



Alternatives to the EU

No clear picture was put forward during the referendum debate as to what form the UK’s relationship with the European Union (EU) should take if the UK chose to relinquish EU membership. Existing models of relationship with the EU, short of membership, are an obvious starting point in assessing possible options, although it seems most likely that the UK will be looking for a bespoke arrangement rather than slotting in to one of those models. The specific terms of the UK’s new relationship with the EU will be subject to political negotiation.

The Law Society identified five options in its [report](#):

- European Economic Area (EEA)/European Free Trade Association (EFTA) membership (for example, Norway)
- EFTA membership with additional cooperation on the basis of bilateral agreements (for example, Switzerland)
- Customs union (for example, Turkey)
- World Trade Organization (WTO) membership only
- WTO membership augmented by a free trade agreement.

Alternative relationships – a summary

	Participation in the internal market	Application of internal market freedoms	Subject to the CJEU’s jurisdiction	A say in EU legislation	Contribution to the EU budget
Renegotiation within the EU	✓ Yes	✓ Yes	✓ Yes	✓ Yes	✓ Yes
EEA/EFTA ('Norway')	✓ Yes but not in relation to CAP* and CFP*	✓ Yes	✗ No, but EFTA Court follows the CJEU	✗ No	✓ Yes, reduced
EFTA + bilateral agreements ('Switzerland')	✓ Yes, subject to the terms of those agreements and very limited participation in relation to financial services	✓ Yes	✗ No, but follows the EFTA Court	✗ No	✓ Yes, reduced
Customs Union (Turkey)	✗ Limited	✗ No	✗ No	✗ No	✗ No
WTO only	✗ No	✗ No	✗ No	✗ No	✗ No
WTO plus FTA	✗ No	✗ No	✗ No	✗ No	✗ No

*CAP – Common Agricultural Policy CFP – Common Fisheries Policy



The following general observations can be made:

- The greater the access that non-member states have to the internal market, the more they must comply with the EU's market rules, and the greater the contribution they must make to the EU's budget.
- The UK's current relationship extends beyond trade so new arrangements would need to be made for co-operation in areas such as criminal justice and policing.
- No state outside the EU has any real voice in the EU legislative process. The UK would be giving up representation in the European Parliament, voting power in the Council of Ministers of the EU, and its right to veto where unanimity is required.
- The UK would not automatically fit in to any of the different relationships, and EEA or EFTA membership would depend on negotiation with the states currently participating in those structures.
- In addition, when withdrawing from the EU, the UK will need to re-negotiate its trade relationships with the wider world as it withdraws from the EU common commercial policy. This includes major parts of the participation in the WTO.

European Free Trade Association

EFTA has four member countries: Norway, Iceland, Liechtenstein and Switzerland.

The EFTA countries regularly negotiate trade agreements together, allowing them to benefit from the greater weight of their combined negotiating power. The reciprocal market access to a larger market is similarly more attractive to potential counterparts. Currently EFTA has 25 free trade agreements covering 35 countries.

Membership of the EFTA is not an automatic right. The UK was formerly a member of the association but it left four decades ago to join the (then) European Economic Community (EEC). Joining EFTA would be a separate negotiation with the four existing EFTA countries who would have their own interests to safeguard in any negotiations.

In terms of the EU, all four EFTA states have access to parts of the internal market. In the case of Norway, Iceland and Liechtenstein (the EEA/EFTA states), the arrangements are set out in the EEA Agreement. Switzerland accesses various parts of the market on the basis of a plethora of sector-specific agreements.



European Economic Area Agreement: Agreement between European Union and European Free Trade Association states

The European Economic Area was created in 1994. It is essentially a trade agreement between the EU member states and the three participating EEA/EFTA States (Norway, Iceland and Liechtenstein). The EEA extends EU internal market free movement of goods, persons, services and establishment to EEA/EFTA states. It does not include other EU policies, such as customs union, direct and indirect taxation, common trade policy, the common fisheries policy or the common agricultural policy. Nor does the EEA Agreement extend to EU policies such as justice and home affairs or foreign and security policy.

The EEA/EFTA countries are bound to implement the majority of EU legislation relevant to the internal market, and their internal market access is conditional upon compliance. The EEA/EFTA states are obliged to transpose EU directives and regulations into their own legal frameworks and to disapply national law where a conflict arises.

The EEA/EFTA states do not have a formal role in the EU legislative process. They can give input in the preparatory phase through participation in expert groups and committees of the European Commission, and they have right to submit comments on proposed legislation. However, ultimately, the EEA/EFTA states are not able to vote on legislation, even though they will be bound by it.

The EEA/EFTA states must contribute to the EU budget. The budget is used for common institutional structures, and the stakeholders from the EEA/EFTA states are allowed to participate on an equal footing with the stakeholders from the EU Member States in competition for funds from different funding programmes.

