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Regulatory Cooperation and Technical Barriers to Trade

1. Introduction:

This paper is part of a series on Brexit. Together with other students involved in the LSE Programme in International Political Economy, we hope to address the technical details under consideration in “the mother of all technical negotiations”¹ and how they inform the potential outcomes. Each paper in this series is concerned with a discrete set of trade issues; this paper reviews technical barriers to trade in goods, and the ways in which the United Kingdom and European Union could mitigate or remove them via regulatory cooperation. This is not an exercise in political forecasting, nor is it an economic analysis of what the various outcomes could mean for the economy of the United Kingdom. The goal is to provide the reader with a technical understanding of the trade issues under consideration, with analysis of the negotiation informed by our opinion, so they can better understand the substantive issues at hand.

In the next section this paper will provide a summary of our conclusions, before going into more detail on the nature of technical barriers to trade and strategies of regulatory cooperation. This paper will then review a number of different outcomes, and look at what each one means for the trade-off between regulatory cooperation and market access. Certainly, there is more to Brexit than technical barriers and regulation; the negotiation touches on everything it means to be a citizen of the United Kingdom. But by focusing on these particular issues the shape of a post-exit agreement comes into clearer view.

2. Summary:

Technical barriers to trade (TBT) and the future form of regulatory cooperation have become major issues in the Brexit negotiations. Any type of post-exit agreement between the UK and the EU is significantly shaped by technical aspects of the trade issues reviewed here and their implications for access to the single-market, and an analysis of them reveals the key dilemma which the UK has to solve in the Brexit negotiations: the trade-off between regulatory autonomy and continued economic cooperation. Large parts of the Brexit campaign were driven by claims to regain regulatory autonomy, and there is considerable domestic pressure for the UK to completely move out of the body of common rules and regulations governing economic relations with the EU. However, defense of existing standards and processes are key for the EU. The EU has been reluctant to deviate from its regulatory regime in previous FTAs and is expected to stay committed to this strong position. Considering current EU internal political dynamics, the UK has limited leverage to establish new regulatory proceedings with full market access in the short term. As the UK starts from the unique position of fully satisfying EU regulatory requirements, continued regulatory alignment for a wide range of economic activities presents a salient path forward. Continued economic cooperation through harmonization would minimize the emergence of new technical barriers to trade, and avoid a proliferation of costs for UK businesses as they attempt to

¹ <https://www.ft.com/content/e79a735c-2715-11e8-b27e-cc62a39d57a0>

adapt to multiple sets of rules. However, harmonization with European rules and regulations, in a relationship where the UK will no longer have an active role in the regulatory process, would severely limit future regulatory autonomy. The final agreement will have to fall somewhere along these two poles, and the following article sheds light on the different alternatives at hand.

The negotiation between the EU and the UK is unique in that the UK is currently in complete alignment with European rules and regulations. In the short term, without a negotiated outcome, TBTs will be entirely de jure. No longer part of the EU, UK based regulatory and certification bodies will lose the ability to certify goods for frictionless entry into the single-market, even though regulatory practices may remain the same. In the long term, as the UK establishes its own regulatory agenda, de facto barriers, meaning substantial differences in regulatory practices, could emerge unless addressed through ongoing regulatory cooperation. Westminster will have to decide on the degree of regulatory autonomy it wants to pursue, but there will be consequences for access to the European market if standards move too far apart. While there are several options for trade arrangements between the UK and EU, this tradeoff means that for regulatory matters there are three types of post-exit agreement: an European Economic Area (EEA) style membership, a free trade agreement (FTA), and a default to WTO trade rules. Each has unique consequences for the impact of technical barriers to trade, as well as for the mode of regulatory cooperation between both parties.

Broadly, these outcomes are laid out in Table 1 below;

| | EEA | FTA | WTO |
|---------------------------------------|--------------------------|------------------------|---------------------|
| Costs of Technical Barriers | Negligible | Significant | Significant |
| Mode of Regulatory Cooperation | Regulatory Harmonization | Regulatory Cooperation | Regulatory Autonomy |

Table 1 – Trade Outcomes Post-Brexit and their implications on TBTs and Regulatory Cooperation

Membership in the EEA or equivalent would allow the United Kingdom to remain in the single market for goods and services at the cost of its own regulatory autonomy. The EEA requires customs procedures at the border, which means costs for exporters. This would also require a certain degree of technical ingenuity to avoid a hard border for Northern Ireland. But while such an arrangement could result in significant transition costs, it would preserve market access and prevent regulatory divergence from becoming a barrier to trade. The United Kingdom would become a rule taker, and regulatory cooperation would essentially take the form of harmonization with EU rules. Membership in the Customs Union for trade in goods would have much the same effect.

