

Prof. David Phinnemore, Prof. Katy Hayward, Dr. Lisa Claire Whitten – Written evidence (NIP0029)

The Protocol on Ireland/Northern Ireland

Written evidence submitted to the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland

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Q1: How would you summarise the impact (both positive and negative) of the Protocol as it currently operates on Northern Ireland?

1. As part of a three-year ESRC-funded research project, we have commissioned during 2021-22 regular surveys to [‘temperature test’ voter attitudes in Northern Ireland](#) on issues relating to Brexit, the Protocol, and their implications for Northern Ireland. This is the only regular polling in Northern Ireland dedicated to the topic of the Protocol.
2. The most recent – and sixth – [survey was conducted on 7-10 October 2022](#). It received more than 3100 responses, and the findings are based on sample of 1499 weighted to be representative of the adult population of Northern Ireland (e.g. by age, gender, region). All results presented are accurate to a margin of error of +/-2.3% at 95% confidence.
3. According to the polling, current opinion on Brexit and the Protocol continues to be divided. A majority (54%) currently see the Protocol, with grace periods, as the appropriate means for managing the impact of Brexit on Northern Ireland and 53% as overall ‘a good thing for Northern Ireland’; 34% and 39% of respondents respectively are of the opposite view.
4. On the impact of the Protocol:
 - 51% think the Protocol is having a positive impact on the Northern Ireland (NI) economy, and 63% think it offers unique opportunities that could benefit Northern Ireland.
 - 62% think it is having a negative impact on political stability in Northern Ireland and 60% think the same about its impact on British-Irish relations.

¹ This evidence is submitted as part of three-year academic research project on *Governance for ‘a place between’: the Multilevel Dynamics of Implementing the Protocol on Ireland/Northern Ireland* funded by the Economic and Social Research Council (www.qub.ac.uk/sites/post-brexit-governance-ni). This evidence does not address legal issues arising from the questions asked. These are addressed in separate evidence submitted by Dr. Billy Melo Araujo, a co-researcher on the above project.

- 47% think the Protocol is positive for the 1998 Belfast (Good Friday) Agreement whilst 39% think it is having a negative effect on it.
- 49% think the Protocol is having a negative impact on Northern Ireland’s constitutional place in the United Kingdom (UK) and 47% see it as negative for Northern Ireland’s place in the UK internal market.
- 32% of voters in Northern Ireland have no concerns about the full operational scope and impact of the Protocol; 56% do have concerns about the Protocol were it to be fully implemented with no adjustment after the grace periods.

