Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
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The Federal Council

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Report on the negotiations on an institutional framework agreement between Switzerland and the EU[1]

[1] Agreement facilitating bilateral relations between the European Union and the Swiss Confederation in parts of the EU single market in which Switzerland participates.

Overview

In 2006, the Federal Council officially considered the possibility of a 'framework agreement' to consolidate the bilateral approach with the EU. In 2007, it decided to examine the viability of such an agreement. In so doing, it fulfilled a request made repeatedly by Parliament since 2002 to examine the viability and feasibility of such an agreement. The EU also showed interest in a 'framework agreement', which the Council confirmed in its conclusions of 8 December 2008. These documented the EU's aim to create an institutional mechanism for the bilateral agreements between Switzerland and the EU. But it was not until 2010 that Switzerland and the EU appointed a joint working group to explore the technical feasibility of a 'framework agreement'. Despite major differences, the findings of the working group were seen as encouraging. They enabled Switzerland to set out its strategy and its principles for a solution to the institutional question. In view of growing pressure from the European Commission to clarify the institutional question before pursuing the current dossiers, in 2012 Switzerland drew up proposals for the attention of the EU for an institutional solution. This communication revived discussions at a technical level and in 2013 enabled Switzerland and the EU to set out a joint non-paper with three possible negotiation options. Switzerland and the EU preferred the third option with a two-pillar model, in which Switzerland and the EU were each separately responsible for the interpretation and monitoring in their own territory, the Court of Justice of the European Union (CJEU) being granted a role in dispute settlement.

On this basis, negotiations began in 2014 after the adoption of the negotiating mandates by both parties. Swiss and EU delegations met regularly between 2014 and 2018 as part of the formal negotiation rounds (with an interruption between November 2014 and November 2015). Although compromises were reached during these negotiations, in particular regarding the institutional mechanisms, it proved impossible, for certain material issues relating to the Agreement on the Free Movement of Persons (AFMP), i.e. the Citizens' Rights Directive (CRD) and the accompanying measures (FlaM), to find a negotiated solution.

On 23 November 2018, the EU informed Switzerland that in its view, the negotiations on the institutional agreement were concluded. It increased pressure on Switzerland to rapidly conclude the agreement by thenceforth refusing to further update the existing agreements. Due to the remaining unresolved points, the Federal Council refrained from initialling the draft institutional agreement, subjecting it to a broad, nationwide consultation which identified three points in need of clarification (CRD, accompanying measures and state aid). The EU was informed about these points on 7 June 2019.

On 11 November 2020, after consultation with the cantons and social partners, the Federal Council set out its position on the three remaining unresolved points of the institutional agreement. The renegotiations with the EU from January 2021 on the clarifications requested by Switzerland led to improved reciprocal understanding and also resulted in some convergence on content. Above all, however, it confirmed the fundamental differences in the area of the free movement of persons, which had existed since the start of negotiations. These material differences were exacerbated further by the fact that the two sides had different interests at stake. Having already made concessions on sovereignty with regard to the institutional mechanisms, to protect its basic interests, Switzerland needed a selective limitation in the dynamic adoption of EU law, at least in the sensitive area of the free movement of persons. For the EU, however, the institutional agreement's added value lay precisely in the dynamic adoption of EU law in the area of the free movement of persons.

In view of these fundamental differences with regard to content and interests, no solution to the unresolved points in accordance with Switzerland's wishes can be expected in the foreseeable future. For the Federal Council, the conditions required to sign the institutional agreement are therefore not fulfilled. It is difficult to state or quantify the consequences of not signing the institutional agreement and of the gradual restriction of Switzerland's market access by the EU; they depend on both on the EU's response and on any measures that

Switzerland may take. Without this institutional agreement it is crucial, therefore, to continue the planning of unilateral mitigation measures (damage limitation) and to make efforts to reach an understanding with the EU in order to avoid as far as possible a negative dynamic and to stabilise relations with the EU (safeguarding of agreements in force).

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1 Mandate and objectives of the report

The Federal Council commissioned the Federal Department of Foreign Affairs (FDFA) to submit by 26 May 2021 a report on the preparation, process and outcome of the negotiations on an institutional agreement between Switzerland and the EU. The present report addresses these three points in section 2. Section 3 of the report also contains an assessment of the negotiations' outcome.

2 History of the institutional negotiations between Switzerland and the EU

2.1 Context of Switzerland–EU relations prior to starting institutional negotiations

In 2006, the Federal Council discussed the **future of its European policy.** Following the People's approval in 2005 of the Schengen/Dublin Association Agreements and the extension of the free movement of persons to the ten new member states of the EU, it wished to define how to move forward with the bilateral approach. To consolidate this approach, in its Europe Report it considered the possibility of **improving the institutional framework**, for example in the form of a 'framework agreement'.[2] Such an agreement would ensure better 'overall coordination' by safeguarding an 'institutional realignment' of the main agreements between Switzerland and the EU. In Switzerland, the idea of a framework agreement was not new. It was at first unclear what form such a 'framework agreement', sometimes known as an 'association agreement' would take. The aim was, however, to create 'joint processes and institutions' for bilateral relations and to make them as well-structured and balanced as possible. This idea originally came from Parliament, where it was discussed from March 2002 by the Council of States Foreign Affairs Committee. Parliamentary procedural requests were also subsequently submitted on this subject.[3] More generally, this idea brought to the forefront once again an issue that had already been a key subject in the negotiations on the European Economic Area (EEA) (participation of a third country in the EU internal market through the adoption of EU legislation). For the Federal Council, a framework agreement only became an option once the Bilaterals II were signed.

The following year, the deliberations that had begun in 2006 about the future of the bilateral approach took on a definite form and in May 2007 the Federal Council defined **three European policy objectives**: 1) rapid and smooth **implementation** of all signed bilateral agreements with the EU, 2) **strengthening** of relations with the EU by signing agreements in new areas of mutual interest, 3) **consolidation** of relations with the EU, including the possible exploration of a framework agreement. Furthermore, it decided to examine the viability of such an agreement. In so doing, it fulfilled the request made repeatedly by Parliament to examine the viability and feasibility of such an agreement.[4] The form of such an agreement was not defined at this stage. At the same time, the Federal Council selected a series of priority dossiers for negotiations with the EU (in particular dossiers in the area of electricity, agriculture and food, public health and product safety, as well as the REACH dossier concerning the registration, evaluation and authorisation of chemicals.

The EU reiterated its interest at both political and technical level in signing a framework agreement. In its **conclusions of 8 December 2008**, the Council of the EU acknowledged the

[2] BBl 2006 6837.
[3] BBl 2002 6326 ; Polla postulate (02.3374); Stähelin postulate (05.3564); Press release from the FAC-S of 1 September 2006, in which the Committee welcomed the Federal Council's 2006 Europe Report and again described the framework agreement as a particularly interesting option.
[4] BBl 2002 6326; Postulat Polla (02.3374); Postulat Stähelin (05.3564).

'extensive and productive cooperation' with Switzerland but stated for the first time that to function properly, the single market required the homogeneous application and interpretation of the ever-evolving EU legislation. Furthermore, the EU noted differences between the bilateral agreements with Switzerland and the evolution of the relevant EU legislation. The EU aimed to alleviate this by establishing an institutional mechanism that would enable the bilateral agreements to be adapted more efficiently to the further evolution of EU legislation. In this context, during the meeting of 15 December 2008 between President of the Swiss Confederation Pascal Couchepin and President of the European Commission José Manuel Barroso, the European Commission reaffirmed its interest in exploring the **possibility of a framework agreement**.

In 2009, no exploratory discussions between Switzerland and the EU with a view to a possible framework agreement took place. The year was marked by the European elections and the Swiss popular vote of 17 May 2009 on the continuation of the free movement of persons with the EU (as provided for in the Agreement on the Free Movement of Persons [AFMP] after an initial period of seven years). This allowed the Federal Council, in its 2009 foreign policy report, to declare the **principles for the adoption of EU legislation** that would play an important role in setting out its position on the institutional issues.[5] These principles were the expression of mutual dissatisfaction with how the bilateral agreements were developing. Switzerland regretted, for example, the slow and in part hesitant updating of certain chapters in the Mutual Recognition Agreement (MRA), while the EU already at that time increasingly criticised Switzerland for refusing to integrate into the AFMP Directive 2004/38 on the right of citizens of the EU to move and reside freely in the EU (Citizens' Rights Directive; CRD). In defining the principles, the Federal Council based itself on the agreement signed on 25 June 2009 with the EU on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures (Customs Security Agreement) that provides for the dynamic adoption of relevant EU legislation and, should legislation not be adopted, grants the other party the right to take appropriate compensatory measures (extending to the suspension of part of the agreement). Against this background, Switzerland declared its willingness to accept that future market access negotiations with the EU would be conducted on the basis of the relevant EU legislation. However, for the Federal Council it was essential that 1) the agreement respected Switzerland's sovereignty (no automatic adoption of EU law as demanded by the EU), 2) Switzerland would be appropriately involved in the drafting of the EU law it would be asked to adopt ('decision-shaping'), 3) Switzerland's domestic processes (including deadlines) were taken into account, 4) any changes to the agreements were made with mutual consent, and 5) should Switzerland fail to adopt a change in the law, the EU could take only proportionate measures (no automatic measures).

2.2 Negotiation process

2.2.1 Exploratory stage

On 19 July 2010, at a meeting between President of the Swiss Confederation Doris Leuthard and President of the European Commission José Manuel Barroso, Switzerland and the EU agreed to initiate **exploratory talks on the possibility of a 'framework agreement'**. A Switzerland-EU technical working group (at director level) was set up for this purpose. To prepare for this new stage, in August 2010 the Federal Council defined the principles that Swiss representatives in the working group were to represent. Some of these principles appear in the Federal Council's report on the assessment of its European policy, compiled in response

[5] BBl 2009 6334.

to the Markwalder postulate 09.3560 and published in September 2010.[6] The principles concerned the four components of an institutional solution: developments in EU law, interpretation, supervision and dispute settlement. With regard to **developments in EU law**, the Federal Council referenced the principles cited in the 2009 foreign policy report, which were inspired by the Customs Security Agreement. Concerning **interpretation**, it did not exclude the possibility of new mechanisms, provided that these ensured greater coherence in the interpretation of the bilateral agreements (e.g. principle of homogeneity and joint legal body). As far as **supervision** was concerned, it was in favour of creating an independent authority on a national or multilateral basis. And lastly, for **dispute settlement**, it endorsed the establishment of an arbitration panel or similar joint body.

2.2.1.1. Switzerland–EU working group

The Switzerland–EU working group, on the Swiss side comprised of representatives from the FDFA, the Federal Department of Economic Affairs, Education and Research (EAER) and the Federal Department of Justice and Police (FDJP), was supported by a working group of representatives from all federal departments. The Switzerland–EU working group, which met from September to November 2010, based its work on a non-paper put forward by Switzerland. This envisaged **three possible institutional solutions**: 1) the 2009 Customs Security Agreement model (model preferred by Switzerland but rejected by the EU); 2) a two-pillar model (also preferred by Switzerland); 3) an EEA-based model (preferred by the EU). In addition, the EU proposed two new models to Switzerland, both of which granted powers to the Court of Justice of the European Union (CJEU). The first would function in a way similar to the Schengen Association Agreement and in particular envisaged the referral of questions for preliminary ruling to the CJEU. The CJEU would also play a part in dispute settlement in the second model proposed, based on the EEA. Switzerland rejected both models, which were not pursued further.

