The Irish Land Border:
Existing and Potential Customs Facilitations in a No-Deal Scenario

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About the authors

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TABLE OF ABBREVIATIONS

AEO	Authorised Economic Operator
APHA	Animal and Plant Health Agency (UK)
BIP	Border Inspection Post
CN	Combined Nomenclature
CVED	Common Entry Veterinary Document
ENS	Entry summary declaration
FTA	Free trade agreement
GATT	General Agreement on Tariffs and Trade
GB	Great Britain, i.e. England, Scotland and Wales
HMRC	Her Majesty's Revenue and Customs
ICC	International Chamber of Commerce
ICS	Import Control System
MRAs	Mutual recognition Agreements
NTBs	Non-tariff barriers
REU	Rest of the EU, i.e. the EU except for the Republic of Ireland
RoI	Republic of Ireland
RoW	Rest of the world
SMEs	Small and medium-sized enterprises
SPS	Sanitary and phytosanitary
TFA	Trade Facilitation Agreement
TFEU	Treaty on the Functioning of the European Union OJ 2016 No C 202, p. 47.
TRQs	Tariff rate quotas
UCC	Union Customs Code Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code OJ 2013 No L 269, p. 1.
UCC-DA	Union Customs Code Delegated Act

	Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code OJ 2015 No L 343, p. 1.
UCC-IA	Union Customs Code Implementing Act Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code OJ 2015 No L 343, p. 558.
WTO	World Trade Organization

KEY TERMS AND DEFINITIONS

Economic operator	A person who, in the course of his or her business, is involved in activities covered by the customs legislation (Art. 5 No 5 UCC) and therefore needs to register with the customs authorities
Exit Day	The date on which the UK is no longer a Member State of the European Union
Micro-enterprises	Enterprises which employ fewer than 10 persons and which have an annual turnover not exceeding EUR 2 million, and/or an annual balance sheet total not exceeding EUR 2 million.
Sensitive goods and products	The goods and products listed in Annex 71-02 to the UCC-DA
Small enterprises	Enterprises which employ fewer than 50 persons and which have an annual turnover not exceeding EUR 10 million, and/or an annual balance sheet total not exceeding EUR 10 million.
SME	The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.
Traders	'Traders' as used in this study includes manufacturers, producers, suppliers. In the context of trade involving customs operations, it refers to refer economic operators within the meaning of Art. 5 No 5 UCC. The opposite are private persons.
VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ 2006 No L 347, p. 1.

EXECUTIVE SUMMARY

The objective is to identify facilitations and simplification for the case that the UK leaves the European Union without an agreement (no-deal Brexit) and to recommend actionable solutions appropriate to the situation on the border between NI and the RoI. Where possible the study focusses on sensitive agricultural goods and products. Based on this study a roadmap for more detailed strategic solutions could be designed to mitigate the administrative burdens of a border between two different customs and regulatory territories as much as possible.

Summary of key findings on facilitations and simplifications

I. Options under GATT

1. Invocation of the security clause

   Article XXI:3(b)(iii) GATT, also known as the security clause, allows Member to take measures which infringe provisions of the GATT. Failure to perform customs checks on goods passing the RoI/NI border would likely violate at least Art. I.1 and X:3(a) GATT.

   The (re-) creation of a customs border between the RoI and NI could jeopardize the peace which has been established by the Belfast Agreement and the Common Travel Area, thereby infringing on a protected security interest. In principle recourse to Art. XXI:3(b)(iii) GATT to justify not installing customs posts and checks at, or close to, the border would therefore not be precluded.

   Measures taken under the security clause are unilateral in nature, i.e. each WTO Member will have to take its own measures and is responsible for justifying them. However, there is nothing to prevent coordinated action between the UK and the EU / RoI to protect their respective and/or mutual security interests.

2. Obtaining a waiver from WTO obligations

   The UK and the EU could each seek a waiver from their WTO obligations as an alternative to the invocation of the security clause. As in the case of measures taken under the security clause, cooperation with the RoI and EU will be required where a solution on one side of the border only will not achieve the objective. If this option is chosen, the UK and EU should therefore consult with each other on the measures they are considering and coordinate their respective application for a waiver.

   Obtaining a waiver will take longer than implementing a unilateral decision taken under the security clause.

   The second difference is that waivers are political decisions and not dependent on the presence of objective conditions.

   Finally, waivers are of limited duration and subject to an annual review if they were granted for a period of more than one year.

3. Frontier traffic

In a no-deal scenario the only facilitations for frontier traffic which are available are those already existing in current legislation.

The UCC provides for some facilitations for border traffic of negligible importance.

A person established in NI may lodge a customs declaration in the RoI provided they present the goods referred to in the customs declaration to the RoI border customs office. This facilitation is conditional on the UK or NI granting reciprocal benefits to persons established in the RoI.

Certain products obtained by RoI farmers on properties located in NI may benefit from total relief from import duties, and seeds, fertilizers, etc. imported by agricultural producers for use in properties adjoining the customs territory likewise benefit from duty relief.

Looking to the future, the study has revealed that certain elements of various frontier traffic agreements or regimes may be a useful model if the UK and the EU were to pursue an agreement on frontier traffic.

II. Designing Business-Oriented Customs Facilities

1. Free Zones

Both NI and the RoI may establish free zones, also known as special economic zones. The primary benefits of free zones are:

- no guarantee is required for goods stored under duty suspension;
- the goods need only be presented to customs (no customs declaration);
- goods can be processed in a free zone under the inward processing procedure; and
- the goods can be declared for entry for free circulation or re-export when they leave the free zone but need to be presented to customs again and, when entering the relevant customs territory, prohibitions and restrictions are applied by the customs authority.

Free zones can be established unilaterally but must be notified to the WTO (and, with regard to free zones in the EU customs territory, to the EU Commission).

Establishing back to back free zones on either side of the border could also be considered as this would facilitate the movement of goods for commercial enterprises.

2. Integrated logistics centres near the border

Logistics centres integrating customs and IT for commercial traffic could be established at strategically located places near the border. The logistics centres could also be placed back to back on each side of the border. Selected logistics centres should be listed as BIPs and outfitted with the required staffing and equipment.

Technological solutions can speed the clearance process. Consideration should be given to the financial burdens small SMEs in particular will incur if they need to acquire the equipment for such solutions.

AEOs should be allowed to use any border crossing and to present the goods to customs at their premises.

Integrated logistics centres can also be used as commercial storage facilities. If they are located away from the border and in more secluded areas they will be less visible and thus potentially less controversial.

Dedicated roads can reduce traffic congestion.

3. Establishing Joint Customs Offices

The UK and the RoI could establish joint customs offices in the respective other territory to combine export and import and clearance and controls at the same place.

Joint customs offices could also form a part of an integrated logistics centre, which would significantly increase efficiency.

4. Single Window and One-Stop-Shop

A single window permits all import and export declarations as well as all documentation to be transmitted to a single authority only once, thus eliminating duplication.

The single window is a national solution. This means that the UK/NI and the EU/RoI will each have their own single window and not a common single window. Nevertheless, the medium-term objective should be to create as much efficiency as possible on each side of the NI/RoI border by aligning the single windows in their presentation and functionality.

The single window is closely related to the one-stop-shop principle. This principle essentially states that, where responsibility for performing controls is shared between the customs authority and another authority, the customs authority shall coordinate the controls so that they are performed at the same time and place. This approach can be combined with joined customs offices and integrated logistics centres, thus increasing efficiency and decreasing release times.

III. Simplifications available for Economic Operators

1. <u>Guarantees</u>

In cases where a customs debt may be incurred (e.g. transit, inward processing) or is incurred but the duty has not been paid yet (deferred payment), a guarantee needs to be provided. In practice, the most common form of guarantee is a comprehensive guarantee provided by a credit institution, financial institution or insurance company accredited in the Union (after Exit Day it would likely have to be accredited in the UK for the purposes of UK customs law).

Under certain conditions the guarantee may be reduced by 50%, 70% or 100% (waiver) of the reference amount. For debts incurred, a reduction to 30% can be granted to AEOC. The holder of a reduction or a waiver must nevertheless supervise the reference amount.

Large companies will be able to take advantage of a reduced guarantee or a waiver. It is questionable whether this facilitation will be a feasible option for small SMEs. Micro-enterprises will likely not be able to use this facilitation.

Although the UK will not initially require guarantees for special procedures in a no-deal scenario barring exceptional circumstances, it does intend to re-introduce them at a later stage. Unless the UK or NI is obliged to align itself with Union rules, it will be free to impose less strict rules.

2. Simplified customs declarations and entry in the declarant's records

Simplified customs declarations allow the declarant to omit certain information on the customs declaration. There is no restriction on the persons who may use this facilitation.

Unless an exception is applicable, a supplementary (full) declaration must be lodged within the prescribed time-limit.

If authorised, a simplified or full declaration may be lodged by entry in the declarant's records. In this case an AEOC may also be granted a waiver from the obligation to present the goods to customs. However, a supplementary declaration must be lodged with the customs authorities.

Where the goods are subject to prohibitions or restrictions, entry in the declarant's records is often not possible. Certain sensitive goods and products must be inspected and checked at a BIP.

The regular use of simplified declarations and entry in the declarant's records on importation are normally combined with deferred payment, so that duties need to be paid only on a monthly basis.

Entry in the declarant's records is appropriate for large companies and SMEs which have a sufficient organisational, administrative and IT capacity. The application requires some preparation, especially in respect of the necessary IT system.

3. Self-assessment

Self-assessment allows economic operators to

- carry out certain customs formalities which are to be carried out by the customs authorities,
- determine the amount of import and export duty payable, and
- perform certain controls under customs supervision.

With regard to customs duties, the difference to entry in the declarant's records is that the authorisation holder needs to calculate the duties themselves, i.e. they need to keep an up-to-date copy of the Irish electronic customs tariff, which will not be feasible for SMEs.

The customs formalities for import and export, e.g. the obligation lodge an entry summary declaration and to respect the time-limit for pre-departure declarations for each consignment, is not affected by an authorisation for self-assessment.

An authorisation for self-assessment may also grant the self-assessment of certain prohibitions and restrictions. Sensitive goods and products must be inspected and checked at a BIP, unless Union legislation provides for a waiver. Consequently, on EU territory in practice this simplification is likely not to be available for such goods and products insofar as it concerns the self-assessment of prohibitions and restrictions.

Self-assessment is available only to AEOCs. It can therefore be anticipated that micro-enterprises and small SMEs will not be able to use this simplification for this reason alone. It is also doubtful whether they will be in a position to correctly determine the customs value and the duties of the consignment.

4. Deferred Payment, Postponed Accounting

Deferred import duty payment is normally combined with the use of simplified declarations, entry in the declarant's records and/or self-assessment. Deferred payment must be authorised and is contingent on the provision of a guarantee. The rules governing the reduction of guarantees apply.

Authorisation holders will need to be in a position to remit the payments due in full on time to avoid late payment penalties, unless the customs authorities draw from the debtor's (or their service provider's) account.

The deferment can also extend to import VAT and excise duties by national law. Alternatively, postponed accounting can be used under national law with regard to import VAT, i.e. the import VAT is directly declared and deducted in the normal monthly or quarterly VAT declaration.

Deferred payment can benefit all economic operators, though micro-enterprises and small SMEs may encounter difficulties in respect of obtaining a reduction of the guarantee amount. Postponed accounting will be an interesting alternative for VAT.

5. Common Transit, Authorised Consignor/Consignee

Given that NI and the RoI will belong to two different customs territories, customs procedures will end at the border and need to start again on the other side of the border. However, the Common Transit Convention allows for a transit procedure covering both customs territories. If the person starting the transit procedure (e.g. in NI) has been granted the status of authorised consignor the consignment does not need to pass through the customs office of departure. If the person receiving the goods (e.g. in the RoI) has been granted the status of authorised consignee the consignment does not need to pass to the customs office of destination. Though certain customs formalities need to be performed and a guarantee for import duties and taxes must be provided, this greatly facilitates consignments shipped from an authorised consignor to an authorised consignee. However, obligations on the basis of other legislation may apply, e.g. the obligation to present sensitive goods and products at a BIP.

IV. Importing and Exporting Milk and Milk Products

Producers / traders in NI will only be able to ship their milk and milk products to the EU if

- the UK – or at least NI – is listed as an authorised country for the introduction of milk and milk products into the EU and
- they are an authorised establishment from which milk and milk products may be introduced into the EU; and
- the UK is "listed" as a third country having an approved residue control plan.

In addition to the ordinary customs formalities, sensitive goods and products goods must enter via a BIP and undergo inspections by an official veterinarian. Currently there is no BIP at or near the land border.

The documentation requirements for consignments to the EU will increase significantly for NI producers / traders. All goods must undergo document inspections and identity checks and some

portion will be subject to physical inspections in accordance with the risk analysis but at least in the percentages stipulated by law.

Pre-inspection facilitations can decrease the frequency of inspections, but such an arrangement is not yet in place. It can be anticipated that the effect of these new rules on UK-EU trade and North-South trade will be significant. Just-in-time delivery or delivery on short notice will not be realistic.

1. SCOPE AND AIM OF THIS STUDY

If and when the United Kingdom ("UK") leaves the EU without a withdrawal agreement and thus without any transitional arrangements in place (the so-called "no-deal scenario"), this will have a major impact on enterprises established in Northern Ireland ("NI") which are engaged in the cross-border trade in goods with the Republic of Ireland ("RoI"), the rest of the EU ("REU") and the rest of the world ("RoW").

Studies have shown that, while a few large undertakings account for the majority of trade between NI and the RoI in terms of the quantities and values of goods traded, a large number of small and medium-sized enterprises ("SMEs") are dependent on this cross-border trade.[1] Micro-enterprises make up a not insignificant portion of SMEs.

SMEs are defined as enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.[2] SMEs are divided into 3 categories: medium-sized enterprises, small enterprises and micro-enterprises. This study treats micro-enterprises separately since they are differentially affected due to their limited financial, organisational and administrative capacities. Many small enterprises will also find that the simplifications and facilitations offered under the UCC will stretch their resources such that they either cannot, or cannot feasibly, take advantage of them. The following table provides an overview of the categories of SMEs:[3]

Type of enterprise	Headcount: Annual work unit	Annual turnover	Annual balance sheet total
Medium-sized	< 250	≤ EUR 50 million	≤ EUR 43 million
Small	< 50	≤ EUR 10 million	≤ EUR 10 million
Micro	< 10	≤ EUR 2 million	≤ EUR 2 million

'Sensitive goods and products'[4] are subject to high tariffs in the EU and have a disproportionate economic impact on trade between NI and the RoI.[5] Sensitive goods and products are also highly regulated; they are subject to special conditions when being imported. To put this another way, such goods face high non-tariff barriers ("NTBs"), particularly in terms of the controls to which they are subject as well as the documentation which must be presented. However, many NI SMEs trade in precisely such goods.

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[1] See e.g. Karlsson, Smart Border 2.0: Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons, 2017, p. 18. HM Government Position Paper, Northern Ireland and Ireland, para. 48: "It is important to note that in 2015, over 80 per cent of North to South trade was carried out by micro, small and medium sized businesses" (footnote omitted).

[2] Art. 2(1) of the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ 2003 No L124, p. 36; see also Commission, User guide to the SME Definition, 2015.

[3] European Commission, User guide to the SME Definition, 2015, p. 11. See also Art. 2(1) of the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. The 'annual turnover' and 'annual balance sheet total' thresholds are alternative, not cumulative.

[4] 'Sensitive goods and products' is a technical term in EU customs law and refers to those goods and products listed in Annex 71-02 to UCC-DA, which is reproduced in Appendix 1.

[5] See e.g. InterTradeIreland. Potential Impact of WTO Tariffs on Cross-Border Trade, 2017, pp. 15 – 22.

Many, perhaps most, NI SMEs will face significant challenges if the no-deal scenario materialises. Many of these enterprises have little to no experience with customs formalities. In addition, VAT registration is low where such registration is optional. It can also be assumed that few SMEs are registered consignors or consignees for transit or excise duty purposes. Furthermore, the application of import duties (which are relatively high for many agricultural products) will often render exports to the adjoining customs territory economically unviable.

The primary objective of this study is to develop practical recommendations and identify actionable measures which can be taken to keep the land border between NI and the RoI as frictionless as possible in the event of a no-deal scenario, though such measures cannot remove the burden of incurring import duties (at least for the customs territory of the EU). The primary focus is on commercial traffic in certain types of sensitive goods and products,[6] and more specifically milk and milk products. However, it must be emphasised that this study can only give a general overview of the situation.

The study begins by briefly reviewing the economic, physical and administrative conditions relating to North-South trade. It is also established that trade interests are implicated in the peace *acquis*.

The next step examines what options are available under GATT to keep the border as open as possible. Both the possibility of invoking the security clause as well as obtaining a waiver are examined. The opportunities under the principle of frontier traffic are explored. In this context the facilitations under the customs legislation of the EU and historical precedent, including Cyprus, are examined.

The next step briefly outlines what becoming an economic operator under the customs rules entails for enterprises on both sides of the border. It also examines the practical effects a no-deal scenario will have on businesses engaged in cross-border trade. Unless micro-enterprises – and likely many small SMEs – are able to redirect their business away from the RoI to enterprises in NI which are able to cope with the new situation or unless some other facilitation can be found, the transition to a customs formalities-based trade relationship with their customers will likely be devastating.

Customs representatives and service providers can be used to deal with customs formalities involved in importing and exporting consignments, e.g. lodging customs declarations and classifying the goods. On the positive side, this will create additional jobs; however, this will generate additional costs for cross-border trade.

The study then examines designing business-oriented customs facilities. The first option examined is the establishment of free zones. The study then turns to exploring the opportunities presented by establishing integrated logistics centres as well as their limitations. These would integrate both customs facilitations and IT for commercial traffic. The option of establishing a joint customs office – which can also be done at an integrated logistics centre – is then presented. Finally, the single window and the one-stop-shop principle are briefly discussed.

The study then examines specific simplifications available to economic operators under Union customs legislation, including guarantees, simplified declarations, entry in the declarant's records, deferred payment, and facilitations under the Common Transit Convention (authorised consignor/consignee). The study evaluates whether the simplification is feasible for large companies, larger SMEs, small SMEs and/or micro-enterprises.

[6] For example, wine, ethyl alcohol, tobacco and fisheries products will not be examined.

The conditions for using the inward and outward processing procedure for milk and milk products is briefly examined because, besides release for free circulation and export, this may become the most frequently used and important customs procedures for enterprises engaged in North-South trade in these products. Other special rules applicable to such products are also described.

Five test cases will then briefly be evaluated to identify facilitations and simplifications under Union customs legislation, as well as relevant VAT aspects.

2. ASSUMPTIONS

The study assumes that the UK implements its no deal land border policy as announced. This policy is reproduced in pertinent part in Appendix 2. It is also assumed that the UK's customs legislation will by and large mirror those of the EU. It is also assumed that the UK will maintain TRQs, in particular on sensitive goods and products (meaning that in order to benefit from WTO tariff quotas importers will, depending on the distribution mechanism, either have to apply for a licence or to import under the first-come, first served system). It is also assumed that the UK will retain the EU's legislation on additional duties for agricultural products (Annex 1 Regulation (EEC) No 2658/87, and Art. 182 Regulation 1308/2013), and entry prices for certain fruit and vegetables (Annex 2 Regulation (EEC) No 2658/87 and Art. 181 Regulation 1308/2013). In any event the normal duties of the Common Customs Tariff, TRQ (cf. Art. 184 Regulation 1308/2013), additional duties and entry prices will be applied on imports from NI into the RoI. The temporary rates of customs duty (tariffs) on imports into the UK after EU Exit[7] are not taken into account because they are in a draft stage only and would cover only a limited transitional period.

This study also assumes that the UK will retain its legislation based on Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended, ("VAT Directive"), and Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty, as amended. Where the UK has enacted or announced new policies relating to VAT or excise duties, such as the HMRC Guidance "VAT for businesses if there's no Brexit deal" or the land border policy, these will be taken into consideration.

[7] https://www.gov.uk/government/publications/temporary-rates-of-customs-duty-on-imports-after-eu-exit.

3. BACKGROUND

3.1 Economic Background

Several studies have already been conducted for the Department for the Economy on the trade in goods patterns between NI and the RoI and the participation in this cross-border trade in goods by the various types of enterprises, so it is not necessary to reproduce them here. For the purposes at hand, it is sufficient to recall the following:

There were an estimated 25,000 heavy goods vehicle (HGV) border crossings per day between NI and the RoI at 42 main crossings points.[8] The table below shows the estimated crossings at the top 7 crossing points.[9]

	HGV
N1 North of Jn20 Jonesborough, Ravensdale, Co. Louth	3750
N1 Jn19 Ravensdale and Jn20 Jonesborough (Northbound), Ravensdale, Co. Louth	3263
A2 Culmore Road on Border	2851
A5 Strabane - Lifford (At Bridge)	1199
N2 NI Border and Emyvale, Mullinderg, Co. Monaghan	855
A3 Cavan, Monaghan	807
A3 Cavan Road, Newtownbutler	755

The following was reported in thejournal.ie citing the 2017 Ireland and the UK – Tax and Customs Links report issued by the Irish Statistics & Economic Research Branch:

> For the 12 national roads crossing the border, in 2016, more than 14 million vehicles entered Ireland from NI:
>
> There were 1 million crossings by HGVs or 2,700 on average per day;
>
> 1.3 million by large goods vehicles or 3,600 per day;
>
> and 12 million by cars or 32,900 per day.[10]

In the light of the fact that, in particular for micro-enterprises, commercial transport may also be done by passenger vehicles, at least some portion of the 12 million cars can be assumed to be involved in cross-border trade.

