



IEA Briefing Paper
**THE NORTHERN IRELAND
PROTOCOL**

Current position and ways forward
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The Northern Ireland Protocol: Current position and ways forward

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Summary

- The Protocol on Ireland/Northern Ireland forms part of the Withdrawal Agreement which formalised the United Kingdom's exit from the European Union.
- Its stated intention was protection of peace and stability in Northern Ireland, which was considered to require trade between Northern Ireland and Ireland to continue without border checks or formalities. Northern Ireland continues to be effectively within the EU's single market for goods, which is protected by requiring customs declaration and regulatory formalities on goods from Great Britain at the ports of Northern Ireland.
- Single market rules therefore continue to have direct effect in Northern Ireland and burdensome requirements apply to movement of goods between two parts of the UK that are highly economically integrated.
- Economic and political disruptions have followed, culminating in the collapse of the Northern Ireland Executive and the refusal of the main Unionist party to re-enter government. Power-sharing and other institutions of the Good Friday Agreement have ground to a halt. Available data suggest that there has been significant diversion of trade, an outcome that the European Commission is actively encouraging but that the Protocol expressly sought to avoid. In general, developments in practice, even with only partial implementation, indicate that key objectives of the Protocol are not being met.
- The UK put forward proposals to reform the Protocol in July last year and the EU responded in October with more limited proposals to adjust some elements of its implementation. The EU's proposals are conditional on full implementation of the Protocol (including the ending of grace periods that have mitigated its effects so far) and UK alignment with certain EU regulations.
- The two sides appear to be far apart but the EU should give active consideration to the UK's proposals, which are economically liberalising and seem more likely than the current form of the Protocol to achieve the parties' aims for peace and stability, while protecting the single market. In the absence of agreement, the UK could be justified in taking unilateral action to protect the Good Friday Agreement and the welfare of the people of Northern Ireland.

Introduction

The Protocol on Ireland/Northern Ireland (the Protocol) was included in the Withdrawal Agreement between the UK and the EU with the stated objective of protecting peace in Northern Ireland (NI), and in particular the operation of the Belfast ('Good Friday') Agreement (GFA). It aimed to avoid customs and regulatory checks or controls and related physical infrastructure at the border between Ireland and NI, while also protecting the EU single market. At the same time, the parties intended to minimise the impact of the Protocol on everyday life in Ireland and NI, and to have regard to the importance of maintaining the integral place of NI in the United Kingdom's internal market¹.

In practice, it has caused economic disruption and political instability. The NI Court of Appeal found that its implementation in law has suspended the parts of the Act of Union that promise equality in trade between Great Britain and Northern Ireland². Early in 2022 the Democratic Unionist Party withdrew from the devolved government in NI, and implementation of the protocol by local agencies and officials has been beset with legal and political challenges³. This has destabilised the institutions of the GFA that the Protocol was designed to protect.

The macroeconomic effects of the Protocol have been difficult to separate from the effects of Brexit generally and the Covid pandemic. It is clear that the costs of dealing with the new trade barriers run into hundreds of millions of pounds and there are many reports of products becoming unavailable or more expensive, with little evidence so far that the benefits from continued participation in the single market outweigh such costs.

Since the Protocol was agreed, the UK and the EU have been working to implement it and manage its impacts, both through a dedicated joint committee and through unilateral measures.

The UK published proposals in July 2021 for what it considers to be a durable solution. This involved amending the Protocol in a way that the UK believes would avoid border controls between NI and Ireland, while protecting the single market and also respecting the constitutional integrity of the UK and the economic interests of NI. The EU responded in October 2021, with a much more limited and heavily conditioned set of proposed mitigations.

This briefing paper summarises the provisions and effects so far of the Protocol, then considers each side's proposals to improve it. Finally, it suggests how the British government could proceed.

Background and content of the Protocol

Under the Protocol, very broadly, Northern Ireland remains subject to EU single market regulation for goods, and to the EU customs code (the UCC). There are no tariffs or customs and regulatory controls between NI and Ireland or the rest of the EU. All goods placed on the market in NI must meet the EU's regulatory requirements and so goods brought from Great Britain (GB) must be declared and subjected to checks and testing in the same way as goods from a third country being imported into the EU. Restrictions and prohibitions under EU law apply to certain goods.

Tariffs are applicable to all goods that are 'at risk' of being moved onward to the EU (see below for how this is defined). As with all imports of goods into the EU, there are specific rules for food and agricultural goods (sanitary and phytosanitary or 'SPS' rules), parcels, personal baggage of travellers, and live animals (including pets and guide dogs).

As summarised by the European Commission: 'the external border of the Union's Single Market for goods and Customs Union has been established between Northern Ireland and Great Britain respective territories. This external border of the Union is managed and controlled by the UK authorities' (European Commission 2021b).

¹ Recitals to Protocol on Ireland/Northern Ireland

² Allister and Others v Secretary of State for Northern Ireland [2022] NICA 15

³ <https://www.bbc.co.uk/news/uk-northern-ireland-56217647>

As a result of the de facto continuation of NI in the EU single market and customs union, EU rules on competition, state aid and VAT also continue to apply in NI. To achieve all of this, the Protocol includes annexes of EU legislation that apply with direct effect in Northern Ireland. Such legislation is subject to automatic updating if the EU amends or replaces it. The UK government only has the right to be informed and discuss the matter⁴.

The European Commission has authority to supervise and bring action against the UK in respect of NI as if it were a member state, and the Court of Justice of the EU (CJEU) has jurisdiction over disputes about the application of the Protocol.

In recognition of the democratic deficit inherent in subjecting a territory to laws and enforcement by bodies in which it has no representation, the Protocol includes a mechanism for the Northern Ireland Assembly to vote periodically on its continuation. The first such vote is due in 2024⁵. The Protocol is overseen by a Joint Committee (JC) of the EU and the UK established under the Withdrawal Agreement. The Protocol also includes a Specialised Committee on NI to advise the JC and a Joint Consultative Working Group (JCWG), to act as a forum for consultation and exchange of information on the implementation of the Protocol⁶.

