

A Border Once Again. Implementing the NI Protocol

The UK government has published its plans for implementing the Northern Ireland Protocol (the 'backstop'). Dr Graham Gudgin explains that the light touch regime it envisages sensibly resists the EU's 'maximalist' demands, but that some difficulties will be unavoidable.

*This is a summary of an extended analysis that Dr Gudgin produced for **Policy Exchange**, which we very much recommend reading here.*

The UK government has been under heavy pressure from the EU to begin tangible preparations to enact the measures agreed in the Northern Ireland Protocol (the 'backstop'). Brussels was demanding border infrastructure, computer systems for customs declarations, and an office in Belfast to house EU officials who would oversee the customs measures.

The EU has now got its answer in the Cabinet Office command paper 'The UK's Approach to the Irish Protocol' (CP226). The essence of the UK position is:

- no international border in the Irish Sea
- no new customs infrastructure
- no tariffs on exports from Northern Ireland to GB
- no tariffs for imports into NI from GB except for goods passing through to the Republic of Ireland
- no EU office in Belfast.

The document stresses that Northern Ireland remains in the UK customs territory and can benefit from any free-trade

agreements that the UK negotiates.

This is a truly minimalist approach to the Protocol while at the same time respecting and abiding by the legal obligations contained in it.

In the Protocol, the EU seeks to establish the economic border of the EU in the Irish Sea between NI and GB, in order to avoid the need for any customs land border between NI and the Republic of Ireland. The Protocol keeps NI within the EU Single Market and operationally within the EU's customs union (even if it also says that NI is *de jure* within the UK customs territory). EU regulations on tradable goods, on state aids and aspects of VAT all apply to firms in Northern Ireland, which can then enjoy tariff-free trade across the Irish land border with no customs checks.

The UK proposal builds on undertakings in the Protocol to have 'unfettered' exports from NI to GB, to *'impact as little as possible on the everyday life of communities'*, with procedures *as easy as possible, and not too burdensome, in particular for smaller businesses'*, and to use *'best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom'*, *'adopting appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible.'* The Government paper is within the spirit of the assertion in article 2(2) which says that *'This Protocol respects the essential State functions and territorial integrity of the United Kingdom.'*

Most strikingly, the paper takes the EU's aggressive reliance on the Good Friday Agreement as an argument for avoiding a land border and turns it against Brussels – arguing that there are *two* communities in NI with strong concerns, and what is sauce for the nationalist goose must also be sauce for the unionist gander.

The paper has received a reasonable welcome from the DUP who

recognise that this is close to the best they could expect, and that Boris Johnson has tried hard to meet their concerns. The reaction of the EU is much more guarded. On one level they welcome the fact that there is a paper at all, but they also worry that the paper's arrangements are insufficient to protect the Single Market. The lack of customs infrastructure will cause concern in Brussels.

Trade from NI to GB ('West-East trade')

This should take place as it does now. There should be no additional process or paperwork, and there will be no checks or restrictions on Northern Ireland goods arriving in the rest of the UK – that is, there will be *unfettered access*, as provided for by the Protocol.

However, not all of the proposals lie within the full control of the UK government even if it is clear that the UK is to deliver the Protocol. Article 6 of the Protocol states that EU procedures on the export of goods will apply to NI-GB trade if they are required under the EU's international obligations. This has been interpreted by the EU as a requirement for export or exit summary declarations on NI-GB trade. The Government's paper states that this should not be necessary, but acknowledges that an exemption from export declarations will need to be agreed with the EU in the Joint Committee.

We should note the asymmetry in this UK position. While the EU insists that it must protect the Single Market by ensuring that any goods which do not meet EU regulatory standards are kept out, the UK takes a less restrictive attitude to goods from the EU which could reach GB via NI with no customs checks.

This loophole in the UK's customs defences could become an issue in trade talks if EU producers use this as a way of exporting goods tariff-free into markets with which the UK has

a free-trade agreement, but the EU does not. Most immediately this could include the USA.

The document also insists that since NI is legally within the UK customs territory it can share fully in any gains from future FTAs. This is clear for exports from NI but less so for imports. If a future FTA between the UK and USA allowed hormone treated beef into NI this would breach the EU's cherished defences of its Single Market. Indeed, the need for checks between GB and NI, especially for agri-foods, is centrally aimed at preventing such goods getting into an NI which has no economic land border with the Republic.

Trade from GB to NI ('East-West Trade')

We will not levy tariffs on goods remaining within the UK customs territory. Only those goods ultimately entering Ireland or the rest of the EU, *or at clear and substantial risk of doing so*, will face tariffs.

Although there will be some limited additional process on goods arriving in Northern Ireland, this will be conducted taking account of all flexibilities and discretion, and we will make full use of the concept of *de-dramatisation*. There will be no new physical customs infrastructure and we see no need to build any. We will however expand some existing entry points for agri-food goods to provide for proportionate additional controls.

Avoiding customs checks on trade into NI from GB is where the real difficulties are, and the success of the Cabinet Office paper will depend on just how light touch these can be made. The role of the Joint Committee and its NI Specialised Committee is important here, deciding for instance which goods are 'at risk' of entering the Republic from NI. The EU has tended to take the view that all goods are potentially at risk. Decisions in the Joint Committee are subject to

independent arbitration, with the ECJ ruling on matters of interpretation of EU law, so the UK cannot guarantee that its preferences will prevail.

The existence of a system of customs declarations for all goods is extraordinary. It is difficult to think of another case among western democracies where customs declarations are needed between regions of the same state.

The Government will need to formalise its objective of avoiding tariffs on internal UK trade by agreement with the EU in the Joint Committee. The aim appears to be to agree further exemptions in order to narrow the definition of an 'at risk' good in Article 5 as far as possible. The Government points out a number of examples of goods crossing from GB to NI where the practical risk of diversion to the EU is very low.

The question of tariffs in the Protocol depends to a degree on the outcome of separate UK-EU negotiations on the future trading relationship. If a zero-tariff agreement between the UK and the EU is reached, it will be easier to implement the Protocol in the light-touch way the Government has outlined. It is understood that independent legal advice has been sought on alternative approaches if no FTA emerges.

Much is still to play for, but it is clear that within the constraints it inherited, the Government has made large strides in ensuring a light touch regime.