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COM(2023) 798 final

Recommendation for a

COUNCIL DECISION

authorising the opening of negotiations between the European Union and the Swiss Confederation on institutional solutions for EU-Switzerland agreements related to the internal market, on agreements that form the basis for Switzerland's permanent contribution to the Union's cohesion and for Switzerland's association to Union programmes

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Reasons

The EU and Switzerland are closely intertwined from an economic, historical, cultural, social and political perspective. The EU is Switzerland's largest trading partner, while Switzerland is the EU's fourth largest trading partner. Over 1.3 million EU citizens live in Switzerland and just under 450,000 Swiss nationals live in the EU. Every day a few hundred thousand frontier workers cross the EU-Swiss border in both directions.

The EU and Switzerland are tied together by multiple bilateral agreements. Through agreements on the free movement of persons, land transport, air transport, trade in agricultural products and mutual recognition in relation to conformity assessment, Switzerland takes part in the EU's internal market¹. Switzerland is also a Schengen associated country. It has traditionally been a strong partner in research and innovation. During the Covid-crisis cooperation between the EU and Switzerland on cross-border health threats increased. Finally, Switzerland is highly integrated in the EU's electricity grid.

While the EU-Switzerland relationship is close, it has also been hampered by several longstanding structural problems in the existing agreements related to the internal market, notably:

- the lack of a uniform interpretation and application of Union law in the fields of the internal market in which Switzerland takes part;
- the absence of a Swiss obligation to dynamic alignment to Union law;
- the absence of an effective dispute settlement mechanism, in which the Court of Justice of the European Union plays a role in respect of Union law;
- the absence of a level playing field between EU and Swiss companies, notably because State aid rules are not included in agreements related to the internal market;
- the absence of a regular and fair financial contribution to the EU's social and economic cohesion.

Context

Between 2014 and 2021, the EU and Switzerland conducted negotiations on an Institutional Framework Agreement intended to solve various structural problems that have been hampering EU-Switzerland relations. In line with the Council negotiating directives of 2014², an Institutional Framework Agreement would have provided for a single governance framework through which the existing agreements related to the internal market would be managed and their correct application ensured. The Institutional Framework Agreement would have also provided the governance framework for additional agreements related to the internal market, including agreements for which negotiations had been authorised by the

¹ Agreement on Air Transport, Agreement on the Carriage of Goods and Passengers by Rail and Road, Agreement on the Free Movement of Persons, Agreement on Mutual Recognition in Relation to Conformity Assessment, Agreement on Trade in Agricultural Products, all signed on 21 June 1999.

² Council Decision 6176/14 authorising the opening of negotiations on an agreement between the European Union and the Swiss Confederation on an institutional framework governing bilateral relations.

Council, notably on food safety (2003 and 2008) and electricity (2006). In addition, it would have provided the governance framework for the agreement on health, for which negotiations had been authorised by the Council in 2008.

Negotiators reached an agreement on a draft Institutional Framework Agreement text at technical level in November 2018. In reaction to the Federal Council's refusal to endorse the draft text, negotiations on the other agreements came to a halt as both the Council, in its conclusions of 19 February 2019, and the European Parliament, in its recommendation of 26 March 2019, made the conclusion of new market access agreements or improved conditions under existing agreements conditional on the conclusion of the Institutional Framework Agreement. On 26 May 2021, despite further attempts to find solutions, the Swiss Federal Council decided to unilaterally terminate the negotiations on the Institutional Framework Agreement.

On 25 February 2022, the Federal Council proposed to restart negotiations on a broad package of measures relating to the bilateral EU-Switzerland relationship, whereby institutional issues would be solved within the existing and future agreements related to the internal market, rather than in a horizontal agreement. Between March 2022 and November 2023, representatives of the Commission conducted exploratory talks with Switzerland to determine whether the Commission could accept the Federal Council's proposals as a basis for recommending the relaunch of negotiations.