Article 6(2) of the Protocol provides that 'having regard to Northern Ireland's integral place in the UK's internal market, the Union and the UK should use their best endeavours to facilitate trade between Northern Ireland and other parts of the UK, in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof.'

The Protocol was, of necessity, drafted in high level terms and set out a legal framework to be operationalised through more detailed arrangements to be agreed by the parties, acting through the JC.

As well as the economic provisions, intended to enable trade on the island of Ireland to continue with no additional formalities or checks, it includes a commitment by the UK and Ireland to maintain the Common Travel Area and commitments by the UK in respect of human rights in NI. NI also continues to participate in the EU's energy market.

The original version of the Protocol, agreed by then-prime minister Theresa May, included an obligation on the parties to use best endeavours to negotiate a replacement agreement. At that time the Protocol was known as 'the backstop', to apply in case no free trade agreement or other future relationship could be agreed between the UK and the EU. As renegotiated by the Johnson administration, the 'backstop' effect was removed, and while article 13.8 of the Protocol acknowledges the possibility that the Protocol could be superseded by a subsequent agreement, there is no duty on the parties actively to pursue such new agreement.

After the UK formally left the EU on 31 January 2020, there was an implementation period before the Protocol came into effect. During this time, a free trade agreement (the Trade and Cooperation Agreement, or TCA) was negotiated between the UK and the EU. The TCA provided for the elimination of tariffs between the UK and the EU. This significantly reduced the fiscal risk to the EU that the Protocol was intended to mitigate, as, other than in very limited scenarios, there would be no incentive to smuggle goods from GB to the EU via NI. However no regulatory alignment or recognition was agreed in the TCA so the EU has started to apply full third country regulatory requirements and checks (such as veterinary certification and border checks) on imports from GB.

During the Implementation Period, the Joint Committee agreed the matters delegated to it by the Protocol, such as the criteria for goods to be considered 'not at risk'. As these important matters were only agreed days before the Protocol and the TCA came into effect, 'grace periods' were put in place during which certain rules would be relaxed or suspended for qualifying businesses for the agreed period.

⁴ Article 13.4 of the Protocol

⁵ Article 18 of the Protocol

⁶ Articles 14 and 15 of the Protocol

Movement of goods from NI to GB is not subject to customs requirements and regulatory checks as the UK decided not to impose them. Technically, the UCC (which applies in Northern Ireland) would require the submission of export declarations, however the EU agreed that it would not require it, and the UK could collect 'equivalent information' from shipping manifests and similar. Some technical requirements apply in limited circumstances, for example to prevent trade in endangered species⁷.

The UK also decided not to require customs and regulatory formalities on imports to GB from Ireland, as this would have arbitrary and distortive effects on trade from NI to GB, some of which is routed via ports in Ireland. Risk-led market surveillance measures are in place to counter possible smuggling via Ireland of goods to which UK tariffs should apply.

'At risk' goods

Technically, Northern Ireland is not in the EU customs union; nominally, in law, it remains in the UK customs area. To protect the EU from goods that do not meet the rules of origin in the Trade and Cooperation Agreement being imported into the single market via NI, evading the EU's tariffs, only goods that are not 'at risk' of onward transit to the EU qualify for tariff-free import from GB to NI. All goods must be declared – but the applicable EU tariff must be paid (to the UK⁸) only on at risk goods.

Under the terms of the Protocol, all goods are to be treated as 'at risk' unless they are (a) not subject to commercial processing in NI, and (b) meet such other criteria agreed by the JC⁹.

Before the Protocol came into effect, the JC agreed on what would constitute 'commercial processing' and the tariff rates that (if not intended for commercial processing) would be deemed to render a good at risk (as there could be an incentive to smuggle it). Goods brought from Great Britain are not at risk if the applicable EU tariff would be zero or if the importer is registered to a trusted trader scheme. For goods brought from outside of both GB and the EU, goods will be not at risk if either the EU's tariff is equal to or less than the UK's, or, if the importer is a trusted trader, the difference between the UK's and the EU's tariff is less than 3%.

The trusted trader benefits do not apply to goods subject to trade defence measures adopted by the EU. Trusted trader status, which broadly requires a business to have a good record of compliance and commit to supply chain transparency, is only available to businesses established in NI or with customs operations located in NI¹⁰.

In effect, the authorisation process allows registered traders in NI who will not be carrying out commercial processing to have their goods treated as 'not at risk'. They will not have to pay any tariffs at all if the goods come from GB, or, if the goods come from neither the UK nor the EU, only the applicable UK tariff will be due.

At the same time, any goods subject to commercial processing (apart from exempted processing concerning food and feed supply, construction, health care and not-for-profit activities) are still considered at risk and buyers in NI must pay the EU's tariffs to bring them from GB. They may be able to claim back any duty paid, subject to state aid limits. To reiterate, all goods, whether at risk or not, must be declared. Their 'risk' status only determines whether and which tariffs must be paid.

⁷ This too could come under pressure in coming months as the UK proposes to cease recognition of EU rules and conformity assessment – so that CE marked goods will no longer be lawfully placed on the UK market (unless also marked with the UK's UKCA mark).

⁸ The EU is not concerned about receiving revenue from this trade, only about removing incentives to evasion.

⁹ Article 5 of the Protocol

¹⁰ Decision of the Withdrawal Agreement Joint Committee on the determination of goods not at risk 17 December 2020

Grace periods

In December 2020, in addition to the relaxation of export declaration requirements, grace periods in respect of food, medicines and parcels were put in place. These applied to certain customs and regulatory matters to allow the continued supply of important goods and parcels from GB to NI (GB is by far NI's biggest source of food and medicines, and indeed all goods brought into the territory¹¹). The EU expected that these grace periods would come to an end by the end of the specified periods of between three and 12 months, by which time either NI customers would have found alternative suppliers in Ireland or elsewhere in the EU, or found ways to comply with the new regulatory requirements.

