



Brexit teething problems or cause to invoke article 16?

Briefing Note

The [Trade and Cooperation Agreement](#) between the EU and the UK clearly helped to avoid the chaos anticipated by a No Deal Brexit that would have created extensive trade barriers and tariffs between the two trading zones. But as the agreement was reached so close to the end of the transition period, there are also some significant teething problems and aspects which still need to be clarified and worked out six weeks on from that deal. If left unaddressed these may have human rights implications in the longer term.

Northern Ireland is bearing the brunt of several of these complications it seems, but it is not alone. Almost all GB businesses that import or export goods to/from the EU, which for customs purposes, includes Northern Ireland will have increased costs or more paperwork or may no longer be permitted to export. Ultimately, many items that are imported from the EU could end up being more expensive despite the trade deal, because of the requirement for new declarations or checks to leave the EU's single market and customs union. Indeed, even companies in Ireland – north or south – may expect challenges to trading with the rest of the EU if goods transit GB.

As a means of avoiding a customs border with physical checks and infrastructure on the island, which would have been the most likely outcome after the 'backstop' proposals by the previous UK Prime Minister Teresa May was rejected, the UK government subsequently agreed to the EU-UK Withdrawal Agreement and the Ireland/Northern Ireland Protocol.¹ Although still part of the United Kingdom, the Protocol keeps NI in the EU's single market for goods and provides that EU customs rules will be enforced at ports, even when shipments are arriving from elsewhere in the UK, i.e. Great Britain.

There are new regulatory checks and processes for goods arriving from GB into all EU countries now that the UK has left the EU and the 11-month transition period 1 February-31 December 2020 is over. It was during the transition period that these details should have been ironed out, but this did not happen as the 'trade deal' (the Trade and Cooperation Agreement between the EU and UK) was only agreed on the 24th December 2020.

¹ The Joint Committee oversees the EU-UK Withdrawal Agreement; the Specialised Committee oversees the Ireland/Northern Ireland Protocol; and the Joint Partnership Council oversees the Trade and Cooperation Agreement.

So essentially there is a trade border between Northern Ireland and the rest of the UK. For the time being, until the new rules are better understood, and the increased paperwork becomes less of a burden, the delivery of certain goods will take more time and hauliers, wholesalers, retailers and even consumers are dealing with the consequences.

It is still early days as the range of problems seem to be far from being resolved and issues may continue to snowball. Customs brokers in Ireland are overwhelmed, partly because UK businesses are understandably unprepared, which has left hauliers in the lurch as they generally drop deliver items in one country (UK or EU) and return with a full lorry. Being stuck in a port waiting for customs clearance is expensive, wastes time and limits the shelf life of perishable products. If journeys are going to take longer or drivers are forced to bring back empty lorries, costs will increase, and alternative options will be needed. Whether lorries are sitting in Holyhead or Dublin, the knock-on effect is that trade is not flowing as normal, which will ultimately result in increased costs for consumers.

Although some hauliers have reportedly said that the red tape and challenges posed in transporting goods are reducing² they must provide shipping companies with completed pre-boarding notifications in order to avoid checks and delays at the destination and Freight Transport Association Ireland have said that, *'There is a growing backlog of goods of all hues, from mechanical parts (car parts) to electrical household goods, furniture, clothing, food supplies sitting in depots because there are not enough agents to process the declarations correctly'*.³

These delays are most noticeable to food items as those products are most visible to consumers, particularly given that all non-essential shops are currently closed during the present lockdown. The disruptions are the result of a number of factors: increased paperwork which has not been satisfactorily prepared by exporting and/or shipping companies; increased cost of shipping, which would have to be passed on to the consumer; delays at ports because of regulatory paperwork, which then has a knock on effect on the shelf-life of food (i.e. perishable foods and ready-meals have a short shelf-life and not very cost effective for retailers if half that time is spent in a lorry rather than in a shop refrigerator).

