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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: State Aid Protocol to the Agreement between the European Community and the Swiss Confederation on Air Transport

STATE AID PROTOCOL
TO THE AGREEMENT
BETWEEN THE EUROPEAN COMMUNITY
AND THE SWISS CONFEDERATION
ON AIR TRANSPORT

THE EUROPEAN UNION, hereinafter referred to as the "Union",

and

THE SWISS CONFEDERATION, hereinafter referred to as "Switzerland",

hereinafter referred to as the "Contracting Parties",

AIMING to strengthen and deepen the participation of Switzerland and its undertakings in the internal market of the Union, in which Switzerland participates on the basis of the Agreement between the European Community and the Swiss Confederation on air transport, done in Luxembourg on 21 June 1999 (hereinafter the "Agreement");

RECOGNISING that the proper functioning and homogeneity in the fields of the internal market in which Switzerland participates requires a level playing field for competition between Swiss and Union undertakings based on substantive and procedural rules equivalent to those that apply in the internal market as regards State aid;

REAFFIRMING the autonomy of the Contracting Parties and the role and competences of their institutions and, as far as Switzerland is concerned, respect for the principles deriving from its constitutional order, including direct democracy, the separation of powers, and federalism,

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Objectives

The objectives of this Protocol are to ensure a level playing field for competition between Union and Swiss undertakings in the fields of the internal market falling under the scope of the Agreement and to guarantee the proper functioning of the internal market by laying down substantive and procedural rules on State aid.

ARTICLE 2

Relation to the Agreement

1. This Protocol and its Annexes shall form an integral part of the Agreement. They shall alter neither the scope nor the objectives of the Agreement.
2. Articles 13 and 14 of the Agreement are repealed.
3. Article 12(2) of the Agreement shall not apply for the purposes of this Protocol.

ARTICLE 3

State aid

1. Save as otherwise provided in the Agreement, any aid granted by Switzerland or by a Member State of the Union, or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Contracting Parties within the scope of the Agreement, be incompatible with the proper functioning of the internal market.

2. The following shall be compatible with the proper functioning of the internal market:
 - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
 - (c) the measures set out in Section A of Annex I.

3. The following may be considered to be compatible with the proper functioning of the internal market:
 - (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
 - (b) aid to promote the execution of an important project of common European interest, or of common interest to the Contracting Parties, or to remedy a serious disturbance in the economy of a Member State of the Union or Switzerland;

- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the interest of the Contracting Parties;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition to an extent contrary to the interest of the Contracting Parties;
- (e) the categories of aid set out in Section B of Annex I.

4. Aid granted in accordance with Section C of Annex I shall be presumed compatible with the proper functioning of the internal market and shall be exempted from notification requirements under Article 4 of this Protocol.

5. Aid granted to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to this Protocol, in so far as the application of this Protocol does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interest of the Contracting Parties.

6. This Protocol shall not apply to aid where the amount granted to a single undertaking for activities within the scope of the Agreement constitutes *de minimis* aid as set out in Section D of Annex I.

7. The Joint Committee may decide to update Sections A and B of Annex I by specifying measures that shall be compatible, or categories of aid that may be considered to be compatible, with the proper functioning of the internal market.

ARTICLE 4

Surveillance

1. For the purposes of Article 1, the Union, in accordance with the distribution of competences between the Union and its Member States, and Switzerland, in accordance with its constitutional order of competences, shall supervise the application of State aid rules in their respective territory in accordance with this Protocol.
2. For the purposes of the implementation of this Protocol, the Union shall maintain a State aid surveillance system in accordance with Articles 93, 106, 107 and 108 of the Treaty on the Functioning of the European Union as supplemented by Union legal acts in the field of State aid and Union legal acts concerning State aid in the air transport sector listed in point 1 of Section A of Annex II to this Protocol.
3. For the purposes of the implementation of this Protocol, Switzerland shall, within five years of the entry into force of this Protocol, establish and maintain a State aid surveillance system that ensures at all times a level of surveillance and enforcement equivalent to that applied in the Union, as set out in paragraph 2, including the following:
 - (a) an independent surveillance authority; and
 - (b) procedures to ensure the review by the surveillance authority of the compatibility of aid with the proper functioning of the internal market, including the following:
 - (i) prior notification to the surveillance authority of planned aid;

- (ii) assessment by the surveillance authority of notified aid and its competence to review non-notified aid;
- (iii) challenge before the competent judicial authority, with suspensive effect from the moment the act is challengeable, of aid that the surveillance authority considers to be incompatible with the proper functioning of the internal market; and
- (iv) recovery, including interest, of aid granted and found incompatible with the proper functioning of the internal market.

