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# After Brexit: Making the Northern Ireland Protocol Work

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## Executive Summary

The UK and the European Union are on the brink of a serious confrontation over the Northern Ireland Protocol, a part of the Withdrawal Agreement intended to avoid a hard border on the island of Ireland after Brexit. The two sides remain at odds, not only over the substance of proposals that call for changes to the protocol but also their overall approach. A standoff should be avoided for the sake of stability in Northern Ireland, the hard-won peace process and the integrity of the Western alliance.

The UK has threatened to use the safeguard clause of the protocol, known as Article 16, if the current negotiation does not lead to changes. Article 16 is a legitimate provision within the treaty, but invoking it to partially suspend parts of the protocol would be a grave error of strategy. It would put the UK in breach of its international obligations and lead to significant economic costs and political uncertainty at a time when the country's economy is already under strain and just before Northern Ireland embarks on its next Stormont Assembly elections. It would also destabilise political relations with two of the UK's most important allies – the EU and the US – and produce a fresh set of difficult choices for the government as it tries to exit the spiralling conflict. The costs of a major invocation of Article 16 far outweigh any prizes, perceived or otherwise.

It is true that there are underlying political, practical and legal tensions within the protocol that need to be addressed if the agreement is to last. Addressing these challenges will only be possible with greater mutual trust between the two sides. In this, the UK government must accept responsibility for the agreement that it negotiated and signed; look to restore trust with EU institutions and member states; and request any treaty amendments in good faith and based on evidence, rather than by acting unilaterally and overriding its existing obligations. The EU, for its part, should accept the principle of a risk-based approach for the unique circumstances in Northern Ireland and be ready to discuss proposals that extend its current offer in a constructive way.

It is only by way of agreement – not confrontation – between the UK and the EU that greater certainty can be offered on those elements of the protocol that create genuine challenges for the people and businesses of Northern Ireland, and those that protect the Good Friday (Belfast) Agreement.

We suggest six practical steps that can be taken by the UK and the EU to put the protocol on a more stable footing:

1. Agree to exempt a special category of “Northern Ireland approved” goods, moving from Great Britain to Northern Ireland, from requirements under EU law provided they meet specific conditions. These conditions are as follows: that their disrupted supply risks having detrimental effects on the Northern Irish economy and society; that they are bound to Northern Ireland for final sale and consumption; and that they meet minimum requirements agreed between the UK and

the EU.

2. Create a robust surveillance and enforcement system to prevent non-compliance.
3. Develop a governance arrangement to manage future barriers to trade and to maintain the list of “Northern Ireland approved” goods over time.
4. Replace EU state-aid rules in the protocol with more up-to-date provisions.
5. Give Northern Irish and UK representatives greater opportunities for consultation on draft EU laws that apply to Northern Ireland.
6. Extend the arbitration-based dispute-settlement mechanism of the Withdrawal Agreement to the trade-related parts of the protocol.

Collectively, this package would minimise most immediate practical difficulties facing Northern Ireland and put the protocol on a more stable footing. With “NI approved” goods exempted from controls, this arrangement could significantly reduce the volume and frequency of checks at Northern Irish ports and airports, while ensuring that goods moving further on to the EU are subject to standard import requirements for third countries. The chief advantage of this arrangement is that it would evolve as the level of risk changes over time, offering a more enduring solution for managing future disagreements within a contained process – rather than through perpetual political crises.

Our proposals also address some concerns about the protocol’s lack of democratic legitimacy by suggesting elected Northern Irish representatives be granted a greater consultative role on EU laws that apply to Northern Ireland, and by removing the direct jurisdiction of the Court of Justice of the European Union (CJEU) from the protocol, while ensuring that the CJEU remains the ultimate arbiter of EU law within the treaty.

While these proposals require further movement from both sides, they seek to avoid a fundamental rewrite of the protocol. It is possible to achieve them through treaty amendments using existing legal routes, including co-decisions of the Joint Committee, legislative changes by the UK and the EU, and a joint interpretative declaration.

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## Where We Are Now and How We Got Here

The row over the Northern Ireland Protocol has been simmering since the UK's post-Brexit relationship with the EU came into effect at the start of 2021, but disagreements have intensified in recent months.

### The Protocol: A Problem or an Opportunity?

The protocol – negotiated by Boris Johnson and later passed by the UK parliament into domestic law – avoided a hard border on the island of Ireland, but kept Northern Ireland part of the EU's single market for goods. It replaced Theresa May's "backstop" that would have seen the whole of the UK remain within the customs union and the single market for goods. Johnson agreed that Northern Ireland would continue to abide by relevant EU rules for trade in goods, state aid and energy, but that the rest of the country would leave the customs union and single market. This arrangement would last for as long as the Northern Ireland Assembly wished it to continue, as part of the protocol known as "the democratic consent mechanism". The unavoidable price to pay was a new barrier in the Irish Sea for most goods moving from Great Britain to Northern Ireland.

Once hailed as a negotiating triumph by Boris Johnson, the same protocol is now regarded by the same prime minister as "unsustainable".<sup>1</sup> The UK argues that the protocol has caused significant practical difficulties since it came into force, citing evidence of excessive costs for businesses, disruptions to supply chains and diversion of trade flows. It is also concerned over the continuing jurisdiction of the Court of Justice of the European Union (CJEU) over parts of the protocol that apply EU rules within Northern Ireland.

In its July command paper entitled "Northern Ireland Protocol: the way forward," the government presented its proposals for an overhaul. It argued for new rules for the movement of goods from Great Britain to Northern Ireland and new customs procedures, a dual regulatory regime for goods circulating within Northern Ireland, removal of EU state-aid rules from the agreement, and "normalised" governance of the protocol with no continued jurisdiction of the CJEU.<sup>2</sup> More recently, Lord Frost, the UK minister responsible for implementing Brexit, has hardened his position by arguing that a more fundamental problem with the protocol is not just the CJEU's role but that "far too much EU law applies directly in Northern Ireland".<sup>3</sup> The UK's proposals are so substantive that they present a completely different vision for Northern Ireland's post-Brexit status and, if implemented, would amount to a new agreement replacing the current protocol.

For the EU, the protocol is part of the treaty that the UK voluntarily accepted and passed into domestic law, and which later paved the way to agreeing the wider Trade and Cooperation Agreement (TCA). Until

recently, the EU had been reluctant to show flexibility on the EU rules applying to Northern Ireland and their enforcement under the protocol.

