

Dr Sylvia de Mars, Dr Colin Murray and Dr Clare Rice – Written evidence (FUI0006)

Evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland on the Protocol’s Impact on Northern Ireland

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RESOLVING CURRENT ISSUES

- [1] The current political impasse between the UK and the EU with regard to the operation of the Protocol on Ireland/Northern Ireland is not an unforeseen development. The tensions seen in 2021, centred largely around Article 16 of the Protocol, demonstrated that both sides had different understandings of the overarching Protocol and the Joint Committee agreement reached in December 2020, and had different intentions with regard to what would come thereafter. This set both sides on different footings from the off.
- [2] The current political situation in Northern Ireland is contributing to tensions between the UK and the EU, and visa versa. In February 2022, the Northern Ireland Executive was collapsed in an act of protest at the Protocol. The continued political

vacuum in Northern Ireland is a direct consequence of steps being taken to further a harder line protest agenda with regard to the Protocol, and is being spearheaded by the Democratic Unionist Party (DUP). The party maintains that it will not facilitate the return of the institutions until changes are secured to the Protocol that comply with [seven criteria](#) it has outlined.

- [3] Despite the presence of these seven criteria, the language around the DUP's Protocol ambitions has been ambiguous. It has not been clear if the party has been seeking the full removal of the Protocol, or if adjustments to the current arrangements would be adequate to prompt a return to power-sharing in Northern Ireland. 'Remove and replace' was the phrase used by the DUP Leader in a BBC debate ahead of the May election, but this is itself imprecise in determining the realms of acceptability. The recent announcement by the UK Foreign Secretary with regard to the potential introduction of domestic legislation to override aspects of the Protocol was broadly well received by the DUP, indicating that changes, rather than removal, would be acceptable. This is an achievable outcome from the situation.
- [4] While Northern Ireland's political crisis is being used by the UK Government as a justification for a fundamental reworking of the Protocol's architecture, the difficulty remains that this agenda is one that continues to align with the ideals outlined in the UK's July 2021 Command Paper, which the EU does not accept. Article 16 of the Protocol provides a formal route to altering the operation of the Protocol in a very limited set of circumstances. That the UK has opted against pursuing this option, despite political rhetoric to the contrary, has for months maintained a space for bilateral action. However, the ramping up of threats of taking unilateral action beyond the scope of what Article 16 would allow is not conducive to positive technical discussions, which are in turn integral to reaching an expedient resolution.
- [5] All of these elements have contributed to heightened tensions between the UK and the EU in working to find solutions to operational issues with the Protocol on Ireland/Northern Ireland. As tensions increase, positions harden. Despite this, progress has been made in multiple areas (detailed hereafter), and opportunities remain for "landing zones" for others. The current difficulties are by no means insurmountable. The post-Brexit relationship between the UK and the EU will not, however, be "fixed" by tackling current Protocol tensions. The EU and the UK will continue to have to work together over Northern Ireland's arrangements. Short-termism will not give rise to sustainable co-operative approaches in the best

interests of Northern Ireland, nor will it create a stable foundation for future UK-EU relations.

PRACTICAL ISSUES

- [6] In terms of the barriers to trade resultant from the Protocol, much of the evidence remains partial or anecdotal. Both the EU and the UK accept that the Protocol can work in a more streamlined fashion, but differ as to how best to achieve this and the scale of adjustment needed (in particular, whether there needs to be a renegotiation of core terms of the Protocol or whether mitigations can take effect in how those terms operate). It is, moreover, significant that the Protocol as concluded in 2019 has already been subject to significant modification, through Joint Committee processes (as in December 2020) and through unilateral action by the EU (to address how the Protocol applies to the supply of medicines between Great Britain and Northern Ireland). The EU has also agreed significant extensions to the grace periods applicable to the operation of elements of EU trade rules under the Protocol.
- [7] The relationship between the Withdrawal Agreement and the Trade and Co-operation Agreement nonetheless makes the operation of the Protocol more challenging. The Trade and Co-operation Agreement saw the UK Government ringfence the UK's ability to diverge from EU product standards, including SPS rules. For the UK Government, the prioritisation of divergence from EU standards generates tensions with the Protocol; the more extensively it pursues this agenda the less flexible the EU is likely to be regarding the protection of the Single Market, as limiting categories of goods which are at risk of moving into the Single Market through Northern Ireland in these circumstances gives rise to opportunities for goods to circulate which do not meet EU standards. This presents a policy clash for the UK Government: divergences of standards in pursuit of its post-Brexit agenda generate more extensive barriers to trade between Great Britain and Northern Ireland.
- [8] The Unionist parties in Northern Ireland have, in addition to concerns over supply-chain dislocations, raised the lack of cross community consent to the Protocol's arrangements and the limited role of the Northern Ireland Assembly in the EU law making process, where the Protocol requires a level of dynamic alignment between Northern Ireland law and EU law developments. These two claims have been

