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SECTORAL AGREEMENTS BETWEEN THE EC AND SWITZERLAND: CONTENTS AND CONTEXT

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1. Introduction

Following the Swiss refusal to enter the European Economic Area (EEA), decided by a referendum of the people in 1992,[1] a package of seven sectoral agreements was negotiated from 1994 onwards between the European Community and the 15 Member States of the European Union on the one hand, and Switzerland on the other. The agreements were signed on 21 June 1999[2] and entered into force on 1 June 2002, after all 17 Contracting Parties had ratified[3] the Agreement on the Free Movement of Persons (hereafter: AFMP).[4] In Switzerland, the seven agreements were approved in a referendum on 21 May 2000.[5]

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1. The EEA Agreement of 2 May 1999 (O.J. 1994, L 1/3) was defeated narrowly, with 49.7% of the voters and seven cantons voting in favour. Cf. Breitenmoser and Husheer, *Europarecht*, 2nd ed. (Zürich/Basel/Geneva, 2002), vol. I, no. 31, and vol. II, no. 1306; Fasel, "Bilaterale Verträge und ihre Auswirkungen", (2000) *Rechtsfocus*, 3, 8.

2. The signing ceremony took place in Luxembourg as part of the 2-day summit of the foreign ministers of the EU Member States, four and a half years after the start of the negotiations and half a year after their conclusion in Vienna in December 1998.

3. Within the EU several steps were needed for the ratification of the seven agreements: the assent of the European Parliament (given on 4 May 2000), the approval of the Agreement on the Free Movement of Persons by all 15 Member States (completed by Christmas 2001), the consent of the EU Council to the seven agreements (28 Feb. 2002) and the approval by the Commission, on behalf of the European Community on Atomic Energy (ECAE/Euratom), of the Agreement on Scientific and Technological Cooperation (4 April 2002).

4. According to the preamble, the Contracting Parties of the AFMP are the Swiss Confederation, on the one part, and the EC and its 15 explicitly named Member States, on the other part.

5. After the consent by the Swiss Parliament on 8 Oct. 1999, the Swiss people approved the seven agreements by a 67.2% yes vote on 21 May 2000. Subsequently, the Agreements were ratified by Switzerland on 16 Oct. 2000. Federal Journal (FJ) 1999, 6450, and 2000, 3773.

In order to avoid negative economic and legal consequences of the Swiss refusal to enter the EEA, the 1999 sectoral agreements[6] deepen the relations between the EU and Switzerland and facilitate market access for both sides. They cover seven areas: free movement of persons,[7] air transport,[8] rail and road transport,[9] agriculture,[10] public procurement,[11] scientific and technological cooperation[12] as well as mutual recognition of conformity assessment (technical barriers to trade).[13] In the Final Acts to these agreements, both Switzerland and the EC formulate several Joint and Unilateral Declarations with regard to the application and further development of the agreements.

The enlargement of the EU in 2004[14] will necessitate amendments only of the AFMP, in particular with regard to new transitional periods and quantitative limits for the new Contracting Parties which also have to be explicitly named in its preamble. This is a consequence of the AFMP as a mixed agreement.[15] The substantive character of such negotiations and amendments together with a considerable extension of the applicability of the agreements exclude the automatic integration of the new EU Member States into the AFMP and justify a new ratification process. In the meantime, the AFMP will remain in force among the 17 original Contracting Parties. The other six

6. They are published in the O.J. 2002, L 114/1, and in the Systematic Collection (SC) of Swiss law under different numbers according to their context (see the footnotes below) and in the FJ 1999, 6489–7110. The message of the Federal Council, which is the Swiss Government, to the Parliament of 23 June 1999, FJ 1999, 6128 et seq., gives a detailed explanatory report for each agreement.

7. Agreement on the Free Movement of Persons between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part (AFMP) of 21 June 1999, O.J. 2002, L 114/6; SC 0.142.112.681; FJ 1999, 7027.

8. Agreement between the European Community and the Swiss Confederation on Air Transport (AAT) of 21 June 1999, O.J. 2002, L 114/73; SC 0.748.127.192.68; FJ 1999, 6948.

9. Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road (ARR) of 21 June 1999, O.J. 2002, L 114/91; SC 0.740.72; FJ 1999, 6971.

10. Agreement between the European Community and the Swiss Confederation on Trade in Agricultural Products (ATAP) of 21 June 1999, O.J. 2002, L 114/132; SC 0.916.026.81; FJ 1999, 6633.

11. Agreement between the European Community and the Swiss Confederation on Certain Aspects of Government Procurement (AGP) of 21 June 1999, O.J. 2002, L 114/430; SC 0.172.052.68; FJ 1999, 6504.

12. Agreement on Scientific and Technological Cooperation between the European Communities and the Swiss Confederation (ASTC) of 21 June 1999, O.J. 2002, L 114/468; SC 0.420.513.1; FJ 1999, 6489.

13. Agreement between the European Community and the Swiss Confederation on Mutual Recognition in relation to Conformity Assessment (MRA) of 21 June 1999, O.J. 2002, L 114/369; SC 0.946.526.81; FJ 1999, 6551.

14. The Copenhagen summit of 12 and 13 Dec. 2002 fixed 1 May 2004 as accession date for the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, Cyprus and Slovenia; cf. *Bulletin Quotidien Europe* spec. No. 8362/2002.

15. See below 4.3.

agreements, however, will be automatically extended to the new EU Member States according to the international law principle of moving frontiers of international treaties.[16]

2. The legal position of Switzerland in the process of European integration in general

Switzerland is very close to the EU – geographically,[17] economically[18] and with regard to its mixture of cultures and languages.[19] In order to reduce differences between the legal orders, the Federal Council decided in 1988 to bring Swiss legislation with international implications in line with the European standards.[20] Since that time, autonomous adaptation[21] and assimilation of Swiss legislation to EU regulations and standards, without any treaty obligation, are often used and will remain important also in the future for those matters which are not covered by the seven sectoral agreements of 1999. Within the areas of these agreements, far-reaching adoption and incorporation of European norms and standards (*acquis communautaire*) into the Swiss legal system are to be seen in the future.[22]

16. With regard to the territorial scope e.g. according to Art. 57 ARR, see Epiney and Sollberger: "Verkehrspolitische Gestaltungsräume der Schweiz auf der Grundlage des Landverkehrsabkommens", *Swiss Papers on European Integration* (SPEI), vol. 31, (Bern 2001), p. 25.

17. Neighbouring States of Switzerland are Austria, France, Germany and Italy, all EU Member States, as well as the Principality of Liechtenstein, Contracting Party of the EEA.

18. The EU and its Member States are the main trading partners of Switzerland, absorbing 60% of the exports and supplying 80% of the imports. Merchandise exports are concentrated in the sectors: machinery, instruments, watches, chemicals, medicinal products and commercial services with about one quarter originating in the financial sector; cf. FJ 2003, 932. According to Goetschel, "Switzerland and European integration: Change through distance", (2003) EFA Rev., 313, Switzerland is economically more integrated into the EU than many of its Member States.

19. According to Art. 4 of Switzerland's new Federal Constitution of 18 Dec. 1998 (SC 101), "(t)he national languages are German, French, Italian and Romansh".

20. FJ 1988 III 388; cf. Mallepell, "Der Einfluss des Gemeinschaftsrechts auf die schweizerische Gesetzgebung 1993–1995", SPEI, vol. 21, (1999), 7 et seq., 11 et seq.

21. Application of such autonomously adapted law generally needs to be oriented towards principles of EC law in order to ensure an interpretation result which is in conformity; cf. Wiegand and Brülhart, "Die Auslegung von autonom nachvollzogenem Recht der Europäischen Gemeinschaft", SPEI, vol. 23 (1999), 29 et seq., 38.

22. In order to facilitate this process, the electronic publication of binding European directives and regulations in the official systematic collection of Swiss law will be realized in autumn 2003; cf. the Federal Publication Statute of 21 March 1986 (SC 170.512). Such an accessible official publication of the *acquis communautaire* also in Switzerland is necessary to satisfy the constitutional requirements of the rule of law as well as the principle of transparency.

In May 1992, because of an animated discussion among the political parties about the future position of Switzerland in an integrated Europe, and during the preparation of the referendum on accession to the EEA,[23] the Swiss Government transmitted a request for accession to the European Union. However, this request had to be frozen after the Swiss people voted against membership of the EEA in a referendum of 6 December 1992.[24] A people's initiative, coming from young people, to start negotiations on accession to the EU immediately, was rejected in a referendum in 2001.[25] Thus, the formal links between Switzerland and the EC before 2002, when the sectoral agreements entered into force, remained the Free Trade Agreement with the European Economic Community of 1972[26] plus some 130 treaties of mainly technical relevance,[27] the Framework Agreement on Scientific and Technical Cooperation[28] and the Transit Agreement.[29]

Within the European Free Trade Association (EFTA), Switzerland has concluded since 1991 preferential agreements with twelve central and eastern European countries as well as with five Mediterranean countries to ensure access conditions similar to those available to the EU.[30] The EFTA Convention of 4 January 1960 itself was updated as a consequence of the seven sectoral agreements in order to ensure the analogous treatment of EFTA Mem-

23. Cf. Zäch, Thürer and Weber (Eds.), *Das Abkommen über den Europäischen Wirtschaftsraum – Eine Orientierung* (Zürich, 1992); Jacot-Guillarmod (Ed.), *Accord EEE – Commentaires et réflexions / EWR-Abkommen – Erste Analysen / EEA Agreement – Comments and reflexions* (Zürich 1992).

24. FJ 1993 I 167. With regard to the consequences of this refusal, the Federal Council emphasized that both the compatibility of Swiss legislation with European Community law and EU membership would remain "strategic objectives" in the future: FJ 1992 III 1185; FJ 1993 II 805; FJ 1994 I 153, 196; FJ 2002 6359; cf. Mallepell, *supra* note 20, p. 14 et seq. Therefore the Federal council refuses to withdraw the request for accession; cf. *Neue Zürcher Zeitung*, No. 224, 27 Sept. 2003, 14.

25. FJ 2001, 2025. As an analysis of the ballot has shown, the refusal should not be seen as a general rejection of European integration as such, but of an immediate start of the accession procedure. Cf. Schwok and Levrat, "Switzerland's Relations with the EU after the Adoption of the Seven Bilateral Agreements", (2001) EFA Rev., 351 et seq.

26. Agreement of 22 July 1972 between the Swiss Confederation and the European Economic Community (O.J. 1972, L 300/189; SC 0.632.401).

27. Exceptions dealing with substantial matters are the Insurance Treaty of 10 Oct. 1989 (O.J. 1991 L 205/3; SC 0.961.1) and the Agreement on Mutual Cooperation in Custom Matters of 9 June 1997 (O.J. 1997, L 169/77; SC 0.632.401.2).

28. Agreement of 22 Nov. 1985 between the Swiss Confederation and the EC (O.J. 1985, L 313/6; SC 0.420.518).

29. Agreement of 2 May 1992 between the Swiss Confederation and the EC (O.J. 1992, L 373/28; SC 0.740.71). According to Art. 20, this agreement will expire after 12 years, i.e. 23 Jan. 2005.

30. Cf. Reports of the Federal Council on foreign trade policy: FJ 2001, 824; FJ 2002, 1263; FJ 2003, 865.

ber States and their nationals. The modified version entered into force on 1 June 2002, together with the sectoral agreements.[31]

Beginning on 5 July 2001,[32] new bilateral negotiations were resumed between Switzerland and the EC in ten more areas.[33] Seven of those areas are so-called "left-overs" from negotiations on the sectoral agreements of 1999:[34] services;[35] double taxation of retired EU-civil servants pensions;[36] liberalization of trade in processed agricultural products;[37] environment;[38] statistics;[39] education, occupational training, youth;[40] media.[41]

On the explicit wishes of Switzerland, negotiations were also commenced on questions of cooperation and participation in the fields of the Agreements of Schengen and Dublin.[42] Moreover, negotiations were started in the fields

31. FJ 2003, 858, 865; FJ 2001, 5028; cf. FJ 2001, 6516, concerning the law on necessary modifications of Swiss legislation, e.g. the Federal Law on the Free Movement of Medical Staff of 19 Dec. 1877 (SC 811.11). The Federal Law on the Free Movement of Lawyers of 23 June 2000 (SC 935.61) regulates the Free Movement of Persons agreed with EFTA and EU in its Arts. 21–33: FJ 1999, 6061 et seq.

32. I.e. before the seven sectoral agreements entered in force in June 2002.

33. FJ 2003, 862 et seq. With regard to the participation of Switzerland in the European process of integration, the website of the Swiss Bureau of Integration www.europa.admin.ch and the periodical "Swiss Papers on European Integration" are informative.

34. See the Joint Declarations in the Final Acts to the sectoral agreements of 1999.

35. Comprehensive liberalization of services supplementary to Art. 5 AFMP; FJ 2003, 864. Because of several important unresolved questions, the negotiations on services were delayed; *Neue Zürcher Zeitung*, no. 42, 20 Feb. 2003.

36. FJ 2003, 863.

37. The coverage of Protocol 2 to the Free Trade Agreement should improve the frontier price compensation mechanism for the agricultural component of products in order to enable both parties to make the most effective possible use of the financial resources available for export refunds: FJ 2003, 862.

38. E.g. participation of Switzerland in the European Environmental Agency (EEA), O.J. 1999 L 117, 1; FJ 2003, 863.

39. E.g. participation of Switzerland in Eurostat: O.J. 1997, L 52/1; FJ 2003, 863.

40. Access for young Swiss to the EU programmes SOKRATES (general education), O.J. 2000, L 28/1; LEONARDO DA VINCI (occupational training), O.J. 1999, L 146/33; YOUTH (extracurricular youth work), O.J. 2000, L 117/1; FJ 2003, 863.

41. Cooperation in the area of media and opening of the EU programmes for the advancement of media, such as "MEDIA Plus", O.J. 2000, L 336/82, and "MEDIA Training", O.J. 2001, L 26/1, for Switzerland; FJ 2003, 863.

42. Agreement of 14 June 1985 on the Gradual Abolition of Controls at Common Frontiers, O.J. 2000, L 239/13 (Schengen I Convention); Convention Applying the Schengen Agreement 1990, O.J. 2000, L 239/19 (Schengen II Convention); Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, O.J. 1997, C 254/1 (Dublin Convention); FJ 2003, 863 et seq. A special consultation mechanism will apply, at Switzerland's request, if new EU law relevant for Schengen might concern Swiss fundamental principles like neutrality, federalism and direct democracy. In that case a joint Committee shall find appropriate solutions, Press release of the Swiss Federal Department of Justice and Police, 30 June 2003.

of combat of fraud[43] and, after the decision of the European Council at the summit of Feira of 20 June 2000, taxation of savings income.[44] Especially in connection with these dossiers, questions regarding the Swiss bank secrecy as well as administrative and judicial assistance come to the fore more and more.[45] In this respect, Switzerland supports the European taxation of interest payments with an "equivalent" paying agent tax. However, a system for an automatic exchange of information between tax authorities is refused by Switzerland, because of the banking secrecy.[46] The latter does not protect criminal activities, which means that it can be lifted for the purpose of combatting fraud. By strengthening mutual judicial and administrative assistance procedures in such cases, Switzerland wants to emphasize that it has no interest in the use of its territory and its banks for the organization of illegal activities. Problems arise, however, as a result of the lack of a uniform definition of offences, primarily in the fields of fraud, tax evasion and money laundering.

3. Legal nature and structure of the sectoral agreements

3.1. *The sectoral agreements as part of international law*

3.1.1. *Legal nature and Contracting Parties*

In colloquial language, and sometimes even in legal writing, the seven sectoral agreements are called "Bilateral Agreements between the EU and Switzerland".[47] This qualification is incorrect for two reasons: first, the EU still has no international legal personality,[48] but needs the EC, represented by

43. FJ 2003, 862.

44. Bull. EU, No. 6/2000, p. 9 et seq.; FJ 2003, 864. Original deadline for the EC according to the conclusions of the European Council of Feira of June 2000 was the end of the year 2002.

45. Breitenmoser and Husheer, *supra* note 1, vol. I, no. 843 et seq.

46. See now the decisions of ECOFIN of 21 Jan. 2003 and 3 June 2003 with regard to the negotiations with Switzerland: *Bulletin Quotidien Europe*, No. 8384/2003, p. 7, and No. 8475/2003, p. 6.

47. Cottier and Panizzon, "Die bilateralen Verträge und das Recht der WTO: Grundlagen und Spannungsfelder", *Jusletter* 11 Sept. 2000, www.weblaw.ch/jusletter/Artikel.jsp?ArticleNr=740&-Language=1; Felder and Kaddous (Eds.), *Accords bilatéraux Suisse – EU (Commentaires) / Bilaterale Abkommen Schweiz – EU (Erste Analysen)* (Basel/Geneva/Munich/Brussels, 2001); Thürer, Weber and Zäch (Eds.), *Bilaterale Verträge Schweiz – EG, Ein Handbuch* (Zürich, 2002). Also the official explanations by the Federal Council in the information brochure for the plebiscite of 21 May 2000 as well as the foreign policy commission of the Swiss Parliament use this term; FJ 2002, 6334 et seq.; Schwok and Levrat, *supra* note 25, p. 335, use a mixed term, namely "sector-specific Bilateral Agreements".

