



**BRIEFING PAPER**

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# Brexit: Customs and Regulatory Arrangements

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## Summary

### Box 1: Update 13 July 2018 – The Brexit White Paper

The Government published a [White Paper](#) on Brexit on 12 July 2018. This is summarised in Box 2 below. Please note the rest of this paper has not yet been updated to take account of the White Paper.

The UK government has been clear since the Lancaster House speech in January 2017 that it is the UK intention to leave both the Single Market and the EU Customs Union. However, over the course of the Phase 1 and Phase 2 negotiations, it has become clear that for the sake of accommodating both UK and EU negotiating objectives and 'red lines', both parties would like to set up customs and regulatory arrangements that will facilitate trade as much as possible – and, as agreed in the December Joint Report concluding Phase 1, that will prevent the resurfacing of a border with physical infrastructure (or a 'hard' border) in Northern Ireland.

This paper considers the proposals the UK Government has made to satisfy the simultaneous objectives to leave the EU Customs Union, but have a cooperative 'customs arrangement' following Brexit; and to leave the Single Market, but maintain trade that is 'as frictionless as possible' following Brexit. These proposals have to navigate the EU's 'red lines', primarily the ones that preclude sectoral agreements (or 'cherry-picking'), and that guarantee an invisible land border between Northern Ireland and Ireland.

### Customs Arrangements

The Government's position is that the UK will leave the EU's Customs Union after Brexit. The BBC reported a Downing Street source as saying "We will not be staying in the customs union or joining a customs union".<sup>1</sup> This is in line with the Prime Minister's Mansion House speech where she said that being in a customs union with the EU "would not be compatible with a meaningful independent trade policy."<sup>2</sup>

Labour has said that it "would seek to negotiate a new comprehensive UK-EU customs union to ensure that there are no tariffs with Europe and to help avoid any need for a hard border in Northern Ireland."<sup>3</sup> This would be subject to certain conditions including that the UK have a say in EU trade deals and assurances on, for example, EU state aid and public procurement policies.

The UK government has put forward three options for post-Brexit 'customs arrangements', all of which are intended to preclude border controls for customs purposes. The first of these is known as the 'maximum facilitation' ('Max Fac') solution (Section 1.3), and involves

1 BBC website, [Brexit: Government insists UK will leave customs union](#), 23 April 2018

2 [PM speech on our future economic partnership with the European Union](#), 2 March 2018, Mansion House

3 Jeremy Corbyn, [Speech on Britain after Brexit](#), 26 February 2018

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the use of technology to avoid delays, checks, and infrastructure at UK-EU borders. The second is known as the Customs Partnership, and would require the UK applying the EU's tariffs at its own external borders and refunding those traders whose goods do not progress beyond the UK into the EU in cases where the UK's own future tariffs are lower than the EU's (Section 1.4). The most recent proposal, sent to the EU on 7 June 2018, suggests the entire UK remaining in the EU's customs union until an alternative solution can be found to keeping the Irish land border open (Section 1.5) One final option, rejected by the UK government to date, is to set up a separate Customs Union with the EU following Brexit (as opposed to being members of the EU Customs Union) (Section 1.6).

### **Regulatory Arrangements**

Border checks will also arise when the UK exits the EU's Single Market, to ensure that products crossing the UK-EU border meet EU regulatory standards. Instead of staying in the Single Market, the UK proposes that the EU and the UK in future recognise each other's regulations as long as those regulations achieve the same outcomes (Section 2.2).

### **Progress in the Negotiations**

At the time of writing, the EU has explicitly rejected 'Max Fac' and the current draft of the 'Customs Partnership' idea, and initial EU reactions to the 'UK-wide customs union' proposal have also flagged up a number of problems (Section 1.7). The EU's response to 'outcome alignment' has been less direct, but the proposal clashes with a number of 'red lines' that the EU has maintained throughout the negotiations, such as integrity of the Single Market and protecting the role of the Court of Justice of the EU (CJEU) (Section 2.3).

An agreed position on customs and regulatory arrangements is not only desirable for the future partnership, but is needed for the conclusion of a Withdrawal Agreement: without agreed customs and regulatory arrangements, it will not be possible to meet the commitments made in the December Joint Report concluding Phase 1 of the negotiations – particularly vis-à-vis avoiding a hard border between Northern Ireland and Ireland.

## Box 2: The Brexit White Paper

### Introduction

The Government published a [White Paper on Brexit](#) on 12 July 2018.<sup>4</sup> The contents of the White Paper and some of the issues raised by it are summarised in this Box. Please note that the rest of this paper has not yet been updated to take account of the White Paper. The White Paper followed a meeting of the Cabinet at Chequers on 6 July 2018. The outcome of that meeting was summarised in a [three page document](#) released by the Government.

Dominic Raab made a [statement](#) on the White Paper on 12 July 2018. Introducing the White Paper, he said:

This White Paper sets out the right Brexit deal, delivering on the result of the referendum; taking back control over our money, laws and borders; supporting the economy by maintaining a strong trading relationship after we have left; ending free movement while avoiding a hard border between Northern Ireland and Ireland, or indeed between Northern Ireland and Great Britain; restoring sovereignty to Parliament and the authority of the UK Supreme Court; seizing the opportunity to forge new trade deals around the world; and maintaining co-operation with the EU in the many other areas that we prize, including security co-operation to keep our people safe. This is our vision for a bold, ambitious and innovative new partnership with the EU. Principled and practical, faithful to the referendum, it delivers a deal that is good for the UK and good for our EU friends.<sup>5</sup>

A number of Brexiteers raised criticisms of the White Paper following the statement.<sup>6</sup>

### The White Paper

The White Paper proposed that the economic partnership include the following elements:

- A common rulebook for goods including agri-food. This would cover only those rules required for frictionless trade at the border. The UK would commit by Treaty to ongoing harmonisation with relevant EU rules. The UK Parliament would be free not to maintain harmonisation in the future but this would be in the knowledge that there would be consequences (for market access, for example).
- UK to participate in EU agencies which provide authorisations for goods in heavily regulated sectors, such as the European Chemicals Agency and the European Aviation Safety Agency.
- A new Facilitated Customs Arrangement, introduced in phases, removing the need for customs checks/controls between the UK and the EU “as if they were a combined customs territory”. The UK would apply the EU’s tariffs and trade policy for goods destined for the EU and its own trade policy for those destined for the UK market.
- No tariffs on goods trade between the UK and EU
- Regulatory freedom for services, recognising that this will lead to reduced access for the UK and EU to each other’s markets
- A new framework allowing UK and EU citizens to continue to travel to each other’s countries, and businesses and professionals to provide services – in line with those the UK might wish to offer other close trading partners in future.

