



Causes & Costs of Swiss Protectionism in Migration: The Way Forward



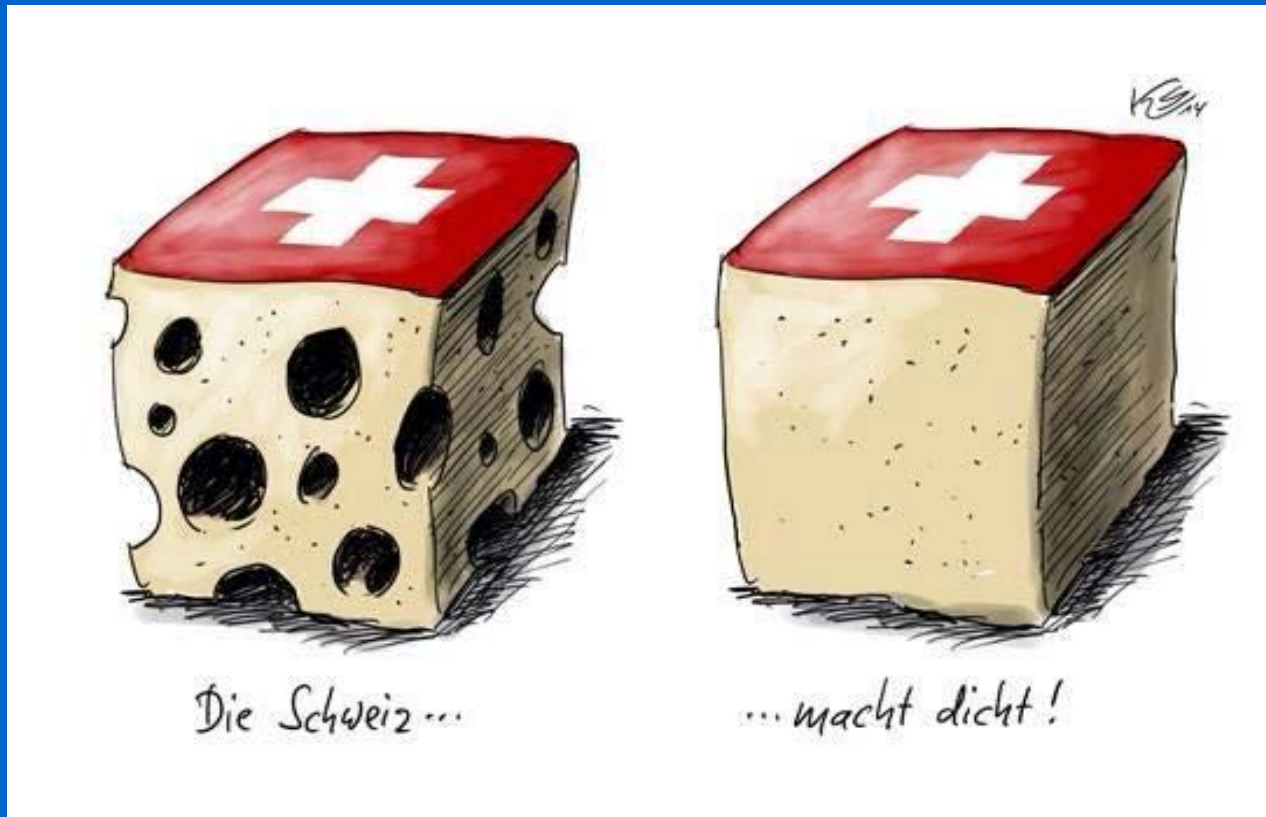
Thomas Cottier
ELEC, Barcelona
October 13, 2014