Overall, the findings of the working group were seen as encouraging. There were **common approaches** on several aspects, especially the dynamic adoption of the relevant EU law coupled with Switzerland's right to decision-shaping in the drafting of legislation, the assurance – sought by both parties – of a homogeneous interpretation of the bilateral agreements concerned, and the independent supervision of their application. Nevertheless, **substantial differences** still remained, specifically regarding the nature of compensatory measures should Switzerland fail to adopt a development in EU law (the EU supported automatic measures, whereas Switzerland demanded that such measures be proportionate), and in regard to the supervisory authority (the EU favoured a supranational body, Switzerland national or multilateral bodies). While Switzerland pointed out that in order to continue talks on an institutional solution, the current bilateral negotiations would first need to be resumed (in particular the electricity dossier), the European Commission stated that without prior renewal by means of an institutional framework, the bilateral approach had no future. Against this uncertain backdrop, in its **conclusions of 14 December 2010**, the Council of the EU adopted a more decisive tone, underlining the need for an institutional solution that should, in particular, provide for a dynamic adaptation of the bilateral agreements to EU law, a homogeneous interpretation of the agreements, an independent supervisory mechanism and a dispute settlement system.

2.2.1.2. Definition of strategies in Switzerland and the EU

On 26 January 2011, the Federal Council adopted its strategy for bilateral relations with the EU. It endorsed the **coordinated negotiation** of all ongoing dossiers **as a whole** (including the institutional issues). Despite the differences with regard to the institutional set-up (in

[6] BBl 2010 7239.

particular possible measures should Switzerland fail to adopt EU law and the configuration of the supervisory authority), Switzerland was confident the EU would align itself with the Swiss approach in view of the advantages of the global and coordinated way the negotiations were conducted (e.g. institutional solution and Switzerland's cohesion contribution). Regarding the institutional dossier, the Federal Council finally gave its formal support to the elaboration of a horizontal **framework agreement** (no longer supporting a general model to be negotiated and implemented for each agreement), despite being aware of the risks of such an approach (e.g. under such a framework agreement the existing bilateral agreements could be subject to new institutional arrangements). At the meeting between President of the Swiss Confederation Micheline Calmy-Rey and President of the European Commission José Manuel Barroso on 8 February 2011, Switzerland was, however, unable to establish its global and coordinated negotiation approach, as the President of the European Commission held certain reservations with regard to Switzerland's wish to conclude a negotiation package. After this meeting, the European Commission made it ever clearer to Switzerland that the **institutional issues would have to be settled** before progress could be made on the remaining open dossiers.

To enable further exploratory talks between Switzerland and the EU on the institutional issues, on 4 May 2011 **the Federal Council expanded its five existing principles** to include a sixth on dispute settlement. This would grant the Joint Committee the authority to settle disputes and in the event of disagreement, enable proportionate compensatory measures that could be monitored by an arbitration panel. Issues relative to interpretation and monitoring were suspended pending a Federal Supreme Court opinion and a legal opinion from Professor Daniel Thürer on this matter. These two opinions, received a few months later, confirmed in particular the suitability of a two-pillar model to safeguard the interpretation and application of the bilateral agreements. The Federal Council consequently **finalised its principles** in autumn 2011, after consultation with the cantons, the parliamentary foreign affairs committees and the social partners.

The exploratory talks between Switzerland and the EU continued, but no progress was made. Substantial differences remained regarding which model to prefer. At the same time, the European Commission increasingly drew Switzerland's attention to new problems in the implementation of existing agreements and showed little willingness to move forward with regard to the open dossiers. To find a way out of this impasse, at a meeting between President of the Swiss Confederation Eveline Widmer-Schlumpf and President of the European Commission José Manuel Barroso, Switzerland announced that it would submit to the EU **proposals for an institutional solution**. It also proposed a **bottom-up approach** that would allow the electricity agreement to be concluded rapidly, so that it could be used as a basis for an institutional solution, should this solution be acceptable to both parties. Initially the EU did not object to this approach, on condition that it would receive sufficient guarantees concerning the further course of action.

2.2.1.3 Switzerland's concrete proposals and the EU's response

After consultation with the cantons, the parliamentary foreign affairs committees and the social partners, on 15 June 2012, the Federal Council decided on **proposals for an institutional solution**. The proposals were based on the **two-pillar model** that specified, in particular, an independent Swiss supervisory authority and the recognition of the principle of homogeneity in the interpretation and application of the bilateral agreements, as well as the possibility of taking proportionate compensatory measures in the event of differences between the Swiss courts and the CJEU with regard to interpretation and application, despite the major differences with the European Commission at technical level regarding the supervision configuration and compensatory measures. The Federal Council further confirmed its **bottom-up approach**. On the same day, President of the Swiss Confederation Eveline Wider-Schlumpf forwarded

Switzerland's detailed proposals in writing to President of the European Commission José Manuel Barroso.

Switzerland had to wait for an answer as the EU was busy setting out its own position with regard to the institutional issues. While the European Commission wished to reject Switzerland's proposals in their entirety, the Council of the EU was more cooperative. In its opinion, the Swiss proposals were a basis for discussion even if they did not meet all of the EU's expectations. The **conclusions of the Council of the EU of 20 December 2012** and the subsequent letter from the President of the Commission confirmed the EU's willingness to draw up a solution **'equivalent' to the institutional framework of the EEA**. The EU did state, however, that it was also willing to discuss other models. It called on Switzerland to commit itself to a dynamic adoption of the relevant EU law, assuming a broad definition of the latter. Furthermore it requested the establishment of an independent 'international' supervisory authority and a mechanism to prevent differences in the interpretation of the relevant EU law. Moreover, regarding dispute settlement, the EU called for Switzerland to submit to an international jurisdiction compatible with the independence of the EU legal order. Lastly, the European Commission signalled that a **horizontal framework agreement was an essential requirement** to settle the other pending issues, thus rejecting the Swiss proposal to try a bottom-up approach.

2.2.1.4. Drafting of a non-paper of negotiation options by Switzerland and the EU

After the EU's answer, **talks at technical level** were resumed and a new Switzerland–EU working group was appointed. On the Swiss side this comprised representatives from the FDFA, the EAER, the FDJP and the Federal Department of the Environment, Transport, Energy and Communications (DETEC). Subsequently, from January 2013, State Secretary Yves Rossier and David O'Sullivan, administrative Director General of the European External Action Service (EEAS), sought approaches that would allow, on the basis of existing elements, the development of an acceptable solution and the resumption of negotiations. **Three options** were defined in a non-paper, leaving the parties a certain amount of scope for interpretation in the wording of their negotiation mandates. The first option, difficult for Switzerland to accept, was the redesign of the institutional pillar of the EFTA, so that its supervisory body and Court would be able to decide on the interpretation and application of the bilateral agreements. The second option, difficult for the EU to accept, was the creation of new, joint supranational institutions to assume this role. As these joint bodies would also be EU institutions, their activities would however need to be subject to the ultimate supervision of the European Commission and the CJEU, also rendering this model sensitive for Switzerland. The third option was based on a two-pillar model, in which Switzerland and the EU would ensure interpretation and supervision independently from one another in their own territories, the Swiss authorities being competent in Switzerland. With this option, the European Commission would also have had the possibility of referring to the CJEU, and depending on the needs of individual sectors, would have had the authority to conduct investigations or to make decisions. Furthermore, the parties were to examine the possibility of Switzerland's courts of final appeal submitting questions to the CJEU for preliminary ruling, without specifying which legal questions might be subject to referral. The dispute settlement mechanism would be strengthened by allowing each party to refer to the CJEU for a binding opinion, the non-observance of which would lead to the suspension or termination of the agreement or agreements concerned, unless the joint committee should decide otherwise. The proposal to bestow on the CJEU interpretation powers in the context of dispute settlement **changed the dynamics of the talks**. For the EU, this removed a considerable hurdle that had arisen with Switzerland's request for national supervision of the bilateral agreements as dispute settlement was reinforced. This approach allowed the parties to **overcome the impasse** in the exploratory

talks on the institutional issues. Furthermore, the non-paper now also stipulated that the institutional solution could cover the **existing and future market access agreements**, a change that would have a strong impact in the subsequent negotiations.

2.2.1.5 Assessment of the non-paper and definition of the next steps

In June 2013, the Federal Council decided to **renew** the **institutional structure** of Switzerland-EU relations in the area of market access. In its view, this was necessary as negotiations with the EU in the areas of market access (especially in the area of electricity) were making no progress or could not be concluded as the EU first wished to settle the institutional issues. In this context, the Federal Council began drafting the negotiating mandate based on the **third option in the non-paper**. It chose this option because it considered it to be the most promising. This option set out a two-pillar supervision mechanism, making it more attractive from a sovereignty point of view. The Federal Council also accepted the principle of an extension of the institutional solution to the five existing and future market access agreements (including the AFMP). This new component was included in the Federal Council's guidelines for the definition of the negotiating mandate. The AFMP was thus included in the guidelines, setting the framework for the adoption of EU law in this agreement. By accepting the application of the institutional solution to all existing and future market access agreements, Switzerland had **softened its approach**. One of the main reasons given for this was that an agreement with the EU was otherwise unlikely. It was also argued that this was an opportunity to obtain concessions from the EU on the institutional mechanisms and moreover, that the material risks of this new orientation were low.

Regarding the **AFMP**, differences of opinion between Switzerland and the EU had existed for years within the joint committee with regard to the application and interpretation of this agreement. The differences mainly concerned the adoption of the CRD and certain accompanying measures (e.g. 8-day prior notice period), which from the EU's point of view was incompatible with the AFMP. From Switzerland's point of view, the CRD went beyond the scope of application of the AFMP and therefore did not belong to the relevant body of law to be adopted. The non-paper incidentally expressly stated that each relevant legal development was to be adopted "taking into account the purpose and scope of application" of the agreement concerned. Regarding the accompanying measures, this change was seen as an opportunity (e.g. to obtain their recognition by the EU).

Confident in the outcome of the negotiations, the Federal Council decided on a **three-step strategy**: 1) Federal Council decision on the renewal of the bilateral approach and preparation of the institutional negotiating mandate, 2) adoption of the negotiating mandate on the institutional issues and the other open dossiers (e.g. health care agreement), while an agreement was reached for ongoing negotiations (including the electricity dossier), and 3) conclusion of negotiations on open dossiers (including institutional issues) in June 2014 at a summit between Switzerland and the EU.

2.2.2 Original negotiating mandates

Switzerland adopted its negotiating mandate on institutional issues once and for all on **18 December 2013** after consultation with the cantons, the parliamentary foreign affairs committees, the social partners and the economic umbrella organisations. The process took longer in the EU and doubts were cast following the approval on 9 February 2014 by the Swiss people and cantons of the **popular initiative to 'Stop mass immigration'**. The initiative demanded the renegotiation of the AFMP and made it impossible for Switzerland to sign AFMP Protocol III concerning the extension of the agreement to Croatia. To rekindle the negotiations, on 30 April 2014, the Federal Council unilaterally decided to introduce quotas allowing Croatian

citizens to access the Swiss labour market as well as other unilateral measures to ensure that Croatia was not at a disadvantage compared with the situation had Protocol III been signed. In parallel to these unilateral measures, on **30 April 2014,** the EU adopted the mandate for negotiations on the institutional issues.