The following table presents data on SME participation in cross-border trade in goods between NI and the RoI.

[8] Atkins Technical Note, 15 August 2017, available at https://www.infrastructure-ni.gov.uk/publications/atkins-technical-note (part 5).
[9] Atkins Technical Note, footnote 8.
[10] Factcheck: Are there really only 100 lorries crossing the border every day?, 1 Feb. 2019, https://www.thejournal.ie/factcheck-lorries-4469494-Feb2019/, reproduced in Karlsson, footnote 1, p. 15.

Types and nature of businesses trading across the border:

	Number/value
Number of NI businesses selling goods to the RoI (2016)[11]	5,136
% of NI businesses selling goods to the RoI employing less than 50 people (2016)[11]	93%
Number of NI businesses selling goods to the RoI employing more than 250 people (2016)[11]	71
% of RoI SMEs exporting to NI (2013)[12]	15%

According to HMRC Regional Trade Statistics for 2018, 32% (£1bn) of the value of NI exports to Ireland was in 'Food and Live Animals', while machinery and other transport equipment accounted for 16% (£519m)[13]

However, there is a significant disparity between the number of small exporters in NI and their share in the value of exports to the RoI. According to NISRA (Northern Ireland Statistics & Research Agency), in 2016 NI small businesses (0-49 employees) accounted for 93% of exporters (the 93% figure represents 4,771 businesses), but only 44% of value of goods exported to Ireland.[11] This disparity is also revealed in trade with GB: NI large businesses (250+ employees) accounted for just 2% (63 businesses in total) of those selling to GB, but 68% of the value of NI goods sales to GB in 2016.

The number of NI businesses trading in goods across the land border reveals a similar disparity in the distribution of participants when broken down by size.

The number of NI businesses that traded goods with ROI in 2016 is as follows:

Number of employees	Exporters	Importers	Exporters & Importers	Exporters &/or Importers
0-9	2,833	3,649	1,501	4,980
10-49	1,938	2,101	1,153	2,887
50-249	294	424	239	479
250+	71	97	62	106
Total	5,136	6,271	2,955	8,452

3.2 Physical and Administrative Infrastructure

In order to develop practical and actionable recommendations the physical infrastructure and conditions existing on the border should also be borne in mind.

[11] NISRA, BESES 2016

[12] InterTradeIreland (2013), Analysis of the key features of an exporting SME on the island of Ireland

[13] NISRA (2019), Overview of Trade, Northern Ireland

The border is 310 miles (approx. 500 km) long and has 208 road crossings.[14] The roads are often serpentine, meandering across the border. In some cases the most direct route is via the other jurisdiction.[15]

There are many towns and cities which lie in close proximity to the border and some homes, farms and businesses actually straddle the border.[16] Some examples[17] are

- Belleek – population 904 (2011 NI census)
- Pettigo - population 600 (2011 NI census)
- Jonesborough population 2465 (2011 NI census) (1 km from border)
- Belcoo 540 (NI) and Blacklion 194 (Ireland) Census 2016.

Northern Ireland's second largest city, Derry/Londonderry, is approximately 4 miles (7 km) from the border[18] and, according to the most recent NI census (2011) had a population of 105,066.[19] It is 20 miles (32 km) from its nearest large town in Ireland, Letterkenny,[20] which has a population of 19,588 according to the most recent Irish census (2011).[21]

In the Southern area of Northern Ireland, Newry also lies 5 miles (8 km) from the border[22] and has a population of 26,967 according to the NI 2011 census.[23] Its nearest Irish neighbour is Dundalk, 14 miles (23 km) away,[24] with a population of 34,496 according to the 2011 Irish census.[25]

Although the border does not have any customs posts, there is some surveillance of vehicle movements. The authorities are thus able to track cars, trucks, etc. in their journey along and across the border. However, this surveillance is for security purposes. While it may be useful for detecting the smuggling of arms across the border for example, it is questionable as to the contribution the existing infrastructure would make to the other elements of the customs authorities' mission. In this connection it should be recalled that part of this mission is the protection of financial interests, i.e. import duties and other taxes, but also the enforcement of standards, e.g. those adopted to protect the environment and plant, animal and human health.[26] In practice, effective implementation of the objectives articulated in the customs authority's mission can only be achieved by conducting inspections based on risk-analysis methods, which includes random checks. Furthermore, the existing security-based surveillance infrastructure would have to be repurposed for customs. Aside from the issue of whether such repurposing is technically feasible in the light of the situation under a no-deal scenario, there is the issue of whether it would be politically acceptable, including amongst the population living along the border.

[14] Colton, Dodge and Jefferson, The 310 Miles Breaking Brexit, Bloomberg, 15 March 2019, https://www.bloomberg.com/features/2019-irish-border/.
[15] Cf. Colton et. al., footnote 16, unless otherwise noted.
[16] Colton et. al., footnote 16.
[17] https://www.nisra.gov.uk/statistics/census/2011-census, unless otherwise noted by omission.
[18] Google maps.
[19] https://www.nisra.gov.uk/statistics/census/2011-census.
[20] Google maps.
[21] https://www.cso.ie/en/census/census2011reports/.
[22] Google maps.
[23] https://www.nisra.gov.uk/statistics/census/2011-census.
[24] Google maps.
[25] https://www.cso.ie/en/census/census2011reports/.
[26] An important example of another protected legal interest is the protection of intellectual property rights, which falls under the mission of protecting against illegitimate trade.

Moreover, such a solution would not address situations where populations are located in close proximity to the border or straddle the border.

3.3 Special Demands Placed on Customs by Sensitive Goods and Products

The importation of sensitive goods and products places special demands on infrastructure. When live animals or products of animal origin are imported into the EU from a third country, they must enter via a border inspection post (BIP) which has been notified to the European Commission and duly listed. A Border Inspection Post is an inspection post designated and approved in line with EU legislation for carrying out checks on animals and animal products arriving from third countries at [an EU] border. These checks are carried out to protect animal and public health, and animal welfare.[27]

Products of animal origin falling within the scope of Council Directive 97/78/EC,[28] which includes milk and milk products, must enter via a BIP.[29] Certain plants must also be presented to at a BIP. Eggs and egg products intended for human consumption, for example, must also be presented at a BIP.[30] The inspection of the documentation must cover 100% of the imports. Other controls which may require fixed installations (e.g. laboratories, testing equipment) must also be carried out. These facilities do not exist at or near the border. In the light of the volume of consignments, there is also a shortage of qualified and experienced personnel.

The RoI has currently listed Dublin Airport, Dublin Port and Shannon (airport) as border inspection posts.[31] This is problematic when considering North – South trade in sensitive goods and products, many of which are subject to veterinary inspections, since the distance to a BIP alone will cause significant disruption to trade. Consequently, the RoI will have to establish BIPs which are closer to the border. The UK will at least initially not require products of animal origin sent directly from the EU27 to enter its territory via a BIP. However, if this policy is changed at some time in the future, NI could also locate its BIPs at or near the RoI/NI border. In addition, a charge is levied for the veterinarian checks at BIPs. Such charges cannot be waived solely for the UK or NI (or the EU where charges are levied by the UK) since that would almost certainly violate *inter alia* Art. I:1 and Art. X:3 (a) GATT.

However, there is precedent for derogating from these strict rules. Sensitive goods and products entering the EU from the EEA States and Switzerland, for example, do not require checks; they may be introduced into the EU subject to the conditions of intra-Union trade. Such a solution on the RoI-side of the border would provide a significant contribution to keeping the border open but would also require an agreement with the EU. The problem is that under a no-deal scenario, this option is not available, at least in the short term.

The UK has published Guidance documents covering *inter alia* imports into the UK of sensitive goods and products directly from the EU.

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[27] Defra, Animal & Plant Health Agency, available at http://apha.defra.gov.uk/official-vets/Guidance/bip/index.htm.
[28] Council Directive 92/118/EEC of 17 December 1992 laying down animal health and public health requirements governing trade in and imports into the Community of products not subject to the said requirements laid down in specific Community rules referred to in Annex A (I) to Directive 89/662/EEC and, as regards pathogens, to Directive 90/425/EEC, OJ 1993 No L62, p. 49
[29] See European Commission, https://ec.europa.eu/food/animals/animalproducts/milk_en.
[30] European Commission, https://ec.europa.eu/food/animals/animalproducts/other_en.
[31] Commission Decision of 28 September 2009 drawing up a list of approved border inspection posts, laying down certain rules on the inspections carried out by Commission veterinary experts and laying down the veterinary units in Traces, OJ L 2009, No L 296, p. 1, as amended.

According to the UK Guidance Notice,[32] exporters in the EU can continue to use TRACES to notify authorities if they are planning on exporting to the UK. Importers are still required to notify the Animal and Plant Health Agency ("APHA") separately under Trade in Animals and Related Products regulations for certain live animals and germinal products. The importer will need to notify UK authorities by completing the IV66 form, which is the same process as is used for imports into the UK from NI or Jersey, Guernsey and the Isle of Man. Importers must notify APHA at least 24 hours before the consignment is due to arrive in the UK.

In respect of feed and food imports directly from the EU, the UK will not be imposing any additional controls or checks and the consignments will not need to be notified on the Import of products, animals, food and feed system.[33] However, the UK authorities will need to be notified of imports of high-risk food and feed products from the EU. Products may be considered high risk if they contain, for example:

- contaminants - mycotoxins and aflatoxins,
- excessive pesticide residues,
- salmonella or
- heavy metals, for example mercury.

It is unclear how long the UK intends to keep these measures in place. If they are removed and the EU is subject to the standard procedures applicable to other third countries, the situation for imports from the EU will change dramatically. For example, imports of live animals, germplasm and products of animal origin into the UK will have to enter through a UK BIP.

Special rules will apply to animal by-products not for human consumption imported directly from the EU.[34]

3.4 Business Considerations and the Peace *Aquis*

Leaving aside the issue of sensitive goods and products, the length of the border, transportation infrastructure, business realities (in particular just-in-time deliveries and deliveries on short notice), proximity (time-limits for lodging entry summary and pre-departure declarations), the volume of small consignments and a proportionately small number of customs officers and staff will make enforcement of the customs legislation challenging at best unless solutions are found.

[32] Department for Environment, Food & Rural Affairs and Animal and Plant Health, Guidance: Importing animals, animal products and high-risk food and feed not of animal origin if the UK leaves the EU with no deal, last updated 10 April 2019, https://www.gov.uk/guidance/importing-animals-animal-products-and-high-risk-food-and-feed-not-of-animal-origin-if-the-UK-leaves-the-EU-with-no-deal.

[33] Guidance, Importing animals, footnote 34.

[34] Department for Environment, Food & Rural Affairs, Guidance: The food and drink sector and preparing for EU Exit, last updated 10 April 2019, available at https://www.gov.uk/guidance/the-food-and-drink-sector-and-preparing-for-eu-exit.

4. OPTIONS UNDER GATT

This part examines and evaluates three potential options under GATT which may provide solutions or partial solutions for keeping the NI/RoI (customs) border as open as possible: the security clause, obtaining a waiver and frontier traffic.

4.1 The Security Clause

As was indicated in section 3.2 above, trade is inextricably intertwined with the Belfast Agreement and Common Travel Area for very practical reasons, in particular due to the large number of micro- and small SME participation in cross-border trade, irrespective of the legal situation. To put this another way, the peace *acquis* which was achieved could be damaged by the creation of a hard (customs) border, meaning that a return to civil unrest is rather more likely than not. However, avoiding controls on goods passing the NI/RoI border risks non-compliance with WTO rules, e.g. Art. 1:1 of the General Agreement on Tariffs and Trade ("GATT").[35] Measures designed to treat goods passing the NI/RoI border more favourably than goods coming from another WTO Member might be challenged by WTO Members under the WTO's dispute settlement system. Non-compliance with the disciplines of the WTO is also a concern for the EU. In this section it will be assumed that a measure treating trade between NI and the RoI more favourably than trade with other WTO Members or the rest of the UK violates GATT. The issue is then whether an exception or justification pursuant to GATT can be found.

The security clause,[36] in this case specifically Art. XXI(b)(iii) GATT, could be invoked. While it is beyond the scope of this study to examine this option in detail, the conditions under which this option would be available can be presented. Article XXI(b)(iii) GATT reads:

> Nothing in this Agreement shall be construed […]
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
> (iii) taken in time of war or other emergency in international relations.

This provision has recently been interpreted by the WTO Panel in *Russia – Traffic in Transit*.[37]

The Panel found that the paragraph (b) must be interpreted as meaning that a Member may not be prevented from taking an action "which [the Member] considers necessary for the protection of its essential security interests".[38] However, this right is conditional on the existence of certain objective circumstances.

[35] This reads in relevant part: "With respect to […] all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in [Art. III:2, 4] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". Such measures might also violate Art. X:3(a) GATT. Other Agreements which could potentially be violated include, e.g. the Technical Barriers to Trade Agreement and the Sanitary and Phytosanitary Agreement.
[36] Article XXI GATT.
[37] Panel Report, *Russia - Measures Concerning Traffic in Transit*, WT/DS512/R, adopted 26 April 2019 ("Panel, *Russia – Traffic in Transit*").
[38] Cf. Panel, *Russia – Traffic in Transit*, paras. 7.61, 7.62.

The conditions under which a Member may invoke Art. XXI(b)(iii) GATT are subject to a Panel's review;[39] the clause 'which it considers' does not extend to the determination of the circumstances.[40]

The Panel interpreted the phrase 'taken in time of' as meaning action taken during the war or other emergency in international relations, i.e. that there is a chronological concurrence between the war or other emergency in international relations.[41]

The Panel found that 'war' refers to armed conflict which may occur between states (international armed conflict), or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict)[42] while an 'emergency in international relations' must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b), all of which concern defence and military interests, as well as maintenance of law and public order interests.[43] The Panel found that 'international relations' relates to "world politics", or "global political interaction, primarily among sovereign states".[44]

The Panel went on to find: "An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[45] This implies that an emergency in international relations can exist where

- defence and military interests and/or
- maintenance of law and public order interests

are acutely jeopardised by objective circumstances. We interpret this to mean that a WTO Member is not required to wait until the risk has materialised where there is a high degree of likelihood that one of the protected interests will be gravely impaired. In this context the Panel noted that Art. XXI(b)(iii) GATT was, in the vast majority of occasions, invoked only in "an acute international crisis".[46] This is an objective criterion subject to judicial review, so any invocation, including in the case of preventive measures, will have to adduce sufficient evidence to justify the claim and support the risk analysis.

The Panel found that 'essential security interests' refers to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.[47] Each Member may define what it considers to be its essential security interests, and specific interests that are considered directly relevant to the

[39] Panel, *Russia – Traffic in Transit*, para. 7.100.
[40] Panel, *Russia – Traffic in Transit*, para. 7.101.
[41] Cf. Panel, *Russia – Traffic in Transit*, para. 7.70.
[42] Panel, *Russia – Traffic in Transit*, para. 7.72.
[43] Panel, *Russia – Traffic in Transit*, para. 7.74. The Panel views the circumstance 'war' as a subcategory of 'emergency in international relations, see para. 7.72: "war is one example of the larger category of "emergency in international relations"."
[44] Panel, *Russia – Traffic in Transit*, para. 7.73.
[45] Panel, *Russia – Traffic in Transit*, para. 7.76.
[46] Panel, *Russia – Traffic in Transit*, para. 7.81. The Panel's interpretation is a very narrow understanding. It remains to be seen whether the term can be expanded so as to include, e.g. environmental concerns, human rights insofar as these do not fall within the category of 'law and public order' or even economic conditions where these pose an existential threat to the Member concerned and/or the residents in its territory. However, for the purposes at issue in this study, the Panel's narrow interpretation is sufficient.
[47] Panel, *Russia – Traffic in Transit*, para. 7.130.

protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances.[48] However, the Member's discretion in defining its 'essential security interests' is limited by its obligation to apply Art. XXI GATT in good faith.[49] The Panel specifically pointed out that merely re-labelling trade interests as 'essential security interests' is excluded.[50] This means that the Panel is able – and obliged pursuant to the Dispute Settlement Understanding – to review the purported 'essential security interest' under a good faith test. The WTO Member invoking Art. XXI GATT bears the burden of proof.[51] The standard of proof or level of articulation required varies according to the circumstances of the specific case at issue: the further the 'emergency in international relations' is removed from armed conflict, or a situation of breakdown of law and public order, the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally be expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict.[52] The closer the emergency in international relations is to the "hard core" of war or armed conflict, the less the level of articulation required.[53]

The good faith test applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to its connection with the measures at issue;[54] in the wording of the provision, the measure must be 'necessary' for the protection its essential security interests.[55] The Panel found that this means it must review whether the measure at issue meets a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that it is not implausible as measure protective of these interests.[56]

Whether or not the UK and the EU can successfully invoke the security clause will depend in the first instance on the specific circumstances prevailing at the time of its invocation. Consequently, any justification relying on Art. XXI GATT can only be evaluated on a case-by-case basis in the light of the specific circumstances prevailing. However, based on the Panel Report, certain principles can be derived for assessing the potential legality of measures designed and intended to keep the NI/RoI border as open as possible.

First, the measures and rationale are subject to judicial review according to the applicable standard, which will vary according to the element being examined. The level of articulation will depend on the circumstances and the closeness of the measure to the protected interest. Trade alone is not a protected interest as that is not an essential security interest within the meaning of the provision. However, this does not imply that trade interests cannot be taken into consideration where these have some relationship to the security interest being protected by the measure. The function of an open border in maintaining peace between NI and the RoI is unique. The Belfast Agreement and the CTA as well as hard-

[48] Panel, *Russia – Traffic in Transit*, para. 7.131.
[49] Panel, *Russia – Traffic in Transit*, paras. 7.132 *et seq*.
[50] Panel, *Russia – Traffic in Transit*, para. 7.133.
[51] Cf. Panel, *Russia – Traffic in Transit*, para. 7.134.
[52] Panel, *Russia – Traffic in Transit*, para. 7.135.
[53] Cf. Panel, *Russia – Traffic in Transit*, paras. 7.134 – 7.137.
[54] Panel, *Russia – Traffic in Transit*, para. 7.138.
[55] Cf. Panel, *Russia – Traffic in Transit*, para. 7.146.
[56] Cf. Panel, *Russia – Traffic in Transit*, paras. 7.138, 7.139.

won experience clearly indicate that an open border is an essential element of the peace *acquis*. Given the physical characteristics of the border and the understanding of the peace *acquis* by the citizenry on both sides of the border, this includes trade. It therefore does not appear implausible to claim that keeping the border open for trade is bound up with, and inseparable from, the security interest, i.e. the 'relationship test' between the measure and the security interest could be met. However, each measure must be evaluated on its merits. For example, the claim that a waiver of charges for inspections at BIPs is a measure necessary to protect security interests may be a difficult argument to make, given that this concerns primarily financial interests, at least at first glance.

Second, the security interest does not need to have actually been impaired; it is sufficient if there is an acute threat to the interest, which must have some international dimension, i.e. it (generally) cannot relate to a purely domestic situation. This results from the element 'emergency in international relations'. Without prejudging any specific recourse to Art. XXI(b)(iii) GATT, it can be said that, in general, the political and security implications and circumstances relating to the NI/RoI border, and thus also the territory of the RoI, tend to lend themselves to this exception.

Third, the interest pursued, specifically maintaining peace and order, is legitimate. However, the level of articulation required will have to take into account not only the circumstances actually prevailing, but also the measure itself and the relationship of that measure to the emergency in international relations. In particular, re-labelling economic, financial or trade interests as security interests will not succeed.[57]

Article XXI GATT permits unilateral measures to be taken by a WTO Member. This means that the provision may justify NI/the UK taking measures on their own territory to avoid a (hard) customs border, e.g. in respect of customs posts and corresponding checks and controls, but this will not address the situation in the RoI. Thus, when considering measures under Art. XXI(b)(iii) GATT attention should be had as to whether they will be effective in achieving the security objective. The assumptions here are that the aim is to prevent unrest and that the establishment of a customs border is a primary catalyst for the unrest. Establishing and maintaining an open border (or at least a border with as few customs controls as possible) can only be achieved where all the parties implement effective and coordinated measures. This means that the objective cannot be (fully) achieved without the EU adopting corresponding measures in respect of the RoI/NI border.

At the WTO-level such legislation will violate Art. X:3(a) GATT,[58] which essentially requires a uniform, i.e. non-discriminatory, application and administration of the laws, regulations, etc., because the RoI/NI border would be administered differently. However, a successful invocation of Art. XXI GATT could justify a violation.

In the light of the mission of the customs authorities and the risks posed by an open border,[59] it is unlikely that the RoI or the EU would agree to, or adopt unilaterally, sweeping exceptions from border controls for the NI/RoI border.[60]

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[57] Cf. Panel, *Russia – Traffic in Transit*, para. 7.133 which, however, expressly mentions only trade interests.

[58] This provision reads in relevant part: "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." Paragraph 1 of Art. X GATT includes *inter alia* laws, regulations, judicial decisions and administrative rulings of general application.

