

European Scrutiny Committee
Re: The Northern Ireland Protocol

WRITTEN EVIDENCE

of Martin Howe QC

1. I am grateful for the opportunity to submit evidence to the Committee's inquiry. I have sought to address many of the Committee's questions, and have grouped them in an order which allows coherent development of the themes in this paper.

B. Application of EU Law within NI (Qs 5, and 7-12) and related Constitutional Implications (Qs 24-25)

2. In my view, the application internally within Northern Ireland of a large number of EU laws, with related EU mechanisms for their interpretation and enforcement, is the most important aspect of the Protocol. Understandably, public and industry attention has focussed on the subject of customs or regulatory checks on goods flowing between GB and NI, since this is where changes to business processes will need to be made as from 1 January 2021.
3. The implications of the application of EU single market goods laws and VAT laws within NI will not be much felt at first, since UK law in these areas is at present fully aligned with EU law. However, divergences will grow over time, both from decisions by the UK to amend or recast these areas of its own laws, and from decisions by the EU to change its own laws in these areas either by formal amendments or by changes of interpretation by the ECJ or other EU organs. This process will lead over

time to progressively divergent legal environments for businesses and for consumers. This will lead to progressively worsening democratic and political consequences, since these areas of the law within NI will be made and interpreted by foreign institutions to which the people of NI will have no democratic input.

4. The areas of EU law which the Protocol applies to NI can be summarised as follows:-
 - (1) EU single market laws relating to goods (Art.5(4) and Annex 2 NIP);
 - (2) EU VAT laws concerning goods (Art.8 and Annex 3 NIP);
 - (3) EU laws relating to the wholesale electricity market (Art.9 and Annex 4 NIP);
 - (4) EU State aid laws (Art.10 and Annex 5);
 - (5) EU customs legislation, Art.5(3) NIP. See further below.
5. Article 10 of the Protocol on EU State aid laws calls for particular attention. Unlike items (1) to (3) and (5), which the NIP applies to the United Kingdom *"in respect of Northern Ireland"*, Art.10 applies to the United Kingdom without geographical limitation, and therefore to and within Great Britain as well as NI. I shall return to this point in Section C below.
6. The application within NI of these areas of EU law will over time have increasingly severe adverse consequences for the integrity of the United

Kingdom internal market, for NI's place in the Union, and for the political and democratic legitimacy of laws which apply to the people of Northern Ireland when those people have no opportunity through the ballot box to vote on the content or application of those laws. (Other than through the periodic all-or-nothing consent mechanism which first arises in late 2024 and even then in the event of a negative vote does not allow NI to diverge from EU laws for a further 2 years).

7. Progressive divergence between laws relating to goods in GB and NI will cause increasing difficulties in trade between GB and NI, particularly with regard to exports of goods from GB to NI. This is regardless of whether or not any customs duties would be imposed.
8. To give a particular concrete example, EU laws on genetically modified organisms have been interpreted expansively (and I would argue perversely) by the ECJ so as to cover gene editing. Should the United Kingdom decide to adopt a more scientifically sound and permissive policy in this field, it would not be possible to apply it within NI because Annex 2 of the NIP applies Regulation (EC) No 1829/2003 on genetically modified food and feed to NI, and Art.13(2) NIP requires such measures to be interpreted in accordance with the ECJ's case law, including future case law, as if the UK were still a member state. If gene editing is liberalised in GB, then farmers in NI would be unable to participate in the benefits by growing gene edited crops or animals, and food from GB could become prohibited from sale into the NI market.
9. This and other future divergences between goods laws in NI and in GB would cause increasing difficulties for example for supermarket chains

who seek to supply the whole of the UK from a single UK-based distribution system. If there are categories of goods which can be sold in GB but cannot be sold in NI, this may lead to goods in shops in NI increasingly being supplied from EU based distribution systems (whether in the Republic or elsewhere).

