



Institutional elements

What is it about?

Switzerland participates in the EU single market in specific sectors. Five agreements currently govern this participation: free movement of persons, overland transport, air transport, agriculture and mutual recognition in relation to conformity assessment (MRA). Two new agreements will be added as part of the further development of the bilateral approach: electricity and food security. These single market agreements guarantee extensive reciprocal market access and prevent discrimination against Swiss companies in the EU single market and vice versa.

The institutional elements ensure that the same rules apply to all stakeholders in the shared single market. These include dynamic adoption of EU law developments, homogeneous interpretation of the agreements, supervision of the agreements and dispute settlement in case Switzerland and the EU are unable to agree. The institutional elements guarantee that the single market agreements are regularly updated and continue to function properly.

Outcome of exploratory talks and outlook for negotiations

There will no longer be a 'framework agreement' covering all of the single market agreements as had been envisaged in the last round of talks. The institutional elements are now to be regulated individually within each single market agreement. This will enable the provisions to be better tailored to each agreement.

Interpretation and supervision of the single market agreements will take the form of a 'two-pillar' model: Switzerland and the EU will each undertake the relevant tasks independently on their own territory. Swiss law will continue to be interpreted by Swiss courts, while EU law and EU legal concepts will continue to be interpreted by EU courts, usually the CJEU (Court of Justice of the European Union).

The adoption of any developments in EU law affecting the single market will continue to be subject to constitutional procedure, in particular the option of a referendum. Switzerland will be obligated to dynamically adopt developments in EU law only in the sectors covered by the single market agreements. 'Dynamic' does not mean 'automatic': Switzerland will take an independent decision with regard to each development and adopt the legislation and regulations in its own way – including by referendum if necessary. Switzerland will thus retain control over the process and can also refuse to adopt EU law in specific cases. If it did so, in exceptional circumstances Switzerland would have to accept the imposition of (proportionate) compensatory measures. These are intended to ensure that all companies in the EU single market continue to operate on a level playing field. In addition, Switzerland will have a say. It will have the right to be involved in the drafting of EU legislation that directly affects Switzerland (the right to shape decisions). Moreover, with regard to adoption, there will be exemptions that must not be influenced by changes in EU law.

The joint political committee for the relevant agreement will also remain the first instance for dispute settlement. The matter would only be decided by a new arbitration panel with members appointed by Switzerland and the EU if no agreement was reached.

This arbitration panel would have the final say in the settlement of all disputes that could not be resolved through political discussions. The panel would play close attention to EU interpretations with regard to the rules of the EU single market. It would refer matters to the CJEU under two conditions. Firstly, the dispute would have to pertain to questions of EU law. Secondly, the interpretation of this law would have to be relevant to and necessary for the arbitration panel's decision in the matter. The arbitration panel would decide the outcome. The CJEU would not make the ruling.

If one party did not think the other was complying with the decision by the arbitration panel, it would be permitted to impose compensatory measures. The aim of any such measures would be to restore balance in the agreements. The measures must therefore be proportionate and their scope limited to the shared single market. The arbitration panel would also be able to decide if the compensatory measures met these criteria.

The aim of the negotiations will be to concretise and anchor these solutions in the relevant agreements.

Difference between this solution and the institutional agreement

The solutions outlined in the exploratory talks include the following improvements:

- The institutional elements will be anchored separately sector by sector in each single market agreement and will therefore be more tailored.
- The competence of the Federal Supreme Court and the Swiss courts with regard to the interpretation of Swiss law will be expressly recognised.
- The arbitration panel will have exclusive jurisdiction to resolve disputes relating to exemptions that do not involve EU legal concepts. It will be expressly agreed that the CJEU will have no role to play in such cases. The arbitration panel will have the final say in the settlement of all disputes.
- The suspension of a specific agreement will not be explicitly mentioned as a possible compensatory measure in the event of an unresolved dispute.