

The Protocol: ‘dynamic alignment’ in post-Brexit Northern Ireland

Northern Ireland occupies a unique position in the relationship between the United Kingdom and the European Union. The much-discussed [Protocol on Ireland/Northern Ireland](#) provides that aspects of EU law continue to apply in post-Brexit Northern Ireland despite it having left the bloc along with the rest of the UK on 31 January 2020.

The terms of the Protocol are without precedent. Designed to address the ‘unique circumstances’ on the island of Ireland – specifically to avoid a hard land border, maintain necessary conditions for north-south cooperation, and protect the [1998 Belfast ‘Good Friday’ Agreement](#) in all its parts – the provisions of the Protocol break legal conventions in both the UK and the EU context.

Under its terms, Northern Ireland remains part of the UK customs territory but is subject to the EU customs code, EU VAT rules, EU Single Market regulations for goods, EU state aid rules and EU regulations relating to electricity supply and energy markets. The Protocol also guarantees Irish citizens living in Northern Ireland ‘no diminution’ in their EU citizenship rights and enables Northern Ireland to remain a recipient of dedicated EU ‘PEACE and INTERREG’ funding.

Although the UK is now a third country in EU law terms, the UK government is, under the Protocol, responsible for ensuring that those EU rules and regulations that continue to apply to Northern Ireland are properly implemented.

These provisions are novel for both parties. From an EU perspective, the Protocol outsources the management of the EU Single Market for goods to the

UK – now a third country. From a UK perspective, the Protocol introduces new barriers to trade within the UK internal market. This latter effect – the creation of a so-called ‘Irish Sea border’ – has been the cause of considerable controversy so far.

Since it came into (almost) full force on 1 January 2021 the UK has accused the EU of adopting an overly legalistic approach to the implementation of the Protocol, particularly when it comes to moving goods between Great Britain and Northern Ireland.

On the other hand, the EU has accused the UK of reneging on commitments made in a binding international legal text due to its unwillingness to implement the Protocol fully or in good faith.

The EU merely ‘took note’ of this move, while reserving the right to launch consequential legal proceedings against the UK in future.

The debate continues.

In July 2021, the UK government published a document titled [Northern Ireland Protocol: the way forward](#) in which it proposed a series of ‘significant changes’ to be considered in new UK and EU negotiations on the Protocol. In [response](#) the EU said that it would engage with the UK on practical solutions but would not reopen negotiations.

In the context of continued UK-EU disagreements over the Protocol, it is worth noting that its provisions have not yet been fully implemented. Various ‘grace periods’ that have delayed full implementation were due to expire this autumn; however, on 6 September 2021, the UK government [unilaterally extended](#) these.

Rather than retaliating, the EU merely ‘[took note](#)’ of this move, while reserving the right to launch consequential legal proceedings against the UK in future.

The implementation of the Protocol has so far generated a worrying degree of political destabilization in Northern Ireland. Unionists view the Protocol as an affront to their sense of Britishness and a threat to Northern Ireland’s place in

the UK; many in the community fear that the effect of implementing the Protocol will be an 'economic united Ireland' by stealth and at the cost of Northern Ireland's participation in the UK's internal market.

Unionist anger over the Protocol was one of the causes of [violent rioting](#) in Northern Ireland in April this year. While subsequent [protests](#) have been peaceful and relatively small, they are indicative of the lingering ire of the Unionist community over the differentiated arrangements for post-Brexit Northern Ireland under the Protocol.

Newly appointed leader of the Democratic Unionist Party (DUP), Sir Jeffrey Donaldson MP, [warned](#) of 'significant consequences' if the 'political, economic and constitutional difficulties created by the protocol' go unaddressed. Those consequences include the possible collapse of devolved institutions in Northern Ireland if Donaldson's DUP decides to withdraw from power-sharing government in protest.

An election campaign would follow, one that is likely to further undermine political stability in an already deeply polarised post-Brexit Northern Ireland.

Clearly, there has been a huge amount of political drama surrounding the Protocol in its first six months of implementation – and that drama is unlikely to abate any time soon. But one consequence of this is that there has been little discussion of the day-to-day impact of the legal effects of the Protocol on businesses and individuals across Northern Ireland.

This essay will try to fill that gap in the conversation about the Protocol and its consequences by reviewing the impact of just one of its legally innovative dimensions – so-called 'dynamic alignment'. It will argue, in particular, that the real-world impact of the Protocol is so extensive that some means must be found to involve people in Northern Ireland in the way new legislation arising from it is generated.

The new dynamism of Northern Ireland

Under Article 13(3) of the Protocol, instruments of EU law listed in Annexes to the Protocol apply 'as amended or replaced' to the UK in respect of Northern Ireland. When the Protocol and its Annexes were agreed by UK and EU

negotiators as part of the UK-EU Withdrawal Agreement in October 2019, 338 acts were listed. Under the Protocol, additions can be made and acts can also be deleted.

