



**TRADE JUSTICE
MOVEMENT**

BRIEFING

Dynamic Alignment and Regulatory Cooperation between the UK and the EU after Brexit

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Executive Summary

Brexit is likely to have a significant impact on regulation in the United Kingdom: both in terms of the way we regulate and the content of the regulations and standards themselves. There is growing concern that existing standards on the environment, labour and other rights secured through European Union membership could be weakened. In response, some have called for a formal commitment to future alignment on regulatory standards between the UK and EU after Brexit.¹

This paper considers the three main options for cooperation or alignment on regulation in future trading arrangements, each one following logically from one of the three most likely options for the UK's future relationship with the EU after Brexit:

1. Membership of the European Single Market

This establishes a common regulatory framework between the UK and the EU, arbitrated by the EU's judicial system and with the political oversight of EU institutions. Participation requires alignment in all areas covered by the 'four freedoms': goods, services, labour and capital.

2. Free Trade Agreement (FTA)

After Brexit, the UK could seek to negotiate an FTA with the EU along similar lines to the agreements that the EU has with Canada (CETA) and Japan (JEFTA).² CETA includes a specific chapter on Regulatory Cooperation which sets out a process of dialogue between Canada and the EU to address regulatory divergence which might affect trade. Free Trade Agreements (FTAs) offer a far lower level of harmonisation than Single Market membership.

3. Partial alignment 'Chequers-type' agreement³

The Chequers agreement put forward by the May administration during Brexit negotiations proposed regulatory alignment between the UK and the EU in some areas of trade but not others. The UK would be a 'rule-taker' in certain economic sectors such as agriculture, where we would also have to accept legal interpretation from the European courts, but in others, such as financial services, the UK would be free to set its own regulations. Chequers was rejected by the EU on the grounds that it splits the four freedoms of the Single Market, but the possibility of partial alignment on certain regulations has not been completely ruled out.

From a trade justice perspective, there are risks associated with each of the above forms of regulatory alignment. These can be broadly categorised as:

1. Deregulation to serve trade goals

Systems set up to facilitate cooperation on regulation in trade agreements are designed solely to facilitate trade, not to achieve other social or environmental objectives. As a result, there is a risk that this leads to deregulation, and convergence to the lowest common denominator. This is a particular concern in relation to the Regulatory Cooperation forums included in the most recent trade deals such as CETA because the design of these institutions tends to prioritise the interests of corporations over social and environmental concerns.

2. Democratic deficit and lack of accountability

Regulations amended as a result of processes established by trade agreements may suffer from a lack of democratic oversight. Firstly, by definition, countries which participate in the Single Market but are outside the EU, such as Norway, have no formal role in the democratic systems which determine its regulations. And secondly, even for EU member states, the design of supranational institutions within free trade agreements often leaves very little space for democratic oversight. For example, the CETA Regulatory Cooperation Forum model sets out a method of assessing regulations with limited democratic or civil society participation.

3. Necessity and ‘science-based’ tests

A third concern is that trade deals and World Trade Organisation (WTO) agreements start from a presumption that regulations should only be permitted to restrict trade, if they are “science-based” and meeting a “legitimate objective.”¹⁴ The definition of what constitutes ‘science-based’ decision making is highly contested. It can also lead to the prioritisation of the trade impacts of regulations over other regulatory concerns. Adopting this approach wholesale would mark a significant departure from the UK’s current position which follows the EU’s Precautionary Principle. This allows countries to ban particular products or processes where there is a risk of harm, rather than the stronger proof of harm required under WTO rules.

This paper presents a more detailed discussion of four possible options for the UK-EU Relationship, including recent proposals for Dynamic Alignment in any future FTA, before concluding with a set of key criteria that should be used when analysing proposals for future cooperation and alignment on regulation between the UK and the EU after Brexit. These are:

1. Non-trade focus

Proposals for future Dynamic Alignment’ should be guided by the environmental or social objectives that led to the regulation rather than trade facilitation. It may be possible to secure regulatory alignment with the EU in a separate EU-UK treaty that sits alongside a trade treaty, though there is no direct precedent for this.

2. Bindingness

Regulations laid down in an international treaty are more binding on particular governments than a commitment in national legislation. As a result, civil society organisations should seek the strongest commitment possible, prioritising provisions in international treaties rather than a simple commitment from the UK government in primary legislation.

3. Compatibility and feasibility

Proposals for future regulatory cooperation or alignment are more likely to be acceptable to both the UK and the EU if they build on existing arrangements that are already agreed in other treaties. For example, any system of comprehensive Dynamic Alignment is likely to be an add-on to the UK’s future participation in the Single Market, while a weaker form of Dynamic Alignment is likely to be an addition to a CETA-style FTA.

1. Introduction

One of the many big questions raised by the UK's departure from the EU is the impact on our regulatory framework. For the last forty years many of the UK's laws and regulations, on issues ranging from food hygiene to employment law to pesticides, have been based on those agreed within the EU. Depending on the terms under which we leave, the UK government may regain control over these regulations, raising concerns for many civil society groups, particularly environmental NGOs and trade unions, who wish to safeguard existing standards in the UK and ensure that in future our standards remain in line with those of the EU. Many of these organisations also fear that in the rush to reinvent a huge body of law and regulation, the principles that guide policy and legislation in the EU could be lost, as well as key monitoring, oversight and enforcement processes.