48. Such a proposal was last refused in the negotiations on the Treaty of Amsterdam in 1997 and has now been made again by the European Convention (Art. 6). Cf. also Breitenmoser and

the European Commission, to negotiate and to sign agreements falling within its competences.[49] Second, only five of the seven agreements are bilateral, i.e. only binding two subjects of international law.[50] The Agreement on Scientific and Technological Cooperation is a trilateral treaty between Switzerland, the EC and Euratom, and the Agreement on the Free Movement of Persons is a mixed agreement, i.e. a multilateral agreement between Switzerland, the EC and the EU Member States.[51] Consequently, this agreement had to be ratified not only by the EC, but also by all 15 Member States of the EU with the involvement of their parliaments.[52] The necessity to conclude the Agreement on the Free Movement of Persons as a mixed agreement results from the fact that the EC is not exclusively competent with regard to free movement of persons, but shares competence with its Member States.[53] The EU Member

Isler, "Der Rechtsschutz im Personenfreizügigkeitsabkommen zwischen der Schweiz und der EG sowie den EU-Mitgliedstaaten", (2002) *Aktuelle Juristische Praxis*, 1005; Craig and de Búrca, *EU Law – Text, Cases and Materials*", 2nd ed. (Oxford, New York, 1998), p. 116 et seq.; Herdegen, *Europarecht*, 3rd ed. (München, 2002), no. 82 et seq.; Streinz, *Europarecht*, 5th ed. (Heidelberg, 2001), no. 121b; Röttinger, "Art. 281", in Lenz (Ed.) *EG-Vertrag Kommentar*, 2nd ed. (Cologne, 1999), no. 6; Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*", 3rd ed. (London/The Hague/Boston, 1998), p. 47, 97, 100, 1254; Tizzano, "The foreign relations law of the EU between Supranationality and Intergovernmental Model", in Cannizzaro (Ed.), *The European Union as an Actor in International Relations* (The Hague/London/New York, 2002), p. 143 et seq. Other opinion held by Wichard, "Art. 1 EG-Vertrag", no. 5–14, "Art. 5 EU-Vertrag", no. 8, and Cremer, "Art. 11 EU-Vertrag", no. 1, "Art. 18 EU-Vertrag", no. 1, both in Calliess and Ruffert (Eds.), *Kommentar zu EU-Vertrag und EG-Vertrag*, 2nd ed. (Neuwied/Kriftel, 2002); Tomuschat, "The International Responsibility of the European Union", in Cannizzaro, p. 181 et seq.

49. Arts. 133(3) and 300(1) EC. See e.g. Craig and de Búrca, *supra* note 48, p. 118, Herdegen, *supra* note 48, no. 138, 439 et seq.; Kapteyn and VerLoren van Themaat, *supra* note 48, p. 1265 et seq.; Streinz, *supra* note 48, no. 300, 600 et seq.

50. Cf. the agreements on air, rail and road transport, agriculture, mutual recognition of conformity assessment and public procurement. Thürer and Hillemanns, "Allgemeine Prinzipien", in Thürer, Weber and Zäch, *supra* note 47, p. 17 et seq.; another view is held by Neframi, who thinks that the Community and the Member States form a single Contracting Party: "International Responsibility of the European Community and the Member States under Mixed Agreements", in Cannizzaro, *supra* note 48, p. 193.

51. Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1235. See in general Gasser, "Grundsätzliche Charakteristik des Abkommens über die Freizügigkeit", in Felder and Kaddous, *supra* note 47, p. 273; Herdegen, *supra* note 48, no. 440; Craig and de Búrca, *supra* note 48, p. 117 et seq.; Kapteyn and VerLoren van Themaat, *supra* note 48, p. 1262 et seq.; Nicolaysen, *Europarecht II – Das Wirtschaftsrecht im Binnenmarkt* (Baden-Baden, 1996), p. 487 et seq.; Röttinger "Art. 300", in Lenz, *supra* note 48, no. 6; Schmalenbach, "Art. 300 EG-Vertrag", in Calliess and Ruffert, *supra* note 48, no. 25 et seq.; Streinz, *supra* note 48, no. 428 et seq.

52. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague/London/New York, 2001), p. 86 et seq.

53. Cf. Opinion 1/1994, *WTO*, [1994] ECR I-5267, para 108. Heliskoski *supra* note 52, p. 25 et seq.

States claim parallel competence in the field of social policy, which is directly linked to free movement of persons.[54]

Despite their legal notions and substantive concepts, which are taken from the European common market and which are identical with the *acquis communautaire* at the date of signature in the matters concerned, the seven sectoral agreements are, in principle, treaties governed by public international law.[55] This is confirmed by the institutional and reciprocal framework and structure of the agreements. Therefore, with regard to their general functioning, they have to be applied and interpreted in the light of general principles of public international law such as reciprocity and territorial sovereignty and according to the Vienna Convention on Treaties.[56] With regard to the substantive content which is part of the *acquis communautaire*, however, application and interpretation have to follow the rules and standards set by the European institutions, especially by the European Court of Justice and the Court of First Instance. In this respect, their implication for Swiss law and effect in legal practice may be characterized as partly integrational or sui generis.

From the point of view of EC law, the sectoral agreements are association agreements in the sense of Article 310 EC.[57] Although this provision was not listed as a legal basis in the proposal of the Commission to the Council con-

54. The variety of areas of activities that an international agreement covers does not necessarily reflect or correspond with the division of powers set out in the EC Treaty; in agreements with various and complex matters, the concept of mixity is often unavoidable: see Koutrakos, "The Interpretation of Mixed Agreements under the Preliminary Reference Procedure", (2002) EFA Rev., 27 et seq., 30.

55. FJ 1999, 6157. Cf. Felder, "Appréciation juridique et politique du cadre institutionnel et des dispositions générales des accords sectoriels", in Felder and Kaddous, *supra* note 47, p. 125 and 130; Filliez, "Application des accords sectoriels par les juridictions suisses: quelques repères", in Felder and Kaddous, ibid., p. 184 et seq.; Zäch, "Gesamtüberblick", in Thürer, Weber and Zäch, *supra* note 47, p. 6.; Thürer and Hillemanns, *supra* note 50, p. 18. Another view is held by Cottier and Evtimov, "Die sektoriellen Abkommen der Schweiz mit der EG: Anwendung und Rechtsschutz", in (2003) *Zeitschrift des bernischen Juristenvereins*, 106 et seq., who characterize the sectoral agreements as being *sui generis* because of their combination of public international and European law.

56. See below section 3.1.5.; Filliez, *supra* note 55, p. 201 et seq.; cf. with regard to association agreements in general Herrnfeld, "Art. 310", in Schwarze (Ed.), *EU-Kommentar* (Baden-Baden, 2000), p. 2420, no. 16.

57. Cf. e.g. Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1257 et seq.; Cottier and Evtimov, *supra* note 55, p. 95; Kahil-Wolff and Mosters, "Struktur und Anwendung des Freizügigkeitsabkommens Schweiz-EG", in Schaffhauser and Schürer (Eds.), *Die Durchführung des Abkommens EU/CH über die Personenfreizügigkeit (Teil Soziale Sicherheit) in der Schweiz*, vol. I, (St. Gallen, 2001), p. 9 et seq., 18. Other view in FJ 2002, 6332 et seq.; Kaddous, "Les accords sectoriels dans le système des relations extérieures de l'Union européenne", in Felder and Kaddous, *supra* note 47, p. 90 et seq.; Andreoli, "Drittstaatsangehörige in der Europäischen Union", SPEI, vol. 22, (1999), p. 59. See about association agreements in general Craig and de Búrca, *supra* note 48, p. 115 et seq.; Herdegen, *supra* note 48, no. 452 et seq.; Herrnfeld, *supra* note 56, p. 2412 et seq.; Kapteyn and VerLoren van Themaat, *supra* note 48, p. 1330 et seq.; Koutrakos, *supra* note 54, p. 33; Nicolaysen,

cerning the conclusion of the seven agreements,[58] the Commission specified in its explanatory report to the proposal that, in view of the package character of the agreements and their institutional provisions,[59] the consent of the European Parliament according to Article 300(3)(2) EC was necessary.[60] A further consequence of the qualification of the sectoral agreements as association agreements was the requirement of a unanimous decision of the Council according to Article 300(2)(1) EC.[61]

3.1.2. *The sectoral agreements as an integral part of Swiss and EC law*

Both in Switzerland[62] and the EU,[63] treaties of international law are automatically part of the legal order upon their entry into force and are therefore *ipso iure* binding for all administrative and judicial bodies.[64] Both legal orders accept the predominance of the so-called "monistic theory", according

supra note 51, p. 517 et seq.; Röttinger, "Art. 310", in Lenz, *supra* note 48, no. 2 et seq.; Schmalenbach, "Art. 310 EG-Vertrag", in Calliess and Ruffert, *supra* note 48, no. 1 et seq., 11; Streinz, *supra* note 48, no. 613 et seq.

58. COM(1999) 229 final, 14; cf. Cottier and Evtimov, *supra* note 55, p. 96; Schmalenbach, *supra* note 57, no. 2 and 13.

59. Cf. Zäch, *supra* note 55, p. 7. Epiney, "Gestaltungsräume schweizerischer Verkehrspolitik dargestellt am Beispiel der Erhebung von Strassenbenutzungsgebühren", in *Jusletter* 6 May 2002, www.weblaw.ch/jusletter/Artikel.jsp? Article Nr=1644&Language=1, no. 4. Fasel, *supra* note 1, p. 15, analyses the reasons for the choice of the package character and calls the position of the EC on this point uncompromising. In fact the package character was chosen by the EC in order to avoid a refusal of some of the agreements in the Swiss plebiscite; cf. COM(1999) 229 of 4 May 1999, in (1999) *Zeitschrift für Europarecht*, 95 et seq.; see also Toledano Laredo, "The EEA Agreement: an overall view", 29 CML Rev., 1201, who points out that the procedure of Art. 310 EC is close to former Art. 237 EC (now Art. 49 TEU) for the accession of new Member States.

60. Cf. Cottier and Evtimov, *supra* note 55, p. 96; Schmalenbach, *supra* note 51, no. 34; Schmalenbach, *supra* note 57, no. 17.

61. Cf. Schmalenbach, *supra* note 51, no. 29; Schmalenbach, *supra* note 57, no. 17. The Treaty of Nice does not change the regulations of Art. 300 EC in a way that is relevant for the sectoral agreements. Art. 310 EC was neither changed in itself nor modified by the new Art. 181a EC. See Fischer, *Der Vertrag von Nizza* (Baden-Baden, 2001), p. 128 et seq., p. 155.

62. Judgment of the Swiss Federal Tribunal (hereafter: "FT") 124 II 307. It is unwritten constitutional law: Achermann, "Der Vorrang des Völkerrechts", in Cottier, Achermann, Wüger and Zellweger (Eds.), *Der Staatsvertrag im schweizerischen Verfassungsrecht* (Bern, 2001), p. 33 et seq., 38; Thürer, "Verfassungsrecht und Völkerrecht", in Thürer, Aubert and Müller (Eds.), *Verfassungsrecht der Schweiz* (Zürich, 2001), para 11 no. 23; Filliez, *supra* note 55, p. 184 et seq.

63. Art. 300(7) EC. Case 181/73, *Haegemann* v. *Belgian State II*, [1974] ECR 449 para 5; Case 104/81, *Hauptzollamt Mainz* v. *Kupferberg & Cie.*, [1982] ECR 3641 para 14; Case C-162/96, *Racke* v. *Hauptzollamt Mainz*, [1998] ECR I-3655 para 46. Cf. Herdegen, *supra* note 48, no. 75; Schmalenbach, *supra* note 51, no. 48 et seq., 51 et seq., 68 et seq.; Schmalenbach, *supra* note 57, no. 34; Streinz, *supra* note 48, no. 431, 605 et seq.

64. In the EU, these agreements form an integral part of Community Law and are binding both for EC institutions as well as for EU Member States. Case 12/86, *Demirel* v. *Stadt Schwäbisch Gmünd*, [1987] ECR 3719 para 7; Breitenmoser and Husheer, *supra* note 1, vol.

to which international law and national law together are part of one legal order, which is deduced from one basis, and where the addressees are the individuals.[65] Due to this unity, international law is automatically and directly adopted by the way of reception in Swiss and Community law.[66] Therefore, an additional implementation of the sectoral agreements into the legal order of Switzerland or the EU by way of transformation or incorporation, as would be the case in dualistic countries and systems,[67] is not necessary.

3.1.3. *The direct effect of the sectoral agreements*

In order to be invoked and applied directly a treaty provision, as well as a decision of the Joint Committees of an EC association treaty, have to be duly published, but also have to be formulated in clear and precise wording. These requirements make a provision justiciable, i.e. *self-executing*. According to the jurisprudence of the ECJ as well as of the Swiss Federal Tribunal, provisions of a treaty are *self-executing* and thus have direct effect if they are sufficiently clear and precise to constitute a valid legal basis for a decision in an individual case.[68] There is no direct effect if a provision just contains indefinite and programmatic goals, governs a matter in outline, gives substantial room for discretion or merely contains guiding principles. Such provisions are not

I, no. 319; Herdegen, *supra* note 48, no. 454; Kaddous, *supra* note 57, p. 99 et seq.; Röttinger, "Art. 300", *supra* note 51, no. 16; Schmalenbach, *supra* note 57, no. 7 et seq.

65. In order to be held binding on individuals, a treaty also requires publication. Cf. Wildhaber and Breitenmoser, "The Relationship between Customary International Law and Municipal Law in Western European Countries", (1988) ZaöRV, 197.

66. Cf. Wildhaber and Breitenmoser, *supra* note 65, 171; Herdegen, *supra* note 48, no. 75; Streinz, *supra* note 48, no. 431.

67. The non-requirement of transformation law is also called the theory of adoption. Wildhaber and Breitenmoser, *supra* note 65, p. 171, 197; Müller and Wildhaber, *Praxis des Völkerrechts*, 3rd ed. (Bern, 2001), p. 153 et seq.; Thürer and Hillemanns, *supra* note 50, p. 20.

68. *Haegemann II*, *supra* note 63; *Kupferberg & Cie.*, *supra* note 63; *Demirel*, *supra* note 64; Case C-192/89, *Sevince*, [1990] ECR I-3461/3500; Case 87/75, *Bresciani*, [1976] ECR 129; Cases 21–24/72, *International Fruit Company NV and others* v. *Produktschap voor Groenten en Fruit*, [1972] ECR 1219; FT 124 III 91; FT 120 Ia 10 et seq.; FT 111 Ib 164; FT 98 Ib 388; cf. Bucher, "Rechtsmittel der Versicherten", in Schaffhauser and Schürer *supra* note 57, no. 7, 12 et seq.; Hangartner, "Art. 5 – Grundsätze rechtsstaatlichen Handelns", in Ehrenzeller, Mastronardi, Schweizer and Vallender (Eds.), *Die schweizerische Bundesverfassung – Kommentar* (Zürich/ Basel/Geneva, 2002), p. 54 no. 42; Kahil-Wolff, "Im APF nicht geregelte Fragen des Rechtsschutzes", in Schaffhauser and Schürer (Eds.), *Rechtsschutz der Versicherten und der Versicherer gemäss Abkommen EU/CH über die Personenfreizügigkeit (APF) im Bereich der Sozialen Sicherheit*, p. 77; Röttinger, "Art. 300", *supra* note 51, no. 17; Röttinger, *supra* note 57, no. 4; Schmalenbach, *supra* note 51, no. 59 et seq.; Thürer and Hillemanns, *supra* note 50, p. 22 et seq.; Streinz, *supra* note 48, no. 432 et seq., 644; Wildhaber and Breitenmoser, *supra* note 65, p. 172. The question of *self-executing*-character and justiciability of a provision or a decision has to be answered for each individual provision and decision separately, not for a treaty or decision mechanism as such: Müller and Wildhaber, *supra* note 67, p. 182 et seq.; Cottier and Evtimov, *supra* note 55, p. 95.

directed towards administrative and judicial bodies and, therefore, have no direct application and execution. They are directed towards the legislature with its discretion, its legislative and political competences.[69]

With regard to the direct effect of treaty provisions, the recent case law of the Swiss Federal Tribunal has not been constant. The judgments on the Free Trade Agreement between Switzerland and the EEC of 1972,[70] which led to this Free Trade Agreement being almost completely ineffective, have been widely criticized by legal scholars.[71] On the other hand, the Federal Tribunal has already decided earlier in a judgment on the EFTA Agreement[72] that its Article 16(1) has *self-executing* character.[73] The Federal Tribunal has not abandoned this precedent even after the contrary signal given in its judgments on the Free Trade Agreement.[74] With respect to the question of direct effect of provisions of the WTO Agreement, no final judgments of the Federal Tribunal exist yet: the question has been left open so far[75] or was answered in the negative,[76] whereas in both judgments, the relevant passages were only so-called *obiter dicta*.

In the AFMP, most provisions on free movement of employees and freedom of establishment according to the provisions in Annex I are *self-executing*;[77] only the provisions on coordination of the systems of social security in Annex II[78] are *non-self-executing*.[79] Article 1(1) of Annex II AFMP, declaring the

69. Case C-469/93, *Chiquita Italia*, [1995] ECR I-4533; FT 124 II 308, with further references; FT 105 II 58; FT 98 Ib 387.

70. Agreement of 22 July 1972 between the Swiss Confederation and the European Economic Community, O.J. 1972, L 300/189; SC 0.632.401.

71. On this not convincing jurisprudence of the Federal Tribunal see FT 118 Ib 367 et seq.; FT 105 II 49 et seq.; Breitenmoser, "Die globale und regionale Interdependenz des schweizerischen Aussenwirtschaftsrechts", in Cottier and Kospe (Eds.), *Der Beitritt der Schweiz zur Europäischen Union, Brennpunkte und Auswirkungen* (Zürich, 1998), p. 49 et seq., 57, with further references.

72. Agreement of 4 Jan. 1960 on the Establishment of the European Free Trade Association (EFTA), SC 0.632.31.

73. FT 98 Ib 387 et seq.

74. FT 116 Ib 302 et seq. However, the rules of origin as provided for in the 3rd Protocol to the Free Trade Agreement were applied in a direct manner: FT 114 Ib 168; cf. Cottier and Evtimov, *supra* note 55, p. 102.

