

Commentary: Customs Union: EU Foundation Stone, Brexit Stumbling Stone*

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It is widely acknowledged that the departure of the UK from the EU's customs union is likely to result in very significant difficulties, in particular, for the Republic of Ireland. The consequences of Brexit may, as some have suggested, be more severe for the Republic than for the UK. News reports suggest that Ireland may want to ask the EU for aid in dealing with the situation.¹

Looked at pragmatically, some may think that things would be so much easier if the UK remained in the EU customs union and single market. Those in favour of Brexit are, however, opposed to the EU common external tariff and the common commercial policy in principle. Some think the EU too capitalist. Others think it restricts the scope for legitimate national policy.

Issues of principle arise, however, for those in the EU as well as those who want to leave it. The EU's customs union is, and always has been, about so much more than trade. That is why the problems which have to be addressed in relation to Brexit are so difficult. The border issue is deservedly to be addressed early in negotiations, but the issues which arise in relation to the border between the Republic of Ireland and Northern Ireland over trade and customs matters are not just about the border. They affect the foundations of the entire EU and, therefore, all EU citizens.

I CUSTOMS UNION: A TOOL FOR PEACE?

European customs unions are a feature of European history with much more than economic significance. Some have

seen in the Zollverein of the nineteenth century 'a genuine sense of national unity through customs union'.²

In the twentieth century customs unions continued to be important, especially after the war of 1939–1945. The US made its aid for European recovery conditional on European cooperation. In 1948 Secretary of State Marshall told the Foreign Affairs Committee of the Senate of the US that the condition of intra-European cooperation was being met. He supported his statement with the comment that:

The customs union among Belgium, the Netherlands, and Luxemburg is now in operation. Negotiations for a Franco-Italian customs union are proceeding.³

These customs unions were rightly seen as the basis for a fundamental change in the affairs of Europe. Indeed, some saw customs unions simply as 'a tool for peace'.⁴ One of the reasons that they were seen as a tool for peace is that they required a substantial level of integration between the economies of the participating states. That was also their attraction to the founders of the European Economic Community.

The creators of the Community had to choose how to achieve their goals. They could have taken a sectoral approach and established a high authority to govern each sector of the economy. This was the approach taken in relation to coal and steel and atomic energy. It could have been taken in relation to other sectors too. For a while this approach had the support of Monnet.⁵ The Netherlands, in particular, resisted the creation of multiple authorities and their then foreign minister, Mr

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¹ *Ireland More Than Likely to Seek Post-Brexit EU Aid*, Kenny, Reuters (18 May 2017), <http://www.reuters.com/article/us-britain-eu-ireland-idUSKCN18E19Y> (accessed 9 Aug. 2017).

² E. J. Hobsbawm, *The Age of Revolution 1789–1848* 166 (Great Britain: Abacus reprinted 1992). R. Pahre says the customs unions 'morphed into a national state' in *Politics and Trade Cooperation in the Nineteenth Century: The Agreeable Customs of 1815–1914* 318 (CUP 2007).

³ Testimony of Secretary of State Marshall at, <http://marshallfoundation.org/library/wp-content/uploads/sites/16/2014/06/48.01.08-Eur-Recov-Pgm-S.pdf> (accessed 9 Aug. 2017). Secretary of State Marshall referred to the same matters in a hearing before the Committee on Foreign Affairs of the House of Representatives on 12 Jan. 1948: see <http://marshallfoundation.org/library/wp-content/uploads/sites/16/2014/06/48.01.12-Postwar-Recovery-H.pdf> (accessed 9 Aug. 2017).

⁴ Leopold Kohr, *Customs Unions – A Tool for Peace*, Foundation for Foreign Affairs, Pamphlet No.8 (Washington DC 1949).

⁵ Z. Pogatsa, *The Neo-Liberal Defeat of European Integration and the Need for a Supra-National Political Economy*, in *The European Union and Supra-National Political Economy* 98, 100–102 (R. Fiorentini & G. Montani eds, Routledge 2015).

