

MEMORANDUM

The New Customs Partnership

Executive Summary

The fundamental problems in the New Customs Partnership (NCP)

This briefing has been prepared on the advice of pre-eminent experts in the field of trade and customs. It explores problems with the proposed New Customs Partnership (NCP) with the EU, which is the second option in the Government's *Future Customs Arrangements: a future partnership paper*.¹

In the Government's paper, the first option was:

- A “**highly streamlined customs arrangement** between the UK and the EU, streamlining and simplifying requirements, leaving as few additional requirements on EU trade as possible” (the Streamlined proposal).

The second option was:

- A “**new customs partnership (NCP)** with the EU, aligning our approach to the customs border in a way that removes the need for a UK-EU customs border. One potential approach would involve the UK mirroring the EU's requirements for imports from the rest of the world where their final destination is the EU.” This would see “the UK acting in partnership with the EU to operate a regime for imports that aligns precisely with the EU's external customs border *for goods that will be consumed in the EU market*” [our emphasis], but that “the UK would also be able to apply its own tariffs and trade policy to UK exports and imports from other

¹ *Future Customs Arrangements: a future partnership paper*, 15 August 2017. <https://www.gov.uk/government/publications/future-customs-arrangements-a-future-partnership-paper>

countries destined for the UK market, in line with our aspiration for an independent trade policy”.

This note sets out –

- why attempting to implement NCP would prevent the UK from adopting an effective independent trade policy;
- why it fails to remove the need for customs checks, unless the UK also agrees to regulatory alignment, and so fails to achieve regulatory autonomy;
- how it would impose restrictions on the UK which are fundamentally similar to the current Customs Union arrangement between the EU and UK, but without all of its benefits
- how other countries are likely to react to it, and how it will imperil the execution of the UK’s independent trade policy, and its ability to improve its own regulatory environment
- how, because the NCP precludes the Streamlined proposal (including a comprehensive customs chapter in an FTA), keeping NCP on the table causes an unnecessary delay which prevents both the government and the private sector from getting ready for Brexit, and thus is effectively a decision to be in a customs union with the EU.

The Streamlined proposal reflects what other national customs authorities around the world are widely seeking to achieve, as well as the direction of travel of the WTO itself. It is therefore achievable in the context of Brexit. However, NCP creates wholly novel administrative and regulatory challenges for business and government for which there are no precedents. It is commendable that the government is considering creative solutions which will surely be needed in all aspects of Brexit, but the NCP forces regulatory alignment, and eliminates the UK’s independent trade policy.

The NCP would, in theory, permit different tariffs for goods depending upon whether their final destination is the UK domestic market or the EU. This would be extremely complicated and difficult to operate, and its costs are as yet unquantifiable. As *Future Customs Arrangements* acknowledges:

“There would need to be a robust enforcement

mechanism that ensured goods which had not complied with the EU's trade policy stayed in the UK. This could involve, for instance, a tracking mechanism, where imports to the UK were tracked until they reached an end user, or a repayment mechanism, where imports to the UK paid whichever was the higher of the UK's or the EU's tariff rates and traders claimed a refund for the difference between the two rates when the goods were sold to an end user in the country charging lower tariffs. Businesses in supply chains would need to be able to track goods or pass the ability to claim a repayment along their supply chain in order to benefit... We acknowledge this is an innovative and untested approach that would take time to develop and implement."

We understand that the second of these mechanisms is now being explored. NCP would also require the EU and the 27 Member States to agree to impose reciprocal arrangements on their businesses and customs authorities, *mutatis mutandis*. Goods imported by the EU but destined for the UK would have to be treated as a UK import and be eligible for the UK tariff rate, not treated as an EU import. In order for rules of origin and customs declarations to be waived, the EU would have to have complete trust in the effectiveness and enforcement of the rebate mechanism. It is hard to envisage an agreement that would both command mutual confidence and be workable.

Below are set out nine fundamental problems with NCP.

1. **The administrative burden of this system would mean low real uptake of UK tariff rates**, because firms would be under a range of requirements to prove they are entitled to receive the relevant tariff rebates. Large numbers of importers would therefore just pay Common External Tariff (CET) rates set by the EU, so they would fail to receive the benefit of any lower tariffs. It is usual, even under well-accepted trade agreements, for some importers just to pay the MFN tariff rate to avoid the bureaucracy

associated with claiming a preference. Therefore, to avoid the relatively small cost of reintroducing a customs border, the whole economy would suffer the larger cost of these requirements.

2. **Exporters to the UK would need their customers in the UK to pay EU tariffs, then try to claim them back** by proving that the goods had gone to a UK end-consumer. In order to set the prices of their goods to take into account import duties that may fall due, exporters do need to know what the duty would be. Under the NCP, this would be difficult to forecast in many cases because of the nature of complex modern supply chains. It would also trespass on matters which may be commercially sensitive. An importing business may be reluctant to disclose the end user of goods, since the supplier could exploit this information and sell straight to the end user. More generally, the destination may simply be unknown. Meat products, for example, are often imported, then re-processed and split for ultimate destinations in in the UK or for export to the EU and around the world.
3. **Our trade partners would be deterred from agreeing mutual tariff reductions by their having to pay EU tariff rates up front.** If we agree a free trade agreement, UK exporters would be able to send goods to their customers in the receiving country tariff-free, but that country's exporters would need to pay the EU tariff and then only potentially claim it back through the rebate system. This substantially reduces the appeal of a free trade agreement with the UK, because the trade partner would have much less incentive to agree to reduce their own tariffs, when the benefits to their exporters would be effectively nullified. Our *de facto* tariffs would remain the EU CET, even if our *de jure* tariff schedules were lower. This means that such agreements would in any event likely violate Article XXIV GATT, which requires that FTAs eliminate duties on substantially all trade between the parties.
4. **The UK would have less negotiating leverage over a potential trade partner's trade barriers and behind the border regulatory barriers.** The UK's trade partners would see limited benefit and so would have less incentive to accept that they must reform their anti-competitive regulations or other non-tariff barriers to our exporters. Such regulations and non-tariff barriers are particularly

important in respect to services trade, which is a key interest to the UK.