[59] These include smuggling, risks to food safety, risks to the environment, risks to health, e.g. where CE certification is required or in heavily regulated fields such as pharmaceuticals. This situation is exacerbated to the point of

Recommendation 1

The (re-) creation of a hard (customs) border between the RoI and NI could jeopardize the peace which has been established by the Belfast Agreement and the Common Travel Area, thereby infringing on a protected security interest. In principle recourse to Art. XXI:3(b)(iii) GATT to justify not installing customs posts and checks at the border would therefore not be precluded. However, the objective factors and/or assessment of future developments would have to be demonstrated. Each measure would need to be assessed on its own merits.

Measures taken under the security clause are unilateral in nature, i.e. each country will have to take its own measures and is responsible for justifying them. Such measures can therefore affect only one side of the border. However, there is nothing to prevent coordinated action between the UK and the EU / RoI to protect their respective and/or mutual security interests.

4.2 Waivers

The UK (and the EU) could also consider obtaining a waiver from WTO obligations in the event that a contemplated measure violates one or more provisions of the WTO. The applications should be coordinated.

Waivers are governed by Art. XXV:5 of the GATT and Art. IX:3, 4 of the WTO Agreement. A waiver is a legal instrument and can be described as an individual decision issued by the WTO Members to permit another Member to derogate from specific provisions of the WTO under the specific circumstances and conditions and for the specific purposes set out in the waiver. While there are procedural rules governing the request and grant of waivers, whether or not to make such a request, the formulation of the request, the negotiations with the other Members and each Member's decision on granting the waiver is a political issue, not a legal matter. Decisions on waiver requests are decided by the Ministerial Conference by consensus. If the Ministerial Conference fails to reach a decision within 90 days, then the decision is taken by vote requiring a qualified majority.[61]

The above description also shows that waivers, unlike invocations of the security clause, are not dependent on the presence of objective conditions, e.g. an emergency in international relations.

This option requires an evaluation of the measures contemplated in respect of their consistency or lack thereof with specific WTO obligations and provisions. Given that the objective is to keep the NI/RoI border as open as possible, it is likely that, in order to be effective, the measure(s) would have to implemented on both sides of the border, i.e. would have to be taken by both NI and the RoI (or the EU). As pointed out above, a unilateral measure affecting only one side of the border may not achieve the objective. This means that, as in the case of an invocation of Art. XXI GATT, coordination with the RoI/EU may be required. In such a case the measure would, in the first instance, have to be acceptable to and coordinated with the RoI/EU.

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unacceptability if the UK has different product regulations and/or imports products from third countries having different standards. See Tony Blair Institute for Global Change, Customs and Exiting the European Union, 2018, p. 42.

[60] A plan to generally exempt SMEs from customs obligations has already been proposed by the UK, see HM Government Position Paper, footnote 1, p. 17. This has plan been criticised and rejected by many as unworkable and undesirable, see e.g. Tony Blair Institute for Global Change, footnote 62, pp. 42 – 43. We agree with this assessment because it would undermine the mission of the customs authorities.

[61] See Art. IX:3 WTO Agreement on the procedural details. The requisite qualified majority is three fourths of the Members, Art. IX:3(a) WTO Agreement.

In this scenario, if a waiver is pursued, then both the UK as well as the RoI/EU would therefore have to apply for and be granted a waiver. Waivers therefore risk having to be modified in order to be acceptable to the WTO Members or rejection by the Ministerial Conference. Furthermore, the contemplated measure(s) cannot be implemented until such time as the waiver has been granted.

Waivers are of limited duration and subject to an annual review where they are granted for a period of more than one year,[62] which is almost certain to be the case in respect of waivers for measures to keep the NI/RoI Border as open as possible. This presents an additional risk.

Recommendation 2

Seeking a waiver represents an alternative to the invocation of the security clause.

The grant of a waiver is a political decision taken by the Ministerial Conference on the basis of consensus, unless the 90-day time-limit expires before a decision is taken, in which case the decision is taken by a qualified majority of the Members. Obtaining a waiver will therefore take longer than implementing a unilateral decision taken under Art. XXI(b)(iii) GATT.

The second difference is that waivers are not dependent on the presence of objective conditions, e.g. an emergency in international relations.

Third, they are of limited duration and subject to an annual review if they were granted for a period of more than one year.

As in the case of measures taken under the security clause, cooperation with the RoI and EU will be required where a solution on only one side of the border only will not achieve the objective.

4.3 Frontier Traffic

One potential facilitation is the principle of frontier traffic. This principle is laid down by Art. XXIV:3 GATT and reads:

> The provisions of this Agreement shall not be construed to prevent:
>
> (a) advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic […].

Subparagraph (b) is specific to trade with the Free Territory of Trieste by countries contiguous to that territory. Its applicability by analogy outside of that context is dubious, in particular given that the preceding subparagraph a) lays down the general rules.

Article XXIV:3 GATT leaves the geographic extent of frontier traffic intentionally vague. The observation by the US representative that the area affected by this provision was usually limited to a distance of 15 kilometres from the frontier was rejected as an interpretive limitation.

> In discussions during the Geneva session of the Preparatory Committee, "it was agreed that 'frontier traffic' should not be defined too narrowly as it varied in each case and that the Organization would have, if necessary, to decide".[63]

The proposal by the German delegation to add to Article XXIV:3(a) a reference to "specific frontier zones specially designated by treaty" was unsuccessful because it was considered unnecessary: "While the CONTRACTING PARTIES would no doubt wish to examine the terms of any particular treaty in the event of a dispute, the Working Party understands that traffic in zones designated in treaties between adjacent

[62] Article IX:4 WTO Agreement.
[63] GATT 1947 Analytical Index, p. 795, footnote omitted.

countries, designed solely to facilitate clearance at the frontier, would normally be covered by the phrase 'frontier traffic'".[64]

Consequently, a "specific frontier [zone] specially designated by treaty" is not necessary for the invocation of this provision. It is therefore not necessary to evaluate whether the Belfast Agreement or rules establishing the Common Travel Area would satisfy such a requirement.

The EU and the UK are thus able to accord each other advantages in order to facilitate frontier traffic along the NI/RoI border on the basis of their being adjacent countries.

There is widespread consensus that geographic extent of the frontier is generally at least 15 kilometres. The outer limits are undefined and subject to debate, but most probably end at about 20 to 25 kilometres from the border. This is in line with the traditional understanding that this exception is to facilitate traffic at or near a border. More recently, some authors have sought to expand geographic scope to include the whole of NI. However, it is unlikely that such an interpretation would survive legal scrutiny.

In conclusion, Article XXIV:3 GATT – frontier traffic can make some contribution to a frictionless border but due to the geographical limitations can only represent a partial solution.

4.3.1 Facilitations for Frontier Traffic Expressly Mentioned in Union legislation

The UCC contains facilitations for frontier traffic in certain instances. Articles 135(5) and 139(6) UCC allow for the application of special rules with respect to goods transported within frontier zones as well as for traffic of negligible importance. Under such rules the need to use specified routes and to present the goods to customs (i.e. to notify them to the customs authority, Art. 5 No 33 UCC) may be waived. Such rules do not exist at Union level (including the scope of the term 'traffic of negligible importance') and can therefore be adopted at the national level. Thus, the RoI would be able to adopt such rules on its own competence. NI and/or the UK could therefore work coordinate with the RoI on such rules.

While Art. 170(2) UCC requires that the declarant be established in the customs territory of the Union, this requirement is waived pursuant to Art. 170(3)(c) UCC for persons who are established in a country the territory of which is adjacent to the customs territory of the Union, and who present the goods to which the customs declaration refers at a Union border customs office adjacent to that country, provided that the country in which the persons are established grants reciprocal benefits to persons established in the customs territory of the Union.

Article 224 UCC-DA grants total relief from import duty for the following goods intended to be used in frontier zones:

(a) equipment owned and used by persons established in a frontier zone of a third country adjacent to the frontier zone in the Union where the goods are to be used;

(b) goods used for projects for the building, repair or maintenance of infrastructure in such a frontier zone in the Union under the responsibility of public authorities.

Pursuant to Art. 35 of the EU Duty Relief Regulation agricultural, stock-farming, bee-keeping, horticultural and forestry products from properties located in a third country adjoining the customs territory of the Union, which are operated by agricultural producers having their principal undertaking

[64] GATT 1947 Analytical Index, p. 796, footnote omitted.

within the said customs territory and adjacent to the third country concerned, shall be admitted free of import duties. To benefit from these provisions, stock-farming products must be derived from animals which originated in the Union or have entered into free circulation therein. These provisions apply *mutatis mutandis* to the products of fishing or fish-farming activities carried out in the lakes or waterways bordering a Member State and a third country by Union fishermen and to the products of hunting activities carried out on such lakes or waterways by Union sportsmen (Art. 38 Duty Relief Regulation).

Furthermore, seeds, fertilizers and products for treatment of soil and crops, intended for use on property located in the customs territory of the Union adjoining a third country and operated by agricultural producers having their principal undertaking within the said third country and adjacent to the customs territory of the Union, shall be admitted free of import duties (Art. 39 Duty Relief Regulation). Such relief shall be granted only for seeds, fertilizers or other products imported directly into the customs territory of the Union by the agricultural producer or on his behalf, and Member States may make relief conditional upon the granting of reciprocal treatment (Art. 40 Duty Relief Regulation).

4.3.2 Historical and Current Examples by Member States or the EU

To understand the contribution that this exception can make to the NI/RoI border situation, the scope of what constitutes 'frontier traffic', i.e. what is covered by this term (e.g. private persons, commercial traffic), is addressed by examining some examples[65] where the EU or a Member State has taken recourse to 'frontier traffic'.

1. Convention between Italy and Switzerland Concerning Frontier Traffic and Grazing

This is a treaty between Italy and Switzerland which entered into force on 17 February 1956. The objective of the Convention was to improve the regulation of frontier traffic and grazing between the two countries by establishing "frontier zones" and providing facilitations for agricultural and forestry undertakings in the frontier zone of one of the Parties and engaging in cultivation or forestry on lands situated in the contiguous frontier zone of the other Party. These facilitations included exempting e.g. livestock crossing the border for grazing purposes, vehicles and machinery used for agricultural and forestry in the frontier zone of the other Party, etc. from customs duties and other taxes (temporary admission). The system of relief from customs duties and other taxes extended to imports and exports of certain products. The Convention also covered long-term grazing.

The Italian – Swiss frontier traffic convention is a good example of two types of transhumance frontier traffic treaties: short-term frontier grazing and long-term pastoral grazing.[66] The Convention was not limited to only e.g. livestock, related machinery, the transportation of raw agricultural produce, products obtained from livestock, including their young, etc. In respect of workers no duties or other charges are charged on e.g. food and beverages (though not for all alcoholic beverages) for workers, coffins, sporting firearms and furniture, household utensils and articles.

Article 5(i)[67] of the Convention is of interest in respect of commercial traffic:

[65] It should be noted that the selected examples do not represent an exhaustive study of all historical or current examples.

[66] Davies, Ogali, Slobodian, Roba, Ouedraogo, Crossing Boundaries: Legal and Policy Arrangements for Cross-border Pastoralism, ed. Velasco-Gil and Maru, Food and Agriculture Organization of the United Nations, 2018, p. 25.

[67] Article 5(i) of the Italian - Swiss frontier traffic convention is headed "Temporary Imports and Exports".

> Goods, other than foodstuffs and beverages, imported or exported with a view to sale, including products personally carried or conveyed, by craftsmen and wage-earning home workers resident in one frontier zone, to markets or fairs in the other zone for sale.
>
> All products taken to a market or fair and left unsold shall be returned to the zone of origin. Import and export duties on articles sold shall be paid as soon as the last market or fair attended has closed.
>
> The customs [authorities] may direct that samples be taken, that distinguishing marks be applied or that drawings and photographs be produced, and may require the re-exports or re-import of the aforementioned articles to be guaranteed by the deposit of the amount of the customs duties or by a reliable surety.

This demonstrates that at least small commercial traffic in limited circumstances is possible. It also shows that providing guarantees is not in all cases necessary.[68]

Article 7 of the Convention is interesting because it provides an exemption from the rule that goods must keep to designated customs routes:

> Where local conditions so require, the customs authorities of the two countries may […] exempt particular types of frontier traffic at particular points on the frontier from the rule that goods traffic shall keep to the customs routes and the prescribed hours.

Article 11 of the Convention governs enforcement, but is vague as to the measures, stating simply that "the two Contracting Parties shall severally adopt the necessary control measures to prevent any misuse of the facilities provided by this Convention."

2. Agreement between the European Community and the Swiss Confederation on Trade in Agricultural Products

Annex 11 Appendix 5 No III to the Agreement between the European Community and the Swiss Confederation on trade in agricultural products[69] may provide some insight for animals sent for grazing in border areas. These rules provide:[70]

1. The official veterinarian of the country of departure shall:
   - notify the official veterinarian of the country of destination 48 hours in advance that the animals are to be dispatched,
   - examine the animals within 48 hours prior to their departure for the grazing ground; the animals must be duly identified,
   - issue a certificate in accordance with a model to be drawn up by the Joint Veterinary Committee.
2. The official veterinarian of the country of destination shall inspect the animals upon arrival in the country of destination to ensure that they comply with the standards laid down in this Annex.

[68] See also Art. 89(8) UCC and Art. 81 UCC-DA on waivers from the general guarantee requirement which go well beyond the frontier zone.
[69] Agreement between the European Community and the Swiss Confederation on trade in agricultural products, OJ 2002 No L 114, p. 132.
[70] Annex 11 Appendix 5 No III to the Agreement between the European Community and the Swiss Confederation on trade in agricultural products.

3. Throughout the duration of the grazing period, the animals shall remain under customs control.
4. The holder of the animals shall make a written statement undertaking:
   (a) to comply with all measures taken pursuant to this Annex and any other measures introduced at local level, in the same way as any holder originating in the Community or Switzerland;
   (b) to pay the costs of the checks required pursuant to this Annex;
   (c) to cooperate fully with arrangements for customs or veterinary checks required by the authorities of the country of dispatch or of destination.
5. Grazing shall be limited to a 10 km strip both sides of the border between Switzerland and the Community; this distance may be increased in special duly substantiated conditions.

Number IV of this Appendix demonstrates that it is possible to limit the checks to be carried out to documentary checks, identity checks, and to permit physical checks in suspicious cases.

Chapter 1 lays down the sectors where recognition of animal products is mutual: they concern specifically milk and products of milk of bovine species intended and not intended for human consumption.

The rules applicable and products covered in this Agreement are very extensive and beyond the scope of this study, but what has been presented gives some insight into the type and nature of the facilitations and simplifications as well their limitations. It should be noted that the extensive nature of these facilitations and simplifications is due primarily to the fact that Switzerland is obliged to follow Union standards. It should also be noted that administrative cooperation between the jurisdictions, including between the customs authorities but also in judicial/criminal matters as well as food safety, is critical.

Evaluation

Conventions and treaties to facilitate pastoral grazing are well established. As the Convention between Italy and Switzerland concerning frontier traffic and grazing indicates, they are of limited geographic scope, usually covering only specifically designated frontier zones. Although this appears to be transposable in part to the NI/RoI border situation, e.g. where the farm straddles the border or where livestock traditionally moves across the border according to the season, in our view the negotiating history of Art. XXIV:3(a) GATT shows that the designation of such zones is not required. Thus, the facilitations could extend across the entire land border within the acceptable geographic boundary (ca. 20 – 25 kilometres).

The persons covered were those engaged in cross-border transhumance production and forestry. It thus did not cover the general population but rather only those engaged in a covered business.

The scope of the exemption from duties and other taxes (VAT) is in the first place related to the activities. Thus, livestock, feed for the livestock, the machinery and equipment required to perform the work, medical instruments for veterinarians, etc. are covered.

The necessities for the workers and/or their families were covered. However, this does not appear to exceed the facilities under the Customs Duty Relief Regulation.[71]

[71] Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, OJ 2009 No L 324, p. 23.

Some small commercial traffic is permitted.

It is possible to avoid having to use approved customs routes.

Enforcement should be achieved through documentation which the person engaging in the covered activities can apply for. The applications and application procedures should be kept as simple, easy and unbureaucratic as possible, bearing in mind that many of the applicants will be micro-enterprises.

In respect of animals, products of animal origin, plants, produce, etc. checks will have to be carried out to avoid abuse and to protect food safety and the environment and effective, proportionate and dissuasive penalties will need to be applied in the case of violations or irregularities.[72] The EU-Swiss Agreement gives an indication of the opportunities but also limitations involved as well as the conditions under which such an agreement is possible (obligatory use of EU standards, customs cooperation, etc.). We are of the view that the 48-hour notification period can at least be reduced within the context of the NI/RoI border provided NI applies Union standards. Identification by way of entering tagged animals into a database to which the authorities where the grazing takes place has access could simplify this aspect.

Another example of this type of agreement is the Treaty between the Kingdom of Denmark and the Federal Republic of Germany Concerning Customs Facilitations for Frontier Traffic.[73] This treaty did not include commercial traffic.

3. Cyprus

Some authors argue that the concept of 'frontier traffic' can be extended to essentially cover the whole of the island of Ireland, or at least the whole of NI.[74] The model used, e.g. by Doyle and Connolly, is Cyprus. They note that the situation on Cyprus is a result of disputed sovereignty in the context of seeking a settlement.[75] They also point out that, pursuant to Art. 2 of the Protocol 10 to the Act of Accession, while recognising the Government of the Republic of Cyprus as the sovereign power for the island as a whole, also very pragmatically takes into account the Government's lack of effective control over the Northern part of the island by allowing goods produced in Northern Cyprus to enter EU markets as Union goods once they are certified as being produced in Northern Cyprus by the Turkish Cypriot Chamber of Commerce.[76]

When Cyprus acceded to the EU it was *de facto* divided following the invasion[77] of the Northern part of the island by Turkey; the Government of the Republic of Cyprus did not and still does not exercise effective control in the Northern region. Article 2(1) of the Accession Protocol expressly recognises this situation, stating that the Union will define "the terms under which the provisions of EU law shall apply to the line between those areas referred to in Article 1 and the areas in which the Government of the Republic of Cyprus exercises effective control." This was done in the 2004 Green Line Regulation.[78]

[72] Cf. also Art. 42(1) UCC.
[73] Translation by the author of this study.
[74] See Doyle, John and Connolly, Eileen, Brexit and the Future of Northern Ireland (June 12, 2017). DCU Brexit Institute - Working paper N. 1 - 2017. Available at SSRN: https://ssrn.com/abstract=3102330.
[75] Doyle and Connolly, footnote 77, p. 9.
[76] Doyle and Connolly, footnote 77, p. 10.
[77] This characterisation is from the EU's perspective. Turkey takes a different view of the events and disputes this view.
[78] Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession, OJ 2004 No L 206, p. 128.

Recitals 3 and 4 of this Regulation state the reasons for and scope of the special customs and fiscal rules applicable to the Green Line:[79]

> (3) Pursuant to Article 2(1) of Protocol 10, this suspension makes it necessary to provide for the terms under which the relevant provisions of EU law shall apply to the line between the above-mentioned areas and those areas in which the Government of the Republic of Cyprus exercises effective control. In order to ensure the effectiveness of these rules, their application has to be extended to the boundary between the areas in which the Government of the Republic of Cyprus does not exercise effective control and the Eastern Sovereign Base Area of the United Kingdom of Great Britain and Northern Ireland.
>
> (4) **Since the abovementioned line does not constitute an external border of the EU, special rules concerning the crossing of goods**, services and persons **need to be established**, the prime responsibility for which belongs to the Republic of Cyprus. **As the** abovementioned **areas are temporarily outside the customs and fiscal territory of the Community** and outside the area of freedom, justice and security, **the special rules should secure an equivalent standard of protection** of the security of the EU with regard to illegal immigration and threats to public order, and **of its economic interests as far as the movement of goods is concerned**. Until sufficient information is available with regard to the state of animal health in the abovementioned areas, **the movement of animals and animal products will be prohibited**. (emphasis added)

The circumstances and reasoning given in these recitals undermine the proposal that Cyprus can be used as a model for the NI/RoI border because the two situations are fundamentally polar opposites in key points:

- the divide between the Northern and Southern parts of Cyprus is temporary;
- the EU does not recognise the Northern part as legitimate or sovereign;
- the EU regards the Northern part as legitimately a part of the customs and fiscal territory of the Union, even though *de facto* that area is not a part of the customs territory due to the lack of effective control of that area by the government of Cyprus;
- the Green Line does not represent the Union's *de jure* external border.

The Cyprus example does not represent a pragmatic model for the NI/RoI border for other reasons, even assuming that the rules could be applied by analogy.

(1) There are a theoretical total number of 11 crossing points, 4 of which are not currently operational.[80]
(2) The restriction on the number of crossing points is essential to enforcement.
(3) The free movement of goods is restricted and does not cover sensitive goods and products.[81] For example, Art. 4(9) sentence 1 of the Green Line Regulation as amended[82] reads: "The

[79] The 'Green Line' means the cease fire line that demarks the territorial divide between the part of the island over which the government of Cyprus exercises effective control and the part of the island over which the government of Cyprus does not exercise effective control.
[80] These are a) Ledra Palace (for pedestrians only), b) Agios Dhometios, c) Pergamos, d) Strovilia, e) Ledra Street (for pedestrians only), f) Zodhia, g) Kato Pyrgos – Karavostasi, h) Kato Pyrgos – Kokkina, i) Kokkina – Pachyammos, j) Lefka-Apliki and k) Deryneia. The last four are the ones not yet open, http://www.mof.gov.cy/mof/customs/customs.nsf/All/05AEEF243C9BFC8BC22572BF002D0A28?OpenDocument.

movement across the line of live animals and animal products which are subject to Community veterinary requirements shall be prohibited."