A FTA between the European Union and the United Kingdom could take several different forms. But a FTA is likely to result in a significant loss of market access in the short-term due to the complexity of certification procedures outside of the single market. Even CETA, the recent trade agreement between Canada and the EU, allows for mutual recognition of conformity assessment for only a small set of goods. The EU takes a conservative approach when recognising external regulations, and is unlikely to change its standard practice in the context of Brexit. Currently, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) entails the most comprehensive agreement on TBTs and regulatory cooperation. It establishes the grounds for a voluntary cooperation in the area of TBTs to “exchange experiences and

information” as well as “identify areas where [the EU and Canada] could cooperate more closely”². Especially the additional *Protocol on the mutual acceptance of the results of conformity assessment* (the “Protocol”) represents a progressive approach towards mutual recognition and the reduction of TBTs³. However, the Protocol does not apply to crucial categories like sanitary and phytosanitary measures as well as agricultural goods, in which the EU is also expected to remain protective in an agreement with the UK.

Over time, technical barriers to trade would become more substantial if regulatory practices diverge, but this can be avoided through committed regulatory cooperation institutionalized in a FTA. We see significant negative implications for market access in the short term due to technical barriers to trade with long-term regulatory cooperation as the most feasible outcome of a free trade agreement. However, reducing TBTs through regulatory cooperation over time would be contingent on clear procedural measures and a commitment from both sides, although the EU’s negotiation position is considerably stronger in this matter.

A default to World Trade Organization (WTO) rules would result in significant barriers to trade in both the short and long term. Without the cooperative institutional approach standard to European FTAs, there would be little dialogue on TBTs, for example in committees and sectoral working groups on specific sectors, or regulatory cooperation more broadly for example through weaker formal mechanisms to determine mutual recognition. Such an approach would be worst case for market access, but allow the United Kingdom to pursue full regulatory autonomy.

There are other types of trade arrangements with the European Union to use as a precedent, but we see the goals of United Kingdom and standard practice within the EU as limiting factors. A customs union, endorsed by Labour⁴, would prohibit any type of free trade agreement between the UK and a third party. This fails to meet Theresa May’s redline on “the freedom [for the United Kingdom] to negotiate trade agreements with other countries around the world.”⁵ And a bespoke free trade agreement that allows for deep market access without disruption due to regulatory barriers, the so called CETA-Plus type deal, would be a policy innovation by and significant concession from the European Union. A robust, top down mutual recognition agreement covering both goods and services appears unlikely, with Donald Tusk stating that such a “pick-and-mix approach for a non-member state is out of the question.”⁶

The loss in market access resulting from a regulatory divergence could result in sensitive losses in mutual trade for both parties. This is why the UK has indicated its awareness for the possible negative consequences of regulatory divergence on the trade in goods and stressed the current close regulatory alignment, mutual trust and willingness to cooperate⁷. Although the EU has signed their willingness to

² CETA Agreement, Chapter Four, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>

³ <http://data.consilium.europa.eu/doc/document/ST-10973-2016-ADD-7/en/pdf>

⁴ Labour backs staying in EU customs union, Keir Starmer confirms, published in the Guardian on 25 February 2018. Accessible here: <https://www.theguardian.com/politics/2018/feb/25/labour-backs-staying-in-eu-customs-union-keir-starmer-confirms>

⁵ Comment delivered in a speech made by the PM at Mansion House on 2 March, 2018. Accessible here; <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>

⁶ Statement by President Donald Tusk on the draft guidelines on the framework for the future relationship with the UK, 7 March 2018. Accessible here; <http://www.consilium.europa.eu/en/press/press-releases/2018/03/07/statement-by-president-donald-tusk-on-the-draft-guidelines-on-the-framework-for-the-future-relationship-with-the-uk/>

⁷ See an overview of the position in the House of Commons Position Paper “Brexit: new guidelines on the framework for future EU-UK relations” <https://commonslibrary.parliament.uk/wp-content/uploads/2018/04/Brexit-new-guidelines-on-the-framework-for-future-EU-UK-relations.pdf>

discuss limited “voluntary regulatory cooperation”, a broader framework of mutual recognition between the EU and UK regulations is highly unlikely⁸. In this manner, some experts see the UK as most likely to be a “rule-taker” in the area of trade in goods, whereas it is likely to diverge from the EU’s regulatory body in the area of services⁹. Given the EU’s quest for a comprehensive trade deal and to prevent the UK from “cherry-picking”, however, this endeavor seems highly problematic.