75. FT 2A.496/1996, unpublished judgment of 14 July 1997, para 4.

76. FT 125 II 306.

77. FJ 1999, 6358; cf. Grossen and de Palézieux, "Abkommen über die Freizügigkeit", in Thürer, Weber and Zäch, *supra* note 47, p. 107, 134; Gasser, *supra* note 51, p. 274 et seq.; Kälin, "Die Bedeutung des Freizügigkeitsabkommens für das Ausländerrecht", in Cottier and Oesch (Eds.), *Die sektoriellen Abkommen Schweiz-EG* (Bern, 2002), p. 19.

78. Cf. Bergmann, "Überblick über die Regelungen des APF betreffend die Soziale Sicherheit", in Schaffhauser and Schürer, *supra* note 57, p. 12 et seq.

79. See FJ 1999, 6358 et seq.; Spira, "L'application de l'Accord sur la libre circulation des personnes par le juge des assurances sociales", in Felder and Kaddous, *supra* note 47, p. 369

EC provisions on coordination[80] and other equivalent provisions in the area of social security to be applicable, leaves the detailed definition and concrete regulation in the individual branches of social security to Swiss legislation. Yet, in this context, it is not correct to speak of an incorporation or a transformation of these provisions of the AFMP into Swiss law,[81] as in monism international law does not need incorporation or transformation. The norms of Annex II of the AFMP do not have to be incorporated or transformed into Swiss law, in the sense of the dualistic theory, but only need clarification, implementation and specification by further norms and statutes in order to be applicable in individual cases. To this end, a clause will be inserted in all relevant federal social security laws, declaring Council Regulations No. 1408/71 and No. 574/72 in effect for Switzerland, to be binding through a reference.[82] Even if there was no reference to the EC Council Regulations in a statute, this would not mean that a precise provision of the AFMP or its Annex I does not have a *self-executing* effect, since the prohibition of discrimination in Article 2 of this Agreement is *self-executing*.[83] This is also true for Article 3 of the Agreement on Air Transport (AAT). These discrimination clauses provide for immediate legal protection against unfair discrimination, even in the cases of a legislative mistake or a failure to enact a law. However, since the discrim-

et seq.; Müller, "Soziale Sicherheit", in Thürer, Weber and Zäch, *supra* note 47,, p. 145. Other view: Bucher, *supra* note 68, no. 17 et seq., 23.

80. In particular Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to the members of their families moving within the Community, O.J. 1971, L 149/2, with the subsequent amendments; most recently changed by Council Regulation (EC) No. 1386/2001 of 5 June 2001 on the amendment of Council Regulation (EEC) No. 1408/71 and Council Regulation (EEC) No. 574/72 on the execution of Council Regulation (EEC) No. 1408/71, O.J. 2001, L 187/1 et seq. (not yet considered in the AFMP). The principle of applying only one security system to one worker and all not gainfully employed members of his family, as well as a general inclusion within the social security system of the State where the working place is situated can be seen as fundamental elements of the new arrangement. Another basic structure is that benefits are due also when a person finally leaves the country and that earlier periods of insurance elsewhere in a Contracting State must be taken into consideration when changing a social security system. In the field of health insurance, some countries like Germany, Austria and Italy have accorded a right to opt for an insurance of the residence State to frontier workers, which had to be exercised within three months of the coming into force of the agreements. FJ 1999, 6153 et seq.

81. Cf. FJ 1999, 6358.

82. See paras. 4–12 of the Federal Law on the Agreement between the EC, their Member States and Switzerland on the Free Movement of Persons, SC 142.20, FJ 1999, 6456 et seq.; cf. Schürer, "Einzelne Regelungen gemäss APF", in Schaffhauser and Schürer, *supra* note 57, p. 81 et seq.; Kahil-Wolff, "Quelques remarques sur les voies de droit en matière de sécurité sociale dans le cadre de l'Accord sur la Libre Circulation des Personnes (ALCP)", (2002) *Journal des Tribunaux*, 64.

83. Similarly: Imhof, "Das bilaterale Abkommen über den freien Personenverkehr und die Soziale Sicherheit", (2000) *Schweizerische Zeitschrift für Sozialversicherung und berufliche Vorsorge*, 22 et seq.; Kahil-Wolff, *supra* note 82, p. 66; Bergmann, *supra* note 78, p. 46.

ination clauses of Article 6 of the Agreement on Public Procurement (APP) and Article 1(3) of the Agreement on Rail and Road Transport (ARR) are only directed towards the Contracting Parties, requiring them not to take any discriminatory measures, these clauses have no *self-executing* character.[84]

3.1.4. *The rank of the sectoral agreements in Swiss and EC law*

Since international treaties are not drafted and enacted in the same proceedings as national legislation, they sometimes do not fit coherently into the system of national law. As a consequence, there may arise conflicts between national and international law. Such collisions, their effects and resulting complications in interpretation make the controversial questions about the rank and the priority of international law sources within a national legal system all the more important.[85] Only if a *self-executing* provision of a treaty has priority over national law, can it be fully enforced by administrative and judicial bodies of the Contracting States.

In Switzerland, the Federal State as well as the Cantons have to respect international law according to Article 5(4) of the Federal Constitution.[86] Despite its open and indefinite character,[87] this provision can, in reference to the rule of law principle, stated in Article 5(1) of the Constitution, be interpreted as an implicit recognition of the general principle that international law has priority over national law, or that the latter must be interpreted in conformity with international law, in both cases with the reservation of deviant case law of the Federal Tribunal.[88] Also, in accordance with the international customary law principles *pacta sunt servanda* and non-consideration of national regulations that are opposed to international obligations, as provided for in Article 26 and

84. Other opinion held by Epiney and Sollberger, *supra* note 16, p. 22.

85. The theory of adoption does not deal with the hierarchical position of international law within the legal order, but accepts conflicts; cf. Achermann, *supra* note 62, p. 37 et seq.

86. See Hangartner, *supra* note 68, p. 51 no. 4, p. 63 et seq.

87. Biaggini, "Das Verhältnis der Schweiz zur internationalen Gemeinschaft, Neuerungen im Rahmen der Verfassungsreform", in (1999) *Aktuelle Juristische Praxis / Pratique Juridique Actuelle*, 722 et seq., 728; Hangartner, *supra* note 68, p. 51 no. 4, p. 63 et seq.

88. Nothing can be concluded from the limitation of the margin of appreciation of the Federal Tribunal according to Art. 191 of the Federal Constitution with respect to the relationship between international and national law. The provision only states that international law has to be taken into consideration and must be applied, whereas no general decision upon a hierarchy of norms is made. The message of the Federal Council on the new Constitution explicitly confirms this: FJ 1997, 136 et seq.; cf. Hangartner, "Art. 191: Massgebendes Recht", in Ehrenzeller, Mastronardi, Schweizer and Vallender, *supra* note 68, note 16 et seq; see also Thürer and Hillemanns, *supra* note 50, p. 21 et seq., who consider that an inflexible general rule would not be appropriate to the dynamic character of international law; for Filliez, *supra* note 55, p. 191 et seq., no rule of conflict is contained in the Article and the courts may still decide according to recognized doctrine and practice.

Article 27 of the Vienna Convention on the Law of Treaties,[89] Switzerland is, according to its own international law commitments, obliged to comply with international treaty law.[90]

Still, the relation between international and national law has not yet been fully clarified by the Swiss Federal Tribunal.[91] According to constant precedents, national law generally has to be interpreted in a way which is consistent with international law and its public order.[92] This is called interpretation favouring international law (*völkerrechtskonforme Auslegung*) and may be seen as an expression of the principle of friendliness to international law (*Völkerrechtsfreundlichkeit*). Included in these rules is a presumption that the legislature did not intend to derogate from international law and that it therefore wished to avoid a conflict between international and municipal law whenever possible.[93] But if the conflict of norms can not be solved by this method, precedence must be given to international law.[94] With regard to human rights norms, this principle of superiority has now been explicitly accepted by the Federal Tribunal.[95]

Insofar as the fundamental freedoms guaranteed by the sectoral agreements and the EC Treaty may be treated as being equal to basic human rights,[96] they should also have priority over Swiss law. Yet, the guarantees of these fundamental freedoms demand citizenship of the Union and a transnational relation, whereas human rights do not. These differences between fundamental freedoms and human rights are, however, the only ones and they do not play a role in this context. Therefore, the free movement and establishment

89. Hereafter: VCT. The seven sectoral agreements being part of public international law fall under the scope of the Vienna Convention on the Law of Treaties of 23 May 1969, SC 0.111; see *supra* 3.1.1. and *infra* 3.1.5.

90. FT 117 Ib 372 et seq.; Filliez, *supra* note 55, p. 185; Müller and Wildhaber, *supra* note 67, p. 73. The same is true for the European Communities, see below in this section.

91. Achermann, *supra* note 62, gives a survey of recent precedents.

92. This principle goes back to the *Frigerio* judgment of the Federal Tribunal: FT 94 I 669 et seq. See also FT 112 II 13. Cf. Filliez, *supra* note 55, p. 201 et seq.

93. Wildhaber and Breitenmoser, *supra* note 65, p. 169.

94. This is called moderate monism with priority of national law. Müller and Wildhaber, *supra* note 67, p. 161 et seq.

95. FT 125 II 425; see already FT 119 V 177. The so-called "*Schubert* practice" (FT 99 Ib 39 et seq.), dating back to the year 1973, which allows the legislature under certain conditions to enact provisions that are in conflict with international law, has therefore become obsolete in this area. The Federal Tribunal left open whether such priority has also to be given to other norms. Cf. Filliez, *supra* note 55, p. 188 et seq.; Thürer and Hillemans, *supra* note 50, p. 21 et seq.

96. See e.g. Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL* v. *Bosman*, [1995] ECR I-4921 et seq. para 129; Case C-416/96, *Eddline El-Yassini*, [1999] ECR I-1209 et seq., para 45; Breitenmoser and Husheer, *supra* note 1, vol. II, no. 934, 1087 and 1362; Schindler, *Die Kollision von Grundfreiheiten und Gemeinschaftsgrundrechten* (Berlin, 2001), p. 73 et seq.

of persons guaranteed in Articles 39 and 43 EC and in the AFMP could be treated as being equal to a basic human right.[97] As a consequence, to the extent that the freedoms guaranteed by the AFMP are equal or similar to basic human rights, the priority of the AFMP over federal and cantonal law in Switzerland would arguably be ensured, according to the case law of the Federal Tribunal.[98]

In the EU, on the other hand, international agreements have a rank between primary and secondary EC law, whereas the priority of primary Community law derives from the fact that compatibility with primary EC law is required.[99] From the point of view of international law, however, internal law may never derogate from the general priority of international law[100] and *pacta sunt servanda* must be respected. The ECJ consequently declares that international law has priority over secondary EC law within the Community legal order.[101] It follows that EC secondary legislation has to be interpreted in conformity with international law.[102] The same goes for national rules which are not compatible with international law obligations of the Community.[103] This constant case law may not hide the fact that the ECJ has very rarely, so far, judged a national regulation to be contrary to international law.[104] Furthermore, on only one occasion has the CFI found EC secondary legislation incompatible with the international law duties of the Community.[105]

3.1.5. *The interpretation of the sectoral agreements*

With regard to the interpretation of the sectoral agreements by the Contracting Parties and their institutions and courts, the following distinction must be made: in general and concerning their institutional functioning, the sectoral agreements are treaties of international law. As such, they have to be

97. The counterpart is the freedom of settlement in Art. 24(1) of the Federal Constitution, which only applies to Swiss nationals, according to the wording of the Constitution. Cf. regarding this parallelism Zufferey, "La liberté d'établissement", in Thürer, Aubert and Müller, *supra* note 62, para 47 no. 9.

98. FT 125 II 425; see already FT 119 V 177. Cf. Bergmann, *supra* note 78, p. 46.

99. Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1230; Herdegen, *supra* note 48, no. 605; Herrnfeld, *supra* note 56, p. 2422, no. 18.; Streinz, *supra* note 48, no. 167 et seq.

100. Cf. Art. 27 VCT. Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1231. Herrnfeld, *supra* note 56,, p. 2422, no. 18.

101. See the related Cases *International Fruit Company NV and others*, *supra* note 68.

102. Case C-341/95, *Bettati* v. *Safety Hi-Tech*, [1998] ECR I-4355 para 20; Case C-284/95, *Safety Hi-Tech* v. *S. & T.*, [1998] ECR I-4301 para 22; Case C-61/94, *Commission* v. *Germany*, [1996] ECR I-3989 para 52. With respect to the ECJ's review of Community legislation against directly effective international law see also *supra* 3.1.3.

103. *Kupferberg*, *supra* note 63, para 14.

104. Cf. e.g. *Commission* v. *Germany*, *supra* note 102, para 18 et seq.; Case C-469/93, *Amministrazione delle Finanze dello Stato* v. *Chiquita Italia SpA*, [1995] ECR I-4533, para 54 et seq.

105. Case T-115/94, *Opel Austria GmbH* v. *Commission*, [1997] ECR II-39, para 122 et seq.

interpreted according to the binding guidelines and principles of Articles 31–33 VCT. In the foreground are grammatical, systematic and teleological interpretations (Art. 31 VCT).[106] That means that the sectoral agreements are not to be interpreted in the same extensive manner as the ECJ and the CFI do in the context of the supranational character of Community Law, which must be distinguished from traditional public international law.[107] Thus, the ECJ and the CFI often and extensively apply the principle of *effet utile*,[108] according to which the effectiveness of the EC treaty has to be ensured to the largest possible extent.[109] Such "a rule of teleological interpretation which would give a treaty text the most extensive possible meaning and effect is neither recognized nor acceptable in international law and relations."[110] The international community, in contrast to the European Community, still lacks homogeneous structures, which is why the principle of effectiveness and *effet utile* was not explicitly mentioned in Article 31 VCT, even though this had been proposed.[111]

However, this conclusion has to be modified due to the static references to the relevant *acquis communautaire* contained in the sectoral agreements, that acquis being developed by the ECJ with reference to the *effet utile.*[112] Thus, according to Article 16(2) of the AFMP, "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". And the Agreement on Air Transport goes even further: as an exception, it gives a far-reaching reference to EC competition law, according full effect to the *effet utile* principle.[113] Article 1(2) AAT says that "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

106. Bernhardt, "Interpretation in International Law", in *Encyclopedia of Public International Law*, vol. II (Amsterdam et al., 1995), p. 1419 et seq.

107. Case 6/64, *Costa* v. *E.N.E.L.*, [1964] ECR 1269 et seq.; Case 26/62*, Van Gend & Loos* v. *Niederländische Finanzverwaltung*, [1963] ECR 24 et seq.; Craig and de Búrca, *supra* note 48, p. 255 et seq.

108. E.g. Case 270/80, *Polydor* v. *Harlequin*, [1982] ECR 329, para 14 et seq.; confirmed in Case C-257/99, *Barkoci and Malik*, [2001] ECR I-6557, para 51 et seq., Case C-235/99, *Kondova*, [2001] ECR I-6427, para 51 et seq., Case C-63/99, *Gloszczuk*, [2001] ECR I-6369, para 48 et seq., and Case C-162/00, *Pokrzeptowicz-Meyer*, [2002] ECR I-1049, para 32.

109. Cf. Borchardt, "Art. 220", in Lenz, *supra* note 48, p. 1620 et seq., no. 18; Craig and de Búrca, *supra* note 48, p. 217 et seq; Herdegen, *supra* note 48, no. 200 et seq.; Kapteyn and VerLoren van Themaat, *supra* note 48, p. 85 et seq.; Streinz, *supra* note 48, no. 498; Wegener, "Art. 220 EG-Vertrag", in Calliess and Ruffert, *supra* note 48, p. 1989 et seq., no. 14.

110. Bernhardt, *supra* note 106, p. 1420. Cf. also Bernhardt, "The scope of territorial application of treaties – Comments on Art. 25 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 ZaöRV (1967), 504.

111. Cf. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, 1984), p. 118, with further references.

112. See *infra* 3.4.

113. See *infra* 5.2.

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."[114]

Through these constructions, the decisions rendered by the ECJ and the CFI in utilization of the *effet utile* principle have to be considered in the direct application and interpretation of the sectoral agreements before Swiss courts.[115] In this respect, the provisions of the agreements have a significant European or integrational law character, despite its international law nature.

3.2. *The institutional framework of the sectoral agreements*

In accordance with the legal character of the seven sectoral agreements as part of international law, each contracting party is responsible for the implementation and application of the treaties on its own territory. There is only one important exception to that principle in the Agreement on Air Transport, where the parties have stipulated that the European institutions apply and supervise the regulations with regard to competition law which has an effect on the European market.[116]

Unlike the EEA and other association treaties with several common organs,[117] the institutional framework of the sectoral agreements is limited

114. Cf. Cottier and Evtimov, *supra* note 55, p. 106 et seq., make such a distinction between general and substantive provisions as a logical consequence of the hybrid character of the sectoral agreements, being part both of public international law and of supranational Community law.

115. Bergmann, *supra* note 78, p. 46; cf. in general Kapteyn and VerLoren van Themaat, *supra* note 48, p. 1330; on *effet utile* applying decisions with regard to the AFMP see Hailbronner, "Freizügigkeit nach EU-Recht und dem bilateralen Abkommen mit der Schweiz über die Freizügigkeit von Personen", (2003) *Zeitschrift für Europarecht*, 51 and 53.