<sup>4</sup> HM Government, [The future relationship between the United Kingdom and the European Union](#), Cm 9593, 12 July 2018

<sup>5</sup> [HC Deb 12 July 2018 cc1158-59](#)

<sup>6</sup> [May’s White Paper a ‘bad deal for Britain’, claim Tory Brexiteers](#), Guardian, 12 July 2018. See also, for example, Hugh Bennett, [The Brexit White Paper: An exercise in giving away control](#), Brexit Central, 13 July 2018

- Measures that guarantee an open and fair trading environment, through, for example, common rules on state aid and agreement to maintain high standards in areas such as the environment and employment.

The Government has suggested that the UK's future relations with the EU could take the form of an Association Agreement.

### Comment

#### *EU reaction*

Michel Barnier said that the EU would analyse the White Paper with the Member States and the European Parliament, in the light of the EU guidelines.<sup>7</sup> Nevertheless, doubts have been expressed over whether the EU will view the White Paper as a basis for negotiations. In particular, the White Paper envisages the UK adopting a "common rulebook" for goods, but not for services and explicitly rejects free movement of people.<sup>8</sup> The EU has consistently said that its 'four freedoms' (goods, services, people and capital) cannot be separated.

Piet Eeckhout, Professor of EU Law at University College, London, doubted whether the EU could accept this as a basis for proper negotiations and described the White Paper as turning "cherry-picking into a form of international relations art".<sup>9</sup> The MLex website noted that "the paper offers no hints of the UK's next move if — as appears likely — EU negotiators reject the proposal."<sup>10</sup>

#### *UK a rule-taker?*

The Times described the proposals for a "common rulebook" as "effectively a manifesto for perpetual rule-taking." While noting that the UK retained a right to object to, or diverge from the common rules, doing so would "effectively collapse the entirety of the complex agreement the government hopes to strike".<sup>11</sup>

#### *Services*

The White Paper sees services as being treated differently to goods. It is proposed that services have "regulatory freedom". The Government accepts "that the UK and the EU will not have current levels of access to each other's markets."<sup>12</sup>

Services account for approximately 80% of the UK economy. The UK exported £277 billion of services in 2017, accounting for 45% of all exports. The UK had a surplus on trade in services of £112 billion in 2017.<sup>13</sup> Looking at trade with the EU only, UK services exports were £110 billion in 2017 (40% of all UK exports to the EU). The UK had a surplus with the EU in trade in services of £28 billion.<sup>14</sup> Some have questioned such a "goods only" approach to Brexit.<sup>15</sup>

<sup>7</sup> M Barnier, [Twitter](#), 12 July 2018

<sup>8</sup> [White Paper](#), para 73

<sup>9</sup> Piet Eeckhout, [Twitter](#), 12 July 2018

<sup>10</sup> MLex, UK paper sets out hopes to stay in single market in goods after Brexit, 12 July 2018

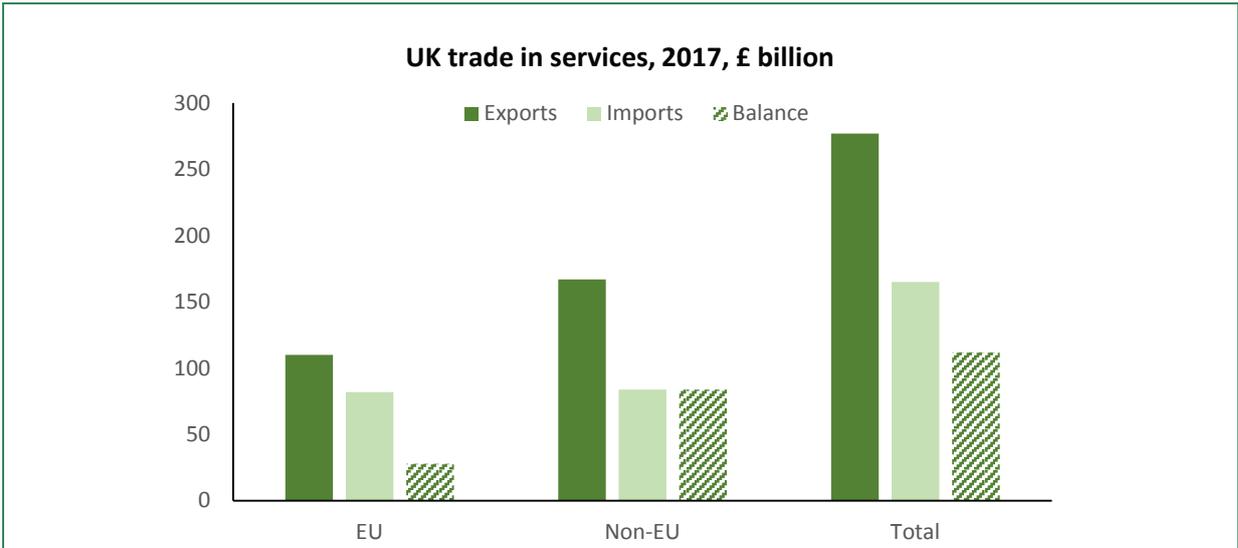
<sup>11</sup> What the White Paper means for Brexit, The Times (Brexit briefing), 12 July 2018

<sup>12</sup> [White Paper](#), p8

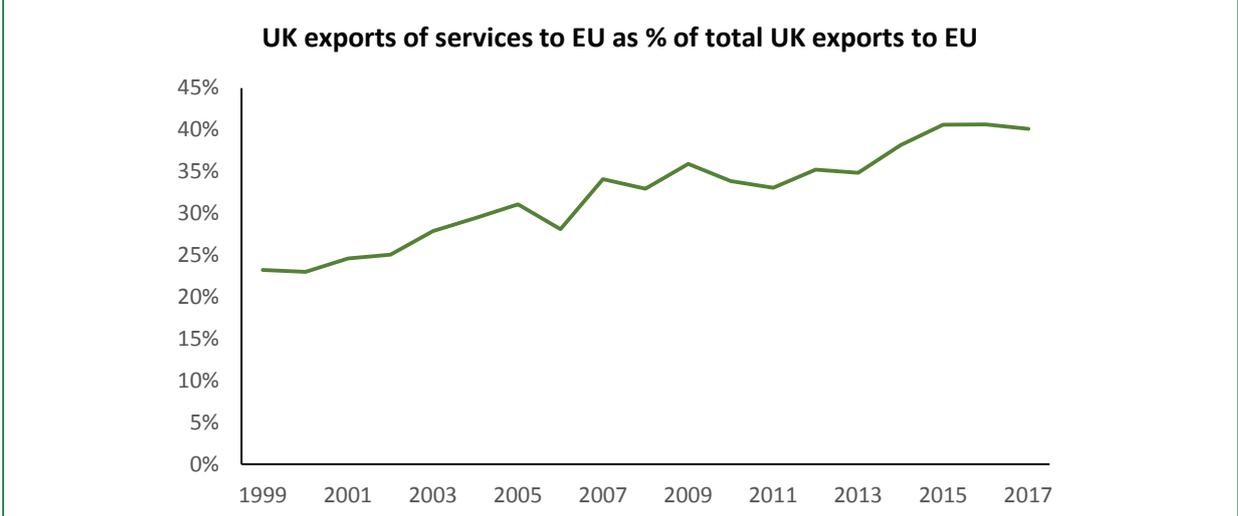
<sup>13</sup> ONS, UK Trade, 10 July 2018, Table 1

<sup>14</sup> ONS, Balance of payments, UK: January to March 2018, 29 June 2018, Table C

<sup>15</sup> Chris Giles, A goods-only Brexit deal puts UK services sector jobs at risk, Financial Times, 5 July 2018



The share of services in exports to the EU has increased from 23% in 1999 to 40% in 2017.



