



UK IN A
CHANGING
EUROPE

THE NORTHERN IRELAND
PROTOCOL BILL:
CONTEXT AND CONSEQUENCES

FOREWORD

Brexit was always going to have particular consequences for Northern Ireland and the Republic of Ireland, though few foresaw the degree to which those consequences would dominate debates following the EU referendum of 2016. Over six years on from that vote, a running dispute over the Protocol on Ireland/Northern Ireland continues to dog relations between the United Kingdom and the European Union.

In response to the current stand-off, the UK government has proposed a piece of primary legislation: the Northern Ireland Protocol Bill. This report explains some of the context to the Bill, what the Bill would do, and what its implications might be. Finally, it considers a number of ways in which the stand-off over the Protocol might be resolved.

I very much hope that what follows will help to clarify what has been a complex and confusing debate. In so far as it does, that is down to the efforts of Catherine Barnard (University of Cambridge), Joelle Grogan (UKICE), Katy Hayward (Queen's University Belfast), Andrew McCormick (formerly lead official on Brexit for the Northern Ireland Executive) and Jill Rutter (also UKICE). I'd like to thank all of them for their hard work – not to mention their patience and good humour in dealing with numerous suggestions and queries. The considerable effort they have put in to writing this report has been supplemented by the careful editing of John Barlow and Alex Walker.

As ever, if you have any comments or feedback, please do not hesitate to get in touch.

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EXECUTIVE SUMMARY

- Both the UK and the EU recognise that adjustments need to be made to the Protocol on Ireland/Northern Ireland, and both have said that their preferred outcome would be a negotiated settlement. However, the two sides are a long way apart.
- The EU's current proposals to adjust the operation of the Protocol cover a wide range of areas, including customs, the movement of Sanitary and Phytosanitary (SPS) products, and medicines, as well as stakeholder engagement. Concerns remain that these would still constitute an increase in regulatory barriers from the current state of affairs, while also not addressing key UK government issues about UK-wide subsidy control or the jurisdiction of the Court of Justice of the European Union.
- As the stand-off between the UK and EU over the Protocol continues, the UK government has introduced the [Northern Ireland Protocol Bill](#).
- The Bill is designed to give the UK government unilateral powers to overwrite provisions of its Withdrawal Agreement with the EU, and specifically the Protocol on Ireland/Northern Ireland.
- It removes the direct effect (or legal enforceability) of significant parts of the Protocol, primarily relating to the trade and regulation of goods, subsidy control and governance of the Protocol in Northern Ireland.
- The UK government has proposed three alternatives to the Protocol, which could be introduced if the Bill becomes law: :
 - a **red channel** for goods entering the Single Market, and a **green channel for** goods entering NI and remaining there. This system minimises paperwork or costs for goods in the green channel;
 - a **dual regulatory regime for NI** which would mean that goods can be produced and sold in NI that meet either EU standards or UK standards;
 - **UK-wide subsidy control policies** replacing the requirement to abide by EU state aid law in NI.

- The UK government acknowledges that terms of the Bill would breach the international legal obligations it has under the Protocol. It has justified this on grounds of ‘necessity’ under international law, i.e. ‘where the only way a State can safeguard an essential interest is the non-performance of another international obligation’. Notably, although safeguard measures could be invoked under Article 16 of the Protocol, the government has chosen not to use them to date.
- If the Bill becomes law, the EU could start infringement proceedings under EU law or trigger the dispute resolution mechanism under the Withdrawal Agreement.
- The Bill could introduce significant **uncertainty** for business and trade in Northern Ireland, not least in terms of the legal basis on which goods enter NI. A major change in rules would place traders in the position of either failing to comply with UK law or failing to comply with international law (i.e. an obligation under the Protocol).
- The [EU has been clear](#) that unilateral change to the Protocol by the UK could result in NI goods losing the right to enter the Single Market, with material consequences for NI in the medium and long-term.
- Ultimately, the Protocol attempts to address a highly knotty problem and a unique set of circumstances and complexities. Any solution to it is bound to benefit from lessons from the 1998 Good Friday/Belfast Agreement, not the least of which is the fact that any resolution to its difficulties needs to be thought of in terms of long-term relationships rather than an overnight fix.

INTRODUCTION

The Northern Ireland Protocol Bill is scheduled to start its passage through the House of Lords soon after the party conference recess. The Bill, introduced by Liz Truss when she was Foreign Secretary, is designed to give the UK government unilateral powers to overwrite provisions of its Withdrawal Agreement with the EU, specifically the Protocol on Ireland/Northern Ireland (NIP).

The Bill represents a response to concerns expressed by both unionist politicians in Northern Ireland (NI) and Conservative MPs, as well as the business community, about the Protocol. The Protocol's primary purpose is to avoid a hard land border between NI and the Republic of Ireland after the UK's exit from the EU — something both the UK and EU recognised would cause profound practical and political difficulties.

Under the terms of the Bill, Northern Ireland continues to be aligned to some EU laws and EU border checks and controls are applied for non-EU products entering Northern Ireland, including from Great Britain. Hence the so-called 'Irish Sea Border'. Post-Brexit economic and regulatory differences between Northern Ireland and the rest of the UK could grow over time, should regulations in the rest of the UK diverge further from those in the EU.

Thanks to the Protocol, a 'hard border' on the island of Ireland has been avoided. Moreover, Northern Ireland, uniquely, benefits from unrestricted access to both the UK market and the EU's Single Market for goods (for imports and exports).

Polling suggests that although the majority of people in NI think that the Protocol is, on balance, good for NI, [opinion on the subject](#) is polarised largely along Leave/Remain lines and thus, broadly speaking, between unionists and nationalists/others. Strong unionists in NI are almost uniformly critical of the Protocol, while strong nationalists are overwhelmingly supportive of it.

