In order to provide legal certainty, ideally a common system of enforcement should be put in place based on the example of the EEA countries. ECJ case law would be binding or serve as an important point of reference.

10.Ensure that the EU law compatibility check is done thoroughly and precisely by the Swiss Integration Office or relevant Swiss legal services and make sure the advice of the Swiss Integration Office on the EU compatibility of new Swiss legislation is taken sufficiently into account.

11. Intensify efforts to streamline cantonal laws and harmonise the manner of implementation of new rules and regulations between the cantons to ensure more homogenous market circumstances throughout Switzerland. This could partly be achieved by organising regular meetings between local officials of the cantons, (legal) experts and representatives of the federal government. It is of vital importance to point to the benefits of a harmonised legal framework, while addressing outstanding issues and keeping an attitude of pragmatism: aim at finding a "win-win" solution.

The EU and the EEA EFTA states

1. The European Commission should consider the notification of legislative proposals that fall within the scope of the areas covered by the EEA Agreement. The proposals could be forwarded to the relevant parliaments and governments in a similar way as it is done for national parliaments of the EU via the IPEX database[175]. By swiftly notifying the EFTA Secretariat when new EU Internal Market legislation is being prepared and adopted, the time gap between the adoption of new legislation on EU level and the potential take up of the same rules by the EEA EFTA States, can be decreased. This contributes to the faster realisation of the renewed level-playing field i.e., competition is less distorted by minimising differences in the legal frameworks of the relevant parties.

2. Ensure better involvement of Iceland, Norway and Liechtenstein in the decision shaping and the implementation phase. Do this by intensifying communication in the form of workshops, seminars and perhaps more frequent meetings of the Joint Committee.

3. Consider updating the EEA agreement to take into account of the extension of the EU Single Market into other areas.

[175] ibid.

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EFTA Court - http://www.eftacourt.int/

EFTA Secretariat - http://www.efta.int/content/legal-texts/eea

EFTA Surveillance Authority - http://www.eftasurv.int/legaltexts/eeaagreement/

Swiss Integration Office (IO) - http://www.europa.admin.ch/index.html?lang=en

Swiss Mission to the EU - http://www.eda.admin.ch/eda/fr/home/topics/eu/eu/misbr.html

Swiss Representation - http://www.eda.admin.ch/eda/en/home/reps/eur/vgbr/ukemlo/ecofin/cheu.html

State Secretariat for Economic Affairs, Switzerland (SECO) http://www.seco.admin.ch/index.html?lang=en

ANNEXES

Annex I. List of Interviewees

Mr François BAUR - Permanent Delegate, Fédération des entreprises suisses - **Economiesuisse**

Ms Susanne BLANK - Wirtschaftspolitik, **Travail.Suisse**

Mr Tom DIDERICH (DG MARKT) - Desk Officer from the **European Commission**

Mr Daniel KLINGELE - Coordination politique, justice et affaires intérieures Porte-parole of the **Swiss Mission to the EU**

Ms Tuula NIEMINEN - Deputy Director General Internal Market at the **EFTA Surveillance Authority**

Mr Lars Erik NORDGAARD - Director EEA Coordination Division (Brussels) of the **EFTA Secretariat**

Mr Tilman RENZ - Information Officer - **Swiss Integration Office** - (written response)

Mr Fabrizio SACCHETTI (DG ENTR) - Policy Officer International Regulatory Agreements from the **European Commission**

Mr Ulrich TRAUTMANN (DG RELEX) - International Relations Officer from the **European Commission**

Ms Marion WEBER (DG ENTR) - Policy Officer International Relations from the **European Commission**

Ms Meike WOLF (DG ENTR) - Legal Officer Notification of technical regulations from the **European Commission**

Annex II: Selected publications by Prof. Dr. Christa Tobler

Publications dealing with the EU-Swiss bilateral law, with references to academic writing by others:

Internetapotheken im europäischen Recht. Positive und negative Integration am Beispiel des grenzüberschreitenden Verkaufs von Arzneimitteln in der EU und in der Schweiz, Basler Schriften zur europäischen Integration No 87, Basel: Europainstitut der Universität Basel 2009.

