

Northern Ireland Protocol State of Play

Dr Alice Enders
alice.enders@endersanalysis.com

+44 (0)20 7851 0900

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- The Protocol on Ireland/Northern Ireland has been a thorn in the side of relations between the UK and the European Union (EU) since the ink was barely dry. It seeks to uphold the Belfast Good Friday Agreement concluded in 1998, which established power-sharing between unionists and nationalists, but this has collapsed since February 2022, because the unionists, supported by the UK Government, oppose Northern Ireland being carved out from the UK Internal Market
- By doing so, the Protocol removes any requirement for customs formalities for goods crossing the land border between Northern Ireland and the Republic of Ireland. The Protocol led to a customs border in the Irish Sea for 'exports' from Great Britain to Northern Ireland, and also requires Parliament to legislate the EU Single Market for goods in Northern Ireland and to carve out the territory from otherwise applicable UK legislation
- UK divergence from the rules of the EU Single Market will threaten Northern Ireland's position in UK supply chains and also potentially undermine the EU Single Market, which is of concern to the EU, especially for matters of human health, such as "genetically modified organisms" (GMOs). This report concludes that a revised agreement should be attached to the EU/UK Trade and Cooperation Agreement (TCA), which then applies to all of the UK

Overview

The Protocol on Ireland/Northern Ireland appended to the EU/UK Withdrawal Agreement is a thorn in the side of relations between the UK and the European Union (EU). Its stated purpose is to preserve the operation of the Belfast Good Friday Agreement concluded in 1998 between the UK and Irish governments and the parties in Northern Ireland. The Belfast Good Friday Agreement established power-sharing between unionists, who support the union, and nationalists, who support Irish unification, ending the Troubles.

The Protocol removes any requirement for customs formalities for goods crossing the land border between Northern Ireland and the Republic of Ireland. The UK may have formally left the EU, but Northern Ireland remains in the EU Single Market. The Protocol has established barriers to trade at the new Irish sea customs border, impeding exports from Great Britain to Northern Ireland. Trade between Great Britain and Northern Ireland, however, far exceeds that between Northern Ireland and the Republic of Ireland.

The UK Government and unionist community regards the Protocol as threatening the constitutional order. The Democratic Unionist Party collapsed the Northern Ireland Executive in February and will not re-enter power-sharing until Northern Ireland's position in the UK Internal Market is restored, despite the Assembly elections in May. The UK government announced on 17 May its intention to legislate to disapply parts of the Protocol but has not published a detailed policy statement.

Under Article 13(8) of the Protocol, the instrument can be superseded by agreement with the EU, which has refused to do so to date. The Political Declaration accompanying the Withdrawal Agreement also states that “alternative arrangements for ensuring the absence of a hard border on the island of Ireland” could be agreed, although the EU has not responded to the UK Government's proposals. These include making Northern Ireland into a “dual regulatory zone”; in my opinion as a former economist at the World Trade Organisation from 1988 to 2009, the proposal is unworkable (see below). This report instead concludes that a revised agreement should be attached to the EU/UK Trade and Cooperation Agreement (TCA), which then applies to all of the UK.

Until the UK and EU agree on a solution to the Protocol, it is unlikely that any progress will be made on resolving a myriad of post-Brexit market access issues. These include financial services, the new barriers to the movement of British touring musicians in the EU, and how to manage the cross-border movement of personal data in the context of the forthcoming UK data protection regime, which diverges from GDPR, noting the UK is currently protected by an adequacy decision by the EU.

Customs and regulatory divergence are the problems

The Protocol preserves the pre-Brexit EU Single Market on the island of Ireland **firstly** by establishing a customs border in the Irish Sea for 'exports' from Great Britain to Northern Ireland. HMRC, the customs authority, enforces EU customs law on such 'imports' into Northern Ireland. The Protocol has also forced traders to fulfil documentary requirements that they were promised would never exist. Pets, live animals, foodstuffs and plants are subject to sanitary and phytosanitary checks. These non-tariff barriers to exports from Great Britain to Northern Ireland will impede such trade and this harm to the UK Internal Market will only increase with divergence.

