



7 December 2018

Institutional agreement between Switzerland and the EU: key points in brief

1. Interests

The Federal Council's objective is to secure the broadest possible access to the European single market (internal market, hereinafter referred to as the 'single market') and to cooperate with the European Union (EU) in selected areas while maintaining as much political autonomy as possible. The **bilateral approach** has proved its worth as the policy towards the EU that best serves Switzerland's interests. The Federal Council aims to conclude an institutional agreement (InstA) in order to **consolidate the bilateral approach – specifically access to the single market** – over the long term and to facilitate its further development.

The InstA introduces the principle of the **dynamic updating** of the bilateral access agreements and establishes a **dispute settlement mechanism** through which both parties can make legal claims. The InstA creates **legal and planning certainty** for Swiss companies and citizens, guarantees their access to the single market and **protects them from discrimination** in favour of EU competitors. It also paves the way for the conclusion of new market access agreements, as the EU is not prepared to conclude such agreements with Switzerland without first resolving the institutional issues. The InstA applies exclusively to the five existing bilateral market access agreements (free movement of persons, overland transport, air transport, technical barriers to trade/MRA and agriculture) and to future market access agreements (e.g. in the electricity sector).

The negotiations on an InstA were based on the Federal Council's mandate of 18 December 2013, which was submitted to the foreign affairs committees and the cantons for consultation. The mandate was further clarified on 2 March 2018. On 7 December 2018, the Federal Council took note of the conclusion of the negotiations and the **draft agreement**. The EU has stated that it is not prepared to continue the negotiations.

State of play: the scope of application was limited – in line with Switzerland's position – to the five existing **market access agreements** and to future market access agreements. Switzerland achieved its objectives with respect to the core of the agreement, namely the **institutional mechanisms** addressing developments in EU law, monitoring, legal interpretation and settlement of disputes. For example, under the InstA Switzerland makes decisions in respect of legal developments in accordance with its constitutional approval procedures, retaining the option of holding referendums (no automatic adoption of EU law). Swiss authorities monitor compliance with the agreements in Switzerland. Furthermore, disputes are to be settled by an arbitration panel comprised of arbitrators appointed in equal numbers by Switzerland and the EU. The jurisdiction of the Court of Justice of the European Union (CJEU) is limited to interpreting EU law adopted by Switzerland. The InstA upholds existing **exemptions** in the sectoral agreements covering overland transport (e.g. a night-time and Sunday ban on heavy-goods traffic, 40-tonne limit), agriculture (e.g. a ban on the international transport of animals by road) and the coordination of social insurance systems (non-export of certain benefits). The provisions on **state subsidies** in the InstA are limited to general principles that are not directly applicable (except in the area of air transport). In line with Switzerland's position, **monitoring** takes place in accordance with the two-pillar model: each party is independently responsible for monitoring on its own territory, and the monitoring system set up by Switzerland is equivalent to the EU's. However, various exemptions Switzerland sought with respect to the **free movement of persons** (Citizens' Rights Directive, accompanying measures, coordination of social insurance systems) have either not been included or only partially included in the InstA. Nevertheless, the EU does recognise Switzerland's particular requirements with respect to cross-border service providers (e.g. the 90-day limit) and thus the need for further measures to safeguard Swiss wage levels. The EU has therefore expressed its willingness to safeguard specific **accompanying measures** under the InstA.

The Federal Council instructed the FDFA on 7 December 2018 to consult relevant stakeholders on the outcome of the negotiations. Based on this consultation, a thorough **analysis of policy interests** is to be carried out with a view to a possible signing of the agreement.

Policy interests must be weighed carefully, taking the following points into consideration:

- Suspending or postponing the negotiations **is not an option** for the EU. Although institutional negotiations at some future date have not been ruled out, for the EU these would require a new

mandate, which would make negotiations unlikely before the middle of 2020. This means there is no guarantee that in future negotiations the EU will be prepared to build on what has already been achieved in the current draft agreement.