This having been said, the SPS inspection scheme set out in Art. 3 Regulation 1480/2004 could serve as a model for the NI/RoI. Under this regime, in order to enforce the applicable SPS measures, experts inspect the goods 1) at the stage of production, 2) at harvest and 3) at stage of marketing.[83] The experts are appointed by the Commission and operate in coordination with the Turkish Cypriot Chamber of Commerce.[84] However, the lorries or other means of transport must be sealed[85] and the consignment must be inspected upon arrival.[86] This rule is not appropriate for very small consignments, e.g. goods to be sold at a farmers' market at the weekend.

Evaluation

The regime governing the free movement of goods on the island of Cyprus cannot be considered an example of frontier traffic and cannot be transposed to the case of the NI/RoI border because the underlying situations are fundamentally different and, indeed, in essential respects polar opposite.

The regime governing the free movement of goods on the island of Cyprus is not appropriate to the NI/RoI border insofar as the former is predicated on a limited number of crossing points.

The regime governing the movement of goods on the island of Cyprus expressly excludes the free movement of animals and products of animal origin and does not permit the unchecked introduction of agricultural produce.

The inspection regime for SPS purposes laid down in Art. 3 Regulation (EC) No 1480/2004 could be applied within the context of the NI/RoI border. While the selection of personnel and supervisory authority would have to be clarified (e.g. the Commission selects from a list of persons provided by the government of NI or other body established in NI and has supervisory authority or co-supervisory authority) in principle it is not obvious that such a solution is unworkable or unacceptable. This could also be extended to meat and meat products for human consumption. However, for such a scheme to achieve the objective of keeping as soft a border as possible, it would have to dispense with sealed containers and/or comprehensive inspections at border crossing points, at least for small consignments typical for micro-enterprises. It is also evident that, as has been emphasised above, NI would have to follow Union standards.

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[81] For example, Art. 4(9) sentence 1 of the Green Line Regulation reads: "The movement across the line of live animals and animal products which are subject to Community veterinary requirements shall be prohibited." Commission Regulation (EC) No 1480/2004 of 10 August 2004 laying down specific rules concerning goods arriving from the areas not under the effective control of the Government of Cyprus in the areas in which the Government exercises effective control, OJ 2004 No L 272, p. 3, lays down special rules to guarantee plant health, food safety and other safety requirements.

[82] See Art. 1(1)(b) Council Regulation (EC) No 293/2005 of 17 February 2005 amending Regulation (EC) No 866/2004 on a regime under Article 2 of Protocol 10 to the Act of Accession as regards agriculture and facilities for persons crossing the line, OJ 2005 No L 50, p. 1.

[83] Art. 3(1) Regulation (EC) No 1480/2004. Special rules apply to potatoes and citrus fruits, Art. 3(1) subparas. 2 and 3 Regulation (EC) No 1480/2004, respectively. On sensitive goods and products not intended for human consumption see Art. 4(1) Regulation (EC) No 1480/2004.

[84] Art. 3(1) Regulation (EC) No 1480/2004.

[85] Art. 3(3) Regulation (EC) No 1480/2004.

[86] Art. 3(4) Regulation (EC) No 1480/2004.

To permit relatively open access for frontier traffic the inspections carried out by the experts would need to be correspondingly frequent and rigorous. Random checks at the border and/or at the point of sale (e.g. in the case of farmers' markets) would have to be performed. Finally, effective, proportionate and dissuasive penalties would have to flank the programme.

Recommendation 3

In a no-deal scenario the only facilitations for frontier traffic which are available are those already existing in current legilation.

Articles 135(5) and 139(6) UCC can be used as a legal basis for relieving goods transported within frontier zones and traffic of negligible economic importance from the obligation to use the routes specified by the customs authorities and to present the goods to customs.

A person established in NI may lodge a customs declaration in the RoI provided they present the goods referred to in the customs declaration to the RoI border customs office (Art. 170(3)(c) UCC). However, this is conditional on the UK or NI granting reciprocal benefits to persons established in the RoI (Art. 170(3)(c) UCC).

Articles 35 – 38 Duty Relief Regulation set out the products and circumstances under which products obtained by RoI farmers on properties located in NI may benefit from total relief from import duties, while Arts 39 and 40 Duty Relief Regulation govern seeds, fertilizers, etc. imported by agricultural producers in third countries for use in properties adjoining those countries. Pursuant to Art. 40(3) Duty Relief Regulation the RoI may the relief granted under Arts 39, 40 Duty Relief Regulation conditional upon NI / the UK granting reciprocal treatment.

Beyond these rules certain elements of various frontier traffic agreements or regimes may be a useful model for the future if the UK and the EU were to pursue such a course of action.

5. DESIGNING BUSINESS-ORIENTED CUSTOMS FACILITIES

5.1 Establishing Free Zones

Both NI and the RoI may establish free zones, also known as special economic zones. These can be established unilaterally but must be notified to the WTO (and, with regard to free zones in the EU customs territory, to the EU Commission which then puts them on its website[87]). Free zones must comply with the Subsidies and Countervailing Measures Agreement; they may run afoul of this Agreement where the economic operators working in these areas receive a benefit which is considered an actionable or prohibited subsidy.[88] Free zones are geographically small, need to be enclosed and there is the question of where they could be located if they are to be near the border. Free zones are long-term projects, requiring extensive physical infrastructure, cost of construction and personnel. Free zones are foreseen by the Union Customs Code.[89] In practice free zones are only beneficial in cases where such zone is primarily used for goods with non-Union (or in the case of NI, non-UK) status. The main benefit is that no guarantee is required for goods stored under duty suspension (as in the case of designated storage facilities) and that the entry in the free zone requires no customs declaration[90] but need only be presented to customs[91]. When the goods leave the free zone, they need to be presented to customs again and can be declared for entry for free circulation or re-export.[92] Goods can also be processed in a free zone under the inward processing procedure.[93] Establishing back to back free zones on either side of the border might be an interesting idea, but such a solution does not dispense from the need to inform the relevant customs authority about the entry of the goods into the relevant customs territory and to apply the applicable prohibitions and restrictions.[94] The same is true for goods directly leaving such free zone.[95] Under the current rules also a pre-arrival and a re-export declaration are necessary.[96]

5.2 Integrating both Customs Facilitations and IT for Commercial Traffic

In order to avoid customs offices directly at the border, logistics centres can be created with their own community system (as the Hamburg port system Dakosy) which stores all relevant information and is available to the customs authority. Customs and other (e.g. veterinary) officials need to be available for necessary controls; the establishment would have to be listed as a BIP. Such locations can function as 'places designated by the customs authorities', so that controls of export and import goods can take place there.[97] Such a solution would relieve economic operators from the obligation to provide a guarantee during temporary storage and from the need to bring the goods to the next customs or

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87 https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/procedural_aspects/imports/free_zones/list_freezones.pdf; according to that list the RoI has currently no free zone, and the UK one on the Isle of Man.

88 See e.g. Stephen Creskoff and Peter Walkenhorst, Implications of WTO Disciplines for Special Economic Zones in Developing Countries, Policy Research Working Paper 4892, The World Bank, April 2009, available at https://openknowledge.worldbank.org/bitstream/handle/10986/4089/WPS4892.pdf?sequence=1.

89 Cf. Arts 243 *et seq*. UCC.

90 Art. 158(1) UCC.

91 Art. 245 UCC.

92 Art. 248 UCC.

93 Art. 247 UCC.

94 Art. 134 UCC.

95 Art. 267(3) UCC.

96 Cf. Arts 127, 274 UCC and Art. 343 UCC-IA.

97 See Art. 5 Nr. 33 and Arts 135(1), 139(1), 147(1) UCC.

veterinary office for possible controls.[98] The data held in the community system can, if provided within the legal time-limit, replace the lodging of an entry summary declaration,[99] as well as an exit summary or a re-export declaration.[100] The exit notification may also be derived from such a system.[101] Such logistics centres could also provide commercial storage facilities managed by holders of a temporary storage or customs warehousing authorisation. Furthermore, customs representatives could offer their services there (often the holders of storage facilities provide such additional services).

Art. 139 UCC in conjunction with Art. 190 UCC-IA provides a facilitation in respect of the presentation of the goods: where the customs authority has access to a commercial system[102] they may accept this as presentation of the goods.

The location of the logistics centres and the transportation infrastructure should be considered together. The logistics centres should be strategically situated within 15 kilometres of the border. Optimally, this solution would also be coordinated with the RoI with a view to providing a throughway to the logistics centre (which provides the services of a customs office and/or BIP) on the respective other territory. Alternatively, they could be installed back to back on the border as this would avoid the issues described in the following paragraph.

Designating certain roads for this traffic means that ideally there should be two lanes for each direction: one for goods to be cleared at, or close to, the customs border and one for transit and other procedures which have been declared prior to arrival by data-processing techniques.[103] Given the road infrastructure, it is questionable whether existing roads could be feasibly repurposed as designated customs routes for commercial traffic.

AEOs can be authorised to use any border crossing both for import and export, as long as they inform the customs authority beforehand: AEOs can also be allowed to present the goods at 'other approved places' within the meaning of Art. 5 Nr. 33 UCC. The lorries or containers of such traders could be made identifiable (e.g. by number plate recognition, a tracking device). In order to prevent non-AEO traders from using border crossings not available to them, some form of supervision, e.g. CCTV, mobile units, will be necessary.

For certain types of traffic, e.g. transit under the common transit convention, a green lane can be made available if there is sufficient space available, though this would mean additional space and potentially additional construction.

The risk of locating a logistics centre away from the border is that the greater the distance, the greater the danger that goods declared for export actually do not leave NI and thus that any VAT relief is granted wrongly. Another risk is that goods enter into NI without having been declared, thus evading payment of

[98] See European Commission, Guidance, http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/customs_code/guidance_customs_formalities_entry_import_en.pdf, pp. 32, 33.
[99] Art. 127(7) UCC.
[100] Arts 271(4), 274(4) UCC.
[101] Art. 332(5), sub-para. 2 UCC-IA.
[102] Art. 190 UCC-IA mentions ports and airports, but it would also include the data system of a logistics centre or free zone as 'other available methods of information'.
[103] Cf. Art. 158(2) UCC.

import duty, VAT and excise duty, and veterinary controls.[104] In the medium term such risk could be mitigated if an electronic tag is attached to each container, lorry or each type of merchandise. If the same tag and corresponding IT system is used on the other side of the border, this would further reduce costs and the risks of fraud and to food safety.

Other technological solutions may help to reduce the risks. If the comprehensive concept presented here is used, then the surveillance required would affect commercial traffic only, which may increase its acceptance. Traders and logistics companies may welcome the technological solutions because they would speed the clearance process, reducing waiting time. In his study "Smart Border 2.0, Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons" Karlsson[105] identified the following points (comments by the authors of this study are in brackets):

- A fully electronic environment: requiring the electronic submission and receipt of documents and payments. This creates a more secure environment by reducing the amount of paper as well as the faster processing of goods at a border (this is indeed the objective of the Union Customs Code with regard to trade in goods but does not totally remove the need to control goods passing the border).
- Automatic Number Plate Recognition (ANPR): ANPR allows the reading of number plates and the use of this information to link to customs pre-arrival information or a declaration for a truck arriving at a border, which can allow faster or even no processing at a border (this solution can also be used for the exit confirmation).
- Smartphone apps: Information for goods can be exchanged through smartphone apps. This can include the provision of minimum information from drivers approaching a border and the receipt of information (e.g. a barcode) by drivers to facilitate passing the border (it would be sufficient, if the car or lorry drives slowly, so that the data can be read and checked).
- Barcode scanning: To facilitate the movement of goods across a border, the provision of a barcode by customs or other border agencies can allow documentation to be scanned and released quickly on arrival (again, the lorry needs to stop somewhere for the scanning; small SMEs may find purchasing the equipment and supplies for this solution financially burdensome).
- Non-intrusive inspection technologies: Where controls on goods or vehicles are required, the use of scanners and other non-intrusive technologies for inspections prior to any requirement to open or stop a vehicle (the means of transport selected for controls needs to stop at the place where the scanner has been placed).
- Radio Frequency Identification (RFID) technologies: The use of RFID associated with goods means that scanning can take place within a limited area, reducing the need for drivers to leave their vehicles (in addition to RFID, which has only a range of a few meters, bluetooth or beacon tags can be used which have a range of a few 100 meters but are more expensive; the widest range can be achieved by GPS tracking but is also the most expensive solution; another alternative is electronic seals. However, whether the use of such technology is within the financial means of especially smaller SMEs is open to question, if the equipment is not

[104] Again, this risk might be mitigated by the design of the roads. However, until such dedicated roads are constructed, this risk will almost certainly have to be assessed as being high.
[105] Karlsson, Smart Border 2.0, footnote 1, p. 21.

provided free of charge by the Government. It should also be pointed out that the use of this technology cannot fully replace the need to conduct physical inspections of the goods.).

The concept of logistics centres with the above-mentioned features make sense and could be combined with IT-solutions which ensure that, for every export declaration, there is an import declaration in the other customs territory. A combined export/import declaration[106] with a corresponding exchange of data could become a long-term objective.

Recommendation 4

Establishing logistics centres integrating customs and IT for commercial traffic could be pursued, though this would be a long-term project and would be costly. In addition to the logistics facilities, which could be strategically located near the border, the dedicated road infrastructure would also need to be planned and implemented. Selected logistics centres could be listed as BIPs and outfitted with the required staffing and equipment.

Technological solutions can help to speed the clearance process. Technological solutions, insofar as they exist, can only ameliorate the situation. Furthermore, consideration could be given to the financial burdens small SMEs in particular will incur if they need to acquire the equipment for such solutions.

AEOs could be allowed to use any border crossing and to present the goods at their premises as 'another approved place' both for import and export. The lorries or containers of such traders could be made identifiable (e.g. by number plate recognition, a tracking device).

Integrated logistics centres would take up space; they would necessarily occupy a certain amount of land, and the more features/facilities incorporated and/or the more traffic that passes through, the larger they would become. In addition, space for queuing lorries will need to be included in the calculation of the space requirements as well as space to expand to accommodate additional traffic in the future. If the logistics centres are used as commercial storage facilities the size would expand further. The use of dedicated roads could reduce traffic congestion and the visibility of the border measures.

5.3 Establishing Joint Customs Offices

The UK and the RoI could establish joint customs offices in the respective other territory to expedite customs approval and clearance. Joint customs offices would combine import and export clearance and controls at the same place. The Norwegian-Swedish arrangements[107] could serve as a model. This solution avoids traders having to stop both in the country of export and in the country of import.

The establishment of a joint customs office would not require an agreement between the UK and the EU if such offices are on the territory of the RoI. Otherwise an agreement is necessary because the application of EU law would be extended beyond the territory of the Union.

If the joint customs office is located on the territory of the RoI an agreement between the RoI and the UK (or government of NI, as the case may be) would be sufficient, i.e. the EU would not need to agree.[108]

Some have proposed the establishment of a fully integrated border, which is a more ambitious solution.[109] A fully integrated border between different customs jurisdictions along a shared border

[106] This is foreseen in Art. 134(2) UCC-DA for trade with special fiscal territories. Furthermore, the Convention on the simplification of formalities in trade in goods, to which the UK has already acceded, provides a common declaration format for export and import declarations; consolidated version under https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/convention_simplification_formalities_en.pdf.

[107] OJ 197 No L 105, p. 17.

[108] Cf. Lux, The UK proposals for avoiding burdens at the EU-UK border, Written evidence submitted to the International Trade Committee of the (UK) House of Parliament for the hearing of evidence on 12 September 2018.

requires a legal and regulatory framework, harmonised procedures, exchange of data and information as well as joint infrastructure.[110] However, such a framework would have to be laid down in an agreement between the EU and the UK.

There is nothing which would prevent joint customs offices forming a part of an integrated logistics centre as described in section 5.2 above.

Recommendation 5

Negotiations could be commenced to establish joint RoI-NI customs offices on each other's territory. If an integrated logistics centre / customs office is established, the joint customs office can also be located there, thus significantly increasing effeciency.

5.4 Single Window and One-Stop-Shop for Declarations and Controls

The customs authorities shall carry out any customs controls they deem necessary to perform their mission.[111] Art. 46(1) subpara. 2 and Art. 188 UCC list various types of such controls.[112] Legislation other than customs legislation may prescribe other forms of control, e.g. the requirement that certain products enter via, and be inspected at, an EU Border Inspection Post ("BIP"). Fresh meat, meat products, milk and milk products and animal products covered by Directive 92/118/EEC, for example, must all undergo veterinary inspections at a BIP which the Member State of import has notified to the Commission, which maintains an electronically available list of these.

In some cases authorities other than the customs authorities must carry out the inspection of the goods.[113] For example, if the goods are subject to inspection at a BIP, an official veterinarian must inspect the animal or consignment.[114] In the case of (highly) regulated goods, such as pharmaceutical products, other authorities may have to inspect the consignment. In such cases the one-stop-shop principle laid down in Art. 47(1) UCC applies. This principle essentially states that, where responsibility for performing the controls is shared between the customs authority and another authority, the customs authority shall coordinate the controls so that they are performed at the same time and place, thus increasing efficiency and decreasing the time it takes for the consignment to be released for the customs procedure applied for.

The one-stop-shop is closely related to the single window from a practical point of view. A single window permits all import and export declarations as well as all documentation to be transmitted to a single authority only once, thus eliminating duplication. The EU has kept the single window separate from the UCC and the UCC IT work programme because the single window also concerns documents and requirements not relating to the customs legislation; the single window is covered by the E-Customs decision.[115]

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[109] Karlsson, Smart Border 2.0, footnote 1, pp. 23 – 24.

[110] Karlsson, Smart Border 2.0, footnote 1, pp. 24 citing European Commission, Guidelines for Integrated Border Management in EC External Cooperation, November 2010.

[111] Cf. Art. 46(1) subpara. 1 UCC.

[112] Art. 152 UCC-DA allows for holders of an authorisation for self-assessment that they can be authorised to perform certain controls themselves.

[113] Cf. Art. 47(1) UCC.

[114] For a brief overview see Irish Tax and Customs, Customs Brexit Information Seminar, pp. 74, 79.

[115] Decision No 70/2008/EC on a paperless environment for customs and trade, OJ 2008 No L 23, p. 21. For further details see also Lux, Union Customs Code – State of play, 2018, p. 42.

One of the biggest stumbling blocks to the implementation of the single window has been the interoperability of the various IT systems. It should be borne in mind that the single window solution is a national/EU solution, meaning that the UK/NI and the EU/RoI will each have their own single window and a common single window. There is no precedent for creating a common window with a non-EU Member State.[116] Consequently, the medium-term objective should be to create as much efficiency as possible on each side of the NI/RoI border.

The single window and one-stop-shop can also be used in the context of an integrated logistics centre / joint customs office, thus significantly increasing efficiency.

Recommendation 6

UK Government should concentrate on developing and implementing its own single window and should enter into consultation with the RoI in its efforts to establish its single window. The medium-term objective should be to create as much efficiency as possible on each side of the NI/RoI border by aligning the single windows in their presentation and functionality.

The single window and one-stop-shop can also be used in the context of an integrated logistics centre / joint customs office, thus significantly increasing efficiency.

[116] See also Pickett, Creating a frictionless border between Ireland and NI: The WTO dimension, evidence submitted to the International Trade Committee for the hearing of evidence on 12 September 2018.

6. BECOMING AN ECONOMIC OPERATOR UNDER THE CUSTOMS RULES: BASIC CONSIDERATIONS FOR ALL TRADERS

6.1 General

In the no-deal scenario, as of Exit Day, i.e. the date on which the UK is no longer a Member State of the European Union, the whole of the UK, including NI, will no longer belong to the EU customs union – this means that the UK will have and apply its own customs formalities and its tariff schedule applicable to products imported from third countries, including the EU. For trade in goods this means that goods crossing the border between NI and the RoI or leaving the UK and entering the customs territory of the EU will be subject to the customs legislation (including import duties) as well as other legislation applicable to imports and exports, including legislation governing the introduction of sensitive agricultural goods and products or highly regulated products such as pharmaceuticals into the EU from third countries.

This applies to goods moving from

- NI to the RoI,
- NI to the REU,
- the RoI to NI and
- the REU to NI.

Non-commercial cross-border movement of goods, e.g. products forming part of the personal luggage of travellers and small packages from private persons to private persons,[117] will also be subject to the customs and VAT legislation. However, non-commercial imports / exports will not be addressed in this section.

6.2 Register as Economic Operator: What Enterprises Need to Do

Many businesses in NI are micro-enterprises and SMEs. Their commercial relations are limited to trade on the island of Ireland. Such companies have no experience with customs operations. This section presents a brief overview of the most important points that they will have to consider when becoming an economic operator within the meaning of Art. 5 No 5 UCC, and thus need to register as such (Art. 9 UCC). Much the same applies to SMEs established in the RoI.

Economic operators in NI will need to apply for an EORI number from the UK authorities and can then either declare themselves, the goods under the new Customs Declaration System (CDS) or use a customs representative to deal with their customs matters. However, the costs incurred by acquiring the necessary software and recruiting knowledgeable staff or using a service provider could be prohibitive for a majority of micro-enterprises and smaller SMEs.