4. In accordance with Switzerland's constitutional order of competences, paragraph 3, point (b), (iii) and (iv), does not apply to acts of the Swiss Federal Assembly or of the Swiss Federal Council.

5. Where the Swiss surveillance authority cannot challenge the aid of the Swiss Federal Assembly or of the Swiss Federal Council before a judicial authority due to its limitations of competence under the Swiss constitutional order, it shall challenge the application by other authorities of that aid in all specific cases. If the judicial authority finds that that aid is incompatible with the proper functioning of the internal market, the competent Swiss judicial and administrative authorities shall take that finding into account when assessing whether to apply that aid in the case before them.

ARTICLE 5

Existing aid

1. Article 4(3), point (b), shall not apply to existing aid, including aid schemes and individual aid.
2. For the purposes of this Protocol, existing aid shall include aid granted before the entry into force of this Protocol and within a period of five years thereof.
3. Within twelve months of the date of establishment of the surveillance system pursuant to Article 4(3), the surveillance authority shall gain an overview of existing aid schemes within the scope of the Agreement that are still in force and make a *prima facie* assessment of those schemes against the criteria set out in Article 3.
4. All existing aid schemes in Switzerland shall be subject to constant review by the surveillance authority as to their compatibility with the proper functioning of the internal market pursuant to paragraphs 5, 6 and 7.
5. If the surveillance authority considers that an existing aid scheme is not, or is no longer, compatible with the proper functioning of the internal market, it shall inform the competent authorities about the obligation to comply with this Protocol. If such an aid scheme is amended or terminated, the competent authorities shall inform the surveillance authority.
6. If the surveillance authority considers the measures taken by the competent authorities to be appropriate to ensure the compatibility of the aid scheme with the proper functioning of the internal market, it shall publish those measures.

7. Notwithstanding paragraph 1 of this Article, if the surveillance authority considers that the aid scheme remains incompatible with the proper functioning of the internal market, the surveillance authority shall publish its assessment and challenge the application of that aid scheme in all specific cases, in accordance with Article 4(3), point (b)(iii), and Article 4(5).

8. For the purposes of this Protocol, if an existing aid scheme is amended in such a way as to affect the compatibility of the aid with the proper functioning of the internal market, the aid shall be considered to be new aid and shall therefore be subject to Article 4(3), point (b).

ARTICLE 6

Transparency

1. With regard to aid granted in their territory, the Contracting Parties shall ensure transparency. For the Union, transparency shall be based on substantive and procedural rules that apply in the Union on State aid within the scope of the Agreement. For Switzerland, transparency shall be based on substantive and procedural rules equivalent to those that apply in the Union on State aid within the scope of the Agreement.

2. Each Contracting Party shall, in respect of its territory and unless otherwise provided in this Protocol, ensure the publication of:

- (a) aid granted;
- (b) opinions or decisions of its surveillance authorities;

- (c) rulings of its competent judicial authorities on the compatibility of aid with the proper functioning of the internal market; and
- (d) guidelines and communications applied by its surveillance authorities.

ARTICLE 7

Terms of cooperation

1. The Contracting Parties shall cooperate and exchange information on State aid, subject to their respective laws and available resources.
2. For the purposes of the uniform implementation, application and interpretation of the substantive rules on State aid and of harmonious development thereof:
 - (a) the Contracting Parties shall cooperate and consult each other with regard to the relevant guidelines and communications referred to in Section B of Annex II; and
 - (b) the surveillance authorities of the Contracting Parties shall conclude arrangements for a regular exchange of information, including on the implications for the application of rules on existing aid.