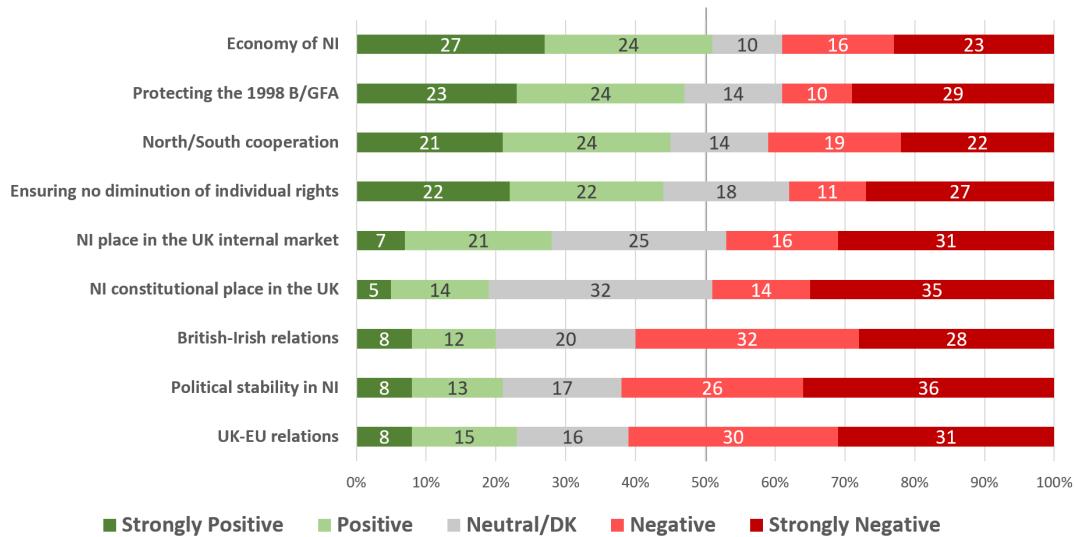


Fig. 1. Overall assessment of the current impact of the Protocol²

5. The polling also found a majority (56%) have concerns about the full operational scope of the Protocol (i.e. without current grace periods and assuming full implementation) and its impact. The proportion is similar to June 2022 (55%). 32% of respondents said they have no such concerns. In June, the proportion was 36%.

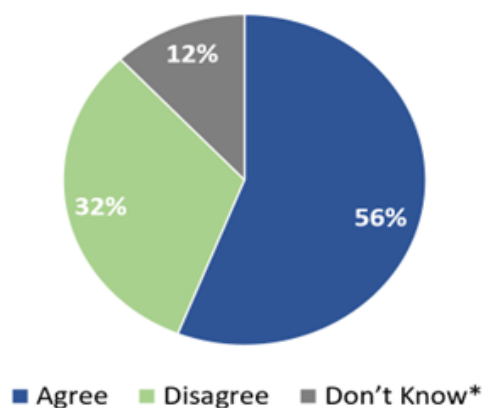


Fig. 2. Do you have any concerns about the Protocol’s full operational scope and impact?

² Don’t Knows/Not sure/No opinion (all ≤2% combined, except for ‘Ensuring no diminution’ at 4%) included under ‘Neutral’.

6. Among those who have concerns, the potential introduction of customs declarations for parcels is the issue of most concern (64%, equating to 36% of respondents overall) followed by restrictions on plants and seeds and chilled meats being brought into Northern Ireland from Great Britain (GB) and requirements for bringing pets from GB into Northern Ireland (of concern to 33% and 32% of respondents overall respectively).
7. The issue of least concern is Northern Ireland aligning with the EU's standards for the production of goods (42%, equating to 24% of respondents overall), followed by the application of EU rules on subsidy control and state aid (27% of respondents overall are concerned).
8. The poll also found that a narrow majority (53%) of respondents are content with the jurisdiction of the Court of Justice (CJEU) being 'a price worth paying for unhindered access to the EU's single market for goods'. 39% disagree.

Q2: What is your overall assessment of the UK Government's approach to the Protocol, including bringing forward the Northern Ireland Protocol Bill? To what extent will it alleviate the issues with the Protocol that it seeks to address?

9. The UK government, since the Withdrawal Agreement (WA) was agreed in 2019, has often failed to be clear and honest about the content of what it agreed with the EU in the Protocol and their implications, particularly for the GB-NI movement of goods. Combined with a failure to recognize the implications of wider Brexit policy choices – most obviously withdrawal from the EU customs union and the EU internal market – this has led to misleading and erroneous claims being made about the Protocol such that much public and political debate is characterised as much by inaccuracies and false assertions as it is factual and informed understanding.
10. The situation is often exacerbated by misunderstandings and misconceptions about the wider context in which the Protocol exists, most obviously regarding the content of the 1998 Agreement, e.g. around consent and the 'east-west' dimension under Strand 3.
11. The UK government has also failed to acknowledge the implications of the 2020 Trade and Cooperation Agreement (TCA) for the effects of the Protocol. It was clear in 2019-20 that the further the post-Brexit trading relationship was away from a customs union with the EU and participation in the EU internal market, the more friction there would be on GB-NI movements of goods under the Protocol. It is worth noting that during the negotiations in 2020 that led to the TCA no obvious effort was made by UK negotiators to pursue arrangements that would mitigate the effects of the Protocol on GB-NI movements of goods.
12. The UK government's response to the consequences of its decisions regarding post-Brexit trading arrangements for Northern Ireland has often included recognition of their disruptive nature, albeit often without acknowledgement that Brexit – by its nature – was always going to entail disruption. However, rather than seek earnestly to resolve issues with the EU while recognizing legal obligations, there has been a tendency to exploit political contestation around the Protocol to pursue wholesale change to the arrangements that follow from the Protocol and the TCA, often signalling a willingness, indeed intent, to act unilaterally rather than

pursue a negotiated outcome. This has been reflected in the 2021 Command Paper and the presentation of the Northern Ireland Protocol Bill. We note, however, that with recent changes in UK government unilateral action has been relegated to an insurance option.