5. **EU quotas make the problem yet more complex.** The EU has quotas for some imports, so that the import is tariff free until the quota is filled. Importers would need to somehow work out whether the quota covered their purchases, in order to calculate their tariff rate, for potentially for many different items. Should the UK decide to administer quotas of its own, the situation would become more complex still, because importers in the rest of the EU would have deal with the same problem.
6. **Only large corporates would be able to carry the significant administrative burdens of this system.** SMEs are those more likely not to bother and just to pay the higher tariff, removing at a stroke any competitive gains for our SMEs and innovative firms. Moreover, the EU would be the unintended beneficiary of this unintended tax on SME importers (and consumers).
7. **Crucially, this option also frustrates UK regulatory independence.** Border controls do not only deal with tariffs, but also with non-tariff controls such as health and safety, product standards and other regulatory requirements. Most UK importers would be unable to show that their non-EU imports are UK- not EU-destined. Thus the EU would be likely to require importers and manufacturers to maintain their product standards in compliance with EU regulation. The EU would also want to see measures to prevent the potential for leakage of UK imports, which are designated for the UK, into the EU across a non-customs frontier. **The main purpose of the NCP is the customs-free circulation of goods between the UK and EU-27. This could not be achieved without the EU demanding regulatory alignment with the EU. So NCP would end up substantially the same as a full customs union, with regulatory obligations reflecting most of the Single Market *acquis*.**
8. **If the above factors mean that uptake of the rebate scheme is low, this would mean that the tariffs levied in practice on goods entering the UK market could be higher than the UK's bound rate, which would be a violation of the GATT. Importers within the UK would be motivated to continue to buy goods from the**

EU-27, rather than seek to take advantage of lower tariffs that might be available on imports from third countries due to the associated regulatory burden. It would therefore be trade-diversionary, which also violates the GATT.

9. **The UK would continue to be a substantial tax collector for the EU, continuing to make a substantial net contribution to the EU budget.** Where importers did not identify imports as UK consumed, the tariffs collected would belong to the EU. It would be hard to pretend this was much different from the present EU “own resources” claim on UK customs revenues. This would continue the unjustified UK net contribution to the EU budget. Any form of customs union means collecting tariff revenues into a common pool. Once UK firms begin applying EU tariffs (because of the alternative burdens), the UK, as now, would be in a disproportionately disadvantaged position, because the UK trades higher percentage of its GDP than any other major EU Member State.

The regulatory question is perhaps the most fundamental. Regulatory alignment not only means the UK does not “take back control” but would mean other countries cannot negotiate advanced trade deals with the UK, which require the UK being able to diverge its regulation away from the EU’s. The result will be that negotiations will likely be fruitless with the UK’s main target countries. **The need for regulatory alignment of the NCP voids the agreement that the cabinet has already agreed in Chequers that the UK would be able to diverge its regulatory system from the EU system. The NCP effectively voids that agreement. It is difficult to understand the purpose of gaining cabinet unity over a specific trade negotiating objective if the government then overrides that cabinet decision.** The UK’s main target countries, including the US have been clear about this. Already, US Commerce Secretary Wilbur Ross has warned that without the UK being able to diverge from EU regulations, it will be unable to sign an FTA with the US. While Australian trade minister Steven Ciobo has said that he would like to see an Australia-UK FTA by December, 2020, and the trade ministers of many TPP-11 countries have noted their desire to see the UK accede to the TPP, given that they regard an NCP and customs union as analogous, Australian Foreign Minister Julie Bishop has made it clear that if the UK

has a customs union with the EU, Australia could not negotiate a trade agreement with the UK.

To assess any UK-EU customs facilitation, the following five questions must be answered:

- **Will the UK have regulatory autonomy such that it can fully execute an independent trade policy?**
- **Will the UK be able to sign meaningful free trade agreements which are compliant with WTO rules?**
- **Will the jurisdiction of the European Court of Justice over the UK be brought to an end?**
- **Will substantial UK contributions to the EU budget be brought to an end?**
- **Will the UK be able to improve its own regulatory environment and lower tariffs in any area of its choosing?**

1. Background: The Customs Partnership and its relationship to other customs arrangements

A. Customs Union vs Free Trade Agreement

i) Functioning of a Customs Union

Some of those who now advocate that the UK should remain in a Customs Union with the EU after Brexit have suggested that the UK should do so to maintain the advantages of tariff-free trade with the EU, and the customs clearance cost advantages of free circulation. On tariffs, however, we can maintain tariff-free trade in both directions by entering into a Free Trade Agreement (FTA) with the EU; and on customs clearance we can mitigate the increased clearance costs by improving our own customs processes and negotiating a high standards customs chapter in an FTA. Meanwhile, although other aspects of the Brexit negotiations raise difficulties, the offer of a zero-tariff FTA is firmly on the table from the EU. That is not surprising, because the advantages to the EU of having a zero-tariff FTA with the UK in avoided tariffs are over twice the tariffs which UK exporters to the EU would avoid, thanks to the UK's very large bilateral trade deficit with the EU, and the fact that the EU's exports to the UK are heavily concentrated in high-tariff sectors. On customs clearing, our goal should be to improve our own customs systems, and those of Member States through a comprehensive customs chapter in an FTA, to mitigate clearance costs.

A basic policy choice, to achieve zero tariffs, and to minimise customs clearance costs, is therefore between implementing zero tariffs by means of a customs union, or through an FTA including a comprehensive customs chapter. Here it is important to understand the fundamental differences between a Customs Union and an FTA, and how to enter into an arrangement with the EU that allows the UK to take advantage of the benefits of Brexit by executing an independent trade policy.

An FTA between parties A and B would require neither to levy tariffs on the goods each imports from the other; it would not determine or constrain what tariffs each country levies on imports from elsewhere. Thus A and B can each independently conduct their external trade policies with other countries, choosing unilaterally to charge tariffs at different levels, and independently to enter into trade agreements,

including FTAs, with other countries. It is therefore possible for country A which has an FTA with country B also to enter into an FTA with C (or D, E, and F) without needing B's agreement or for B to be involved in any way.

By contrast, a Customs Union requires each of its members to charge identical external tariffs. This has a number of inevitable consequences. First, members of a customs union cannot choose to reduce or eliminate tariffs on third country imports even where it is clearly in their interests to do so.²

Secondly, it is necessary for the Customs Union as a whole to implement so-called trade protection measures, such as anti-dumping duties. This means that an individual member of a customs union may lose out, either if the union chooses not to impose measures to protect one of its vital industries, or if anti-dumping duties are brought in, in order to protect industries in other CU members but which simply drive up costs for consumers or industrial users of the imported products which are the target of the measures.