Meanwhile, the UK government set up the Trader Support Service (TSS) to facilitate importers in NI and their suppliers in GB to submit declarations for goods moving between GB and NI.

In practice, even with the grace periods and other devices, and despite the assistance of the Trader Support Service, the Protocol has caused serious disruptions to the economy and inhabitants of NI.

The UK unilaterally extended the grace periods, when it became clear that full implementation on the availability and costs of food and medicines in NI, and the ability of families and small businesses to send parcels between GB and NI would have material negative effects.

The EU began proceedings against the UK for violations of the Protocol in June 2021. It then halted proceedings in July 2021, following the publication of the UK's Command Paper (see below), in recognition of the need for both sides to devote efforts to addressing the acknowledged problems.

Article 16

Article 16 of the Protocol sets out 'safeguard' provisions that include the right for a party to take 'appropriate' unilateral measures if the application of the Protocol 'leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade'. Informally, giving notice of intention to take such measures has become known as 'triggering article 16'¹². Safeguard measures are to be restricted in scope and duration to 'what is strictly necessary in order to remedy the situation' and should prioritise 'such measures as will least disturb the functioning' of the Protocol. If a safeguard measure taken by one party creates an 'imbalance' between the rights and obligations of the parties, the other party may take such 'proportionate rebalancing measures as are strictly necessary to remedy the imbalance', also prioritising measures that will least disturb the functioning of the Protocol¹³.

Article 16 requires the party that wishes to rely on it to give the other party one month's notice of its intention to take unilateral steps, and set up a process of consultation to try to avoid them. Disputes on matters such as whether the article 16 threshold has been reached, or the appropriateness of the parties' responses are subject to the dispute settlement process provided for under the Withdrawal Agreement, which could culminate in arbitration and judgment by the CJEU if matters of EU law fall to be determined.

The UK considers that the diversion of trade, economic disturbances and political upheaval in NI meet the criteria for giving notice and unilaterally suspending economic aspects of the Protocol (HM Government 2021). However, triggering article 16 only commences a process. While parts of the Protocol that are causing disruption could be suspended, it is not necessarily a route to a durable solution as it is intended to be a temporary response, with business as usual under the terms of the Protocol resuming when those circumstances have abated. It also depends on the outcome of negotiations and potential arbitration, so could cause protracted uncertainty.

¹¹ <https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/Overview-of-NI-Trade-October-2021.pdf>

¹² The EU has already triggered article 16, when, in 2021 it gave notice that it would be suspending free movement of vaccines across the Irish border to protect its own supplies. It quickly withdrew the notice, in the face of an outcry, not just from the UK but from member states including Ireland.

¹³ Article 16 of the Protocol.

The operation of the Protocol in practice

This section summarises some of the key data on the economic effects of and responses to the Protocol. Since it came into effect on 31 December 2020:

- The UK government is spending £360 million establishing and operating the Trader Support Scheme in its first two years, a further £150 million on digital agri-food certification and tens of millions more in related funding to the NI Executive (HM Government 2021). TSS comprises a portal for businesses to access the HMRC systems for customs declarations, and support such as a call centre and a 'customs academy' to train users. The UK government has funded this so far but has not committed to do so indefinitely, and if TSS is to continue, it may have to be funded directly by traders, or by the NI government.
- The introduction of international trade formalities to high frequency domestic transactions that were not optimised or organised to minimise exposure to the EU's external trade barriers was pronounced. In January to March 2021, checks on goods from GB at the ports in NI represented approximately 20% of all checks carried out at the EU's borders and more than any single member state, despite NI's population comprising just 0.5% of that of the EU (HM Government 2021).
- The Central Statistics Office of Ireland reported that imports from Northern Ireland in the first eleven months of 2021 increased by €1,440 million (+64%) to €3,679 million when compared with January to November 2020 and exports to Northern Ireland were €3,305 million in the period January to November 2021, an increase of €1,078 million (+48%) on the same period in 2020¹⁴.
- Data available from the Northern Ireland Statistics and Research Authority to date indicate that trade between NI and Ireland remained stable year on year between 2020 and 2021¹⁵ (notably during the pandemic shutdowns, when international trade in general was sharply down) while trade between GB and NI fell during the same period¹⁶.
- The UK government's Command Paper cited a 40% year on year increase in Ireland's exports to NI in 2021 in support of its contention that the trade diversion criteria for triggering article 16 have been met, and to make the case to the EU for a negotiated solution based on the UK's proposals (HM Government 2021).
- Economist Esmond Birnie estimated that the cost of the Protocol to NI so far has been £850 million per year¹⁷

¹⁴ CSO statistical release, 17 January 2022

<https://www.cso.ie/en/releasesandpublications/er/gei/goodsexportsandimports-november2021/>

¹⁵NISRA UK Regions Imports and Exports of Goods by Country and World Region

<https://uktradeingoodsmap.nisra.gov.uk/?reporter=NI&partner=IE&commodity&year=2021>

¹⁶NISRA Northern Ireland Broad Economy Sales and

Exports Statistics: Trade in Goods and Services

Results 2020 <https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/BESES-Trade-in-Goods-and-Services-Publication-2020.pdf>

¹⁷News Letter 12 August 2021 *Esmond Birnie: The Irish Sea border is costing Northern Ireland £850m a year* <https://www.newsletter.co.uk/news/opinion/columnists/esmond-birnie-the-irish-sea-border-is-costing-northern-ireland-ps850m-a-year-3344732>

