

FROM CUSTOMS UNION TO CUSTOMS ARRANGEMENT:

Exiting the EU's Customs Union



**Briefing note by EFTA4UK
13/01/2019**

Executive Summary:

- **The UK will certainly leave the European Union's Customs Union. This is an incontrovertible fact of leaving the European Union.**
- **Participation in *the* EU Customs Union (EUCU) is factually only available to EU member states:**

Customs union of the European Union (Article 28, TFEU)

Definition

1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.
2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

- **It is possible however, to enter into 'a' customs union with the EU, something the UK should pursue in the short term; in fact, this is current Government policy.**
- **Once the UK has left the EU and the necessary preparations and negotiations have been made, the UK and EU should mutually terminate the transitional EU-UK customs union and replace it with an advanced EU-UK Customs arrangement; which would allow for near-frictionless trade and mean no hard border on the Island of Ireland. This would also allow the UK to strike new FTAs (Free Trade Agreements) around the globe.**

Introduction:

“The choice of the United Kingdom’s customs model with the EU post-Brexit is vital.

The EU has customs unions with the non-EU countries San Marino, Andorra and, most notably, Turkey. It also has customs facilitation treaties with countries such as Switzerland and Norway”

- **Catherine Barnard, Professor of European Union Law at Cambridge University¹**

Since the UK is leaving the EU and won’t be a member state after March 2019, we cannot be in **the** EU customs union.

The UK could however negotiate ‘a’ customs union or special customs arrangement with the EU.

Turkey, Jersey, The Isle of Man (IOM)², Guernsey, Monaco, San Marino and Andorra all have special customs arrangements with the European Union and the UK *could* do likewise.

What does the Government think?

It is current HMG policy for the UK to leave the EU’s customs union when it leaves the EU on the **29th March 2019**.³

However, the UK will participate in a substitute customs union until the end of the Planned transitional period/ implementation phase (scheduled to run to 31st December 2020).

A transitional customs union could be used until it could be **superseded** by the new, bespoke UK-EU customs partnership we are proposing.

The **Draft Agreement**⁴ on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union explains in legal terms how the UK will seamlessly move from being in **The EU Customs Union** to a new EU -UK “single customs territory”:

ARTICLE 6

Single customs territory, movement of goods

1. Until the future relationship becomes applicable, a single customs territory between the Union and the United Kingdom shall be established ("the single customs territory"). Accordingly, Northern Ireland is in the same customs territory as Great Britain.

The single customs territory shall comprise:

- (a) the customs territory of the Union defined in Article 4 of Regulation (EU) No 952/2013; and
- (b) the customs territory of the United Kingdom.

The UK will therefore leave the EU’s Customs Union and enter into ‘a’ customs union with the EU, having essentially the same effect.

The question is, what happens when the transitional period ends, and we are in neither ‘the’ or ‘a’ customs union with the EU?

The UK could:

1. **Agree to remain in a customs union with the EU via some new agreement.**
2. **Seek no new customs union with the EU once the transition period ends.**
3. **Seek an ambitious, bespoke customs partnership, which would not be a full customs union, but an agreement to facilitate bilateral trade.**

PM Theresa May

The Prime Minister has stated that long-term, the UK will not be a member of the EU's Customs Union.

However, the Prime Minister has also stated:

“I know my emphasis on striking trade agreements with countries outside Europe has led to questions about whether Britain seeks to remain a member of the EU's Customs Union. And it is true that full Customs Union membership prevents us from negotiating our own comprehensive trade deals.

Now, I want Britain to be able to negotiate its own trade agreements. But I also want tariff-free trade with Europe and cross-border trade there to be as frictionless as possible.

That means I do not want Britain to be part of the Common Commercial Policy and I do not want us to be bound by the Common External Tariff. These are the elements of the Customs Union that prevent us from striking our own comprehensive trade agreements with other countries. But I do want us to have a customs agreement with the EU.

