

# Switzerland's migration regime and services trade liberalization

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# Foreign nationals act (FNA) of 1 January 2008

## A new external dimension of migration policy formulation

- agreement on free movement of persons with EU of 2001 → two circles model of admission
- GATS mode 4 commitments within 2nd circle
- GATS-*plus* commitments in FTAs:
  - a third circle? or
  - within the 2nd circle?

# Research questions

- Is there a match (correspondence) or a misalignment (discrepancy) between GATS mode 4 categories of workers liberalized by Switzerland's GATS commitments and the categories of migrant workers liberalized by Swiss common law?
- Do GATS mode 4 and FTAs derogate from FNA or basically re-state the FNA regime?
- What is the existing level of protection in respect of mode 4 trade – is it transparent and low or opaque and restrictive?

# Two circles model

- EU/EFTA nationals
- 2/3 of migrants in CH
- agreement on free movement of 2001
  - persons seeking employment (6months)
  - self-employed or employee
  - service suppliers during no more than 90 days per year
- claim to admission if requirements are fulfilled
- Non-EU/EFTA nationals
- 1/3 of migrants in CH
- Foreign Nationals Act
  - Self-employed
  - Employee
  - Service suppliers
- limited to executives, managers and specialists (EMS)
- no claim to admission, discretion of cantonal authorities

# Swiss admission system for non-EU/EFTA nationals

- work authorization requirement subject to the application from the employer (Art. 18)
- proof that the employment is in the interests of the economy as a whole (Art. 18)
- quota (Art. 20)
- domestic worker and EU/EFTA precedence principle (Art. 21)
- prevailing wage and working conditions (Art. 22)
- suitable accommodation (Art. 24)
- **personal requirements of (Art. 23)**

# « Personal requirements »: skill bias

- short-term and residence permits will only be granted to “managers, specialists and other qualified workers” (23:1) and
- cumulatively, the canton has the discretion to decide whether to grant the permit by checking on (23:2)
  - professional qualifications of applicants
  - professional and social adaptability
  - language skills
  - age
- as indicators for the workers’ prospect of “lasting integration in the Swiss job market and the social environment.” (Art. 23:2).

# Exceptions from the regular admission requirements:

1. Student retention (Art. 21:2)
2. Cross-border service suppliers (Art. 26)
3. Exceptions under (Art. 23:3):
4. Commuters (Art. 25)
5. Education (Art. 27)
6. Medical treatment (Art. 28)
7. Exceptions under (Art. 30)
8. admissions under FTAs and other international agreements (Art. 2:1)

# Admission for cross-border services Art. 26 FNA

- 1 Foreign nationals may only be admitted to provide a temporary cross-border service if their activity is in the general interests of the economy.
- 2 The requirements of Articles 20 (quota), 22 (wage and working conditions) and 23 (personal requirements) apply by analogy



# Who are service suppliers in FNA?

- service supplier is not defined in Art. 26; **an employee** of a service supplier also falls within scope
- Art. 26 read in light of Art. 23:
  - „Executive, Manager or Specialist (EMS)
  - or „qualified worker” category
  - or exceptions of Art. 23:3

# Exceptions of Art. 23:3

- a. investors and entrepreneurs;
- b. recognised persons from the world of science, culture and sport;
- c. persons with special professional knowledge or skills, provided there is a need for their admission;
- d. persons who are part of an executive transfer;
- e. persons whose activity in Switzerland is indispensable

# Admission as service supplier, relaxed criteria

- EU/EFTA & domestic worker precedence (Art. 21) is waived, because Art. 26 also applies to EU/EFTA workers staying longer than 90-days
- short term stays: regular admission criteria are waived, including:
  - language, skills, age and social adaptability requirement (Art. 23:2)
  - suitable housing (Art. 24)

# Swiss horizontal (partial) commitment in mode 4

Sector	Limitations on Market Access	Limitations on National Treatment
<p>For all services sectors</p>	<p>4) unbound, except for specialized managerial staff and experts employed by a foreign company and staying not over 4 years</p>	<p>4) unbound except for persons listed under market access column, subject to the following limitations and conditions: ....            and all other provisions of the legislation relating to immigration, entry, stay and work.</p>

Blanket reference, refers *inter alia* to Foreign Nationals Act (FNA)

# GATS definition of service suppliers: distinction service supplier vs employee

- « Mode 4 covers service suppliers who are themselves service suppliers, but also natural persons employed by a foreign service supplier, but not foreigners who are employees of a national service company or individual. »
  - » WTO Secretariat Background Note on Presence of Natural Persons 15 Sept. 2009

# Who are service suppliers in Swiss GATS mode 4?

- Essential personnel up to 4 yrs
  - ICTs (link to mode 3)
  - at level of executives managers, specialists
- Other ess. personnel 3 months
  - employees
    - BV
    - SS
    - CSS
      - restricted to specific sectors
        - » Engineering, computer hard/soft software consultancy

