

IIEA Policy Brief

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With the UK's referendum on its EU membership fast approaching, and UK public opinion precariously balanced, politicians and policymakers are turning their attention towards the tangible implications of a potential Brexit.

The Northern Irish dimension of this debate has recently come to the fore, with particular attention focused on possible implications of Brexit for the border.

Any hardening of the Northern Irish border, whether in the form of customs posts or passport controls, would have political and economic implications for both the UK and Ireland, encompassing mobility, trade and supply chains, and, in the worst case scenario, perhaps even affecting the fragile settlement in the North.

This IIEA brief describes the possible implications for the Northern Irish border in the event of Brexit.

Click image below for a larger version

The Common Travel Area and the Schengen Zone

Before examining potential issues for the border, it is necessary to provide some background on the Common Travel Area (CTA), the free travel zone through which Irish and British citizens enjoy a remarkable, and mutual, degree of migratory freedom.

The UK and Ireland are outside of the Schengen acquis, the passport-free travel area shared by 26 EU and non-EU states. But the two countries have shared their common travel area for nearly a century, which allows citizens of one state to live and work in the other, without restrictions.

The CTA has had tangible benefits for British-Irish relations, particularly as a result of increased trade and mobility across the Irish sea, and on the island of Ireland.

The combination of the CTA, full EU membership (including the EU's customs union and Single Market), and the onset of the peace process, ultimately meant that both customs posts and checkpoints on the Northern Irish border became unnecessary. In fact, the dismantling of security posts and reopening of secondary border-crossings has made the presence of the border

almost impossible to discern – for many travellers today, only the sudden loss of a 3G signal is an indication that they have crossed the border.

But the CTA is something of a peculiarity in the context of modern bilateral arrangements. Though it has existed since shortly after the establishment of the Irish Free State in 1922

(albeit with some interruption during World War II and the post-war period), it is not directly provided for in legislation in either Ireland or the UK.¹

In fact, the most prominent legal reference to the CTA is in the protocol attached to the Treaty of Amsterdam, which exempted Ireland and the UK from certain aspects of Treaty Articles 26 and 77 which establish an internal market without internal frontiers and controls.

The structure of the Protocol is that Article 1 gives the UK the right to exercise passport controls at its borders. It is then set out in Article 2 that Ireland, by virtue of the common travel area between the UK and Ireland, is given the same rights for as long as the common travel area is maintained.

As discussed later in this brief, this protocol has some relevance to the future of the border, depending on the terms of a British exit.

What would happen to the border in the event of a Brexit?

In light of the progress of the last 30 years, a number of significant figures in the Brexit debate have expressed concern over the future of the border in the event of Brexit. Indeed, the issue of customs or passport controls - or both – seems inevitably to arise in the discussion surrounding Brexit.

Though there are many possible post-Brexit models to consider, key to this discussion on the border is whether or not the UK maintains access to the Single Market. Thus, this section describes these two scenarios (in or out of the Single Market) and their potential impact on the Northern Irish border.

Possible Brexit Scenarios and their implications for the Border

The future of the border depends on the nature of the post-Brexit EU-UK arrangements, namely:

- If the UK remains as part of the Single Market either as a member of the European Economic Area, like Norway, or some 'special arrangement' similar to the EU's agreement with Switzerland. In this scenario, the UK would be obliged to abide by Single Market regulations, including freedom of movement, and would not have a voice at the table during the creation of future Single Market rules²;

or

- In the event that agreement cannot be reached on post-Brexit Single Market access, and the UK finds itself outside both the EU and Single Market, and the UK conducts its trade with the EU on the basis of WTO rules

The implications of these two scenarios for the border are analysed on the following pages.

What is the common Travel Area?



The Common Travel Area is an agreement between Ireland and the United Kingdom allowing for free movement between the two states. It predates the free movement of persons provisions that are a part of the fundamental freedoms in the EU Treaties

Agreed in 1923 between the United Kingdom and the Irish Free State, the CTA was fully implemented by 1925. It was suspended after the outbreak of the Second World War in 1939, but reinstated in 1952, and has continued without interruption to the present day.

The CTA Covers the whole of the United Kingdom and the Republic of Ireland, including the Channel Islands and the Isle of Man.

The CTA is not specifically provided for in legislation in either country, but is referenced in many pieces of domestic legislation and bilateral agreements between the UK and Ireland.

Scenario 1 - The UK Remains a Part of the Single Market through membership of the European Economic Area or through a special arrangement

- **Border Customs Posts likely**
- **Passport controls unlikely**

If the UK remains in the Single Market either as part of the European Economic Area or a special UK/EU arrangement with the application of the four freedoms of movement of goods, capital, services and persons then the issue of **passport controls** does not arise as the opt-out from Schengen under Protocol 20 of the Treaty of Amsterdam, described earlier, could continue to apply.

However, the issue of **customs controls** does arise because the UK would be outside the Customs Union covered by Treaty Articles 30, 31, and 32 of the Treaty on the Functioning of the European Union (TFEU) along with the Common Commercial Policy in Articles 206 and 207 TFEU.

In this scenario, if the agreement is similar to the Norway / EEA agreement, or the Swiss bilateral agreement, then free trade between the UK and EU would be primarily in industrial merchandise, goods and services, and not in agriculture and fisheries produce. Customs Rules of Origin procedures would apply to all merchandise trade and significant customs tariffs would apply to agricultural produce.

The UK Treasury Report on Brexit *HM Treasury analysis: the long-term economic impact of EU membership and the alternatives* says that the economic cost of being outside the Customs Union

would be significant and would impact on supply chains for time sensitive industries::

Without the customs union, businesses trading within the EU would have to submit customs declarations, pay Value Added Tax on their products as they cross a border, and accept delays while waiting for them to clear inspections. The OECD has estimated that crossing the border, documentation and other delays can increase the transaction costs of trade by up to 24% of the value of traded goods.