At the moment there are three 'grace periods' which have been negotiated with the EU:

- until the 1st April authorised traders such as supermarkets and their 'trusted' GB suppliers have a grace period from needing the official certification for products of animal origin, composite products, food and feed of non-animal origin and plants and plant products. New SPS (Sanitary and phytosanitary) requirements will exist from 1 May, which can include animal health certification (Export Health Certificates) by veterinary inspectors, which require a 24-hour advance notice and can be costly. The UK government has set up the Movements Assistance Scheme to help agri-food businesses with the costs of trading between GB and NI.

² <https://www.times-series.co.uk/news/national/19012109.health-education-authorities-deny-poots-ni-food-shortage-claims/>

³ <https://www.irishtimes.com/news/world/brexit/brexit-freight-group-warns-taoiseach-of-empty-shelves-and-higher-prices-1.4459240>

- until the 30th June restricted foods such as raw sausages and chilled mince, and ungraded eggs and unpasteurised milk are permitted to be shipped to GB-NI.
- until 31st December 2021 there is a phasing in of regulatory requirements for medicines in order to avoid disruption to the flow of medicines from GB-NI.

These schemes are not supposed to be open to extension, although CEOs from a number of the large supermarkets have asked the UK government to negotiate with the EU in order to keep this 'trusted trader' scheme open until a feasible long-term solution is found. The EU is vigorous at protecting the Single Market, particularly around food safety standards (SPS).

A number of new committees and partnerships have been set up within the UK and between the EU and the UK in light of the TCA. The UK government has a new 'dedicated team' to work with supermarkets, the food industry and the Northern Ireland Executive in order 'to develop ways to streamline the movement of goods'. The TCA Partnership Council is made up of ministerial level representatives from the EU and the UK and will oversee the 'attainment of the objectives' and supervise the implementation of the agreement. There are no less than 19 new Trade Specialised Committees, including the Trade Specialised Committee on Sanitary and Phytosanitary Measures which will aim to ensure that relevant trading does not compromise biosecurity, Trade Specialised Committee on Customs Cooperation and Rules of Origin and the Trade Specialised Committee on Technical Barriers to Trade.

Another issue causing concern/delay is around rules of origin, which is not necessarily straightforward and requires that EU businesses exporting goods to the UK, and vice versa, to confirm each products' origins by way of import and security declarations. The situation is complicated by the fact that the UK is a hub of EU distribution. Many products, notably foods, are imported to GB from an EU county, are unpacked and repacked in the GB, but not necessarily modified or subject to further manufacturing and then distributed to the EU, where they may be subject to customs taxes, or tariffs, invariably increasing the cost for consumers.⁴ Rules of origin apply not only to food products (see below).

The fishing industry in Scotland was clearly not prepared for the very late TCA⁵ and the fishing industry in both Ireland and Northern Ireland are claiming significant losses because of the TCA.⁶ Other businesses on the island of Ireland are also feeling the Brexit-effect for goods imported from other EU countries that are shipped by way of the UK 'land bridge'. Some businesses, both north and south, are looking at long term solutions and changing their shipping routes to and from the EU via the Rosslare rather than via the UK. The other

⁴ Percy Pig jellies, which are sold by Marks and Spencer, for example, are made in Germany and are not subject to tariffs when Britain imports them. However, they could be subject to tariffs when the British retailer distributes them to its Irish stores. <https://www.irishtimes.com/news/ireland/irish-news/percy-pigs-become-latest-brexit-victim-as-retailer-m-s-warns-price-may-rise-1.4453462?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fireland%2Firish-news%2Fpercy-pigs-become-latest-brexit-victim-as-retailer-m-s-warns-price-may-rise-1.4453462>

⁵ Seemingly indicative of the Scottish fishing industry, Berwick Shellfish, sold 87% of its £1.7m earnings to France, Spain and Germany last year, but is facing severe disruption and delay so far this year. <https://www.bbc.co.uk/news/business-55638969>

⁶ <https://www.rte.ie/news/brexit/2021/0114/1189714-fish-quota/>

alternative is that businesses are now looking for new suppliers. Boots NI, for example, have begun stocking sandwiches made by NI company Deli Lites to replace their suddenly difficult to access former supplier (presumably GB based). Musgrave Group, Ireland's largest grocery distributor, including Supervalu and Centra, have noted the 'teething issues' around Brexit, but 'have a sourcing strategy to buy 100% Irish and fresh meat produce'. Marks & Spencer has stated that for its Irish shops, it may need to buy more Irish/Northern Irish-made products.

