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# After Brexit: Northern Ireland and the Future of the Protocol

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## Introduction

When the UK struck a post-Brexit trade agreement with the EU in December 2020, many hoped that this would mark a new beginning for UK-EU relations but few really believed it. In recent months Britain and the EU have fallen out politically and diplomatically, with a speed that exceeded most expectations. One of the most persistent sources of tension has revolved around the Northern Ireland Protocol: new post-Brexit arrangements intended to avoid a hard border on the island of Ireland and their implications for Northern Ireland's place within the UK.

This briefing examines the issues at the core of these tensions, considers what it means for the future of the Protocol and suggests immediate steps that the UK government and the EU could take to diffuse the tensions and restore trust.

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## Where We Are Now

When UK Northern Ireland Secretary Brandon Lewis triumphantly announced at the start of the new year that there is no such thing as the Irish Sea border, he may have been speaking wishfully rather than about the reality of border trade that has been on display in the first months of 2021. Trade with Northern Ireland has been disrupted with new checks and red tape; some consumers have experienced depleted shelves in supermarkets; and checks in Northern Irish ports have been suspended amid threats to staff. All this while the full scale of checks on goods moving from Great Britain to Northern Ireland has not yet begun thanks to the “grace periods” that are currently in place.

The political reality has been no easier than the economic one. Tensions have escalated after, on 29 January, the European Commission attempted to trigger the safeguard procedure of the Protocol (“Article 16”) in order to ban EU vaccine exports to Northern Ireland. While the Commission promptly withdrew the provision, its mistake has emboldened both the Northern Irish unionists to ask that the Protocol be suspended and the UK government to demand “flexibilities” on the implementation of the Protocol from Brussels. Angry letters were exchanged between Maros Sefcovic, Commission vice-president responsible for implementing the Protocol, and Michael Gove, until recently his UK counterpart. The UK asked for an extension of the grace periods, and the Commission rejected that request; harsh words were said in Brussels accusing London of not fulfilling the agreement and in London accusing Brussels of its “integrationist theology”.

Following the Commission’s Article 16 incident, Boris Johnson pledged to “do everything we need to do ... to ensure there is no barrier down the Irish Sea”. After the prime minister’s remarks, UK officials privately said that the UK would use the Joint Committee process to try to find a resolution with the Commission. But they were also clear that, were the joint process to fail, the government would likely take “unilateral measures” to extend the grace periods for goods, even without the Commission’s prior approval. Two options were floated: either using the Article 16 to seek temporary suspension of certain checks, or legislating unilaterally to further delay, if not suspend, the checks. A month later, on 3 March, the UK government announced that it would unilaterally grant businesses longer waivers for certain goods moving from Great Britain to Northern Ireland. Its decision extends the grace period, due to expire on 1 April, that allows supermarkets and their suppliers to avoid some requirements necessary under EU legislation. The EU said that this amounted to a breach of the Protocol and that it would launch legal action against the UK very soon.

This most recent episode of acrimony undermines the already strained trust necessary to make the new arrangements work. Tensions are likely to grow in the months ahead as the EU pursues legal action against the UK government. They will also play into domestic politics, further stoking domestic opposition to the protocol – particularly from hard-Eurosceptic Conservative MPs and the unionists –

and raise questions about the durability of the Protocol. In the next sections, this briefing considers the reasons behind the current difficulties, the prospects for the Protocol and what can be done to change the situation going forward.

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## The Problem: What It Is and How We Got Here

### The Protocol, for all its flaws, is a unique solution to a unique problem

The Northern Ireland Protocol is a key component of the withdrawal treaty negotiated between the UK and the EU. It provides the means by which the free movement of goods continues on the island of Ireland. However, Northern Ireland is treated differently from the rest of the UK. Under the Protocol, the province has to follow EU customs and single-market rules, including product standards, food-safety measures and state-aid rules. Because the rest of the UK has a more distant trading arrangement with the EU – with the freedom to set its own customs and regulatory rules – this approach necessitates new checks and controls for goods moving from Great Britain to Northern Ireland and, to a much lesser extent, from Northern Ireland to Great Britain. This creates a new barrier down the Irish Sea.