2.2.2.1 Swiss mandate

First of all, the Swiss mandate reiterated the **general principles**. The Swiss delegation should ensure that the institutional solution be compatible with the functioning of the Swiss institutions, i.e. with direct democracy and federalism. The solution should also – bearing in mind that Switzerland is not an EU member – ensure a balance between rights and obligations, and safeguard the homogeneity of law and a homogeneous application and interpretation of the agreements concerned. Lastly, it stated that the institutional solution should cover existing and future market access agreements.

The mandate then defined the **parameters of the institutional solution**. Regarding **developments in EU law**, the mandate stipulated that the automatic adoption of EU law was excluded and that any adoption should be decided by Switzerland, in compliance with its constitutional and legal provisions. Furthermore, the adoption should only concern the relevant EU law, this being determined according to the objectives and scope of application of each agreement. In addition, appropriate participation in the drafting of this *acquis* in the EU must be safeguarded. In the event of non-adoption of a development in relevant EU law, the EU should only be able to take appropriate compensatory measures (at most partial or complete suspension of the agreement concerned). With regard to the **interpretation** of the adopted EU law, the mandate stipulated that Switzerland could recognise the authority of the CJEU for interpretation of that law, and that the possibility should exist for Swiss Courts to submit to the CJEU questions for preliminary ruling, and/or institutionalised dialogue between the Federal Supreme Court and the CJEU. With regard to **supervision**, the mandate incorporated the two-pillar model, excluding any direct authority of the European Commission. And lastly, the mandate stipulated that the Joint Committee was responsible for **dispute settlement**, both parties having the possibility, in the event of disputes over the interpretation of the adopted EU law, to refer to the CJEU for its opinion on interpretation. However, the CJEU would not be able to settle the dispute between Switzerland and the EU. Only the joint committee would have the authority to determine the consequences of an interpretation of the CJEU on the disputed *acquis*.

Given the scope of the institutional solution, the mandate lastly settled certain **material matters in relation to the existing market access agreements**, including the AFMP and the Overland Transport Agreement. The Free Trade Agreement of 1972 (1972 FTA) was excluded. Furthermore, the mandate confirmed that the institutional solution could in no way alter the scope of application, the objectives or the material content of the agreements. The mandate also stipulated that, in general terms, Switzerland would not commit itself to adopting the *acquis* that existed prior to the coming into force of the institutional agreement. With regard to the **AFMP**, the mandate particularly emphasised that Switzerland would not adopt the CRD and its further developments and would maintain the Swiss accompanying measures in their entirety, including with regard to the jurisdiction of the CJEU.

2.2.2.2 EU mandate

The EU mandate contained certain **general principles** whose common aim was to ensure homogeneity and legal security in the single market. The institutional agreement was to provide for the following: the **dynamic adoption** of EU law, with Switzerland allowed appropriate participation in its evolution, an **obligation regarding the homogeneous application and interpretation** of *acquis*, an **independent supervision mechanism**, in which the European

Commission would be responsible for the supervision of Switzerland's application of the agreement concerned, as well as **independent judicial control**, in which both parties would be able to refer to the CJEU and the Swiss Courts could ask the CJEU for opinions of interpretation. Should no settlement be found to a dispute (e.g. Swiss non-compliance with CJEU rulings), this would lead to the termination of the agreement or agreements concerned (automatic sanction).

Furthermore, the mandate stated that the institutional solution should cover the **existing and future market access agreements**. According to the mandate, the institutional agreement should cover at least nine agreements: the 1972 FTA, the AFMP, the Air Transport Agreement, the Overland Transport Agreement, the Agricultural Agreement, the MRA, the Government Procurement Agreement, the Customs Security Agreement and the Statistics Agreement. Lastly, the mandate stipulated that the institutional agreement should contain a long-term financial mechanism for Switzerland's cohesion contribution to the EU.

2.2.3 Negotiation process 2014–18

Between 2014 and 2018, the negotiations on the institutional agreement took place in **three stages**. During these three stages, the Swiss delegation comprised representatives from the FDFA, the EAER, the FDJP and the cantons and was supported by a coordination group of representatives from the FDFA, the EAER, the Federal Department of Finance (FDF), the DETEC, the Federal Department of Home Affairs (FDHA) and the FDJP. **First stage**: negotiations began in May 2014 and lasted until November 2014, followed by a one-year pause. **Second stage**: subsequently they resumed in November 2015 and lasted until December 2017. **Third stage**: at the beginning of 2018, Switzerland changed its approach and set out its negotiating mandate more precisely. The third negotiation stage ended in November 2018 after a meeting between Federal Councillor Ignazio Cassis and EU-Commissioner Johannes Hahn on 23 November 2018 in Zurich.

2.2.3.1 First stage: 2014–15

The negotiations began on **22 May 2014** with the presentation of the parties' respective draft agreements. Negotiations then continued on the basis of the EU draft agreement, supplemented by some components of the Swiss draft. Switzerland and the EU quickly agreed on the general outline of the principle of the dynamic adoption of developments in EU law, coupled with Switzerland's participation in drafting developments in this law, even though certain points remained unresolved (e.g. compensatory measures in the event of non-adoption). There were different models for the interpretation and supervision of the agreements concerned. This entailed detailed discussion. Various meetings in 2014 between State Secretary Yves Rossier and Director General David O'Sullivan **yielded some progress**. The EU came closer to Switzerland's position on supervision (no role given to the European Commission) and dispute settlement (joint committee as primary mechanism), although substantial differences of opinion existed on dispute settlement regarding the CJEU's power of interpretation, and regarding potential compensatory measures should the CJEU's opinion not be respected. The European Commission **showed little flexibility** on these two points. **Dispute settlement** increasingly proved to be the main obstacle to progress in the institutional agreement negotiations.

As far as the **material issues** were concerned, on 24 June 2014, Switzerland presented its requirements for the AFMP (CRD and accompanying measures) and for the Overland Transport Agreement. In consultation with the EU, provision had been made for these issues to be dealt with in parallel to the institutional agreement negotiations. Concerning the CRD, the European Commission acknowledged that there were certain differences between the *acquis*

on the right to free movement in the AFMP and the CRD (e.g. the concept of social assistance) that needed clarification. It emphasised, however, that there was little room for manoeuvre. It tended towards the solution found for the EEA, in which the CRD was adopted in its entirety, accompanied by a political declaration specifically excluding the matter of political rights. Regarding the accompanying measures, the European Commission pointed out that its room for manoeuvre was also limited, especially as from its point of view at least seven of the eleven measures were incompatible with the AFMP (including the 8-day rule and the obligation to pay a financial guarantee). At that stage, they were seeking an exchange of ideas with the aim of establishing less restrictive but equally effective measures. It also pointed out that enforcement directive 2014/67, which was being implemented by the member states, provided a suitable solution to this issue.

In November 2014 negotiations were **suspended** due to the European elections, which resulted in the appointment of a new European Commission headed by President Jean-Claude Juncker. This change led to a cementing of positions regarding the institutional issues. During informal contacts the new European Commission appeared to be rather inflexible on the unresolved points. Against the backdrop of difficulties surrounding the implementation of the 'Stop mass immigration' initiative, in its **conclusions of December 2014**, the Council of the EU reserved its right to terminate the negotiations on the institutional issues and other ongoing negotiations should Switzerland violate the terms of the AFMP. In the consultations between Switzerland and the EU on this matter, the European Commission tied the conclusion of the institutional negotiations to a solution for the AFMP. These consultations, which resumed after a meeting between President of the Swiss Confederation Simonetta Sommaruga and President of the European Commission Jean-Claude Juncker, were intended to safeguard the implementation of the **'Stop mass immigration'** initiative. In April 2015, the European Commission decided on several measures, including the suspension of the exploratory talks on a financial services agreement and the negotiations on an electricity agreement. In reaction to these developments, in August 2015, Switzerland created a new **structure for its negotiations with the EU**. State Secretary Jacques de Watteville was appointed to coordinate the negotiations with the EU and assumed leadership of the new structure. In September 2015, in parallel to the consultations between Switzerland and the EU on the AFMP and in light of the positively deemed *momentum* in this dossier, it was agreed with the EU to **resume negotiations on the institutional agreement**.

2.2.3.2 Second stage: 2015–17

Negotiations resumed on **24 November 2015**, with a new chief negotiator for the EU delegation, Ambassador Claude Maerten. This first official meeting of the delegations after one year gave both sides the opportunity to set out their objectives and respective positions. At this stage, the talks mainly concerned the **institutional mechanisms**, i.e. the role and power of interpretation of the CJEU in dispute settlement and the nature of measures that could be taken in the event of unresolved disputes (Switzerland argued for proportionate compensatory measures while the EU favoured automatic sanctions extending to the automatic termination of the agreement or agreements concerned), as well as certain related subjects (e.g. supervision of state aid). These talks achieved some progress, such as Switzerland being able to obtain formulations in its favour regarding changes in EU law (preservation of the principle of equivalence and appropriate deadlines for the adoption of EU law by Switzerland) and the interpretation of the agreements (reference to international law). The **material issues regarding the AFMP** (CRD and accompanying measures) were temporarily excluded from the delegations' talks because they were closely tied to the implementation of the new Article 121a of the Federal Constitution (management of immigration) and to the ongoing consultations on this matter between Switzerland and the EU. In 2016, despite the ongoing

process, the accompanying measures were the subject of several technical exploratory talks between the relevant entities.

At the start of 2016, growing tensions within the EU due to the **Brexit vote in the United Kingdom** made it harder to find a mutually acceptable solution on the free movement of persons (implementation of the 'Stop mass immigration' initiative), which hampered progress on the institutional issues as the European Commission had associated the two dossiers. The Commission's opinion was that the problems in the area of the free movement of persons proved the necessity of an institutional agreement. After the United Kingdom voted to leave the EU on 23 June 2016, the **European Commission's position hardened**. This became obvious during the last round of negotiations on the institutional agreement in 2016, which took place on 27 and 28 July. The issues on dispute settlement remained unresolved without any immediate prospect of a solution. The same held true for the **material issues regarding the AFMP**, which were once again discussed in the setting of the institutional negotiations despite the Swiss delegation's request to concentrate primarily on the institutional mechanisms. Regarding the **CRD**, the EU indicated that this was a development of the rules governing the free movement of persons on which the AFMP was based. Switzerland emphatically rejected this claim. As far as the **accompanying measures** were concerned, Switzerland proposed to take them out of the institutional agreement ('carve out'). The EU categorically rejected this proposal. The EU was equally opposed to a supplementary protocol to the agreement that would have recognised these measures as compatible with the AFMP; it insisted that the adoption of the relevant EU directives was sufficient to safeguard the current level of wage protection in Switzerland.