Underlying these concerns is the fear that as the UK seeks to increase trade with non-EU countries after Brexit, the country will move away from the EU's comparatively high regulatory standards towards a much lower US regulatory model. The risk that trade negotiations surrounding Brexit will undermine the UK's current environmental, social, health and labour standards has led many organisations to seek legal guarantees that our existing standards will be protected after Brexit. The weakest form of safeguard is a unilateral commitment from the UK Government to retain existing levels of protection, even if it is in primary legislation. Stronger alternatives include protecting these standards in an international treaty, namely the UK-EU Future Relationship agreement; while others have called for continued participation in the Single Market or indeed continued EU membership (both of which by definition mean that we continue to adopt the EU's regulatory framework).

This briefing begins by outlining a number of models for cooperation on regulation in existing international treaties, highlighting some of the concerns that have been raised about formal Regulatory Cooperation institutions within recent trade agreements. It then explores the different options for future cooperation on regulation proposed in the various possible models for the future UK-EU relationship, considering the advantages and disadvantages of each one.

2. Defining terms: Different types of alignment and cooperation

First, it is important to set out the terminology used in these debates. Some of these terms have precise legal meanings in international trade agreements and treaties whilst others are alternative phrases that are vaguer. It is therefore important to be clear about how they will be used in this briefing.

Regulatory cooperation can be used to refer in general terms to any and all types of cooperation between states in relation to regulations that potentially impact on trade, including both cooperation within trade agreements, and cooperation outside of trade agreements. This includes weaker forms of cooperation, which may be aspirational and unenforceable, for example, countries working together to develop labour standards at the International Labour Organisation, and stronger forms, for example, the shared regulations across the European Single Market, which are enforced by the European Courts (CJEU).⁵

However, the term '**Regulatory Cooperation**' is most commonly used to refer to Regulatory Cooperation Chapters in more recent Free Trade Agreements (FTAs). These chapters set out proposals for the creation of new institutions specifically designed to facilitate free trade, rather than to achieve regulatory objectives. Thus for example, Chapter 21 of CETA which is entitled Regulatory Cooperation, outlines a system of dialogue between EU and Canadian trade officials and regulators which has the long-term aim of subjecting regulatory measures to scrutiny.⁶ In this context, the term 'Regulatory Cooperation' therefore refers to a specific institutional process, called either a Regulatory Cooperation Council (RCC, in the TTIP) or a Regulatory Cooperation Forum (RCF, in CETA).

Regulatory alignment or convergence generally refers to a process by which states bringing their respective regulations into line with each other in some way. Unlike 'regulatory cooperation', the term does not refer to a process of dialogue in trade agreements, but has a vaguer, more generic meaning. It could therefore be used to describe the common regulations of the EU, or indeed a much weaker arrangement such as non-enforceable standardisation, whereby global bodies agree to common standards but not an enforcement mechanism, as is the case in some climate and labour agreements.

Mutual recognition refers to a more specific legal commitment that states make, to recognise the practices and standards of another state as equivalent to their own. The term can be applied both to the mutual recognition of rules and of conformity assessments, which are quite distinct concepts, as explained in a recent House of Commons Library briefing:

“Mutual recognition of rules involves two countries recognising each other’s standards as equivalent. They may have different rules but these achieve the same outcomes. These rules are generally managed by shared processes or institutions. This is very different to mutual recognition of conformity assessments which is a much more limited concept. Mutual recognition of conformity assessments acknowledges the differences between regulatory regimes but permits one party to test and certify that a product complies with the other party’s regulations.”⁷

An example of this second understanding of the term is the Mutual Recognition Agreement (MRA) for medicines testing between the EU and the US. The agreement means that the EU trusts the US's inspection regime, and vice versa. It does not mean that the EU recognises US standards as equivalent: medicines must still meet EU standards, but US authorities are trusted to assess whether they in fact do. It is worth noting that MRAs, like Regulatory Cooperation Chapters, are specifically designed to minimise unnecessary barriers to trade, rather than to achieve regulatory objectives.

Harmonisation can refer to the adoption of the same regulations, and thus has the same meaning as 'alignment' or 'convergence'. However it can also be used to describe the process that leads to eliminating regulatory barriers to trade, such as the system of dialogue that is set out in the Regulatory Cooperation Chapters of FTAs such as CETA mentioned above.

Equivalence is sometimes used to describe the outcome of mutual recognition, particularly mutual recognition of rules, which means one state accepts another's rules as 'equivalent' to its own. This generally describes a unilateral decision of one state to recognise another's rules as equivalent, without the bilateral commitment implied by any of the other terms listed. The absence of bilateral commitment means that the recognition can be withdrawn at any time.⁸

Dynamic Alignment is sometimes used to refer broadly to any model of cooperation which ensures that one state's regulations automatically track another's. Full harmonisation or convergence would be one form of dynamic alignment, since states would have the same regulations by default, but it is also possible in theory to have unilateral Dynamic Alignment, whereby one state voluntarily copies the other's regulations. Such a commitment could be included in an FTA, perhaps in specific sectors, without the shared regulatory regime that is implied by full convergence.

