UK Trade Policy Observatory and Fieldfisher Dr Peter Holmes and Andrew Hood – Written evidence (FFT0024)

UK Trade Policy Observatory

The UKTPO is a partnership between the University of Sussex and Chatham House that initiates, comments on and analyses trade policy proposals for the UK and trains British policy-makers, negotiators and other interested parties through tailored training packages. The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world.

Fieldfisher

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This submission covers regulatory barriers to trade and the UK's approach to mitigating them in the Draft Free Trade Agreement ('FTA') with the EU.

Executive Summary

The UK's aim is to allow regulations for goods sold in the UK to diverge from those of the EU, but for the UK to allow goods made in the UK for export to the EU to be certified by UK authorities as being entitled to be placed on the market within the EU with no restrictions. This approach to recognition would be reciprocated in the UK. Whilst this may reflect the 'best bits' of current EU FTAs with third countries, Michel Barnier has already stated that this will be unacceptable to the EU.

There are certain areas where refusal to align to EU rules would be very costly and have no benefits. One could imagine some compromise in which the UK would bind itself to keeping to those rules and in return minimising NTBs.

2. a) What are likely to be the most important technical barriers to UK trade with the EU?

SPS and TBT rules and barriers to trade

The EU Single Market plan was developed in the 1980s to ensure that as far as possible Member States of the EC did not introduce regulations that would have the same discriminatory effect targeting imports as the tariffs removed in 1969

had had. It was feared that the recession of the late 1970s and early 1980s might provoke a wave of regulatory protectionism. Identifying and controlling such obstacles to trade is even more complex than the issues involved in tariffs.

Barriers to trade can arise from:

- Standards. These are not barriers in themselves; rather they are meant to facilitate trade. But may be associated with measures that create barriers;
- Regulations. These may make compliance with a particular standard compulsory - WTO rules say regulations should be based on international standards where possible, but sometimes countries use their own standards or set regulations unlinked to standards; and
- Testing and certification and the procedures for proof of compliance with regulations are probably the trickiest element. There are usually checks that must be made at the point of production but then, at the importer's border, inspectors (not necessarily customs staff) will make checks based on customs declarations on a sample of goods (ranging from a tiny proportion to 100%) either to ensure the paperwork is OK or in some cases to carry out physical inspections.

The procedures for dealing with technical barriers are even more complex than customs tariff barriers. They differ from product to product, country to country and even differ according to the individual producer. There are broad WTO disciplines that cover

- General regulation notably the GATT Article III requirement for "National Treatment" i.e. non-discrimination;
- Mandatory requirements on non-food products, including labelling rules , covered by the WTO Technical Barriers to Trade agreement; and
- Food and animal and plant health rule (Sanitary and PhytoSanitary Agreement)

What impact would the absence of a UK-EU trade agreement at the end of the transition period have on non-tariff barriers and, consequently, UK businesses? How prepared are UK businesses for this situation and what should they be doing to get ready?

The EU import regime lays down very broad rules that may affect trade. The EU may agree certain relaxations with a third country in any FTA or Customs Union ('CU') or in bespoke arrangements where an FTA or CU is not in place (or occasionally to supplement an existing FTA). Such barriers may be far more important than tariffs, as there may actually be an absolute ban on all sales of goods not compliant with relevant rules.

Even when a country does have identical rules to those of the EU, its goods are potentially subject to border inspections. The intensity of these depends on

- The sensitivity of the product, e.g. potential dangers and specific rules on trade in the product such as quotas or controls required by Multilateral Environmental agreements
- The trust EU places in the exporting country's quality control regime
- The nature of any agreement the EU has with that country

Customs Unions and Free Trade Agreements do not necessarily address these technical barriers but they may have associated provisions that help reduce barriers.

The EU has some limited agreements about *mutual recognition of testing and certification* with the US and Australia even though there are no FTAs in place. The EU's FTAs with Korea and Japan do cover some standardisation and mutual recognition matters. Most of its FTAs mention aspirations on standards and regulations and certification but do nothing to eliminate border controls.

2. b) How could these be addressed in the future UK-EU trade agreement and what precedents exist in other trade agreements?