However, the EU's position shifted in October with the publication of a series of non-papers that presented solutions to the practical problems arising from the accord. Unlike the UK, the EU is keen to highlight that, for all its imperfections, the protocol is a "unique opportunity" for Northern Ireland, which not only avoids a border on the island of Ireland, but also grants it dual access to the European and British markets. In its proposals, the EU has agreed to more bespoke arrangements and derogations from EU law for Northern Ireland, but it has refused to renegotiate the protocol.<sup>4</sup> Its proposals seek to eliminate some of the customs formalities needed under the protocol, reduce the frequency of checks on products of animal and plant origin (SPS goods), and allow medicines produced and approved in Great Britain to be sold in Northern Ireland. As a quid pro quo, exporters would be subject to stricter conditions, and new safeguard measures, which the EU could take, would be put in place if new risks arose.<sup>5</sup> The EU has also suggested new consultative mechanisms for Northern Irish stakeholders, but its proposals fall short of any consultative role on new EU legislation that will eventually apply to Northern Ireland.

### **The Standoff Over Principles**

In some ways, the two sides have come closer to each other than ever before. The EU has shifted from its initial position and tilted to the principle of a more risk-based approach long favoured by the UK, accepting for the first time that exemptions from the general application of EU law are both necessary and possible for the unique circumstances of Northern Ireland. They now also agree, in principle, that for as long as some goods remain in Northern Ireland, they could face reduced requirements and checks when moving across the Irish Sea.

In others, however, the gap between the two is as wide as ever. Most critically, the UK and the EU disagree on two points of principle. One is the extent to which EU law must feature in the protocol. The UK thinks that agreement is possible without the inclusion of directly applicable EU law. The EU, on the other hand, rejects any arrangements that would not involve a degree of alignment with EU rules while avoiding checks on the island of Ireland. The second is over the extent to which any changes can be made to the text of the protocol. London wants the existing one to be replaced with a wholly new agreement, arguing the protocol could be replaced by a "subsequent agreement" under Article 13(8). Brussels insists that any changes must be accommodated within "the framework of the [current] protocol" and that there is no mandate for renegotiating the agreement that was concluded only two years ago.

For the current negotiation to succeed, not only do both sides have to find agreement on the issues, but one has to move on the points of principle. Either the UK accepts the changes cannot amount to a

wholly new protocol and that aspects of EU law will continue to apply in Northern Ireland, or the EU agrees to alter the agreement in fundamental ways.

## **The Trust Deficit**

Complicating any solution is the fact that there is an acute lack of trust in the relationship between the UK and the EU. When the protocol was agreed, it was predicated on mutual trust. Implementing the protocol has required taking a common view of what EU requirements mean on the ground, and trusting UK authorities to administer and enforce the EU's external border, in Northern Irish ports and airports.

Trust has been eroded over the past year. Since the protocol came into effect, the EU side has watched with alarm as the UK government has acted unilaterally on several occasions, extending waivers for goods moving from Great Britain to Northern Ireland, threatened to suspend parts of the protocol, and claimed more recently that it no longer has confidence in the agreement which it voluntarily entered and signed in autumn 2019. On the UK side, the EU's rules-based approach to implementing the protocol has been viewed as inflexible and overly legalistic. Trust has also been eroded within Northern Ireland where public opinion on the protocol continues to be split: an alarming 87 per cent of people distrust the UK government in managing the interests of Northern Ireland after Brexit, compared to the 44 per cent who distrust the European side and the 45 per cent the Irish government.<sup>6</sup>

As a consequence, we are now in a situation where the EU fears that the UK government is looking to undermine the protocol and will not live up to its commitments, whatever concessions it may be granted, while the UK fears that the EU will always prioritise protecting its single market over finding solutions that address the unique circumstances in Northern Ireland. The paradox of the situation is that trust is a necessary condition for any durable resolution of the problems, yet it is also deeply absent, hindering the ability to find constructive solutions.

## **A Choice on the Horizon**

The UK government has argued that if it fails to find agreement with the EU, it will invoke Article 16, an emergency clause of the protocol that can be used by either side to introduce temporary safeguards to protect its economy or society. In the meantime, it has said it would keep in place the "standstill" arrangements that would see the grace periods and easement on the movement of some goods extended until further notice.<sup>7</sup>

So far, there has been little substantive progress in the negotiations, with the two sides being far apart on most issues and even further on the points of principle. There have been early signs of progress on the issue of medicines moving from Great Britain and Northern Ireland, and a growing expectation, on both sides, that the discussions will likely continue into 2022.

Sooner or later, however, the UK government will have to decide whether it has achieved sufficient progress to accept a deal emerging from the talks with the European Commission, or whether to follow through on its threat to invoke Article 16. This is the choice between embarking on a path of serious confrontation with the EU or one of cooperation, with a focus on finding negotiated solutions.



## The Path of Confrontation

The UK government has said that if it fails to find agreement with the EU, it will invoke Article 16 of the protocol. Taking this action will put the UK on the path of confrontation with the EU and will have destabilising effects not only on Northern Ireland, but also on wider relations with the EU.

### An Invocation of Article 16

Article 16 is a legitimate provision in the protocol that allows either party to take temporary safeguard measures if “the application of the protocol” leads to “serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade”.<sup>8</sup> In those circumstances, either party has the right to take unilateral safeguard measures although they must be “restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation”.<sup>9</sup>

By invoking Article 16, the UK government would have to choose what safeguard measures it puts in place. It could intervene minimally – partially suspending specific paperwork and requirements needed to move goods to Northern Ireland – but it could go as far as unilaterally disapplying all elements of the protocol that involve EU rules (Articles 5 and 7–10). There have been suggestions that the government might opt for the latter approach in the hope that it would allow the UK to implement its proposals from the command paper and would eventually make the EU bend further.

Although Article 16 can be used by either side in the case of exceptional circumstances, it does not grant them *carte blanche* to unilaterally disapply the protocol and its provisions. The legitimacy of invoking Article 16 rests on two questions: first, whether the threshold for using it has been met; and second, whether the safeguards in place are “strictly necessary” to alleviate the identified problems.

To meet the threshold for Article 16, the government might point to the prospect of political instability in Northern Ireland as an instance of “societal difficulties”, or to the evidence of “trade diversion” for some goods that were previously sourced from Great Britain, but are now imported from Ireland. However, Article 16 is a broad and ambiguously drafted provision, with its precise function and legal effects less than clear.<sup>10</sup> For example, a case based solely on the evidence of “trade diversion” is unlikely to be convincing at arbitration as some supply-chain adjustment was a feature of the protocol from the start. It would also be difficult for the UK to demonstrate what diversion is the consequence of the protocol itself as opposed to that of new post-Brexit trade arrangements.