- Supplies of specialist goods imported and sold by small retailers, such as kosher food, have been particularly disrupted¹⁸.
- Inflation in NI seems to be running at a higher rate than in the rest of the UK, though this could be caused by a number of factors (Patel 2022). The business sentiment indicators for April 2022 from the Markit Purchasing Managers Index show firms in NI reporting the biggest increases in operating costs, prices charged and backlogs of work in the UK. NI firms were the least optimistic about the year ahead¹⁹.
- The Commission's response to the Command Paper claimed that the British government had 'not provided any concrete economic evidence nor substantiated the precise difficulties faced resulting from the implementation of the agreed solution which would outweigh the benefits and opportunities that Northern Ireland business has by remaining de facto part of the Union's Single Market for goods and are confirmed by a majority of Northern Ireland businesses' (European Commission 2021b). However the Commission based this assertion on polling data that do not seem to support its argument. The proportion of businesses reporting difficulties declining from 41% to 32% between 2020 and 2021, with only 29% reporting that their business has adapted well is not a strong sign that the problems with the Protocol will disperse over time, especially as the polling was based on the current partial implementation which the Commission wishes to complete. 67% of surveyed businesses believed that NI's status post-EU Exit presents opportunities for the region, but respondents could agree that the arrangement presents opportunities, without necessarily accepting or understanding the associated costs.
- The EU's position is that such costs should be temporary, as supply chains will orient away from GB, and costs will be outweighed by NI's unique access to both the EU and (for exports) UK markets. Modelling by economists at the University of Strathclyde has cast doubt on this. It found that

'due to larger trade barriers for goods imports from GB, NI firms will substitute intermediate demand for GB inputs with inputs from the rest of the world (ROW) (including the EU) [whether or not tariffs are applicable]. Thus, the ability of substituting GB intermediate inputs and goods for the ROW/EU is crucial for the ability of NI to take advantage of the special trading arrangement. However, under no reasonable circumstances do we find that this could lead to a full compensation of the loss of GDP caused by the introduction of trade restrictions. Hence, there appears to be no evidence that the NP allows NI to enjoy 'the best of both worlds' (Duparc-Portier & Figus 2021)²⁰.
- An audit by the Commission of the UK's implementation of Sanitary and Phytosanitary measures controls found that the systems so far put into place are 'not fit for purpose, [do] not comply with EU rules and cannot provide sufficient assurances that only compliant animals and goods are permitted to enter the EU SPS area through the designated border control posts in Northern Ireland.' (European Commission 2022). The audit report listed what the authors considered to be widespread non-compliance including under-resourcing of border control points, lack of watertight systems, and failure to enforce labelling requirements.

¹⁸ BBC News 9 July 2021 *Brexit: NI Jewish community 'at risk' over chilled meat ban*
<https://www.bbc.co.uk/news/uk-northern-ireland-57765223>

¹⁹ NatWest UK Regional PMI 9 May 2022
<https://www.markiteconomics.com/Public/Home/PressRelease/872bd423001e4a22bd903159151ecc5>

²⁰ Such significant diversion of trade to Ireland and the rest of the EU would also surely add further weight to the case for emergency measures under article 16.

The report concluded that 'the Commission does not have confidence that the United Kingdom authorities can guarantee that such goods are only supplied to the listed supermarkets in Northern Ireland and are not marketed outside Northern Ireland'. It did not, however, include any evidence of unauthorised SPS goods from NI being found in Ireland or elsewhere in the EU.

- Parties in NI that had strongly supported 'rigorous implementation' of the Protocol have recognised the economic and political difficulties that even partial implementation has caused, and now seek agreed reforms to mitigate its effects²¹.

UK Proposals

In July 2021 the UK published a Command Paper setting out proposals for substantially renegotiating the institutional framework and the parts of the Protocol relating to trade in goods. The stated objectives are:

- First, removing 'the burdens on trade in goods within the UK while managing the real risks to the EU Single Market';
- Second, 'ensuring that businesses and consumers in Northern Ireland can continue to have normal access to goods from the rest of the UK; and
- Third, normalising 'the governance basis of the Protocol so that the relationship between the UK and the EU is not ultimately policed by the EU institutions including the Court of Justice'. (HM Government 2021).

The proposals for trade in goods are built on the premise, already accepted in the Protocol as it stands, that different processes should apply to goods brought to Northern Ireland from Great Britain based on their intended destination and the risk that they pose to the single market. It is also intended that the proposed amendments would continue to support a system with no need for infrastructure or checks at the international border between Ireland and NI. Proposals for particular areas are described in the following sections.

Customs

On customs, the UK proposed that rather than all goods being declared in full conformity with the UCC, traders could instead make a simple declaration that the final destination of their goods is NI. Full customs formalities would still be required for goods moving onward to Ireland or another member state, and the UK would apply and enforce them. All traders would be required to register with a 'light touch' scheme to enable checks and controls to be carried out to ensure that goods were being correctly differentiated and declared.

Rather than a complex mechanism to determine whether tariffs are payable, by default no tariffs would be applicable on goods from GB, other than those declared for onward transit to the EU.

There would also be a complete elimination of declaration and information requirements on goods moving from NI to GB.

²¹ See for example this discussion on Twitter with Alliance Party leader Naomi Long https://twitter.com/naomi_long/status/1490363841154277380. Even Sinn Fein have stated that 'solutions' are required <https://news.sky.com/story/sinn-fein-accuses-uk-government-of-holding-people-of-northern-ireland-to-ransom-as-dup-reiterates-protocol-must-be-removed-12609407> .

Regulation

The UK proposed that Northern Ireland would be a dual regulatory zone, where manufactured and SPS goods should be able to circulate in NI if they meet either UK or EU rules. As with customs, only those goods declared for onward transit to the EU would undergo the EU's checks and certification requirements.

Stricter measures would be maintained for live animals, and the UK remains open to an SPS agreement with the EU which may identify 'areas of significant difference where the level of risk-based controls may need to be higher'. The UK is open to including medicines within the dual regulatory zone for manufactured goods or excluding them from the Protocol entirely with UK-regulated medicines only to be available in NI.