Good regulatory practice (GRP) is a term that is used in many trade agreements, to refer to measures that states can take, generally as part of a formal treaty, to inform other parties of proposed or actual regulatory changes. The term is used in the context of WTO agreements and CETA. The EU describes the objective of GRP as "transparency, predictability and accountability;"⁹ However, in practice the term tends to mean little more than keeping other states informed about prospective or actual regulatory changes.

This briefing will use capitalised 'Regulatory Cooperation' in a narrow sense, to describe the specific model of dialogue and engagement outlined in Regulatory Cooperation Chapters of FTAs. However the words 'cooperation' or 'alignment' on their own will refer more broadly to any attempts to cooperate on regulations in the context of trade. The terms 'regulatory alignment', 'harmonisation' and 'equivalence' will be avoided, unless referring to a specific situation where the term was used; 'Dynamic Alignment' will be understood in a broad sense, specifying when it refers to a unilateral or bilateral commitment; 'convergence' will be understood to mean adopting the same regulations in a maximal sense; and 'mutual recognition' will always be qualified to specify whether it refers to recognition of rules or conformity assessment.

3. Current and proposed models of cooperation

1. European Single Market

The European Single Market is the largest common market in the world. It is far more comprehensive and more integrated than a Free Trade Area, since the level of regulatory convergence between its members goes far beyond the provisions of an FTA. This is because the Single Market has a common regulatory framework, with its own judicial system and the political oversight of the EU institutions.

States that participate in the Single Market, even as a non-EU member, commit to accepting complete alignment in all areas of regulation covered by the ‘four freedoms’: goods, services, labour and capital, backed up by the judicial oversight of the EU Courts (CJEU). During Brexit negotiations, the EU has insisted that UK participation in the Single Market would require full convergence with all EU regulations that affect cross-border trade, including acceptance of the four freedoms and convergence of all regulations that affect any of the four freedoms.¹⁰ This situation currently applies to countries like Norway which participate in the Single Market but are not members of the EU. Although Single Market members can diverge from the regulations in certain areas, this cannot be done in any way that might affect the four freedoms. Thus, for example, the UK can have higher animal welfare standards than EU countries for its domestic farms, but it cannot use these to ban imports of food or other products derived from animals raised in other countries.

A key question here is what counts as ‘affecting trade’, which would require further negotiation if the UK were to seek to participate in the Single Market after Brexit. Thus for example, from an environmental perspective, one commentator points out that if the EU’s existing precautionary principle is applied consistently and “the list of EU environmental measures where there is no difficulty at all with the UK having the flexibility to take a quite different approach is rather small.”¹¹ The European Economic Area (EEA) Agreement, which the UK could seek to remain a part of in order to participate in the Single Market, includes EU legislation in all areas, apart from the common agriculture and fisheries policies, customs union, security policy, home affairs and taxation.¹²

2. A Free Trade Agreement that builds on the CETA and JEFTA models

CETA and JEFTA are two comprehensive FTAs that the EU has agreed with third countries (Canada and Japan respectively) in the past two years. They serve as a model for the kind of trade deals the EU is willing to sign with ‘third countries’ – countries which are not in the Single Market or in the EU. Both these deals fall far short of Single Market participation or shared customs arrangements, but nonetheless they are still more comprehensive than older trade agreements in the commitments expected of countries that are a party to them, both in terms of coverage (the number of policy areas that are impacted), and the level of liberalisation required (the number of sectors that will be opened to competition from the other party).

CETA is one of the first deals to include a specific chapter on Regulatory Cooperation, modelled on the Regulatory Cooperation chapter that was proposed for the Transatlantic Trade and Investment Partnership (TTIP – a deal between the EU and the US, abandoned in 2018).¹³ The chapter sets out a process of dialogue between Canada and the EU to address regulatory barriers to trade, most of which takes place through a Regulatory Cooperation Forum. This brings together ‘trade experts’ and political leaders from both sides, with, as legal professor Marija Bartl explains, the aim of “*creating institutional channels for the exchange of information, methodologies and knowledge between regulators and stakeholders... (so that) their ‘thinking’ would align, thus minimizing the numbers of divergent regulations.*”¹⁴

The FTAs currently in place that include Regulatory Cooperation processes (e.g. CETA and JEFTA) do not specify who should be invited to participate in these forums. However, because the main focus of Regulatory Cooperation is on removing barriers to trade, commentators have suggested that these forums are likely to be dominated by business interests.¹⁵ Civil society groups have argued that unless the treaty explicitly states that trade unions and other civil society groups must also be invited, the majority of the input will come from corporations.¹⁶ While the recommendations resulting from the Regulatory Cooperation processes are non-binding, they set in motion a method for addressing barriers to trade which departs significantly from the normal democratic process that sets regulations outside of trade agreements. Regulations are ordinarily designed with social, public health or environmental objectives in mind, even in trade blocs such as the EU's Single Market. In the CETA model, the objective of the Regulatory Cooperation Forum is to facilitate trade rather than regulate in the public interest.