The UK is negotiating for a “top-down” approach to regulatory cooperation, opting out or ‘de-recognising’ specific fields of trade. The EU is reluctant to give the UK selective market access free from a broad agreement on TBTs because it wants to protect the Single Market and preserve its negotiating position in other FTAs. Since the EU’s regulatory policy body is strongly institutionalised and change requires input from 27 member states, it will be difficult for the UK to dictate regulatory terms. With the EU unlikely to capitulate, the UK will have to decide where the prize of regulatory autonomy is worth the costs to trade.

The next section will provide detail on the nature of technical barriers to trade (TBTs), as well as strategies of regulatory cooperation used by states to mitigate or remove them. This report will then review the different types of outcomes in more detail, including a review of both a customs union and a CETA-Plus type agreement. It will conclude by arguing that any post-exit agreement will come down to the domestic trade-off the UK is willing to be make between regulatory autonomy and market access to the European Union, with the outcomes restricted to either EEA style membership, a free trade agreement, or a default to WTO trade rules.

3. Background: Technical Barriers to Trade and Regulatory Cooperation

The goal of this section is to provide the reader with detail on technical barriers to trade and the various ways in which they are addressed in trade agreements. We believe this detail is necessary to understand the issues around Brexit and the consequences of any post-exit agreement for the United Kingdom and its regulatory agenda.

Technical Barriers to Trade (TBT) are generally considered as rules, regulations or standards, which bear the potential to hinder cross-border trade. Trade barriers are popularly understood as tariffs¹⁰, but due to decades of work through the General Agreement on Tariffs and Trade and the WTO, tariffs and quantitative limits have fallen to historic lows. Non-tariff measures such as TBTs are the most significant barriers to trade in the modern, international economy.

There are three classes of technical barriers as defined by the WTO’s Agreement on Technical Barriers to Trade (the TBT Agreement)¹¹:

1. **Technical Regulations** lay down specific characteristics or methods of production, and are typically passed through legislative processes and legally binding. They govern how products are made and classified, covering all stages from inputs to retail

⁸ *Ibid*; This is further elaborated in Alan Beattie’s article „Trade talk tips for Brexit Britain“:

<https://www.ft.com/content/be5149c6-2b5c-11e8-a34a-7e7563b0b0f4>

⁹ Simon Wolfson, Brexit-Britain should be a rule-taker on goods, but not services:

<https://www.ft.com/content/aad7815a-64e9-11e8-bdd1-cc0534df682c>

¹⁰ See for example the recent actions by the US to impose tariffs on steel and aluminum imports;

<https://www.nytimes.com/2018/03/08/us/politics/trump-tariff-announcement.html>

¹¹ WTO Agreement on Technical Barriers to Trade, https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#annexI, Annex 1; The WTO Agreements Series – Technical Barriers to Trade,

https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf

2. **Standards**, like regulations, lay down guidelines or characteristics as well as production methods, but unlike regulations are determined by a recognized specialist or technical body outside of the legislative process and are usually voluntary
3. **Conformity Assessment Procedures** are the methods used to determine if goods comply with the relevant standards or regulations, and are the crucial element for countries outside of the European Union trying to gain market access

States pass regulations to meet legitimate public safety and domestic policy goals, but these measures also have the potential to distort or inhibit trade. The WTO TBT Agreement tries to balance domestic concerns with the benefits of trade by preventing unnecessary obstacles and seeking the international application of standards wherever possible¹². Within WTO rules, legitimate objectives for the introduction of technical barriers to trade include “national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment,”¹³ with compliance ensured through a TBT notification process. Although the objectives mentioned above are designed to protect the public interest, TBTs have been found to have a severe effect on market access and competitiveness for exporters. Additional production, packaging, or labelling requirements increase costs for exporters and reduce time-to-market¹⁴. Having multiple sets of standards tends to favor large businesses, who can typically afford compliance teams, over small and medium size enterprises in international trade.