Beyen, sought instead a customs union dealing with all trade in goods.⁶

The Treaty of Rome 1957, Article 9.1, said: 'The Community shall be based upon a customs union covering the exchange of all goods'. That broad wording resolves the battle between those wanting a sectoral approach to integration and those wanting a comprehensive approach.

As negotiations over the Irish border get underway, it would be as well to remember that the European Economic Community (EEC) was founded on a customs union because it was comprehensive and was the least bureaucratic of the alternatives. Those two qualities remain significant today.

It is also worth remembering that customs unions have long been seen, at least by some, as a tool for peace. Attention is understandably directed towards the Good Friday Agreement in the context of the peace process and Brexit. The EU customs union, like many other customs unions, may well also have had a role to play in cementing peaceful relations between its members. That is likely to influence the depth of the agreement which is established between a departing member of the customs union and those that remain.

2 CUSTOMS UNION AND THE EU

The EU's customs union was to be achieved in three main stages within which there were a series of steps. In the event, the union was achieved eighteen months ahead of schedule on 1 July 1968. That result was assisted by the reductions in tariff rates that the rest of the world achieved within the framework of GATT. When it comes to Brexit what was achieved with help from the global community over many years is, some envisage, to be brought to an end in relation to one member of the union in an instant.

The provisions of GATT 1994 remain significant in relation to customs and therefore Brexit. GATT 94's most favoured nation principle would prevent the formation of a customs union except when it exists with respect to 'substantially all trade between the constituent territories' or at least 'substantially all' the trade in products originating in such territories.⁷ The EEC customs union clearly satisfied those requirements as the Court of Justice has noted.⁸

The comprehensive nature of the EU's customs union has also significance internally in the EU. It is an essential element of the first of the four fundamental freedoms which the founding treaties deal with, namely, the free movement of goods. During the debate on Brexit a good deal of emphasis has been placed on free movement of people. Free movement of goods deserves attention too.

As we have seen, Article 9.1 of the Treaty of Rome established the foundational nature of the customs union. The EC Treaty, Article 23.1 also said that 'the Community shall be based upon a customs union which shall cover all trade in goods'.

The Treaty on the Functioning of the EU acknowledges the EU's development in saying that 'The Union shall comprise a customs union'. The Union Customs Code (UCC),⁹ recital (9) however, uses the traditional wording and states simply that 'The Union is based upon a customs union'. When solutions are considered to the problems which arise in Ireland it is important to remember that. One can compromise over many matters in relation to a building. One cannot easily compromise over its foundations.

The breadth of the effects of a foundational customs union should not be underestimated. Many would see a customs union as second best to global free trade, but the broader the economic context in which a customs union is placed the easier it is to justify.¹⁰

One should also distinguish the arguments for entering into a customs union in the first place from leaving an established customs union, as the UK proposes to do. The authors of a rare study dealing with departures from a customs union, made sometime before the UK referendum, said that it 'points to the general potential superiority of continued customs union membership over a policy of withdrawal'.¹¹ Some economists would disagree with that, of course.

Negotiations affecting the borders of the EU customs union touch upon a profoundly important element of the EU and not just when those negotiations concern Ireland. If the depth of a future agreement between departing and remaining members of a customs union is influenced by the fact that a customs union may be seen as a tool for peace, then the foundational nature of the EU customs union is likely to influence the breadth of the agreement.

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⁶ See generally: A. S. Milward, *The European Rescue of the Nation-State 173–196* (2d ed., Oxford: Routledge 2000), 'The Netherlands and the Origins of the Common Market'.

⁷ See Art. XXIV.8 GATT 1947 and GATT 94. The general significance of these provisions is not considered here.

⁸ See Case 38/75 *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen* [1975] ECR 1439 at para. 14.