13. Despite the existence of agreed structures and process for supervising and implementing the Protocol, there has been a tendency to seek to address Protocol issues outside this framework. Although the EU-UK Joint Committee exists to 'seek appropriate ways and methods of preventing problems that might arise in areas covered by [the] Agreement or of resolving disputes that may arise regarding the interpretation and application of the Agreement' (Article 164(4) WA), there has only been one meeting of the Joint Committee since June 2021.

14. Formal meetings of the institutions charged with governance of the Protocol are infrequent (see Figure 3) and the outputs from such meetings lack detail. In place of the formal meetings, we note that informal meetings between the principals and between officials remain important. Ad hoc and informal meetings have their place, but there are also dangers in over-reliance on such mechanisms for communication, especially when there is so much public misperception about the Protocol and so much is often resting on the outcome of such contacts.

	2020												2021												2022											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Joint Committee			X			X		X	X	X			X							X					X											
Specialised Committee				X		X		X	X	X			X	X				X	X							X										
Joint Consultative Working Group												X		X	X		X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	

Fig. 3. Official meetings of the bodies governing the Protocol

15. The existence of the Northern Ireland Protocol Bill appears to be motivated less by a wish to make agreed arrangements work and more by a desire to fundamentally alter the Protocol. Such change is to be pursued through various means, including the disapplication of core provisions and the removal of the jurisdiction of the CJEU. There should be no doubt that it is unrealistic to expect the benefits of the Protocol to continue (e.g. free access to the EU's single market for goods) after its key provisions have been hollowed out and a core element of its governance arrangements dismantled.

16. The focus on unilateral action risks undermining the Protocol and renewed deterioration in UK-EU relations. Unilateral action would introduce additional legal complexity as well as legal uncertainty for NI businesses and would most likely lead to retaliatory action from the EU thus undermining the operation of the UK-EU relations.

Q3: What is your assessment of the Government's argument that the Bill, and the measures contained within it, are necessary to safeguard the Belfast/Good Friday Agreement?

17. We remain unconvinced by the UK government's 'necessity' argument. We note that the UK and the EU agreed the terms of the Protocol on the understanding that the Protocol is 'without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent'. (Article 1) We note also that the Protocol includes UK commitments concerning 'no diminution of rights, safeguards or equality of opportunities' and the work of the rights bodies under the 1998 Agreement (Article 2). We further note that the Protocol 'shall be implemented so as to maintain the necessary conditions for continued North-South cooperation' (Article 11).
18. Clearly, however, the impact of the Protocol on GB-NI movements of goods and the failure of the TCA to mitigate the effects of what was agreed in the Protocol has undermined Northern Ireland's position in the UK internal market. The situation has caused disruption and deep concern for many people in Northern Ireland, particularly those who identify as unionist, and has clearly contributed to political instability and a clear sense among unionists that Northern Ireland's position in the UK is being threatened as a consequence of agreed post-Brexit arrangements for Northern Ireland.
19. If there is to be broad consensus on maintaining the 1998 Agreement, concerns about the impact of Brexit and the Protocol on Northern Ireland need to be addressed. These concerns are primarily in relation to the negative impact of the Protocol on political stability in the UK, on British-Irish relations and UK-EU relations. In this sense, we know that improvements in the UK-EU relationship will bring benefits to the British-Irish relationship, which will in turn enhance community relations in Northern Ireland. Given that the Northern Ireland Protocol Bill goes against the wishes of three of the largest parties in Northern Ireland, those of the Irish government and the EU, it is quite evident that unilateral action will not create the improved relations necessary to shore up the 1998 Agreement.

