

Chapter 2

The UK Process of Leaving the EU



On 23 June 2016, people in the UK and in Gibraltar cast their vote on the *United Kingdom European Union Membership Referendum*, also known as the *EU Referendum* or the *Brexit Referendum*. Asked to decide whether the country should remain a member of, or leave the European Union, 51.89% of those who took part in the vote chose to leave. Although legally the referendum was non-binding, the UK government of that time, led by Prime Minister David Cameron, had promised to implement the result. The official EU withdrawal process, commonly known as ‘*Brexit*’ was initiated on 29 March 2017. The complex process is based on the never before used Article 50 of the *Treaty on the European Union* (TEU). Brexit was originally due to happen on 29 March 2019, i.e. two years after then Prime Minister May triggered the formal process to leave and kicked off negotiations with the European Union.

2.1 State of Play and Possible Brexit Scenarios

The popular vote neither settled the debate nor clarified the tangled question of what should come next. So far, the process of withdrawal has been marked by intense political debate, ministerial resignations, and much speculation. Prime Minister May’s resignation announced on 24 May 2019 and the ensuing leadership contest slowed down the domestic decision-making process. Discussions, at home and with Brussels resumed with the arrival of Boris Johnson, a pro-Brexit leader, at 10 Downing Street on 24 July 2019. Three and a half years after the Brexit vote, the last word has not yet been spoken regarding the terms of this unprecedented divorce. The impact of Brexit on economic activities, both licit and illicit, including trade in tobacco products, therefore remains hard to predict.

Although TEU Art. 50 stating “*Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*” has never been triggered before, some relevant precedents exist for all scenarios considered.¹ Under

¹Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012.

the first scenario, i.e. ‘*soft Brexit*’, the UK remains in the EU’s single market, but not its customs union. The *European Economic Area (EEA) Agreement* that brings together the EU Member States and the three EEA EFTA States—Iceland, Liechtenstein and Norway—is an example of how such relationship could be structured.² The second scenario consists of the deal negotiated by the former Prime Minister (PM) May where the UK leaves the single market, but maintains a customs union with the EU. In this case, the arrangement between the EU and Turkey presents an interesting precedent.³ Under the third scenario, which reflects the most recent arrangement negotiated with the EU by the current PM Boris Johnson and announced in October 2019, the UK leaves the single market and the customs union and agrees to a comprehensive free trade agreement with the EU. The precedents in these case are practically all the existing FTAs globally. Finally, the fourth and last scenario foresees a ‘*hard Brexit*’, i.e. a situation where absent any comprehensive agreement between the parties, future UK–EU relations would be based on World Trade Organization (WTO) terms. This is also common for the countries which are WTO Members but have not concluded additional FTAs among themselves.

Disagreements in the House of Commons regarding the arrangement negotiated with the EU by the current PM Boris Johnson resulted in arranging a short notice general election, held on 12 December 2019. Not surprisingly, the then ongoing process of leaving the EU topped the list of the electorate’s concerns in the run up to the election. The Conservatives campaigned to get Brexit done by pushing through Johnson’s deal and thus structure future economic relations with the EU on the basis of a trade agreement. Labour on the other hand, promised a new arrangement with the EU followed by a popular vote, whereas the Liberal Democrats pledged to fight for a second referendum with the option to stay in the EU unless they win a majority and can enact their policy of revoking TEU Article 50. Many did not hesitate to call the elections “historic”, with voters facing a “historic choice”.⁴ Quite historic was also the landslide victory of the Conservative Party, which received an eighty seat majority (their largest majority since 1987) and winning 43.6% of the vote (the highest percentage by any party since 1979).

The election finally brought clarity to the Brexit process. Thanks to a sizeable majority of the Conservative Party in the UK Parliament, the latter accepted Johnson’s deal on 23 January 2020. The UK Government issued and deposited Britain’s instrument of ratification of the 2019 Withdrawal Agreement on 29 January 2020. The Agreement was ratified by the Council of the European Union on 30 January 2020, following the consent of the European Parliament on 29 January 2020. The United Kingdom’s withdrawal from the European Union took effect on 11 p.m.

²The EEA Agreement was signed in Porto on 2 May 1992 and entered into force on 1 January 1994. Liechtenstein joined on 1 May 1995. See EFTA (2020) and UK in a Changing Europe (2019) EU-Turkey Customs Union.

³The EU-Turkey Customs Union was established on 1 January 1996 by Decision No 1/95 of the EC-Turkey Association Council. See EC-Turkey Association Council (1995), and UK in a Changing Europe (2018).

⁴Brown (2019).

GMT on 31 January 2020, and at that moment the Withdrawal Agreement entered into force, as per its Art. 185.

Pursuant to Art. 126, the 2019 Withdrawal Agreement provides for a transition period until at least 31 December 2020, during which the UK remains in the single market, in order to ensure frictionless trade until a long-term relationship is agreed. The transition period can be extended once for up to one or two years by a EU–UK Joint Committee, as long as it decides to do so before 1 July 2020.⁵

During the transition, all EU legislation, rules and court decisions will continue to apply to and in the UK as if it were a Member State.⁶ This means the UK will continue to participate in the EU customs union and the single market (with all four freedoms) and in all Union policies. Any changes to EU legislation or rules will automatically apply to the UK.