Despite some news reports, Northern Ireland is not facing a food crisis. There has been some disruption to the supply chain and some of these may continue and potentially may get worse after the grace periods end. So, this may lead in the longer term to an expansion in the sourcing of products from alternative suppliers locally. Aodhán Connolly from the Northern Ireland Retail Consortium, has stated that, '*There's not food shortages, there are choice issues*'. He gave the example that '*the average supermarket has up to 50,000 product lines*', and the Brexit-effect concerns '*only a couple of hundred*'.⁷

Clearly there are problems implementing the new rules and regulations, but these initial difficulties seem very far from being a crisis at this stage, as more time is needed for the new system to bed in. Brexit is creating challenges for the whole of the UK, although Northern Ireland, and indeed in some instances Ireland is, as Aodhán Connolly explains, at the '*end of the supply chain*' by way of the fact that items coming from the EU generally pass through the UK by way of the land bridge.

There is also further confusion around GB-based suppliers of Irish companies or companies that have an Irish internet domain and the lack of clarity of whether they can charge for customs when shipping to NI and/or Ireland.

Not just food

GB exporters of all sizes have suffered because new charges in VAT, customs and other charges, as well as increased shipping fees, indeed customers are sometimes also paying extra fees.⁸ Covid has also played a role in the supply and demand problems for other goods as well. Many more people are spending more time at home, including working from home, increasing the demand for new furniture, equipment and other items. However, Covid has also had a negative impact on workers in factories, which along with congestion at ports and other supply chain issues is affecting supply. The distribution centre for IKEA (in north and south of Ireland) is in England. Customers in Ireland have had orders cancelled because of 'an interruption in its supply chain', with one customer being informed that her order is 'in a port somewhere'.

⁷ <https://www.newsletter.co.uk/business/ni-supermarket-business-figure-no-food-shortages-only-choice-issues-3103539>

⁸ https://www.theguardian.com/politics/2021/jan/17/shock-brexit-charges-are-hurting-us-say-small-british-businesses?utm_term=eb982650ba37adbafa351130c9a0cf74&utm_campaign=GuardianTodayUK&utm_source=esp&utm_medium=Email&CMP=GTUK_email
<https://www.bbc.co.uk/news/business-55576571>
<https://www.bbc.co.uk/news/business-55638969>

As noted above, the rules of origin apply not only to food products. The Trade and Cooperation Agreement allows for the rules of origin in relation to cars to be phased in, which stops British cars exported to the EU being subject to a 10% tariff and permits car makers to use parts made in either the UK or EU without generating extra tariffs. Prof David Bailey, of UK in a Changing Europe explained that there will be *'limits on how many parts a factory can source from outside Europe completely. If a car was assembled in Sunderland but made of 80% Japanese parts, it would count as Japanese and be hit with the 10% tariff. Under the Brexit deal, these "rules of origin" will be phased in.'*⁹

One product that is causing problems and may be indicative of other 'at risk goods' - that is those goods moving from GB to NI but run the risk of illegally crossing the border into the EU - is British steel. Negotiations are still in the process for finding a permanent solution for the present situation which, at the very least, would increase quotas for steel imports. At present, because steel exports from GB to NI are considered to be 'at risk' they are therefore subject to the EU's Steel Safeguarding measures [ie, tariffs] if they exceed the EU import quota.¹⁰ EU steel however can be sold tariff and quota free into Northern Ireland. Steel coming into NI from anywhere else in the world is counted against the UK import quota.