Both the UK and the EU recognise that adjustments need to be made to the Protocol, following concerns expressed by business, and both have said that their preferred outcome would be a settlement agreed between them. On 30 September 2022, Foreign Secretary James Cleverly and the EU Commissioner for Interinstitutional Relations Maroš Šefčovič echoed a mutual commitment for a solution. But the two sides are a long way apart. The UK government has argued that the Protocol is fundamentally flawed and needs to be replaced by something that recognises the importance of East-West trade and the UK internal market. It also argues that the jurisdiction of the Court of Justice of the European Union

(CJEU) over the EU law that applies in NI under the Protocol should be replaced by normal trade agreement resolution mechanisms.

The EU has said it will not renegotiate the Protocol (and says that it does not have the mandate to do so) but has suggested modifications which, it claims, would reduce the burden of compliance (compared to what was agreed in October 2019 and December 2020) and address issues raised by businesses in NI. The distance between the two sides remains significant, however. The EU is taking legal proceedings against the UK for infringement of the Protocol and is equipping itself for rapid response to breaches of the Withdrawal Agreement. The UK meanwhile is preparing to take unilateral action to undermine the effects of the Protocol via the NI Protocol Bill.

The Bill is an extraordinary piece of legislation for several reasons. The government has claimed that it is intended as insurance against a failure to reach a negotiated agreement with the EU. Moreover, it has justified the legislation on the grounds of ‘necessity’ in public international law (safeguarding ‘an essential interest against a grave and imminent peril’) — a highly unusual and contested claim.

The government points to the political situation in NI as evidence of damage being done to the region and to the 1998 Good Friday/Belfast Agreement by the Protocol. Following elections to the NI Assembly in May 2022, the Democratic Unionist Party (DUP) fell to second place behind Sinn Féin. It has refused to nominate a Deputy First Minister to the Executive, nor a Speaker for the Assembly, until the standoff over the Protocol is resolved to its satisfaction. As a consequence, Northern Ireland has no properly functioning Executive or Assembly. Long-standing policy problems in Northern Ireland (for example, dealing with the ever-growing hospital waiting lists) continue to go unaddressed.

Any hopes the government might have had that the introduction of the Bill would secure the DUP’s return to government were soon dashed. If there is no Executive formed by 28 October, the UK government will face a legal obligation to call new NI Assembly elections within 12 weeks. This will offer a second attempt at shifting NI-party dynamics and forming an Executive. In the face of the DUP’s unwillingness to concede, one alternative is to introduce primary legislation allowing the current caretaker Executive to stagger on and thus avoid a return to NI government by the civil service (as happened for almost 3 years between 2017 and January 2020). However, this would be another instance of the UK government taking major decisions in response to the concerns of one NI party. If it did so, it is not certain that the other parties would then be willing to continue to serve in the mandatory coalition that is the NI Executive.

This fragile state of affairs is in the hands of the newly-appointed Secretary of State and Minister of State at the Northern Ireland Office. They will also be responsible for ensuring that NI's interests and concerns in the round are properly reflected in the UK government's position in negotiations, although the lead in any Protocol-focused negotiations with the EU falls to the Foreign Secretary. The success or failure of these negotiations would have wide ramifications beyond the political scene in NI; the same is true of the passage of the Protocol Bill.

We consider these ramifications in what follows. In the first section, we look at the provisions of, and justification for, the Northern Ireland Protocol Bill. We then consider the parliamentary prospects for the Bill, which is scheduled to have its second reading in the House of Lords after the 2022 annual party conferences. We consider three alternatives to the Protocol proposed by the UK government, which could be introduced if the Bill becomes law.

We then look at the consequences of the Bill passing, which will be determined to a large extent by the EU's reaction. This report considers implications for trade East-West between the islands, as well as North-South on the island of Ireland. It also highlights potential effects on the UK's international reputation. But the Bill would also have wider political ramifications which we examine — not least in NI, where the UK government faces difficult choices by the end of October if the Executive is not back and fully functioning.

In the final section we look at some suggested options for a solution to this issue which has dogged UK-EU relations since the 2016 EU referendum.

THE NORTHERN IRELAND PROTOCOL BILL

CONTENT OF THE NORTHERN IRELAND PROTOCOL BILL

The Bill is a complicated piece of legislation which would have major implications.

First, it removes the direct effect of the Protocol in UK law for a set of ‘excluded provisions’ (Clause 2). The excluded provisions are specified in the Bill, and primarily relate to the regulation and movement of goods to NI, subsidy control, and the NIP governance arrangements. Removing the direct effect of these provisions means that UK authorities, including Ministers, civil servants and devolved governments, would no longer have to comply with or enforce parts of the Protocol. The Bill is drafted in such a way as to make the prospect of successful challenge in the courts once it becomes law unlikely. (However, it does not stop the EU challenging the legislation — see below).

Second, while the Bill changes the regime governing the customs and the movement of goods to NI, it does not intend to introduce a land border on the island of Ireland. The Bill replaces the requirement in the Protocol that customs duties are due on goods entering NI that are ‘at risk’ of entering the EU (Clause 4) with the UK’s preferred model of a [red channel](#) for goods heading for the Single Market and a [green channel](#) for goods that will stay in NI (Clause 5). The channel determining customs and tariff treatment replaces the requirement to abide by EU state aid law in NI with the UK post-Brexit regime (the Subsidy Control Act 2022). The Bill also removes the right of EU representatives to oversee the application of the Protocol in NI (Clause 13) including with regard to border and goods checks.