The adoption of an amendment to the Foreign Nationals Act in December 2016, aimed at promoting the potential of the domestic labour force, allowed the new Article 121a of the Swiss Federal Constitution, introduced by the 'Stop mass immigration' initiative, to be implemented. **Attention returned to the ongoing negotiations** including the institutional dossier. At this stage, the Swiss delegation underwent a change of personnel. On 1 April 2017, State Secretary Pascale Baeriswyl took over the reins from State Secretary Jacques de Watteville as negotiation coordinator. The meeting between President of the Swiss Confederation Doris Leuthard and President of the European Commission Jean-Claude Juncker on 6 April 2017 reinforced the **positive dynamic** in Switzerland–EU relations that had developed after the challenges arising from the 'Stop mass immigration' initiative had been resolved. The European Commission stressed that all the dossiers on hold would now be reopened (e.g. electricity, public health and full association in Horizon 2020). It also expressed its wish for a rapid solution on the institutional dossier. To conclude the institutional agreement, four important points still had to be resolved: dispute settlement, the regime to apply to state aid (in particular supervision), material issues (impact of the dynamic adoption of EU law on certain existing agreements, including the AFMP) and the clause on termination. **Some progress was made**. In particular, the European Commission stated in April 2017 that it was willing to consider the role of an arbitration panel to assess the proportionality of the compensatory measures and which would decide on the '*sui-generis*' provisions of the agreements concerned (i.e. provisions not based on EU law). Nevertheless, **differences of opinion remained**. Concerning the material issues with regard to the AFMP (CRD and accompanying measures) the European Commission argued that exceptions in the dynamic adoption in these two areas were unacceptable to the EU. Only specific solutions would be considered and could be discussed.

At the **end of 2017**, the negotiations at technical level took on a **new dynamic**. During the meeting of 23 November 2017 between President of the Swiss Confederation Doris Leuthard and President of the European Commission Jean-Claude Juncker – which would later be interpreted differently by Switzerland and the EU – President Juncker submitted to Switzerland

a new proposal for dispute settlement. He also informed Switzerland that he had for the first time assigned the dossier to a commissioner (Johannes Hahn), providing Federal Councillor Ignazio Cassis with a direct counterpart for the institutional dossier. The EU proposed that an arbitration panel should be responsible for settling disputes. To safeguard the principle of homogeneity, this arbitration panel should refer to the CJEU matters regarding provisions on the 'functioning of the area of the single market [in which Switzerland participates]' or 'competition in the single market', or if one of the parties requested that the matter be referred. The decision of the CJEU would be binding on the arbitration panel.

On 21 December 2017, the European Commission granted Switzerland an Implementing Decision recognising **stock exchange equivalence**. However, unlike recognitions in this area granted to other third countries (e.g. Australia or the US), the European Commission granted Switzerland only temporary equivalence until 31 December 2018. It referred to the **conclusions of the Council of 28 February 2017**, referencing the policy introduced in 2014, according to which the conclusion of an institutional agreement remained a requirement for the EU to continue development of the sectoral approach.

2.2.3.3 Third stage: 2018

In light of these developments, on 31 January 2018, the Federal Council held a **detailed discussion on Switzerland's European policy**. Part of this discussion was the examination of new approaches to dispute settlement. The Federal Council also appointed State Secretary Roberto Balzaretti chief coordinator of all negotiations with the EU. Subsequently the Federal Council instructed the FDFA to explore specific points with the EU, in order to adapt the Swiss negotiating mandate if necessary. Two points were to be explored regarding dispute settlement: 1) an **alternative model without the CJEU,** but including the Federal Supreme Court (responsible for dispute settlement on Swiss territory, whereas the CJEU would be responsible for this in the EU) and with an arbitration panel that would only be responsible for assessing the proportionality of any compensatory measures; 2) **amendment to the EU proposal** of 23 November 2017 (in particular the optional nature of recourse to the CJEU by the arbitration panel). At the same time, the Federal Council wished to clarify to what extent it could soften its position on the CRD and instructed the FDJP to examine on which aspects concessions could be made.

In early February 2018, State Secretary Robert Balzaretti explored the points mentioned with EEAS Deputy Secretary General Christian Leffler. The **EU firmly rejected the proposals**, stating that it was imperative that the only body competent to interpret EU law be the CJEU. In light of these developments, on 2 March 2018, the Federal Council decided to **amend** certain points of the **negotiating mandate**. Thenceforth, this stated that the Swiss delegation could accept dispute settlement through an **arbitration panel with an equal number of representatives from each side**, if the joint committee were unable to settle a dispute within a specified period. The arbitration panel could also refer matters pertaining to the interpretation of EU law to the CJEU. A provision on **state aid** was also added to the mandate as this had not been included in the original mandate of 18 December 2013. This stated that any regulation of state aid in the institutional agreement must be limited to principles and that the system for monitoring state aid should be based on a two-pillar solution and correspond to the Swiss legal order. As far as the **accompanying measures** were concerned (11 measures in appendix to the mandate), the mandate stipulated that these had to be maintained in their entirety and that the arbitration panel could not refer matters of interpretation to the CJEU. The CRD, on which the FDJP had submitted a summary to the Federal Council in February 2018 indicating a very narrow scope for flexibility e.g. on facilitation of family reunification (while at the same time reasoning that any further concessions were inconceivable given the domestic political context) was ultimately not mentioned in these clarifications. The negotiating mandate of 2013,

which already stipulated that Switzerland would not adopt the CRD nor its developments, retained its validity unchanged. The amendments to the negotiating mandate also detailed the exceptions to be achieved in the area of social assistance.

With this new point of departure, in **March 2018 the negotiations** resumed again. Even though compromises could be reached, in particular on dispute settlement (the EU accepting that the CJEU could only be called upon for the interpretation or application of EU law, and that the arbitration panel in individual cases would be able to decide alone whether referral in a specific case was relevant and necessary) and also on state aid, there was very little scope to find a solution on the material issues concerning the AFMP (CRD and accompanying measures). With regard to the **CRD**, the EU insisted that this be fully integrated into the AFMP, merely reiterating its proposal for a solution similar to that in the EEA. Switzerland's desire to explicitly exclude the integration of the CRD into the institutional agreement was rejected by the EU. During informal exploratory talks on 16 October 2018 with State Secretary Robert Balzaretti and State Secretary for Migration Mario Gattiker, the EU also refused to consider the possibility of partial exemptions regarding the CRD. A **fundamentally different approach** existed on this point. For this reason, the CRD was not mentioned in the draft of the institutional agreement. Regarding the **accompanying measures**, the Swiss delegation tried again to remove them from the dynamic adoption of law ('carve out') and stressed that without such an exception, the Federal Council would not be in a position to sign the institutional agreement. The EU confirmed that it could not consider the exclusion of all of the accompanying measures from the dynamic adoption of law. However, it proposed Protocol 1 to guarantee certain specific exceptions. The Swiss delegation pointed out that its current mandate did not allow it to negotiate on any such text. Lastly, regarding the **termination clause**, Switzerland and the EU were unable to finalise the procedure for the existing agreements covered by the institutional agreement in the event of its termination.

On 23 November 2018, Federal Councillor Ignazio Cassis met EU Commissioner Johannes Hahn to take stock of the institutional negotiations. The EU expressed its impatience and stated that the negotiations had come to an end. Although the meeting led to a compromise regarding the termination clause, given the circumstances it did not allow any clarification on the points that were still unresolved from Switzerland's point of view, in particular relating to the CRD (which was not mentioned in the draft of the institutional agreement) and to the accompanying measures (Protocol 1, which was not approved by Switzerland, remained an EU proposal).

2.2.4 Interruption in negotiations between 2019 and 2020

In December 2018, the Federal Council **acknowledged the draft of the institutional agreement** in its version of November 2018. Under its negotiating mandate of 2013 Switzerland had sought to safeguard the accompanying measures for the future and explicitly rule out the integration of the CRD into the AFMP. The draft agreement did not resolve these issues. The Federal Council **therefore refrained from accepting the draft agreement** as a joint negotiation outcome and declined to initial it, despite considering that it was largely in Switzerland's interest. At the start of 2019, it decided to subject the matter to a maturing process by conducting wide-ranging consultations with representatives from the economy, the scientific community, political parties, the social partners, the cantons and Parliament and other concerned parties.

These comprehensive ad hoc consultations in the first six months of 2019 allowed it to identify or narrow down the **interests and concerns of the main Swiss stakeholders.** Furthermore, they sparked broad debate in Switzerland on the advantages and disadvantages of the draft agreement. During these consultations, various criticisms were made of the draft agreement. **Three aspects of the draft** – the CRD, the accompanying measures and state aid – were

seen to require more detailed clarification. The Federal Council informed the European Commission of this in its letter of 7 June 2019, stating that it considered the agreement to be largely in the interest of Switzerland and that clarification of the three points would allow it to submit the agreement to Parliament. From summer 2019, the Federal Council's Committee for Foreign Affairs and European Policy was commissioned to elaborate specific solutions with broad political support within Switzerland for these three unresolved points, together with the cantons and social partners. A two-track process at political and technical level was immediately begun and continued until September 2020. The process was subject to delay due to the COVID-19 pandemic and the popular initiative 'For moderate immigration' (Limitation Initiative).

In parallel to this consultation and clarification process in Switzerland, the European Commission ramped up its policy of putting pressure on Switzerland to conclude the institutional agreement. At the end of 2018, EU Commissioner Hahn had signalled that there would be no further updates to the existing agreements until the institutional matters were resolved. In January 2019, the Cabinet of the President of the European Commission formally instructed the Commission services to **suspend or delay the ongoing talks with Switzerland on market access,** until there was a result in the institutional dossier. Exceptions would only be allowed in the event of substantial interest for the EU and after approval by the Secretary General of the European Commission and the Head of Cabinet of the Presidency. These measures came in addition to the already blocked negotiations, for example in the area of public health (blocked since May 2018), electricity (since July 2018) and food security (since December 2018) and the negative signals received about work on the update of chapter 4 of the MRA on medicinal products. The EU Council reinforced this decisive attitude in its **conclusions of 19 February 2019**, in which it stressed that the conclusion of the institutional agreement for the EU was a requirement for the conclusion of future agreements on Switzerland's participation in the EU single market and also "an essential element for deciding upon further progress towards mutually beneficial market access". In July 2019, soon after the publication on 7 June of the **report on the consultations in Switzerland**, on which occasion the Federal Council had sent **positive signals** to the President of the European Council Jean-Claude Juncker, the EU decided not to renew the recognition of the equivalence of Swiss stock exchange regulation, temporarily renewed in December 2018, deeming the progress made in the institutional dossier to be unsatisfactory. In view of this development, although the Swiss Parliament approved a **second Swiss contribution** to the selected EU member states (cohesion contribution), it decided that no binding commitments should be made in this dossier as long as the EU adopted discriminatory measures against Switzerland, such as not extending the stock exchange equivalence.

In this context of **growing pressure**, which was slightly alleviated through cooperation between Switzerland and the EU during the COVID-19 pandemic, on 14 October 2020, after the rejection of the Limitation Initiative, the Federal Council appointed State Secretary Livia Leu as new chief negotiator for negotiations with the EU. Without amending the negotiating mandate approved in 2013 and redefined in 2018, on 11 November 2020 the Federal Council set out its position with precise guidelines for the three points of the agreement in need of clarification. With regard to the **CRD**, it demanded that the agreement explicitly rule out the integral incorporation of the CRD into the AFMP and that any partial adoption of the CRD be limited to the free movement of persons taking up gainful employment and their family members and – to a lesser extent – to economically inactive persons who had sufficient financial means. Specifically, Switzerland demanded assurance that seven areas of the CRD would be excluded. With regard to the **accompanying measures**, the Federal Council demanded the safeguarding of the protective effect of the existing accompanying measures, including the dual enforcement system, regardless of developments in EU law and CJEU case

law. Lastly, it should be ensured that the provisions on **state aid** in the draft institutional agreement would have no horizontal effect beyond the areas covered by the draft agreement, especially not on the 1972 FTA. On 13 November 2020, President of the Swiss Confederation Simonetta Sommaruga, during a telephone conversation with President of the European Commission Ursula von der Leyen, presented Switzerland's offer to the EU on these three points, thus relaunching the negotiations at technical level.