These talks led to a common understanding that records both sides' political understanding on the way forward for a future negotiation and identifies the components and parameters of a broad negotiating package, as well as landing zones and solutions on key institutional and sectoral points. This common understanding was endorsed by the Swiss Federal Council on 8 November 2023 and by the European Commission on 21 November 2023. Both sides committed to use the common understanding as a basis for the respective negotiating mandates they would be seeking and agreed on the joint ambition of concluding the negotiations in the course of 2024.

The Swiss Federal Council has now consulted the Swiss Parliament and cantons on a new negotiating mandate.

Throughout the exploratory talks, Member States (EFTA Working Party³) and the European Parliament (AFET Committee and DEEA Delegation⁴) were regularly debriefed. In its Resolution of 4 October 2023, the European Parliament called for the prompt finalisation of the talks, the quick adoption of negotiating mandates and the conclusion of negotiations during the terms of the present Commission and European Parliament.

Objectives

Through negotiations on a broad package of measures related to the bilateral relationship with Switzerland, the EU aims to establish equivalent rights for citizens and a level playing field for businesses. To do so, it is necessary to address the longstanding structural issues and establish a new balance of rights and obligations for the EU and Switzerland across the interconnected market access agreements, while establishing legal certainty and a uniformity of approach in the fields of the internal market in which Switzerland participates, as well as expanding the tangible benefits for EU and Swiss nationals and companies. As a result, the

³ Working Party on European Free Trade Association

⁴ Committee on Foreign Affairs (AFET Committee) and Delegation for Northern cooperation and for relations with Switzerland and Norway and to the EU-Iceland Joint Parliamentary Committee and the European Economic Area (EEA) Joint Parliamentary Committee (DEEA Delegation).

existing and future agreements related to the internal market should be based on the principle of non-discrimination between citizens and a level playing field between companies.

These agreements should include institutional provisions that reflect the following essential principles and elements:

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

The above-mentioned institutional provisions should be included in future agreements on electricity and food safety on which negotiations had been suspended in 2018 pending conclusion of negotiations on the institutional framework agreement, as well as in any future agreement related to the internal market. In addition, these provisions should apply by analogy in a future agreement on health that would provide for Switzerland's participation in EU mechanisms and networks. The agreement on electricity should aim to foster trade in electricity, increase social welfare, ensure grid stability and security of supply and facilitate the transition to a net zero energy system. The future agreement on food safety should aim to contribute to the establishment of an EU-Switzerland food safety area. The agreement on health should aim to foster collaboration for the benefit of the health of the EU and Swiss populations.

The introduction of institutional provisions in the Agreement on the Free Movement of Persons should lead to a significant improvement of EU citizens' rights in Switzerland and of Swiss nationals in the EU, notably through the incorporation in that agreement of Directive 2004/38/EC on the right of EU citizens and their families to move and reside freely within the EU⁵ and the introduction of a dispute settlement mechanism. Non-discrimination between Member States and reciprocity should be at the heart of the agreement. Conditions for EU citizens and Swiss nationals to acquire permanent residence should be improved. The amendments to the Agreement on the Free Movement of Persons should also better frame the existing Swiss flanking measures to Directive 96/71/EC concerning the posting of workers⁶ and the subsequent developments of the Union *acquis* in that area. Specific limited exceptions may need to be agreed.

The introduction of the institutional provisions in the Agreement on the Carriage of Goods and Passengers by Rail and Road should not alter the scope of the Agreement which includes international passenger transport, with the exception of Swiss purely domestic transport (i.e. national long-distance, regional and local transport). Specific limited exceptions may need to be agreed.

The EU also aims to establish a permanent, legally binding mechanism for Switzerland's regular, mutually agreed and fair financial contribution to the EU's cohesion, as part of the new balance of right and obligations. In addition, the principle should be established that Switzerland should contribute to the costs of development, operation and maintenance of any EU information system to which it has access.

In the negotiations, the EU aims to establish appropriate arrangements for Switzerland's association to Union programmes, notably Horizon Europe, Euratom Research and Training, the activities of the European Joint Undertaking for ITER and the Development of Fusion Energy, Digital Europe, Erasmus+, as well as the Copernicus component of the EU's space programme and activities, or parts thereof.