116. Jaag, "Institutionen und Verfahren", in Thürer et al., *supra* note 47, p. 42, 45, and Spinner, "Rechtliche Grundlagen und Grenzen für bilaterale Abkommen", in Felder and Kaddous, *supra* note 47, p. 15, therefore call it a partial integration treaty. Kaddous, *supra* note 57, p. 79, 82, and Cottier and Evtimov, *supra* note 55, p. 89, qualify it even as a full integration treaty; see also von Büren, "Auswirkungen des Luftverkehrsabkommens auf das Wettbewerbsrecht", in Cottier and Oesch, *supra* note 77, p. 71.

117. Cf. Arts. 98 et seq. of the EEA Agreement. Cf. e.g. Norberg, Hökborg, Johansson, Eliasson and Dedichen, *EEA Law: A Commentary on the EEA Agreement* (Stockholm, 1993), p. 85 et seq., 112 et seq.; Haas, "Die institutionellen Bestimmungen des EWR-Abkommens (Art. 89 – 110)", in Zäch et al., *supra* note 23, p. 280 et seq.; Toledano Laredo, *supra* note 59, 1208 et seq.; Norberg, "The Agreement on a European Economic Area", 29 CML Rev., 1180 et seq.

and weak. For the management and supervision of the proper functioning[118] of the sectoral agreements, the parties set up for every agreement one Joint Committee,[119] which is composed of representatives of the Contracting Parties.[120] According to the principle of equal rights of Contracting Parties in international law,[121] they decide by consensus, i.e. unanimously. The Joint Committees adopt their own procedural rules and may appoint teams of experts and observers to support them or to take over specific tasks.[122] Such organization rules are of administrative character and need no approval by a Council decision in the EC or in Switzerland.[123]

In particular, the Joint Committees have the following purpose: they exchange views and information of the Contracting Parties and may make recommendations. In specific cases which are determined in the agreements, they dispose of a decision-making power. Thus, the Joint Committees are specifically authorized to change the annexes[124] and to decide on the adoption of new law of the Contracting Parties in the agreements. Depending on the subject of such newly adopted law, this may be a matter of important

118. Cf. the criticism concerning the lack of a uniform definition of this term and the tasks of the Joint Committees within the different sectoral agreements, by Thebrath, "Inkrafttreten der bilateralen Abkommen Schweiz-EU", in *Jusletter* 30 Sept. 2002, www.weblaw.ch/jusletter/Artikel. jsp? Article Nr=1916&Language=1, no. 157, 159 et seq.

119. The Agreement on Research is managed by the already existing Research Committee of the general Agreement of 1986 (Art. 6 Agreement on Scientific and Technological Cooperation – ASTC). The Agreement on Trade in Agricultural Products sets up a Veterinary Committee (Art. 19 of Annex 11 of the Agreement on Trade in Agricultural Products – ATAP) in addition to a Joint Committee for general questions (Art. 6 Agreement on Trade in Agricultural Products). The Joint Committee which is set up by the Agreement on Rail and Road Transport (ARR) will take over the management of the Transit Agreement of 1992 as well (Art. 51 ARR). The Joint Committee for the AFMP decided to create two subcommittees that will treat the fields of social security and recognition of diploma: FJ 2003, 861. In the first meeting of the Joint Committee of the AFMP, e.g., organizational regulations were established; see COM(2002) 476.

120. In the Swiss delegations, there are always representatives of the main responsible office, the integration office and other offices interested in a specific area. The cantons are represented in all areas. Cf. Jaag, *supra* note 116, p. 50 et seq.; Röttinger, *supra* note 57, no. 9, underlines that in organs of association agreements, the Member States and the EC "are speaking with one voice".

121. See e.g. UN Charter Art. 2(1), deriving from the principle of equality of States; cf. Müller and Wildhaber, *supra* note 67, p. 215 et seq., 807 et seq.; Brownlie, *Principles of Public International Law*, 5th ed. (Oxford, 1998), p. 289 et seq.

122. Cf. e.g. the permanent traffic observatory for the monitoring of road, rail and combined traffic in the Alpine region according to Art. 45 of the Agreement on Rail and Road Transport.

123. These additional bodies and committees are not international organizations and do not have legal personality.

124. Cf. FJ 2003, 859. According to the joint declaration of the Contracting Parties in the Final Acts, both the Agreement on Government Procurement and the Agreement on Mutual Recognition in relation to Conformity Assessment provide for their annexes to be updated within a month at most of the coming into force of the agreements.

decisions and functions of the Joint Committees. For such a conferral of legislative powers, the basis of democratic legitimation is quite weak, particularly for Switzerland with its democratic institutions of direct participation of the citizen. Nevertheless, the Contracting Parties remain competent for amendments and changes of the sectoral agreements with new treaty obligations. Such changes have to be approved by the Contracting Parties according to their respective internal procedures.[125]

Whereas the EC is represented in the Joint Committees of the sectoral agreements by the Commission alone, in the Joint Committee of the AFMP, the Commission is assisted by representatives of the Member States. In this case, "(t)he position to be taken by the Community in the course of the implementation of the Agreement as regards decisions or recommendations of the Joint Committee shall be laid down by the Council, acting by qualified majority, on a proposal from the Commission".[126]

3.3. *Legal protection under the sectoral agreements*

In general, the courts of the Contracting Parties are competent to interpret the sectoral agreements and the texts they refer to.[127] There is no joint judicial body or tribunal supervising correct application and uniform interpretation of the agreements.[128] Therefore, it is possible that different courts of the Contracting Parties, which are institutionally separate and independent, may take divergent or even contradictory decisions within their own legal system.[129] However, courts in the EU Member States can submit to the ECJ a question

125. Cf. Art. 300 EC and Arts. 140 et seq., 160 and 184 of the Swiss Constitution. Regarding the competences and procedures for the decision-making of the Joint Committees, the Federal Council should not vote inside the Committee without having the approval of the parliament or the people if the nature of the provisions requires it, which is also the case when new EC law is introduced or control mechanisms are delegated to EC institutions.

126. Council Decision 8767/99 of 12 July 1999, AELE 38/SOC 225.

127. Cf. Cottier and Evtimov, "Probleme des Rechtsschutzes bei der Anwendung der sektoriellen Abkommen mit der EG", in Cottier and Oesch, *supra* note 77, p. 203 et seq.; Cottier and Evtimov, *supra* note 55, p. 82 et seq.

128. Cf. Borchardt, "Grundsätze des Rechtsschutzes gemäss APF", in Schaffhauser and Schürer, *supra* note 57, p. 51 et seq., considers neither the creation of a specific judicial body nor a mixed jurisdiction like in the EEA as useful in case of the sectoral agreements. Cf. also Thebrath, *supra* note 118, no. 162, who suggests *de lege ferenda* a judicial function for the Joint Committees together with the ECJ, composed equally of Swiss and EC judges, as a second instance.

129. Cf. Bergmann, *supra* note 78, p. 45, fearing negative consequences for the security and clarity of law in the field of social security; Jaag, *supra* note 116, at 47, note 35, considers that if Swiss tribunals in a specific decision ignore the case law of the ECJ, this is a violation of the sectoral agreements in general. See also Spinner, *supra* note 116, p. 15.

for a preliminary ruling according to Article 234 EC.[130] Within the EU, uniformity in the application of the sectoral agreements is therefore guaranteed by the ECJ.[131]

Recognizing the independence of their judiciary, the Contracting Parties nevertheless may ask a Joint Committee set up by an agreement to determine the implications of the internal jurisprudence related to an agreement. The only exception lies again in the Agreement on Air Transport. Here, the provisions on competition shall be applied and controlled by the Community institutions in accordance with Community legislation,[132] and "(a)ll questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under this Agreement, shall be of the exclusive competence of the Court of Justice of the European Communities".[133]

Contrary to the EEA Agreement, which secures the dynamic and homogenous legal framework of the extended common market through a mandatory obligation to adopt the enacted Community Law (*acquis communautaire)*,[134] the seven sectoral agreements hardly contain any provisions regarding legal protection, but demand a reciprocal recognition of equivalent legal provisions[135] that have to be applied and interpreted according to international law principles.[136]

An important exception, besides the supranational approach in the Agreement on Air Transport,[137] is to be found in the AFMP. Article 11 of this agreement contains a far-reaching minimal guarantee of legal proceedings.[138] This means, first, an immediately enforceable right of appeal to the competent authorities, which, as stated by its paragraph 1, is exclusively destined to "the application of the provisions of this Agreement". Second, such appeals must

130. Cf. Borchardt, *supra* note 128, p. 59 et seq.; Bucher, *supra* note 68, p. 92 et seq.; Koutrakos, *supra* note 54, p. 36, 52, would like a clearer reasoning by the ECJ in this area with regard to mixed agreements. See for the EEA: Norberg, *supra* note 117, p. 1189.

131. Swiss nationals claiming social security benefits from an EU Member State can use this remedy. Cf. Kahil-Wolff, *supra* note 82, p. 65; Koutrakos, *supra* note 54, p. 34, points out that Art. 310 EC brings the entire agreement within the scope of the Court's jurisdiction; see the *Demirel* case, *supra* note 64.

132. Art. 11 referring to Arts. 8 and 9 AAT.

133. Art. 20 AAT. Cf. Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1329; Cottier and Evtimov, *supra* note 55, p. 89; Hirsbrunner, "Die kartellrechtlichen Bestimmungen des Abkommens über den Luftverkehr", in Felder and Kaddous, *supra* note 47, p. 463 et seq., 476; Jaag, *supra* note 116, pp. 42, 45 and 48.

134. Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1315 et seq.; Haas, *supra* note 117, p. 274 et seq., 295 et seq.; Norberg et al., *supra* note 117, p. 104 et seq., 177 et seq.

135. See the message of the Federal Council to Parliament of 23 June 1999 on the approval of the sectoral agreements between Switzerland and the EC: FJ 1999, 6128 et seq.

136. See *supra* 2.1.3. and 5.

137. See *supra* 2.2. and 2.3. Cf. also Jaag, *supra* note 116, p. 42, 58 et seq.

138. Cf. Breitenmoser and Isler, *supra* note 48, p. 1003 et seq., 1014 et seq.; Borchardt, *supra* note 128, p. 54 et seq.; Kahil-Wolff, *supra* note 68, p. 68 et seq.

be processed within a reasonable period of time.[139] And third, this guarantee gives the right "to appeal to the competent national judicial body in respect of decisions on appeals, or the absence of a decision within a reasonable period of time".[140]

Since Article 11 AFMP applies to all persons, there may be some problems with regard to the definition and interpretation of the general exclusion of public servants from certain rights as stated by Article 10 Annex I AFMP. The judgment of the European Court of Human Rights in *Pellegrin* v. *France*,[141] which refers to the corresponding interpretation by the ECJ concerning Article 39(4) EC,[142] tries to make a clarifying distinction: the term "public service employment" used for the exclusion from the right to a fair trial under Article 6 ECHR, is now – by taking as a basis a functional point of view and following Article 39(4) EC and its interpretation by the ECJ – very narrowly limited to the exercise of core sovereign powers.[143]

According to Article 11 AFMP, the Contracting Parties are obliged to provide for two-tier appeal proceedings. Paragraph 1 guarantees the right of appeal to a competent national authority[144] and paragraph 2 says that the appeal has to be processed within a reasonable period of time.[145] The provision is similar to Article 13 ECHR. An effective appeal to a sufficiently independent administrative body has to be provided for.[146] The possibility of raising objections before the instance that already decided on the case in question is not sufficient.[147] According to Article 11(3) AFMP, persons must have the opportunity to appeal to the competent national judicial body in respect of decisions on appeals or the absence of a decision within a reasonable period of time. This provision brings to mind Article 6(1) ECHR, which is also applicable under the AFMP in the area of, among others, social security, because the enforcement of social security claims normally concerns

139. Art. 11(2) AFMP.

140. Art. 11(3) AFMP. Cf. Bucher, *supra* note 68, no. 49 et seq., no. 70 et seq., who considers the Swiss system of legal protection to be in conformity with Art. 11 AFMP.

141. Judgment No. 2854/ 95 of 9 Dec. 1999, Reports 1999-VIII, 207/251.

142. Ibid., paras. 37 et seq.

143. Ibid., paras. 66 et seq. See also Maritz, "Der Dienstleistungsverkehr im Abkommen über die Freizügigkeit der Personen", in Felder and Kaddous, *supra* note 47, p. 345.; Brechmann, "Art. 39 EG-Vertrag", in Calliess and Ruffert, *supra* note 48, no. 99 et seq., 103 et seq.; Scheuer, "Art. 39", in Lenz, *supra* note 48, no. 83.

144. A judicial body is not required. Cf. also Kahil-Wolff, *supra* note 82, p. 62 et seq.

145. Kahil-Wolff, *supra* note 82, p. 63, is not convinced that cantonal Swiss courts always meet this condition in the field of social security.

146. Cf. Häfliger and Schürmann, *Die Europäische Menschenrechtskonvention und die Schweiz*, 2nd ed. (Bern, 1999), p. 333 et seq.; Villiger, *Handbuch der Europäischen Menschenrechtskonvention (EMRK)*, 2nd ed. (Zürich, 1999), no. 649.

147. Schweizer, "Kommentierung von Art.13 EMRK", in *Internationaler Kommentar zur Europäischen Menschenrechtskonvention*, 5th instalment (Cologne et al., 2002), para 65.

civil rights in the sense of Article 6(1) ECHR.[148] Taking Article 6(1) ECHR as a yardstick, in contrast to Article 11(1) AFMP and Article 13 ECHR, an appeal to an administrative body in the second instance is not sufficient, but an independent and impartial court has to decide.[149] This requirement is met in Switzerland by the Federal Tribunal, the Federal Social Security Tribunal and the Federal Appeal Commissions, but not by the Federal Council.[150] In the light of the object and purpose of a uniform application and interpretation of the AFMP in Switzerland, cantonal courts are not national instances in the sense of Article 11(3) AFMP.

Article 11 AFMP is, like Article 6(1) ECHR, directly applicable and, therefore, gives an individual right to legal protection in its scope of application, even if the municipal procedural law does not provide for a legal remedy.[151]

With respect to legal protection of private persons, two main competences of the Joint Committee need to be stressed: on the one hand, the responsibility for the proper application of the agreement according to Article 14(1) AFMP;[152] on the other hand, the right to determine the implications of new case law of the ECJ according to Article 16(2) AFMP.[153] It is questionable whether national courts can suspend proceedings when encountering difficulties of interpretation in order to turn to the Federal Council, so that it can consult the Joint Committee. Such an action is not excluded by the agreement, but is hardly compatible with the courts' view of independence.[154] They will normally want to decide without any delay caused by a consultation of the Joint Committee, which could moreover violate the imperative of processing appeals within a reasonable period of time stated in Article 11(2) AFMP.

148. Cf. the description of the precedents by the European Court of Human Rights, in Haefliger and Schürmann, *supra* note 146, p. 144 et seq., Villiger, *supra* note 146, no. 382 et seq., 389, and Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1607. See also Bucher, *supra* note 68, no. 55 et seq., with regard to the cantonal procedures of appeal.

149. Regarding the requirements of Art. 6 ECHR on a court, cf. Haefliger and Schürmann, *supr*a note 146, p. 166 et seq.; Villiger, *supra* note 146, no. 415.

150. Kiener, *Richterliche Unabhängigkeit, Verfassungsrechtliche Anforderungen an Richterinnen und Richter* (Bern, 2001), p. 316 et seq. (with further references).

151. See FT 125 II 425 et seq.

152. With respect to the management of the AFMP, the Joint Committee can, just as in the other sectoral agreements, issue recommendations and decide on changes of Annexes II and III to the Agreement (Art. 18 AFMP).

153. Cf. *supra* note 125. Disputes among the Contracting Parties on application and interpretation of the AFMP are also settled by the Joint Committee (Art. 19 AFMP). See on the parallel regulation in the EEA Agreement: Norberg, *supra* note 117, p. 1193.

154. Cf. Jaag, *supra* note 116, p. 54 et seq.

3.4. *Changes and updating of the sectoral agreements*

One of the main reasons for the rejection of the EEA Agreement by the Swiss people was its dynamic character, i.e. the obligation also to adopt the future *acquis communautaire* in the dynamic and homogenous EEA, irrespective of the time of signing the EEA Agreement.[155] Article 6 EEA Agreement, declaring the decisions of the ECJ held prior to signing of the Agreement on 4 May 1992 to be binding,[156] requires provisions of the EEA Agreement to be identical with the corresponding primary and secondary provisions of EC law in their basic content.[157] The advance to the future *acquis communautaire*, which has to be mandatorily implemented by all EFTA countries according to Article 97 et seq. EEA Agreement, will only be determined by the EC institutions and solely in the context of EC legislation (so-called decision-making procedure). EFTA Member States merely have the possibility to influence this development through issuing opinions (so-called decision-shaping procedure).[158] The subsequent procedure for adopting new EEA legislation under Articles 98–104 EEA Agreement puts a time limit on national proceedings of approval.[159]

Unlike in the EEA Agreement, the sectoral agreements are static and have no dynamic character.[160] That means that only the *acquis communautaire* prior to the date of signature of the sectoral agreements and to which reference is made will be applied in relations between the Contracting Parties. Case law of the ECJ and the CFI established after 21 June 1999 must be brought to Switzerland's attention. It is then up to the Joint Committees, which should ensure the proper functioning of the agreements, to determine the implications of such case law.[161] New legal acts of the Contracting Parties have to be announced to the other Party through the Joint Committee, which "shall hold

155. See *supra* 3.3. Cf. also Veuve, "Mesures d'accompagnement de l'Accord sur la libre circulation des personnes", in Felder and Kaddous, *supra* note 47, p. 291. On the EEA: Norberg, *supra* note 117, p. 1172. He stresses that a particular challenge was to safeguard the decision-making autonomy of each of the Contracting Parties while securing the dynamic and homogeneous concept that requires a parallel development with the EC rules (p. 1175).