Third, the Bill delegates (or gives) extremely broad powers to Ministers (so-called ‘super’ Henry VIII Powers) to change existing law or to make new law related to areas currently governed by the NIP. In most cases these powers can be used when Ministers consider their use ‘appropriate’. Ministers can use the powers to change primary legislation (or Parliament-made law).

The Bill also gives Ministers the power to disapply certain parts of the Protocol (other than provisions on individual rights, the common travel area and North-South cooperation) for a range of ‘permitted purposes’. These permitted purposes include, for example, safeguarding social or economic stability in NI; and lessening, eliminating, or avoiding differences between tax or customs duties in NI and GB.

The powers enable Ministers to change law in areas currently governed by the Protocol. Under the Protocol, EU regulations continue to apply in relation to Northern Ireland in order to allow it continued free access to the EU Single Market for goods. The powers under the Protocol Bill would see these replaced with those put forward by the UK government. For example, Ministers could come up with new regulations on the movement of goods between GB and NI (Clause 5). UK government departments could also regulate customs issues, including duties and the administration and enforcement of customs (Clause 6). These new Executive powers could also be used by Ministers of the Crown within areas currently devolved to NI (not to mention Scotland and Wales).

In addition, UK Ministers could ‘sub-delegate’ legislative powers to the devolved administrations (Clause 22(6)). This ‘tertiary legislation’ subsequently made by a devolved administration would not be subject to scrutiny even if, [as discussed by the Hansard Society](#), it amended primary legislation or made retrospective provision.

Changes to the law made by Ministers have only limited scrutiny by Parliament. They are to be subject to ‘negative resolution’. This means that Parliament does not have to consent to changes to the law before they come into force, although Parliament could reject them.

Fourth, the Bill introduces new rules on the regulation of goods. It introduces a ‘dual regulatory’ regime in NI in, for example, manufactured goods, medicines and agri-foods (Clause 7). This means that businesses selling or manufacturing goods in NI would have the choice of whether to comply with EU or UK rules. The most immediate impact of this is not in NI but for GB businesses which do not manufacture goods to EU standards but rather UK standards which would no longer face regulatory barriers entering NI.

Fifth, in anticipation of a possible future deal to resolve the issues, the Bill empowers a Minister to take such measures as s/he considers appropriate to implement any new agreement reached with the EU to ‘replace’ the Protocol (Clause 19). There is no requirement for any parliamentary vote on this — and so no opportunity for Parliament to scrutinise any new UK-EU deal.

Sixth, the Bill removes jurisdiction of the Court of Justice of the European Union (CJEU) over the NIP. The Bill says that UK courts are not bound by decisions of the CJEU, and removes the ability of UK courts to refer cases concerning the NIP to the CJEU (Clause 20). The Bill removes any role for the CJEU in the NIP or related provisions in the Withdrawal Agreement (Clause 13). This is directly contrary to an EU ‘red line’, insisting that the CJEU have oversight over the interpretation and application of the Protocol.

The net result of these provisions is that the government would equip itself to implement its own preferred version of the trading arrangements between GB and NI, whether this be something like the proposals it laid out in its [White Paper in July 2021](#) or a new negotiated agreement with the EU. What is clear is that this would entail new powers for the UK Executive, with minimal opportunity for parliamentary oversight from either Westminster or Stormont.

HOW THE GOVERNMENT JUSTIFIES THE BILL

In its explanatory memorandum, the [stated purpose of the Bill](#) is

to provide Ministers with the power to make changes to the operation of the Northern Ireland Protocol in domestic law which protect the Belfast (Good Friday) Agreement and to safeguard peace and stability in Northern Ireland.

The UK government accepts that the Bill will result in ‘the non-performance of certain obligations’, but has justified this breach of international legal obligations under both the Withdrawal Agreement and the NIP on the grounds of the doctrine of necessity in international law. The government [has said](#) that the legislation is ‘currently the only way to provide the means to alleviate the socio-political conditions’ in ‘the challenging, complex and unique circumstances of Northern Ireland’ and expects ‘this situation and its causes will persist into the medium-to-long-term’.

The argument that the government can justify the Bill on grounds of necessity has attracted significant criticism from legal experts, who have underlined the extremely high test for when the defence can be invoked by a state. Under the [relevant provision of international law](#), state action must be ‘the only way for the State to safeguard an essential interest against a grave and imminent peril.’ Sir Jonathan Jones KC [highlighted that lesser measures](#), including Article 16 of NIP, have not been first considered.

WHY DIDN'T THE GOVERNMENT USE ARTICLE 16?

The UK government has chosen not to use Article 16(1), the safeguard clause in the NIP, which can be invoked by either side where the application of the NIP leads to ‘serious economic, societal or environmental difficulties’ that are liable to persist, or lead to the diversion of trade.

Article 16 would not provide for the kinds of sweeping changes envisaged by the Bill, not least because Article 16(1) requires the safeguard measures to be restricted in scope and duration to what is ‘strictly necessary in order to remedy

the situation'. The Article also makes clear that priority must be given to 'such measures as will least disturb the functioning of this Protocol'.

Nonetheless, the option is still open. If the UK decides to proceed down the Article 16 route, it would need to follow the procedure set out in Annex 7 and to notify the EU through the Joint Committee. The two sides must then enter consultations immediately and cannot take safeguard measures until one month has elapsed. This is unless there are exceptional circumstances requiring immediate action when the UK can take protective measures which are 'strictly necessary to remedy the situation'. Bearing such limitations in mind, the UK government has decided that the safeguard measures of Article 16 are inadequate for the purposes for which the Bill is designed.

