

Analysis

Customs and the Northern Ireland Protocol

Speed read

The Protocol claims that Northern Ireland will remain part of the UK customs territory, but in substance most EU customs rules will continue to apply, placing significant restrictions on GB/NI trade. Under the expansive definition of goods 'at risk' of onward movement into the EU market, EU duties are likely to apply to the majority of goods, and the UK's power to reimburse or waive these duties will be subject to the full EU state aid regime, as overseen by the Commission. EU institutions, including the CJEU, will have a significant role in oversight and enforcement.



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Seventy years after George Orwell's death, legislative 'doublespeak' is alive and well, at least if the customs elements of the Northern Ireland Protocol attached to the UK's EU Withdrawal Agreement ('the Protocol') are any indication. This article disentangles the complex and somewhat obscure drafting of the relevant provisions and explains why – notwithstanding the optimistic rhetoric – a significant customs border is likely to be placed down the Irish Sea, with extensive checks and bureaucracy at Northern Irish ports in particular.

The first paragraph of article 4 of the Protocol would appear to be plain enough: 'Northern Ireland is part of the customs territory of the United Kingdom.' It serves to make clear that Northern Ireland is to be included within the scope of any future free trade agreements that the UK may conclude with third countries. However, once the subsequent provisions of the Protocol are understood, it is clear that, as a matter of substance, the practicalities of exporting and importing goods into and out of Northern Ireland are likely to be very different from trading conditions elsewhere in the UK.

The Joint Committee

The Protocol makes frequent reference to a 'Joint Committee', which is to have a critical role in the future implementation of its provisions. The Joint Committee itself is not a creature of Protocol, however, but an element of the main EU Withdrawal Agreement instead. This creates a committee to oversee its implementation, to be composed of representatives from (and

co-chaired by) the UK and the EU; this is to meet at least once a year or at the request of one of the two parties. Importantly, it is able to adopt binding decisions to amend certain parts of the Withdrawal Agreement, which both sides will then need to implement accordingly. Specialised committees are also to be set up to oversee various key separation issues.

However, while the aim of this body is clear enough – to give the UK and EU equal roles in overseeing the application of the agreement – it is as yet unclear who will represent each side and in practice how often it will meet, though its first meeting took place (by video link, given the Covid-19 crisis) on 30 March 2020.

On which goods will duties be payable?

Article 5 of the Protocol sets out the detailed rules for 'Customs, movement of goods.' Under article 5(1):

'No customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing.'

Similarly, goods arriving from third countries will be subject to the UK tariff regime unless they too are deemed 'at risk'.

This drafting might appear to suggest that the imposition of customs duties on goods entering Northern Ireland from elsewhere in the UK will be the exception rather than rule. However, once the full concept of 'at risk' in article 5(2) is understood, any optimism as regards frictionless trade is liable to be dashed. Here, it transpires, the default position is that goods *will* be considered at risk of onward movement into the EU, 'unless it is established that the 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...' (emphasis added).

There are a number of important points to note here.

First, the burden of proof will be on the importer or trader, who must establish that both conditions are fulfilled to avoid paying duties.

Second, the definition of 'commercial processing' that follows is remarkably broad: 'any alteration of goods, any transformation of goods in any way, or any subjecting of goods to operations other than for the purpose of preserving them in good condition or for adding or affixing marks, labels, seals or any other documentation to ensure compliance with any specific requirements.' Though there is scope for the Joint Committee to establish conditions under which processing is to be considered outside of (a), this would appear to have more to do with working out the detailed rules for implementation rather than a means of creating any significant exemptions or derogations, which the wide definition enshrined in the Protocol itself would not appear to permit.

Third, even if the commercial processing and end consumption envisaged by the importer is to take place entirely within Northern Ireland, duties will still be payable. For example, a widget maker in Belfast that imports components from an English supplier will be liable to pay EU customs duties, as by using those components to make widgets it will subject them to a form of processing (and note that even a mere assembly operation not capable of conferring origin under article 24 of the Union Customs Code would appear to suffice here). It is irrelevant that there is in reality no prospect of the widgets produced entering the EU market and being consumed there.

Fourth, the criteria mentioned in (b) are yet to be worked out, and there is no obligation on the parties to reach agreement on these by the end of the transition period. The third sub-para of article 5(2) refers to various matters that the Joint Committee may 'take into consideration' in determining these criteria, including final destination and use, nature and value of the good, nature of the movement, and incentives for undeclared onward shipment, and the Joint Committee will also 'have regard to the specific circumstances in Northern Ireland.' But these very general considerations evidently leave a vast amount to negotiate and resolve within a tight timeframe.

Fifth, and following from this, if the Joint Committee fails to agree what criteria should be applied by the end of the transition period (which, given the past history of UK/EU negotiation, is not inconceivable), then the effect must be that condition (b) is incapable of fulfilment and all goods entering Northern Ireland from elsewhere in the UK will automatically be deemed 'at risk'. The only exception will be goods covered by the general exemption of duties in respect of 'personal property' (as defined in article 2(1)(c) of Council Regulation (EC) No 1186/2009).

