

## Dr Sylvia de Mars and Mr Colin Murray – Written evidence

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### MERITS AND DRAWBACKS OF THE UK GOVERNMENT'S 2021 COMMAND PAPER

- [1] The July 2021 Command Paper, *Northern Ireland Protocol: the way forward*, sets out the current UK Government position which maintains that the Protocol was concluded in October 2019 under circumstances in which the UK's negotiating position was weak, involves a significant measure of EU 'overreach', and must thus be revisited.<sup>1</sup>
- [2] The UK proposes an 'alternative way forward', which sets out three strands on which the UK would like to reopen negotiations to establish a "new balance" in the Protocol's operation. These are:
  - a. Tackling burdens on trade in goods within the UK while managing risks to the EU Single Market.<sup>2</sup>
  - b. Ensuring that businesses and consumers in Northern Ireland can continue to have normal access to goods from the rest of the UK on which they have long relied.<sup>3</sup>
  - c. Normalising the 'governance balance' of the Protocol.<sup>4</sup>

The UK Government maintains that this is not a reworking of the Protocol as a whole, but these are far-reaching changes which would not be achievable within the present terms of the Protocol. As such, they require a renegotiation of its terms, and consequently the EU approval processes this would entail.

### BURDENS ON TRADE IN GOODS

- [3] On **customs**, the Protocol currently applies two sets of rules to products originating in Great Britain. Where these are "at risk" of crossing into Ireland, they have to comply with the EU's Customs Code, under Article 5 of the Protocol. They must also be checked for regulatory compliance with EU Single Market law as they enter what

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<sup>1</sup> See the discussions in paragraph 10, the conclusion in paragraph 27 that "[t]he way the Protocol is working needs to change", and Lord Frost, 'Observations on the present state of the nation' (Lisbon, 12 October 2021) <https://www.gov.uk/government/speeches/lord-frost-speech-observations-on-the-present-state-of-the-nation-12-october-2021>.

<sup>2</sup> Paragraph 39.

<sup>3</sup> Paragraph 40.

<sup>4</sup> Paragraph 41.

is part of the EU's market territory. The Joint Committee has been tasked with detailing what "at risk" means in this context, and the UK is dissatisfied with the current approach. Its alternative proposal is one of self-responsibility, by which traders declare if their own goods are "at risk" – and thereby only apply customs processes to those goods declared to be destined for the EU.<sup>5</sup>

- [4] This proposal requires a considerable measure of trust on the part of the EU, as it assumes that two things will happen: first, that all producers will label their goods honestly; and second, that all producers and traders will know the end destination of such goods. The EU is already trusting the UK to manage these processes at this frontier of the Single Market. The suggested UK mitigation for this 'honour-based' self-certification regime is "the requirement for all such traders to register in a light-touch scheme" that involves transparency of supply chains, but which is not further detailed.<sup>6</sup> Without a compelling account of how this proposal would result in equivalent oversight and enforcement of the EU's external border to the current Protocol, it will not be regarded by the EU as a workable alternative.
- [5] On **SPS** measures, the Command Paper proposes a similar solution: self-certification on the part of suppliers, with the full SPS regime only applying to goods going to Ireland, backed up by "risk-based and intelligence-led controls on consignments" – but negating "certificates and checks" for products that are not "intended" to leave Northern Ireland.<sup>7</sup> The key word there is "intended" – this is unlikely to be enough assurance for the EU, which will want regulatory controls on all goods that are actually exported to Ireland, and not only on goods that have been self-declared as intended to go to Northern Ireland.
- [6] The Command Paper also specifically addresses the cross-border movement of live animals, and here agrees that the pre-Brexit EU system was appropriate – but effectively asking for mutual recognition of the UK and EU SPS regulatory systems now that the UK has left the EU, with product-specific exceptions to this arrangement for high-risk products. This can be compared to the agreement the EU has with New Zealand on food safety standards.<sup>8</sup> The issue with this New Zealand-style approach is that it does not actually reduce checks to the extent that the Command Paper proposes, as was confirmed by Maroš Šefčovič when addressing the Northern Ireland Assembly in June 2021. Instead, the EU proposed a Swiss-style SPS arrangement, which has Switzerland applying relevant EU regulations in a binding fashion.<sup>9</sup>
- [7] The final SPS proposal is that pets should be able to move freely between Great Britain and Northern Ireland on the basis of UK legal requirements. This would obviate the need for EU-compliant certification and vaccinations.<sup>10</sup> This proposal might appear attractive; it should be easier to determine if a pet is bound for Ireland than a product for sale on the market. Nonetheless, given the Common Travel Area, Northern Ireland's pet owners can very easily bring them into Ireland, and it is not clear how the vaccination status of their pets would be observed or enforced. The EU has thus remained unwilling to countenance an exemption for pet movements unless UK pet-related legal requirements align with EU requirements.

