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Future trade with the EU: Mutual recognition

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Summary

'Mutual recognition' has featured prominently in the debate over the UK's future relationship with the EU. This paper examines the different ways in which this term is used. It considers how mutual recognition has been used in practice, within the EU, between the EU and non-EU countries and between non-EU countries.

Mutual recognition of *rules* involves two countries recognising each other's standards as equivalent. They may have different rules but these achieve the same outcomes. These rules are generally managed by shared processes or institutions. This is very different to mutual recognition of *conformity assessments* which is a much more limited concept. Mutual recognition of conformity assessments acknowledges the differences between regulatory regimes but permits one party to test and certify that a product complies with the other party's regulations.

It is worth noting that mutual recognition as used in the Single Market is different to mutual recognition agreements between the EU and non-EU countries. Where rules are not harmonised at EU level, EU Member States must recognise each other's regulations except where the specific and narrow derogations laid down in the Treaties, legislation and Court of Justice case law apply. Within the EU, the principle of mutual recognition is that once a product is lawfully placed on the market in one Member State, it can be marketed in another Member State without barriers (subject to some limited exceptions).

The EU has already indicated that it would reject a partnership with the UK based on mutual recognition outside the Single Market and its enforcement mechanisms. M Barnier has stated that the idea of mutual recognition, in which the UK and EU would agree common regulatory outcomes but have the freedom to set their own rules, would not work: "In the absence of a common discipline, in the absence of EU law that can override national law, in the absence of common supervision and a common court, there can be no mutual recognition of standards."¹

Outside the EU, mutual recognition is generally much more limited in scope than arrangements within the EU. Mutual recognition agreements (MRAs) can be arranged without or alongside wider free trade agreements (FTAs). Australia, Israel, New Zealand and the US have MRAs with the EU, without a wider FTA.² Canada, Japan and South Korea have MRAs within the context of their respective FTAs.³ Beyond the specific principle of mutual recognition within the EU itself, and to a lesser extent the Trans-Tasman arrangement between Australia and New Zealand, most mutual recognition agreements are limited to conformity testing (e.g. with the US) which as noted above, is much more limited than mutual recognition within the EU.

Where there is so-called 'mutual' recognition of standards themselves, the alignment is in fact based on EU rules (e.g. with Israel, Ukraine, Turkey). This category covers countries in the EU neighbourhood, effectively extending the territory of the internal market. This may explain why the Government's Brexit White Paper proposes a "common rulebook" for trade in goods.

¹ 'Theresa May aims to calm Brussels fears with key Brexit speech', *Financial Times*, 2 March 2018

² The EU currently has five sectoral deals with Australia and New Zealand, but opened negotiations for a wider free trade agreement on 22 May; 'EU ministers greenlight Australia-New Zealand trade talks', *Financial Times*, 22 May 2018; European Commission, *Launching trade negotiations with Australia and New Zealand*, 2017

³ Institute for Public Policy Research, *The shared market: A new proposal for a future partnership between the UK and the EU*, 18 December 2018, p13

1. Introduction

Whatever form it takes, the UK's future customs relationship with the EU will address only tariffs and rules of origin. Non-tariff barriers and the degree of regulatory alignment or divergence are a much larger part of the picture and a more significant challenge.

This paper first explains the terminology of harmonisation and mutual recognition. Secondly it outlines the respective positions of the UK and the EU on the future relationship. The third section lays out different mutual recognition models with examples: within the EU itself; between the EU and third countries; and elsewhere in the world, for example the Trans-Tasman Agreement. Finally it identifies the conditions for and limitations of mutual recognition, and the challenges for a sector-by-sector approach. These models give some indication of how to address divergence in rules and standards, albeit on a more limited scale to that needed in the UK-EU future relationship.

2. Terminology

There are different bases for mutual recognition.⁴

- Mutual recognition of rules involves two countries recognising each other's standards or regulatory regimes as equivalent. Their rules may look different but achieve the same regulatory objectives and/or outcomes. These rules are typically 'managed' by shared processes or institutions. According to Dr Lorand Bartels' evidence to the International Trade Committee: "In terms of the strict logic, the way out of harmonisation and the way to greater flexibility is mutual recognition of standards".⁵
- Mutual recognition of conformity assessment: A much more limited form of recognition, acknowledging the differences in two different regulatory regimes but permitting one party to test and certify that a product complies with the other parties' regulations.⁶ A country can test an exporter's product to ensure it meets the importing country's regulations, reducing duplication of some procedures.
- Equivalence: Not mutual recognition, but better termed 'reciprocal unilateral recognition', equivalence means that one side recognises the other's standards or regulatory regimes as being 'equivalent' to its own, or that they are 'adequate' to be recognised. This is a unilateral decision by the importing country that can be withdrawn at any time.

These categories are discussed further below, with specific examples.

Figure 1: Scale of alignment



Source: [CBI Smooth Operations report](#), 11 April 2018 p10⁷

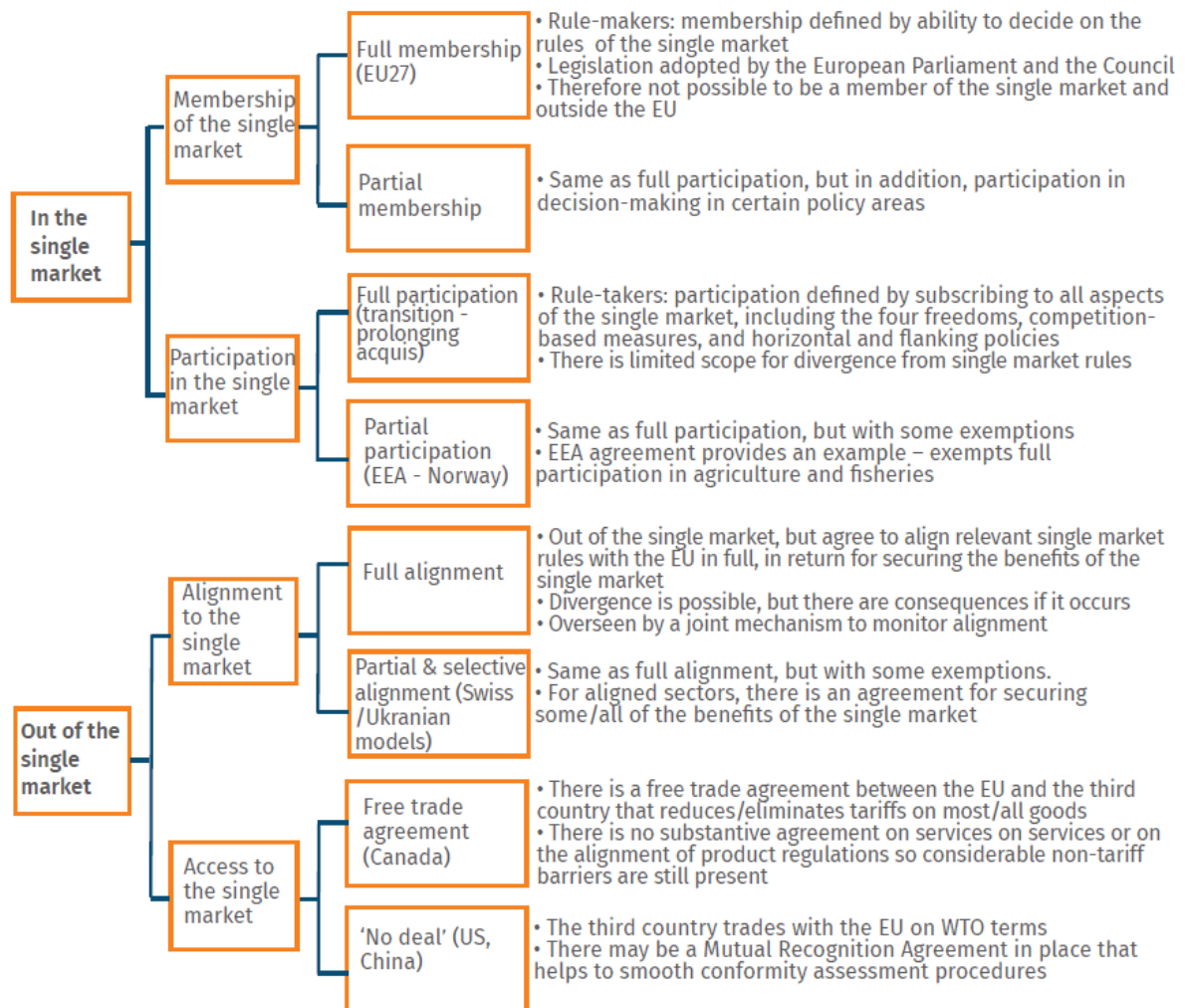
⁴ See Institute for Government, *Trade After Brexit: Options for the UK's relationship with the EU*, 18 December 2017 p22; KNG Shaffer and K Nicolaidis, *Transnational Mutual Recognition Regimes: Governance without Global Government*, IILJ NYU Law School Working Paper 2005/6, p8.

⁵ International Trade Committee, *Implications of arrangements for Ireland-Northern Ireland border for wider UK Trade Policy*, 13 December 2017, HC 665i, Q50

⁶ Institute for Government, *Mutual recognition: can the UK have its Brexit cake and eat it?*, 1 September 2017; International Trade Committee, *UK-US Trade Relations*, 1 May 2018, HC481, para 41

⁷ As discussed above, the definition of 'harmonisation' in this figure is not universal. The two different forms of mutual recognition appear at different positions in this ladder.

Figure 2: Options in relation to the Single Market



Source: IPPR [The Shared Market: A new proposal for a future partnership between the UK and the EU](#), 18 December 2017, p8

Again, this shows a mutual recognition agreement at the bottom of the scale. Some mutual recognition on conformity assessment is also possible in a wider free trade agreement (the Canada model), and mutual recognition of rules or standards would be possible in an alignment model (transition; EEA), but this would include overall institutional architecture to enforce it.