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February 9, 2014

- Swiss voters approved by a narrow margin of 50.3% v. 49.7% (20'000) and 14 v. 12 Cantons an initiative “Against Mass Immigration”, now constituting Article 121a of the Federal Constitution:
 - Autonomous management of migration
 - General application of quotas including EU/EFTA
 - Preference of Swiss employees
 - Possible restrictions of right to family
 - Prohibition to conclude new treaties incompatible with Article 121a Cst.
 - Duty to adjust existing agreements incompatible with Art. 121a Cst.
 - Implementation by federal law or executive ordinance by February 9, 2017

Fortress Switzerland



Incompatible with European Law

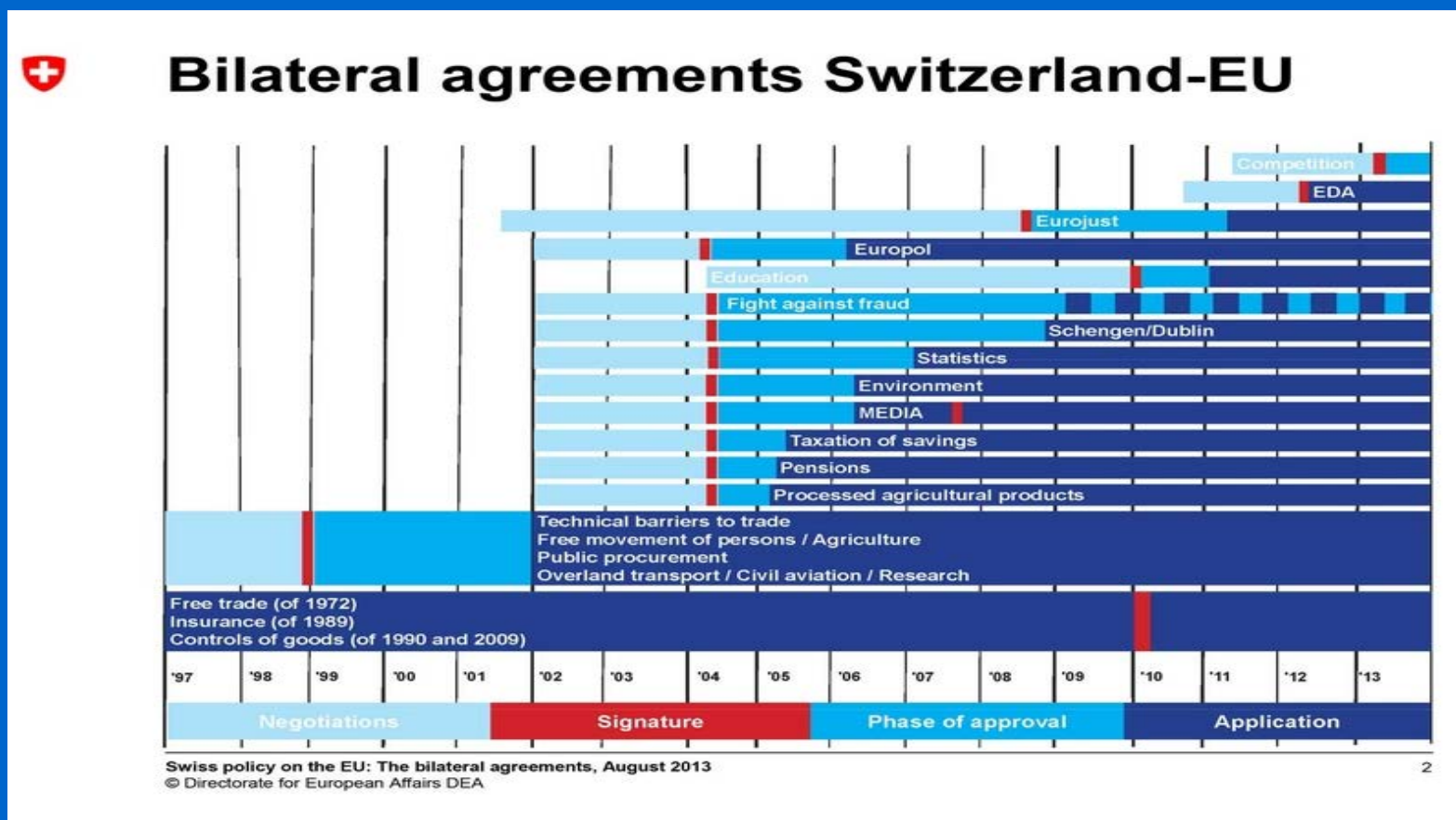
Free Movement of Persons

- Art. 121a Cst. reflects existing model of 2nd tier immigration towards third countries outside of EU/EFTA
