

Submissions the SLSC received on the Official Controls (Northern Ireland) Regulations 2023 (SI 2023/17)

(See: SLSC, 26th Report, Session 2022-23, HL Paper 139.)

- Rt Hon Lord Dodds of Duncairn Rt Hon & Sir Jeffrey Donaldson MP, Democratic Unionist Party
- Road Haulage Association
- AJ Power Limited
- Applied Logistics
- Dr Dan Boucher
- BulletExpress
- Centre for the Union
- Gray & Adams Ltd
- McBurney Transport Group
- McCulla Ireland (I)
- McCulla Ireland (II)
- MMK Express Limited
- Mr Jack Steele
- Palyn Transport Management Consultants
- Target Transport

Dear Lord Hodgson,

Re: Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17),

We write to draw the attention of the Secondary Legislation Scrutiny Committee to a series of concerns with respect to the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17).

We argue that the Regulations should be brought to the attention of the House because they engage the Committee's terms of reference under 4:

1] 'that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House.'

The regulations are hugely controversial and of great political and legal importance for the following reasons:

i) Devolved

First, they involve the Westminster Parliament in legislating on a devolved Northern Ireland matter that is the proper concern of the NI Department of Agriculture, Environment and Rural Affairs (DAERA).

ii) Legally Important – International Law

Second, the regulations are for the purpose of building infrastructure to give effect to customs and Sanitary and Phytosanitary (SPS) checks on goods at Northern Ireland points of entry coming from the rest of the United Kingdom as if Northern Ireland was a foreign country vis a vis the rest of the UK. The regulations consequently give effect to undermining the territorial integrity of the United Kingdom. This is contrary to two important principles of international law, first the concept of the territorial integrity of the sovereign state, in our case the United Kingdom of Great Britain and Northern Ireland¹, and second the principle of self-determination, in that the people of NI are citizens of the United Kingdom of Great Britain and Northern Ireland.²

In order to unpack the difficulty with the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17), in terms of territorial integrity and self-determination, one must understand that their purpose is for protecting the integrity of the different legal regime that applies to Northern Ireland in response to pressure from the 27 sovereign states in the European Union. It is helpful to rise to this challenge through consideration of applications of territorial integrity and self-determination. To

¹ For example: 'Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.' UN General Assembly resolution 1514 (XV)), UN Resolutions have the standing of customary international law.

² For example: Article 1 (2) of the UN Charter states that the purpose of the UN is:

'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; ...'

The United Nations International Covenant on Civil and Political Rights, meanwhile, begins:

'1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'

this end it is useful to consider, *The UN Declaration on Principles of International Law, Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations*.

The Declaration states:

‘Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.’

It also states:

‘Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.’

Lest anyone should be in any doubt about its importance of these principles, the Declaration also affirms:

‘The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.’

And ‘Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.’

To the extent that these regulations, based on regulation making powers in Article 8 C EUWA 2018, give effect to the disruption of the United Kingdom of Great Britain and Northern Ireland and are the result of legislation introduced in response to demands made by 27 other sovereign states in a treaty³, their compliance with international law is plainly in jeopardy.

³ <https://www.legislation.gov.uk/ukpga/2018/16/section/8C>, 8C Power in connection with Ireland/Northern Ireland Protocol in withdrawal agreement

(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate—

(a) to implement the Protocol on Ireland/Northern Ireland in the withdrawal agreement,

(b) to supplement the effect of section 7A in relation to the Protocol, or

(c) otherwise for the purposes of dealing with matters arising out of, or related to, the Protocol (including matters arising by virtue of section 7A and the Protocol).

(2) Regulations under subsection (1) may make any provision that could be made by an Act of Parliament (including modifying this Act).

(3) Regulations under subsection (1) may (among other things) make provision facilitating the access to the market within Great Britain of qualifying Northern Ireland goods.

(4) Such provision may (among other things) include provision about the recognition within Great Britain of technical regulations, assessments, registrations, certificates, approvals and authorisations issued by—

(a) the authorities of a member State, or

(b) bodies established in a member State, in respect of qualifying Northern Ireland goods.

(5) Regulations under subsection (1) may (among other things) restate, for the purposes of making the law clearer or more accessible, anything that forms part of domestic law by virtue of section 7A and the Protocol.

In order to really understand the difficulty facing the Regulations, however, one must appreciate that self-determination is also classed as a peremptory norm of international relations, that is to say a foundational, basic norm of international law that, consistent with the above, cannot be contradicted. The Vienna Convention on the Law of Treaties defines the capacity of peremptory norms without listing them. The fact that the right to self-determination is a peremptory norm of international relations, however, is set out by the International Law Commission. For example, its chapter entitled 'Peremptory norms of general international law (jus cogens)' contains what the Vienna Convention on the Law of Treaties does not set out, namely a list of Peremptory norms of general international law (jus cogens), although it is careful to stress that the list is non illustrative: *'Annex (a) The prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; (h) The right of self-determination.'*⁴

Speaking of self-determination specifically, the Commission states:

*'(12) The final norm listed in the annex is the right of self-determination. In describing the norm as having peremptory character, the Commission has used the formulation "the right of self-determination", although it has at times referred to the "right to self determination".'*⁵

The implications arising from this are plainly set out by Article 53 of the Vienna Convention on the Law of Treaties which states:

'Treaties conflicting with a peremptory norm of general international law ("jus cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

This invalidates the Regulations because their purpose, under S 8C of the European Union Withdrawal Agreement Act 2018 is to give effect to the Protocol, which is voided by the effect that it

[F2(5A)Regulations under subsection (1) may not amend, repeal or otherwise modify the operation of section 47 of the United Kingdom Internal Market Act 2020 ("the 2020 Act"), except by making—

(a)provision of the sort that is contemplated by section 47(2) of the 2020 Act (permitted checks);

(b)provision under subsection (6);

(c)provision of the sort described in paragraph 21(b) of Schedule 7 (supplementary and transitional provision etc) in connection with—

(i)provision within either of the preceding paragraphs;

(ii)Articles 5 to 10 of the Northern Ireland Protocol ceasing to apply (and the resulting operation of section 55(1) of the 2020 Act).]

(6)A Minister of the Crown may by regulations define "qualifying Northern Ireland goods" for the purposes of this Act.

(7)In this section any reference to the Protocol on Ireland/Northern Ireland includes a reference to—

(a)any other provision of the withdrawal agreement so far as applying to the Protocol, and

(b)any provision of EU law which is applied by, or referred to in, the Protocol (to the extent of the application or reference),

but does not include the second sentence of Article 11(1) of the Protocol (which provides that the United Kingdom and the Republic of Ireland may continue to make new arrangements that build on the provisions of the Belfast Agreement in other areas of North-South cooperation on the island of Ireland).]

⁴ <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>

⁵ Ibid., p. 942.

has undermining the integrity of the United Kingdom of Great Britain and Northern Ireland and that it has in removing Northern Ireland's part in its self-determination in relation to the laws to which it is subject in some 300 different areas.

Some might seek to argue that Northern Ireland's role in its self-determination is upheld by Article 18 of the Protocol which makes provision for a vote by members of the Northern Ireland Assembly four years after Protocol comes into effect and after every four to eight years thereafter. The problem with this argument is that Article 18 does not amount to vote of self-determination but rather a vote of self-negation.

The first problem is that the Protocol was imposed without the sanction of an Article 18 vote and provision is not made for one until four years after Northern Ireland is subject to having its laws made by a polity of which it is not a part and in which it has no representation. This is problematic both because the provision of Article 18 rightly authenticates the sense that Northern Ireland should be involved in its own law making and because it denies Northern Ireland that right, effectively making it an EU colony for four years (Colonies are created where any laws are made for a jurisdiction by a polity of which it is not a part and in which it has no representation. Most colonies are largely self-governing and are defined as colonies because in some respects their laws are made by the legislature of an outside power in which they have no representation.) This denial of democracy for four years is manifest both in relation to democracy as a process that involves the elected representatives of the people holding the government that proposes the legislation to account and in relation to democracy as a process that involves the elected representative of the people in scrutinising, amending and making the laws to which they are subject.