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Annex III. Overview of EU - Swiss bilateral agreements

Agreements	Signed	Entry into Force	Areas
Free Trade Agreement	22 July 1972	1 January 1973	Removed barriers as customs and quotas for industrial products between the contracting parties, thereby creating a *free trade zone*. * Checks at border crossings are still carried out as usual.
The Insurance Agreement	10 October 1989	1 January 1993	Guarantees insurance companies of both parties the freedom to establish operations in the territory of the other contracting party.
Bilateral I *sectoral agreements*	21 June 1999	1 June 2002	Research Technical Barriers to trade Free movement of Persons Land transport Agriculture Public procurement Air Transport
Bilateral II *sectoral agreement*	October 2004	*Differs per policy field.*	Processed agricultural goods Statistics Media Environment Pensions Education, occupational training, youth Taxation of savings Schengen *acquis* Dublin Convention Fight against fraud

Annex IV. Comparison between EU law, EEA law and bilateral law

Topic	*EU law*	*EEA*	*Bilateral law*
1) Material scope	All explicitly or implicitly conferred powers (principle of conferral of powers). Particularly important: generally applicable rules, e.g. the prohibition of discrimination on grounds of nationality.	In principle: same. Starting point EU law as it stood in 1992, with exceptions (e.g. goods from third countries, fisheries). Same.	Sectorial approach, starting point EU law as it stood in 1999, but mostly more limited (e.g. services), partially broader (Schengen). Selective, e.g. general prohibitions of discrimination on grounds of nationality in certain agreements.
2) Development	Treaty revisions, development of secondary law (participation of the Member States in the decision making process, degree depending on the applicable procedure).	Dynamic though no automatic taking over of new EU law, adaptation within the limits of the EEA Agreement (e.g. not discrimination legislation based on Art. 19 TFEU), no decision making process but decision shaping.	Existing agreements: in principle static, partially taking over new (secondary) EU law by Joint Committees, no participation in either decision making or decision shaping (exception: Schengen: dynamic, decision shaping; carriage of goods: decision-shaping).
3) Interpretation	Purpose-oriented, authoritative interpretation by the European Court of Justice (ECJ).	Same for the EU; homogeneous and purposive interpretation by the EFTA Court for the EEA EFTA States (probably more far-reaching that required by the wording of the agreement).	Interpretation by the courts taking into account the nature of the agreement; partially homogeneous interpretation with date limit (e.g. Air Transport, Free Movement of Persons).
4) Enforcement	Highly developed institutional system, Commission and ECJ in cooperation with the national courts and authorities, various judicial procedures under EU law.	Mostly same, but two pillars: Commission/ESA Surveillance Authority and ECJ/EFTA Court, including enforcement actions and preliminary rulings ("Opinions" of the EFTA Court).	In principle no common system (exception: Air Transport; e.g. dispute with Germany); diplomatic Joint Committees (e.g. dispute on company taxation); enforcement actions and preliminary rulings only within the EU (e.g. *Stamm and Hauser*, *Grimme*).
5) Protection of rights	Highly developed system with important elements based on ECJ case law, e.g. conform interpretation, primacy and direct effect, Member State liability and right to effective, proportionate and dissuasive sanctions.	Same for EU Member States; mostly same of the EEA EFTA States (direct effect only for implemented EEA law – in practice, no negative consequences).	Same for EU Member States; for Switzerland in principle similar, though no direct effect of important provisions of the Free Trade Agreement (e.g. *Adams, OMO, Physiogel*).

Chart 1: Prohibition of both discrimination and protection

Topic:

Art. 110 TFEU has two aspects: a prohibition of discrimination (for cases where products are similar) and a prohibition of protection (for cases where products are not similar but are nevertheless in competition).

Two distinct situations, two prohibitions under Art. 110 TFEU

The goods at issue are similar, Art. 110(1) TFEU

Criteria for determining similarity:
- Characteristics of the product;
- Ability to meet the needs of the consumers.

E.g. aquavit and beverages made from neutral alcohol are similar; *Commission v Denmark* (1980); but whisky and fruit wine are not; *John Walker* (1986).

In this case, the TFEU prohibits discrimination against the foreign product.

Meaning: higher taxation of the foreign product is prohibited.

E.g. *Commission v Denmark* (1980)

The goods at issue are dissimilar, but are in competition with each other, Art. 110(2) TFEU

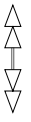
E.g.
- Bananas and other table fruit; *Co-Frutta* (1987);
- Beer and the lightest and least expensive varieties of wines; *Commission v Sweden* (2008).