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<sup>5</sup> Paragraph 48.

<sup>6</sup> Paragraph 48.

<sup>7</sup> Paragraph 50.

<sup>8</sup> Paragraphs 51-52.

<sup>9</sup> As reported here: <https://www.rte.ie/news/brexit/2021/0628/1231742-sefcovic-protocol-stormont/>.

<sup>10</sup> Paragraph 53.

- [8] On **VAT and excise**, the UK seeks a more “flexible settlement” with “greater freedom to set VAT and excise rates and structures in Northern Ireland”, but “underpinned by clear safeguards” where this would cause distortions on the island of Ireland.<sup>11</sup> These proposals, however, lack necessary detail on what a flexible settlement would look like, and on what safeguards would apply to such a regime.
- [9] The Command Paper next considers **enforcement** generally and stresses that the changes proposed would require data sharing and law enforcement cooperation. The relaxed SPS measures would furthermore require “particularly strong oversight” and “visibility of supply chains”, as well as labelling requirements for UK-only goods and “increased market surveillance”.<sup>12</sup> The EU is likely to reject any move away from the enforcement mechanisms set out in the Protocol, particularly where they relate to the UK’s application of the EU laws pertaining to the EU’s external border, given that these Protocol terms are based upon EU Single Market rules for goods applying in Northern Ireland.
- [10] Finally, on the subject of “unfettered access” from Northern Ireland goods to the Great Britain market, the UK proposes to cease information collection requirements that have replaced export declarations.<sup>13</sup> The UK Government suggests that there is no risk to doing away with these because whatever goods are moved from Northern Ireland to Great Britain, they will be either consumed or treated in the UK, rather than in the EU. This proposal, in our view, does not involve any substantial risks for the EU’s management of its trade borders and if the EU were willing to show flexibility on how its Customs Code applies to the specific circumstances of Northern Ireland, these proposals provide a basis for negotiation.

## **CIRCULATION OF GOODS FROM GREAT BRITAIN WITHIN NORTHERN IRELAND**

- [11] The second element of the Command Paper’s “new balance” proposes a **dual regulatory system** for all goods, to be policed by market surveillance and data gathering, backed up by “clearer rules for product-labelling”. It acknowledges that separate solutions for medicines might be necessary, and indeed suggests that medicines might need to be removed from the Protocol altogether on public health grounds.<sup>14</sup>
- [12] This proposal assumes that dual regulation with minimal oversight (which takes place away from the border) is viable, even in the face of increasing divergence between product regulation standards between the UK and the EU. Goods meeting both EU standards and UK standards would be in free circulation in Northern Ireland, with labelling being the most obvious distinguishing factor. Beyond risk-focused spot checks resulting from market surveillance there would be no safeguards to ensure that products entering Northern Ireland, and thus free to circulate within the Single Market, would meet EU standards. This proposal assumes that traders would adopt the correct labelling for the “destination” market, but says nothing about situations

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<sup>11</sup> Paragraph 54.

<sup>12</sup> Paragraph 55.

<sup>13</sup> Paragraphs 56-57.