After the entry into force of the 2019 Withdrawal Agreement, the attention shifted to the future EU–UK relationship, and in particular to the announced trade deal. The EU–Canada Comprehensive Economic and Trade Agreement (CETA) entered into force provisionally on 21 September 2017 has often been cited as a basis for a future relationship.⁷ The non-binding Political Declaration on the future EU–UK relationship, closely connected to the 2019 Withdrawal Agreement—the two Brexit texts negotiated so far by the parties (described in Sect. 2.2 below)—suggests that a free trade agreement could be at the core of the future relationship between the UK and the EU.⁸

However, there is only a limited amount of time for a process that is expected to be difficult and tense. For instance, it took Canada and the EU seven years to negotiate CETA. A crucial point will be how much the UK will wish to diverge from existing EU rules. On this aspect, despite the centrality of Brexit in the December 2019 elections, the campaign had little to say about how the UK would approach the future relationship with the EU. While the UK Government has argued that a trade deal can be concluded by the end of December 2020, European leaders have repeatedly sounded alarm bells, warning that the UK’s imposed deadline leaves little time, and that achieving a comprehensive trade deal in 11 months is unrealistic.⁹ As of February 2020, the latter remains subject of negotiations yet to come. Talks are set to commence on 3 March. Should the parties not manage to reach an agreement by the end of 2020 and the transition period is not extended, a no-deal (or ‘cliff-edge’) Brexit would be the default outcome in 2021.

⁵Art. 132 ‘Extension of the transition period’, 2019 Withdrawal Agreement.

⁶Art. 127 ‘Scope of the Transition’, 2019 Withdrawal Agreement.

⁷See O’Carroll (2019) Can UK get ‘super Canada-plus’ trade deal with EU by end of 2020?

⁸Para. 3 of the 2019 Political Declaration reads “[...] *this declaration establishes the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation.*”

⁹Euronews (2020) Post-Brexit Guide: Where are we now—and how did we get here?

2.2 Relevant Brexit Instruments

The future relationship between the UK and the EU remains to be designed. Negotiations have so far delivered two tangible instruments: a Withdrawal Agreement and a non-binding Political Declaration. For the issue of illicit trade in tobacco products, these instruments are of limited relevance with the exception of the special provisions applicable to the overseas territory of Gibraltar and, to a lesser extent, to the Irish border.

2.2.1 *The Withdrawal Agreement*

After months of intense negotiations, on 14 November 2018 London and Brussels announced that they had agreed on the conditions for Brexit, set out in the Withdrawal Agreement (the ‘2018 Withdrawal Agreement’).¹⁰ This text contains the proposed terms on how to implement Brexit and illustrates the general features of the relationship between the two sides in the short to medium term. The *2018 Withdrawal Agreement* has remained in form of a draft; the House of Commons has voted down the text three consecutive times in the first quarter of 2019 during the May Government.¹¹ After taking office, PM Johnson followed up on his promise to renegotiate the *2018 Withdrawal Agreement* with the EU and surprised many when he rapidly secured an alternative deal from the EU27 in the autumn of 2019.

The 2019 Withdrawal Agreement¹² which entered into force on 31 January 2020 largely mirrors its predecessor. The main differences are in the *Protocol on Ireland/Northern Ireland*—or the ‘backstop’ as it is commonly known. The *2019 Withdrawal Agreement* provides how goods shall be treated during the transition period starting on Brexit day (31 January 2020) and ending on 31 December 2020. Like its predecessor, the 2019 Withdrawal Agreement does not offer much detail on how the two sides will interact after Brexit. Quite unsurprisingly, the issue of illicit trade, including tobacco products, did not capture much attention in the negotiations.

The 541-page long 2019 Withdrawal Agreement only uses the word “illicit” in relation to tobacco once, namely in the *Protocol on Gibraltar*, where the UK undertakes to ensure that the ratification of the *WHO Framework Convention on Tobacco Control* (FCTC) and of the *Protocol to Eliminate Illicit Trade in Tobacco Products* (ITP) is extended to Gibraltar by 30 June 2020.¹³ The word “smuggling” appears four

¹⁰HM Government (2018) Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018. See also, European Commission (2019) The EU–UK Withdrawal Agreement explained.

¹¹On 15 January 2019 (432 to 202), on 12 March 2019 (391 to 242) and lastly on 29 March 2019 (344 votes to 286).

¹²HM Government (2019) New Withdrawal Agreement and Political Declaration.

¹³2019 Withdrawal Agreement, Protocol on Gibraltar, Article 3 para 3.

times: three times in the *Protocol on Gibraltar* and one in the *Protocol relating to the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus*.¹⁴ Finally, the 2019 Withdrawal Agreement mentions the word “tobacco” six times. Beside the above-mentioned *Protocol on Gibraltar*,¹⁵ “tobacco” is mentioned in Annex 2 and 3 to the *Protocol on Ireland/Northern Ireland* which contains references to the *2014 EU Tobacco Products Directive*¹⁶ and to *Council Directive 2011/64 on the structure and rates of excise duty applied to manufactured tobacco*. These provisions of EU law, discussed in the subsequent sections, will continue to apply to and in the UK in respect of Northern Ireland.