Furthermore, even if the UK government puts forward a persuasive case for invoking Article 16, it will have to show that its safeguards meet the “strictly necessary” test. It will have to demonstrate it has chosen measures that are as restricted as possible. The text states that these measures must be

“restricted with regard to their scope and duration to what is strictly necessary to remedy the situation” and that the priority should be given to “measures that disrupt the functioning of the protocol least.” Any safeguards must also be reviewed by the Joint Committee every three months. In other words, there is a clear expectation within Article 16 that any safeguard measures must be temporary and proportionate to the harm that they are trying to prevent. If the UK opted for the “maximalist” approach to Article 16 – designed to suspend EU law-related sections of the treaty – it would be very likely to fail at the “strictly necessary” test.

### **A Political Response by the EU**

Just as the UK has a choice about whether, and how, it invokes Article 16, the EU too has to decide how firmly and swiftly it responds to it. The EU can respond in a political and legal way, with a range of retaliatory actions in its arsenal, as outlined in Figure 1. The EU could respond in a political way with countermeasures that do not require prior authorisation by the dispute-settlement body and that act as a deterrent for the UK, while the legal response begins litigation and any retaliation is justified following a ruling of the dispute-settlement body only.

The EU’s response will depend on what the UK government does. If the UK puts in place limited safeguards, it can be expected that the EU will respond in a more measured way, using the legal instruments at its disposal. If, on the other hand, the UK seeks to use Article 16 in a maximalist way, its actions will be met with a political response designed to deter the government from taking such action.

There are several options for what the political response might entail. The first option includes the “rebalancing” measures that the EU would be automatically entitled to take following any invocation of Article 16.<sup>11</sup> In theory, rebalancing measures could amount to stricter checks on some goods crossing the border with the EU or tariffs on sensitive British exports. However, there are constraints on the rebalancing measures themselves. They must be “strictly necessary” to the situation and be “proportionate” to what the other side does. The risk with excessive rebalancing is that its proportionality could be challenged in arbitration by the other side, leading to yet further litigation.

There are other more unilateral countermeasures that the EU could impose outside the scope of Article 16. They include, on the one hand, acting in areas outside formal agreements – for example, by suspending the UK’s data-adequacy decision that allows for cross-border flow of personal data – or, on the other, retaliating with respect to the recently concluded TCA. This could involve either invoking the termination clause (Article 779), which would set a 12-month timetable to find a resolution before the treaty gets suspended, or using the safeguard clause (Article 773) to impose retaliatory measures on wider EU–UK trade.

## A Legal Response

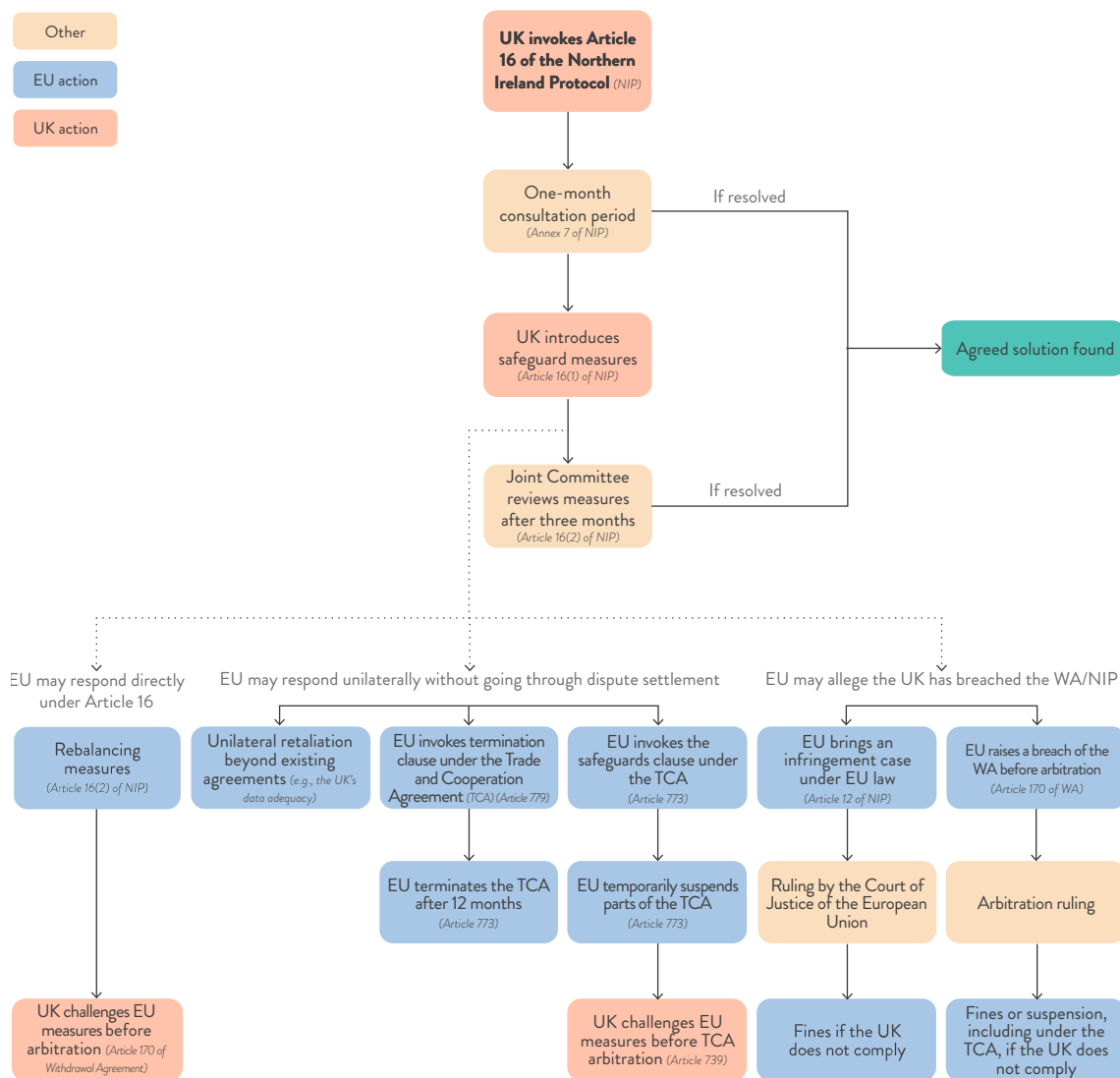
Alongside any political measures taken by the EU, an invocation of Article 16 would also trigger a legal response. Depending on the UK's actions, the EU could challenge: (i) whether the UK has met the threshold for Article 16; (ii) whether the safeguard measures it puts in place are legitimate under Article 16; or (iii) whether the means by which the UK is acting are consistent with other obligations under the Withdrawal Agreement (WA). Depending on the nature of the claim, it could either raise a dispute before the arbitration panel, or bring an infringement case against the UK if it alleged a breach of EU rules under the protocol.