Partial membership does not exist in practice but the IPPR includes it to cover all possible models.

3. UK and EU positions

3.1 Introduction

The green text in the draft withdrawal agreement of 19 March (together with the update published on 19 June 2018)⁸ represents what the UK and the EU have agreed so far. The House of Lords report, [UK-EU Relations after Brexit](#) includes a table outlining the positions of the UK Government, the European Council and the European Parliament.⁹

3.2 UK position

The UK Government's position is essentially to have the right to diverge, especially in services but to remain aligned through the 'common rulebook' for goods.

The UK Government's position, at least for trade in goods, appears to have evolved with more emphasis now on the 'common rule book', as set out in the White Paper, and less on the mutual recognition approach of earlier statements such as the Mansion House speech.

Mansion House speech

In her Mansion House speech on the future economic partnership,¹⁰ the Prime Minister stated that UK and EU regulatory standards will remain in practice "substantially similar" for trade in goods. She referred to "a comprehensive system of mutual recognition", where the UK "will need to make a strong commitment that its regulatory standards will remain as high as the EU's." The PM acknowledged that divergence ("not achiev[ing] the same outcomes as EU law") might lead to a corresponding loss of access to the EU market.

The speech did not specify which sectors would be prioritised in the negotiation, where divergence might be beneficial and therefore where market access might be lost. It also did not specify how particular objectives would be achieved. Interestingly, at Mansion House the PM did not explicitly refer to the '3 basket approach' proposed on previous occasions, which has so far been rejected by the EU. This approach would leave open the possibility of different degrees of participation in different sectors: (a) sectors in and remaining aligned to the EU (b) sectors completely out and different rules, but mutual access maintained e.g. fisheries, (c) where the UK could diverge to achieve the same regulatory goals or outcomes by different means but the EU could correspondingly restrict market access in these areas ('managed divergence'). Variations of this approach were proposed by the Institute for Public Policy Research and the Institute for Government.¹¹

⁸ [Joint Statement from the negotiators of the European Union and the Government of the United Kingdom](#), 19 June 2018

⁹ House of Lords EU Committee, [UK-EU relations after Brexit](#), 8 June 2018, HL 149

¹⁰ Prime Minister's [Speech on our future economic partnership with the European Union](#), 2 March 2018

¹¹ Institute for Public Policy Research, [The shared market: A new proposal for a future partnership between the UK and the EU](#), 18 December 2018; Institute for

David Davis evidence to Select Committees

The then Secretary of State for Exiting the EU, David Davis, told the Lords EU Committee in January that the aim is for an overarching trade relationship, not a sector by sector deal. Regarding tariffs, he saw no reason for separate discussions e.g. on chemicals, automotive, electronics, given that all trade in goods should attract zero tariffs (explicitly offered by the EU¹²). However, there would be sector by sector issues concerning mutual recognition of both standards and inspection. For example, agriculture, fisheries and financial services would have to be dealt with separately by “mutual regulatory equivalence”.¹³ As noted above, ‘equivalence’ normally rests upon unilateral recognition which can be withdrawn.

David Davis also told the Commons Exiting the EU Committee that “we will seek outcome equivalence in many areas, but not harmonisation”.¹⁴ “Alignment ... isn’t having exactly the same rules. It is sometimes having mutually recognised rules, mutually recognised inspection – that is what we are aiming at.”¹⁵ This interpretation of alignment differs from the EU’s understanding, which generally means harmonised rules based on those of the EU.

The CBI survey ‘Smooth Operations’ found that in 18 of the 23 sectors surveyed, companies favoured close convergence. Alignment is particularly important for aviation, aerospace and chemicals. Sectors where opportunities for regulatory divergence or rule changes may have some limited benefits include shipping, waste and environmental services, water, tourism and agriculture.¹⁶

The UK wants to stay in EU standard-setting organisations CEN and CENELEC¹⁷, currently open to EU and EEA members only, and is seeking continued membership of EU agencies, specifically the European Medicines Agency, the European Chemicals Agency and the European Aviation Safety Agency.¹⁸ As some agencies, including the EMA, currently do not allow third country membership, their statutes would need to be changed.

Government, *Trade After Brexit: Options for the UK’s relationship with the EU*, 18 December 2017

¹² Michel Barnier, *Speech*, Hanover, 23 April 2018

¹³ House of Lords European Union Committee, *Scrutiny of Brexit negotiations*, 29 January 2019, Q12

¹⁴ Exiting the EU Committee, *The progress of the UK’s negotiations on EU withdrawal*, 24 January 2018, HC 372, Q702

¹⁵ ‘David Davis promises no special Brexit status for N Ireland’, *Financial Times*, 5 December 2017

¹⁶ CBI, *Smooth Operations*, 11 April 2018

¹⁷ ‘UK to apply to stay in European standards system after Brexit’, *Financial Times*, 11 June 2018

¹⁸ HM Government, *The future relationship between the United Kingdom and the European Union*, Cm 9593, July 2018, p16

Box 1: The White Paper

The UK Government published a [White Paper](#) on Brexit in July 2018.¹⁹ This set out the Government's proposals for the UK's future trading relations with the EU. One of the main proposals was the establishment of a free trade area in goods between the UK and the EU. This aimed to ensure "continued frictionless access at the border to each other's markets for goods"²⁰ and would be based on a 'common rulebook'. The White Paper said that the economic partnership with the EU would include:

a common rulebook for goods including agri-food, covering only those rules necessary to provide for frictionless trade at the border – meaning that the UK would make an upfront choice to commit by treaty to ongoing harmonisation with the relevant EU rules, with all those rules legislated for by Parliament or the devolved legislatures²¹

This would include the UK and EU continuing to recognise each other's type approval authorities i.e. mutual recognition of conformity assessment. The White Paper gives the example of mutual recognition of Vehicle Type Approvals.²²

The UK Government's proposal would:

enable products to only undergo one set of approvals and authorisations in either market, before being sold in both.²³

The emphasis on a common rulebook is closer to the harmonisation approach to the Single Market (where Member States rules are aligned by legislation) as opposed to the mutual recognition approach.²⁴

Having said that, the White Paper does refer to "mutual recognition". For example:

To fulfil the aims set out in this paper across the economic and security partnerships, the UK should continue to participate in certain EU bodies and agencies. UK participation would be important for different reasons, but could relate to enabling mutual recognition of standards, sharing essential expertise and personnel, and exchanging data and information.²⁵

The White Paper includes proposals for the mutual recognition of professional qualifications to allow professionals to offer services in both the UK and the EU.²⁶ The White Paper said:

The UK agrees with the position set out in the European Council's March 2018 Guidelines, which stated that the future partnership should include ambitious provisions on the recognition of professional qualifications. This is particularly relevant for the healthcare, education and veterinary/agri-food sectors in the context of North-South cooperation between Northern Ireland and Ireland.²⁷

The UK's proposal would:

- be broad in scope, covering the same range of professions as the Mutual Recognition of Qualifications Directive;
- include those operating either on a permanent or temporary basis across borders;
- be predictable and proportionate, enabling professionals to demonstrate that they meet the necessary requirements, or to undertake legitimate compensatory measures where there is a significant difference between qualifications or training, in a timely way; and

¹⁹ HM Government, *The future relationship between the United Kingdom and the European Union*, Cm 9593, July 2018

²⁰ P7

²¹ P8

²² P21

²³ P7

²⁴ [The Brexit White Paper on future relations and alternative proposals](#), Commons Library Briefing Paper 8387 (see page 13)

²⁵ HM Government, *The future relationship between the United Kingdom and the European Union*, Cm 9593, July 2018, para 36, p92

²⁶ Para 49

²⁷ Para 54

- provide transparency, with cooperation between regulators to facilitate the exchange of information about breaches of professional standards, and to review changes to professional qualifications over time.²⁸

3.3 EU position

Central features of the EU's position are that there should be no cherry picking of individual sectors to preserve the integrity of the internal market and the four freedoms, and that a non-member should not receive the same benefits as a Member State. The future relationship agreement should be underpinned by enforcement and dispute settlement mechanisms. This institutional framework is a central concern for the EU. The Commission has insisted that substantive mutual recognition of product rules themselves is not available outside the internal market and its regulatory infrastructure including the European Court of Justice.

Reflecting the European Commission's trade guidelines of 7 March 2018,²⁹ M Barnier's speech in Hanover set out the intention for an ambitious and wide-ranging free trade agreement even within the UK's red lines.³⁰ In terms of mutual recognition this would include a "framework for voluntary regulatory cooperation to encourage convergence of rules", and provisions on movement of people and related areas such as coordination of social security and the recognition of professional qualifications. On data the EU would take 'adequacy' decisions, where the level of protection in the UK is deemed equivalent to that of the EU. (The UK is seeking an enhanced version of equivalence with supportive mechanisms, discussed below.) These elements are conditional on a strong level playing field, meaning common ground on competition and state aid, social and environmental standards, and guarantees against tax dumping. Such 'non-regression' clauses are also found in the EU's trade agreements e.g. with Japan.

Box 2: EU's future relationship guidelines³¹

Draft Article 12 on the level playing field

"Given the UK's geographic proximity and economic interdependence with the EU27, the future relationship will only deliver in a mutually satisfactory way if it includes robust guarantees which ensure a level playing field. The aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection with respect to, inter alia, competition and state aid, tax, social, environment and regulatory measures and practices".

