

Acknowledgements

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Responsibility for imprecisions and errors remains with each individual author.

Introduction

Switzerland is, geographically, politically and culturally a very close neighbour to the European Union. All the Swiss borders are shared with EU (Austria, France, Germany and Italy) or with EEA (Liechtenstein) countries. This makes Switzerland the third most important EU trading partner (behind US and China), whilst the EU is Switzerland's main trading partner.

With regard to individuals, according to the latest statistics¹, over 1 million EU citizens live in Switzerland and some 430.000 Swiss citizens live in the EU.

On top of that, approximately 230.000 cross-border workers commute daily to Switzerland to go to work.

This phenomenon is particularly relevant in Canton Ticino, where nearly 1 in 4 workers (around 23%) is a frontier worker.

It is than crucial for Switzerland to strengthen its relationship both with the EU and with neighbour countries and this has been done over the years by bilateral treaties, although further negotiations with the EU have been recently suspended and put at stake further to the outcome of the Swiss popular initiative against mass immigration.

This book outlines and analyses the legal framework governing free movement of persons between Switzerland and the EU, looking at it from an Italian perspective.

The intention is to provide students and economic operators with an accessible tool of basic documents and information concerning the rules governing cross-frontier relationship between Switzerland and Italy.

Actually, the contributions collected in this volume relate to individual lectures delivered at the University of Insubria, Varese (Italy), within a teaching module funded by the European Union within the Erasmus+ program (Jean Monnet). They tackle different aspects of the free movement of persons, with a focus on the mobility of cross-border workers and its main legal implications. I am fully aware that, due to their individual origin, subjects addressed by different authors may present some repetitions and overlapping. Nonetheless, when it occurs, I am inclined to consider it as an added value rather than a pitfall as it may offer the reader a different analysis perspective.

1 Source: European Union External Action Service, www.eeas.europa.eu, accessed on 19 March 2016.

The first two chapters aim at offering some introductory remarks on the relationship between Switzerland and the EU, considering its origin and its evolution, and on the Swiss-EU 1999 bilateral agreement on the free movement of persons (FMP). Most of the information and data contained therein are retrieved from European Union's institutional websites and from the Directorate for European Affairs (DEA) of the Swiss Federal Department of Foreign Affairs (FDFA), which represent a unique updated and unpaired repository of information whose sources are hereby acknowledged.

The following chapters offer a thorough and more in-depth legal analysis on selected topics such as the outcome of the 9 February 2014 referendum on the popular initiative against mass immigration and its impact on the FMP agreement; the comparison between the Economic and Monetary Union and Switzerland in the light of the economic crisis; the relationship between Switzerland and the EU on antitrust; the judicial cooperation between Switzerland and the EU; the impact of the agreement on the taxation of savings between the EU and Switzerland and the multilateral convention on common Reporting Standard on the bank secrecy, the tax treatment of cross-border workers and the effects of the FMP agreement; and the administrative cooperation between Switzerland and the EU financial authorities.

It goes without saying that without the most valuable contributions of all the individual authors, this book could not have been written and for that reason I express my deepest and sincere gratitude to each and all of them.

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The relationship between Switzerland and the European Union: Historical Evolution and Current Legal Framework

Abstract: The author analyses the evolution of the legal framework governing the relationship between Switzerland and the European Union, being Switzerland a member of the European Free Trade Association but not adhering to the European Economic Area. Specific attention is devoted to the content of the Switzerland-EU bilateral agreements “packages” and to sectoral agreements between Switzerland and Italy.

1 Introductory remarks

Not being part of the European Union (EU), the relationship between the Swiss Confederation (hereinafter referred to as Switzerland), the EU and the latter’s member States are governed by a series of multilateral and bilateral international agreements. Two basic principles have to be borne in mind when looking at the concerned relationships: since the European Economic Community (EEC) was established pursuant to the Treaty of Rome signed on 25 March 1957, the treaty making power with regard to commercial policy has been identified as an exclusive responsibility of the EEC¹; on the other hand, when with regard to (other) policies falling within the shared responsibilities of the EU and its member States agreement have not (yet) been negotiated nor finalized between the EU and a third State (saying Switzerland as far as we are concerned), the EU member States retain the bilateral treaty making power to the extent that the content of the agreement at stake does not clash with EU law and until EU *jus superveniens* repeals the bilateral relationship.

The above implies as a consequence that EU member States are prevented from entering negotiations and agreements affecting trade or, more in general commercial policy, between themselves and Switzerland as all commercial agreements between the EU and third States, whether bilateral between the

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1 M. KANIEL, *The Exclusive Treaty-Making Power of the European Community up to the period of the Single European Act*, Kluwer, The Hague, 1996.

EU and another State or multilateral in the framework of an international organization fall within the exclusive remit of the EU. Conversely, there are still several bilateral agreements in force between Switzerland and EU member States either because entered before establishment or accession of the concerned member State to the EU, or because subsequent multilateral agreements between Switzerland and the EU contain provisions stating that the concerned agreement does not affect existing conventions to which EU member States are or will be parties in relation to the subject matter.

Another element to consider when looking at the relationship between the EU and Switzerland or between the latter and the EU member States is that Switzerland is a federal State, meaning that the treaty making power in Switzerland lies with the federal government in Bern whilst Swiss cantons do not enjoy foreign powers. This has not prevented frontier cantons (like Ticino, Grisons or Valais) to enter preferential arrangements with local authorities (such as regions or provinces in Italy) to further promote and strengthen their trans-frontier relationship². A valid model of this approach is represented by the work community *Regio Insubrica*³, which fosters cooperation between local Swiss and Italian authorities in the Alps Lakes Region to facilitate exchange of information and joint programs and support trans-frontier movement of people for work or tourism purposes. Nonetheless it has to be noted that spontaneous organisations like the *Regio Insubrica* or other kind of memorandum of understandings or protocols of intents between Swiss cantons and local authorities of neighbouring countries (such as *Regione Lombardia* or *Tyrol*⁴) cannot generate nor be source of legal obligations according to general principles of public international law, as the treaty making power remains with the central government of the contracting parties.

2 For a more in-depth analysis of the regional transborder cooperation in Italy, see G. SAPUTELLI, *The Regions and Their International Activities*, in S. MANGIAMELI (Ed.), *Italian Regionalism: Between Unitary Traditions and Federal Processes. Essays on Federalism and Regionalism I*, Springer, Heidelberg, 2014, pp. 281-306; and, with a focus on Swiss cross-border cooperation, OECD Territorial Reviews, *Switzerland*, OECD, Paris, 2002, spec. pp. 79-83.

3 www.regioinsubrica.org.

4 Framework conditions for cross-border cooperation between the employment services and the employers' organisations of Tyrol and South Tyrol were signed in 1997 and renewed and extended to other organisations in May 2000 within the *EURES TransTirolia* partnership. In November 2002, Grisons joined the *TransTirolia* with the *Kantonales Amt für Industrie, Gewerbe und Arbeit (KIGA)* (Cantonal Office for Industry and Labour). The partnership covers the Federal State of Tyrol, including the districts of Landeck, Imst, Innsbruck (city and State), Schwarz and Lienz in Austria; the Autonomous Province of Bolzano-South Tyrol in Italy; and the Canton of Grisons in Switzerland.