Any legal case would take at least several months to resolve and not have immediate consequences. If arbitration eventually ruled that the UK acted unlawfully under the WA, the EU would be entitled to retaliate further. In this instance, the UK would be asked to pay a fine imposed by arbitration and, if it refused to do so, the EU would be allowed to suspend obligations under the WA or to “cross-retaliate” under the TCA, for example by imposing tariffs on British exports.<sup>12</sup>

The legal response would be particularly important if the UK was to introduce domestic legislation to give effect to its objectives in invoking Article 16. Any domestic legislation conflicting with commitments under the WA would put the UK in breach of its international obligations.<sup>13</sup> The government has already said that it would, at the minimum, have to bring secondary legislation to ensure consistency of its actions with UK domestic law. But if it sought to use Article 16 in a more expansive fashion, this would likely require amendments to primary legislation to avoid a challenge in domestic courts. There are suggestions that the government may choose to do so under a bill amending the status of “retained EU law” that it is planning to introduce in the first half of 2022.

Much of this will ultimately depend on the precise case for invoking Article 16 and the government's legal position. What is already clear, however, is that an expansive use of Article 16 would lead to a swift retaliation by the EU and a complex legal dispute that would take several months to resolve, with the UK's ability to win any such dispute far from guaranteed.

**Figure 1 – Invoking Article 16 and the potential EU response**



Source: TBI

### A Trap of the UK's Own Making

To regard Article 16 as a way of resolving the problems arising from the protocol would be a mistake. Any safeguards, even if taken legitimately by the UK government, could only be temporary. Article 16 was never envisaged as a means of disapplying the protocol unilaterally or of doing so on a permanent basis. Keeping the safeguard measures in place permanently would put the UK in clear breach of the treaty. A failure to withdraw them after the arbitration ruling would have not only economic costs, but also damage the UK's credibility as a reliable international partner.

The UK government may hope that implementing the partial suspension of the protocol will quickly prove the feasibility of its approach. But even if some businesses find its plans beneficial, this will quickly turn into a political problem in the EU's eyes. It would amount to a unilateral disapplication of parts of the protocol, and trigger a political response by the EU that would see it retaliate robustly and swiftly to discourage the UK from establishing new facts on the ground. Not only would the protocol with an unpoliced border in the Irish Sea be seen as a risk to the integrity of the EU's single market – an outcome that the EU would be keen to avoid – but it would also be viewed as a hostile act, with the EU worried that normalising this behaviour could legitimise future non-compliance with international treaties signed with other countries. As a consequence, the UK would face self-inflicted economic damage at a time when its economy is already under pressure from rising inflation and ongoing supply-chain problems. It would also face political pressure from a US administration concerned that UK actions could create instability in Northern Ireland, undermining the Good Friday (Belfast) Agreement.

At this point, the UK government would have to choose between accepting the political, economic and reputational costs of its actions, or returning to the negotiating table to find common ground from a position of weakness. The former would be deeply damaging to the UK's own interests and to Northern Ireland. In the case of the latter, it would have to reluctantly accept the EU's offer that would keep the core of the protocol intact. Northern Irish unionists would feel betrayed by the UK government once again, a situation that would continue to fuel tension in already strained Northern Irish politics.

The costs of confrontation clearly outweigh any perceived prizes. An expansive use of Article 16 would only introduce greater uncertainty for businesses, put London on the path of serious confrontation with Brussels, and further undermine the trust that is necessary to find lasting solutions to the genuine problems currently under negotiation. At best, Article 16 would give the UK extra time to find a negotiated solution with the EU and, at worst, it would be a self-imposed trap with grave economic and political costs – for no gain.

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## The Path of Cooperation

Instead of proceeding further down the path of confrontation, the UK government should focus on a series of negotiated solutions that address the underlying tensions within the protocol. In this chapter, we describe the steps that the UK and EU should take to make the protocol work.

### What Needs to Change

There are three underlying tensions that any negotiated solution should strive to address.

The first area of tension is the practical difficulties that make the movement of goods from Great Britain to Northern Ireland more costly and challenging for businesses. The problem here is not so much the risk of trade being diverted; some supply-chain adjustments were always going to be a feature of the new trading relationship with the EU after Brexit. The bigger problem is the prospect of regulatory divergence as Great Britain moves away from EU rules that continue to apply in Northern Ireland. As we noted in our report on the [UK's post-Brexit regulatory choices](#), published in June 2021, divergence does not only occur as a result of the government actively deciding to diverge from EU rules already on its statute, but also more “passively” through Northern Ireland being subject to new and updated EU rules that the rest of the UK is not bound to.<sup>14</sup> No solution will address this problem completely if the government’s policy is to actively push the UK away from EU rules. However, more could be done in two areas: facilitate movement of those goods that are bound to Northern Ireland, and manage the differences in views over what divergence means for Northern Ireland through a contained governance process, rather than a series of perpetual crises.

The second area is political. The protocol currently lacks cross-community support in Northern Ireland, with most unionists opposing it and charging the Johnson government with betrayal over the issue. It is true that the consent mechanism of the protocol requires only a simple majority vote – both for the EU law-related aspects of the protocol to be kept for another four years or for the protocol to cease to apply. And it remains to be seen how far it will be possible to keep those EU law-related parts of the treaty without cross-community support. It is plausible that support for the protocol may be maintained with a majority in the Assembly, but it would risk leaving the institutions of the Good Friday (Belfast) Agreement damaged. Without doubt, it is extremely difficult to find a compromise that would win the backing of both main communities. However, there is more that can be done, on a practical level, to recognise the concerns of both communities and to give them a greater voice in managing the protocol by strengthening the participation of the Northern Ireland Executive in the protocol’s governance.

The third set of tensions relates to the legal ambiguities within the protocol. One source of ambiguity arises from the dual ambition of Northern Ireland participating in the EU single market for goods and the

related compliance with EU customs code, while also seeking to maintain Northern Ireland's "integral place" within the UK's internal market and customs territory. It may be a legal fudge but it creates tension when it plays out in the protocol's practical operation. Another source of ambiguity stems from provisions that were agreed at a time when there was uncertainty about wider UK-EU trading arrangements but now, in tandem with new arrangements agreed under the TCA, raise legal difficulties. This includes, for example, the state-aid provisions of the protocol.