2.2.2 *The Political Declaration*

Beside the *2019 Withdrawal Agreement*, the UK and the EU agreed on a non-binding statement of future relations in the form of a *Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom* (2019 Political Declaration). Like the Withdrawal Agreement, the Political Declaration, was first signed on 25 November 2018 by the Government of former PM Theresa May. The Political Declaration sketches out the kind of long-term relation that the UK and the EU want to have in a range of areas, including trade, defence, and security. By and large, the 2019 Political Declaration reflects the content of the 2018 document. With respect to certain elements however, the new version has been ‘watered down’, reflecting the different stance of the May and Johnson premierships. In particular, the aspirations for a close future trading arrangement seem somewhat reduced in the new text. For instance, while the original version aspired to an “as close as possible” future trading relationship with the EU, that phrase was replaced by “ambitious” in the revised text. Some commentators have suggested that the current UK Government aims at establishing more distant economic ties with the EU than what its predecessor had in mind, a relationship characterised by less regulatory alignment and greater trade barriers between Britain and its largest trading partner.¹⁷

Despite the very general language, some elements of the 2019 Political Declaration can nevertheless be retained for the purpose of this work. For instance, document opens with the general statement that “*The future relationship [...] [w]hile it cannot amount to the rights or obligations of membership, [] should be approached with high ambition with regard to its scope and depth, and [...] might evolve over time*”

¹⁴2019 Withdrawal Agreement, Protocol relating to the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus, Article 2 para 6.

¹⁵The 2019 Withdrawal Agreement, Protocol on Gibraltar refers to the Memoranda of Understanding concluded between the Kingdom of Spain and the United Kingdom in November 2018 in relation to citizens’ rights, tobacco and other products, cooperation on environmental matters and cooperation in police and customs matters, as well as the agreement to conclude a treaty on taxation and the protection of financial interests.

¹⁶Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014.

¹⁷See, for instance Milliken and John (2019).

(Paragraph 5). With regard to tariffs, Paragraph 22 provides that “*The economic partnership should through a Free Trade Agreement ensure no tariffs, fees, charges or quantitative restrictions across all sectors with appropriate and modern accompanying rules of origin, and with ambitious customs arrangements that are in line with the Parties’ objectives and principles above.*” With regard to customs, “*The Parties will put in place ambitious customs arrangements []. In doing so, the Parties envisage making use of all available facilitative arrangements and technologies [] and ensuring that customs authorities are able to protect the Parties’ respective financial interests and enforce public policies. To this end, the [UK and the EU] intend to consider [] administrative cooperation in customs matters and mutual assistance, including [] through the exchange of information to combat customs fraud and other illegal activity [.]*”, as stated in Paragraph 24.

On global cooperation, Paragraph 75 of the 2019 Political Declaration promotes cooperation in international fora, where there is mutual interest, including in the area of public health and consumer protection. Another aspect of the future relationship relevant to the fight against illicit tobacco trade is law enforcement and judicial cooperation in criminal matters, as discussed in Paragraphs 80–89 of the 2019 Political Declaration. According to Paragraph 82, the future relationship “*will provide for comprehensive, closed, balanced and reciprocal law enforcement and judicial cooperation in criminal matters, with the view to delivering strong operational capabilities for the purposes of the prevention, investigation, detection and prosecution of criminal offences, taking into account the geographic proximity, shared and evolving threats the Parties face, [and] the mutual benefits to the safety and security of their citizens [...]*”. The three main areas of cooperation, to be covered by future arrangements, are data exchange; operational cooperation between law enforcement authorities and judicial cooperation in criminal matters; as well as anti-money laundering and counter terrorism financing.

The press that covered Brexit only made sporadic references to the problem of illicit tobacco trade in relation to departure of the UK from the EU, in particular in relation to the risk of increased smuggling across the Irish border. As mentioned above, the Withdrawal Agreement (both in the original 2018 and revised 2019 versions) mainly refers to illicit trade and tobacco in the Protocol on Gibraltar, an instrument sought by the Spanish Government which is discussed in Sect. 2.4 below. The following sub-section maps out in greater detail the possible impact of Brexit on the control of illicit trade in the region.

2.3 Possible Impact of Brexit on the Control of Illicit Trade in Tobacco

The impact of Brexit on the control of illicit trade in tobacco products can be analysed by looking at how the completion of the TEU Art. 50 procedure may impact UK legislation as well as the regulation of the UK–EU border. As an EU Member, the

UK was bound to EU legislation, including legislation that directly or indirectly relates to tobacco control and trade. The most relevant legislation for this discussion is the UK law (including in the form of EU-derived domestic legislation), and the *EU Withdrawal Act of 2018*,¹⁸ which provides for a retention of the directly applicable EU legislation. Post-Brexit, the UK will be able to amend its legislation unilaterally where and how it deems necessary, as well as to refrain from adopting new rules developed by the EU. This may result in differences in the applicable regulatory frameworks to the relevant territories—a situation that illicit activities can try to exploit. Due to the geographic situation of the UK and the cross-border nature of illicit tobacco trade, two areas of the UK territory are of particular interest from this perspective, namely Gibraltar and the area surrounding the Irish border.

2.3.1 *Impact on the UK Legislation*

Legal certainty is necessary for economic activity to flourish whereas, typically, illicit activities attempt to benefit from legal uncertainty. Because of the way in which EU law works and how it is implemented at the national level, the withdrawal from the EU would have a major impact on future UK legislation.

