



# Evidence to the Northern Ireland Affairs Committee: Brexit and the Northern Ireland Protocol

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.

We examine the outworking of the Protocol and its interaction with the TCA through four key areas. In doing so, we address the Committee's specific questions on:

- the implications of the Protocol for intergovernmental and public service co-operation between Northern Ireland and the Republic of Ireland, and for trade between Northern Ireland and the Republic of Ireland;
- the implications of the Protocol for devolution;
- the interaction between the Protocol and the future relationship between the UK and the EU.

NOTE: We examine this topic and the points we raise here in more depth in our freely available article '[Into the Unknown: Implementing the Protocol on Ireland/Northern Ireland](#)' (*Journal of Cross Border Studies in Ireland* (2020), pp. 17-28).

## Introduction

[1] The end of the Brexit transition period at midnight on 31 December 2020 marked a decisive change in the operational relationship between the United Kingdom (UK) and the European Union (EU). Northern Ireland has been affected by trade disruption in the weeks since the Ireland/Northern Ireland Protocol and the Trade and Cooperation Agreement (TCA) entered force, and these disruptions have contributed to increasing instability in Northern Ireland's politics. A statement by the Secretary of State for Northern Ireland declaring that there 'is no Irish Sea border' has not served to dampen disputes over the impacts of these changes.

[2] The UK Government's May 2020 Command Paper on the implementation of the Protocol emphasised its commitment to the unity of the UK's internal market within its negotiating aims. The intricacies of post-Brexit trade flows, however, received little attention in this document, and UK Government commitments that trade flows from Northern Ireland to Great Britain would remain unfettered after the end of the transition/implementation period

contributed to complacency around the scale of the shift that Brexit would entail. Businesses in Great Britain, in particular, received little guidance as to how new rules would affect movements of goods into Northern Ireland. The truncated transition/implementation period and the negotiations over the implementation of the Protocol running into December 2020 left little opportunity for traders and hauliers to understand the implications of the new arrangements.

## Movement of Goods

- [3] The UK's exit from the EU was always going to present challenges for the movement of goods between the UK and the EU. The Protocol in its original 2018 design would have maintained a broad degree of alignment between the UK as a whole and the EU and thus mitigated some of the sudden changes in the nature of this trading relationship. The Protocol as revised in 2019 maintains a high degree of alignment (*de facto* continuation of the EU Single Market for goods) for Northern Ireland only. The UK's exit from the EU therefore also required the UK Government to manage the country's own internal market, developments which had to happen simultaneously with negotiations over future trading relationships with the EU.
- [4] These challenges were further compounded by the specific circumstances of Northern Ireland, geographically, historically, politically and economically, which meant that sudden changes to arrangements with regard to either the EU Single Market or the UK internal market stood to be disruptive. The resultant Northern Ireland-Great Britain frictions in early 2021 have been compounded by all of these changes being finalised with minimal time for businesses to prepare for them.
- [5] It should thus come as little surprise that the movement of goods between Great Britain and Northern Ireland has been problematic in the opening weeks of 2021. The first weeks of the Protocol's operation were marked by some retailers struggling to adequately stock shelves in Northern Ireland and having hurriedly to shift supply chains. For instance, Sainsbury's in Northern Ireland stocked goods from Henderson Group marked with imagery from another retailer, and Boots opted to source sandwiches from local producers when they became unable to rely on their usual supply routes.
- [6] The rules surrounding trade, particularly requirements for documentation, have become more complex. Depending on the type of consignment, where it is originating from and where it is intended for, different paperwork requirements exist. Three specific aspects of this which have contributed to the challenges being faced currently in Northern Ireland are rules for sanitary and phytosanitary (SPS) products, certification delays and rules of origin.
- [7] With regard to SPS checks, it had been hoped that the TCA would build upon the Northern Ireland Protocol in terms of identifying further scope for mutual recognition and equivalence in order to minimise disruption. However, the TCA does not do this, and these non-tariff barriers thus remain. There are three elements to SPS checks on goods entering Northern Ireland from GB: a documentary check; an identity check; and a physical check. These are performed on a selection of vehicles and are conducted at Border Control Posts at ports in Northern Ireland. These checks can take several hours, causing subsequent delays in delivery times for products.
- [8] Provision is made within the December 2020 agreements for mutual recognition of 'trusted trader' schemes, entailing that some firms with a track record of quality in terms of clearing border control processes could attain a formal status enabling them to benefit from faster applications and less frequent checks (as Authorised Economic Operators). Companies, however, had little time to adapt to these new arrangements. The Joint Committee agreement also saw specific grace periods around the application of EU food safety rules to Northern Ireland regarding chilled and processed meats. These grace periods were not

intended to allow for an ongoing period of business as usual, they were put in place to allow retailers to adjust supply chains and product lines in response to the new arrangements.