PARLIAMENTARY PROSPECTS OF THE BILL

The Bill passed all its Commons stages, unamended, in July 2022. This rapid passage was partly due to the distraction of the Conservative leadership election. Nevertheless, strong opposition to the government's justification for the Bill in terms of international law had been voiced from Conservative backbenchers as well as from the Opposition. Criticism of the Bill had been mixed with warnings about its implications from legislators in Westminster and elsewhere in the UK, including [Scotland](#). In July, the House of Lords Delegated Powers and Regulatory Reform Committee published [a damning report](#) on the Bill describing it as

a skeleton bill that confers on Ministers a licence to legislate in the widest possible terms. The Bill unilaterally departs from the Northern Ireland Protocol and enables Ministers to depart from the Protocol even further. The Bill represents as stark a transfer of power from Parliament to the Executive as we have seen throughout the Brexit process. The Bill is unprecedented in its cavalier treatment of Parliament, the EU and the Government's international obligations..

The report pointed out that the government was giving itself huge powers not just to amend existing primary legislation (so-called Henry VIII powers) but also to amend the provisions of this (i.e. the NIP Bill) legislation.

This suggests that the Bill could face a rough passage in the House of Lords. The key question is whether the Lords may object to: (a) the principle of the Bill (e.g. that it disapplies international law) or (b) the mechanisms in the Bill (e.g. the broad delegated powers to Ministers). If (b), the Lords will table amendments to put more conditions on the use of the powers or require a parliamentary vote. There may be some argument, but they are likely to find a compromise with the government, and pass the Bill. However, this won't change the fact that the Bill disapplies international law (i.e. the NIP) and the government will still be able to use those Henry VIII powers.

If the Lords' objections focus on (a), they will find the Bill very difficult to amend. A stand-off would then become likely between the House of Lords and the House of Commons. A meaningful vote amendment or delaying the passage of the Bill are the only ways open to Lords for expressing opposition to legislation. In either case, this means that there could be an extended period of ping-pong between the Commons and Lords over proposed amendments to the Bill.

The Commons' votes on any amendments by the Lords will be an early test of the Prime Minister's authority within her own party and she cannot assume no opposition there even though the Bill passed easily while the Conservative leadership election was ongoing. One of the amendments that was tabled in the Commons but was not moved would have provided for a parliamentary vote before the government could use the powers in the Bill. Such an amendment might well reappear in either the Lords or the Commons. But even that may not be enough to secure the passage of the Bill.

The Lords could conceivably decide to block passage in this parliamentary session and 'reject' the Bill. That would mean that the government would have to bring it back in another session in the same form. The government could then force it through under the [Parliament Acts](#) — last used in the Blair government to secure the passage of the 2000 Sexual Offences (Amendment) Act and the Hunting Act in 2004.

Notably, the government will not be able to claim that this Bill is a manifesto commitment, since the 2019 manifesto explicitly presented the Withdrawal Agreement which contained the NIP as part of its 'oven-ready' deal allowing the UK to leave the EU. This means that the government will not be able to force through the legislation as it might otherwise have been able to do.

WHAT THE GOVERNMENT CAN DO WITH THE POWERS DELEGATED BY THE BILL

The [explanatory note](#) accompanying the Bill says that it ‘provides Ministers with powers to make new law related to the NIP, putting in place suitable domestic arrangements where needed.’ From an additional paper the government put forward, ‘[The UK’s Solution](#)’ to the Protocol, we can see that these ‘domestic arrangements’ could potentially cover three main areas: a green channel for goods entering NI from sea or air and remaining there, a dual regulatory regime for NI, and UK-wide subsidy control policies.

We know the broad ambition of each of these proposals. The green lane is intended to allow goods to enter NI from GB with minimal friction in terms of additional paperwork or costs. The principle of the green lane is that it is just to be used for goods for sale and consumption in NI, i.e. within the UK. It would necessarily be accompanied by a red lane for goods that may go on to cross the Irish border for distribution in the EU single market. The purpose here is to reduce the barrier of the so-called ‘Irish Sea border’.

The big question that this proposal does not and cannot answer is how it is possible to be certain that goods intended for end-users in NI would not be able to enter the EU. In particular, this plan would not protect the single epidemiological unit across the island of Ireland which was at the heart of the UK’s proposals in October 2019.

The dual regulatory regime would mean that goods can be produced and sold in NI that meet either EU standards or UK standards. The major effect of this would be to allow GB goods to be sold in NI without any regulatory barriers, whereas under the current Protocol regime, goods that do not meet EU standards cannot enter NI. The government also emphasises that the regulatory regime would allow NI businesses to choose which standards to follow.

The Bill would also change the control of subsidies in NI. Clause 12 of the NIP Bill would disapply Article 10 of the Protocol and in its place extend the UK’s domestic subsidy control regime to cover NI by amending section 48(3) of the Domestic Subsidy Control Act. This is intended to avoid confusion about whether EU state aid rules apply and thus whether subsidies need approval from the EU. The claim is that it brings certainty for business by having all subsidies across the UK covered by the domestic regime.

As noted above, the powers granted to Ministers of the Crown in the NIP Bill are extensive and open-ended. The text of the original Bill itself does not delimit the scope of these powers and this is in part because the government is not yet clear on the details of such arrangements. By necessity, such arrangements are highly complex, with different implications for businesses trading in different sectors and types of goods.

Without knowing the details of the powers or these arrangements, it is still possible to identify particular challenges that the UK government will face in attempting to design and implement them. Some such difficulties relate to unintended or knock-on consequences. Take the green/red channel proposal, for example. The grounds on which loads are categorised as being valid for use of the green or red channels will be critical here. One essential condition would be sufficient information about the nature of the loads, their intended use, and the relevant recipients. The provisions on ‘at risk’ goods agreed in December 2020 focussed on issues such as tariff differentials and rules of origin, as the issues being addressed were based on customs obligations. The Protocol does not make any allowance for agri-food goods to be designated ‘not at risk’, as the risk concerns animal, plant and ultimately human health.

