



The Centre for
Cross Border Studies

Briefing Paper

The need for regulatory cross-border
territorial impact assessment:
Challenges at the Ireland-Northern
Ireland border

December 2019

The need for regulatory cross-border territorial impact assessment: Challenges at the Ireland-Northern Ireland border

Introduction

The purpose of this Briefing Paper is to highlight the urgent need for policy-makers, decision-makers and legislators to assess the impact of a proposed policy, regulation, strategy or law, for example, on their jurisdiction's borders, and to assess how their implementation has affected the socio-economic conditions of citizens in a border region.¹ To undertake such an exercise is not necessarily a means of restricting or impeding the development of a particular policy, strategy or piece of legislation by focusing solely on its potentially negative impacts on a border region, but can instead become an instrument to maximise its benefits by identifying opportunities to make positive cross-border connections with policies, strategies or legislation in the neighbouring jurisdiction. At a more basic level, assessing impact from this perspective will provide evidence as to whether a proposed policy or piece of legislation facilitates or inhibits the ability of those within a border region or within the wider jurisdiction to engage in cross-border or inter-jurisdictional cooperation. It is an essential element of evidence based policy-making.

However, this Briefing Paper will also briefly consider the current status of evidence based policy-making and what the Ireland-Northern Ireland border may tell us about this in light of the United Kingdom's withdrawal from the European Union.² As discussions continue on the merits of the Withdrawal Agreement reached between the EU and the UK Government in October 2019, and as the legislation to implement it is to come before a new Westminster parliament following the December general election, the urgency of a territorial impact assessment with a cross-border dimension has become increasingly apparent. But while the issue of the UK's departure from the EU may have provided an immediate focus on the question of cross-border impact assessment – or “border-proofing” – the underlying need for it predates Brexit and will continue to exist post-Brexit.

Evidence-based policy making: A hostile environment?

Those training to work within the policy environment in the UK Civil Service are instructed on how “A knowledgeable and skilled policy professional commissions, understands and uses information from analysts, statisticians and social researchers to support policy design”, and “makes effective use of experts to develop a sound evidence base to support policy recommendations”.³ Within Northern Ireland, civil servants' development is founded on the principle that “If policy outcomes and public services are to be improved, it is crucial that

¹ This Briefing Paper was authored by Dr Anthony Soares, CCBS Acting Director.

² For a range of Briefing Papers relating to Brexit published by the Centre for Cross Border Studies, visit <http://crossborder.ie/category/research-and-policy/policy/briefings/>. The Centre's responses to various consultations and its submissions of evidence to parliamentary committees can be accessed at <http://crossborder.ie/category/research-and-policy/policy/consultation-responses/>.

³ Policy Profession, “[Policy Profession Standards: a framework for professional development](#)” (2019), p.3.

policy decisions should be based on sound evidence”.⁴ Nevertheless, UK civil servants are also reminded that “policy development reflects the political realities”.⁵ This implicitly suggests there may be tensions between what the evidence points to in terms of a proposed policy, and the political direction that has given rise to such a policy. In other words, could it be that a policy may be put into place because of political motivations despite the fact that the evidence says it will not achieve what it proposes, or even that it will have negative impacts?

Drawing on his experience as a former Minister in the Welsh Government, Leighton Andrews describes Michael Gove’s declaration during the 2016 EU referendum campaign that the UK had had enough of experts as running against the grain of the normal state of affairs. Andrews stresses the increasing importance of evidence in the development of policy, suggesting that “proof of evidence is largely normative now in governmental policy-making and requirements of proof of evidence are built into the process of government”.⁶ Nevertheless, the constraints that make up the overall policy environment within government (including devolved government) are also clearly outlined by Andrews, who identifies three key factors influencing the extent to which ministers are able or willing to consider evidence: time, trust, and “the authorising environment”.

While the issue of time constraints may be a familiar one, and not unique to the consideration of evidence in relation to a proposed policy, the other two deserve further comment. Again drawing on his own experience as a Minister, Andrews notes that “a sometimes unconscious barrier for evidence transmission may be confirmation bias”, and how “in the melee of information through which you are driving forward, it is inevitable that you will come to rely on sources you trust, whether they be organisations or individuals” (p.5). “Building trust”, he notes, “which can rest on a reputation for credibility and reliability, takes time, but it is arguably the most fundamental element the policy community needs to address if evidence is to be translated into policy” (p.5). This raises the question of how to build trust in relation to an area of evidence that has not traditionally been called upon when assessing the potential impacts of a proposed policy; how can legislators and policy-makers be convinced of the need to gather evidence on how what they are proposing will affect their citizens living near their jurisdictional borders, or the movement of goods, people and ideas between their jurisdiction and those of their neighbours, or between different devolved regions within the UK if this has not been customary practice?