It can be assumed that many, if not most, SMEs and micro-enterprises established in the RoI are in a similar position to their NI business partners in respect of their customs status and experience with customs operations. This impacts NI enterprises because, if their business partners in the RoI do not register, obtain an EORI number, obtain the computer equipment and software or designate a customs representative, they will not be able to import the goods into the RoI from the NI enterprise. The same applies where the RoI business partner is the supplier, since exports also involve lodging customs declarations.

[117] On the exemption from import duties see Arts 23-27 and 41 of the Duty Relief Regulation (EC) No 1186/2009, OJ 2009 No L 324, p. 23.

As an alternative, the NI enterprise could set up a 'permanent business establishment' within the meaning of Art. 5 No 32 UCC in the RoI. A permanent business establishment is a fixed place of business, where both the necessary human and technical resources are permanently present and through which a person's customs-related operations are wholly or partly carried out. The NI enterprise will then be able to register with RoI customs, obtain an (EU) EORI number and conduct its customs-related operations (e.g. importing from NI) in the RoI via its permanent business establishment which, in turn, may also use the services of a customs representative. To put it another way, a permanent business establishment allows an enterprise established in a third country (e.g. the UK) to be treated as if were established in the EU for customs purposes. Another option is setting up a separate company in the RoI.

Recommendation 7

Setting up a 'permanent business establishment' within the meaning of Art. 5 No 32 UCC in the territory of the EU allows enterprises established in third countries to be treated as if they were established in the EU for customs purposes. This allows them to conduct customs operations in the customs territory of the Union, e.g. importing products from NI.

Assuming that the UK mirrors this legislation, enterprises established in the EU can set up a permanent business establishment in the UK and be treated as if they were UK enterprises for customs purposes.

For large enterprises this may be a viable option to serve their business partners in the RoI (or UK) which cannot become economic operators. Another option is setting up a separate company in the RoI. However, except for larger SMEs these options will not be feasible due to the cost, staffing and administrative requirements it involves.

6.3 Other Challenges Facing New Economic Operators

In addition to the steps businesses need to take in order to become economic operators under the customs rules, all businesses new to customs operations will face additional challenges, including providing guarantees for potential or actual customs debts, payment of customs duties and import VAT or excise duties due upon import, applying for authorisations, executing and complying with customs formalities, establishing operating procedures for dealing with customs matters and determining what the impact of the new situation will have on business operations and cashflow position. Appendix 3 provides a non-exhaustive checklist for undertakings.

In some cases particular checks and inspections of imported products are necessary. These may be subject to charges. For example, a charge is levied for the veterinarian checks at BIPs.

6.4 Customs Formalities and Customs Service Providers

Economic operators will have to comply with the customs formalities, e.g. lodging customs declarations, complying with time-limits for entry summary and pre-departure declarations, classifying the goods and determine the customs value. However, economic operators can also use a customs representative (customs service provider / agent) to do this on their behalf.

A customs representative is a person appointed by another person to carry out the acts and formalities required under the customs legislation in his or her dealings with customs authorities.[118] Such representation may be either direct, in which case the customs representative acts in the name of and on behalf of another person, or indirect, in which case the customs representative acts in his or her own name but on behalf of another person and therefore becomes liable for import duties.[119] The customs representative must be established within the customs territory of the Union, unless he acts on behalf of

[118] Art. 5 no 6 UCC.

[119] Art. 18(1) subpara. 2 and Art. 77(3), 2nd sentence UCC.

persons who are not required to be established within the customs territory of the Union.[120] Customs representatives who are established in NI may therefore act as the agent of their NI customers in the RoI provided their customers are not required to be established within the customs territory of the Union.

This is certainly a significant facilitation both for service providers as well as for exporters/importers. However, in the light of the fees the service provider will charge, it can be anticipated that few micro-enterprises or smaller SMEs will have the financial means to avail themselves of the services offered by customs agents which come as an additional cost on top of the import duties and charges for inspections they need to bear anyway in a no-deal scenario.

6.5 Time-limits

The time-limits for lodging entry summary or pre-departure declarations are of particular importance for economic operators. The time-limit for lodging an entry summary declaration (ENS) with the competent EU customs authority for transport by road is one hour before the crossing of the border (Art. 108 UCC-DA). The same time-limit applies for pre-departure declarations (Art. 244(1)(c) UCC-DA).

A waiver would require either the inclusion of traffic between the RoI and NI in Arts 108 and 244 UCC-DA or an international agreement with the EU (as with Switzerland[121]).

Failure to adopt facilitations in this matter would have a significant negative effect on businesses on both sides of the border, in particular where just-in-time or delivery on short notice is involved.

Recommendation 8

The UK may wish to consider granting waivers or at least reductions of time-limits in respect of entry summary declarations and pre-departure declarations, at least for low-risk products crossing the border.

6.6 Application for authorisations

6.6.1 Customs authorisations and other decisions

On Exit Day, enterprises established in NI may continue to use their customs authorisations in the UK provided these were granted by HMRC.[122] However, as a rule, customs authorisations granted by UK customs authorities will no longer be valid in the EU27 as of Exit Day.[123] Similarly, the UK Guidance warns:

> If you're named on an authorisation issued by another EU customs authority to place goods into a customs special procedure in the UK, you will not be able to receive goods in the UK under that authorisation after the UK leaves the EU. For example, to import goods for processing from the EU whilst duty is suspended or relieved, you'll need a separate authorisation from HMRC.[124]

This means that, where the other jurisdiction issued an authorisation for, e.g. AEO status or a special procedure,[125] or where the other jurisdiction issued a decision on the basis of the customs legislation,

[120] Cf. Art. 18(2) and Art. 170(3)(c) UCC.
[121] OJ 2009 No L 199, p. 24.
[122] See HMRC, Guidance: Changes to your customs authorisations if the UK leaves the EU without a deal, 6 March 2019, https://www.gov.uk/guidance/changes-to-your-customs-authorisations-if-the-uk-leaves-the-eu-without-a-deal.
[123] European Commission, Guidance Note: Withdrawal of the United Kingdom and Customs Related Matters in Case of No Deal, 11 March 2019, p. 3.
[124] HMRC, Guidance: Changes to your customs authorisations, footnote 128.
[125] For further details see HMRC, Guidance: Changes to your customs authorisations, footnote 128.

e.g. binding tariff or origin information,[126] these will cease to be valid. A new authorisation or decision must be applied for and obtained in good time.

SMEs only involved in trade between NI and the RoI have not needed customs authorisations, registrations, etc. To prepare for a no-deal Brexit they will need to register as an economic operator, apply for authorisations, in particular for simplified declarations or entry in the declarant's records, deferred payment, comprehensive guarantees, possibly with a reduced amount, transit facilitations (authorised consignee and/or consignor), inward and/or outward processing, temporary storage and/or customs warehousing facilities.

Recommendation 9

SMEs so far not involved in trade with third countries should be made aware of the registrations they need to make and the authorisations they need to apply for. Companies established in NI holding authorisations or other decisions issued by the RoI should apply for such authorisation decisions from HMRC.

6.6.2 Certification of Conformity

The issue of conformity assessments and certifications is far too complex and broad a subject to be dealt with in detail in this study. An analysis of the wide variety of sectors, products and complex rules is far beyond the scope of this study.

On Exit Day UK economic operators will need to ensure that their conformity certificates are valid under EU law when exporting to the Union. This will not be the case where, for example, a Notified Body is involved in the certification of the UK-based enterprise and the Notified Body which performed the conformity assessment is located in the UK. This affects, for example accredited certification and control bodies pursuant to Regulation 1151/2012.[127] There have been numerous guidance documents published both by the UK government and the European Commission addressing specific areas and matters. The following is a sample of the guidance documents on the Commission's website: Medicinal Products for Human and Veterinary Use, Plant Protection Products, Biocidal Products, Animal Feed, Genetically Modified Organisms, Plant Reproductive Material, Movements of Live Animals, Slaughterhouse Operators and Animal Transport. In addition, products falling within the scope of REACH and authorisations for trade in protected species, ecolabels, fertilizers, and intellectual property rights, including the protection of food and drink names, are also affected.

Failure to comply with these requirements will result in delays at customs or rejection of the goods. Non-compliance may be subject to civil and/or criminal penalties.

The issues facing importers established in NI when importing products from the EU, including the RoI, are similar where the authorisation or attestation was issued by an EU27 Notified Body. The administrative effort on the part of the UK authorities or UK authorised bodies to (re-) issue the certificates, licences, etc. will be significant and likely result in delays. However, the UK has transitional measures in place for at least some products. For example, according to the UK Guidance document on UKCA markings

> If the UK leaves the EU without a deal you will still, in the majority of cases, be able to use the CE marking to demonstrate compliance with the legal requirements and to sell products on the UK

[126] These are expressly mentioned in European Commission, Guidance Note: Withdrawal, footnote 129.

[127] Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ 2012 No L343, p. 1.

market after 31 October 2019. This is intended to be for a time-limited period. However, in some cases, […] you will need to apply the new UKCA marking to products being sold in the UK.[128]

This policy should be extended to as many products as possible and the transition period geared to the actual time it will take to process all the applications.

Recommendation 10

Transitional measures ensuring the validity of conformity assessments and certifications are unilateral measures which the UK can take even if the EU does not.

It can be expected that traders will find the rules and procedures to be extremely complex and confusing. The administrative effort on the part of the UK authorities or UK authorised bodies to issue the certificates, licences, etc. will be significant and likely result in delays. To the extent possible a transitional period during which such licences, certificates, etc. issued by an EU27 Member State or authorised body should continue to be recognised in order to avoid disruption to trade and business. The transition period should be geared toward the actual amount of time it will take to process the applications.

6.6.3 Simplified General Checklist for Economic Operators

The following simplified general checklist for enterprises engaging in cross-border trade is intended to provide a better understanding of what economic operators will be facing.

- Ensure that the product is in conformity with the essential requirements.
- Where harmonised standards have not been used, ensure that the alternative technical solution satisfies the essential requirements and had this verified by an appropriate body where necessary.
- Where certification by a Notified Body is required, ensure that such a certification by a competent EU27 Notified Body has been carried out and the attestation has been provided.
- Ensure that the pertinent EU declaration or attestation of conformity accompanies the consignment.
- Ensure that the technical dossiers, risk assessments, etc. have been drawn up and provided to the EU customer.
- Ensure that all applicable labelling requirements have been satisfied.
- Ensure that the relevant EU conformity marking (e.g. the CE marking) has been duly affixed to the product where this is required.

6.6.4 Import / Export Licences

Most goods may be exported from or imported into the EU without a licence. However, for certain products a licence (i.e. authorisation/approval/notification) is required for shipments from a third country to the EU or exports from the EU. These include, e.g. certain waste materials, hazardous chemicals and drug precursors.[129] The range of products and fields covered are very diverse and the licensing obligations are set out in individual Regulations.[130] As of Exit Day the Union's licencing requirements for imports/exports to or from third countries will also apply to the UK. In addition, export

[128] Department for Business, Energy & Industrial Strategy, Guidance: Using the UKCA marking if the UK leaves the EU without a deal, 2 February 2019.

[129] See European Commission, Guidance: EU Rules in the Field of Import/Export Licences for Certain Goods, 25 January 2018 for an indicative list.

[130] For an overview of some of the products covered and EU legislation see European Commission, Notice to Stakeholders: EU Rules in the Field of Import/Export Licences for certain Goods, 25 January 2018, https://ec.europa.eu/info/sites/info/files/file_import/import_and_export_licences_en.pdf.

control legislation, e.g. the Dual Use Regulation, will apply to transactions between the EU27 and the UK.[131]

Import / export licences are mandatory authorisations/approvals/notifications of shipments from a third country to the EU or from the EU to a third country. Consequently, traders will need to verify whether the goods they are shipping to the EU27 are subject to an import licence and, if so, obtain an authorisation from the competent Member State authority.

Import/export licences issued by the UK as a Member State on the basis of Union law will no longer be valid for shipments to the EU-27 from third countries or vice versa. Traders in the EU holding an import or export licence issued by a UK authority on the basis of Union law will therefore have to obtain a new licence from an EU27 authority.

It can be assumed that the situation in the UK will mirror that of the EU.

6.6.5 Driving Licences for Road Haulage

The EU has adopted Regulation 2019/501[132] to ensure basic road freight and road passenger connectivity after the UK withdraws from the EU. In respect of the carriage of goods, the scope is too narrow to make any meaningful contribution to keeping the land border between the RoI and NI open.[133] Both the EU and the UK have issued several Guidance documents relating to road haulage. According to the UK Guidance document a Community Licence may be used for journeys to and from Ireland, journeys through Ireland to other EU or EEA countries, or journeys through Ireland between Great Britain and Northern Ireland.[134]

The professional qualifications of drivers issued by UK authorities will not be valid in the EU27 on Exit Day. The driver attestation may have to be issued by an EU27 authority. Certificates of professional competence issued by the UK or by an approved training centre in the UK will no longer be valid in the EU27.[135]

Furthermore, access to the EU market is jeopardised:[136]

- undertakings engaged in the occupation of road transport operator in the Union must have an effective and stable establishment in an EU Member State (Art. 3(1)(a) Regulation 1071/2009);
- an undertaking which engages in the occupation of road transport operator shall designate a transport manager who, in turn, must be resident in the EU;
- the international carriage of goods in the Union is subject to possession of a Community licence issued by the competent authority of the Member State in which the haulier is established and in

[131] Both the EU and the UK have adopted unilateral measures in respect of dual-use items. This is not, however, of direct relevance to this study.

[132] Regulation (EU) 2019/501 of the European Parliament and of the Council of 25 March 2019 on common rules ensuring basic road freight and road passenger connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union, OJ 2019 No LI 85, p. 39.

[133] See Art. 3(2)(e) Regulation 2019/501.

[134] Department for Transport, Driver and Vehicle Licensing Agency, Traffic Commissioners for Great Britain, and Driver and Vehicle Standards Agency, Guidance: Prepare to drive in the EU after Brexit: lorry and goods vehicle drivers, last updated 21 March 2019.

[135] European Commission, Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Road Transport, 19 January 2018, p. 2.

[136] European Commission, Notice to Stakeholders, Road Transport, footnote 143, p. 3.

which it is entitled to carry out the international carriage of goods. Otherwise the international Transport Forum applies, but then cabotage is prohibited.

Most EU27 Member States will require that commercial trailers weighing over 750 kg and non-commercial trailers weighing over 3,500 kg be registered before towing them to or through their territory.[137]

The effect that this will have on the logistics industry and businesses reliant on cross-border trade between NI and the RoI would be dramatic. It should be recalled that there are an estimated 25,000 heavy goods vehicle (HGV) border crossings per day between NI and the RoI at 42 main crossings points.[138]

EU hauliers will continue to be able to move goods in the UK as they do now. This includes journeys to and from the UK, through the UK and cabotage within the UK. EU hauliers' Community Licences and CPC documents will be recognised. EU hauliers will not require ECMT permits to operate in the UK.[139]

6.7 VAT and Excise Duty

The UK has announced facilitations for VAT and excise duty in its Guidance documents "VAT for businesses if there's no Brexit deal" and "Moving and declaring excise goods if the UK leaves the EU without a deal".

The UK's Low Value Consignment Relief programme, under which all goods entering the UK as parcels sent by businesses abroad will be liable for VAT which will be collected from the business selling the goods into the UK, unless

- the goods are relieved from VAT under UK law or
- the value of the consignment does not exceed £ 135

may have a negative effect on RoI or RoW businesses.[140] In particular, these businesses will have to register with an HMRC digital service and account for VAT due.[141] Micro-enterprises and SMEs located in the RoI may find registration and the bureaucracy intimidating and difficult to manage; using a third-party service provider will then be the only a feasible option for them.

Article 143(1)(e) VAT Directive provides for an exemption from VAT of the re-importation, by the person who exported them, of goods in the state in which they were exported, where those goods are exempt from customs duties.

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[137] Cf. Department for Transport, Driver and Vehicle Licensing Agency, Traffic Commissioners for Great Britain, and Driver and Vehicle Standards Agency, Guidance: Prepare to drive in the EU after Brexit: lorry and goods vehicle drivers, last updated 21 March 2019.

[138] Atkins Technical Note, footnote 8. See also section 3.1 above

[139] Department for Transport, Driver and Vehicle Licensing Agency, Traffic Commissioners for Great Britain, and Driver and Vehicle Standards Agency, Guidance: Prepare to drive in the EU after Brexit: lorry and goods vehicle drivers, last updated 21 March 2019.

[140] HMRC, Guidance: VAT for businesses if there's no Brexit deal, 23 August 2018, available at https://www.gov.uk/government/publications/vat-for-businesses-if-theres-no-brexit-deal/vat-for-businesses-if-theres-no-brexit-deal.

[141] HMRC, Guidance: VAT, footnote 148.

The primary issue which arises under Art. 143(1)(e) VAT Directive is providing proof of the identity of the product being re-imported where the good was dispatched to the other territory prior to Exit Day and re-enters after Exit Day.

7. SIMPLIFICATIONS AVAILABLE FOR ECONOMIC OPERATORS

7.1 Overview of the Standard Process and Possible Facilitations

The following depicts in simplified form the normal sequence of events under EU customs law for goods entering into the EU customs territory through a land border:[142]

- One hour before the lorry crosses the border an entry summary declaration must be lodged by the carrier;[143] the customs authority performs a risk analysis within this hour.[144]
- Once the goods have arrived in the EU customs territory, they need to be brought to the competent import customs office.[145]
- On arrival at the competent customs office, the goods need to be presented to customs,[146] i.e. their arrival and availability for customs controls needs to be notified.[147]
- At the latest upon arrival at the competent customs office, a temporary storage declaration must be lodged.[148]
- The goods can then be stored in a temporary storage facility for up to 90 days.[149]
- Subsequently, the goods are declared for a customs procedure (e.g. release for free circulation or inward processing) or are re-exported under a corresponding declaration or notification.

Where live animals or products of animal origin such as milk or milk products, fresh meat, etc. are brought into the territory of the Union they must enter via a BIP where veterinary checks are performed.

For each of these steps (excluding live animals and products of animal origin) simplifications can be envisioned:

1. The requirement of a pre-arrival declaration could be waived in the context of North-South trade, either in an agreement between the EU and the UK (as currently with Switzerland) or autonomously in Art. 104 UCC-DA (as currently towards Ceuta and Mellila, Gibraltar, Heligoland, San Marino, and the Vatican City State).
2. Other places than the competent import customs office can be designated or approved to which the goods need to be brought (e.g. the premises of a specific trader or a specific logistics centre at which customs officials are available); alternatively, a free zone could be established directly at the border.[150]
3. Instead of requesting a presentation notification, access by the customs authority to a commercial system (e.g. of a logistics centre or free zone) may be accepted.[151]
4. The customs authority may accept a customs declaration as also fulfilling the function of a temporary storage declaration.[152]
5. For the customs declaration the following facilitations are available:

[142] For goods entering by sea or air, additional reporting requirements exist, and certain time-limits are longer.
[143] Art. 127 UCC, Art. 108 UCC-DA.
[144] Art. 128 UCC, Arts 186, 187 UCC-IA.
[145] Art. 135 UCC.
[146] Art. 139 UCC.
[147] Art. 5 No. 33 UCC.
[148] Art. 145 UCC.
[149] Arts 148, 149 UCC.
[150] Art. 135(2) UCC. See also section 5.1 on free zones and section 5.2 on integrated logistics centres.
[151] Art. 190 UCC-IA.
[152] Art. 192 UCC-IA.

- simplified declarations followed by a periodic (monthly) full declaration of all goods imported,[153]
- simplified or full declarations made by entry in the declarant's records followed by a periodic (monthly) full declaration to the customs authority of all goods imported;[154] for holders of an authorisation for entry in the declarant's records, the requirement of a presentation notification may be waived;
- self-assessment which still requires monthly declarations and payments of customs duties,[155]
- for specific cases the possibility of a declaration made by passing the border exists, but these are very limited with regard to commercial goods;[156] the further possibility of an oral declaration[157] is not practical in the Irish context.

For North-South trade the following will be particularly relevant: a waiver from the entry summary declaration, the designation or approval of other places for the presentation of goods, the acceptance of customs declarations instead of temporary storage declarations, customs declarations in the form of an entry in the declarant's records or self-assessment.

The following depicts in simplified form the normal sequence of events under EU customs law for goods leaving the EU customs territory through a land border:[158]

1. An export (or in the case of non-Union goods, e.g. NI goods which remained in the EU under duty suspension, a re-export) declaration must be lodged with the customs office of export[159] at the latest one hour before the lorry crosses the border.[160] This is also the customs office to which the goods must be presented.
2. After a potential control of the declaration and/or the goods, the customs office of export releases the goods which can then be moved to the customs office of exit.[161]
3. The goods must be presented (again) at the customs office of exit.[162]
4. The customs office of exit, possibly after a control, releases the goods for exit.[163]
5. When the goods have left the EU customs territory, the customs office of exit informs the customs office of export which in turn certifies the exit to the exporter.[164]

The simplifications on export are limited:

- Instead of having to bring the goods to the customs office of export, the exporter can be authorised to declare their availability for controls at another approved or designated place (e.g. the exporter's premises or a logistics centre).

