



## Evidence to the Northern Ireland Affairs Committee 'Unfettered Access: Northern Ireland and customs arrangements after Brexit' Inquiry

Colin Murray and Clare Rice

### *Author Biographies*

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This evidence is presented in a personal capacity and does not represent the views of the ESRC or of Newcastle University.

Given our areas of expertise, we are addressing the Committee's specific questions on:

- whether the revised Northern Ireland Protocol will allow goods produced in Northern Ireland unfettered access to the rest of the UK internal market; and
- other issues and challenges arising from the implementation of the Northern Ireland Protocol.

### **CUSTOMS UNION (Article 5)**

- [1] The revised Protocol outlines that Northern Ireland will *de jure* remain part of the customs territory of the United Kingdom (UK), but will, *de facto*, be subject to the EU's Union Customs Code. This is intended to ensure that the integrity of the EU's external border with the UK is maintained, while Northern Ireland's 'specific circumstances', generated by Strand 2 of the Good Friday (Belfast) Agreement 1998, are recognised. The Venn diagram Northern Ireland finds itself at the centre of gives rise to myriad challenges.
- [2] In practice, this arrangement necessitates that Northern Ireland applies the Union Customs Code. This will need to be incorporated into law, either in Westminster or through the Northern Ireland Assembly. Article 271 of the Code entails that goods moving from Northern Ireland to Great Britain will have to be declared (an "exit declaration"). There will also be an obligation that goods moving from Great Britain to Northern Ireland will be subject to customs declarations, and goods that are 'at risk' of entering the EU through Northern Ireland will be subject to restrictions, including any tariffs and quotas applicable after the end of the transition/implementation period. Where the goods in question ultimately stay in Northern Ireland, the UK will be able to put in place a rebate system to cover charges. It remains to be seen how this can be proven in all instances, as it may still be possible to move goods across the border regardless.

- [3] The details of how this system will work in practice remain largely to be determined by the Joint Committee. While the Protocol provides an initial scope of this, the substantive elements are currently lacking. The Joint Committee will decide the criteria of goods ‘at risk’ of being transferred into the EU market, as well as defining what is meant by ‘at risk.’ If this is not achieved within the transition phase, then all goods will have to be considered to be ‘at risk’ and so checked and tariffed accordingly, placing a potentially unnecessary burden on businesses and on Northern Ireland’s ports and airports.
- [4] As yet, it is not clear what the impact will be on businesses in Northern Ireland as a result of the increased bureaucratic responsibility that will come with the measures as outlined in the Protocol. Further, in placing the onus on business to pay customs costs up front, small and medium enterprises (SMEs) will be most at risk.
- [5] There is an opportunity for the *de facto* border in Irish Sea to be hardened or softened through the Joint Committee’s decisions, increasing or reducing the impact of these arrangements. The Joint Committee will face a monumental task in this regard given the time available, especially in light of the ongoing coronavirus pandemic.

## **UNFETTERED ACCESS (Article 6)**

- [6] It is evident from the previous section that the extent to which trade will be ‘unfettered’ between Northern Ireland and Great Britain under the arrangements outlined in the revised Protocol is limited in practice. By its very definition, there will be a bureaucratic dynamic to the movement of all goods moving between Northern Ireland and Great Britain, and there will be costs attributable to this. This is in contrast to Article 6 of the Protocol which states:
 

‘[n]othing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom’s internal market’.
- [7] The definition of ‘unfettered’ is key here. This could range from an agreement on the future relationship between the UK and the EU which provides for zero tariffs, to a minimal amount of paperwork with little disruption or cost implications to businesses, to more extensive requirements. This could present challenges for the UK and EU teams on the Joint Committee if the starting points on this are drastically different, something which could usurp valuable time in an already tight timeframe.
- [8] Article 6 is carefully worded in that it is accurate that there is nothing within the Protocol preventing the UK from ensuring ‘unfettered access.’ However, the UK will need to make concessions if this is the true ambition. If the UK opts to diverge from EU requirements on product standards, then checks will be unavoidable. Necessary to minimising checks and to bringing about the conditions to move into the territory of zero tariffs would be a UK commitment to aligning with at least some standards as determined by the EU. In essence, the greater the extent to which the UK opts to diverge from EU requirements, the increased likelihood there will be of trade disruption between Northern Ireland and Great Britain.
- [9] Trade negotiations are running concurrently with the UK implementing the Protocol. It is important to highlight that there are real dangers in assuming that the trade talks will implicitly give rise to solutions for the challenges that can be seen in the Protocol. It is notable also that existing explanations of Article 6 provisions by the UK Government have contributed to public (mis)understanding. Whereas the Protocol clearly indicates that

customs declarations and tariffs will be unavoidable as a consequence of the arrangements that have been provided for in respect of Northern Ireland, the UK Government has nonetheless maintained that there will be no need for checks.

