

## Retained EU Law: Where next?

Evidence Submitted to the House of Commons European Scrutiny Committee

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The evidence is submitted here is based on work carried out to monitor the political and legal implications of the implementation of the Protocol on Ireland / Northern Ireland as part of a three-year ESRC-funded project: *Governance for 'a place between': the Multilevel Dynamics of Implementing the Protocol on Ireland/Northern Ireland*.<sup>2</sup>

As such, the content does not address all of the questions posed by the 'Retained EU Law: Where next?' inquiry but rather provides specific evidence regarding the interaction between the Protocol and retained EU law. In doing so this submission primarily offers a response to the final question set by the Committee and does so from the perspective of Northern Ireland.

### **Q. Are there issues specific to the devolved administrations and legislatures that should be taken into account as part of the Government's reviews into retained EU law?**

1. Section 7A of the European Union (Withdrawal) Act 2018 (EUWA 2018) (as amended by the European Union (Withdrawal Agreement) Act 2020) provides that the UK-EU Withdrawal Agreement has direct effect in UK law.
2. Article 12(4) of the Protocol on Ireland / Northern Ireland, which is part of the UK-EU Withdrawal Agreement, provides that EU law instruments covered by Articles 5, 7 to 10 and 12(2) of the Protocol shall continue apply to the UK in respect of Northern Ireland, notwithstanding that it left the EU along with the rest of the UK on 31 January 2020, and provides for the continued jurisdiction of the Court of Justice of the European Union (CJEU) for these purpose.
3. Article 13(3) of the Protocol provides that any EU law instrument that it makes applicable to and in Northern Ireland shall apply "as amended or replaced" and that CJEU case law shall continue to apply so far as it is relevant for the interpretation and application of any EU law made applicable by the Protocol.
4. Together, the provisions of the Protocol and section 7A of the EUWA 2018 put Northern Ireland in a position of dynamic regulatory alignment with the specific body of EU law included in the scope of the Protocol. This 'Protocol-applicable EU law', and by consequence the Northern Ireland jurisdiction, has a unique status in the UK domestic legal context post-Brexit; that status needs to be considered and accommodated in any UK Government review of retained EU law.
5. In view of provisions outlined regarding Protocol-applicable EU law, sections 1 to 7 of the EUWA 2018 (regarding the saving of EU-derived domestic legislation, direct EU legislation, and the creation of the new retained EU law category) have a differentiated effect in Northern Ireland. Whereas for the rest of the UK, sections 1 to 7 of the EUWA 2018 provided that all EU law that applied on 'exit day' became 'retained EU law' in Northern Ireland, all EU law that applied on 'exit day' *and was not Protocol applicable EU law* became 'retained EU law'.
6. Any UK Government reviews of retained EU law in the UK must take into account the parallel application in Northern Ireland of Protocol applicable EU law and retained EU law. A failure to do so is very likely to result in unmanaged divergence within the UK and will make legal clarity and policy coherence more difficult where Northern Ireland and, for example, its position in the UK internal market is concerned.

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<sup>1</sup> Queen's University Belfast but this evidence should not be read to represent the views of our employer.

<sup>2</sup> For further details see: <https://www.qub.ac.uk/sites/post-brexit-governance-ni/>

7. Developments in secondary legislation since the UK left the EU suggest that, at present, the unique position of Northern Ireland in respect to areas of retained EU law in Great Britain (GB retained EU law) which are Protocol applicable EU law in Northern Ireland (NI Protocol applicable EU law), is not being fully considered.
8. Some recent examples of UK statutory instruments that have made changes in GB retained EU law in areas of NI Protocol applicable EU law are included below. Based on information provided by the UK Government in Explanatory Memoranda, it does not *appear* that due consideration has been or is being given to the unique position of Northern Ireland under the Protocol.
9. As the UK Government conducts its reviews of retained EU law and, more broadly, as post-Brexit UK legislative changes continue to take effect, the unique position of Northern Ireland established through the Protocol is at risk of being overlooked and therefore insufficiently managed. Every effort ought to be made to avoid such a risk.

**Examples of changes to retained EU law in Great Britain which apply as Protocol Applicable EU law in Northern Ireland**

UK Statutory Instrument	Made	Explanation
The Organic Production (Amendment) Regulations 2022, <a href="#">SI 2022/360</a>	22.03.2022	<p>This statutory instrument amends retained EU legislation in Great Britain that relates to the regulation of organic production. The effect of the legislation is to extend existing derogations for the use of non-organic pullets (young chickens) and non-organic gellan gum in organic production in Great Britain.</p> <p>The relevant (GB) retained EU legislation applies in Northern Ireland as Protocol applicable EU law. <a href="#">Explanatory Memorandum</a> to the SI states that the department “do not anticipate that this [divergence] will substantially disadvantage NI industry.”</p>
The Genetically Modified Organisms (Deliberate Release) (Amendment) (England) Regulations 2022, <a href="#">SI 2022/347</a>	21.03.2022	<p>This statutory instrument removes a requirement arising from CJEU case law for authorities in England to submit a risk assessment prior to the release of certain genetically modified (GM) plants that have been produced by ‘traditional breeding’. This area of EU legislation and associated CJEU case law continues to apply in Northern Ireland under the Protocol.</p> <p><a href="#">Explanatory Memorandum</a> to the SI does not note any divergence implications or possible relevance of the Protocol and/or changes in other devolved jurisdictions.</p>
Milk and Milk Products (Pupils in Educational Establishments) Aid Applications (England and Scotland) Regulations 2022, <a href="#">SI 2022/160</a>	17.02.2022	<p>This statutory instrument makes minor technical changes to the retained EU law version of <a href="#">Regulation 1308/2013</a> in Great Britain that regulates (among other things) school milk schemes and which continues to apply in Northern Ireland under the Protocol.</p> <p><a href="#">Explanatory Memorandum</a> for the SI does not mention the particular position of Northern Ireland under the Protocol and/or any possible divergence implications associated.</p>
Pesticides (Revocation) (EU Exit) Regulations 2022, <a href="#">SI 2022/144</a>	09.02.2022	<p>This statutory instrument revokes various aspects of ‘direct EU legislation’ regarding the regulation of plant protection products (PPP) and maximum residue levels (MRL) in Great Britain. The amended EU law instruments apply in Northern Ireland as Protocol applicable EU law.</p> <p>Amendments made to retained EU law versions in GB are technical and do</p>

		not reflect a change in policy. <a href="#">Explanatory Memorandum</a> to SI 2022/144 does not mention Northern Ireland or its particular position arising from the Protocol.
The Phytosanitary Conditions (Amendment) Regulations 2022, <a href="#">SI 2022/114</a>	08.02.2022	<p>This statutory instrument amends retained EU law version of <a href="#">Regulation (EU) 2019/2071</a> in Great Britain to introduce measures against the import of host plants and other relevant regulated goods for <i>Scolytus morawitzi</i> "Morawitz's bark beetle" and <i>Polygraphus proximus</i> "Sakhalin fir bark beetle" and updates existing measures to enable trade and strengthen protections against <i>Thaumetopoea processionea</i> "oak processionary moth"</p> <p>While the amended EU Regulation continues to apply in Northern Ireland under the Protocol, the <a href="#">Explanatory Memorandum</a> to the SI does not mention this nor therefore account for any potential divergence implications.</p>