



Evidence to the Committee on the Future Relationship with the European Union

‘Progress of the negotiations on the UK’s Future Relationship with the EU’ 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. As a function of our expertise, we address the Committee’s specific questions on the themes of:

- Negotiation priorities
- Interpretation and implementation of the Withdrawal Agreement and the Protocol on Ireland and Northern Ireland
- The role of the Joint Committee and the Specialised Committee on Northern Ireland
- Specific constitutional considerations for Northern Ireland

NEGOTIATION PRIORITIES

[1] The Withdrawal Agreement is not a substitute for a fully developed post-Brexit relationship between the UK and the EU; it provides a transition/implementation period to allow that relationship to be negotiated. Even with regard to the Protocol on Ireland/Northern Ireland, which establishes baseline requirements applicable to Northern Ireland after the end of the transition/implementation period, there was a pragmatic ambiguity built into some of its provisions in order to secure the Withdrawal Agreement. This deferred both the technical discussions on the meaning of its terms applicable to goods and their implementation to the truncated period between 31 January 2020 and 31 December 2020 (if the transition/implementation period is not extended) and meant that they would have to be conducted alongside future relationship negotiations.

[2] In addition to the challenge of concluding negotiations by the end of 2020, there is now also the additional and unforeseen difficulty of these talks happening against the backdrop of the Covid-19 global pandemic. Given the EU Commission’s structure (particularly its dedicated Task Force for Relations with the United Kingdom), and its operation distinct from Member State responses to Covid-19, the pandemic is unlikely to impede its negotiation efforts. For

the UK Government, however, the pandemic presents a competing priority which must be addressed. The pandemic therefore has a greater potential to present challenges for the UK side in the negotiations over the future relationship and implementation of the Protocol. Proceeding with these negotiations amidst diminished capacity within the same limited time frame presents serious difficulties in these drastically changed circumstances. Amid the pandemic, there is very little bandwidth for political actors to address points of disagreement between the negotiating teams in the remaining time in the transition/implementation period.

- [3] The Joint Committee, and in particular the Protocol's Specialised Committee and Joint Consultative Working Group (which will meet more regularly), provide important opportunities for Northern Ireland to have some voice in this process. The inclusion of representatives from Northern Ireland's Executive is contingent on the continued functioning of the devolved institutions in Northern Ireland (as determined in the *New Decade, New Approach* agreement (NDNA) concluded in January 2020). This is an important element of the NDNA deal, as it establishes an additional impetus for politicians to work together in Northern Ireland, while also helping to bed-in these working relationships ahead the transition period concluding.
- [4] It is important to note also with regard to Northern Ireland that one of the first acts of the restored Northern Ireland Assembly in 2020 was to unanimously vote against giving consent to the passage of the European Union (Withdrawal Agreement) Bill. Given that the devolved institutions in Scotland and Wales adopted similar positions, which the UK Government ignored through its reading of an exception to the workings of the Sewel Convention, raises a concern that Northern Ireland's voice will be marginalised, at a time when it also needs to be incorporated into the overall UK position in the future relationship negotiations. Consistent dialogue is also required between officials and politicians in Northern Ireland and Westminster during these talks. It should not fall to the delegations to the Protocol bodies to represent the specific requirements for Northern Ireland.
- [5] It is imperative that these factors are taken into consideration ahead of the June 2020 EU summit and inform any decision by the UK Government on seeking to extend the transition period beyond 31 December 2020. Article 132 of the Withdrawal Agreement provides for a dedicated mechanism for extending the transition/implementation period; ignoring its terms in the expectation that an extension might later be concluded is therefore ill-advised. Such brinkmanship would bring with it severe uncertainty, with the Northern Ireland economy in little position to accommodate the resultant costs.