The fact that in the UK context it has not been practice to “border-proof” policy in the past was amply demonstrated following publication in October 2019 of the Department for Exiting the European Union’s Impact Assessment of the European Union (Withdrawal Agreement) Bill.⁷ In its opinion on the Impact Assessment, and in particular on aspects relating to the Protocol on Ireland/Northern Ireland, the Regulatory Policy Committee notes how the

⁴ The Executive Office, [“Effective Policy Making – Workbook Two – Developing and Analysing the Evidence Base”](#), p.7.

⁵ [“Policy Profession Standards: a framework for professional development”](#), p.9.

⁶ Leighton Andrews, [“How can we demonstrate the public value of evidence-based policy making when government ministers declare that the people ‘have had enough of experts’?”](#) (2017), p.2.

⁷ Department for Exiting the European Union, [“EU \(Withdrawal Agreement\) Bill Impact Assessment”](#) (21 October 2019).

Department has “provided a structured, qualitative analysis of the impacts of the new Northern Ireland/Ireland Protocol [which] also includes an assessment of the scale of trade between GB and Northern Ireland [...], but does not monetise any of the impacts it describes”.⁸ One of the underlying reasons the Department felt it was unable to provide an estimated cost of the potential impacts was, as the Committee explains in its report, that “data on individual movements of goods across the border are not available, and would be required to make an estimate” (p.5). The Committee’s report also highlights how the Department’s “analysis notes that there will be disproportionate impacts on small business that trade across the [Northern Ireland/Ireland] border”, but that “it does not quantify the degree of disproportionate impact” (p.8).

The Department for Exiting the European Union’s lack of awareness of relevant data in relation to cross-border movements does not only mean it is not in a position to adequately quantify the impact of a crucial piece of legislation, it also highlights how this situation is indicative of a longstanding blind-spot in terms of the need to assess the impact of proposed legislation or policy from a cross-border dimension.⁹ For those who understand the necessity of “border-proofing” of policy, the question of building trust with legislators and policy-makers is a crucial one, and one where the process does not simply involve the introduction of new providers of evidence, and rather the introduction of a whole body of evidence that has been too readily ignored by government and civil servants, including in the devolved administrations.

Finally, turning to Leighton Andrew’s question of the “authorising environment” as a factor influencing ministers’ ability or willingness to consider evidence, he describes how “they are situated within a context defined by a party programme, a history of prior policies, a balance of power within a Cabinet, particularly in a coalition context, and a budgetary framework” (p.6). In other words, the political context will condition the extent to which any given minister (or political representative) will be informed by evidence, according to whether it is in tune with the political trajectory being pursued. “Above all”, Andrews adds, ministers “are likely to be concerned about the media perception of their actions”, and notes how the “media can reinforce evidence – or can undermine it, particularly if the evidence flies in the face of the underpinning ideological position of a particular newspaper outlet” (p.6). Suffice it to say that the prevailing “authorising environment” in recent years has been largely inimical to evidence regarding the impact of the United Kingdom’s withdrawal from the European Union on the border between Northern Ireland and Ireland, and on the cross-border movements and relations within and between these islands. As we move into a post-Brexit context, it is crucial that legislators and policy-makers urgently take up the practice of “border-proofing” proposed policy and legislation if they wish to avoid severe disruption to border communities and to cross-border relations across these islands.

⁸ Regulatory Policy Committee, [“Opinion on the Impact Assessment of the EU \(Withdrawal Agreement\) Bill”](#) (21 October 2019), p.3.

⁹ In this regard it is interesting to note the Regulatory Policy Committee’s comments on how the Department’s Impact Assessment “could benefit from assessment of data from sources other than National Statistics, such as those held by hauliers or local administrative data” (p.13).

The urgent need for “border-proofing”

Despite the apparent focus on the “problem” of the Northern Ireland-Ireland border during the debates concerning the UK’s withdrawal from the EU, and the intermittent acknowledgements that there is a lack of knowledge surrounding it, there is a risk that post-Brexit policy will nevertheless be largely formulated without taking it properly into account. This danger is clearly alluded to in the Regulatory Policy Committee’s report on the Department for Exiting the European Union’s impact assessment of the European Union (Withdrawal Agreement) Bill:

“The present [Impact Assessment] states that the policy will not be reviewed, arguing that the Bill is a purely technical exercise designed to give effect to the Withdrawal Agreement, and does not present a monitoring and evaluation plan. This approach is unusual given that the policy being implemented is both novel and significant. Given the data gaps described in the IA and the explicit commitment to secondary legislation and assessment as time elapses and more information becomes available, the [Regulatory Policy Committee] recommends that the Department set out a monitoring and evaluation plan that would address those gaps and track impacts that are currently too uncertain to assess. This is particularly the case for the new Protocol, where appropriate monitoring and evaluation (for example more detailed monitoring of trade flows) could support appropriate decision-making on the future of the Protocol and of the UK’s future trade arrangements” (p.14).