In this case, the TFEU prohibits protection of the domestic good.

Meaning: favouring the domestic product is prohibited.

E.g. *Co-Frutta* (1987)

Although: in practice the Court often does not distinguish as between which situation is at issue; e.g. *Humblot* (1985).



Different taxation based on objective criteria

There is no infringement where different taxation is based on objective criteria; e.g. the raw materials used or the production process; *Chemical Farmaceutici* (1981), *John Walker* (1986).

1The charts are taken from Christa Tobler/Jacques Beglinger, Essential EU Law in Charts (2nd edition, Lisbon version), Budapest: HGV-Orac 2010 (forthcoming; publication expected in February 2010); see www.eur-charts.eu

Chart 2: Result: MEEQRs covered by Art. 34 TFEU

Topic:

As a result of the ECJ's case law, the term "MEEQR" covers both distinctly applicable measures and indistinctly applicable measures, though the latter are only covered under certain conditions. Certain selling arrangements are never covered.

Result of the four landmark cases: MEEQRs falling under Art. 34 TFEU

MEEQRs

- *Dassonville* (1974): "all trading rules actually or potentially, directly or indirectly, hindering trade".
- *Towing Trailers (*2009): "any [...] measure that hinders access of products originating in other Member States to the market of a Member State".

Distinctly applicable measures

For examples, see ***Chart 8/16***

Indistinctly applicable measures

... if there is no mandatory requirement or the measure adopted is not proportionate; *Cassis de Dijon* (1979), *Keck* (1993), *Towing Trailers* (2009).

E.g.:

- Product rules (i.e. rules concerning the product itself, such as requirements relating to designation, form, size, weight, composition, presentation, labelling, packaging etc.); e.g. *Heimdienst* (2000), *Chocolate* (2003), *Technical Adaptions* (2008);
- Rules concerning the use of a good; e.g. *Mickelsson and Roos* (2009);
- Rules concerning the circumstances of selling which have a different effect on domestically produced and imported goods; e.g. *Gourmet International* (2001), *DocMorris* (2003), *Commission v Germany* (2008), *LIBRO* (2009).

Not covered: certain selling arrangements

Rules concerning the circumstances of selling, if they have the same effect on domestically produced and imported goods; *Keck* (1993).

Relationship with Art. 36 TFEU

- The above concerns the *scope* of Art. 34 TFEU, i.e. the meaning of the term MEEQR.
- The issue of derogations (Art. 36 TFEU) follows as a subsequent step; see ***Chart 8/24***.
- In other words: in a strict sense, mandatory/imperative requirements are separate and distinct from the issue of justification. However, in practice they have the same effect; see ***Chart 8/25***.

Chart 3: Derogations under Art. 36 TFEU

Topic:

Art. 36 TFEU provides possibilities for derogation from Arts. 34 and 35 TFEU.