EU law today covers a broad range of areas but not all EU legislation has the same effect on Member States. There are two main ways in which EU law applies, namely through regulations or directives. Starting from the latter, once passed at the EU level, directives have to be implemented (or ‘transposed’) into domestic legislation before they can be binding on individuals and companies.¹⁹ In the UK, directives are implemented either by primary legislation (i.e. an Act of Parliament) or, much more commonly, by secondary legislation (a Statutory Instrument). The implementing legislation is domestic legislation and thus part of the UK’s legal system. For instance, in the area of tobacco control, the UK has adopted the *Tobacco Products (Traceability and Security Features) Regulations 2019* to implement track and trace and security features for tobacco in the UK, as required by the *EU Tobacco Products Directive*, discussed in detail below. On the contrary, EU regulations, once passed at the EU level, are directly applicable and binding on individuals and companies in the Member States without the need for national implementation measures. There are currently about 12,000 EU regulations in operation in the UK. The same applies to decisions, although these are only binding on those to whom they are addressed.

From the moment the UK left the EU and once the transition period is completed, EU law will stop flowing into the UK legal system. Today, EU law applies pursuant

¹⁸European Union (Withdrawal) Act 2018.

¹⁹EU directives may contain minimum and maximum (or full) harmonisation requirements. In the case of minimum harmonisation, a directive sets minimum standards, often in recognition of the fact that the legal systems in some EU countries have already set higher standards. In this case, EU countries have the right to set higher standards than those foreseen in the directive. In the case of maximum harmonisation, EU countries may not introduce rules that are stricter than those set in the directive.

to the *European Communities Act 1972*. According to the 2018 Withdrawal Act UK will not have to consider the EU law as a source of law and will not be bound by the EU institutions previously legislating for the UK. To avoid a situation where the withdrawal would create a legislative black hole from the moment of Brexit (or where there is also a transition period after Brexit) the 2018 Withdrawal Act provides for a retention of most existing directly applicable EU law in UK after the exit day by creating a new body of ‘retained EU law’.²⁰ As for EU-derived domestic legislation (the body of UK legislation resulting from the implementation of EU directives), the 2018 Withdrawal Act foresees that it will preserve the same effect in domestic law as it had immediately before the exit day.²¹

Past Brexit day, the UK would decide whether to mirror any post-exit developments of the EU law into domestic law by amending that body of ‘retained EU law’. For instance, should the EU amend the *2014 Tobacco Products Directive* after Brexit, the UK would in principle be free to decide whether to undertake the changes necessary to reflect such amendment in the UK legislation, or not. Similarly, any new or amended EU regulation relevant to the issue of illicit tobacco trade would, as such, not apply in the UK. Should the UK deem specific legislative content (or parts thereof) necessary in the UK, it would have to enact corresponding domestic legislation.

2.3.2 *Impact on Trade in Goods and Customs Controls*

The EU is the UK’s largest trading partner. In 2017, 44% of all UK exports went to the EU, while 53% of all UK imports came from the EU.²² The possibility of introducing tariff and non-tariff barriers to goods originating in the EU imported into the UK (and vice versa) depends on the type of agreement that the two parties will eventually negotiate. Options have evolved over time and are now reflected in the four Brexit scenarios discussed above, ranging from ‘*Soft Brexit*’ to ‘*Hard Brexit*’. The pros and cons of each approach have been the subject of intense debates, mainly from the perspective of UK manufacturers and exporters.²³

The collection of import tariffs on tobacco products from the EU under the different scenarios and the resulting possible price increase or decrease, is discussed below in Sect. 4.1. Beside tariffs, also relevant for the question of illicit trade in tobacco products is the post-Brexit approach to border controls.

Today, goods between the UK and the EU circulate freely, and the UK’s management of the border is heavily influenced by the country’s (former) EU Membership.

²⁰Under the heading ‘Retention of existing EU law’, Section 3 of the 2018 Withdrawal Act states “*Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day.*”

²¹Section 2, 2018 Withdrawal Act, “*EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.*”

²²Ward (2019).

²³See for instance UK Parliament (2017) European Union Committee Brexit: trade in goods, and also UNCTAD (2019) No-deal Brexit: the trade winners and losers.

Brexit is likely to change this, in particular under the scenarios that foresee structuring EU–UK relations on the basis of a trade agreement (third scenario) or in case of ‘*Hard Brexit*’. Time is of the essence. The UK Government has acknowledged that the possibility of facing a period of “less than optimal” border functioning is concrete.²⁴ The Government, wherever possible, would have to put in place coping responses for which efficacy remains impossible to predict. While individuals and businesses alike would be negatively impacted by a sub-optimal border to varying degrees, those involved in illicit activities, including illicit tobacco trade, could try to profit.

The UK border is a complex concept. It can be crossed by people or goods coming to or leaving the UK by air, sea or land at more than 270 recognised crossing points.²⁵ Total imports into the UK in 2017 amounted to a value of £476 billion, comprising £259 billion imports from the EU and £217 billion imports from the rest of the world.²⁶ New customs controls, tariffs, and non-tariff barriers might apply to trade in both directions.

Changes to the import and export procedures would result in more bureaucracy. Increased red tape is burdensome for economic operators and for customs authorities alike. For instance, in case of ‘*Hard Brexit*’, absent any type of arrangement, one can expect that trade under ‘third country’ status would result in customs declarations and upfront Value Added Tax (VAT) payments. In some cases, firms may need export licenses. In a report published in October 2018, HMRC foresees that the number of customs declarations that the UK authorities need to process might rise from 55 million a year to 260 million.²⁷ New border systems would be needed and their deployment takes time.

