

The EU Customs Union after Brexit

How from a Customs Perspective the Integrity of the Internal Market Is Protected after the Transitional Phase under the Revised Protocol on Ireland/Northern Ireland

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Abstract

In this contribution the author examines how, from a customs perspective, the integrity of the internal market is protected after the transitional phase under the Revised Protocol on Ireland/Northern Ireland. He briefly discusses the customs aspects of the Withdrawal Agreement and then examines in depth the revised arrangement with regard to the Irish border in light of the protection of the integrity of the internal market. He shows that the revised arrangement cleared the Brexit deal through parliament and paved the UK's way to leave the EU on 31 January 2020. He concludes, however, that given the complexity of the legislation underlying the revised arrangement, the UK will be paying a high price for getting Brexit done, keeping the Irish border open and protecting the integrity of the internal market of the EU.

Keywords: Brexit, EU Customs Union, Internal Market

After several years of negotiation the Withdrawal Agreement between the UK and the EU has been agreed.¹ On 31 January 2020 the UK formally left the EU and is no longer a member state of the EU. However, as will be explained below, this is probably not the end of the Brexit saga.

The Withdrawal Agreement contains a transition period, which ends on 31 December 2020. During this period the UK remains part of both the EU customs union and the internal market. The UK will already be able to sign and ratify free trade agreements with non-EU countries.

In principle, after 31 December 2020, withdrawal from the EU customs union and internal market will take place. The UK parliament has even adopted a law determining that the transition period cannot be extended beyond 31 December 2020.

The preference of the UK is clear: withdrawal from the EU customs union and internal market as of 1 January 2021. The big question is whether this will be feasible. The UK and EU aim to conclude a free trade agreement, and it remains to be seen whether negotiation time of less than a year is sufficient for that. Under nor-

mal circumstances, negotiating a free trade agreement takes several years, while the prospect of a fast negotiation is also dimmed by the different views of the EU and the UK on the content and scope of such agreement.² Another important feature of the Withdrawal Agreement is the arrangement to solve the issue of the Irish border, *i.e.* the border between Northern Ireland and the Irish Republic. That issue has been solved with the Revised Protocol on Ireland/Northern Ireland (hereafter, the Protocol).³ This article focuses on the solution for the Irish border as agreed in the Protocol and what it will mean in practice for the future relationship between the EU and the UK.

1 Brief Overview of the Withdrawal Agreement from a Customs Perspective

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In brief, the solution for the Irish border is Northern Ireland remaining under EU customs legislation as of 1 January 2021 while the UK leaves the customs union. At the same time, Northern Ireland will remain part of the UK customs territory. However, before going into more detail, I first provide a brief overview of the Withdrawal Agreement and its arrangements for customs and trade.

During the transition period (1 February 2020 to 31 December 2020) included in the revised Withdrawal Agreement, the UK will remain part of the EU Customs Union and the Internal Market, including the four freedoms.⁴ This means that trade between the UK and the EU will be conducted in the same manner as during the time the UK was a member state of the EU. No customs duties will be applied on products coming from the UK to the EU and vice versa. During the transition period

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1. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019, OJ C 384 I/1.

2. See for example: *Financial Times*, 1 March 2020, 'The UK's threat to walk out of EU trade talks is real'; *The Guardian*, 5 March 2020, 'Barnier warns of grave differences between EU and UK in trade talks'.

3. Revised Protocol Ireland/Northern Ireland, 17 October 2019, TF50 (2019) 64-Commission to EU 27.

4. European Council (2018), Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, XT 21004/18 COR 2.

customs formalities and controls in trade between the UK and the EU are therefore unnecessary. From a VAT and excise duty perspective, the rules and mechanisms for intra-EU trade will continue to be applied without border formalities being imposed.

The transition period can be extended, but the UK needs to apply for this by 1 July 2020. However, the UK government has made clear that they do not wish to extend the transition period and want an agreement with the EU in place by the end of 2020. This means that in 2020 a lot of negotiating work will need to be done by both the UK and the EU to complete a new trade agreement that will then apply as of 1 January 2021.

