

BRIEFING

# Switzerland votes 'against mass immigration': How can the EU respond?

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Swiss citizens narrowly approved a referendum on 9 February 2014 that will require Swiss authorities to introduce annual quotas on foreign workers and further regulate immigration. The new law, approved by 50.3 % of voters, will result in changes in the fields of asylum, the movement of cross-border workers, family reunification and social benefits. Significantly, the new restrictions would also apply to citizens of the EU.

The referendum was initiated by the right-wing Swiss People's Party (SVP), which has been a vocal critic of the growing numbers of foreign workers arriving in the country every year; last year's total reached nearly 80 000, in a country with a population of 8 million. In fact, the percentage of foreigners among Switzerland's population has not exploded in recent years: in 2013, foreign workers represented 23.5 % of the Swiss population – a relatively small increase from the 20 % recorded in 1999. However, a negative image of immigration in the country has recently been exacerbated by poor economic conditions in the euro area, particularly when compared with the sound state of the Swiss economy.

The referendum may have a profound effect on EU-Switzerland relations. The Swiss authorities now have three years to renegotiate the bilateral Agreement on the Free Movement of Persons, which entered into force on 1 June 2002. Another more pressing deadline is also looming: before May 2014, Swiss quotas on foreign workers presently in force (under a safeguard clause) will have to be lifted.

## Background: The EU's bilateral agreements with Switzerland

The Agreement on the Free Movement of Persons, signed in June 1999, institutes free circulation between the EU and Switzerland. This applies

to workers, but also entails the mutual recognition of qualifications and the right to purchase real estate and to benefit from social security protection. The Agreement on the Free Movement of Persons is one of seven agreements relating to the internal market – a package called 'Bilateral I'. The other six concern the following fields:

- air transport,
- carriage of passengers and goods by road and rail,
- trade in agricultural products,
- mutual recognition of conformity assessment,
- certain aspects of government procurement,
- scientific and technological cooperation.

In signing these agreements, the parties linked the accords to one another, creating a unified 'package' and guaranteeing reciprocity. A 'guillotine clause' (Article 25 of the Agreement on the Free Movement of Persons) ensured that the seven agreements entered into force simultaneously; it also establishes that if one party terminated one of the agreements, all seven would cease to apply.

The Agreement on the Free Movement of Persons was extended on 1 April 2006 – with a phase-in period – to eight of the new EU Member States (called the 'EU 8' in this context). Of the ten states that had recently entered the EU, two – Malta and Cyprus – immediately enjoyed the free circulation that Switzerland granted the old EU 15 Member States (creating a group defined as 'EU 17'). The phase-in period and its limits for the EU 8 ended on 1 May 2011. Romania and Bulgaria benefited from the agreement from 2009 but are still subject to limits, scheduled to expire on 31 May 2016.

The situation changed for EU 8 citizens on 18 April 2012, when the Swiss Federal Council activated a safeguard clause, included in the agreement, to restrict long-term residence permits for EU 8 citizens; the number of these citizens receiving a 'B-permit', valid for one to five years, was capped. The change reflected pressure placed on the Swiss Council by the People's Party (SVP) and the 'Environment and Population Association', which feared that immigration would rise as a result of the crisis in the EU and anticipated 'salary dumping'.

The safeguard clause was extended on 1 May 2013. Switzerland still applies annual limits: only 545 people from the EU 8 may obtain a permit, and, as of 1 June 2013, only 13 428 people from EU 17. While the quotas are established at national level, permits are granted on a first-come, first-served basis by cantonal administrations. These measures will expire after one year – i.e. in May 2014 – and cannot be renewed.

The EU-Switzerland Agreement on the Free Movement of Persons, signed in 1999, is linked to six other agreements.

As the EU incorporated new Member States, the bilateral agreements with Switzerland were extended to new EU countries.

The Swiss government has already applied a 'safeguard clause' to limit the long-term residence permits for EU citizens.

## Policy options

The Swiss authorities must implement the referendum

The referendum of 9 February is not immediately applicable: the Swiss Council has three years to enforce it by law and can try in the meantime to negotiate a revision of the Agreement on the Free Movement of Persons

within three years.

to accommodate the changes required by the referendum. Under Article 18 of this agreement, a proposal to revise the agreement must be submitted to the Joint Committee of EU and Swiss representatives. If negotiations fail, the Swiss authorities will have to act by decree in order to comply with the outcome of the referendum, and this would breach the current agreement. Switzerland may also unilaterally terminate the accord with a six-month notification to the EU, but this would activate the 'guillotine clause' and terminate the entire Bilateral I package.

The EU may choose among different courses of action, which would involve the European Parliament to different degrees.

