

Victoria Hewson - Written evidence (FUI0015)

Written evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland follow-up inquiry on the impact of the Protocol on Ireland/Northern Ireland

Introduction

This submission is authored by Victoria Hewson, Head of Regulatory Affairs at the Institute of Economic Affairs (IEA).

I welcome the opportunity to submit to the Committee's further inquiry on the impact of the Protocol on Ireland/Northern Ireland, and have focused on selected questions from the call for evidence drawing on my research on this topic, including [A Hard Question – Managing the Irish Border through Brexit](#), in the December 2017 Irish Journal of European Law, and the briefing paper [The Northern Ireland Protocol: Current Position and Ways Forward](#) published by the IEA in May 2022.

I would be happy to assist the Committee further in their inquiry.

The practical impact of the Protocol

(4) Which aspects of the Protocol's operation are creating most difficulties? Which practical modifications to the operation of the Protocol would make it operate more effectively?

Economically, the difficulties have been caused by the Protocol's default setting that all goods are at risk of moving from NI to Ireland or elsewhere in the single market. All goods moving to NI from GB must be declared and treated as 'at risk' for fiscal purposes unless they meet certain conditions. This means that by default, tariffs must be paid unless the importer can show that the goods meet the criteria to be treated as not at risk. All goods in NI must meet the EU's regulatory requirements and be submitted for checks at the border where EU import controls require it – this particularly affects food and agricultural products.

Modifications to the operation of the protocol that reduce some bureaucracy but do not tackle these structural defaults seem unlikely to make material improvements or reverse the diversion of trade that has already occurred. Reversing the default so that full customs and regulatory requirements apply only to goods declared for onward movement to Ireland or the rest of the single market would make the protocol operate more efficiently by eliminating the costs that are currently borne by importers of the majority of goods brought to or produced in NI that are for domestic consumption or part of UK supply chains. These costs are out of all proportion to the risks to the single market.

Politically, the continued direct effect of hundreds of items of EU regulations (including the customs code and border regulations, and regulations relating to goods, VAT and state aid) and the ongoing jurisdiction of the European Commission and the Court of Justice of the EU have resulted in relevant provisions of the Act of Union being subjugated (as the Court of Appeal in Northern Ireland described it). This means that it does not have support from Unionist parties, who have refused to execute its further implementation and, most recently, even to participate in power sharing in the NI government at all. The UK government has proposed to make NI a dual regulatory zone, where EU regulations would be recognised for the NI market by operation of UK law, with NI brought under the UK's national regime for subsidy control. This modification would largely eliminate the issues with the subordination of UK law to EU law in NI that Unionist parties see as undermining its constitutional position, without reintroducing formal border controls and infrastructure that nationalist communities would reject.

Any negotiated solution that does not respect Northern Ireland's place in the UK's legal order and internal market will continue to be unstable and undermine the Belfast Agreement. A system that seeks to apply international trade rules, however attenuated, between two highly integrated parts of a national economy will cause economic burdens that need significant benefits to justify them. No such benefits have arisen or are likely to arise.

(6) What is the impact of regulatory divergence between the UK (in respect of Great Britain) and the EU upon the operation of the Protocol and the ability to identify solutions to the current problems?

Even when underlying regulations remain largely identical, and differences such as the EU's ban on imports of chilled meat have been suspended by grace periods, the introduction of formalities alone has caused many GB based suppliers to exit the NI market or certain goods to be withdrawn. Summary of the effects on trade, inflation and business confidence is set out in the IEA briefing paper [The Northern Ireland Protocol: Current position and Ways Forward](#), published in May 2022.

As the Protocol currently works, substantive divergence from EU laws by the UK could lead to even more trade diversion as suppliers in GB may be unable or unwilling to maintain production to serve both the GB and (much smaller) NI markets. Arguably this is one of the great benefits of the Protocol to the EU – it creates a strong incentive for the UK to align to EU laws, even in the absence of formal agreement to do so.

A solution based on economic openness and unilateral (or optimally, mutual) recognition of regulations that deliver acceptable levels of safety and health protection can be identified. Rather than limit the dual regulatory zone proposed in the UK government's July 2021 Command paper to NI, this could be extended to the whole of the UK. Other than in respect of SPS goods, and animals and animal derived products in particular, conformity with regulations is not generally controlled at international borders. Therefore at least for industrial goods, the usual practices of market surveillance and contractual obligations will allow Irish and other member state authorities to maintain compliance with applicable goods regulations in their territories, despite divergence in the UK. Additional cooperative measures may be required in respect of SPS goods; even here if a risk based approach is adopted, physical border controls should not be necessary.

Alternatives to the Protocol

(8) Is there a viable alternative to the Protocol? To what extent would such alternatives address the priorities and concerns of each side?

The proposals for a 'green channel' and dual regulatory zone set out in the UK's Command Paper of July 2021 set out a viable alternative approach for the trade related aspects of the Protocol. As well as removing the economic burdens of the protocol, they would address the constitutional aspects and could lead to the restoration and stable operation of the institutions of the Belfast 'Good Friday' Agreement. Optimally this approach would be developed and adopted by agreement between the parties. It would be in the EU's interests to participate fully in data sharing and oversight of enforcement.

The partial implementation of the Protocol so far has been criticised by the Commission as not fit for purpose, and infringement proceedings against the UK in respect of the continuation of the grace periods were initiated (and then paused), but there is no evidence that the absence of the full border controls expected from strict implementation has led to leakage of unauthorized goods into Ireland or elsewhere in the single market.