²⁸ Para 55

²⁹ European Commission, [Guidelines](#), 7 March 2018

³⁰ Michel Barnier, [Speech](#), Hanover, 23 April 2018

³¹ European Council [22-23 March 2018](#) largely adopting the European Commission's trade guidelines of 7 March

The European Parliament supports an association agreement between the UK and EU.³² This would be adopted under Article 217 of the Treaty on the Functioning of the European Union (TFEU) which provides for “an association involving reciprocal rights and obligations, common action and special procedure”. Switzerland’s sectoral agreements are not formally described as an association agreement but are adopted on the legal basis of Article 217.³³

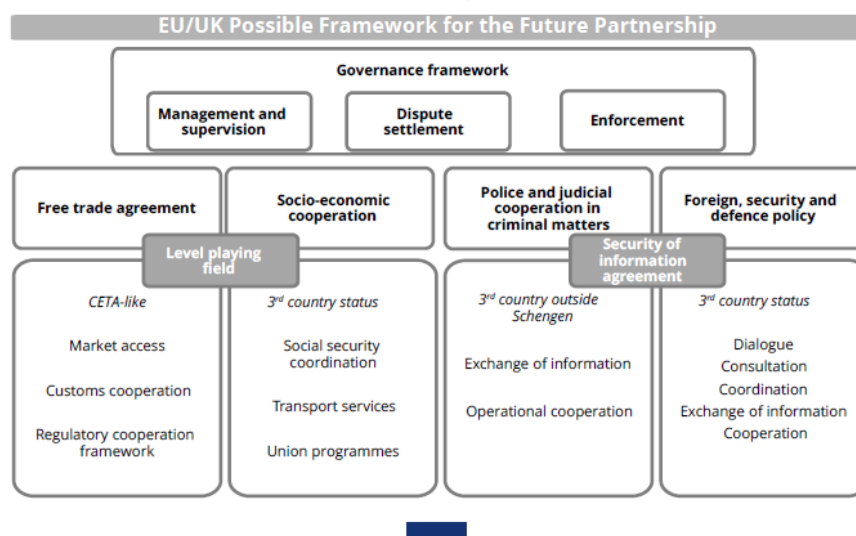
In the UK-EU agreement, trade would be one of four chapters, together with internal security, external security and defence, and other programmes such as education and culture, R&D cooperation (e.g. Erasmus, Horizon). This structure also reflects the Commission’s approach, as confirmed in Barnier’s evidence to the Lords EU Committee³⁴ and the diagram below. The political text on future partnership to be annexed to the withdrawal agreement could comprise heads of agreement for the sectors involved and the plan for each within the trade chapter.³⁵

³² [European Parliament resolution on the framework of the future EU-UK relationship](#), 14 March 2018

³³ Panos Koutrakos, *EU International Relations Law* (Hart, 2015) pp. 381-382

³⁴ House of Lords EU Committee, [Brexit: scrutiny of negotiations](#), 21 February 2018, Q2

³⁵ Guy Verhofstadt oral evidence to House of Lords EU Committee, [Brexit: scrutiny of negotiations](#), 20 February 2018 House of Lords EU committee, 21 February 2018, Q6 (p13)

Figure 3: EU/UK possible framework for the future partnership

Source: European Commission, April 2018

No cherry picking?

The EU has consistently insisted that the four freedoms of the Single Market are indivisible and that there can be no ‘cherry picking’ through participation based on a sector-by-sector approach, that would undermine the integrity and proper functioning of the Single Market.³⁶ However, the approach for the trade chapter outlined by the EU shows that there is a difference between excluding sectors altogether and differentiated treatment between sectors. The latter could be agreed in the context of the overall governance framework.

The EU itself asks for the possibility of sectoral approaches. In the guidelines on the future relationship, within trade in goods the EU has specifically identified that it is seeking existing reciprocal access to fishing waters and resources.³⁷ It has also been claimed that the level playing field in certain policy areas is a form of the EU cherry picking.³⁸ In her Mansion House speech, the PM challenged the EU’s line: “The fact is that every free trade agreement has varying market access depending on the respective interests of the countries involved. If this is cherry-picking, then every trade arrangement is cherry-picking.”

Clause 12 of the European Parliament resolution rules out the possibility of a sector-by-sector approach for a Deep and Comprehensive Free Trade Agreement (DCFTA), although the DCFTA established in the association agreement with Ukraine can be seen as an example of ‘cherry-picking’ sectors of the internal market (including goods, services and capital but excluding labour).³⁹ In addition, even within services the DCFTA with Ukraine includes the possibility of full participation in the

³⁶ [European Council guidelines adopted 23 March 2018](#), para 7

³⁷ [European Council guidelines as above](#), para 8(i)

³⁸ [Brexit: new guidelines on the framework for future EU-UK relations](#), Commons Library Briefing Paper, 19 April 2018, section 8.4

³⁹ Institute for Government, [Association Agreements](#), 22 March 2018

internal market for particular sectors including financial services, telecommunications, postal and courier services, and international maritime services.⁴⁰ The requirement for this is full compliance with EU legislation in those sectors, “creating the conditions for aligning key sectors of the Ukrainian economy to EU standards”.⁴¹

On services, the EU’s position is that companies from the other party will have the right of establishment and market access to provide services under host state rules.⁴² This means that UK firms would have to comply with EU Member State regulations and vice versa when operating in each other’s markets. Specifically on financial services, M Barnier has said: “Where allowed by our legislation, we will be able to consider some of the United Kingdom’s rules as equivalent using a proportionate and risk-based approach, in particular for financial stability, which will remain our main concern.”⁴³ This equivalence-based approach was reiterated by Barnier and by the EU Commissioner for financial regulation, Valdis Dombrovskis, in late April 2018.⁴⁴

⁴⁰ Institute for Public Policy Research, *The shared market: A new proposal for a future partnership between the UK and the EU*, 18 December 2018, p16; ‘Two working examples of access to single market’ [letter from Michael Emerson], *Financial Times*, 23 November 2017

⁴¹ European External Action Service, *EU-Ukraine Deep and Comprehensive Free Trade Area*

⁴² Michel Barnier, *Speech*, Hanover, 23 April 2018

⁴³ ‘EU may treat some UK financial rules as equivalent after Brexit – Barnier’, *Reuters*, 9 January 2018

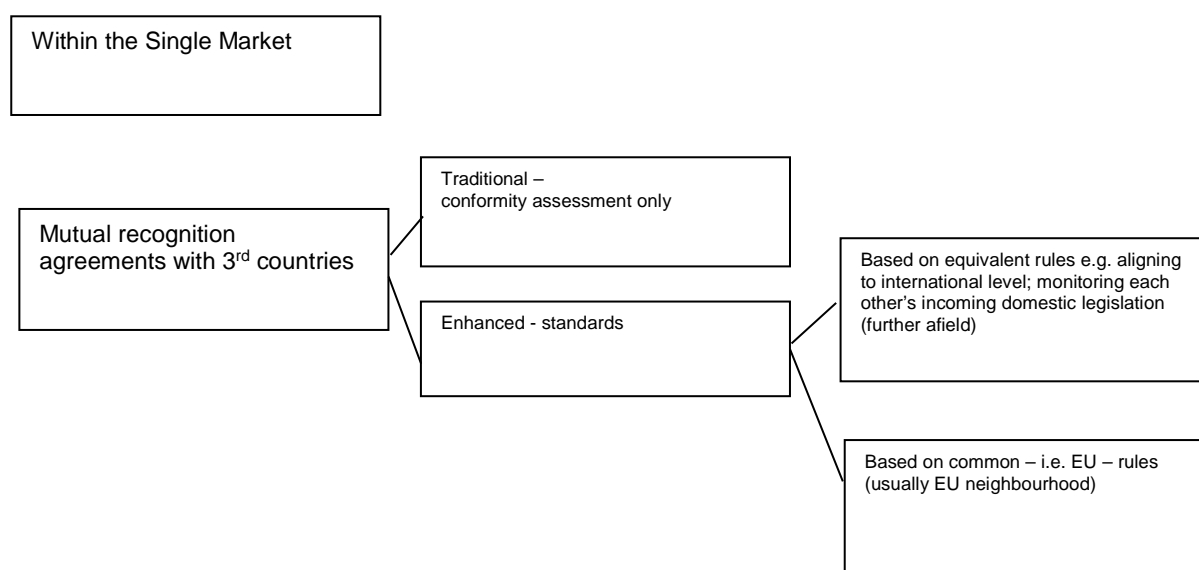
⁴⁴ ‘Michel Barnier quashes UK hopes of special access to EU markets’, *Financial Times*, 26 April 2018; ‘EU damps hopes of bespoke post-Brexit financial deal for UK’, *Financial Times*, 25 April 2018

4. Different mutual recognition models

4.1 Introduction

It is important to distinguish the principle of mutual recognition in the Single Market from mutual recognition agreements (MRAs) between the EU and third countries, as these categories have quite different features. The European Commission has further categorised mutual recognition agreements with third countries in two ways: as 'traditional' agreements, meaning those that cover conformity assessment only, and 'enhanced' agreements relating to standards themselves, of which there are two types: those based on equivalent rules, and those based on common rules.⁴⁵ Equivalent rules can be governed either by treaty, or by parties screening each other's legislation (e.g. some sectors of the Switzerland agreement; the marine equipment agreement between the EU and US, which is based on the rules of the International Maritime Organisation (IMO) of which both are members; the more recent South Korea FTA). 'Common rules' are in fact EU rules involving the adoption by the non-EU party of the *acquis communautaire* (the EU's body of law) as a basis for its own legislation e.g. Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs) with countries such as Israel, and Protocols to the Europe Agreements on Conformity Assessment and Acceptance of Industrial Products (PECAs) with candidate countries who hope to join the EU. An enhanced equivalence agreement of the kind the UK is aiming for in financial services, for example, does not fit obviously into these existing EU categories.

