Europe is currently facing a “migration crisis”. In many EU Member States and in Switzerland, politicians and/or people have uttered the wish to limit immigration. In Switzerland, the adoption of the so-called mass immigration initiative has led to the adoption of a new constitutional article, demanding an “autonomous control” of the immigration of foreign nationals. But what are the remaining legal margins for limiting migration to the EU and Switzerland? Is the setting of quotas still possible?

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EU Law: A Privileged Status for EU Citizens

With regard to the rules applying in the EU, the Treaty on the Functioning of the European Union (TFEU) clearly differentiates between EU citizens and Third Country Nationals (TCN).

First of all, in case of cross-border economic activities, EU citizens benefit from the fundamental freedoms. These transnational movements can either be covered by the free movement of workers (art. 45 TFEU, in case of work contracts), the freedom of establishment (art. 49 TFEU, in case of long-term self-employed activities), or the freedom to provide services (art. 56 TFEU, in case of short-term self-employed activities). The core terms “worker”, “establishment” and “service” are autonomous EU law concepts. Their respective definitions have been shaped by the European Court of Justice (ECJ) during many years and do not have the same meaning as identical terms used in national law. In principle, the fundamental freedoms do not protect TCNs. However, in special circumstances, the ECJ has confirmed that they may also apply to TCNs – for example, to family members of EU citizens or to posted workers hired by an EU based company who, itself, beneficiary of the free movement of services. When the economic activity ends, the revocation of the right of residence becomes possible, as the person no longer benefits from the fundamental freedoms. However, in certain cases, a person may have acquired a right to remain (in case of retirement, incapacity to work due to an accident at work, etc.).

“EU citizenship guarantees EU citizens a right to move and reside freely within the territory of the EU Member States.”

Even in the absence of economic activities – or in the case of doubt about the category a person falls into – EU citizenship, introduced by the Maastricht Treaty in 1992, guarantees EU citizens a right to move and reside freely within the territory of the Member States. The right of residence as an EU citizen continues when the economic activity ends, unless the person has become an unreasonable burden on the host state due to a lack of sufficient resources. According to art. 20 TFEU, every “person holding the nationality of a Member State” is a citizen of the Union. Thus, TCNs, even those living in the EU for a very long time, cannot benefit from the EU citizenship provisions.
Mobility, not Migration

If a person fulfills the requirements set by the fundamental freedoms or the citizenship provisions and the applicable secondary legislation – in general, a job or sufficient financial resources, plus comprehensive sickness insurance cover – he or she has a right to migrate.

Movement of EU citizens within the Member States is no longer considered as “migration”. Instead, the EU institutions use the terms of “free movement” or “mobility”. The notion of migration is in fact used for TCNs coming from outside the EU.

Is it possible to Justify Quotas?

Discrimination on the grounds of nationality, but also other forms of restrictions or impediments to market access for EU citizens are considered an infringement of the fundamental freedoms or the EU citizenship rules – unless they can be justified. Possible grounds for justification can either be written (i.e. explicitly mentioned by the TFEU or unwritten ones (i.e. not mentioned in the Treaty, but developed by the ECJ). Written grounds are leges speciales compared to unwritten mandatory requirements, which means that they have to be examined first. It is, however, contested in legal doctrine whether direct discrimination can be justified on unwritten grounds. In either case, it is difficult to justify direct discrimination.

“Direct discrimination can be justified on written grounds such as public policy, public security, and public health.”

The grounds explicitly mentioned by the Treaty are public policy, public security, and public health. They are also detailed by the Citizens Directive, which contains several provisions on the application of these derogations to natural persons and has introduced three different levels of protection, depending on the status of the person: (1.) All individuals covered by EU law, (2.) individuals with a right of permanent residence, and (3.) minors and individuals having resided in a host state for 10 years.

The Citizens Directive, which codifies significant ECJ case-law, states that all measures adopted on grounds of public policy or public security must comply with the principle of proportionality and be based on the personal conduct of the individual.

“Public policy, public security and public health exceptions cannot be invoked to serve economic ends.”

When skimming through the Citizens Directive, one gets the impression that its provisions are essentially dealing with individual expulsion decisions linked to a certain behavior of the individual concerned. Collective decisions linked to economic or social problems of a country as a whole due to “mass immigration” are not mentioned at all. The directive just specifies that public policy grounds may only be invoked based on the personal conduct of the migrant and cannot rely on considerations of general prevention.