In some ways, these challenges reflect an imperfect compromise *that is* the protocol. In others, they are reflective of the type of more distant post-Brexit arrangement that the UK government selected. Settling these tensions completely is impossible without reopening the remit of the UK's wider relationship with the EU. Still, what can be done today is to try to ease the detrimental impacts of the challenges in practice. In the section below, we present several practical steps that could be taken to achieve this.

### Six Practical Steps to Make the Protocol Work

1. **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.**
2. **Create a robust surveillance and enforcement system to prevent non-compliance.**
3. **Develop a governance arrangement to manage future barriers to trade and to maintain the list of "Northern Ireland approved" goods over time.**
4. **Replace EU state-aid rules in the protocol with more up-to-date provisions.**
5. **Give Northern Irish and UK representatives greater opportunities for consultation on draft EU laws that apply to Northern Ireland.**
6. **Extend the arbitration-based dispute-settlement mechanism of the Withdrawal Agreement to the trade-related parts of the protocol.**

At the core of our proposed solution is the idea of differentiation based on the final destination of goods in order to minimise the burden of checks in the Irish Sea and to strengthen Northern Ireland's place in the UK internal market. This principle has already been accepted by the EU in its latest package of proposals on sanitary and phytosanitary (SPS) goods and on medicines, and also features in the UK's proposals.

We suggest there should be a special category of "Northern Ireland approved" ("NI approved") goods that would be exempt from requirements under EU law and controls when crossing into Northern Ireland. This would be provided that they meet three core criteria: that their disrupted supply would risk creating damage to the Northern Irish economy or society, that they are explicitly destined for final sale

and consumption in Northern Ireland, and that they meet the minimum requirements agreed between the UK and the EU.

This would not be a blanket waiver for all goods moving from Great Britain to Northern Ireland. This exemption should apply only to those goods that are designated to require unfettered access to Northern Ireland because their disrupted supply would risk creating societal, economic or environmental difficulties that are liable to persist there. Products that are not listed as “NI approved” for the purposes of GB-NI trade or are bound for the EU single market, via Northern Ireland, would be subject to standard controls as required under EU rules.

This solution is predicated on a robust surveillance and enforcement regime to minimise the risk of onward movement of exempted goods to the EU, and on a governance arrangement to ensure the list of “NI approved” goods can evolve over time and depending on changing circumstances, and that either party can take appropriate safeguard measures in case of any imbalance to its trade.

**1. 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.**

Under the current protocol, all goods moving from Great Britain to Northern Ireland would be subject to the requirements of EU law as they apply to any goods imported from third countries. The EU has already shifted in its latest proposals from this rules-based approach to a more risk-based one for SPS goods and medicines, agreeing that, for as long as they meet certain conditions, they could qualify for reduced controls at and behind the border when entering Northern Ireland.

We suggest that the UK and the EU develop this approach into a wider and inclusive principle that could apply to goods moving from Great Britain to Northern Ireland if they meet agreed conditions. Our proposal is to exempt a special category of “Northern Ireland approved” goods from requirements under EU law and controls upon entry to Northern Ireland, provided that: (i) their disrupted supply could have detrimental effects on the economy and society of Northern Ireland; (ii) these goods are destined for final sale and consumption in Northern Ireland; (iii) they meet minimum requirements mutually agreed between the UK and the EU; (iv) and they are appropriately pre-verified, labelled and under market surveillance.

In practice, this could be done either by a derogation from EU law that falls within the scope of the protocol specifically for “NI approved” listed goods – or by the EU recognising UK laws for the purposes of “NI approved” listed goods as equivalent to their own, subject to the conditions above.

This is not a blanket exemption on all goods entering Northern Ireland from Great Britain. Nor is it an application of the principle of “mutual recognition” to wider UK-EU trade. Goods that do not fall in the scope of this waiver would also have to meet appropriate customs and regulatory requirements, and



undergo necessary border controls. Checks, as required by EU rules, would continue to be applied on all other GB goods moving onwards to Ireland and the rest of the EU single market. However, this arrangement could deliver a significant reduction in the volume and frequency of checks and controls, with a substantive proportion of goods having their checks waived under this exemption.

What makes this different from the current proposals on the table is that we propose that the UK and the EU formalise an agreed principle that could in theory apply to any listed goods, as long as they meet certain conditions and are appropriately managed and governed. This would result in a more enduring but highly adaptive arrangement that could be managed over time, depending on the level of risk that future barriers to trade create to the economy and society of Northern Ireland.

There are four elements that would need to be worked out for this arrangement to work:

- Scope: what categories of goods should be in the scope of the “NI approved” exemption?
- Conditions: what are the criteria that would have to be met to qualify for the exemption?
- Surveillance: how will the system be protected so that it is not subject to non-compliance and abuse that would threaten the integrity of the EU single market?
- Governance: how will the system be managed on an ongoing basis so that any emerging risks can be managed promptly?

It is not for this paper to be prescriptive about the details of this arrangement. In our view, the type of goods that would naturally fall into the scope of this waiver are products of animal and plant origin, medicines and medical devices, as their disrupted supply could have most material impact on Northern Ireland. Agreeing the list of goods and the conditions attached to it would require a detailed negotiation.

## **2. Develop a robust surveillance and enforcement system to prevent non-compliance.**

An important aspect of this arrangement is ensuring that “NI approved” goods do not move onwards to the EU single market, and that UK authorities can tackle non-compliance arising from any traders not declaring these movements.

The UK and the EU should agree to a robust surveillance and enforcement regime. Exporters of goods that qualify for the “NI approved” exemption would be required to label goods appropriately. But there are further options that the parties could consider. A failure to declare goods in this way would be a violation of UK domestic law and could be made a criminal offence for those who knowingly violate it. At the ports, there could also be spot checks on a proportion of all consignments that have not been declared, based on the risk profiles of different goods.

## **3. Develop a governance arrangement to manage future barriers to trade and to maintain the list of “Northern Ireland approved” goods over time.**

As Great Britain gradually diverges from EU rules and Northern Ireland stays aligned, new disagreements are bound to arise in the future. The question is how these differences can be managed with a contained process rather than through a series of heated crises, and how the goods that would be subject to new checks can be exempted if they are shown to meet the criteria for “NI approved” goods.

We suggest the concept of “NI approved” goods is a dynamic approach to managing risk that can be expanded or constrained, depending on the level of risk that arises. In practice, this will require agreeing a list of goods that fall into its scope, and a process for determining what goods fall into the category of “NI approved” goods, how that list is updated, and how any exemption could be withdrawn.

