

Written evidence submitted by the Centre for Customs and Excise Studies (UNF0003)

This paper addresses several matters raised by the Northern Ireland Affairs Committee. Its focus is on customs and related border management implications of the post-Brexit arrangements in terms of policy and procedure. It does not address issues of capacity or economic impact.

Centre for Customs and Excise Studies

The Centre for Customs and Excise Studies (CCES) at Charles Sturt University, Australia is recognised by the World Customs Organization (WCO) and its peers as the world's leading provider of research, training and education in the highly specialised areas of customs and border management.

CCES also hosts the secretariat for the International Network of Customs Universities (www.incu.org) and, in association with the University of Münster, Germany, publishes the World Customs Journal (www.worldcustomsjournal.org) which is dedicated to international customs matters.

The aim of CCES is to raise the academic profile of the customs profession through the development and promotion of educational programs, academic and applied research and intellectual input to strategic decision making. It is in this context in which this submission is provided.

Background

The United Kingdom's decision to leave the European Union has resulted in the emergence of two separate customs territories¹ – that of the UK and that of the EU.

With the dissolution of the single customs territory, the UK is now compelled to establish its own customs laws and to ensure compliance with those laws when trading with other parties, including EU member states, in order to maintain control of its borders. Similarly, the EU will seek to ensure compliance with its customs laws when trading with the UK. While the compliance management framework that each party implements is yet to be determined, it is important to note that the enforcement of trading laws between two separate customs territories cannot be achieved in the absence of effective border controls of some description.

The question at hand is what shape might each party's border controls take in the post-transition environment?

The Protocol

The new Ireland/Northern Ireland Protocol (the Protocol) identifies, among other things, a broad regulatory framework under which future customs arrangements will operate following the UK's withdrawal from the EU. The central pillar of the Protocol is the UK's commitment to avoid a hard border between the Republic of Ireland and Northern Ireland, including any physical infrastructure or related checks and controls. In this regard, the UK Government has made it quite clear that "it will not, under any circumstances, place infrastructure, checks or controls, at or near the Ireland/Northern Ireland border".²

In essence, this is achieved by providing that:

1. Northern Ireland is part of the customs territory of the United Kingdom;³ and

- Northern Ireland remains aligned with the EU on goods (including certain laws for VAT on goods), and applies EU tariffs in Northern Ireland except for movements within the single customs territory of the United Kingdom.⁴

By eliminating the possibility of border controls between the Republic of Ireland and Northern Ireland, the possible future regulatory scenarios involving the UK can be categorised as follows (see Figure 1):

- UK Exports;
- UK Imports;
- Intra-UK movements;
- Intra-EU movements (Republic of Ireland); and
- Intra-EU movements (other EU member states).

The two scenarios that are of particular relevance to this inquiry are the following goods movements:

- Great Britain to Northern Ireland; and
- Northern Ireland to Great Britain.

In addition, it is important to consider implications of the Protocol on scenario 3 – imports into the UK via Northern Ireland.

Figure 1: Trading scenarios under the Political Declaration

		Place of destination				
		Great Britain	Northern Ireland	Rep. of Ireland	Other EU country	Third Country
Place of Origin	Great Britain		Intra-UK movement 1	UK Export	UK Export	UK Export
	Northern Ireland	Intra-UK movement 2		Intra-EU movement	Intra-EU movement	UK Export
	Rep. of Ireland	UK Import	Intra-EU movement		Intra-EU movement	EU Export
	Other EU country	UK Import	Intra-EU movement	Intra-EU movement		EU Export
	Third Country	UK Import	UK Import 3	EU Import	EU Import	

Intra-UK Movements: Great Britain to Northern Ireland

Article 5 (1) of the Protocol provides that “No customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport ... unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing”.

Article 5(2) of the Protocol provides that “... 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 [i.e. the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently being moved into the Union].

Regardless of what risk criteria are agreed upon between the UK and EU, there will be a need for the regulators to determine the following for every consignment sent to Northern Ireland from Great Britain:

1. Are the goods likely to be subject to commercial processing in Northern Ireland?
2. Is there a risk that the goods may subsequently be moved into the EU, either via the Republic of Ireland, or directly to one of the other EU member states?