True, the Protocol has deep imperfections. It shifts a border down to the Irish Sea rather than removing the need for it; it puts the onus on Northern Ireland to stay aligned to EU rules with limited input into these rules; and its durability hangs on the promise of continued support by the Northern Irish Assembly. It is, by design, a very fragile solution. But it was always a compromise, a balancing act between satisfying the need for border checks with a third country – which arose from the UK's sovereign decision to leave the single market and customs union – while respecting the Good Friday Agreement and avoiding a border on the island of Ireland. There was never any solution to Brexit that would have simultaneously involved no border on the island of Ireland, no border between Great Britain and Northern Ireland, and the decision to break free from the EU single market and customs union. All Brexit outcomes, from the perspective of Northern Ireland, were always suboptimal.

The merits of this approach have divided Northern Irish politics since it was agreed in October 2019. Proponents of the Protocol say that this is the only alternative to erecting the border on the island of Ireland and, if implemented, it will give Northern Irish firms unique access to both British and European markets, attracting inward investment into a region whose economy has long suffered from underinvestment. Others, especially in the unionist community, see it as an impediment to the territorial integrity of the UK and, even, a threat to their identity.

The Protocol is also unusual from the EU's perspective. It places the EU's external border inside the territory of a third country, with the customs and regulatory checks in the Irish Sea as a means of controlling what enters the single market. However, the EU cannot enforce the rules and checks on the UK's territory – UK authorities are solely responsible for implementing them in both GB and NI – while having a legal jurisdiction over the way its rules are applied in Northern Ireland. This results in a unique

situation whereby the EU has the legal right to demand that the Protocol be adequately implemented, but not the practical right to enforce any necessary checks on the ground.

### **The present difficulties reflect not only the lack of preparedness, but also structural tensions at the heart of new arrangements**

The difficulties of the last few weeks are in many ways the result of the lack of preparedness for the post-Brexit arrangements. Businesses have had little time to adapt to rapidly changing patterns and volumes of goods. In December 2020, the UK-EU Joint Committee, which oversees the Protocol, agreed to temporarily relax some of the new rules applying to Northern Ireland. Among other things, both sides agreed a number of “grace periods” to ease initial frictions: three months for parcels of online retailers and agri-food imports, exempting supermarkets and their suppliers from the full range of checks required under the EU’s sanitary and phytosanitary regime; six months for chilled meats from GB to NI; and 12 months for pharmaceuticals. But these decisions, announced only a few weeks before the Protocol came fully in force on 1 January, did not leave businesses with much time to implement them.

To avoid compounding already difficult frictions, last month the UK requested further easing of the rules with an extension of the grace periods and finding more permanent “light touch” solutions for movement of some agricultural products and parcels. The EU responded by initially ruling out the extensions for grace periods and said that the British government was not implementing its obligations fully, including by not having enough physical checks or not giving access to the UK’s customs systems that the Protocol requires.

It would be a mistake to look at the current problems and put all the blame on the Protocol, however. The difficulties are the result of more structural tensions, namely that: (1) there is a low threshold for checks required on goods moving from Great Britain to Northern Ireland; (2) an acute lack of trust between London and Brussels undermines effective cooperation required to make the new arrangements work.

The first problem is that the threshold for checks on goods moving from the UK to the EU is relatively low. In particular, the lack of meaningful provisions on products of animal origin in the recently concluded trade and cooperation agreement (TCA) results in onerous requirements for moving products of animal origin not only from Britain to the EU, but also from Britain to Northern Ireland. When the adjustment period for moving animal products ends, likely at some point this year, it will be easier to trade these goods from Great Britain to New Zealand than to Northern Ireland. Similar problems will occur for regulated goods, such as pharmaceuticals – a result of the lack of mutual recognition of product testing in the UK-EU deal.

The second problem is that while the protocol was agreed on the presumption of mutual trust, the relations have been mired in mistrust and mutual misunderstanding. Trust underpins how well British and EU officials work together to enforce the Protocol, how well political leaders get on at the high-level committees and how well British diplomats can work with their counterparts in EU institutions when Brussels tells Northern Ireland to adopt a hefty body of new rules. Take away that trust and the default is mutual suspicion and paranoia.