The Institute for Government commented:

The discussion of the future of the UK services sector – much bigger than goods – is cursory outside financial services. Nothing is done to explain the benefits the UK sees from future regulatory flexibility and why they outweigh the benefits of staying within the Single Market.<sup>16</sup>

*Customs*

The “Facilitated Customs Arrangement” is to be phased in.<sup>17</sup> It is not known how long this phasing in process will take. The proposal raises a number of issues:

- Is it overly complex?
- Will the EU allow another country to collect tariffs on its behalf?
- How susceptible is it to fraud?<sup>18</sup>

<sup>16</sup> Jill Rutter, [Does the Brexit White Paper pass our six tests?](#) Institute for Government, 12 July 2018

<sup>17</sup> [White Paper](#), para 21

<sup>18</sup> Jill Rutter, [Does the Brexit White Paper pass our six tests?](#) Institute for Government, 12 July 2018

# 1. Customs Arrangements

## 1.1 The Current UK Position on the Customs Union

On Thursday 26 April 2018 the House of Commons debated a motion on the customs union and borders.<sup>19</sup> This motion, in the name of a number of Select Committee chairs, “calls on the Government to include as an objective in negotiations on the future relationship between the UK and the EU the establishment of an effective customs union between the two territories.”

Nicky Morgan (Chair of the Treasury Committee) and Yvette Cooper (Chair of the Home Affairs Committee) explained their reasons for calling the debate:

With just six months to go before the Brexit deal needs to be concluded, delays to the customs and trade legislation mean we are running out of time for Parliament to help to shape the negotiations based on the evidence we hear and before the deal is done. Yet many of our back bench committees have forensically gathered evidence on different Brexit options and the practical implications. That is why it was the overwhelming conclusion of committee chairs – including those who voted leave and who voted remain, supporters and opponents of a customs union – that backbench MPs should get the chance of an early constructive debate and vote on this crucial issue, not bound by the party whips, but informed by committee evidence instead.<sup>20</sup>

As an article in the Economist observed, “the customs union is really a proxy for a bigger question: how closely aligned should Britain stay with the EU after Brexit.”<sup>21</sup>

Customs union amendments to Government Bills on trade and customs have been proposed. Both these Bills completed their Committee Stage in the Commons several months ago but no date has been set for Report Stage. As a result, the House has not yet had an opportunity to discuss these amendments.

While Government policy is to leave the customs union, it suffered a defeat in the House of Lords on 18 April. An amendment to the *European Union (Withdrawal) Bill* was passed, calling on the Government to explore the option of a customs union with the EU. Lord Kerr explained the purpose of this amendment as follows:

The Government would be required to negotiate for a customs union and make a statement about the outcome of the negotiations, which would be before the withdrawal implementation Bill came to the House. It seems to me that the requirement on the Government is simply to negotiate. I may be

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19 [HC Deb 26 April 2018 cc1053-1132](#)

20 Yvette Cooper and Nicky Morgan, [For Sake Of Manufacturing And Peace In Northern Ireland We Need A Customs Union](#), Huffington Post, 19 April 2018. A list of relevant select committee reports is in the Appendix at the end of this note.

21 [The fight over a customs union is a proxy for the bigger Brexit battle](#), Economist, 25 April 2018

wrong about the willingness of the other side to envision a customs union—we cannot require the Government to come back with a customs union—but we can require the Government to explain how hard they have tried and what kind of customs union they think might be available.<sup>22</sup>

For the Government, the Minister, Lord Callinan, opposed the amendment and said that it would require “the Government to make a Statement to Parliament on the steps taken towards the delivery of an objective the Government have clearly ruled out.”<sup>23</sup>

This amendment was defeated when the Bill returned to the Commons. However, commentators have recently noted that it is likely that the ‘customs union’ discussion will be reopened when the Trade and Customs Bill returns to the Commons; there is no firm date on when this will happen yet.

To contextualise the Parliamentary debates on customs, the paper will now set out what the EU Customs Union achieves, and what the possible alternative customs arrangements post-Brexit look like.

## 1.2 The EU Customs Union

The EU Member States are party to the EU Customs Union, which encapsulates both the EU’s customs arrangements and the EU equivalent of a ‘free trade agreement’: the Single Market.

The key characteristic of a customs union as opposed to a free trade agreement is the common external tariff. All members of the customs union apply the same set of tariffs on goods imported from outside the EU. Goods will therefore be subject to the same tariffs irrespective of which Member State they are imported into. Once inside the customs union, goods can move tariff-free between its members – benefitting from the ‘free trade area’ function of a customs union. The customs union is relevant for trade in goods alone, as there are no tariffs on services.

In 2015, the EU’s average tariff was 2.6% for non-agricultural products. This is an average figure: tariffs on some individual products are higher. The EU tariff on cars, for example, is 10%. Tariffs are generally higher on agricultural goods (much higher in some cases). The average EU tariff on sugars and confectionery, and on beverages and tobacco, is around 20%.<sup>24</sup>

Membership of the customs union means EU Member States are limited in their ability to operate independent trade policies, for instance by pursuing bilateral free trade agreements with non-EU countries.

The customs union means goods can move freely between EU Member States without the need for checks on the origin of goods, as the same tariff is paid regardless of which Member State they were imported into. This is different from a free trade agreement, where tariffs are abolished on trade between the parties but they are free to set their own tariffs

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22 [HL Deb 18 April 2018 c1177](#)

23 [HL Deb 18 2018 c1195](#)

24 World Trade Organization, [WTO Tariff Profiles 2017](#), p. 82.

on trade with third countries. Exports to the EU from countries outside the customs union are consequently still subject to rules of origin checks *even* if they have a free trade agreement with the EU. This is to ensure the correct tariff is paid, and to prevent goods entering the EU via a low tariff country without the EU having concluded its own agreement with that country.

To understand this, take the following hypothetical example. The EU tariff on cars is 10%. Suppose country A has a trade agreement with the EU with a zero tariff on cars, but sets its own tariff on cars at 5%. Without rules of origin, country B could export cars to country A, pay a tariff of 5% and then export them on to the EU paying no further tariff. Rules of origin are required to prevent this happening ensuring that only goods originating in country A benefit from the free trade agreement.