This means that, under the Protocol, Northern Ireland is in a position of 'dynamic alignment' with a specified but potentially evolving selection of the EU '*acquis*', the body of legal and other agreed obligations and commitments that apply to, and in, EU member states.

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In implementing the Protocol, therefore, the UK must keep Northern Ireland aligned with any changes made to the EU legal instruments included in the scope of the Protocol.

Six months into the full implementation of the Protocol, how has the body of EU law that applies to, and in, Northern Ireland changed?

Like many issues in the world of Brexit, the answer is not simple. Several different types of change have taken place. These relate to different kinds of EU legislation and the processes involved in making and amending them.

The changes fall into three broad categories

- additions to and deletions from the Annexes to the Protocol;
- repeal, replacement, and expiry of applicable EU law; and
- changes to EU legislation implementing applicable EU law.

1. Additions to and deletions from the Annexes to the Protocol

The first category of change concerns the specific EU acts that apply in Northern Ireland under the Protocol. Through the Joint Committee set up to oversee the implementation of the UK-EU Withdrawal Agreement, the UK and the EU can, by agreement, add new EU acts to the Annexes to the Protocol. The Joint Committee can also remove acts listed.

Before the end of the transition period, in December 2020, the UK and EU agreed to add eight EU acts to Annex 2 of the Protocol. It also agreed to remove two EU acts listed in the same Annex.

Of the eight acts added, five related to legislation that the Joint Committee decided, following review, should have been included in the original text of Annex 2. The five acts that were added are:

- rules for monitoring trade between the EU and third countries in drug precursors ([Council Regulation \(EC\) 111/2005](#));
- use of indications or marks to identify the lot – or batch – to which food products belong ([Directive 2011/401/EU](#));
- rules on the marketing of fodder plant seed ([Council Directive 66/401/EEC](#));
- rules on the marketing of propagating material of ornamental plants ([Council Directive 98/56/EC](#)); and
- rules on the marketing of vegetable propagating and planting material other than seed ([Council Directive 2008/72/EC](#)).

The three other additions were new EU acts adopted since the content of the Protocol had initially been agreed in November 2018. The Joint Committee decided that the following three acts fell within the scope of the Protocol, so added these to Annex 2:

- bilateral safeguard clauses and other mechanisms for the temporary withdrawal of preferences in certain EU trade agreements with third countries ([Regulation \(EU\) 2019/287](#));
- measures to reduce the impact of certain plastic products on the environment ([Directive \(EU\) 2019/904](#)); and
- and measures to control the introduction and import of cultural goods ([Regulation \(EU\) 2019/880](#)).

The two acts that were removed by the Joint Committee concerned CO₂ emissions standards for passenger cars ([Regulation \(EC\) 443/2009](#)) and light-duty commercial vehicles ([Regulation \(EU\) 510/2011](#)). Their original inclusion was deemed unnecessary.

Taking these changes into account, when the Protocol entered into force on 1 January 2021 following the end of the transition period, 344 EU law acts were listed in its Annexes. There have been no further additions or deletions since then.

2. Repeal, replacement and expiry of applicable EU Law

The second category of change covers the repeal, replacement, and expiry of EU acts – regulations, directives, and decisions – listed in the Annexes to the Protocol. Changes in this category are the result of normal EU legislative processes and follow from the provision in Article 13(3) of the Protocol stating that relevant EU acts apply as ‘amended or replaced’ to and in Northern Ireland.

Of the 338 EU legal acts originally listed in the Annexes, 46 had been repealed as of 1 July 2021. Not all were directly replaced by a new piece of EU legislation, however. This is because several relevant changes consolidated provisions previously spread over numerous pieces of (now repealed) legislation, into one or two new, more comprehensive acts.

Overall, the 46 repealed acts have been replaced by 17 new acts. In most instances, this dynamic alignment concerns changes to pieces of EU legislation that had been adopted prior to the UK’s withdrawal from the EU on 31 January 2020. Of the 17 new acts, only three were adopted after the UK left the EU.

In terms of coverage, 23 of the 46 repealed acts concerned controls on animal health and were replaced by two new pieces of legislation: [Regulation \(EU\) 2016/429](#) and [Commission Delegated Regulation \(EU\) 2020/687](#). The former is known as the ‘Animal Health Law’ and the latter is a related, supplementary act. Together these two new acts incorporate and update pre-existing provisions set out in the 23 repealed acts.

The changes laid down in the Animal Health Law were agreed in March 2016, before the UK’s EU referendum and therefore with the UK taking full part in its adoption. The original text included transitional measures and allowed for the repeal of the earlier acts to take effect in April 2021.

As a supplement to the 2016 Regulation, the Commission Delegated Regulation from 2020 sets out measures to prevent and control the spread of certain diseases. The relevant diseases were listed in the 2016 act but required more specific provisions.