It is near-impossible to guarantee that a good would not cross the land border to the Republic of Ireland (and so, into the EU) once in NI. However, managing such risks depends on knowledge of those goods that are going through the green channel as well as the red channel. Such knowledge requires information, and that in turn requires ‘paperwork’ and bureaucracy, as well as an ability to check to confirm that the information provided is accurate. This is why it is impossible to conceive of a completely frictionless Irish Sea border if there is a frictionless Irish land border, which is even more difficult to manage in practical terms. A channels-based model is only likely to be agreed if the EU and the Member States can accept an arrangement which sufficiently manages these risks and which does not create unmanageable precedents or compromises to the EU’s wider management of the Single Market and its trade with other third countries.

What is clear is that there will continue to need to be at least occasional checks on goods in both red and green channels in order to manage risk. One concern from NI businesses is that responsibility for correct designation of a good primarily lies with the importer. The Bill removes the right of EU representatives to oversee border and goods checks. Whilst GB-based businesses may be glad of easy access to the NI market, the burden of risk will tend to lie less with them than with the NI importers. Furthermore, the assumption in the green/red channels notion is that we are dealing with finished products whereas the

most complex difficulties lie with intermediate goods that are entering NI to be processed into something else.

The dual regulatory regime is of obvious benefit to GB businesses wishing to trade into NI — they would no longer need to make sure that the regulatory approvals, labelling, and certification are all in order in accordance with EU rules. Such a regime is of less obvious benefit to NI businesses, given that they already have free access to the GB and EU markets. However, if GB businesses could trade freely into NI, then some NI businesses could find it necessary to be able to produce to non-EU standards to avoid being at a competitive disadvantage.

In such instances, it is valid to ask, if the EU standard is one, what is the second standard in the dual regulatory regime? Is it UK-wide or NI-decided, as per devolved competence? This is further complicated where it would depend on the regulatory area, as some areas (e.g. product standards) are reserved to be regulated at UK-wide level. In some other areas (e.g. agriculture), it is likely to be an NI-decided regime. This raises new questions about whether Stormont would be willing to legislate to non-EU standards to prevent NI businesses from being undercut by non-EU products, and if so, how quickly could this be achieved?

The Protocol makes specific provision for the continuation of the Single Electricity Market (SEM) which is operated by the two regulatory authorities of the Republic of Ireland and NI, and which is governed by EU legislation. The Protocol Bill does not exclude this sector from the provisions on state aid, judicial oversight, or regulatory control. However, any material departure from the existing arrangements would call the operation of the SEM into question. The most immediate risk would be upward pressure on prices as market operators would price in the new risks arising from any uncertainty.

TRADE CONSEQUENCES OF THE BILL

The mere introduction of the Bill has already had a chilling effect on UK-EU relations. In response, the EU refused to allow the UK to join some programmes to which it negotiated access in the Trade and Cooperation Agreement (TCA), most notably the Horizon Europe research funding programme. The UK has started dispute resolution proceedings on this under the mechanisms provided in the TCA. But there are likely to be more consequences if the Bill reaches the statute book, and still further implications if the powers under the Bill are used.

WHAT ARE THE EU'S OPTIONS FOR RESPONSE?

The EU has a number of options if it feels that the UK is breaching the commitments it made in the Withdrawal Agreement to implement the Northern Ireland Protocol as agreed.

The EU can start infringement proceedings against the UK under Article 258 Treaty on the Functioning of the European Union (TFEU) in conjunction with Article 12(4) of the Protocol. It has already done this in respect of earlier alleged [breaches](#) by the UK, and in particular its decision to extend grace periods for the movement of certain goods without checks unilaterally. It can also bring proceedings under the dispute resolution mechanism in the Withdrawal Agreement (which starts with consultation, then referral to an arbitration panel, after which there is either compliance, or failing that, tariffs).

But the EU has other options as well which could put the whole basis of UK-EU trading relations after Brexit at risk. Options include:

- Art. 779 TCA, which allows the EU to terminate the TCA, on the first day of the twelfth month after notification
- Art. 521 TCA, which allows the EU to terminate the trade part of the TCA on the first day of the ninth month after notification
- Art. 772 TCA, which allows the EU to suspend or terminate the TCA in whole or in part if it considers the UK has breached an 'essential safeguard' by committing a 'serious and substantial' breach of the rule of law. Priority must be given to the measures which least disturb the functioning of this agreement and of any supplementing agreements.

There are other provisions it could invoke too which, while not directly related to the NIP, could strongly demonstrate its displeasure. We have already seen

the absence of cooperation around the UK's accession to Horizon and other EU programmes to which the UK negotiated access in the TCA.

WHAT WOULD THAT MEAN FOR TRADE?

In terms of the consequences of such an escalation in UK-EU friction, the nearest parallel we have is what would have happened if the UK had failed to reach a Withdrawal Agreement and left the EU without a deal. This was a scenario that many thought was on the cards in Autumn 2019 and for which there was extensive government contingency planning (partially revealed in the Operation Kingfisher documents).

The clearest implication of the passage of the Bill, and any action by UK Ministers to apply the powers, would be uncertainty. That alone could cause disruption to trade, as most companies would wish to conscientiously comply with their legal obligations. However, it would be difficult to comply with legal obligations where there are contradictory provisions in place. The Act would have standing in domestic law but would not in itself remove the fact that the Withdrawal Agreement (including the Protocol) has effect in international law. Traders would have to consider what actions might or might not lead to challenge in either the UK courts (if they failed to comply with some new requirement under the Act) or in the CJEU (if they failed to comply with an obligation under the Protocol). This uncertainty would exist whatever action might be taken by the EU, or even if no action followed immediately. For example, if border control posts at the NI ports and airports are not operating as required by EU law, there would be doubt about the legal basis for food to enter NI from GB. The grace periods delayed the application of the relevant legal requirements but did not amend or remove them.