Thirdly, it is impossible for a CU member to enter into an FTA, or indeed any agreement involving concessions on tariffs, on its own, because that would breach its obligation to maintain identical external tariffs. Only the Customs Union as a whole unit can enter into FTAs with non-members.

This is not quite the case with an asymmetric customs union, of the kind which exists between Turkey and the EU (below) and which some propose should exist between the UK and EU after Brexit. Under this arrangement, the EU would remain free without needing the UK's consent to enter into FTAs with another country, and the UK would be compelled to reduce its own tariffs on goods from that country. However, that other country would not be under any obligation to reduce its own tariffs to UK exporters.

Fourthly, in a Customs Union, tariff revenue is collected in a common pot. (In the EU, all tariffs collected by Member States are paid to the

² To give one example, the EU's Common External Tariff requires the UK to impose a 16% tariff on oranges imported from outside the EU. Since there are no orange growers in the UK, no UK industry benefits from this tariff but UK consumers must pay 16% above world price levels for their oranges. The benefit of this artificially higher price level of course goes to orange growers in Mediterranean EU states.

Commission as EU “own resources”, less a 20% allowance to cover the costs of collection). The justification is that it is not possible to tell where goods imported at the ports of any particular member are consumed.

A customs union intrinsically means very rigid central control of the application of the common tariff at CU external borders. The Commission explains on its website that “*the 28 national customs administrations of the EU act as though they were one*”. EU Member States must interpret and apply common customs rules according to guidance from the Commission, and according to ECJ rulings.

Any difference in tariffs or interpretation of rules would mean goods flowing into the union from outside at ports with the weakest controls. Post-Brexit membership of a customs union with the EU would entail either continuing direct jurisdiction of the ECJ, or an obligation to apply and follow ECJ interpretation of the rules.³

But the collection of tariffs is **only one function of customs**. Customs and other border control agencies are also responsible for the application of a vast range of non-tariff and regulatory controls to imported goods, from health checks on imported food to preventing import of children's toys with excess lead. Once goods have crossed an external CU border of the EU customs union, they can circulate freely between Member States with no systematic checks at internal borders, so the application of non-tariff controls must be harmonised, as well as tariffs.

In addition, within the EU it is also necessary for these rules to be applied to goods produced domestically within each Member State as part of the Single Market. Within the EU, it is the combination of these same rules and standards applying to goods imported from outside the EU via customs controls and the internal application of those same standards and rules to goods produced inside each Member State, which enables goods to be allowed across the internal borders of the EU without checks (free circulation). Thus to deliver completely frictionless trade after withdrawal, the UK would have to remain not only in the Customs Union but in the Single Market, at least as regards its rules relating to goods as distinct from services, with the UK in a rule-taking position and with no vote on the rules.

³The EU-Turkey customs union agreement contains explicit obligations on Turkey to follow and apply ECJ case law: see <http://lawyersforbritain.org/staying-in-the-eu-customs-union-after-exit>

If the UK were to remain in a customs union with free circulation with the EU after Brexit, we would be required to exercise identical non-tariff controls to those of the EU on all our imports from non-EU states. This in turn would mean: (1) we could not agree with a trading partner to accept goods which departed from EU-mandated standards, even if we judged that standards applied by that trading partner were just as effective; and (2) we would have to apply EU-mandated standards to our domestic production of goods. Technical rules affecting product regulation would have to be identical to avoid checks, which would mean remaining within the Single Market in total alignment. This alignment would preclude independent trade policy.

The reasons for this are that, first, the EU would not accept the possibility of UK-produced goods which did not conform with EU standards circulating in the EU. Secondly, it would also breach our obligations under the WTO Agreements not to impose requirements on goods imported from other WTO countries while allowing domestic producers the advantage of manufacturing to different standards.

Therefore, membership of a post-Brexit customs union with the EU is not merely an economic issue affecting our external trade; it is also and more importantly an issue of sovereignty and of control. It would mean following every change the EU chooses to make in future to those rules, and every future interpretation of those rules by the ECJ, but without a right to vote on changes to those rules, or on EU decisions on trade agreements with non-Member States.

ii) The alternative: a free trade agreement with the EU

The alternative, and Government policy, is to enter into an FTA with the EU. Unlike a Customs Union, an FTA relates only to tariffs which apply as between the parties, not to tariffs with third countries. The EU-UK FTA would contain provisions on regulatory issues, technical barriers to trade, sanitary and phytosanitary measures, and standards. These regulatory provisions would contain divergence management mechanisms within a standard agreement on regulatory coherence, including both good regulatory practice, and recognition of regulation by the other party.⁴

⁴ It is usual to include these matters in modern free trade agreements, though the UK and EU will be looking for wider and deeper coverage than is usually achieved.

However, because an FTA does not regulate the trade relations of its parties with third countries, it is necessary to take steps to prevent circumvention of its benefits by third country importers. Let us take an example where A and B have a zero-tariff FTA between them, while A also has an FTA with C; however there is no FTA between B and C.

If nothing were done to stop it, it would be possible for manufacturers in C to ship their goods into A, and then re-export them to B from A, thereby avoiding the tariffs that would be applicable if there were a direct export from C to B.

To prevent this, FTAs invariably apply only to goods which *originate within* the other FTA party. This entails that customs controls *need to operate* on the border between FTA members in order to apply the zero-tariff concession only to goods which originate within the other FTA party, and to charge tariffs on non-originating goods. These customs controls then operate additionally to prevent goods which do not comply with non-tariff rules and standards from crossing the internal borders of the FTA. Thus, there is no requirement within an FTA for the non-tariff rules and regulations relating to the standards of goods on the domestic markets of FTA members, or imported from outside, to be the same. This is critical, as it would enable the UK as a non-member to regain the ultimate power to depart from EU rules and standards (where the UK judges it in its interests to do so).

The trade-off is that an FTA does impose some administrative burdens on exporters as compared with a Customs Union. The real question however is the costs of these additional checks, and how they compare to the benefits of the UK executing an independent trade policy, and having the freedom to change the laws and rules which apply to domestically produced and imported goods of all kinds.

These benefits are not just economic, but just as importantly are political: regaining control of huge swathes of domestic laws which control what goods may or may not be produced and how this is done, and recovering control of trade policy, are vital.