⁴⁵ See e.g. European Commission Staff Working Paper, *Priorities for bilateral/regional trade related activities in the field of mutual recognition agreements for industrial products and related technical dialogue SEC (2004) 1072* 25 August 2004. The paper also mentions 'other possible measures' such as recognition of voluntary labelling schemes.

Figure 4: EU categorisation of mutual recognition

Source: author's diagram based on information from European Commission staff working paper on priorities for mutual recognition agreements (2004)⁴⁶

4.2 Within the EU

Where there are harmonised rules, EU and non-EU operators must comply with them in the internal market. Speaking at the London School of Economics, Stefaan De Rynck, senior advisor to Michel Barnier, said: "The EU has moved away in the wake of the financial crisis from mutual recognition of national standards to a centralised approach with a single EU rule book and common enforcement structures and single supervisory structures."⁴⁷

The principle of mutual recognition applies only to products not covered by rules which have been harmonised, so accounts for approximately 25%⁴⁸ of products on the EU market. As a third country, the UK could still benefit from the EU principle of mutual recognition by placing a good on one Member State's market, which would then be sold in the other Member States (subject to the limited derogations discussed below).

The basic principle of mutual recognition in EU law provides that if a product or service is lawfully placed on the market in one Member State of the EU/EEA, it can be marketed in another Member State without barriers. The principle was established by the Court of Justice in the

⁴⁶ European Commission Staff Working Paper, *Priorities for bilateral/regional trade related activities in the field of mutual recognition agreements for industrial products and related technical dialogue SEC (2004) 1072* 25 August 2004

⁴⁷ 'EU Brexit adviser deals blow to Theresa May's free-trade proposal', *Guardian*, 6 March 2018 reporting De Rynck's talk at LSE, 5 March 2018

⁴⁸ European Commission, *Evaluation of the Application of the mutual recognition principle in the field of goods*, June 2015, p31

1979 *Cassis de Dijon* case (120/78), which concerned a German import ban on the French liqueur.

Permissible exceptions to refusing recognition of products from another Member State are laid down in the Treaty itself and in case law. Concerning goods, Article 36 TFEU does allow restrictions on trade where justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Where a rule applies to both imported and national goods, further justifications based on 'mandatory requirements' are available. The *Cassis de Dijon* case mentions factors such as effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. This is a non-exhaustive list e.g. road safety was added in C-110/05 *Commission v Italy* which concerned a ban on the use of moped trailers.

In services, a ban on cold calling potential customers deprived the firm Alpine of a "rapid and direct technique for marketing and for contacting potential clients in another Member State", but in this case it was justified and proportionate in the public interest on grounds of consumer protection (C-384/93 *Alpine Investments*).

Member State measures must be *necessary* to achieve a legitimate aim and *proportionate* i.e. if other less trade-restrictive measures are available to achieve that aim then the justification will not be accepted.

National derogations can be seen as an opportunity to diverge even within the internal market. However, they must be justified on a strictly case-by-case basis according to the facts, and these derogations from free movement are only allowed in the context of the institutional 'ecosystem' (this term from the [EU27 regulatory issues slides](#)) of the EU. Professor Stephen Weatherill argues that "Primary EU law does not dictate that if products are good enough for one Member State, then they are good enough for all Member States. Instead it demands only that the more fastidious State shall demonstrate why they are not good enough for it."⁴⁹

Mutual recognition within the internal market is also governed by legislation. The [current Mutual Recognition Regulation 764/2008](#) defines the rights and obligations for public authorities and for firms that wish to market their products in another EU country. It requires public authorities to give written notice of trade-restricting action to the European Commission and traders and gives a time limited right to reply (Art 6). This Regulation is in the process of being amended⁵⁰ and going through the EU legislative process (see [European Scrutiny Committee](#)

⁴⁹ S Weatherill, 'The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist' (2017), Oxford Legal Studies Research Paper 43/2017

⁵⁰ December 2017 [legislative proposal COM\(2017\)796](#) – new Regulation on mutual recognition of goods lawfully marketed in another Member State (to replace the Mutual Recognition Regulation 764/2008)

[29th report](#), 23 May 2018: Mutual recognition of goods) as part of the Goods Package⁵¹ on improving the principle of mutual recognition.

The new Regulation proposes:

- a new simple voluntary mutual recognition declaration to show that a product is already on the market in another Member State and that it meets requirements there, to prevent different requirements for proof in different Member States (Lord Henley, BEIS responsible Minister, is particularly supportive of this in the Explanatory Memorandum on the Regulation, according to the European Scrutiny Committee report)
- a 'single market clause' in national technical regulations to the effect that goods marketed in another Member State are presumed to be compatible with the national measure. This clause also applies to Turkey as a party to the customs union.
- strengthening product national contact points and the problem-solving mechanism through SOLVIT. SOLVIT aims to address obstacles faced by EU citizens or business in another country in cases where a public authority is not meeting its obligations under EU law. The SOLVIT centre in the home State liaises with the SOLVIT centre in the country where the problem occurred.⁵²

The [Single Market Transparency Directive 2015/1535](#) also aims to prevent barriers for products which are not or only partially harmonised. Member States are required to notify any draft regulations concerning these products to the European Commission at least three months before their proposed adoption (the 'standstill' period).

If agreement can be reached, these types of mechanisms could be instructive for the future UK-EU relationship.

4.3 Arrangements between the EU and third countries

Mutual recognition agreements can be arranged without or alongside wider free trade agreements. Australia, Israel, New Zealand and the US have MRAs with the EU, without a wider free trade agreement.⁵³ Canada, Japan and South Korea have mutual recognition agreements within the context of their respective FTAs.⁵⁴ The EU's free trade agreements typically include mutual recognition provisions on technical barriers to trade (TBT), which do not require harmonisation of standards; on sanitary and phytosanitary standards (SPS), where measures may be regarded as mutually equivalent; and on narrower mutual recognition of professional qualifications only for particular

⁵¹ European Commission Communication COM (2017) 787 [The Goods Package: Reinforcing trust in the single market](#)

⁵² European Commission [SOLVIT homepage](#). Examples of problems solved [here](#)

⁵³ The EU currently has five sectoral deals with Australia and New Zealand, but opened negotiations for a wider free trade agreement on 22 May; EU ministers greenlight Australia-New Zealand trade talks', *Financial Times*, 22 May 2018; European Commission, [Launching trade negotiations with Australia and New Zealand](#), 2017

⁵⁴ Institute for Public Policy Research, [The shared market: A new proposal for a future partnership between the UK and the EU](#), 18 December 2018, p13

regulated occupations.⁵⁵ These agreements tend to relate to goods only. Where mutual recognition agreements work on a sector-by-sector basis, the number of sectors covered is narrow, and many have not been fully functional in practice.⁵⁶

The European Commission laid out its future priorities based on lessons drawn from the EU's existing MRAs in a 2004 paper,⁵⁷ which continues to reflect its current view. The Commission concluded that MRAs covering conformity assessment only, without alignment of regulatory standards, have "proven difficult to negotiate and even more difficult to implement. It is not worth pursuing new negotiations on this type of MRA."⁵⁸ In existing MRAs not based on equivalence of rules, it suggested deepening rather than broadening in terms of sectors: "efforts should concentrate on the management of sectors that operate satisfactorily and the simplification of procedures."⁵⁹ It recommended that future agreements should be founded on "clear equivalence of respective rules and a real prospect of making them operate almost 'automatically'".⁶⁰

Conformity assessment – 'traditional'

Conformity assessment implies no alignment on standards themselves, and the regulatory requirements of the two parties may differ substantially.⁶¹ This type of overall MRA, with sectoral annexes covering a small number of sectors, has been concluded with the US, Japan, Canada, Australia, New Zealand and Israel. There is also mutual recognition of conformity assessment bodies in particular sectors in the wider framework of particular FTAs: for example, vehicle type approvals by third country authorities are recognised through the EU-South Korea FTA and the agreements with Switzerland.

⁵⁵ Institute for Public Policy Research, *The shared market: A new proposal for a future partnership between the UK and the EU*, 18 December 2018, p12

⁵⁶ E Lydgate & A Winters (2017) *Deep and not comprehensive? What the WTO rules permit for a UK-EU trade agreement*, University of Sussex Economics Working Paper Series 12-1017, p13; Correia de Brito, Kauffmann & Pelkmans (2016), 'The contribution of mutual recognition to international regulatory co-operation', OECD Regulatory Policy Working Paper No. 2, p80

⁵⁷ European Commission Staff Working Paper, *Priorities for bilateral/regional trade related activities in the field of mutual recognition agreements for industrial products and related technical dialogue SEC (2004) 1072*, 25 August 2004

⁵⁸ As above, p3

⁵⁹ As above, executive summary, p2

⁶⁰ As above, executive summary, p2

⁶¹ See OECD (2016), p67

Box 3: Sectoral annexes for certain regulated sectors in the EU's FTAs – no single market treatment (from EU27 regulatory issues slides, February 2018)⁶²

Cars, Pharmaceutical Good Manufacturing Practices (GMP⁶³), Chemicals, Wines and Spirits, Consumer Electronics

- promote compatibility and convergence of regulations based on international standards and enhance regulatory cooperation
- avoid undue delays for regulatory and administrative market access procedures
- avoid unnecessary duplication of testing/certification requirements/audits
- facilitate trade by recognising GMP certificates/inspections/labels
- prevent the creation of new barriers which could nullify benefits of the FTA
- limited recognition of home requirements as equivalent to EU requirements

Canada

The Comprehensive Economic and Trade Agreement (CETA) with Canada is much more limited than the regulatory recognition of the EU Single Market.⁶⁴ A Protocol to CETA provides a framework for Canada's testing bodies to certify that goods made in Canada meet European standards, and vice versa, but there is no mutual recognition of the actual standards. Individual agreements would need to be agreed according to sector depending on the specific regulations for the particular product. In some areas Canada has agreed to follow EU rules without reciprocation, and with no influence in how the EU sets those rules.⁶⁵

The CBI's Smooth Operations report explains that "because the EU and Canada have different laws, to sell products both in the EU and Canada businesses on both sides must – in the main – comply with two sets of rules, get products cleared by two sets of regulators, pay for two sets of licences and in some instances, even pay for the authorities on the other side to randomly inspect their products before goods can cross the border."⁶⁶

CETA's provisions on financial services are considered below.