Rules of origin can be complex when products are assembled in more than one country and can introduce bureaucracy and delay into cross-border trade.<sup>25</sup> They are consequently undesirable, but are likely to return to trade between the EU and the UK upon the UK's exit from the customs union, even if tariffs on goods produced in the UK and the EU remain at 0% as intended.<sup>26</sup>

In order to avoid friction at the UK-EU borders, in particular the land border between Ireland and Northern Ireland (where physical infrastructure and 'hard' borders have been explicitly ruled out by both negotiating parties<sup>27</sup>), the UK has offered three models of customs arrangements to apply under the future UK-EU partnership. The first of these has been described as a 'highly streamlined customs arrangement'; the next has been called the 'Customs Partnership' option; and the most recent UK proposal effectively keeps the UK in the customs union until an alternative model of cooperation can be found.

### 1.3 Post-Brexit Model 1: Max Fac

The government's pitch for what has become known as the 'Max Fac' (Maximum Facilitation) customs option aims to establish the following:

A highly streamlined customs arrangement between the UK and the EU, streamlining and simplifying requirements, leaving as few additional requirements on UK-EU trade as possible. This would aim to: continue some of the existing agreements between the UK and the EU; put in place new negotiated and unilateral facilitations to reduce and remove barriers to trade; and implement technology-based solutions to make it easier to comply with customs procedures.<sup>28</sup>

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25 For more information on the EU Customs Union, see Catherine Barnard, [The customs union](#) (The UK in a Changing Europe); Alex Stojanovic, [Five Things to know about a Customs Union](#) (Institute for Government); Ingo Borchert and Julia Magntorn, [What can the UK learn from existing customs unions?](#) (UK Trade Policy Observatory).

26 See Commons Briefing Paper, [Brexit: new guidelines on the framework for future EU-UK relations](#) (19 April 2018) p. 84.

27 For details, see Commons Briefing Paper [Brexit: 'sufficient progress' to move to phase 2](#) (19 December 2017.)

28 Prime Minister Theresa May, [Mansion House Speech](#) (2 March 2018).

The customs 'Future Partnership' paper establishes in more detail what kinds of solutions could result in this type of trade facilitation.<sup>29</sup> Amongst them are the expansion of existing trade facilitation schemes, such as 'authorised economic operator' or 'trusted trader' schemes, as well as technological improvements to 'streamline' the UK's current customs processing methods. Joe Owen of the Institute for Government helpfully [summarises](#) the intended effects of the UK's proposals:

The UK proposal goes further than most customs agreements. New technology using number plate recognition would ease flow at ports like Dover and Calais, while negotiating waivers for certain bits of paperwork would ease the burden on traders.

Add all of the different elements up and you have something which is pretty much world leading in terms of customs agreements.

There are two observed shortcomings with this proposal as a post-Brexit customs arrangement. The first is that not all the technology relied upon to make trade as frictionless as 'Max Fac' intends to currently exists; and even where it does exist, the EU would have to adopt it at the same time in order for the intended benefits to manifest. There is a consensus view that implementing 'Max Fac' will be impossible by the time a new UK-EU customs arrangement is needed in January 2021.<sup>30</sup> This problem was acknowledged by the 'Max Fac' advocates in May 2018, however, who reportedly are willing to prolong the agreed transition (or implementation) period set up in the Withdrawal Agreement in order to buy the time to make 'Max Fac' workable<sup>31</sup>; a longer transition, of course, will mean simply staying in the EU Customs Union.

However, a longer transition period will not address the second problem 'Max Fac' faces as a border solution: the promises made by both the UK and the EU with regards to the Northern Ireland border are not about minimizing the level of border checks done, but they preclude border checks altogether. 'Max Fac' will consequently result in something that has been described as 'as frictionless as possible' a border, but this is not the same thing as 'no physical infrastructure' and 'no hard border', which are the commitments agreed between the UK and the EU in the December 2017 Joint Report concluding Phase 1.<sup>32</sup> While trade facilitation can and should be pursued generally between the EU and the UK, it does not address the specific problems raised by the Northern Ireland border.

The UK government appears to have conceded as much in the Mansion House speech:

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29 HM Government, [Future customs arrangements: A future partnership paper](#) (August 2017).

30 HC NIAC, [The land border between Northern Ireland and Ireland](#) (HC 329, 13 March 2018), paras. 71-82.

31 Harry Cole and Nick Gutteridge, '[Brexiters urge Theresa May to extend the transition period to end Cabinet deadlock over the Customs Partnership](#)' (The Sun, 9 May 2018)

32 For details, see Commons Briefing Paper [Brexit: 'sufficient progress' to move to phase 2](#) (19 December 2017)

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Option two would be a highly streamlined customs arrangement, where we would jointly agree to implement a range of measures to minimise frictions to trade, together with specific provisions for Northern Ireland.<sup>33</sup>

What those specific provisions for Northern Ireland would be, and how they fulfil all three of the commitments made with regards to borders in Northern Ireland, however, has not been specified further to date, beyond treating the island of Ireland as a single agricultural area (for 'checks' and animal health regulation (or 'SPS') purposes) and pursuing an exemption for the 'small traders' who make up 80% of the traffic across the land border.<sup>34</sup> Such an exemption will not avoid a border – because if there is an exemption, there will also be a rule to be applied, and that rule will require verification to ensure that everyone claiming to be a 'small trader' is actually a 'small trader'.<sup>35</sup>

The Northern Ireland Affairs Committee consequently found in its report on [The Land Border between Northern Ireland and Ireland](#) that a 'Max Fac' customs arrangement would not satisfy the Joint Report commitments made by both the UK and the EU in December 2017:

The Committee has heard numerous proposals for how the UK and the EU could ensure customs compliance without physical infrastructure at the border. This is currently the case for enforcement in relation to fuel, alcohol and tobacco. These proposals address the question of compliance through mobile patrols, risk analysis, data-sharing and enforcement measures away from the border. However, we have had no visibility of any technical solutions, anywhere in the world, beyond the aspirational, that would remove the need for physical infrastructure at the border.<sup>36</sup>

The Northern Ireland Affairs Committee is not alone in its scepticism about the feasibility of a 'Max Fac' solution in the near future. In April, EU officials were reported to have subjected the UK negotiators to a "systematic and forensic annihilation" of all the UK's proposals, including 'Max Fac', noting that "none of the UK's customs options will work. None of them."<sup>37</sup>

'Max Fac' thus appears to be desirable so as to facilitate trade generally, but is unable to achieve the Phase 1 goal of avoiding a land border with physical infrastructure in Northern Ireland, at which point it will not be enough to underpin the Withdrawal Agreement or future relationship agreement with the EU. The 'compromise' of staying in the EU Customs Union until 'Max Fac' will work to prevent a customs border in Northern Ireland is in that sense interesting: as several commentators

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33 Prime Minister Theresa May, [Mansion House Speech](#) (2 March 2018).

34 Ibid.

35 See the comments made by Paul Mac Flynn in HC NIAC, [The land border between Northern Ireland and Ireland](#) (HC 329, 13 March 2018), para. 71.