- Art. 121a Cst. is not compatible with the Agreement on Free Movement of Persons (FMPPA) concluded 1999 being part of a package deal with the EU and EFTA:
 - QRs phased out (except for Romania, Bulgaria)
 - No quotas, principle of non-discrimination
 - Right to family

Assertive European Union

- “Free movement of persons is as important to the EU as principle as is direct democracy to Switzerland” (Chief negotiator O’Sullivan, Feb.11, 2011)
- Major concessions on Free Movement of Persons very unlikely
- Confirmed October 10th 2014 in response to Swiss negotiating mandate
- Risk of suspension or cancellation of 1999 Package of Bilateral I Agreements

Bilateral Agreements CH-EU



The Economist, Charlemagne

15.2.14



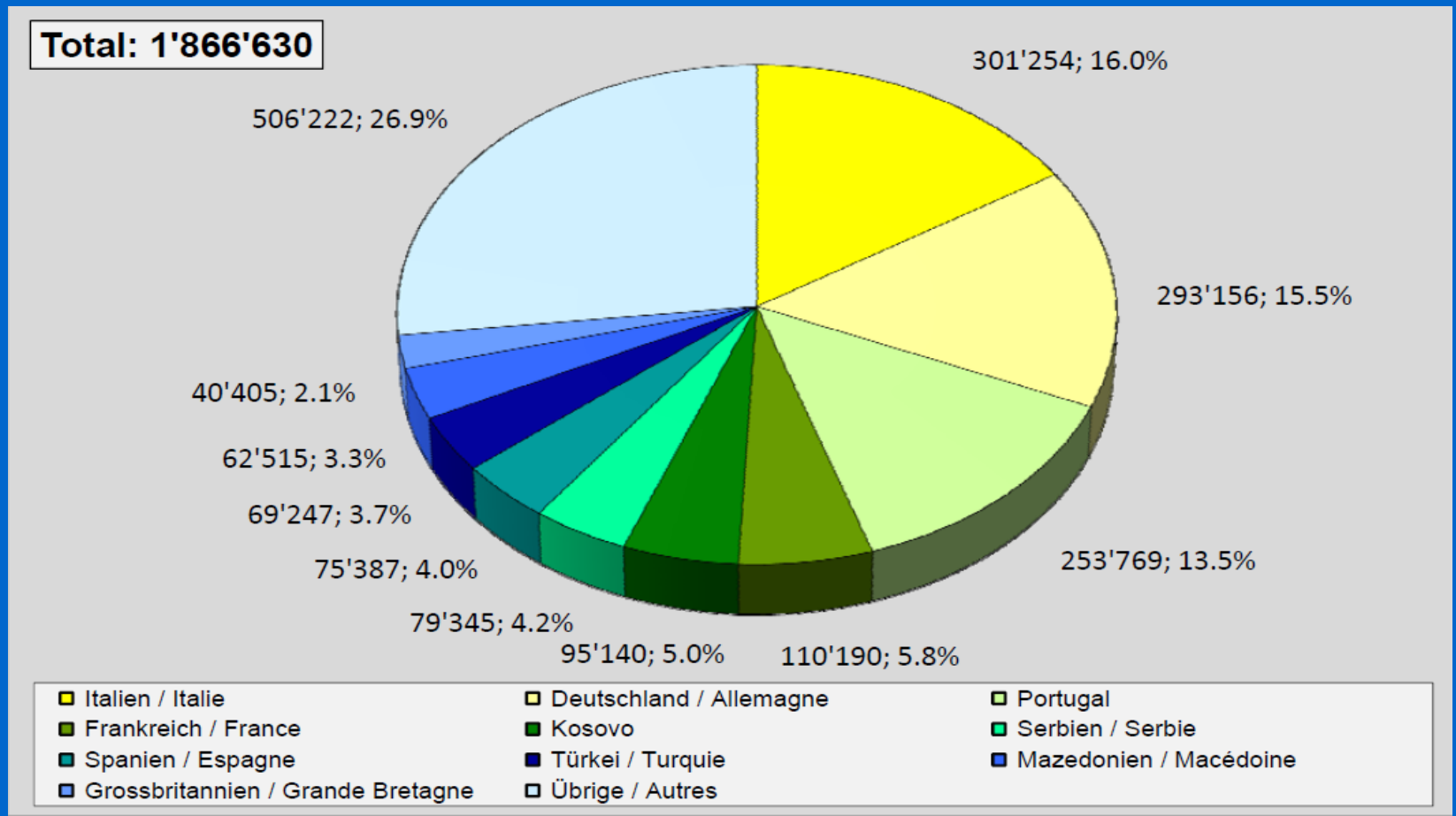
Swiss Immigration 2013: Impact of EU Debt Crisis

