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Alternative arrangements to the Brexit-deal Irish Backstop: can the UK be trusted?

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When discussing the issue of the Irish Backstop, which Boris Johnson says has to be removed from the EU-EU Withdrawal agreement, the assumption is that what is at stake are goods and products manufactured or grown (for agricultural product) in Great Britain that are exported to Ireland. Boris Johnson has, for instance, proposed that Northern Ireland remain aligned on EU regulations for dairy and agricultural products. But there is far more at stake: all goods that would transit through Northern Ireland to the EU on Irish soil; and those include not only products manufactured or grown in the UK, but also any product manufactured or grown outside of the EU customs area, in the forefront Chinese and US products etc.

Under EU law – which applies to Ireland and would continue applying to the UK during the transition period after Brexit, "products in free circulation" are treated exactly in the same way as products manufactured or grown in the EU member states when crossing the EU's internal borders. Article 29 of the Treaty on the functioning of the European Union is stating that "products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges"; this treaty provision has remained unchanged since the Rome Treaty of 1957 and has always applied to circulation of goods between the UK and Ireland, as well as between those and other EU member States. If the UK leaves the EU's custom union and if there are no checks and no levying of custom duties for goods transiting from Great Britain to Ireland there will

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be a strong incentive for Chinese, US and other producers to export goods through British ports.

As long as the standards on products will remain similar between the EU and the UK, it will not matter whether a third country good is being checked in a UK port, or in Rotterdam, Barcelona or the Piraeus. But if the UK standards become less stringent than the EU standards – so-called "regulatory divergence" – checks on products will have to differentiate between those importations whose final destination is the UK and those whose final destination is the EU. Even if there is no regulatory divergence, there might be soon an incentive to export goods to the EU through UK ports if there is no hard border, for all products for which UK tariffs would be lower than the EU external tariff. Furthermore, there are quite complex issues since in the customs union the VAT is levied in the country of production – or of import. The backstop is providing for the necessary arrangements that should avoid the creation of incentives to diverting traffic of goods from third countries, as well for regulatory divergence as for customs tariffs and taxes. Alternative arrangements that would replace the present Irish protocol (the backstop) need to deal with the issue of products in free circulation and not only with UK and EU products.

Amongst the exiting ideas to replace the backstop, solutions are proposed that would permit checking the conformity of goods to regulatory standards and levying duties and taxes at places that would not be the land border between Northern-Ireland and the rest of Ireland. Making those checks and levying those duties in Ireland or on the continent would place all the burden – administrative and economic – on EU member states and would harm the smooth circulation of products between Ireland and the rest of the EU. Alternatively, having those checks and levying entrusted to UK authorities somewhere else than on the Irish border can be imagined. At any rate this would place a heavy burden on the UK customs officials, because when checking imports from China, the US and so forth they would need to differentiate between those products that are intended to remain in the UK and those whose final destination is the EU. They would also have to levy duties in a differentiated way, and the amount levied by UK authorities on third country products destinated to the EU market would need to be refunded to the EU budget. Such a solution is technically feasible, but needs to be worked out in detail, and this is not possible in the short time span which separates us from 31 October.

Any alternative arrangement impeding the birth of incentives for third country producers to make use of regulatory and tariff divergence between the UK and the EU would need to include strong confidence building measures. And this is not easy. The problem is not only the government of the day in London. On 7 March 2019 the European Commission had to lodge a court action against the UK,[1] which illustrates how serious the issue of trust with the UK is. Neither the issue itself nor the date on which the action has been lodged has any direct link to Brexit. The issue is that between 2011 and 2017 (under the Cameron and May governments) the UK authorities have failed to enter into the accounts the correct amounts of customs duties and to make available to the EU budget the correct amount of resources in respect of certain imports of textiles and footwear from the People's Republic of China, for a

[1] Case C-213/19: Action brought on 7 March 2019 — European Commission v United Kingdom of Great Britain and Northern Ireland https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CN0213

total amount of 2,678 billion €. The main argument of the Commission is that "Despite repeated warnings about the risk of fraud by OLAF and the Commission, the United Kingdom failed to put in place risk-based approaches in customs control to prevent the release into free circulation of undervalued goods into the Union […]. As a result of that inaction in the face of repeated warnings, the United Kingdom failed to take the risk-based measures required under the Union's customs and own resources legislation. […] There have been exceptionally high losses to the Union budget caused by the United Kingdom's breach of Union law and the resulting levels of imports of undervalued goods to that Member State. Because the United Kingdom did not follow the Commission's recommendations, in contrast to other Member States, the United Kingdom attracted more undervalued trade. Those exceptionally high losses also affected drastically fair burden-sharing among Member States, as they had to be compensated by correspondingly higher GNI contributions by the other Member States to the Union." An Action for a declaration of failure to fulfil obligations is preceded by a non-adjudicative phase, which clearly lasted for at least a year, so the UK authorities had ample time to try and justify their lack of action but did not in a convincing way. One hypothesis which comes to mind is that the UK authorities had other priorities at the time: any way, customs duties do not flow into the relevant member state's budget but in the EU budget…

If the UK authorities did not proceed with the necessary duty levying while the UK was a fully-fledged member of the internal market and customs union, why would they be more zealous after Brexit?