The Protocol prevents divergence in Northern Ireland. It preserves the pre-Brexit EU Single Market on the island of Ireland **secondly**, by requiring Parliament and responsible executive agencies to:

- **Legislate the EU Single Market in Northern Ireland;** and
- **Carve out Northern Ireland** from UK legislation that diverges from the rules of the EU Single Market for goods to ensure that these do not apply in Northern Ireland.

A report published by the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland on 22 March 2022 states that over 300 pieces of EU legislation apply to Northern Ireland on a “dynamic” basis.¹ EU legislation is evolving and Parliament is obliged to keep pace with the application of this legislation in Northern Ireland to preserve the territory’s position in the EU Single Market.

Human health is a major concern in the vast EU Single Market

The EU Single Market is an integrated borderless area stretching across 27 Member States and, due to the Protocol, also Northern Ireland. Once a product is placed on the EU market, whether by importation or by domestic production, it is in free circulation. To obtain this outcome, the EU requires Member States to align their policies in a myriad of policy areas. The most important by far are those that pertain to human health, whether from consuming medicines or food, alongside prohibitions on arms.

To this end, the EU requires strict alignment on policies affecting products through prescriptive regulations covering:

- Medicines, toys (obviously for children’s safety reasons), product safety, cosmetics;
- Products of animal origin, including hygiene of foodstuffs and animal by-products, animal feed, veterinary medicines, use of microbials, imports of animals, including pets, and plants;
- Classification, labelling and packaging of substances and mixtures (i.e. ingredients), and food health claims and marketing standards;
- Geographical indications identifying the origin of food, drink (e.g., Scotch whisky) and foods;
- Machinery products, radio equipment, motor vehicles and vehicle safety information, batteries.

The UK Parliament is required to legislate EU rules on taxation in Northern Ireland or carve out the territory from diverging UK legislation. In this policy area, the guidelines are not as prescriptive as regulations, because the EU only requires Member States to implement “directives”. This includes ensuring that the VAT regime in Northern Ireland is compliant with the EU VAT Directive. A recent example of divergence is the UK’s decision to zero-rate solar panels, in order to encourage their installation, which initially could not apply to Northern Ireland, although the EU then agreed to allow its implementation.

State aid is an important policy area that also falls within the scope of the Protocol. State aid takes the form of a specific subsidy to a commercial enterprise. State aid rules are described as a key requirement for a “level playing field” on the conditions of competition applying in the EU Single Market. The EU requires Member States to observe constraints on state aid.² The UK cannot provide state aid to Northern Ireland in a manner that is inconsistent with these rules.

More generally, UK divergence from the rules of the EU Single Market will threaten Northern Ireland’s position in UK supply chains and also potentially undermine the Single Market. In the Queen’s Speech, the UK government announced the Genetic Technology (Precision Breeding) Bill to simplify the regulatory regime for precision-bred plants and animals that have genetic changes that could have arisen through traditional breeding or natural processes. These products are banned in the EU Single Market under its legislation on “genetically modified organisms”.³ Furthermore, the Food Standards Agency overturned a rule on radioactivity levels in produce, allowing 23 categories of agri-food products grown in Fukushima

¹ Lords Select Committee, [Protocol on Ireland/Northern Ireland Sub-Committee](#)

² European Commission, [Competition Policy: State Aid Overview](#)

³ European Parliament, [New plant-breeding techniques: Applicability of EU GMO rules](#), 2019

in Japan to be imported to the UK, including the popcorn gifted by Prime Minister Fumio Kishida upon his state visit to the UK to Prime Minister Boris Johnson.⁴ These “radioactive” products remain banned by the EU.