156. Cf. Jacot-Guillarmod, "Préambule, objectifs et principes (art. 1er -7 EEE)", in Jacot-Guillarmod, *supra* note 23, p. 63 et seq.; Petersmann, "EWR-Abkommen, GATT und die Wirtschaftsfreiheit in der Schweiz", in Jacot-Guillarmod, *supra* note 23, p. 90 et seq.

157. See Norberg et al., *supra* note 117, p. 104 et seq.

158. Cf. Felder, "Structure institutionnelle et procédure décisionnelle de l'EEE", in Jacot-Guillarmod, *supra* note 23, p. 575 et seq.; Felder, *supra* note 55, p. 122 et seq.; Haas, *supra* note 117, p. 287 et seq.; Norberg, *supra* note 117, p. 1183 et seq.; Norberg et al., *supra* note 117, p. 129 et seq., 137 et seq.

159. See FJ 1992 IV 1 et seq.

160. FJ 2002, 6328; Felder, *supra* note 55, p. 128; Jaag, *supra* note 116, p. 59 et seq.; Spinner, *supra* note 116, p. 15.

161. Art. 16(1) and 2 AFMP, see also Art. 9 ASTC, Art. 7 AGP, Art. 12 and 18(2) MRA, Art. 8 and 11 ATAP, Art. 23 and 30 AAT, Art. 52 and 55 ARR. Cf. *supra* note 125. Cf. Borchardt,

an exchange of views on the implications of such an amendment for the proper functioning of the Agreement".[162] Since the references in the sectoral agreements to Community Law are static,[163] a change in an EC provision does not automatically bring about a change in the agreements. Amendments to the agreements will only enter into force after the respective internal procedures have been completed.[164] Merely technical adjustments and amendments to the *acquis communautaire* may, nevertheless, be adopted by decision of the Joint Committee and may enter into force immediately after that.[165]

An exception is once again the Agreement on Air Transport.[166] Referring in a general and dynamic way to EC law, Article 11 AAT states that competition law in the field of air transport shall be applied and controlled by the Community institutions in accordance with Community legislation.

3.5. *"Guillotine Clauses"*

As a consequence of the principle of "appropriate parallelism" introduced by the EC, the seven sectoral agreements are mandatorily coupled with each other by so-called "guillotine clauses".[167] This means that all seven agreements could only come into force together[168] and will also come to an end if any one of them is terminated or not renewed.[169] Thus, according to these guillotine clauses the seven agreements cease to apply six months after receipt of notification of non-renewal or termination.[170] Cancellation of one agreement will, therefore, have direct consequences for the effectiveness of the other sectoral agreements.

supra note 128, p. 63 et seq., and Bergmann, *supra* note 78, p. 45, both criticize the risks of conflicts with these provisions.

162. Art. 17(2) AFMP.

163. E.g. Annexes II and III AFMP.

164. In Switzerland there may be the possibility of a referendum.

165. See *supra* note 161. Cf. Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1381.

166. Cf. also Cottier and Evtimov, *supra* note 55, p. 89; Felder, *supra* note 55, p. 128 et seq.

167. FJ 1999, 6156; cf. Fasel, *supra* note 1, p.14 et seq.; Spinner, *supra* note 116, p. 17, interprets the guillotine clauses as a demonstration of power by the EU. Cf. also Fraoua and Mader, "Les accords sectoriels et la démocratie suisse", in Felder and Kaddous, *supra* note 47, p. 157, who stress that because of the connecting guillotine clauses, a negative vote regarding the sectoral agreements becomes more difficult for the Swiss citizen.

168. The EC or the ECAE and the EC respectively (Agreement on Scientific and Technological Cooperation) as well as the EC and the EU Member States (Agreement on the Free Movement of Persons) would not have put into force the other agreements if one agreement had been rejected by Switzerland in the facultative referendum of 21 May 2000 (*supra*, section 1).

169. Cf. Thürer and Hillemanns, *supra* note 50, p. 29.

170. Cf. Art. 25(4) AFMP; Art. 25(4) AGP; Art. 21(4) MRA; Art. 36(4) AAT; Art. 58 para. 4 ARR; Art. 14(4) ASTC; Art. 17(4) ATAP.

4. The Agreement on the Free Movement of Persons (AFMP)

4.1. *Aims and contents*

Once the transitional periods have expired,[171] the AFMP will ultimately be effective with regard to the entire *acquis communautaire* in the field of free movement and settlement of persons. The text of the Agreement does not explicitly state this, but the preamble makes clear that the Contracting Parties are determined "to bring about the free movement of persons between them on the basis of the rules applying in the European Community". Still, its content is limited to the *acquis communautaire* as it was developed up to 21 June 1999.[172]

Articles 39 and 43 EC also belong to these "rules". From those provisions, the ECJ deduces not only an extensive prohibition of discrimination, but also – going further than this – a prohibition of restraints:[173] regulations that hinder or deter a national of a Member State from leaving his or her country of origin in order to make use of his or her right of free movement, constitute impairments to this freedom, even if they are applied independently of the nationality of the persons concerned.[174] All corollary rights, such as the right to seek employment in a Contracting State,[175] are likewise part of the relevant *acquis communautaire*.[176]

After the transitional period, persons coming from another Contracting State and working in Switzerland for more than one year will have a right to stay for five years.[177] Below one year of employment, a residence permit for the same duration as the contract is guaranteed.[178] A person employed for less than three months does not need a residence permit.[179] The same

171. See *infra*, 4.4.
172. COM(1999) 229 final, 2; FJ 1999, 6310. Cf. Breitenmoser and Isler, *supra* note 48, p. 1011 et seq. But the Joint Committee may decide on the consideration of new EC jurisdiction, Art. 16(2) AFMP; see also *supra* 5.2., 3., and 4. as well as below in this section.
173. See cf. Scheuer, *supra* note 143, no. 83; id., "Art. 43", in Lenz, *supra* note 48, no. 7 et seq.
174. See p. 4921 et seq. of the judgment in *Bosman*, *supra* note 96; see also Breitenmoser and Husheer, *supra* note 1, vol. II, no. 934, 1087, 1358; Fasel, *supra* note 1, p. 17; Brechmann, *supra* note 143, no. 45 et seq., 48 et seq.
175. Art. 2(1)(2) Annex I AFMP; Article 39(3) lit. b EC; Brechmann, *supra* note 143, no. 85.
176. The Community has recently decided that Swiss nationals no longer need a visa to enter the EU territory for a stay of more than 3 months. Council Regulation (EC) No. 453/2003 of 6 March 2003, amending Reg. (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. 2003, L. 69/10.
177. Art. 6(1) Annex I AFMP.
178. Art. 6(2)(1) of Annex I AFMP.
179. Art. 6(2)(2) of Annex I AFMP.

unconditional rights are enjoyed by their spouses, their children under 21 years and other dependant members of the family,[180] which is a remarkable difference to spouses of Swiss nationals who come from other countries outside the EU, as these have a conditional right to stay for just one year. Children who are not EU or EFTA citizens may join their Swiss parent(s) only if they are under 18 years old.[181] In a recent judgment the Federal Tribunal upheld this discrimination of Swiss nationals compared to citizens of the EU or the EFTA countries regarding the bringing-in of family members with a foreign nationality.[182]

The AFMP does not guarantee rights founded on the status of citizen of the Union according to Article 18(1) EC.[183] Therefore, the famous and far-reaching judgments of the ECJ in the cases of *María Martínez Sala*[184] and *Baumbast*[185] do not come under the agreement, which does not contain a provision similar to the discrimination clause of Article 12 EC, as far as its field of application.[186] In contrast, the principle of equal treatment provided for in Article 2 AFMP is not as extensive; it only applies in the areas of the agreement according to its Annexes I, II and III. Rights based on the status of citizen of the Union are not covered by these Annexes.

Comparable considerations can be made with respect to the judgment of the ECJ in the *Decker* case.[187] There, a Luxembourg national claimed reimburse-

180. Art. 3 Annex I AFMP.

181. Arts. 7 and 17(2) of the Swiss Statute on the Settlement of Foreigners (SC 142.20). This right will be automatically renewed every year, after 5 years indefinitely. Cf. the parliamentary motion 01.3237 by Vreni Hubmann, official bulletin of the National Council 2002, p. 385, and the proposed Arts. 41–50 for a new statute for foreigners, FJ 2002, 3851.

182. The judgment left the correction of this situation to legislation, making reference to Art. 191 of the Swiss Constitution (see *supra* 3.1.3), which declares Swiss federal laws and international law binding for the Federal Tribunal. FT 129 II 249.

183. Cf. Breitenmoser and Husheer, *supra* note 1, vol. I, no. 429 et seq.

184. Case C-85/96, *María Martínez Sala* v. *Freistaat Bayern*, [1998] ECR I-2691. In that case, in proceedings before the Higher Social Court of Bavaria, the German *Bundesland* "Freistaat Bayern" refused to pay a child-raising allowance to the applicant, who was a Spanish national, on the grounds that she was neither an employed person nor in possession of a valid residence permit. The ECJ decided differently. In paras. 61 et seq., it deemed that Mrs Martínez Sala as a result of her status as citizen of the Union, must not be discriminated against in comparison with German nationals. Cf. the critical annotation by Tomuschat, 37 CML Rev., 449 et seq., 456; Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1090.

185. Case C-413/99, *Baumbast and R.*, ECR 2002, I-7091.

186. Cf. Spiegel, "Uebernahme der Rechtsprechung des Europäischen Gerichtshofs?", in Murer (Ed.), *Das Personenverkehrsabkommen mit der EU und seine Auswirkungen auf die soziale Sicherheit in der Schweiz* (Bern, 2001), p. 331, 351 et seq.; Hailbronner, *supra* note 115, p. 53 et seq., however, concerning the free movement of students, does not completely exclude application if citizenship of the Union is only one interpretation element among other relevant factors, p. 55.

187. Case C-120/95, *Nicolas Decker* v. *Caisse de Maladie des employés privés*, [1998] ECR I-1831 et seq.; see also Bergmann, *supra* note 78, p. 37 et seq.

ment from his health insurance company for spectacles bought in Belgium. According to Luxembourg law, an authorization would have been necessary for this, which is why the health insurance company did not want to reimburse him. The ECJ decided that this regulation violated the right of free movement of goods under Article 28 EC.[188] However, since the free movement of goods is not established in the sectoral agreements, a similar Swiss regulation would not face objections.[189] On the other hand, a constellation such as the one in *Kohll*[190] would have to be treated the same way as in the EU.[191] The passive freedom to provide person-oriented services, which includes dental treatment in another Member State, is guaranteed for a duration of 90 days of actual work in a calendar year or three months according to Article 5(1) AFMP in combination with Article 23(1) of its Annex I.[192] In *Kohll*, a person who was insured in Luxembourg had applied for a dental treatment for his daughter in Trier (Germany). His request was refused, but the ECJ held this denial to be a violation of the freedom of services within the meaning of Article 49 EC.[193]

It is important to emphasize that Council Regulation 64/221/EC is part of the Agreement, and can be the legal basis for a refusal of the right to enter and to reside for reasons of public order, public security and public health.[194] When applying this exception, the State must first ascertain whether a less intensive measure would be sufficient; also, the conduct which the Contracting State concerned wishes to prevent has to give rise, in the case of its own nationals, to punitive measures or other genuine and effective measures designed to combat it.[195]

188. *Decker*, *supra* note 187, para 46.

189. Bergmann, *supra* note 78, p. 47 et seq. Same opinion held by Kahil-Wolff, *supra* note 82, p. 60 et seq.

190. Case C-158/96, *Raymond Kohll* v. *Union des caisses de maladie*, ECR 1998, I-1931 et seq. See also Bergmann, *supra* note 78, p. 37 et seq.

191. Cf. Bergmann, *supra* note 78, p. 48. For another view, see Kahil-Wolff, *supra* note 82, p. 61. However, she is convinced that recent Swiss legislation, e.g. the new Art. 4a of the Law on Health Insurance (SC 832.10), providing for the same obligatory insurance for family members of a person working in Switzerland, and Art. 13 and 14 of the Law on Unemployment Insurance (SC 837.0), stating a residence clause, is discriminatory.

192. Cf. Martz, "Der Dienstleistungsverkehr im Abkommen über die Freizügigkeit der Personen, in Felder and Kaddous, *supra* note 47, p. 331, 338.

193. Ibid., para 54; see also Case C-157/99, *B.S.M. Smits-Geraets* v. *Stichting Ziekenfonds VGZ and H.T.M. Peerbooms* v. *Stichting CZ Groep Zorgverzekeringen*, [2001] ECR I-5473; Case C-368/98, *Abdon Vanbraekel* v. *Alliance nationale des mutualités chrétiennes (ANMC)*, [2001] ECR I-5363.

194. Council Regulation (EEC) No. 64/221 of 25 Feb. 1964, completed by Council Regulations (EEC) No. 72/194 and No. 75/35. Art. 5(2) Annex I of the AFMP, referring to Art. 16 AFMP.

195. See recently in Case C-100/01, *Ministre de l'Intérieur* v. *Aitor Oteiza Olazabal* [2002] ECR I-10981.

4.2. *The relevant acquis communautaire*

With regard to the *acquis communautaire* which has to be taken into account by Swiss authorities and courts, Article 16(2) AFMP states the following: until the date of signing of the Agreement, i.e. 21 June 1999, the case law of the ECJ interpreting concepts and terms of Community Law constitutes part of the relevant *acquis communautaire*. The significance and implications of the case law after that date will be determined by the Joint Committee.[196] For this purpose the jurisprudence "shall be brought to Switzerland's attention".[197] This provision is not unproblematic. On the one hand, the question arises what is the relationship between the Swiss courts and the Joint Committee[198] and via what procedure they receive the information from the Joint Committee. On the other hand, it is difficult to appraise in what cases and under what circumstances and conditions new judgments depart from or extend the former *acquis communautaire*.[199]

The ECJ rarely declares a change in its case law as being a new leading case,[200] departing from precedents, as some other courts do. To that extent, the decisions of the ECJ on limitation of the scope of application of Article 28 EC are an exception,[201] as is the change of practice with respect to the limited right of action of the European Parliament.[202] The issue can be illustrated for the area of free movement of persons with the example of the case law following the *Bosman* case,[203] which dealt with the transfer rules for professional sportsmen and their compatibility with Article 39 EC. In *Lehtonen*[204]

196. About the far-reaching consequences see *supra* note 125. Cf. also Bergmann, *supra* note 78, p. 45, criticizing Art. 16(2) AFMP and underlining the problems which would arise if the Joint Committee does not perform its duties strictly. Hailbronner, *supra* note 115, p. 51 et seq., emphasizes that even judgments after 21 June 1999 must be taken into consideration for interpretation of the AFMP, if they merely specify and concretize case law prior to that date. See also below.

197. See also *supra* 3.4.

198. Kahil-Wolff, *supra* note 82, p. 68, is worried about the lack of possibility of appeal after a Joint Committee decision differing from that of the Federal Court or the Federal Court of Social Security. In case of a judgment of the European Court of Human Rights that is in contrast to a Swiss decision of last instance, this decision may be revised according to Art. 139a of the Swiss Statute on the Administration of Justice (SC 173.110). See also *supra*, 3.3.

199. Critical also Lustenberger, "Das Verfahren in zwischenstaatlichen Fällen gemäss Abkommen", in Murer, *supra* note 186, p. 78.

200. See also Hailbronner, *supra* note 115, p. 52; Kahil-Wolff, *supra* note 82, p. 67. The Swiss courts do in general declare a change explicitly, e.g. FT 125 V 205.

201. Case C-267 & 268/91, *Criminal Proceedings against Keck and Mithouard*, [1993] ECR I-6097, para 16.

202. Case C-70/88, *European Parliament* v. *Council (Tschernobyl I)*, [1990] ECR I-2041, paras. 15 et seq., compared to Case 294/83, *Parti écologiste "Les Verts"* v. *European Parliament*, [1986] ECR 1339, paras. 23 et seq.

203. See *supra* note 96.

204. Case C-176/96, *Lehtonen and Castors Braine*, [2000] ECR I-2681.

and *Deliège*[205] the Court specified and put in relative terms its more general statement in the *Bosman* judgment. Because of this delimited and more precise scope of application of Community law, these two new cases may be seen as part of the former *acquis communautaire*. The cases *Lehtonen* and *Deliège*, therefore, are not further developments, for whose incorporation into the *acquis communautaire* of the AFMP a specific and unanimous decision by the Joint Committee would be required. This is otherwise with regard to the most recent case law of the ECJ in tax matters, which is now also part of the new *acquis communautaire* in the area of free movement of persons,[206] but will be applicable under the AFMP only after a unanimous decision of the Joint Committee.

4.3. *Legal nature*

As already mentioned, the AFMP was concluded as a mixed agreement.[207] This category, which is now explicitly provided for in the EC Treaty,[208] was developed in practice by the ECJ.[209] But there still remain some unclear and controversial points concerning the concept of mixity because there is neither a precise written guideline for its handling[210] nor anything other than an undetailed rule about its impact on the division of competences.[211] Rules on

205. Case C-51/96 & C-191/97, *Deliège v. Ligue francophone de judo et disciplines ASBL and others*, [2000] I-2549.

206. Cf. Case C-385/00, *F.W.L. de Groot* v. *Staatssecretaris van Financiën*, [2002] ECR I-11819. See *infra* text at note 241.

207. See *supra* 3.1.1.: "Shared powers" and "joint competences" are concerned.

208. It appears for the first time in the new version of Art. 133(6) EC, revised by the Treaty of Nice. The provision concerns cultural, audio-visual, educational, social and health related services in trade agreements.