It will therefore be incumbent upon the regulators to assess the risk of any shipment being sent to Northern Ireland from Great Britain meeting either or both of these criteria. The question of course is, how will this be determined - what information will be required, in what form, and at what point may physical intervention be required?

In the context of this scenario, the UK Government has stated that “Any processes normally required on goods entering the EU will be implemented ... on trade moving East-West between Great Britain and Northern Ireland. For as long as Northern Ireland participates in the customs arrangements and regulatory zone, there will therefore be processes to ensure that goods entering Northern Ireland destined for the EU pay the right duty and that all goods comply with the appropriate rules. These processes will be largely electronic in nature and any checks on goods will principally relate to regulatory alignment rather than customs compliance (noting, for example, that the UK currently checks only 4% of movements notified through customs declarations, with under 1% involving physical checks of the consignment)”.⁵

Consequently, the UK Government accepts that it will be necessary to introduce processes to ensure compliance with the relevant requirements. In doing so, it indicates that these will be largely electronic in nature. Given that HMRC, like most customs administrations around the globe, has the ability to receive and process trade data electronically, it is reasonable to assume that all such transactions would be automated. It does imply, however, a need for traders to provide HMRC with a report for all movements of goods from Great Britain to Northern Ireland. The question of whether HMRC has the capacity to deal with such an increased workload is not addressed in this paper but will most certainly need to be considered.

The contemporary method for assessing regulatory compliance is to screen the data against profiles and identify those shipments that may require further examination – either documentary checks or, if necessary, physical examination of the goods. As such screening is commonly undertaken prior to

the arrival of the goods, traders would generally be advised of the customs status of the goods prior to their arrival in Northern Ireland.

In most cases, suspected non-compliance would be addressed after the goods have been delivered to the buyer. This would most commonly involve a post-clearance audit, which may simply be a desk audit, or may be a more comprehensive audit that would be performed at the trader's premises. There may of course be situations where the matter must be dealt with at the time of (or prior to) arrival, to ensure that the goods do not enter the economy of Northern Ireland (e.g. in the case of prohibited goods).

The final part of the UK Government statement is rather puzzling. It states that "... any checks on goods will principally relate to regulatory alignment rather than customs compliance (noting, for example, that the UK currently checks only 4% of movements notified through customs declarations, with under 1% involving physical checks of the consignment)". If we break this statement down, we have three essential elements:

1. Checks on goods will principally relate to regulatory alignment rather than customs compliance;
2. The UK currently checks only 4% of movements notified through customs declarations; and
3. Under 1% of customs intervention activities involve physical checks of the consignment.

First, a comment on point 3. While this paper cannot attest to the percentage of physical checks undertaken by HMRC, the figure of 1% is consistent with inspection figures among other developed countries.

Second, the suggestion (point 2) that HMRC only checks 4% of customs declarations implies that 96% of declarations go unchecked. While not knowing the actual percentage of secondary checks of a documentary nature performed by HMRC, the figure of 4% is again consistent with inspection figures among other developed countries. However, it should be noted that 100% of declarations are subjected to the screening process, and consequently the 4% figure could be misleading as presented.

Lastly, point 1. The differentiation between 'regulatory alignment' and 'customs compliance' is somewhat perplexing. The role of HMRC is to ensure compliance with the law. When Customs undertake their various compliance assessment activities (e.g. pre-arrival screening and assessment, audits, real-time intervention in high-risk cases, etc.) their objective is to determine which transactions are compliant with the law, which are not, and the reason for any non-compliance. The term 'regulatory alignment' may be politically attractive but it does not appear in the customs lexicon.

Having established the need to report (electronically) all shipments from Great Britain to Northern Ireland, the need to screen and assess the data and the inevitability of some documentary and physical checks, the question of who will undertake the assessments and checks arises. In this regard, it should be remembered that the EU has a responsibility to ensure that its borders are controlled effectively, and for this reason it is not surprising that EU officials will also be involved in some, if not all of these activities.