Natural person ≠ service supplier

Service is supplied thru presence in Switzerland of foreign natural person employed by a foreign firm

# „Essential personnel“ (ICTs/EMS): market access

- Scheduled hurdles:
  - Quota
  - work permit
- Non-scheduled hurdles:
  - General interest of the economy (Art. 18 FNA)
  - Personal requirements (Art. 23 FNA)
    - language, skill and age as promise for „lasting“ prospect of socioeconomic integration
  - Suitable housing (Art. 24)

# « other essential personnel » (BV, SS, CSS) market access

## Scheduled hurdles:

- Quota
- work permit
- five years of related experience
- number of service suppliers limited depending on size of the task to be performed
- Non-scheduled hurdles:
  - general interest of the economy
  - ENT towards CH and EU/EFTA workers
  - waived personal requirements (→short-term stay)
  - waived suitable housing (→ short-term stay)



# National Treatment limitations

1. Wage and working conditions parity
2. measures limiting professional and geographical mobility within Switzerland
3. regulations related to statutory systems of social security and public retirement plans (with respect to qualifying period, residency requirement, etc.)
4. all other provisions of the legislation relating to immigration, entry, stay and work
5. Eligibility for subsidies, tax incentives and tax credits

# opaque and restrictive Mode 4 commitments of Switzerland

1. partial commitments („unbound except for“)
2. hierarchical/functional definition of service suppliers (EMS category)
3. hidden hurdles because of blanket referencing to immigration law (suitable housing, language, age)
4. „strict eligibility criteria“ with a bias towards highly skilled or „elevated functional levels“
5. contingent on mode 3 linkage (commercial presence of foreign company employing ICTs)
6. long pre-employment required (1-5 years)
7. no GATS visa, visa and work permit are two separate procedures
8. quantitative restrictions (quota, ENT)
9. wage and working conditions parity
10. no MRAs or promise to negotiate MRA

# Preliminary Finding

- Natural person, whose movement is liberalized in GATS mode 4 commitments of Switzerland is never a service supplier, but always an employee
  - but under broad reading of Art. 26 FNA benefits from the eased entry requirements, which Swiss law provides for service suppliers
- match between categories of workers of GATS mode 4 Schedule of Switzerland and FNA

# Article 2:1 FNA: precedence of international agreements

- In theory: Precedence of FTAs and GATS mode 4 over the FNA and the two circles model
- In practice: blanket reference in GATS mode 4 commitment of Switzerland « re-introduces » compliance with FNA

# GATS-*plus* of Japan- Switzerland EPA (2009)

## JP-CH EPA

- Installers and maintainers
- 5 yrs for ITCs
- quota not applicable

## GATS mode 4

- not foreseen
- 4 yrs for ICTs
- Quota

# GATS-*plus* of EFTA-Korea FTA (2005)

## CH-Korea FTA

- ICT 5 yrs
- CSS in 16 new categories
- « other »: installers and maintainers
- Quota not applicable

## GATS mode 4

- ICT 4 yrs.
- CSS in 3 categories
- Not foreseen
- Quota applies

# Art. 100 FNA: services agreements?

2 The **Federal Council** may conclude agreements with foreign states or international organisations

on:

- a. visa and the conduct of border controls;
- b. the readmission and transit of persons residing...;
- c. ....;
- d. ....;
- e. basic and advanced professional training;
- f. recruitment of employees;
- g. cross-border services;**
- h. the legal status of persons ...

# Art. 100 para 2 let g FNA—what for?

Example: Agreement on Installers and Maintainers with Germany of 1999

- waives work permit requirement (but not notification) to facilitate short-term provision of services
  - similar agreements envisaged for specialists
    - accounting, legal, architectural, software installation services
- in FTAs or on an MFN-basis for GATS mode 4



# Conclusions

- skill-biased admission for third country nationals in Swiss immigration common law, GATS mode 4 commitments & FTA mode 4 commitments
- short-term service suppliers enjoy privileged status in Swiss common law, given the waiver of:
  - skill, age, language as indicator of «prospect of lasting integration in the Swiss job market and the social environment” (Art. 23:2)
  - ENT (EU/EFTA precedence principle) (Art. 21)
  - suitable housing (Art. 24)

# Conclusions, cnt'd

- GATS mode 4 Schedule of Switzerland does not derogate from FNA or create a third circle of admission
- FTAs can waive the quota requirement (CH-Japan & EFTA-Korea) and introduce new categories but these remain an implementation of Swiss common law on foreigners
- Executive-level arrangements can waive the work permit, but not notification requirements (CH-Germany)

# Thanks for your attention!