209. Cf. Opinion 1/1994, *WTO*, *supra* note 53; see also Gaja, "Trends in judicial activism and judicial self-restraint relating to Community agreements", in Cannizzaro, *supra* note 48, p. 124; the term results from "a picture of a concept of overlapping and shared external competence", Klabbers, "Restraints on the treaty-making powers of Member States deriving from EU-Law: towards a framework for analysis", in Cannizzaro, ibid., p. 154, 167. Cf. also the duty of cooperation in Opinion 2/1991, *ILO*, [1993] ECR I-1061, para 4.

210. Cf. Neuwahl, "Shared powers or combined incompetence? More on mixity", in 33 CML Rev., 683, 687. She doubts that the ECJ will ever be willing or able to lay down a detailed rule and therefore suggests the drafting of a code of conduct.

211. Mixity does not in general give a more precise picture of the division of competence, but it can avoid difficult political choices because the division of power is no longer relevant in itself: Klabbers, *supra* note 209, p. 157. He also evokes the question whether the exercise of political power still depends of the possession of a legal power (p. 158). For Tomuschat, *supra* note 48, p. 184, there is "an institutional necessity to conclude mixed agreements" with third countries. Cf. in general Pocar, "The decision-making process of the European Community in external relations", in Cannizzaro, *supra* note 48, p. 16; Baratta, "Overlaps between European Community competence and European Union foreign policy activity", in Cannizzaro ibid., p.

the international responsibility of the EC and its Member States in case of the violation of such a treaty have not yet been confirmed by the ECJ.[212]

Mixity can be an important instrument for the Member States to maintain their influence in the negotiation, conclusion, application and implementation of an agreement.[213] However, when an agreement is mixed, the *acquis communautaire* automatically becomes inseparably connected to all fields of that agreement and has therefore to be respected directly or indirectly also in areas which may be within the exclusive competence of the EU Member States.[214] Within this larger scope, the ECJ may try to extend its control in order to reach uniformity and conformity.[215]

4.4. *Transitional periods*

The AFMP does not immediately extend the entire *acquis communautaire* of Articles 39 et seq. EC, but only after different transitional periods.[216]

64, observes a lack of clear power divisions and corresponding regulations in the whole field of external relations, which might weaken the rule of law. Same opinion: Gaja, *supra* note 209, p. 131, who criticizes the ECJ for giving too much freedom to the Community institutions (self-restraint); see also Tizzano, *supra* note 48, p. 136 et seq.

212. Neframi, *supra* note 50, p. 205, gives a model of categorization for international responsibility in case of mixed agreements.

213. See Opinion 2/2000, *Cartagena Protocol*, [2001] ECR I-9713, where the Commission argued in favour of a preponderant EC competence based on a wide interpretation of Art. 133 EC, leaving to the Member States no more than a residual power. The Member States refused this extension, trying to safeguard their partial power. This might reflect the basic tension between a fast integrative federalism and an intergovernmental confederalism model, for which mixity is indeed a pragmatic solution in the field of external relations. The ECJ decided that the competence concerning the Cartagena Protocol is shared. Cf. also Klabbers, *supra* note 209, p. 157; Neuwahl, *supra* note 210, p. 679.

214. Case C-53/96, *Hermès International v. FHT Marketing Choice*, [1998] ECR I-3603 at 3648, para 32: "where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply." See also Cases C-300/98 and C-392/98, *Parfums Christian Dior and others*, [2000] ECR I-11344 at 11358, para 35; cf. Gaja, *supra* note 209, p. 119 et seq.; Tizzano, *supra* note 48, p. 140, saying that "no sector is now beyond the reach of Community law"; Klabbers, *supra* note 209, p. 161, 164; Neuwahl, *supra* note 210, p. 678.

215. The close relation between two fields of competence can even lead to an implied power of the Community and restrict the Member States' competence to conclude agreements in that area at all. Case C-22/70, *Commission* v. *Council (ERTA)*, [1971] ECR 263 at 274, para 17. See also Gaja, *supra* note 209, p. 121; Klabbers, *supra* note 209, p. 167; Tizzano, *supra* note 48, p. 138 et seq.

216. See also Grossen and de Palézieux, *supra* note 77, p. 113 et seq.; Gasser, *supra* note 51, p. 275; Mach, "L'accord sur la libre circulation des personnes dans l'optique des praticiens", in Felder and Kaddous, *supra* note 47, p. 313 et seq.

On entry into force of the Agreement, the following rights are guaranteed:
– workers from the EC who are already integrated into the regular Swiss labour market must be treated equally to nationals;[217]
– there are long-term (five years) and short-term (up to one year) permissions to reside;[218] renewal of the long-term residence permit will take place automatically,[219] renewal of the short-term residence permit only if the employed person furnishes proof to the competent authorities that he or she is able to pursue an economic activity.[220] The status of so-called "saisonnier", i.e. seasonally employed person, is abolished as well as the obligation on this category and on short-time residents to leave Switzerland immediately after the end of the contract for work;[221]
– occupational and geographical mobility for workers integrated into the regular Swiss labour market is guaranteed; they will have a right to change residence and employment without previous official authorization;[222]
– a person who has the right of residence and is a national of a Contracting Party is entitled to be joined by the members of his or her family;[223]
– frontier workers only need to return once a week to their place of residence[224] and they enjoy geographic and occupational mobility inside the frontier zones;[225]
– the number of new residence permits may not be limited to fewer than 15,000 (long-term residence) respectively 115,000 (short-term residence) per year.[226]

After two years, these rights are extended, since the priority of local workers and all disadvantages for EU nationals regarding the controls of wage and working conditions are abolished.[227]

After five years, the following rights are guaranteed:
– the quantitative limits for residence will be cancelled;[228]
– the frontier zones for frontier workers will be abolished;[229]

217. Art. 10(5) AFMP.
218. Art. 6(1) and 6(2)(1) Annex I AFMP.
219. Art. 6(1) Annex I AFMP.
220. Art. 27(1) Annex I AFMP.
221. Art. 27(1) and (3) Annex I AFMP.
222. Art. 10(5) AFMP.
223. Art. 3 Annex I AFMP. See with regard to the discrimination of Swiss nationals through the interaction of this provision with the Swiss Statute on the Settlement of Foreigners (SC 142.20) *supra* 4.1.
224. Art. 28 and Art. 32 Annex I AFMP. Since the entry into force of the AFMP, a large number of former frontier workers now reside in Switzerland, FJ 2003, 861.
225. Art. 30(2) and Art. 34 Annex I AFMP.
226. Art. 10(3) AFMP.
227. Art. 10(2) AFMP.
228. Art. 10(1)(2) AFMP.
229. Art. 7(3) Annex I AFMP.

– if the number of new residence permits in a given year exceeds the average of the three preceding years by more than 10%, Switzerland may again, for the following two years, unilaterally limit the number of new residents. This regulation is valid up to twelve years after the entry into force of the Agreement.[230]

After seven years, the treaty ends – together with the other six sectoral agreements – if Switzerland[231] or the EU decide not to continue with it. If neither Contracting Party cancels it, it will be renewed indefinitely.[232]

After twelve years – for Swiss nationals inside the EU already after two years[233] – transition to the free movement of persons according to EC law will be completed; a safeguard clause may be applied by mutual consent.[234]

4.5. *Relation to existing agreements*

The scope of application of the AFMP is the same as existing bilateral treaty obligations of Switzerland, also and particularly in the area of social security. For this reason, the question of the relationship between this sectoral Agreement and other bilateral treaties that Switzerland has already concluded with the Member States of the EU is to be considered.[235]

According to Article 20 AFMP, bilateral social security agreements between Switzerland and the EU Member States covering the same subject-matter shall be suspended, unless otherwise provided for under Annex II. For employed persons who had moved their permanent residency to or commenced employment in a different EU Member State before the entry into force of the sectoral Agreement, earlier existing treaties on social security are still applicable, corresponding to the precedents of the ECJ, if they comprise a more favourable regulation.[236] These precedents are determined strongly by considerations of *effet utile*,[237] but they should also have validity under

230. Art. 10(4)(1) AFMP.

231. The Federal Council and the Swiss Parliament will decide by taking experiences into account. A facultative referendum is possible.

232. Art. 25(2) AFMP.

233. Because the rights provided for in Art. 10(1), (3) and (4) AFMP are reserved for Switzerland only.

234. The number of new residents cannot be limited anymore; see Art. 10(4)(1) AFMP; this was the last remaining restriction (*supra* note 230). The mutual safeguard clause is based on Arts. 14 and 19 AFMP. Cf. FJ 1999, 6153, 6313, 6316.

235. See also Thürer and Hillemanns, *supra* note 50, p. 26 et seq.

236. Case C-227/89, *Ludwig Rönfeldt* v. *Bundesversicherungsanstalt für Angestellte*, [1991] ECR I-323 et seq.; Case C-75/99, *Edmund Thelen*, [2000] ECR I-9399.

237. See e.g. the argumentation of the ECJ in *Rönfeldt*, *supra* note 236, para 23 et seq.

the AFMP in the light of the protection of asset rights, which is part of the right of property.[238]

Furthermore, according to Article 21 AFMP, the bilateral treaties between Switzerland and the EU Member States on double taxation are not affected and remain in full force. Thus, the definition of "frontier workers" in the double taxation agreement is unaffected (para 1), and the Contracting Parties are not prevented from distinguishing in their fiscal legislation between taxpayers whose situations are not comparable, especially as regards their place of residence (para 2). Nor will the Contracting Parties be prevented from adopting or applying measures to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion under their own tax legislation or agreements aimed at preventing double taxation (para 3). The latter provision does not however oblige the Contracting Parties to cooperate and to give mutual assistance and information in tax cases.[239] Nevertheless, in the recent decision in *de Groot*, the ECJ states that fundamental freedoms must always be respected when dealing with taxation law in general and conventions for the avoidance of double taxation specifically,[240] even though direct taxation falls within the competence of the Member States.[241] This is the first case that may go further than the *acquis communautaire* referred to in the sectoral Agreement. Therefore, the Joint Committee has to decide whether and how it will be introduced into the AFMP.

Bilateral agreements concluded in other areas are not affected insofar as they are compatible with the AFMP.[242] If they are incompatible with this Agreement, the latter shall prevail.[243]

238. See Art. 1(1) of the Additional Protocol to the European Convention on Human Rights. Cf. Breitenmoser and Husheer, *supra* note 1, vol. II, no. 1661; Brombacher Steiner, who does not consider the right of property as relevant, takes a different view: "Die soziale Sicherheit im Abkommen über die Freizügigkeit der Personen", in Felder and Kaddous, *supra* note 47, p. 368.

239. This subject is at the centre of the new bilateral negotiations between Switzerland and the EC, *supra* note 46.

240. *De Groot*, *supra* note 206, para 110, 114. Conventions for the avoidance of double taxation or internal taxation law may not contain methods of calculation discriminating either directly or indirectly on grounds of nationality. A proportionality factor that only takes into account personal tax advantages and tax-free amounts with regard to the revenue earned in the residence State without considering that the other States where professional activity has occurred do not treat personal and family circumstances when taxing the income, therefore violates Art. 39 EC.

241. *De Groot*, *supra* note 206, para 75 et seq., para 94.

242. According to Art. 22(1) AFMP, such agreements concern private individuals, economic operators, cross-border cooperation or local frontier traffic.

243. Art. 22(2) AFMP.

4.6. *Joint and Unilateral Declarations*

The Contracting Parties have attached Joint Declarations to the Final Act of the AFMP and take note of Unilateral Declarations. The Joint Declarations refer to the general liberalization of service provisions, to retirement pensions of former employees of EC institutions resident in Switzerland, to the application of the Agreement, and to further negotiations. The Unilateral Declarations of Switzerland concern the renewal of the Agreement, the migration and asylum policy[244] and the recognition of architects' diplomas. The Unilateral Declarations of the EC and the EU Member States refer to Articles 1 (on entry and exit) and 17 (on persons providing services) of Annex I, and to Swiss attendance at Joint Committees.

5. The Agreement on Air Transport (AAT)

5.1. *Aims and contents*

The AAT governs access of Swiss airlines to the liberalized European aviation market on the basis of reciprocity.[245] This access is granted step by step: the 3rd and 4th freedom (e.g. Zurich-Paris or Paris-Zurich respectively) coming into effect together with the Agreement, the 5th and 7th freedom (e.g. Zurich-Paris-Madrid or Paris-London respectively) two years later. Negotiations on granting the 8th freedom (so-called "cabotage", that is domestic flights operated by a foreign airline) will be commenced five years after coming into effect of the Agreement.[246] As stated in Article 15(2) AAT, the traffic rights are granted to Community and Swiss air carriers which have their principal place of business and, if any, their registered office in the Community respectively in Switzerland and which are licensed according to the provisions of Council Regulation (EEC) No. 2407/92. A Community air carrier needs to meet the requirements of the genuine link clause of Article 3 of Council Regulation (EEC) No. 2407/92, demanding a 50% Community ownership. The rule for Swiss ownership is determined by Article 52(2) lit. c of the Swiss Aviation Act which delegates the specification of the conditions to the Federal

244. In order to reinforce cooperation in these areas, "Switzerland is willing to participate in the EU system for coordinating asylum applications, and it proposes that negotiations be entered into for the conclusion of a convention parallel to the Dublin Convention".

245. It also concerns the Swiss individuals through the inclusion of Council Regulations (EC) 2027/97 (O.J. 1997, L 285/1) and 295/91 (O.J. 1991, L 36/5) on the responsibility of Airlines towards their passengers: Dettling-Ott, "Auswirkungen des Luftverkehrsabkommens auf die Rechtsstellung der Passagiere", in Cottier and Oesch, *supra* note 77, p. 83 et seq.

246. Art. 15 AAT; FJ 1999, 6150.

Council.[247] Discrimination on the grounds of nationality is prohibited, and Swiss natural and legal persons are on a par with European persons, which means that they obtain freedom of establishment and investment.[248]

5.2. *The AAT as a partial integration agreement*

Contrary to the other sectoral agreements, the AAT is not governed by traditional public international law alone but extends the applicable EC competition law regarding air transport to Switzerland.[249] The distinct character of the AAT as a so-called partial integration agreement[250] is evident especially in the area of legal protection. According to Article 11(1) AAT, Community institutions, including the Commission and the ECJ, receive far-reaching supervision and control competences in the area of competition law, i.e. Articles 8 and 9 AAT. Therefore, in the field of air transport, supranational European competition law is also applicable in Switzerland, which constitutes a considerable intervention into the sovereignty of Switzerland within this limited area. The competition law provisions of Article 8 and 9 match Article 81 and 82 EC.[251] According to Article 8 AAT, agreements and behaviour limiting competition, such as price fixing and market division, are prohibited. This prohibition, however, does not apply automatically because of Article 8(3) AAT: it is possible to declare such agreements legal, if they contribute to the furtherance of technical and scientific progress and thereby adequately take the interests of consumers into account because there is still sufficient competition on the

247. Swiss Act on Aviation of 21 Dec. 1948 (SC 748.0). Its Art. 52(2) lit. c also transfers to the Federal Council the competence to conclude international treaties that regulate the rights of foreign citizens in this regard. The Federal Council has passed the Regulation on Aviation of 14 Nov. 1973, SC 780.01, and specified the requirements for ownership in Arts. 4 and 5. According to Art. 4 the exclusive owners of the aircraft must be either a Swiss citizen, a foreign citizen who has an equal status due to an international treaty, or a foreign citizen with a long-term Swiss residence permit who uses the aircraft usually starting from Switzerland. Corporate bodies need to have their seat in Switzerland and must be registered there, only associations have to be incorporated according to Swiss law and two thirds of their members and their board as well as their president are required to reside in Switzerland being either Swiss nationals or foreigners with an equal status based on an international agreement. Art 5 excludes fiduciary rights of disposal from the meaning of ownership.

248. Art. 4 AAT; FJ 1999, 6150 et seq.

249. FJ 1999, 6150.

250. FJ 1999, 6156; cf. e.g. Haldimann "Grundzüge des Abkommens über den Luftverkehr", in Felder and Kaddous, *supra* note 47, p. 459 et seq.; Hirsbrunner, *supra* note 133, p. 464; Zäch, *supra* note 55, p. 7; for Felder, *supra* note 55, p. 125 et seq., and Cottier and Evtimov, *supra* note 55, p. 89, it is an integration agreement; cf. also the authors referred to *supra* note 116.

251. See also Dettling-Ott, "Abkommen über den Luftverkehr", in Thürer et al., *supra* note 47, p. 468 et seq.; Hirsbrunner, *supra* note 133.

routes in question. Article 9 AAT, on the other hand, strictly prohibits abuse of a market-dominating position.

According to Article 11(1) AAT, the Community institutions thus apply and enforce the provisions of Article 8 and 9 AAT,[252] with the exceptions mentioned above, and they examine mergers with consequences for the European Union. Switzerland is thereby obliged to enable the competent Community institutions to conduct inquiries regarding competition and antitrust laws in the area of civil aviation on Swiss territory, which requires the creation of a legal basis in Swiss antitrust law. Such control and supervision competences of the Commission and the ECJ do not exist in the area of government aid, they remain a power of each Contracting Party, as Article 14 states explicitly.[253]

With regard to the proper enforcement of the AAT, each Contracting Party shall be responsible on its own territory.[254] However, Article 18(2) AAT states an important exception to the principle of territoriality for the precisely defined area of traffic rights as provided for in Chapter 3 AAT:[255] whenever Council Regulations No. 2407/92 and 2408/92[256] contain competences of the EC institutions towards the Member States, these powers shall also be enjoyed with regard to Switzerland.[257] Due to this dynamic reference, the new European Aviation Safety Agency (EASA)[258] would clearly be able to

252. The Federal Council has formulated a message that suggests an adaptation of the Antitrust law (SC 251) to the new control mechanisms provided for in the AAT: FJ 2002, 5506.