2.2.5 Final phase of negotiations 2021

Negotiations with the EU resumed after an **initial meeting on 21 January 2021** between Stéphanie Riso, Deputy Head of Cabinet of the new European Commission President Ursula von der Leyen, and State Secretary Livia Leu in Brussels. **Six rounds of negotiations** took place between Switzerland and the EU. The discussions were intensive, substantive and specific and revolved around the three aforementioned issues requiring clarification. In accordance with the topics to be discussed, State Secretary Livia Leu was accompanied each time by State Secretary Marie-Gabrielle Ineichen-Fleisch (accompanying measures, state aid) or State Secretary Mario Gattiker (CRD). Switzerland communicated its requests for clarifications to the EU mainly in writing and explained them orally; it systematically took positions on the EU's proposals/counterproposals. Despite the extensive efforts of both delegations, no agreement could be reached during the negotiations. A meeting on 23 April 2021 between President of the Swiss Confederation Guy Parmelin and von der Leyen served as an opportunity to take **stock at political level of the technical negotiations** and – for Switzerland – to reiterate its offer.

After this meeting, **considerable differences remained between Switzerland and the EU**. Although it was possible to resolve the state aid issue satisfactorily under the condition that agreement could be reached on the other two issues, the **substantive issues relating to the AFMP** (CRD, accompanying measures) remained unresolved. The EU thus clearly signalled that it was not in a position to fully accept Switzerland's demands. With regard to the **CRD** and its possible incorporation into the AFMP, the EU showed no willingness to grant Switzerland an exception in the CRD's seven areas based on the concept of EU citizenship. Switzerland holds that these areas go beyond the free movement of persons agreed on in the AFMP. Regarding the **accompanying measures**, the EU was willing to reopen Protocol 1. However, it only made specific counterproposals to some of Switzerland's demands (in particular, having a non-regression clause to ensure that EU law and CJEU case law cannot reduce protection, acknowledging the social partners' role, recognising a right to take additional domestic measures, and allowing Switzerland to determine the intensity of review within the strict framework set by the relevant EU law to be incorporated) and did not make any proposals regarding other points essential for Switzerland, e.g. the request to broaden the exceptions contained in Protocol 1. These counterproposals did not go far enough to guarantee that the existing accompanying measures would continue to have their protective effects. In return for any changes to Protocol 1 (originally an EU proposal that was not formally negotiated between Switzerland and the EU), the EU expected additional concessions from Switzerland, in particular to have the cohesion-related parts of the draft of the institutional agreement expanded and strengthened.

In this context, the EU – in line with its usual approach – signalled its willingness to **continue negotiations**, tied to the expectation that Switzerland would make additional concessions. As agreed at the meeting of 23 April 2021 between Parmelin and von der Leyen, the two chief negotiators of Switzerland and the EU remained in contact during this phase. During their contacts, Switzerland informed the European Commission of the consultations carried out by

the Federal Council in Switzerland and reiterated its offer. The European Commission called attention to its position already expressed at the high-level meeting of 23 April 2021.

2.3 Result of the negotiations

2.3.1 Scope

The draft of the institutional agreement concerns the five existing market access agreements (free movement of persons, overland transport, air transport, MRA and agriculture). All future market access agreements (e.g. the electricity agreement) would also fall within the scope of the institutional agreement, provided that they explicitly refer to this agreement and that the EU and Switzerland do not agree otherwise. The institutional agreement would not cover the 1972 FTA, the Agreement on Government Procurement, the Agreement on Customs Security and the Statistics Agreement, despite the instructions to this end in the EU's mandate.

2.3.2 Institutional mechanisms and functioning of the agreement

The institutional mechanisms for developments in EU law, interpretation, supervision and dispute settlement form the core of the draft institutional agreement. In addition to these mechanisms, the termination clause, which is part of how the agreement functions, also plays a role in assessing the outcome of the negotiations.

2.3.2.1. Developments in EU law

The draft institutional agreement provides for the **market access agreements to be updated dynamically** (Article 5 in conjunction with Articles 12 to 14), i.e. Switzerland and the EU commit to the principle of integrating relevant EU legal acts into the market access agreements concerned as quickly as possible. This only applies to EU legal acts falling within the scope of the market access agreements. Protocol 2 of the draft institutional agreement provides for certain exceptions to the dynamic updating of these agreements. As soon as new EU legal acts are drafted, the European Commission would have to inform Switzerland and consult Swiss experts to the same extent as the experts of the EU member states. In this sense, the EU would guarantee Switzerland the right to participate to the greatest possible extent in **shaping decisions** taken during the EU's legislation-drafting process. However, the draft institutional agreement does not provide for Switzerland to have voting rights.

Any changes in relevant EU law would have to be integrated into the market access agreements. This would have to be done in accordance with the rules of the respective agreements and **taking into account Switzerland's domestic procedures**. Any updating of the respective agreements with a view to integrating a change in EU law would have to be agreed either in the respective joint committee or in direct negotiations. During such discussions, it would be possible to determine the ways in which the agreements could be updated, such as special transitional periods, institutional adjustments and specific arrangements. Switzerland would not be able to agree definitively to any given updating of an agreement until after the relevant domestic approval procedures (including a referendum). Any incorporation of EU law into a market access agreement would thus require an **independent decision by Switzerland**. The automatic updating of agreements, whereby EU law would become part of a market access agreement without Switzerland's doing anything to this effect, would be ruled out. If the updating of an agreement (including any changes to domestic law) were to require the approval of the Federal Assembly, Switzerland would have at most two years to complete the necessary domestic procedures. If the decision to approve it were submitted to a referendum, this period would be extended by one year. This means that the

transposition periods provided for in EU legal acts would only be relevant for Switzerland if they were longer than this period of two or three years. If the given EU legal acts were to be implemented before the end of this two-year or three-year period, Switzerland would examine – in accordance with the provisions of Swiss law – the possibility of provisionally applying the given decision of the joint committee or the given arrangement for the updating of the agreement from the date on which the latter enters into force in the EU.

The draft institutional agreement does **not provide for a procedure in the event that a party finds itself unable to update an agreement in due time** (for example, if the two-year period for the incorporation of EU legislation into the given agreement were to expire without it having been possible to ratify any agreed-upon updating of the agreement). The absence of such a procedure can be interpreted to mean that the parties did not want to define specific legal consequences. If a party were to refuse to update an agreement, a dispute would arise to which the provisions of Article 10 of the draft institutional agreement would apply (see the Dispute settlement section below). The procedure under Article 10 of the draft institutional agreement would also apply if the EU refused to update an agreement, for example the MRA.

2.3.2.2. Interpretation

The **principle of uniform interpretation** is set out in Article 4 of the draft institutional agreement. This provision primarily concerns the courts and the authorities, in Switzerland and in the EU, responsible for implementing the agreements. Article 4 paragraph 1 of the draft institutional agreement would oblige Switzerland and the EU – each acting autonomously on its own territory – to interpret and apply the market access agreements concerned uniformly and in compliance with the principles of international law. Both sides would have to interpret and apply EU legal concepts in accordance with the relevant case law of the CJEU (para. 2). This obligation would generally become relevant whenever substantive provisions in the five agreements covered by the institutional agreement were applied, insofar as they were based on EU law. This principle is not new in itself; it already exists in the existing market access agreements between Switzerland and the EU, in particular in the AFMP (Art. 16 para. 2) and the Agreement on Air Transport (Art. 1 para. 2). However, these agreements' provisions only oblige the parties to take into account the relevant CJEU case law *prior to* the date they were signed, whereas Article 4 of the draft institutional agreement would oblige the Swiss authorities and courts to also take into account the relevant CJEU case law handed down *after* the signature of the institutional agreement.

2.3.2.3. Supervision

The draft institutional agreement provides for a **two-pillar model** (Art. 6 and 7). Switzerland and the EU would each be independently responsible for applying the agreements properly on their own territory. This solution would thus not create a supranational supervisory body or grant the European Commission any supervisory powers over Switzerland, in contrast to what the EU had sought in its negotiating mandate.

2.3.2.4. Dispute settlement

The **dispute settlement procedure** is set out in Article 10 of the draft institutional agreement. As with many international agreements, it is based on a **conventional arbitration procedure** – but with the special feature that, where necessary and appropriate, the arbitration panel would consult the CJEU regarding the interpretation of the EU law contained in the agreements. The draft institutional agreement assigns this role to the CJEU because the CJEU bears the last-instance authority to interpret EU law.

Before referring the **dispute** to the arbitration panel, the parties would attempt to **settle it within the joint committee**, as already provided for in the existing agreements. In the event

of a dispute over the interpretation or application of the institutional agreement or an affected agreement, or if there were disagreements regarding the incorporation of an EU legal development into the relevant agreement, the parties would first consult each other as usual in the respective joint committee in order to find a mutually acceptable solution to the dispute (Art. 10 para. 1). If the joint committee were to not succeed in resolving the dispute within a specified timeframe, either party would be allowed to request that the dispute be referred to an arbitration panel composed of arbitrators appointed in equal numbers by Switzerland and the EU (Article 10 para. 2). Protocol 3 to the draft institutional agreement specifies in detail the composition of the arbitration panel and how the arbitration is to be conducted. These rules are fundamentally in line with standard arbitration arrangements in international law. If, in order to settle a dispute, it is necessary and appropriate to clarify **how to interpret or apply an EU legal term**, the arbitration panel would request clarification from the CJEU (Art. 10 para. 3). The parties are not entitled to appeal directly to the CJEU, but must ask the arbitration panel to request the involvement of the CJEU. The arbitration panel bears the sole authority to decide whether to ask the CJEU for clarification. The rules also specify that if the panel refuses to involve the CJEU, it must justify its decision (Art. III.9 para. 3 of Protocol 3). To settle the dispute, the panel would base its deliberations on the institutional agreement, the provisions of the relevant market access agreements and other applicable rules of international law. The latter also include general principles of international law, such as those regarding state responsibility (Art. IV.3 para. 1 of Protocol 3). If the arbitration panel asks the CJEU to interpret a provision of EU law, it must respect the CJEU's decision when settling the dispute (Art. 10 para. 3). However, it would always be the panel that takes the decision regarding each specific dispute.

The parties would fundamentally be **bound by the decision of the panel**. The losing party must inform the other party and the respective joint committee of the measures it has taken to comply with the panel's decision (Art. 10 para. 5). If a party decides not to implement the arbitration panel's decision, or if the other party considers that the implementation measures taken are not in accordance with the decision, the latter may take compensatory measures. These may go so far as to suspend the agreement(s) concerned, but they must be proportionate in that they rectify a possible imbalance (Art. 10 para. 6). In the event of disagreement between the parties on the proportionality of the compensatory measures, the party targeted by them may first refer the matter back to the competent joint committee. If the joint committee fails to reach a decision within a specified period of time, the party targeted may submit the matter to the arbitration panel, which will make a judgment.

2.3.2.5. Termination clause

Article 22 of the draft institutional agreement contains the **termination clause**, which allows either party to terminate the agreement. This clause also sets out the consequences of termination. Any market access agreement concluded after the signature of the institutional agreement and explicitly referring to it would cease to have effect together with the institutional agreement six months after the institutional agreement's termination. This follows the logic that firstly the EU would not conclude any new market access agreements without an institutional agreement, and secondly any such agreements would refer to the institutional mechanisms under the institutional agreement and their institutional provisions would no longer function if the institutional agreement no longer applied. However, the five existing market access agreements covered by the institutional agreement would **not be immediately terminated** if the institutional agreement were terminated. Instead, the institutional agreement 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 on a solution, these agreements would stay in force. Otherwise, the agreements would cease to have effect

six months after the initiation of the consultation process, as provided for in the institutional agreement. However, the guillotine clause contained in these existing Bilateral I agreements would not apply; i.e., the Agreement on Government Procurement, which is also part of the Bilaterals I package, would stay in force.

