



After the E.U. Referendum...

Whither financial markets law?

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Introduction

- The referendum last month established the United Kingdom's desire to leave the European Union.
- The UK must now determine its future relationship with the EU.
- The Government is confronted with widely differing models of relationship which might offer an alternative to EU membership.

The Norwegian Model

EEA Membership

Membership of the European Economic Area (“EEA”)

One simple option would be for the UK to join the EEA. **In order to do so, it would also be legally required to join EFTA (see below).** The EEA legal framework has existed since 1994.

The Norwegian Model

EEA Membership

- Britain would then be outside the common agricultural and fisheries policies.
- The UK would pay nearly as much into the budget as it does today.
- Free movement of labour would continue.
- The UK would have to apply the single market's rules and regulations in non-excluded areas without having a vote on them.
- Membership in the EEA would entitle the UK to an independent seat on all global trade and standard-setting bodies.
- However, it would have no representation on the European Council and the European Parliament and Council of Ministers.

The Norwegian Model

EEA Membership (cont.)

- One of the main principles of the EEA Agreement is “homogeneity”: the existence of common rules and equal conditions of competition throughout the EEA.
- The EFTA Surveillance Authority monitors the EFTA states which are also party to the EEA Agreement with powers corresponding to that of the European Commission.
- The EFTA equivalent of the European Parliament is the Committee of MPs of the EFTA States where decisions are taken by consensus.
- Where an EU policy area falls within the four freedoms or other aims of the EEA Agreement (see above), then it is EEA-relevant.

The Norwegian Model

EEA Membership

- As soon as EEA-relevant EU legislation has been adopted in the EU, a decision shall be taken to amend the EEA Agreement to permit simultaneous application of the legislation across the EU.
- EEA/EFTA states can contribute to the development of legislative proposals on the expert level, where they are on equal footing with the EU Member States. According to Article 99(1) of the Agreement on the EEA, the “Commission shall informally seek advice from experts of the EFTA States [...] for the elaboration of its proposals”.
- Reportedly, EFTA states do not make use of this right to the fullest extent possible.

The Norwegian Model

EEA Membership

- ECJ decisions are not directly binding. The EFTA Court has jurisdiction with regard to EEA EFTA States.
- There is no written obligation on the courts of last resort of EFTA member states to make a reference to the EFTA Court.
- The preliminary rulings of the EFTA Court are not binding on national courts. They are termed “advisory” opinions. They do, however, have strong persuasive and moral force.
- The EEA Agreement has formulated homogeneity rules which in essence bind the EFTA Court to follow relevant ECJ case law.
- Norway’s review of the EEA Agreement found that the EFTA Court is stricter than the ECJ according to a 2012 report by the Norwegian government..

A summary of the Norwegian Model by Open Europe

Included under EEA agreement / EEA access to EU markets	Voluntary add-ons	Norwegian independence / not included in EEA
<p>Goods: Some agriculture and fisheries products; Energy; Competition and state aid; Trade facilitation and technical cooperation.</p> <p>Services: Financial services; Transport; Postal services; Electronic communication, audio-visual services and information society;</p> <p>Capital</p> <p>Persons: Free movement of persons; Social security; Recognition of professional qualifications.</p> <p>'Flanking and horizontal' policies: Consumer protection; Cultural Affairs; Education, training and youth; Research and innovation; Public health; Enterprise policy; Civil protection; Health and safety at work and labour law; Environment; Employment and social policy; Company law; Budgetary matters; Gender equality, anti-discrimination and family policy</p>	<p>Justice and home affairs: Associate member of Schengen border-free area; Participates in 'Dublin system' for asylum claims; Participates in Europol and Eurojust</p> <p>Foreign policy: Norway is actively seeking association with the EU's foreign & security and security & defence policies and participates in EU joint missions</p>	<p>Agricultural policy</p> <p>Fisheries policy</p> <p>Regional policy</p> <p>External trade policy</p> <p>Foreign policy</p>

The Swiss Model

“Voluntary Alignment”

Membership of the European Free Trade Association (“EFTA”) and voluntary alignment with single market rules to facilitate market access

The UK could join EFTA while staying out of the EEA. This is the Swiss model: Switzerland is part of EFTA but not EEA. To facilitate trade and market access, Switzerland has negotiated a large number of bilateral treaties and sectoral agreements with the EU.

The Swiss Model

“Voluntary Alignment”

- Merely joining EFTA brings with it little economic benefit: membership would not give the UK access to the many free trade agreements concluded between the EFTA states and third countries.
- Switzerland has concluded more than 120 sectoral agreements with the EU.
- There is no agreement on services, in particular financial services, with the EU, which would be problematic for the UK.
- Switzerland also contributes to the EU budget: its contribution per head is about 55% of the UK contribution.
- Switzerland opposes the free movement of people and has raised the issue with the EU. The EU has stipulated that Switzerland must rethink the migration issue or start to lose access to the single market.

The Swiss Model

“Voluntary Alignment” (cont.)