Switzerland

The agreement with Switzerland is a hybrid agreement. Part of the framework of MRAs with Switzerland is 'traditional' in that it covers only conformity assessment, whereas other parts are 'enhanced' based

⁶² [EU27 regulatory issues slides](#), 21 February 2018, slide 23

⁶³ Good Manufacturing Practices are designed to ensure consistent minimum quality standards and minimise risks in production which cannot be eliminated by testing the final product. They often test conformity to guidelines recommended by licensing agencies in a particular sector e.g. covering food and drink, cosmetics, pharmaceuticals, dietary supplements and medical devices. Good Manufacturing Practices are also included in the EU-US MRA regarding pharmaceuticals and medical devices, and in the ACAA with Israel.

⁶⁴ Stephen Woolcock, [What a CETA \(or CETA+\) free trade agreement would mean](#), LSE Brexit blog, 9 March 2018

⁶⁵ Exiting the EU Committee, [The future UK-EU relationship](#), 4 April 2018, HC 935, para 22

⁶⁶ CBI, [Smooth Operations](#), 11 April 2018, p11

on equivalent rules, depending on the sector.⁶⁷ In its review of MRAs, the Commission notes that “Switzerland is probably a unique case. A European, highly developed economy with infrastructure equivalent to that of the EU and with strong incentive to align its rules with those of the EU, its main trading partner.”⁶⁸ In that sense it is in a similar position to the UK. However, the EU has stated it is not keen on a Swiss-style agreement and is currently negotiating stronger governance arrangements. This includes an independent arbitration panel with issues of EU law referred to the EU Court of Justice, and the ability for Swiss laws to be changed automatically in line with EU law.⁶⁹

The EU-Swiss agreement includes a chapter on motor vehicles providing for mutual recognition of vehicle type approvals. Where legislation is deemed equivalent, EU type approvals will be recognised as proving conformity with Swiss legislation, and vice versa.⁷⁰

Box 4: Trade with Switzerland in industrial goods (from EU27 regulatory issues slides, February 2018⁷¹)

- Specific historical context: convergence towards EU/EEA
- Mutual Recognition Agreement in relation to conformity assessment:
 - Where equivalence of substantive rules is granted, it is assessed by the EU based on Swiss full alignment with relevant acquis (horizontal [framework] legislation + vertical [sectoral] legislation)
 - -20 sectoral chapters listing relevant EU and Swiss legislation:
 - 15 New Approach sectors (CE marking legislation, e.g. electrical equipment, machinery, toys, gas appliances, etc.)
 - 5 additional sectors: motor vehicles, agricultural and forestry tractors

Good Laboratory Practice for the testing of chemicals, Good Manufacturing Practice for pharmaceuticals, biocidal products

Products compliant with Swiss aligned legislation covered by MRA equivalence provisions accepted in the EU as compliant with corresponding EU legislation (and vice versa)

- -Unsatisfactory governance: no provisions on dynamic alignment and preservation of role of CJEU
- -Heavy maintenance required: static agreement, each change in relevant EU acquis requires new EU equivalence assessment of amended Swiss legislation by EU side and decision by MRA governing body amending relevant sectorial chapters
- -No waiving of border controls & no free movement clause beyond specific MRA scope

⁶⁷ European Commission Staff Working Paper, *Priorities for bilateral/regional trade related activities in the field of mutual recognition agreements for industrial products and related technical dialogue SEC (2004) 1072*, 25 August 2004, p4

⁶⁸ As above, p5

⁶⁹ ‘Swiss soften line on foreign judges in bid to bolster EU ties’, *Financial Times*, 5 March 2018

⁷⁰ HM Government, *Automotive Sector report*, December 2017, para 64-65

⁷¹ *EU27 regulatory issues slides*, 21 February 2018, slides 26-27

South Korea

In the EU-South Korea FTA both sides have committed to providing full market access by eliminating tariff and non-tariff barriers.

In addition to the automotive sector discussed below in 'equivalent rules', other sectors of the FTA include mutual recognition tools to tackle non-tariff barriers in pharmaceuticals, chemicals and electronics:

- Pharmaceuticals – inform each other of laws, regulations etc. such laws to take into account international rules, practices, guidelines
- Chemicals – public health & environmental measures, best practice and regulatory mechanisms
- Electronics - agreement to recognise international standard-setting bodies (but no working group as with automotive, chemicals/pharmaceuticals)

The FTA sets up a Committee on Trade in Goods that shall meet at the request of either party. This Committee can consider broadening the scope of non-tariff barrier disciplines, speeding up liberalisation as well as tackling other issues related to trade in goods between South Korea and the EU.⁷²

US

The 1998 EU-US Agreement was the first MRA to cover multiple sectors.⁷³ Figure 5 shows the structure of the EU-US agreement and the mechanisms in each sector. However, again the agreement only relates to conformity assessment and the range of coverage is quite narrow. There are only 6 sectors - telecoms equipment, electromagnetic compatibility, electrical safety, recreational craft, medical devices and pharmaceuticals - of which 2 are currently operational.⁷⁴ In this respect the MRA is aspirational rather than fully implemented. Initially 11 areas were being negotiated.⁷⁵ The MRA also has a transatlantic structure for overseeing implementation.⁷⁶

⁷² European Commission, *EU-South Korea Free Trade Agreement: a quick reading guide*, October 2010

⁷³ OECD (2016), p73

⁷⁴ See European Commission, *Mutual Recognition Agreements*. The pharma agreement was concluded in 2017 after 20 years, but will not fully come into force in 2019, and scope of medicines covered may not be finalised until 2022.

⁷⁵ International Trade Committee, *UK-US relations*, 25 October 2017, HC 481-i, Shanker Singham oral evidence

⁷⁶ International Trade Committee, *UK-US Trade Relations*, 1 May 2018, HC481, para 27

Figure 5: Structure of the EU-US MRA

Framework	
<ul style="list-style-type: none"> ▪ Preamble, emphasising market access, encouraging harmonisation and equivalent assurance ▪ Specifying definitions (e.g. 'designations') ▪ Specifies conditions by which each party will accept or recognize results of Conformity Assessment Procedures ▪ Transition periods (confidence building) ▪ Designation and listing procedures ▪ Suspension rules of Conformity Assessment Bodies ▪ Conditions for withdrawals ▪ Monitoring of Conformity Assessment Bodies ▪ Exchange of information and contact points ▪ Joint committee (plus sectoral ones) ▪ Preservation of regulatory authority ▪ Provisions for suspension of recognition obligations 	
Sectoral annexes	
Telecoms Equipment <i><u>Operational since 2000</u></i>	Specification of laws and requirements; CAPs; listing of authorities; designation; subcontracting; <i>transitional arrangement: 24 months.</i>
Electro-Magnetic Compatibility (EMC) <i><u>Operational since 2000</u></i>	Similar setup as for telecoms equipment
Electrical Safety <i><u>Not operational</u></i>	Similar setup as for telecoms equipment; cross-linkages to telecoms and EMC. In EU, lab assessments completed under US Occupational Safety and Health Administration (OSHA) procedures (EU can do on-site visits in the US).
Recreational Crafts <i><u>Operational 2000-2006 only</u></i>	Specification of laws and requirements; scope and coverage; designating authorities; CAPs; transition of 18 months; link with EMC and electrical safety.
Pharmaceutical Good Manufacturing Practices (GMP) <i><u>Not operational</u></i>	Pre and post approval inspections; 3 year transition period; equivalence determination at end of 3 years; nature of recognition of inspection reports; transmission of reports; suspension; joint sectoral committee; safeguard clause; appendix with applicable laws; criteria for equivalence in that appendix
Medical devices <i><u>Not operational</u></i>	Scope different in EU and US; product coverage (quality evaluation systems; product evaluation; post-market vigilance reports); 3 year transition period; other aspects similar to pharma GMP; alert systems

Source: adapted from [OECD \(2016\)](#), p. 76

There are also separate agreements between the EU and the US. The recent agreement on prudential measures in insurance and reinsurance services allows recognition even though rules are not identical.⁷⁷

The EU-US MRA on marine equipment was agreed in 2004. Going beyond conformity assessment, it is an 'enhanced' MRA that involves harmonisation based on the international rules of the International Maritime Organisation. This is an early example of the European Commission's current policy towards MRAs.

Common rules

According to Correia Brito et al's comprehensive study for the OECD, apart from the EU context covering the internal market and agreements where third countries adopt EU rules for access to it, the only other mutual recognition arrangement based on common rules is the Trans-Tasman Agreement between Australia and New Zealand.⁷⁸

Agreements based on common rules relate to the EU's neighbourhood. While these agreements look like 'mutual' recognition agreements, they are really facilitating the extension of the trade territory and rules of the EU internal market. Examples of these are Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs) concluded with Israel, and the Protocols to the Europe Agreements on Conformity Assessment and Acceptance of Industrial Products (PECAAs), concluded with candidate countries for EU membership.