Indeed, certain industries, namely machinery including computers; vehicles; gems and precious metals; mineral fuels including oil; and electrical machinery which make up the largest percentage of overall imports *and* exports to/from the UK may face difficulties which have not yet come to light in first weeks since the end of the Brexit transition period. Like Ireland other EU countries, namely Germany, France and the Netherlands, each of which do significant percentages of overall trade with the UK could well face similar 'teething problems' ie bureaucratic paperwork issues and delays at ports, etc.¹¹

Human Rights

While it is unknown whether these teething problems will persist or grow there are distinct issues that may need further observation from a human rights perspective. Northern Ireland, like the rest of the UK, has weakened its social assistance provisions during the austerity agenda progressed by the current and previous governments over the last ten years. This has undermined the safety net for many in our society and led to increased poverty levels. This situation has been further exacerbated by the economic hardships of COVID-19 and in turn more people are turning to the social security system, a situation that has been highlighted in the *COVID-19 Feminist Recovery Plan* by Women's Policy Group NI.¹² In addition, there was an increase in demand/usage of food banks in Northern Ireland in 2020 by almost 150 percent per cent when compared with the previous year.¹³

⁹ <https://www.mirror.co.uk/news/politics/brexit-trade-deal-15-details-23230033>

¹⁰ <https://www.belfasttelegraph.co.uk/news/uk/25-tariff-on-steel-imports-to-northern-ireland-ruinous-39974482.html>

¹¹ <http://www.worldstopexports.com/united-kingdoms-top-exports/>
<http://www.worldstopexports.com/united-kingdoms-top-10-imports/>

¹² <https://wrda.net/wp-content/uploads/2020/07/WPG-NI-Feminist-Recovery-Plan-2020.pdf>

¹³ <https://www.belfastlive.co.uk/news/ni-food-banks-see-demand-18356140>; <https://www.itv.com/news/utv/2020-12-03/80-surge-in-demand-for-food-banks-in-northern-ireland>

These new trading and import arrangements with GB, Northern Ireland's biggest trade partner, are clearly more complex and burdensome than prior arrangements, but they are also only at the initial stages of implemented and it is therefore too early to properly assess their long-term impact. Nonetheless there will be clear concerns if these problems persist or indeed grow, as any increase in the cost of goods, particularly foods, are ultimately likely to be borne by the consumer. The initial food shortages are leading to a 'lack of choice' and not a lack of goods themselves, but in an economy where a broad range of products creates greater consumer options, particularly for a budget shopper on a low income, the extent of this lack of choice may have an impact if it continues. Likewise, if certain goods prove to be too expensive to transport to Northern Ireland this may have a knock-on effect on local jobs in certain sectors. The potential upside is that some stores already seem to be focussing on seeking alternative suppliers for certain goods, many of whom are in Northern Ireland, which can only be good for local employment prospects.

The Belfast/Good Friday acknowledged the 'particular circumstances of Northern Ireland' and affirmed that regardless of the future constitutional status of Northern Ireland that it would 'be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities'. The principles of mutual respect for the identity and ethos of both communities and parity of esteem were also to be reflected in any additional rights in a new Northern Ireland Bill of Rights but this protection has unfortunately never been enacted. The Agreement also established the British-Irish Council 'to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands'. Considering the above, it might be argued that more needs to be done to consider the sentiments of those within our community who identify as British and feel that the new trading restrictions in the Irish Sea (the result of Brexit and the Ireland/Northern Ireland Protocol), represent a *de facto* border in the Irish Sea, which further erodes their connection with Britain and threatens the Union.¹⁴ The delays and barriers for Northern Ireland's trade with Great Britain as a result of the Brexit arrangements has led to the escalation of unionist political and community opposition to the structures of Protocol. In recent days this has culminated in the DAERA Minister withdrawing staff from two ports due to fears for their safety¹⁵ and some political party offices being damaged.¹⁶

In response some have outlined the view that current conditions justify invoking Article 16 (Article 16 of the Protocol in relation to Northern Ireland or Article INST 36: Safeguard Measures of the TCA, the GB counterpart of Article 16) thus permitting the UK to 'unilaterally take appropriate safeguard measures' if it has led to 'serious economic, societal or environmental difficulties that are liable to persist'.¹⁷ But the recent misstep by the EU in attempting to trigger Article 16 to establish export controls to Northern Ireland for Covid 19

¹⁴ <https://www.belfasttelegraph.co.uk/news/northern-ireland/loyalists-hold-talks-with-nio-to-express-anger-over-irish-sea-border-39997279.html>