In this regard, Article 12 (2) of the Protocol provides that "Union representatives shall have the right 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, as well as activities related to the implementation and application of Article 5, and the United Kingdom shall

provide, upon request, all relevant information relating to such activities. The United Kingdom shall facilitate such presence of Union representatives and shall provide them with the information requested. Where the Union representative requests the authorities of the United Kingdom to carry out control measures in individual cases for duly stated reasons, the authorities of the United Kingdom shall carry out those control measures". Further, the CJEU will have oversight for the application of Union law in Northern Ireland.

Intra-UK Movements: Northern Ireland to Great Britain

This scenario differs markedly from the previous scenario as the EU has no interest in West-East intra-UK trade. Consequently, the controls that should apply to such trade are for the UK Government alone to determine.

At first blush it may appear that no risk exists from a customs perspective. However, in situations where the goods were originally shipped from an EU member state – either the Republic of Ireland or another member state – no customs controls will have been exercised:

- Customs controls will not be in operation on the Republic of Ireland/Northern Ireland border; and
- Goods from other EU states will have been treated as intra-EU movements, to which no customs controls apply providing the goods originated in an EU member state.

This is due to the fact that Article 5 of the Protocol aligns Northern Ireland with the EU in relation to the movement of goods by applying customs legislation and related laws to and in the United Kingdom in respect of Northern Ireland.

In the absence of any West-East controls, the UK would be accepting the legitimacy of EU trade on face value, and Northern Ireland may over time become a porous border for unlawful goods and revenue leakage. In order to ensure effective control of its borders, the UK should therefore examine the risks posed to border integrity by trade from Northern Ireland and develop mitigation strategies to address the risks. This may include the introduction of trade movement notifications comparable to customs declarations, and compliance management disciplines similar to those applying to East-West trade.

Imports into the UK via Northern Ireland

As previously noted, Article 5 (1) of the Protocol provides that "The customs duties in respect of a good being moved by direct transport to Northern Ireland other than from the Union ... shall be the duties applicable in the United Kingdom ... 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, Article 5(2) of the Protocol provides that "... 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 [i.e. the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently being moved into the Union].

Consequently, as is the case with Intra-UK Movements from Great Britain to Northern Ireland, there will be a requirement for imports into the UK via Northern Ireland to be assessed to determine whether:

1. The goods are likely to be subject to commercial processing in Northern Ireland
2. There is a risk that the goods may subsequently be moved into the EU, either via the Republic of Ireland, or directly to one of the other EU member states.

As such, in addition to treating goods arriving in the UK via Northern Ireland as UK imports, similar risk assessments involving both HMRC and EU authorities will apply to such transactions as will apply to Intra-UK Movements from Great Britain to Northern Ireland. This is acknowledged by the UK Government which indicates that, “Any processes normally required on goods entering the EU will be implemented at the Northern Ireland-Rest of World border or on trade moving East-West between Great Britain and Northern Ireland”.⁶

Conclusion

It is clear that, in order to fulfil the requirements of the Protocol and to ensure effective control of the UK and EU borders, it will be necessary for both East-West and West-East trade to be reported by the trading community and assessed by the customs authorities. In addition, imports into the UK via Northern Ireland will be subjected to additional scrutiny to assess the likelihood of their diversion into the EU.

While controls over West-East trade are solely a matter for the UK Government to decide, any decision to waive such controls may result in Northern Ireland becoming a porous border for unlawful goods and revenue leakage.

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¹ GATT Article XXIV (2) indicates that a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories

² Explainer for the new Ireland/Northern Ireland Protocol and the Political Declaration on the Future Relationship (point 7)

³ Article 4 of the Protocol

⁴ Article 5 of the Protocol and Explainer for the new Ireland/Northern Ireland Protocol and the Political Declaration on the Future Relationship (point 2)

⁵ Explainer for the new Ireland/Northern Ireland Protocol and the Political Declaration on the Future Relationship (point 16)

⁶ Explainer for the new Ireland/Northern Ireland Protocol and the Political Declaration on the Future Relationship (point 16)