The second problem is that if we seek to 'time limit' the sense in which Northern Ireland has been an effective colony to four years by saying that the vote four years after the application of the Protocol is for the purpose of providing democratic scrutiny all the laws imposed in the last four years, the mechanics of the vote simply do not allow for this. Article 18 makes provision for one debate of up to 6 hours and one vote. There is no opportunity to scrutinise the legislation of the past four years through amendments and votes, and one would be compelled to submit all the legislation to one vote when clearly intelligent engagement would require the facility to accept some laws, amend and accept others and reject others. As if this was not enough any claim that this provides democracy suffers from the fatal flaw that even if the Assembly voted 'no' this would not cause any of the laws of the past four years to fall away. Indeed, it would have the effect of asking for laws to continue to be imposed for a further two years and then followed by some kind of proposal for doing things differently to some unknown degree which may do nothing to change any laws passed up until that point.

On the other hand, if we agree that Northern Ireland is made a colony of the EU for the first four years, and effectively stuck with the legislation passed during that period, and instead test Article 18 as a vote for all the legislation that will come in the next four years, one encounters even more problems. All the difficulties about not being able to scrutinise or amend four years' of legislation with a single vote stand, as does the problem that it would not even be possible to talk about some of the legislation because it would not yet have even been published or necessarily even conceived. Moreover, and once again, a no vote would actually have the effect of being a yes vote to another two years of imposed legislation followed by some kind of undefined proposal for doing things differently, although in what way, and whether changing any laws passed up until that point, is entirely unclear.

The nature and effect of a vote must be judged not by what is supposed to be its impact, but by its actual impact. The actual effect of an Article 18 vote is not a provision whereby Northern Ireland can be afforded democratic rights in any recognisable sense: namely in relation to holding Commissioners to account as they propose legislation and shaping that legislation through amendment, with the option of rejecting it entirely if not satisfied. Instead, its practical effect is for MLAs to renounce the rights of their constituents to be represented in the making of the laws to which they are subject in some 300 areas for between 4 and 8 years.

The first difficulty with this arrangement is that it is not clear that elected representatives actually have the right to renounce the rights of citizens to be represented in the making of the laws to which they are subject on their behalf. The effective task at hand is constitutionally completely different from the usual sense of representing in the sense of giving effect to the rights of your constituents to be represented in law making. The only relevant comparator here is the way in which the UN deals with colonies that wish to remain colonies, and whose people therefore wish to renounce their right to vote narrowly with respect to the responsibilities held by the colonial power. Whilst the vast majority of colonies have seized the opportunity to claim the full vote of their citizens, there are a very small numbers of colonies who, normally, because of a combination of: i) their sense of identity with the colonial power, ii) small size and iii) opportunity to be self-governing in many respects, wish to remain in a colonial relationship with respect to certain governance competencies which stay with the colonial power. The enormity of what is involved, however, is such that the citizens of the colony are required to consent to this not through elected representatives, but directly themselves in a referendum to indicate that this is so. It is not for a representative to renounce these rights. Only the citizen can do that themselves. In that sense it is clear that the UK is being subjected to the indignity of being forced to treat part of itself with less respect than a colony.⁶

The second difficulty is that the UK Government cannot ask the people of Northern Ireland to uniquely submit to being less enfranchised than people living in the rest of the UK, and indeed people living in the Republic of Ireland, because it has constrained itself in international law by affording the people of Northern Ireland an additional guarantee of the integrity of their democratic rights through the Belfast Good Friday Agreement right 'to pursue democratically national and political aspirations' of which more in the next section.

In conclusion to this point, therefore, Article 18 does not invalidate our contention that the Regulations are invalidated because the treaty it is the purpose of the Regulations to effect has been voided because of its violation of the peremptory norm of international relations, 'self-determination.' The impact thus remains that it is no longer appropriate to make laws on the basis of S. 8C of the European Union Withdrawal Agreement Act 2018.

iii) Contrary to the Belfast Good Friday Agreement

Third, Articles 1 and 2 subject the Protocol, as a whole, to the Belfast Good Friday Agreement. This is of critical importance because Article 31 of the Vienna Convention on the Law of the Treaties states Article 30 (2) of the Vienna Convention on the Law of Treaties states: 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.' In particular, Article 2 (1) makes it plain that the operation of the Protocol must not be permitted to undermine the Belfast Good Friday Agreement human rights

⁶ An example of a NSGT determining whether it wishes to maintain NSGT status or not is New Caledonia, which is currently classified as an NSGT under France as the colonial power. This has result in 3 referenda. <https://press.un.org/en/2022/gacol3359.doc.htm>

provisions. Specifically, it states: *'The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, ...'* which include the 'right to pursue democratically national and political aspirations.'

From the time when the Belfast Good Friday Agreement was made on 10 April 1998 (and indeed from long before) until 31 December 2020, the people of Northern Ireland enjoyed the right to: i) stand for election to make all the laws to which they were subject and ii) elect fellow citizens to make those laws. Since the coming into force of Articles 5 to 10 of the Protocol, however, their operational effect has been shown to directly contradict Article 2 (1), which subjects the Protocol to the Belfast Good Friday Agreement, (meaning that the latter takes precedence, see Art 31 (2) Vienna Convention on Law of Treaties) to the requirement that the right that they enjoyed previously to 'pursue democratically national and political aspirations' should continue to be upheld. That right, however, has instead been subject to radical curtailment as the people of Northern Ireland no longer have the right to seek democratically national and political aspirations with respect to 300 different areas of the law to which they are subject. Since 1 January 2021, 428 laws have been imposed on Northern Ireland in relation to which the people of NI have neither been able to serve as legislators nor as citizens having elected, and having an ongoing relationship with, their legislators. This is directly relevant to the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17), because it is their purpose to protect the integrity of the regulatory regime resulting from the imposition of those 428 new laws.

As if this was not enough the laying of these regulations just ahead of the hope that there might be something to celebrate on the occasion of the twenty fifth anniversary of the signing of the Belfast Good Friday Agreement, 10 April 2023, makes them about as controversial as it is possible to imagine. The whole purpose of the Good Friday Agreement was to persuade people who had previously sought to pursue national and political aspirations through terrorism to renounce this and to instead determine 'to pursue democratically national and political aspirations.' This process was all about upholding the importance of the NI vote and NI citizenship. It is, therefore, a matter of huge controversy that notwithstanding this additional international legal imperative which only applies to Northern Ireland, Northern Ireland is now the part of the UK where it is no longer possible to pursue democratically national and political aspirations in relation to 300 areas of the laws to which we are subject. Rather than honouring the Belfast Good Friday Agreement the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17) play a critical role in undermining it by laying the foundation for protecting a regulatory regime created on the basis of subverting the human rights foundation carefully laid by the Belfast Good Friday Agreement. Again Article 18 of the Protocol provides no answer to these difficulties for the reasons set out in ii).

iv) Economically Destructive

Fourth, the impact of the customs and SPS border that it is the purpose of the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17) to give effect to, has been shown to be far more destructive than expected, i.e. that associated with the allocation of customs and SPS borders along international borders.

Lorries engaged in international trade typically carry one or two products in bulk. In order to take these across an international border they have to meet the expense, in time and money, of generating one of two export declarations and, depending on the cargo, potentially one or two SPS declarations. While the task of having to generate these is a hassle and an expense, the cost,

expressed as a percentage of the value of the cargo, is tiny. It constitutes an obstacle that can easily be negotiated.