ARTICLE 8

Consultations

1. At the request of a Contracting Party, the Contracting Parties shall consult each other, within the Joint Committee, on matters relating to the implementation of this Protocol.
2. In the event of developments concerning important interests of a Contracting Party that may affect the operation of this Protocol, the Joint Committee shall, at the request of a Contracting Party, meet at an appropriately high level within 30 days of that request in order to discuss the matter.

ARTICLE 9

Integration of legal acts

1. Notwithstanding Article 5 of the Institutional Protocol to the Agreement between the European Community and the Swiss Confederation on Air Transport (hereinafter referred to as the "Institutional Protocol"), for the purposes of Article 3(4) and (6) and Article 4(2) and (3) of this Protocol, and in order to guarantee legal certainty and the homogeneity of the law in the fields of the internal market in which Switzerland participates by virtue of the Agreement, Switzerland and the Union shall ensure that legal acts of the Union adopted in the fields covered by Sections C and D of Annex I to this Protocol as well as Section A of Annex II to this Protocol are integrated into those Annexes as quickly as possible after their adoption.

2. When it adopts a legal act in the field covered by Sections C and D of Annex I or Section A of Annex II, the Union shall inform Switzerland thereof as quickly as possible through the Joint Committee. At the request of either of the Contracting Parties, the Joint Committee shall conduct an exchange of views on the subject.

3. The Joint Committee shall act in accordance with paragraph 1 of this Article by adopting a decision as quickly as possible to amend Sections C and D of Annex I as well as Section A of Annex II, including the necessary adaptations.

4. Subject to Article 6 of the Institutional Protocol, decisions of the Joint Committee pursuant to paragraph 3 of this Article shall enter into force immediately, but under no circumstances before the date on which the corresponding legal act of the Union becomes applicable in the Union.

ARTICLE 10

Entry into force

1. This Protocol shall be ratified or approved by the Contracting Parties in accordance with their own procedures. The Contracting Parties shall notify each other of the completion of the internal procedures necessary to the entry into force of this Protocol.

2. This Protocol shall enter into force on the first day of the second month following the last notification regarding the following instruments:

- (a) Institutional Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons;
- (b) Amending Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons;
- (c) Institutional Protocol to the Agreement between the European Community and the Swiss Confederation on air transport;
- (d) Amending Protocol to the Agreement between the European Community and the Swiss Confederation on air transport;
- (e) Institutional Protocol to the Agreement between the European Community and the Swiss Confederation on the carriage of goods and passengers by rail and road;
- (f) Amending Protocol to the Agreement between the European Community and the Swiss Confederation on the carriage of goods and passengers by rail and road;
- (g) State Aid Protocol to the Agreement between the European Community and the Swiss Confederation on the carriage of goods and passengers by rail and road;

- (h) Amending Protocol to the Agreement between the European Community and the Swiss Confederation on trade in agricultural products;
- (i) Institutional Protocol to the Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment;
- (j) Amending Protocol to the Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment;
- (k) Agreement between the European Union and the Swiss Confederation on Switzerland's regular financial contribution towards reducing economic and social disparities in the European Union;
- (l) Agreement between the European Union and the European Atomic Energy Community, of the one part, and the Swiss Confederation, of the other part, on the participation of the Swiss Confederation in Union programmes;
- (m) Agreement between the European Union and the Swiss Confederation on the terms and conditions for the participation of the Swiss Confederation in the European Union Agency for the Space Programme.

ARTICLE 11

Amendment and termination

1. This Protocol may be amended at any time by mutual agreement of the Contracting Parties.
2. Where the Agreement is terminated in accordance with Article 36(3) of the Agreement, this Protocol shall cease to be in force on the date referred to in Article 36(4) of the Agreement.
3. Where the Agreement ceases to be in force, the rights and obligations that individuals and undertakings have already acquired by virtue of the Agreement before the date of the cessation of the Agreement shall be preserved. The Contracting Parties shall settle by mutual agreement what action is to be taken in respect of rights in the process of being acquired.