36 HC NIAC, [The land border between Northern Ireland and Ireland](#) (HC 329, 13 March 2018) para. 82.

37 Peter Foster, [Exclusive: EU rejects Theresa May's Brexit Irish border solution as doubts grow over whether UK can leave customs union](#) (Telegraph, 20 April 2018)

have reported,<sup>38</sup> there is a fear amongst 'Brexiters' MPs that this could result in an indefinite transition period, as it is not clear when (if ever) the required technology will be ready.

## 1.4 Post-Brexit Model 2: a Customs Partnership

Option 2 - the Customs Partnership - is no less ambitious than using technology to try to 'avoid' or 'minimise' a border. It has been known to be the Prime Minister's preferred option for a future customs arrangement, but Cabinet has been divided between Options 1 and 2. The UK has been sparing on the details of what it imagines a Customs Partnership to look like, but the Mansion House speech suggests the following:

At the border, the UK would mirror the EU's requirements for imports from the rest of the world, applying the same tariffs and the same rules of origin as the EU for those goods arriving in the UK and intended for the EU. By following this approach, we would know that all goods entering the EU via the UK pay the right EU duties, removing the need for customs processes at the UK-EU border.

But, importantly, we would put in place a mechanism so that the UK would also be able to apply its own tariffs and trade policy for goods intended for the UK market. As we have set out previously, this would require the means to ensure that both sides can trust the system and a robust enforcement mechanism.<sup>39</sup>

In theory, this appears to satisfy all the UK red lines and the EU-UK mutual 'Northern Ireland' red lines. The problem lies in practice, however, which is that having one country collect duties on using another country's tariffs, and then refunding traders according to where the goods actually end up going, is completely unprecedented for a number of reasons.

The EU has to date [dismissed](#) such a Customs Partnership as being 'magical thinking', not least because of the short timescale in which it would have to be up and running, as well as it being overly costly and burdensome for traders and the Member States because of the endless 'refund' claims and transport monitoring it would involve. The Customs Partnership is also the 'customs' option that has attracted severe criticism from within the Conservative Party.

A crunch cabinet committee meeting in May, intended to result in the 'adoption' of the Customs Partnership as the option to be pursued, resulted in the committee [dropping the proposal](#) in its current form and the Prime Minister asking for it to be revised. The Foreign Secretary Boris Johnson [made clear](#) it is the long-term consequences of being in the Customs Partnership itself that resulted in Cabinet opposition:

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<sup>38</sup> See, eg, Paul Goodman, [Staying in the Customs Union until 2022. The Pluses. The Minuses](#) (Conservative Home, 13 May 2018); Nick Gutteridge (Sun), [Twitter Thread](#) (10 May 2018); James Blitz, [Can Theresa May find a customs fudge?](#) (FT, 10 May 2018).

<sup>39</sup> Prime Minister Theresa May, [Mansion House Speech](#) (2 March 2018).

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It's totally untried and would make it very, very difficult to do free trade deals. If you have the new customs partnership, you have a crazy system whereby you end up collecting the tariffs on behalf of the EU at the UK frontier. If the EU decides to impose punitive tariffs on something the UK wants to bring in cheaply there's nothing you can do.

That's not taking back control of your trade policy, it's not taking back control of your laws, it's not taking back control of your borders and it's actually not taking back control of your money either, because tariffs would get paid centrally back to Brussels.

Given these both internal and external restrictions, it seems that the Customs Partnership, at least in its current form, faces serious obstacles. This is despite the fact that on 8 May, the Irish Taoiseach Leo Varadkar [told](#) law-makers in Dublin that the proposal could perhaps be made 'workable' and the EU negotiators [asking](#) the UK government to clarify the functioning of the Customs Partnership on five specific points:

- How can the U.K. collect EU tariffs when no longer legally a member of the EU?
- How will the U.K. mirror EU law while also enjoying the freedom to deviate from it?
- How does the U.K. intend to channel customs duty collected in the U.K. into the EU's central budget?
- How should EU customs authorities reciprocate for products destined for the U.K.?
- How will the U.K. ensure compliance with rules of origin, to prevent cheaper goods entering the EU by the backdoor?

### 1.5 Post-Brexit Model 3: 'the Customs Backstop'

Following significant disagreement in the UK cabinet on whether Model 1 or Model 2 should be the 'preferred' customs arrangement following Brexit, the UK appears to have decided instead to focus on providing a 'backstop' solution for avoiding a hard border on the island of Ireland in the field of customs. This latest proposal, which can be referred to as the 'customs backstop' model, was sent to the EU on 7 June. It [proposes](#) UK-wide membership of the Customs Union (and the EU rules on VAT) until an alternative solution to keeping the land border open can be found – which the government expects to be achieved by the end of 2021. It requests, however, that this extended Customs Union membership does not preclude the UK concluding Free Trade Agreements (FTAs) where these do not conflict with the EU Customs Union policies (eg, on tariffs).

On 11 June, the Commission released [a set of slides](#) that were presented to the Council Article 50 Working Party on 8 June, and set out the EU reaction to the UK proposal. It contrasts what the UK is suggesting with 'EU backstop proposal', summarised as:

- Northern Ireland as part of the Union's customs territory (no border)
- Full regulatory alignment on EU goods acquis in Northern Ireland

- Full EU supervision and enforcement mechanisms

The EU slides note that there are key unanswered questions in the UK proposal regarding governance, the operation of the EU's Common External Tariff, and the very nature of a 'backstop', which cannot be time-limited. More generally, the slides highlight that (unlike the EU's own proposal) the UK customs proposal does not address regulatory alignment, is not actually a back-stop if it is time-limited, and according to the EU, pre-determines the UK-EU future relationship by setting out a UK-wide policy.

The main factor in the 'customs backstop' [commented](#) on at the time of writing is whether such a backstop should be UK-wide, as the UK government has argued – or Northern Ireland-specific, as the EU reads the Joint Report as saying, and as Michel Barnier [confirmed](#) upon receipt of the 7 June 2018 UK customs proposal.

If Northern Ireland-specific, as the EU seems to desire, the logical consequence of this 'customs arrangement' is a border in the Irish Sea for customs purposes, as Great Britain and Northern Ireland would then be separate customs territories. For it to be UK-wide, however, the EU will have to concede to some 'cherry-picking' of its *acquis*. Even if the EU should prove willing to concede to a UK-wide customs union for the sake of Northern Ireland's land border, however, this in no way guarantees that it will also be amenable to the UK being part of the Customs Union but also able to conclude its own trade deals.

What we can say about the EU position so far is that its slides on the 'customs backstop' do not categorically rule out the UK proposal in these slides; and the UK proposal itself acknowledges that it only addresses part of what is needed, noting that a further paper on 'regulatory standards' is forthcoming. This third 'model' consequently may function as a starting point for further negotiations on the Option C 'backstop' agreed in the December 2017 Joint Report.