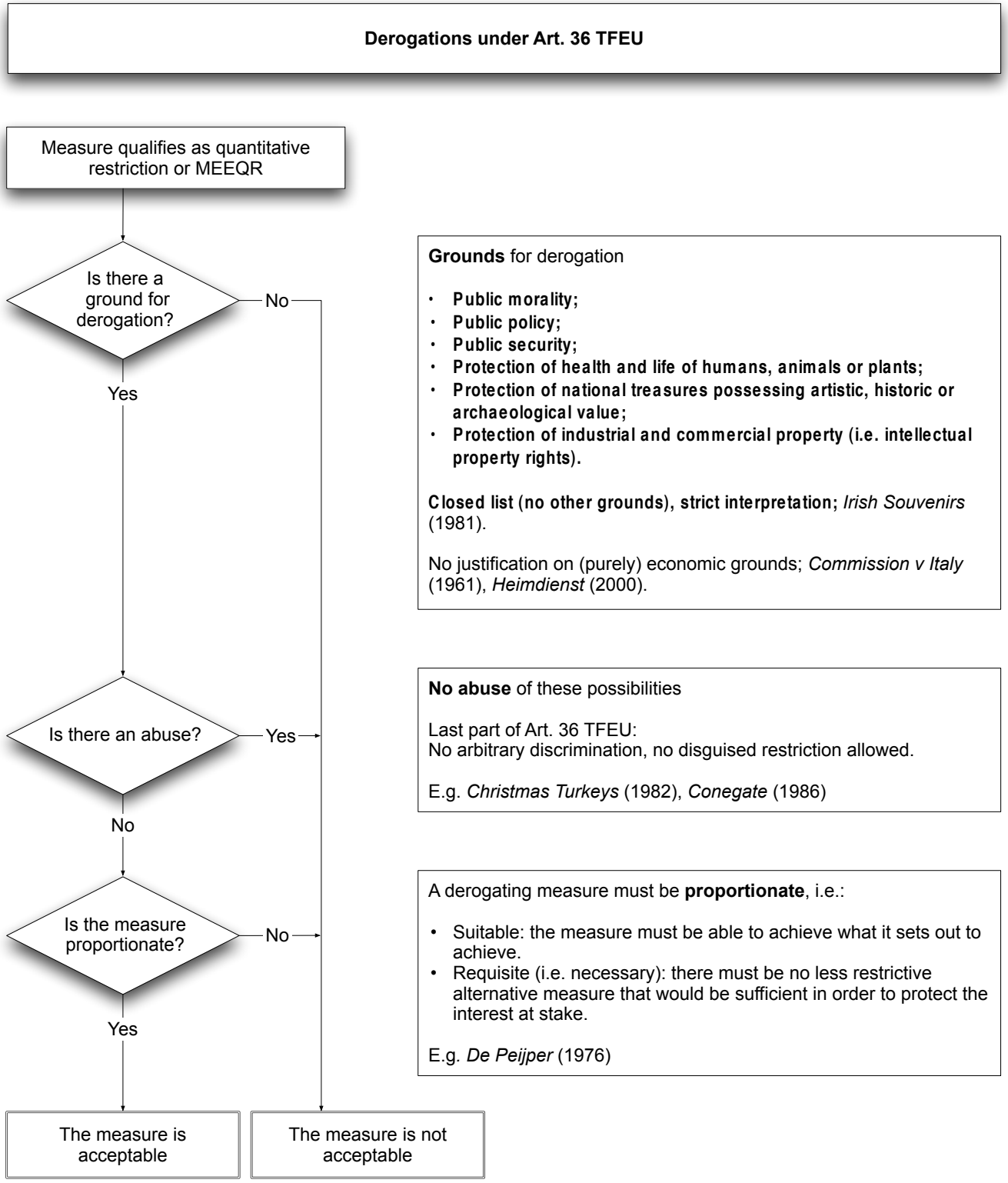


Chart 4: MEEQRs under Art. 35 TFEU

Topic:
For a long time, the Court appeared to interpret the concept of MEEQR under Art. 35 TFEU as including distinctly applicable measures only. More recently, the Court also included indistinctly applicable measures.

The term "MEEQR" under Art. 35 TFEU

General context

According to the ECJ in *Groenveld* (1979), Art. 35 TFEU covers national measures which:
- Have as their specific object or effect the restriction of patterns of exports;
- And thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the state in question at the expense of the production or of the trade of other Member States.

Specifically: MEEQRs

Distinctly applicable measures

Until recently, the Court held that Art. 35 TFEU catches only measures which formally provide for a difference in treatment between products destined for export and those sold within the Member State concerned, and that such measures can be justified only on the basis of Art. 36 TFEU; *Grilli* (2003).

Thus:

The term "MEEQR" covers distinctly applicable measures.

E.g.:
- A licensing system only for export products; *Bouhelier* (1977);
- A requirement of registry with the export board; *Jersey Potatoes* (2005).

Indistinctly applicable measures

In *Gysbrechts and Santurel* (2008), the Court found an indistinctly applicable measure to constitute an MEEQR. It held that such MEEQRs may be justified on the basis of Art. 36 TFEU or of overriding requirements of public interest, e.g. consumer protection under *Cassis de Dijon* (1979).