[153] Arts 166, 167 UCC.
[154] Arts 167, 182 UCC.
[155] Art. 185 UCC, Art. 237 UCC-IA.
[156] Arts 138, 139, 141, 142 UCC-DA.
[157] Arts 135, 136, 142 UCC-DA.
[158] For goods entering by sea or air, additional reporting requirements exist, and certain time-limits are longer.
[159] This is normally the customs office competent for the place where the exporter is established, Art. 221(2) UCC-IA.
[160] Art. 244(1) UCC.
[161] This is the customs office responsible for the border crossing, Art. 329 UCC-IA.
[162] Art. 331 UCC-IA.
[163] Arts 332, 233 UCC-IA.
[164] Art. 334 UCC-IA.

- Export declarations made by entry in the declarant's records can be authorised only in a limited number of cases, in particular when the customs office of export is also the customs office of exit and the requirement of a pre-departure declaration is waived.[165]
- The cases in which passing the border is deemed to be an export or a re-export declaration are very limited.[166]
- The customs offices of export and exit can be the same[167] in which case only one presentation to customs is necessary and the exchange of data between two customs offices and the entailing delay until the exit is certified to the exporter can be avoided.

For South-North trade authorising or approving other places than the customs office of export for any controls, allowing entry in the declarant's records, insofar as it is possible, and taking measures ensuring that the customs offices of export and exit are the same are of particular importance.

Where facilitations are available but potentially restricted is there provision/precedent for stretching these (for example, to allow agri-food products generally to be included)?

The best which can be achieved is that agri-food products are included in generally available facilitations. Where BIP requirements exist or where inspections by official veterinarians are required, such requirements can be waived only where EU law provides for this. Where the import concerns e.g. milk for further processing in the EU before being used for human consumption, the required documents must be signed by an official veterinarian.[168] Furthermore, health certificates, etc. will be required by Union customs authorities upon import.

The UK is free to establish its own rules, so it can authorise the self-assessment of certain or all sensitive goods and products dispatched from the RoI or originating in the RoI and establish the conditions under which this is permissible.

How long would these take to implement typically?

Granting authorisations for entry in the declarant's records typically takes several months because the reliability and financial standing of the trader needs to be established, as this simplification is combined with deferred duty payment and a comprehensive guarantee which may be reduced under certain conditions. If a presentation waiver is applied for under an authorisation for entry in the declarant's records, the applicant needs to be AEOC.

Applications for a temporary storage facility, a customs warehouse, inward or outward processing also typically take several months. They are normally also combined with an application for a comprehensive guarantee (which may be reduced under certain conditions) and facilitations with regard to customs declarations.

As a rule, where the applicant is an AEOC the amount of time it takes for granting another authorisation is reduced insofar as certain criteria are deemed to be fulfilled. Where the authorisation includes

[165] Art. 150(4) UCC-DA.
[166] Arts 19, 140, 141, 142 UCC-DA.
[167] Art. 221(2) UCC-IA.
[168] See for example the model health certificates in Annex II to Regulation 605/2010.

additional criteria, e.g. a control plan or the rate of yield, the time it takes for the applicant to adequately prepare the application and for the customs authority to evaluate and grant the application will increase in proportion to the number of additional criteria, their complexity and the standard applicable to the examination of the criteria.

On the NI side authorisations may be able to be granted more quickly where the UK reduces the legal standards and/or administrative rules. However, it can also be anticipated that the customs authorities will be facing significant challenges in processing both new claims as well as re-issuing authorisations granted by an EU27 Member State authority. This indicates that, in the period immediately following Exit Day, significant delays in the issuance of authorisations should be anticipated. For this reason, such applications should be lodged and processed beforehand on both sides of the border.

If possible, where these facilitations are being used for EU-RoW trade currently, the typical trade using them, how successfully they are being used and the impact on the local economy?

Simplified declarations and entry in the declarant's records are widely used by companies importing larger volumes from third countries. Where agents are used, typically standard declarations are made because the duty amount is immediately known and can be charged to the client. The impact of customs procedures is positive on customs agents and other service providers (IT, consultants) who will have additional business after Exit Day (though there will be a lack of knowledgeable staff). For traders these procedures create additional costs and risks, e.g. when the tariff classification is challenged by the customs authority in post-clearance audits and additional duty amounts will be collected and/or sanctions will be applied.

7.2 Guarantees

Guarantees[169] are normally required both for customs debts which have been incurred (i.e. for deferred payment) and for those which may be incurred. The latter is notably the case where a suspension procedure other than free zone or temporary storage is used.

A reduction or waiver of a comprehensive guarantee for customs debts and other charges may be authorised where the applicant fulfils certain AEOC criteria.[170] Thus, although the applicant does not need to actually hold an AEOC authorisation, if he does, these criteria are deemed to be satisfied without requiring further proof.

Article 84 UCC-DA in conjunction with Art. 158(1) UCC-IA govern the reduction or waiver of guarantees provided pursuant to Art. 95(2) UCC. The reductions may reduce the reference amount by 50%, 70% or 100% (waiver). However, the holder of a waiver must nevertheless supervise the reference amount.

[169] This section discusses guarantees within the context of the UCC only. On guarantees specific to licences for imports or exports in the agri-food sector see Commission Delegated Regulation (EU) 2016/1237 of 18 May 2016 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council with regard to the rules for applying the system of import and export licences and supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the rules on the release and forfeit of securities lodged for such licences, OJ 2016 No L 206, p. 1.

[170] Art. 95(2) UCC.

Comprehensive guarantees may be reduced by 70% of the reference amount[171] for customs debts and other charges which have already been incurred, i.e. in the case of deferred payment pursuant Art. 110 UCC,[172] but only where the applicant is an AEOC.

The guarantee is monitored by the customs authorities.[173] Where the guarantee is no longer sufficient, the customs authorities may demand an appropriate additional guarantee.[174]

According to its Guidance document, the UK does not initially intend to require guarantees for special procedures in a no-deal scenario except where the applicant for that procedure had overdue tax returns or has not paid tax or duties.[175] The UK does, however, intend to re-introduce guarantees at a later stage. In that case the UK may, of course, impose less strict rules in a no-deal scenario.

Evaluation

Large companies will be able to take advantage of reduced comprehensive guarantees or guarantee waivers. It is questionable whether the reduction of guarantees will be a feasible option for small SMEs or SMEs which are unfamiliar with customs operations since they may not have the administrative or organisational capacity to satisfy the criteria or properly prepare the applications. Micro-enterprises will likely not be able to use this facilitation.

Although the UK will not initially require guarantees for special procedures in a no-deal scenario barring exceptional circumstances, it does intend to re-introduce them at a later stage. Unless the UK or NI is obliged to align itself with Union rules, it will be free to impose less strict rules.

7.3 Simplified Declarations

Simplified declarations[176] allow customs declarations to be lodged which omit some of the particulars required in the standard customs declaration as well as certain supporting documents.[177] However, pursuant to Art. 166(2) UCC the regular use of a simplified declaration is subject to authorisation by the customs authorities. The criteria which must be fulfilled for the grant of this authorisation are laid down in Art. 145 UCC-DA. Article 145(1)(b) and (d) UCC-DA are of particular relevance for this study:

> (b) where applicable, the applicant has satisfactory procedures in place for the handling of licences and authorisations granted in accordance with commercial policy measures or relating to trade in agricultural products;
>
> (d) where applicable, the applicant has satisfactory procedures in place for the handling of import and export licences connected to prohibitions and restrictions, including measures to distinguish goods subject to the prohibitions or restrictions from other goods and to ensure compliance with those prohibitions and restrictions.

AEOCs are deemed to fulfil these conditions in so far as their records are appropriate for the purposes of the placement of goods under a customs procedure on the basis of a simplified declaration,[178] i.e. taking

[171] The reference amount is the amount for which the comprehensive guarantee would have been otherwise set.
[172] Cf. Art. 158(2) UCC-IA.
[173] Art. 89(6) UCC. On the monitoring itself see Art. 157 UCC-IA.
[174] Art. 97 UCC.
[175] HMRC, Guidance: Changes to your customs authorisations, footnote 128.
[176] Art. 5 No 12 UCC.
[177] Cf. Art. 166(1) UCC
[178] Art. 145(2) UCC-DA.

this proviso into account, AEOCs automatically qualify for the authorisation to regularly use simplified customs declarations.

The scope of the goods covered by the acceptance or authorisation may be restricted where additional documentation is necessary, e.g. for the enforcement of prohibitions or restrictions or in the case of import or export licences.[179] In the case of products subject to inspections and checks, they must be carried out by an official veterinarian at a BIP. Where a simplified declaration was used, generally[180] a supplementary declaration must be lodged at a later time within the prescribed time-limit[181] in order to provide the customs authorities with all the prescribed particulars; the necessary documents must be in the declarant's possession and, in the event of an inspection, be put at the disposal of the customs authorities.[182]

Article 225 UCC-IA provides an additional facilitation: the declarant may make the supplementary declarations available through direct electronic access to the authorisation holder's IT system where:

- it is a periodic supplementary declaration to entry in the declarant's records; and
- the economic operator is authorised under self-assessment to calculate the amount of import and export duty payable.

In practice, making the information directly accessible to the customs authorities *via* direct electronic access is necessary because this is the only way that the data can be accessed by the customs authorities' IT system and electronically examined.[183]

Evaluation

The non-regular use of simplified customs declarations will benefit small SMEs. It may also benefit some micro-enterprises.

Where regular use of simplified customs declarations is desired, the economic operator must apply for authorisation. Due to practical considerations, e.g. the IT infrastructure necessary and the organisational and administrative structures and resources involved, it is likely that this simplification will mostly benefit large companies, though SMEs of a certain size may also benefit.

7.4 Entry in the Declarant's Records

Entry in the declarant's records is a form of customs declaration. The customs authorities may authorise a person to lodge a customs declaration, including a simplified declaration, in the form of an entry in the declarant's records.[184]

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[179] In this way see Henke in Witte, UZK Kommentar, 7th ed., Art. 166, paras. 8, 11.

[180] There are certain exceptions to the requirement that a supplementary declaration must be lodged, e.g. where the goods were placed under a customs warehouse procedure (Art. 167(2)(a) UCC) or do not exceed the *de minimis* threshold (Art. 167(3) UCC-DA – this is currently EUR 1,000).

[181] Pursuant to Art. 146(1), (3) UCC-DA this is either either within 10 days after the release of the goods or, at the latest, 10 days after the expiry of the month. Art. 146(2) UCC-DA restricts the time period which a supplementary declaration covers to one month where a customs debt is incurred as a result of the acceptance of the customs declaration of goods for a customs procedure (Art. 105(1) UCC).

[182] Art. 167(1) UCC.

[183] See also Lux, UCC – Text edition and introduction, Mendel Verlag, 2018.

[184] Art. 182(1) UCC.

The authorisation may only be granted where the particulars of that declaration are at the disposal of the customs authorities in the declarant's electronic system at the time when the customs declaration in the form of an entry in the declarant's records is lodged.[185] A control plan must be set up concurrently with the authorisation.[186]

The declarant must lodge a supplementary declaration within the prescribed period.

The applicant may also be authorised to notify the presentation of the goods to customs though they are located at his premises which are then 'another place approved by the customs authorities' in the sense of Art. 5 No 33 UCC. Where this is granted the declarant may himself release the goods for free circulation after they have arrived at his business premises and been entered into his records. [187] This is the primary benefit of this simplification.

Entry in the declarant's records is subject to certain conditions and restrictions.[188] Entry in the declarant's records can be used for export and re-export only in exceptional cases.

The use of entry in the declarant's records can be combined with the option of a waiver from the obligation to present the goods: first, the applicant must be an AEOC. Article 150(3) – (6) UCC-DA sets out additional restrictions.

In those cases where the goods are subject to prohibitions or restrictions, additional limitations may apply because the goods may not be released for free circulation until all restrictions have been applied and the goods are not subject to any prohibition.[189] This may be dealt with by laying down stipulations and conditions in the authorisation(s) or by exempting certain goods from the scope of the authorisation, i.e. requesting that the goods be presented.[190] Certain sensitive goods and products must be inspected and checked at a BIP.

Where the authorisation to lodge a customs declaration in the form of an entry in the declarant's records lays down a time-limit for informing the holder of that authorisation of any controls to be performed, the goods shall be deemed to have been released at the expiry of that time-limit, unless the supervising customs office has indicated within that time-limit its intention to perform a control; where the authorisation does not lay down such a time-limit, the supervising customs office shall release the goods in accordance with Art. 194 UCC.[191]

Information must be kept available for any controls by the customs authorities.[192] Furthermore, the competent authorities must be informed of the goods released under the authorised procedure(s) during the time period(s) laid down by way of a supplementary declaration in accordance with Art. 167(1) UCC.

The regular use of simplified declarations and entry in the declarant's records on importation are normally combined with deferred payment, so that duties need to be paid only on a monthly basis.

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[185] Art. 182(1) UCC.
[186] Art. 233 UCC-IA.
[187] Art. 235 UCC-IA.
[188] Art. 150(2) UCC-DA.
[189] Art. 194(1) UCC.
[190] Cf. Art. 182(3), (4) UCC.
[191] Art. 235 UCC-IA.
[192] Art. 234 UCC-IA.

Evaluation

Where the goods are subject to prohibitions or restrictions, the use of entry in the declarant's records is restricted. Certain sensitive goods and products must be inspected and checked at a BIP. This simplification is appropriate for large companies and SMEs which have a sufficient organisational, administrative and IT capacity. The application requires some preparation, especially in respect of the control plan.

7.5 Self-Assessment

Self-assessment allows economic operator to:

- carry out certain customs formalities which are to be carried out by the customs authorities;
- determine the amount of import and export duty payable; and
- perform certain controls under customs supervision.[193]

With regard to customs duties, in contrast to entry in the declarant's records the authorisation holder calculates the customs duties himself, meaning that he has to have an up-to-date copy of the Irish electronic customs tariff.

The authorisation to perform controls is exceptional in nature: the authorisation is usually rejected due to a prohibition or restriction.[194] In respect of the self-assessment of prohibitions and restrictions, Art. 152 UCC-DA prescribes that the authorisation will specify the controls that the holder of the authorisation, under customs supervision, must carry out to ensure compliance with said prohibitions and restrictions. In the case of sensitive goods and products inspections and checks must be carried out by an official veterinarian at a BIP. In practice this will effectively preclude the use of self-assessment for these products.

Self-assessment must be authorised and is available exclusively to AEOCs.[195] A self-assessment authorisation does not affect the obligation to lodge an entry summary or a pre-departure declaration within the stipulated time-limits.

Evaluation

Self-assessment is available only to AEOCs. It can therefore be anticipated that micro-enterprises and small SMEs will not be able to use this simplification for this reason alone. It is also doubtful whether they will be in a position to correctly determine the customs value and the duties of the consignment.

An authorisation for self-assessment may also grant the self-assessment of prohibitions and restrictions. In this case, the controls that the holder of the authorisation must carry out to ensure compliance with said prohibitions and restrictions will be set out in the authorisation and are done under customs supervision. Where there is a legal basis, this can avoid sensitive goods and products having to be inspected and checked at a BIP.

7.6 Deferred Payment

Deferred payment is an authorisation which allows 'the person concerned' to defer duties payable,[196] i.e. import duties. The 'person concerned' may be a third party, i.e. a person other than the customs debtor,

[193] Cf. Art. 185(1) UCC.
[194] In this way Henke in Witte, UZK Kommentar, footnote 188, Art. 185, para. 4.
[195] Cf. Art. 185(1) and (2) UCC.
[196] Cf. Art. 110 UCC.

e.g. a freight forwarder or customs representative. This facilitation is normally combined with simplified declarations, entry in the declarant's records and/or self-assessment.

The authorisation is conditional on a guarantee (see section 7.2 above) being provided.

Import VAT can be deferred where this is foreseen by national law. Excise duties may also be deferred.[197]

The debtor may authorise the customs authority to draw from his or her service provider's account to ensure timely payment of the amounts owed. Otherwise, the debtor will have to take internal measures to ensure timely payment of all amounts due.

According to the UK's Land Border Policy, "small businesses trading across the border, not currently VAT registered, would be able to report VAT online periodically, without any new processes at the border". The UCC prescribes that the goods cannot be released for free circulation until the 'other charges' – these include import VAT and excise duty – have been collected or deferred.[198] Article 111 UCC lays down the periods for which payment is deferred. The period is usually for 30 days.

Evaluation

Deferred payment must be authorised and is contingent on the provision of a guarantee. The rules governing the provision and reduction of guarantees described in section 7.2 above apply.

Deferred payment can benefit all economic operators, though micro-enterprises and small SMEs may encounter difficulties in respect of obtaining a reduction of the comprehensive guarantee amount.

7.7 Common Transit, Authorised Consignor/Consignee

For transit the rules of the Common Transit Convention[199] allow a number of facilitations, such as starting the transit movement at the premises of an authorised consignor and ending it at the premises of an authorised consignee in another customs territory. In this case, the consignment does not need to be presented at the customs office of departure or the customs office of destination, thus greatly facilitating the flow of goods. This is without prejudice to obligations on the basis of other legislation, e.g. the obligation to present sensitive goods and products at a BIP. In addition, customs formalities apply, e.g. customs declarations must be lodged or seals must be used, though the authorised consignor may affix his own seals (Art. 81 of Annex 1 of the Convention).

The use of the procedure is subject to a guarantee for import duties and taxes. A comprehensive guarantee may be reduced or waived under the same rules as under the UCC (Art. 75 of Annex 1 of the Convention).

This procedure will be available because the UK is a contracting party to the Convention.[200]

The main differences in comparison to the current situation are that:

- Union goods moving within the EU do not need to be placed under a transit procedure;

[197] This is also the case under German national law, though a guarantee must be provided.
[198] Art. 201(2)(b) UCC.
[199] OJ 1987 No L 226, p. 2. Latest consolidated version under https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:01987A0813(01)-20171205.
[200] See https://ec.europa.eu/taxation_customs/sites/taxation/files/04-02-2019-convention-common-transit-procedure_en.pdf

- as an alternative to transit, holders of an authorisation for temporary storage, customs warehousing, inward processing, and temporary admission can be authorised to move non-Union goods, but only within the respective customs territory;
- a border crossing notification is not necessary when the border of an EU Member State is crossed.

The Convention can also be used for moving Union goods (e.g. from the Netherlands) through the UK and NI to the RoI. However, this creates additional burdens (use of customs declarations, seals and guarantees). Consequently, establishing direct regular shipping services between REU and the RoI ports is economically more efficient[201] because, unlike using the UK as a land bridge, direct regular shipping services avoid the use of a transit procedure for the movement of Union goods between EU Member States.

Evaluation

Common transit and the facilitations available thereunder will become an important customs procedure for trade between NI and the RoI (for which it is currently not necessary insofar as Union goods are moved on the island). Due to the conditions for granting the status of authorised consignor or consignee and the requirement that guarantees be provided, this facilitation will likely only be available in practice to large companies and larger SMEs. A service provider (e.g. logistic company) can, however, use the common transit procedure on behalf of SMEs.

[201] See Arts 120-122a UCC-DA.

8. INWARD AND OUTWARD PROCESSING OF MILK AND MILK PRODUCTS

8.1 Overview

Special attention needs to be given to inward and outward processing of sensitive goods and products. It is assumed that the UK's laws and regulations will mirror those of the EU.

For the purposes of this section, sensitive goods and products refer to agricultural products such as live animals, fresh products such as fresh produce and fresh meat and products of animal origin, e.g. milk products.[202] In turn, these can be classified as products intended for human consumption and animal by-products. This study focusses on the former.

Products intended for human consumption can most easily be understood by contrasting them with animal by-products. Animal by-products are products which humans do not eat. Examples of the latter include animal feed (e.g. based on fishmeal and processed animal protein), organic fertilisers and soil improvers (e.g. manure or guano) and technical products (e.g. pet food, hides and skins for leather, wool, blood for producing diagnostic tools).[203]

Sensitive goods and products intended for human consumption can be broken down into

- aquaculture products,
- fresh meat,
- game meat,
- meat products,
- milk and milk products,
- poultry meat and
- other products of animal origin.[204]

'Other products of animal origin' are defined as all those products for human consumption where harmonised EU rules for importation and trade that have not been laid down elsewhere.[205] They include *inter alia*:

- eggs
- honey and royal jelly
- blood and blood products
- bone
- animal casing
- lard and rendered fat and
- gelatine.[206]

In respect of 'milk and milk products intended for human consumption', these include:

- raw milk,

[202] On sensitive goods and products see also Appendix 1. Other sensitive goods and products include, for example, certain types of alcohol and unmanufactured tobacco falling classified under CN ex 2401.
[203] European Commission, https://ec.europa.eu/food/safety/animal-by-products_en.
[204] See European Commission, https://ec.europa.eu/food/animals/animalproducts_en.
[205] European Commission, https://ec.europa.eu/food/animals/animalproducts/other_en.
[206] European Commission, https://ec.europa.eu/food/animals/animalproducts/other_en.

- dairy products,
- colostrum and
- colostrum-based products.

Sensitive goods and products intended for human consumption may be processed in another customs territory, e.g. raw milk wholly obtained in NI is transported to an undertaking in the RoI to be turned into yoghurt or undergo high temperature treatment.[207] Where a third country is involved, as will be the case between NI and the RoI on Exit Day, this production operation is, in order to save duties in both customs territories, usually done by way of the outward / inward processing procedures.