2.3.3 State aid

The draft institutional agreement contains **common substantive principles** agreed between Switzerland and the EU – in accordance with the relevant EU law – **on state aid**. These principles are not self-executing, except for the Agreement on Air Transport, as it is the only existing market access agreement that already contains state aid provisions. The draft institutional agreement provides for this agreement to incorporate new aviation-relevant state aid provisions of EU law on the basis of a decision by the corresponding joint committee (Art. 8B para. 6 and Annex X as well as the joint EU–Switzerland declaration on the integration, into the Agreement of 21 June 1999 on Air Transport, of Annex X on the provisions required under Article 8B, paragraph 6, first indent, with regard to this Agreement). Future market access agreements, such as the electricity agreement, must incorporate the principles on state aid contained in the draft institutional agreement and, where necessary and as part of the agreements' negotiation, also incorporate additions to these principles.

The draft institutional agreement also sets out **procedural provisions** with regard to state aid. It provides for each party to independently monitor state aid on its territory through its own supervisory authority **(two-pillar model**). For Switzerland, this means that state aid granted by the Confederation, the cantons and, where appropriate, the municipalities would be monitored by a Swiss authority. This supervision would have to be implemented in specific terms in national law and would depend on the given economic sector. Article 8B of the draft institutional agreement provides for certain modalities to this end, such as the introduction of a notification procedure. Specifically, the Swiss authority would have to monitor state aid in Switzerland just as closely as the European Commission does in the EU. The draft institutional agreement also expressly recognises that Switzerland will implement the supervision of state aid within the framework of its constitutional principles of separation of powers and federalism.

The **1972 FTA** is not directly affected by the state aid provisions in the draft institutional agreement. However, according to a joint committee draft decision that Switzerland and the EU intended to adopt under the FTA after the institutional agreement took effect, the FTA's state aid provisions (formulated in very general terms) would have to be interpreted in accordance with the corresponding provisions of the institutional agreement whenever the parties jointly decided to refer a given dispute over state aid under the FTA to the arbitration panel established under the institutional agreement.

2.3.4 Free movement of persons

The AFMP, as a market access agreement, would be **subject to the institutional agreement** and thus to the principle of dynamic adoption of EU law set out therein. However, the Federal Council had requested various exceptions to this principle in three areas related to the free movement of persons: 1) the **accompanying measures**, 2) the **CRD** and 3) Regulation (EC) No 883/2004 on the **coordination of social security systems**. While it was possible to keep existing exceptions from becoming subject to the principle of dynamic updating in the third area, as stipulated in the Swiss delegation's mandate, no such result could be achieved in the other two areas.

In the first area, the EU considered several of the **accompanying measures** to be incompatible with the right to free movement of services enshrined in the AFMP and called for

appropriate adaptations. In the draft institutional agreement, the EU made a *proposal* to Switzerland *(Protocol 1)*. Protocol 1 stipulates that Switzerland would incorporate the relevant EU posting law (in particular Enforcement Directive 2014/67/EU and the revised Posting of Workers Directive 2018/957/EU) within three years of the institutional agreement having taken effect. However, the EU acknowledged that incorporating and implementing this law would not fully cover Switzerland's protection requirements in this area. Therefore, taking into account the specificities of the Swiss labour market as well as the specific and limited nature of the right to free movement of services, which is limited to 90 days in the AFMP, the EU offered, in Protocol 1, to accept a number of measures that go beyond the scope of those provided for in EU law on the posting of workers. Specifically, the EU's offer guaranteed the right to apply the following core measures: 1) the possibility of a sector-specific prior notice period of four working days based on an objective risk analysis, 2) a sector-specific obligation – based on an objective risk analysis – to provide a financial guarantee in respect of service providers that have failed to meet their financial obligations and 3) obtaining documentation from independent service providers. The EU's offer specified that the measures agreed in Protocol 1 would not be subject to the principle of dynamic adoption of EU law and that it would not be possible to challenge their core stipulations via the arbitration panel or in any court. On the other hand, the other accompanying measures would not be safeguarded within the institutional agreement; they would be subject to the principle of dynamic adoption and to review by the arbitration panel. However, their content is comparable to the measures in force in the EU. During the negotiations to clarify the draft institutional agreement, it was not possible to adapt Protocol 1 in a satisfactory manner (see 2.2.5 above).

The **CRD** is not mentioned in the draft institutional agreement. Switzerland was unable to obtain an explicit exception in the draft institutional agreement that would have exempted it from the obligation to incorporate the directive into the AFMP. The dispute settlement mechanism provided for under the institutional agreement would apply in the event of a disagreement with the EU regarding Switzerland's incorporation of the CRD. Here, it can be assumed that the arbitration panel would refer the questions concerning the interpretation of the relevant provisions of the CRD to the CJEU. Should the arbitration panel reach a decision contrary to Switzerland's wishes, the modalities for the incorporation or partial incorporation of the CRD would have to be negotiated within the joint committee on the AFMP. If Switzerland were to refuse to incorporate the CRD, the EU could take proportionate compensatory measures. This is a realistic scenario insofar as the EU was not prepared during the clarification period of the institutional agreement negotiations to grant Switzerland explicit exemptions in the event of the CRD's potential incorporation into the AFMP (see 2.2.5 above).

2.3.5 Joint declarations and decision of the joint committee on the 1972 FTA

The EU wanted the other existing agreements, in particular the **1972 FTA,** to be subject to the institutional agreement. Switzerland rejected this demand from the outset. It argued that the 1972 FTA is not a market access agreement within the meaning of the institutional agreement because unlike such agreements, it is not based on legal harmonisation between Switzerland and the EU, i.e. not based on the relevant EU law, and it does not allow Switzerland, in return for such harmonisation, to participate fully in the EU single market in the given agreement's sector. The EU agreed to exclude the 1972 FTA from the institutional agreement, provided the 1972 FTA were mentioned in the institutional agreement's preamble and included in a **joint declaration** in **which Switzerland and the EU expressed their intention to start negotiations on its modernisation**. The declaration contains a non-exhaustive list of topics essentially based on latest-generation comprehensive free trade agreements. The list still

needs more specifics, to be added by the negotiating parties (sections 6 and 7 of the declaration). For the interim phase, from the date the institutional agreement took effect until a future modernised FTA entered into force, the declaration provides for the possibility of also using the institutional agreement 's dispute settlement mechanism for 1972 FTA matters, but only if both parties agree in the context of that specific dispute. The 1972 FTA's joint committee must formally decide to use the institutional agreement's dispute settlement mechanism in order for such use to become legally possible. A **draft decision to this effect** was added to the institutional agreement. The 1972 FTA's joint committee, which has little leeway to make substantive changes to this draft decision, would not take the decision until the institutional agreement came into effect.

Regarding **cohesion**, a joint declaration was added to the draft institutional agreement. This declaration states that Switzerland will pay its contributions autonomously and in consideration of its access to the EU internal market. This declaration does not create any legal obligation for Switzerland to make such contributions on a regular basis.

3 Assessment of the outcome of the negotiations

3.1 Initial stances of the negotiating parties

It has been the long-standing objective of Switzerland's European policy to secure the most extensive access possible to the EU single market and to cooperate in selected areas of interest, while retaining the greatest possible political autonomy. The **bilateral, tailor-made approach** has proven the most effective way to achieve this foreign policy objective. It is the approach which best safeguards Switzerland's interests in relation to the EU, its most important economic and political partner.

The EU, on the other hand, has insisted for some years that institutional mechanisms must accompany the bilateral agreements, specifically dynamic adoption of EU law and an effective dispute settlement mechanism. It has made the signing of an institutional agreement a **precondition for Switzerland's participation in the EU single market**, and specifically for the conclusion of any new market access agreements. It seeks to ensure a level playing field for anyone operating in the EU single market. The EU was therefore particularly interested in ensuring uniformity of the law relating to the free movement of persons, an area in which for many years the two parties have taken different stances regarding incorporation and interpretation (the key issues being the accompanying measures and the Citizens' Rights Directive).

It was against this backdrop that the Federal Council began negotiating an institutional agreement with the aim of consolidating the bilateral approach in order to **ensure access** to the EU single market and **expand access** by concluding new market access agreements.

3.2 2013 negotiating mandate

3.2.1 Institutional aspects

Switzerland was aware from the outset that in addition to the potential benefits, there would be some aspects of an institutional agreement that were problematic. It was aware in particular that such an agreement would **affect its sovereignty** in certain respects. In its negotiating mandate of 18 December 2013 (see 2.2.2 above), the Federal Council acknowledged, regarding **institutional matters**, that the principle of dynamic adoption of legislation and the competence of the CJEU with regard to the interpretation of EU law were essential conditions for the EU, and must therefore be included in an institutional agreement governing Switzerland's participation in the EU single market. In return, Switzerland asked for adequate involvement in the development of the relevant EU legislation. Any compensatory measures in response to a failure to adopt a new provision must be proportionate, and may include the partial or total suspension of the agreement(s) concerned. Monitoring of the proper implementation of the agreements must fall to the Swiss authorities. Furthermore, the institutional agreement must only apply to the existing market access agreements, excluding the 1972 FTA.

3.2.2 Points of material interest

In addition, the negotiating mandate (see 2.2.2 above) also covered a number of **points of key interest** for Switzerland in **material areas** such as overland transport and especially the

free movement of persons. To safeguard these interests, the December 2013 negotiating mandate listed several exemptions (material reservations relating to the dynamic adoption of EU law and CJEU case law). These 'red lines' included safeguards that all of the **accompanying measures** would be maintained and that the **Citizens' Rights Directive would not be incorporated** into the AFMP – two areas in which conversely the EU hoped to resolve differences with Switzerland through the institutional agreement (see above). It was therefore inevitable from the outset that there would be conflicting interests between Switzerland and the EU on the free movement of persons.

3.3 Assessment of the draft agreement of 23 November 2018

In its assessment of the draft agreement of 23 November 2018, the Federal Council reported some progress on the points of its 2013 negotiating mandate (including the clarifications made on 2 March 2018, i.e. a detailed list of accompanying measures which must be safeguarded and a supplement relating to state aid, see 2.2.3.3 above).

The **scope of application** of the institutional agreement was limited – as requested by Switzerland – to the five existing market access agreements and to future market access agreements. In particular, the institutional agreement would not apply to the 1972 FTA or the Agreement on Government Procurement. The parties did, however, state their intention to enter into negotiations on the modernisation of these two agreements within the framework of the institutional agreement.

With regard to the impact of the **institutional mechanisms** on Swiss sovereignty, it had also been possible to obtain adjustments in the direction desired by Switzerland. By excluding the automatic **incorporation of developments in EU law**, it was possible to safeguard the autonomy of the Swiss legislative process; Switzerland was to be accorded sufficient time to decide independently through its own ordinary approval procedures (which include the possibility of a referendum) whether to incorporate individual developments in EU law. In the event that Switzerland did not incorporate a given provision into its legislation, the EU would have the option of taking proportionate compensatory measures. Switzerland was also granted the right to participate in the development of relevant EU legal instruments (decision-shaping).