When lorries engaged in international trade enter their destination economy, they travel to distribution centres where they are unloaded and their goods are then loaded, with the goods of many other lorries, onto different lorries engaging in domestic trade. The contents of these lorries are completely different to the contents of lorries engaged in international trade. Rather than carrying one or two products, they can carry up to 300, as they take goods from Exeter to Edinburgh or Cardiff to Carlisle, from Birmingham to Belfast etc.

However, if one was to place a customs border arbitrarily across the middle of an economy, for our purposes, the UK economy, from, say, Chester to Great Grimsby, these lorries would be stopped and required not to produce one or two customs declarations but 300 and potentially another 300 SPS declarations. The cost of having to generate all this paperwork in time and money expressed as a percentage of the value of the cargo (which is not the cost of checks) would be huge and constitute, for some purposes, an absolute barrier making trade on this basis either uneconomic or not work the bother.

The application of a customs border in this domestic context, for which it was not designed, would therefore be much more divisive than the application of a customs border along the international boundary between two separate economies, for which it was designed. It would require the UK to submit, before the world, to the indignity of inserting an alienation within itself the practical consequences of which are far more divisive than those flowing from the application of a customs border between different countries. Far from resulting in the mere inconvenience of an additional hurdle, as in international trade, the application of a customs border across an integrated economy would effectively constitute, for some purposes, a solid barrier, the consequences of which would be devastating. Regardless of which side of the border one was located, people would be denied access to the full benefits of citizenship which in the modern nation state means direct access to a whole national single market, with all that this means in terms of restricting their economic opportunities.

Now, at this point, in turning to apply these realities to the place within the United Kingdom where such a border has been imposed, between GB and NI, it is important to understand two points:

In the first instance, the devastating implications of applying a customs border across the domestic economy are obscured to some considerable degree by the presence of grace periods. Hauliers have made it plain that if the grace periods ended and the Protocol is applied then Northern Ireland's supply chains would begin to break within 48 hours. The infrastructure created by the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17) would be fully implicated in giving effect to this breaking of the supply chain, raising huge concerns about access to essential supplies.⁷

In the second instance, the Chester-Great Grimsby customs border fails to adequately explain the difficulty arising from the Northern Ireland Protocol, enforced by these regulations, which can only be fully appreciated when one remembers that if you cut off a small part of the UK economy, like Northern Ireland, from the wider UK economy, you create difficulties for it that far outweigh the difficulties that would arise for those effected if you simply cut the economy in half. While this would cause massive disruption, people living North of a Chester-Great Grimsby customs border would still have access to a lot of suppliers as would those South of the border. Northern Ireland,

⁷ www.irishnews.com/news/brexit/2022/10/21/news/full_implementation_of_ni_protocol_would_halt_east-west_trade_within_48_hours_-2870649/
<https://www.bbc.co.uk/news/uk-northern-ireland-63357119>

however, finds itself in a more challenging situation. In order to fully understand this point one must recognise that access to the Republic of Ireland single market in no way offsets being cut off from the greater part of UK economic nationality, one must understand that Northern Ireland is a fully integrated part of the UK economy with only limited economic connections between NI and ROI.

v) Political Change of Course

Fifth, in a letter to the House of Lords Sub Committee on the Protocol of 28 December, Lord Benyon made it clear that the purpose of some proposed new regulations (subsequently named the Official Controls (Northern Ireland) Regulations 2023) was to facilitate the Protocol Bill.

'As you are aware, the Government is working intensively to put in place revised arrangements for the operation of the Northern Ireland Protocol which address the social, political and economic difficulties that the Protocol has caused in the past two years. The Government's preference remains a negotiated solution, but we are proceeding with the Northern Ireland Protocol Bill (the 'Bill') as the situation in Northern Ireland needs to be resolved in any event. This involves preparing to be able to deliver the red and green lane arrangements set out in the Bill in a smooth and timely way. ... Defra will introduce the necessary statutory instrument and relevant guidance to underpin this early in 2023.'

However, the regulations are made on the basis of a Regulation making power for the purpose not of implementing the Protocol Bill, presented to Parliament as a constraint on the Protocol, but rather on the basis of a power in S.8C EUWA that is, contrarily, for the express purpose of giving effect to the Protocol and for no other purpose.

From June 2022 until the publications of these regulations the Government had been operating in a context where it had paused pushing ahead any further with the Protocol and had instead introduced the Protocol Bill to limit its damage. We appreciate that shortly before Christmas the Government said it was also pausing the Protocol Bill but that was not because of a change of policy but simply for the purpose of focusing narrowly on the task of seeking to get comparable concessions through a deal between then and mid Feb 2023. What the Official Controls (Northern Ireland) Regulations 2023 imply, however, is that instead the Government is now reverting to the Protocol and its implementation. This endows the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17) with huge political significance.

In the first instance, it calls into question the Government's seriousness in approaching the negotiations. It is not possible to strengthen one's hand in negotiations, if one wants a better deal, by delivering to the other side, in advance, the heart of what they want. It is one thing to pause the Protocol Bill in the run up to doing a deal. It is quite another to actually walk back to the Protocol to implement one of its main provisions and right at the point when the Government would have the people of Northern Ireland believe that it is going into bat for them.

In the second instance, it calls into question the Government's commitment to the Protocol Bill. How can the Government have any intention of securing everything in the Protocol Bill if it is already proceeding with progressing the implementation of the heart of the Protocol before the conclusion of the negotiations??

2] The regulations should be brought to the attention of the House because they are 'inappropriate in view of changed circumstances since the enactment of the parent Act;'

The purpose of the Regulations is to give effect to the Northern Ireland Protocol under S 8C EUWA but it is no longer appropriate that they should do so because of changed circumstances since the enactment of the parent Act.

Parliament voted for the Protocol on the basis that it is subjected to the Belfast Good Friday Agreement. The treaty drafters did not go to the length of subjecting the Protocol to the Belfast Good Friday Agreement because the drafters believed that the Protocol was obviously consistent with it. Had that been the case then there would have been no rationale for subjecting the Protocol to the Belfast Good Friday Agreement. Moreover, the clear concern that there might be a conflict translated into placing a very explicit international legal obligation on the UK Government, see Article 2(1) above, especially pages 5 and 6, to ensure that the implementation of the Protocol does not undermine the human rights, discrimination and equality of opportunity provisions in the Belfast Good Friday Agreement.

Parliament voted for the Protocol in the context of this protection.

However, those rights have now been eroded in that the people of Northern Ireland have not had the opportunity to pursue 'democratically national and political aspirations' in relation to the development of 428 laws to which they have been subject. Northern Ireland is now the one place in the United Kingdom where the value of the vote and the value of citizenship has been debased because since 1 January 2021 it is no longer possible to stand for election to make all the laws to which we are subject, nor is it possible to elect fellow citizens to make all the laws to which we are subject.

Given that some parliamentarians only voted for the parent Act on the basis that the protections would be applied, and that in actual fact the protections have not been applied such that the 'right to pursue democratically national and political aspirations' has been subject to dramatic erosion, we are confronted with a changed circumstance which means it is no longer appropriate to seek to uphold the integrity of the regulatory regime created as a consequence of the violation of those rights through the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17).

It would be deeply problematic for Parliament to vote for these regulations at any time after the changed circumstances arising from knowledge about the practical implications of the Protocol with respect to the erosion of human rights commitments at the heart of the Belfast Good Friday Agreement. To do so now, however, and thereby effect the erosion of the Belfast Good Friday Agreement on the eve of the twenty fifth anniversary of its signing, would be particularly reckless.

3] (e) that there appear to be inadequacies in the consultation process which relates to the instrument;

Notwithstanding the huge controversy associated with these regulations, we are not aware of any public consultation ahead of their introduction.

The complete absence of consultation, especially in light of all the problems set out above, is completely indefensible.