¹⁵ <https://www.bbc.co.uk/news/uk-northern-ireland-55895276>

¹⁶ <https://www.bbc.co.uk/news/uk-northern-ireland-55901809>

¹⁷ <https://www.newsletter.co.uk/news/opinion/unionists-are-already-calling-article-16-ni-protocol-be-invoked-and-they-have-good-reason-do-so-given-how-it-panning-out-3087925>

vaccines has clearly outlined the dangers of utilizing this mechanism both practically and politically.¹⁸

The management of the Northern Ireland Protocol has a very clear set of relationships and decision-making structures for dealing with its implementation and addressing any problems as they arise. Article 14 of the Protocol makes provision for the Specialised Committee, who are appointed to make specific recommendations on the operation of the Protocol and how any difficulties might be overcome. These recommendations are made to the Joint Committee who are then charged with reaching agreement on any decision and acting jointly to implement an agreed response action. In comparison Article 16 allows for unilateral action by either party to suspend the Protocol. It is also clear that if the UK did trigger Article 16 and suspend elements of the Protocol that it found most egregious that the EU would also be entitled to adopt 'rebalancing measures'. The expectation for both the triggering of Article 16 or such rebalancing measures is that they only suspend elements that are strictly necessary, are limited to the shortest period possible and that they would be removed as quickly as possible. Any failure to eventually reverse an Article 16 suspension would also likely jeopardise the long-term future of the Protocol into the future.¹⁹ Therefore, the more appropriate procedures for dealing with any difficulties in the implementation of the Protocol remain unutilised at this point and should be followed before any further consideration of the nuclear option available under Article 16.

It was always going to be the case that there would be greater delays and disturbances to trade once the UK opted for a front stop option where Northern Ireland had separate arrangements for accessing and complying with EU Customs Union and Single Market arrangements. This contrasts with the previous backstop arrangements in the original Withdrawal Agreement where the entire UK would retain access to the single market and Customs Union.

Until more time has passed, certainly more than six weeks, and officials and businesses are given adequate time to learn and implement the new rules, it is likely too early to assess if the current problems being experienced are 'teething problems' which will iron out or whether they are likely to persist in the longer term and be detrimental to Northern Ireland. While there were clearly early problems in GB to NI trade there is also optimism about dealing with those challenges into the future.²⁰ The present set of circumstances, while unwelcome, seem far from conditions for invoking article 16, not least because the full details of the article's implications are similarly unclear both in the short and long term for the full set of relationships across these islands and with the EU. Indeed, other solutions

¹⁸ <https://www.bbc.co.uk/news/uk-55865539>

¹⁹ For a more detailed explanation of how Article 16 would work see Katy Hayward and David Phinnemore <https://blogs.lse.ac.uk/europpblog/2021/01/14/article-16-of-the-ireland-northern-ireland-protocol-offers-no-quick-fix/>

²⁰ The recent Manufacturing NI survey for instance has shown that while 44% of manufacturing firms experienced some difficulties in the first month of the operation of the Protocol but only 23% expected these problems to persist. <https://www.manufacturingmonthni.com/wp-content/uploads/2021/02/Protocol-Report-February-2021-Final.pdf>

such as the extension of existing grace periods are already in discussion as possible alternative approaches.²¹

These problems are also not unique to Northern Ireland or to the Protocol. There are clearly other problems across the UK as well as in Ireland (and potentially in other parts of the EU).²² These obvious trade, rights and political concerns should continue to be monitored to ensure that they do not continue in the long term, but given that the UK left the EU and made a trade deal only a few days before the end of the transition period the current circumstances are also clearly the result of insufficient time for the businesses and bureaucratic burdens of these new trading conditions to be adequately prepared for.

February 2021

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²¹ <https://www.gov.uk/government/publications/letter-from-the-chancellor-of-the-duchy-of-lancaster-to-the-vice-president-of-the-european-commission-2-february-2021>

²² <https://www.usnews.com/news/world/articles/2021-02-07/exports-from-uk-to-eu-down-68-since-brexit-trade-deal-say-hauliers>