The regulatory issues are critical. As opposed to anti-competitive, prescriptive regulatory systems, the UK needs regulatory autonomy to unlock the huge gains which can come with a reduction of anti-

competitive market distortions.

iii) Mitigating the burdens of customs checks within an FTA

Of course, steps should be taken to minimise the costs to businesses of operating post-Brexit customs controls between the UK and the EU. This indeed is the stated aim of the government in its paper, which proposes the “highly streamlined customs arrangement” to facilitate trade with the EU.

A legal customs border is the point at which it becomes a legal requirement either to satisfy origin requirements or to pay a tariff, and to comply with non-tariff rules. It does not follow that customs rules have to be enforced by physical inspection of goods at that border. In practice (and as now required in law by the WTO Customs Facilitation Agreement, ratified by the EU), the vast majority of goods enter the UK from non-EU countries by using electronic pre-submission of documents and electronic payment of any duties. Only a very small proportion are physically checked.

The answer therefore would be to improve our own customs arrangements⁵, and to negotiate a comprehensive agreement with the EU on customs to maximise facilitation between the UK and the EU Member States, especially those where there is significant trade.

Nor is it necessary under an FTA regime for physical customs controls to be exercised at the Irish land border, since based on experience at land borders elsewhere, alternative mechanisms exist for the proper customs regulation of the very small volume of trade which crosses that border (see further below). To reduce border frictions under an FTA, we should ensure a high standard customs chapter in a UK-EU trade agreement, as well as improving our own systems. Briefly here, this can include improving our provisions for self-assessment, postponed accounting for VAT for all imports, improving the functioning of the Accredited Economic Operator (AEO) system, and making warehousing and reliefs such as inward processing work better.

⁵ See the IEA/ACITA recommendation in *Under Control: What HMRC can do to prepare and optimise customs processes for all outcomes* iea.org.uk/publications/under-control/

B. Forms of customs arrangements

The various forms of customs arrangements which have been discussed constitute proposed solutions to the issues of, a) many industries' suggestion that we need to preserve the free circulation of goods between the UK and the EU-27; and b) the need to maintain an open border between Northern Ireland and the Republic of Ireland. The following section discusses the nature of "the" vs. "a" customs union as proposed solutions, and the relationship with the Northern Ireland border.

Suggestions that the UK remain in "the" or "a" customs union both refer to the UK maintaining the Common External Tariff (CET). Proposals for "a" customs union include a partial customs union for some goods but not others (an example of which is the EU-Turkey arrangement, discussed below).

i) The Customs Union

The customs union itself involves all members sharing a common external tariff (CET) and quotas. Membership therefore carries economic and trade implications: tariffs increase the price of goods, and by operation of the common commercial policy, as *Future Customs Arrangements* states: "Membership of the... Customs Union means [that] the EU negotiates trade agreements, including tariffs, on behalf of all Member States". If the UK does not control its own tariff schedules, it cannot use their potential reduction as leverage in any trade negotiation. Any negotiation on the CET would necessarily go through Brussels, rendering the Department of International Trade essentially obsolete.

However, the customs union alone would not deliver free circulation of goods between the UK and the EU. In order to do that, there must be comprehensive recognition underpinned by harmonisation emanating from single market rules, such that these inspections would not be necessary. In practice, if the goal of complete free circulation is to be achieved within a customs union, this would require both customs union *and* single market membership (at least as regards all rules for goods).

ii) A customs union

Leaving aside questions about the legal basis and WTO consistency of

whether a separate customs union could be created after the UK leaves the treaties in March 2019, a customs union of any kind also requires all members to operate *identical* external tariffs in the areas of coverage. Only the customs union as a whole, not individual members, can enter external trade negotiations involving tariffs in these areas. Therefore, even with its own trade negotiator, the UK would be unable to meaningfully negotiate its own agreements. As we analyse in the Turkey-EU Association Agreement below, Turkey is now an example of this, and must accept whatever the EU negotiates for its imports, then argue separately for concessions from other countries for its exports (with very little leverage). Turkey and the European Commission themselves have noted the major problems with this agreement.

The necessary collection of tariff revenues in a common pool is especially disadvantageous for the UK, which has a higher percentage of trade outside the EU than any other member.

iii) The EU-Turkey agreement and the Ukraine Association Agreement

Turkey is the only major non-EU country that is a member of a customs union with the EU. It has been stated that this does not constitute full alignment: the customs union with Turkey is not complete, as it does not cover most agricultural produce. However, Turkey must “align itself with the Common Customs Tariff” (Article 13(1)) and “adjust its customs tariff whenever necessary to take account of changes in the Common Customs Tariff” (Article 13(2)) for all products that are covered. Turkey also cannot be involved in Commission decisions on changing its Tariff (but under Article 14(1) it is to be “informed” of these decisions “in sufficient time for it simultaneously to align the Turkish customs tariff on the Common Customs Tariff”). Article 39(1)(a) and Article 55(1) also require Turkey adopt EU Regulations and ECJ case law in competition law, with no vote on legislation and the right only to have Turkish experts “informally consulted”.

For external trade, Turkey must harmonise commercial policy with the EU with regard to the importation of goods from third countries into Turkey (Article 16), but does not necessarily receive tariff-free goods access for its own exports to the relevant non-member. This depends on negotiating successfully a separate trade agreement, but without the

leverage of reduced tariffs or making regulations more pro-competitive.

In the case of Turkey, the Ankara Agreement (1963) was intended to serve as a pathway for Turkey to accede to the EU, which is why Turkey committed to the EEA rules and the *acquis*. The Turkish arrangement includes increasing harmonisation, such as a Turkish commitment to adopt the *acquis* in sectors covered by the customs union, approximate commercial policies, and harmonise intellectual property rights policies. There are also fundamental similarities with the Ukrainian model (the Deep and Comprehensive Free Trade Agreement, DCFTA), with tariff-free goods access and services 'passporting', but also alignment of considerable areas of regulation in competition, state aid, public procurement and anti-dumping, with plans to integrate foreign policy, defence and security, home affairs and justice policy, and it states that Ukraine is expected to "[achieve] convergence with the EU in political, economic and legal areas".⁶ Whether Ukraine's regulations affecting trade are sufficiently aligned to the *acquis* is judged by a joint Association Council with no right of appeal; in disputes on interpretation of the EU law with which Ukraine is converging, the ultimate verdict is with the ECJ.