10. Divergence will arise not simply from changes in relevant laws within the UK but from changes to EU laws in the relevant areas and changes in interpretation which are not followed by the UK. Where an existing EU measure is amended or replaced, the amended or replacement measure will apply automatically to NI (Art.13(3) NIP). Where a new EU measure is adopted within the relevant field, although it does not apply automatically, the Joint Committee may apply it under Art.13(4) under threat of the EU adopting “remedial measures” if it fails to do so. This is very similar to the mechanism under which the EEA States have effectively been compelled to implement new EU measures under the EEA Agreement on pain of EU economic sanctions.
11. Mechanics of application of EU laws within NI: These areas of EU law will apply in accordance with the EU law doctrines of direct effect and supremacy over all laws of national origin, including Acts of Parliament, and will be bindingly interpreted by the ECJ. UK courts will be able, and the Supreme Court will be required, to refer all relevant points of interpretation to the ECJ under the preliminary reference procedure. The Commission will be able to take direct actions in the ECJ against the UK. This is the clear effect of Art.4 WA in combination with Art.12(4) NIP. It will be as if the UK were still a Member State, subject to Commission enforcement and ECJ adjudication, the only difference being that the UK

no longer has any representation on the Commission, the Court or any other EU institution.

12. Constitutional implications (Qs 24-26): A foundational constitutional principle of the United Kingdom since its creation has been that it should operate as a unified internal market without barriers to trade between the different parts of the Kingdom.

13. When the United Kingdom of Great Britain was first formed in 1707 from the union of Scotland and England, the Articles of Union provided for freedom of trade between the parts of the United Kingdom, and for common external customs duties. The Articles of Union IV and VI said:

“IV. That all the Subjects of the united Kingdom of Great-Britain shall, from and after the Union, have full Freedom and Intercourse of Trade and Navigation, to and from any Port or Place within the said united Kingdom, and the Dominions and Plantations thereunto belonging .

VI. That all Parts of the united Kingdom, for ever, from and after the Union, shall have the same Allowances, Encouragements, and Draw-backs, and be under the same Prohibitions, Restrictions, and Regulations of Trade, and liable to the same Customs and Duties, and Import and Export.”

14. When the United Kingdom was extended to include Ireland in 1801, the Articles of Union between Great Britain and Ireland similarly provided for freedom of trade between the parts of the United Kingdom and for common external customs duties and trade relationships with foreign powers:-

“VI. The subjects of Great Britain and Ireland shall be on the same footing in respect of trade and navigation, and in all treaties with foreign powers the subjects of Ireland shall have the same privileges as British subjects.

VII. From January 1, 1801, all prohibitions and bounties on the export of articles the produce or manufacture of either country to the other shall cease."

15. After the partition of Ireland in the 1920s, what is now the Republic ceased to be part of the United Kingdom. Northern Ireland remained part of the United Kingdom, but was given its own devolved Parliament. The legislation establishing that Parliament (the Government of Ireland Act 1920) carefully preserved the unity of the single United Kingdom internal market. Notably, subs 4(1) specified that the following matters were reserved to Westminster:-

"(7) Trade with any place out of the part of Ireland within their jurisdiction, except so far as trade may be affected by the exercise of the powers of taxation given to the said parliaments, or by regulations made for the sole purpose of preventing contagious disease, or by steps taken by means of inquiries or agencies out of the part of Ireland within their jurisdiction for the improvement of the trade of that part or for the protection of traders of that part from fraud; the granting of bounties on the export of goods; quarantine; navigation, including merchant shipping (except as respects inland waters, the regulation of harbours, and local health regulations);"

16. The reservation in (7) above prevented the Parliament of Northern Ireland from imposing import or export bans or restrictions (other than in the limited respects set out for e.g. preventing "contagious disease") which would affect trade with other parts of the UK or abroad. The prohibition against the Parliament of Northern Ireland making laws for "*the granting of bounties on the export of goods*" showed that the Westminster Parliament in 1920 recognised that the devolved powers of the Parliament of Northern Ireland should not extend to measures which would disrupt or distort trade, reflecting the continuing application of the principles in Art.VI of the Articles of Union between Great Britain and Ireland.