The practicalities of exporting and importing goods into and out of Northern Ireland are likely to be very different from trading conditions elsewhere in the UK

Finally, it may well be hard to formulate and agree any general criteria for (b), so in practice if the Joint Committee does manage to reach some consensus in the short term, this is more likely to involve exemptions for individual imports rather than broad categories. In any event, these rules will need to be kept under constant review: for example, any changes or divergences in the external tariffs applied by the UK and EU to products from third countries will affect the incentives for smuggling across the Irish border, so will need to be considered accordingly.

What duties will apply?

As with other aspects of the Protocol, the answer to this question is not exactly obvious on the face of the text, and its real meaning emerges only after a bit of digging. Under article 5(3):

'Legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 shall apply to and in the United Kingdom in respect of Northern Ireland (not including the territorial waters of the United Kingdom).'

Anodyne as this may sound, the legislation referenced in fact encompasses the sum of EU customs law: the Uniform Customs Code and all other EU customs legislation, as interpreted by the Court of Justice of the European Union (CJEU). All the tariffs and tariff classifications set out in that code and associated legislation will apply accordingly (and are beyond the reach of the Joint Committee). Even though the level of duty will be set at EU level, however, the charges levied will be retained by the UK.

Furthermore, the effect of article 5(4) and para 5 of Annex 2 (which make Northern Ireland part of the EU single market's regulatory zone) is that EU remedies and trade defence measures (anti-dumping duties and countervailing measures) will also apply to all goods arriving in Northern Ireland, from wherever they originate. As article 5(4) is not excluded in the second sub-para of article 5(1), these duties

will therefore apply in respect of third country goods, even if UK duty applies otherwise.

Moreover, in the event that the EU were to become involved in a trade dispute with the UK and the single market were to impose these kinds of countervailing measures against the UK, the Protocol would appear to require that Northern Ireland should have to levy the additional duties owed on such goods arriving from Great Britain, effectively requiring the UK to enforce a retaliatory measure against itself. Even if the UK and EU can agree a zero-tariff free trade regime *inter se*, the trade remedies regime will still apply, so some checks and charges on an intra-UK trade at Northern Irish ports appear inevitable.

Next, given that the default position is for EU duties to apply to goods entering Northern Ireland from third countries and Great Britain, it is perhaps not surprising the EU rules on duties and measures having equivalent effect should also be preserved as regards goods entering from or destined for the EU market. As such, article 5(5) prescribes that articles 30 and 110 of the Treaty on the Functioning of the European Union (TFEU) are to continue to apply, thus prohibiting duties on imports from the EU, quantitative restrictions on imports from and exports to the EU, and discriminatory taxation as between EU and domestic goods. These rules are necessary to eliminate barriers to trade on the Irish land border, but particularly – as regards taxation and article 110 of the TFEU – may well require Northern Ireland to apply considerably different rules from the rest of the UK, the more that the latter seeks to diverge.

Finally, it should be noted that the Joint Committee's power to agree criteria under article 5(2) only extends to determining the level of duty that will be payable on a particular good or type of good; the Joint Committee has no substantial role in determining what customs checks and procedures are to be applied on entry into Northern Ireland. Nor, ultimately, does the UK have any control over these at all; instead, under article 5(3) it must (as regards Northern Ireland) follow what is mandated in the Union Customs Code, subject only to a very limited exception for marine products.

Exemptions

Having levied the duties required, the UK does then have a power under article 5(6) to reimburse these, waive the customs debt owed, or compensate the undertakings affected. There is no need for the conditions under which these exemptions will apply to be agreed by the Joint Committee. However, the UK's freedom of action under article 5(6) remains subject to EU state aid rules (article 10); in other words, far from the UK having an unrestricted unilateral power to grant exemptions to goods otherwise caught by EU duties, all such exemptions will instead be subject to the full EU state aid regime, as overseen by the Commission. Given that reimbursement is likely in many cases to amount to state aid, Commission approval is likely to be required, ultimately giving the EU a far more significant role in deciding on the article 5(6) exemptions than may at first be apparent.

Where the levies have to be paid upfront at the border and are only reimbursed subsequently, this will inevitably import significant bureaucracy and administrative cost, even if the overall effect is fiscally neutral. However, the power under article 5(6)(b) 'to provide for circumstances in which a customs debt which has arisen is to be waived in respect of goods brought into Northern Ireland' could be important, as this apparently envisages that tariffs could function as a kind of floating charge over particular categories and might not have to be paid upfront on certain imports. If charges are

eschewed at the border, however, there must be a risk from the EU perspective that the goods could end up entering the EU market without ever having paid the required dues. From the UK perspective, article 5(6)(c) could also be significant, as unlike the reimbursement and compensation provision in articles 5(6)(a) and (d), it is not limited to levies arising under article 5(3), so could in principle be deployed to reimburse businesses importing goods that have been subject to anti-dumping duties, provided these can be shown not to have entered the Union.