- Suspending the current negotiation process would have **negative consequences**, ranging from a break-off of negotiations on sectoral dossiers such as electricity, public health and food safety (which the EU links to institutional issues) to the non-recognition of the equivalence of Swiss stock market regulation under MiFIR 23. Other negative consequences can be expected, including legal uncertainties with respect to the regular updating of existing market access agreements (e.g. the Agreement on Mutual Recognition in relation to Conformity Assessment), which would lead to an erosion of Switzerland's current access to the single market. There is also the risk that it will not be possible to conclude an agreement on Switzerland's participation in the next EU framework programme for research from 2021 onwards. Negotiations on air cabotage and on Switzerland's participation in the European Union Agency for Railways (ERA), the Public Regulated Service (PRS), the European Global Navigation Satellite Systems Agency (GSA) and media and culture programmes could also be affected.

The following are the main provisions of the InstA:

2. Scope (Art. 2)

The InstA would apply to the **five existing market access agreements** (free movement of persons, overland transport, air transport, technical barriers to trade/MRA and agriculture) as well as to **future market access agreements** (e.g. the electricity agreement currently being negotiated).

Economic importance: the trade in goods carried out under the bilateral agreements between Switzerland and the EU amounts to CHF 1 billion per day. Switzerland earns one in every three francs through trade with the EU. The Agreement on Mutual Recognition in relation to Conformity Assessment (MRA), which governs the removal of technical barriers to trade, is a case in point. In the 20 product areas covered by the MRA, Swiss exports to the EU exceeded CHF 74 billion in 2016, equivalent to 69% of Swiss industrial exports to the EU. The MRA allows the chemical and pharmaceutical industries alone to achieve annual cost savings of CHF 150–300 million. The next MRA update will focus on medical devices, a sector that comprises some 14,000 companies and over 58,000 jobs in Switzerland and accounts for 2.3% of GDP and 4% of the nation's export volume.

The InstA does not apply to the **Agreement on Government Procurement** and the **Free Trade Agreement** (FTA) of 1972. The two parties have however issued a political declaration of intent expressing their willingness to enter into negotiations to bring the two agreements **up to date**. The declaration is not legally binding and leaves the content and outcome of the agreements open-ended. The declaration is without prejudice to the application of the InstA to a future, modernised FTA, which would only be the case if the FTA were updated into a market access agreement (based on harmonisation with EU law). As the current FTA lacks a dispute settlement mechanism, the dispute settlement mechanism of the InstA can be used in the areas covered by the FTA (e.g. state subsidies or economic safeguard measures) from the time the InstA enters into force until the entry into force of an updated FTA – provided that both parties agree to this.

3. Institutional mechanisms (Art. 1)

The institutional mechanisms for developments in EU law, monitoring, legal interpretation and settlement of disputes form the core of the InstA:

Developments in EU law (Art. 5, in conjunction with Arts. 12–14): in order to safeguard Switzerland's long-term access to the single market, the Swiss-EU market access agreements must be regularly adapted in line with relevant developments in EU law. Failure to do so would result in legal discrepancies and trade barriers that would hamper market access for Swiss stakeholders, putting them at a disadvantage. Under the draft InstA, Switzerland and the EU undertake to incorporate relevant developments in EU law into the agreements. Switzerland can however decide each amendment on a case-by-case basis in accordance with its constitutionally enshrined decision-making procedures. The right to hold a referendum is therefore fully respected. The **automatic adoption of EU law has been explicitly ruled out**. Switzerland must be systematically consulted in shaping developments of relevant EU law and thus has the option to present its concerns early on in the process. If Switzerland is not prepared to adopt a development in EU law, the EU can initiate the dispute settlement procedure (see section on dispute settlement).

Legal interpretation (Art. 4): Switzerland and the EU interpret the bilateral agreements independently and as uniformly as possible in accordance with the principles of international law. EU law incorporated into the agreements is interpreted in accordance with the case law of the CJEU.

Monitoring (Arts. 6 and 7): Switzerland and the EU are independently responsible for the proper application of the agreements on their own territory (**two-pillar model**). Any problems that may arise are to be discussed in the joint committees responsible for the management of the agreements.

Dispute settlement (Art. 10 and Protocol 3): either party may refer a dispute to the joint committee concerned. If the joint committee cannot find a solution within three months, either party may request that the dispute be referred to an **arbitration panel** composed of arbitrators appointed in equal numbers by Switzerland and the EU. If resolving the dispute requires clarification of a question concerning the interpretation or application of EU law, the arbitration panel refers the matter to the CJEU. The arbitration panel then resolves the matter based on the CJEU's interpretation. The parties are bound by the arbitration panel's decision. But if one of the parties decides not to implement the decision, or if the other party considers the measures taken to be at odds with the decision, the other party may take **proportionate compensatory measures**. If the two parties disagree about whether the compensatory measures are proportionate, the party affected by the measures may also request the arbitration panel to determine whether or not they are proportionate. Such dispute settlement proceedings are likely to take several years (see dispute settlement diagram in Appendix II).