The **authority to monitor** the correct application and interpretation in Switzerland of the market access agreements under the institutional agreement would remain in the hands of the Swiss authorities and courts. They would, however, have to take into account relevant CJEU rulings with regard to EU law.

As is customary in international law, an arbitration panel would be set up for the **settlement of disputes**, with an equal number of arbitrators appointed by Switzerland and the EU. Switzerland must accept the competence of the CJEU regarding the interpretation of the EU law contained in the agreements. If a contracting party failed to comply with a decision by the panel, the other party would be permitted to take – proportionate – compensatory measures, which the arbitration panel would have the power to review.

Regarding the material provisions in the areas of key concern for Switzerland, it was possible to exempt from the dynamic adoption of EU legislation certain exceptions in favour of Switzerland already contained in the market access agreements. For example, the institutional agreement explicitly confirms and guarantees the continued prohibition of night and Sunday driving and the 40-tonne limit for lorries in the area of overland transport, international road

transport of live animals in the area of agriculture, and the export of certain services for the coordination of social security in the area of the free movement of persons.

The material provisions of the institutional agreement regarding **state aid** would be limited to the definition of a legal regime, which would have to be adopted and possibly expanded as part of future market access agreements in order to be applicable. Of the existing market access agreements, the provisions of the institutional agreement on state aid apply only to the Agreement on Air Transport, which already contains provisions that are almost identical to those of the institutional agreement. With regard to monitoring, the two-pillar model requested by Switzerland would be applied. State aid would be supervised in Switzerland by a Swiss authority and not by the European Commission.

Not compatible with the Swiss mandate were the provisions on the **free movement of persons**. Specifically, the agreement did not explicitly exclude the adoption of the Citizens' Rights Directive or provide legal safeguards that the accompanying measures would be maintained. With regard to the latter, the EU recognised the need for additional measures beyond EU law on the posting of workers in order to guarantee adequate wage protection given the specificities of the Swiss labour market. It therefore proposed in Protocol 1 to include provisions to at least partially safeguard three key specific accompanying measures (prior notice, financial guarantee and documentation obligations for self-employed persons). This did not, however, meet Switzerland's demands to safeguard the current measures. The Citizens' Rights Directive is not mentioned at all in the draft agreement, meaning that the question of its adoption ultimately remains unresolved and thus controversial.

Finally, the **denunciation clause** also remained problematic. It links the termination of the institutional agreement with the abrogation of the agreements falling within its scope. These would cease to apply if the institutional agreement were terminated, thus posing a considerable risk to the Bilaterals I package of agreements, and indirectly to Schengen/Dublin. This is the case even though termination of the institutional agreement would not immediately terminate the existing market access agreements to which it applies. This would only happen if during the three-month consultation no alternative solution were found. In practice, this clause greatly reduces the scope for both terminating and amending the institutional agreement.

In its assessment of 7 December 2018, the Federal Council considered the outcome of the negotiations to be largely compatible with Switzerland's interests. However, in **important areas of interest**, it was not possible to incorporate all of the key elements of the negotiating mandate into the agreement, in particular those regarding the accompanying measures and the Citizens' Rights Directive. For this reason, the Federal Council opted not to accept the draft agreement as the joint result of the negotiations and not to initial it.

3.4 Assessment of the outcome of the subsequent negotiations in spring 2021 on the three outstanding points

Extensive consultations in Switzerland with major political and economic stakeholders confirmed the urgent need for clarification regarding the issues of wage protection and the Citizens' Rights Directive, and regarding state aid. In order to ensure the widest possible backing for Switzerland's position on these three matters, the Federal Council involved the cantons and the social partners in the development of the proposed solutions. On 11 November 2020, it set out its position as follows:

- Instead of excluding the incorporation of the Citizens' Rights Directive in its entirety, Switzerland required the **exclusion of only seven provisions of the Directive**.

- Instead of requiring legal safeguards with regard to all of the existing accompanying measures, Switzerland only demanded legal certainty with regard to the **maintenance of their protective effect**, through the definition of clear rules.
- Regarding the state aid provisions, it would only be necessary to ensure that they did not have any **horizontal impact** on the areas covered by the institutional agreement, and in particular that they did not affect the 1972 FTA.

The **subsequent negotiations** with the EU since January 2021 on the clarifications requested by Switzerland have led to a better mutual understanding and to convergence on some issues. Primarily, however, they underscored **fundamentally different stances** – already present at the beginning of the negotiations – between the two parties on the free movement of persons.

- With regard to the Citizens' Rights Directive, Switzerland and the EU hold fundamentally different stances on the scope of the **free movement of persons** as set out in the AFMP. For Switzerland, this is limited to the free movement of workers and their family members; persons not in gainful employment only enjoy this freedom if they have sufficient financial means. Any incorporation of the Citizens' Rights Directive into the AFMP must therefore be limited to aspects relating to the free movement of workers and their family members. However, for the EU, the adoption of the Citizens' Rights Directive extended free movement and linked this to the concept of EU citizenship. Hence the EU was not prepared to agree to the Swiss solution and to grant the necessary exceptions regarding the incorporation of the Citizens' Rights Directive into the FMPA.
- With regard to *wage and employee protection*, both Switzerland and the EU apply the principle of '***equal pay for equal work***', which is why the current rules on posted workers in the various EU member states and Switzerland are on the whole comparable. Differences exist mainly with regard to certain instruments and to enforcement (e.g. the prior notice period, the rules on the provision of a financial guarantee and the obligation to assume certain expenses). These different stances stem firstly from the fact that enforcement is organised differently in Switzerland. Switzerland has a long tradition of dual enforcement, which dates back to well before the introduction of the AFMP. In the EU, the social partners may also be involved, but the enforcement system is still largely organised by the state. Secondly, the Swiss context in some cases requires instruments that are not provided for under EU law. In Switzerland, the freedom to provide services for 90 days encourages the use of multiple short-term contracts, and the large wage differentials that remain with the EU pose a particular risk for Switzerland. Protocol 1 already safeguards some of these instruments, but to a lesser extent than the current accompanying measures. The EU did make specific counterproposals in response to some of Switzerland's concerns. However, it has so far been unwilling to accept Switzerland's main objective, which was to better safeguard the current wage protections independently of developments in EU law and CJEU rulings, which may have a negative impact. Without the requested improvements, the agreement would **not entirely safeguard the protective effect** of the current accompanying measures.
- Regarding the state aid provisions in the institutional agreement, the EU was prepared to agree to Switzerland's request for clarification, but only on condition that the other two points be settled first. As described above, this condition **was not met**.

The **high-level meeting** between the President of the Swiss Confederation and the President of the European Commission on 23 April in Brussels reconfirmed these differences and did not lead to any concessions. Switzerland reiterated its proposed solution and made clear that without substantial concessions from the EU on the three unresolved issues, the conditions for continuing negotiations and signing the institutional agreement would not be met. Following

the presidential-level meeting, there was no indication even between negotiators that the EU would make sufficient concessions to allow Switzerland to conclude the agreement.

3.5 Consequences of not signing the agreement

The next steps with regard to the institutional agreement had to be decided on the basis of a **weighing of interests**. The previously discussed consequences and risks of concluding an agreement based on the current draft had to be weighed against the disadvantages of not reaching an agreement. It was difficult to state or quantify the potential consequences of signing or not signing the agreement because they depend on a number of variables.

It is virtually impossible to predict in advance the actual economic consequences for Switzerland were the EU to **gradually restrict market access** following the decision not to conclude the institutional agreement. These consequences will depend in particular on specific measures taken by the EU to **exert pressure** on Switzerland and on the effectiveness of measures taken by Switzerland in response to limit the damage (see below). In addition, Switzerland will seek to come to an understanding with the EU on future cooperation to prevent or mitigate any negative dynamic.

The following consequences are already apparent or foreseeable:

- Without an institutional agreement, the EU has already established that it will **not conclude any new market access agreements** with Switzerland. Consequently, Switzerland and the EU have not concluded any new market access agreements since 2008. The planned agreements on energy, **food safety and trade in timber** are currently blocked. The following figures illustrate the cost for the **energy sector** alone. The energy sector estimates a loss of trade opportunities in the order of hundreds of millions of Swiss francs, while an EPFL study from December 2019 suggests a long-term trade deficit (to 2030) of up to an additional billion francs per year. Mitigation measures to stabilise the Swiss electric grid will also generate additional costs of several million francs, as Switzerland will be excluded from the EU energy trading platforms. These additional costs will ultimately be passed on to the end consumer in Switzerland. The stability of the grid depends on the willingness of the EU and its member states to cooperate with Switzerland, which could impact Switzerland's energy supply in the medium term.
- In December 2018, the European Commission also announced that it was no longer prepared to update **existing market access agreements** unless it had an overriding interest in doing so. Specifically, this blocks the updating of the MRA chapter on **medicinal products.** The medtec sector forecasts initial additional costs of CHF 115 million, plus CHF 70 million per year to meet the EU's requirements vis-à-vis third countries. This would result in competitive disadvantages and a reduction in the attractiveness of Switzerland as a business location that are difficult to quantify. It also blocks the updating of several annexes of the agricultural agreement, in particular with regard to the Veterinary Annex, which could lead to technical barriers to trade in the medium term (e.g. reintroduction of veterinary certification and border controls). The bilateral agreements on overland transport and air transport will however continue to be updated for the time being, with a few important exceptions (Swiss participation in the ERA, cabotage in air transport). Work is also ongoing to update Annex III of the AFMP (mutual recognition of professional qualifications).
- Finally, the EU has **connected the institutional agreement with other dossiers for purely political reasons**. This affects negotiations in the fields of public **health**, **stock exchange equivalence** and Swiss participation in the EU framework programmes for **research**, education and culture. Moreover, the implementation of Switzerland's second

contribution has recently become an additional condition for Swiss participation in the Framework Programme for Research and Innovation.

The immediate impact of not signing the institutional agreement is **uncertainty** about the conditions for Switzerland's continued participation in the EU single market and cooperation between Switzerland and the EU in important sectors. If Switzerland cannot conclude any new market access agreements, it will no longer be able to develop its single market access, which will deteriorate as existing agreements become outdated. In the worst case, Switzerland would revert to trading with the EU on free trade terms in the medium to long term. As EU legislation on the single market evolves, it is likely that Swiss stakeholders in the single market will be **less able to compete** in the single market and will lose some of their competitive advantage both over competitors in the EU and also third countries with which the EU concludes new agreements. Legal uncertainty in Switzerland's relations with its most important economic partner could **make Switzerland a less attractive business location** and **slow investment** in Switzerland.

To prepare for all such eventualities, the Federal Council began some time ago to plan and, where necessary and feasible, to implement **measures to mitigate the negative consequences** of not signing the institutional agreement.

- For example, in June 2019, it activated the measure to protect the Swiss stock exchange infrastructure in reaction to the EU's decision to revoke Switzerland's **stock exchange equivalence**. This measure currently allows EU traders to continue to trade Swiss shares on Swiss stock exchanges.
- To prepare for the event that the chapter of the MRA dedicated to **medicinal products** were not updated, the Federal Council decided to make amendments to Swiss legislation in the short and medium term in order to safeguard supply chains and market surveillance in Switzerland.
- In the **energy** sector, a number of measures have been taken to ensure the stability of the grid. These include (private sector) technical agreements between Swissgrid and European grid operators.
- Regarding **Horizon Europe**, solutions for several scenarios are in the pipeline. An already adopted dispatch allocating the funding for Switzerland's participation allows for flexibility in the event of full, partial or project-related association with third country status.
- For **Erasmus**, a Swiss solution guarantees European mobility in all fields of education, regardless of Switzerland’s association in the programme.