This Protocol is drawn up in duplicate in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, each text being equally authentic.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto, have signed this Protocol.

Done at ... this day of ... in the year ...

For the European Union

For the Swiss Confederation

EXEMPTIONS AND CLARIFICATIONS

SECTION A

MEASURES COMPATIBLE WITH THE PROPER FUNCTIONING
OF THE INTERNAL MARKET, AS REFERRED TO IN ARTICLE 3(2), POINT (c)

The following measures shall be compatible with the proper functioning of the internal market and shall not be subject to Article 4(3), point (b):

[...].

SECTION B

CATEGORIES OF AID THAT MAY BE CONSIDERED TO BE COMPATIBLE
WITH THE PROPER FUNCTIONING OF THE INTERNAL MARKET,
AS REFERRED TO IN ARTICLE 3(3), POINT (e)

The following categories of aid may be considered to be compatible with the proper functioning of the internal market:

[...].

SECTION C

BLOCK EXEMPTIONS, AS REFERRED TO IN ARTICLE 3(4)

Aid shall be presumed compatible with the proper functioning of the internal market and shall be exempted from the notification requirements under Article 4 if it is granted in accordance with the substantive conditions set out in the following provisions:

- (1) Chapters I and III of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1), as last amended by Commission Regulation (EU) 2023/1315 of 23 June 2023 (OJ L 167, 30.6.2023, p. 1);
- (2) Articles 1 to 6 of Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

SECTION D

DE MINIMIS AID, AS REFERRED TO IN ARTICLE 3(6)

"*De minimis* aid" shall have the meaning that it has in Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L, 2023/2831, 15.12.2023).

For aid granted to undertakings entrusted with the operation of services of general economic interest, "*de minimis* aid" shall have the meaning that it has in Commission Regulation (EU) 2023/2832 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L, 2023/2832, 15.12.2023).

GENERAL AND SECTORAL ACTS APPLICABLE IN THE EUROPEAN UNION
AS REFERRED TO IN ARTICLE 4(2)

SECTION A

GENERAL AND SECTORAL ACTS

- (1) For the purposes of this Protocol and pursuant to Article 4(2), the following acts shall be applied by the Union:
- (a) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9);
 - (b) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 (OJ L 140, 30.4.2004, p. 1), as last amended by Commission Regulation (EU) 2016/2105 of 1 December 2016 (OJ L 327, 2.12.2016, p. 19);
 - (c) Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1), as last amended by Commission Regulation (EU) 2023/1315 of 23 June 2023 (OJ L 167, 30.6.2023, p. 1);

- (d) Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3);
 - (e) Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L, 2023/2831, 15.12.2023);
 - (f) Commission Regulation (EU) 2023/2832 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L, 2023/2832, 15.12.2023);
 - (g) Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3).
- (2) For the purposes of this Protocol and pursuant to Article 4(3), Switzerland shall establish and maintain a State aid surveillance system that ensures at all times a level of surveillance and enforcement equivalent to that applied by the Union, as set out in Article 4(2) and point (1) of this Section.

SECTION B

GUIDELINES, COMMUNICATIONS AND DECISIONAL PRACTICE OF THE EUROPEAN COMMISSION

- (1) For the purposes of this Protocol and pursuant to Article 4(3), the Swiss surveillance authority and the competent judicial authorities in Switzerland shall take due account of, and follow to the extent possible, the relevant guidelines and communications binding on the European Commission, as well as its decisional practice, in order to ensure a level of surveillance and enforcement equivalent to that of the Union.

 - (2) The European Commission shall notify to the Joint Committee, and publish, the guidelines and communications it considers relevant under the Agreement.
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JOINT DECLARATION
ACCOMPANYING THE STATE AID PROTOCOL
TO THE AGREEMENT BETWEEN THE EUROPEAN COMMUNITY
AND THE SWISS CONFEDERATION ON AIR TRANSPORT

If the European Commission grants financial support, in any form whatsoever, which is not subject to State aid rules under this Protocol, and which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between the Contracting Parties within the scope of the Agreement, Switzerland may request consultations to discuss the matter.