As noted above, there are broadly three ways that the need for border controls on goods can be limited in trade agreements.

The GATT (1947) Art III laid down the principle of *National Treatment* which states that regulatory requirements for imported goods that have paid their duties and taxes shall be no different from the requirements for domestic goods. But this does not prevent the need for border inspections to ensure that goods coming into the country do comply with the same rules as domestic goods.

The Rome Treaty (1957) provided for "approximation" of laws (not actually "harmonisation") where differences might lead to trade barriers, including the need to check at borders whether the importers regulations or *mandatory standards* had been met. This was a slow process requiring unanimity. The landmark Cassis de Dijon (1978) case at the ECJ asserted that there was a presumption that goods made in one EU member state to its rules should be regarded as equivalent to goods made in any other unless the importer could show otherwise. This Mutual Recognition of mandatory standards led to the Single Market (=Internal Market) programme to ensure that mandatory standards were sufficiently similar to make this politically possible. However this did not automatically eliminate the need for border checks. The Member States agreed to allow goods made in other countries to be sold freely but in order to avoid border checks there had to be Mutual Recognition of the testing and certification procedures applied in each state to confirm compliance

The key to ensuring a free flow of goods lies in Mutual Recognition of Testing and Certification. Regardless of the nature of the rules or the exporter's domestic rules the EU will require proof or evidence that the good is compliant.

In some cases, inspection of paperwork will do. In others some goods must be physically checked which may be away from the border.

There are two main distinctions that affect the approach to testing and certification (and the inspection regime which applies), namely:

- between non-EU members of the European Economic Area (plus Switzerland) and the rest of the world; and
- between food and animal health rules and other rules including labelling.

3. What form of regulatory cooperation should there be between the UK and EU, including cooperation with EU agencies?

The MRAs with third countries in EU FTAs and the self-standing MRAs on conformity assessment do not wholly eliminate the NTBs. They are not automatic but set up procedures under which CA bodies can be approved and result in limited coverage in practice.

In its proposed Draft FTA the UK tries to go far further than this. In the TBT sphere the UK proposes a process for the EU to recognise UK regulations as equivalent to those of the EU even when they differ:

> *The requested Party shall accept those technical regulations as equivalent, even if they differ, provided that it is satisfied that the technical regulation of the requesting Party adequately fulfils the objectives of its own technical regulation. If the requested Party does not accept a technical regulation of the requesting Party as equivalent, the requested Party shall explain the reasons for its decision. (Annex 5)*

There is a similar request for SPS measures.

For TBT measures in particular the UK demand seems to go much further. After spelling out a very ambitious range of sectors, Annex 5-A The Mutual Acceptance of the Results of Conformity Assessment of the UK draft Article 12 lays out procedures for recognising bodies conducting conformity assessments (i.e. allowing them to certify conformity) not unlike CETA. This is followed by *Article 15 Transition from the EU Single Market,* which calls for the UK Accreditation service to continue to be allowed to certify UK based bodies as competent to test for conformity to EU rules. The sectors covered are essentially all covered in any of the existing EU MRAs.

That is, in the covered sectors, everything for Conformity Assessment carries on as if the UK were in the Single Market. Manufacturers will still have to have documentation but should be exempt from physical inspections and UK agencies can operate across Europe. The proposed Mutual Recognition of Conformity

Assessment is limited to sectors listed in the Appendix, but that is eight pages long, so this is a very ambitious request. There is a separate annexe for ensuring Mutual Recognition of Type Approval certification of cars.

It would be highly desirable for the UK to secure such goals but this almost certainly will require some sort of alignment with substantive rules, association with EU agencies and a dispute settlement system that gives guarantees.