- Movements
 - 155 401 incoming
 - 70 023 departures
 - 85 378 net increase
 - 34 000 naturalisation
- EU/EFTA
- 67.8% (increase 4.3%)
 - 15 337 Portugal
 - 7777 Germany
 - 6895 Italy
 - 6261 France

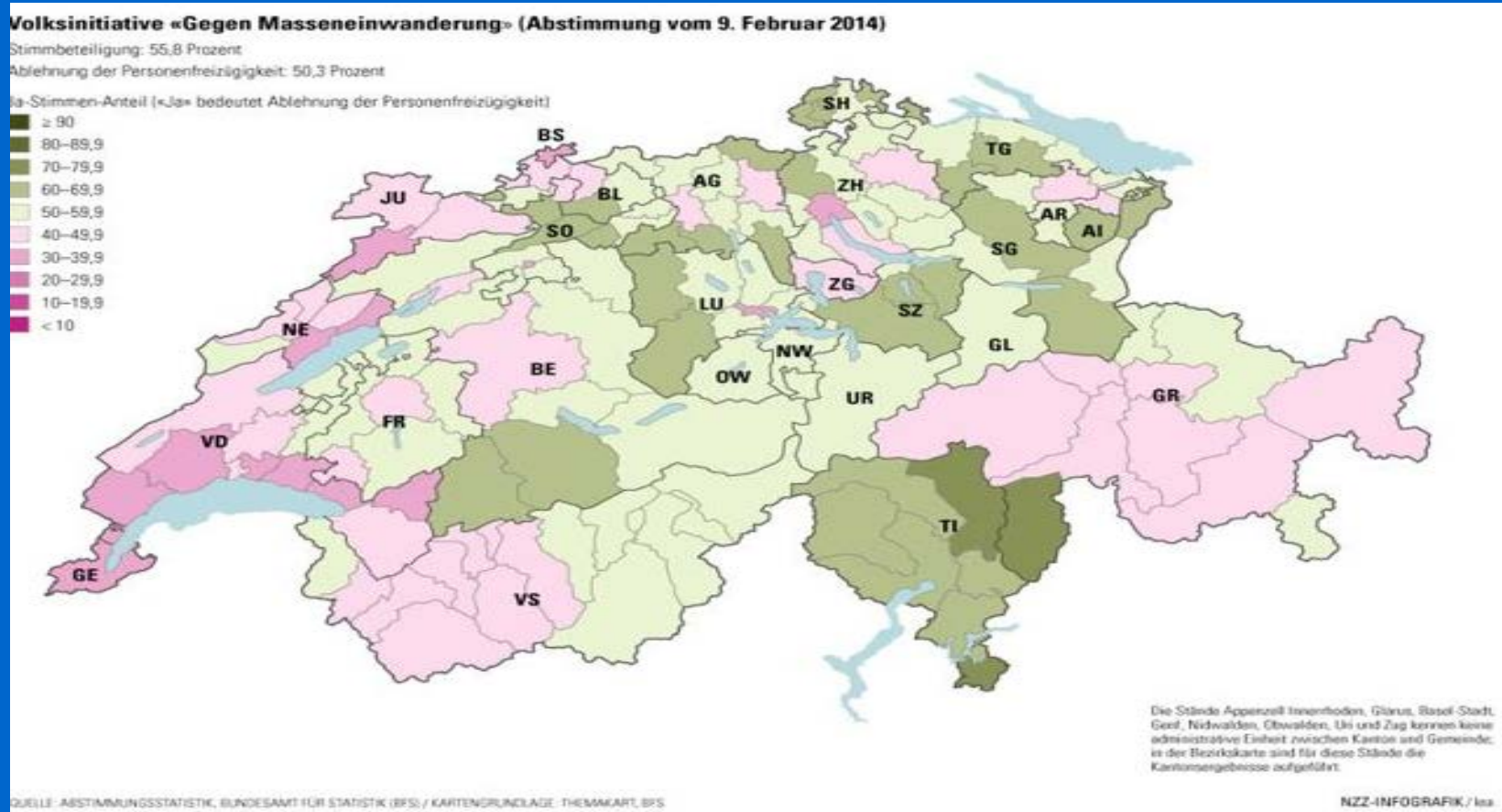
- Residents with foreign passports
- 1 886 630 (Dec 13)
- Increase: 3.4 %
 - 48% Work
 - 32% Family
 - 11% Education
- 24 % of population