Yours sincerely

Rt Hon Sir Jeffrey Donaldson MP

Rt Hon Lord Dodds of Duncairn

Dear Lord Hodgson

23 January 2023

Re: Official Controls (NI) Regulations Statutory Instrument 2023 No: 17

I write with regard to the above statutory instrument made on the 11th January 2023 and coming into effect on the 2nd February 2023.

It is of considerable concern that it does not appear the regulations have been subject to proper consultation and full and proper consideration by those most affected by its introduction.

We would respectfully suggest that the regulations specified above should be brought to the attention of the house due to the committee's terms of reference paragraph 4:

- a) ***That it is legally important or gives rise to public policy likely to be of interest to the House*** in that the regulations will impose additional burden on businesses and consumers within Northern Ireland with the primary vires resting with the Department of Agriculture Environment and Rural Affairs in Northern Ireland, and we are unaware of any consultation regarding these regulations which would appear to be contrary to the Governments own Consultation Principles – Guidance updated in 2018 and runs contrary to good governance and transparency. It would also appear that the original stated purpose of the regulations (As per Lord Benyon on the 28 December) was for the enactment of the Protocol Bill should a negotiated settlement not be achievable with the European Union regarding the Ireland/Northern Ireland Protocol, however this objective appears to have been

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changed with different vires (Section 8c of the EUWA) used again without proper debate or consultation.

- b) The regulations are being made for the construction of Border Control Posts to give effect to regulatory Customs and Sanitary and Phytosanitary checks on goods entering Northern Ireland from Britain both of which are within the United Kingdom thus resulting in a significant impact on goods moving within the UK internal Market. This is contrary to the commitment made by the previous Foreign Secretary Liz Truss who assured the road transport logistics sector that “it would be the same as moving goods from Birmingham to Glasgow as it would be from Birmingham to Belfast”. These provisions will result in significant increase in costs to Northern Ireland Businesses and consumers and will lead to a reduction in the movement of goods from GB to NI.

The current Customs and SPS requirements on the movement of goods between GB and NI are designed for long distance trade with limited product lines across International borders. This results in limited amount of bureaucracy and costs which can be completed over a lengthy period prior to arrival in the country of destination with the cost being minimal due to the limited number of product lines being transported. However, the nature of the movement of goods between GB and Northern Ireland is totally different to that of International trade with significant number of product lines within a single load being transported from manufacturing facilities, regional distribution hubs or collected from multiple sites within GB with the last leg of the journey to Northern Ireland within an internal market within a just in time delivery window. Considering the volume of product lines, the necessity to complete multiple Export Health Certificates and Customs declarations will have a significant impact on GB to NI trade resulting in trade diversion, significant increase in costs, considerable reduction in product selection and will negatively impact of

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business efficiency due to the circular nature of logistics between GB and Northern Ireland (For every load leaving Northern Ireland to GB the vehicle must bring a load back). This ensures NI product remains competitive in the GB marketplace as the transport costs is covered by the outbound and inbound loads.

Your Sincerely

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Diesel generating sets worldwide

23 January 2023

Dear Lord Hodgson

Official Control (NI) Regulations Statutory Instrument No. 17 2023

I am writing to you regarding the statutory instrument made on the 11th January 2023 which will come into effect on the 2nd February 2023.

I have concerns that the regulations have not been subject to proper consultation or the scrutiny of those most affected by its introduction.

The regulations require the construction of Border Control Posts for regulatory Customs checks on goods entering Northern Ireland from Great Britain contrary to commitments by previous Government Ministers. These provisions will result in significant costs to the Northern Ireland businesses due to Custom paperwork / entry requirements and potentially higher EU Customs duties (Taric v UKGT). It should also be borne in mind that these provisions will over time result in a reduction in procurements from G.B.

I would suggest this matter should be brought to the attention of the House.

Yours sincerely

Ashley Pigott
Chairman &
Managing Director

AJ Power Limited

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Attention of Lord Hodgson of Astley Abbots

As a service partner to over 450 GB Traders exporting to the Island of Ireland I feel that I'm in a good position to be able to comment on the lack of consultation of the proposed NI border controls. Specifically I have been contacted by a key Customer, who has very valid concerns, that I can only agree with. I am a GB resident working in NI and clearly see both aspects of the supply chain. I practically see the day to day impact of the Protocol and Brexit and the way decisions made and assumed affect GB traders and real people on the ground. I am all too aware of other operators in the market that continue to flout the rules as they currently exist and have to call out the claims made by officialdom that all EU checks are being made on entry via NI for product at risk.

Most authorities simply would not know where product is destined for based on the health information and complete lack of HMRC control at the ports. Local port authorities would not know what is in the majority of vehicles moving into and through NI based on the declaration and especially the STAMNI scheme. We have been saying this for over two years now.

The infrastructure required to control the movement of product from GB to EU via NI simply does not exist. Given what the port authorities are supposed to be doing to protect public health, how does anybody think that the current Belfast facilities are nothing short of embarrassing. A car park a few tents in one area next to the motorway and another facility so small that it is simply laughable it could cope with the level of checks required although the FSA have claimed that such facilities are available and operational at all ports.

In times of further austerity and public debt being at a substantial level of GDP, where is the funding coming from to build the facilities required to satisfy the EU? Even if this is validated as a true requirement by HMG I would like to know how the decision will be arrived at. Time and again we see and experience a lack of understanding at many levels of Government be it HMG, Stormont and interested parties such as HMRC, FSA, DAERA and DEFRA. There are many example of this and not consulting with stakeholders is a fundamental flaw.

As likely you will know Ireland is to receive a total of 1.16billion euro between 2021 and 2025 as a result of Brexit. While it is understandable this is necessary expenditure as a result of Brexit, and is clear to see how they have invested and extended port facilities, how this to be funded in NI and if the requirement is deemed as needed, are the UK Government pressing for the EU to build the facility? I doubt it.

My Customer's comment and I agree with this completely

DEFRA has blindly stated that the government cannot foresee a position where permanent border controls are not required at NI ports of entry, even just for red lane requirements. This only further proves that the failure to consult is creating bad law. For example, should the UK move forward with the "Protocol Bill" and the EU maintain its resistance then the BCPs at NI ports would be pointless as the EU may set to impose its own controls on Irish or mainland Europe side. Also, should the negotiations prove fruitful, and the EU accept similar

controls for GB to IE movements as say from Dublin to Holyhead, (where there are no such BCPs) than again they would not be needed.

Even in the most basic statement from DEFRA suggesting the checks will be required for goods going directly to Ireland from GB via NI ports (so called red lane checks) it is implausible to believe that positioning such controls at all NI ports is a reasonably practical or cost-effective position. Surely a central BCP south of port of Belfast on the Dublin road could facilitate this trade (estimated at 5% of the total trade by HMG) as the consignments are moving under seal and would be predeclared even before they arrive in the NI port and therefore can be easily diverted to a single inland BCP, as per HMGs own plans for entry to GB from the EU. This would create a substantial cost reduction in terms of not just the building of infrastructure but also the on costs of running the facilities. The operational efficiency of implementing controls at all ports of entry to NI would be severely impacted by the infrequent sailings and peaks and troughs of activity. At a time when the Northern Irish Health service is on its knees, and centralisation of services is seen as the way forward it is somewhat of a paradox that government appears to desire to build a fragmented Border controls model on the costliest basis thinkable.

I assume HMG does not intend to do a deal which creates more checks than are already in place. Given DAERA has stated that it has completed 100% of all the checks required for goods going into Ireland, and additionally the controls for goods coming into Northern Ireland which would be removed/ reduced in any outcome it is difficult to see why larger facilities are required.