Thus:

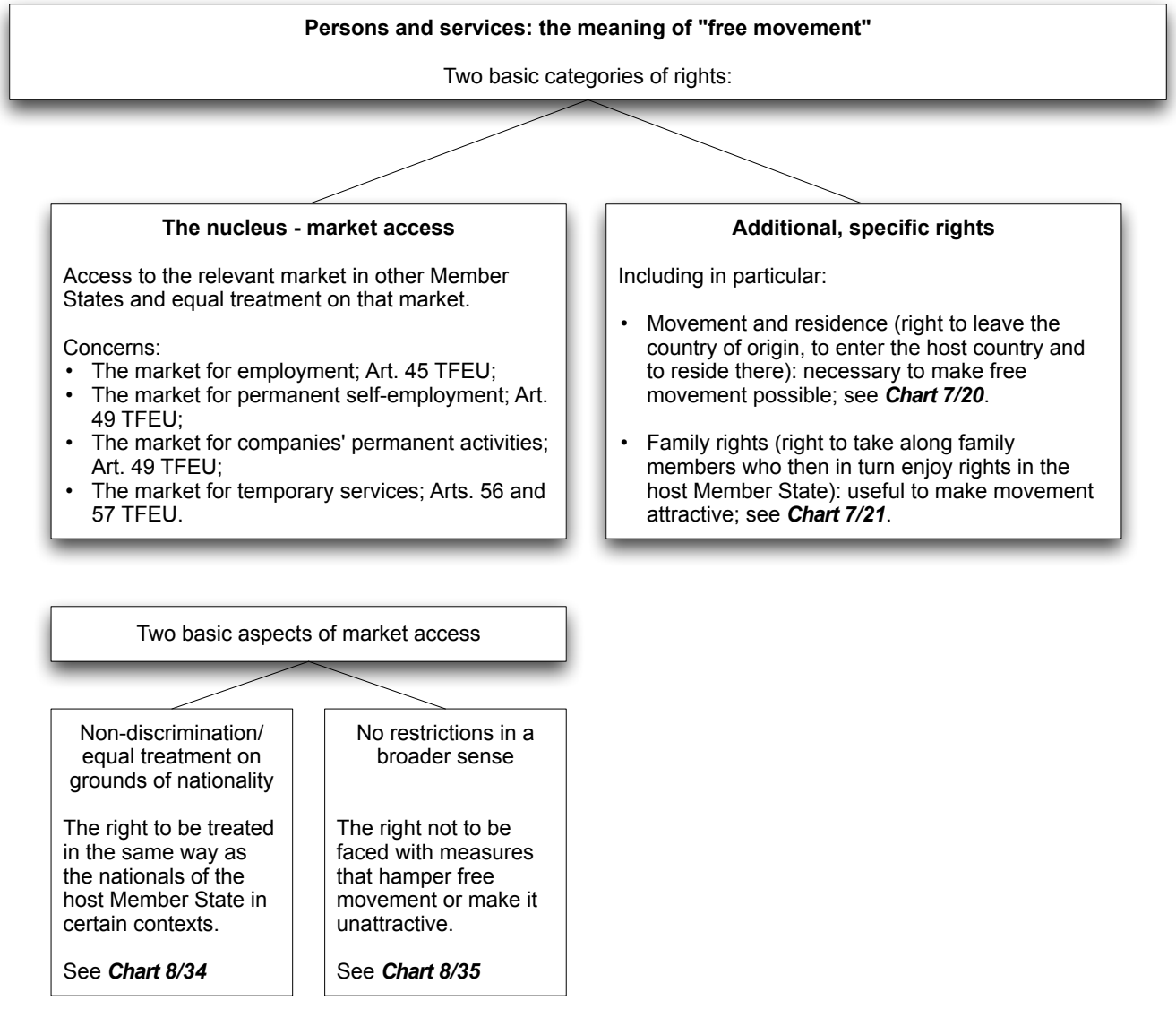
The term "MEEQR" includes even indistinctly applicable measures, if they:
- Provide a particular advantage for the national production or for the domestic market, at the expense of the production or of the trade of other Member States;
- Are not adopted in the interest of mandatory requirement; see ***Chart 8/20***;
- Or, if adopted in the interest of a mandatory requirement, are not proportionate; see ***Chart 8/20***.

E.g. a general prohibition on requiring a deposit or payment before the end of the period allowing the consumer to withdraw from a distance contract; *Gysbrechts and Santurel* (2008).

Chart 5: Persons and services: free movement rights

Topic:

The rights granted under the provisions on the free movement of persons and services consist of two main categories, namely market access rights and additional, specific rights.