When the Transition period ends, the UK has said it will insist on reclaiming its right to set its own mandatory standards and will no longer be bound by EU supranational governance of testing and certification. The ability of the UK to depart from EU procedures means that the EU will no longer be able to rely on the UK having enforced compliance with its rules and therefore the EU is likely to insist on the right to check goods at the border. This point has been forcibly made by M.Barnier in a speech on June 10th. (Speech_by_Michel_Barnier_at_the_European_Economic_and_Social_Committee_Plenary_Session.pdfSpeech_by_Michel_Barnier_at_the_European_Economic_and_Social_Committee_Plenary_Session.pdf)

Interestingly, he not only stresses that the EU does not want to have its standards undermined by tolerating laxer UK checks, but also talks of curbing the UK's competitiveness in the certification field. He goes as far as saying that whatever the results of the negotiations 'As a third country, the UK will no longer be able to grant marketing authorisations for pharmaceuticals or type-approvals for cars for the EU market.'

The EU is unlikely to accept a comprehensive agreement on conformity assessment. Recent statements suggested that the EU would demand wholesale alignment to EU rules as a condition of a general conformity assessment MRA. There has been some relaxation of this in practice but it seems very likely that the EU would insist on a firm commitment to alignment and enforcement of EU rules. Areas where the UK would, almost certainly, have to continue to accept EU rules for the foreseeable future are cars and chemicals.

The gain from using EU standards in cars is overwhelming and there is no conceivable advantage in diverging. The UK could not hope to sell cars not conforming to the UNECE standards used by the EU and has more or less recognised this in its DFTA text. The UK would probably also have to go further and agree to bind itself to UNECE standards before type approvals issued by UK bodies would be recognised in the EU.

In the Chemical sector, the government has made an issue of retaining sovereignty but the industry has made it very clear that an attempt to go it alone would not only risk losing access to the EU market but to third countries who rely on the safety guaranteed by the EU's REACH rule. The head of the Industry association CBA recently argued that a move away from earlier willingness to seek some sort of link to the EU chemicals regime would be very serious:

> "*Market access is solely dependent on regulatory compliance. No compliance means there can be no trade,…The UK Government's intended actions effectively prevents access to EU markets for many UK companies and makes continued access more expensive for others*," (https://www.icis.com/explore/resources/news/2020/06/10/10517818/uk-breakaway-from-eu-chems-regulations-could-shut-off-market-access-for-some-firms-cba).

These are areas where the gains from refusal to accept EU rules would have huge costs and no benefits and where a shift in the UK position would be economically most valuable.

The situation in Northern Ireland is more complex. All goods produced in Northern Ireland must comply with EU regulations. Goods made there must be to EU norms. They can be certified as such by bodies based there, which could then be sold on into GB, but EU documents appear to suggest that to be sold in the EU they must have been certified by an EU accredited body. *"Bodies established in Northern Ireland may certify products, but certificates issued by Notified Bodies in Northern Ireland are valid only in Northern Ireland. By contrast, these certificates are not valid in the EU."*

https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_industrial_products.pdf

To avoid additional expenses and uncertainties to secure market access in the EU for regulation-sensitive areas, the UK is almost certainly going to have to tie itself down to accept EU rules in certain areas and accept some form of binding dispute settlement, minimising the involvement of the CJEU. Following Brexit, the UK position was to propose a commitment to EU rules in some areas to secure market access but not in others, an approach denounced by the EU as cherry-picking. It is unclear how easy it will be to revive this.

4. How could the UK and EU minimise the costs and disruption associated with any testing and compliance processes that will be required, including conformity assessments? How effective would mutual recognition be in keeping these to a minimum?

The other countries of the EEA (Norway Iceland Liechtenstein) have agreed to accept enforceable supranational obligations to align their mandatory standards to those of the EU, in goods covered by the EEA Treaty, i.e. excluding agriculture and fish. There is therefore no need for any technical checks on the border for goods covered by the EEA Treaty. This is because not only the standards but the testing regime in the partners is the same as the EU with testing and certification bodies overseen by accreditation bodies approved by Brussels and an EFTA Surveillance Authority and an EFTA Court able to ensure compliance.

The Swiss have signed a number of Bilateral Agreements that create a similar position.