I would also like to ask of the role of HMRC in the operation of the controls. If the red lane, GB to IE via NI, checks create the requirement for the BCPs, and government was attempting to replicate Controls for Direct movement into Ireland then why would BCPs not fall under customs control. Not all goods moving GB to IE via NI will have SPS requirements. Again, a further trap door opens for hauliers as goods need to be released into Ireland after being cleared by Irish customs, not just SPS.

Therefore, I trust it is clear that the continual failure to consult with the sector, is yet again leading to poor decision making by Government. Perhaps the intention will be similar to 2021 when meetings with hauliers began to happen after the controls were rolled out and the mess became obvious.

Steve Burden

Operations Director

Applied Logistics

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Dear Lord Hodgson,

Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17),

I am writing to draw the attention of the Secondary Legislation Scrutiny Committee to some far-reaching concerns regarding the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17), mindful of your terms of reference 4 a.

‘that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;’

It is the purpose of the regulations to protect, through border checks, the integrity of a different legal regime that operates on Northern Ireland than in the rest of the United Kingdom.

That different legal regime is the result of Northern Ireland being subject to laws in 300 areas that are made for NI by the EU Council of Ministers and Parliament.

No part of the United Kingdom – including Northern Ireland – is part of the EU and so Northern Ireland has no representation in either the Council of Ministers or the European Parliament.

This means that whereas before 1 Jan 2021 people in NI could stand for election to make all the laws they are subject to and could also vote at election time to choose law-makers from fellow citizens, this is no longer possible not just in relation to 300 laws but in relation to 300 areas of law.

Of course, I understand that the debasing of the vote in Northern Ireland and the resulting truncation of citizenship in NI, does not arise from these regulations, but they are totally implicated in validating it in having the purpose of upholding the integrity of what results from that truncation, of deeming its consequences worthy of protection.

In that sense it is impossible to vote for these regulations without also voting to acquiesce with and authenticate the truncation of citizenship in NI on which they depend.

This seems completely bizarre just weeks out from the twenty fifth anniversary celebrations of the Good Friday Agreement which were supposed to be all about turning away from terrorism to the pursuit of exclusively democratic means, a strategy that rightly assumes the option of full citizenship.

I also believe that your terms of reference are engaged under 4 b:

‘The regulations should be brought to the attention of the House because they are ‘inappropriate in view of changed circumstances since the enactment of the parent Act;’

Article 2 (1) of the Protocol places an obligation on the UK Government to ensure that the operation of the Protocol does not result in the erosion of the human rights provisions in the Belfast Good Friday Agreement.

These include the right ‘to pursue democratically national and political aspirations’ set out in the ‘rights, safeguards and equality of opportunity’ section of the agreement.

Anyone voting in 2020 for Section 8C of the parent Act which pertains to the Protocol would have done so on the assumption that the protections it affords with respect to democracy would be upheld.

This, however, is exactly what has happened. From 10 April 1998 (and indeed long before) until the end of 2020, the people of NI had the right to stand for election to serve as legislators making all the law to which they are subject, but the operation of the Protocol is resulting in the radical truncation of that right.

The fact that protections in the Protocol have not been upheld means that there has been a hugely important change since the passing of the parent legislation that means that rather than upholding the Good Friday Agreement the operation of the Protocol has debased the value of the vote in Northern Ireland, and by extension of citizenship in Northern Ireland, and this necessarily calls into question the appropriateness of the Official Controls (Northern Ireland) Regulations 2023 (S.I., 2023, No. 17).

These matters impinge on me even though I don't live in Northern Ireland because any arrangement that moves away from the principle that the United Kingdom of Great Britain and Northern Ireland is prepared to allow some of its citizens to have a lesser citizenship than those residing in other parts of the country cannot but impact the quality of the political community that underpins the UK as a whole.

I am English, but have spent 25 years living in Wales and am in the process of moving to Northern Ireland. In making that move I will lose the right I currently have, and have exercised in Wales, to stand for election to make all the laws to which I am subject and thus experience the truncation of my citizenship. I am already working in the Province for a political party.

Best Wishes

Dr Dan Boucher
07979591407

Dear Lord Hodgson

23 January 2023

Re: Official Controls (NI) Regulations Statutory Instrument 2023 No: 17

I write with regard to the above statutory instrument made on the 11th January 2023 and coming into effect on the 2nd February 2023.

It is of considerable concern that it does not appear the regulations have been subject to proper consultation and full and proper consideration by those most affected by its introduction.

We would respectfully suggest that the regulations specified above should be brought to the attention of the house due to the committee's terms of reference paragraph 4:

That it is legally important or gives rise to public policy likely to be of interest to the House in that the regulations will impose additional burden on businesses and consumers within Northern Ireland with the primary vires resting with the Department of Agriculture Environment and Rural Affairs in Northern Ireland, and we are unaware of any consultation regarding these regulations which would appear to be contrary to the Governments own Consultation Principles – Guidance updated in 2018 and runs contrary to good governance and transparency. It would also appear that the original stated purpose of the regulations (As per Lord Benyon on the 28 December) was for the enactment of the Protocol Bill should a negotiated settlement not be achievable with the European Union regarding the Ireland/Northern Ireland Protocol, however this objective appears to have been changed with different vires (Section 8c of the EUWA) used again without proper debate or consultation.

The regulations are being made for the construction of Border Control Posts to give effect to regulatory Customs and Sanitary and Phytosanitary checks on goods entering Northern Ireland from Britain both of which are within the United Kingdom thus resulting in a significant impact on goods moving within the UK internal Market. This is contrary to the commitment made by the previous Foreign Secretary Liz Truss who assured the road transport logistics sector that "it would be the same as moving goods from Birmingham to Glasgow as it would be from Birmingham to Belfast". These provisions will result in significant increase in costs to Northern Ireland Businesses and consumers and will lead to a reduction in the movement of goods from GB to NI.



The current Customs and SPS requirements on the movement of goods between GB and NI are designed for long distance trade with limited product lines across International borders. This results in limited amount of bureaucracy and costs which can be completed over a lengthy period prior to arrival in the country of destination with the cost being minimal due to the limited number of product lines being transported. However, the nature of the movement of goods between GB and Northern Ireland is totally different to that of International trade with significant number of product lines within a single load being transported from manufacturing facilities, regional distribution hubs or collected from multiple sites within GB with the last leg of the journey to Northern Ireland within an internal market within a just in time delivery window. Considering the volume of product lines, the necessity to complete multiple Export Health Certificates and Customs declarations will have a significant impact on GB to NI trade resulting in trade diversion, significant increase in costs, considerable reduction in product selection and will negatively impact of business efficiency due to the circular nature of logistics between GB and Northern Ireland (For every load leaving Northern Ireland to GB the vehicle must bring a load back). This ensures NI product remains competitive in the GB marketplace as the transport costs is covered by the outbound and inbound loads.

Yours Sincerely,



David McCutcheon
Chief Executive Officer



Centre for the Union

Submission

House of Lords – Secondary Legislation Scrutiny Committee

22 January 2023

Introduction

[1] This submission is provided on behalf of the Centre for the Union, a pro Union think tank with an active department in all parts of the United Kingdom. This submission is prepared by the Northern Ireland Department but reflects the view of our organisation collectively.

[2] The committee's terms of reference ('TOR') provides the ability to determine that the special attention of the House should be drawn to any measure which falls within paragraph 4 of the TOR.

[3] Paragraph (4) provides:

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may imperfectly achieve its policy objectives;

(d) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;

(e) that there appear to be inadequacies in the consultation process which relates to the instrument;

(f) that the instrument appears to deal inappropriately with deficiencies in retained EU law.

[4] In our submission the impugned regulations, for reasons which we will develop *infra* in more detail, plainly falls within paragraph (4) (a), (b), (c), (d) and (e).