As the directive does not mention other, more “global” situations, it could be argued that its scope is limited to individual decisions and that it is a lex specialis for these special circumstances. According to the hierarchy of EU law, this could mean that for all other types of decisions, only primary law provisions are applicable. So the notions of “public policy” and “public security” have to be interpreted, as they could be potentially applicable.

“It is imaginable that serious economic or social difficulties linked to massive migration could qualitatively as a threat to public policy or public security and therefore justify certain limits – for example, the limitation of new permits to a certain maximum number.”

However, these difficulties would have to be real and demonstrable, and not just claimed by some politicians. In addition, all measures taken would need to fulfill a proportionality test – for example, they could be limited to certain sectors or geographical areas – which could prove to be very complicated.

“Claimed difficulties have to be real as well as demonstrable and must comply with the principle of proportionality.”

A general system of quotas for “mobile” EU citizens would therefore probably not be compatible with EU law.

One Solution: Limiting Entitlement to Social Assistance

Another possibility, however, could be the use of a perfectly legal loophole: The Citizens Directive actually gives Member States the possibility, to a certain extent, to limit entitlement to social assistance. This does not mean that an EU citizen is denied the right to residence in another Member State, but de facto residence becomes unattractive to those individuals relying on social assistance. It could therefore be an option for Member States with high expenses for social assistance paid to EU nationals (instead of choosing quotas and risking a violation of EU law).
Third Country Nationals: A Different Story

Unlike EU citizens, TCNs residing in the EU do not automatically have the right to free movement. Their entry and residence rights, but also their possibility to switch Member States, are governed by a different set of rules.

Legal migration into the EU is possible only in special cases:

- First of all, in cases of family reunification with an EU citizen, a TCN has a (derived) right to reside in the respective Member State and to follow the EU citizen into another Member State.

- Secondly, certain categories of (labor) migrants may qualify for immigration (or just temporarilly migration) into the EU based on the Blue Card Directive, the Seasonal Workers Directive or the Intra-Corporate Transferees Directive. Students and researchers are subject to their own instrument (the Students and Researchers Directive), so are family members of TCNs legally residing in a Member State (Family Reunification Directive). The status of TCNs is further detailed by the Long-term Residents Directive and the Single Permit Directive.

These directives permitting entry and residence of TCNs (except for the Family Reunification Directive) contain the same clause that can also be found in primary law: The Member States have the right to determine the volumes of admission of TCNs coming from third countries to their territory in order to seek work.

“Therefore, a quota system regulating the immigration of TCNs seeking work within the EU Member States would be compatible with EU law.”

Special Rules on Asylum Seekers, Refugees and Beneficiaries of Subsidiary Protection

Applicants for international protection (i.e. asylum seekers or applicants for subsidiary protection) are governed by special rules. These individuals can be transferred from one Member State to another according to the Dublin regulation. Applicants for international protection can even be expelled to a non-EU Member State, under the condition that the respective third state is considered as “safe”. Otherwise, the principle of non-refoulement would be violated. So, before transferring an applicant, every EU Member State has to verify if that person is going to be treated according to international human rights standards and the Geneva Convention. EU Member States are generally considered as “safe”, with the exception of Greece.

“Applicants for international protection are governed by special rules, according to the Dublin regulation and the principle of non-refoulement.”

Including asylum seekers into a quota system and fixing an absolute cap would not be compatible with EU and international law, if that system would lead to an expulsion of a person to a country where he or she runs the risk of torture or inhuman or degrading treatment.

Switzerland: EU Citizens Privileged over Third Country Nationals

In Switzerland, the situation is similar to the one described in the EU. On the one hand, Switzerland has concluded the Agreement on the Free Movement of Persons (AFMP) in 1999. It entered into force in 2002. The AFMP grants EU citizens a right of residence and access to an economic activity in Switzerland (and vice-versa regarding Swiss citizens in the EU). The AFMP introduced a gradual system from quotas over free movement with a so-called safeguard clause to full free movement. Whereas in the first five years, quotas were possible, this has not been the case anymore since 2014: For the so-called EU-15 countries plus Malta and Cyprus and the so-called EU-8 members, which entered the EU in 2004, no quantitative limits can be set and full free movement is guaranteed. Just for Romania and Bulgaria, a safeguard clause is still applicable until 2019, meaning that the number of new residence permits can be limited if the average of the three preceding years is exceeded by more than 10%. The number of new residence permits (in a certain category) is then limited to the average of the three preceding years plus 5%.

“The Free Movement of Persons Agreement grants EU citizens a right to residence and access to economic activity in Switzerland (and vice versa).”

TCNs, on the other hand, fall under the Foreign Nationals Act (FNA), which explicitly foresees the possibility to define quotas for the Confederation and the cantons and basically limits immigration to managers, specialists and other qualified workers. Priority is given to domestic workforce.