The EU could, in turn, react by terminating Bilateral I package. Such a decision would have to be taken by the Council, by qualified majority, on a proposal from the Commission or the High Representative for Foreign Policy, after obtaining the consent of the European Parliament. Since the EU treaties do not deal with termination of international agreements, the procedure would be the one used for concluding international agreements (Article 218.6 TFEU). Terminating 'Bilateral I' would have a disruptive effect on other bilateral treaties in force – which number more than 120 – since the free circulation of persons is a pillar of the internal market. Bilateral trade, investments, capital movements and transport could all suffer in such a scenario.

The seven linked agreements could be terminated...

Some observers claim that Switzerland has already violated the Bilateral I agreements by failing to ratify the protocol to the Horizon 2020 and Erasmus programmes following Croatia's accession to the EU. From a legal point of view, however, Horizon 2020 and Erasmus have no link with the Bilateral I package and can be terminated without impinging on other agreements (as stipulated by Article 3.3 of the 'Youth in Action' agreement).

...or suspended.

Aside from the 'guillotine clause', the EU has a number of 'softer' options available. These include suspending the agreements in force until they are revised to take into account Swiss legislative changes resulting from the referendum. Such a suspension, according to Article 218.9 TFEU, requires a qualified majority decision of the Council, on a proposal of the Commission or the High Representative. The Parliament's consent is not required in this case, but Parliament must be immediately and fully informed at each stage of the procedure (Article 218.10 TFEU).

Negotiations on the wider institutional framework for bilateral relations may also be frozen.

In any case, the EU could also freeze the negotiations currently being conducted with Switzerland to create a wider and more stable institutional framework. Even before the recent referendum threw a spanner into the complicated works of EU-Swiss relations, the mechanism was considered unwieldy – composed of a plethora of bilateral agreements, lacking an outside arbitrator in case of disputes and in need of an update to reflect the evolution of the internal market. To this end, the Swiss adopted a negotiating mandate in December 2013. The Council had also been expected to adopt a mandate, but this is likely to be affected by the Swiss referendum.

The referendum confirms the need for a new

And while negotiations are likely to be derailed by the referendum, the referendum should in fact serve to underscore their urgency: in the long

framework.

term, the overall institutional framework should be reworked, in no small part in order to prevent such unilateral actions from undermining the bilateral relationship.

## Annex: Text of referendum

### **Initiative populaire fédérale 'Contre l'immigration de masse'**

#### **I**

*La Constitution<sup>1</sup> est modifiée comme suit:*

*Art. 121 Titre (nouveau) Législation dans le domaine des étrangers et de l'asile*

*Art. 121a (nouveau) Gestion de l'immigration*

- 1 La Suisse gère de manière autonome l'immigration des étrangers.*
- 2 Le nombre des autorisations délivrées pour le séjour des étrangers en Suisse est limité par des plafonds et des contingents annuels. Les plafonds valent pour toutes les autorisations délivrées en vertu du droit des étrangers, domaine de l'asile inclus. Le droit au séjour durable, au regroupement familial et aux prestations sociales peut être limité.*
- 3 Les plafonds et les contingents annuels pour les étrangers exerçant une activité lucrative doivent être fixés en fonction des intérêts économiques globaux de la Suisse et dans le respect du principe de la préférence nationale; ils doivent inclure les frontaliers. Les critères déterminants pour l'octroi d'autorisations de séjour sont en particulier la demande d'un employeur, la capacité d'intégration et une source de revenus suffisante et autonome.*
- 4 Aucun traité international contraire au présent article ne sera conclu.*
- 5 La loi règle les modalités.*

#### **II**

*Les dispositions transitoires de la Constitution sont modifiées comme suit:*

*Art. 197, ch. 92 (nouveau)*

*9. Disposition transitoire ad art. 121a (Gestion de l'immigration)*

- 1 Les traités internationaux contraires à l'art. 121a doivent être renégociés et adaptés dans un délai de trois ans à compter de l'acceptation dudit article par le peuple et les cantons.*
- 2 Si les lois d'application afférentes ne sont pas entrées en vigueur dans les trois ans à compter de l'acceptation de l'art. 121a par le peuple et les cantons, le Conseil fédéral édicte provisoirement les dispositions d'application nécessaires par voie d'ordonnance.*

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<sup>1</sup> RS 101

<sup>2</sup> *L'initiative populaire ne vise pas à remplacer une disposition transitoire en vigueur de la Constitution: c'est pourquoi le chiffre de la disposition transitoire relative au présent article ne sera fixé qu'après le scrutin, en fonction de l'ordre chronologique dans lequel les différentes modifications constitutionnelles auront été acceptées. La Chancellerie fédérale procédera aux adaptations nécessaires avant publication au Recueil officiel du droit fédéral (RO).*

**Text in Italian :** <http://www.admin.ch/ch/i/pore/vi/vis413t.html>

**Text in German :** <http://www.admin.ch/ch/d/pore/vi/vis413t.html>