NZZ Feb 21, 2014

Nationalities (2013)



Geographical Distribution of Votes



Motives: Anecdotal Evidence

- Contra

- Protect relations with EU
- Inefficiency of quotas and red tape
- Risk of economic downturn (back to 1990s slump)
- Loss of investment, exports, dislocation of jobs)
- Solidarity and European integration
- Cosmopolitanism

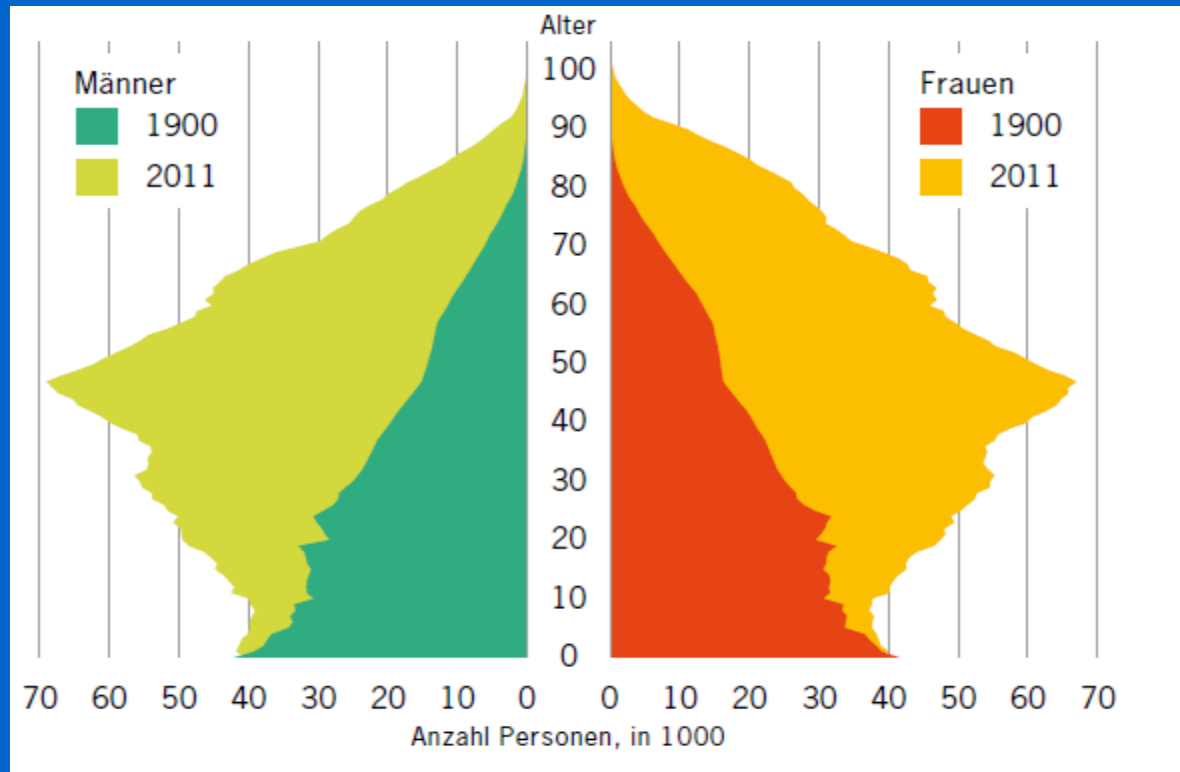
- Favourable

- National conservative agenda and ideology, fear of losing Swiss identity
- Fighting creeping EU Membership
- Untamed increase of foreign population, density in agglomerations
- Social dumping and competition on job market
- Sustainable development
- Relations with EU manageable
- Tactical voting

Costs of Article 121a Cst.

- Reputational costs on perception of Switzerland, alienation and demotivation of European inhabitants in the country
- Quota system attracts less qualified personnel
- Creates red tape and additional costs
- Does not substantially reduce numbers due to economic needs
- Switzerland will continue to depend on immigration due to demographic structure:

Demographic Structure of Switzerland



Potential Economic Costs

- Loss of jobs
- Legal uncertainty for businesses during next 3 years: impact on FDI and domestic investment
- Shift of jobs to EU countries
- Shift in allocation of residence permits
- Tensions among sectors competing for quotas
- Flanking measures (labour standards) undermined

Costs for Swiss EU Relations

- Suspension of extension of FMIPA to Croatia triggered suspension of negotiations on Erasmus, Horizon 2020, and on Energy