No other non-member state has similar rights of access to the EU. Turkey has an agreement associated with its customs union (1996) which obliges it to make EU standards mandatory but it was not till 2006 that the EU agreed to accept Turkish Testing and certification results. Until that point Turkish firms had to get their products certified as saleable in the EU by EU based or accredited testing agencies such as the German TuV. Documentation may still need be shown at the border. Strictly speaking not all documentation has to be inspected at the border as opposed to the point of sale but EU rules make it clear that they may be checked there:

> *7.3. CONTROL OF PRODUCTS FROM THIRD COUNTRIES BY CUSTOMS*
> *Points of entry to the EU are relevant to stop non-compliant and unsafe products coming in from third countries. Being the place where all products from third countries have to pass by, they are the ideal place to stop unsafe and noncompliant products before they are released for free circulation and subsequently circulate freely within the European Union.*

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0726(02)&from=EN

The EU has signed FTAs with Korea and Japan that require those countries to adopt EU (UNECE) standards for cars and both parties accept certificates issued by the other stating that an exporter's product meets the requirements of the importer.

CETA and a self standing MRA with Australia provide for MR of testing and certification bodies but they only cover a subset of products and recognition is dependent on a further process laid down in the agreement. Only a small number of testing agencies are allowed to issue approvals and the EU border checks will only recognise certificates issues by these bodies.

As we noted above the regimes are different between rules on technical barriers to trade and sanitary and phytosanitary measures ('SPS rules') .

Technical Barriers To Trade (TBT) Rules

These are the rules that apply to non-food products or to non-safety rules applying to foods, e.g. labelling.

Many but not all products require a CE mark to be affixed showing that the product complies with EU rules. There are a complex variety of rules which vary according as to whether a product can be self certified by a producer as in conformity with the EU rules. The EU website has a list of goods where the manufacturer can themselves provide evidence of conformity or whether third party certification is needed.

https://ec.europa.eu/growth/single-market/ce-marking/manufacturers_en

Where third party inspection is needed - and there is a mutual recognition agreement ('MRA') covering the product in question - a check by an inspection agency based in the exporting country and accredited by the EU will usually suffice but EU customs may need to check the paperwork. Where there is no MRA on conformity assessment a non-Member exporter must secure the services of an EU based or accredited inspection service and be ready to produce the paperwork at the border. The manufacturer must make available a Declaration of Conformity and ensure the importer keeps it on file – and is then ready take on legal responsibility for it. (The 'Blue Guide' on the implementation of EU products rules 2016 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0726(02)&from=EN)

The EU has Mutual Recognition agreements with Australia Canada Japan New Zealand Switzerland Israel (partially) and the US, (some part of FTAs, some not). These agreements are generally framework agreements which lay down a process for securing recognition

See https://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements_en

These generally only cover certain products. For example, under the EU-Canada Comprehensive Economic and Trade Agreement ('CETA'), Canadian bodies are eligible to apply for the right issue certificates confirming conformity of Canadian made goods with the EU rules in a set of areas (see Appendix).

The example of cars

Although the EU and Korea and Japan have recently agreed to accept each other's Type Approval Certificates ('TACs') for cars, it was many years before EU MS accepted each other's TACs within the EU.

For many years EU Member States all had the same standards for vehicles, based on those set by a UN body, the UNECE in Geneva. But each state had differences in how their testing labs operated. When a car model was launched its safety was tested by one or more sample vehicles being tested to destruction. Thereafter every individual car made would have a Type Approval Certificate stating it was made in the same way as the tested car. But because the process was different in each MS until 1992 cars coming from other countries, whether in the EU or not, had to show at the border that they had a certificate proving compliance with the rules even where they were the same.

As we noted earlier the EU will not automatically accept cars tested by third countries agencies unless there is an MRA.

SPS Rules

Animal and food products need to comply with sanitary and phytosanitary (SPS) requirements. SPS measures are designed to protect humans, animals, and plants from diseases, pests, or contaminants. Goods subject to these measures are food products, live animals and products of animal origin as well as plants and plant products. SPS checks are required on such products imported into the EU from non-EU countries. This includes document checks as well further inspections, controls and even testing.

