

Herring or Cheese? The Swiss/European Union Relationship Without an Institutional Framework Agreement

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Wednesday, May 26, 2021, proved to be a red-letter day for the Swiss- EU bilateral relationship. By way of background, in 2002, Switzerland and the EU concluded a mutual recognition agreement (MRA) under which goods complying with the regulations applicable in one party are freely accepted in the market of the other. By value, the vast majority of Switzerland's exports to the EU enjoy friction-free access under the MRA, including Switzerland's 2019 medical device exports of €5.5 billion annually.

For several years leading up to May 26, 2021, Switzerland and the EU had been engaged in negotiations on an IFA, which would draw Switzerland and the EU closer in terms of legal and political cooperation. On May 26, however, Switzerland informed the EU that it did not intend to sign the IFA.

On the same date, and following Switzerland's announcement that it would not sign the IFA, the Commission announced that absent an IFA deal, it had unilaterally decided that Swiss medical devices were no longer covered by the MRA. That is, from that date, Swiss medical devices would no longer enjoy friction-free access to the EU market on the basis of mutual recognition. Instead, Swiss devices would face new trade barriers, with Switzerland effectively treated as a non-associated third country. Through its unlawful action, the Commission seems to be trying to force Switzerland's hand in negotiations on the IFA.

The European Commission's unilateral conduct is in clear violation of the MRA, EU law, and World Trade Organization (WTO) law. The MRA continues to be in force and bind both parties. In addition, the EU Commission's position, adopted through an informal "Notice to Stakeholders" on May 26, 2021, has no legal basis in EU law. Further, the Commission's action violates several provisions of WTO agreements.

The Commission's action comes at a critical juncture in the Switzerland-EU relationship because the two sides are now defining the contours of their post-IFA relationship. Unlike Brexit, Switzerland and the EU do not have to negotiate a new trade relationship from scratch. On the contrary, the many bilateral trade agreements on which the two parties have already agreed continue to apply. While Switzerland will want to preserve its existing rights under those agreements, the Commission's unilateral action seems to signal an effort to reverse Switzerland's existing rights.

The risk of a progressive reversal of Switzerland's interests is highlighted by the Commission's [publication](#) of the "List of Participating Countries in Horizon Europe" on June 17, 2021, by which legal entities established in Switzerland were informed that they were "currently not covered by the transitional arrangement." This was followed on July 12 by a formal communication by the EU Commission to the Swiss Federal Council that Switzerland was relegated to the status of a non-associated third country under the EU Framework Programme for Research and Innovation of Horizon Europe. Thus, Swiss researchers are now excluded from the program, where they had held [the top place](#) of the 16 associated

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countries in terms of participation and funding, with a net EU contribution of almost €300 million for 2020 alone.

With the Commission deploying assertive tactics to roll back Switzerland's rights in the new bilateral relationship, Switzerland must now decide how to react. If Switzerland yields to the Commission's unilateral action to roll back the MRA for medical devices, the country would abandon its rights under the MRA, the WTO agreements, and public international law. Sending a signal of acceptance at this time could have far-reaching economic and political consequences for Switzerland. In fact, while the Commission's current illegal conduct relates to medical devices, the Commission could expand its unlawful conduct to reverse market access rights for other Swiss goods, currently protected under the MRA and other bilateral treaties, and ultimately, Switzerland would have to give in to the EU's coercion to sign an IFA.

Both EU and international law afford Switzerland and its business interests powerful remedies to protect existing rights. The WTO, in particular, offers Switzerland different options to step up diplomatic efforts, including (but not limited to) legal challenge. WTO disputes are a common feature of friendly international relations — indeed, that's the whole point of the WTO's dispute settlement system. The EU has often faced WTO challenges brought by close trade partners, and, as befits a union based on the rule of law, it respects both the process and the outcome. For example, in 2013, the EU imposed coercive trade restrictions on the Faroe Islands in the context of failed negotiations over fishing quotas (Herring dispute). In response, the Faroe Islands asserted its legal rights, including at the WTO. Early in the legal proceedings, the EU opted to settle the case, with the Faroe Islands significantly increasing its historical fishing quota.

In sum, Switzerland's decision to walk away from the IFA negotiations was an assertion of the country's independence, which changes its relationship with the EU. That act should now be backed with similarly assertive positions to protect Switzerland's rights in the new relationship with the EU.