



Evidence to the Protocol on Ireland/Northern Ireland Sub-Committee: ‘Introductory Inquiry into the Operation of the Protocol on Ireland/Northern Ireland’

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Author Biographies

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CURRENT STATE OF PLAY AND THE PROTOCOL’S OPERATION

- [1] The Ireland/Northern Ireland Protocol’s operation remains a point of contention and subject to on-going efforts of refinement. This is the result of a lack of clarity over issues that its operation has given rise to and difficulties in reaching consensus in how to address these. This has been further compounded by inconsistency in terms of how these challenges have been characterised politically, being characterised as anything from teething problems to unresolved issues to requiring major readjustments to the Protocol. These assessments of the Protocol reflect issues with the operation of specific elements, and cannot be usefully applied to its overall operation.
- [2] The Secretary of State for Northern Ireland has characterised the Protocol as a Policy Document. This is, at best, a mischaracterisation. There is considerable scope for adjusting the Protocol. Indeed, its operation with regard to state aid was altered by the December 2020 Joint Committee agreement. There is, nonetheless a legal baseline within the Protocol’s trade elements. These provisions treat Northern Ireland as being part of the EU Single Market for goods, with all the consequences that carries. Some of those consequences can be adjusted if both the EU and UK accept that there is no risk of onward movement of goods into the rest of the Single Market. This submission thus turns to consider the three common discourses around adjusting the Protocol: teething problems, unresolved issues and major adjustments.

- [3] Teething problems with the Protocol do exist. The term is jarring for those in Northern Ireland who are finding trade more difficult as a result of Brexit, but it can have a limited application in Protocol debates. It best applies to problems that were not fully appreciated before the Protocol came into effect, and have been exposed by the Protocol's operation, and have thus been seen, for example, in relation to the impact of steel tariffs and the movement of assistance animals between Great Britain and Northern Ireland.
- [4] Unresolved issues are areas that the UK and EU deliberately determined would be revisited following the conclusion of the Withdrawal Agreement in December 2020. The extended grace period which was agreed over authorisation of medicines is the best example of an explicitly unresolved issue. Both the EU and the UK recognised that something would need to be arranged in this regard after the Protocol came into effect, but the time to address this complex issue did not exist within the truncated transition/implementation period. The mood music from the parties to date suggest that, in negotiations over the Protocol, there has been considerable progress towards a long-term fix to replace these mitigations.
- [5] The grace periods around medicines regulation can be contrasted with the grace periods with regard to chilled meats. The full range of Sanitary and Phytosanitary (SPS) checks on Great-Britain-to-Northern-Ireland trade that the Protocol required, on its legal terms, would have had to be prepared for and brought into effect within days of the reshaping of the Protocol in December 2020 being agreed. This would have led to considerable difficulties at ports in January 2021 in relation to goods moving from Great Britain. The number of checks in relation to this will increase further when the grace periods come to an end.
- [6] What cannot be overlooked in relation to SPS checks is that the arrangement in place is one that was negotiated and agreed by both the UK Government and the EU. The grace periods with regard to chilled meats were therefore to facilitate planning by businesses over supply chains. While the Protocol's operation in this regard has not been smooth, the changes that Brexit effects were always going to require significant adjustments for businesses. These grace periods were not to facilitate long term adjustments, but they are now being used as a hook to generate the possibility for such adjustments. The experience of January 2021 emphasises the need for appropriate arrangements to be put in place ahead of the grace periods coming to an end to allow time for businesses to prepare.

THE CONTINUING DIALOGUE BETWEEN THE UK AND THE EU REGARDING THE PROTOCOL IN THE WITHDRAWAL AGREEMENT JOINT COMMITTEE AND THE GOVERNANCE BODIES REPORTING TO IT

- [7] The way in which the EU and UK have conceived of the trade aspects of the Protocol has differed from the outset. Both parties have foregrounded the importance of the Northern Ireland peace process, but beyond that start point, accounts diverge. For the EU, the purpose of the Protocol on Ireland/Northern Ireland was to maintain Northern Ireland's place within the EU Single Market for goods as a means of preventing the need for border controls on the island of Ireland as a result of Brexit;

for the UK, the deal was a necessity to achieving Brexit, and could be amended, reshaped or removed in the aftermath of leaving the EU.

- [8] The legal mechanisms of the Protocol align with the EU's understanding of its purpose. This means that the UK Government's unilateral extensions to grace periods, even if they align with its account of what it thought the Protocol was for, are breaches of the Protocol's terms. The EU is, with regard to trade in goods, a deeply integrationist order. Given that under the Protocol the EU must agree exceptions to the operation of Single Market border rules, this is such a divergence from the standard operation of the Single Market that it was always likely to be a considerable (and long running) work of persuasion on the UK Government's part. Checks on the external frontier of the EU are unavoidable – this was a known consequence of Brexit from the outset.
- [9] Discussions over the Protocol, moreover, are not happening in isolation of other trade arrangements into which the UK enters. As the Protocol is an agreement the UK signed-up to enabling Northern Ireland to remain within the EU's Single Market, such negotiations have direct consequences for the operation and outworking of the Protocol for businesses in Northern Ireland. Trade Agreements which the UK concludes which admit products into the UK market which are restricted from the EU Single Market will inevitably have an impact on the EU's conception of goods "at risk" of onward movement from Northern Ireland into the Single Market.
- [10] Currently, Northern Ireland's elected representatives have limited direct say in the Protocol's post-Brexit governance arrangements. This has obvious shortcomings in that it distances Northern Ireland's institutions, which are dealing with the outworking of the Protocol and overseeing the procedural aspects of enacting it, from discussions on the design of those very arrangements. However, it also entails an additional dynamic in terms of how Brexit more generally has shaped and has been shaped by the actions of political parties in Northern Ireland. This has been no different with the Protocol, with perspectives on it ranging from it being the fault of Brussels and Dublin, to it being something that needs full implementation in its current form.
- [11] The rioting seen earlier in 2021 only emphasises how contentious the Protocol has become. Ahead of the impending Assembly election (May 2022, if not sooner), and the Assembly's 2024 vote under the Protocol's democratic consent mechanism (Article 18) on the continuation of Articles 5-10, this is not likely to change. With no obligation for elected representatives in Northern Ireland to engage in problem-solving, the Protocol has ended up becoming a political punch bag. Its detractors are not obliged to set out an alternate vision in light of the realities of Brexit.