<sup>14</sup> Paragraphs 58-61.

where they, whether accidentally or intentionally, neglect to do so. It provides inadequate safeguards to make it workable for the EU.

- [13] This section of the Command Paper also addresses **subsidy control** and notes that subsequent Trade and Cooperation Agreement arrangements obviate the need for Northern Ireland to be subjected to the EU's subsidies rules.<sup>15</sup> It suggests that enhanced consultation can mitigate any advantages Northern Ireland's producers might have in comparison to Single Market operators in light of the UK's separate subsidy regime. We believe these proposals to be reasonable and that they highlight an area in which a compromise can be found, in light of the Trade and Cooperation Agreement's terms.

## GOVERNANCE

- [14] The final set of proposals outlines new institutional arrangements that effectively end the jurisdiction of the EU institutions, up to and including the CJEU, in the oversight of the Protocol. Notwithstanding the recent focus on the CJEU,<sup>16</sup> the Command Paper regards the role of all EU institutions under Article 12 of the Protocol as problematic. It wishes to replace the role played by the Commission and the CJEU in enforcing parts of the Protocol with a dispute settlement process comparable to the arbitration which is part of the Trade and Cooperation Agreement. The Command Paper acknowledges this would require amending the Protocol.<sup>17</sup> It should be noted that in singling out Articles 12(4) to 12(7), it appears that the UK is not protesting the Commission's oversight role as set out in Articles 12(2) and 12(3).
- [15] This proposal disregards the distinct nature of the Protocol. The EU outsourced its external trade border's workings to a non-Member State in agreeing to the Protocol, and permits the UK to run that EU border on the conditions that the UK applies the relevant EU law, and that the EU can itself exercise an oversight and, where necessary, secondary enforcement role over how the UK does this. This is not comparable to other trade agreements with enforcement mechanisms based upon arbitration.
- [16] The CJEU has long established that where the EU concludes any international agreement which contains provisions of EU law, it is to be the sole interpreter of those provisions of EU law.<sup>18</sup> Removing the role of the CJEU from the Protocol would result in the CJEU finding that the Protocol is contrary to EU law. The only way to remove the role of the CJEU from the Protocol, then, is to also remove operative EU law. However, that would mean that this specific portion of the EU's external border is somehow not governed by EU law – but rather some 'other' law, that an independent arbitral tribunal is responsible for enforcing. In our view, this is an unworkable proposal – and one that illustrates that the UK wishes not so much to renegotiate dimensions of the Protocol, but rather the foundations of its operation.

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<sup>15</sup> Paragraphs 63-65.

<sup>16</sup> See, for example, <https://www.bbc.co.uk/news/uk-northern-ireland-58856544>.

<sup>17</sup> Paragraphs 66-70.

<sup>18</sup> See the CJEU's case law on the autonomy of EU law, and in particular, Opinion 1/91 ECLI:EU:C:1991:490, Opinion 2/13 ECLI:EU:C:2014:2454, and *Achmea* ECLI:EU:C:2018:158.

- [17] The UK request to involve Northern Ireland more in EU consultations on proposed legislation that affects the Protocol is, by contrast, reasonable. The democratic deficit inherent in the application of such a large body of EU law in Northern Ireland without representation within EU institutions has been addressed within the Protocol by the Article 18 “Stormont lock”, but Assembly votes on the overall operation of the Protocol are not the same as active involvement in law making. Mechanisms could be developed which align more closely with the arrangements the EU maintains with EEA members like Norway.<sup>19</sup>