Whether that means we must reach a completely new customs agreement, become an associate member of the Customs Union in some way, or remain a signatory to some elements of it, I hold no preconceived position. I have an open mind on how we do it. It is not the means that matter, but the ends.”⁵

A bespoke customs partnership?

During the debate preceding the UK's EU referendum and since, there have been many proposed solutions put forward to the challenges that leaving the EU's customs union would mean for importers and exporters.

We analysed these proposals (from think tanks, bloggers and politicians) in our detailed report 'EFTA and the Customs Union'.⁶ We concluded that while each proposal had its own merits and flaws, none of them were likely to be sufficient.

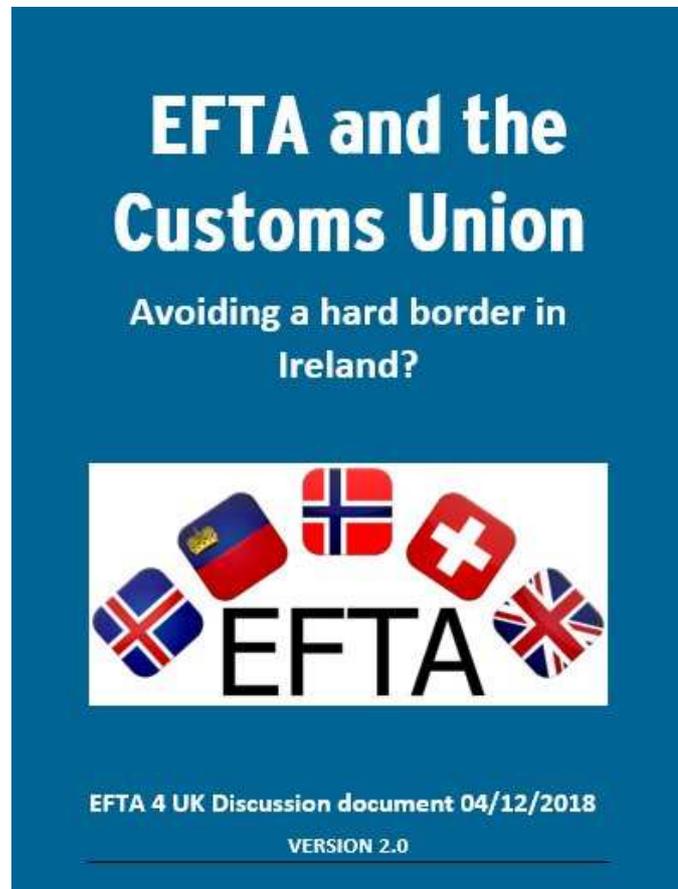
We proposed instead the **Bespoke customs partnership** which we will outline in a more concise form here.

A Hybrid solution?

The challenges the UK faces cannot simply be solved technologically or by diplomacy, or via any other singular factor.

Instead, the UK and EU should use the transition period (during which time we will be in a customs union with the EU) to negotiate and implement new *agreements*, new *methods*, *technology* and *systems*.

The UK should also rejoin the European Free Trade Association (EFTA) and maintain membership of the European Economic Area (EØS / EEA). Retaining EEA membership solves many of the problems associated with leaving the EU's customs union and ameliorates many others.



The EEA Agreement (of which the UK is currently a signatory) would provide us with an excellent starting point for our new customs partnership.

Protocol 10⁷ of the EEA is entitled 'On simplification of inspections and formalities in respect of carriage of goods' and contains clauses such as those below:

PROTOCOL 10

The Contracting Parties shall facilitate, at the places of departure and destination of goods, the use of simplified procedures and data processing and data transmission techniques for the purposes of the export, transit and import of goods

Article 5. Plant health rules

1. Plant health inspections of imports shall take the form only of random checks and sample testing except in duly justified circumstances.