The EU has tighter rules for animal and fish products than vegetable products. In the former case the exporting country must be on an approved list of countries; it must have an approved "competent authority" to ensure there is effective monitoring of compliance with EU standards by exporters. For example, when importing fresh meat and meat products the EU requires: "*A residue monitoring plan for live animals and animal products which includes testing for residues of veterinary drugs, pesticides, heavy metals and contaminants, must be in place to verify compliance with EU requirements*." And "*Imports are only authorised from approved establishments (e.g. slaughterhouses, cutting plants, game handling establishments, cold stores, meat processing plants), which have been inspected by the competent authority of the exporting country and found to meet EU requirements*"

Then at the EU border*: "Imports of meat or meat products must enter the EU via an approved Border Inspection Post of the EU under the authority of an official veterinarian in the EU Member State in question. Each consignment is subject to a systematic documentary check, identity check and, as appropriate, a physical check. The frequency of physical checks depends on the risk profile of the product and also on the results of previous checks*"

(see https://ec.europa.eu/food/sites/food/files/safety/docs/ia_trade_import-cond-meat_en.pdf)

The UK's implementation regime for meat products is explained in http://apha.defra.gov.uk/documents/bip/iin/vcap.pdf.

Meat products must be pre-notified in advance and are liable to documentary and physical checks at the border.

There are parallel rules for seafood. The current implementation in the UK is explained here https://www.seafish.org/article/import-guidance

To be able to import from a third country into the EU the foreign exporter must have documents showing the export establishment has been approved by the EU and that the exporter confirms safety requirements are met, and that there is documentation allowing traceability of the source of the product. Then at the border all consignments should be checked for documentation any can be physically checked. Canada Chile and New Zealand have "equivalence" agreements with the EU that allow for lower levels of physical checks.

These rules will apply to all meat and seafood imported from outside the EU itself. Since fishery and agricultural products are not covered by the EEA agreement this applies also to Norway and Turkey.

Plant based products are subject to only slightly less stringent rules. Imports in to the EU must

- *"be accompanied by a plant-health certificate issued by the relevant competent authorities of the exporting country";*
- *"undergo customs and phytosanitary inspections at the point of entry into the EU (border)";*

- *"be imported into the EU by an importer registered in the official register of an EU country"; and*
- *"be announced before arrival to the customs office at the point of entry."*

https://trade.ec.europa.eu/tradehelp/sanitary-and-phytosanitary-requirements

As stated above there must be a registered importer who takes legal liability for the product.

Appendix

CETA Sectors eligible for MRA in conformity assessment

- Electrical and electronic equipment, including electrical installations and appliances, and related components
- Radio and telecommunications terminal equipment
- Toys
- Construction products
- Machinery, including parts, components, including safety components, interchangeable equipment, and assemblies of machines
- Measuring instruments
- Hot-water boilers, including related appliances
- Equipment, machines, apparatus, devices, control components, protection systems, safety devices, controlling devices and regulating devices, and related instrumentation and prevention and detection systems for use in potentially explosive atmospheres (ATEX equipment)
- Equipment for use outdoors as it relates to noise emission in the environment
- Recreational craft and their components

https://ec.europa.eu/growth/tools-databases/nando/index.cfm?fuseaction=ceta.main

Sectors UK proposes eligible for MRA of Conformity Assessment in Draft FTA with EU; cars additional.

1) Electromagnetic compatibility;
2) Radio and telecommunications terminal equipment;
3) Machinery, including parts, components, including safety components, interchangeable equipment, and assemblies of machines;
4) Equipment for use outdoors as it relates to noise emission in the environment;
5) Equipment, machines, apparatus, devices, control components, protection systems, safety devices, controlling devices and regulating devices, and related instrumentation and prevention and detection systems for use in potentially explosive atmospheres (ATEX equipment);
6) Medical devices;
7) In-vitro medical devices
8) Pressure equipment, including vessels, piping, accessories and assemblies, transportable and simple;
9) Simple pressure vessels;
10) Transportable pressure equipment;
11) Construction products;
12) Measuring instruments;
13) Non-automatic weighing instruments;
14) Toys;
15) Rail subsystems and interoperability constituents;
16)Personal Protective Equipment;
17) Recreational craft, including their components;
18) Lifts and components for lifts;
19) Gas Appliances;
20) Hot-water boilers, including related appliances;
21) Cableway installations;
22)Pyrotechnics;
23) Civil Explosives;
24) Fertilisers;
25) Unmanned Aircraft;

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