- **Consistency with existing policy provisions in the policy area**

While the institutional provisions would not alter the objectives of the various agreements, they would ensure a more consistent and uniform application of the Union *acquis* throughout the parts of the internal market in which Switzerland participates or in policy areas in which Switzerland has committed to dynamic alignment. The principles of non-discrimination of EU citizens and a level playing between EU and Swiss companies would be put at the heart of the various agreements.

- **Consistency with other Union policies**

The negotiation on a broad package of measures relating to the bilateral EU-Switzerland relationship would contribute to the achievement of the Union's policy objectives in the following policy areas:

- justice, fundamental rights and employment;
- business and industry;

⁵ Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 018 21.1.1997, p. 1.

- health;
- transport;
- energy;
- food safety;
- trade;
- single market;
- competition.

In addition, the agreement associating Switzerland to Union programmes would contribute furthering the Union’s policy objectives in the following policy areas:

- education and training;
- research and innovation;
- digital economy and society;
- space.

The establishment of a legally binding framework for Switzerland’s financial contribution to the EU’s economic and social cohesion would contribute to the achievement of the Union’s policy objectives in this policy area in the long run, not in the least by providing legal certainty and predictability.

Finally, by ensuring that Switzerland makes an adequate contribution to the management and operation of the programmes and agencies in which it participates and the information systems to which it has access, the negotiations would ensure the protection of the Union’s financial interests.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The legal basis for the decision is provided by Article 218(3) and (4) of the Treaty on the Functioning of the European Union (TFEU) setting out the procedure for negotiating and concluding agreements between the Union and non-EU countries. Additionally, Article 101 of Treaty establishing the European Atomic Energy Community (Euratom agreement) should apply for those matters falling under the Euratom Treaty.

• Subsidiarity (for non-exclusive competence)

N/A (exclusive competence)

• Proportionality

The Decision is proportional to the objective of promoting the objective to establish legal certainty and a uniformity of approach in the fields of the internal market in which Switzerland participates, and of ensuring that anyone participating in the EU internal market must abide by the same rules and obligations.

• Choice of the instrument

The instrument is provided for under Article 218(3) and (4) TFEU.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

N/A

- **Stakeholder consultations**

N/A

- **Collection and use of expertise**

N/A

- **Impact assessment**

N/A

- **Regulatory fitness and simplification**

N/A

- **Fundamental rights**

N/A

4. BUDGETARY IMPLICATIONS

The EU foresees agreements that will have an impact on the EU budget.

This concerns the agreement associating Switzerland to Horizon Europe, Euratom Research and Training Programme, the activities of the European Joint Undertaking for ITER and the Development of Fusion Energy, Digital Europe and Erasmus+ programmes, as well as Switzerland's participation in the Copernicus component of the EU space programme. The proposed agreement will set out fair and balanced conditions concerning the financial contribution of Switzerland to Union programmes in which it would participate and include the general administrative costs for managing those programmes. The agreement will include a reciprocity clause, ensuring that legal entities established in the Union have, as far as possible, access to participate in Switzerland's equivalent research and innovation programmes, in accordance with the conditions laid down in the domestic legislation of Switzerland.

This also concerns the agreements establishing a mechanism for Switzerland's financial contribution to the cost of development, operation and maintenance of any Union information system to which Switzerland has access. Arrangements will also be made for Switzerland's contribution to the costs of Union agencies and bodies in which it would participate.

The exact budgetary implications will depend on the outcome of the negotiation.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The negotiation process is expected to start in 2024. During the exploratory talks, the European Commission and Switzerland expressed the joint ambition to finalise the negotiations in the course of 2024, after which the various agreements would need to be signed and concluded.