A **horizontal joint committee**, composed of representatives of the parties, is to be set up to ensure the proper functioning of the InstA (Art. 15). The InstA also provides for the establishment of a **joint parliamentary committee** comprised of an equal number of members of the European Parliament and the Swiss Federal Assembly. This committee will be able to issue reports and resolutions (Art. 16).

4. Exemptions (Protocol 2)

The InstA provides Switzerland with a number of specific exemptions from the dynamic adoption approach to EU law developments. These exemptions confirm existing special arrangements for overland transport (e.g. a night-time and Sunday ban on heavy-goods traffic, 40-tonne limit), agriculture (e.g. a ban on the international transport of animals by road) and the coordination of social insurance systems (e.g. non-export of certain benefits). The EU has also offered exemptions relating to the accompanying measures (see section 6).

5. State subsidies (Arts. 8A, B, C, Annex X)

Switzerland and the EU have agreed on certain principles concerning state subsidies as one of the principal means of ensuring a level playing field for all operators in the single market. These would apply exclusively to the existing Agreement on Air Transport and to market access agreements to be concluded in the future (e.g. an electricity agreement).

- The institutional agreement's *substantive* provisions on state subsidies are limited to **non-directly applicable principles** which establish a framework for concrete subsidy schemes under the sectoral agreements. These principles are not justiciable unless they are incorporated into the respective sectoral agreements. The Agreement on Air Transport already contains a state subsidies scheme that is in line with the general provisions of the InstA. With a view to concluding future market agreements, binding substantive provisions will have to be negotiated as part of these sectoral agreements.
- Each party will use its own monitoring authorities to independently monitor state subsidies on its own territory under equivalent monitoring regimes (**two-pillar model**). The InstA sets out specific procedures for this purpose, stipulating that the Swiss system must be equivalent to that of the EU. The monitoring authority may, for example, order the recovery of improperly granted subsidies. The monitoring authority must be notified in advance of planned subsidies exceeding a predefined minimum amount. Switzerland will monitor the subsidies in accordance with its constitutional principles of separation of powers and federalism. As regards the Agreement on Air Transport, Switzerland already has a monitoring authority – the Competition Commission (COMCO) – whose remit will have to be reviewed in light of the InstA.

6. Free movement of persons

The InstA applies to the Agreement on the Free Movement of Persons (AFMP), a market access agreement that is subject to the principle of the dynamic updating of the bilateral access agreements (cf. the section on developments in EU law). Nevertheless, the Federal Council sought **exemptions** from the adoption of EU law ('red lines') in three areas: the accompanying measures, the Citizens' Rights Directive (2004/38, CRD) and the amendment to Regulation 883/2004 on the coordination of social

security systems. The EU's position, in contrast, is that all operators in the single market must be subject to the **same conditions** ('level playing field') and that general exemptions are in principle unacceptable. It is furthermore the EU's view that the dispute settlement mechanism provided for under the InstA could be used to address and resolve any disagreements about the adoption of EU law on a case-by-case basis.

Accompanying measures: the Federal Council has always insisted that Swiss **wage levels must be safeguarded** and that the wage protection arrangements under the accompanying measures, which are necessary to ensure this, must be guaranteed. The EU, for its part, believes that some of the accompanying measures are not in conformity with the right to free movement of services enshrined in the Free Movement of Persons Agreement of 1999 and has for over ten years been demanding that they be adapted. The EU's criticism is not directed at the measures themselves but rather concerns their **proportionality**. This was why the EU sought an institutional agreement in the first place. And this is also why it was not possible for the negotiations to reach a successful outcome without dealing with this issue.