253. FJ 1999, 6256. Art. 13(2) lit. a AAT, concerning aid having a social character granted to individual consumers without discrimination, and lit. b on aid to make good the damage caused by natural disasters or exceptional occurrences, even state a compatibility with the AAT; also aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment (Art. 13(3) lit. a AAT), aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Contracting Party (lit. b) and aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest (lit. c), is allowed. Switzerland considers that much criticized former governmental aid for SWISSAIR does not come under the competence of the Joint Committee; cf. *Bulletin Quotidien Europe* No. 8366/2002, p. 17.

254. Art. 18(1) AAT; FJ 1999, 6257.

255. Art. 18(2) AAT explicitly refers to the authorization of air services in Chapter 3 AAT.

256. Council Regulation (EEC) No. 2407/92 of 23 July 1992 on licensing of air carriers (O.J. 1992, L 240/1) and Council Regulation (EEC) No. 2408/92 of 23 July 1992 (O.J. 1992, L 240/8) on access for Community air carriers to intra-Community air routes. Within the AAT they are part of the so-called "third liberalization-package", qualified by the Federal Council as the most substantial innovations of the Agreement: FJ 1999, 6261. In addition to their high relevance in practice, they are of a self-executing nature: FJ 1999, 6259 et seq.

257. FJ 1999, 6257. See in general Haldimann, *supra* note 250, p. 451, and Dettling-Ott, *supra* note 251, p. 473.

258. Regulation (EC) No. 1592/02 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, O.J. 2002, L 240/1.

take decisions that are binding for Switzerland, too, whether it is a member of EASA or not,[259] but only within the restricted scope of Article 18(2) AAT. Thus, limitations on landing rights for environmental reasons[260] are excluded from the control mechanism of Article 18(2) AAT.

According to Article 10 AAT, examination competences of the Commission do not extend to facts relating exclusively to Switzerland or having an exclusive effect on routes with third countries. For this, Swiss antitrust authorities are solely competent. According to Article 11(2) AAT, they thereby apply Article 8 and 9 AAT, and, therefore, indirectly the European provisions of Article 81 and 82 ECT.

Article 20 AAT provides for an exclusive competence of the ECJ to rule on the validity of decisions of Community institutions. Therefore, a company domiciled in Switzerland can only appeal to the CFI and the ECJ as Community institutions for transnational competition disputes in the sense of the AAT. This applies only to the more or less voluntary willingness of companies based in Switzerland to cooperate, but not to execution orders by the police or orders that interfere with basic rights[261] within the scope of examination measures of the Swiss Competition Commission,[262] against which an appeal is possible to the Appeals Commission for Competition Matters. Against execution orders by this Commission and its secretariat, domestic legal remedies are also open to companies in Switzerland, that is the complaint to the Appeals Commission for Competition Matters according to the Law on Administrative Proceedings[263] and the Antitrust Law[264] as well as a further appeal to the Swiss Federal Tribunal.

Switzerland has added to the Final Act to the AAT a declaration on a possible change in the statute or in procedural rules of the ECJ.[265] With respect to the possibility to take legal action against Swiss airlines as well as Switzerland itself, the Swiss Government expressed its wish that if a change should occur, in which lawyers admitted in a country with a similar agreement as the one at hand are allowed to appear in front of the ECJ, such a possibility

259. This is good reason to recommend participation of Switzerland in the EASA, because then it could take part in the decision-making or decision-shaping process.

260. Art. 18(2) AAT. The basis for such measures can be either Art. 8(2) or (9) of Council Regulation (EEC) No. 2408/92. Cf. Dettling-Ott, *supra* note 251, p. 473; Haldimann, *supra* note 250, p. 451.

261. See also Joined Cases 46/87 & 227/88, *Hoechst* v. *Commission*, [1989] ECR 2859.

262. See www.wettbewerbskommission.ch

263. Art. 45 Law on Administrative Proceedings (SC 172.021).

264. Art. 43 Antitrust Law (SC 251).

265. Final Act of the AAT, Declaration by Switzerland on a possible amendment to the Statute of the Court of Justice of the European Communities, O.J. 2002, L 114/90.

to appear in matters brought before the Court according to this Agreement should also be created for Swiss lawyers admitted in Switzerland.[266]

6. The Agreement on the Carriage of Goods and Passengers by Rail and Road (ARR)

6.1. *Aims and contents*

The goals and contents of the Agreement on Rail and Road Transport[267] are the following:
– more efficient traffic management, which is technically, geographically and economically most suitable to the transport modes covered by the Agreement, by means of reciprocal opening of the transport market for the carriage of goods and passengers by road and rail, step by step;[268]
– reciprocity and free choice of mode of transport;[269]
– prohibition of discrimination;[270]
– co-ordinated transport policy[271] between Switzerland and the EU with the goals of sustainable mobility, environmental protection, comparability of conditions and avoidance of detours by traffic;[272]

266. FJ 1999, 6970.
267. See also Ambühl, "Zur Konzeption der koordinierten Verkehrspolitik", in Felder and Kaddous, *supra* note 47, p. 514 et seq.; Epiney and Sollberger, *supra* note 16, p. 21 et seq.; Schneuwly, "Principales caractéristiques de l'Accord sur les transports de marchandises et de voyageurs par rail et par route", in Felder and Kaddous, *supra* note 47, p. 493 et seq.; Weber and Friedli, "Abkommen über den Güter- und Personenverkehr auf Schiene und Strasse", in Thürer et al., *supra* note 47, p. 391 et seq.
268. Art. 1(1) ARR.
269. Art. 1(2) ARR. Critical point of view hold by Epiney, *supra* note 59, no. 16 et seq, 18; Epiney and Sollberger, *supra* note 16, p. 22 et seq.
270. Art. 1(3) ARR. As to its character as a non-self-executing provision, see *supra* section 3.1.3. The Joint Committee is currently discussing whether the priority for regional traffic when according access to the Gotthard tunnel is discriminatory. As far as the territory of Austria is concerned, Art. 11 ARR introduces a system of ecopoints for Swiss operators, which is equivalent to Art. 11 of Protocol No. 9 of the Act of Accession to Austria to the EU concerning EU operators.
271. Title IV ARR. Cf. Epiney and Sollberger, "Zum Gestaltungsspielraum der Vertragsparteien: die rechtliche Tragweite des Art. 32 des Abkommens über den Güter- und Personenverkehr auf Schiene und Strasse", in Felder and Kaddous, *supra* note 47, p. 522 et seq.; Weber and Friedli, *supra* note 267, p. 409 et seq.; Epiney, *supra* note 59, no. 19 et seq., 22, is not convinced that the Communities fulfil their own requirements with regard to environmental protection in the fields of transport policy.
272. See Epiney, *supra* note 59, no. 5 et seq., who thinks that the conflict of interests between Switzerland and the EC or some specific Member States was profound and a compromise very difficult to reach. According to Epiney and Sollberger, *supra* note 16, p. 66 et seq., Switzerland has in the end given up much room for manoeuvre.

– more and fairer competition between and within the two modes of transportation, road and rail;
– partial supplementation and continuation of the Agreement on Transit (term until 2005);[273]
– gradual bringing into line of Swiss law with European provisions regarding technical control and maximum weight for heavy goods vehicles (HGVs);
– competitive supply of rail services in the Alpine region (shift of traffic from the road to the railroad track)[274];
– increased taxation parallel to the increase of maximum weight through a stepwise introduction of a system of fees based on a "polluter pays" principle,[275] i.e. differentiated according to emission categories;
– retention of the current prohibition on night trips for HGVs between 22.00 and 5.00 (easing of border formalities such as processing before 5.00). In addition, the ARR contains three different safeguard clauses.[276]

Swiss home trade, which refers to any transnational carriage of goods or passengers within the geographical scope of the Agreement by a vehicle registered in Switzerland, will be totally deregulated from 2005 on.[277]

6.2. *Content and significance of the protection clauses*

The ARR contains the three following so-called "corrective measures": a unilateral fiscal safeguard clause in Article 46 ARR, a consensual safeguard clause in Article 47 ARR and special crisis measures in Article 48 ARR.[278]

273. Cf. Epiney and Sollberger, *supra* note 16, p. 26.
274. On 20 Feb. 1994, the Swiss citizens accepted a people's constitutional initiative for the protection of the Alpine region which includes the obligation to realize this shift: FJ 1994 II 696. It led to Art. 84 and 196(1) of the Federal Consitution, providing for 10 years to complete this aim. See on its compatibility with the Transit Agreement: Rütsche, "Alpeninitiative und Transitabkommen", in Rütsche and Sollberger, "Verkehrspolitik und Alpenraum", SPEI, vol. 6, (1996), p. 6 et seq., 10 et seq., 16 et seq.
275. From 2005, the following regulations will apply: increase of the maximum weight to 40 tons and a fee of CHF 297 (EUR 180; weighted average) for transits on the axis Basel-Chiasso (300 km). After the beginning of operation of the first NEAT tunnel at Lötschberg, but on 1 Jan. 2008 at the latest, the fee will be increased to CHF 325–330 (EUR 200). Adjustment to inflation will be made every other year after 2007, if the average inflation between entering into force of the Agreement and 31 Dec. 2004 is above 2%, there will be an adjustment in 2005 as well. As to decisions on collecting fees and allocating infrastructure capacity in international rail transport, the States shall ensure a possibility for appeal before an independent body, Art. 29 ARR. Cf. Cottier and Evtimov, *supra* note 55, p. 90 et seq.
276. See *infra* under 4.2. et seq.
277. Art. 12 ARR.
278. The clauses are contained in part E of title IV concerning coordinated traffic policy. See also Weber and Friedli, *supra* note 267, p. 423 et seq.

6.2.1. *The unilateral fiscal safeguard clause (Art. 46 ARR)*

Article 46 ARR gives Switzerland a right to apply unilateral fiscal safeguard measures. This instrument can be applied efficiently to increase the transit price in a strictly established procedure up to a fixed level in the case of an insufficient use of the rail capacity.[279] Switzerland may raise the toll provided for in Article 40(4) ARR by a maximum 12.5% as long as the following five preconditions are cumulatively met:[280]

– difficulties with Swiss trans-alpine road traffic flows continue after 1 January 2005;
– the average rate of utilization of the rail capacity in Switzerland (accompanied and unaccompanied combined transport) is less than 66% over a ten-week period;
– rail prices are competitive;
– the measures under Article 36 ARR regarding quality parameters are applied correctly;
– scope and duration of the measures are limited to whatever is strictly necessary to remedy the situation (a first extension for six months is possible, a further one only if the Joint Committee agrees).

Moreover, the Joint Committee must be informed before application of the corrective measures, and measures may only be introduced at the earliest 30 days after the notification to the Joint Committee, save where the latter decides otherwise.[281]

A later renewed application of such safeguard measures must comply with the following conditions:

– where the previous measures did not last longer than six months, further measures may be taken only after a period of twelve months from the date of cessation of the previous measures;[282]
– where the previous measures exceeded six months, further measures may be taken only after a period of eighteen months from the date of cessation of the previous measures;[283]
– safeguard measures may never be introduced more than twice within five years of the date on which such measures were first introduced.[284]

Exceptions to these requirements can be decided by the Joint Committee by mutual agreement under special circumstances.[285] For its part, the EC "may,

279. Cf. Ambühl, *supra* note 267, p. 516 et seq.; Friedli, "Das Abkommen über den Güter- und Personenverkehr auf Schiene und Strasse: eine politische Würdigung", in Felder and Kaddous, *supra* note 47, p. 481 et seq., 486; Schneuwly, *supra* note 267, p. 491 et seq., 506.
280. Art. 46(1) ARR.
281. Art. 46(4) ARR.
282. Art. 46(3) lit. b subpara. 2 obl. 1 ARR.
283. Art. 46(3) lit. b subpara. 2 obl. 2 ARR.
284. Art. 46(3) lit. b subpara. 2 obl. 3 ARR.
285. Art. 46(3) lit. b subpara. 3 ARR.

subject to comparable conditions, take similar corrective measures".[286] In all cases, conditional revenues resulting from the increase in charges "shall be used to help make rail and combined transport more competitive vis-à-vis road transport".[287] Such unilateral measures, if in correspondence with aims and principles of the ARR, can in the opinion of the Federal Council theoretically already be taken from 1 January 2005 on, but in reality, they are only feasible with the full utilization of the Swiss toll, meaning at the earliest from the inauguration of the first basis tunnel on. Beside the additional rise of the toll through unilateral fiscal protection measures, Switzerland still has the possibility to reduce artificially the price of the railway via the resolution of purposeful subsidies, first of all through a cheaper price of the marked-out route.

6.2.2. *The consensual safeguard clause (Art. 47 ARR)*

The Joint Committee can, by mutual agreement and corresponding to a clearly defined procedure, take fiscal or non-fiscal measures (driving ban, quantitative limits, etc.) if the attainment of the objectives set out in Article 30 ARR is prejudiced.[288] There must be a meeting of the Joint Committee within 15 days of one Contracting Party's request being submitted.[289] The traffic observatory must be informed immediately, and should report within 14 days on the situation and on any measures to be taken.[290] Taking account of this report – and within 60 days of its first meeting on the matter – the Joint Committee then decides on the measures to be taken; this period can be extended by mutual agreement.[291] The measures must be limited in scope and duration, to whatever is strictly necessary to remedy the situation. They should interfere as little as possible with the operation of the ARR.[292]

6.2.3. *Special crisis measures (Art. 48 ARR)*

In cases of *force majeure*, the Contracting Parties must take all possible concerted action to restore and maintain the flow of traffic. Priority is to be given to sensitive cargoes.

286. Art. 46(2) ARR.
287. Art. 46(1) ARR.
288. Art. 47(1) ARR.
289. Art. 47(2) ARR.
290. Art. 47(1) ARR.
291. Art. 47(2) ARR.
292. Art. 47(3) ARR.

7. The Agreement on Trade in Agricultural products (ATAP)

7.1. *Aims and contents*

The ATAP provides for tariff concessions and the removal of technical barriers,[293] so that trade in non-processed agricultural products between Switzerland and the EU can be further liberalized and access to each other's markets be improved.[294]

7.1.1. *"Quantitative improvements"*

These concern tariff concessions, such as reduction or abolition of customs duties, establishment of customs quotas, etc.[295] Annexes 1 to 3 of the ATAP, which are not directly applicable,[296] list the sectors concerned; thereby the emphasis is on cheese products.[297] For these, reciprocal free market access will be introduced after a transition period of five years. This is to be achieved by a gradual increase in quantities exempted from customs duties, a gradual reduction of export subsidies by Switzerland (no EU export subsidies from the beginning) and a reciprocal stepwise elimination of import duties. In addition, the Agreement entails easing of customs duties for vegetables, fruit and horticultural products, and special meats.

7.1.2. *"Qualitative improvements"*

This area concerns removing technical barriers to trade. The Agreement is generally based on the principle of mutual recognition in relation to the equality of legislation.[298] Annexes 4 to 11 contain regulations on the sectoral differentiated product categories.[299]

293. Arts. 1(1), (2) and (4) AAP.

294. Today 75% of Switzerland's agricultural imports come from the EC. FJ 1999, 6149, 6227 et seq. See also Senti, "Abkommen über den Handel mit landwirtschaftlichen Erzeugnissen", in Thürer et al., *supra* note 47, p. 581 et seq.

295. FJ 1999, 6149, 6227 et seq.

296. FJ 1999, 6229. Reference is made to the obligations of the GATT / WTO Uruguay Round and the corresponding message of the Federal Council of 19 Sept. 1994, FJ 1994 IV 1011. See also for Swiss case law *supra* notes 75 and 76.

297. See Aebi, Bötsch, Félix, Häberli, Markstein, Pohl, Rothen, Schauenberg, Zuber, "Das Abkommen über den Handel mit landwirtschaftlichen Erzeugnissen: eine politische und wirtschaftliche Würdigung", in Felder and Kaddous, *supra* note 47, p. 586 et seq.

298. FJ 1999, 6150.

299. In the veterinary sector and in the fields of plant health, animal food, seeds and organically produced foodstuffs, the equivalence of control systems will be recognized within a large area. Not included are fish and meat products as well as eggs. Switzerland plans to modify its law on foodstuffs (SC 817.0) in order to harmonize the legislation and thereby make an extension to these sectors possible (FJ 1999, 6237, 6243, 6246 et seq.), according to the general evolutionary clause in Art. 13 ATAP. Existing names of origin will be protected in the

8. The Agreement on Scientific and Technological Cooperation (ASTC)

The ASTC secures participation of Switzerland in the 5th Research and Technological Development Framework Programme (FP5)[300] on the same terms as a Member State of the EEA. It also includes the research programme of EURATOM, the so-called "Nuclear Framework Programme".[301] Participation was scheduled for FP5, but this programme was already terminated on 31 December 2002. The fixed time limit was valid also for the ASTC[302] and is the reason why the conclusion of a new agreement with regard to FP6 is needed.[303] Since this necessity was foreseen during the negotiations, a prolongation was planed for the next FP.[304]

The parties agreed that, on the one hand, Swiss research entities and scientists can participate in all specific programmes of the FP5 as equals.[305] Switzerland from now on takes part in the different research committees of the FP as an observer[306] and is allowed to coordinate projects.[307] On the other hand, EU research entities (universities, research organizations, companies, individuals) can participate in Swiss research programmes and projects under the following conditions: Swiss regulations on participation need to be met, administrative costs must be shared, and the assent of the project leader and

sectors of spirits and wine (Annex 8 ATAP). A compromise was found for the name "Grappa": Swiss spirits from the italophone region are allowed to be called "Grappa" if they fulfil EC requirements for this speciality (FJ 1999, 6236). Cf. Switzerland's Declaration on Grappa in the Final Act of the ATAP. See also Aebi and others, *supra* note 297, p. 600 et seq. A conflict about the Swiss wine "Champagne" is related to Art. 5(8) of Annex 7 ATAP, where the name "Champagne" will be reserved exclusively for a French region in 2004. It led to a claim by Swiss wine-growers against Commission and Council, which is currently pending at the CFI and which is based on the argument of a violation of general legal principles and the principle of proportionality: Case T-212/02, *Commune de Champagne and others* v. *Commission*; cf. also O.J. 2002, C 2002, 27; *Bulletin Quotidien Europe* No. 8315/2002, p. 16; FJ 1999, 6235; see critical view by Senti, *supra* note 294, p. 623 et seq., 627.