This is what has been on display in recent months. In London's eyes, Brussels, being dogmatic about its rules, treats the Irish Sea border as if it were a border with any other third country, with UK officials emphasising that the checks in Belfast or Larne should never mirror the Dover-Calais border. The view in Brussels is that the British government agreed to this arrangement in full knowledge of its consequences and must honour its commitments. The Irish government has advocated for greater flexibilities from Brussels, particularly on the extension of the grace periods, but that has put it at odds with some member states who worry that, with Britain diverging from EU rules over time, any permanent derogations from EU law could pose a danger to the EU's single market.



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## Where We Are Heading

### The Protocol will remain a source of tensions as the grace periods end and Britain gradually diverges from EU regulations

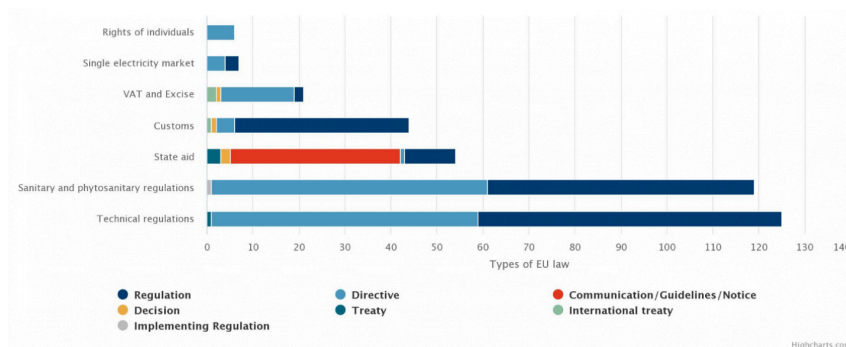
Without addressing the structural problems with the new arrangements, the Protocol will likely remain a significant source of political tension in Northern Ireland and the UK. One reason for this is that the economic frictions will likely get worse in the short term, exacerbating political pressure on the UK government to be seen to do something about the problems. True, extending the grace periods further delays additional friction for goods moving from Great Britain to Northern Ireland. It also gives businesses more time to build their own surveillance systems which, as the UK government argues, could ease some pressure on the border. But in the absence of movement from Brussels, some physical checks would still be required after the grace periods end.

The second, perhaps bigger problem is that the regulatory gulf in the Irish Sea will only deepen over time as Britain gradually diverges from EU regulations. Unlike the rest of the UK, Northern Ireland will continue alignment with more than 300 EU single-market rules which are included in the Protocol (see Figure 1). This divergence will happen in two distinct ways: when EU single-market rules evolve but Britain will no longer align, and when UK ministers take an active decision to change existing EU regulations currently on the UK's statute book.

The first type of divergence will be less visible. If any of the EU rules applying to Northern Ireland are amended or replaced by new ones, they will take a direct effect, creating an instant source of divergence with Great Britain. This means that, even if the UK government does not actively exercise its freedom to diverge from retained EU rules, some divergence – and, with it, new barriers and costs for businesses – will invariably happen over time.

The second type is different because it poses a choice for the UK government. Every time British ministers contemplate changing the single-market rules for trade in goods for Britain, they will be reminded of an unattractive choice: diverge at the cost of deepening the barrier within our own internal market – or keep up with the same rules to minimise the economic and political troubles across the Irish Sea.

**Figure 1 – EU law under the scope of the Protocol**



Source: TBI analysis of the NI Protocol

**Mistrust on both sides is the biggest barrier to making the Protocol work. The risk is that the dispute over UK unilateral measures spirals out beyond Northern Ireland**

Making the Protocol work requires trust on both sides. The problem with Britain’s unilateral decision to extend the grace periods is not only what it does, but also what it signals: that the UK is prepared to make choices alone and to shift the onus onto the Commission to appear responsible for the new checks. This is likely to undermine willingness of the EU to grant easements on the Protocol. The Commission has already said that it would launch legal action against the UK’s unilateral decision. Before a formal case is brought to the European Court of Justice (ECJ), the UK will have the opportunity to explain its actions and to offer a more permanent solution. If this does not happen, the infringement proceedings will lead to a case before the ECJ.

