



Institutional elements

Overview

Switzerland participates in certain areas of the EU internal market. This is currently regulated in five agreements covering the free movement of persons, overland transport, air transport, agriculture and mutual recognition in relation to conformity assessment (MRA) respectively. As part of the further development of the bilateral approach, an agreement on electricity should be added and the existing agreement on agriculture should be expanded to cover food safety (in a separate protocol).

These agreements, commonly referred to as 'internal market agreements', guarantee extensive reciprocal market access and thus prevent discrimination against Swiss companies in the EU internal market and vice versa. In this context, Switzerland and the EU have agreed on new institutional elements. They ensure the good functioning of these agreements and a level playing field at all times for all participants in the internal market.

The new institutional elements include the dynamic alignment of legislation, the uniform interpretation of the agreements, their surveillance and the settlement of disputes in the event of disagreements between Switzerland and the EU.

Key elements

The institutional elements will henceforth be regulated separately in each internal market agreement. This makes it possible to better take into account the specificities of each agreement. This differs from the approach taken in the negotiations on a 'framework agreement', which were broken off in May 2021. That agreement would have set out the institutional elements horizontally for all internal market agreements.

If the EU law on the internal market evolves in areas that fall within the scope of one of the internal market agreements, Switzerland and the EU will integrate these developments of the law into the respective agreement (this is known as obligation of dynamic alignment of legislation). However, 'dynamic' does not mean 'automatic': this means that Switzerland decides autonomously and in accordance with its usual internal procedures – including its direct democratic decision-making processes such as the referendum – on any integration of a new, relevant EU legal act into an agreement and on any necessary adjustments to the national legislation in this context. Switzerland therefore retains control.

Switzerland may also refuse to integrate a new EU legal act into an agreement. If Switzerland does so, despite having an obligation according to a decision of the arbitral tribunal (in the dispute settlement procedure; see below) to integrate it, the EU may take proportionate compensatory measures. However, such compensatory measures may be taken only in the agreement concerned or in one of the other internal market agreements (in the case of the agreement on trade in agricultural products, only in the protocol on food safety). They are intended to offset the imbalance that has arisen between the parties as a result of Switzerland not having integrated the legal act.

Furthermore, Switzerland will have a say in the drafting of EU legal acts that have to be integrated in the internal market agreements (*decision shaping*).

Additionally, exceptions could be negotiated in key areas of the respective internal market agreements, along with a non-regression clause in respect of wage protection. There is no

obligation of alignment of legislation in these areas. The parties may agree on new exceptions in the future, if need be.

A total of 95 legislative acts of the EU are integrated into the agreements and protocols of the Switzerland-EU package. EU legislative acts have an importance in the EU that is generally comparable to that of federal acts in Switzerland. Like federal acts, they contain important legislative provisions. The figure of 95 does not include non-legislative acts of the EU. These are usually adopted by the European Commission and always remain within the framework of the relevant EU legislative acts on which they are based. Non-legislative acts of the EU can be compared to Swiss ordinances. The legal implications of the 95 EU legislative acts for Switzerland arise only in combination with the rules of the respective agreement. In particular, no conclusions can be drawn from the number of the integrated EU legislative acts alone as to their implications for Switzerland. For more detailed information on this topic, see the document 'Overview of EU legislative acts relating to the Switzerland-EU package'.

Interpretation and surveillance of the internal market agreements take place according to the so-called two-pillar model. In other words, these tasks will be performed autonomously by Switzerland and the EU in their respective territories. The Federal Supreme Court and the Swiss courts retain jurisdiction over disputes arising under these agreements between a person or company and another person or company or the state. The dispute settlement mechanism that is foreseen (see below) applies only to disputes between Switzerland and the EU and thus not to private individuals.

The Joint Committee of the respective agreement remains the first instance for dispute settlement. Only if a consensus cannot be reached within the Joint Committee, either side can refer the dispute to an arbitral tribunal, in which both sides are equally represented, for a decision. The parties retain the autonomy of their courts with regard to the interpretation of their own law. There is therefore no asymmetry.