- **Detailed explanation of the specific provisions of the proposal**

The Commission recommends that:

- the Council adopts a Decision authorising the European Commission to open and conduct negotiations with Switzerland on a broad package of measures related to the bilateral relationship with the Swiss Confederation;
- the Council attaches negotiating directives to the Council Decision;
- the Council replaces and repeals Council Decision 6176/14 authorising the opening of negotiations on an agreement between the European Union and the Swiss Confederation on an institutional framework governing bilateral relations;
- the Council designates a special committee in consultation with which the negotiations must be conducted;
- the Council addresses the Decision to the negotiator.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 218(3) and (4) thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, in particular Article 101 thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) In February 2014, the Council noted that relations between the Union and Switzerland had developed towards a higher degree of integration. Switzerland had already been given access to a number of sectors linked to the internal market and negotiations were envisaged, which would widen Switzerland's participation in the internal market.
- (2) The Council therefore mandated the European Commission to negotiate an institutional framework agreement that would introduce institutional provisions in existing and future agreements between the EU and Switzerland related to the internal market.
- (3) In November 2018, the European Commission and Switzerland finalised the draft text of an institutional framework agreement, but negotiations continued on several issues including free movement of persons.
- (4) In May 2021, following further exchanges with the European Commission, Switzerland unilaterally terminated negotiations on an institutional framework agreement.
- (5) In February 2022, the Federal Council presented an alternative way forward, consisting of a broad package of measures relating to the bilateral EU-Switzerland relationship, including a new approach regarding the institutional elements. These institutional elements would be included in each bilateral agreement related to the internal market rather than in a horizontal agreement. In March 2022, the European Commission and Switzerland engaged in exploratory talks to determine whether both sides could restart negotiations on this basis.
- (6) In light of the outcome of the exploratory talks, and building on the 2014 mandate for an institutional framework agreement as well as earlier mandates for agreements on electricity, health, food safety and the participation of Switzerland in the European Union Agencies for the Space Programme and for Railways, the Commission proposed to reengage in negotiations on a broad package.

- (7) The broad package would include:
- institutional provisions to be included in existing and future agreements related to the internal market providing for dynamic alignment with the Union *acquis*, uniform interpretation and application, and dispute resolution,
 - State aid provisions to be included in existing and future agreements related to the internal market;
 - new agreements on electricity, health and an updated and extended agreement on food safety;
 - an agreement allowing for Switzerland’s participation in Union programmes;
 - an agreement allowing Switzerland to participate in the European Union Agency for the Space Programme;
 - an agreement ensuring Switzerland’s permanent financial contribution to the reduction of economic and social disparities in the European Union, and;
 - other elements such as Switzerland’s financial contribution for its access and use of information systems.
- (8) In order to ensure homogeneity and a level playing field for operators within the internal market, the agreements related to the internal market and the Union acts referred to in these agreements should be applied in accordance with the case-law of the Court of Justice of the European Union. This should cover all case-law, prior and subsequent to the conclusion of the negotiations.
- (9) Continued participation of Switzerland in the internal market and its possible widening presuppose that rules applicable to relations with Switzerland in the fields covered by the agreements are the same as those applying in the internal market and that their interpretation and application cannot differ.
- (10) Moreover, homogeneity requires that current and future Union law in the fields covered by those agreements is incorporated into the agreements as it is adopted, or as it develops or changes. An incorporation procedure, including a maximum time-limit for implementation, should be provided to this end.
- (11) An independent arbitral tribunal should be set up to settle disputes. The arbitral tribunal should refer a question to the Court of Justice of the European Union for a binding decision, where the application of provisions of the agreements involves concepts of Union law, including possible exceptions and safeguards.
- (12) The identical institutional provisions should be included in all existing and future EU-Switzerland agreements related to the internal market in order to facilitate the coordinated and coherent management of the agreements. These institutional provisions would be introduced notably in the following existing agreements: Agreement on the Free Movement of Persons⁷, Agreement on Air Transport⁸, Agreement on the Carriage of Goods and Passengers by Rail and Road⁹, Agreement on Mutual Recognition in Relation to Conformity Assessment¹⁰, Agreement on Trade in Agricultural Products¹¹, all signed on 21 June 1999. The institutional provisions

⁷ OJ L 114, 30.04.2002, p. 6.