Importing from Northern Ireland into Great Britain

The recitals at the start of the Protocol note that ‘nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom’s internal market’, and this language is repeated in article 6(1). As a comment on the Protocol, this statement is hardly surprising: the text is part of a bilateral UK/EU Treaty, and exists to avoid a hard border on the island of Ireland while still protecting the integrity of the EU single market. The terms on which goods might enter the remainder of the UK were not the parties’ concern.

However, while the Protocol may not require any customs duties to be levied on goods arriving into mainland UK ports from Northern Ireland, maintaining open access as at present would not be unproblematic. For any good where the UK duty is set at a higher level than the EU equivalent, there would be a strong incentive to smuggle in such goods via the Northern Irish route and avoid paying the UK tariff. Furthermore, in so far as the UK ends up in any trade dispute with the EU and adopts retaliatory duties against the single market, transit via Northern Ireland would also appear to offer an easy means of avoidance.

Enforcement

Article 12(1) makes the UK authorities responsible for implementing and applying the provisions of the Protocol, but supervening upon this the EU and its institutions (including the CJEU) maintain a significant role as regards oversight and enforcement.

Article 12(2) provides for Union representatives to be present ‘during any activities of the authorities of the United Kingdom related to the implementation and application of provisions of Union law made applicable by this Protocol’ and gives them comprehensive powers to require information from the UK authorities. The Union representatives’ role extends beyond mere supervision, however; they will also be able to direct the UK authorities to carry out control measures in individual cases for duly stated reasons.

In the event of disagreement about the UK’s obligations under the Protocol, one might have envisaged that the dispute would be referred to the Joint Committee. But under article 12(4) that is not the case. Instead, the Union institutions have their usual powers in relation to the Treaties. If, for example, it appears that the UK is being too generous in reimbursing the customs duties it has levied and that this amounts to state aid, the Commission will be able to take enforcement action against the UK accordingly, just as it would against a member state, with the dispute ultimately to be resolved in the CJEU. The court will also be able to give preliminary rulings in support of the Protocol, giving EU judges the final say as to how the relevant elements of EU law retained by the agreement are to be interpreted in and apply to Northern Ireland.

From a domestic law perspective, it appears that private enforcement of UK obligations under the Protocol will also remain possible. Under the new s 7A(1) of the European Union (Withdrawal) Act 2018, all rights and obligations arising under the withdrawal agreement are given legal effect in the UK, such that:

‘The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—

‘(a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly’ (s 7A(2)).

On this basis, just as it has hitherto been possible to challenge a public body for failures to comply with EU law in the domestic courts (notably by way of judicial review), it appears this will remain the case as regards public authorities’ EU law obligations in Northern Ireland as preserved by the Protocol.

This may well turn out to be of considerable importance as the full ramifications of the Protocol are worked out. If, for example, a manufacturer in Ireland finds itself being undercut by a Northern Ireland competitor who has benefitted from having its purchases from the UK being classified as not ‘at risk’ but is still managing to sell the goods it has then produced into the EU market, the Irish business would apparently be able to challenge the UK’s neglect of its obligations under the Protocol in the Northern Ireland courts. It might even be possible to claim a form of Francovich damages for any loss suffered accordingly (on the basis that the public authority was in breach of statutory duty under s 7A(1) of the European Union (Withdrawal) Act 2018 rather than s 2(1) of the European Communities Act 1972 as previously).

Conclusion

The claim that ‘nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom’s internal market’ is telling, implicitly acknowledging that the same principle of unfettered market access will not hold true in the opposite direction. Even in the most optimistic scenario involving a comprehensive UK/EU free trade deal, the effect of the Protocol will inevitably be to place substantial fetters on market access for goods moving from Great Britain into Northern Ireland.

Moreover, while the Protocol represents a further stage of agreement as to the future UK/EU relationship in comparison to the original Withdrawal Agreement (which required the all-UK customs backstop accordingly), there is still a great deal for the Joint Committee to work out in a very short space of time. In default of such agreement, there will not be a legal vacuum, though; rather, Northern Ireland will effectively stay within the EU customs territory, despite the claim in the Protocol that it is henceforth to be part of the UK’s customs territory.

The UK does have the power to reimburse or waive tariffs (subject to EU state aid rules), but its implementation of its obligations under the Protocol will be subject to significant European oversight. Breaches of the UK’s retained EU law obligations will also be amenable to challenge in the domestic courts. Recent comments from the UK government suggesting unwillingness to abide by its commitments under the Protocol have already worried Brussels, and further disputes in this sensitive area would appear inevitable. All of this is bound to result in significant and prolonged litigation, both domestically and at EU level, such that the ultimate force of the Protocol in Northern Ireland may end up being determined as much by the courts as by the Joint Committee and the governments it represents. ■