The Court of Justice of the European Union (CJEU) never rules on a dispute. If the arbitral tribunal – composed of a Swiss arbitrator, an EU arbitrator and a jointly appointed chair – deems the interpretation of EU law necessary and relevant for it to reach a decision, it shall refer the question to the CJEU - exclusively for this purpose. The CJEU cannot intervene in arbitration proceedings on its own initiative.

The competences of the Swiss courts and of the Federal Supreme Court are not affected by the outcome of the negotiations.

As the internal market agreements are not based on Swiss law, it is neither foreseen nor required that the arbitral tribunal refer questions to the Federal Supreme Court.

Lastly, the dispute settlement mechanism is strictly an inter-state arrangement. And it is always the arbitral tribunal that has the final say in the main case.

Compensatory measures

If one party considers that the other party has not complied with the arbitral tribunal's decision regarding a specific dispute, that party may take compensatory measures in the agreement concerned or in another internal market agreement (in the agricultural part of the agreement on trade in agricultural products this is possible only if there is a breach of that agreement [incl. the part on food safety], but not if there is a breach of any other internal market agreement; in the agreement on health, compensatory measures may be taken only in this agreement or in relation to Switzerland's participation in the EU health programme); the areas in which it is possible to take such measures are therefore clearly defined and can be anticipated by both sides. The compensatory measures are intended to restore the balance between the parties and must therefore be proportionate. The proportionality of such measures can in turn be reviewed by the arbitral tribunal.

Furthermore, the following points were agreed on in the negotiations with regard to potential compensatory measures:

- Compensatory measures potentially taken following a dispute settlement procedure may be applied at the earliest three months after their notification (automatic suspensive effect).
- At the request of the party concerned, the arbitral tribunal will decide on the basis of certain criteria (in particular the potential of compensatory measures to cause irreparable damage) whether the suspensive effect is to be extended beyond that three-month period until a decision is reached on the proportionality of the compensatory measures.

To prevent one party being 'sanctioned' by the other under the pretext of compensatory measures, the following rules apply:

- Compensatory measures may be taken only if an arbitral tribunal has issued a legally binding decision in which it finds either the EU or Switzerland to be in breach of one of the internal market agreements, and the party in question subsequently fails to implement that decision.
- The area in which compensatory measures may be taken is generally restricted to the internal market agreements, although in the case of the agricultural part of the agreement on trade in agricultural products such measures are possible only if the breach relates to that agreement [incl. the part on food safety], but not if there is a breach of any other internal market agreement (see 'Special cases' below). Moreover, in the health agreement, where the institutional elements apply by analogy, compensatory measures may be taken only in this agreement or in relation to Switzerland's participation in the EU health programme (see also 'Special cases' below). This means that the area in which compensatory measures may be taken is clearly defined and can be anticipated by both Switzerland and the EU.
- Any compensatory measures may be applied at the earliest three months after their notification (automatic suspensive effect). The party affected by the measures may ask an arbitral tribunal to rule on the proportionality of the notified compensatory measures. It can also ask the arbitral tribunal to prolong the suspensive effect until its decision on the proportionality of the measures. In this way, the party in question is protected against disproportionate compensatory measures.

Special cases

The institutional elements will apply by analogy in the health agreement, although it is not an internal market agreement. This is intended to ensure the proper functioning of the agreement and smooth cooperation, which includes in particular Switzerland participating in the relevant EU health security bodies. Possible compensatory measures may be taken only in the agreement on health or in relation to the protocol to the Programmes' Agreement on Switzerland's participation in the EU health programme. Consequently, dispute settlement procedures within the scope of the health agreement can have no impact on the internal market agreements, and vice versa.

Another special case that must be mentioned is the agreement on trade in agricultural products. In the future, this agreement will be structured in two parts – one dealing with agricultural products and the other with food safety; the latter is encapsulated in the protocol on food safety (see above). The agricultural part of the agreement is not subject to the dynamic alignment of legislation. And in the event of disputes, although an arbitral tribunal is foreseen, there is no possibility of involving the CJEU. In addition, compensatory measures may be taken in relation to the agricultural part of the agreement only if there is a breach of that agreement (including the protocol on food safety), but not if there is a breach of any other internal market agreement. The situation is different in the food safety part of the agreement. As this part is about participation in the internal market, the institutional elements apply.