Article 9(2) of the EEA Agreement is a key element to our proposals:

EEA Agreement:

Article 9(2): With a view to developing the results achieved in this Agreement, the Contracting Parties will continue their efforts in order further to improve and simplify all aspects of rules of origin and to increase cooperation in customs matters.

Article 10: Customs duties on imports and exports, and any charges having equivalent effect, shall be prohibited between the Contracting Parties.

Without prejudice to the arrangements set out in Protocol 5, this shall also apply to customs duties of a fiscal nature.

Article 11: Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties.

Article 12: Quantitative restrictions on exports and all measures having equivalent effect shall be prohibited between the Contracting Parties.

Article 9(2) reinforced by Article 3 EEA provides a solid basis for our new customs partnership.

TFEU Article 8

Article 8 of the European Union's consolidated Treaties⁸ states that:

“The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness”

If the UK leaves the EU in 2019, we will no longer be an EU member state but a 'neighbouring country'.

While Article 8 is undoubtedly vague and more of a general declaration of goodwill than a specific legal obligation, it certainly corresponds well with our idea for a bespoke customs partnership.

Article 8

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

We could cite this to the EU when negotiating our new post-brexit arrangements.

Existing International and European agreements

There are many existing international and European agreements which would provide firm underpinnings to our new bilateral EU-EK customs partnership. These include (but are not limited to):

- The World Trade Organisation (WTO)'s recently ratified **Trade Facilitation Agreement (TFA)**. The TFA is relevant because not only is the UK a WTO member, but also the EU itself has been a WTO member since 1 January 1995. All⁹ member States of the EU are also WTO members.¹⁰



- United Nations Economic Commission for Europe (UNECE) **International Convention on the Harmonization of Frontier Controls of Goods (1982)**. As the UNECE website states:

“The Convention applies to all goods being imported or exported or in transit, when they are moved across one or more maritime, air or inland frontier.

Its objective is to reduce barriers to international trade and facilitate the movement of goods by reducing the requirements for completing formalities as well as the number and duration of controls, in particular by national and international coordination of control procedures and of their methods of application.”¹¹



- The Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention, 1975).
- The Common Transit Convention (which the government have negotiated to remain a part of after Brexit) and its supplementary convention the Convention on the Simplification of Formalities in the Trade of Goods.¹²

Rex system?

The European Commission website describes the REX system:

“The Registered Exporter system (the REX system) is the system of certification of origin of goods that applies in the Generalised System of Preference (GSP) of the European Union since 1 January 2017. It is based on a principle of self-certification by economic operators who will make out themselves so-called statements on origin. To be entitled to make out a statement on origin, an economic operator will have to be registered in a database by his competent authorities. The economic operator will become a "registered exporter".

The REX system will progressively and completely replace the current system of origin certification based on certificates of origin issued by governmental authorities and on invoice declarations made out under certain conditions by economic operators.

The supporting IT system, which is called the REX system, is made available by the European Commission.”

As customs expert Hans Maessen has stated:

“The proof of the origin of goods is of major importance in a customs declaration as duties depend on the origin of imported goods. In the coming years, a new system to prove the origin of goods, called Rex, will be introduced worldwide, including the UK and the EU. Unfortunately, origin rules are very complicated, especially if goods are assembled or processed. Rex gives an exporter the option to inform the buyer and customs about the origin of traded goods on the invoice with a simple statement.”

The EU could extend access to REX to the UK as part of a new UK-EU customs partnership.

As the European Commission has stated:

“Progressively, the REX system will also be applied in the context of bilateral trade agreements between the EU and the partner countries. CETA, the free-trade agreement between the EU and Canada will be the first such agreement.”¹³

Smart border 2.0?