UK ports could be put under accrued stress. Reports by Dover and Kent Councils have warned of possible massive disruptions and the UK Government also foresees disturbances in the Channel ports.²⁸ Industries relying on ‘just-in-time’ supplies of parts (e.g. car industry) or fresh products (e.g. food and drink industries) have voiced similar concerns.

Both sides are preparing contingency plans in case of ‘*Hard Brexit*’. In the UK, the Department for Exiting the European Union (DExEU) is responsible for coordinating EU exit-related issues, including those affecting the border. Because of

²⁴According to the National Audit Office (NAO), “*The government does not have enough time to put in place all of the infrastructure, systems and people required for fully effective border operations on day one. It has decided to prioritise security and flow of traffic over compliance activity in the short term.*” National Audit Office (2018) The UK border: preparedness for EU exit, p. 10.

²⁵National Audit Office (2017) The UK border: issues and challenges for government’s management of the border in light of the UK’s planned departure from the EU, p. 8.

²⁶In addition, total exports in 2017 amounted to £339 billion, comprising £164 billion exports to the EU and £175 billion exports to the rest of the world. Total EU trade was worth £423 billion and total rest of the world trade was worth £392 billion in 2017. See Office for National Statistics (2018) Pink Book, Table 9.4.

²⁷See, for instance O’Carroll (2017). <https://www.theguardian.com/politics/2017/mar/31/uk-ports-struggling-fivefold-rise-customs-brexit-hmrc-mps-declaration>.

²⁸Sandford (2018).

the uncertainty in the outcome of the Brexit negotiations (that has persisted since the creation of the DExEU in July 2016), it remains unclear whether the necessary customs system, resources, and infrastructure will be ready on time. For instance, to fully enforce compliance regimes from day one, HMRC needs infrastructure to track goods, whereas Border Force require space and facilities to physically examine goods. As for the additional human resources, Border Force has estimated that it could require around 2000 staff to meet all requirements in the event of ‘*Hard Brexit*’, including compliance with WTO rules and other international obligations.²⁹ New staff requirements needs time for recruitment, security clearance, and training.

The customs system is another critical element. HMRC’s implementation of the Customs Declaration Service (CDS) started before the EU Referendum in June 2016, but following the vote and the resulting uncertainty, significant time has been lost. Depending on the final outcome of Brexit implementation, the system might need to be able to handle multiple times the current number of customs declarations each year, and a significantly higher number of traders (estimated between 145,000 and 250,000) may have to make customs declarations for the first time.³⁰

2.4 Territorial Impact

The United Kingdom consists of four constituent countries: England, Scotland, Wales, and Northern Ireland. The UK also has fourteen British Overseas Territories, including Gibraltar, and Akrotiri and Dhekelia on the island of Cyprus.³¹ The Brexit vote was not unanimous: while voters in England (including Gibraltar) and Wales supported Brexit, Scotland and Northern Ireland favoured to remain in the EU. Beside the island of Great Britain, Northern Ireland (a region located in the north east of the island of Ireland and which is part of the UK) and Gibraltar are of particular relevance to the question of how Brexit may impact illicit trade in tobacco products between the EU and the UK. Both regions share borders with EU Members, namely with the Republic of Ireland (560 km and 1700 crossing points) and Spain.

As a result of a process known as devolution, there are distinct legislatures and governments in Scotland, Wales, and Northern Ireland (devolved governments), which have powers over a range of policy areas which had previously been the preserve of the UK Government. The control of competencies coming back from the EU is contested between the UK and the devolved governments. The lack of rules in the largely unwritten constitution means that there are no clear ways of resolving the resulting conflicts. For instance, the duty system is not a devolved administration issue and

²⁹See, for instance, Crawford (2018).

³⁰National Audit Office (2018) The UK border: preparedness for EU exit, p. 36.

³¹The other twelve overseas territories are Anguilla; Bermuda; the British Antarctic Territory; the British Indian Ocean Territory; the British Virgin Islands; the Cayman Islands; the Falkland Islands; Gibraltar; Montserrat; Saint Helena, Ascension and Tristan da Cunha; the Turks and Caicos Islands; the Pitcairn Islands; South Georgia and the South Sandwich Islands.

therefore no ‘devolved administration interests’ arise. However, health is a devolved matter and the devolved administrations each have tobacco control strategies, which set out their commitment to working with the UK Government to tackle illicit trade in tobacco. The present study mainly focuses on England.

2.4.1 *The Irish Border*

For historical reasons, the Irish border is a matter of great political, security, and diplomatic sensitivity.³² This issue has dominated talks for months in the context of Brexit and the word ‘backstop’ has become common parlance in the UK and beyond. Generally used to describe a position of last resort, ‘backstop’ in the context of Brexit means maintaining a seamless border on the island of Ireland in the event of a ‘*Hard Brexit*’. To prevent the reintroduction of a physical border with physical checks and infrastructure between Ireland and the UK, the latter had suggested that technological solutions could provide a ‘non-visible border’. Such claims were met with scepticism in Brussels.³³ The backstop negotiated by former PM May implied a single customs territory, effectively keeping the whole of the UK (and not only Northern Ireland) in the EU customs union unless and until both the EU and UK decide otherwise.

The 2019 Withdrawal Agreement negotiated by PM Johnson largely reflects what was done by his predecessor but departs from it on the crucial backstop issue. To appease hard-line Brexiteers, a complex new mechanism was agreed.