EU legislation is enforceable through the Commission working together with the EFTA Surveillance Authority, which is specifically tasked with monitoring compliance by the EEA/EFTA states.

If an EEA/EFTA state fails to comply with its obligations, a case could be brought against it in the EFTA Court. Just as the EFTA Surveillance Authority works together with and follows the Commission, the EFTA Court is bound to follow the rulings of the Court of Justice of the European Union (CJEU).



Case study

Norway does not participate in the Common Fisheries Policy (CFP) or Common Agricultural Policy (CAP). Fishing and forestry (which falls within the CAP), in addition to the oil and gas production, are essential components of the Norwegian economy. Such resources offer a natural economic competitive advantage as they cannot be moved in the same way as services or manufacturing.

The freedom to opt out of the CAP and the CFP is fundamental to Norway's position against joining the EU; protecting its fishing grounds is a 'red line' in domestic politics. In those areas where it does participate in the internal market, Norway is bound to implement the applicable EU legislation. Although it has observer status within the Council, this does not translate into ability to vote on the legislation. It therefore holds no formal law-making powers, despite the fact that it is governed by EU laws to a large extent.

Switzerland: EFTA plus bilateral agreements

Switzerland is the fourth EFTA state, but is not part of the EEA. It has its own unique set of arrangements for EU market access which operate in a different way from the other EFTA countries. The EU/Swiss relationship is governed by a whole series of bilateral treaties dating back as far as 1956. These operate in conjunction with a number of multilateral international treaties to which both the EU and Switzerland are parties.

A 1972 bilateral agreement saw the creation of a free trade zone for industrial products which has since been extended to include trade in agricultural products. A 1989 agreement opened up parts of the insurance markets. Seven bilateral agreements were concluded in 1999, including an agreement on the free movement of persons. Switzerland does not participate in social and employment policy and is not bound by EU law in this area. Further agreements in 2004 centred on co-operation, both economically and more generally.

Switzerland is able to determine its own commercial policy and customs tariffs. As a member of EFTA it participates in all of EFTA's free trade agreements but is also able to conclude its own individual negotiations with third countries. Practically speaking, the majority of agreements are concluded together with its EFTA partners.

Unlike the EEA/EFTA states, Switzerland is not automatically bound to implement EU internal market legislation, but in practice it must have regard to most such EU legislation to ensure



reciprocal market access. Switzerland has to ensure regulations offer equivalent protection and standards to the EU regime and compliance of those standards. As with all companies, Swiss companies are bound by EU standards if they want to sell their products in the EU.

Furthermore, Switzerland cannot unilaterally amend parts of the agreement. This became clear after the 2014 referendum in which the Swiss voted against the free movement of persons from the EU. Since then Switzerland has been locked in negotiations with the EU as to how it would be possible to implement the result in the framework created with the EU, and what the restriction of free movement of persons would mean to the future of the bilateral arrangements.

While Switzerland has considerable access to the internal market in terms of goods it has a far lower level of integration in relation to services. So, for example, Switzerland sets its own financial services regulation but its access to the single market in relation to financial services is correspondingly very limited. There are obvious implications for the UK financial services sector under a similar model.

Switzerland also contributes to the EU budget, but its contribution is far lower than that of the other EEA/EFTA States. This reflects the fact that it participates to a lesser extent in the internal market, has more limited access to the EU funding programmes and there is no relevant institutional framework.

There is no equivalent to the structure established by the EFTA Surveillance Authority and EFTA Court. Nor is there any formal arbitration or adjudication mechanism available to resolve disputes that arise under the Swiss-EU agreements.

In practical terms it is almost inconceivable that the 'Swiss model' would be an option for the UK.

The Council of the EU has indicated that it has no wish to repeat the experience of the past 50 years or so by recreating individually negotiated arrangements that it regards as unwieldy and complex, and which cannot properly accommodate the ever-changing legislative environment.

Customs union

Turkey is the only major economy which operates a customs union with the EU. Turkey has a long-standing relationship with the EU which can be traced back to 1959 when it applied for associate membership of the EEC. An initial association agreement between the two, known as the Ankara Agreement, was signed in 1963.

Since 1999 Turkey has been a candidate for EU membership. It is therefore a country 'on the way in' rather than viewing an association agreement as an end in itself. Its progress has been



stalled by the obvious political difficulties regarding Cyprus and EU criticism of Turkey's record on human rights and the rule of law.

A Turkey-EU customs union was established in 1995 covering trade in manufactured products. Preferential trade agreements are also in place governing trade in steel and agricultural products.

The customs union does not merely remove customs tariffs for goods traded between Turkey and the EU. Under the agreement Turkey is obliged to align itself with the Common Customs Tariff (CCT) in relation to third countries. As with the EEA/EFTA states, Turkey is also obliged to follow the rules relevant to the CCT which are set by the EU with no seat at the negotiating table.

