

Update

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Initiative “against mass immigration”: Swiss vote to set limits on immigration including from the EU

On 9th February 2014, Swiss citizens narrowly approved, by just 50.3%, the initiative “against mass immigration” which imposes limits on the number of foreigners allowed into the country and may lead to the end of Switzerland’s *Agreement on the Free Movement of Persons* (“AFMP”) with the European Union (“EU”).

I. Introduction

The AFMP between the EU and Switzerland came into force in 2002 and is a key element of the bilateral agreements between the EU and Switzerland. According to the AFMP, EU and Swiss nationals are entitled to choose their place of residence and work within the signatory States’ territories.

Since the entry into force of the AFMP twelve years ago, migratory flows have consistently increased, in particular over the last five years during which net immigration has run at around 80,000 people per year on average (70% of whom are EU nationals). Foreigners now make up 23% of the Swiss population of around 8 million.

This upsurge in immigration has seen concern grow amongst a fringe of the Swiss population that immigrants are eroding the nation’s distinctive culture and are contributing to rising rents, crowded transport and more crime. In this context, the Swiss People’s Party (UDC/SVP) – known for its anti-foreigner and anti-EU agenda – presented in February 2012 an initiative against mass immigration, which aimed at implementing a restrictive immigration policy (the “**Initiative**”).

On 9th February 2014, a majority of the Cantons and 50.3% of the Swiss voters approved the Initiative.

II. Content of the Initiative

The Initiative provides for the addition of a new Article 121 *a* in the Swiss Federal Constitution (“SFC”) according to which Switzerland must conduct its own immigration policy autonomously and sovereignly.

In particular, Article 121 *a* SFC requires that yearly quotas be applied to all foreign nationals (without distinction between EU and non-EU nationals). Moreover, all types of permit under the scope of the legislation must be subject to quotas. Further, rights to permanent residence, family reunification and social benefits may be limited.

Article 121 *a* SFC also provides that the yearly quotas must be set by taking into account Switzerland’s global economic interests and Swiss nationals’ prioritisation. Decisive criteria for the granting of permits include most notably a request from an employer, an integration capacity as well as an autonomous source of revenues.

Finally, Article 121 *a* SFC sets forth that no international treaty contrary thereto may be concluded. Also, international treaties contrary to Article 121 *a* SFC must be renegotiated and adapted within a period of three years. If the implementing legislation does not enter into force within three years, the Federal Council must enact, on a temporary basis, the necessary provisions by way of ordinance.

III. Consequences

1. Swiss Immigration Law

Article 121a SFC will result in fundamental changes to the current Swiss immigration legal framework and could, in particular, have the consequences described below. That being said, foreigners who are already established in Switzerland benefit from acquired rights and will not be affected by the implementation of the Initiative.

a) Quotas

The yearly quotas will be applicable to all types of permit and to all foreigners, irrespective of their nationality. This will mainly have an impact on EU nationals, given that they have until now only been subject to quotas during the time of application of the safeguard clause (which will apply at the latest until 31st May 2014 with respect to EU nationals except for Bulgarian and Romanian). That being said, quotas have already been in place with respect to third-state nationals (i.e. non-EU nationals) applying for work permits. Therefore, the Initiative will in principle only have a limited impact on these foreigners. However, all permit applications based on family reunification will become subject to quotas, which is not the case today.

b) National preference

The Swiss authorities will have to set the quotas by taking into account in particular Swiss nationals' prioritisation. This may imply, most notably, that companies intending to file work permit applications for EU nationals could first have to demonstrate that there are no good candidates on the local market. Frontier workers will not be considered as part of such a local market. That being said, companies will obviously not be forced to hire Swiss nationals if they do not have the requested work skills and capabilities.

c) Integration capacity

Before approving permit applications, the Swiss authorities will have to examine in particular whether the applicant possesses the requisite "integration capacity". This is not a condition under current legislation and will have to be specified in an implementing provision. However, the "integration capacity" could for instance be understood as a requirement with respect to specific permit applications to speak a national language of Switzerland.

d) Procedure

The work permit application process for EU nationals could become similar to the current process for third-state nationals. Cantonal authorities would make local market assessments and decide whether or not a quota may be granted. Upon a favorable decision from the cantonal authority, the application would be transmitted to the Federal authority for migration, which in turn would also verify that the applicant fulfills the conditions set out under the law. If a favorable decision is issued by the Federal authority, the cantonal authority would finally issue the work permit. In particular, EU workers would not be able to start working before the issuance of a work permit. It may be that the whole procedure would take several months.

2. AFMP and Bilateral Agreements

Article 121a SFC provides in particular for the introduction of quotas for EU nationals and for the respect of the Swiss nationals' prioritisation. These two limitations to immigration are contrary to the AFMP and will necessarily lead to a renegotiation/revocation of the AFMP. Important consequences of the approval of the Initiative are therefore likely to arise from this renegotiation/revocation.

Indeed, the denunciation of the AFMP by Switzerland could have an impact on other bilateral agreements, as they are directly linked to the AFMP (which is part of a package of seven agreements). At this stage, however, consequences remain uncertain in the context of bilateral agreements on technical barriers to trade, public procurement markets, agriculture, research, civil aviation, and overland transport.

With this in mind, the European Commission issued a statement on 9th February 2014 expressing its "*regret*" that the Initiative had been adopted, although it did not give any indication as to the effects that the denunciation of the AFMP by Switzerland may have on the other above mentioned agreements. The European Commission states notably that "*this [i.e. the adoption of the Initiative] goes against the principle of the free movement of people between the European Union and Switzerland. The Union will examine the implications of this initiative on Swiss-EU relations as a whole*".

IV. Implementation

The Initiative provides that the Swiss government and parliament have three years to introduce the implementing provisions necessary for the application of the Initiative's restrictions to the immigration.

Theoretically, the implementing legislation of Article 121a SFC could enter into force before the three years period has lapsed. However, since the implementation process is likely to take some time, one may expect that it will not enter into force before 2017. Until then, EU nationals will continue to benefit from the AFMP except if notice of termination is previously given by the EU (the Swiss authorities have already indicated that they will not terminate the AFMP and will try to renegotiate it in accordance with Article 121a SFC).

The Swiss government has already taken a number of initial decisions regarding the implementation of Article 121a SFC. In this context, an implementation plan will be drawn up by the Federal Department of Justice and Police ("FDJP"), the Department of Foreign Affairs and the Department of Economic Affairs, Education and Research acting together by the end of June 2014 and will constitute the basis for the necessary legislative work. A draft law will then be presented to the Swiss parliament by the end of the year. The FDJP will also draft the necessary implementing ordinances. These ordinances will be enforced if the legislative process is not completed within the stipulated timeframe (i.e. three years). Indeed, Article 121a SFC allows the Swiss government to implement the new immigration system on a temporary basis by way of ordinance. In parallel with work at legislative level, the Swiss government will hold exploratory talks with the EU with a view to conducting negotiations on the AFMP.

Since the Initiative's wording is very general, there are still critical questions to be resolved. Therefore, the Swiss government and parliament will benefit from a certain discretionary power when implementing Article 121a SFC. This is in particular true with respect to the actual numbers of quotas to be granted and how they will be allocated among the different types of permit application. For instance, if high enough quota ceilings are set by the federal authorities regarding work permit applications, the Cantons may be in a position to continue to grant work permits to EU nationals without affecting the business needs of the companies.

Please do not hesitate to contact us in case of any questions.

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