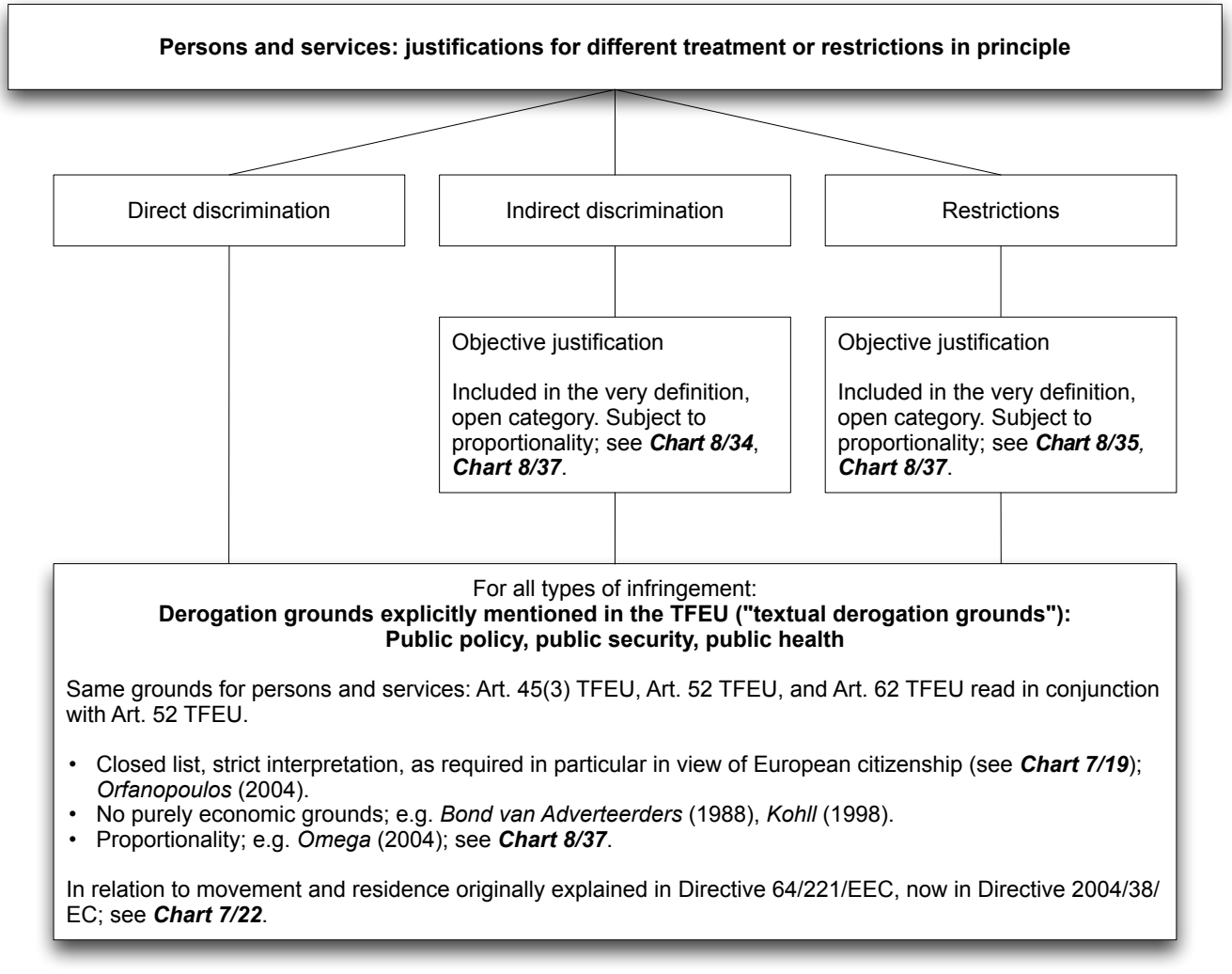


Note:
Different from competition law (see ***Chapter 9***), there is no de minimis rule in free movement law. Any restriction, even minor, is prohibited; *Care insurance* (2008).

Chart 6: Persons and services: textual derogations

Topic:

In principle, direct discrimination may only be justified on the basis of the derogations explicitly provided for in the Treaty (textual derogations). Conversely, the definitions of indirect discrimination and of restrictions by their nature include the element of objective justification.



