

## **Professor Simon Usherwood – Written evidence (FUI0001)**

Submission to House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland

### **Follow-up inquiry on the impact of the Protocol of Ireland/Northern Ireland**

25 May 2022

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1. This evidence focuses on the potential for cooperation between the European Union (EU) and the United Kingdom (UK) over the Protocol.
2. It is important to start by recalling that the Protocol was the product of an intense and extensive negotiation between the EU and the UK between March 2017 and late 2019, with much scoping of opinion of interested parties by both sides. Moreover, the Protocol was especially scrutinised within the UK, in its various forms and was a key reason for the delay in UK agreement: it was only with the amendments agreed during the autumn of 2019 by Prime Minister Johnson that Parliament was satisfied that its requirements were met. The obligations of the EU Withdrawal (No.2) Act (the 'Benn Act') that the UK government had to request further extensions to the Art.50 process so long as no Withdrawal Agreement was in place imposed no conditions as to the form of this Agreement, nor did it (or could it) oblige the EU to agree to such a request. All of this is to underline that the generally accepted requirements of *pacta sunt servanda* have been met and no evident grounds exist for the UK to pursue a policy of disapplication or revocation of the Protocol or Withdrawal Agreement due to coercion, improper process or the other grounds listed in the Vienna Convention on the Law of Treaties Arts.46-53.

3. At the most general level, the UK government appears to hold the position that the Protocol cannot be made to work sustainably with its current text and so necessarily requires amendment, potentially very significantly. By contrast, the EU's position is that the Protocol already contains considerable space for flexible interpretation, which has not been fully explored to date, so any amendment is premature. These two positions are not incompatible, since interpretation within the text could logically be taken as far as is possible, whereupon amendment might become a realistic solution. However, this would require the UK to engage sincerely and comprehensively with the current Protocol, with a stated and accepted objective of trying to make it work. This will be very difficult, given the current low levels of trust in the UK government by the EU, following the rhetoric and actions of the period since 2020.
4. Part of the challenge for current UK government policy is that the mooted proposals to pursue either domestic legislation routes or use of Art.16 NIP safeguarding do not appear credible to the EU. While the government could pass domestic Acts that modify or disapply all or part of the Protocol, this does not negate the continuing international obligations it entered into by agreeing the Withdrawal Agreement (most obviously Art.4(2) on disapplying 'inconsistent or incompatible domestic provisions' and Art.5 WA on good faith). Likewise, Art.16 NIP requires justification for temporary and minimally-disruptive suspension of the Protocol, which can be challenged and sanctioned under dispute settlement mechanisms. Moreover, Art.16 NIP only allows for suspension to alleviate problems while the parties find a mutually-accepted negotiated solution, which the EU sees as essentially what is on offer now: invoking Art.16 would merely raise tensions and increase uncertainty in Northern Ireland, going directly against the stated objectives of the UK government. Given the scope for the EU to make use of Art.749 TCA remedies or Art.772 TCA suspension for non-fulfilment of essential obligations, there is confidence that any trade war that result from the UK not applying the Protocol would hurt the EU much less than the UK. This further strongly disinclines the EU to bend to current British statements on why it must renegotiate the terms of the Protocol.

5. A process of UK re-engagement would need to cover a number of key aspects:
- a. The government would need to give a clear and concise statement of the objective of making all efforts to implement the Protocol within the current text, with renegotiation only being an option should this effort produce demonstrable negative implications for Northern Ireland (with specific markers of what this would involve, and an independent process for ascertaining as such).
  - b. There would need to be a broad re-engagement with the technical negotiations with the European Commission that started in October 2020, with senior government buy-in to the provision of necessary staff as needed from across all involved departments.
  - c. The government would have to make all efforts to engage Northern Irish stakeholders in all spheres of public life to make active contributions to this process. While a functioning Northern Irish Executive might not be possible in such a scenario, this should not preclude the normalisation of regional involvement, as would be consistent with the principles of the Belfast/Good Friday Agreement.
  - d. The UK government would need to make demonstrable advances in its obligations to implement all other parts of the Withdrawal Agreement and the Trade & Cooperation Agreement, as a means of highlighting its commitment to those treaties and to nullify any charges of selective implementation.
  - e. The UK government would need to become much more active in making detailed proposals on areas of disagreement: throughout the process of withdrawal from the EU since 2016 there has been a strong tendency to note what the government does not like about different options and to demand that the EU provides solutions. By taking this as a joint responsibility, the government would not only demonstrate its good faith credentials but would also have more opportunity to shape outcomes to its advantage.
  - f. Such effects would be further strengthened by consistent and robust public rhetoric from government ministers in support of this overall approach.

6. In the short-term, it would be difficult for this approach to generate significant improvements, mainly for the reason already mentioned that the EU is unlikely to accept the government's words alone. Incremental steps will occur with material actions on implementation and constructive debate in talks. The Commission's proposals of October 2020 offer an example of how this might look, with progressive easements being possible as the EU can be satisfied about reduced risk on particular issues and about sincere and comprehensive partnership with the UK.
  
7. Again, this approach is not a rejection of the UK government's claim that the Protocol cannot be a lasting solution for Northern Ireland, but it would mean that any future push to secure renegotiation would start from a position where the EU could much less doubt the sincerity or legality of the UK's actions. Moves to push for renegotiation would have to follow the obligations of the various EU-UK commitments and would have to be undertaken jointly, rather than through any unilateral action. Moreover, future arguments about renegotiation would most profitably be presented as addressing the problems caused despite the best efforts of both parties to make the current Protocol work.
  
8. More broadly, the issues around the Protocol highlight a wider issue in British policy towards the EU, namely the lack of a clear strategic objective. The dominant mode in policy throughout the post-war period has been one of crisis management and damage limitation: the push for the Single Market in the 1980s is the main exception to this. In the current context, there remains an absence of clarity about what the purpose of withdrawing from the EU might be, or of how the EU might fit into the UK's domestic and international priorities: Northern Ireland forms an important bridging case between these two realms. This requires acknowledgement by the UK government of the legitimate interests of the EU and of its role within the UK's immediate neighbourhood. Such acknowledgement offers not only the potential to advance British interests, but also would help to signal the UK's broad intentions to the EU, so further reinforcing the credibility of its actions.

9. This approach is grounded in process rather than substantive content, but it does point to the priority to focus in the first instance on specific and bounded issues (e.g. on real-time data sharing) to provide a basis for a progressive rebuilding of the UK-EU relationship on the Protocol. Material actions will matter but can only create positive effects in that relationship if they are accompanied by constructive rhetoric and an acknowledgement that reaching a steady state for Northern Ireland's position in the post-withdrawal environment will take considerable time and patience.