Any changes to the movement of goods into NI from outside the EU would have implications for the movement of goods between NI and the EU, i.e. across the land border. In many cases, a useful comparison is with some of the scenarios considered in light of the prospects for 'No Deal' prior to the Withdrawal Agreement. A key example that was discussed in the work on 'No Deal' was the trade in milk, with a substantial proportion of milk produced in NI being processed south of the border. If the processing company based in the Republic of Ireland had any material doubt about the status of NI milk (for example the risk that NI cows had been fed non-EU standard feed), it may refuse to accept milk from NI producers for fear of jeopardising the status of its outputs as legitimate EU produce. This is not just a concern for the Irish producers but for the EU as a whole. The EU has legal obligations to other trading partners, who might see an opportunity to challenge EU exports if they could find a plausible argument to

doubt the legitimate origins of some of the ingredients of the product in question.

Further doubt could be added to the trading status of NI business if the legal uncertainties around the Bill led to suspension of some of the agreed arrangements affecting tariffs and other terms of trade. Within the short-term, this could increase the opportunities for non-compliance, thus enhancing the risk of smuggling.

Any action to resolve these uncertainties would potentially increase the difficulties for trade. A central factor from the EU point of view is that, if there are no controls at the UK/EU land border (i.e. Irish border), a number of key risks arise, which they would need to resolve. Applying effective controls across the open land border has been judged to be near impossible given the number of crossing points. Hence, it is very likely that the passage of the Bill would lead to significant action; the [escalations](#) that have been considered and adopted by the EU show that this has been considered in detail. They would be able to [invoke actions](#) affecting many aspects of UK-EU trade, and could tailor the intervention to focus the effects on GB traders (though it would be impossible to insulate NI wholly from the consequences).

Uncertainty, or even worse, confirmation by the EU that the enactment of the Bill would remove the right of NI goods to enter the EU Single Market, could also have material economic consequences in the medium-to-long-term. Dual market access is the most positive aspect of the operation of the Protocol and was for a time used by UK Ministers as a selling point for the Withdrawal Agreement. Its removal would affect established NI manufacturers, and companies seeking a location for inward investment projects would at best think twice about the benefits of locating in NI. This is not least given the doubt that the Bill would raise over the 'Unique Selling Point' that the Protocol in principle offers NI through dual market access.

WHAT WOULD IT MEAN FOR UK-EU RELATIONS?

If the EU suspended or terminated the TCA, in whole or in part, in response to the enactment of the Bill the effect would be to effectively see trade between the EU and UK operate as if there is no deal. Since the principal benefit of the TCA was to allow zero tariff and zero quota trade, traders on both sides would have to adjust to a regime with Most Favoured Nation (i.e. non-preferential) tariffs applied by both sides, and trade governed by WTO rules. This would lead to considerable and further trade disruption and significant increase in costs because those tariffs would have to be passed on to consumers.

If all of the TCA were terminated, it would also mean that a whole suite of other areas would likely be affected. The TCA can be reviewed on request from the end of 2024 or compulsorily in late 2025. This could cover a wide range of areas, from data adequacy (which is outside the TCA but is subject to review), to security cooperation, to social security cooperation, to agreements on fisheries and energy (but not citizens' rights, which should remain protected through the Withdrawal Agreement). In response, the UK might decide to suspend any further payments of its outstanding liabilities, which would add to tensions.

The possibility of suspension or termination of the TCA has a potentially chilling effect on the attractiveness of the UK as a destination for foreign direct investment or as a business partner since its tariff-free access to the Single Market would look potentially risky. The former Chancellor, Rishi Sunak, noted in March 2022 that uncertainty about the UK's final relationship with the EU had dampened business investment in the period since the referendum in 2016.

The NI Protocol Bill is not the only shadow over longer-term UK-EU trade relations. The EU may look to trigger the level playing field clauses in the TCA and review certain aspects of the Agreement. This could come if it decides that UK subsidies or divergence from the regulations inherited from the EU (for example, via the [Retained EU Law \(Revocation and Reform\) Bill](#)) are undercutting EU businesses contrary to the 'level playing field' commitments.

WIDER CONSEQUENCES OF THE BILL

The ramifications of the Bill are not just confined to trade. The political implications for NI are significant, and not merely in terms of restoring fully functioning devolution. Immediately before the Bill was published, 52 of NI's 90 [MLAs wrote to then Prime Minister](#) Boris Johnson urging against unilateral action. What is more, polling indicates that only [18 per cent of voters](#) in NI would not consider a negotiated outcome as preferable to unilateral action. However, polling also indicates increasing support among DUP supporters for its position that it will not take up the position of deputy First Minister while the Protocol remains.

The effect of the DUP's refusal is that the NI Executive cannot function, and the existing caretaker Ministers can take only very limited decisions. The Assembly is also unable to meet while the DUP refuses to support the election of a new Speaker. Under existing legislation even these caretaker arrangements expire on 28 October 2022. On that date, the caretaker Ministers cease to hold office, no new Ministers can be appointed, and a fresh Assembly election must be called within 12 weeks.

The UK government has made clear that it wants the DUP to agree to nominate a deputy First Minister and thus allow a fully functioning Executive to be re-established and avoid the need to call new Assembly elections. There appears little prospect of the DUP agreeing to this before the end of October. A fresh election is therefore very likely unless the government chooses to introduce and fast-track Westminster legislation to cancel an election and provide for existing caretaker Ministers to remain in office. But it is unclear if existing Ministers would be prepared to continue in their constrained caretaker positions if an election were postponed.