The details should be up for negotiation. In our view, the list could be realised through an annex to the protocol to be maintained and updated over time. The Specialised Committee on the Implementation of the Protocol could be responsible for maintaining and reviewing the list regularly. Its work could be supported with an independent panel made up of experts to assess the impact of disrupted supply on the Northern Irish economy and society, and who would provide regular recommendations to the Specialised Committee, thus informing the basis for the committee’s decisions. Either party could request a review of the list at any time when it considers there to be a material change of circumstances, for example, as a result of significant changes in UK or EU law, or their respective regulatory systems, or of concluding a new trade agreement that raises the risk threshold for goods.

To ensure that the parties can swiftly respond to emerging risk, there could be new safeguard measures to be taken in case of unforeseen risks or a material change in the circumstances of either party. In this instance, the parties could take “rebalancing” measures to remedy any potential imbalance. Any such safeguards could build upon the principles suggested by the EU in their non-papers and similar provisions contained in the TCA.

#### **4. Replace EU state-aid rules in the protocol with more up-to-date provisions.**

Under the protocol, the UK has to apply EU state-aid rules for any subsidies that affect trade between Northern Ireland and the EU (Article 10). The European Commission retains its enforcement powers and the CJEU its jurisdiction, in much the same way as when the UK was inside the EU. The current provisions create a risk that a wider range of UK-wide subsidies could be caught by the requirements of the protocol – a problem often referred to as “reach-back” – thereby undermining predictability for businesses and creating legal uncertainty. This issue has been extensively highlighted by state-aid experts<sup>15</sup> and acknowledged by the EU in its unilateral declaration on Article 10.<sup>16</sup>

While it is understandable the EU looked to defend its interests when the UK government had offered no clarity on its post-Brexit state-aid regime throughout the negotiations, this has changed now that the UK has committed to new subsidy-control provisions in the TCA and is introducing a new domestic independently enforced regime. This new system will offer greater certainty on how subsidies will be

governed across the UK, but in combination with Article 10 of the protocol, it also risks creating a complex legal environment for aid that will apply to Northern Irish firms.

To address this, we suggest replacing Article 10 with a new provision that would extend the subsidy control provided for in the TCA to any aid that affects trade and investment between Northern Ireland and the EU. However, since Northern Ireland benefits from privileged access to the EU single market for goods, we also suggest additional protections for the EU.

Under the TCA, subsidies must be assessed using a common framework of principles. Both sides must offer remedies in their domestic courts to the affected third parties, and have recourse to novel “rebalancing” measures, including rapid tariff retaliation if either believes that subsidies could cause a significant negative impact on trade.

The commission could be given a formal consultation role for any aid at risk of affecting trade between the EU and Northern Ireland, allowing it to work actively with the UK’s new domestic-subsidy regulator, the Competition and Markets Authority (CMA). This, combined with measures available to it under the TCA, would give the EU reassurance that any future subsidies would not distort competition, while delivering protection and certainty, and avoiding difficult litigation in the future.

#### **5. Give Northern Irish and UK representatives greater consultative opportunities on draft EU laws that apply to Northern Ireland.**

To address concerns about Northern Ireland accepting laws on which it has no say, we propose that Northern Irish and UK representatives be given greater opportunities for consultation on new EU laws that fall under the protocol. This could ensure that the views of representatives of the Northern Irish Executive and UK government can feed into draft EU laws that will apply to Northern Ireland and that the officials have a better understanding of those laws.

Under the protocol, the UK-EU Joint Consultative Working Group (JCWG) is a body that serves as the main forum for exchanging information about planned EU acts within the scope of the protocol. It is through this body that the EU informs the UK about any amendments to EU rules listed in the protocol and through which the UK has an opportunity to influence those rules. The UK government has committed to inviting representatives of the Northern Ireland Executive to these meetings.<sup>17</sup> However, this body’s function is to primarily serve as an information exchange, and less for formal consultation on planned and new EU legal acts that will eventually apply to Northern Ireland.

We propose expanding the remit of the JCWG to offer greater formal opportunities for consultation and to enable formal participation of representatives of the Northern Ireland Executive. More specifically, we suggest that when the commission prepares new EU legislation that applies to Northern Ireland, it should inform UK and Northern Irish representation in the JCWG, while informally consulting relevant UK and Northern Irish experts in the same way it asks for expert views from EU member states. To the

extent that new EU legal acts apply to Northern Ireland under the protocol, the commission should also allow, and formally invite, UK and Northern Irish representatives to take part in the preparation of drafts later adopted by the EU. Finally, UK and Northern Irish representatives should be able to request a formal preliminary exchange with the commission before any final adoption of EU laws that directly apply to Northern Ireland.

These proposals are based on the EU's recent offer to Switzerland.<sup>18</sup> The EU might be concerned these arrangements would give the UK government an opportunity to influence the EU on its planned legislation by the back door, but UK and Northern Irish representatives should be offered consultation *only* with respect to potential effects on Northern Ireland.

#### **6. Extend the arbitration-based dispute-settlement mechanism from the Withdrawal Agreement to the trade-related parts of the protocol.**

Under the current agreement, the European Commission enforces any EU laws that apply to Northern Ireland, and the CJEU is the arbiter of disputes relating to any provisions of the protocol based on those EU rules (Articles 5 and 7-10). The role of EU institutions in enforcing the protocol, and the CJEU in particular, are not a driver of the practical difficulties arising from the protocol. However, there are ongoing concerns over democratic legitimacy of the protocol, if EU institutions maintain their full remit over EU laws applicable in Northern Ireland in much the same way as for any EU member states, but without input into those law.

To facilitate compromise over this issue, we suggest that the UK and the EU consider extending the application of the arbitration mechanism of the Withdrawal Agreement to the trade-related parts of the protocol.<sup>19</sup> Under this mechanism, independent arbitration handles the settling of disputes arising from the agreement, but the CJEU has interpretive powers for all questions involving EU law. This arbitration panel then resolves such matters based on the CJEU's interpretation, with the parties bound by the panel's ruling.

This would remove the European Commission's direct supervision of EU law under the protocol, and the direct jurisdiction of the CJEU over the application and interpretation of trade-related parts of the protocol (Articles 5 and 7-10). However, by keeping the CJEU reference procedure for any disputes that directly involve questions of EU law, the court would remain the ultimate arbiter of EU law, in line with existing case law on the issue. Although the commission would no longer be able to bring an infringement case before the CJEU – for example, if it is concerned about the incorrect application or late transposition of EU law in Northern Ireland – it could use the Joint Committee to raise its concern with the UK government. If its concerns were not met, it would be able to take the issue to arbitration and seek remedies, including by cross-retaliating with respect to the TCA, which is not possible under the current Article 12. This model is not novel; it has been used by the EU not only in the Withdrawal Agreement, but also in third-country agreements featuring elements of EU law.<sup>20</sup>

## Amending the Protocol Without Renegotiation

The key to finding a way forward is, first, by finding unanimity on a compromise and, then, looking for appropriate legal routes that put agreed solutions into effect. The protocol contains a provision, under Article 13(8), that would allow for a “subsequent agreement” to replace it if both parties agree to it. However, there are other routes for amending the protocol without fundamentally altering it.