Q4: What impact will the Northern Ireland Protocol Bill have on the economic and political climate in Northern Ireland, and on North-South and East-West relations, if and when it comes into law?

20. As part of our research project we have been engaging with business and civil society stakeholders to discuss their views on Brexit and the Protocol and the various developments in the UK government's approach to the Protocol and attempts to address issues of concern regarding its application. There has been a constant desire among stakeholders for pragmatism and a negotiated settlement of issues of concern. The appetite for unilateral action on the part of the UK government either via the use of Article 16 or the disapplication of provisions of the Protocol has been extremely limited.
21. In our recent polling in early October 2022, 71% of our respondents indicated a preference for the UK and the EU reaching an agreement on the Protocol's implementation rather than the UK take unilateral action. A majority (59%) do not believe the UK would be justified in taking

unilateral action to disapply elements of the Protocol. 52% maintain that the EU would be justified in taking retaliatory action, including potentially suspending the trade provisions of the TCA, if the UK did take unilateral action to suspend elements of the Protocol.

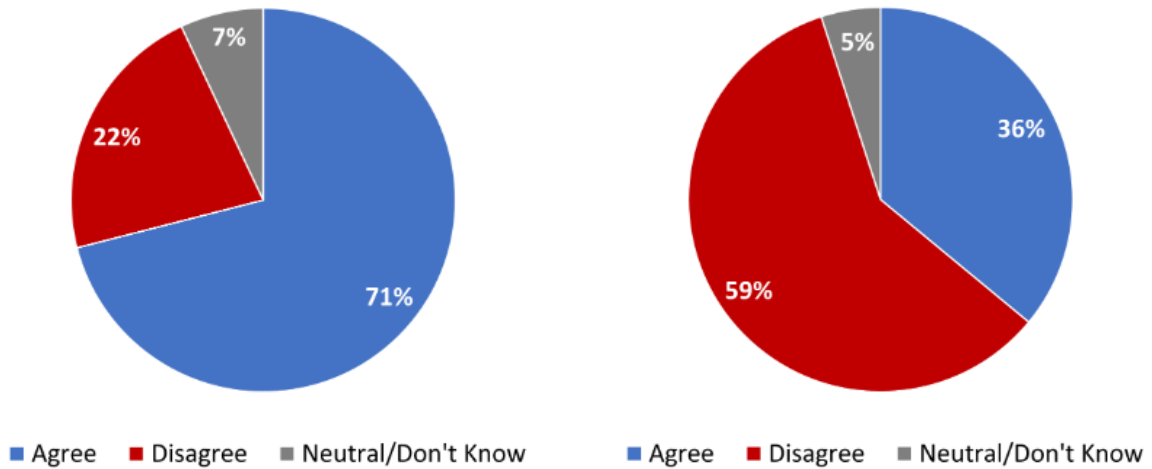


Fig 4: A negotiated UK-EU solution to the outstanding issues with the Protocol is preferable to the UK taking unilateral action

The UK government would be justified in taking unilateral action to disapply core elements of the Protocol, as per its NI Protocol Bill, even if this is in breach of international law

Fig. 4. Opinion on unilateral action

22. We also note from that levels of trust in the UK government to manage the interests of Northern Ireland with respect to the Protocol are extremely low. Across all six polls we have commissioned, no more than 7% of respondents have indicated trust in the UK government on this question. Indeed, there has been considerable distrust. In October 2022, 84% of respondents distrusted the UK government to manage the interests of Northern Ireland with respect to the Protocol. This figure includes 49% who distrust the UK government 'a lot'.

23. The standing of the UK government is of serious concern. Voters in Northern Ireland either do not agree that the UK government is acting in the best interests of Northern Ireland with the Northern Ireland Protocol Bill or do not believe that the UK government will necessarily deliver either its adoption or its implementation.