Once the required authorisations have been granted,[208] the process begins by placing the goods under the outward processing procedure (e.g. in NI).[209] When the goods arrive in the other customs territory (e.g. the RoI), they are placed under the inward processing procedure for processing under duty and tax suspension.[210] Subsequently, the processed products are re-exported to the other customs territory (here: NI).[211] On re-importation (here: in NI) the duties need only be paid on the value added through the processing.[212]

Equivalent (in the RoI: Union, in NI: UK) goods may be used in the processing provided their use has been authorised.[213] The exporter and the re-importer may be different persons.[214] This means, for example, that an enterprise in NI may ship a consignment of raw milk to a facility in the RoI for processing under the outward processing procedure and a different enterprise in NI may re-import the processed milk into NI while still being able to benefit from the duty advantage under outward processing, meaning that the import duty can be calculated only on the basis of the value added abroad rather than on the full value of the processed product.

The customs authority must set the rate of yield where this has not been specified in agricultural Union legislation.[215] The 'rate of yield' is the quantity or percentage of processed products obtained from the processing of a given quantity of goods placed under a processing procedure.[216]

The applicant must state the rate of yield in the application for the inward processing procedure (expected rate of yield). The method for calculating the expected rate of yield must also be provided in the application and will be verified by the customs authority in an initial visit to the applicant's premises. If the rate of yield is not known at the time of the application, the applicant may indicate that the method is based on his production records. Changes in the rate of yield must be notified.

The holder of the inward processing authorisation must present a bill of discharge to the supervising customs office within 30 days after the expiry of the time-limit for discharge,[217] though this period may

[207] The description of the inward and outward processing procedures is not intended to be complete or exhaustive; that is far beyond the scope of this study. Rather, it is intended to give a very basic overview of those elements of these procedures which are essential to this study.
[208] Art. 211 UCC.
[209] Art. 259 UCC.
[210] Art. 256 UCC.
[211] Art. 270 UCC.
[212] Art. 86(5) UCC.
[213] Art. 223(1) UCC, Art. 169 UCC-DA, Arts 268, 269 UCC-IA).
[214] Art. 259(1) UCC.
[215] Cf. Art. 255(1) UCC.
[216] Art. 5 No 38 UCC.

be extended to up to 60 days upon request by the authorisation holder.[218] In those cases where the supervising customs office considers the presentation of the bill of discharge unnecessary it may waive the obligation to present the bill of discharge.[219] Instead of re-exporting the processed products the authorisation holder may release them for free circulation within the customs territory. For such cases Art. 170 UCC-DA provides a simplification: no customs declaration and subsequent release for free circulation is necessary if the holder of the authorisation lets the time limit for discharge pass. However, this facilitation is not available if the processed products are subject to official controls.

8.2 Economic Conditions Test

Sensitive goods and products are subject to specials rules. For example, while a customs declaration supplemented by certain additional data elements can generally be considered an application for an authorisation for the inward or outward processing procedure, this is not the case when the goods are sensitive goods and products.[220]

In derogation to Art. 173(1) UCC-DA, which prescribes that authorisations for inward or outward processing have a maximum period of validity of five years, where the authorisation relates to sensitive goods and products the maximum period of validity of the authorisation is three years.[221] Retroactive authorisations for sensitive goods may only be issued for a period of three months before the date of acceptance of the application.[222]

The authorisation of the inward processing procedure for agricultural products listed in Annex 71-02 UCC-DA is, in principle, subject to an economic conditions test, meaning that the essential interests of Union producers of the same raw material or processed product would not be affected by the authorisation.[223]

However, pursuant to Art. 167(1) UCC-DA, in certain cases the economic conditions for inward processing are deemed to be fulfilled where the processing concerns one of the enumerated operations. Of particular relevance for SMEs are the operations mentioned in Art. 167(1) (c), (f) and (s) UCC-DA, because they allow an authorisation to be granted without an examination of the economic conditions in cases where:

- the processing of goods directly or indirectly put at the disposal of the holder of the authorisation is carried out according to specifications on behalf of a person established outside of the customs territory of the Union, generally against payment of processing costs alone; or
- the aggregate value of goods to be placed under the inward processing procedure per applicant and calendar year for each eight-digit CN code does not exceed EUR 150,000.

If the economic conditions need to be examined, this examination takes place in the Customs Experts Group (Art. 259 UCC-IA) and usually takes several months (often with a negative result).

The economic conditions test is deemed to be fulfilled if the applicant proves that:

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[217] Art. 175(1) subpara. 1 UCC-DA.
[218] Art. 175(2) UCC-DA. In exceptional cases, the customs authorities may extend the period even if it has expired.
[219] Art. 175(1) subpara. 2 UCC-DA.
[220] See Art. 163(1)(c) and (d) UCC-DA.
[221] Art. 173(2) UCC-DA.
[222] Art. 172(2) UCC-DA.
[223] Art. 211(4)(b) UCC, Arts 166, 167 UCC-DA.

- the same product, including commercial quality and technical characteristics, at 8-digit CN code level is unavailable within the EU; or
- the differences in price between goods produced in the EU and those intended to be imported, where the price of the comparable EU goods would not make the proposed commercial operation economically viable.[224]

Given the comparable agricultural structure in NI and the RoI (and the REU), it is unlikely that these conditions can be met.

8.3 Checks on the Import and Export of Milk and Milk Products

The import of animals and animal products is subject to the special rules laid down in Art. 7 Directive 90/425/EEC, which governs the entry of the covered products from third countries. Pursuant to Art. 11 Regulation 178/2002[225]

> Food and feed imported into the Community for placing on the market within the Community shall comply with the relevant requirements of food law or conditions recognised by the Community to be at least equivalent thereto or, where a specific agreement exists between the Community and the exporting country, with requirements contained therein.

In overview,

- the non-EU country of origin must be authorised for introduction of milk and milk products into the EU;
- the establishment of origin must be approved and authorised as an establishment from which milk and milk products may be introduced into the EU;
- the third country of origin has an approved residue plan.[226]

Once these conditions have been fulfilled, traders must ensure that all necessary documents accompany the consignment, in particular the documents mentioned in Art. 14 Regulation 854/2004[227] and the health certificate where prescribed by Art. 5 or 6 Regulation 605/2010.[228]

The milk or milk products must be inspected at a BIP to ensure that all the requirements provided for in the EU legislation are fulfilled. Directive 97/78/EC[229] governs the principles applicable to the organisation of veterinary checks on products of animal origin entering the EU from third countries.

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[224] Art. 167(1)(f)(i) and (ii) UCC-DA.

[225] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002 No L 31, p. 1.

[226] See European Commission, https://ec.europa.eu/food/animals/animalproducts/milk_en.

[227] Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption, OJ 2004 No L 139, p. 206. See also European Commission, Notice to Stakeholders: Withdrawal of the United Kingdom and EU Food Law and EU Quality Schemes, 1 February 2018, p. 8.

[228] Commission Regulation (EU) No 605/2010 of 2 July 2010 laying down animal and public health and veterinary certification conditions for the introduction into the European Union of raw milk and dairy products intended for human consumption, OJ 2010 No L 175, p. 1.

[229] Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries, OJ 1998 No L 24, p. 9.

Importers must comply with the procedures laid down in Regulation 136/2004.[230] This means, for example, that the importer must provide the Common Veterinary Entry Document prior to the arrival of the goods.

With regard to export and re-export, Art. 12 Regulation 178/2002 stipulates the following:

> 1. Food and feed exported or re-exported from the Community for placing on the market of a third country shall comply with the relevant requirements of food law, unless otherwise requested by the authorities of the importing country or established by the laws, regulations, standards, codes of practice and other legal and administrative procedures as may be in force in the importing country.
>
> In other circumstances, except in the case where foods are injurious to health or feeds are unsafe, food and feed can only be exported or re-exported if the competent authorities of the country of destination have expressly agreed, after having been fully informed of the reasons for which and the circumstances in which the food or feed concerned could not be placed on the market in the Community.
>
> 2. Where the provisions of a bilateral agreement concluded between the Community or one of its Member States and a third country are applicable, food and feed exported from the Community or that Member State to that third country shall comply with the said provisions.

Checklist
In summary, milk or milk products can only be imported into the EU under the following conditions:[231]

- The consignment is presented at a BIP for veterinary checks;
- The products come from an EU listed third country for which no safeguard measures are in place;
- The products come from an EU approved establishment which has been listed for the relevant product;
- The products bear an EU approved health mark/identification mark;
- The consignment is accompanied by appropriate health certificate(s);
- The animal product is appropriately wrapped and labelled with a health mark;
- The importer is registered with the government agency (in the RoI: the Department of Agriculture, Food and the Marine (DAFM) or the Sea-Fisheries Protection Authority (SFPA)), as appropriate for the animal product being imported; and
- The person responsible for the load has given 24 hours advance notification to the competent BIP. That person must be registered with the competent national authority and TRACES.

These conditions will clearly have an effect on businesses due to the administrative burdens created by the documentary requirement but also by the need to transport the goods to a BIP (which are not currently located at or near the land border).

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[230] Commission Regulation (EC) No 136/2004 of 22 January 2004 laying down procedures for veterinary checks at Community border inspection posts on products imported from third countries, OJ 2004, No L 21, p. 11.
[231] This list is based on Food Safety Authority of Ireland, https://www.fsai.ie/faq/import_export.html. The list presented here is not intended as exhaustive.

Article 23 Regulation 882/2004 offers an important facilitation. Pursuant to Art. 23(1) Regulation 882/2004 specific pre-export checks that a third country carries out on feed and food immediately prior to export to the Union with a view to verifying that the exported products satisfy Union requirements may be approved in accordance with the procedure referred to in Article 62(3) Regulation 882/2004. The approval may apply only to feed and food originating in the third country concerned and may be granted for one or more products.[232]

The practical effect of such approval is to reduce the frequency of import controls for feed or food.[233] However, Member States are required to carry out official controls on feed and food imported in accordance with the approval referred to in Art. 23(1) Regulation 882/2004 so as to ensure that the pre-export checks carried out in the third country remain effective.[234]

Evaluation

If the UK or at least NI is not listed as an approved country for a specific sensitive product, e.g. milk and milk products, and does not have an approved residue plan, those products from the UK or NI will not be able to be imported into the EU. If the UK or NI is listed, the establishment of origin must be approved and authorised as an establishment from which milk and milk products may be introduced into the EU.

Under the standard procedure, exporters and importers will have to comply with stringent conditions, in particular relating to documentation. The goods can only enter the EU via a BIP; there is currently no BIP at or near the land border. All goods must undergo document checks[235] and some portion will be subject to random physical inspections[236] in accordance with the risk analysis but at least in the percentages stipulated by law.[237] The effect that this will have on businesses on both sides of the border will likely be dramatic. Just-in-time delivery or delivery on short notice will not be realistic.

Although there are some facilitations possible under this model such as pre-inspections, these are not available in a no-deal scenario and do not appear to be adequate to the situation on the island of Ireland.

[232] Article 62(3) refers to Council Decision 1999/468/EC, now Regulation (EU) No 182/2011, which provides for the adoption of measures.
[233] Art. 23(2) Regulation 882/2004.
[234] Art. 23(2) Regulation 882/2004.
[235] For a detailed overview see Irish Tax and Customs, Customs Brexit Information Seminar, pp. 79 *et seq*.
[236] On the physical inspections see Irish Tax and Customs, footnote 254, pp. 85 *et seq*.
[237] On the frequencies see 94/360/EC: Commission Decision of 20 May 1994 on the reduced frequency of physical checks of consignments of certain products to be implemented from third countries, under Council Directive 90/675/EEC, OJ 1994 No L 158, p. 41.

9. 5 TEST CASES

As under EU law there is no difference between goods coming from NI and those coming from other parts of the UK, the term 'UK' includes NI.

Test Case 1

Raw materials (sensitive goods and products of NI origin) are transferred to the RoI for substantial processing (change to the four-digit tariff heading) and the end products are returned to the UK for sale to consumer. Please also include an assessment for minimal processing.

Legal analysis and possible simplifications

a) Standard procedure

For the export from the UK it is advisable (though not required) to export under an authorisation for outward processing (Arts 211, 259 UCC). The possibility of applying for such an authorisation simply by lodging an export declaration is not available for sensitive (agricultural) goods (Art. 163(1)(d) UCC-DA), though the UK may permit this. If regular use is to be made of this procedure, application for a standard authorisation is advisable. The benefit of using outward processing is that, on re-import in the UK, instead of calculating the import duty on the total value of the processed product, only the processing costs are subject to the import duty (Art. 86(5) UCC); the preference must be stated at the time of lodging the declaration for free circulation (Art. 56(3) UCC). The exporter and the re-importer in the UK may be different persons (Art. 259(1) UCC), except where the application for inward processing is based on Art. 167(1)(c) UCC-DA. The export from the UK requires no guarantee. However, if a lorry is used the declaration should be made one hour before crossing the border (Art. 244(1)(c) UCC-DA).

Prior to entering the EU customs territory (in the case of lorries: 1 hour before, Art. 108 UCC-DA) the carrier must lodge an entry summary declaration to the customs office of entry (Art. 127 UCC). Subsequently, the goods must be presented to customs and a temporary storage declaration must be lodged (Arts 139, 145 UCC). As the goods are to be processed in the EU and then to be re-exported, the goods should be placed under the inward processing procedure (Art. 256 UCC). The use of the procedure requires an authorisation (Art. 211 UCC); the benefit is that no customs duties, import VAT and excise duties are collected as long as the goods remain under the procedure; however, a guarantee must be provided (Art. 211(3)(c) UCC). However, with regard to the sensitive goods listed in Annex 71-02 there is a serious risk that the application will be rejected if the conditions of Art. 167 UCC-DA are not met. The possibility of applying for such an authorisation simply by lodging a customs declaration requesting that the goods be placed under the inward processing procedure is not available for sensitive (agricultural) goods (Art. 163(1)(c) UCC-DA).

Apart from customs legislation, the following requirements need to be met:

1. The UK must be a listed country for the sensitive good or product. If the UK is not authorised for the introduction of milk and milk products, for example, then these products will not be permitted to enter the territory of the EU.
2. The UK has an approved residue plan.
3. The establishment of origin must be approved and authorised as an establishment for the sensitive goods and products, e.g. milk and milk products. No sensitive goods or products which are not from an appropriately authorised and approved establishment of origin may be

introduced into the EU. For example, an establishment of origin has only been authorised and approved for the introduction of poultrymeat. It cannot introduce milk or milk products into the EU.

4. The sensitive goods and products must enter the EU via a listed Border Inspection Post ("BIP"). The RoI currently has only three listed BIPs: Dublin Airport, Dublin Port and Shannon (airport).
5. Pre-notification of at least 24 hours of the arrival of the consignment must be given. The person responsible for the load is responsible for the pre-notification. That person must be registered with TRACES and the competent national authority.
6. All supporting documentation is submitted. This includes in particular:
    a. the Common Veterinary Entry Document (CVED)
    b. Health Certificate and
    c. commercial documents for cross-checking purposes.
7. The appropriate method of transportation (e.g. seals) is used.
8. All applicable labeling and packaging requirements are satisfied.
9. All – i.e. 100% – of the consignments must undergo a document inspection and identity check at the BIP. Physical inspections are conducted
    a. on the basis of risk analysis, which includes random checks;
    b. in accordance with the percentage of consignments which must be inspected by law (Directive 90/675/EEC); and
    c. if there is an irregularity or the official veterinarian has reasonable suspicion.
10. Inspections are subject to charge.

After the processing a re-export declaration must be lodged within the time limit set for the discharge of the procedure (Art. 257 UCC) prior to the moment the goods leave the trader's premises and within the time-limit set for the mode of transport, i.e. in the case of a lorry one hour before crossing the border (Art. 244(1)(c) UCC-DA). The processed products may be moved to the border under the inward processing authorisation (Art. 179 UCC-DA) but not within the UK; if the latter is intended, the goods need to be moved under the common transit procedure. Within 30 days after the time limit for discharge, a bill of discharge must be presented to the competent customs office (Art. 175 UCC-DA).

As the consignment is being imported directly from the EU, the import procedure will be the same as before Exit Day, i.e. there will be no additional controls or checks.[238] In NI TRACES can no longer be used.[239]

b) Possible simplifications

Declarations made by entry in the declarant's records may be authorised (Art. 182 UCC, Arts 234, 235 UCC-IA). They can be combined with a waiver from the obligation to present the goods to customs if the authorisation holder is an AEOC (Art. 183(3) UCC). A periodic (monthly) declaration must nevertheless be sent to the competent customs office (Art. 167 UCC). In respect of sensitive goods and products, such authorisations will in practice not be available or only of limited benefit because the law mandates that inspections and checks be carried out by the official veterinarian at a BIP.

[238] Cf. Department for Environment, Food & Rural Affairs and Animal and Plant Health, Guidance: Importing animals, animal products, footnote 34.

[239] Department for Environment, Food & Rural Affairs and Animal and Plant Health, Guidance: Importing animals, animal products, footnote 34, however, states that exporters in the EU can continue to use TRACES to notify authorities if they are planning on exporting to the UK.

The need for an entry summary declaration and the notification time limit for goods to be brought out of the EU can be waived if there is a legal basis (as between the EU and Switzerland, or for goods moved to and from Heligoland or San Marino). In respect of sensitive goods and products the person responsible for the load must give at least 24 hours advance notice to the BIP before the arrival of the consignment ("advance notification"). The person lodging the advance notification must be registered with the competent national authority and, for import in the EU, TRACES.

If the holder of the inward processing authorisation fulfils all the requirements, he may be granted a guarantee waiver (Arts 89, 95 UCC, Art. 158(1) UCC-IA) but he nevertheless needs to supervise the so-called reference amount, i.e. the amount for which the comprehensive guarantee would have been set otherwise (Art. 84 UCC-DA).

c) Minimal processing / Usual forms of handling

The so-called usual forms of handling set out in Annex 71-03 UCC-DA (reproduced in Appendix 4). Goods placed under:

- customs warehousing; or
- a processing procedure; or
- in a free zone

may undergo usual forms of handling intended to:

- preserve them;
- improve their appearance or marketable quality; or
- prepare them for distribution or resale (Art. 220 UCC).

The usual forms of handling are set out in Annex 71-03 UCC-DA (Art. 180 UCC-DA). Such treatment can be performed under the customs warehousing or free zone procedure rather than under the inward processing procedure. In such cases no bill of discharge is needed. However, customs warehousing by persons other than the customs authorities requires an authorisation, and a guarantee, unless a guarantee waiver has been granted. For goods in a free zone no guarantee is required.

Where a product undergoes a usual form of handling there will normally be no change in the eight-digit CN code (cf. the chapeau to Annex 71-03 to the UCC-DA). The following are usual forms of handling which milk or milk products might undergo:

- conservation, by means of pasteurisation, sterilisation, irradiation or the addition of preservatives (Annex 71-03 No 5 UCC-DA); or
- treatment:
    - by simple raising of the temperature, without further treatment or distillation process, or
    - by simple lowering of the temperature;

  even if this results in a different eight-digit CN code (Annex 71-03 No 8 UCC-DA); or
- dilution or concentration of fluids, without further treatment or distillation process, even if this results in a different eight-digit CN code (Annex 71-03 No 13 UCC-DA); or

- mixing between them of the same kind of goods, with a different quality, in order to obtain a constant quality or a quality which is requested by the customer, without changing the nature of the goods (Annex 71-03 No 14 UCC-DA); or
- packing, unpacking, change of packing, decanting and simple transfer into containers, even if this results in a different eight-digit CN code, affixing, removal and altering of marks, seals, labels, price tags or other similar distinguishing signs (Annex 71-03 No 18 UCC-DA); or
- denaturing, even if this results in a different eight-digit CN code (Annex 71-03 No 21 UCC-DA).

Costs incurred for usual forms of handling within the customs territory of the Union in respect of goods placed under inward processing or storage, or an increase in value of the goods due to such handling, will not be taken into account for the calculation of the amount of import duty where satisfactory proof of those costs is provided by the declarant (cf. Art. 86(1) subpara. 1 UCC). However, the customs value, quantity, nature and origin of non-Union goods used in the operations will be taken into account for the calculation of the amount of import duty (Art. 86(1) subpara. 2 UCC).

Although the inward and outward processing procedures are subject to an authorisation, usual forms of handling do not require an authorisation and are therefore not to be included in the authorisation.

Given the necessary customs formalities, it is questionable whether it is worthwhile to perform such activities outside the enterprise's own customs territory.

d) VAT issues

As the goods are directly sold to consumers (presumably) by the company which ordered the processing from the UK, this company is already registered for VAT in the UK and needs to charge the UK VAT rate to the consumer. Small businesses below the VAT threshold which have opted not to register for VAT are only liable for import VAT; as they are not entitled to VAT deduction, using outward and inward processing is not a viable business model as they would have to register for VAT. If the RoI company sells directly to consumers in the UK, it needs to register for VAT in the UK and to charge the UK VAT rate to the consumer. For sales up to a value of £150 a special regime will be introduced by the UK (in line with the new EU rules), but a registration in the UK will also be necessary, though a service provider (platform) can be used instead.

According to the UK's Land Border Policy goods arriving from Ireland will still be subject to the appropriate VAT and Excise duty as today and the UK government would continue to collect these taxes on Irish goods in future. VAT registered businesses would continue to account for VAT on their normal VAT returns; **small businesses trading across the border, not currently VAT registered, would be able to report VAT online periodically, without any new processes at the border** (emphasis added).