⁹ Regulation of the European Parliament and of the Council of 9 Oct. 2011, 952/2013/EU, laying down the Union Customs Code recast O.J. [2013] L269/1.

¹⁰ The economic analysis of customs unions in modern times was to a large extent begun by Joseph Viner's *The Customs Union Issue* (London: Stevens and Sons 1950) and J. E. Meade's *The Theory of Customs Unions* (Amsterdam: North-Holland publishing Co, 3d printing 1968). Much subsequent work has been carried out. Useful but dated reviews are by M. B. Krauss, *Recent Developments in Customs Union Theory: An Interpretive Survey*, 10(2) J. Econ. Lit. 413 (1972) and A. Tovias, *A Survey of the Theory of Economic Integration*, 15(1) J. Eur. Integration (1991). Other work includes: C. Kowalczyk, *Welfare and Integration*, 41(2) Int'l Econ. Rev. 483 (2000); E. Ornelas, *Exchanging Market Access at the Outsiders' Expense: The Case of Customs Unions*, 40(1) Can. J. Econ. 207 (2007) and H. Konishi, C. Kowalczyk & T. Sjöström, *Global Free Trade Is in the Core of a Customs Union Game*, 17(2) Rev. Int'l Econ. 304 (2009).

¹¹ A. M. El Agraï & A. J. Jones, *Macroeconomics of Regional Integration: Withdrawal from a Customs Union*, 23(1) J. Econ. Integration 75 (2008), abstract.

3 CUSTOMS UNION: THE SINGLE MARKET AND OTHER INTERNAL DEVELOPMENTS

The EU's customs union was established in 1968. Some legislation was brought into effect then but much remained to be done. Customs duty was established as an element of own resources from 1 January 1971.¹² In 1982 the Commission published '1982: Programme for the attainment of the Customs Union'. It acknowledged that:

Twenty-four years after the creation of the European Community, it must be admitted that full customs union is still a long way off.¹³

The customs union is not finished today. Even after the establishment of the Community Customs Code and the UCC, there is still much work to be done. For example, as the Commission has said:

Member States need to act as one in the management of the Customs Union to ensure that national administrations, businesses and the public obtain the maximum advantages.¹⁴

In other words, legislation is not enough to create a functioning customs union. One needs also unified management. The Commission has a central role to play but the national customs authorities are also indispensable. Closer cooperation between them is something the Commission anticipates.¹⁵ That is not to say that further legislative developments will not be forthcoming. The Commission has put forward a proposal for a directive on the Union legal framework for customs infringements and sanctions¹⁶ although it has not been universally welcomed.¹⁷

Negotiations over Brexit have to take account of the fact that the EU's customs union is still developing. Some of that development can be seen in the growth of the responsibilities of national customs authorities. These are set out in the mission of customs authorities set out in the UCC Article 3. They range from the supervision of the Union's international trade, the protection of the EU's financial interests, ensuring the security and safety of

Union residents and environmental protection. The broader the range of national customs authorities' responsibilities becomes the harder it becomes to diminish the difference between territories inside and those outside the EU customs union.

An important development for the operation of the EU's customs union was the establishment of the single market as from 1 January 1993. Article 13 of the Single European Act required there to be an area without internal frontiers.¹⁸ Such an area was inconsistent with the existence of customs controls. As the Court of First Instance said:

The abolition of customs and tax frontiers,..., is a direct result of Article 13 of the Single Act, which became Article 7a of the EC Treaty, which provides that 'the internal market shall comprise an area without internal frontiers'. It is thus a direct and necessary consequence of that provision.¹⁹

It was a development with significant effects on customs agents. Édouard Dubois et Fils SA estimated that:

following the completion of the internal market on 1 January 1993, it suffered the almost total and definitive cessation of its activities as a customs agent. It estimates the resultant material damage at FF 112 339 703.²⁰

One factor that the Brexit negotiations must take into account is that it is not customs union which removes border controls, it is the single market. The external border between Norway and Sweden marks the boundary of the EU customs union and divides two territories both within the single market. That is fundamentally different from an external border of the EU customs union which divides a territory inside the single market from a territory outside the single market.