The problem with a partial customs arrangement is that, the more coverage it has, the less leverage the UK would have in reducing services barriers (as the world's second largest services exporter). A customs union for goods alone that covers trade in substantially all goods, or a partial customs union with a wider FTA may pass WTO muster, but would emasculate UK trade policy. In practice, when the UK seeks a services liberalisation concession (the hardest to accomplish because they involve negotiations over removing behind the border anti-competitive regulatory barriers), this would become virtually impossible without the capacity to offer concessions on the goods side. Nor are CET rates low on all goods, with spikes in areas like agriculture, textiles and even some industrial goods (such as cars, where the 10% tariff far exceeds, Japan's 0%, the US 2.5%, and is only beaten by China's 25%).

iv) Northern Ireland

The questions raised about the Irish border can already be dealt with relatively straightforwardly, provided both parties are operating in good

⁶ http://www.eeas.europa.eu/archives/docs/images/top_stories/140912_eu-ukraine-association-agreement-quick_guide.pdf

faith and are genuinely seeking solutions. First, it is important to understand the type of trade that crosses the border. Only 5% of the turnover of Northern Ireland's economy is sales to the Republic: 87% is within Northern Ireland or to mainland Great Britain, making its economic interest maintaining the UK single market; only 53 Northern Irish businesses with over 250 employees export goods to the Republic, and 92% of cross-border businesses employ under 50 people. This is high frequency, low volume trade, typified by SMEs and micro-firms.

Both HMRC Chief Jon Thompson and Chairman of the Irish Revenue Commissioners (IRC) Niall Cody have stated that the border would not need new infrastructure, while Liam Irwin, head of Ireland's customs authorities, has stated that any physical checks would not happen at the border, but at "trade facilitation posts... 10 or 15 kilometres back from the border". Lars Karlsson, author of the European Parliament's *Smart Border 2.0* report, also stated: "[this would be] a border without any new infrastructure... what you would describe as a frictionless border".⁷ This makes such profound and permanent limits for the UK's constitutional and economic status unnecessary. This also applies to the technical question of the apparent burden of customs clearance, which, through technological improvements alone, would rapidly become much smaller.

The UK's withdrawal from the EU would mean reintroduction of a customs border; while customs checks are a current requirement for the EU external border, most formalities are carried out electronically before arrival, and in a small minority of instances at warehouses or at point of payment.

Meanwhile, HMRC physically checks only 4% of consignments arriving in the EU at the UK external border; the IRC checks 1%. After withdrawal, 95% of goods could pass the border without checks, and the infrastructure needed for the remainder would be very limited. The use of an Authorised Economic Operator (AEO) scheme allows all paperwork to be completed by an exporter in their home jurisdiction, with sealed consignments crossing the border and VAT or duty payments made afterwards (and with simpler returns possible for smaller traders). The

⁷ Former leader of the Ulster Unionist Party David Trimble agreed with the DUP position when he stated: "It is not true that Brexit in any way threatens the peace process... The Border has never gone away entirely... There is no reason it can't continue to be policed without hard barriers, even after Brexit", and clarified that we already deal with the issue of smuggling because (in spite of the single market) differences in regulations and duties remain, and we also deal with illegal migrants.

main exception on border checks is animals and animal products, which are already required to be exported by accredited operators and subject to a devolved regime for Northern Ireland.

Potential solutions to the Irish border question have been addressed extensively in <https://capx.co/how-to-fix-the-irish-border-problem/>. There is no silver bullet for the border issue, but several things which must all be done together. If the UK is able to put no infrastructure on the Irish border, then it would be up to the EU to explain to the Republic of Ireland why it requires the Republic to do so. Similarly, if the UK is willing to create a Special Economic Zone in parts of Northern Ireland, it is up to the EU to explain to the Republic why it would refuse to create a contiguous zone in the border region.

The border also already marks the boundary between two different jurisdictions. Border checks are not necessary, for example, to stop non-compliant products entering the UK. In the instance where UK regulations are stricter than other Member States' (in the case of furniture regulations, for example) importers do not wish to place illegal products on the market, while there is also behind the border enforcement by trading standards.

Meanwhile, should the UK make future changes to its SPS rules (on sanitary and phytosanitary measures), it would be possible to devolve this responsibility to Northern Ireland should any risk of trade barriers arise (many areas of regulation are already devolved, including animal health, with different corporate tax rates, a single electricity market for the island of Ireland, the Common Travel Area and exemption from UK carbon tax legislation).

C. The “Customs Partnership” proposal

In addition to proposing a “highly streamlined customs arrangement”, the Government's paper also proposed, as an alternative to the highly streamlined approach, a *New Customs Partnership with the EU*.

This idea at first sight seems to offer the promise of getting the best of both worlds: the freedom of action regarding its external trade that would accrue to the UK under an FTA, but also the avoidance of the administrative burden of customs rules of origin and non-tariff controls

that would normally go along with an FTA.

However, regrettably, closer examination of the proposals makes it clear that this promise cannot be realised. Even if this could be made to work, that would be at the expense of imposing administrative burdens and costs which would far exceed the burdens of complying with normal rules of origin controls under an FTA. Those (fairly limited) burdens under an FTA would be concentrated on the sector of the economy exporting goods into the EU. By contrast, the customs partnership would impose costs and burdens across the whole economy, on businesses which have nothing to do with exporting to the EU. The price of avoiding controls at the point of export of goods into the EU would be to festoon the entire economy with burdensome controls, while crippling the ability of the UK to conduct an independent trade policy.

i) Impact of the New Customs Partnership on regulatory autonomy

Any customs arrangement that included any common external tariffs for goods for the UK market would place the UK in a rule-taking position vis-à-vis the EU, meaning a fundamental obstacle both to independent UK trade policy and legal independence after withdrawal. It would require a high degree of regulatory alignment to function for free customs circulation, further precluding meaningful trade agreements with Australia and New Zealand, for example, and constituting replication of a customs union. The Australian Foreign Minister at the CHOGM 2018 meeting noted that while Australia would like an agreement with the UK (and trade minister Steven Ciobo has said he wants one by 2020), it could not enter into a trade negotiation with a UK that was part of a customs union with the EU.

However, the form of NCP in the second option described in *Future Customs Arrangements* also fundamentally prevents an independent UK trade policy being achievable. Although the model would in theory allow different tariffs for goods whose final destination is the domestic UK market, it would be extremely difficult for this to operate (as the customs trade themselves have already noted to the government). First, the necessary administrative burden of such a system would mean low uptake, with large numbers of importers paying CET-based rates instead of dealing with requisite paperwork proving the end destination of the

imported goods, such that importers would not receive the benefit of lower tariffs (even in a well understood and administered agreement like NAFTA, many importers simply pay the MFN tariff rate to avoid rules of origin compliance).