⁸ OJ L 114, 30.04.2002, p. 73.

⁹ OJ L 114, 30.04.2002, p. 91.

¹⁰ OJ L 114, 30.04.2002, p. 132.

¹¹ OJ L 114, 30.04.2002, p. 369.

would also be included in the future agreements on electricity and on food safety. They should apply by analogy in the future agreement on health where that agreement provides for the participation of Switzerland in EU mechanisms and networks.

- (13) With the aim of ensuring a level playing field for competition on the internal market, State aid rules applicable to the EU Member States and Switzerland should be included in the existing Agreement on Air Transport and the Agreement on the Carriage of Goods and Passengers by Rail and Road, as well as in future agreements related to the internal market, including an agreement on electricity. Further, the review of any State aid in Switzerland should be based on substantive and procedural rules equivalent to the ones applied within the EU.
- (14) Without prejudice to the obligation to incorporate current and future Union law in the Agreement on the Free Movement of Persons and respecting the principles of non-discrimination between Member States and reciprocity, specific limited adaptations to existing Union *acquis* in the area of the free movement of persons may need to be agreed. Any adaptations should not result in a reduction of rights currently enjoyed by EU citizens under the Agreement on the Free Movement of Persons.
- (15) Without prejudice to the obligation to incorporate current and future Union law in the area of posting of workers in the Agreement on the Free Movement of Persons, specific limited adaptations may need to be agreed in order to take account of the specificities of the Swiss labour market and ensure the application of the Agreement. Without prejudice to the principles of non-discrimination, justification and proportionality, these adaptations should be limited to the prior notification of the cross-border provision of services in order to facilitate controls in specific sectors based on risk assessments, the deposit of a financial guarantee for service providers who failed to meet their prior financial obligations, and requirements on self-employed persons as regards the provision of clearly limited and specified documents. The Union may also agree that Switzerland should not be bound by future amendments to Union legal instruments in the area of posting of workers where their effect is to meaningfully weaken or reduce the level of protection of posted workers with regard to the terms and conditions of employment, notably remuneration and allowances.
- (16) Without prejudice to the obligation to incorporate current and future Union law in the fields covered by the Agreement on the Carriage of Goods and Passengers by Rail and Road, specific limited adaptations in this area could be agreed. These should not alter the scope of the Agreement, which includes international passenger transport, with the exception of Swiss purely domestic transport (i.e. national long-distance, regional and local transport).
- (17) With the objective to consolidate and deepen the long-standing and successful EU-Switzerland cooperation, notably in research and innovation, education, training, youth, sport and culture, as well as other areas of common interest, an agreement should enable Switzerland's more systematic participation in Union programmes in the future. This agreement would set the general terms and conditions of Switzerland's participation in any Union programme.
- (18) Specific terms and conditions of Switzerland's participation in the generation of Union programmes for the period 2021-2027, in particular the Research and Innovation programmes, the activities of the European Joint Undertaking for ITER and the Development of Fusion Energy, Digital Europe, Erasmus+, EU4Health and Copernicus should also be agreed.

- (19) In light of Switzerland's participation in the EU's internal market and in order to encourage the continuous and balanced strengthening of economic and social relations between them, the EU and Switzerland should establish a new legally binding mechanism to allow for a regular, mutually agreed and fair financial contribution by Switzerland towards reducing economic and social disparities between their regions. This new legally binding mechanism should be ready for the next EU multiannual financial framework.

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, a broad package of measures related to bilateral relations with the Swiss Confederation.

Article 2

The negotiating directives are set out in the Annex.

Article 3

This Decision replaces and repeals Council Decision 6176/14 authorising the opening of negotiations on an agreement between the European Union and the Swiss Confederation on an institutional framework governing bilateral relations.

Article 4

The negotiations shall be conducted in consultations with [name of the special committee], acting as special committee in accordance with Article 218(4) TFEU, and on the basis of the directives contained in the annex.

Article 5

The Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*