- [9] Product origin rules are often complex. However, this becomes more complex when a product originates in the EU, undergoes some form of processing in the UK, and then is planned to be sold back into the EU. While the product might have originated from the EU in terms of where it started its journey, if it is repackaged or even simply warehoused in the Great Britain, this affects its status under the TCA. This then has implications if the good is to be moved on for sale elsewhere, including Northern Ireland. Local supply chains can help to mitigate the full extent of this impact but the ongoing changes in supply chains resultant from Brexit is one of the most prominent ongoing challenges for businesses.
- [10] The consequence of these challenges and changes since the end of the transition phase has been that businesses operating in the Republic of Ireland have also had to adapt to rapidly changing patterns and volumes of goods moving through it for the purposes of trade. Within the first fortnight of January 2021, new ferry routes to Ireland from Cherbourg and Dunkirk became operational, Stena Line redirected its newest vessel to Rosslare (originally intended for the Belfast-Birkenhead route) and there are calls for more routes to be established. In redirecting traffic onto these routes, businesses are prioritising certainty of crossing borders within the EU over the speed, in terms of transit time if all processes operate efficiently, of moving goods from Ireland into the remainder of the EU through Great Britain.
- [11] In short, it is simplistic to present the issues which have arisen since the start of 2021 as either teething troubles or long-term adjustments. Both have developed. Many of the issues that traders have faced with new processes will be resolved as they become more familiar with these processes. Some longer-term shifts in supply chains and warehousing will nonetheless be inevitable, particularly in light of the scope for food, plant and animal standards to diverge between Great Britain and the EU.
- [12] There is also scope for businesses operating in Northern Ireland and inward investors to adapt to its new place at the cusp of the EU Single Market and UK Internal Market. Businesses seeking to bring goods from the EU into Great Britain have the opportunity to do so through Northern Ireland with fewer barriers to trade, creating an incentive for them to locate in Northern Ireland. This is not simply a matter of “brass plate” companies; complex supply chains have to be routed through Northern Ireland to take advantage of these arrangements. Similar advantages now exist for producers based in Northern Ireland. For these advantages to be realised, however, the Protocol needs a period of stable operation to persuade businesses engaged in inward investment into Northern Ireland of its benefits.

## Mitigating Disruption

- [13] In light of the initial challenges that have been seen in recent weeks, there have been calls for the UK Government to invoke Article 16 of the Protocol. This states (in part) that:

‘If the application of the Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures.’

- [14] The purpose of Article 16 is to provide a means of recourse should there be serious and ongoing difficulties arising as a result of the Protocol’s application, mirroring standard provisions in comparable international trade treaties. There are a number of reasons, therefore, why it is not appropriate to consider Article 16 as a course to pursue at this stage. First, there were always going to be initial challenges once the Protocol and the TCA came into effect. It is too early at this stage to determine if the difficulties that have been seen so

far are symptomatic of actors adjusting to the new procedures in place, or if they will bear long-term impact of a sufficiently detrimental nature such that steps under Article 16 could be considered.

- [15] Second, Article 16(2) outlines that there would be EU involvement in determining how any such issues can be managed and addressed. It is not a simple case of claiming a detrimental impact of the Protocol as a means to achieving its disapplication. If the UK decided to take safeguarding measures under Article 16(1), the EU would be able to take steps to rebalance the functioning of the Protocol. In effect, Article 16 is not in practice a means for the UK to act in a solo capacity to initiate changes in response to the impact of the Protocol. The disbelief which greeted an ill-judged and quickly reversed EU Commission proposal to trigger Article 16 to provide for export controls protecting against the movement of Covid-19 vaccines from the EU, through Northern Ireland and into Great Britain illustrates the dangers in this course of action.
- [16] The challenges that have arisen since 1 January 2021 have reinforced differences between political parties within Northern Ireland and between the UK and the EU. There are nonetheless processes in place to facilitate the resolution of any disputes that may arise between the EU and the UK in terms of the implementation of the Withdrawal Agreement and the Protocol. The TCA itself also provides an oversight function in the form of the Joint Partnership Council. These mechanisms provide routes for any problems or unintended consequences of the Protocol to be identified and rectified if they are shown to have long term and unintended consequences.
- [17] The first few weeks of the Protocol's operation have been characterised by some deeply divisive rhetoric and initiatives. The UK Government responded to the debacle around the EU's proposed invocation of Article 16 on 29 January 2021 with a catalogue of ameliorations that it would like to see take effect around the Protocol. The EU has maintained that it will only contemplate further adjustments when the UK fulfils the terms of the December 2020 Joint Committee agreement, including with regard to electronic access to customs databases. These developments, however, indicate that the EU and the UK Government both believe that the Protocol can best be managed through the Joint Committee processes.