The new approach foresees that customs controls will happen when goods arrive to Northern Ireland, rather than across the island of Ireland. In practice, as illustrated in Art. 5 of the *Protocol on Ireland/Northern Ireland to the 2019 Withdrawal Agreement*, the actual checks will be on what is effectively a customs border between Great Britain and the Island of Ireland, with goods being checked at ‘points of entry’ in Northern Ireland. In other words, while legally there will be a customs border between Northern Ireland (which stays in the UK) and the Republic of Ireland (which stays in the EU), in practice goods will not be checked on the border between them but rather at ports and airports in Northern Ireland. Tariffs will only have to be paid on goods being moved from Great Britain to Northern Ireland if those products are considered ‘at

³²After decades of unrest, the Northern Ireland peace process led to the adoption of the Good Friday Agreement (or Belfast Agreement), effective from 2 December 1999. Among other things, the Agreement sets out the present devolved system of government and creates a number of institutions between Northern Ireland and the Republic of Ireland and between the latter and the UK. Recitals in the Protocol on Ireland/Northern Ireland of the 2019 Withdrawal Agreement states “*recalling that the United Kingdom’s withdrawal from the Union presents a significant and unique challenge to the island of Ireland, and reaffirming that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation there*”.

³³See Rice (2019), and Tidey (2019).

risk’ of being transported into the Republic of Ireland. A joint committee made up of UK and EU representatives will draw up a list of what goods are considered ‘at risk’. If tariffs are paid on ‘at risk’ goods that do not end up being sent on from Northern Ireland into the EU, the UK would be responsible for refunding the relevant amounts.

Furthermore, pursuant to Art. 8 of the *Protocol on Ireland/Northern Ireland to the 2019 Withdrawal Agreement*, EU law on value added tax will apply in Northern Ireland, but will be limited to goods (not services). Accordingly, Northern Ireland will be allowed to have different VAT rates than the rest of the UK, which would not normally be allowed under EU law. This means that Northern Ireland may apply the same VAT rates on certain goods as the Republic of Ireland, to stop any unfair advantages on either side of the border that could be exploited by illicit activities.

Several commentators voiced their concerns for increased illicit trade following Brexit between the Republic of Ireland—an EU Member—and Northern Ireland.³⁴ The Irish border has a history of smuggling activities. Illicit trade seems to concentrate on tobacco products and fuel. HMRC considers the smuggling of counterfeit cigarettes—manufactured in Eastern Europe and Asia—into Ireland and across the border as a significant threat.³⁵ Also, Irish authorities have reported a number of illicit production facilities producing counterfeit cigarettes for the UK market.³⁶ The risk of increased illicit activities around the Irish border will depend on the final outcome of the negotiations between the UK and the EU. While the excise tax differential between the UK and Ireland is minimal—both countries apply excise tax rates that are among the highest in the EU—the possible introduction of import tariffs on tobacco products imported into the UK from the EU (a scenario conceivable under the ‘*Hard Brexit*’ scenario) could work as additional incentive to pursue illicit activities targeting the UK. This aspect is discussed in Sect. 4.1.1 below.

2.4.2 Gibraltar

Gibraltar has been under British control since 1713. Its status as an overseas territory has long been a source of contention with Spain, and the latter threatened to use its veto over Britain’s divorce deal unless some of its demands were met. Spain used Brexit to secure measures to combat tobacco smuggling. Indeed, the region has traditionally been the entry point for illegal tobacco products into Spain. In 2017,

³⁴See for instance, Jones (2019). <https://www.irishtimes.com/news/ireland/irish-news/smuggling-at-the-border-why-the-uk-s-brex-it-plan-is-raising-fears-1.3,824,760><https://www.irishtimes.com/news/ireland/irish-news/smuggling-at-the-border-why-the-uk-s-brex-it-plan-is-raising-fears-1.3824760>.

³⁵Police Service of Northern Ireland and An Garda Síochána (2018) Cross Border Organised Crime Assessment 2018.

³⁶Ibid.

Spanish authorities seized more than 600,000 cartons of cigarettes.³⁷ Figures show that the discrepancy between consumption of licit tobacco products and legitimate imports is substantial, with part of the difference presumably diverted toward the illicit market.³⁸ Significant price differences create opportunities for arbitrage that can be exploited.

The territorial status of Gibraltar within the EU is peculiar.³⁹ Gibraltar is a VAT free jurisdiction.⁴⁰ Since it is outside the customs union and Schengen Area, contrary to the Irish border, Gibraltar already has a relatively ‘hard’ border with Spain, with the result that checks were required on goods and people crossing to and from Spain. At the request of Spain, the UK negotiated a specific *Protocol on Gibraltar to the 2018 Withdrawal Agreement* with several references to illicit trade, specifically in tobacco products (see Sect. 2.2.1. above).⁴¹ Further, the UK and Spain signed the *Memorandum of Understanding on Tobacco and other Products* and several other bilateral instruments.⁴² The entry into force of such memoranda is subject to the ratification of the 2019 Withdrawal Agreement in the UK and the EU.