300. O.J. 1999, L 26/1; FJ 2003, 861.

301. O.J. 1999, L 26/34; FJ 2003, 861.

302. Art. 14(2) ASTC in conjunction with the preamble: 31 Dec. 2002.

303. The renewed ASTC has been initialled on 5 Sept. 2003, and will come into force on 1 Jan. 2004 on a provisional basis even before signature and internal ratification; cf. *Neue Zürcher Zeitung*, No. 206, 6–7 Sept. 2003.

304. O.J. 2002, L 232, in (2003) *Zeitschrift für Europarecht*, 14; FJ 1999, 6146, 6195. The Joint Committee prepared the negotiations; FJ 2003, 861; cf. in general Kleiber, "Politique scientifique internationale et coopération scientifique en Europe", in Felder and Kaddous, *supra* note 47, p. 684 et seq.; von Arb, "Grundzüge des Abkommens über die wissenschaftliche und technische Zusammenarbeit", in Felder and Kaddous, *supra* note 47, p. 690 et seq.

305. Cf. Schenker-Wicki and Holzer, "Abkommen über die wissenschaftliche und technologische Zusammenarbeit", in Thürer et al., *supra* note 47, p. 647 et seq.

306. The legal status of Switzerland is not identical to that of the EFTA States, but to that of associated countries that are applying for membership in the EU/EC: FJ 1999, 6195.

307. FJ 1999, 6192, 6194.

the person responsible for programme management must be given.[308] The financial contribution of Switzerland will be calculated on the basis of the gross domestic product[309] in comparison with one of the 15 EU Member States.[310] If the FP5 is modified or expanded within the first three months, Switzerland can terminate its participation with a period of notice of six months. In this specific case, the "guillotine clause" will not be applied.[311]

With regard to intellectual property, research entities participating in the other Contracting Party's project shall have the same rights and obligations.[312]

9. The Agreement on Certain Aspects of Government Procurement (AGP)

9.1. *Aims and contents*

The principal goal of this Agreement is to create better access conditions to the procurement markets, which are important sectors, representing about 720 billion EURO for the EU and approximately 24 billion EURO for Switzerland.[313] The AGP aims at mutual expansion and broadening of the scope of liberalization of public procurement markets reached in the Government Procurement Agreement (GPA) within the frame of the World Trade Organization (WTO)[314], for the following areas:[315]

– railroad traffic and telecommunications;
– the entire energy sectors;
– inclusion of private contracting entities in the classic sectors of water and

308. FJ 1999, 6194.
309. Reference should be the latest statistical data from the Organization for Economic Cooperation and Development (OECD). Art. 5(2)(2) ASTC.
310. The programme concerning nuclear fusion is excluded. FJ 1999, 6196. Art. 5(2) ASTC. Annex B gives detailed rules regarding Switzerland's financial contribution.
311. FJ 1999, 6146, 6195; Art. 9(1) ASTC.
312. Art. 4 ASTC. Annex A provides for guiding principles on the allocation of intellectual property rights. Its Art. 2 requires treatment consistent with the TRIPS Agreement of the GATT-WTO, the Berne Convention (Paris Act 1971) and the Paris Convention (Stockholm Act 1967). Cf. Schenker-Wicki and Holzer, *supra* note 305, p. 652 et seq.; Cottier and Evtimov, *supra* note 55, p. 83.
313. FJ 1999, 6148.
314. O.J. 1994, L 336/290; SC 0.632.231.422. As provided for in Art. 145 AGP, the Agreement shall not affect rights and obligations of the Contracting Parties under agreements concluded under the auspices of the WTO. According to Arts. 1 and 2 AGP, the Communities' and Switzerland's Annexes and General Notes to Annex 1 of the GPA must be amended within a month of the entry into force of the Agreement. Cf. Bollinger, "Grundzüge des Abkommens über bestimmte Aspekte des öffentlichen Beschaffungswesens", in Felder and Kaddous, *supra* note 47, p. 643 et seq.
315. FJ 1999, 6147, 6202 et seq.; FJ 2002, 860; Art. 3(5) AGP.

energy supply, urban transport, sea ports and airports;
– inclusion of further contracting entities in the traffic sectors (e.g. cable railways, ski-lifts);
– inclusion of municipalities and districts in the scope of the GPA (only between the EU and Switzerland; suppliers from other GPA Member States are not entitled to have access to procurements of Swiss municipalities).[316]

In sectors, such as telecommunications, which are in a process of liberalization and which demonstrably function under competitive conditions, businesses can be freed from the procurement regulations.[317] The Agreement is based on the assumptions that the two legal systems are equivalent and that mutual market access is comparable.[318] Therefore, the principle of non-discrimination is provided for, containing the principles of most-favoured-nation and national treatment.[319] Further fundamental principles are transparency and fairness.[320] Detailed lists of the entities concerned are contained in Annexes I-IV AGP; the services covered by the Agreement are listed in Annex VI.[321] Switzerland has stated several exceptions in Annex VIII. The Agreement also provides for mutual exchange of information on tender notices, relevant legislation[322] and mutual access to corresponding databases.[323] Control of compliance with the duties stemming from the Agreement[324] is exercised by an independent commission composed of the European Communities Commission and Swiss representatives. Both parties

316. Cf. Wasescha, "Das Abkommen über bestimmte Aspekte des öffentlichen Beschaffungswesens: eine Würdigung aus politischer und wirtschaftspolitischer Sicht", in Felder and Kaddous, *supra* note 47, p. 637 et seq. On the experiences of the cantons with the AGP see Mayer, "Erfahrungen der Kantone mit dem Abkommen über bestimmte Aspekte des öffentlichen Beschaffungswesens", in Felder and Kaddous, *supra* note 47, p. 669 et seq.

317. Art. 3(5) AGP; FJ 1999, 6147 et seq., 6205 et seq.; FJ 2002, 860: Switzerland has announced in the Joint Committee that it will exclude the telecommunication sector on the basis of this provision.

318. Therefore harmonization or taking over of law is not provided for in the AGP; Zimmerli, "Auswirkungen auf das öffentliche Beschaffungswesen", in Cottier and Oesch, *supra* note 77, p. 162.

319. FJ 1999, 6206; Art. 6 AGP; Annex X AGP contains a list of examples of behaviour which is direct or indirect discrimination within the definition of the Agreement.

320. Arts. 3(1), 4(1) AGP.

321. Beside services in the field of construction, which are contained in Annex VII AGP. See also Biaggini, "Abkommen über bestimmte Aspekte des öffentlichen Beschaffungswesens", in Thürer et al., *supra* note 47, p. 351 et seq.

322. Names and addresses of these so-called "contact points" need to be communicated by the Contracting Parties (Art. 7(3) AGP).

323. FJ 1999, 6208; Switzerland already took part in the EU project SIMAP, terminated in 1998, which worked out a data system for public markets; Art. 12 AGP on information technology.

324. Art. 8 AGP on the monitoring authority.

provide legal remedies for breaches of contract which also exist in the framework of the GPA.[325]

As for the compatibility of the AGP with WTO law, problems may be seen with regard to the most-favoured-nation clause and the requirements for preferential agreements.[326]

9.2. *Legal protection*

The AGP contains detailed legal protection provisions in Article 5 and Annex V. While Article 5 is not self-executing, paragraph 1 of Annex V is. According to this provision, access to independent and impartial courts, public proceedings, time limits for challenges of no less than 10 days as well as other specific requirements with regard to due process of law have to be guaranteed. Paragraphs 2 and 3, which are not directly applicable, concern in particular interim measures and the consequences of unlawful decisions.

An exception to the principle of non-discrimination exists for Switzerland with regard to cantonal legal remedies, which are not available to EU suppliers below the threshold level because Article 6(3) AGP is only a best-endeavour clause.[327]

Disputes between the Contracting parties about the application of the Agreement can be settled by the Joint Committee,[328] which is established by Article 11 AGP. The Joint Committee also periodically checks the Annexes and decides by general consent about their adaptation if one Contracting Party so requests.

325. Arts. XX and XXII of the Government Procurement Agreement. Cf. Cottier and Evtimov, *supra* note 55, p. 84 et seq.

326. Cf. Cottier and Panizzon, *supra* note 47, no. 27 et seq. The authors think that a general evaluation is limited and only concrete cases allow precise analysis. The Federal Council has taken into consideration this question regarding each sectoral agreement and sees no contradiction with the WTO obligations: FJ 1999, 6430 et seq; critical view held by Cottier, "Das Ende der bilateralen Ära: rechtliche Auswirkungen der WTO auf die Integrationspolitik der Schweiz", in Cottier and Kospe, *supra* note 71, p. 103 et seq., who argues that the scope for sectoral bilateral agreements remains limited, due to the requirements of WTO law.

327. FJ 1999, 6147, 6206 et seq.; see the explanatory notification in Annex IX B AGP; cf. also Thürer and Hillemanns, *supra* note 50, p. 31 et seq.; Bollinger, *supra* note 314, p. 653 et seq.

328. Art. 10 AGP.

10. The Agreement on Mutual Recognition in relation to Conformity Assessment (MRA)

10.1. *Aims and contents*

In order to avoid duplication of procedures, this agreement on technical barriers to trade grants mutual acceptance of the results of conformity assessment (tests, reports, authorizations, conformity marks, certificates, manufacturer's declarations of conformity), which means a systematic examination to determine the extent to which an industrial product, process or service fulfils specified requirements by the laws of the EU and Switzerland.[329] According to the preamble, the Contracting Parties wish to facilitate trade by eliminating technical barriers[330] and to ensure protection for health, safety, the environment and consumers. The Agreement is designed to reduce the time and costs for marketing products originating from the other Contracting Party, and to equalize market access conditions for them.[331] It reinforces the "global approach" by taking into consideration the recommendations of the WTO Agreement on Technical Barriers to trade.

Article 1 MRA states the general principle of mutual recognition which is effected at two levels:[332]
– if the Swiss legislation differs from that of the Communities, conformity assessment shall be made on basis of the other Contracting Party (export destination).[333] Thus, only one conformity assessment body is needed for the controls concerning EC and Swiss standards;
– if, according to the MRA, standards are considered by the Joint Committee[334] to be equal, conformity assessment can be made on basis of only one legislation and is then accepted by the other Contracting Party without any need for a new evaluation.[335]

The scope of the Agreement is limited to end-products originating in the Contracting Parties.[336] However, if products are covered by agreements on mutual recognition in relation to conformity assessment between Switzerland and Member States of both EFTA and EEA, products of EFTA States shall

329. See e.g. Arioli, "Der Abbau von technischen Handelshemmnissen", in Cottier and Oesch, *supra* note 77, p. 124 et seq.
330. See also FJ 1999, 6148, 6212. Cf. Zosso, "Das Abkommen über die gegenseitige Anerkennung von Konformitätsbewertungen: eine politische und wirtschaftliche Würdigung", in Felder and Kaddous, *supra* note 47, p. 553 et seq.
331. FJ 1999, 6149, 6213.
332. Cf. FJ 1999, 6214.
333. Art. 1(1) MRA.
334. Art. 1(3) MRA referring to Art. 10 MRA.
335. Art. 1(2) MRA.
336. Art. 4(1) MRA.

also be covered.[337] The product sectors concerned by the MRA are set out in Annex I.[338] Annex II provides for general principles for designating conformity assessment bodies. A verification of compliance of these bodies can be demanded by the Contracting Parties.[339]

The Joint Committee established by Article 10 MRA may modify the Annexes, keeping the Articles up to date with technical progress.[340] It is responsible for the removal and inclusion of conformity assessment bodies, as well as for drawing up the procedure for carrying out the verifications provided for in Articles 7 and 8 MRA.[341] The Committee also examines all notifications made by the Contracting Parties[342] and is the dispute settlement body.[343]

10.2. *Evaluation*

The Agreement neither contains a harmonization of regulatory provisions for putting products into circulation between Switzerland and the EU nor a systematic recognition of equivalence of national regulations in the sense of the "Cassis de Dijon" principle.[344] Because of the far-reaching euro-compatibility of Swiss regulations for areas with equivalent Swiss legislation, the proofs of conformity (tests, certificates etc.) required for Switzerland are valid for marketing in the EU area at the same time, whereby the Agreement goes further than similar treaties that exist between the EC and the USA[345] or Canada.[346] Thereby it should be noted that this access, for example in the case of pharmaceutical products, only includes certain aspects, such as reciprocal recognition of inspections by the official manufacturing control or product analysis by

337. Art. 4(2) MRA. Such parallel agreements are planed to ensure even more homogeneity; cf. preamble MRA and FJ 1999, 6149, 6215.

338. See Hertig, "Grundzüge des Abkommens über die gegenseitige Anerkennung von Konformitätsbewertungen", in Felder and Kaddous, *supra* note 47, p. 564 et seq.

339. Art. 8(1) MRA; FJ 1999, 6216.

340. Art. 10(5) MRA; FJ 1999, 6216.

341. Art. 10(4) lit. a-d MRA. The Joint Committee has recently decided on a list of conformity assessment bodies to be recognized in the scope of the MRA; O.J. 2003, L 56/1.

342. Art. 10(4) lit. e MRA.

343. Art. 14 MRA.

344. This was not the objective of the Swiss Federal Council; see FJ 1999, 6213; cf. also Bühler, "Abkommen über die gegenseitige Anerkennung von Konformitätsbewertungen", in Thürer et al., *supra* note 47, p. 533; Arioli, *supra* note 329, p. 144 et seq.; cf. on the "*Cassis de Dijon*" principle in general: Breitenmoser and Husheer, *supra* note 1, no. 910; Craig and de Búrca, *supra* note 48, p. 604 et seq.; Nicolaysen, *supra* note 51, p. 49, 67; Streinz, *supra* note 48, no. 667, 671 et seq., 700 et seq., 738 et seq.; Herdegen, *supra* note 48, no. 294.

345. Agreement on Mutual Recognition between the European Community and the United States of America, O.J. 1999, L 31/3.

346. Agreement on Mutual Recognition between the European Community and Canada, O.J. 1998, L 280/3.

the manufacturer or a public authority, but not an authorization to market new medicines as such.[347] Areas not included by the Agreement are foods, bio label and bio audit.[348]

11. Concluding remarks

The seven 1999 sectoral agreements between the EC, its Member States and Switzerland are, in several respects, a pragmatic solution to a unique problem. They bridge the gap between the European and the Swiss markets following the Swiss rejection of participation in the EEA.

With regard to the question of legal nature and structure, the agreements form part of public international law including some elements of, and references to, supranational EC law. By traditional treaty law methods, areas of substantive matters related to EC law and principles are taken over by a neighbouring third State which accepts, in these fields, the jurisprudence of the ECJ either directly or by way of consent within the Joint Committees. This new form of partial participation in the European process of integration enables Switzerland to preserve traditional concepts of reciprocity and sovereignty in general as well as institutional independence.

In legal, economic and political terms, the EC extends with the sectoral agreements its contractual ties with a weighty trade partner and neighbour in the centre of Europe, which is a prerequisite and a good basis for the achievement of further bilateral and sectoral agreements in areas of common interest. As a consequence, the process of European integration will be strengthened, since Switzerland takes part as a third State in important, though limited, areas of the common market and will have first experiences with its practical functioning. Thus, these sectoral agreements may be seen as important elements paving the way for a second package of sectoral agreements, which is already under negotiation.

In comparison with other agreement models which bind the EU to European and Mediterranean non-member countries, the system of the sectoral agreements might be called a new means of "differentiated integration", somewhere between cooperation and integration. Indeed, apart from the AAT, with its dynamic references to EC law and institutions, this is not as far-reaching as the EEA, with its supranational institutions and automatic taking-over of the future *acquis communautaire*. Nevertheless, it does go further than usual association agreements or a pure trade union such as that with Turkey. With the experience of such rather specific and pragmatic agreements, Switzer-

347. Annex 1 Chapter 4 MRA, which refers in its Section 1 to Art. 1(2) MRA.
348. FJ 1999, 6224.

land may now prepare and follow the path towards EU membership, which still remains the "strategic objective" of its European policy.[349] The growing integration of a remaining "island" on the European map is for many reasons certainly also a long-term aim of the EU.

Nevertheless, it is hard to predict what impact the sectoral agreements will have. Since the twofold nature and structure of the agreements with both public international and EC law involved leaves no room for common and judicial organs, there is a risk that identical provisions and rights might be applied and interpreted in different or even contradictory ways. In this respect, the Joint Committees cannot be a valuable alternative. Furthermore, according to the parallelism of the seven agreements based on the so-called "guillotine clauses", there is a permanent threat of a sudden interruption and an end to this kind of sectoral approach. One may fear, therefore, that such a risk will not create an atmosphere of confidence and trust for all participants at the legal, economic and political levels.

These last considerations might lead to the final conclusion that sectoral agreements are not a real or long-term alternative for Switzerland to further steps towards European integration in the future or even a bright model for other European states. Nevertheless, they may be seen as a helpful intermediary or transitional step for a State like Switzerland, which is – for different reasons of democratic and institutional structures – not yet ready or willing to embark immediately on the path of European integration together with the other EU Member States. In the meantime and for the short term, the seven highly technical sectoral agreements must prove their relevance and value through their concrete application in practice.

349. Cf. FJ 1992 III 1185; FJ 1994 I 153, 196; FJ 2002, 6359.