## **LEVEL PLAYING FIELD (Article 10)**

- [10] The concept of a level playing field denotes the attempts contained within the Withdrawal Agreement and the revised Protocol to ensure that businesses on one side of the border on the island of Ireland do not have unfair state assistance in a way that may make it possible to undercut businesses on the other side of the border. These provisions can be found in Article 10 of the Withdrawal Agreement and Annex 5 of the Protocol on Ireland/Northern Ireland.
- [11] In respect of the UK, EU State Aid rules will continue to apply in any case where support might impact on trade flows between Northern Ireland and the Republic of Ireland and under the Protocol, the European Commission can enforce State Aid rules. This means that should the UK adopt changes with regard to VAT or corporation tax, for example, that give an advantage to producers in Northern Ireland over producers in Ireland, action can be taken against the UK. Actors within the UK can also rely on EU law to initiate legal proceedings through the UK's domestic courts. This is due to the direct effect of State Aid rules in UK law. With regard to trade between Great Britain, Northern Ireland and Ireland, these measures formally ensure the maintenance of a level playing field.
- [12] Some exemptions from State Aid rules exist; Northern Ireland currently is an Assisted Area under the Regional Aid exemptions. This status is held in virtue of the UK having assigned it, which it was able to do as a Member State of the EU. The Withdrawal Agreement and the Protocol expressly outline that this status will be continued for as long as Northern Ireland continues to meet the criteria for this.
- [13] In effect, this means that regardless of the outcome of negotiations to ascertain the future relationship between the UK and the EU, Northern Ireland will retain this status and be able to benefit accordingly. This maintains a level playing field on the island of Ireland, but also benefits Northern Ireland-Great Britain trade, as it helps to ensure that Northern Ireland is not at a disadvantage compared to elsewhere in the UK. However, it does emphasise that the UK will need to tread cautiously in the design of its policies with regard to issuing subsidies or other aid to businesses within the UK.

## **CJEU OVERSIGHT (Article 12)**

- [14] Under the revised Protocol, there are aspects of EU law that will need to apply in Northern Ireland. The Protocol effectively treats Northern Ireland as though it were a Member State for the purposes of trade in goods. This covers some 300 pieces of EU law and also provides for updating in light of developments. The Withdrawal Agreement Act 2020 provides for this legislative task to be undertaken either through Westminster or the Northern Ireland Assembly (although, with the Assembly functioning, it is to be hoped that it would have primacy in this regard).
- [15] Under Article 12 of the Protocol, the UK's fulfilment of the obligations regarding the trade rules applicable to Northern Ireland are overseen by the EU Commission, which has the power to initiate legal proceedings against the UK through the Court of Justice of the European Union (CJEU). While these rules operate in respect of Northern Ireland, it is the

responsibility of the UK to ensure that these obligations are fulfilled, and therefore any enforcement action would be taken against the UK and not Northern Ireland's institutions.

- [16] The Protocol effectively determines that while the UK has responsibility for implementing the provisions agreed, the EU Commission (and ultimately the CJEU) will oversee the trade elements of the deal. This is a complicated arrangement, not replicated for other elements of the Protocol (such as Article 2's rights protections, for which arbitration through the Withdrawal Agreement's Committee system applies).
- [17] It is unlikely that steps would be instituted against the UK while negotiations on the future relationship are on-going. During this time, issues can be brought to the negotiating table. In any event, the enforcement powers only appear to take effect upon the end of the transition/implementation period. The CJEU also has jurisdiction with regard to the oversight of State Aid rules (as this task involves a direct interpretation of EU law). If the UK adopted a policy of subsidising the production of a good intended for sale in the EU, this could open the way for infringement proceedings to be initiated. Domestic courts across the UK will be able to apply EU State Aid rules (and, where necessary, to seek preliminary rulings from the CJEU) under the terms of the Protocol.
- [18] In effect, although the UK will have left the EU, the complex arrangements outlined in the Protocol mean that there will still be a level of oversight from the EU institutions on measures relating to trade in goods which affect Northern Ireland.

