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From: General Secretariat of the Council

To: Permanent Representatives Committee/Council

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Subject: Directives for the negotiation of institutional provisions for EU-Switzerland agreements related to the internal market, as well as on agreements that form the basis for Switzerland's permanent contribution to the Union's cohesion and for Switzerland's association to Union programmes

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**DIRECTIVES FOR THE NEGOTIATION OF INSTITUTIONAL PROVISIONS FOR EU-SWITZERLAND AGREEMENTS RELATED TO THE INTERNAL MARKET, AS WELL AS AGREEMENTS THAT FORM THE BASIS FOR SWITZERLAND'S PERMANENT CONTRIBUTION TO THE UNION'S COHESION, FOR SWITZERLAND'S ASSOCIATION TO UNION PROGRAMMES**

1. Institutional provisions

1.1. General principles

The common objective of the parties should be to ensure homogeneity and legal certainty in the internal market. To that end, the negotiation should result in agreed institutional provisions that will be included in all existing and future EU-Switzerland agreements related to the internal market. Continued participation of Switzerland in the internal market and its possible widening presuppose also that rules applicable to relations with Switzerland in the fields covered by the agreements are the same as those applying in the internal market and that their interpretation and application cannot differ.

Bearing in mind that objective, the institutional provisions should reflect the following essential principles and include the following elements:

- Uniform interpretation and application of the Union *acquis*: an obligation to interpret and apply homogeneously the Union *acquis*, all through the internal market, including State aid provisions. This requires that the agreements with Switzerland and the Union acts referred to in the agreements are interpreted and applied in conformity with the case-law of the Court of Justice of the European Union, both prior or subsequent to the signature of the corresponding agreement.

- Dynamic alignment: an obligation of the parties to ensure the dynamic adaptation of the agreements with Switzerland that relate to the internal market to the evolving Union *acquis*, via an appropriate decision-making procedure and a maximum time limit for the adaptation of relevant Union *acquis* into the Swiss legal order;
- Dispute settlement: an effective mechanism for the resolution of disputes that safeguards the competence of the Court of Justice of the European Union to interpret Union law. To that end, an independent arbitral tribunal should be set up to settle disputes. Where the application of provisions of the agreements involves concepts of Union law, the arbitral tribunal should be under an obligation to refer a question to the Court of Justice of the European Union which takes a decision that is legally binding on the arbitral tribunal;
- Interconnection between agreements: the procedure to be followed if one of the parties considers that the other party has not complied with the arbitral tribunal's decision, including the possibility for that party to take proportionate and effective compensatory measures in the agreement concerned or in any other agreement related to the internal market, including the suspension in part or in full of such agreement or agreements. The existing provisions on termination linking the EU-Switzerland agreements concluded in April 2002 should be maintained;
- Forward-looking nature of institutional solutions: the institutional provisions established in the negotiation should apply to and be identical in existing and future agreements related to the internal market, subject to technically justified adaptations.

## 1.2. Application of the institutional provisions

### 1.2.1. Existing agreements with Switzerland related to the internal market

The existing agreements with Switzerland related to the internal market should be modified to include identical institutional provisions established in the negotiation.

In particular, the following existing agreements related to the internal market should be considered for the inclusion of institutional provisions that will be negotiated:

- Agreement on the Free Movement of Persons;
- Agreement on Air Transport;
- Agreement on the Carriage of Goods and Passengers by Rail and Road;
- Agreement on Trade in Agricultural Products;
- Agreement on Mutual Recognition in Relation to Conformity Assessment.

#### 1.2.2. Future agreements with Switzerland related to the internal market

The institutional provisions that will be subject of the negotiation should apply, as appropriate, also to all future agreements related to the internal market, which might be concluded with Switzerland, including those for which negotiations are already authorised, in particular in the areas of electricity<sup>1</sup> and food safety.<sup>2</sup> They should apply by analogy in the future agreement on health<sup>3</sup> where that agreement provides for the participation of Switzerland in EU mechanisms and networks.