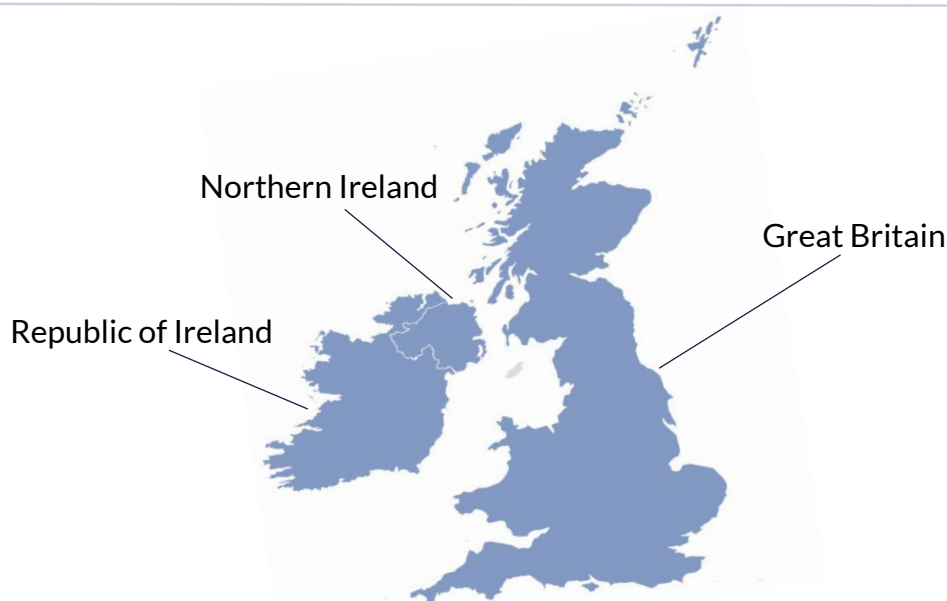
Trade barriers only on exports from Great Britain to Northern Ireland

Under the UK’s Internal Market Act (passed after the Protocol), exports from Northern Ireland to Great Britain, including all products from the Republic of Ireland that cross the land border into Northern Ireland, enjoy unfettered access. The core market access principles of the UK’s Internal Market Act market are mutual recognition and non-discrimination, designed to prevent potentially harmful trade barriers to the movement of goods, services and people. This unfettered access to Great Britain for exports from Northern Ireland is not reciprocated by the EU for exports from Great Britain to Northern Ireland under the terms of the Protocol, which requires the UK to apply the EU’s customs procedures and applicable Single Market regulations to those “imports”.

Two schemes apply to exports from Great Britain to Northern Ireland:

- The UK Trader Support Service acts as a customs broker for exporters from Great Britain to Northern Ireland. Traders file their exit declarations and the Trader Support Service completes the operation with HMRC. Traders usually have to pay for a customs broker to export products, in this case the UK government funds the service. This implicit subsidy has contributed to the re-routing, through Northern Ireland, of exports from Great Britain destined for the Republic of Ireland.
- The UK government also operates the UK Trader Scheme, which administers customs easements for supermarket chains that send products to Northern Ireland for sale in their retail outlets. The UK and EU agreed to a three-month grace period for compliance with EU customs procedures for products sold in supermarkets and their suppliers and a six-month grace period on chilled meats, such as sausages, which are prohibited on entry into the EU Single Market. The UK extended the three-month grace period unilaterally, and the EU then agreed to extend the six-month grace period. Northern Ireland supply chains will face further disruption when the grace periods lapse.

Figure 1: Map of Great Britain, Northern Ireland, and Republic of Ireland



[Source: Enders Analysis, Microsoft Bing]

⁴ *Telegraph*, [Boris Johnson munches 'Fukushima popcorn' as radioactive food rules scrapped](#), 2022

The UK's proposed dual regulatory regime

In July 2021, the Government's Command Paper succinctly described the problem posed by the Protocol:

The border between Ireland and Northern Ireland has been successfully maintained without infrastructure or checks, and the EU Single Market has been protected. However, the Protocol has not delivered on some of its other core objectives, notably the explicit commitments to protect Northern Ireland's place in the UK internal market and to avoid disruption to everyday lives.