It should be noted that given this tight schedule, the danger of a hard Brexit is far from over. If the UK and the EU fail to reach an agreement, then both parties will have to fall back on the WTO scenario, *i.e.* imposing their Most Favoured Nation duty rates on each other's products (with the UK still needing to set their own Most Favoured Nation duty rates).⁵

Contrary to the draft Withdrawal Agreement, the revised Withdrawal Agreement intends to introduce a permanent solution for the Irish border.⁶ According to the EU Commission:

The revised Protocol is no longer an insurance policy that applies unless and until the EU and the UK conclude a subsequent agreement that replaces it in part or in full. It is a fully legally operative solution that will continue to apply unless it fails to receive the democratic support of the Northern Ireland Assembly.⁷

In the remainder of this article the arrangement with regard to the Irish border is further examined. As will be discussed later, this arrangement is unique in the history of the EU customs union, but very complicated, triggering the question of whether it can be implemented in time (*i.e.* before the end of 2020).

2 Revised Protocol Ireland/Northern Ireland

The Protocol was agreed on 17 November 2019. Compared with the draft Protocol negotiated by former Prime Minister May (and rejected three times by UK parliament) it contains a new approach with regard to the Irish border. Under the initial draft Protocol the

5. See: I. Hallak, EPRS, EU Parliament Briefing, Future EU-UK trade relationship, February 2020, in which different scenarios, including a hard Brexit, are described.

6. On the draft Withdrawal Agreement of 2018, which was rejected by UK Parliament, see: Eileen Connolly and John Doyle, Brexit and the Irish Border, EJLS Special issue, October 2019, pp. 153-186.

7. European Commission, Questions & Answers, What did you agree today?, 17 October 2019, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_19_6122.

UK as a whole would remain in the EU customs union until a solution for the Irish border had been found (the Irish backstop). It failed to pass UK parliament, one of the main reasons being the possible 'indefinite' stay within the customs union. This would make it impossible for the UK to conclude its own free trade agreements with third countries. Being able to conclude own free trade agreements and the possibility to manage its own customs tariff were important conditions for the UK government and the majority of the UK parliament. Neither would be possible if the UK remained in a customs union with the EU.

Under the Withdrawal Agreement and the Protocol, Northern Ireland remains part of the customs territory of the UK, while the UK itself leaves the customs union. This means that free trade agreements concluded by the UK with third countries also apply to goods produced in Northern Ireland, while on entry into Northern Ireland goods coming from these third countries benefit from preferential duty treatment.

The border between Northern Ireland and Ireland will remain open, *i.e.* no checks and border controls will take place, and no tariffs will be applied both ways. Instead, these checks and border controls will take place between the UK and Northern Ireland.⁸ The solution agreed to protect the integrity of the internal market is, simply stated, that the UK collects import duties on third country goods destined for the EU (*i.e.* Ireland) and on goods coming from the other parts of the UK into Northern Ireland. To complement this arrangement, Northern Ireland will still be applying the Union Customs Code (UCC) and a substantial amount of other EU legislation, all aimed at aligning Northern Ireland with internal market rules of the EU.⁹ The overall aim is, of course, to maintain a frictionless border between Ireland and Northern Ireland.

3 Goods Destined for the EU, the Customs Regime

As mentioned previously, as of 1 January 2021 (assuming a trade agreement between the EU and the UK has by then been concluded or, alternatively, a hard Brexit has taken place), the UK will collect import duties on behalf of the EU on goods destined for the EU. In the Protocol this arrangement has been included in Article 5 (Customs, movement of goods).

Article 5(1) determines that no customs duties will be levied on goods brought into Northern Ireland from another part of the UK by direct transport, unless those goods are at risk of subsequently being moved into the EU. Further, it is determined there that in case goods

8. However, see the *Times* of 23 February 2020: 'Brexit team seeks to evade Irish Sea checks on goods'.

9. Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10 October 2013, pp. 1-101).

are being moved to Northern Ireland from other countries than the UK and the EU countries, the customs duties of the UK will apply, unless that good is at risk of subsequently being moved to the EU.^{10, 11}

The big question is when goods should be considered to be at risk of subsequently being moved into the EU. Article 5(2) stipulates that for the purposes of Article 5(1) of the Protocol:¹²

(...) a good brought into Northern Ireland from outside the Union shall be considered to be at risk of subsequently being moved into the Union unless it is established that that good:

- a. will not be subject to commercial processing in Northern Ireland; and
- b. fulfils the criteria established by the Joint Committee in accordance with the fourth subparagraph of this paragraph. (...)