The main goal of the *Memorandum of Understanding on Tobacco and other Products* is to limit the price differences between tobacco products sold in Spain and those sold in Gibraltar where they are much cheaper, and therefore to reduce arbitrage opportunities. According to Paragraph 1 on ‘Price Differentials’:

The Government of Gibraltar, being concerned about [...] the existence of an illicit trade in tobacco in the area around Gibraltar [...] has committed to ensure that, by 30th June 2020 the average retail price differential of tobacco products (cigarettes, cigars, fine cut tobacco, and other tobacco products) will be no more than 32% greater than the most recently published Spanish prices for the equivalent tobacco products in mainland Spain and the Balearics. [...] For cigarette products the market will be divided into four categories of product: premium cigarettes, mid-high cigarettes, mid-low cigarettes and lower-price cigarettes with a minimum price provided for each category. For fine cut tobacco, the market will be divided into two categories of product: premium and non-premium with a minimum price provided for each category. The Gibraltar competent authorities will set minimum retail prices for each of the categories of tobacco products, which will be published quarterly in the Gibraltar Gazette. [...]

³⁷See, for instance, de Miguel and Abellan (2018).

³⁸Gibraltar imported 72 million packs of cigarettes in 2017 despite its meagre population of just 34,000 inhabitants, according to the Spanish Tax Agency. If all of the tobacco imported went on internal consumption it would mean each Gibraltarian would have to smoke 5.8 packs of cigarettes every day. See, for instance, The Olive Press (2018).

³⁹The UK is responsible for Gibraltar’s external relations and Union law is applicable to Gibraltar to the extent provided in the 1972 Act of Accession by virtue of Article 355(3) TFEU.

⁴⁰The UK’s 1972 Act of Accession provided for certain derogations in relation to Gibraltar, including exclusion from the Common Agricultural and Fisheries Policies, and from the customs union (including VAT and common commercial policies).

⁴¹In general, on the Protocol and on the negotiations between Spain and the UK, see Durrant et al. (2018).

⁴²HM Government (2018) Brexit negotiations: Gibraltar Memoranda of Understanding.

The Memorandum also contains provisions on information sharing, according to which the Parties undertake to exchange detailed information, for instance regarding the amount of raw or unmanufactured tobacco and tobacco products that have been imported, sold or exported from or to Gibraltar, details of imports, specifying variety, origin, exporter, destination, importer, and weight in kilogrammes (for raw or unmanufactured tobacco). For tobacco products, information will distinguish between the different types of tobacco products, report on the trend in retail prices for each tobacco product type (weighted average price for the amount sold, minimum price and maximum price).⁴³ With regard to enforcement, the Memorandum mandates reciprocal cooperation, in particular for the identification of persons responsible for smuggling activities and for the collection of debts owed to the state.⁴⁴

References

- Brown C (2019) Polls close in historic British election. CBC News, 12 Dec 2019. <https://www.cbc.ca/news/world/britain-brexit-election-johnson-corbyn-vote-1.5392818>. Accessed 24 February 2020
- Consolidated version of the Treaty on European Union (TEU). OJ C 326, 26.10.2012, pp 13–390. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>. Accessed 24 Feb 2020
- Council of the European Union (2011) Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco, OJ L 176, p 24, 5 July 2011
- Crawford R (2018) We need 5000 extra customs officers to cope with Brexit—but more cuts are coming instead
- de Miguel B and Abellan L (2018) Tobacco complicates Brexit negotiations with Gibraltar. El Pais online, 17 Oct 2018. https://elpais.com/elpais/2018/10/17/inenglish/1539760338_678882.html. Accessed 24 February 2020
- Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ L 127, 29.4.2014
- Durrant T, Stojanovic A, Lloyd L (2018) Negotiating Brexit: the views of the EU 27. Institute for Government, March 2018. https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_views-eu-27-v5_WEB.pdf. Accessed 24 Feb 2020
- EC-Turkey Association Council (1995). Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC). https://www.avrupa.info.tr/sites/default/files/2016-09/Custom_Union_des_ENG_0.pdf. Accessed 24 Feb 2020

⁴³See Paragraph 2, Memorandum of Understanding on Tobacco and Other Products. The Memorandum also requires sharing information that distinguish between direct retail sales and duty-free sales to leisure cruises or other forms of transport (para. 2); and report, on a quarterly basis, about the effectiveness of the efforts made to prevent and combat fraud and smuggling in the region, including the legislation adopted for this purpose, the administrative and judicial measures applied, the human and material resources employed to combat fraud and smuggling, and the quantity and value of the seizures made (with specific reference to traceability).

⁴⁴See Paragraph 5 and 6, Memorandum of Understanding on Tobacco and Other Products.