Not the least of the concerns which the EU will have in relation to the border between the Republic of Ireland and Northern Ireland is that, if it is made too porous, the EU may suffer a loss of its own resources of which customs duty is a significant element.²¹ All Member States are to take the same measures to counter fraud affecting the

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¹² See Council Decision No. 70/243/EEC on the Replacement of Financial Contributions from Member States by the Communities' Own Resources [1970] OJ L94/19.

¹³ COM(82) 50 final, 12 Feb. 1982 at para. 3, at 2.

¹⁴ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Developing the EU Customs Union and Its Governance* COM(2016) 813 final, 21 Dec. 2016, at para. 3.1 'Customs authorities acting as one'. See also Decision No. 624/2007/EC of the European Parliament and of the Council of 23 May 2007, establishing an action programme for customs in the Community (Customs 2013), Art. 4.1(b) OJ [2007] L 154/25.

¹⁵ See the Communication at 4 which envisages, e.g. a more active Customs Policy Group.

¹⁶ COM(2013) 884 final, 13 Dec. 2013.

¹⁷ This journal has carried a number of articles on the proposed directive including T. Lyons, *A Customs Union Without Harmonized Sanctions: Time for Change?*, 10 GTCJ 136-142 (2015).

¹⁸ The Single European Act, Art. 13, introducing Art. 7a into the EEC Treaty.

¹⁹ Case T-113/96 ECLI:EU:T:1998:11 *Édouard Dubois et Fils SA v. Commission* [1998] ECR-II 125 at para. 46. See also para. 43.

²⁰ See para. 14 of the judgment in Case T-113/96 noted above.

²¹ In 2015 customs duty seems to have been about 13% of the own resources of the EU: EUR 18, 634,700,000/141,80,422,939. In the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the State of the Customs Union COM (2012) 791 final, 21 Dec. 2012 the Commission put customs duty at approximately 13% of the EU Budget (para. 1.3.2., 9).

Union's financial interests as they take to counter fraud affecting their own financial interests.²²

The UK may also want to take account of the fact that EU investigations into what happens on UK territory may be a feature of its life in the future. There have been such investigations even in relation to countries in the European Economic Area (EEA) in the past.²³ The less controlled the border the more likely such investigations will be.

Internal EU developments have undoubtedly strengthened the customs union. At the same time they have contributed to the difficulties of resolving the issues that Ireland faces on Brexit. Some developments may, however, make resolving those difficulties somewhat easier. For example, The Commission Communication of December 2016 'Developing the EU Customs Union and its Governance' sets out the aim of having a single window for traders 'that would bring together the different interactions between administrations and trade over movement of goods into and out of the EU'.²⁴ The Communication acknowledges that it will not be easy to achieve but the aim may have particular significance for Ireland. So too may the ambition:

to ensure seamless customs operation across the EU and equivalence of results based on strengthened risk analysis capacity in the Member States addressing national and transnational risks in the common risk management framework.²⁵

It may be that solutions to the questions arising in relation to the border in Ireland are easier to address once it is borne in mind that 'seamless customs operations' are generally desirable.

4 CUSTOMS UNION: EU COOPERATION WITH THIRD COUNTRIES

A number of the Commission's plans for the future development of the EU's customs union inevitably have to do with its external border. Management of the borders of the customs union is one of three major issues which the

Commission has identified which governance structures have to address.²⁶ One area of particular concern is the need to coordinate the different areas of policy involved in border management.

These different areas are concerned not just with trade and tariff matters but with:

security, the fight against terrorism, product safety, health, intellectual property rights, environmental protection and market protection, dual-use goods and firearms.²⁷

This list reflects the breadth of the mission of customs authorities as set out in the UCC, Article 3, referred to above.