Several customs industry experts such as Mr Maessen and Lars Karlsson suggest that a combination of international best practice, technological solutions coupled with both regulatory alignment (and a bilateral agreement to avoid tariffs) will lead to a frictionless border.¹⁴ These ‘**Smart border**’ ideas are explained by Mr Karlsson in his report ‘**Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons**’¹⁵

Mr Karlsson stated in the study that to make a Smart Border on the Island of Ireland feasible there would need to be:

- A bilateral EU-UK agreement regulating advanced customs cooperation avoiding duplication and with possibility to carry out tasks on each other;
- Mutual recognition of Authorised Economic Operators (AEO);
- A Customs-to-Customs technical agreement on exchange of risk data;
- Pre-registration of Operators (AEO) and People (Trusted Commercial Travellers programme in combination with a Certified Taxable Person programme);
- Identification system by the border;
- A Single Window with one-stop-shop-elements;
- A Unique Consignment reference number (UCR);
- Simplified Customs declaration system (100% electronic) with re-use of export data for imports;
- Mobile Control and Inspection Units;
- Technical surveillance of the border (CCTV, ANPR etc). ANPR can be used at unmanned border crossings to undertake automatic checks without stopping

We believe that the suggestions and ideas contained in this study could indeed help resolve many of the potential problems after Brexit that might arise on the Island of Ireland.

We suggest that HMG employ Mr Maessen and Mr Karlsson to help oversee the implementation of new systems, procedures and technologies which would help make our new EU-UK bespoke bilateral customs partnership work.

Draft Political Declaration

The November 2018 Draft **Political Declaration**¹⁶ setting out the framework for the future relationship between the European Union and the United Kingdom states:

“The Parties envisage having a trading relationship on goods that is as close as possible, with a view to facilitating the ease of legitimate trade...with a view to facilitating the movement of goods across borders, the Parties envisage comprehensive arrangements that will create a free trade area, combining deep regulatory and customs cooperation.

The economic partnership should ensure no tariffs, fees, charges or quantitative restrictions across all sectors, with ambitious customs arrangements that, in line with the Parties' objectives and principles above, build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin.”

The Draft Political Declaration says on Customs issues that the parties (EU and UK) wish to put in place ***“ambitious customs arrangements”***:¹⁷

Customs

26. The Parties will put in place ambitious customs arrangements, in pursuit of their overall objectives. In doing so, the Parties envisage making use of all available facilitative arrangements and technologies, in full respect of their legal orders and ensuring that customs authorities are able to protect the Parties' respective financial interests and enforce public policies. To this end, they intend to consider mutual recognition of trusted traders' programmes, administrative cooperation in customs matters and mutual assistance, including for the recovery of claims related to taxes and duties, and through the exchange of information to combat customs fraud and other illegal activity.
27. Such facilitative arrangements and technologies will also be considered in developing any alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing.

Conclusions

Being inside a customs union with the EU would seriously inhibit the UK pursuing new free trade agreements (FTAs) with third countries, since we would be unable to unilaterally alter our own tariffs.

Even if we stayed in the EU's Customs Union there is no guarantee we could share in their existing and future FTAs.

Sovereignty

By definition, being in a customs union places restriction on UK trade policy.

Symbolically remaining in the/a customs union with the EU would be unacceptable to those parliamentarians and members of the public who seek to 'take back control' from the EU.

It would therefore be unsustainable for the UK to remain in a customs union with the European Union in the long term. We should therefore use the transition period to negotiate a new bilateral bespoke customs arrangement between UK and EU.

This would be made up of:

- New technologies and systems (as outlined by Mr Maesson and Mr Karlsson) combined with international best practice as recommended by the WCO.
- Negotiated access to the REX system.
- A new protocol to be added to the EEA agreement specifically relating to NI/ROI trade, with the creation of a new joint committee to oversee border issues.
- All parties upholding their commitments and duties under existing international agreements.

Combined with the EU's Customs 2020¹⁸ and Union Customs Code¹⁹ (UCC) programmes, the UK and EU can retain frictionless trade without ever needing to invoke the backstop.



For more detail and analysis, please see our longer report – EFTA and the Customs Union.

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