## 1.6 Post-Brexit Model 4: a separate Customs Union

There is a potential alternative 'model' for customs arrangements post-Brexit that has received less explicit support from the UK government, but until the Mansion House speech appeared to be a possibility all the same. Governmental statements on Brexit have been clear that the UK is leaving *the* Customs Union – but, as commentators have regularly pointed out, only Member States can be in *the* EU Customs Union, so this is an inevitable consequence of Brexit. Being out of *the* Customs Union does not preclude concluding a new customs union agreement with the EU, which does operate custom unions with third countries: Turkey, Andorra and San Marino.<sup>40</sup>

### The Labour Position

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<sup>40</sup> European Commission, [Customs Unions](#)

The Labour Party has adopted staying in 'a' customs union as its policy, as made clear by Jeremy Corbyn in a February 2018 speech:

We have long argued that a customs union is a viable option for the final deal. So Labour would seek to negotiate a new comprehensive UK-EU customs union to ensure that there are no tariffs with Europe and to help avoid any need for a hard border in Northern Ireland.<sup>41</sup>

He set out some conditions which Labour would seek to have apply to a new UK-EU customs union. For example, it 'would need to ensure the UK has a say in future trade deals.' Labour would not accept 'a deal that left Britain as a passive recipient of rules decided elsewhere by others. That would mean ending up as mere rule takers.'

Labour would also seek assurances in areas such as state aid and public procurement. Mr Corbyn said:

So we would also seek to negotiate protections, clarifications or exemptions where necessary in relation to privatisation and public service competition directives state aid and procurement rules and the posted workers directive.

We cannot be held back inside or outside the EU from taking the steps we need to support cutting edge industries and local business, stop the tide of privatisation and outsourcing or from preventing employers being able to import cheap agency labour to undercut existing pay and conditions.

It is by no means clear that the EU would accept these conditions; a comparison to the customs union it has with Turkey, as well as its reaction to the most recent government 'backstop' proposal (Model 3) suggest that it will not.

### The EU-Turkey Customs Union

Turkey has a customs union agreement with the EU.<sup>42</sup> The customs union came into force in 1995. The context was very different from Brexit. According to a note by the European Parliament Research Service, "the CU was conceived as a prelude to the accession of Turkey to the EU and crafted to complement the accession process".<sup>43</sup>

The customs union between Turkey and the EU is partial. All industrial goods are covered but not agriculture (except processed agricultural products). According to the European Commission, "the Customs Union foresees that Turkey is to align to the *acquis communautaire* in several essential internal market areas, notably with regard to industrial standards."<sup>44</sup>

The EU-Turkey arrangements do not include a harmonised system of trade defence (anti-dumping measures etc). The EU and Turkey have

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41 Jeremy Corbyn, [Speech on Britain after Brexit](#), 26 February 2018

42 The other countries which have a customs union with the EU are Andorra and San Marino.

43 EPRS, Customs unions and FTAs: Debate with respect to EU neighbours, November 2017

44 European Commission, [Trade: Turkey](#)

imposed these measures on each other introducing a further friction on trade.<sup>45</sup>

In December 2016, the European Commission proposed a modernisation of the EU-Turkey customs agreement but this now appears to be on hold.<sup>46</sup>

There is an asymmetric relationship between Turkey and the EU in the operation of the customs union. Turkey has no seat in EU free trade negotiations with third countries.<sup>47</sup> Furthermore, Turkey must open up its market to those countries with which the EU has negotiated a free trade agreement, but does not automatically gain reciprocal access to those markets.<sup>48</sup> The Labour party's Brexit position would attempt to negotiate greater participation in the EU's trade policy, but it is doubtful that the EU is open to this, given its response to the most recent government 'backstop' proposal.

The EU-Turkey border is not frictionless, in part due to the partial nature of the EU-Turkey customs union (but also other issues, such as transport permits).<sup>49</sup> Checks still occur and there are delays at the border.

The Turkey model would need to be significantly adjusted to meet the conditions agreed to in the December 2017 Joint Report: for example, coverage of agricultural products, for one, would be needed to prevent controls at the land border in Northern Ireland.<sup>50</sup>

Some commentators have suggested that aspects of the Turkey model could work for the UK all the same. The Institute of Directors, for example, has called for "a bespoke, partial customs union with the EU." This would include all industrial goods and some limited processed agricultural goods. This would mean UK manufacturing firms would avoid costly rules of origin but the UK would also be able to pursue its own free trade agreements in areas not included in the customs union. The IoD suggests that the "UK can use Turkey as a base to build upon."<sup>51</sup>

However, the Prime Minister in the Mansion House speech made clear that even an 'improved' Turkey would not be of interest to the government unless it satisfies the 'Model 3' or Labour party conditions outlined above:

The UK has been clear it is leaving the Customs Union.

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45 European Commission, [Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Custom Union, and an Assessment of its Possible Enhancement](#), 26 October 2016, para 7.1.9

46 Erdogan dares Brussels to kill EU accession talks, Financial Times, 6 September 2017

47 World Bank, [Evaluation of the EU-Turkey Customs Union](#), 28 March 2014, para 6

48 Exiting the EU Committee, [The future UK-EU relationship](#), 4th report of 2017-19, HC 935, 4 April 2018, para 129

49 Turkey border gridlock hints at pain to come for Brexit Britain, Financial Times, 16 February 2017

50 See Section 6 of Commons Briefing Paper [A UK-EU Customs Union](#) (25 April 2018).

51 IoD, [Customising Brexit: A hybrid option for a UK-EU trade framework](#) (February 2018)

The EU has also formed a customs union with some other countries.

But those arrangements, if applied to the UK, would mean the EU setting the UK's external tariffs, being able to let other countries sell more into the UK without making it any easier for us to sell more to them, or the UK signing up to the Common Commercial Policy. That would not be compatible with a meaningful independent trade policy. It would mean we had less control than we do now over our trade in the world. Neither Leave nor Remain voters would want that.<sup>52</sup>

A customs union consequently seems likely to resolve the problems set out vis-à-vis technological ability, implementation time needed, and the Northern Ireland land border highlighted for Models 1 and 2 above – but cuts out what the UK government identifies as one of the primary advantages of Brexit, which is the ability to pursue an independent trade policy. Models 1 and 2 are thus of little interest to the EU, but Model 4 is of little interest to the UK.

### 1.7 Summary

The preceding discussion of the various alternatives to the EU Customs Union post-Brexit primarily highlights problems, but are thus far very short on solutions that satisfy the 'red lines' of both the UK and the EU. It is difficult to see how a 'compromise' on the customs arrangements is possible, short of one party softening its 'red lines' and adjusting its proposals accordingly.

Tony Connelly of RTE Ireland [reported](#) in early May that the UK government knows that the Customs Partnership proposal is not achievable before the date of exit, and that it will hope to implement something like it long-term while staying in a customs union with the EU in the medium term. Very similarly, advocates for 'Max Fac' are currently equally indicating that their solution will not be ready in time, but they are willing to stay in the EU Customs Union (in a transition) until it is ready. These reports are effectively confirmed by the 'customs backstop' proposal transmitted to the EU in early June.