Assurance and enforcement

All of this would be backed by comprehensive data sharing and risk and intelligence-based checks and monitoring. Particularly strong oversight would be applied to SPS goods with supply chain visibility, labelling requirements to ensure UK only sales, increased market surveillance and penalties for non-compliant traders who move UK only goods across the border to Ireland. The UK has also accepted that specific provision may be needed for oversight on medicines and a small number of other key sectors.

Subsidy control

Article 10 of the protocol applies EU state aid law (including for example prior authorisation requirements and the jurisdiction of the CJEU) to 'measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol'. The meaning of 'affect that trade' has given rise to legal uncertainty as to, for example, whether subsidies to businesses in GB would be caught if they supply goods to NI, or whether service providers in NI (not subject to the Protocol) who work with goods suppliers (who are subject to the Protocol) would be covered. The EU made a declaration on the interpretation of article 10 before the Protocol came into effect²², which sought to limit its application to state aid with a genuine and direct link to NI and substantiated, foreseeable effect on trade between NI and the EU. In practice it is clear that the Commission does not consider that this declaration has any limiting effect on the application of state aid law²³ so the uncertainty persists, and has already given rise to litigation in GB²⁴.

The Protocol was drafted in uncertainty as to what wider controls on state aid might eventually be agreed and, eventually, the Trade and Cooperation Agreement included provision on subsidy control that the EU finds satisfactory for the rest of the UK. The British government therefore proposed that article 10 is no longer required at all and the UK's national subsidy control regime (as laid out in the Subsidy Control Bill currently before Parliament) should apply in Northern Ireland. The Command Paper also envisaged some enhanced rights of referral or consultation for the EU in relation to 'subsidies of significant scale relating directly to Northern Ireland'. Some experts in the field have welcomed this proposal as 'capable of providing a fairer, more reasonable and sustainable basis for dealing with subsidy competition between Northern Ireland and the EU than Article 10'²⁵.

²²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946286/Unilateral_declarations_by_the_European_Union_and_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_in_the_Withdrawal_Agreement_Joint_Committee_on_Article_10_1_of_the_Protocol.pdf

²³ George Peretz QC *EU Commission issues "Notice to Stakeholders" on Brexit and State aid 21 January 2021* <https://eurelationslaw.com/blog/eu-commission-issues-notice-to-stakeholders-on-brexit-and-state-aid>

²⁴ *R(British Sugar) v Secretary of State for International Trade*[2022] EWHC 393 (Admin)

²⁵ G. Peretz QC and J. Webber *The UK's Proposed Revisions to Article 10 of the Northern Ireland Protocol: a Sensible Basis for Negotiation 2 September 2021* <https://eurelationslaw.com/blog/the-uks-proposed-revisions-to-article-10-of-the-northern-ireland-protocol-a-sensible-basis-for-negotiation>

Governance

The UK considers that the imbalance in the institutional structure of the protocol has created an adversarial setting for any problems that arise and increased tensions and divisions in NI and between NI and GB. The Command Paper proposed a 'return to a normal treaty framework' with disputes managed through consultations and, ultimately, international arbitration. While not explicitly stated in the Command Paper, the UK intention appears to be to remove direct application of EU law in NI, such that the CJEU would have no basis on which to claim jurisdiction. However the Command Paper proposes no change to the continuation of NI in the EU's single energy market so continuation of CJEU jurisdiction may have been accepted in that area at least.

Consultation with NI bodies

The UK calls for greater consultation with NI bodies on EU laws that will be 'applied or replicated' in NI. This could be, and arguably always should have been, accommodated through the institutions of the GFA, which were intended to support cooperation between NI and Ireland and between the British and Irish governments, including on matters concerning the EU.

To allow for changes to the protocol to be negotiated, the UK proposed a standstill period with immediate effect during which all grace periods would be maintained and legal actions and processes frozen. The EU duly put its infringement actions on hold and the UK ceased further implementation of the Protocol²⁶. Ministers in Northern Ireland attempted to take this further and cease the checks on goods from GB that were being carried out, but the order by then-agriculture minister Edwin Poots was suspended by the High Court in NI, pending a full judicial review of its legality²⁷.

EU proposals

In October 2021 the EU responded to the Command Paper with proposals that adhere closely to the current provisions of the Protocol, and broaden some of the simplifications and facilitations, albeit in ways that will likely require more derogations from EU laws than it has previously been willing to contemplate. It published four 'non-papers'²⁸ and some supporting press material and fact sheets. The Commission accepts in the papers that there have been 'difficulties' in Northern Ireland, but attributes these to 'Brexit' rather than to the operation of the Protocol. It rules out amendments to or renegotiation of the Protocol. Its specific proposals are described in the following sections.

Customs

The non-paper on customs (European Commission 2021b) proposed an extension of the scope of traders and goods that could qualify as 'not at risk'. Although not expressly set out in the non-paper, the fact sheet of 'examples' indicate that the extension would include allowing GB based traders to register for the trusted trader scheme, without having to have an establishment in NI, and amending the definition of 'commercial processing' to allow more small manufacturing businesses to be excluded from it, and thus able to class their imported materials as not at risk.

All imports would still need to be covered by a customs declaration and a safety and security declaration but the non-paper goes on to propose the elimination of some fields in the customs declaration forms. According to the accompanying press briefing, this would be expected to result in a 50% reduction in paperwork, but this is as measured against what would be required under full implementation (upon

²⁶ As confirmed by Lord Frost in his statement to the House of Lords in September 2021 <https://questions-statements.parliament.uk/written-statements/detail/2021-09-06/hlws257?>

²⁷ *Judge suspends Poots' order to end Irish Sea border checks*, Belfast Telegraph, 4 February 2022 <https://www.belfasttelegraph.co.uk/news/northern-ireland/judge-suspends-poots-order-to-end-irish-sea-border-checks-41313003.html>

²⁸ A non-paper is a document published for discussion purposes that is not intended to be binding.

which the EU offer is conditional) and refers to the reduction in fields to be completed in each form, rather than the number of forms. It is also understood that the 'commodity code' field, which can be the most onerous for small businesses to complete, will be retained.

