

**Schriften zur Grenzüberschreitenden Zusammenarbeit**

**Band 16**

**Wissenschaft**

**Switzerland and the European Union:**  
The implications of the institutional  
framework and the right of free movement  
for the mutual recognition  
of Professional qualifications

**Joel Günthardt**

**DIKE**

**Nomos**

# Table of contents

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

Table of contents

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

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

Table of contents

4.4.2.4	Justifications	179
4.4.2.5	Swiss flanking measures	180
4.5	Conclusion to Chapter4	183
<b>Part III: Mutual recognition of Professional qualifications</b>		<b>185</b>
5	Mutual recognition of Professional qualifications	187
5.1	Introduction	187
5.1.1	Evolution of Directive 2005/36/EC	188
5.1.2	Decisions of the Joint Committee Switzerland/EU on the free movement of persons with regard to Annex III to the AFMP	194
5.1.3	Lack of implementation of Directives 2013/55/EU and 2018/958	197
5.2	Principle of mutual trust	200
5.2.1	Mutual recognition by means of primary law	201
5.2.2	Recent internal market case law of the CJEU with regard to primary law: <i>Brouillard</i>	205
5.2.3	Case law with regard to primary law under the <i>acquis suisse</i>	207
5.2.3.1	Case law of the CJEU: <i>Ettwein</i>	207
5.2.3.2	Early case law of the FAC	208
5.2.3.3	Cantonal case law	210
5.2.3.4	Current case law of the FAC	210
5.2.3.4.1	Partial recognition	210
5.2.3.4.2	Landmark case of the FAC concerning discrimination and equal treatment	211
5.2.3.4.3	Application of primary law for the unregulated professions?	211
5.2.3.5	Current case law of the Swiss Federal Court	211
5.2.3.5.1	Application of primary law	211
5.2.3.5.2	Laboratory doctor	212
5.2.4	Diploma as a restriction for non-regulated professions	212
5.2.5	Duty to take Professional qualifications into account as a general principle of EU law?	214
5.2.6	Abuse of rights and zigzag recognition	216
5.2.6.1	First duster of the abuse of rights concept	218
5.2.6.2	The second cluster of the abuse of rights concept	220
5.2.6.3	Third cluster of the abuse of rights concept	222

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

Table of contents

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

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



Table of contents

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

8.2.3	Directive 98/5/EC or the 'Facilitating Practice Directive'	389
8.2.3.1	Host Member State-title - Integration of lawyers	392
8.2.3.2	Formalities	393
8.2.4	Directive 77/249/EEC or the 'Facilitating Services Directive'	394
8.2.4.1	Scope of the Facilitating Services Directive	394
8.2.4.2	Substantive rules of the Facilitating Services Directive	396
8.2.4.3	Professional rules and conduct	397
8.2.4.4	Familiarisation with the host Member State's legal System	399
8.2.5	Case law of the CJEU	399
8.2.5.1	Case law with regard to the Integration of lawyers	399
8.2.5.1.1	Case C-118/09, Koller	399
8.2.5.1.2	Case C-359/09, Ebert	400
8.2.5.1.3	Joined cases C-58/13 and C-59/13, Torresi	400
8.2.5.1.4	Case C-431/17, Dikigorikos Syllogos Athinon	401
8.2.5.2	Aptitude test: Case 145/99, Commission v Italy	401
8.2.5.3	Language requirements: Case C-193/05, Commission v Luxembourg	401
8.2.5.4	Working in part-time public-service employment: Case C-229/05, Jakubowska	402
8.2.5.5	Co-involvement of domestic lawyers: Case C-472/85, Commission v France	403
8.2.5.6	Limit on the reimbursement of lawyers: Case C-289/02, AMOK	403
8.2.5.7	Regulation of legal fees: Joined cases C-94/04 and C-202/04, Cipolla and Case C-565/08, Commission v Italy	403
8.2.5.8	Authentication of Services: Case C-342/15, Piringier	404
8.2.5.9	Interim conclusion	406
8.2.6	Case law of the EFTA Court with regard to the legal profession	407
8.2.6.1	Case E-I/07: Criminal proceedings against A	407
8.2.6.2	Case E-6/13: Metacom v Rechtsanwälte Zipper & Col legen	407
8.3	The regulation of lawyers on a national level	408
8.3.1	Enrolment of lawyers in the cantonal bar register	411
8.3.1.1	Personal requirements	411

Table of contents

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

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

Table of contents

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

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

Table of contents

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