In the pursuit of free trade, countries have sought to remove or minimize technical barriers through different approaches. States seek to reduce barriers and costs of TBT through harmonization or mutual recognition;

1. **Harmonization** is where states share common regulations across state lines, which prevents or ends barriers due to differences in technical regulations. The EU has in the past pursued a harmonisation approach, but moved to adopt a mutual recognition approach in the Single Market.
2. **Mutual Recognition** means that states retain some degree of autonomy, but acknowledge regulations in other states as equivalent to their own in order to provide market access. This can be to various degrees of specificity, ranging from full recognition of the entire regulatory system to specific, concrete mutual recognition of a certification or standard for one product.
3. **Mutual Recognition of Conformity Assessment** is the process of recognizing regulatory certifications in third parties as equivalent to domestic certification procedures. The European Union typically facilitates this through a Mutual Recognition Agreement (MRA), which provides market access on a discrete, product specific basis.

Harmonization and mutual recognition are not comprehensive, exhaustive approaches to removing TBTs; cooperation can be discrete or sector specific between trading partners. States can harmonize their rules in some sectors while pursuing regulatory independence in others. Alternatively, states can avoid regulatory cooperation and maintain full autonomy. This involves a trade-off, where technical barriers remain in place and opportunities for greater exchange are left off the table. Technical

¹² WTO Agreement on Technical Barriers to Trade, Article 2, https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#annexI

¹³ Ibid.

¹⁴ European Commission, Technical Barriers to Trade, http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150987.pdf

standards, although generally voluntary, are often used to indicate conformity with mandatory technical regulations, as in the case of the EU.

Within the EU, free trade in goods is generally secured through a combined approach of harmonization or approximation and mutual recognition in an ongoing process of regulatory cooperation. Free movement of goods in harmonized sectors is guaranteed through rules on the EU level, which preclude divergent national legislative measures that impose technical barriers¹⁵. Full harmonization, having one common set of regulations across all the member states, has never been a viable option within the European Union. The principle of mutual recognition applies for products not covered by harmonized rules. Under this principle, member states decide to recognize the regulatory processes of other member states as equivalent to their own. However, experience shows that mutual recognition is only feasible when there is a high degree of convergence or approximation of regulatory requirements and conditions between countries.

Regulatory requirements within the European single market are deeply integrated. The EU member states widely cooperate on regulatory matters, with the EU gradually defining minimal essential standards and facilitating information sharing on technical details and implications of rule changes between the member states. In addition to the TBT notification procedure at the WTO, the EU has an internal 2015/1535 notification procedure for TBTs.¹⁶ This facilitates an additional layer of information sharing both between states and across the private sector,¹⁷ and minimizes the impact of TBTs on market access within the single market. This information sharing, strengthened by a common network of technical experts pooled from across the member states, has allowed for full mutual regulatory recognition between the member states. Together with gradual harmonization through improvements to minimal standards, this process gives credibility to European wide regulations and mutual recognition within the single market. And this approach to regulatory cooperation give the European Union a powerful negotiating position when determining access for third parties as dilutions to regulations or standards would be opposed by any number of member states with a credible claim to protect the public interest and veto power.

Non-member states with access to the single market are typically required to harmonize with EU rules and regulation. This is the case for Norway as a member of the European Economic Area, Turkey through its participation in a Customs Union, and Ukraine in its recent Deep and Comprehensive Free Trade Agreement. These states engage in regulatory dialogue and fact sharing exercises with the European Union to establish and maintain credibility, and in some cases, do contribute to technical research. But they are nonetheless expected to adopt European legislation as their own to retain market access. In exchange for access to the single-market, these countries have, in certain ways, given up the ability to shape regulations in their own markets.