Secondly, for trade partners, there would as a result be considerably less incentive to negotiate lower tariffs, as their exporters would, in turn, be unable to receive the full benefit of these. While in theory agriculture might be an exception due to greater tariff reductions, the fact that meat exporters and importers may not know products' final destinations would create similar burdens. Furthermore, the resulting trade diversion issue could create a WTO problem if different importers are treated in different ways, and because importers must declare where their products ultimately end up. In practice, most exporters and importers would be unable to determine specific products' actual destinations; in many cases these are not known for some time after initial import.

This option also compromises UK regulatory independence. Because the NCP addresses only tariffs, and not other border activities in connection with the regulatory compliance of goods entering the EU market, it would not in reality deal with the problem of free circulation of goods with no border formalities between the UK and EU, *unless* also accompanied by an agreement on regulatory alignment to minimise border checks.

This regulatory alignment would mean no other country would be able to negotiate a trade deal with the UK if they want the UK to diverge its regulation in any way from the EU's. This precludes serious negotiations with the UK, including for the very countries the UK has prioritised, the US, Australia, New Zealand (and possible TPP accession). This is also the case if the UK adopts any other customs union-type option with the EU. While regulatory alignment appears to be driven by concerns about the Northern Ireland border, these concerns can be dealt with in other ways. Customs barriers in general are also rapidly falling, due to technology alone.

ii) Impact of NCP on international trade agreements

The NCP raises an immediate problem of the likely attitude of non-EU countries with which the UK would be seeking free trade agreements. These would be seeking zero tariff agreements (in both directions) and a

reduction of behind the border barriers (in both directions). The UK will be unable in practice to offer zero tariffs on imported goods from the FTA partner, as UK importers will still have to pay EU-level tariffs and then try to claim them back by a cumbersome procedure of proving that the goods have gone to an end consumer in the UK. Furthermore, in a situation where the exporter sold to a wholesaler or intermediate trader, it could well be unknown at the time of importation whether the goods would end up with UK consumers or EU consumers (or possibly part to each destination) making commercial terms difficult to establish.

Many foreign traders would not understand this complex system and would expect to pay the EU-level tariffs (as set out in the CET) anyway. The consequence is that international trade partners would not be willing to enter into a one-sided FTA with the UK, under which UK exporters would be entitled to send goods tariff-free but their exporters would be subject to tariffs and which could only be reclaimed under a complex rebate system, dependent on actions of traders down the supply chain over whom the exporter would have no control.

While this in theory would not prevent deals (which are always about far more than tariffs), it would render the UK's offer with respect to their tariff aspect effectively nugatory. The UK needs to be able to offer access to its market in goods in order to be able to secure the reduction of trade barriers and regulatory protectionism which our exporters need in the field of services. It is simply not credible for the UK to say to a prospective trading partner *"give us a deal which allows our services exporters unhindered access to your domestic market, but your goods exporters cannot be given unhindered tariff free access to our market because of our customs partnership with the EU."*

iii) The problem of supply chains

It would be difficult enough to operate this system where goods are imported and supplied direct to the end user, as might happen where a big company buys goods for its own use, or when a major supermarket directly imports goods for sale on its own shelves.

However, there will be many instances where goods are imported into the UK from a non-EU country, and it will not be possible to tell whether they are UK-destined imports, or EU-destined imports, until an

occurrence much later.

In many sectors of the economy, supply chains are far more complex than a direct supply to an end user. A big wholesaler may acquire imported goods, which it then sells to a dealer who in turn sells to another dealer and then to an end retailer or commercial user. It is a characteristic of such supply chains that traders are reluctant to disclose the identities of their customers to their suppliers or vice versa, for fear of being cut out. So a big wholesaler who buys imported goods from outside the EU may be aware of where its own customers are located, but simply be unaware, and unable to find out, whether the goods it supplies to those customers will stay in the UK or go to the EU.

This would make it in practice impossible for importers to recover a rebate of EU-level tariffs even where a rebate is theoretically due. Thus, UK consumers would fail to receive the benefit of reduced UK tariffs, whether the reductions were as a result of an FTA or as a result of a unilateral decision to remove or reduce tariffs on goods (such as clothing, footwear and many kinds of food), which are expensive for low income consumers and where there is no UK producer interest which benefits from the tariffs.

The problem is even more acute in cases where components are imported into the UK and then incorporated into a larger assembly which is exported to the EU. Let us take the example of a camshaft, to be incorporated into an engine, in turn to be incorporated into a car. Cars come off the production line and may then be sent either to the EU, to the UK domestic market, or to another export destination. At the point when the camshaft is supplied to the engine plant, and when the engine containing the camshaft is supplied to the car assembly plant, it will simply be unknown whether a particular camshaft is a UK import, or an EU import under the scheme.

iv) The problem of quotas

Because of quotas or quantitative limits, the situation is even more complex than collecting one of two different levels of tariffs. The agricultural sector in particular has numerous quotas, under which a certain quantity of product is imported into the EU at concessionary or zero tariffs. These are called Tariff Rate Quotas (TRQs).

For example, there is currently an EU-wide quota permitting the import of 228,254 tonnes (“carcass weight equivalent”) of New Zealand lamb and goat at zero duty. Any lamb imported in excess of that quota is charged very high duties of 12.8% by value, plus a “per kilo” duty which varies according to the type of meat product from 90.2 up to 311.8 euros/100kg. The effective tariff rate is much higher.⁸

After Brexit, these quotas will be carved up between the EU and the UK. However, under the NCP proposal, the imported goods would count against either the EU quota or the UK quota, depending upon where the goods end up being consumed; the destination could well be unknown or undetermined at the time of importation. Trying to administer such a dual quota system would be extremely complex. A meat processor in the UK might import a particular cut from New Zealand, then turn parts of it into mince for the EU, with other products going to South Africa and other places. It would be impossible to trace this, and therefore impossible for the New Zealand producer to claim the rebate from the reduction of the tariff, or make an argument that the product should benefit from the agreed TRQ.