Our proposed package of solutions could be made through the following combination of instruments: (i) co-decisions of the Joint Committee amending the agreement; (ii) unilateral declarations and legislative changes by the EU to exempt Northern Ireland from the application of specific EU laws; and (iii) a joint instrument agreed by the UK and the EU.

Co-decisions of the Joint Committee are a standard way of implementing the agreement and can also be used to adopt “amendments in the cases provided in the agreement” (Article 164(4)(f) of the WA). One such case, under Article 6(2) of the protocol, states that the EU and the UK should “use their best endeavours to facilitate trade between Northern Ireland and other parts of the UK” and, to this end, the Joint Committee shall keep this provision “under constant review” and “adopt appropriate recommendations with a view to avoiding controls at the ports and airports in Northern Ireland to the greatest extent possible.” In our view, the proposed “Northern Ireland approved” goods designation could be adopted as a decision of the Joint Committee with a view to facilitating trade between Northern Ireland and other parts of the UK, and in recognition of Northern Ireland’s integral place in the UK internal market.

However, it would require changes to EU legislation, either by giving Northern Ireland a derogation from EU law specifically for “NI approved” listed goods that are imported from Great Britain, or by recognising UK domestic regulations as equivalent to the EU’s own but, again, only for the purposes of “NI approved” listed goods. To be clear, this would not amount to the EU applying the principle of “mutual recognition”, or that of “equivalence”, to all GB-NI trade. Any exemptions would only apply to those GB-NI goods listed as “NI approved” and that meet the criteria agreed between the UK and the EU.

Where textual amendments are necessary, most of them could be made under the powers granted to the Joint Committee under Article 164(5)(d) of the WA, “to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when the Agreement was signed, and provided that such decisions do not amend the essential elements of that Agreement”. The changes to the provisions on state aid could fall into the scope of such “unforeseen situations” at the time of signing the agreement. The difficulty would arise with amending Article 12 of the protocol, which would require textual changes, but one way to avoid this would be to offer joint clarification on how to interpret this provision in a “joint instrument” agreed between the two sides, with the EU declaring their intention to use arbitration under the WA as the primary channel for resolving disputes originating from the protocol.

The joint instrument could serve a broader purpose in clarifying how both parties intend for the amended protocol to be interpreted and to formalise any unilateral commitments made by them. Joint instruments are a common way for parties to international treaties to offer clarifications in a binding way. In this instance, when the WA is subject to future interpretation, for example, by arbitration, that interpretation would have to refer to the instrument.

### **What It Will Take to Accept This Offer**

In accepting our suggested solutions, both sides would need to shift further from their positions.

For the UK, this solution would help reduce most checks and controls on Northern Ireland-destined goods. It would also ensure that the agreement can evolve in line with changing circumstances on both sides, providing a more durable solution. However, for this arrangement to be acceptable, the UK government would have to drop its principled stance that no direct references to EU law could be contained in the agreement, and that the protocol must be replaced in its entirety. Rather than looking to remove all EU law from the protocol as a matter of ideological preoccupation with the protocol, the government should be focused instead on exploring how the practical outcomes it seeks could be achieved through different means. Many of its concerns over the protocol's lack of democratic legitimacy could be addressed by negotiating better arrangements for consultation with Northern Irish and UK representatives over new EU rules applying to Northern Ireland, and by using independent arbitration for the protocol, even if it means that the CJEU retains a narrow role in interpreting EU law within the treaty.<sup>21</sup>

The EU has already taken steps towards compromise, and it may be difficult for it to consider further movement. With our proposals, we suggest that the EU extends the principle it has already accepted in its non-papers – the differentiation of goods based on their final destination – and formalise it under the special category of “NI approved” goods. This would make the arrangement more durable and allow the protocol to evolve over time. We do not propose this as a free lunch. There should be mutually agreed requirements applying to those agreed goods and a system of governance and surveillance. The suggested revisions to governance are designed specifically to ensure that Northern Irish representatives are given greater input into the functioning of the protocol.

The bigger question that the EU might ask is whether the UK government is a reliable partner to which it can grant concessions on the agreement it signed two years ago. This is a legitimate concern, and we accept that the more the UK simply wants to disapply the protocol, the less willing the EU will be to find a constructive way forward.

**Figure 2 – Comparing the UK and EU positions on the current protocol and TBI's proposals**

### Movement of goods (customs) (Article 5)

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#### Current Protocol

Northern Ireland (NI) remains part of the UK customs territory, but customs' formalities are necessary for GB-NI goods. Exemption of customs duties for goods "not at risk" of moving to the EU.



#### The UK's proposed changes

Removal of customs formalities and process to depend on the destination of goods, with NI-destined goods having reduced requirements.



#### The EU's proposed changes

Removal of some customs paperwork for NI goods, with some formalities shifting to electronic means.

#### The TBI compromise

Removal of some customs formalities depending on the status and final destination of goods, with "NI approved" listed goods facing reduced requirements.

### Movement of goods (manufactured goods) (Article 7)

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#### Current Protocol

All-island regulatory zone agreed for the island of Ireland, covering all manufactured goods. NI complies with current and future EU acquis on manufactured goods if listed in the protocol. Additional regulatory approvals required for goods moving from GB to NI.



#### The UK's proposed changes

Dual-regulatory regime for manufactured goods circulating within NI, with goods that meet UK or EU rules, and labelled accordingly, to be accepted by the NI market. No checks on manufactured goods produced in GB moving to NI. New bespoke arrangements for medicines.



#### The EU's proposed changes

Changes limited only to medicines. Medicines produced in GB and approved by GB regulators to be recognised for sale in NI.

#### The TBI compromise

Removal of regulatory requirements and authorisations for "NI approved" listed manufactured goods, subject to mutually agreed minimum requirements; a surveillance regime to prevent non-compliance; and appropriate safeguards. Non-listed manufactured goods and goods moving to the EU facing same requirements as provided by EU law.