Negotiations on agreements giving Switzerland access to further sectors of the internal market should not be concluded before the conclusion of the negotiation on institutional provisions, addressed above in Point 1.1.

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<sup>1</sup> ST 12034/06.

<sup>2</sup> ST 12375/08.

<sup>3</sup> [Add reference to Council decision/ST documents]

## 2. State aid

With the aim of ensuring a level playing field for competition on the internal market, State aid rules applicable to the EU Member States and Switzerland should be included at least in the Agreement on Air Transport and the Agreement on the Carriage of Goods and Passengers by Rail and Road, as well as in future agreements related to the internal market, including an agreement on electricity. Further, the review of any State aid should be based on substantive and procedural rules equivalent to the ones applied within the EU.

## 3. Switzerland's financial contribution

### 3.1. Switzerland's financial contribution to the Union's cohesion

The negotiation should also cover an EU-Switzerland agreement providing the legal basis for Switzerland's regular, mutually agreed and fair contribution to the Union's cohesion. Such a contribution is a central counterpart to Switzerland's participation in the internal market. The agreement should therefore establish a permanent financial mechanism for the Swiss contribution to economic and social cohesion within the EU. The framework of this new legally binding mechanism should be ready and functional for the next EU multiannual financial framework.

The first contribution under the permanent financial mechanism should include an additional financial commitment covering the period between end 2024 and the entry into force of the permanent financial mechanism. This commitment should duly reflect Switzerland and the EU's level of partnership and cooperation in that period.

### 3.2. Switzerland's financial contribution to EU information systems

Switzerland should contribute to the relevant future costs of development, operation and maintenance of any EU information systems to which it has access.

#### 4. Participation in Union programmes

##### 4.1. General principles

The negotiation should cover a standalone agreement that should provide for the general terms and conditions of the participation of Switzerland to Union programmes. The protocols on the association of Switzerland to specific Union programmes should be adopted by a Joint Committee set under this agreement.

The agreement should:

- ensure a fair balance as regards the contributions and benefits of Switzerland participating in the Union programmes;
- lay down the conditions of participation in the Union programmes, including the calculation of the financial contributions to the individual programmes and their administrative costs. These contributions shall constitute assigned revenues in accordance with Article 21(5) of the Financial Regulation;
- not confer to Switzerland any decision-making power in respect of the Union programmes, unless such power is foreseen in the corresponding Union instrument;
- guarantee the rights of the Union to ensure sound financial management and to protect its financial interests.

The agreement should determine the level of financial contribution payable by Switzerland to the general budget of the Union.

The agreement should set forth rules concerning sound financial management in relation to Union funding. In particular, the agreement should provide for the adequate protection of the financial interest of the Union, including the prevention, detection, correction and investigation of irregularities, including fraud, the recovery of funds lost, wrongly paid or incorrectly used, and, where appropriate, the imposition of administrative penalties and the recovery of money. The European Anti-Fraud Office (OLAF) may carry out administrative investigations, including on-the-spot checks and inspections. The European Public Prosecutor's Office may investigate and prosecute criminal offences against the financial interests of the Union.

The Commission should, during negotiations, assess the possibility to include a clause on provisional application with a retroactive effect only if other elements of the EU-Switzerland negotiation are progressing satisfactorily, notably the negotiation of institutional provisions for agreements related to the internal market. Furthermore, negotiations of the agreement giving Switzerland access to Union programmes should not be concluded before the conclusion of the negotiations on the agreements containing the full set of institutional provisions and state aid rules and of the negotiations on the agreement providing the legal basis for Switzerland's regular, mutually agreed and fair contribution to the Union's cohesion.

The agreement should outline the rules of participation for Switzerland in the governance structures of the Union programmes, subject to conditions in the corresponding Union instrument.

The agreement should foresee the possibility of Switzerland's future association to other Union programmes via a protocol or protocols to the agreement. Such protocol or protocols should be adopted through a simplified procedure by a body established under the agreement.

The agreement should be in conformity with related EU policies and objectives.