The **EU has made the following proposal** in Protocol 1 of this draft agreement: in order to ensure a level playing field for all operators in the single market, Switzerland must adopt relevant EU law relating to the posting of workers within three years of the entry into force of the InstA. This applies to **Enforcement Directive 2014/67/EU** and **Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers**, which establish the principle of 'the same pay for the same work in the same place'. While adopting Directive 2018/957/EU would not pose a problem for Switzerland, the Enforcement Directive does not provide a sound basis for a number of the accompanying measures. In order to mitigate this problem and taking the specificities of the Swiss labour market into account, the EU has offered to accept a series of proportionate measures that extend beyond the scope of existing provisions of EU law relating to the posting of workers. Specifically, the EU offer provides **treaty safeguards for the following key measures**:

- the possibility of four working days' **prior notice** for specific sectors based on risk analyses (currently 8 calendar days);
- the **obligation to provide a financial guarantee** in respect of service providers that fail to meet their financial obligations;
- and an **obligation to obtain documentation from independent service providers**.

Citizens' Rights Directive 2004/38 (CRD): from the Swiss perspective, the CRD does not constitute a further development of the free movement of persons (in the sense of the free movement of workers under the Agreement on the Free Movement of Persons). Switzerland is therefore of the opinion that it does not have to adopt the CRD. Various provisions are especially problematic for Switzerland: in particular the extension of the entitlement to social assistance, the extension of the protection against expulsion (public policy exception), and the right of permanent residence for persons who have resided in the country for five years. The EU, for its part, considers that the CRD does constitute a further development of the free movement of persons.

The CRD is not mentioned in this draft agreement. The InstA thus grants Switzerland no explicit exemption in this respect. The EU did not insist that Switzerland explicitly commit under the InstA to adopt the CRD within a specific period of time, as it is required to do in relation to the rules governing the posting of workers. The dispute settlement mechanism provided for under the InstA would apply in the event of a disagreement with the EU as to Switzerland's adoption of the CRD. Should the arbitration panel rule against Switzerland, the terms of Switzerland's adoption, or partial adoption, of the CRD would have to be negotiated. If Switzerland were to still refuse to adopt the CRD, the EU could decide to take compensatory measures, which would have to be proportionate. (See Appendix I)

Coordination of social insurance systems: the EU is currently working on a further revision of Regulation 883/2004 on the Coordination of Social Security Systems. A key issue is the change of responsibility for paying unemployment benefits to frontier workers. As the revision of Regulation 883/2004 is still ongoing, it is not mentioned in the InstA. The terms of adoption would, if necessary, have to be negotiated at a later stage under the auspices of the joint committee.

Any dispute concerning Switzerland's future adoption of amended Regulation 883/2004 would have to be settled under the dispute settlement mechanism. Regardless of whether an institutional agreement is concluded, the EU and its member states will in all likelihood demand that Switzerland adopt this amended regulation. Switzerland has so far always agreed to the incorporation of previous amendments of Regulation 883/2004 into the Agreement on the Free Movement of Persons. If the InstA were to be concluded, this dispute could be settled in an orderly manner under the dispute settlement mechanism (see above). The proportionality of any compensatory measures taken against Switzerland would in that case be reviewed by the neutral arbitration panel. Without an institutional agreement, it cannot be ruled

out that the EU would take retaliatory measures. If the EU were to take retaliatory measures in these circumstances, there would be no established mechanism for reviewing them, as provided for under the InstA.

The question of a possible adoption of EU law in the three areas related to the free movement of persons mentioned above – accompanying measures, the CRD and coordination of social security systems – only arises once the InstA enters into force, under the mechanisms provided by the InstA (i.e. there is no obligation to adopt EU law in these areas).