When applied to the Brexit negotiation, an understanding of technical barriers to trade and the mode of regulatory cooperation informs the range of possible outcomes. As a member of the single market, the United Kingdom presently satisfies EU regulations. On the day of its exit from the European Union there will be no de facto TBTs. But without a negotiated outcome, de jure TBTs will represent a

¹⁵ European Commission, Free movement in harmonised and non-harmonised sectors, https://ec.europa.eu/growth/single-market/goods/free-movement-sectors_en

¹⁶ European Commission, Technical Barriers to Trade, https://ec.europa.eu/growth/single-market/barriers-to-trade_en

¹⁷ European Commission, 2015/1535 notification procedure, https://ec.europa.eu/growth/single-market/barriers-to-trade/tris_en

significant barrier to entry for UK based exporters. No longer in the EU, UK based regulatory and certification bodies will lose the ability to certify goods for frictionless entry into the single-market, even though regulatory practices will remain the same. With the preservation of EU legislation and regulatory best practice a goal of the current government through its Withdrawal Bill,¹⁸ we expect de facto equivalence to be maintained in the short run with or without a negotiated outcome. However, the UK government has also stated its desire to deregulate certain sectors after leaving the EU, and actual regulatory divergence is possible in the near future. The main challenge for the current government is managing the trade-off between market access to the EU through regulatory cooperation and acceptance of EU rules and standards, and pursuing regulatory autonomy at the cost of creating TBTs and inhibiting the flow of goods.

4. Options:

This section provides an analysis for a number of salient outcomes in the ongoing exit negotiations, including a number of outcomes that no longer look feasible given negotiating positions on each side. Our conclusion is that, given the required trade-off between regulatory autonomy and market access, the outcome is restricted to an EEA agreement, a free trade agreement along the lines of CETA, or a default to WTO rules. Other outcomes, including a Customs Union membership and the so-called CETA-Plus free trade agreement, appear unlikely.

EEA Agreement

On its way out of the European Union, the United Kingdom could consider participation in the European Economic Area or an equivalent comprehensive agreement. This would preserve market access for British goods and services, and involve some participation in the development of new regulations within the EU, but involves substantial trade-offs for the domestic regulatory agenda. The EEA is grounded in homogeneity; member countries facilitate frictionless trade by harmonizing their internal rules and regulations to match the European Union. If it wanted to preserve market access on an ongoing basis through EEA membership, the United Kingdom would need to continuously update its domestic legislation across a wide range of economic activities to match any changes to EU rules. Norway, an EEA member, participates in twenty-one EU regulatory institutions directly through its membership,¹⁹ and to that extent has a certain say in the development of new industrial and safety standards. But EEA members have no formal influence over the rule-making process itself. Compared to the benefits of full membership, the UK would lose the ability to introduce new rules and have no type of veto power over proposed changes. The EEA requires customs procedures at the border which means new costs for UK based exporters, and would also require technical innovations in order to avoid a hard border for Northern Ireland. But while such an arrangement could result in significant transition costs, it would preserve market access and prevent regulatory divergence from becoming a barrier to trade in the long run.

Customs Union Membership:

While a Customs Union Membership also appears to be out of the question given the current state of the negotiation, it is worthwhile exploring the implications for TBTs and regulatory cooperation were the EU and the UK to agree on such an arrangement. Turkey, which entered into a Customs Union with

¹⁸ United Kingdom HM Government, Continuity in the availability of goods for the EU and the UK, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638958/Continuity_in_the_availability_of_goods_for_the_EU_and_the_UK_Position_Paper.pdf

¹⁹ <https://www.norway.no/en/missions/eu/areas-of-cooperation/participation-in-programmes-and-agencies/>

the European Union via the 1995 Ankara Agreement, can move goods into Europe without customs duties or quantitative restrictions. But unlike the EEA, the Customs Union does not apply to trade in services or agriculture. Also, unlike EEA members, who can largely determine their own trade relations with third parties, Turkey is bound to a common external tariff at a rate determined by the EU. For regulatory matters, were the United Kingdom to participate in such a customs union, it would be bound by the European *acquis* in all matters related to commercial policy. In addition to its customs requirements, Turkey has an obligation to adopt new rules and standards adopted by the European Union in a wide set of economic areas. As with EEA membership, the United Kingdom would only be an informal party to any new rules or agreements. But unlike members of the European Economic Area, the United Kingdom would not need to make contributions to the European budget and would retain policy autonomy across the services sector. This means that the United Kingdom could, at the cost of regulatory autonomy in the production and treatment of goods, retain the ability to set its own regulations for financial services, the treatment of consumer data, and media services. A Customs Union also appears to be unlikely, despite support from the opposition, as it would prohibit the United Kingdom from pursuing free trade deals with any third party.