Social and political attitudes to the Protocol

(11) How can concerns about the perceived democratic deficit at the heart of the Protocol, in view of the continued dynamic application of significant areas of EU law to Northern Ireland in the absence of UK participation in the EU institutions, be addressed?

Very simply, the direct effect of EU laws and jurisdiction of the European Commission and CJEU should be taken out of the Protocol. The arrangement should work on the same basis in international law as the Trade and Cooperation Agreement between the UK and the EU, which is more usual between sovereign parties outside of EU membership.

The UK and EU approach

(14) What is your assessment of the EU's approach to and management of the impact of the Protocol over the past year, including the publication of its four 'non-papers' in October 2021? Has it done enough to take account of concerns over the Protocol?

(15) Are the EU's proposals sufficient to mitigate the impact of the Protocol on movement of goods between Great Britain and Northern Ireland?

Taking questions 14 and 15 together, the EU's proposals do not materially advance the effort to mitigate the impact of the protocol or improve its provisions.

The Commission accepts in its non-papers that there have been 'difficulties' in Northern Ireland, but attributes these to 'Brexit' rather than to the operation of the Protocol. It rules out amendments to or renegotiation of the Protocol.

The Commission claimed in the non-papers that the British government had 'not provided any concrete economic evidence nor substantiated the precise difficulties faced resulting from the implementation of the agreed solution which would outweigh the benefits and opportunities that Northern Ireland business has by remaining de facto part of the Union's Single Market for goods and are confirmed by a majority of Northern Ireland businesses' (European Commission Customs Non-paper).

However the Commission based this assertion on polling data that do not seem to support its argument. The proportion of businesses reporting difficulties declining from 41% to 32% between 2020 and 2021, with only 29% reporting that their business has adapted well is not a strong sign that the problems with the Protocol will disperse over time, especially as the polling was based on the current, partial implementation which the Commission wishes to complete. 67% of surveyed businesses believed that NI's status post-EU Exit presents opportunities for the region, but respondents could agree that the arrangement presents opportunities, without necessarily accepting or understanding the associated costs.

The EU's position is that such costs should be temporary, as supply chains will orient away from GB, and costs will be outweighed by NI's unique access to both the EU and (for exports) UK markets. Modelling by economists at the University of Strathclyde has cast doubt on this. They found that 'due to larger trade barriers for goods imports from GB, NI firms will substitute intermediate demand for GB inputs with inputs from the rest of the world (ROW) (including the EU) [whether or not

tariffs are applicable]. Thus, the ability of substituting GB intermediate inputs and goods for the ROW/EU is crucial for the ability of NI to take advantage of the special trading arrangement. However, under no reasonable circumstances do we find that this could lead to a full compensation of the loss of GDP caused by the introduction of trade restrictions. Hence, there appears to be no evidence that the NP allows NI to enjoy 'the best of both worlds' (see Duparc-Portier, G and Figus, G. *The impact of the new Northern Ireland protocol: can Northern Ireland enjoy the best of both worlds?* In *Regional Studies* (2021)).

The proposals in the non papers are limited in scope and heavily conditioned in ways that the UK seems unlikely to be able to accept. They come from a starting point of full implementation (ie an end to the grace periods and other ad hoc deviations currently operating) and UK alignment with relevant EU laws. Fully implementing the Protocol and then embedding the enhanced administrative facilitations set out in the non-papers would leave consumers and businesses in NI in a worse position than they are at present.

The EU proposals, or indeed any that entrench the current framework or drive it to full implementation, would add distortions and costs to businesses and consumers in NI.

The reliance on trusted trader schemes, for both fiscal and regulatory facilitations could have anti-competitive effects, with only supermarkets and larger retailers able to benefit and smaller retailers, wholesalers and manufacturers facing the greatest costs and distortions. According to UK government figures, of 16,000 businesses in NI that purchase goods from GB, 15,000 are small or micro enterprises with fewer than 50 employees. Such businesses have limited capacity to complete checks or meet the qualification criteria for the trusted trader facilitations that have been offered.

The EU's position acknowledges, and even actively seeks, trade diversion on a scale that was not the intention of the parties. In effect, the Commission is admitting that the Protocol can only be made to work if there is massive diversion of trade, which is in some ways also an admission that it can't be made to work, given that its objectives included recognition of NI's place in the UK internal market and having

as little impact as possible on the everyday life of communities in Northern Ireland. The presence of the article 16 safeguards on economic disturbance and diversion of trade also indicate that such outcomes were not the intention of the drafters of the Protocol when it was agreed.

(16) Do you see any grounds for compromise between the UK and EU's positions that would respect both sides' concerns?

Both sides' stated priorities, reflected in the wording of the Protocol itself, include protection of the Belfast Agreement. The obvious ground for compromise is that the Protocol as currently formulated does not achieve this objective, indeed has had the opposite effect.

While some in the Unionist community may oppose retaining any parts of the Protocol, and would reject even the limited formalities associated with differentiated treatment of goods under the Command Paper proposals, nationalists should welcome the continued commitment to an absence of physical or administrative trade barriers between NI and Ireland. All communities would benefit from restoration of stable governance and free trade between GB and NI.

Such an arrangement may even deliver the 'best of both worlds' outcome that the Protocol's supporters had originally hoped for. The EU has little to lose from a restructuring of the Protocol, other than its leverage against the UK. A collaborative, negotiated solution would surely be more reflective of the EU's preference for rules-based order than the alternative, which seems at present to be unilateral action by the UK, which may in turn lead to protracted legal actions. At a time when the EU and its member states face economic and security challenges on a number of fronts, this is surely a ground for it to seek compromise.

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