More worryingly, the dispute might escalate further and affect wider UK-EU trade. If the ECJ were to rule in the Commission’s favour, the UK would be liable to pay a fine for its failure to implement the deal. Accepting the fine would be an admission of wrongdoing by the British government and further inflame anti-EU sentiment on the UK side, making it politically difficult for the government to accept the ECJ’s ruling. Such an outcome would undermine trust completely and, in all likelihood, escalate into tit-for-tat retaliation, with tariffs being imposed on some sensitive UK exports to the EU.

**There are three broad outcomes for the Protocol: test it to the point of destruction, renegotiate it, or rethink the political approach to its implementation**

If mistrust continues to dominate mutual relations and the structural problems persist, the default is that the Protocol will be tested to the point of destruction. The politics in Britain will favour further delaying the implementation of the Protocol or even suspending some of its obligations by triggering the safeguard clause (Article 16). At the same time, the EU will find it hard to justify flexibilities in enforcing

the EU rules underpinning the Protocol. The outcome, in such a scenario, is ongoing political rows, complex legal disputes and retaliatory actions. This would, in turn, undermine the certainty and predictability that businesses need from the Protocol. Such serious political and economic tensions would make the Protocol hard to sustain.

It is not in the UK's or the EU's interest to end up in this situation. For the EU, a belligerent Britain with little interest in enforcing the Protocol would raise the difficult question of whether some form of checks should be placed on goods leaving the island of Ireland destined for the European continent. It is unclear right now what it would take to trigger such a move – putting Ireland in a very difficult position – but its prospect is not wholly unlikely. The UK, on the other hand, would suffer both economic costs as a result of the EU's likely retaliation on sensitive exports, as well as significant political costs. It would signal the UK's untrustworthiness as an international partner and compromise any prospect of concluding the trade negotiations with the Biden administration in the US.

There are two alternatives to this damaging outcome. One is renegotiating the Protocol. There are some in Westminster who think that the only way to address the imperfections of the Protocol is to rethink the Protocol altogether. Their claim is that there are ways in which the Protocol can be enforced without the need for customs and regulatory checks in the Irish Sea. These proposals build upon the ideas for “mutual enforcement” which were floated during the Protocol renegotiation in the autumn of 2019. It is true that these ideas are more plausible than the “alternative arrangements” which proved unworkable. But there are two problems. First, these ideas were explored during the renegotiation and rejected by the Commission. The second, bigger problem is that any proposal for mutual enforcement is predicated on high levels of mutual trust between trading partners. Trust, however, is the scarcest resource here.

The other alternative is to rethink the political approach to implementation of the Protocol and work through the structural problems in an attempt to find a more stable equilibrium. This is the least damaging option of all three. It would require both sides to actively address the issue that underpins the most onerous aspects of the protocol: checks on the products of animal origin. More importantly, it would need a distinct change in the political approach on both sides. The UK would have to acknowledge that the Protocol is here to stay and that it would honour its commitments and stop poking Brussels in the eye. On the EU side, it would require a recognition that some easements from EU legislation are necessary to make the Protocol work, but they do not mean an unenforceable border with no controls on what enters the single market.

### **Ultimately, the durability of the Protocol rests on continued support by the Northern Irish Assembly**

If the Protocol fails, it will be either because it proves unworkable in practice or because it loses support from the Northern Irish community. The former is being tested right now and, as explained above,

depends on whether the UK and the EU can find a way to make the arrangements work without stoking further tension in Northern Ireland and poisoning political relations between London, Dublin and Brussels. The latter will be up to Stormont to decide.

Under what is known as “the consent mechanism”, the parts of the Protocol relating to the EU law in Northern Ireland will cease to operate if the Northern Ireland Assembly (MLAs) do not give its regular consent. The first vote in the Assembly will be in late 2024, only months after the next UK general election. This vote will be specifically about the continued application of parts of the Protocol that relate to EU law, not the full Protocol.

Although the unionists will certainly reject any continued alignment with EU rules, the strength of their representation in Stormont depends on the outcome of next year’s parliamentary election. More generally, there are three possible outcomes for the Assembly vote. If there is a vote with cross-community support in favour of continued alignment, the arrangements will continue for another eight years. If, however, there is a simple majority vote in favour of alignment but without cross-community support, then that will be followed by another possible vote in four years. Finally, if there is a majority vote against alignment, there will be a two-year period to agree new arrangements, during which the Joint Committee would make recommendations on the alternatives. This means that the earliest Northern Ireland could leave alignment would be at the end of 2026.