On the basis of Article 5(2) it can be concluded that with regard to goods being moved into Northern Ireland from outside the EU (thus, including goods from other parts of the UK), the legal presumption is made that they are at risk of being moved into the EU and that EU customs duties against the EU duty rates should be levied.

Only if goods are not subject to further processing in Northern Ireland *and* fulfil the criteria established by the Joint Committee, the goods will not be considered to be at risk of moving into the EU.¹³ It follows that goods that are further processed in Northern Ireland are always assumed to be at risk of moving to the EU and are thus subject to EU customs duties on arrival. Since the UCC applies in and to Northern Ireland, I assume that businesses wanting to process goods from other parts of the UK or from outside the EU can (or should) apply the special procedure of inward processing to avoid EU duty payment on components in case the finished goods are meant to stay in Northern Ireland or go back to the other parts of the UK. However, what will happen on release from the procedure into free circulation remains unclear: should UK duties or EU duties be applied? The Protocol does not answer that question. I would assume that UK duties will apply as the goods are intended to stay in Northern Ireland or go back to the other parts of the UK. If the goods are intended to

go to the EU, then, obviously, EU duties should be applied. Regular audits will be necessary after completion of the processing to determine whether goods actually stayed in the UK or went to the EU in order to determine which duties should be applied.

If goods are not subject to further processing, it has to be determined whether they can be considered to be at risk of being moved to the EU. For these goods, criteria will be determined by the Joint Committee, according to Article 5(2) of the Protocol. Having regard to the specific circumstances of Northern Ireland, the Joint Committee decides on the criteria, taking the following into consideration:

- a. the final destination and use of the good;
- b. the nature and value of the good;
- c. the nature of the movement; and
- d. the incentive for undeclared onward-movement into the Union, in particular incentives resulting from the duties payable pursuant to paragraph 1 (of Article 5, WdW).

It seems to me that the nature and value of the goods (apart from the obvious final destination and use of the goods) will be the most important considerations for determining whether a risk is present. In my view it will be a difficult task for the Joint Committee to come up with clear and objective criteria that can be easily applied in practice. The 'nature' of the goods is a rather subjective criterion. It should be considered to define 'at risk' goods on the basis of the classification in the Combined Nomenclature combined with a minimum value. In my view this would be the only way to objectify the 'at risk' criterion on the basis of the nature and value of the goods.

It is obvious, however, that the consideration mentioned under d) is also important. I assume that this refers to products that are subject to high duty rates in the EU (*e.g.* agricultural goods, apparel and shoes). It appears that such goods can be classified as being 'at risk' up front and thus subject to the EU duty rates. In this case the Joint Committee will also need to determine specifically for which goods this consideration applies.¹⁴

The role of EU customs law in the UK and Northern Ireland is further explained in Articles 5(3) and 5(6) of the Protocol. Article 5(3) first determines that legislation defined in Article 5(2) of the UCC applies to and in the UK in respect of Northern Ireland. The legislation mentioned there is the UCC, the EU Customs Tariff, legislation with respect to relief from customs duties and international agreements relating to customs regulation applicable to the EU. In other words, the whole body of customs legislation of the EU also applies to and in the UK in respect of Northern Ireland.

Article 5(6) of the Protocol determines that the UK may (with regard to duties levied according to Article 5(3) (so EU duties)):

10. See <https://www.instituteforgovernment.org.uk/explainers/brexit-deal-northern-ireland-protocol>; here the customs arrangements to solve the Irish border issue are explained in brief.

11. See also: C. Cirlig, 'The revised Brexit deal: what has changed and next steps', EPRS, European Parliament, October 2019.

12. An important exception is being made for personal property of residents of the UK, brought into Northern Ireland from another part of the UK. This follows from the third paragraph of Art. 5(1) of the Protocol. According to Art. 5(7) also consignments of negligible value, travellers' personal luggage and goods shipped from one individual to another are not subject to duties.

13. Processing is defined as any alteration of goods, any transformation or any operation other than for preserving them in good condition or for adding or affixing marks, labels, seals and documentation to comply with specific requirements.

14. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756375/14_November_Technical_Explanatory_Note_Arts_6-8_Northern_Ireland_Protocol.pdf.

- a. reimburse duties levied pursuant to the provisions of Union law made applicable by paragraph 3 in respect of goods brought into Northern Ireland;
- b. provide for circumstances in which a customs debt which has arisen is to be waived in respect of goods brought into Northern Ireland;
- c. provide for circumstances in which customs duties are to be reimbursed in respect of goods that can be shown not to have entered the Union; and
- d. compensate undertakings to offset the impact of the application of paragraph 3.

This shows that not only the management of the levying and collection of EU duties but also the management of refunds and reimbursements is a task of UK customs. It also follows from the mere fact that according to Article 5(3) of the Protocol EU customs law applies if goods are considered at risk of moving into the EU.

Somewhat puzzling is the first paragraph of Article 5(6):

Customs duties levied by the United Kingdom in accordance with paragraph 3 are not remitted to the Union.

This seems to indicate that EU customs duties on goods brought into Northern Ireland, even if these goods ultimately end up in the EU, are not to be remitted to the EU. Under this provision the UK, apparently, can keep revenues from EU customs duties legally collected on goods destined for the EU. However, an alternative interpretation of Article 5 (6) could be that it merely tries to indicate that customs duties applicable in the UK in respect of goods moved into Northern Ireland are not to be remitted to the EU. After all these customs duties are levied according to the EU customs legislation, the UCC being applicable in the UK in respect of Northern Ireland. Further clarification is needed here.

4 Conclusions

As discussed earlier, execution of the arrangement is in the hands of UK customs authorities, who will have a difficult task. Whether for businesses and UK customs authorities the Protocol will be a workable solution will greatly depend on the work to be done by the Joint Committee. If the Joint Committee succeeds in setting objective criteria to determine when goods are at risk, it will be clear upon import into Northern Ireland whether EU customs duties or UK customs duties apply.

However, where a good is regarded at risk and subject to EU duties, the UK authorities can, nevertheless, grant refunds if that good in the end stays within the UK. Needless to say, this also will involve a lot of work for the UK customs authorities and businesses. It will specifically apply to UK 'at risk' goods moving into Northern Ireland (third country 'at risk' goods will be subject to EU duties as well, and if the EU duty rate is higher

than the UK one, a refund is also necessary if the good stays within the UK).

That being said, it is also clear that in any event the new arrangement will lead to checks and border controls between the UK and Northern Ireland. Businesses in the UK moving goods to Northern Ireland will have to file customs declarations to do so. These customs declarations must be processed by the UK customs authorities in Northern Ireland, and goods coming from the UK must be checked by them. Essentially, this entails a 'border' in the Irish Sea between Northern Ireland and the rest of the UK. All this is a consequence of the UK-EU agreement on having EU customs law being applied in and to Northern Ireland.¹⁵

The Institute for Government has stated that the Protocol will almost certainly be undeliverable by December 2020,¹⁶ The reason being the complicated arrangement for Northern Ireland that needs to be translated to new procedures and computer systems, combined with the insistence of the UK Government that there will be few physical checks (thus triggering a need for electronic procedures rather than physical ones). In conclusion, the Institute for Government warns of a major disruption for businesses, because systems and procedures will almost certainly not be ready by the end of 2020. It also warns that the UK may find itself before the EU Court of Justice, because the implementation of the border arrangement falls entirely on the UK and the UK may not be able to deliver on time.

It can be concluded that the Irish border issue has been resolved, but in complicated legislation, whose implementation falls entirely on the UK. It remains to be seen whether the Irish border will be ready in time. It might well be that the end of the Irish border saga is not there (yet). The UK will be paying a high price for getting Brexit done, keeping the Irish border open and protecting the integrity of the internal market of the EU.

15. Although the UK government has stated on several occasions that no border will be present in the Irish sea, see for example: *The Guardian*, 20 January 2020, the Irish border issue could land UK in court, report finds. <https://www.theguardian.com/politics/2020/jan/13/brexit-irish-border-uk-northern-ireland>.

16. Institute for Government, *Getting Brexit done, What happens now?*, IfG Insight, January 2020, p. 18.