INTERPRETATION AND IMPLEMENTATION

Customs Territory

- [6] The revised Protocol outlines that Northern Ireland will *de jure* remain part of the customs territory of the United Kingdom (UK) (Article 4), but will, *de facto*, continue to be subject to the EU's Union Customs Code (Article 5). 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. Northern Ireland finds itself at the intersection point of a Venn diagram between divergent regulatory and customs regimes, giving rise to myriad challenges.
- [7] In practice, Protocol's terms explicitly continue to apply the Union Customs Code to Northern Ireland (Article 5(4)). 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 can 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.

- [8] Beyond this outline, much needs to be done to implement these terms. The Joint Committee must 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 be considered to be 'at risk' (Article 5(2)) and so will need to be checked and tariffed accordingly, placing a burden on businesses, ports and airports. The terms of the Protocol are thus so stark that they shift all obligations onto the UK Government for producing a workable account of what is 'at risk'; failure to agree will mean that everything is at risk (and assure the protection of the EU Single Market). The UK Government will also have to develop its rebate scheme within the transition phase (Article 5(6)).
- [9] Under these terms, for example, any fish caught by UK registered boats from Northern Ireland will technically be bringing goods into the EU's customs territory. In light of the stark consequences of this scenario, the Protocol prioritises the work of the Joint Committee to establish conditions under which such vessels will be exempt from EU requirements upon vessels of non-Member states (Article 5(3)). The Commission has, however, noted in recent briefings that there has been no progress towards concluding such arrangements.
- [10] It is worth noting that any payable duties are not remitted to the EU and the system is administered by the UK. In other words, the EU's primary concern is to prevent Northern Ireland businesses operating with full access to the single market gaining an unfair advantage over businesses within the EU single market by circumventing tariffs and quotas applicable to them (especially as the UK concludes its own trade deals). A sufficiently comprehensive future relationship Agreement would help to address any Single Market concerns, and minimise the potential barriers between Great Britain and Northern Ireland.
- [11] It nonetheless remains unclear how businesses in Northern Ireland will be affected by the impositions that will come with the measures outlined in the Protocol. However, in placing the onus on business to pay customs costs up front (which might then be reimbursed through a scheme established under Article 5(6)), it is clear that small and medium enterprises (SMEs) will be most at risk. The human and financial capital involved in this in the scenario of no agreement being achieved and operationalised by the end of December 2020 is likely to be unsustainable for these businesses.
- [12] The *de facto* border in the Irish Sea can thus be hardened or softened through the Joint Committee's decisions, increasing or reducing the Protocol's impact. The future relationship negotiations will also make a difference; the greater any resultant regulatory alignment and the more tariffs that are removed as a result of these negotiations, limiting the gap between the EU single market and the UK's internal market, the less that businesses in Northern Ireland will be pulled between these markets. The Joint Committee, however, faces a onerous task in the time available, especially in light of the ongoing coronavirus pandemic.

Unfettered Access

- [13] 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. Article 6 of the Protocol states that:

'[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'.

Note that this provision is "one-way"; it implicitly accepts that there will be an increasing bureaucratic dimension to the movement of goods between Great Britain and Northern Ireland. Moreover, given that the Union Customs Code applies, at the very least export declarations will be needed as goods leave Northern Ireland, where EU customs rules apply. There will be costs attributable to this, but the UK is responsible for managing the processes and should be aiming to put a streamlines digital arrangement in place.