Goods in a given sector certified for acceptance on the home market of one party are automatically accepted on the market of the other party with no further testing or checks, as if between EU Member States. This requires the use of identical technical standards and testing procedures.⁷⁹ The Commission's view is that "Such agreements can only be concluded with countries where there is a political commitment for extension of the internal market to them, which de facto requires them adopting the *acquis communautaire*."⁸⁰

Switzerland

As mentioned above, the relationship with Switzerland is a hybrid one with a network of different agreements. In goods, Switzerland and the EU have a Free Trade Agreement preventing tariffs and quotas for industrial products, together with agreements to reduce tariffs on agricultural and processed agricultural products. Alongside this there is

⁷⁷ International Trade Committee, *UK-US relations*, 25 October 2017, HC 481-i, Shanker Singham oral evidence, Council of the European Union, *Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance*, 23 May 2017, European Commission, *Fact Sheet – EU-US agreement on insurance and reinsurance*, 22 September 2017

⁷⁸ Correia de Brito, Kauffmann & Pelkmans (2016), 'The contribution of mutual recognition to international regulatory co-operation', OECD Regulatory Policy Working Paper No. 2

⁷⁹ 'Two working examples of access to single market' [letter from Michael Emerson], *Financial Times*, 23 November 2017

⁸⁰ European Commission Staff Working Paper, *Priorities for bilateral/regional trade related activities in the field of mutual recognition agreements for industrial products and related technical dialogue SEC (2004) 1072*, 25 August 2004, p5

an ‘enhanced’ Mutual Recognition Agreement to reduce technical barriers to trade.⁸¹

Although the EU-Swiss MRA is the widest and most ambitious in the world⁸², in practice this ‘mutual’ recognition is applied asymmetrically. It involves ensuring that “standards testing bodies in Switzerland are able to say whether something meets EU standards, and then that good can just be shipped across the border... This is largely a process whereby the [underlying] EU standards and rules in goods have been adopted by Switzerland and then they can be sold in the EU... The Swiss accept products from the EU on the *Cassis de Dijon* principle mechanism, but the EU does not recognise the *Cassis de Dijon* towards Swiss products.”⁸³ Switzerland has accepted this principle to make it easier to import products made in the EU/EEA, but it is not reciprocated for Swiss exports.

Turkey

The Customs Union between the EU and Turkey entered into force at the end of 1995. It covers all industrial goods but excludes agriculture (except processed agricultural products), services and public procurement. Bilateral trade concessions apply to agricultural as well as coal and steel products. In addition to providing for a common external tariff for the products covered, the Customs Union requires Turkey to align to the *acquis communautaire* in several essential internal market areas, particularly with regard to industrial standards.⁸⁴

When the EU concludes a trade agreement with a third country Turkey is required to take on the obligations of that agreement but has to negotiate its own benefits and access to that country’s market.

Alongside its membership of the customs union, Turkey also aligns with the EU’s chemicals regime under REACH as part of an agreement to reduce Technical Barriers to Trade.

The examples of Turkey and Switzerland illustrate that where MRAs are based on ‘common’ rules, those rules are in fact EU rules. These agreements require “adoption of the *acquis communautaire* (legislation, case law, decisions) by the other party as a basis for its own legislation”.⁸⁵ This is also the case with the technical standards on which conformity testing is based in the ACAAs and PECAs. In the ACAA with Israel, for example, the EU is not recognising Israeli rules, so in that sense there is no ‘mutual’ recognition or ‘equivalence’.⁸⁶ Sussex

⁸¹ Institute for Public Policy Research, *The shared market: A new proposal for a future partnership between the UK and the EU*, 18 December 2018, p14

⁸² OECD 2016, p66

⁸³ Exiting the EU Committee, *The future UK-EU relationship*, 4 April 2018, HC 935, paras 66 and 68. Exiting the EU Committee, *The progress of the UK’s negotiations on EU withdrawal*, 6 February 2018, HC 372, Q921 and Q923; Institute for Public Policy Research, *The shared market: A new proposal for a future partnership between the UK and the EU*, 18 December 2018, p15

⁸⁴ European Commission, *Turkey*

⁸⁵ European Commission Staff Working Paper, *Priorities for bilateral/regional trade related activities in the field of mutual recognition agreements for industrial products and related technical dialogue SEC (2004) 1072*, 25 August 2004, p5

⁸⁶ ‘Brussels’ reach encourages others to harmonise product rules’ [letter from Edmond McGovern], *Financial Times*, 28 November 2017

University's UK Trade Policy Observatory (UKTPO) noted in written evidence to the Business, Energy and Industrial Strategy (BEIS) Select Committee's Brexit inquiry that "A basic requirement for an ACAA [Agreements on Conformity Assessment and Acceptance of Industrial Products] is legislative alignment." As the European Scrutiny Committee report summary indicates, Swiss MRA(s) and ACAAs are better termed *market integration* agreements as they require unilateral alignment with EU legislation.

Box 5: Article 3: Alignment of legislation⁸⁷

For the purpose of this Protocol, Israel agrees to take appropriate measures, in consultation with the European Commission, to align with and maintain relevant EU law as it applies to the placing on the market of products covered by this Protocol.

In sectors covered by this Protocol where relevant EU law is based upon the use of technical standards giving presumption of conformity with essential safety requirements (known as "New Approach" sectors) Israel agrees to take appropriate measures, in consultation with the European Commission, to align with and maintain relevant EU practice in the fields of standardisation, metrology, accreditation, conformity assessment, market surveillance, general safety of products, and producers' liability. "New Approach" sectors are indicated as such in the Sectoral Annexes.

Equivalent rules

Equivalence decisions are based on an assessment of the results of regulatory regimes, rather than similarities in regulation.⁸⁸ As the International Trade Committee's report puts it, in cases of equivalence, one country recognises that the regulations of a third country in a specific area achieve the same regulatory outcomes even if they do not follow the exact same specifications as the recognising country's laws. As a result, if a product is compliant there, it need not go through extra checks and certification for compliance.⁸⁹

However, equivalence usually refers to a unilateral assessment by one party. Insofar as it is 'mutual', equivalence is better viewed as a network of unilateral decisions, or reciprocal unilateral recognition. Equivalence or minimum 'adequacy' is used by the EU towards third countries in data protection, financial services and airline security.

In the EU's current trade relations, equivalent rules can be determined by reference to an international treaty where both parties agree to follow those rules, or by the parties screening each other's planned legislation. This occurs e.g. in some sectors of the EU-Switzerland agreement; and in the marine equipment agreement with the US, which

⁸⁷ 2013/1/EU: [Council Decision of 20 November 2012 on the conclusion of a Protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, on Conformity Assessment and Acceptance of Industrial Products \(CAA\)](#)

⁸⁸ Institute for Government, [UK-EU regulation after Brexit: options for equivalence](#), 21 November 2017

⁸⁹ International Trade Committee, [UK-US Trade Relations](#), 1 May 2018, HC481, para 41

is based on the rules of the International Maritime Organisation of which both are members. More recently, the EU-South Korea FTA makes reference to United Nations Economic Commission for Europe (UNECE) harmonisation in the automotive sector.

Box 6: Equivalent rules in the automotive sector

EU-South Korea FTA (2011): includes a provision on the mutual recognition of vehicle type approvals. A type approval issued by one party's competent authority, confirming conformity with the relevant UN ECE Regulations, must be accepted by the other party as providing proof of conformity.

The basis for this is both parties' commitment to aligning their own regulations to World Forum for Harmonisation of Vehicle Regulations (WP.29) UNECE [United Nations Economic Commission for Europe] regulations or Global Tech regulations within five years.

Compliance with these commitments is monitored by a working group also established under the FTA.

Korea has agreed to accept 'EURO VI' certificates for heavy duty commercial vehicles, and simplified electronic documentary procedures for imports of E-marked tyres.

Voluntary information exchanges and cooperation on upcoming regulatory measures are also used at agency level, for example between the European Medicines Agency and the US Food and Drug Administration on pharmaceuticals.

The screening of intended future legislation is especially relevant in the EU-UK context since the parties are starting from shared rules.

Financial services

Box 7: EU draft guidelines on trade and the future relationship: Annex 4 financial services

"Regarding financial services, the aim should be reviewed and improved equivalence mechanisms, allowing appropriate access to financial services markets, while preserving financial stability, the integrity of the single market and the autonomy of decision making in the European Union. Equivalence mechanisms and decisions remain defined and implemented on a unilateral basis by the European Union."

'Improved equivalence' in the EU's draft above appears to relate to the institutional mechanisms which would underpin the agreement (as opposed to allowing a greater scope for substantive divergence).

The Chancellor's 7 March HSBC speech⁹⁰ challenged the European Commission's assertion that financial services cannot be part of a free trade agreement. He recognised that a future economic partnership "will always need to ensure a fair balance of the rights and obligations associated with market access".

He noted the aim of delivering an equivalent outcome by different means, but that the EU's established third-country equivalence regime would be inadequate. Instead a principle of "mutual recognition and reciprocal regulatory equivalence" is needed, provided it is objectively

⁹⁰ Chancellor's [Speech on financial services](#), HSBC, 7 March 2018; see also Chancellor's evidence to European Scrutiny Committee, [EU Withdrawal](#), 5 March 2018, HC 763

assessed, with proper governance structures, dispute resolution mechanisms, and sensible notice periods to market participants.

This would include maintaining a structured regulatory dialogue to discuss new rules proposed by either side and an objective process to determine whether they provide sufficiently equivalent regulatory outcomes including not only the rules themselves, but also an assessment of the way in which they are enforced.