17. These same principles are recognised in the legislation governing the powers of the Northern Ireland Assembly. Section 26(4) of the Northern Ireland Act 1998 provides that:

(4) If any subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department contains a provision which the Secretary of State considers-

(a) would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order; or

(b) would have an adverse effect on the operation of the single market in goods and services within the United Kingdom,

the Secretary of State may by order revoke the legislation.

18. It can be seen that the preservation of freedom of trade within the UK's own single market is a fundamental constitutional principle upon which the Union was founded. It was embedded both within the original Articles of Union between England and Scotland and in the subsequent Articles of Union between Great Britain and Ireland. These parts of the Articles of Union remain part of statute law applying both to Great Britain and Northern Ireland to this day, and are not affected in their application to Northern Ireland by the partition of Ireland and the separation of the Republic from the UK.

19. The Protocol cuts across the Articles of Union in two ways. First, the citizens of Northern Ireland plainly under this Protocol (which is "a treaty with a foreign power") will not - "*have the same privileges, and be on the same footing*" as citizens in the rest of the UK. They will be subject to rules and restrictions and the rulings of a foreign court which are not imposed on citizens of Great Britain.

20. Secondly, although the Protocol allows the UK to permit goods to be imported from Northern Ireland to Great Britain, it requires the export of goods the other way to be banned if they do not conform with the EU rules which will apply within Northern Ireland.
21. The Articles of Union have the status of an Act of Parliament. It is therefore legally possible for a later Act - such as the 2020 Act which implements the Withdrawal Agreement - to repeal or over-ride them. It nevertheless remains the case that by overriding them in order to implement the Protocol as part of UK law, Parliament is altering the constitutional status of Northern Ireland relative to other parts of the United Kingdom. It subjects the people of Northern Ireland to laws over which neither they, nor their elected representatives in Westminster or Stormont, have any control, and to the rulings of a foreign court.

C. State aid in the Protocol (Qs 13 to 16)

22. State aid control under Article 10 of the NIP is *not* limited to “*the UK in respect of Northern Ireland*”, unlike the areas of law listed above. Instead, the limitation is by reference to a possible effect of measures on trade under the Protocol, regardless of where in the UK any aid is given or where the recipient of the aid is located and carries on business.
23. The application of the State aid provision in Art.10 across Great Britain is a matter of particular concern, in the event of either a “no-future-relationship-deal” or in the event of a deal from which the UK government successfully excludes EU State aid rules. The State aid Article in the NIP can then be used by the EU Commission to control and restrict the grant of many forms of State aid across Great Britain, including for

example tax reliefs in future primary legislation which fall within the ECJ's wide and ever expanding definition of State aid.

24. Annex 5 of the NIP lists out effectively the full corpus of EU State aid laws, rules and Commission guidance, and Art.10 applies those rules to the United Kingdom¹ *"in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol."* That means not just trade across the Irish land border, but all trade in goods between NI and any part of the EU27. Thus, a subsidy given to a car plant in Sunderland which allows that plant to ship cars to the Northern Ireland market more cheaply, so competing with German cars there, would appear to fall within the scope of Article 10 and be notifiable to the EU Commission. This problem is exacerbated by the fact that the ECJ's jurisprudence on State aids counts a theoretical or indirect effect on trade as sufficient to bring a measure within EU State aid control.

Customs (Qs 17 and 19)

25. Art.5(3) NIP applies EU customs legislation to NI. EU customs legislation is defined in Art.5(2) of Reg 952/2013 as the Union Customs Code (UCC), the Common Customs Tariff, EU customs reliefs legislation and EU external agreements. The UCC is an EU Regulation which has direct internal legal effect within member states without the need for national implementing legislation, and by virtue of the NIP it will continue to apply directly within NI and will for example directly bind HMRC in the same way as an Act of Parliament would (or arguably even more effectively since its provisions will prevail over all UK legislation).