However, it also appears unlikely that a fresh Assembly election will change or resolve any of the outstanding issues. The Protocol will be centre stage again, although cost of living issues and the absence of an Executive to tackle them will doubtless predominate as well. This will compound divisions that already exist and exacerbate the polarisation that was evident in the election in May 2022, with current polling suggesting little prospect of significant change in support for the main parties. It is difficult to envisage an election outcome that sees the DUP overtake Sinn Féin to hold most seats in the Assembly once more. Even if the DUP may attract back voters who supported Traditional Unionist Voice in May,

that would not yield additional seats, since the DUP would have received their second preferences anyway under the Assembly's STV voting system. Their hard-line stance may drive some more moderate supporters to the UUP or Alliance.

In the short term the Bill is therefore unlikely to resolve the issues in NI relating to the democratic functioning of the 1998 Agreement, e.g. over forming the Executive. In the longer term the Bill, with its presumption of unilateral action and a non-negotiated outcome, may simply replace the lack of unionist consent for the Protocol with a lack of wider consent for any unilateral alternative.

The Bill is not only significant for NI. The powers the Bill would give Ministers of the Crown could potentially be exercised in areas of devolved competence across the UK. Further, if another bill were to become UK law without legislative consent from Scotland and Wales, as is likely to be the case with the Bill, this could further erode trust in intergovernmental relations. Such an action would follow earlier examples (e.g. the UK Internal Market Act) where the UK government has proceeded without legislative consent despite the Sewel Convention which contends that Parliament will 'not normally' legislate on devolved areas without the agreement of the devolved legislatures. The Scottish government has said it will not put a consent motion to the Scottish Parliament on the Bill: it has already passed a [motion opposing the Bill](#).

The EU has made its objections to the NIP Bill very clear — indeed, the timing of relaunched and additional infringement proceedings (e.g. when the Bill was laid and when it passed the Commons) is an indication that it sees the progress of the Bill as worsening the conditions for the UK-EU relationship. This goes beyond the status of the Withdrawal Agreement and affects the Trade and Cooperation Agreement as well, as discussed above.

In all, far from bringing stability to Northern Ireland, the NIP Bill risks raising new dimensions of uncertainty for NI's governance, economic status, and trading relations.

POTENTIAL OPTIONS FOR RESOLUTION: PRACTICALITIES

THE PROPOSALS FROM THE EU

The EU has said that it is willing to negotiate on the basis of the propositions it put forward in October, and which have since become more detailed. The [proposals](#) cover a wide range of areas, including customs, movement of SPS products, and medicines, as well as stakeholder engagement. Notably, these proposals could be developed further, as the EU has confirmed that the package was [not a ‘take it or leave it’ offer](#).

While these proposals would reduce the number of checks between GB and NI compared to what is required in the Protocol, they are still a long way from the government’s view, and unionist demand, that goods from GB destined to stay in NI should be able to move seamlessly across the Irish Sea. The fundamental point that has been at the heart of the negotiations since 2017 is that there is no ready means of securing that outcome if GB regulation is not aligned closely to the Single Market. GB (and UK) regulatory freedom has always been seen as one of the benefits of Brexit.

The EU’s proposals are also in many respects more onerous than the system that is currently operating with the grace periods in place — so the net effect would be to increase barriers to trade, not reduce them, though they would be a very significant easement from the last ‘agreed’ position. The approach in the Protocol Bill asserts that no checks are required on a wide range of goods, even though, in the absence of any checks at the land border, there would be nothing to prevent them entering the EU. While the actual risks to the Single Market are currently low, the approach of **dismissing the risks as trivial** ignores the firm and clear position taken by the EU from 2016 onwards and the fact that the risks would increase over time as UK and EU standards diverge.

The EU proposals also do not address the wider political concerns about tax policy nor about the jurisdiction of the Court of Justice of the European Union (CJEU), though the latter in particular is not among the practical and operational concerns that affect trade to NI. Nor has the EU yet addressed concerns about travelling with pets or receiving parcels sent from GB without additional costs or hassle. Indeed, non-implementation of the rules on such movements is one of the

areas over which the EU has instituted [legal action](#) against the UK government for failing to implement the approach agreed in December 2020. The EU is also [taking proceedings](#) against the government for failing to provide information on trade moving from NI to GB, as the UK had [committed](#) to doing as part of enabling ‘unfettered access’ for NI goods entering GB.

PROPOSALS FROM OTHER SOURCES

There have been a considerable number of proposals from UK (and NI) parties for agreements between the UK and the EU which could ease border bureaucracy — not least the conclusion of a veterinary agreement. In December 2021, the [Institute for Global Change](#) proposed a six pronged approach to resolving the Protocol:

- Agree to exempt a special category of ‘Northern Ireland approved’ goods, moving from Great Britain to Northern Ireland, from requirements under EU law and controls, provided those goods remain in Northern Ireland and meet minimum mutually agreed requirements;
- Create a robust surveillance and enforcement system to prevent non-compliance.
- Develop a governance arrangement to manage future barriers to trade and to maintain the list of ‘Northern Ireland approved’ goods over time;
- Replace EU state-aid rules in the Protocol with more up-to-date provisions;
- Give Northern Irish and UK representatives greater opportunities for consultation on draft EU laws that apply to Northern Ireland; and
- Extend the arbitration-based dispute-settlement mechanism of the Withdrawal Agreement to the trade-related parts of the Protocol.

Hilary Benn MP, former chair of the (now defunct) Commons Future Relations with the EU Committee [proposed](#) that both sides move to reach a compromise deal, starting with the UK dropping the NI Protocol Bill and the EU conceding that much of GB-NI trade (for example, movements to supermarkets) does not pose a risk to the Single Market. His sentiments have been echoed by former Conservative Northern Ireland Secretary Julian Smith who [has urged](#) the new government to show ‘pragmatism’ and reset the relationship.