The proposed dual regulatory regime of the Command Paper removes in principle the need for a customs border in the Irish Sea for exports from Great Britain to Northern Ireland. On North-South trade, from Northern Ireland to the Republic of Ireland, the Command paper assures the EU that the Single Market would not undergo the entry of non-compliant products. This assurance is provided through a pledge to sanction associated traders through UK legislation setting out penalties. This ex-post enforcement of compliance with the EU Single Market would be without precedent in the global trading system, which relies on ex-ante enforcement. Ex-ante enforcement at the border, or prior to shipment for agri-food products, is invariably applied by customs authorities because of the difficulty of establishing whether a product is compliant with relevant prohibitions, standards and regulations, once it is placed on the domestic market.

It is unclear how this dual regulatory regime would operate in practice. One scheme might engage establishments in Northern Ireland and Great Britain to supply commercial documentation, ideally customs documentation to HMRC for shipments destined for the Republic of Ireland. This scheme however also begs the question of ensuring that the documentation relates precisely to the contents of the shipments; the presumption that all shipments are as stated in the documentation is precisely the reason for customs enforcement in the first place: checks keep traders honest. The Command Paper also does not address the issue of goods placed in free circulation on the UK Internal Market as a result of the UK's trade agreements with third countries.

It is unclear from the Foreign Secretary's statement to Parliament on 17 May how far UK government thinking has developed since the publication of the Command Paper. The Foreign Secretary indicated that the UK remains committed to providing the EU with the appropriate level of assurances on the placement of non-compliant products on the Single Market through a trusted trader scheme underpinned by real time commercial data. Ms Truss blames the EU's absence of mandate to change the Protocol for the current stalemate.

These problems only worsen with UK regulatory divergence. Agri-food products are the biggest challenge. For example, as noted above, the EU's legislation on "genetically modified organisms" applies a ban to products the UK intends to produce once the Genetic Technology (Precision Breeding) Bill is enacted to improve food security.⁵ How will such products be kept out of the EU Single Market if they enter the food supply chain of the UK?

The Trade and Cooperation Agreement is the way forward

If the Northern Ireland Protocol were not applicable, Northern Ireland—like Scotland, Wales and England—would fall under the regime of the Trade and Cooperation Agreement. The TCA applies reciprocally to the EU and the UK, including Northern Ireland. The UK government could aim for a single TCA regime across the UK, from west to east, for all traders to observe exporting and importing from the EU.

Under Article 13(8) of the Protocol, the UK and EU can agree to supersede the Protocol with a new agreement, which would form an annex to the TCA. HMRC would ensure goods exported across the land

⁵ NUTRAingredients.com, [UK pushes for crop biofortification with Genetic Technology Bill](#), 2022

border to the Republic of Ireland are compliant with the rules of the EU Single Market. HMRC would make available to the customs authority of the Republic of Ireland the associated documentation, and market surveillance would be applied to track such products once they enter the Republic of Ireland. Additionally, the Republic of Ireland could examine shipments destined to the EU for such compliance.

This regime is known as mutual enforcement: even without EU reciprocity, the UK could provide this assurance on a unilateral basis to the EU. It would require customs documentation and checks away from the border. The cooperation of the EU would ensure maximum compliance and minimum physical infrastructure.

The challenge will be to persuade the Irish government and nationalist parties to accept the need for a new agreement. In the December 2017 Joint Report of the UK and EU, the parties committed to avoid “*a hard border, including any physical infrastructure or related checks and controls.*” There are already checks on the island in respect of VAT, excise duties and immigration. The Joint Report is subject to different interpretations: it is unclear whether it guarantees no checks on the island of Ireland or no checks at the land border. The Joint Report is not legally binding, and the Protocol has already established more checks on the island of Ireland in respect of goods moving from GB to Northern Ireland.

The Irish government fears that unilateral action on the part of the UK government will result in checks on Irish products exported to the EU Single Market. Mutual enforcement with ex-ante compliance would allay these fears.

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