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Comments on Non Paper Andreas Schwab, Oct 24, 2022

The paper is highly useful in further seeking common ground in the negotiations as suggested in the [road map of the Association La Suisse en Europe](#) in December 2021. It is based upon the package deal approach with identical institutional arrangements attached, working out common features inherent to all agreements contemplated. The following comments are submitted:

Ad 1: It was widely assumed in Switzerland that the framework agreement (FA) would not pass a referendum. [Regular polls](#) show that a majority of some 60% of the electorate has been in favour of the FA prior to cancelling negotiations on May 26, 2021. The need for institutional arrangements is widely shared among voters in Switzerland.

Ad 2: Art. 8 FA is a suitable framework for subsidies using a two pillar approach which could also be extended to the FTA. The main problem is transparency in Switzerland which does not exist between Cantons and the Federal Government. For surveillance the model used in Government Procurement of May 21, 1999 ([SR 0.172.052.68](#)) Art. 8 could be used.

Ad 3: It will be important to further clarify the relationship of arbitration and the CJEU. The latter should have jurisdiction to interpret EU law, including directives, regulations and primary law as explicitly referred to in treaties. Bilateral treaties as such are instruments of public international law and fall in the exclusive jurisdiction of the arbitration panel in these proceedings. Notions applied may differ from EU, not having the same meaning. No recourse to the CJEU is necessary for agreements based upon equivalence and short of adopting EU secondary law, such as the 1909 Agreement on custom's cooperation ([SR 0.631.242.05](#)). The CJEU has jurisdiction to review these agreements in preliminary rulings brought by Courts of MS. The same holds true for the Swiss Federal Supreme Court in cases brought by private parties.

Ad 3: Given the possibility of opt out clauses and proportionate measures of compensation, subject to review by the arbitration panel, there is no need to address all exceptions in the treaties themselves. This should facilitate finding agreement on difficult issues where the EU is not in a position to grant exceptions in market access agreements. The point is properly made in point 4 of the non-paper.

Ad 5: The proposal may clarify that EU adopted on dispatched labour can be properly implemented also using the Swiss model of partnership between social partners, and does not necessarily need to take recourse to public administration in securing equal pay for equal work at the same place.

Ad 6: The Agreement on Electricity should be included in the fast track, providing for temporary suspension of free market access below 100'000 kw/h until a new pricing model is adopted in the EU, while extending the scope to gas and hydrogen transmissions. The agreement is of great importance for securing network stability in the first place.

Annex: Comments on dispute settlement proceedings will be made separately.

Thomas Cottier

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