It is, however, clear that even where feasible, such unilateral measures would **at best only partially mitigate** the negative consequences of a failure to update existing agreements or conclude new agreements with the EU. One exception to this has been the measure to protect the stock exchange infrastructure, which in fact increased the revenues of Swiss stock exchanges. This configuration would however be difficult to replicate.

By their nature, such unilateral measures would only be able to compensate for the reduced market access resulting from the EU's position to a very limited extent. It is therefore clearly essential for Switzerland to continue to **cultivate and strengthen its partnership and dialogue with the EU**. This is also in the EU's longer-term interest as the reduced effectiveness of the market access agreements would also have negative consequences for the EU.

3.6 Results of the consultations with national stakeholders

Following the high-level meeting in Brussels on 23 April, on 26 April 2021 the Federal Council consulted the foreign affairs committees of both chambers with regard to its assessment that without substantial concessions from the EU on the three unresolved matters, Switzerland's conditions for continuing negotiations or signing the institutional agreement would not be met. It also conducted a consultation procedure with the cantons.

In their position statement of 10 May, the **cantonal governments** agreed with the Federal Council's assessment that Switzerland had already taken important steps towards the EU in several critical areas, and that the two parties still maintain very different positions. Like the Federal Council, they believed that clarifications on the three points that Switzerland considers unresolved are indispensable for Switzerland to sign the institutional agreement. At the same time, the cantons emphasised that the Federal Council should do everything in its power to ensure a stable environment for bilateral relations with the EU and that it should exhaust all political options in this regard. The cantons remain convinced that both sides have an interest in finding pragmatic solutions on the unresolved issues. If on the basis of new developments or changes in the EU's position it became possible to sign the agreement, the Federal Council would have the full support of the cantonal governments.

In its position statement, the **Council of States Foreign Affairs Committee** did not comment on the Federal Council's assessment, as under Switzerland's constitution, the decision to break off, suspend or continue negotiations is the prerogative of the Federal Council. The majority of the **National Council Foreign Affairs Committee** requested in its statement that the Federal Council pursue the negotiations as intensely as possible at both technical and political level, that it seek the best possible result for Switzerland in order to conclude the negotiations quickly and adopt the dispatch to Parliament.

3.7 Summary and conclusions

The negotiations on an institutional agreement must be viewed in the broader context of Switzerland–EU relations. The EU has concluded more agreements with Switzerland than with any other third country. Switzerland is among the EU's four biggest economic partners in terms of trade in goods, services and investment. Daily Swiss–EU trade in goods amounts to about CHF 1 billion. Switzerland contributes significantly to the free movement of persons in Europe – 7.2% of all EU–28/EFTA citizens who do not live in their country of origin reside in Switzerland. There are 1.4 million EU/EFTA citizens living in Switzerland. In addition, about 340,000 people commute to Switzerland from the EU, and well over 200,000 persons from the EU/EFTA area are subject to registration each year. The broad partnership based on over 100 agreements covers not only the economy and the labour market, but also other relevant policy areas such as research and education, security, justice and asylum, and the environment, and extends to the joint international commitment to human rights, democracy and peace. This cooperation is working well and will be pursued irrespective of any institutional agreement.

Switzerland's fundamental interest in its relationship with the EU was and is to secure its participation in the EU's single market and to be able to expand this participation in the future. Switzerland already made **concessions** when initiating negotiations on the **institutional mechanisms** demanded by the EU. These concessions included Switzerland accepting in principle the dynamic adoption of EU law and the jurisdiction of the CJEU to interpret EU law as integral to the institutional framework.

This step represented a paradigm shift in the relationship between Switzerland and the EU, and given its **impact on Swiss sovereignty**, it was controversial in Switzerland from the

outset. This issue was exacerbated by the institutional agreement's termination clause, which in linking the institutional agreement's termination to that of the existing market access agreements would drive up the price of leaving the institutional agreement and make it de facto impossible to terminate.

Even before the negotiations started, certain areas of the free movement of persons were problematic, in particular **wage protection** and the **Citizens' Rights Directive**. This is why the 2013 mandate laid down as **red lines** that the institutional agreement must include safeguards for the existing accompanying measures and explicitly rule out incorporating the Citizens' Rights Directive into the AFMP. It was these two points in particular that prompted the Federal Council to refrain from initialling the draft. They were not (or not sufficiently in the case of wage protection), provided for in the November 2018 draft of the institutional agreement. And unsurprisingly, precisely these two points – along with state aid – were the ones reaffirmed as **key Swiss interests** during the broad domestic consultations of the first half of 2019.

After involving the cantons and social partners, the Federal Council, on 11 November 2020, specified in detail its **proposals for solving** the three remaining unsettled points of the institutional agreement. Here, Switzerland did not call for exemption from having to adopt any of the Citizens' Rights Directive at all nor from the posted workers system, but rather presented a series of specific demands for exceptions regarding essential matters. These demands enjoyed broad political support domestically and were primordial for attempts to build a majority in favour of an agreement. This was why the Federal Council decided to consider these demands as the absolute bottom line. Without the improvements demanded, the agreement would not entirely safeguard the protective effect of the current accompanying measures. And without explicit assurances regarding exceptions to the possible incorporation of the Citizens' Rights Directive into the AFMP, there would be a risk of a real paradigm shift in immigration policy. The Federal Council did not want to take these risks.

In the renegotiations, despite extensive efforts on both sides, hardly any rapprochement was possible. The gulf between the parties remained largely unbridged.

Regarding exceptions to the Citizens' Rights Directive, the EU was **not willing to meet Switzerland's demands**. Specifically, Switzerland wanted to keep areas such as the following from being incorporated into the AFMP:

- the right of permanent residence,
- the more restrictive conditions for expulsions from the country ('ordre public' exception) and
- the extension of the right of residence and the entitlements to social assistance for persons not in gainful employment and for persons whose employment relationship has been involuntarily terminated.

These explicit exceptions were indispensable for Switzerland. Under Switzerland's tried and tested dual permit regime, even within the framework of the free movement of persons, foreign nationals are allowed to move to Switzerland only for the purpose of gainful employment or to accompany a family member taking up gainful employment. Even under the Agreement on the Free Movement of Persons between Switzerland and the EU, persons not in gainful employment are only eligible for a residence permit if they have sufficient financial resources. In contrast, the Citizens' Rights Directive grants a right of residence to immigrants in a range of differing circumstances, even if they do not have sufficient financial resources. The exceptions Switzerland requested regarding the Citizens' Rights Directive were aimed at continuing to safeguard these tried and tested principles of immigration policy, which would no longer be guaranteed if the Citizens' Rights Directive were adopted in full. Incorporating the

Citizens' Rights Directive in its entirety would effectively have constituted a **paradigm shift** with regard to Switzerland's immigration policy – a policy that enjoys broad support among the Swiss population and cantons. It would also run contrary to the policy that the Federal Council has advocated to the people and cantons in all votes to date on the free movement of persons. The Federal Council would like to maintain this immigration policy, including as regards the free movement of persons. The policy is associated with above-average employment rates, low social assistance rates and overall successful integration of the foreign nationals who immigrate. In contrast, veering away from such a policy would also have an impact on the cantons' **social assistance costs**. These costs would primarily arise due to the provision of assistance to persons whose employment relationship has been terminated involuntarily and who can no longer find employment. Under the current system, they have to leave Switzerland after a certain period of time. Were the Citizens' Rights Directive to be incorporated into the AFMP, they could in principle remain in Switzerland indefinitely and also receive social assistance in the country as long as they continue to make efforts to integrate into the labour market. The **more restrictive conditions for expulsions from the country** provided for in the Citizens' Rights Directive is also problematic, as it would clash with provisions in Article 121 paragraphs 3–6 of the Federal Constitution – provisions added to the Federal Constitution because of the adoption of the expulsion initiative.

In order to ensure that the **protective effect of the accompanying measures** would not be diminished by any developments in EU law or in CJEU case law, Switzerland had requested, among other things, the following specific improvements:

- Making the 'equal pay for equal work' principle – as safeguarded in Switzerland – immune to any changes in EU law and CJEU case law that could weaken the wage protection currently provided by the existing accompanying measures ('non-regression clause')
- Guaranteeing the current Swiss rules on expenses of posted workers
- Establishing a prior notice period of four working days for all sectors (not only for high-risk sectors)
- Having a general obligation – in all sectors, not only in high-risk ones – to pay a financial guarantee; and this not only upon repeat offences

As in other areas, the EU did not make any concessions to Switzerland regarding these points.

Instead, in the subsequent negotiations, the fundamental nature of the **substantive differences** became increasingly apparent, particularly regarding interpretation of the free movement of persons within the framework of the AFMP and understanding for Switzerland's requests for exceptions regarding its accompanying measures. These material differences are further exacerbated by the **differing interests of** the two sides; having made concessions limiting Swiss sovereignty as regards the institutional mechanisms, Switzerland needed – as protection for its essential interests – to have limits put on the dynamic adoption of EU law, at least in the sensitive area of the free movement of persons. Given the above, the Federal Council had little room for manoeuvre on the three points still to be clarified. For the EU, the institutional agreement’s real added value lies precisely in the dynamic adoption of EU rules on the free movement of persons, and accordingly the EU had little understanding for Switzerland's demands for exceptions.

In view of these substantial differences in terms of content and policy goals, **no solution to** the unresolved points in the direction demanded by Switzerland can be expected in the **foreseeable** future. It is not surprising that of all areas, the Citizens’ Rights Directive and the accompanying measures are the ones in which there are unresolvable sticking points; it was precisely these two issues that led to the EU's demands for an institutional agreement in the first place. The Federal Council had repeatedly emphasised that it would not sign the

institutional agreement if no satisfactory solutions could be found to the aforementioned requests for clarification. The **overall outcome of the negotiations needed to be balanced** in terms of Switzerland's interests in order for the agreement to enjoy enough domestic political support to win Parliament's and the people's approval. In the Federal Council's view, a referendum rejected by the people would be the worst possible outcome and would severely restrict the room for manoeuvre for Switzerland's Europe policy for years to come.

According to the Federal Constitution, the decision to conclude or sign an international treaty – or not – is the prerogative and responsibility of the Federal Council. For the reasons outlined above, the Federal Council deemed the prerequisites for concluding the institutional agreement to not be met. This assessment logically follows from the fact that the goals adopted on 11 November 2020 as obligatory minimum standards were clearly not achieved in the end. It took into account the results of the consultations with the foreign affairs committees and with the cantons and was the result of a **weighing of interests** that also factored in the disadvantages of not concluding the institutional agreement. It is, however, impossible to precisely determine or quantify in advance the consequences of not concluding the institutional agreement, nor those of the erosion of market access that the EU threatened to allow if it is not concluded; these consequences depend both on the EU's response and on any measures taken by Switzerland. That is why the Federal Council is working to ensure that the non-conclusion of the institutional agreement is accompanied not only by the continued planning of unilateral **mitigation measures** (to limit the damage), but also by a common understanding with the EU to avoid as much as possible any negative dynamic, to **stabilise** relations with the EU (preserving the progress already made) and to pursue the bilateral approach, which is in the interest of both Switzerland and the EU.