The non-paper also proposed allowing supermarkets and large national retailers to complete their customs declarations on an aggregate monthly basis, rather than filing a declaration for each transaction. In practice, the UK's Trader Support Service already makes this facilitation (known in the UK as EIDR²⁹) available to traders who use TSS to complete customs. The non-paper did not address the issue that has arisen in respect of goods such as steel that are subject to EU trade remedies.³⁰ By operation of the 'at risk' test and the EU's latest trade remedy measures, importers of steel to NI have been left without access to either a UK or EU quota, and must pay high tariffs to access affected goods.

There were no proposals on parcels. VAT was mentioned as a consideration, but no new facilitations were put forward.

SPS

The non-paper on food and agriculture or 'SPS' issues (European Commission 2021c) proposes 'genuine simplification of processes and procedures for a significant range of goods destined solely for sale to end consumers in retail shops in Northern Ireland'. The accompanying press statement claimed that this would result in an 80% reduction in identity and physical checks. As with customs, although not expressly stated, this is as against what would have been required under full, strict implementation. The Commission remains firmly of the view that there can be no elimination of checks, even on goods known to be intended for the NI market only.

In substance, the non-paper proposes that authorised importers in NI, bringing SPS goods originating from EU-listed establishments in GB³¹ would not require a certificate for every item in a load. Instead, a single certificate to cover an entire load could be accepted, with detailed documentation for each product to be made available for inspection electronically. Full, individual certification would still be required for banned and restricted goods, such as sausages and chilled meats and a number of specialist goods such as organic produce. The proposal strictly applies strictly to goods for sale direct to consumers only: 'movements of SPS goods to other operators of the food chain such as farmers or other food processors in Northern Ireland would be excluded'. It would also only apply to 'end products produced from primary products originating in the UK in accordance with the EU-UK Trade and Cooperation Agreement or coming from the EU'. This would exclude from the simplifications any food products that include ingredients from outside of GB or the EU, and onward distribution from GB of imported goods like meat from New Zealand or fresh vegetables from Kenya.

The proposal on banned meats would allow the import into NI of chilled meat products, such as sausages, on condition that they are individually certified and that GB aligns to EU laws in respect of the production of such items.

Overall, the offer would exclude many NI businesses that rely on SPS goods from GB, and would exclude goods from producers in GB that only wish to serve the UK market and do not wish to undergo the process of becoming EU-listed. It does not cover the non-SPS rules that also form barriers to the entry of food and agricultural goods into NI. It does not address issues with pets, seed potatoes, organic goods or oak trees some of which remain outright banned or at least still required to be individually certified.

The Commission expressly states that the scope of any solution must be based on changes to supply chains that have already happened or are in progress – so it has no expectation of reversing any diversion that has already occurred. This seems likely to both add complexity, with further differentiation of goods based on the effect the Protocol has had on them, and to exclude from facilitations goods that

²⁹ Entry in the Declarant's Records.

³⁰ *Factory closure warning over NI steel import tariffs* RTE 15 January 2021
<https://www.rte.ie/news/2021/0115/1190022-northern-ireland-steel/>

³¹ I.e. those that have been accepted by the EU as meeting its requirements for exporting to the single market

have been hardest hit, and therefore subject to diversion already, thus targeting solutions inversely to where the need is.

Medicines

At present under the Protocol, medicines placed on the market in NI must be covered by a valid marketing authorisation issued either by the Commission (for EU-wide authorisations) or by the MHRA³² applying EU legislation. Importers of medicine to NI from GB require an importer authorisation and would need to carry out batch testing in NI on consignments from GB.

The grace period (originally due to end in December 2021) allowed batch testing and manufacturing to continue in GB, otherwise medicines brought to NI from GB would have had to be subject to compliance activity at locations in NI.

In the non-paper on medicines (European Commission 2021d), the EU offered to allow authorisations by the MHRA for NI, based on EU law, to continue. Compliance and testing in GB for medicines to be supplied to NI would also continue on condition that the UK fully applies the relevant EU legislation, covering quality, safety, efficacy, pharmacovigilance and batch testing and release. Strict labelling would be required to ensure medicines that enter NI under this regime are not supplied onward within the single market. As the UK has not diverged from EU law in this area, this would mean additional labelling requirements for the supply of medicines to NI but it is intended that the same pack of medicines could be supplied across the whole UK market.

Medicines that must be centrally authorised by the European Medicines Agency (such as new cancer drugs) could be authorised by the MHRA only on a temporary basis until the EMA had decided whether or not to issue an authorisation.

The EU's position would mean that manufacturers that wish to supply NI and GB would need two licences, albeit in most cases both could be issued by the MHRA. If UK and EU regulation diverges such that the substantive requirements for licences change (in addition to extra labelling and so on) this could become an even more serious barrier to NI's access to UK wide healthcare supply chains. If the UK changes national laws on new medicines and this leads to medicines being available that are not yet authorised under EU rules, or if the UK recognises authorisations from other countries not recognised by the EU, such medicines would not be allowed for sale in NI.

The EU has proceeded unilaterally to change its own laws to implement these proposals³³.

The proposals in the non-paper do not include veterinary medicine or medical devices³⁴, and there were no proposals for other manufactured goods.