3. Partial alignment: Chequers-type agreement

During the Brexit negotiations, the UK government proposed a mixed model of alignment whereby the UK-EU Future Relationship was based on regulatory alignment in some sectors of the economy but not others. This proposal, which became known as the 'Chequers' model, was put forward to ensure frictionless cross-border trade in goods while giving the UK flexibility to diverge from EU regulations in services and other areas, including environmental regulation and labour rights.¹⁷ It would also involve leaving the Single Market and therefore enable the UK government to achieve its political objective of ending free movement of labour.

The Chequers proposal would require the UK to accept a common regulatory regime in certain economic sectors. For example, the UK could align on cross-border goods trade, which would involve automatically applying the EU's common rulebook for any regulations that apply to goods traded across the UK-EU borders, including agricultural products and manufactured goods. In these sectors the UK would be a 'rule-taker' and would have to accept rulings (or at least interpretation) from the European courts. In other areas, such as services, the UK would be free to set its own standards under its own judicial regime.

In 2018, the Chequers proposal was rejected by the EU on the grounds that it split the four freedoms of the Single Market. Although alignment in some areas but not others is a theoretical possibility, the EU's position at that time was that it would only accept either full Single Market participation or third country status with a CETA or JEFTA style FTA. It is however not impossible that the current negotiations could lead to a Chequers-like outcome, because both the UK and EU would like to achieve a level of regulatory alignment in cross border trade in goods that goes beyond CETA. The difficulty is achieving this without undermining the integrity of the Single Market.

Table: **Delineation of different cooperation models**

	Single Market	Canada-style FTA	Chequers-style agreement
Environmental standards alignment	Full convergence on all regulations affecting trade	Limited alignment, but aspirational dialogue to improve harmonisation	Alignment in specific areas, such as goods trade, which may affect environmental regulations
Workers' rights alignment	Full convergence on all regulations affecting trade	Limited alignment, but aspirational dialogue to improve harmonisation	Alignment in specific areas, such as goods trade, which may affect workers' rights
Democratic oversight	Limited – no membership of EU institutions, but possible influence through EFTA ¹⁸	Through national Parliament	Through national Parliament, with some 'rule-taking'
Common judicial oversight	Common jurisdiction of EU courts and EFTA Court	None, except dispute settlement provisions outlined in FTA	ECJ interpretations take primacy in particular areas, otherwise none except dispute settlement in FTA

4. Concerns about cooperation and alignment

This section outlines a series of concerns that have been raised in relation to the different models of regulatory alignment in the context of trade agreements. It is worth noting that not all of the concerns apply to all types of alignment.

1. Alignment leading to deregulation

The concern here is that regulatory alignment in the context of an FTA is likely to lead to deregulation as it is easier for the parties to simply settle for the lowest common denominator, rather than seeking ways to work together to raise or maintain standards. These concerns are particularly acute in recent FTAs such as CETA, which contain formal Regulatory Cooperation provisions explicitly designed with the primary objective of removing barriers to free trade between countries. The European Public Health Alliance cites several areas of regulation, including food standards labelling, access to medicines and antimicrobial resistance, where there is a risk of a reduction in standards, particularly in comprehensive FTAs such as CETA and JEFTA.¹⁹ The relationship is less clear cut in relation to the Single Market, as the EU has its own parliament and judicial system to set regulations, some of which are primarily intended to achieve social, environmental or other objectives whilst others are designed to reduce barriers to trade and promote a 'level playing field.'

In a comprehensive critique of Regulatory Cooperation in the TTIP, Bartl argues that because the central objective of the proposed RCC is "to contribute to parties' activities pursuing public policy ... whilst facilitating trade and investment," the experts who would be invited to lead the process would be trade experts, rather than experts in social, environmental or health regulation.²⁰ The focus on trade also means that corporate interests have a far greater incentive than other organisations to bring issues to the RCCs, to say nothing of the resources required in order to do so, leading to concerns about 'corporate capture': if participants are drawn primarily from the private sector, there is a very real concern that they may well prioritise the interests of multinational companies over the interests of the wider public.

Bartl suggests that this may happen without any malicious attempt to deregulate, purely as a consequence of the institutional design of the RCCs. Whilst national institutions are more likely to be governed by political processes, and as a result it is not necessary to state the powers and role of each participant, at an international level such specification is key:

.....
"Beyond the state... The 'functionalist' forms of integration not only sever bureaucratic expertise from more overt forms of democratic control, but by constituting them around purposes, expertise's blind spots may turn into outright policy biases." ²¹
.....

As a result, she concludes that the introduction of TTIP's model of regulatory cooperation risks a "shift toward the US-like (more market based) regulatory style,"²² in contrast to the EU's more value-led 'pluralist' approach, which includes a 'social cost-benefit analysis.'²³ These fears are compounded by the institutional architecture and the trade-focused, economic language around which the RCCs are framed.