- The EEA principle of homogeneity does not apply directly to Switzerland (which is not a party to the EEA Agreement).
- In practice, Switzerland has to accept EU regulations and directives and follow their interpretation by the ECJ/EFTA court in order to be able to export to EU states. This is sometimes termed “voluntary alignment”.

The Baudenbacher Model

Renegotiation of the EEA Agreement

And now for something completely different...

Carl Baudenbacher, Chair of the EFTA Court of Justice has reportedly commented that the UK could join EFTA and then unite with Norway and Switzerland to secure revisions to the EEA Agreement; following which, the UK and Switzerland would join the EEA

The Baudenbacher Model

Renegotiation of the EEA Agreement

- This offers an intriguing third way between membership of the EEA/EFTA and falling back to a bilateral free trade agreement (“FTA”) with the EU.
- In combination, the negotiating power of Norway, Switzerland and the UK would be considerable.
- It is not clear, however, what parts of the EEA Agreement might be open to renegotiation or might be prioritised by the states in the new alliance. Popular suggestions will include:
 - a cap on the free movement of persons;
 - a relaxation of the principle of homogeneity, (in particular in the manner in which ECJ decisions bind the EFTA Court); and/or
 - political influence in the processes of developing and negotiating EEA-relevant EU legislation.

The Canadian Model

Replicating CETA

Adherence to a bilateral Free Trade Agreement along the lines of the “Comprehensive Economic and Trade Agreement” between Canada and the EU

Many who campaigned for the UK to “Leave” the EU view a bilateral FTA between the EU and UK as the most likely model for their future relationship. Canada concluded a free trade agreement with the EU in 2014 but it has not yet been ratified.

The Canadian Model

Replicating CETA

- There is no existing EU FTA on a scale which would match the existing export/import levels reflected in dealings with the UK on which the relationship could be modelled.
- An FTA doesn't necessarily mean eliminating tariffs and quotas, nor does it guarantee harmonised standards.
- Canada's FTA with the EU, agreed in 2014 but not yet ratified has fallen short of harmonising regulations and standards even in the areas included in the agreement, some of these constitute some of the larger barriers to trade.
- The agreement says there will be more co-operation on future regulations but cars and chemicals made to meet Canadian standards may not be sold in the EU.
- Crucially, financial services are also excluded from the CETA.

The Turkish Model

Customs union

Entering into a customs union

A customs union eliminates internal tariffs and requires the participating countries to agree on common external tariffs.

The Turkish Model

Customs union

- If the UK accepted a customs union with the EU, it would have to follow decisions on tariffs made by the EU.
- The UK would not have full access to the EU's internal market, unless the agreement was extended to cover services, which is not the case for Turkey.
- Turkey must therefore rely.

The US Model

Third country equivalence

The Third Country “Passport”

The EU is negotiating an ambitious and balanced trade and investment deal with the US: the Transatlantic Trade and Investment Partnership (TTIP). This will not include financial services.

The US Model

Third country equivalence

- The provision of US financial services into the EU is increasingly subject to a determination by the European Commission that the US is an “equivalent” regulatory regime.
- This is also the case for any country whose trade arrangements with the EU do not cover financial services.
- The US benefits from equivalency decisions in respect of 14 EU financial services regulations. (So too does Japan. Canada benefits from 13, Switzerland from 9 and Turkey from 1).
- Recently, equivalence determination has been linked in EU legislation to compliance with international principles (e.g. new EU Benchmarks Regulation equivalence provision refers to *IOSCO Principles for Benchmarks*), which sets a useful precedent and implies that the Commission’s approach may be subject to greater standardisation in future.

The US Model

Third country equivalence (cont.)

- The path to an equivalence determination rarely runs smoothly in practice for third countries. Recent examples of difficulties encountered by the US include CCP recognition and the AIFMD marketing passport.
- If the UK adopts existing EU legislation in force in the UK at the point of exit it will be virtually impossible to argue that it is not equivalent for the purposes of the same legislation in the EU.
- Equivalence can only be guaranteed in this way, however, for so long as UK law and regulation tracks European law and regulation.

The “Rest of the World” Model

WTO Rules

Relying on membership of the World Trade Organisation (“WTO”)

All 173 members of the WTO are parties to the General Agreement on Tariffs and Trade (“GATT”) and the General Agreement on Trade in Services (“GATS”).

The “Rest of the World” Model

WTO Rules

- The basic WTO principle of most favoured nation (“MFN”) requires that a WTO member must apply the same conditions on all trade with other WTO members.
- MFN applies to GATS as well as to GATT. However, upon accession, members may introduce temporary exemptions to this rule where services are concerned.
- National treatment is a parallel principle and an integral part of many WTO agreements. It is found in all 3 of the main WTO agreements (GATT, GATS and TRIPS) and means that imported goods/services should be treated no less favourably than domestically produced goods (at least after the foreign goods have entered the market). It was introduced to tackle non-tariff barriers to trade.

The “Rest of the World” Model

WTO Rules

- The UK would have to re-establish customs controls at borders with EU member-states.
- The UK would be subject to the EU’s common external tariffs.
- Trade between the EU and Russia, for example, relies heavily on WTO rules and principles. (Russia benefits from only one equivalence decision—on statutory audit).

Conclusion