- Full implementation of Art. 121a Cst. inevitably leads to violation of treaty law, possible sanctions, suspension and cancellation of full package of 1999 treaties either by EU or Switzerland
- Art. 121a Cst. fundamentally weakens Swiss treaty making powers with EU

Paradoxical Effects of Art. 121a Constitution



The Way forward: An Issue of Timing

- The path of autonomy and domestic legislation
- Homework

- The path of negotiations
- Towards a new Package Deal



Mitunterzeichner des Appells (v. l.): Patrick Odier, Rolf Soiron, Ulrich Gygi, Claude Nicollier, Ruth Dreifuss, Micheline Calmy-Rey, Pascal Couchepin, Patrick Aebischer

Dramatischer Aufruf gegen den Alt

Mehr als 100 Persönlichkeiten aus Politik, Wirtschaft, Wissenschaft und Kultur lancieren Appell zur Re

VON CHRISTOF MOSER, ALAN CASSIDY
UND HENRY HABEGGER

«Die Schweiz in Europa – Aufruf besorgter Bürgerinnen und Bürger»: Unter diesem Titel richtet eine äusserst prominent besetzte Gruppe, die sich «tief besorgt» zeigt über «die Verwirrung, in die die Politik gegenüber ihren europäischen Partnern geraten ist», kommende Woche einen Appell an die Bevölkerung. Zu den Erstunterzeichnern des Aufrufs,

Schweiz warnt und zur Rettung der bilateralen Verträge mit der EU eine «offene und verantwortungsvolle Europa-Debatte» fordert, gehören Patrick Odier, Präsident der Bankiervereinigung, Lonza-Präsident Rolf Soiron, SBB-Präsident Ulrich Gygi, Ex-Astronaut Claude Nicollier, die Alt-Bundesräte Ruth Dreifuss, Micheline Calmy-Rey und Pascal Couchepin, ETH-Lausanne-Präsident Patrick Aebischer, Alt-Bundesrichter Giuseppe Nays und Swiss-Re-Präsident Walter Kiel-

lichkeiten aus Politik, Wirtschaft, Wissenschaft und Kultur den Appell unterschrieben.