Test Case 2

Raw materials (sensitive goods and products of UK origin) are transferred to the RoI for substantial processing (change to the four-digit tariff heading) and the end products are returned to the UK for sale to consumer. Please also include an assessment for minimal processing.

Legal analysis and possible simplifications

From an EU customs and VAT point of view there is no difference to Test Case 1 because NI and the UK will be considered a third country after Exit Day. If the goods are moved by ship or aircraft the time-limits for entry summary and pre-departure declarations will be different (see Arts 105, 106, 244 UCC-DA).

Test Case 3

Raw materials (sensitive goods and products of mixed origin imported to NI) are transferred to the RoI for substantial processing (change to the four-digit tariff heading) and the end products are returned to the UK for sale to consumer. Please also include an assessment for minimal processing.

Legal analysis and possible simplifications

In respect of customs procedures point of view there is no difference to Test Case 1. This having been said, from a regulatory point of view (agri-food law) the scenario presents significant difficulty where products from a country other than the UK comprise part of the consignment. In particular:

- the non-EU country of origin must be authorised for introduction of the products concerned into the EU;
- have an approved residue plan; and
- the establishment of origin must be approved and authorised as an establishment from which the products concerned may be introduced into the EU.

Unless these conditions (and all other conditions applicable to the products concerned) are satisfied, the goods cannot enter EU territory.

One potential solution – assuming that the aforementioned conditions are satisfied – is for the NI enterprise to direct the suppliers to ship the products directly to the processor in the RoI. This would also solve the issue of use of the proper and valid CVEDs, health certificates, etc., since the supplier would then use the EU forms when shipping the goods.

Test Case 4

A business operating cross border sending raw materials (sensitive goods and products of RoI origin) from their operation in the RoI to their processing plant in NI for processing and then for:

a. Return to the RoI for sale
b. Sale to the RoI consumer direct from NI

Legal analysis and possible simplifications

This is essentially the opposite of Test Case 1, but in Test Case 4 the RoI enterprise's processing operation is located in NI. The operation in NI may either be performed by a permanent business establishment of the RoI company or by a separate legal entity owned by the RoI company. Consequently:

a) Alternative a (return to the RoI) for sale

Standard procedure

For the export from the RoI it is advisable (though not required) to export under an authorisation for outward processing (Arts 211, 259 UCC). Outward processing does not require that a different legal entity perform the processing. The possibility of applying for such authorisation in the context of the export declaration is not available for sensitive (agricultural) goods (Art. 163(1)(d) UCC DA). Since regular use will be made of this procedure, application for a standard authorisation is advisable. The benefit of using outward processing is that on re-import into the RoI, instead of calculating the import duty on the total value of the processed product, only the processing costs are taken into account when calculating the import duty (Art. 86(5) UCC). The preference must be stated at the time of the declaration for free circulation. The exporter and the re-importer in the RoI may be different persons (Art. 259(1) UCC).[240] The export from the RoI requires no guarantee. However, if a lorry is used the declaration should be made one hour before crossing the border (Art. 244(1)(c) UCC-DA).

The permanent business establishment or company in NI must have an UK-EORI registration and apply for an inward processing authorisation. In a no-deal scenario the customs authorities are not bound by the strict EU rules and can grant the authorisation without an examination of the economic conditions. The UK will not require a guarantee to cover the customs duties and import VAT.[241] The competent authorities in NI are also in a position not to apply the other EU rules explained for Test Case 1.

The permanent business establishment or NI enterprise must lodge the customs declarations with the UK customs authorities or use a customs representative. This takes into account the UK's Land Border Policy. However, it should be noted that the Land Border Policy states:

> The UK government would not introduce any new checks or controls on goods at the land border between Ireland and Northern Ireland, including no customs requirements for nearly all goods.

The exact scope of this policy is not yet known.

Prior to entering the UK customs territory (in the case of lorries: 1 hour before, Art. 108 UCC-DA) the carrier must lodge an entry summary declaration to the customs office of entry (Art. 127 UCC), unless the UK waives this requirement. As the consignment is being imported directly from the EU, the import process will be the same as before Exit Day, i.e. there will be no additional controls or checks.[242] Subsequently, the goods must be presented to customs and a temporary storage declaration must be lodged (cf. Arts 139, 145 UCC). Instead of such a declaration the goods may be declared for the inward

[240] However, in the case of job-processing under Art. 167(1)(c) UCC-DA the exporter and the re-exporter must normally be the same person, unless the exporter has directed the processor to deliver the goods to another person.

[241] HMRC, Guidance: Changes to your customs authorisations, footnote 128.

[242] Cf. Department for Environment, Food & Rural Affairs and Animal and Plant Health, Guidance: Importing animals, animal products, footnote 34.

processing procedure (cf. Art. 256 UCC). The benefit of using this procedure is that no customs duties, import VAT and excise duties are collected as long as the goods remain under the procedure. A customs declaration cannot be considered to be an application for placing the goods under the inward processing procedure where the goods are sensitive (agricultural) goods (cf. Art. 163(1)(c) UCC DA), unless the UK waives this requirement.

After the processing a re-export declaration must be lodged within the time-limit set for the discharge of the procedure (cf. Art. 257 UCC) prior to the moment the goods leave the trader's premises and within the time-limit set for the mode of transport, i.e. in the case of a lorry one hour before crossing the border (cf. Art. 244(1)(c) UCC DA). The processed products may, if authorised, be moved to the border under the inward processing authorisation (cf. Art. 179 UCC DA) but not within the RoI; if the latter is intended, the goods need to be moved under the common transit procedure. Within 30 days after the time-limit for discharge, a bill of discharge shall be presented to the competent customs office (cf. Art. 175 UCC DA), unless the UK enacts different rules.

On importation into the RoI the goods will be declared for free circulation claiming the benefit from outward processing, i.e. the import duty is only applied on the processing costs instead of the full amount. For example, the duty rate for not flavoured yoghurt, not containing sugar nor added fruit, nuts or cocoa, of a fat content between 3 and 6% (CN code 0403 10 13) is €24.4 per 100 kg. The precise amount to be charged is then calculated pursuant to Art. 75 UCC-DA. This will make the product more expensive than a yoghurt produced in the RoI or the REU.

When importing foods of animal origin for human consumption into the territory of the Union in addition the following must be observed:

- The products bear an EU approved health mark/identification mark;
- The consignment is accompanied by appropriate health certificate(s) (Export Health Certificate signed by an official veterinarian);
- The animal product is appropriately wrapped and labelled with a health mark;
- The importer is registered with the government agency (in the RoI: the Department of Agriculture, Food and the Marine (DAFM) or the Sea-Fisheries Protection Authority (SFPA)), as appropriate for the animal product being imported;
- The person responsible for the load has given 24 hours advance notification to the competent BIP. That person must be registered with the competent national authority and TRACES;
- The appropriate method of transportation (e.g. seals) is used;
- All applicable labeling and packaging requirements are satisfied.

<u>Possible simplifications</u>

For the processes taking place in NI waivers from the EU rules may be contemplated.

For the processes taking place in the EU only the facilitations described in section 7 are available such as declarations made by entry in the declarant's records (Art. 182 UCC, Arts 234, 235 UCC IA), possibly combined with a waiver from the obligation to present the goods to customs (Art. 183(3) UCC). A periodic (monthly) declaration must nevertheless be sent to the competent customs office (Art. 167 UCC). An authorisation for self-assessment (Art. 185 UCC) may provide further benefits, but this would probably concern certain controls which must normally be performed by government officials and requires a legal basis. In respect of sensitive goods and products, such authorisations will not be

applicable in practice because EU law mandates that inspections and checks be carried out by the official veterinarian at a BIP.

The need for an entry summary declaration and the notification time-limit for goods to be brought out of the EU can be waived if there is a legal basis (as between the EU and Switzerland, or for goods moved to and from Heligoland or San Marino).

Minimal processing / Usual forms of handling

In respect of usual forms of handling see Test Case 1 point c above.

VAT issues

Alternative a

Under alternative a the sale to the consumer in the RoI is made by the permanent business establishment or a separate company in the RoI, so that it is registered for VAT in the RoI and can, after the import (with, possibly deferred, payment of import VAT) sell the goods to consumers in the RoI charging the Irish VAT rate. It can deduct the import VAT or use postponed accounting which will be introduced in the RoI.

Alternative b

Under alternative b a direct sale from NI to the consumer in the RoI is intended. This would mean that the benefit from outward processing cannot be used, unless an arrangement is made with the customer that a direct representative declares the processed products in the RoI for release for free circulation claiming the benefit from outward processing on behalf of the client. As this would have to be done for every client separately, already from a customs point of view this is not a viable business model.

As the sale is not made by the permanent business establishment or separate company in the RoI, but by the company in NI, it would have to register for VAT in the RoI or to use the refund mechanism under Directive 86/560/EEC.243. For sales up to a value of € 150 a special regime will be introduced by the EU,[244] but if the NI company wishes to sell the goods directly to consumers in the RoI it will need to register for this regime in the RoI, too, or use the platform of a service provider. This is not a viable business model from the VAT point of view, either.

Test Case 5

A business operating cross border sending raw materials (sensitive goods and products of NI origin) from their operation in NI to their processing plant in the RoI for processing and then for:

a. Return to NI for sale
b. Sale to NI consumer direct from the RoI

Legal analysis and possible simplifications

Alternative a (return to NI for sale)

[243] OJ 1986 No L 326, 40.
[244] Directive 2017/2455, OJ 2017 No L 348, p. 7.

In respect of customs procedures and VAT there is no difference to Test Case 1 if the rules for NI are the same as those for the UK.

Alternative b (sale to NI consumer direct from the RoI)

The problems described for alternative b for Test Case 4 would be the same if in NI the same rules will be applied as those of the EU.

Appendix 1

UCC-DA ANNEX 71-02

Sensitive goods and products

The following goods are covered by this Annex:

(1) The following agricultural products falling under one of the following sectors of the common market organization (CMO):

Beef and veal sector: products referred to in Regulation (EU) No 1308/2013, Article 1(2)(o) and listed in Annex I Part XV;

Pigmeat sector: products referred to in Regulation (EU) No 1308/2013, Article 1(2)(q) and listed in Annex I Part XVII;

Sheepmeat and goatmeat sector: products referred to in Regulation (EU) No 1308/2013, Article 1(2)(r) and listed in Annex I Part XVIII;

Eggs sector: products referred to in Regulation (EU) No 1308/2013, Article 1(2)(s) and listed in Annex I Part XIX;

Poultrymeat sector: products referred to in Regulation (EU) No 1308/2013, Article 1(2)(t) and listed in Annex I Part XX;

Apiculture products: products referred to in Regulation (EU) No 1308/2013, Article 1(2)(v) and listed in Annex I Part XXII;

Cereals sector: products referred to in Article 1(2)(a), Annex I Part I of Regulation (EU) No 1308/2013;

Rice sector: products referred to in Article 1(2)(b), Annex I Part II of Regulation (EU) No 1308/2013;

Sugar sector: products referred to in Article 1(2)(c), Annex I Part III of Regulation (EU) No 1308/2013;

Olive oil sector: products referred to in Article 1(2)(g), Annex I Part VII of Regulation (EU) No 1308/2013;

Milk and milk-products sector: products referred to in Article 1(2)(p), Annex I Part XVI of Regulation (EU) No 1308/2013;

Wine sector: products referred to in Article 1(2)(l), Annex I Part XII of Regulation (EU) No 1308/2013 and falling under CN codes:

0806 10 90

2009 61
2009 69

2204 21 (quality wine PDO and PGI excepted)

2204 29 (quality wine PDO and PGI excepted) 2204 30

(2) Ethyl alcohol and spirit products falling under CN codes:

2207 10

2207 20

2208 40 39 – 2208 40 99

2208 90 91 – 2208 90 99

(3) ex 2401 unmanufactured tobacco
(4) Products other than those under points 1 and 2 subject to agricultural export refund.
(5) Fishery products listed in Annex I to Council Regulation (EC) No 1379/2013 on the common organization of the markets in fishery and aquaculture products and products listed in Annex V to this regulation subject to a partial autonomous suspension.
(6) All fishery products subject to an autonomous quota.

Appendix 2

UK Land Border Policy in the case of a no-deal scenario

Relevant Excerpt

Guidance

EU Exit: Avoiding a hard border in NI in a no deal scenario

Published 13 March 2019

Last updated 22 March 2019

From:

Cabinet Office, Department for Environment, Food & Rural Affairs, NI Office, and HM Revenue & Customs

Contents

The unique social, political and economic circumstances of NI must be reflected in any arrangements that apply in a no deal scenario.

This government is committed to the Belfast Agreement and to do everything in our power to ensure no return to a hard border between NI and Ireland.

Today we are confirming a strictly unilateral, temporary approach to checks, processes and tariffs in NI. This would apply if the UK leaves the EU without a deal on 12 April.

The UK government would not introduce any new checks or controls on goods at the land border between Ireland and NI, including no customs requirements for nearly all goods.

The UK temporary import tariff announced today would therefore not apply to goods crossing from Ireland into NI.

We would only apply a small number of measures strictly necessary to comply with international legal obligations, protect the biosecurity of the island of Ireland, or to avoid the highest risks to NI businesses - but these measures would not require checks at the border.

Because these are unilateral measures, they only mitigate the impacts from exit that are within the UK government's control. These measures do not set out the position in respect of tariffs or processes to be applied to goods moving from NI to Ireland.

We recognise that NI's businesses will have concerns about the impact that this approach would have on their competitiveness. That is why we remain determined to secure a deal and an orderly exit from the EU.

A negotiated settlement is the only means of sustainably guaranteeing no hard border and protecting businesses in NI. This is why we are, first and foremost, still committed to leaving the EU with a deal. In a no deal scenario, the UK government is committed to entering into discussions urgently with the European Commission and the Irish Government to jointly agree long-term measures to avoid a hard border.

We also recognise that there are challenges and risks for maintaining control of our borders, monitoring the flow of goods into the UK, and the challenge posed by organised criminals seeking to exploit any new system. That is why we are clear that this approach will only be strictly temporary.

The specific changes proposed are set out below.

Compliance with international legal obligations:

to fulfil essential international obligations, there would be new requirements for importers and exporters to declare trade with the EU on a very limited set of goods

these are the only new processes which would be introduced in order to meet the UK's international legal obligations. There are no other products that would require new checks or processes

Specifically:

electronic notifications would be required for trade in dangerous chemicals, ozone depleting substances and F-gases

Belfast International Airport would be the designated point of entry for endangered species and rough diamonds entering NI

dual-use or torture goods would require a license for exports to the EU

Protecting the biosecurity of the island of Ireland:

to protect human, animal, and plant health, animals and animal products from countries outside the EU would need to enter NI through a Border Inspection Post and regulated plant material from third countries entering NI via the EU would require certification and checks at inland trader premises or enter via an established Point of Entry as a direct third country import

high risk plant material entering NI from the EU would require a phytosanitary certificate and pre-notification, replacing the current EU plant passport scheme. These checks will be done electronically with no physical inspection required

Avoiding the highest risks to NI businesses:

to prevent unfair treatment of NI businesses, goods arriving from Ireland would still be subject to the appropriate VAT and Excise duty as today and the UK government would continue to collect these taxes on Irish goods in future. VAT registered businesses would continue to account for VAT on their normal VAT returns

small businesses trading across the border, not currently VAT registered, would be able to report VAT online periodically, without any new processes at the border

Irish businesses sending parcels to NI would need to register with HMRC in order to ensure VAT was paid on these goods - but anyone in NI receiving a gift sent from Ireland would not pay VAT

as in Great Britain, businesses currently registered on the EU Excise system would register on a UK equivalent

These measures would not require checks at the land border.

Dependent on the outcome of the votes this week, we may then bring forward a package of secondary legislation to implement these arrangements which Parliament must approve for these temporary arrangements to come into force.

Appendix 3

CHECKLIST FOR NEW ECONOMIC OPERATORS

The following non-exhaustive checklist is intended to provide new economic operators with a guide to the preparations and actions they should undertake for dealing with customs. They should:

- classify the goods according to the Combined Nomenclature or UK equivalent;
- determine the customs value when importing;
- learn how to fill out and lodge electronic customs declarations and other documents involved in customs operations or export control;
- apply for authorisations and licences;
- apply for comprehensive guarantees and reductions of the amounts to be provided, including guarantee waivers;
- monitor the reference amounts of comprehensive guarantees;
- monitor compliance with other authorisations (e.g. AEO, inward processing);
- review whether the provisions of export control are applicable to the exports;
- establish a management and control system for the retention of all:
    - customs-related documentation
    - export control-related documentation
    - documentation for regulatory purposes

  in an appropriate form for at least the statutory retention period (also having regard to customs and foreign trade (export control) audits);
- name a:
    - customs director and export control officer;
    - compliance officer for standards / conformity assessments;
    - data protection officer; and/or
    - conclude an agreement to fulfil these functions where this is permitted by law and cannot be done in-house;
- establish strict guidelines and procedures for complying with:
    - customs laws and regulations
    - VAT and excise duties (including declarations)
    - regulatory requirements (e.g. conformity marks, etc.)
    - prohibitions and restrictions
    - export control matters
    - and documenting said compliance, including the management and retention of all documentation;
- establish strict guidelines and procedures governing obtaining, managing and saving any import and/or export licences which may be required, e.g.:
    - common entry documents (CEDs) for certain feed and food products of non-animal origin;
    - dossiers or other such documents (e.g. chemicals, medicinal products);
    - veterinary certificates;
- establish guidelines and procedures covering the provision of customs guarantees;
- establish guidelines and procedures for communications with the customs authorities, including the authorised contact person(s), means of contact, management and retention of all communications sent or received;

- ensure compliance with prohibitions on drawbacks when non-originating goods are used or incorporated into the undertaking's products;
- establish guidelines for preparing for and accommodating field audits (customs and foreign trade / export control);
- establish guidelines and procedures for communications with the customs brokers, including the authorised contact person(s), means of contact, management and retention of all communications sent or received;
- establish guidelines and procedures for applications necessary for certain customs procedures, e.g. inward or outward processing, temporary admission, end use;
- identify what facilitations or simplifications are available for the customs operations used, what the conditions for obtaining an authorisation and the feasibility;
- determine a strategy to deal with the impact of payments of import duties on cashflow;
- determine a strategy to deal with the impact of the costs of lodging customs declarations;
- determine a strategy to deal with the impact of the new situation on VAT and excise duty on cashflow; and
- determine how to lodge repayment or remission claims or correcting wrong declarations.

Appendix 4

Annex 71-03 to the UCC-DA

List of permitted usual forms of handling

Unless otherwise specified, none of the following forms of handling may give rise to a different eight-digit CN code.

(1) ventilation, spreading-out, drying, removal of dust, simple cleaning operations, repair of packing, elementary repairs of damage incurred during transport or storage in so far as it concerns simple operations, application and removal of protective coating for transport;

(2) reconstruction of the goods after transport;

(3) stocktaking, sampling, sorting, sifting, mechanical filtering and weighing of the goods;

(4) removal of damaged or contaminated components;

(5) conservation, by means of pasteurisation, sterilisation, irradiation or the addition of preservatives;

(6) treatment against parasites;

(7) anti-rust treatment;

(8) treatment:

- by simple raising of the temperature, without further treatment or distillation process, or
- by simple lowering of the temperature;

even if this results in a different eight-digit CN code;

(9) electrostatic treatment, uncreasing or ironing of textiles;

(10) treatment consisting in:

- stemming and/or pitting of fruits, cutting up and breaking down of dried fruits or vegetables, rehydration of fruits, or
- dehydration of fruits even if this results in a different eight-digit CN code;

(11) desalination, cleaning and butting of hides;

(12) addition of goods or addition or replacement of accessory components as long as this addition or replacement is relatively limited or is intended to ensure compliance with technical standards and does not change the nature or improve the performances of the original goods, even if this results in a different eight-digit CN code for the added or replacement goods;

(13) dilution or concentration of fluids, without further treatment or distillation process, even if this results in a different eight-digit CN code;

(14) mixing between them of the same kind of goods, with a different quality, in order to obtain a constant quality or a quality which is requested by the customer, without changing the nature of the goods;

(15) mixing of gas or fuel oils not containing biodiesel with gas or fuel oils containing biodiesel, classified in Chapter 27 of the CN, in order to obtain a constant quality or a quality which is requested by the customer, without changing the nature of the goods even if this results in a different eight-digit CN code;

(16) mixing of gas or fuel oils with biodiesel so that the mixture obtained contains less than 0,5%, by volume, of biodiesel, and mixing of biodiesel with gas or fuel oils so that the mixture obtained contains less than 0,5 %, by volume, of gas or fuel oils;

(17) dividing or size cutting out of goods if only simple operations are involved;

(18) packing, unpacking, change of packing, decanting and simple transfer into containers, even if this results in a different eight-digit CN code, affixing, removal and altering of marks, seals, labels, price tags or other similar distinguishing signs;

(19) testing, adjusting, regulating and putting into working order of machines, apparatus and vehicles, in particular in order to control the compliance with technical standards, if only simple operations are involved;

(20) dulling of pipe fittings to prepare the goods for certain markets;

(21) denaturing, even if this results in a different eight-digit CN code;

(22) any usual forms of handling, other than the abovementioned, intended to improve the appearance or marketable quality of the import goods or to prepare them for distribution or resale, provided that these operations do not change the nature or improve the performance of the original goods.