Hammond acknowledged consequences for choosing not to maintain equivalent outcomes but that these should be reasonable and proportionate, predictable and decided by an independent arbitration mechanism. For this he raised the example of the governance mechanism already in CETA (rather than CETA-style provisions on standards which do not go far enough).⁹¹

According to the FT, under a 'dynamic reciprocal mutual recognition model' [this phrase is a quote from an anonymous source] "the UK would commit to keeping its financial regulations in line with EU rules, and would cede authority to a dispute resolution mechanism to calibrate the City's market access or impose other conditions — for example higher capital requirements — if one side was seen to be breaking the spirit of the agreement".⁹²

The White Paper said that the Government was aiming for:

new economic and regulatory arrangements for financial services, preserving the mutual benefits of integrated markets and protecting financial stability while respecting the right of the UK and the EU to control access to their own markets – noting that these arrangements will not replicate the EU's passporting regimes;⁹³

The White Paper proposed a "new economic and regulatory arrangement" for financial services. This would build on the EU's existing equivalence arrangements. These new arrangements "would be based on the principle of autonomy for each party over decisions regarding access to its market."⁹⁴ They would include provisions on governance, supervisory co-operation and regulatory dialogue. The White Paper accepted that continuing with passporting would not be compatible with leaving the Single Market.

The Chancellor described the White Paper's proposal as "less than mutual recognition, but ... more than the EU's equivalence regime." He said it was "a model that preserves the stability, transparency and certainty of the former, while respecting the sovereignty of the latter."⁹⁵ The Institute for Government commented that these proposals "would

⁹¹ See also 'UK aims to keep financial rules close to EU after Brexit', *Financial Times*, 16 February 2018

⁹² As above

⁹³ HM Government, *The future relationship between the United Kingdom and the European Union*, Cm 9593, July 2018, para 8

⁹⁴ Para 64, page 30

⁹⁵ Philip Hammond, 'A new approach for UK financial services after Brexit', *Financial Times*, 12 July 2018

require the EU to show a lot of flexibility.”⁹⁶ The UK has pointed to the TTIP negotiations for an example of enhanced financial services equivalence: outcome-based assessment of whether the other side’s regime was equivalent, underpinned by a binding appeal system that would enable either side to automatically gain equivalence if they were found to have been unfairly denied. This goes beyond the EU’s current conception of the ‘equivalent rules’ model.

According to the Centre for European Reform, the EU tabled informal proposals on regulatory co-operation in financial services during the fifth round of the TTIP negotiations. In its non-paper the EU proposed a process that could eventually lead to ‘mutual reliance’ of regulations and future rules, although mutual reliance was not fully defined. However, other sections of the non-paper clarified that any party may rescind equivalence decisions unilaterally, but should consult beforehand.⁹⁷

The wording on mutual recognition of standards was ultimately dropped in the TTIP negotiations. As an alternative, the parties agreed to establish a softer US-EU Financial Markets Regulatory Dialogue (FMRD).⁹⁸

Box 8: Insurance: pre-emptive equivalence

In the Solvency II legislation harmonising insurance regulation on how insurers are funded and governed, the EU granted equivalence to several third countries pre-emptively before the relevant EU directive came into effect. Switzerland, Bermuda and the US are deemed to have fully or partially equivalent rules. Open Europe advocates the UK seeking this ‘pre-emptive equivalence’ approach.

The recent EU-US agreement on prudential measures in insurance and reinsurance services allows recognition even though rules are not identical.⁹⁹

Data

Similarly to financial services, the UK wants a solution that goes further than unilateral ‘adequacy’ decisions in data protection based on Art 45 General Data Protection Regulation (GDPR).¹⁰⁰ Adequacy decisions allow the Commission to recognise that a third country provides data

⁹⁶ Institute for Government, *The PM’s Brexit white paper: what does it mean?* 13 July 2018

⁹⁷ Sam Lowe, *On Brexit, TTIP and the City of London*, Centre for European Reform, 30 May 2018

⁹⁸ International Trade Committee, *UK-US Trade Relations*, 1 May 2018, HC481, para 89

⁹⁹ International Trade Committee, *UK-US relations*, 25 October 2017, HC 481-i, Shanker Singham oral evidence; Council of the European Union, *Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance*, 23 May 2017, European Commission, *Fact Sheet – EU-US agreement on insurance and reinsurance*, 22 September 2017

¹⁰⁰ [Regulation 2016/679](#)

protection standards that are ‘essentially equivalent’ to those applied in the EU, allowing for the free flow of personal data.¹⁰¹

In evidence to the Exiting the EU Committee on 9 May, data experts concurred that the UK should seek a stand-alone data agreement, separate from a trade agreement, in an international Treaty. This would take account of the fundamental rights element of data protection and would give a further layer of protection.¹⁰²

Services

The EU has stated that access to services will be on the basis of host State rules.

CETA provisions (without any pluses...) fall short of passporting and do not go far beyond WTO terms, according to the Institute for Government.¹⁰³ CETA does include some provision for trade in services, including access to the Canadian markets in telecoms, energy and maritime transport sectors, and enables EU companies to bid for public procurement contracts in Canada. The EU has agreed to open up its services markets using the ‘negative list’ approach meaning that all services markets are liberalised except those explicitly excluded.¹⁰⁴ However, the EU entered a large number of reservations on Canadian access to EU financial markets. The agreement focuses on access according to host State rules, and there is nothing about equivalence.¹⁰⁵

The Exiting the EU Committee concluded that a trade agreement making up for the loss in services coverage the UK currently enjoys as part of the Single Market “would require an unprecedented development of mutual recognition agreements far more ambitious than any previously agreed by the EU with a third country.”¹⁰⁶ Explaining the barriers to the EU-UK relationship simply ‘cloning’ the mutual recognition practices on services from the Single Market, Fredrik Erixon told the Exiting the EU Committee that there will be differences between sectors depending on the degree of EU regulation and the need for a licence approval.¹⁰⁷

The Most Favoured Nation clause in CETA with Canada and other agreements means that if the EU offered broader or more generous

¹⁰¹ [UK data protection future partnership slides](#), 23 May 2018. See also DExEU [Technical note on data protection](#) 7 June 2018; [The exchange and protection of personal data \(Future partnership paper\)](#) 24 August 2017

¹⁰² The Exiting the EU Committee published its report, [The progress of the UK's negotiations on EU withdrawal: Data](#) (HC 1317) on 3 July 2018

¹⁰³ Institute for Government, [Brexit and financial services](#), 10 April 2018. See also Study for European Parliament ECON committee, [Implications of Brexit on EU Financial Services](#), June 2017, p19

¹⁰⁴ [CETA: The EU-Canada Free Trade Agreement](#), Commons Library Briefing Paper, CBP 7492

¹⁰⁵ Exiting the EU Committee, [The future UK-EU relationship](#), 4 April 2018, HC 935, para 19; Exiting the EU Committee, [The progress of the UK's negotiations on EU withdrawal](#), 10 January 2018, HC 372 Q499. See also Stephen Woolcock, [What a CETA \(or CETA+\) free trade agreement would mean](#), LSE Brexit blog, 9 March 2018

¹⁰⁶ Exiting the EU Committee, [The future UK-EU relationship](#), 4 April 2018, HC 935, para 37

¹⁰⁷ Exiting the EU Committee, [The future UK-EU relationship](#), 4 April 2018, HC 935, para 27; Exiting the EU Committee, [The progress of the UK's negotiations on EU withdrawal](#), 10 January 2018, HC 372 Q490

services coverage to the UK then it would be obliged to offer similar improved terms to its existing trading partners. Clifford Chance suggested it might be possible for the EU and the UK to have a mutual recognition agreement on financial services with an underlying requirement that the UK and EU regulators would perform in a particular way. Another nation wishing to take advantage of the MFN clause would also need to conform to those mutual recognition requirements. In this way, it would open up a renegotiation for the EU but it would not be an automatic opening up of the same benefit.¹⁰⁸

4.4 Mutual recognition arrangements elsewhere in the world

Trans-Tasman Mutual Recognition Agreement (TTMRA)

The Trans-Tasman arrangement only involves two countries – Australia and New Zealand – as compared to the EU28 (currently) and the EFTA countries within the EEA. The Trans-Tasman Mutual Recognition Agreement (TTMRA) is inspired by the *Cassis de Dijon* principle in EU case law – goods lawfully marketed in one territory can be marketed in another, and goods only need to comply with regulations and standards in the country where they were produced. The Trans-Tasman Agreement works on a presumption that there is mutual recognition unless otherwise stated. However, there is a lengthy negative list in an annex setting out goods or sectors where the agreement does *not* apply.¹⁰⁹ In evidence to the Exiting the EU Committee, Dr Lorand Bartels stated that “...[the Australia and New Zealand] agreement has many more carve-outs than what one sees in the EU.”¹¹⁰ The Institute for Government points out that within the TTMRA highly regulated sectors are exempt from the mutual recognition provisions, and there is no extensive provision for services.¹¹¹

It only applies to a limited range of goods (and not to services). Highly regulated sectors, such as chemicals and pharmaceuticals, are largely excluded.

According to the Institute for Government, both governments have a much more relaxed approach to regulation than the EU tends to show. In the TTMRA, the equivalence of regulatory objectives is assumed to be valid, unless there is a specific clause stating otherwise. In this respect, it differs from the situation in the EU’s internal market, where Member States must justify any restriction of trade based on derogations in the Treaty and case law, and those lawful restrictions must also be

¹⁰⁸ Exiting the EU Committee, *The future UK-EU relationship*, 4 April 2018, HC 935, para 32; Exiting the EU Committee, *The progress of the UK’s negotiations on EU withdrawal*, 21 March 2018 HC 372 (Jessica Gladstone evidence Qq1256–1257)

¹⁰⁹ OECD (2016), p71

¹¹⁰ Exiting the EU Committee, *The future UK-EU relationship*, 4 April 2018, HC 935, para 26.; Exiting the EU Committee, *The progress of the UK’s negotiations on EU withdrawal*, 17 January 2018, HC 372, Q561

¹¹¹ Institute for Government, *Trade after Brexit*, 18 December 2017, p40

proportionate (see Weatherill in the section on mutual recognition within the internal market above).

