



## Institutional elements

### What are the 'institutional elements'?

Switzerland participates in the EU single market in certain areas. This is currently regulated in five agreements on the free movement of persons, land transport, air transport, agriculture and mutual recognition (MRA). Two further agreements – on electricity and food safety – are to be added as part of the further development of the bilateral approach. 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 participants in the single market. The institutional elements include the dynamic adoption of legislation, a standardised interpretation of the agreements, their supervision and the settlement of disputes in the event of disagreements between Switzerland and the EU. The institutional elements guarantee that the single market agreements are regularly updated and function well.

### Negotiation result

A framework agreement covering all single market agreements, as was envisaged in the last negotiations, was not part of the negotiations on the package. The institutional elements are now regulated individually in each single market agreement. This allows the specificities of the individual agreements to be taken into account more precisely.

The dynamic adoption of legislation only applies in the area of single market agreements and is limited to their scope of application. This cannot be changed unilaterally by the EU. "Dynamic" also does not mean automatic: this means that Switzerland decides independently and in accordance with its usual procedures – including its direct democratic decision-making processes such as referendums – on any adoption of legislation and any necessary adjustments to national law in this context.

Switzerland therefore retains control, and can refuse to adopt a new EU legal instrument. However, if it does so, the EU may take proportionate compensatory measures in the agreement concerned or in another single market agreement. The compensatory measures are intended to offset the imbalance that has arisen between the parties as a result of the non-adoption.

In addition, Switzerland will have a say in the drafting of EU legislation that it must adopt as part of the single market agreements (decision shaping). Lastly, exceptions have been defined in key areas that are exempt from the obligation to adopt legislation.

Uniform interpretation and application as well as surveillance of the single market agreements will be carried out under what is known as the two-pillar model: this means that Switzerland and the EU fulfil the corresponding tasks independently within their respective territories. The Federal Supreme Court and the Swiss courts retain jurisdiction over disputes between a person or company and another person, another company or the state with regard to the agreements. The envisaged dispute settlement mechanism (see below) only applies to disputes between Switzerland and the EU.

The settlement of disputes will continue to take place first in the joint committees of the agreement concerned. Only if no agreement can be reached there can either side submit the dispute to an arbitration panel with equal representation for decision.

If the dispute raises questions regarding the interpretation of EU law and the interpretation of this law is relevant and necessary for the assessment of the dispute in the view of the arbitration panel, the panel must refer to the Court of Justice of the European Union (CJEU) for the interpretation of this law. However, the dispute itself will always be adjudicated by the arbitration panel, not the CJEU.

If, in the opinion of the other party, one party has not complied with the decision of the arbitration panel in a specific dispute, the latter can take compensatory measures in the agreement concerned or in another single market agreement. This is in order to restore balance between the contracting parties. The compensatory measures must therefore be proportionate. Whether such measures are proportionate can in turn be reviewed by the arbitration panel.

The aim of the negotiations was to agree the specific details of the proposed solutions and incorporate them into the seven relevant agreements. **This goal has been achieved.**

In addition, the following details were settled in the negotiations:

- Compensatory measures that may be taken as a result of a dispute settlement procedure may be applied at the earliest three months after notification (automatic suspensive effect).
- At the request of the party concerned, the arbitration panel will decide on the basis of certain criteria (in particular the potential of compensatory measures for irreparable damage) whether the suspensive effect is to be extended beyond the three months until a decision is reached on the proportionality of the compensatory measures.
- The termination of one of the new single market agreements (electricity, food safety) would not automatically lead to the termination of the existing single market agreements (no 'super guillotine').
- Switzerland has a set period of time to carry out the domestic procedures required to adopt new EU legislation. If legislation must be approved by Parliament (including a possible referendum), this period does not commence when the EU issues notification of the legal instrument in question, but only when Switzerland informs the EU that the legal instrument must be approved by Parliament (and possibly by the Swiss electorate). This allows more time for the approval procedure to be carried out.
- If the courts of the EU member states submit preliminary questions to the CJEU on the interpretation of a single market agreement or legal instruments of the EU contained within it that Switzerland has adopted, Switzerland may also submit an opinion to the CJEU.

### **Importance for Switzerland**

By including the institutional solutions in the single market agreements, the bilateral approach can be continued. This also creates legal certainty, equal treatment and a level playing field for the contracting parties, economic operators and individuals in the areas concerned. The sectoral package approach chosen by the Federal Council in February 2022 has therefore proven its worth. The objective of embedding the institutional elements for each sector in each individual single market agreement has been achieved. This has made it possible to take into account the specific aspects of each individual agreement and find customised solutions for them.

In order to protect Switzerland's essential interests, certain areas could be excluded from the dynamic adoption of legislation and thus secured for the future. Switzerland can also participate in the drafting of EU legislation that it must adopt as part of the single market agreements. Lastly, it is ensured that disputes in the area of the single market can in future be resolved within an orderly framework, whereby the role of the CJEU is limited to the interpretation of its own law and the disputes as such are decided by an arbitration panel with equal representation. Arbitrary "punitive measures" by one side against the other are no longer

possible with this solution. Any compensation measures must be proportionate and are limited to the single market agreements.

In addition, they generally have a suspensive effect until the arbitration panel has ruled on their proportionality, in order to avoid any damage resulting from disproportionate measures. Overall, this leads to a significantly better result in the area of institutional elements than would have been achieved with the previous approach of the framework agreement.