EFFORTS TO IDENTIFY SOLUTIONS TO THE PROBLEMS THUS FAR IDENTIFIED

- [12] There are two key factors to keep in mind in relation to finding solutions to problems with the operation of the Protocol. The first is that there is no workable alternative solution to the Protocol. To create conditions where businesses will be required to adapt to a raft of further changes, some more onerous and/or costly than those

already being experienced, is not a desirable outcome. Therefore, the only feasible option is to find ways to make the Protocol more effectively operational. The second is that neither calls for the Protocol's removal nor its fulsome implementation are where the greatest potential can be extracted from the Protocol in Northern Ireland. Demands for its removal overlook that there is no workable alternative, while calls for fulsome implementation deny space for beneficial adjustments to be made.

[13] In essence, there is scope for some of the amendments that the UK envisages now that Brexit has happened, but there is a need for these to happen within the legal parameters of EU law and in line with the UK's agreement that Northern Ireland would remain a part of the Single Market. Technical discussions remain on-going within the Joint Committee framework to this end, but with key actors on both sides talking at cross-purposes, it is difficult to see how agreement will be reached on the most contentious aspects of the Protocol in the foreseeable. With grace periods quickly running out, this is a deeply concerning set of circumstances.

THE CURRENT SITUATION IN NORTHERN IRELAND AS IT RELATES TO THE PROTOCOL, INCLUDING THE VIEWS AND CONCERNS OF COMMUNITIES AND STAKEHOLDERS

[14] The Protocol remains a source of concern and tension in Northern Ireland. The Democratic Unionist Party (DUP), at the time of writing, has in place a strategy aimed at undermining the operation of the Protocol. This has borne consequences in terms of Northern Ireland's governance, particularly in relation to engagement in North-South bodies established under the Good Friday/Belfast Agreement 1998.

[15] Ongoing difficulties within the Democratic Unionist Party (DUP) are also cause for concern. While these have been internal political party matters, the ensuing challenges this gives rise to in terms of the working relationships between Northern Ireland's Executive parties are a cause for concern. The Protocol's operationalisation is linked to the presence of a functioning Assembly and Executive, and should it be the case that the institutions are collapsed by either the First or deputy First Minister, this will have direct consequences in terms of the Protocol and its management in Northern Ireland.

[16] A judicial review has also been held in relation to the Protocol. The case was heard in Belfast's High Court in May 2021, with a decision pending. Spearheaded by a collective of unionist politicians in Northern Ireland and Great Britain, it was argued that the UK Parliament had unlawfully placed a border in the Irish Sea in enacting legislation to enable the Protocol on Ireland/Northern Ireland to take effect. Two of the Complainants listed are no longer leaders of their respective parties (UUP and DUP), so it is not clear if this is a move backed on a personal or a party level in relation to these entities. Regardless, the outcome of this case will further add to current contentions within Northern Ireland.

[17] The challenge runs into the difficulty of parliamentary sovereignty. The UK reached a Withdrawal Agreement which specifically took account of the legal requirements of the Belfast/Good Friday Agreement 1998 and the UK's constitutional arrangements, such as the terms of the Act of Union. Parliament accepted the direct

effect of this Agreement within UK law. The relationship between Article 4 and 5 of the Protocol was deliberately designed to keep Northern Ireland within UK customs territory, reflecting the requirements of the Act of Union. The UK is able to exercise its statehood with regard to Northern Ireland by managing its own (internal) trading affairs in light of its international agreements. The UK Government, however, has consistently been reluctant to own its decisions in agreeing the Protocol, distancing itself from these compromises, but in a way that has created the impression that the Protocol is some form of imposition upon the UK.

- [18] It is necessary also to be mindful that, at the time of writing, the traditional summer marching season is approaching. This will be the first since the Protocol came into operation. In the wider context of Brexit, political instability within Northern Ireland, the Protocol and residual tensions in the aftermath of violence and rioting earlier in 2021, the elements are present for this to be a deeply challenging summer. The sensitivity of this situation and its reactivity to political words and actions cannot be overlooked, especially with regard to the Protocol.

CONCLUSION

- [19] The UK and EU have frequently been talking across each other in relation to the operation of the Protocol, with the consequence that the most contentious aspects of the Protocol cannot be resolved. Northern Ireland's politics, with an Assembly election less than a year away, do not facilitate long-term debates over the Protocol. These circumstances are both adding new challenges and exacerbating those that were already known. Temporary bilateral mitigations to provide more time for adjustment and to address these divisions, along with immediate adjustments to deal with teething problems and unresolved issues, are needed to de-escalate current tensions.
- [20] The latter (addressing the rules covering medicines authorisations, assistance animals or steel tariffs), by themselves, might appear to be of limited overall significance. Together with additional bilaterally agreed grace periods over chilled meats, however, takes the urgency out of contentious Protocol issues and demonstrates the UK and EU working together. Until the UK and the EU find a common understanding of the Protocol, the potential consequence of unilateral action will remain escalation of these disagreements to the EU's Court of Justice. Such a path can be avoided but it will necessitate both sides working together.

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