The TTMRA works by treating New Zealand as a de facto Australian state government, sitting in the Council of Australian Governments when regulations are discussed. There are also shared agencies in some sectors, such as food safety and banking supervision. In some areas it goes beyond mutual recognition to harmonisation.¹¹²

Replicating that option, with the UK as a '28th State', would give the UK a greater say after Brexit than the EEA members or Switzerland, which is unlikely to be accepted.¹¹³ Although in the transition agreement there is provision for the UK to attend meetings affecting its interests, a TTMRA-style mechanism would go much further.

The agreement can be revoked by either side for up to one year. This is longer than the period the EU has proposed in the UK-EU withdrawal agreement for suspending the UK's market benefits if it infringes EU law during the transition period.

¹¹² Institute for Government, [Trade after Brexit](#), 18 December 2017, p24

¹¹³ Institute for Government, [Third Stop on the Road to Brexit](#) 20 February 2018

5. Challenges to a sectoral approach

There are a number of challenges to this sectoral approach, aside from the EU's objections to cherry-picking, including:

- how to choose sectors, with different priorities in the EU27.¹¹⁴
- the interconnectedness of rules: how many and which rules should be adhered to e.g. in the case of car standards, there are ancillary and related rules such as emissions, State aid, working conditions etc. Sectors could however be identified with reference to their legal basis (i.e. Treaty article).
- as outlined in the CBI Smooth Operations report, the need to avoid the temptation of a simple sectoral approach and instead examine the UK and EU's ties rule by rule; changes to rules for one sector will not just affect businesses in that sector.¹¹⁵
- how to solve disputes: objective determination of whether a competitive advantage has been gained is very difficult

The shift to the common rulebook approach in the White Paper reflects previous assessments, such as by the Institute for Government, that an agreement with the UK based on broad mutual recognition is highly unlikely. Its absence of oversight and institutions would contradict the EU's approach to trade:¹¹⁶ a "comprehensive mutual recognition of rules ... would be completely unprecedented and require a massive change of approach by the EU."¹¹⁷ In addition, a 'managed divergence' system along the lines of the IfG and IPPR proposals is unlikely to gain traction among the remaining Member States. Instead, Andrew Duff suggests that a DCFTA between the UK and EU should be agreed, supplemented with a system of sector by sector mutual recognition agreements.¹¹⁸

Professor Piet Eeckhout's study on trade relations for the European Parliament's International Trade Committee finds that an intermediate model, which would allow for continued convergence and mutual recognition in some sectors/freedoms, but not others, is unavailable and cannot easily be constructed for legal, institutional, and political reasons. The stark choice is between a customs union/free trade agreement, or continued internal market membership through the EEA or an equivalent agreement.¹¹⁹ In a University College London blog post based on that study, he further argues that irreconcilable market

¹¹⁴ Centre for European Reform, *Holding out hope for a half-way Brexit house*, 22 January 2018

¹¹⁵ CBI, *Smooth Operations*, 11 April 2018, *Brexit: 'Bonfire of rules' mean more costs than benefits, CBI says*, BBC, 11 April 2018, 'UK businesses call for post-Brexit alignment with EU regulations', *Financial Times*, 11 April 2018

¹¹⁶ Institute for Government, *Trade after Brexit*, 18 December 2017, Executive Summary

¹¹⁷ Institute for Government, *Trade after Brexit*, 18 December 2017, p27

¹¹⁸ Andrew Duff, European Policy Centre discussion paper, *Brexit: What Theresa May's White Paper must do*, European Policy Centre discussion paper, 16 May 2018, p3

¹¹⁹ Piet Eeckhout, *Future trade relations between the EU and the UK: options after Brexit*, Study for the European Parliament INTA Committee, March 2018

integration versus trade liberalisation paradigms mean “it is difficult to imagine a relationship that would allow for continued convergence and mutual recognition in some sectors, or for some of the basic freedoms, but not others”.¹²⁰ In common with Duff, Eeckhout believes that a DCFTA with system of mutual recognition is the most likely model. However, this would be one-way alignment i.e. the UK with the EU.

Pascal Lamy, former EU Trade Commissioner and Director General of the WTO, told the Exiting the EU Committee: “Mutual recognition... is a very specific way of ensuring, provisionally, with a certain fragility, regulatory convergence”¹²¹ ... “there are nice words about best efforts to co-operate in standardisation of spare parts of cars or chemical ingredients, but the legal constraint is very weak and totally different from what it is in the internal market”.¹²²

This fragility is echoed by Professor Gareth Davies, who argues that mutual recognition has a “self-destructive quality which gives it a short shelf life”.¹²³ (This is largely because mutual recognition tends to create the conditions for harmonised rules. Conversely, in the current situation the UK and the EU are heading in the opposite direction.)

The Transatlantic Trade and Investment Partnership (TTIP) negotiations suggest that mutual recognition of testing and certification is much harder to do than anticipated. Proposals were then scaled down to focus on mechanisms for approximation of *future* legislation.¹²⁴ (For example, similar to the measures in the EU-South Korea FTA)

A further legal issue is compatibility with WTO rules. WTO rules state that customs unions or free trade agreements must liberalise “substantially all the trade” in goods (Art XXIV:8b GATT) or have “substantial sectoral coverage” for trade in services (Art V:1(a) GATS). Narrow sectoral agreements that did not cover “substantially all the trade” between the UK and EU would be vulnerable to challenge by other WTO members. This implies that sectoral arrangements would need to be made in the context of a broader agreement.¹²⁵

There is no settled definition of ‘substantially all’ trade in goods in the WTO’s rulings.¹²⁶ In services, ‘substantial’ means “in terms of number of sectors, volume of trade affected and modes of supply... Agreements should not provide for the a priori exclusion of any mode of supply.” (Art V:1(a) GATS). In reality, as Pascal Lamy told the Exiting the EU

¹²⁰ P Eeckhout and C Leroy, *Post-Brexit Trade Relations: No Middle Way Between Free Trade Agreement and Internal Market*, University College London Brexit Blog, 16 May 2018

¹²¹ Exiting the EU Committee, *The progress of the UK’s negotiations on EU withdrawal*, 27 February 2018, HC 372, Q1158

¹²² As above, Q1161

¹²³ G Davies, ‘Is Mutual Recognition an Alternative to Harmonization? Lessons on Trade and Tolerance of Diversity from the EU’ in L Bartels & F Ortino (eds) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006), p265

¹²⁴ Exiting the EU Committee, *The progress of the UK’s negotiations on EU withdrawal*, 21 February 2018, HC 372, Q1055

¹²⁵ See E Lydgate & A Winters (2017) *Deep and not comprehensive? What the WTO rules permit for a UK-EU trade agreement*, University of Sussex Economics Working Paper Series 12-1017

¹²⁶ Appellate Body Report, Turkey – Restriction on Imports of Textile and Clothing Products (Turkey – Textiles), [WT/DS34/AB/R](#), adopted 22 October 1999, para 48-49

Committee, agreements should be notified to the WTO to be vetted by committee, but there are many waiting in line and control is 'shallow', so that agreements are unlikely to be blocked.¹²⁷ The UKTPO has also pointed out that these provisions have never been fully enforced.¹²⁸

WTO rules exclude arrangements whereby UK-EU trade in a few specific sectors would receive more favourable terms than those offered to other WTO members. For example, the arrangement which the UK government reached with Nissan would not be WTO-consistent if it included tariff concessions. This principle is made clear in the 2000 *Canada – Autos* dispute.¹²⁹ It would be possible according to WTO rules to sign an agreement labelled a Free Trade Agreement, but within which the rules of origin were applied in such a way that for some products no tariffs were applied regardless of origin.¹³⁰

¹²⁷ Exiting the EU Committee, *The progress of the UK's negotiations on EU withdrawal*, 27 February 2018, HC 372, Q1126

¹²⁸ E Lydgate & A Winters, *Can a UK-EU Free Trade Area preserve the benefits of the Customs Union or Single Market in some sectors?*, UK Trade Policy Observatory Briefing Paper 10, September 2017, p5

¹²⁹ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* (Canada – Autos), [WT/DS139/AB/R](#) and [WT/DS142/AB/R](#), adopted 31 May 2000, paras. 79-84

¹³⁰ House of Lords European Union Committee, *Brexit: trade in goods*, Written evidence from Peter Holmes, [FTG0026](#), 29 January 2017

6. Conclusion

Sectoral arrangements are unlikely to be accepted by the EU without overarching governance structures. This could be done by an overall association agreement in the form of a Deep and Comprehensive Free Trade Agreement (DCFTA), supported by mutual recognition agreements in individual sectors. These are likely to be on the basis of Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs) aligning to EU rules.

Where UK and EU rules are not aligned, regulatory equivalence (same objectives, different means) could be achieved by voluntary agreement. This could be done by reference to international rules where relevant, or by monitoring each other's incoming legislation and standards. This would need to be supported by a mechanism to mediate disputes and govern the circumstances in which recognition could be withdrawn.

The dynamic for sectoral agreements in the negotiations may be partly influenced by who will have chief negotiator responsibility for the future relationship on the EU side. This role could fall to a special negotiator (similar to M Barnier's position in the withdrawal negotiations), the incoming EU Trade Commissioner, or the Commission's Directorates General in separate policy areas.

The European Scrutiny Committee's report on mutual recognition in goods concludes that "The contradiction between the Government's vision of mutual recognition and the nature of the EU's regulatory union suggests that there is not much middle ground: the Government is likely to find itself faced with a choice between a standard Mutual Recognition Agreement (though perhaps more comprehensive in the range of sectors covered) or a market integration agreement which involves accepting EU rules." The Brexit White paper suggests the Government has opted for the latter, at least as far as trade in goods is concerned.

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