Importance for Switzerland

Including the new institutional elements in the internal market agreements enables the bilateral approach to be continued. It also creates legal certainty and a level playing field for the parties to the agreements, economic operators and private individuals in the areas concerned. The

sectoral package approach chosen by the Federal Council in February 2022 has therefore proved its worth in the negotiations. The objective of embedding the institutional elements in each individual internal market agreement has been achieved, making it possible to take account of the specificities of each agreement and to find customised solutions for them.

In order to protect Switzerland's essential interests, certain areas were successfully excluded from the dynamic alignment of legislation and thus secured for the future. Switzerland can also participate in the drafting of EU legal acts that fall within the scope of the internal market agreements between Switzerland and the EU. The scope itself cannot be adjusted unilaterally by the EU. Lastly, it has been ensured that disputes in the area of the internal market will be settled within an orderly framework in the future, with an arbitral tribunal in which each side is represented equally always handing down the final decision on the disputes as such. This solution means that arbitrary 'punitive measures' by one side against the other are no longer possible. Any compensatory measures must be proportionate and are limited to the field of the internal market.

Moreover, a suspensive effect generally applies to these measures until the arbitral tribunal has come to a decision on their proportionality. This is intended to prevent any damage being caused by disproportionate measures.

Specifically

- **Role of the CJEU:** Sometimes authorities in EU member states apply EU law, which is also integrated in one of the internal market agreements, incorrectly and to the detriment of Swiss businesses. For example, in the past Swiss transport companies have complained about the Swiss diplomas for drivers of heavy goods vehicles weighing over 3.5 tonnes not being recognised in an EU member state. Until now, Switzerland was unable to take legal action in defence of its companies in such cases. It could only seek to reach a political-diplomatic solution with the EU in the Joint Committee of the agreement on land transport or intervene at the political level in the EU member state in question. The new institutional elements change that: in the future, if no solution can be found within the Joint Committee, Switzerland may refer the dispute to an arbitral tribunal, in which both parties are equally represented. That tribunal will decide on the dispute independently. It would only refer a matter to the CJEU if it believed the interpretation of provisions of EU law which have been integrated in the agreement on land transport to be both relevant and necessary to reach a decision on the dispute. The arbitral tribunal itself decides whether these conditions are given. In the case under discussion, the arbitral tribunal could want to know the CJEU's view on how the articles of EU law integrated in the agreement on land transport regarding the recognition of HGV drivers' diplomas are to be understood precisely. The arbitral tribunal would then reach its decision on the dispute on the basis of the CJEU's decision regarding this specific question of interpretation. Should it come to the conclusion that the non-recognition of the Swiss HGV drivers' diplomas constituted a breach of the agreement on land transport, the EU member state in question would be obliged to recognise the Swiss diplomas.
- **Compensatory measures:** Let us assume that Switzerland allows helicopter pilots to fly up to the age of 65, while the EU has an upper age limit of 60. Should the arbitral tribunal conclude that Switzerland is in breach of the air transport agreement and should Switzerland then fail to comply with this decision, the EU could take proportionate compensatory measures. The compensatory measures would have to be taken within the framework of the air transport agreement or one of the other internal market agreements (in the case of the agreement on trade in agricultural products they may only be taken in the food safety protocol, the agricultural part is excluded). For example, the EU could henceforth refuse to recognise the licences of Swiss helicopter pilots in the EU as a compensatory measure. However, compensatory measures would not be possible in relation to research, for example. In other words, the EU would no longer be able to exclude Switzerland from the EU research programme in such a case. Switzerland could then ask the arbitral tribunal to rule on the proportionality of the compensatory measures taken by the EU. If the EU measure (non-recognition of Swiss helicopter pilot licences) were

restricted to Swiss helicopter pilots over 60, the arbitral tribunal would most likely come to the conclusion that this is proportionate. But if the EU were to generally stop recognising all Swiss helicopter pilot licences, the measure would probably no longer be deemed proportionate.