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Brexit: The UK cannot 'stay in' the EU customs union

With the election result generating renewed discussion over the various ways of leaving the EU that the UK could pursue, we find ourselves going back over old ground. One of the misunderstandings that continues to be repeated frequently is the idea that, as it leaves the EU, the UK can 'stay in' the customs union. This creates the impression that the UK faces a menu of choices where it can elect to keep certain aspects of its prior membership of the EU as it leaves. And it creates a hint that 'staying in' the customs union may be easier than other options, as 'grandfathering' customs arrangements may be simpler than coming up with new ones.

This impression is entirely false. The fact that one hears this reference from senior politicians and in the media so frequently is reflective of a lack of understanding of many of the significant details of EU institutional arrangements that, sadly, permeates much of the discussion of the Brexit process. As the UK leaves the EU it will leave the EU customs union. It is as simple as that.

Exactly how the UK then attempts to replace the arrangements around various aspects of trade, including customs arrangements, is then a decision for the UK. There are various options which have differing pros and cons, as we explain below. One option would be to attempt to form a new customs union between the UK and the EU. That is not the same as staying in the existing union. This is not just a semantic point: the characteristics of the 'new' customs union would likely be bespoke and require detailed negotiation between the UK and the EU, even if in many instances they sought to replicate aspects of existing arrangements.

The customs unions issue is more complex than most realize. An excellent overview is provided by Dr Richard North in his monograph 16 (see <http://www.eureferendum.com/documents/BrexitMonograph016.pdf>). There are three basic and critical points to be made.

First, membership of the EU customs union derives its legal basis from membership of the EU. Second, arrangements around customs union are only part of the possible set of the arrangements which could help goods and services to move with minimal interruption between European borders. Much of the legislation that facilitates that derives from the single market, not the customs union per se. Third, in the EU context the customs union has been combined with a common commercial policy such that trade deals with third parties are a competence of the Union as a whole. As a matter of logic, given that the UK cannot stay in the EU customs union as a non-EU member and new arrangements will be bespoke, it could be possible to negotiate a customs union deal which afforded the UK scope to strike its own arrangements with third parties. Whether that would be plausible as a matter of practical politics is another matter.

A quick review of EU, Turkey, and EEA experience helps to make these points clear.

The EU's internal market and the customs union

The idea that the region would constitute a customs union is among the foundational ideas of the EU, embodied in Article 110 of the Treaty of Rome. But even though the customs union was in place, it was commonplace for the passage of goods across EU borders to be interrupted through to the early 1980s. Such movement was tariff free, but documentary checks to demonstrate the origin and ownership of goods were still commonplace. It took an additional set of political agreements, culminating in the Single European Act and arrangements on customs cooperation in the Maastricht Treaty, to generate the 'frictionless' movement of goods across borders that we see today. Through that legislative process the arrangements for free movement of goods have become interwoven with the broader regulatory framework that the EU has established as 'the single market'.

Turkey is not in the EU customs union

It is often stated that Turkey, while not an EU member, is “in” the EU customs union. Strictly speaking that is not true: Turkey has a separate agreement that implements a bespoke customs union between Turkey and the EU. But that arrangement does not cover all the sectors that the EU customs union covers (services and agriculture are excluded), and it does not afford the same degree of trade facilitation as the EU customs union in the sectors it does cover, because a number of residual documentary checks and restrictions remain.

The 1995 agreement saw Turkey and the EU adopt tariff free in industrial goods. Turkey also undertook to both align certain regulatory and employment standards in industrial sectors with those in the EU, and also to follow the common commercial policy and external tariff in those sectors. But Turkey is not in the single market. Hence although trade in manufactured goods between Turkey and the EU is tariff free, it is usual for goods inbound to the EU to be held up at the border as various aspects of documentation and conformity with EU standards are checked, including whether Turkish trucks have required permits to travel into the EU. It is routine for trucks carrying goods from Turkey into the EU to be stopped at the border for many hours.

The 1995 agreement has also created an asymmetric situation regarding third party deals. If the EU makes a trade deal with a third party, Turkey is obligated to follow the subsequent evolution of the Union Customs Code and reduce tariffs on imports from that third party. But the third party in the trade deal may not recognise Turkey as a signatory to the EU deal, and hence may keep their tariffs on Turkish goods in place. That is an asymmetry Turkey and the EU are still wrestling with, among many other aspects of their relationship. This underlines the specific point: Turkey’s arrangements for trading with the EU represent one variant of a bespoke relationship with its own strengths and weaknesses. It can hardly be said to be the same as a country which is “in” the EU’s customs union.

EFTA, EEA and customs cooperation

Non-EU members of the EEA are not part of the EU’s customs union, and nor is Switzerland. These countries are not obligated to follow the common commercial policy, instead they negotiate trade deals with third parties as a block as EFTA. They have, however, an agreement which both delivers tariff free trade with the EU, and an advanced set of measures for customs and trade facilitation. Procedures for documentation, information sharing and the like have evolved such that impediments to movement of goods are minimized. This is greatly facilitated and partly implemented via the convergence of regulatory standards implied by the EEA or by Switzerland’s set of bilateral treaties. For these non-EU states the arrangements for demonstrating origin of goods and information sharing are different to those in the EU, but a new system has been launched this year which allows a degree of self-certification and creates a ‘registered exporters’ scheme where administrative burdens are further lightened. Even in the EEA-EU case (take the Norway-Sweden border as an example) there are customs posts at road borders and spot checks on trucks carrying goods.

What do they really mean?

What do politicians and others really mean when, despite their demonstrable lack of understanding of the points above, they talk about ‘staying in’ the customs union? In our view, they are referencing a couple of things: the intuition that arrangements around movement of goods matter, and the hope that an agreement can be reached which is as close as possible to the status quo. The absence of tariffs on such movement, however, is only part of what makes ‘frictionless’ trade possible.

The importance of these issues has been raised by the DUP’s likely involvement in generating a majority for May’s administration. The commitment on all sides to try and find a way to minimise the impact of Brexit on arrangements at the Irish border is real. But anything approximating a ‘frictionless’ arrangement will require an unprecedented degree of flexibility from the EU and creativity on both sides as part of a bespoke set of arrangements. Obviously, “no deal” means “no bespoke arrangements”. But the idea of ‘staying in’ the customs union does more to confuse the situation than clarify it.

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