The impact of these administrative costs would be particularly pronounced for time sensitive industries like fresh food or those participating in complex pan-EU supply chains such as the aerospace and automotive industry. For example, separate evidence from time-sensitive industries in countries acceding to the EU suggests that every 1 hour of customs delay adds 0.8 percentage points to the ad valorem trade-cost rate and leads to 5% less trade.

If indeed Brexit leads to a return of customs posts and controls similar to the old customs posts between Dundalk and Newry, which were removed when the internal market was created in 1993, it is clear from the Treasury position that there would be economic costs associated for both sides. However, it is not possible to state at this stage precisely how these controls would operate, and it is possible that simplified procedures would be put in place that would prioritise spot checks and audit over extensive examination of goods consignments.

What are the Rules of Origins procedure?

The purpose of the EU's Rules of Origin procedures are to ensure that a specific proportion of the goods in question are manufactured with inputs from the country that has a free trade agreement with the EU rather than third countries. Otherwise there would be a danger that the EU's common external tariff could be bypassed if the country concerned had a lower tariff for the product involved or had a free trade agreement with a third country that was subject to the EU's common external tariff. The Rules ensure that goods from third countries cannot bypass the EU's common external tariff. If the third country content exceeds a specified amount, customs duty is payable.

This issue could arise because the UK, if it leaves the EU, would be outside the Customs Union and Common Commercial Policy regardless of what type of free trade agreement (if any) it manages to negotiate. It is also the case that where revenue issues arise then administrations will tend to err on the side of caution to protect revenue and trade. So, even though tariffs on industrial goods are low, Rules of Origin procedures will apply to UK/EU trade and Customs posts with provision for physical inspection very likely to be required.

If agriculture and fisheries products are excluded from any EU-UK free trade agreement then significant tariffs would apply to imports here from Northern Ireland and Great Britain. In order to avoid increased food prices the UK could set its agricultural tariffs lower than the EU's common external tariff. It may also seek to conclude free trade agreements with other countries that would include agriculture and fisheries products. Any such developments would increase the importance of customs controls from an Irish perspective. Already the prospect of an EU-Mercosur free trade agreement that would include agriculture has created unease in farming circles about access for beef and dairy products to the Irish market."

There is also the added difficulty of securing a border that is already somewhat porous. The Government reports that cross-border fuel-smuggling alone already costs €300m per year in lost taxes. Differential pricing of products such as diesel and cigarettes have long been a factor in driving borderland smuggling. Any further price or currency fluctuation, as is quite conceivable in the post-Brexit scenario, could further drive illegal trade and make proper securing of the border an economic imperative for both states.

Why are customs posts required between EU and EEA countries?

The European Economic Area (EEA) is an agreement between the EU and three of the European Free Trade Association (EFTA) member states (Norway, Iceland and Liechtenstein, with Switzerland having a separate bilateral agreement). It provides for a free trade agreement but does not extend the EU's Customs Union to the EEA/EFTA states.

The aim of both the free trade area and the EU Customs Union is to abolish tariffs on trade but the EU member states have also abolished customs borders and procedures between themselves. These customs borders remain in place both between the EU and EEA/EFTA and the EEA/EFTA states themselves. Furthermore, the common customs tariff on imports into the EU from third countries is not harmonised with the EEA/EFTA states.

Scenario 2 – The UK cannot negotiate Single Market Access, receives no 'Special Arrangement' with the EU, and trades on the basis of WTO rules

- **Customs Controls Certain**
- **Passport Controls possible**

Considering the tenor of the debate in the UK at present, focusing as it does on issues of immigration, sovereignty and subsidiarity, many consider it unlikely that the first scenario, in which the UK is forced to accept the rules of the Single Market without having a say in their creation, would be politically palatable.

However, if the UK cannot agree access to the Single Market as part of the EEA or through a bilateral free trade agreement, the only other option available is trading on the basis of WTO rules.

In this case, the need for **Customs controls** would be even stronger. All goods, including both industrial goods and agriculture and fisheries produce, would have tariffs and would be subject to Rules of Origin. This would be necessary to ensure that the common external tariff was not bypassed for the EU, or indeed for the UK in situations where it had a higher tariff than the EU.

It is in this scenario that the issue of border **passport control** is most likely to arise.

The main issue would be whether Ireland, in the absence of the UK, would still have its opt-out from the Schengen area under the Protocol in the Treaty of Amsterdam. As discussed earlier, the opt-out is structured as a joint exemption for the UK and Ireland and assumes the continuation of the Common Travel Area.

One might assume that the EU, in order to accommodate a Member State for whom North/South passport controls would have significant political implications, would be sympathetic to Irish requirements vis-à-vis the CTA. It might in turn be a reasonable assumption that the EU would endeavour to ensure that an agreement could be reached to avoid passport controls.

Such an outcome cannot be guaranteed, however, and the centrality of the immigration question to the UK's reform agenda, as well as the ongoing discussion over migration and its impact on security in Europe cannot be easily dismissed.

In a situation in which the UK opted out of the Single Market and the four freedoms, in part to control immigration, then maintaining the common travel area and the open border with Ireland would make control of immigration complicated, to say the least.

Conclusions

The above leaves us with two conclusions:

- **Customs controls including at the North /South Border are very likely in the event of Brexit, irrespective of the subsequent trade relationship negotiated by the UK.**
- **In the event of the UK leaving both the EU and the Single Market, passport controls are possible, particularly in light of the political concerns regarding migration and border control.**

After two decades of an open border and cross-border peace building either of the above outcomes would be an unwelcome complication for both the Irish and British governments as well as for the whole island of Ireland.



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