- [14] The definition of 'unfettered' is therefore at issue. Although the UK Government now acknowledges that the Protocol's arrangements will impose some bureaucratic requirements (which, despite their costs, might be explained away as not amounting to a physical fetter), these could be as nothing compared to the checks which might come into place if the future relationship negotiations between the UK and the EU do not provide for zero tariffs and quotas and broad regulatory alignment. The wording of Article 6 is significant; the Protocol does not prevent physical checks on goods moving from Northern Ireland to Great Britain (SPS requirements notwithstanding), it places the choice over whether to do so in the UK Government's hands.
- [15] The UK Government has, in effect, accepted that its choices over the EU-UK future relationship will be determinative of whether fetters in the form of physical restrictions need to be put in place. It is evident from the summaries that have been produced by the UK and the EU following the three negotiation rounds conducted to date that their starting points on the future relationship differ, with little time to achieve convergence. If the UK opts to diverge from EU requirements on product standards, more extensive checks will be unavoidable. In essence, the greater the extent to which the UK opts to diverge from EU requirements, the greater the increase there will be in trade disruption between Northern Ireland and Great Britain. In terms of the future bureaucratic requirements on trade into the EU customs territory, including Northern Ireland, the UK should prioritise negotiating away certain requirements, including security declarations, to facilitate trade between Great Britain and Northern Ireland.
- [16] There are real dangers in assuming that the trade talks will produce solutions for the challenges for trade under the Protocol. Explanations of Article 6 provisions by the UK Government to date 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 long maintained that there would be no need for any checks. This has caused confusion for businesses and inhibited effective planning to address the coming requirements.
- [17] The Withdrawal Agreement and the Protocol require some obligations on goods movements between Northern Ireland and Great Britain. The extent of these burdens will depend upon both the future relationship negotiations and the work in the Withdrawal Agreement's committees to implement the Protocol. The UK Government has made little public on the technical, physical and staff preparations underway to address these requirements. The UK Government must publicly consult with stake holders in Northern Ireland or further points of contention are likely to arise. This secrecy also raises more general questions over the UK's negotiation strategy, as it cannot be known what compromises might be needed if its starting objectives are unclear.

Level Playing Field

- [18] The concept of a level playing field is found in the Withdrawal Agreement and the revised Protocol provisions which seek to ensure that businesses in Northern Ireland (but potentially with wider implications across the UK) do not have unfair state assistance in a way that may make it possible for them to undercut businesses on the other side of the border (which are bound by the rules applicable in an EU Member State). The requirements on State Aid can be found in Article 10 and Annex 5 of the Protocol on Ireland/Northern Ireland.
- [19] 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, which give an advantage to producers in Northern Ireland over producers in Ireland (including, for example, where such measures benefit the production of component parts in Great Britain), affected parties can continue to rely on relevant EU law to initiate legal proceedings through the UK's domestic courts. This is due to the continuing direct effect of State Aid rules in UK law provided by the Protocol. With regard to trade between Great Britain, Northern Ireland and Ireland, these measures formally ensure the maintenance of a level playing field.
- [20] Some exemptions from State Aid rules exist; Northern Ireland currently is an Assisted Area under the Regional Aid exemptions. This status is held by 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 establish that this status will be continued for as long as Northern Ireland continues to meet the necessary criteria (Protocol, Annex 5, para 1, 3.2 and 5).
- [21] 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.
- [22] In response to the Covid-19 pandemic, EU state aid rules have been relaxed as a means of supporting economies in recovering from the impact of measures to mitigate transmission of the virus. The UK can also undertake activities that would have the impact of state aid measures in practice in response to the crisis. This is a timely reminder that these arrangements are variable, and that the UK will need to remain informed on EU rules in this regard, as there could be implications for businesses in Northern Ireland where differences emerge.

EU OVERSIGHT

- [23] Under the revised Protocol, there are aspects of EU law that will continue 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, that it would have primacy in this regard).

- [24] 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.
- [25] 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).
- [26] 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 goods 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.
- [27] In effect, although the UK has 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. This backdrop makes the controversy over the proposal to situate an EU Office in Northern Ireland perplexing. An EU presence in Northern Ireland to monitor the operational implementation of the Protocol and to ensure the movement of goods into the Republic of Ireland is compliant with the legal requirements of the Single Market is envisaged in the Protocol (Article 12(2)). The UK Government's unspecified concerns over the threat posed by such an Office to the Good Friday/Belfast Agreement does not benefit its argument. This point of contention is again consuming valuable time, while also weakening public trust, not least in Northern Ireland, in the sincerity of the 'best endeavours' being used in the conduct of these negotiations.