CETA-Style Agreement:

It seems, given statements in the last year by both Theresa May and Donald Tusk, that a CETA-style free trade agreement is emerging as a focal point. A free trade agreement still involves a high level of uncertainty as to the outcome, but a CETA-style treaty could entail broad policy autonomy in regulatory matters for the United Kingdom, albeit at the cost of frictionless access to the single market. For treatment of technical barriers, CETA generally incorporates the WTO TBT Agreement. As to regulatory cooperation, the EU and Canada have agreed to cooperate in a wide range of areas.²⁰ Cooperation is formalized through a Regulatory Cooperation Forum, which is tasked with fostering regulatory cooperation and determining future areas of cooperation. This is further enabled by the above mentioned Protocol, which determines the process by which the EU and Canada establish mutual recognition of conformity assessment. The process depends on mutual acceptance of conformity assessment and accreditation bodies in each party for a limited range of goods, with additional categories to be added over time by mutual agreement. The goal is for fostered cooperation in a formal venue to lead to regulatory cooperation and mutual recognition in the long term.²¹ Regulatory cooperation is facilitated on a voluntary basis, meaning that there are no strict enforcement mechanisms or formal criteria for mutual recognition. CETA does encourage regulators to exchange information and build institutional relationships, but the parties retain regulatory autonomy. Unlike a EEA agreement or membership in a Customs Union, a CETA-style outcome would not imply the harmonization of UK regulations and standards for concerned market areas on a forward basis. Trade costs related to border controls and regulatory compliance with EU regulations remain in place for Canadian exporters.

Applied to the UK, CETA would mean a considerable loss of market access and trade potential. Despite currently satisfying EU requirements, conformity assessment bodies within the UK would still need formal approval from the EU under a Protocol-type process, which could restrict market access in the short term and disrupt existing commercial relationships. Notably, the Protocol does not cover crucial categories like sanitary and phytosanitary measures as well as agricultural goods. And the possibility of regulatory divergence between the UK and the EU threatens to reduce the scope for mutual recognition in

²⁰ WTO, TBT Agreement, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>, Chapter 4

²¹ Woolcock, Steve, What a CETA (or CETA+) agreement would mean, <http://blogs.lse.ac.uk/brexit/2018/03/09/what-a-ceta-or-ceta-free-trade-agreement-would-mean/>

the future. A comprehensive Protocol, with mutual recognition for a broad range of goods, would take a considerable amount of time to negotiate. Such an agreement would allow the UK to broadly pursue an independent regulatory agenda and to negotiate free trade agreements with third parties.

Generally, it is much more difficult for third parties to gain mutual recognition from the European Union. Even participation in a free trade agreement with the European Union will only have limited impact in this space. The European Union stresses the importance of regulatory cooperation through dialogue over time and has only offered limited formal mutual recognition to its trading partners through Mutual Recognition Agreements. For example, the CETA between the European Union and Canada does not generally list regulatory requirements, but instead includes the above mentioned Protocol for goods²² and a protocol on the mutual recognition of the compliance and enforcement programme regarding good manufacturing practices for pharmaceutical products²³. The first Protocol, however, provides for only eight product categories of mutual recognition, whereas the second focuses on the restricted category of medicinal products or drugs, representing an overall small share of trade in goods to date. Furthermore, CETA establishes a Regulatory Cooperation Forum (RCF) to discuss TBTs and possible resolving mechanisms²⁴. CETA is a bottom up approach to regulatory cooperation, where mutual recognition is a deliberative, negotiated and political process. And while a CETA style FTA provides for some immediate level of mutual recognition, it would take time to meaningfully reduce regulatory barriers. Although CETA allows for the possibility of a MRA in services, a first for the European Union, no MRA to date has covered certification or mutual recognition for the services sector.

CETA-Plus ("Bespoke") Agreement:

A CETA-Plus style agreement refers to a potential bespoke FTA between the UK and the EU, building on CETA but granting more frictionless access to the EU single market. A crucial part of such a bespoke agreement for trade in goods and regulatory cooperation would be mutual recognition and mutual recognition of conformity assessment for as many sectors as possible from the effective date. As noted above, the extent to which mutual recognition can be negotiated depends on the UK's willingness to trade off regulatory autonomy for better market access to the EU. The EU's acceptance of mutual recognition will be a function of its confidence that UK regulations and standards will remain in conformity with EU requirements. CETA-Plus is interesting in that it could include broader treatment for trade in services and agri-food products, broadly left out of the initial EU-Canada agreement. For trade in goods, CETA-Plus can be understood as a comprehensive, top down scheduling of conformity assessment bodies and areas of mutual recognition in effect on the first day of the agreement. Such an arrangement would alleviate short term loss of market access due to the procedural issue listed above, but the EU appears unlikely to agree to a "pick-and-mix" approach without substantial concessions from the UK in regulatory or other areas. Together with the UK's goal for regulatory autonomy, a broad MRA or schedule of covered goods by the EU seems a highly unlikely concession.