unsuccessfully litigated in the *Re Allister* case. In terms of the Belfast/Good Friday Agreement's consent provisions, the Northern Ireland Court of Appeal has noted that these only apply to the operation of devolved functions and to Northern Ireland's place as part of the UK. In terms of the democratic deficit issue, the Court responded to arguments on the basis of Article 3 of Protocol 1 of the ECHR by noting the special consent arrangements provided under Article 18 of the Northern Ireland Protocol. There is little chance of the UK Supreme Court reversing the decision of the Court of Appeal, which relies directly upon the position the Supreme Court adopted in *Miller*.

BENEFITS AND OPPORTUNITIES OF THE PROTOCOL

- [9] Notwithstanding the weakness of legal arguments questioning the compatibility of the Protocol with the 1998 Agreement, nothing within the Agreement can oblige the Unionist parties to participate in power sharing in Northern Ireland if they perceive it to be against their interest to do so. It is therefore worth repeating that the Protocol requires a considerable amount of work to function smoothly, as both the UK and EU have recognised, with the EU approach being to attempt to mitigate specific issues as they are identified. Grace periods are not a panacea; they were initially intended to allow time for supply chains to adapt in light of the dislocations of Brexit or to give time for particular problems, such as medicine supply, to be addressed.
- [10] If the Protocol therefore falls short of delivering the "best-of-both-worlds" access that Northern Ireland was promised in October 2019, this is in large part a function of the additional friction in trade between the UK and the EU Single Market resultant from the terms of the Trade and Co-operation Agreement. A further, and no less serious issue in practical terms, is that companies were given very little time to adapt to the new rules coming into effect at the height of a global pandemic. In these less-than-ideal conditions, many companies appear to have prioritised other concerns over new rules affecting a small market, and it stands to reason that the continuing uncertainty over how the Protocol will operate is continuing to put some companies off engaging with the Protocol's requirements.
- [11] Some of the potential benefits of the Protocol are therefore yet to be realised and will likely only be able to be realised if it is permitted to operate in a stable context. The particular market access benefits of the Protocol nonetheless enable policy

makers in Northern Ireland to position it as an attractive entry point into both the other parts of the UK's Internal Market and the EU Single Market. In light of decades of stalled efforts to promote economic growth in Northern Ireland, these are significant potential benefits, without the drawbacks of upfront costs to public finances which have been associated with other approaches to stimulating business in Northern Ireland, such as reducing corporation tax.

- [12] It should also be noteworthy, for Unionists, that if the Protocol is permitted to operate, and businesses based in Northern Ireland become reliant upon it in their operations, then it becomes very difficult to remove in future. Even in the scenario of a vote on reunification, Northern Ireland's special market access arrangements with regard to Great Britain would likely have to be retained or else there would be a risk of collapsing its economy. The Protocol, properly functioning, connects Northern Ireland into both markets.