The Canadian Centre for Policy Alternatives reach a similar conclusion about the RCF process in CETA, citing in particular the relationship between treaties and domestic law:

.....
"CETA establishes institutions and processes for the alignment of regulations between the European Union and Canada. New and existing laws will go through a burdensome process in order to converge or otherwise make them equivalent. As this process is based on an international treaty, it stands above domestic legislation and institutions. In other words, it will be far more difficult and sometimes effectively impossible to undo the results of regulatory cooperation." ²⁴
.....

This analysis implies that there is cause for greater caution when assigning regulatory powers to international institutions, as compared to domestic institutions, in the context of trade agreements such as TTIP or CETA. This conclusion might apply to some degree to non-CETA models of cooperation as well: a Chequers-style proposal might similarly involve some level of bilateral regulatory alignment, for example, regarding the application of the EU's 'common rulebook' on cross-border goods trade. It is important to clearly define the powers of the institutions which make regulatory decisions, extend democratic oversight where possible and ensure that participants have expertise in social and environmental regulation as well as trade policy, in order to avoid a trade-promoting or deregulatory bias.

2. Democratic deficit and lack of accountability

A related issue is that regulatory bodies, particularly in the context of FTAs, may not be subject to appropriate democratic oversight, with decisions made in secret and no role for civil society to input into these decisions. This may also be a concern in relation to domestic regulation, but there are a number of reasons why it is likely to be more pronounced at the international level.

Many international institutions are not directly accountable to a defined democratic body. This is particularly true for the new joint regulatory forums set out in bilateral FTAs such as CETA, although the severity of this issue depends both on the institution's formal powers which may well be limited, and also the scope for them exert influence to change regulation. This issue can be mitigated if the FTA sets clear limits on the role of a joint regulatory forum to, for example, reporting and discussing possible regulatory changes, as compared to other suggestions that these bodies may have secondary rule making powers.

There is often a particular democratic deficit when it comes to international treaties, since governments tend to negotiate and agree international agreements with limited oversight from their legislatures. This is particularly acute in the UK, where the Executive's Royal Prerogative means it can negotiate, sign and ratify treaties without any requirement for either a debate or a vote in Parliament. This creates the serious risk that the institutional design of regulatory cooperation in the UK's future trade agreements does not reflect wider democratic opinion, but rather the priorities of the particular government in power at the time. This issue is best addressed if countries take steps to strengthen their domestic democratic oversight of trade policy, but it also highlights important questions about the legitimacy of these new regulatory provisions in trade agreements in general.

Unless these regulatory alignment processes in FTAs are specifically set up to actively engage with civil society, there may be a number of barriers to meaningful engagement with the broader public. Specific mechanisms would need to be designed to ensure trade discussions were published, in an accessible format and that resources were made available to facilitate public engagement. There would also need to be provisions to ensure that this input was fully considered. These provisions either don't exist or are very weak in agreements such as CETA.

These concerns again apply primarily to the kind of Regulatory Cooperation outlined in TTIP and CETA, though they may also be relevant to some degree to supranational institutions in general. At the EU level, for instance, there is a well-defined democratic infrastructure, but important questions about democratic participation in EU institutions remain, particularly in the UK. In the case of the UK leaving the EU but remaining in the Single Market, a key challenge will be ensuring democratic oversight despite the UK's rule-taker status.

3. Necessity and ‘science-based’ tests

Necessity tests are designed to prevent countries introducing spurious regulations that create unnecessary barriers to trade and are therefore a form of protectionism. The tests are commonly included in FTAs and are also applied in the EU Single Market, to ensure that goods produced in one EU country can be sold without restriction in another.

In theory, necessity tests do not prevent governments from introducing regulation to achieve ‘legitimate’ policy aims, but in practice they require governments to draft regulations in ways that reduce their impact on trade as much as possible. Trade lawyers are asked to decide whether a particular regulation constitutes an ‘unnecessary barrier to trade’ or a ‘legitimate policy objective’, and as there is nothing to prevent broad interpretation of these provisions, the resulting rulings often favour trade objectives above public policy objectives. Thus for example, the necessity test in GATS (the multilateral General Agreement on Trade in Services)²⁵ states that regulatory measures should be *“based on objective and transparent criteria”* and *“not more burdensome than necessary to ensure the quality of the service”*, the latter phrase in particular being sufficiently vague to risk legal challenges to important and legitimate public policy objectives.

A concrete example of the problems caused by necessity tests is in relation to animal welfare, because the WTO only recognises animal health issues as a legitimate reason for banning certain food products. Animal welfare issues are not recognised as legitimate, even when there is extensive public concern and even scientific evidence that particular practices are harmful to animal welfare. An example of where this led to a challenge is the tuna-dolphin GATT case in 1991, where Mexico successfully challenged the US decision to ban tuna caught using fishing practices that also caused harm to dolphins.²⁶ Similarly, the WTO contains no requirements for members to uphold core International Labour Standards, and there are likely to be other moral, value-based or cultural issues which do not fall into the narrow remit

of what the organisation deems a legitimate concern. This restricts the ability for governments to regulate in the public interest.