“The Foreign Nationals Act explicitly foresees the possibility to define quotas for Third Country Nationals.”
For asylum seekers in Switzerland, the legal situation is the same as in the EU as Switzerland is also bound by the Dublin regulation (Dublin Association Agreement) and the international instruments mentioned above.

**Difficult Transposition of the Mass Immigration Initiative**

After the acceptance of the mass immigration initiative in 2014, there have been long debates on the possible transposition of the new constitutional provision (art. 121a). In fact, art. 121a Constitution asks for the restriction of the number of residence permits for foreign nationals in Switzerland by annual quantitative limits and quotas. These quantitative limits and quotas should be determined according to Switzerland’s general economic interests, while giving priority to Swiss citizens. The re-introduction of quotas for EU citizens that already benefit from (full) free movement would therefore violate the AFMP – especially the stand still clause of art. 13 AFMP, which prohibits the Contracting Parties to adopt new restrictive measures vis-à-vis each other’s nationals.

Thus, some legal scholars have argued that the implementation of the constitutional mandate is simply impossible and can be ignored. Others have suggested the application of art. 14 para. 2 AFMP: This article says that, in the event of serious economic or social difficulties, the Joint Committee shall meet at the request of either Contracting Party in order to examine appropriate measures to remedy the situation. The Joint Committee may decide what measures to take within 60 days of the date of the request. This period may be extended by the Joint Committee. The scope and duration of such measures shall not exceed that which is strictly necessary to remedy the situation.

Preference shall be given to measures that least disrupt the working of the Agreement.

This provision raises three different questions:

1. **How are the decisions going to be taken?** Could Switzerland unilaterally take measures? Actually, the same article states that the Joint Committee shall reach its decisions by mutual agreement. It is therefore necessary that the EU and its Member States agree with the measures suggested by Switzerland – which is actually hard to believe, given the very clear position of the EU Commission on Free Movement.

   “The EU and its Member States need to agree with the measures suggested by Switzerland.”

2. **What is the factual situation that triggers the application of art. 14 para. 2 AFMP?** The article speaks of “serious economic or social difficulties”. Again, these terms are subject to interpretation, but the difficulties have to be real and demonstrable. They also have to be “serious”. Difficulties in one canton are probably not sufficient.

3. **What are the measures to be taken?** Can quota constitute such “appropriate measures”? Art. 14 para. 2 AFMP emphasizes that the measures have to be proportionate with regard to their scope and their duration. This implies that they have to be flexible, rather short-term, and limited to sectors or regions that face the difficulties. A fixed annual quota for all foreign nationals wishing to migrate to Switzerland probably does not meet the requirements of such a proportionality test.

“The measures have to be flexible, rather short term, and limited to sectors or regions that face economic or social difficulties.”

To sum it up, article 14 para. 2 AFMP is probably not the miracle solution. However, it is better to find a solution inside the AFMP than terminating and re-negotiating it ... Losing the bilateral agreements – the seven bilateral agreements concluded in 1999 are all linked by a “guillotine clause” – would be a bad option, considering their positive economic impact.

By the way: The new constitutional article also raises other questions, especially with regard to its compatibility with the non-refoulement principle and other fundamental rights such as family reunification. The future will show how this difficult provision will be transposed. It is hard to imagine that it is possible without violations of international agreements.

**Tilting at Windmills**

All in all, one can say that the international, EU, and Swiss legal framework with regard to migration has become very complex. Due to Europeanization and the emergence of higher human rights standards, national states’ margins to “unilaterally” or “autonomously” limit immigration have become considerably smaller in the past decades. The remaining competences are mostly confined to TCNs coming for work purposes. This being said, it might not be wise to put at risk good relations with EU neighboring countries by leading endless discussions about quotas and maximum numbers.
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Zusammenfassung

Gegen Windmühlen kämpfen? – rechtliche Möglichkeiten, die Einwanderung nach EU und Schweizer Recht zu begrenzen


Résumé

Combatte les moulins à vent ? – les marges de manœuvre légales pour limiter l’immigration selon le droit de l’UE et de la Suisse

L’Europe se trouve dans une « crise migratoire ». Dans de nombreux États membres ainsi qu’en Suisse, le peuple et/ou des politicien-ne-s ont émis le souhait de limiter l’immigration. Cet article analyse les possibilités légales de mettre en œuvre ce souhait et arrive à la conclusion que la marge de manœuvre des États n’est que très restreinte, vu le cadre juridique existant.