[5] In summary:

(a) the OCR (NI) 2023 deals with an issue of the utmost political, constitutional and thus legal importance. The interpretation applied to Northern Ireland is that it is the entry point, and thus part of, the EU territory rather than that of the United Kingdom. It is difficult to envisage a matter of more importance to the House.

(b) the laying of OCR (NI) 2023 is plainly inappropriate in so far as no one at the time of the laying of the parent Act anticipated that the powers therein would be used to treat NI as purely *de jure* part of the UK customs of territory, but in fact in practice part of the EU territory. That point is made good by reference to Article 4 of the Protocol itself which expressly states NI is part of the UK customs territory. It is further emphasised by Article 5 (1) and (2) whereby even the 'at risk' concept treats NI and the EU as two separate territories.

(c), (d) and (e) can be treated together due to significant overlap. The explanatory notes (as will be addressed further *infra*) set out contradictory positions as to the purpose for which the powers are being exercised. It is submitted by the Government that it is to (i) implement existing obligations (i.e the Protocol); (ii) to prepare for the NI Protocol Bill (which in fact replaces large parts of the Protocol and therefore cannot logically have any relation to implementation of the Protocol or existing obligations therein; (iii) to prepare for any (as yet known and unknowable) 'negotiated solution'. It is plain therefore that the exercise of the relevant enabling power is for an improper (or at the very least, entirely confused) purpose. There has been no significant widespread consultation- or scrutiny of either House- on treating Northern Ireland as the entry point into the EU.

[6] We address below the various flaws in the impugned regulations *infra*.

The interpretation applied to OCR 2017/625 treats NI as part of the EU

[7] The OCR (NI) 2023 regulations rest on the premise that Article 64 (1) of OCR 2017/625 requires or permits border control posts be constructed at the entry point into Northern Ireland. Article 64 (1) provides:

“1.Border control posts shall be located in the immediate vicinity of the point of entry into the Union and either in a place which is designated by the customs authorities in accordance with Article 135(1) and (2) of Regulation (EU) No 952/2013 or in a free zone.”

[8] The definition of “entry point into the Union” is provided by Article 3 (40) of OCR 2017/625, which states:

“(40) ‘entering the Union’ or ‘entry into the Union’ means the action of bringing animals and goods into one of the territories that are listed in Annex I to this Regulation from outside these territories, except in relation to the rules referred to in point (g) of Article 1(2) for which these terms mean the action of bringing goods into the ‘Union territory’ as defined in the second subparagraph of Article 1(3) of Regulation (EU) 2016/2031;”

[9] Annex 1, at point 28, defines the United Kingdom as ‘Great Britain and Northern Ireland’. It is trite to point out therefore that bringing animals or goods from one part of the UK to another is not entering the Union, but rather moving internally within the UK.

[10] This being so, a proper interpretation of Article 64 (1) does not create any obligation to construct border control posts internally within the territory defined as the United Kingdom of Great Britain and Northern Ireland.

[11] In *Rooney and JR181* (3) [2023] NIKB 3 Colton J¹ concluded that for the purposes of the Protocol, Northern Ireland is to be treated as the entry point into the European Union. This finding is defeated by the Protocol itself, particularly Article 4. We squarely confront the judgment of Colton J and maintain the position that it is entirely wrong.

[12] Article 4 of the Protocol provides:

“Northern Ireland is part of the customs territory of the United Kingdom”

[13] Article 5 (1) of the Protocol provides:

“1. No customs duty shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing.” (underlining added)

¹ Adrian Colton, former SDLP election candidate and now highly regarded High Court judge.

[14] Two obvious points emerge: (i) the Protocol, given effect by s7A of the 2018 Act, provides that NI is part of the customs territory of the UK; (ii) even in Article 5 (1), the 'at risk' concept itself recognises that Northern Ireland is part of the United Kingdom, and it is only goods "*at risk of subsequently being moved into the Union*" which are liable to customs duty. Therefore, Northern Ireland (as part of the UK) and the European Union are recognised as distinct and separate entities.

[15] Any purported general implication derived from pulling together a combination the various sleight of hand provisions in the Protocol, must yield to the specific provision as set out in Article 4. On this basis alone the judgment of Colton J is fundamentally flawed.

[16] There is no *res judicata* (particularly as to Judicial Review judgments of the High Court) in this instance, and the Department of Agriculture, Environment and Rural Affairs are- for questionable political reasons which is raising serious concerns as to potential bias in the civil service - as yet refusing to appeal the highly contentious ruling, despite the Minister who was the target of the politically motivated challenge by two nationalist/republican activists making clear prior to leaving office that his position was that there should be an appeal.

[17] The committee will further note that the two applicants were granted 'standing' to bring the proceedings on an extraordinary basis; namely a bare assertion they cared about the rule of law and supported the Belfast Agreement. A theme running throughout the judgment was what appeared to be a clear hostility to the DUP Minister, and unionism's opposition to the Protocol in general, with a number of additional 'political' comments littered throughout the judgment.

[18] The committee will additionally, it is anticipated, feel some level of discomfort at a further theme running throughout the judgment of Colton J in *Rooney and JR181* (3), which appears to operate on the premise that the Minister is accountable to civil servants, rather than the other way around. This is a dangerous narrative for democracy, and seeks to empower civil servants over and above their Minister.

[19] In circumstances whereby this first instance judgment aligns with the legal basis for the Government's efforts to treat OCR 2017/625 as meaning NI is the entry point into the EU, there are deep concerns about the ultimate correctness of this judgment.

[20] There is presently pre-action protocol proceedings issued against the Government which squarely seeks to challenge the interpretation of OCR 2017/625. If this is successful, and there is every prospect that another High Court judge and/or the Court of Appeal will overturn Colton J, then the whole basis of OCR (NI) 2023 will be rendered redundant.

[21] In any event, and additionally, the Regulations have not been properly enacted in circumstances in which they seek to apply a domestic law interpretation to EU law which applies via Annex 2, in a different format to the EU law itself. In relying upon the EU law (via the Regulations) the Respondent is constrained to the definition imposed under EU law, save where it expressly states otherwise. No such steps have been taken. Thereafter, the position is, and remains, that the correct definition must be that as provided for under the EU law provision, which has been enacted domestically (via section 7A of the 2018 Act).

Breach of Article 4 of the Protocol

[22] The Government cannot give effect to Article 4 of the Protocol, and simultaneously apply OCR 2017/625 in a manner which entirely contradicts that specific provision, (i.e., by treating Northern Ireland as part of the EU customs territory).

[23] Section 7A of the 2018 Act brings into domestic law the provisions of Article 4 of the Protocol, which guarantees- as a matter of domestic law- Northern Ireland is part of the customs territory of the United Kingdom.

[24] Section 7A (2) (a) and (b) provides, *inter alia*, that the rights provided for in the Withdrawal Agreement (inclusive of the Protocol) are to be recognised, available and followed accordingly in domestic law.

[25] As per section 7A (3) of the 2018 Act, every enactment must be read and be given effect subject to section 7A (2).

[26] Accordingly, the Regulations are contrary to Article 4 of the Protocol, given effect in domestic law by section 7A (2) of the 2018 Act to the effect that Northern Ireland is part of the customs territory of the United Kingdom. This express provision is breached by laying Official Controls (Northern Ireland) Regulations 2023 which, by virtue of the interpretation applied to OCR 2017/625, treats Northern Ireland as the entry point into the EU rather than as part of the customs territory of the United Kingdom, which is expressly guaranteed by Article 4 of the Protocol.

Improper purpose

[27] The enabling power conferred by section 8C of the 2018 Act directs itself, even in the broad power in (c), to implementing the Protocol. However, the Government has been clear, both via public statements and in a letter published in the House of Lords by Lord Benyon, that the purpose of the Regulations is to give effect to the as yet unenacted NI Protocol Bill.