In a similar way, seven of the other repealed acts concerned EU rules on official controls and checks on food and feed, animal health and welfare standards, plant health and plant protection. These were replaced by a single overarching EU act ([Regulation \(EU\) 2017/625](#)) known as the 'Official Controls Regulation'.

It incorporates and updates pre-existing provisions in the repealed acts. It was agreed in April 2017, shortly after the UK triggered Article 50 announcing its intended withdrawal from the EU, and so with the UK participating in the regulation's adoption. The two regulations included transitional measures and allowed for the repeal of the earlier acts to take effect in December 2019.

Also repealed were two directives – [Council Directives 93/42/EEC](#) and [90/385/EEC](#) – concerning the production of and trade in medical devices. This had been provided for elsewhere in [Regulation \(EU\) 2017/745](#) that was already listed in Annex 2 to the Protocol so the repealed directives were not replaced directly.

A further 14 repealed regulations and directives originally listed in the Protocol have been directly replaced by new acts. Of these, four concerned the regulation of electricity markets and energy supplies ([Directive 2009/72/EC](#), [Regulation \(EC\) 714/2009](#), [Regulation \(EC\) 713/2009](#) and [Directive 2005/89/EC](#)) and were originally listed in Annex 4, supplementing Article 9 of the Protocol which makes provision for the continued operation of the Single Electricity Market on the island of Ireland after Brexit.

Overall, then, of the 17 new acts that have replaced the 46 repealed acts, only three have been adopted by the EU since the UK's withdrawal on 31 January 2020.

The four acts originally listed in Annex 4 have been replaced by four updated acts ([Directive \(EU\) 2019/944](#), [Regulation \(EU\) 2019/943](#), [Regulation \(EU\) 2019/942](#) and [Regulation \(EU\) 2019/941](#) respectively) between July 2019 and

December 2020. The replacement acts cover the same policy areas and implement changes agreed in June 2019 – again, while the UK was still a member of the EU.

The remaining ten acts that have been repealed and replaced directly concerned:

- the approval and market surveillance of motor vehicles and related products ([Directive 2007/46/EC](#)) replaced by [Regulation \(EU\) 2018/858](#) adopted in June 2018;
- controls on cash entering or leaving the EU ([Regulation \(EC\) 1889/2005](#)) replaced by [Regulation \(EU\) 2018/1672](#) adopted November 2018;
- controls on trade in goods that could be used in capital punishment or torture ([Council Regulation \(EC\) 1236/2005](#)) replaced by [Regulation \(EU\) 2019/125](#), adopted in January 2019;
- the mutual recognition of goods between member states ([Regulation \(EC\) 764/2008](#)) replaced by [Regulation \(EU\) 2019/515](#) adopted in March 2019;
- controls on persistent organic pollutants ([Regulation \(EC\) 850/2004](#)) replaced by [Regulation \(EU\) 2019/1021](#) adopted in June 2019;
- the marketing and use of explosives precursors ([Regulation \(EU\) 98/2013](#)) replaced by [Regulation \(EU\) 2019/1148](#) adopted in July 2019;
- provisions for the conservation of fisheries and marine ecosystems ([Council Regulation \(EC\) 850/98](#)) replaced by [Regulation \(EU\) 2019/1241](#) adopted in July 2019;
- provisions for computerising the movement and surveillance of exercisable goods ([Decision 1152/2003/EC](#)) replaced by [Decision \(EU\) 2020/263](#) adopted in February 2020;
- rules on the labelling of tyres ([Regulation \(EC\) 1222/2009](#)) replaced by [Regulation 2020/740](#), adopted in June 2020; and
- controls on the acquisition and possession of weapons ([Council Directive 91/447/EEC](#)) replaced by [Directive \(EU\) 2021/555](#) adopted in April 2021.

Overall, then, of the 17 new acts that have replaced the 46 repealed acts, only

three have been adopted by the EU since the UK's withdrawal on 31 January 2020.

In addition to the repealed acts, two acts originally listed in the Annexes expired after the UK withdrew from the EU. These concerned the regulation of imports from third countries affected by the Chernobyl disaster ([Council Regulation \(EC\) 733/2008](#)) and temporary trade measures for goods originating in Ukraine ([Regulation \(EU\) 2017/1566](#)).

Taking all of these changes into account alongside those agreed by the Joint Committee in December 2020, the number of EU acts that apply in post-Brexit Northern Ireland has actually decreased since the Protocol entered into force. As of 1 July 2021, there are now 313 EU regulations, directives and decisions that apply; 25 less than when the Protocol was first agreed.

Annex	Area	Regulations, Directives, Decisions*	
		October 2019	July 2021
1	Individual Rights	6	6
2	Trade in Goods	287	262
3	VAT and Excise	19	19
4	Single Electricity Market	7	7
5	State Aid	19	19
	Total	338	313





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