OTHER NORTHERN-IRELAND SPECIFIC CONSIDERATIONS

- [28] Northern Ireland's devolved institutions were restarted in January 2020 following a three-year hiatus which saw deep ruptures between its major parties. 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 can 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.
- [29] While there is a financial aspect to this, increasing the capacity of Northern Ireland's devolved institutions is even more important, because it will become the only part of the UK to operate under such 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 (and likely with less guidance on measures in preparation at an EU level from the UK's delegation in Brussels). The confusions over EU law exposed by the Renewable Heat Incentive Scheme scandal which collapsed Northern Ireland's institutions in 2017 illustrates an existing lack of capacity to manage these requirements.

- [30] Northern Ireland's unique position with regard to the EU Single Market and the UK customs territory under the Protocol 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. It is in the UK's interests, therefore, to work to ensure alignment can be achieved, where possible, in order to mitigate the difficulties that could potentially arise for the governance of Northern Ireland.
- [31] 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 any future relationship Agreement and the work of the Joint Committee will have a profound impact on how the constitutional conversation develops in Northern Ireland.
- [32] Further, it is important to highlight a practical consequence of the Covid-19 pandemic on institutional capacity in Northern Ireland, in light of the additional administrative responsibilities that will fall to these devolved institutions at the end of the transition period. It has been confirmed by the Permanent Secretary to the Executive Office in Northern Ireland that a number of staff members have been redeployed from working on the UK's exit from the EU to working on Covid-19. The Executive's Brexit Sub-Committee, established as part of the NDNA agreement, has also been abandoned because of Covid-19 reprioritisation, replaced instead with meetings for single item agendas focussed on Brexit-related issues. Northern Ireland is not in a position to be able to prepare fully for what might come at the start of 2021; the resources and capacity are not present. This is something the UK Government needs to remember in considering the feasibility of managing an extensive change come 1 January 2021.

CONCLUSIONS

- [33] If the UK and the EU cannot secure a future relationship Agreement this year, and does not take steps to extend the transition timeframe, the consequences for Northern Ireland will be stark. These ramifications would unavoidably create barriers to trade for businesses in Northern Ireland that would amount to a trade border in the Irish Sea. There remains a high degree of ambiguity around the practical operation of some key areas of the Protocol on Ireland/Northern Ireland. Much of the detailed thinking about how the measures outlined in the Protocol will work in practice has been passed to the Joint Committee.
- [34] This was a pragmatic decision at the time of the Withdrawal Agreement; pushing some of these difficult questions onto a future technocratic body enabled the deal to be concluded and ratified. However, the Covid-19 global pandemic has changed the context of these negotiations – it has heightened strains on the Northern Ireland economy and distracted attention, not unjustifiably, from the need to address these issues.
- [35] What will be required to minimise trade disruption through the work of the Joint Committee is something of 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.

[36] We do not yet know how the Protocol will work in practice. Hundreds of pieces of legislation will require revision in the UK to facilitate the broad aims outlined in the Withdrawal Agreement, but this remains to be done. It has also not been established what, if any, additional assistance will be given to the devolved institutions in Northern Ireland to support the additional workload that will arise, particularly from the start of 2021. The implications of the Protocol, moreover, 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 technical discussions.

[37] Given the distance that remains after three sets of talks, it is difficult to see an argument against an extension being sought to the transition/implementation period. The Covid-19 pandemic cannot be permitted to form the basis of a justification for these scenarios becoming reality in the pursuit of concluding these concerted efforts by the end of 2020. It is not evident that any elements of the Withdrawal Agreement can be deferred until after the transition phase. Each part is mutually reliant on the others, and with regard to the Protocol, are integral to its implementation. Anything less than this will entail severe consequences for Northern Ireland.

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](#).

15 May 2020