- EFTA (2020) Basic features of the EEA agreement. <https://www.efta.int/eea/eea-agreement/eea-basic-features>. Accessed 24 Feb 2020
- EU-Canada Comprehensive Economic and Trade Agreement (2017). <https://ec.europa.eu/trade/policy/in-focus/ceta/>. Accessed 24 Feb 2020
- Euronews (2020) Post-Brexit guide: where are we now—and how did we get here? 25 February 2020. <https://www.euronews.com/2020/02/11/brexit-draft-deal-first-of-many-hurdles-to-a-smooth-exit> Accessed 27 Feb 2020
- European Commission (2019) The EU-UK withdrawal agreement explained, 8 February 2019, TF50 (2019) 59. https://ec.europa.eu/commission/sites/beta-political/files/the-withdrawal_agreement_explained.pdf. Accessed 24 Feb 2020
- European Communities Act 1972. United Kingdom Parliament. <http://www.legislation.gov.uk/ukpga/1972/68/contents>. Accessed 24 Feb 2020
- European Union (Withdrawal) Act 2018. United Kingdom Parliament. <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>. Accessed 24 Feb 2020
- HM Government (2018) Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018. <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>. Accessed 24 Feb 2020
- HM Government (2018) Brexit negotiations: Gibraltar memoranda of understanding. <https://www.gov.uk/government/publications/eu-exit-negotiations-gibraltar-memoranda-of-understanding>. Accessed 24 Feb 2020
- HM Government (2019) New withdrawal agreement and political declaration. <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>. Accessed 24 Feb 2020
- HM Government (2019) Political Declaration setting out the framework for the future relationship between the United Kingdom and the European Union, 19 Mar 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840656/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf. Accessed 24 Feb 2020
- Jones JH (2019) Smuggling at the border: why the UK's Brexit plan is raising fears. Irish Times, 14 March 2019. <https://www.irishtimes.com/news/ireland/irish-news/smuggling-at-the-border-why-the-uk-s-brexit-plan-is-raising-fears-1.3824760>. Accessed 24 Feb 2020
- Milliken D, John M (2019) UK heading for 'fairly hard' Brexit if Johnson deal passes. Reuters, 18 October 2019. <https://ru.reuters.com/article/idUSKBN1WW2F8>. Accessed 24 Feb 2020
- National Audit Office (2017) The UK border: issues and challenges for government's management of the border in light of the UK's planned departure from the EU. Session 2017–2019, HC 513, National Audit Office, October 2017. www.nao.org.uk/wp-content/uploads/2017/10/The-UK-border.pdf. Accessed 24 Feb 2020
- National Audit Office (2018) The UK border: preparedness for EU exit. HC 1619 Session 2017–2019 24 October 2018. <https://www.nao.org.uk/wp-content/uploads/2018/10/The-UK-border-preparedness-for-EU-exit.pdf>. Accessed 24 Feb 2020
- O'Carroll L (2017) Concerns as HMRC faces 'fivefold rise in customs checks' after Brexit. The Guardian, 31 March 2017. <https://www.theguardian.com/politics/2017/mar/31/uk-ports-struggling-fivefold-rise-customs-brexit-hmrc-mps-declaration>. Accessed 24 Feb 2020
- O'Carroll L (2019) Can UK get 'super Canada-plus' trade deal with EU by end of 2020? The Guardian, 12 November 2019. <https://www.theguardian.com/politics/2019/nov/12/can-uk-get-brexit-super-canada-plus-trade-deal-with-eu-by-end-of-2020>. Accessed 24 Feb 2020
- Office for National Statistics (2018) UK balance of payments, the pink book: 2018. <https://www.ons.gov.uk/releases/ukbalanceofpaymentsthepinkbook2018>. Accessed 24 Feb 2020
- Police Service of Northern Ireland and An Garda Síochána (2018) Cross border organised crime assessment 2018. <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/cross-border-organised-crime-assessment-2018.PDF>. Accessed 24 Feb 2020

- Rice C (2019) Irish border: technology ‘only part of solution’ after Brexit. BBC Online, 26 June 2019. <https://www.bbc.com/news/uk-northern-ireland-48772409>. Accessed 24 Feb 2020
- Sandford A (2018) No-deal Brexit: what would ‘WTO terms’ mean for UK-EU trade? Euronews, 31 July 2019. <https://www.euronews.com/2018/12/19/how-would-uk-eu-trade-be-affected-by-a-no-deal-brexite>. Accessed 24 Feb 2020
- The Olive Press (2018) Spanish tax agency questions Gibraltar’s Tobacco Imports. The Olive Press, 4 March 2018. <https://www.theolivepress.es/spain-news/2018/03/04/spanish-tax-agency-questions-gibraltars-tobacco-imports/>. Accessed 24 Feb 2020
- The Tobacco products (traceability and security features) regulations (2019) United Kingdom Parliament. <http://www.legislation.gov.uk/uksi/2019/594/made>. Accessed 24 Feb 2020
- Tidey A (2019) Irish border: can technology remove the need for a backstop? Euronews, 5 February 2019. <https://www.euronews.com/2019/02/05/irish-border-can-technology-remove-the-need-for-a-backstop>. Accessed 24 Feb 2020
- TUC, 3 October 2018. <https://www.tuc.org.uk/blogs/we-need-5000-extra-customs-officers-cope-brexite-more-cuts-are-coming-instead>. Accessed 24 Feb 2020
- UK Parliament (2017) Brexit: Gibraltar. House of Lords, European Union Committee, 13th Report of Session 2016–17 HL Paper 116. <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/116/116.pdf>. Accessed 24 Feb 2020
- UK Parliament (2017) European Union Committee Brexit: trade in goods. 16th Report of Session 2016–17. Published 14 March 2017—HL Paper 129. <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/129/12902.htm>. Accessed 24 Feb 2020
- UK in a Changing Europe (2018) EU-Turkey customs union. <https://ukandeu.ac.uk/explainers/eu-turkey-customs-union/>. Accessed 24 Feb 2020
- UK in a Changing Europe (2019) The European single market. <https://ukandeu.ac.uk/explainers/the-european-single-market/>. Accessed 24 Feb 2020
- UNCTAD (2019) No-deal Brexit: the trade winners and losers, 3 April 2019. <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2052>. Accessed 24 Feb 2020
- Ward M (2019) Statistics on UK-EU trade. House of Commons Library, Briefing Paper Number 7851, 24 July 2019. <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7851#fullreport>. Accessed 24 Feb 2020

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