[28] This is plainly not an exercise of the power conferred by section 8C in a manner consistent with implementing the Protocol, because it- on the Government's own case- has in fact been used in pursuit of a collateral purpose, namely re-writing the Protocol via the NI Protocol Bill, or to implement an as yet knowable hypothetical 'negotiated settlement'.

[29] The fundamental contradictions are evident in the explanatory memorandum to OCR (NI) 2023. At 6.4 it states:

6.4 These powers will be necessary to implement either a negotiated solution with the European Union, or to implement the Northern Ireland Protocol Bill (the 'Bill'). The Bill, currently before Parliament, includes powers that would also require the enhancement of infrastructure at Northern Ireland ports (for example, section 5(3) creating regulation making powers for checks and controls). As these powers are not yet in

force, and the infrastructure improvements have a significant lead in time, it is appropriate to use the existing powers available.

[30] However, at 12 (of the same memorandum) it provides:

12. Impact

12.1 There is no significant, impact on business, charities or voluntary bodies. These regulations will ensure that the existing commitment can be executed in full.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because, as above, this relates to implementation of an existing commitment.

[31] It further goes on to confirm there has been no consultation (and thus on this ground alone falling squarely within paragraph (4) (e)) on the regulations, but to claim they have consulted on the NI Protocol Bill and other matters. It is difficult to see the relevance of this to the exercise of the power conferred by section 8C of the 2018 Act.

[32] The memorandum faces both ways. On one hand it claims to be about implementing the unenacted Protocol Bill or a hypothetical unknown negotiated deal with the EU; on the other hand it claims to implement an existing commitment. We ask the simple question: which is it?

[33] There is a further extraordinary position set out at 7.6 of the memorandum. The Government in the High Court and Court of Appeal in *Allister et al* argued that the implementation of the Protocol (particularly Article 18 and the NI Assembly consent vote) was not devolved. Yet now the Government seemingly accept that the implementation of the Protocol is devolved:

7.6 Schedule 2 of the Northern Ireland Act 1998 sets out Excepted Matters for Northern Ireland. Section 3(c) of this Schedule posits that the “[observation] and 3 CO/EM/2022.3 [implementation] of international obligations is not an excepted matter”. Therefore, under the terms of section 4(1) of the Act, where “transferred matter” means any matter which is not an excepted or reserved matter”, it is the responsibility of the Northern Ireland Executive to implement international obligations.

[34] This reversal demonstrates that the Government in truth are all over the place as to the legal basis for much of their Protocol implementation. This is not a sound footing on which to making such far-reaching constitutional regulations such as treating NI as part of the EU.

Coda

[35] We would further draw to the attention of the committee that the judgment of Colton J in *Rooney* and *JR181* (3), and that of the Court of Appeal in the *Allister et al* Protocol case, quoted extensively from an academic book on the NI Protocol produced by a group of self-declared Remain academics. In this book it was revealed that the NI judiciary have taken part in Chatham House rules ‘seminars’ facilitated by the Judicial Studies Board which was addressed by a range of pro EU academics ‘explaining’ to the Judges the impact of the Protocol.

[36] The Protocol, and the interpretation/impact of it, is robustly contested, both politically and legally. It is deeply concerning that the judiciary are being lectured by only one side of the debate, and (it certainly seems from the reliance on these academic works in the relevant judgments) thereafter are simply adopting, or at the least being heavily influenced by, a partisan analysis of the Protocol. These ‘seminars’ were ongoing during the time the *Allister et al* case was before the court. We have yet to ascertain whether the first instance judge in that case attended whilst the *Allister et al* case was before him.

[37] This is an important issue as one could only imagine the outcry if the judiciary were quoting (as an ‘authority’, which wasn’t even cited in any of the relevant cases by the applicants/respondents) from legal academic analysis produced by persons who were self-declared Brexit supporters and anti-Protocol campaigners.

[38] On 21 December 2022 the Lady Chief Justice issued guidance in regards judicial participation in research. This included the following:

“...judicial discretion and independence would not be impaired by participation in the proposed research, and members of the judiciary would not be drawn into areas of political controversy or commenting on the merits of government policy...”²

[39] It would be anticipated the same principle applies to all activities undertaken by the judiciary. It is difficult to see how participating in Chatham House rules seminars hosted by pro EU/pro Protocol academics, whose work is then later cited, despite not being relied upon by any party in the relevant cases, authoritatively in judgments issued by the same judges who attended such partisan and politically controversial lectures. This is even more egregious whereby parties to the relevant cases haven’t had an opportunity to contest the materials relied upon unilaterally by the judge.

[40] As this does relate to the work of the committee, in so far the relevant OCR (NI) 2023 rests heavily on legal interpretation to be applied by the NI Judiciary, we would urge the committee to write to the Lady Chief Justice and seek an explanation as to this matter and to outline the deep concerns as to the perception created by pro-EU/pro Protocol academics lecturing judges, particularly at a time when those opposed to the Protocol having cases before the Court on the very issues which are the subject matter of the Chatham House lectures.

² <https://www.judiciaryni.uk/publications/judicial-participation-research-projects>

Conclusion

[41] This submission itself demonstrates how the Protocol, and these regulations, are infecting and dividing every aspect of society in NI and reducing confidence within the unionist community in the fairness and independence of the civil service, political process and even the judiciary. The Protocol is having far-reaching, fundamental and potentially unalterable adverse consequences for society in Northern Ireland. In our submission, there is unlikely to ever be a more necessary reason/s for the committee to exercise scrutiny powers than that which is set out in this submission.

Jamie Bryson

NI Director of Policy

Centre for the Union



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Dear Lord Hodgson

23 January 2023

Re: Official Controls (NI) Regulations Statutory Instrument 2023 No: 17

I write with regard to the above statutory instrument made on the 11th January 2023 and coming into effect on the 2nd February 2023.

It is of considerable concern that it does not appear the regulations have been subject to proper consultation and full and proper consideration by those most affected by its introduction.

We would respectively suggest that the regulations specified above should be brought to the attention of the house due to the committee's terms of reference paragraph 4:

- a) ***That it is legally important or gives rise to public policy likely to be of interest to the House*** in that the regulations will impose additional burden on businesses and consumers within Northern Ireland with the primary vires resting with the Department of Agriculture Environment and Rural Affairs in Northern Ireland, and we are unaware of any consultation regarding these regulations which would appear to be contrary to the Governments own Consultation Principles – Guidance updated in 2018 and runs contrary to good governance and transparency. It would also appear that the original stated purpose of the regulations (As per Lord Benyon on the 28 December) was for the enactment of the Protocol Bill should a negotiated settlement not be achievable with the European Union regarding the Ireland/Northern Ireland Protocol, however this objective appears to have been changed with different vires (Section 8c of the EUWA) used again without proper debate or consultation.

The regulations are being made for the construction of Border Control Posts to give effect to regulatory Customs and Sanitary and Phytosanitary checks on goods entering Northern Ireland from Britain both of which are within the United Kingdom thus resulting in a significant impact on goods moving within the UK internal Market. This is contrary to the commitment made by the previous Foreign Secretary Liz Truss who assured the road transport logistics sector that *“it would be the same as moving goods from Birmingham to Glasgow as it would be from Birmingham to Belfast”*. These provisions will result in significant increase in costs to Northern Ireland Businesses and consumers and will lead to a reduction in the movement of goods from GB to NI.

/continued.....



Page 2 /continued.....