## **MERITS AND DRAWBACKS OF THE EU’S OCTOBER 2021 PROPOSALS**

- [18] The October 2021 EU proposals come in four non-papers – on medicines, on SPS issues, on customs, and on engagement with Northern Ireland stakeholders/authorities – each of which will be addressed in turn.
- [19] On **Medicines**, the EU proposals provide that many of the product compliance checks with EU regulations could take place in Great Britain, albeit following EU law. The trade-off for this leeway – in that regulatory compliance checks normally have to take place *within* the EU – is that there would be limitations on where these ‘GB certified’ medicines could be sold (eg, not outside of the UK) and the EU would seek enhanced oversight.<sup>20</sup> These proposals provide a reasonable outline by which to facilitate producers in Great Britain bringing medicines onto the Northern Ireland market (and also Cyprus, Malta and Ireland), but they are quite far removed from the UK request to exempt medicines from the Protocol altogether. The published proposals, moreover, leave open important questions over how regulatory processes would be coordinated (perhaps unsurprising in a negotiating document).
- [20] On **SPS**, the EU proposals effectively simplify paperwork and reduce the volume of checks for retail goods that are moving into Northern Ireland from Great Britain and will clearly be sold in Northern Ireland. Any mode of transport from Great Britain carrying such retail goods, such as a container, would only have to fill in a single Export Health Certificate. Documentary checks would also be digitised. Product movements that are prohibited under EU law, such as sausages, could continue, but would need to satisfy EU production requirements and be accompanied by documentation. These adjustments would be subject to greater labelling requirements and enhanced monitoring, as well as a safeguard clause if products were found to be crossing into Ireland.<sup>21</sup>
- [21] This package of proposals addresses supermarket issues, but not the movement of goods generally, and in many ways simply provides that if the UK proves more willing to continue to apply EU regulatory standards, the EU will be able to ease some of the checks it places on goods moving from Great Britain to Northern Ireland. The details of how and where checks would reduce are to be coordinated, and the EU presents this as more or less a ‘final offer’ on SPS issues. It does not contemplate self-certification, but there is a willingness to at least reduce the volume of checks

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<sup>19</sup> Paragraph 71.

<sup>20</sup> [https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-medicines\\_en](https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-medicines_en) (Paragraphs 9-25).

<sup>21</sup> [https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-sanitary-and-phytosanitary-sps-issues\\_en](https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-sanitary-and-phytosanitary-sps-issues_en) (Paragraphs 8-13)

required, and to permit sausages and similar 'consumer meats' to enter Northern Ireland in spite of EU law's general prohibition on such movements.

- [22] On **customs**, the EU proposes revisiting the "at risk" of moving into the EU category of goods to reduce its scope, and proposes reducing customs formalities for goods not deemed to be at risk.<sup>22</sup> These proposals contain minimal detail and as such are hard to assess in terms of just how much of a documentary relief they would provide Great Britain producers/traders – the EU proposals are predicated upon further negotiation. Again, self-certification of destination is not considered, but the explicit goal is to reduce customs burdens for products moving from Great Britain to Northern Ireland.
- [23] On **engagement**, the EU proposals are limited: they indicate that greater deliberation is possible within the Withdrawal Agreement's structures, but do not go so far as to offer pre-legislative consultation to Northern Ireland's representatives.<sup>23</sup> This falls short of what is provided to EEA member states.

## SCOPE OF ONGOING DISAGREEMENT

- [24] Once the Protocol became operational, it was always the case that there was going to need to be some reflection upon how its terms work in practice. The points of disagreement between the UK and the EU nonetheless remain substantial, in part because the UK Government and EU Commission proposals start from very different premises. The EU proposals are aimed at making the existing Protocol operate more smoothly, and they stress the input from Northern Ireland's business community in what they have proposed. The UK proposals, meanwhile, are unattainable unless the entire Protocol is reopened for negotiation.
- [25] The EU has not produced proposals on **VAT and excise arrangements**, on the proposed **dual regulatory regime for goods circulating the Northern Ireland market** on **CJEU oversight of the Protocol in Article 12**, on **Article 10 of the Protocol** (regarding the application of the EU state aid rules to all UK subsidies that have an effect on trade between Northern Ireland and the EU), or on **pets**. Once again, the scope of the negotiating positions reflects the priorities of the parties. The UK Government has proposed an ambitious range of reforms, in order to restrict the Protocol's operation. The EU's priority has, instead, been to demonstrate that it is engaged in practical adjustments which address the concerns of businesses subject to the Protocol in Northern Ireland. Thus it has avoided making any up-front concessions on UK Government proposals which do not reflect prominent concerns in Northern Ireland.
- [26] The EU's proposals on **customs, SPS, medicines** and **governance** fall short of what the UK Government has been seeking. The greatest 'gap' regards medicines, where the UK proposal, to exempt medicines from the Protocol, is far removed from the EU's offer, which is to allow UK bodies to certify that the medicines meet EU standards. On **customs** and **SPS**, it is difficult to assess how far the parties are a