Turkey has also adopted other EU rules, for example, in relation to intellectual property law and the EU's regulations relating to commercial policy, thus extending the concept of a level playing field to business with Turkey beyond what might be agreed under a simple free trade agreement.

Work is going ahead on a Roadmap towards a visa-free regime with Turkey. A re-admission agreement – one of the Roadmap requirements – was ratified by the Turkish parliament at the end of June 2014. The Roadmap is intended to establish mechanisms to prevent irregular migration; judicial and police co-operation are also specifically mentioned. However, any further steps to integrate Turkey further in the EU policies, including giving visa access, must be agreed by all 28 Member States.

While Turkey's level of access to the internal market is significantly reduced in relation to goods in comparison with that enjoyed by member states, it is even more restricted in the case of services which are not included in the Turkish agreement. Services access is therefore limited to unilateral market opening measures and WTO commitments. Similarly public procurement is not covered by the existing agreement.

A customs union arrangement following the Turkish template could have ramifications for the UK given the extent to which professional services and financial services make up UK exports to the EU.

The EU-Turkey customs union, as with most international agreements, has its problems. One of the major problems from the Turkish point of view is that Turkey must allow access to third country products on the same basis as the EU, but it is at the discretion of those third parties to decide whether they wish to give Turkish producers reciprocal access.



The World Trade Organisation

The UK was a member of the WTO's predecessor, the (General Agreement on Tariffs and Trade) GATT and has been a member of the WTO since its creation in 1995. The EU is also a member in its own right and coordinates the position of the EU member states. The way in which the UK operates within the WTO would be altered by EU withdrawal.

The director general of the WTO, Robert Azevedo, has indicated that the current terms for both the UK and EU may need to be adjusted to take account of the UK's withdrawal from the EU.¹

There is no precedent or process for carrying out this type of negotiation but historically adjusting the terms of existing members has taken a number of years.

One of the most important rules of the WTO is the Most Favoured Nation (MFN) principle: if a benefit is offered to one trading partner, it must be offered to all other WTO members. The exception is where there is a preferential arrangement such as a free trade agreement or customs union like the EU. WTO members have access to each others' markets on this basis. Many of them trade with the EU but the rules provide for a different and more limited arrangement than EU internal market access.

As a member of the WTO outside the EU, the UK would not have unfettered access to the internal market in the way it does now and it would neither be bound by, nor benefit from, the four fundamental freedoms of capital, persons, services and goods. It should be noted that the EU internal market goes further than trade agreements in that it also removes those trade barriers which exist in the member states' legislation, for example, in relation to freedom of establishment or services the national taxation rules that have discriminatory effects, or in relation to goods the rules allowing only the use of certain nationally defined product standards.

While WTO members can broker trade agreements with the EU to access the internal market, this is not the same as participating in the market. WTO membership does not encompass activities such as co-operation in policing and civil or criminal justice, so these would need to be considered separately.

Membership of the WTO provides for dispute settlement through its Dispute Settlement Body. It is possible for a WTO member to challenge legislation or resolve regulatory disputes where the issues related specifically to WTO commitments. Unlike EU membership, however,

¹ The UK would also need to re-establish its terms of trade within the WTO. The UK, as an individual country, would of course remain a WTO member, but it would not have defined terms in the WTO for its trade in goods and services. It only has these commitments as an EU member. Key aspects of the EU's terms of trade could not simply be cut and pasted for the UK. Therefore important elements would need to be negotiated.



WTO membership does not provide separately for private enforcement of rights so individuals or companies impacted by the lack of compliance of one WTO member with their own commitments would not be able to start their own legal proceedings to seek redress. Neither is there a WTO equivalent to the European Commission, an independent body able to hold members to account for infringements of the WTO rules or agreements.

Outside the EU, the UK would have sole discretion over its trade policy and trade negotiations within the WTO. It would fall to the UK to renegotiate all its international agreements within the secession period if it did not wish to resort to the fall-back position reliant solely on WTO commitments and unilateral market opening decisions.

World Trade Organization membership plus a free trade agreement

The UK could also opt to try to negotiate an FTA with the EU itself. The form this would take would depend very much on the UK and EU's respective trading priorities. It could range from an in-depth arrangement with aspects akin to the levels of integration with Switzerland or, at the other end of the spectrum, could focus on simple removal of tariff barriers to facilitate trade in goods.

What happens next?

The result will depend very much on what the UK negotiating priorities are and the attitudes of the remaining EU member states. It is impossible to predict the level of services integration which would be achievable, either in terms of financial services (which, as noted above are a particularly large contributor to the UK economy) or in relation to other services, including legal services. The Law Society will be following developments over the coming months.

For more information on withdrawal, please see our Brexit webpage here:

<https://www.lawsociety.org.uk/support-services/brexit-and-the-legal-sector/>