WTO Rules:

WTO rules covering trade in goods and regulatory cooperation are largely found in the TBT Agreement and related notification processes. The TBT Agreement is meant to create transparency over technical regulations, standards, and conformity assessment procedures in the global economy, but has not resulted in multilateral harmonization or mutual recognition. While the Agreement does lay out rules,

²² <http://data.consilium.europa.eu/doc/document/ST-10973-2016-ADD-7/en/pdf>

²³ <http://data.consilium.europa.eu/doc/document/ST-10973-2016-ADD-8/en/pdf>

²⁴ CETA, Article 21.6.. <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>

for example regarding the 'regulatory life-cycle'²⁵ and means to minimize protectionist non-tariff measures, non-tariff barriers such as the existing EU's rules and regulations have, broadly, not been subject to complaints at the WTO. A default to WTO rules for trade between the UK and EU would mean that the regulation of TBT would depend on national treatment, or non-discrimination, and allow for full regulatory autonomy by the UK. This would also require that UK products go through border controls and conformity assessment procedures at the EU border and vice versa, implying significant costs at the border and significant losses in mutual trade between the two parties. Without an institutional forum for negotiated mutual recognition or mutual recognition of conformity assessment, the UK would have few opportunities to remove or reduce technical barriers to trade as they emerge, meaning that the long term costs of technical barriers would remain high as well. A default to WTO rules does mean that the UK could pursue full regulatory independence, but this could also have a limited effect on its own marketplace; as noted in the 8 June, 2018 report by the House of Lords European Union Committee, regulatory autonomy is expected to lead only to a limited success as most international companies aim at complying with the highest sets of international standards uniformly to increase their market access globally.²⁶ The UK could envisage to file complaints about the legitimacy of existing EU TBT in front of the WTO dispute settlement body in order to lower the EU's TBT. However, this would be highly speculative and does not bear high chances of success.

5. Conclusion:

As mentioned above, the final FTA post-Brexit will be an expression of the UK's willingness to trade off regulatory autonomy and access to the EU Single Market. TBT can result in significant costs for producers and exporters of goods, leading to considerable economic consequences in the mutual trade. As the UK enters these negotiations from a unique position, with currently perfectly aligned regulatory measures, the initial bargaining position is strong. Therefore, the UK would most probably prefer a "top-down" approach concerning regulatory cooperation, opting out or 'de-recognizing' only specific fields of trade. On the other hand, the EU will most probably be reluctant to provide the UK with a market access free from TBT, in the form of MRA, in order to protect the EU Single Market as well as their negotiation position in other FTAs. As the EU's regulatory policy body is strongly institutionalized and includes 27 member states, it will be difficult for the UK to dictate regulatory terms throughout the negotiations. Therefore, the UK will have to decide which rules and regulations to comply with and in which areas to advance regulatory autonomy leading to increased costs for trade. In an EEA Agreement or Customs Union membership, the UK would continue to accept regulations from the EU in exchange for continued unhindered market access. However, this would not be in accordance with the UK's quest for more regulatory autonomy, as their influence in shaping the regulatory norms would even diminish as compared to the current status as EU member. Although CETA does include Chapters on TBT and Regulatory Cooperation, the respective measures remained on a voluntary basis, which does not eliminate border controls. Therefore, in a possible "CETA-Plus" agreement, the UK is likely to push for an increased amount of MRA to be included. However, especially in the areas of Services and agri-food products, the EU is likely to be reluctant to MRA, mainly to protect EU-internal regulations and standards. This would considerably weaken the UK's negotiation position, as a re-introduction of regulatory border controls would mean considerable economic costs in the trade with its primary trading partner.

²⁵ The WTO Agreements Series – Technical Barriers to Trade,
https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf

²⁶ <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/149/14906.htm#footnote-076>

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