1. Not just to Northern Ireland in contrast to the other provisions of the NIP.

26. This means for example that Ministers cannot lawfully direct HMRC to narrow the field of checks on goods passing between GB and NI if that runs counter to HMRC's own legal interpretation of the NIP and the UCC. This is likely to undercut severely the UK's negotiating position regarding what goods are to be treated as "at risk" of passing from NI into the EU27 and subject to duty on being imported from GB into NI.

What action can be taken?

27. If the present situation is left unaddressed and the WA and NIP left in force, it is likely that the Commission will take legal steps to enforce its interpretation of the UK's obligations under the Protocol, notably on the subject of State aid (as applying across GB as well as NI) and on the issue of "goods at risk". Once we have passed 1 January 2021, the Commission will have every incentive to take such action with every prospect of a sympathetic hearing from the ECJ.
28. The Commission (and the whole EU) will have a particular incentive to take vigorous enforcement action in the event of a "no-future-relationship-deal" scenario. Areas of particular focus are likely to be (1) the wide ranging application of Art.10 NIP to control State aids across the whole of the UK; (2) extensive and onerous customs and other checks on trade from GB to NI in order to prevent actual, perceived or imaginary² threats to the integrity of the EU internal market.

2. The EU has a strong protectionist interest in making imports of goods from GB to NI as cumbersome as possible, in order to give a clear advantage to exporters in the Republic and elsewhere in the EU in selling their goods into the NI market (which will not be subject to customs controls).

29. In legal theory, the simplest and most straightforward way to end or at least curtail these areas of dispute would be by agreement with the EU to modify the WA or NIP. However, the obvious question is what negotiating leverage does the UK have to achieve this, particularly in the event of a no deal or near no deal scenario?
30. It is the case that the key parts of the NIP are terminable under the so-called consent mechanism in Art.18. This requires a simple majority vote in the NI Assembly for those parts of the NIP to continue.³ However, the first vote under this process will not be until late 2024, and even if there is a negative vote, those parts of the NIP (including the crucial Art.10 on State aid) will continue in force for another two years⁴ to allow other arrangements to be put in their place.
31. The direct effect and supremacy of the Protocol and associated areas of EU law within the UK legal system arise from the combination of treaty provisions (notably Art.4 of the WA) which provide for direct effect and supremacy, and of the UK's own internal law which gives effect to those treaty provisions. This is the same mechanism as for EU law, where legal effect within the UK's internal legal system was given to the Treaty doctrines of direct effect and supremacy by virtue of section 2 of the European Communities Act 1972. The WA and NIP are similarly given internal legal effect within the UK by provisions in the European Union (Withdrawal Agreement) Act 2020 which are effectively identical in

3. Paragraph 3(b) of the UK's Unilateral Declaration referred to in Art.18(2) NIP.

4. I.e. until the end of 2026.

wording and substance to those parts of the ECA 1972.⁵

32. It is a consequence of these provisions that a later Act of Parliament which contradicts the WA or NIP would, as things stand, be over-ridden by the UK courts. However, it would be possible by using an Act of Parliament which used clear and explicit words⁶ to restrict or oust their application as a matter of UK internal law. Parliament always retained this ultimate power during our EU membership, and section 38 of the 2020 Act (on Parliamentary sovereignty) makes this ultimate power explicit.
33. Therefore, it would be possible for example in a UK Internal Market Act which provides for the UK's own State aid regime to apply across Great Britain, to legislate that that regime applies to any aid given to entities in GB to the exclusion of the regime under Art.10 NIP and notwithstanding section 7A or any other provision of the 2018 or 2020 Acts. Such a provision could not be challenged in UK courts, and UK courts would be bound to give effect to it, even if (as seems possible) it might cause judicial disquiet. That at least would prevent injunctions being issued in UK courts suspending tax reliefs or other State aid measures in GB for alleged breach of Art.10 of the NIP, and would effectively strengthen the UK's negotiating position regarding "goods at risk".

5. See section 7A of the EU (Withdrawal) Act 2018 providing for "general implementation" of the WA (including the NIP). Section 7A was inserted by the EU (Withdrawal Agreement) Act 2020.

6. Which would have to be sufficiently clear and unambiguous not to be mangled and disregarded by potentially hostile courts.

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