Engagement

In the non-paper on Engagement with Northern Ireland Stakeholders and Authorities (European Commission 2021a), the Commission reports that following discussions with businesses, civic society groups and public authorities, there is 'a real interest in Northern Ireland for greater transparency and for [EU] measures to take account of implications for Northern Ireland'. It proposes improving transparency on EU laws applicable in NI with a new website, participation of structured groups of experts in the JCWG, publication of minutes of the JCWG, 'structured dialogue' between NI

³² The Medicines and Healthcare Regulation Authority, the UK's medicines regulator

³³ Directive of the European Parliament and of the Council amending Directives 2001/20/EC and 2001/83/EC as regards derogations from certain obligations concerning certain medicinal products for human use made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta

³⁴ In respect of which concerns have already arisen: Belfast Telegraph 12 April 2022 Covid-19: *Concern over potential shortages as EU rules on tests reportedly set to replace UK law in Northern Ireland* <https://www.belfasttelegraph.co.uk/news/health/coronavirus/covid-19-concern-over-potential-shortages-as-eu-rules-on-tests-reportedly-set-to-replace-uk-law-in-northern-ireland-41545399.html>

'stakeholders' and EU and UK authorities and with Protocol committees, and stronger links between the Northern Ireland Assembly and the EU-UK Parliamentary Partnership Assembly.

The engagement proposals seem underpowered, given the political frictions the Protocol has already caused. The Commission was able to proceed with unilateral changes to its laws in the vital area of medicines, without the agreement of the UK government or consultation with devolved institutions in NI, indicating that a new website and some stakeholder committees will fall short of the level of transparency and accountability that people in NI can reasonably expect.

In summary, despite the offered facilitations, and even changes to EU regulations to deliver them, the Commission remains firmly of the view that the existing framework must continue and consumers and businesses in NI should adapt away from goods that originate in GB. Even where provision is offered for the continuation of goods supply from GB, such as in food and medicines, this is stated to be conditional on the UK maintaining alignment with EU rules in the affected areas.

Critical assessment of proposals

As the intentions of the UK and the EU (as reflected the recitals and provisions of the Protocol) include stability and peace in NI, including respecting the constitutional status of NI (as set out in the GFA) and its place in the UK internal market, their proposals should be assessed on the basis of whether they move towards those objectives.

Achieving the objectives of the Protocol

The UK's proposals in the Command Paper have the great benefit of simplicity. As well as economic benefits for NI, this would largely solve the governance and engagement issues, partly because there would be so much less to govern and engage with.

It has been argued that the direction of travel on the EU's side is favourable to the UK³⁵, and indeed in the non-papers the Commission offered concessions that it had previously ruled out. But while the current default position persists, that NI is in the EU's single market for goods and subject to its customs regulations, with facilitations for UK goods, rather than the reverse, with NI in the UK single market and under UK customs regulation with certain protections for the EU, the economic and political costs for NI seem likely to persist.

The Commission cites evidence of business already orienting away from reliance on GB suppliers and increased trade between NI and Ireland as proof that full implementation of the protocol, subject to the latest offers, can and should proceed. It disregards, though, the point that just because it is possible to obtain goods from suppliers in the EU does not mean that it is efficient to do so or represents good value and meets consumer preferences. The EU proposals, or indeed any that entrench the current framework or drive it to full implementation, would add distortions and costs to businesses and consumers in NI.

The reliance on trusted trader schemes, for both fiscal and regulatory facilitations could have anti-competitive effects, with only supermarkets and larger retailers able to benefit and smaller retailers, wholesalers and manufacturers facing the greatest costs and distortions. Of 16,000 businesses in NI that purchase goods from GB, 15,000 are small or micro enterprises with fewer than 50 employees and so have limited capacity to complete checks or meet the qualification criteria for the facilitations that have been offered (HM Government 2021).

³⁵See for example former UK Brexit negotiator Raoul Ruparel
<https://twitter.com/RaoulRuparel/status/1517243953254391808>

The EU's position acknowledges, and even actively seeks, trade diversion on a scale that was not the intention of the parties. In effect, the Commission is admitting that the Protocol can only be made to work if there is massive diversion of trade, which is in some ways also an admission that it can't be made to work, given that its objectives included recognition of NI's place in the UK internal market and having as little impact as possible on the everyday life of communities in Northern Ireland. The presence of the article 16 safeguards on economic disturbance and diversion of trade also indicate that this was not the intention of the drafters of the Protocol when it was agreed.

It is notable that in its non-papers and associated materials, and even in its detailed audit, the Commission does not provide evidence of the perceived risks to the single market or customs union from incomplete implementation of the protocol actually materialising. There is no published evidence of goods intended for the NI market, or for processing in NI, finding their way to the market in Ireland or other member states. This suggests that, pursuant to its duty under article 6 of the Protocol, and in light of the stated objectives of the arrangement, the EU should be more open to fundamental reforms of the Protocol. Its rigidity brings into question whether averting risks to the single market is its priority, or if it is not in fact using the Protocol as leverage to procure regulatory alignment from the UK or in pursuit of other tactical priorities. Certainly, the EU would see the very fact of derogating so significantly from its border controls at one border of the single market as a loss to the integrity of the single market. Such risks could, however, be more proportionately addressed by actions on the EU side – such as by light checks on goods moving from Ireland to the rest of the EU, as suggested by Bennett and Vines (2022).

The UK's proposals are economically liberalising and, in many ways, represent a free market solution to the issue of the Irish border, showing high levels of openness to trade with the EU. To work in the interest of all British consumers, the recognition of EU regulation should be carried across into the rest of the UK, as outlined in *Changing the Rules - a unilateral approach to non-tariff barriers* (Hewson 2022). The fact that the government is pursuing this for part of the UK indicates that concerns that unilateral recognition might present risks to consumers is not a logical reason for withholding such recognition.

While some in the Unionist community may oppose retaining any parts of the Protocol, and would reject even the limited formalities associated with differentiated treatment of goods under the Command Paper proposals, nationalists should welcome the continued commitment to an absence of physical or administrative trade barriers between NI and Ireland. All communities would benefit from restoration of stable governance and free trade between GB and NI. This arrangement may even deliver the 'best of both worlds' outcome that the Protocol's supporters had originally hoped for.