«Ich bin kein EU-Turbo, sondern ein ausgesprochener EU-Skeptiker», betont Wirtschaftsführer Soiron. «Mir macht aber Sorgen, mit welcher Nonchalance inzwischen behauptet wird, dass wir auch ohne bilaterale Verträge gut leben könnten.» Auch SBB-Präsident Gygi sagt: «Ich will die Beziehungen zur EU mit den Bilateralen erhalten. Dafür

tung.» Es gehe um einen Appell aus der Gesellschaft an die Politik, das Thema Europa und EU «zu enttabuisieren», sagt der ehemalige Bundesgerichtspräsident Nays: «In der Politik wagt sich kaum noch jemand, sich dieses Themas überhaupt anzunehmen.»

AUSLÖSER DES APPELLS ist das Ja vom 9. Februar zur SVP-Masseneinwanderungsinitiative. Die Umsetzung des neuen Verfassungsartikels zur Begrenzung

The Path of Domestic Legislation

- Vote on “Ecopop” Initiative in November 2014
- Domestic implementation of Art. 121a Cst. by means of legislation and ordinances in preparation:
- Different scenarios being discussed
- Draft legislation subject to referendum
- Indirect vote on maintaining Bilateral Agreements
- Obligation of Government to implement regulations February 2017

Duty to Negotiate with EU

- Art. 121a(4) Cst. does not allow new treaties incompatible with its provisions (ignored in the adoption of the CH-China FTA)
- Art. 197(9) Cst. requires negotiations and adjustment of existing treaties under Art. 121a Cst. No obligation to withdraw or cancel FMPPA
- Government is obliged to negotiate. It takes two to tango for agreement and adjustment:
- No obligation to agree in accordance with Art. 197(9) Cst.

Swiss-EU Negotiations on Bilaterals III

- Switzerland should seek extension of safeguard clauses and ceilings on immigration (e.g. 30%) in the context of *ordre public* exemptions
- Switzerland will need to offer major concessions
 - Extension of FMPA on new Member States
 - Improving implementation of FMPA on the ground
 - Non-discriminatory taxation (holding companies)
 - banking secrecy (automatic information)
 - Disciplines on subsidies and competition
 - Institutional reform (surveillance authority and dynamic adoption of *acquis*)
- Likely Referendum on new Package (Bilaterals III)

Impact on Art. 121a Cst Implementation

- Switzerland, by means of treaty network, is a *de facto* Member of the EU
- Polls suggest that a majority of people does not want to give up bilateral agreements
- Article 121a Cst. can only be implemented to the extent compatible with Swiss-EU treaty without risking Bilateral I Agreements

Failing or Partial Agreement

- Failure to conclude leaves existing FMPA in place
- Art. 121a(1-3) Cst. on substance is not self-executing (5). It does not displace self-executing treaty obligations of FMPA
- The doctrine of the Supreme Court denying treaty application in case of deliberate infringement (Schubert) does not apply, due to non-self execution of substantive provisions of Art. 121a Cst.

Conclusions

- The Government prepares implementation at home and negotiations with EU at the same time (Mandate October 10, 2014)
- Treaties stay in force and prevail (direct effect)
- Likely that domestic implementation will be compatible with FMIPA in Switzerland by 2017
- Much depends on solution of debt crisis and growth in EU (decrease of immigration)



Thank you for your attention!
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