THE UK AND EU APPROACHES & VIABLE ALTERNATIVES

- [13] Negotiations over trade arrangements ordinarily involve a two-way exchange. The UK Government's Protocol proposals, however, have relied on portraying the agreed terms of the Protocol as an example of "overreach" by the EU, which thereby do not require the UK to make reciprocal concessions. The expectation that the EU will make the substantive concessions, under the threat of unilateral action by the UK, is a difficult proposition, but one in keeping with the UK and EU relationship not stabilising post-Brexit. The mere fact that the UK introduces legislative proposals which would breach its Protocol commitments does not mean that these will ultimately take legal effect; the provisions of the Internal Market Bill which would have breached the Protocol were withdrawn as a result of negotiations.
- [14] This is not to say that this mode of interaction has been particularly productive; the UK and EU were engaged in talks over mitigating the Protocol's application to Great Britain to Northern Ireland trade for months, a process which was paused in the run in to the Northern Ireland Assembly elections. The advantage of focussing on a "green channel" (or "express channel") approach is nonetheless that it can theoretically be accommodated as an agreed application of what amounts to goods "at risk" of entering the Single Market, and thus amounts to talks about the application of the Protocol, and not a renegotiation of it. It is, nonetheless, in current conditions, a "high trust" option, and it is almost impossible for the UK

Government to brow beat Brussels into an approach that relies on trust. Instead, it would be more productive to focus on the issues of data sharing with the EU which would facilitate this approach.

- [15] In terms of more substantive reworking of the Protocol, setting aside approaches such as '[mutual enforcement](#)' that would appear to be impossibilities in terms of the EU's position, the issues of democratic deficit, the VAT regime and CJEU oversight loom large. The EU's offering on [Engagement with Northern Ireland stakeholders and authorities](#) is one of very few areas where all commentators on the Protocol seem agreed; this offer could be substantially improved. The EU needs to provide Northern Ireland stakeholders and authorities consultation opportunities on draft EU laws applicable under the Protocol, or otherwise likely to affect it, on par with the arrangements offered to [Switzerland](#) in the EU's attempt to renegotiate the Swiss-EU bilaterals. The Protocol's Joint Consultative Working Group (JCWG) could have an expanded remit by agreement in the Joint Committee that enabled this consultative function; it would not require renegotiating the Withdrawal Agreement, but would address a clearly justifiable constitutional concern in Northern Ireland.
- [16] Movement on Northern Ireland's democratic deficit is as vital as the removal of CJEU oversight of the Protocol is inconceivable. If relations between the UK and the EU were better than they are on matters of the Protocol, it might be possible to renegotiate the Protocol so as to limit CJEU involvement to the extent of its role under the Withdrawal Agreement, restricting it to having the exclusive authority to give binding interpretations of all matters of EU law raised in disputes relating to the Protocol. In the context of UK-EU relations being conditioned by the UK's explicit political rejection of its Protocol obligations, as well as two separate attempts to legislate domestically so as to contravene those obligations, it is unimaginable that the EU will deem its ability to enforce the Protocol both via the CJEU and the Commission's infringement proceedings under Article 258 TFEU, *and* via the UK's domestic courts and the preliminary reference process retained under Article 12(4) of the Protocol, to be superfluous. Added to this is the fact that the CJEU's 'role' under the Protocol has thus far remained dormant—it has not ruled on the Protocol to date—meaning that the argument that the CJEU's role is adding to the social difficulties in Northern Ireland is weaker than the other practical dimensions of the Protocol's operation. The EU thus has little incentive to redraft the Protocol to address this point.

- [17] The EU likewise did not offer any compromise position on Northern Ireland's inclusion in the EU VAT regime in its October 2021 proposals, and it is difficult to see why it would given the clear operation of the Protocol's terms in this regard. VAT came to the fore in a speech by the Foreign Secretary on 17 May 2022, when she [told](#) the House of Commons that "citizens in Northern Ireland are unable to benefit fully from the same advantages as the rest of the UK, like the reduction in VAT on solar panels". It is not clear how this is causing either practical or constitutional problems *in general* in Northern Ireland, and so the EU's appetite for renegotiating the VAT arrangements in place to enable goods to move across the island of Ireland (and into the EU) without charging VAT is likely to be limited. This does not preclude collaborative adjustments to VAT, or even temporary exceptions to the EU VAT regime that the UK government can present as working to address economic or societal difficulties (which, as Article 16 indicates, permits temporary disapplication of the Protocol's rules); these are likely to be negotiable in the Joint Committee, as long as targeted, and temporary.
- [18] In sum, the EU can move further and should be expected to move further on the Protocol's democratic deficit; and negotiations on practical measures to mitigate the effects of the Protocol should continue, with more movement by the EU perhaps possible. The removal of the CJEU's jurisdiction over the Protocol and wholesale abandonment of the EU legal regimes that underpin the Protocol are not going to see movement from the EU given the current political climate surrounding those negotiations, and so the legal and practical implications of pushing for those changes – whether via domestic override or safeguards under Article 16 of the Protocol – are likely to involve dispute settlement and counterbalancing/remedial measures by the EU across the breadth of its legal relationship with the UK.