A similar parallel can be drawn with the insistence in the WTO and other trade agreements that regulations affecting trade must be grounded in scientific evidence.²⁷ Once again, this measure was designed to prevent protectionist policies, but it fails to recognise that there is a broader approach to risk and evidence that is also consistent with scientific principles. For instance, the EU follows the Precautionary Principle which allows countries to ban products or practices if there is a risk of harm, even if it is not yet proven that the harm definitely exists. This has led to the EU banning hormone-fed beef, a policy which was deemed unscientific by the WTO in a challenge from the US.²⁸

The concern with regards to both necessity and scientific tests is that trade officials and trade bodies are making decisions about issues that are not primarily to do with trade. The interpretation of what counts as a ‘reasonable policy objective’, ‘scientific’ or ‘distorting trade’ is a highly subjective matter. However the current approach to regulatory alignment in trade agreements, and to some degree within the EU Single Market, is that these interpretations are left to trade lawyers.

5. Options for the UK-EU Future Relationship

This final section examines the various alternatives that have been proposed for the future UK-EU relationship, including the political realities surrounding each one, and considers how the issue of regulatory cooperation might be addressed in each option.

1. Withdrawal Agreement and Political Declaration

The Withdrawal Agreement (WA) was agreed between the UK and the EU in Autumn 2018, but subsequently rejected by the UK parliament. The WA outlines the process for the UK's departure from the European Union, and as such, does not directly outline the UK-EU future relationship beyond the 'implementation period'. As a result, it contains little information about possible regulatory alignment between the UK and the EU after Brexit, although there are a couple of clues that give some indication of the provisions the EU and UK might be willing to accept.

One relevant area is the proposal for a Northern Ireland backstop, which commits the UK to remaining within the EU customs union at the end of the implementation period, if an adequate means of maintaining an open border between Northern Ireland and the Republic of Ireland has not been found. This would commit the UK to aligning key regulations on agriculture and other cross-border goods trade; some of these regulations would apply to the whole of the UK, and others just to Northern Ireland.

In theory this proposal suggests that the EU is open to some degree of regulatory alignment with the UK, by which the UK becomes a 'rule-taker'.²⁹ It is important to note however that the purpose of the backstop is to keep open the border between Ireland and Northern Ireland, and to ensure a level playing field for the purposes of trade, and as such, this proposal is fundamentally different from environmentally motivated Dynamic Alignment. Regulations which are not considered relevant to the particular kind of trade that happens at this border are not covered by the alignment provisions in the backstop – including relevant environmental policy.

There are other reasons why it would be a mistake to view the backstop as a likely model for the future relationship between the UK and the EU in the long term: first, because both the UK and the EU have made it clear that this is a temporary arrangement that would only be operationalised in the absence of an alternative solution to the problem of the Irish border. Second, because the backstop is very unpopular among Conservative and Democratic Unionist MPs, and as a result has been rejected by the UK parliament on several occasions. It does however have one advantage over other models in that it has been agreed by both the EU and the UK government, and could therefore be a starting point for theoretical discussions about what alignment might look like after Brexit.

The WA also contains several other provisions which will be important for the Future Relationship, notably the Level Playing Field (LPF) and Non-Regression (NR) provisions. These seek to prevent the UK from undercutting the EU in relation to state aid, competition law and certain kinds of labour and environmental regulations. The NR provisions in particular provide a form of regulatory alignment from the outset, as a prerequisite to even beginning FTA negotiations,³⁰ and they also include explicit references to environmental regulation and workers' rights.³¹ The LPF aims to be a baseline, above which further cooperation is to be outlined in an FTA: we can therefore assume the EU wants further cooperation, but that it has already addressed many of its key concerns in the WA.

However, there are a few caveats worth noting when it comes to the LPF provisions. The first is that the LPF is not as strong as the 'rule-taking' in the backstop or as in the Single Market. The UK would be free to diverge from its current commitments in certain areas, for example, it has been suggested that EU regulations on food hygiene would no longer apply, including the infamous ban on chlorinated chicken.³²

Secondly, the dispute-settlement process outlined in the WA is a state-to-state process, where the EU would have to launch a challenge against the UK at a private arbitration panel, rather than under the jurisdiction of the CJEU.³³ This makes it harder to enforce the LPF provisions, especially as, for political reasons, the EU is unlikely to launch state-to-state dispute settlement on a comparatively minor good regulatory practice issue. In addition, this form of dispute settlement does not give members of the public or NGOs the same legal recourse that they have within the EU, whereby cases can be brought by private actors at the European courts.

Thirdly, the LPF is primarily designed to promote economic competitiveness and to prevent the UK from undercutting the EU in order to attract investment and trade. This is quite distinct from cooperating with the aim of achieving environmental, social or other outcomes.

The Political Declaration (PD) is non-binding, and therefore intentionally vague when it comes to future regulatory alignment, although it is clear that regulatory commitments will arise out of Future Relationship negotiations, which will only begin once the WA is ratified. However the PD does refer to cooperation on regulations in relation to data and financial services, probably reflecting concerns from European Member States that the UK will seek to undercut the EU in these areas. The PD also mentions regulatory cooperation when it considers how best to maintain frictionless trade at the border, stating that the cooperation should be 'deep', which could suggest going further than the provisions in CETA, but also that it will be in the context of an FTA and built on the LPF, which implies a relationship which falls short of Single Market membership. The PD also makes no mention of the 'alignment in some areas but not others' proposal in Chequers and has therefore often been interpreted as a rejection of it.