This causes particular problems in places where the exporters need to know whether or not they can claim quota at the point of importation. For example, the New Zealand Meat Board allocates slices of quota to individual exporters, who can trade quota allocations between them (and sell them on when they sell their business).⁹ It is impossible to see how the business models of New Zealand lamb exporters could survive a system where it would be unknown whether their imports into the UK would be within the UK’s TRQ; they would be dependent upon information from further down the supply chain that might never be obtained.

The consequence is that it is likely the proposed system would put the UK in breach of its WTO obligations to honour the TRQ concessions which it will inherit from the EU.¹⁰

⁸New Zealand Meat Board: <http://www.nzmeatboard.org/main.cfm?id=21>

⁹For a description of the administration of the quota system by the New Zealand Meat Board, see their Guidance Note on allocation: <http://www.nzmeatboard.org/main.cfm?id=40>

¹⁰In fact, in the case of New Zealand lamb, the quota was originally a UK national quota and was inherited by the EEC when the UK joined in 1973.

v) Operation of the system within the EU

For this system to operate, it is not just UK customs that would be involved in collecting EU-level tariffs. It would be necessary in a number of circumstances for EU customs to collect UK-level tariffs on imports from the rest of the world, in cases where UK-level tariffs are higher, and then operate the “rebate” system. This would be needed where, for example, the EU has a free trade agreement with a third country but the UK does not; or where the UK was operating trade protection measures (e.g. anti-dumping duties) which are different in rate and scope from EU measures.

This would impose a significant burden across the EU in having to operate UK-level tariffs at every external entry point from Piraeus westwards. Further, the EU would then run into the same problems as the UK above, if it tries to negotiate future FTAs with non-Member States with no FTA with the UK. The EU would be hobbled in offering tariff-free access to its market by an obligation to charge-and-rebate UK-level tariffs under its customs partnership deal with the UK. We can see no realistic chance at all that the EU would agree to this arrangement.

Indeed, it appears that the only reason the EU has allowed the negotiation process to run about the NCP is because they are playing the UK against time. As long as they continue to do this, the private sector cannot prepare for post-Brexit arrangements. There is a grave risk that we would then be forced into a customs union arrangement, even if it is against our policy.

vi) Regulatory problems

Another fundamental problem with this system is how it could be made to operate to enforce non-tariff controls, such as (for example) food hygiene or safety rules, emanating from single market rules applying internally within the EU. Whilst a “charge the higher tariff then rebate” system could in theory ensure that tariffs are not avoided (at the cost in practice of wrongly charging those tariffs on many goods which ought not to have to bear them), it is impossible to see how the proposed system could prevent goods which comply with UK regulations but do not comply with EU regulations from migrating into the EU. The EU would

most likely react to this by tightening rather than loosening their customs checks to avoid leakage, unless there was such a high level of regulatory alignment (adopting the single market rules completely) that free circulation between the UK and EU-27 could be guaranteed. Since avoiding customs checks between the UK and EU would seem to be the only benefit of such a complex and cumbersome arrangement, continued adherence to single market rules would seem to be an inevitable consequence.

As we have pointed out, in many sectors of the economy, supply chains are complex, with the identities of traders down the chain not necessarily even being known to those higher up the chain. Yet the original version of the NCP, as described in the August 2017 paper, seems to imply that a government operated “robust tracking system” would monitor all imported goods from outside the EU as they make their way down the distribution system to the end consumer. While we understand that the Government is no longer pursuing a policy of tracking every single good, in practice it is hard to see leakage can be avoided both for tariff and regulatory purposes.

But this raises a further issue. The NCP supposedly only relates to goods imported from outside the EU. But what happens to domestically produced goods which comply with UK standards but not with EU standards? What is to stop them migrating into the EU, in the absence of UK/EU customs controls? Would the robust tracking system need to track not only all goods imported from outside the EU, but also all domestically produced goods as well? Again, the only way to make such a system work is to have complete regulatory alignment with the EU, including the UK’s wholesale adoption of EU standards and underlying product regulation, for all its internal production as well as international trade.

It seems perverse to propose an elaborate tracking system across the whole economy, involving high costs and administrative burdens, just to avoid applying controls at the obvious point for them to be applied, namely where the goods pass from the UK into the EU. This can be achieved in a way that mitigates the increased friction of moving away from free circulation by improving all our customs agencies in the UK plus the EU27, and by agreeing a comprehensive customs chapter in an FTA, as well as measures on trade and business facilitation.

vii) Rules of origin controls

As already mentioned, an FTA involves the operation of rules of origin (ROO). Their purpose is to prevent goods from outside the FTA parties from taking advantage of the tariff concessions, by limiting the concession to those goods which originate within the FTA parties. Not every manufacturing operation applied to an imported product (for example just applying a lick of paint) means that the product now “originates” within the FTA, and there are detailed rules which specify how much needs to be done for the goods to count as “originating”.

The rules of origin which apply between the EU and its existing European free trade partners have been standardised and are contained in the Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin¹¹ (normally shortened to the PEM Convention). The assumption is that a UK-EU FTA would be based on these rules, to avoid having to reinvent the wheel, and in order to use a system of rules with which our exporters are already familiar in relation to trade, particularly with the EFTA states. It is also important for the novation of our existing agreements (through the EU) that for cumulation purposes, both the UK and EU have the same rules of origin.

The PEM Convention provides the further advantage of providing for so-called cumulation of origin, both bilateral and “diagonal”. Bilateral cumulation means that in assessing whether goods satisfy rules of origin, you take account of work done in both FTA partners. For example, when asking whether a car assembled in the UK satisfies origin rules for import into the EU, one would take account not only of components made within the UK but also those made in the EU (if an engine travels from Germany to the UK, where it is assembled into a car, the German engine counts in the same way as a UK engine towards the whole car, as originating within the FTA and therefore entitled to zero tariff import into the EU).

Diagonal cumulation goes further, and means that components or work done in any of the wider area which is in a free trade relationship with the EU count towards satisfying rules of origin. In the above example, it would not matter if the engine had been made in Switzerland rather than Germany. In the case of UK exports to Switzerland, the EU content in UK

¹¹ http://www.efta.int/media/documents/legal_texts/free_trade_relations/montenegro/pem_convention_on_origin.pdf

goods would count towards satisfying Swiss rules of origin. (At present the UK is in free trade relations with Switzerland under an EU-Swiss bilateral deal, but our assumption is that this would be replicated in a post-Brexit UK-Swiss FTA.)