All this makes the durability of the Protocol uncertain. It also raises the prospect of the wider UK-EU relationship being open to renegotiation within the next decade. For future UK governments, it will offer a first meaningful opportunity to rethink the post-Brexit relationship with the EU and to consider how the whole UK could be brought closer to the single market and customs union.

## The Way Forward: What Can Be Done Now

If the UK and the EU have a genuine interest in making the Protocol work, they have no alternative but to rethink their political approach to implementing the new arrangements. The current approach has led them down to political disagreements and, now, a legal dispute. Unless they are prepared to renegotiate the Protocol altogether, their only alternative is to acknowledge the structural problems that exist in the current arrangements and to constructively explore solutions.

There are at least three things that both sides can do to address the current problems and help restore trust.

1. **A change in political attitude by both sides.** The tensions can only be addressed if both sides acknowledge the problems that exist and try to find a way forward. This should start, on the UK side, by dropping denialism about the existence of the Irish Sea border and replacing it with clear-headed realism about what can be done to minimise its impacts. The UK prime minister must accept responsibility for the commitments he agreed to in full knowledge of its consequences; the UK's trustworthiness as an international partner is on the line. For the EU's part, Brussels should recognise that an approach which equates the border requirements in Belfast or Larne with those in the Dover-Calais strait is not realistic; the problems here go beyond supply chains and touch on a sense of identity and belonging of one community in Northern Ireland. Making the Protocol requires some easements and granting them would not inevitably undermine the EU single market.
2. **An agreement on equivalence of sanitary and phytosanitary (SPS) measures.** The two sides should immediately enter into negotiations over a veterinary/agri-food equivalence agreement that would cover movement of animal products from GB to NI. The lack of any meaningful SPS provisions in the TCA leads to a very low bar for checks on the products of animal origin. The EU has previously struck agreements for veterinary equivalence with various countries around the world. There are different versions of this agreement and not all of them would require the whole UK to strictly align to EU SPS rules. No agreement would remove the need for all checks (there were checks on live animals moving from GB to NI before January), but even a modest agreement could reduce the frequency of checks, simplify certification requirements and, most importantly, help institutionalise trust with the EU.
3. **Joint consultative group on measures affecting East-West trade.** Britain's future divergence from EU rules for trade in goods will only increase barriers to trade between GB and NI. It is important, for the durability of the Protocol, that there is full transparency of how the East-West barriers change over time. To facilitate this effort, the UK and the EU should form a consultative group on East-West trade under the auspices of the Joint Committee. Article 6 of the Protocol states that both sides should use "their best endeavors to facilitate trade between Northern Ireland and other parts of the UK" and that the Joint Committee "shall adopt appropriate recommendations with a view of avoiding controls at the ports and airports of Northern Ireland to the extent possible". A

new consultative committee could increase transparency of new barriers at and behind the border and allow more structured efforts between the UK government, Northern Irish Executive and the European Commission to examine ways in which these barriers could be minimised in practice.

Taken together, these three measures would be the first steps towards finding a more stable equilibrium for the Protocol. They would not amount to fundamentally changing the Protocol or the type of Brexit that the UK government has chosen. Nor would they suffice for hardline opponents of the Protocol. But they offer concrete ideas for what is required to diffuse the tensions and rebuild some mutual trust. The alternative is the gradual disintegration of their relations into a fractious relationship that will serve no one.

The Protocol is a delicate compromise and, even with the best efforts, there will be uncertainty about whether it can succeed beyond the next consent vote at the end of 2024. It is possible that, by then, businesses will have adapted over time to the new arrangements and that Northern Ireland's position within both European and British markets will be a pull factor for higher inward investment into the region. Equally, it is possible that growing political and economic tensions will lead to an unstable business environment and, without cross-community support, the Protocol will be hard to sustain in the future. Future UK governments might even use that reality as an opportunity to bring the whole UK closer to the single market and customs union.

Until then, the UK government and the EU have the shared responsibility to try to make the new arrangements work. Now is the time for cool heads to prevail.



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