Options

The UK's proposals face the significant drawback that they require substantial rewriting of important parts of the Protocol, and the EU has rejected any amendments or renegotiation. This leaves the British government with the following options:

- **Unilaterally adopt the proposals in the Command Paper and reorient the infrastructure currently in place to put them into effect.**

Optimally this would not be entirely unilateral as the proposals assume cooperation with the Commission and member states, in particular Ireland, to allow the assurance and enforcement measures based on data sharing and market surveillance to work. However an uncooperative implementation would be a greater risk to the EU than to the UK, which may incentivise cooperation at some level. The north/south and east/west cooperation fora created by the Good Friday Agreement and so far neglected or frustrated by the Protocol, would be ideally suited as vehicles to operate such joint work. This approach could therefore not only protect but invigorate the institutions of the GFA.

Such an approach runs the risk of infringement action and retaliation by the EU.

- **Trigger article 16**

As described above, safeguard measures under article 16 would have to be on a temporary basis with the expectation of a return to full implementation when the triggering events had subsided. Yet, as shown by the economic data and the statements of the EU so far, diversion of trade and political disruption are built into the operation of the Protocol in practice, and there is no practical way for the economic and societal disruptions to subside in the absence of substantial changes. Action taken under article 16 could, however, become the new status quo, and develop into an agreed position, especially if it provided further assurance to the EU that unauthorised goods were not, in fact being smuggled into the single market via NI.

- **Negotiate based on the EU's proposals**

This would entail accepting that the general framework of the Protocol will remain as it currently stands, and trying to expand further the facilitations and simplifications offered by the EU. From a negotiating perspective, it may help to move the EU towards more concessions if Commission officials genuinely believe that the alternative would be unilateral actions by the UK, so this option and the first two are not mutually exclusive. However, the Commission's current proposals are not only limited, they are heavily conditioned in ways that the UK seems unlikely to be able to accept. Fully implementing the Protocol and then embedding the enhanced facilitations would leave consumers and businesses in NI in a worse position than they are at present.

- **Repudiate the Protocol entirely**

Some unionists in NI, concerned by the ruling of the Court of Appeal that part of the Act of Union had been 'subjugated' by different rules of trade in NI and GB, have called for the Protocol to be repudiated in its entirety, with no dual regulatory zone or differentiation of goods brought into the territory. This uncompromising view may be understandable from the perspective of Unionist politicians and voters who feel that they have been deceived by the national government, but it risks wasting an opportunity for a solution that respects the constitutional integrity of the UK and brings UK-wide economic advantages. It could also infringe parts of the Protocol that are not causing difficulties, without good reason.

- **Continue as it is, with ad hoc unilateral and agreed measures**

The outcome of the elections for the NI Assembly on 5 May 2022, has made further implementation of the Protocol, a key demand of the Commission, functionally very difficult for the British government to deliver. The elections left Sinn Fein as the largest single party, and the Unionist DUP has stated that it will not re-enter government in NI while the Protocol remains in place, so, because of the requirements for cross community coalition under the GFA, no devolved government in NI seems likely to be formed in the near future.

As well as making the administrative side of operating the Protocol more difficult, the absence of a functioning executive demonstrates how the Protocol has damaged the institutions of the GFA that it was expressly designed to protect. Continuation of the arrangement in its current, partial and contested, implementation will therefore prolong the political and legal uncertainty that people and businesses in NI are operating under, and the British government is justified in its position that it cannot allow this.

Structural change

A comprehensive legal analysis is beyond the scope of this briefing paper. It seems clear though that simply repeating that the UK entered into the Protocol voluntarily so should strictly observe its provisions, and even be precluded from using mechanisms allowing its suspension, cannot be the answer, morally or in law.

Equally, relying on negotiated solutions with the EU, based on accepting and mitigating the current legal and economic structure is flawed. There is little indication that the Commission is open to a negotiated solution that goes anywhere near far enough to address even the economic problems and still less to suggest any movement on the constitutional and political issues, which can only be addressed with structural changes to the default position under the Protocol. Any negotiated solution that does not respect Northern Ireland's place in the UK's legal order and internal market will continue to be unstable and undermine the GFA. A system that seeks to apply international trade rules, however attenuated, between two highly integrated parts of a national economy will cause economic burdens that need significant benefits to justify them. No such benefits have arisen or are likely to arise.

Conclusion

The operation of the Protocol has caused economic and political disruption in Northern Ireland. The part of the Act of Union concerning trade has been subjugated and the institutions of the Good Friday Agreement, across all three of its strands, are at a standstill.

The European Commission has criticised the United Kingdom for not providing evidence that the economic disruption outweighs the benefits of NI's position in the single market for goods. Such evidence at this stage could only be based on modelling, and analysis that has been carried out to date has indicated that no such 'best of both worlds' benefits are likely to materialise. At the same time, the Commission has failed to provide evidence of the potential harms that the Protocol is designed to prevent from its side, that is, unauthorised products being brought from GB to the single market via NI. Given the gaps in implementation that the Commission has identified, some evidence of leakage of unauthorised goods into Ireland might have been expected, if the Commission's fears are well founded, but to date there has been none.

In light of the harms to the NI economy, the British constitution, the GFA, and devolved government and society in NI, such harms surely need to be serious and to justify the continuation of the Protocol in its current form.

The EU should be open to renegotiating the Protocol without the UK needing to take unilateral steps, as it is not meeting the express objectives of the parties. The Protocol itself anticipated both action in response to economic and societal disturbances or diversion of trade (all of which are occurring) and future agreed settlements.

In the absence of agreement from the EU, the UK should consider unilateral action to protect the interests of the people in NI and the wider UK. The proposals for a dual regulatory zone set out in the Command Paper are economically liberalising and should be extended to the whole of the UK. As well as economic benefits from such openness, this would alleviate the concerns of Unionist parties about the constitutional position of NI, which may help to break political deadlock in the devolved institutions in NI.

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