## CONSTITUTIONAL CONSIDERATIONS

- [19] Northern Ireland's devolved institutions were restarted in January 2020 following a three-year hiatus. This has been a period of protracted political contention. The unprecedented coronavirus pandemic has added an additional pressure to both politicians and civil servants as they work to stabilise these institutions. It is difficult to see how the devolved institutions would cope with the additional responsibilities for the implementation of EU law and the management in a practical sense of meeting the requirements contained within the Protocol without additional support from Westminster.
- [20] While there is a financial aspect to this, increasing the capacity of the devolved institutions is even more important, because Northern Ireland will become the only part of the UK to operate under these obligations. Its devolved institutions will become solely responsible for managing the transposition of EU law into domestic law, not simply adapting such measures to a Northern Ireland context in light of work undertaken in other parts of the UK.
- [21] The unique position the Protocol places Northern Ireland in with regard to the EU Single Market and the UK customs territory entails that a strict division of competences within the UK will become increasingly difficult to achieve. The Protocol is ambiguous in providing a workable solution for this, as the problem lies within the UK's arrangements for its own internal market. A framework will need to be established which allows Northern Ireland to adhere to EU standards insofar as it is obliged by the Protocol to do so.
- [22] The idea of any form of border which differentiates Northern Ireland from the rest of the UK is one that carries deep symbolic significance. On a fundamental level, to the degree that the Protocol imposes a divergence from Great Britain (in keeping Northern Ireland, *de facto*, within the EU Single Market in terms of goods), this can be interpreted as creating pressure upon the Union. Unionism and nationalism in Northern Ireland might not be trade-based identities, but the repercussions of the trade negotiations and the work of the

Joint Committee will impact upon people from both of these communities – both in terms of how these societal groups view each other and in their constitutional aspirations. The terms of the Future Relationship Agreement and the work of the Joint Committee will have a profound impact on how the constitutional conversation develops in Northern Ireland.

## CONCLUSION

- [23] There remains a high degree of ambiguity around the practical operation of some of the Protocol on Ireland/Northern Ireland's terms. Much of the detailed thinking about how the measures outlined in the Protocol will work in practice has been referred to the Joint Committee. This was a pragmatic decision at the time of the Withdrawal Agreement; pushing some of these difficult questions down the road and onto a technocratic body enabled the deal to be concluded and ratified.
- [24] The Joint Committee was developed as an instrument to implement the Withdrawal Agreement and address areas of conflict. The revised Protocol instead gives it the task of developing a range of rules regarding trade applicable to Northern Ireland. Whereas the terms of the backstop meant that its potential operation (if it had been called into effect) was relatively clear, much of the technical work on the Protocol is still to be done, and will have to be worked out on a truncated time frame.
- [25] In short, these elements of the Protocol were rather less "oven-ready" than has sometimes been portrayed, and the exigencies of the Covid-19 response makes it even more difficult to ready these elements within the transposition timeframe. The Protocol's requirements amount to a moving target; the more comprehensive a trade deal within a potential Future Relationship Agreement, the fewer checks that will be required to administer the Irish Sea frontier. But under the Protocol, the UK must be ready to administer this frontier, come what may, at the end of the transition period. These pressures all militate towards an extension of the transition/implementation period beyond 31 December 2020; the Protocol's arrangements are too important to be rushed.
- [26] The Protocol does not provide that unfettered trade will automatically occur between Northern Ireland and Great Britain once the transition period ends – it gives the UK the ability to prevent fetters from emerging. The UK Government can secure this outcome if it negotiates a Future Relationship Agreement with the EU which entails comprehensive alignment between the UK and the EU. If it does not prioritise this aim, then divergences in standards between the UK and the EU (and particularly efforts by the UK to raise minimum product standards) will lead to fetters being introduced on West-East movements through the operation of domestic law, and not the Protocol.
- [27] The implications of the Protocol extend beyond trade, and they speak to fundamental matters of identity, governance, and constitutional aspirations for Northern Ireland. These wider considerations must not become lost in the forthcoming technical discussions.

**NOTE:** Also see oral evidence delivered by Mr Colin Murray with Dr Sylvia de Mars (Newcastle University) to the Lords EU Select Committee in February 2019 as part of the 'Protocol on Ireland/Northern Ireland' inquiry, large parts of which are also relevant to the scope of this particular inquiry. The transcript can be found [here](#).

30 March 2020