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State of Play of Swiss-EU Negotiations
Speaking Note

Distinguished Chairman
Dear Members of the European Parliament

I truly wish to thank you for the invitation. I am honored to be able to attend this meeting to discuss Swiss EU-relations today. In my introductory note, I will address two issues.

My first remark concerns the EU's position that the Status quo is not a valid option for the future and the exclusion of Switzerland from Horizon Europe.

Since 2008, the EU has expected Switzerland to agree to new institutional rules. The EU has made it clear that a renewed institutional setting is a precondition for the conclusion of *new* agreements with which Switzerland participates in the internal market. An agreement on electricity – as referred to by Thomas Cottier – will be an example to the point. In addition, the EU has *also* decided, on a case-by-case basis,

- not to grant adequacy decisions vis-à-vis Switzerland,
- not to allow Switzerland to participate in EU programs, and
- not to update existing agreements,

until Switzerland is ready to conclude new institutional rules. For the EU, it is thus not an option to continue the close relationship with Switzerland on the basis of the *existing* treaty network.

Switzerland has taken note of this stance. Consequently, the Swiss Federal Council has reinforced its intention to speed up the exploratory talks with the Commission, in order to find common grounds for successful negotiations. This is good news.

However, in my view, the EU's policy not to grant adequacy decisions, not to update existing agreements and not to allow Switzerland to participate in EU programs is not appropriate in order to force Switzerland back to the negotiation table. Arguably, this policy is even counterproductive, as is typically the case with *Horizon Europe*. Three observations are noteworthy:

- First, the exclusion of researchers at Swiss institutions hits, and frustrates, mainly persons which already now *do* support close and stable relations with the EU. They are in favor of renewing the institutional setting. They do not need to be persuaded.
- Second, many researchers at Swiss institutions are not Swiss but EU citizens. In particular, they are often junior scientists who have come to Switzerland to shape their careers, to develop networks and to acquire professional competencies, before maybe returning to their home countries and building up research capacity there.

- Third, Swiss institutions rank among the leading universities in Europe and beyond. According to a ranking of "Times Higher Education", the Swiss Federal Institute of Technology in Zurich, the ETH, is the best university outside of the United States and Great Britain! It does not make sense to disconnect researchers at such institutions from the pan-European network of research and excellence and thereby weaken Europe's global competitiveness in knowledge production. Now more than ever, our scientists need to work together across national borders to solve today's challenges.

In conclusion, the current EU's policy results in collateral damage, to the detriment of both Switzerland and the EU.

My second remark draws your attention to the role which the European Court of Justice potentially plays in settling disputes between Switzerland and the EU in the future.

This is a sensitive issue. I support the establishment of a system whereby an arbitration panel settles a dispute but is obliged to involve the ECJ when the case turns on the interpretation of EU law. The ECJ's involvement is imperative, taking into account the autonomy of EU law and the prerogative of the ECJ to have the last word on the interpretation of EU law.

In Switzerland, however, the involvement of the ECJ is controversially debated. Two observations are noteworthy:

- First, some argue that the ECJ is the court of the other party and, therefore, is not in a position to act impartially. I am convinced that this argument is not based on solid grounds. The ECJ has proven that it is competent to interpret provisions in treaties with third states. Thereby, it has developed a proper methodology, including the *Polydor* principle. The ECJ has proven time and again that it acts in an independent and impartial manner also in cases in which rights and obligations of third countries, foreign persons and foreign firms are at stake. Under the newly envisaged dispute settlement rules, the procedure before the ECJ will allow the EU member states as well as Switzerland to submit their views as to the correct meaning of the EU law provision in question; the procedure will *not* be directed "against" Switzerland. I admit that, so far, we have not fully succeeded in informing the wider public in Switzerland on these characteristics of the ECJ.
- Second, it is decisive to define an arbitration panel's obligation to involve the ECJ in clear terms. In this respect, the wording of the draft institutional agreement of 2018 was not ideal. A more appropriate solution could be found along the following lines: An arbitration panel should be obliged to involve the ECJ when the meaning of an EU law provision in a bilateral agreement is doubtful *in the EU context* and has not yet been interpreted authoritatively by the ECJ. EU law can be found, obviously, in regulations and directives which are referred to in a bilateral agreement. EU law can also be found in a bilateral agreement itself, having used the *copy-and-paste* method with the intention to give it an identical meaning in the bilateral agreement. Having said this, an arbitration panel should *not* be obliged to involve the ECJ when the meaning of an EU law provision is clear or when the ECJ has already interpreted the EU law provision in the EU context; the *acte clair* doctrine should apply here. An arbitration panel should *not* be obliged to involve the ECJ when the meaning of an EU law provision is controversial *in the bilateral context*. An arbitration panel is competent to

interpret an EU law provision *as applicable between Switzerland and the EU*. In conclusion, an arbitration panel's obligation to involve the ECJ should be determined in light of these considerations. It is essential that an arbitration panel has a relevant and original function. Otherwise, it would not make sense to establish such an arbitration panel at all, and it might be difficult to "sell" the envisaged model of dispute settlement to the public in Switzerland.

I thank you for your attention and look forward to the discussion.

Matthias Oesch