## Movement of goods (agri-food and SPS goods) (Article 7)

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### Current Protocol

All-island regulatory zone agreed for the island of Ireland, covering all sanitary and phytosanitary goods and agri-food. Checks on SPS goods required when moving from GB to NI.



#### The UK's proposed changes

Risk-based approach for goods moving from GB to NI, with NI-destined goods exempted from certification and checks. Bespoke arrangements for live animals, with pre-notification requirements. Dual-regulatory regime for SPS goods circulating within NI, with goods meeting UK or EU rules, and labelled accordingly, accepted onto the NI market.



#### The EU's proposed changes

EU SPS requirements for goods moving from GB to NI partially waived if goods destined for NI. Full checks on GB goods moving to Ireland via NI.

### The TBI compromise

Removal of requirements for "NI approved" listed SPS goods, subject to mutually agreed minimum requirements; a surveillance regime to prevent non-compliance; and appropriate safeguards. Non-listed SPS goods moving to the EU facing the same requirements as provided by EU law.

## Movement of goods (VAT and excise) (Article 8)

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### Current Protocol

NI applies EU VAT and excise rules for goods, with some exceptions.



#### The UK's proposed changes

More flexible rules, with greater freedom to set VAT and excise in NI.



#### The EU's proposed changes

No changes.

### The TBI compromise

No changes.



## Single electricity market (Article 9)

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### Current Protocol

No changes.



### The UK's proposed changes

No changes.



### The EU's proposed changes

No changes.

### The TBI compromise

No changes.

## State aid/Subsidy control (Article 10)

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### Current Protocol

EU state-aid rules apply to UK subsidies with effect on trade between NI and the EU, and the European Commission's enforcement of those rules.



### The UK's proposed changes

Replace Article 10 with new UK subsidy-control arrangements, as set out in the UK Subsidy Control Bill.



### The EU's proposed changes

No changes.

### The TBI compromise

Replace Article 10 with new provisions referencing the subsidy-control provisions in the Trade and Cooperation Agreement and a new consultative role for the European Commission.

## Governance – enforcement and dispute resolution (Article 12)

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### Current Protocol

EU institutions enforce the application of EU rules applicable to NI under the protocol. The European Commission monitors compliance with EU rules and the CJEU is the final arbiter.



#### The UK's proposed changes

Renegotiate Articles 12(4)-(7) to remove the role for EU institutions, up to and including the CJEU, to enforce some of the protocol's provisions.



#### The EU's proposed changes

No changes.

### The TBI compromise

Extend the application of the Withdrawal Agreement arbitration-based dispute settlement and remedies to Articles 5 and 7-10.

## Governance – institutional provisions (Articles 13-14)

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### Current Protocol

Specialised Committee is responsible for supervising the protocol. Joint Consultative Working Group (JCWG) acts as the technical-level body. NI has no formal consultation into relevant EU processes.



#### The UK's proposed changes

Greater role for NI institutions in any areas where EU law is applied in NI.



#### The EU's proposed changes

No changes, but EU proposes processes to improve transparency of EU laws under the protocol, and enhanced engagement with NI businesses, stakeholders and civil society.

### The TBI compromise

New governance process to manage future risks and barriers to trade, with Specialised Committee given new functions. New enhanced consultation on draft EU laws for Northern Irish and UK representatives through the JCWG.

Source: TBI

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## Conclusion

We are at a moment of real danger that could lead to a serious and long confrontation with the EU over the Northern Ireland Protocol, potentially costing us years of stable political relations in a period when the UK and the EU should be working together, and when the Western alliance should not be undermined by such internal disputes.

If the UK government cares about the stability of Northern Ireland and respects the delicate balance established by the Good Friday (Belfast) Agreement, it should avoid unnecessary steps that would escalate the current situation.

The government may have convinced itself that only hardball tactics will persuade Brussels to bend – and that using Article 16 to unilaterally suspend parts of the protocol that it dislikes will make it bend further. However, proceeding further towards the path of such confrontation would be a grave error of strategy. It would lead to a swift economic retaliation by the EU, a complex legal dispute, and months of instability just before the people of Northern Ireland vote in the Stormont Assembly elections in May 2022.

It is in the government's own self-interest to avoid invoking Article 16 because to do so would mean setting a trap for itself. After months of a fractious fight, the UK would eventually have to choose between not implementing its obligations under the treaty it signed or retreating to accept the EU's proposals. The former would cost the UK not only its trade agreement with the EU, but its reputation as a reliable international partner. The latter would represent the humiliation of an abject failure of strategy and leave the genuine problems of the protocol unresolved.

It is true that there are underlying practical, political and legal tensions within the protocol that need to be addressed if the protocol is to last. If the UK government cares about addressing those genuine challenges, it must accept responsibility for the agreement into which it voluntarily entered; it must look to restore trust with EU institutions and member states; and it must request any changes to the treaty in good faith and based on evidence, not by acting unilaterally and overriding its international obligations. It is only by way of agreement with the EU – not confrontation – that greater certainty can be offered on those elements of the protocol that create genuine challenges for the people and businesses of Northern Ireland.

Our proposals look to address most of the practical problems that would put the protocol on a more stable footing. They do not form a perfect solution, but there is no such one when mutual trust between the UK and the EU is absent; when the UK proactively seeks to diverge from the EU's regulatory orbit while Northern Ireland remains within; and when the political difficulties facing Northern Ireland do not arise as much from the operation of the protocol as from Brexit itself.

Ultimately, it will be up to the elected representatives of Northern Ireland to decide whether most of the protocol should be kept or replaced with a different arrangement. This vote is due to take place in the Northern Ireland Assembly in 2024. Until then, the UK and the EU have a shared responsibility to try and make the protocol work.

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## Footnotes

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8. ^ Article 16(1), NI Protocol, WA
9. ^ Article 16(1), NI Protocol, WA
10. ^ For an excellent discussion of the intricacies of Article 16, please see: Howse, R, “This is not an exit”: The Article 16 Safeguards in the Ireland/Northern Ireland Protocol, Brexit Institute Working Paper Series, No 14/2021, 2021, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3959075](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3959075)
11. ^ Article 16(2) NIP

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12. ^ Under Article 178, WA
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  19. ^ Title III, Article 170-181, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community
  20. ^ This includes, for example, EU agreements with Ukraine (Article 322, EU-Ukraine Association Agreement) and the draft Institutional Framework Agreement (IFA) with Switzerland (Article 10, IFA, November 2018 draft).
  21. ^ According to the CJEU jurisprudence, the CJEU must be the sole arbiter of any provisions of EU law and no external tribunal can have a role in interpreting EU law. Any third-country agreement that does comply with this principle would be deemed unlawful by the CJEU.
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