That 'customs backstop' proposal is an attempt to at least in part satisfy Option C from the December Joint Report - the 'backstop' whereby the UK signs up for full regulatory alignment on issues affecting the all-island economy - as neither of the alternative government proposals on future customs arrangements have been accepted by the EU as being a viable way forward that avoids physical infrastructure at the land border.<sup>53</sup>

More specific EU reservations about the UK's 'customs backstop' aside, however, it should be noted that the matter of its duration is of both an EU and a domestic concern. If it is time-limited, it does not serve as a 'backstop' and is unacceptable to the EU - but if it is not time-limited, it may represent the new 'end state' relationship between the UK and the

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52 Prime Minister Theresa May, [Mansion House Speech](#) (2 March 2018).

53 Commons Briefing Paper [Brexit: 'sufficient progress' to move to phase 2](#) (19 December 2017)

EU in customs for either Northern Ireland or the UK as a whole, unless the UK's intended 2021 replacement solution satisfies the Joint Report conditions in full.<sup>54</sup>

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54 Adam Payne, [The EU believes Theresa May's 'unstable' government could collapse before Brexit](#) (Business Insider, 5 May 2018)

## 2. Regulatory Arrangements

### 2.1 Pre-Brexit: the Single Market<sup>55</sup>

The EU has had the goal since the Treaty of Rome to create a 'common market'. However, the simple negative provisions in the Treaty of Rome – declaring that Member States will not impose restrictions on the movement of goods, services, capital or people – did very little to encourage the development of a functional internal market. Of interest for the purposes of looking at trade between the UK and the EU are the EU's efforts to ensure genuine free movement in goods first and foremost.

Until the 1980s, there was little EU law governing internal Member State regulations on goods. A product could cross a border without incurring a fee, but might incur a sales tax, or indeed a restriction on sale, on health and safety grounds, or because of cultural differences such as the legal age to drink, and so on. These problems, rooted in the absence of consistent mutual recognition of standards, applied within the Member States, and the absence of common regulations governing internal sale and use of products, were extremely difficult to remove.

The Single European Act (SEA) 1986 resulted in a combination of both 'negative' and 'positive' rules being introduced, in no small part because of the SEA's introduction of an overarching power for the EU to introduce new legislation where this was necessary for the 'establishment and functioning of the internal market'. This new power, found in former Article 100a of the EC Treaty, precluded single Member State vetoes on internal market legislation. Common standards and regulations that would help the creation of the 'single' or 'internal' market were suddenly adopted with significantly greater speed and ease.

It is estimated by the EU itself that by the end of 1992, 90% of all identified legislative issues plaguing the 'internal market' had been resolved. For example, [EEC regulations harmonising what customs declarations looked like](#) in 1987 meant that goods started moving across internal borders – like the one we are examining in this chapter – with significantly greater ease and at reduced cost.<sup>56</sup> By the end of 1992, with the single market in goods complete, customs posts on EU internal land borders were made redundant and could be removed.

What, then, defines the completed 'Single Market in goods'?

The EU, following 1992, is a more advanced example of economic integration between sovereign states than exists anywhere else in the world. There is extensive harmonisation of standards in EU law, meaning products do not need to be checked for compliance when they

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<sup>55</sup> For an overview of the development of the Single Market, see European Parliament, [The internal market: general principles](#) (November 2017).

<sup>56</sup> An example given in Katy Hayward, [The Origins of the Irish Border](#) (The UK in a Changing EU, January 2017).

travel between Member States. However, more importantly, even when there is no harmonisation, the EU operates on principles of 'mutual recognition' with only limited exceptions.<sup>57</sup> The consequence of this is that once a product is legally sold in one Member State, it should be sellable in all other Member States, unless there are overriding specific reasons why a particular Member State does not wish it to be sold. Any restriction on the free movement of any product is challengeable before the CJEU, which then considers both whether the restriction is necessary (eg, does it help to protect a legitimate overriding national interest?) and proportionate (eg, is the 'movement restriction' the least invasive way of protecting that national interest?). This combination of 'same rules' and 'recognition of each other's rules, except in very limited and challengeable circumstances', means that, in combination with the EU Customs Union's harmonised tariff and customs rules, products simply do not have to be checked at the border.

In the rare situation where a product produced in Member State A can, for legitimate overriding reasons, not be sold in Member State B, this can be controlled within the Member States, rather than at the border – or at the point of sale, rather than at the point of import. Borders, consequently, might be there as geographical landmarks within the EU, but they do not serve a trade purpose any more.

However, as Stephen Weatherill [sets out](#) in detail, there is more to the Single Market than the rules that make up EU law. Rules only become meaningful in complex international trade relations if there is significant mutual trust that they will be fully abided by. If country A promises that it produces milk in the same way that country B does, that only becomes a meaningful commitment if country B can somehow 'trust' that country A is doing that. Within the EU, that trust has been built on the overarching ability to check that agreed rules are being applied, and the ability to enforce the rules when they are not being applied.

The Single Market is thus made up of not only rules, but also an extensive architecture that ensures that EU law is enforced, that there is appropriate supervision of commitments made by EU Member States, that all the Member States will 'sincerely cooperate' to ensure that the EU laws work, and that all EU law is interpreted in the same way in all Member States. The EU institutions and their ability to hold each other and the Member States to account if they do not comply with the EU's laws as intended is the foundation for the 'trust' needed to abandon border controls based on mutual recognition and regulatory alignment in trade. Compatible and mutually recognised rules, in other words, are the beginning of not needing border checks; the full extent of institutional and administrative cooperation and integration that make up the EU is an equally essential part of it. More limited economic

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<sup>57</sup> As established in the seminal Cassis de Dijon case: Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ECLI:EU:C:1979:42. For an explainer, see Full Fact's [How the EU works: what is the single market?](#) (8 March 2016)

integration projects across the world have not done away with internal borders in full.<sup>58</sup>

### 2.2 Post-Brexit Model: Outcome Alignment

Currently, the UK's internal technical product regulations (whether on industrial goods or agricultural ones) are fully aligned to the EU's. It may as a consequence seem as though goods crossing the border will necessitate 'checks' only if the UK starts to operate different technical regulations than the EU does. Indeed, the UK government's primary argument in the negotiations on Brexit to date has been that as long as the rules remain identical, or the EU and the UK recognise each other's rules as 'good enough', trade should be able to continue without border checks between the UK and the EU:

The UK will need to make a strong commitment that its regulatory standards will remain as high as the EU's. That commitment, in practice, will mean that UK and EU regulatory standards will remain substantially similar in the future.

Our default is that UK law may not necessarily be identical to EU law, but it should achieve the same outcomes. In some cases Parliament might choose to pass an identical law – businesses who export to the EU tell us that it is strongly in their interest to have a single set of regulatory standards that mean they can sell into the UK and EU markets.

If the Parliament of the day decided not to achieve the same outcomes as EU law, it would be in the knowledge that there may be consequences for our market access.