A much debated question: how strict is the division?

- In principle, rules that are not universally applicable are not consistent with EU law unless they fall within an express derogating provision; *Bond van Adverteerders* (1988), *Commission v Germany* (2007), *Laval* (2007).
- However, case law is not always clear about the applicable category (direct discrimination, indirect discrimination, restriction) and/or about the type of justification (textual, objective) in a given case; e.g. *Safir* (1998), *Kohll* (1998), both concerning services.
- In the specific context of taxation, the ECJ appears to be willing to generally accept objective justification; e.g. *Metallgesellschaft* (2001), concerning the cohesion of the national tax system.

Compare ***Chart 8/25***

Chart 7: Relationship between the provisions on capital and the other freedoms

Topic:

Cases falling under the provisions on the free movement of capital may at the same time fall under another category. However, this may not be true in particular in relation to cases involving a non-EU country.

Relationship between the free movement of capital and the other freedoms

Whether the simultaneous application of different free movement regimes is possible depends on the situation.

Examples:

Establishment and capital:
Cross-border investment in a company (e.g. through the purchase of company shares)

- If the investment gives the person definite influence over the company's decision-making and allows the person to determine the company's decisions: Art. 49 TFEU (establishment).
- If there is no such influence: Art. 63 TFEU (capital).

Baars (2000), *Thin Cap Group Litigation* (2007)

Note:
The national legislation at issue may relate to both situations simultaneously. In such cases, both Arts. 49 and 63 TFEU apply; e.g. *Test Claimants* (2006), *Holböck* (2007).

Services and capital:
An activity that touches upon both issues

Whether or not both regimes may apply simultaneously appears to depend on the countries involved in a concrete case:

- Cross-border economic activity at an internal border of the EU; or
- Cross-border economic activity involving a third country.

Within the EU

Both regimes may apply simultaneously; e.g. *Commission v France* (2004).

In practice, the ECJ often only looks at one regime; e.g. *Bouanich* (2006).

Cases involving a third country

EU law on the free movement of capital appears not to apply where the service element prevails and where there is no multilateral or bilateral law on the free movement of services; *Fidium Finanz* (2006).

E.g. EU - Switzerland: there is no bilateral Treaty on services that would cover the type of financial services at issue in *Fidium Finanz* (2006).

Conversely, the EEA Agreement (1992) covers all four freedoms (though goods only in a limited manner; see ***Chart 2/6***, ***Chart 7/4***); *Ospelt* (2003). The EFTA Court tends not to apply two categories simultaneously; *Piazza* (2005).

Chart 8: The *Cassis de Dijon* principle and the need for harmonisation

Topic:
At a time when harmonisation was difficult to achieve due to political difficulties (including the requirement for unanimity voting in the Council), the ECJ's *Cassis de Dijon* ruling drastically reduced the need for harmonisation.

The Cassis de Dijon principle ...

Cassis de Dijon (1979) on the meaning of Art. 34 TFEU (then Art. 30 of the EEC Treaty): goods lawfully produced in one Member State must, in principle, be accepted in other Member States.

Home state control

The quality of a good is controlled by the state of origin, i.e. only the home state may legislate on this issue.

Mutual recognition

In principle, Member States must accept goods originating from other Member States.

"In principle":
- In the case of indistinctly applicable measures: subject to mandatory requirements; see ***Chart 8/20***;
- In all cases: subject to Art. 36 TFEU; see ***Chart 8/24***.

... drastically reduced the need for harmonisation

Cassis de Dijon Communication by the Commission (1979)

After *Cassis de Dijon* (1979), harmonisation in respect of those areas covered under Art. 34 TFEU is only necessary in the context of:
- Mandatory requirements;
- Art. 36 TFEU justifications.

Notes:
- After *Cassis de Dijon* (1979) and through the development of the definition of restrictions as a legal concept by the ECJ, the *Cassis de Dijon* principle also applies in other fields of EU Treaty law; see ***Chart 8/35***, ***Chart 8/63***.
- The Cassis de Dijon principle also applies in the framework of certain secondary legislation; e.g. Art. 3 of Directive 2000/31/EC (e-commerce Directive); Arts. 2 and 2a of Directive 89/552/EEC (Audiovisual Media Services Directive).

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