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The current Customs and SPS requirements on the movement of goods between GB and NI are designed for long distance trade with limited product lines across International borders. This results in limited amount of bureaucracy and costs which can be completed over a lengthy period prior to arrival in the country of destination with the cost being minimal due to the limited number of product lines being transported. However, the nature of the movement of goods between GB and Northern Ireland is totally different to that of International trade with significant number of product lines within a single load being transported from manufacturing facilities, regional distribution hubs or collected from multiple sites within GB with the last leg of the journey to Northern Ireland within an internal market within a just in time delivery window. Considering the volume of product lines, the necessity to complete multiple Export Health Certificates and Customs declarations will have a significant impact on GB to NI trade resulting in trade diversion, significant increase in costs, considerable reduction in product selection and will negatively impact of business efficiency due to the circular nature of logistics between GB and Northern Ireland (For every load leaving Northern Ireland to GB the vehicle must bring a load back). This ensures NI product remains competitive in the GB marketplace as the transport costs is covered by the outbound and inbound loads.

Yours sincerely

Geoff Potter
Managing Director

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Your Sincerely

Paul C Jackson
McBurney Transport Group

Attention of Lord Hodgson of Astley Abbots

DEFRA has blindly stated that the government cannot foresee a position where permanent border controls are not required at NI ports of entry, even just for red lane requirements. This only further proves that the failure to consult is creating bad law. For example, should the UK move forward with the "Protocol Bill" and the EU maintain its resistance then the BCPs at NI ports would be pointless as the EU may set to impose its own controls on Irish or mainland Europe side. Also, should the negotiations prove fruitful, and the EU accept similar controls for GB to IE movements as say from Dublin to Holyhead, (where there are no such BCPs) than again they would not be needed.

Even in the most basic statement from DEFRA suggesting the checks will be required for goods going directly to Ireland from GB via NI ports (so called red lane checks) it is implausible to believe that positioning such controls at all NI ports is a reasonably practical or cost-effective position. Surely a central BCP south of port of Belfast on the Dublin road could facilitate this trade (estimated at 5% of the total trade by HMG) as the consignments are moving under seal and would be predeclared even before they arrive in the NI port and therefore can be easily diverted to a single inland BCP, as per HMGs own plans for entry to GB from the EU. This would create a substantial cost reduction in terms of not just the building of infrastructure but also the on costs of running the facilities. The operational efficiency of implementing controls at all ports of entry to NI would be severely impacted by the infrequent sailings and peaks and troughs of activity. At a time when the Northern Irish Health service is on its knees, and centralisation of services is seen as the way forward it is somewhat of a paradox that government appears to desire to build a fragmented Border controls model on the costliest basis thinkable.

I assume HMG does not intend to do a deal which creates more checks than are already in place. Given DAERA has stated that it has completed 100% of all the checks required for goods going into Ireland, and additionally the controls for goods coming into Northern Ireland which would be removed/reduced in any outcome it is difficult to see why larger facilities are required.

I would also like to ask of the role of HMRC in the operation of the controls. If the red lane, GB to IE via NI, checks create the requirement for the BCPs, and government was attempting to replicate Controls for Direct movement into Ireland then why would BCPs not fall under customs control. Not all goods moving GB to IE via NI will have SPS requirements. Again, a further trap door opens for hauliers as goods need to be released into Ireland after being cleared by Irish customs, not just SPS.

Therefore, I trust it is clear that the continual failure to consult with the sector, is yet again leading to poor decision making by Government. Perhaps the intention will be similar to 2021 when meetings with hauliers began to happen after the controls were rolled out and the mess became obvious.

Peter Summerton
Managing Director
Date: 23rd Jan 2023

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RHA

Dear Lord Hodgson 22 January 2023

Re: Official Controls (NI) Regulations Statutory Instrument 2023 No: 17

I write with regard to the above statutory instrument made on the 11th January 2023 and coming into effect on the 2nd February 2023.

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McCulla Ireland

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Your Sincerely
Timothy Ballantine
Director

Dear Lord Hodgson of Astley Abbots,

I am writing to you today as a gravely concerned young person regarding the Official Controls (Northern Ireland) Regulations 2023.

With particular allusion to your terms of reference, 4a states, 'that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;'

The role of the aforementioned regulations is to ensure the cohesion and security of the legal system which currently operates in Northern Ireland, differing from the other constituent parts of the United Kingdom.

That legal system had been imposed upon Northern Ireland by the EU polity of politicians and officials. Unlike the rest of the United Kingdom, Northern Ireland is currently subject to laws in 300 various legal areas.

Northern Ireland is not a member state of the European Union. It is a constituent part of the United Kingdom. Prior to the imposition of this foreign EU legal system, via the Northern Ireland Protocol, citizens of Northern Ireland were able to enjoy the protected rights to elect people to represent them and legislate on their behalf, but also to stand for election themselves, and legislate, just as the other parts of the United Kingdom. It is not ethical that I am unable to enjoy the equality as my fellow Britons across the country. The young people in those areas of the UK are valued and have the ability to make a difference.

For the last 25 years, my parents and grandparents have enjoyed the right to "pursue democratically political and national aspirations." This right, enshrined in the Good Friday Agreement, bequeathed the citizens of the Northern Ireland the right to elect someone on their behalf to legislate and to stand for election themselves, and legislate. My generation, the teenagers and students, the new voters, have had this fundamentally important right, stolen from us. We are devoid of any ability to impact nor influence in the EU's foreign legislature. This is unacceptable.

The purpose of the Good Friday Agreement was to bring about peace, balance and a cessation of hostilities. The importance of maintaining this was absolutely paramount to prevent the scourge of terrorism from once again sparking violence and holding democracy to ransom. As a young person, I have not experienced this violent extremism. As we approach the 25th anniversary of the Good Friday Agreement, we ought to be mindful that it was intended to stop the hostilities of the day, but also to ensure the proceeding generations would enjoy democratic rights.

Article 2 (1) of the Northern Ireland Protocol, outlines a UK Government commitment to ensure the protection of Northern Irish citizen rights and to prevent the erosion of said rights. I fail to understand therefore, why the UK Government are now seeking to implement regulations that would solidify a legal system that is eroding those precious citizen rights, as guaranteed by the "right to pursue democratically national and political aspirations" in the "Rights, Safeguards and Equalities" section of the Good Friday Agreement.

I understand that these regulations are not directly responsible for the degradation of Northern Ireland's democracy and citizen rights. However, the regulations are complacent in the perpetual perversion of Northern Ireland's position, democratic institutions and citizen rights. I find it outrageous that these regulations deem the erosion of my rights as a young person. From my perspective as a young person, these regulations serve as a cog in the oppressive legal machine which is currently steamrolling Northern Irish democracy and citizen rights.

This is a grotesque mutilation of democracy, and for me as person, an 18-year-old first time voter to-be, this is utterly horrifying to watch the erosion of my rights.

As I have mentioned, I would like to see the importance of my rights restored to an equal footing with that of other members of the United Kingdom. I would like to see the rights which my parents enjoyed for 25 years, delegated to me. I would like to see the continuity of peace and civility rather than violence and disorder. I would like to see the restoration of democracy in Northern Ireland.

I am young and I have a life to live. It's my desire to see Northern Ireland work and to make a difference. However, I cannot make a difference as the right to elect people to legislate or stand for election myself, has been stripped from my generation.

It is for that reason that I implore the Committee to take my comments into account as a young person, and with the interests of Northern Irish democracy, citizens and the Good Friday Agreement at Heart, that the Committee would also recommend the Lords to oppose this legislation and acknowledge its dangerous potential to protect the continued desecration and degradation of my citizen rights as a young voter.

Regards,

Jack Steele

19 Lord Wardens Hollow
BT19 1GP
Bangor
County Down
Northern Ireland
07423219334

Jacaranda House
55 Drumlin Road
Donaghcloney
BT66 7NJ

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22nd January 2023

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Personally, as a small business whose trade is 95% GB-NI we have endured two years of torture administering the bureaucracy, imposing unnecessary costs on our customers and if the solution is more bureaucracy, then I fear for the future of many small businesses in Northern Ireland not just our own.

Your Sincerely

Mark Tait

Mark Tait
Managing Director