And there will need to be an independent mechanism to oversee these arrangements.<sup>59</sup>

However, this bid in the Mansion House speech for 'mutual recognition' between the EU and the UK (post-Brexit) underplays the unprecedented achievement that the Single Market is. The type of 'mutual recognition' being asked for by the UK does not even exist between the Member States, where – as discussed above, and as Stephen Weatherill [explains](#) in more detail – exceptions to mutual recognition still operate, but they do so on the condition of the oversight of the CJEU.

'Mutual recognition' as described in the Mansion House speech also does not exist between the EU and other third countries in free trade; and not purely because other third countries operate significantly different rules from the EU. There are significant limits to the level of 'mutual recognition' that the EU is willing to adopt vis-à-vis third countries, where it has significantly less control over the regulatory standards adopted and how those standards are enforced than it does within the Single Market. In other words, there is reduced trust in the technical regulations adopted by non-EU Member States – and post-Brexit, while the UK might start out with identical rules, it will not start

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<sup>58</sup> For a helpful summary, see Ingo Borchert and Julia Magntorn, [What can the UK learn from existing customs unions](#) (UK Trade Policy Observatory, 29 March 2018).

<sup>59</sup> Prime Minister Theresa May, [Mansion House Speech](#) (2 March 2018).

out with the kind of enforceable 'trust' that the Single Market mandates.

The examples of 'mutual recognition' that the EU has accepted in international trade agreements (or FTAs) are very limited. In the EU's FTAs, what is normally called 'mutual recognition' refers only to so-called [conformity assessment exercises](#): whereby the EU recognises assessments from approved authorities in that third country, proclaiming that the products being exported to the EU meet the EU's regulatory standards. This is a world removed from what the PM describes in Mansion House, which is effectively that the EU recognise that whatever the UK adopts as regulatory standards will be 'equal' to the EU's own standards.<sup>60</sup>

There are some other policy areas in which the EU operates a form of 'recognition' of foreign regulation – but this comes with significant caveats. These kinds of 'equivalence' decisions, where the EU determines that foreign rules are 'equal' to the EU rules, are unilaterally extended by the EU, and revocable without any particular appeal rights. The EU consequently [recognises](#) that, for instance, US financial regulation is broadly comparable to EU financial regulation – but only in certain financial sectors, and it reserves the right to change its mind at any time, should US regulations change. Similarly, the EU [recognises](#) the data protection 'adequacy' of some third countries – but as this too is unilateral recognition, the Prime Minister in the Mansion House speech actually [described](#) it as being insufficiently 'secure' for future UK-EU data relations.

It is difficult to imagine that this type of unilateral one-way recognition of UK standards would then be 'secure' enough to avoid having any infrastructure at the Northern Ireland border; after all, the UK's regulations may currently guarantee compliance with the EU rules, but as Mansion House makes explicit, they could stop doing so at any point in time at Parliament's request. It would be impossible to not reintroduce border controls in those circumstances, and as they may arrive at any point in time, the EU may consider border infrastructure necessary at the point of withdrawal so it will be available if needed.

There are specific difficulties likely to arise in the UK's request for 'mutual recognition' of agricultural goods in particular. Switzerland was not exempt from EU border controls until, in 2009, it signed the so-called Veterinary Agreement, which commits it to effectively adopting and staying current on the entire EU acquis on agricultural health and safety indefinitely.<sup>61</sup> This permits agriculture to move between Switzerland and the EU, but is not an example of 'mutual recognition'.

The UK government appears attuned to the importance of the free movement of agri-food on the island of Ireland, as it specifically highlights Sanitary and phytosanitary (SPS) measures as needing

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60 Emily Lydgate, [Hard Brexit, Soft Border: Some trade implications of the intra-Irish border options](#) (UK Trade Policy Observatory, 7 December 2017).

61 See the Swiss Confederation, [Veterinary Agreement between Switzerland and the EU](#) (March 2017).

resolution to prevent a hard border in Northern Ireland. However, it uses Switzerland as an example of the EU reaching 'deep agreement with near neighbours', only to then ask for something quite different from what Switzerland has: recognition of 'regulatory equivalence'.<sup>62</sup> Switzerland is thus a precedent for something the UK has not indicated it is willing to agree to: ongoing adoption of the Single Market rules for the sake of frictionless trade.

The 'mutual recognition' of equivalent outcomes pursued in the UK appears to be asking the EU to operate on a level of trust that only exists within the Single Market, without the UK actually being in the Single Market and subject to all of its oversight and enforcement mechanisms. The Commission has not responded positively to this ask: it implies UK integration (or alignment) on a UK-determined sectoral basis ('cherry-picking'), and is thus seen to undermine the 'integrity and functioning' of the Single Market, including the oversight role carried out by the CJEU.<sup>63</sup>

### 2.3 Summary

The UK government's position is clear on desiring a degree of regulatory divergence from the EU following Brexit; the EU is equally clear on this having the inevitable consequence that barriers will arise, even at internal land borders. Differing technical regulations on goods and agri-food products will result in compliance checks, but perhaps more importantly, even the *possibility* of future differentiation is likely to result in the ability to carry out those checks being deemed necessary at the end of the transition period.

It is difficult to imagine a compromise here. As the European Scrutiny Committee [concluded](#) on 9 May 2018:

... the UK and the EU's visions of the level of mutual recognition that is possible within the future economic partnership diverge so considerably that it may not be possible for the negotiators to find a middle ground. The Government may therefore eventually face a choice between two things: either a conventional Mutual Recognition Agreement which would enable UK conformity assessment bodies (CABs) to certify conformity with EU product rules and vice-versa, or a market integration agreement which would require de facto continued adherence to EU rules.

It is particularly difficult to see how a compromise position would satisfy the Withdrawal Agreement's [Protocol on Northern Ireland](#), unless it reflects the backstop option of 'full alignment' to the EU acquis on all products that are likely to cross the land border in Northern Ireland.<sup>64</sup> However, that commitment to 'full alignment' has also been caught up

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62 HM Government, [Northern Ireland and Ireland \(Position Paper\)](#) (August 2017), paras 55-57.

63 European Commission, [Internal EU27 preparatory discussions on the framework for the future relationship: "Regulatory issues"](#) (February 2018) p. 15.

64 See Commons Briefing Paper [Brexit: 'sufficient progress' to move to phase 2](#) (19 December 2017).

in the disagreements between the UK and the EU on the nature of their future regulatory arrangements.

The UK and EU appeared agreed on a definition of 'full alignment' when adopting the Joint Report in December 2017, but now disagree on how to translate that commitment into legal terms: the UK wishes to pursue 'outcome alignment', whereas the EU is adamant that avoiding a border in Northern Ireland can only be achieved by adoption of the relevant EU acquis.<sup>65</sup>

Unless agreement on regulatory arrangements is reached, a resolution to the customs arrangements problems described above will not be enough to avoid a land border in Northern Ireland via the Option C model set out in December. The practical issues now arising in light of the agreed 'backstop' in the Joint Report may result in a very 'hard' Brexit, without an agreement covering withdrawal and transition in place.

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<sup>65</sup> See Section 8 of Commons Briefing Paper, [Brexit: the draft withdrawal agreement](#) (26 March 2018).

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