2. Partial alignment, as in the Chequers proposal

As discussed earlier, the Chequers option sought regulatory alignment between the UK and the EU in certain economic sectors, whilst the UK would then diverge from the EU in other sectors. However, the main 'problem' with this model is that it was rejected by the EU as a proposal for the future relationship. This is because the EU is determined not to separate the 'four freedoms' in the Single Market – freedom of movement of labour, capital, goods and services, as it sees such a move as enabling the UK to pick and choose which parts of the Single Market it wishes to align with, which in effect constitutes a threat to the union.

Nevertheless, it is possible that the EU may in the end be willing to consider a version of the Chequers agreement, which includes very specific alignment in particular sectors, as long as the benefits to the UK fall short of full participation in the Single Market. If such a deal is achieved, much work will be required to ensure that alignment is designed, monitored and delivered in such a way as to safeguard standards, rather than solely to promote trade. The priority for the UK government is likely to be to retain as much EU market access as possible while minimising its regulatory obligations; while the priority for the EU would be to minimise the scope for the UK to undercut the EU through regulatory diversion and thus divert its trade and investment. Both these aims are distinct from, but not unrelated to, securing environmental, labour and other protections.

3. Single Market membership

The so-called ‘Norway option’, or the more accurate ‘Norway+ Customs Union’ proposal, has not been formally supported or put forward by the UK Government, Brussels or any major party. Indeed Norway has expressed reservations about the proposal that the UK might join the European Free Trade Area (EFTA). The option lacks political support because it does not secure the provisions hard-line Brexiters want – such as ending free movement and the jurisdiction of the ECJ – and equally does not satisfy many Remainers, since it ends political cooperation and participation in EU institutions.

Nonetheless the Norway+ option has the advantage of being tried and tested. Norway provides an example of a country which is heavily aligned with the EU in terms of regulations while being outside of the political union; as a result, it is effectively a ‘rule taker’ with full market access. If the Government’s sole aims were to maximise trade with the EU, ensure an open Irish border and yet still leave the EU, Norway+ would be a good option.

The regulatory cooperation between Norway and the EU involves some exceptions and complexities in relation to agriculture and fishing, but aside from these idiosyncrasies it is in essence quite simple: Norway copies all EU Single Market regulation and can therefore trade freely with the EU, accepting ECJ oversight and eliminating the need for regulatory border checks. This means most EU environmental legislation applies to Norwegian goods and services.

From the perspective of UK trade unions, environmental groups and other civil society organisations that wish to lock-in the EU’s regulatory framework after Brexit, Norway+ offers a ready-made model for how this could work in practice. This will only become a possibility if the political realities change in both the UK and Brussels.

4. Dynamic Alignment

Various civil society organisations have called for ‘Dynamic Alignment’ between the UK and the EU after Brexit. This is usually interpreted as the UK applying EU regulations in particular areas – for example, anything which affects the environment – and committing to change these regulations as and when the EU changes them. The aim is to ensure that the UK keeps pace with EU environmental standards, assuming that EU standards will be sufficiently high, a commitment which would prevent the UK from signing trade agreements with lower standards. The DA proposal would be that this would be included in a future UK-EU trade (or other) agreement, thus making it difficult for future UK governments to overturn through primary legislation.

The advantages to the EU of DA are similar to those of the LPF provisions in the WA: they prevent the UK from undercutting the EU in key areas. The advantages to the UK are a guaranteed minimum standard of regulation, however it would be a ‘rule-taker’ in these areas. The UK would use any form of DA to seek market access in return from the EU, probably along similar lines to the proposal in Chequers, whereby the UK’s adherence to the EU’s common rulebook is the passport to frictionless cross-border trade with the EU.

The problem with this approach is the same problem faced by Chequers – the EU is unlikely to want to offer the UK de facto full access to the Single Market if it is only aligned in some and not all areas of regulation (thereby splitting the four freedoms). However the extent to which this is the case depends on how the DA proposal is constructed. Comprehensive DA, whereby all regulations affecting the environment (and/or workers’ rights and other social objectives) are aligned between the UK and EU, is unlikely to be an acceptable option unless the UK commits to participating in the Single Market. This brings us much closer to the Norway+ option.

A weaker version of DA would need to be more limited either in scope or in enforceability, or both. The former would mean specific alignment with much smaller areas of EU law; for example, an environmental alignment clause could be drafted in such a way as to make its environmental objective explicit and distinct from the existing LPF provisions which are primarily to do with competition and trade. The problem with this is that, from a trade perspective, it is not clear what the UK gets in return, unless it can be used in some way to secure wider market access.

Using alignment in certain areas to secure market access, however, is likely to be seen as splitting the four freedoms and as such, to be rejected by the EU in the same way as the Chequers model. This weaker form of Dynamic Alignment is also unlikely to meet the objectives of the civil society groups, as it is likely that important areas of environmental and labour regulation would be excluded in the negotiation process.