POLITICAL STABILITY

- [19] The Protocol continues to be a source of contestation and a basis for stalling power-sharing. In the May 2022 Assembly election, a majority of elected MLAs support the Protocol's continued application with negotiated adjustments. However, the combined vote share of the DUP and Traditional Unionist Voice (TUV) indicate that there is a large element of Unionist opposition to such arrangements. Both parties, and particularly the DUP, argue that this equates to a mandate to take any action at political disposal for this purpose. Although it was anticipated that the DUP would be unlikely to return to the Executive, the party's stance with regard to the

Assembly was not foreseen. The DUP, backed by the TUV, has since articulated that there is a choice facing the Prime Minister: either the Protocol or power-sharing can be in place, but not both.

- [20] The DUP could see potential opportunity in another Assembly election being held in the near future as a means of capitalising on the stance it has taken, with a view to being returned as the largest party in the Assembly again (and, thus, eligible to nominate to the post of First Minister). In the wider context of the cost-of-living crisis and mounting tensions between the parties (levied, in particular, at the DUP), to have another election before the end of the year would add a further destabilising effect to the mix and likely make it even more difficult to regain a stable footing in Northern Ireland thereafter.
- [21] Should agreement be reached that will be sufficient to encourage the DUP to return to power-sharing, this will not in itself take the Protocol off the table as a dominant issue in Northern Ireland's politics. Article 18's democratic consent mechanism means that there will be a vote in 2024 on the continued application of Articles 5-10 of the Protocol, relating to trade. Given the timelines at play, a further Assembly election in the interim could become a proxy for this.
- [22] The most recent recall of the Northern Ireland Assembly on 30 May 2022 demonstrated the gravity of the current issues and highlighted that these extend in two directions: between the DUP and Westminster with regard to the Protocol; and between the DUP and the majority of other parties represented in the Northern Ireland Assembly, particularly Sinn Féin. Addressing the UK-EU impasse with regard to ongoing discussions on the Protocol will only tend to one aspect of the current political challenges within Northern Ireland. How the UK Government proceeds regarding the Protocol will directly determine how the political situation within Northern Ireland will play out. This will become especially pertinent should there be need for the UK and Irish governments to support efforts to re-start the institutions, as was seen with the *New Decade, New Approach* deal brokered in January 2020.
- [23] Political stability in Northern Ireland is therefore contingent at this point on the UK Government's actions. The present political situation is not akin to previous instances of stalemate in Northern Ireland, which relied on cross-party negotiation and agreement in various forms to reach their conclusion. The centrality of the Protocol in this picture—itself beyond the parameters of what politicians in Northern Ireland can directly negotiate—has introduced a new dynamic which makes this a

much more challenging deadlock than previous ones to overcome, and one that is reliant on external factors for resolution.

[24] The introduction of domestic legislation to override aspects of the Protocol is not conducive to creating stability in post-Brexit Northern Ireland. Such approaches generate uncertainty in the short term and provide no solid solution for the long term. Anything short of a negotiated outcome will fall short of providing the most stable foundation possible. The UK Government's relationship with the Irish Government also needs to be rebuilt. Political stability in Northern Ireland cannot be disentangled from UK-Ireland relations, and a fractious relationship between the UK and Irish governments makes it difficult to support Northern Ireland's parties in the process of returning to power-sharing. The repercussions of rhetoric, threats and failure to work towards agreed solutions over the Protocol thus extend far beyond Westminster.

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