The way in which the NCP would deal with rules of origin controls on goods passing from the UK to the EU (or vice versa) is not specifically explained in any public document of which the authors are aware. But as avoiding the need to satisfy and certify rules of origin compliance is a primary objective of NCP, it is assumed that NCP is dependent on the theory that the EU would dispense with rules of origin on assembled goods imported from the UK into the EU, the *quid pro quo* for the EU being that the UK would levy EU-level tariffs on the included components. This is only achievable if the EU will be satisfied that the system for identifying and monitoring goods on which importers claim a rebate on goods not destined for the EU market is watertight and comprehensively enforced. The costs associated with such a system could well outweigh the costs associated with rules of origin compliance. The implications for businesses that export to the EU are likely to be such that they will not claim any applicable rebate on third country products that would give rise to the necessity to separate production, or they would buy goods from the EU 27, so as to be out of the scope of the NCP rebate process entirely. Both of these consequences mean that NCP would be likely violate WTO rules, because (if the UK has a lower tariff or is not applying EU trade remedies) the UK's *de facto* tariff rates will be higher than its bound rate under the GATT, and there would be a diversionary effect that would violate Article XXIV GATT. FTA partners who have agreed preferential tariffs would also be able to take action if their agreed tariff concessions are not in fact available and those free trade agreements would also themselves violate Article XXIV. This is because it is a fundamental requirement of GATT that Members must charge the same tariffs to everyone, subject only to closely defined permissible exceptions. Under GATT Article XXIV, Members are permitted to deviate from their obligation to charge the same tariffs to everyone, either in respect of imports from another party to a customs union, or another party in a free trade area, defined in Article XXIV(8)(b) as follows:

“A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of

commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) *are eliminated* on substantially all the trade between the constituent territories in products originating in such territories.” [our emphasis]

The obvious problem with the concept of not exercising rules of origin in return for the UK levying the EU’s tariffs on included components is that the free trade agreement then does not satisfy the permitted definition, because tariffs are not fully eliminated on goods passing between the UK and the UK’s FTA partner or, effectively, between the UK and the EU, as EU tariffs imposed by the UK on incoming components are still borne on finished products that are traded between the EU and the UK.

There would also be cause for complaint by the EU’s other free trade partners, who would face a competitive distortion of normal rules of origin requirements arising from the EU’s special “partnership” with the UK. Those EU FTA partners include countries with substantial manufacturing interests, such as Switzerland and Korea, who may challenge the lawfulness of the arrangement and/or allege breaches by the EU of most favoured nation clauses in their own FTAs.

Since the option of charging EU-level tariffs on components to be included in assembled products destined for the EU is unlawful, we conclude that there is simply no alternative to the EU continuing to exercise ROO customs controls at the EU/UK border for the purpose of applying tariffs to products made in the UK which do not satisfy UK origin requirements. Therefore it is simply not possible for the NCP to achieve its stated aim of dispensing with the need for customs controls at this border, without nullifying the tariff concessions the UK has agreed with its other trading partners, either bilaterally or in the WTO.

viii) Negotiations and EU reactions to the NCP

The EU has already on a number of occasions rejected this concept, labelling it “magical thinking”. It also appears that it has been rejected once again as a possible solution to the Irish border issue.

This proposal may also undermine the prospects of the more reasonable and realistic proposal of streamlined customs arrangements (avoiding

physical infrastructure at the Irish land border).

Because NCP and High Facilitation are mutually exclusive, while both are on the table this issue is not being conclusively dealt with in EU-UK negotiations, and the private sector cannot take the necessary steps to adapt. If this continues then it becomes more likely the UK will run out of negotiating time. Without progress quickly, business may perceive they lack sufficient time to make changes, and pressure the UK to accede to EU demands as the negotiation progresses, thus making it more likely we will end up in a Customs Unions/Single Market arrangement as a rule taker indefinitely, which precludes independent trade policy and improving our regulatory environment. This implies a serious risk that we would reach the next election having not really left the EU, with no deals elsewhere, and with the EU leading our TRQ negotiations, running negotiations with third countries with whom we currently have trade agreements through the EU. With no capacity to act decisively in the WTO or improve our own regulatory environment, six years after the referendum, this would be intolerable for the electorate.

The negotiating delays also spill over into other areas such as the UK's WTO processes for rectification and/or modification. The UK's TRQ negotiations specifically are being slowed down by the inability of other countries to understand whether the UK will have full control over its schedules or not. This is therefore also slowing down processes like Government Procurement Agreement accession; as long as this is delayed there is no incentive for other countries to be reasonable with the UK in the TRQ negotiation to reap the benefits of liberalisation going forward. If this is in doubt, they may make TRQ negotiation difficult for both the UK and the EU. The hard-won concession in the implementation period to be able to negotiate with other countries will become illusory.

2. Conclusions

The NCP proposed is undeliverable in operational terms and would require a degree of regulatory alignment that would make the execution of an independent trade policy a practical impossibility. This covers not only our external trade agenda but our own control over UK regulation and whether we can improve it.

Economists have recently described a “new normal” of limited global growth, potentially secular global stagnation. This can be avoided by a group of countries committing to reduce the distortions found in anti-competitive regulation. For example, a 20% reduction in distortions in the TPP 11, plus the UK and US, over 15 years could yield approximately an added 0.5% into global GDP year-on-year (c.\$2 trillion over the period), according to some estimates. Set against this, customs clearance costs are small. (It should be noted that the estimates of the impact of behind the border barrier reduction are conservative, ignoring distortion reductions elsewhere, for example in China, that this approach may yield, nor do they assume any interaction effects.)

Any form of the customs arrangements above would mean continuing curtailment of UK capacity for independent trade and self-government, plus ECJ jurisdiction, applying harmonised rules and regulations across the domestic UK economy; they also mean external tariffs and abiding by future changes, but without a vote.

Without full control over tariffs and regulations, the UK would be prevented from entering trade agreements requiring their adjustment, i.e. any advanced trade negotiation (including TPP accession or a US-UK trade deal). Meaningful trade agreements would thus become impossible and the DIT essentially obsolete. Without a decision by Government soon however, there is a risk that the UK will be forced to accept regulatory harmonisation, and a customs union as some UK businesses may claim they have been denied the time to prepare for divergence. Harmonisation with EU regulation does not just mean a rule-taking position in a system that is static however, but an obligation to follow one that is becoming ever more anti-competitive. It is critical that NCP is swiftly removed from the table, so negotiations can proceed at speed. In this case, further delay is itself a decision.