In establishing its relations with a third country the EU needs to ensure that it is able properly to address all these matters. The facilitation of risk-based controls, the use of appropriate IT equipment and the use of non-intrusive detection equipment is something that receives particular mention.²⁸

These matters must be considered in the light of multi-lateral treaties and bilateral treaties.

4.1 Multilateral Treaties

A recent addition to the large number of relevant multi-lateral treaties is the WTO's Trade and Facilitation Agreement which entered into force on 22 February 2017.²⁹ Article 8 of that agreement specifically addresses the functioning of customs operations at borders. At Article 8.2 it states:

Each Member shall, to the extent possible and practicable, cooperate on mutually agreed terms with other Members with whom it shares a common border with a view to coordinating procedures at border crossings to facilitate cross-border trade. Such cooperation and coordination may include:

- (a) alignment of working days and hours;
- (b) alignment of procedures and formalities;
- (c) development and sharing of common facilities;

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²² TFEU Art. 325.2.

²³ Some lead to litigation. See e.g. the mission of investigation in relation to Icelandic prawns in 1992 which underlay *Nortrade Foods Ltd v. CCE* [1998] V&DR 133; see especially paras 12 and 13.

²⁴ COM(2016) 813 final, 21 Dec. 2016, noted at n. 12 above, at para. 3.2.3.

²⁵ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of Dec. 2016 COM(2016) 813 final, 21 Dec. 2016, at para. 3.1.3.

²⁶ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of Dec. 2016 *Developing the EU Customs Union and Its Governance* COM(2016) 813 final, 21 Dec. 2016, s. 3, 6.

²⁷ *Ibid.*, at para. 3.2. and para. 3.2.1.

²⁸ *Ibid.*, at paras 2.1, 3.1.3 and 3.3.1.

²⁹ The EU's instrument of acceptance is dated 1 Oct. 2015 and is available at, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeacc_e.htm#eec (accessed 9 Aug. 2017).

(d) joint controls;

(e) establishment of one stop border post control.

The Revised Kyoto Convention³⁰ also contains many relevant provisions on a wide variety of matters in both its General Annex and its 10 Specific Annexes. Customs controls and the use of information technology are dealt with, for example, in Chapters 6 and 7 of the General Annex. The Specific Annexes deal with importation, exportation, transit and processing, along with many other matters.

The general international law on customs is likely to be of some significance in relation to agreements which are made in relation to the border between the Republic of Ireland and Northern Ireland. It is also useful to take account of the customs cooperation arrangements that the EU has entered into with third states.

4.2 EU Agreements

In 2005, the Agreement between the European Community and the Government of the People's Republic of China on cooperation and mutual administrative assistance in customs matters (known as the 'CCMAA') entered into force. On 2 June 2017 the EU and China signed a Strategic Framework for Customs Cooperation 2018–2020.³¹ The arrangements are overseen by a Joint Customs Cooperation Committee a steering group and working groups. Mutual recognition and trusted trader programmes, mutual exchange of information, supply chain security, the fight against fraud, environmental protection and many other matters are covered.

Agreements in relation to customs cooperation and a wide range of customs matters exist with many other countries. They also frequently establish a Joint Customs Cooperation Committee. Sometimes the customs provisions are dealt with in specific customs agreements such as those with Japan³² and the US.³³ Sometimes the customs provisions appear as part of a free trade agreement which deal with rules of origin and many other customs matters such as in the agreements with Ukraine,³⁴ South Korea,³⁵

and Canada.³⁶ There are, of course, many agreements between the EU and third countries. They are available via a number of Commission web-sites. It is not possible to consider them in detail here.

What is clear, though, is that in negotiating customs provisions affecting the border in Ireland the EU and the UK may draw on the provisions of both multilateral and bilateral agreements. They may help in establishing an agreement of the requisite depth and breadth and ensure the 'seamless customs operations' that are so desirable.