## Constitutional Considerations

- [18] Wider questions around the constitutional future of the UK have become wrapped into these debates, and Brexit has acted as a catalyst for many of these conversations. This is not to suggest that Brexit or its practical outworking through the Protocol and the TCA will in itself lead to a change in Northern Ireland's status. The Protocol explicitly acknowledges Northern Ireland's status as part of the UK and the "Stormont Lock" provisions require Northern Ireland's elected representatives have some say over the Protocol's operation. Concerns have nonetheless been raised regarding the constitutional implications of the Protocol and the democratic deficit it creates.
- [19] That Northern Ireland remains *de facto* part of the EU single market in goods might be thought to raise issues regarding the UK's constitutional integrity. Claims have been made that it undermines provisions of the Act of Union. The Withdrawal Agreement was nonetheless explicitly negotiated to acknowledge that Northern Ireland, *de jure*, remains part of the UK's customs territory. The UK Parliament has accepted, and legislated to give effect to, a treaty which sees these special rules apply to Northern Ireland. The UK Parliament has the ability to legislate to authorise EU rules to continue to apply to Northern Ireland, and the Protocol was deliberately framed to acknowledge that the continuation of these rules was the UK's choice. The Protocol does not threaten the operation of the UK constitution, it is an outworking of constitutional arrangements which emphasise Parliament's role.

[20] Article 18 of the Protocol (the “Stormont Lock”) provides the Northern Ireland Assembly with the opportunity to vote, in 2024, on whether or not to continue to apply Articles 5-10. This is not the same as providing ongoing Northern Ireland input into the operation of the Protocol. The Northern Ireland Executive has the opportunity to participate as part of the UK delegation when issues related to the Protocol are discussed in the Withdrawal Agreement’s committee system, but this closed-door arrangement is not the same as active scrutiny by elected representatives. The House of Lords is establishing a committee dedicated to overseeing the operation of the Protocol which would be usefully mirrored within the Northern Ireland Assembly, cross-cutting the work of departmental committees.

[21] Articles 5-10 of the Protocol relate specifically to trade, so a vote against their continuation would not equate to a vote to disapply the Protocol. Loose talk of scrapping the Protocol does not recognise that large parts of it are excluded from the operation of the Stormont Lock. Northern Ireland’s trade arrangements could nonetheless potentially face an additional upheaval in the coming years as a result of these provisions. Ongoing uncertainty around the operation of the Protocol is not conducive to inward investment for Northern Ireland and could prevent the opportunities presented by the Protocol from being realised.

## Conclusion

[22] The challenges and difficulties that have been seen since 1 January 2021 are the result of the UK’s exit from the EU – there is no way in which Brexit could be achieved without disruptions to trade flows. The Protocol was an effort to ameliorate those disruptions, but it also involved choices as to where the trade barriers that did result would take effect. The final iteration of the Protocol has produced an arrangement where the bulk of this (ameliorated) friction is now arising between Great Britain and Northern Ireland, rather than at the UK-EU border on the island of Ireland.

[23] The UK and EU will continue to communicate on the implementation of the Protocol through its Specialised Committee on this and the Joint Committee, and with regard to the TCA, through the Joint Partnership Council. The initial problems with the operation of the Protocol are already forming the basis of efforts to improve the situation. The mitigations that are in place currently to ease the transition with regard to trade are temporary. Some of these grace periods could well be extended through Joint Committee negotiations, but now that the general shape of the trading rules are known, there is a much better opportunity for traders to use the resultant window of time to adapt to the changes than there was in the latter part of 2020.

[24] Article 16 of the Protocol does not provide the solution to the problems being seen currently, and it is unhelpful to confuse public understanding of what is happening with political assertions to the contrary. It is important that close cooperation between government, officials and businesses – in Great Britain and in Northern Ireland – occurs in the weeks and months ahead in order to smooth the disruptions in this process. The stable operation of the Protocol and any necessary adjustments through the Joint Committee mechanism, not wholesale departures from it which create yet more uncertainty, provide way forward.

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