The final option would be to include some form of DA enshrined in UK primary legislation. This could be similar to the UK Government's proposal for a bill which enshrines labour rights after Brexit and holds them in line with EU standards. This was put forward in Spring 2019, in an offer to appease the Labour party; however its key limitation is the fact that it is much easier for future governments to reverse primary legislation than it is to overturn commitments made in international treaties. The UK-EU future relationship treaty is therefore the obvious place to secure binding and enforceable commitments to any form of Dynamic Alignment. In conclusion though it appears that DA either collapses into a version of the Norway+ option, with full alignment and Single Market participation; or into a Chequers-like proposal. Again, given their current political composition, neither proposal is likely to be acceptable to both the UK government and the EU.

6. Conclusion

The big question for the UK after Brexit is to what extent it can diverge from the existing models of regulatory alignment between the EU and its partners. As things stand, there is no precedent for a model that stands between the extremes of third country status (such as Canada's relationship in CETA) and Single Market participation (such as Norway).

Institutional Regulatory Cooperation as included in the CETA FTA raises important questions about democratic oversight, deregulation and corporate capture, as outlined in section 4 of this report. Regulatory alignment within the Single Market is more comprehensive and includes explicit labour, social and environmental objectives, which are enforceable by the EU courts. It also has the advantage of addressing the Irish border issue, unlike a CETA-style deal. However it is still fundamentally a trading entity, whereby shared regulations are about facilitating cross-border trade. The Single Market also faces some political opposition due to its free movement of labour provision. It is in this context that the Chequers model is proposed, as a way of ensuring alignment in certain industries but not others. Theresa May's version of Chequers was primarily about trade facilitation, to avoid the need for a hard border in Northern Ireland, rather than achieving environmental or social objectives. It also faces political opposition from the EU since it is interpreted as splitting the four freedoms.

Environmental groups, trade unions and other civil society organisations campaigning for Dynamic Alignment between the UK and EU after Brexit are therefore likely to find themselves calling for something distinct from, and more ambitious than, any existing FTA models, including the proposed Chequers agreement. The analysis presented in this report leads to the following recommendations for the content of such proposals:

1. Non-trade focus

Any proposal for 'Dynamic Alignment' must be framed in terms of environmental and social objectives rather than solely trade facilitation. This means avoiding both clauses on trade necessity tests as are found in WTO agreements and certain FTAs, and also the CETA-style Regulatory Cooperation described in Section 3.2 of this report.

2. Bindingness

There should be a more binding commitment from the UK government than primary legislation, which can be overturned by a subsequent government. Any proposal should be a formal part of a UK-EU treaty, with clear legal recourse for civil society organisations and members of the public when this treaty is breached. This makes it harder for future governments to change the provisions and easier for them to be enforced.

3. Compatibility and feasibility

Wherever possible, civil society organisations should begin with existing models of regulatory alignment that already exist in international treaties. This will help to ensure that the proposed Dynamic Alignment model is actually workable in practice, and also increase the likelihood of it being politically feasible. It is also important to recognise both the EU's key political objectives (not to split the freedoms of the Single Market and ensure a LPF), as well as the UK's (only to commit to alignment with the EU if this delivers sufficient market access and cross-border trade in return). Given the current options on the table, any comprehensive Dynamic Alignment proposal seems likely to be an add-on to participation in the Single Market, while a weaker form of Dynamic Alignment will likely be an add-on to a CETA-style FTA.

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- ² CETA is the standard abbreviation for the EU-Canada Comprehensive Economic and Trade Agreement, which came into force provisionally on 21st September 2017, and JEFTA for EU-Japan Economic Partnership Agreement, which came into force 1st February 2019. For more information, see the respective pages on the EU website. More information about both deals available at: <https://ec.europa.eu>
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- ⁴ WTO (undated). 'Technical Information on Technical barriers to trade.' WTO website. Available at: www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm
- ⁵ CJEU stands for Court of Justice of the European Union.
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- ¹⁷ For more on the Chequers proposal, see Fella, S. (2019). 'Brexit: Proposals for the future UK-EU relationship.' *House of Commons Briefing Paper* No. 08483. Available at: researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8483 pp. 9-10.
- ¹⁸ It is also worth noting that the UK was democratically involved with the creation of existing EU environmental policy, and so initially at least, it would be applying laws for which it had a say in. For more information regarding the scope for EFTA members to influence EU policy, see EFTA, *op. cit.*
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- ²¹ *Ibid.*, p. 9.
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TRADE JUSTICE MOVEMENT

The Trade Justice Movement is a coalition of organisations, including trade unions, aid agencies, environment and human rights campaigns, fairtrade organisations, and faith and consumer groups. Together, we are campaigning for trade justice – not free trade – with the rules weighted to benefit people and the environment. The movement is supported by more than 60 member organisations that have over 6 million members.

We believe that everyone has the right to feed their families, make a decent living and protect their environment. But the rich and powerful are pursuing trade policies that put profits before the needs of people and the planet. To end poverty and protect the environment we need trade justice, not free trade.

www.tjm.org.uk