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<sup>22</sup> [https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-customs\\_en](https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-customs_en) (Paragraphs 21-26)

<sup>23</sup> [https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-engagement-northern-ireland-stakeholders-and-authorities\\_en](https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-engagement-northern-ireland-stakeholders-and-authorities_en) (Paragraphs 9-23)

part, because the EU proposals need to be worked out further before it is possible to assess what level of 'burden reduction' they offer for Great Britain business. The EU has made an offer that appears to address some of the UK concerns, but the percentages of check reductions which have attracted headlines cannot be substantiated.<sup>24</sup> On **governance**, the parties agree that greater consultation with Northern Ireland's political and civil society/business representatives is desirable, but the EU's offer does not address UK concerns about Northern Ireland's ability to provide pre-legislative input into EU legislative proposals. This is a disagreement which requires urgent attention.

## IF AGREEMENT CANNOT BE REACHED

- [27] The UK's July 2021 Command Paper asserts that the grounds already exist to start safeguard procedures under Article 16 of the Protocol, which enables either party to take "appropriate safeguard measures" if "the Application of the protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade".<sup>25</sup> The UK Government argument is that trade diversion is happening, as the application of the Protocol means that Great Britain to Northern Ireland trade is diminishing and trade between Northern Ireland and Ireland is increasing.
- [28] It is, in our view, not at all clear that Article 16 is designed to address trade diversions internal to the UK, nor that it is intended to address foreseen diversions. The Protocol's operation involved the creation of barriers in the Irish Sea, which have produced foreseeable supply chain shifts. Some of these have been mitigated by grace periods, but these periods were always intended to give suppliers an opportunity to adapt, they were never an alternative to adaptation. A particular problem for the UK is that the CJEU has to date not actually exercised any of its role under Article 12, so it is unclear how its role in the Protocol is leading to any serious difficulties or a diversion of trade. A further problem is that it is difficult for the UK to demonstrate the necessity of invoking Article 16 without first attempting to operate the Commission's proposed mitigations.
- [29] Article 16 is a mechanism for taking specific safeguard measures proportionate to specific and evidenced problems. It is not an instrument for unilaterally rewriting the Protocol. If the UK takes steps under Article 16 to implement its **dual regulatory regime** based on **self-certification**, the EU is likely to view this as a breach of the Protocol's provisions. This will, at least, lead to arbitration under Annex 7 of the Protocol and simultaneous counteraction through "proportionate rebalancing measures" under Article 16(2) of the Protocol. The scope of any triggering of Article 16 is therefore all important; disputes over targeted interventions and counter-measures are likely to be addressed through the Article 16 processes, whereas any effort to fundamentally alter the Protocol could precipitate responses such as the suspension or termination of the Trade and Cooperation Agreement which is consequent to the Withdrawal Agreement.

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<sup>24</sup> See [https://ec.europa.eu/commission/presscorner/detail/en/speech\\_21\\_5844](https://ec.europa.eu/commission/presscorner/detail/en/speech_21_5844).

<sup>25</sup> Paragraph 29.



- [30] On the conclusion of the Protocol, Northern Ireland was promised the “best of both worlds” in terms of access to the UK Internal Market and EU Single Market, and that this unique status would attract foreign direct investment. These benefits will not flow for as long as the Protocol is beset by instability. However much UK-EU relations are strained, Northern Ireland’s stability depends on their constructive engagement on points of dispute.

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