Both make clear that trust between both sides is an essential prerequisite of the sort of compromise that is needed — and at the moment there is very little trust between the two sides. Indeed one of the challenges besetting the process now is

that not only is trust absent between the UK and the EU, the UK government has burnt any credibility it may have had with most of the parties in NI and with the Northern Irish public. Only 5% of people [polled in June 2022](#) said they trusted the UK government when it comes to managing NI's interests in the Protocol, compared to 84% who said they distrusted the UK government, of which 55% 'strongly distrusted' it. It is pertinent to ask how the UK government is intending to build trust in NI of its approach to the Protocol — and not just among unionists.

POTENTIAL OPTIONS FOR RESOLUTION: PROCESS

LESSONS FROM THE 1998 AGREEMENT

Beyond the substance, there may be a case for looking at the process to agree to any long-term settlement. In a [recent blog for UK in a Changing Europe](#), former permanent secretary at the Northern Ireland Office, Sir Jonathan Stephens, said

[t]he process around the Protocol has been fundamentally flawed because the key players who need to accept and work with the outcome – the parties in Northern Ireland – have never properly been involved.

Sir Jonathan, who was an official supporting the talks that led to the Good Friday/Belfast Agreement, argued that the failure to engage the multiple NI parties in the process of negotiating the future arrangements for NI has long-term negative consequences. The exclusionary approach the UK adopted more generally to the Brexit negotiations was not confined to NI — governments in Scotland and Wales were similarly frustrated — but it does have particularly regretful effects for NI, given its unique post-Brexit circumstances.

Stephens proposed a process that more closely mirrored that used to develop the Belfast/Good Friday Agreement, directly involving the key players most directly affected — the parties in NI — as well as the UK government and EU. One key element of the Belfast/Good Friday Agreement was its three-strand approach; in particular that it ensured that the Irish government had a clear and legitimate position in Strands 2 and 3 (concerning the NI/UK and NI/Republic of Ireland relationships respectively), but not in Strand 1 which was explicitly about the internal governance of NI.

The negotiations over the Protocol are particularly fraught because they both engage the fundamental political issues at the heart of the conflicting visions of unionism and nationalism in NI and thus the relationship with the Republic of Ireland and the EU, while also needing to address highly technical details of management of border processes and cross-border supply chains and requiring both sides to make judgements about risk. The consent mechanism which the Johnson government secured when the Withdrawal Agreement was reached did not introduce a requirement for cross community consent. The view was that it would be wrong for the representatives of one or other of the larger communities

in NI to have, in effect, a [veto over a Treaty between the UK and the EU](#). However, it was clear even then that cross-community consent was highly desirable and would secure greater stability for the post-Brexit arrangements. Hence the [UK declared](#) that

[...] the objective of the democratic consent process ...should be to seek to achieve agreement that is as broad as possible in Northern Ireland and, where possible, through a process taken forward and supported by a power sharing Northern Ireland Executive which has conducted a thorough process of public consultation.

It also said that, if the first vote in the NI Assembly in 2024 only approved the continuation of the Protocol by a simple majority, it would commission an independent review, with the objective of addressing the issues that were causing any difficulty. There could be grounds for beginning such a process in advance of the Assembly vote in 2024.

One of the features of the peace process in NI — most significantly in the path to the 1998 Agreement — was the involvement of international chairs. Adopting such an approach now would require a leap of faith (and change of usual practice) by both UK and EU negotiators. But one contention is that an external facilitator could potentially serve a purpose, even for a limited time. An inclusive and well-designed process, possibly with facilitation and analysis by independent leaders and experts, intended to respect and relay the concerns and views of all sections of NI society, could have a better chance of securing resolution than the unilateral approach in the Protocol Bill or continued escalation of UK-EU tensions.

Six years after the implications of Brexit for NI became clear, there is an urgent and compelling need for constructive engagement. Following the kind of process that helped secure the Belfast/Good Friday Agreement would be arguably preferable than contradictory assertions of what the 1998 Agreement actually means.

CONCLUSION

The issues and difficulties surrounding the Protocol on Ireland/Northern Ireland — both practical and political — are extremely complex. The path to managing the unique circumstances of NI post-Brexit has never been straightforward, and it will never be an easy one. However, the consequences that follow from the current impasse could be bad and even more difficult to contain — with the worst effects falling upon NI itself. This is not least because an increase in UK-EU tensions almost inevitably means a worsening of inter-community relations within NI. For this reason, it is necessary for both the UK and EU to expend all possible efforts to find a common approach and a path to agreement. We conclude that this approach must allow, where possible, for the presentation of evidence from those most affected to decision-makers over the Protocol. As such, the process should entail engagement with relevant stakeholders and representatives in NI.

Any agreement must allow reasonable time for adaptation and implementation by businesses and officials. Crucially, both sides should also commit to presenting information on the Protocol in a way that is useful and beneficial to businesses and citizens, minimising the risk of stirring up indignation or exacerbating polarisation. And expectations should be managed — the Protocol will not be ‘fixed’ in a one-off agreement. It will require a commitment on both sides to manage the challenges that will arise as the UK embarks on new ventures outside the EU with mutual respect. Just as the future of NI will be both British and Irish, it will also entail an enduring relationship between the UK and EU. Any decisions made now about the Protocol by either the UK or the EU should be made with this relationship — and responsibility — in mind.

UK in a Changing Europe promotes rigorous, high-quality and independent research into the complex and ever changing relationship between the UK and the EU. It is funded by the Economic and Social Research Council and based at King's College London.

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