The Committee is in no doubt that evidence from a cross-border perspective is needed going forward, and that current practices in terms of policy development and evaluation are insufficient. Without such evidence it will be impossible to judge how the UK’s withdrawal from the EU is impacting on the Northern Ireland-Ireland border region or on North-South and East-West relations, or to ensure the proper operation of the Protocol on Ireland/Northern Ireland. It cannot be the case that the Department for Exiting the European Union’s Impact Assessment of the European Union (Withdrawal Agreement) Bill, with all its data gaps, should be seen as the only necessary example of “border-proofing” of policy.

“Border-proofing” must be undertaken, for example, in relation to the development of UK common frameworks encompassing such areas as international trade, immigration and international relations. This does not mean simply ensuring the proper involvement and consideration of the devolved administrations in the formulation of such frameworks, although this will be vitally important;¹⁰ it means testing any proposed framework within the specific context of the Northern Ireland-Ireland border region – which necessarily implies doing so from a *cross-border* perspective – as well as in the wider context of cross-border relations within and across these islands. Moreover, while the consideration of potential economic impacts is imperative, “border-proofing” also includes an assessment of potential impacts across a further three dimensions: social, environmental and cooperation.

¹⁰ On this see, for example, the House of Commons Public Administration and Constitutional Affairs Committee’s report, [“Devolution and Exiting the EU: reconciling differences and building strong relationships”](#) (31 July 2018).

The underlying principles of “border-proofing” can be found in the [Impact Assessment Toolkit for Cross-Border Cooperation](#), developed in 2011 by the Centre for Cross Border Studies and our colleagues from the Euro-Institut in Kehl, Germany. It requires assessing impacts in terms of how a particular proposed intervention will affect *cross-border* economic, social and environmental relations, as well as the extent of institutional and other networks of cross-border cooperation. In terms of the latter, for example, any proposed post-Brexit UK common framework must be assessed in terms of its impact on the operation of the North South Ministerial Council, a core institution of the 1998 Belfast/Good Friday Agreement. Without such “border-proofing”, post-Brexit policy development and legislation will be undertaken blindly and with potentially severe consequences for those who live within the Northern Ireland-Ireland border region, and for relations within and across these islands.

“Border-proofing” is not an inherently “negative” exercise, only looking to identify the potentially deleterious effects of a proposed policy or piece of legislation. It is also an essential method of gathering evidence that can identify means of maximising the potential benefits of a policy or piece of legislation by highlighting cross-border links with policies or legislation being developed in the other jurisdiction. In this respect the proposed UK Shared Prosperity Fund represents a significant example that would benefit from being “border-proofed”.¹¹ As it currently stands, and bearing in mind the existing lack of detail, the overall objective of the Shared Prosperity Fund is to “reduce inequalities between communities across our four nations, once we have left the European Union and EU Structural Funds”, as set out in 2018 by the then Secretary of State for Housing, Communities and Local Government, James Brokenshire.¹² “Border-proofing” would ensure that the proposed Fund explicitly sets out how it would support cross-border cooperation as a means of reducing inequalities, recognising that particularly in the case of Northern Ireland this may involve cooperating beyond the four nations of the UK. This would provide Northern Ireland the means to capitalise on the mutually beneficial opportunities for cross-border initiatives presented by Ireland’s [National Development Plan 2018-2027](#) and its [National Planning Framework](#).

Brexit has undoubtedly demonstrated the urgent need for “border-proofing” of proposed legislation and policy. However, it is important to recognise that that need was there before Brexit and will continue to exist in relation to matters not directly related to the UK’s withdrawal from the EU. It is also not just a practice that must be instituted by the UK Government and UK civil servants, but also by the Irish Government, the devolved administrations and by local government across these islands. Only then will we be able to capture the full potential of the communities living and working within and between these islands.

¹¹ For some considerations on the replacement of EU funding, see the Centre for Cross Border Studies’ [“Submission to the APPG on post-Brexit funding inquiry”](#) (28 August 2018).

¹² James Brokenshire MP, [“Written Statement”](#) (24 July 2018). See also House of Commons Library Briefing Paper, [“The UK Shared Prosperity Fund”](#) (3 September 2019).