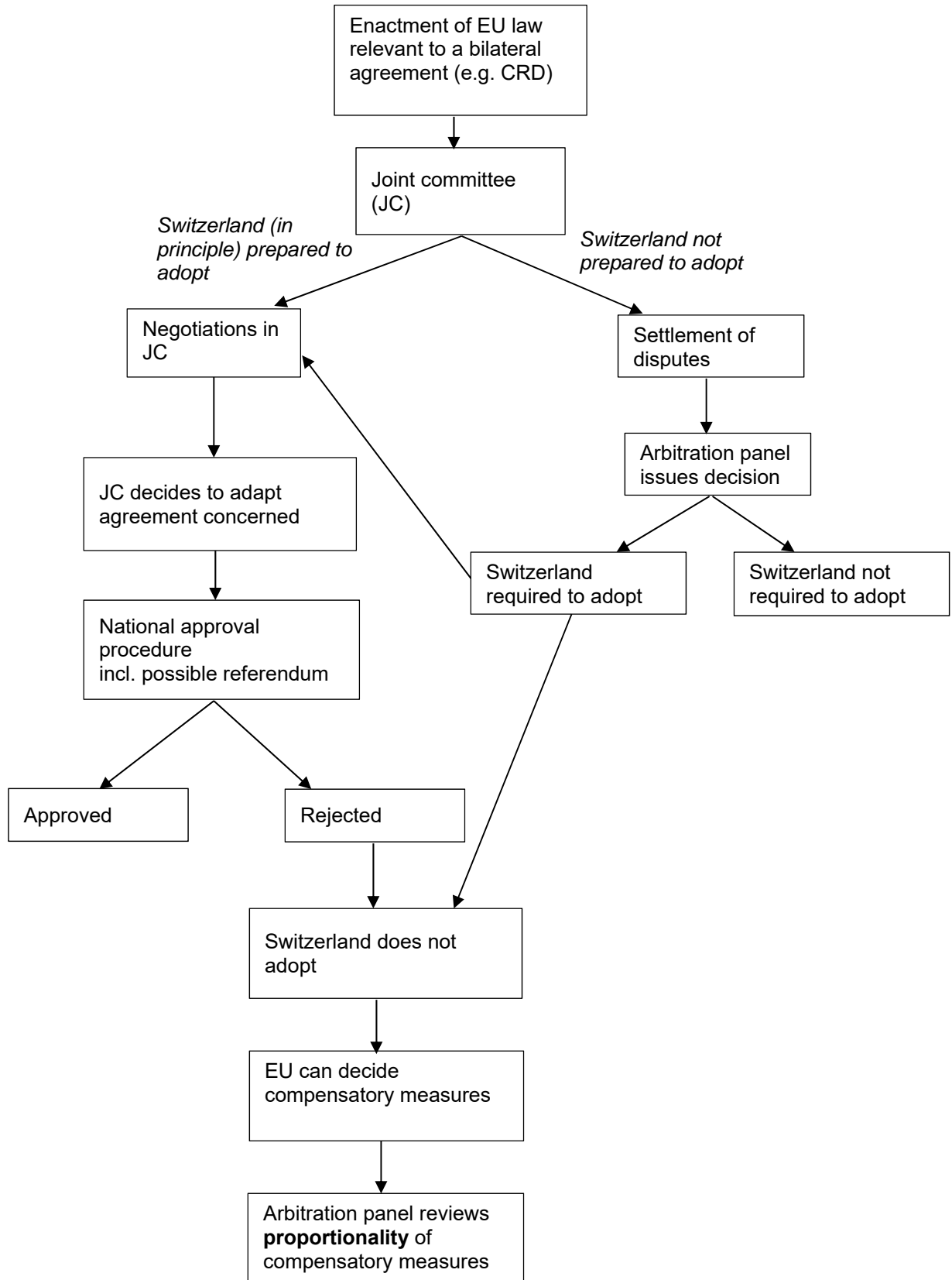
7. Contributions to the reduction of economic and social disparities

The preamble of the InstA and a joint political declaration specifically mention Switzerland's contributions to selected EU member states aimed at reducing economic and social disparities in the EU. These contributions are placed in the context of Switzerland's access to the single market and recognised as having been made independently by a nation motivated by the principle of solidarity. Switzerland also declares its readiness to coordinate future projects and programmes with those of the EU, without however undertaking to make ongoing payments for an indefinite period of time.

8. Termination clause (Art. 22)

The InstA terminates six months after notice of termination is received. Termination of the InstA does not have the effect of terminating the existing market access agreements to which it applies. The InstA provides for a **three-month consultation process** during which the parties would discuss the consequences for the existing agreements and the next steps to be taken. If the parties agreed a solution, the relevant agreements would continue to apply. But if they failed to reach an agreement, the relevant agreements would cease to apply at the end of an additional six-month period, as provided for therein. Any new sectoral agreements signed after the conclusion of the InstA will terminate at the same time as the InstA, i.e. six months after notice of termination is received.

Appendix I: dynamic adoption of EU law developments



Appendix II: example of dispute settlement procedure