5 CONCLUSION

One of the purposes of Brexit is to allow the UK to pursue a commercial policy which is different from that pursued by the EU. In other words the UK seeks divergence from the EU. One of the fundamental purposes of many agreements between the EU and third countries is convergence. The conflict between the aims of divergence and those of convergence is bound to produce interesting situations requiring the attention of negotiators, not least in the field of customs and trade.

When considering the special position of Ireland the negotiators may find it useful also to keep in mind a number of matters which appear to emerge from the discussion above, namely:

- Customs unions have often been seen as tools for peace. This indicates that any new agreement is likely to be one of considerable depth. Can customs cooperation, although requiring a somewhat shallower association than customs union, perform something of the same function as customs union?
- The EU's customs union is a foundation of the Union. It is comprehensive in nature and not sectoral. It is justified by political and social considerations as well as by economic ones. Consequently, its preservation, protection and future development is a matter of existential importance for the EU. The EU's customs union is not just about customs. Its breadth is likely

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³⁰ 17 Apr. 2008, http://www.wcoomd.org/Topics/Facilitation/Instrument%20and%20Tools/Conventions/pf_revised_kyoto_conv/Kyoto_New (accessed 9 Aug. 2017).

³¹ <http://data.consilium.europa.eu/doc/document/ST-9548-2017-INIT/en/pdf> (accessed 9 Aug. 2017).

³² See the EC/Japan agreement on cooperation and mutual administrative assistance in customs matters [2008] OJ L62/23. In 2010, mutual recognition of authorized economic operators was agreed.

³³ See the EC/US Agreement on customs cooperation and mutual assistance in customs matters [1997] OJ L222/17; the EC/US Agreement on intensifying and broadening the Agreement on customs cooperation and mutual assistance in customs matters to include cooperation on container security and related matters [2004] OJ L304/34; a joint statement on supply chain security of 2011 and a decision on the mutual recognition of trade partnership programmes in 2012.

³⁴ Protocol I to the Agreement deals with the definition of the concept of 'originating products' and methods of administrative cooperation. Protocol II to the Agreement deal with mutual administrative assistance in customs matters. There are many other provisions dealing with customs matters in the agreements.

³⁵ See the agreement between the European Community and the Republic of Korea on cooperation and mutual administrative assistance in customs matters [1997] OJ L121/14 and the free trade agreement between the EU/South Korea which has protocols on the definition of 'originating products' and methods of administrative cooperation and on mutual administrative assistance in customs matters [2011] OJ L127/1415.

³⁶ See the EC/Canada Customs Cooperation Agreement of 1998, [1998] OJ L7/38, which says: 'The contracting parties aim to develop customs cooperation of the widest possible scope' and the CETA, particularly Ch. Six, *Customs and Trade Facilitation*: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (accessed 9 Aug. 2017).

to be reflected in any agreement which is established in relation to Ireland.

- The EU's customs union owes its smooth functioning to the internal market which removed internal customs controls. Replicating the effects of the internal market between parties which are not both in the internal market produces considerable challenges. They will need to meet by any agreement concerning the border between the Republic of Ireland and Northern Ireland. It may be that such an agreement will then prove to have a more general significance for the establishment of other agreements aiming to establish 'seamless customs operations'.

- In negotiating a Brexit agreement, particularly one dealing with the border issue, negotiators may be able to draw some inspiration from the EU's agreements over customs cooperation and trade agreements with third countries. If an agreement relating to the Irish border may influence other agreements, it may also be influenced by them.

The President of the European Parliament, Antonio Tajani has said that 'Brexit will be a particular challenge for Ireland and its people'.³⁷ That is true because of both conceptual and practical matters. It is true also because the customs union is a foundation stone for the EU but, for some others, a stumbling stone.

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³⁷ <http://www.europarl.europa.eu/news/en/headlines/priorities/20160701TST34439/20170227STO64128/tajani-brexit-will-be-a-particular-challenge-for-ireland-and-its-people> (accessed 9 Aug. 2017).