## 4.2. Specific principles

The protocol or protocols on the participation in the Horizon Europe, Euratom Research and Training Programme, the activities of the European Joint Undertaking for ITER and the Development of Fusion Energy, Digital Europe, Erasmus+ and Creative Europe programmes should provide for specific terms and conditions of the participation of Switzerland to these programmes.

With respect to Copernicus, general principles, specific terms and conditions for Switzerland's participation in the Copernicus component of the EU Space programme and activities, or parts thereof, should be laid down in line with the relevant provisions of the EU Space Programme Regulation, and in particular Articles 3(c), 7 and 24 thereof.

## 5. Agreement on the Free Movement of Persons

### 5.1. Free movement of persons and long-term residence

Without prejudice to the obligation to incorporate current and future Union law in the Agreement on the Free Movement of Persons and to interpret such Union law in accordance with the case-law of the Court of Justice of the European Union, and respecting the principles of non-discrimination between Member States and reciprocity, specific provisions may be agreed that, irrespective of future Union law, reserve for Switzerland the possibility to adopt or maintain certain measures. These measures could relate to enhanced protection against expulsions, permanent residence for economically inactive EU citizens, requirements as regards biometric identifiers on national identity cards and existing exceptions to coordination of social security schemes<sup>4</sup>. These measures should not result in the reduction of rights currently enjoyed by EU citizens under the Agreement on the Free Movement of Persons. In addition, non-discrimination in the acquisition of long-term residence permit by EU citizens should be ensured, notably regarding the minimum duration of prior residence of 5 years required. Regard may also have to be given to descriptions of measures currently permitted under relevant Union law in relation to the right of residence of persons not benefitting from permanent residence, as well as notification obligations on Swiss employers of the taking up of employment by workers and on EU self-employed establishing in Switzerland.

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<sup>4</sup> Decision 1/2012 of the Joint Committee of 31 March 2012 adapting Annex II on the coordination of social security to the Agreement on the Free Movement of Persons, OJ L 103, 13.4.2012, p. 51-59.

## 5.2. Posting of workers

Without prejudice to the obligation to incorporate current and future Union law in the area of posting of workers in the Agreement on the Free Movement of Persons and to interpret such Union law in accordance with the case-law of the Court of Justice of the European Union, specific provisions may be agreed that, irrespective of future Union law, reserve for Switzerland the possibility to adopt or maintain certain measures in order to take account of the specificities of the Swiss labour market and ensure the application of the Agreement. Without prejudice to the principles of non-discrimination, justification and proportionality, these measures should be limited to the prior notification of the cross-border provision of services in order to facilitate controls in specific sectors based on risk assessments, the deposit of a financial guarantee for service providers who failed to meet their prior financial obligations, and requirements on self-employed persons as regards the provision of clearly limited and specified documents. The Union may also agree that Switzerland should not be bound by future amendments to Union legal instruments in the area of posting of workers where their effect is to meaningfully weaken or reduce the level of protection of posted workers with regard to the terms and conditions of employment, notably remuneration and allowances.

## 6. Agreement on the Carriage of Goods and Passenger by Rail and Road

Without prejudice to the obligation to incorporate current and future Union law in the fields covered by the Agreement on the Carriage of Goods and Passengers by Rail and Road and to interpret such Union law in accordance with the case-law of the Court of Justice of the European Union, specific provisions may be agreed that, irrespective of future Union law, reserve for Switzerland the possibility to adopt or maintain certain measures. These measures should not alter the scope of the Agreement, which includes international passenger transport, with the exception of Swiss purely domestic transport (i.e. national long-distance, regional and local transport).

## 7. Evolution of the scope of the negotiations

Without prejudice to the current scope of the negotiations identified in this decision, should Switzerland express an interest in enlarging the agreed scope, it would be in the interest of the Union to cover other areas, such as scoping, modernisation and evolution of the EU-Switzerland Free Trade Agreement of 1972, notably regarding processed agricultural products. It is understood that an enlargement of the scope of the negotiations would need to be authorised in accordance with the relevant procedures, in particular as it entails the assessment by the Union of whether such an enlargement of the negotiations still reflects its interest at the relevant time.

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