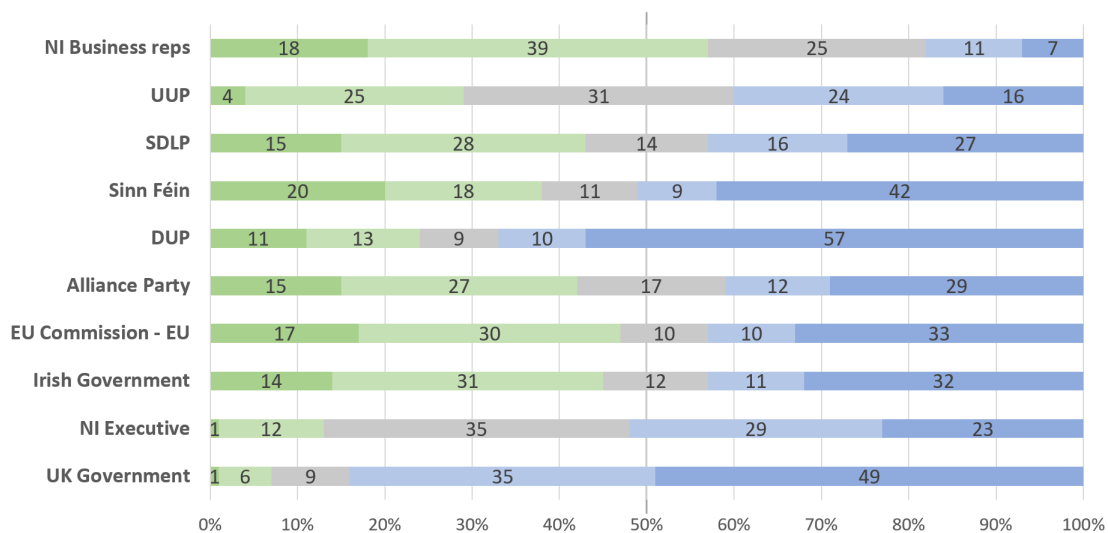


Fig. 5. Levels of trust in/distrust of actors to manage the interests of Northern Ireland with respect to the Protocol

24. We also note [EU statements](#) that the adoption and implementation of the Northern Ireland Protocol Bill could seriously undermine UK-EU relations and indeed threaten the Protocol and access to the internal market and so north-south cross-border trade.
25. We further note the persistent concerns within unionism around being 'betrayed' – once again – by the UK government. The UK government has raised expectations with the Northern Ireland Protocol Bill without necessarily being in a position to deliver on them.
26. The political instability and uncertainty that Brexit and the Protocol have created in Northern Ireland remain of major concern to people in Northern Ireland. As yet, there is no discernible evidence to suggest that the Northern Ireland Protocol Bill has had or will have a positive impact in reducing that instability or uncertainty. It is more likely to have the opposite effect.

Q10: What are the practical and legal implications of removing the jurisdiction of the European Court of Justice in the UK to oversee the implementation of the Protocol and stating that UK courts are not bound by decisions of the CJEU on matters related to the Protocol?

27. The arrangements in place regarding the jurisdiction of the CJEU – combined with the dynamic regulatory alignment of the UK in respect of Northern Ireland with agreed provisions of EU law – are designed to ensure the continued privileged access of NI traders into the EU internal market for goods and avoid a physical hardening of the border on the island of Ireland. To move away from the current arrangements without the agreement of the EU would consequently threaten that access. This would re-introduce uncertainty around post-Brexit arrangements for cross-border trade on the island of Ireland and raise questions about whether a physical hardening of the border through new checks and controls can continue to be avoided.
28. There can be unintended effects of Subsection (1) of Clause 13 of the Northern Ireland Protocol Bill, which sets out that any provision of the

Protocol or Withdrawal Agreement is excluded in so far as it confers jurisdiction of the CJEU in relation to the Protocol. As the explanatory note underlines, 'That is the case whether the CJEU jurisdiction relates to excluded provisions or any other matter'. Article 12(4) Protocol states that the CJEU has jurisdiction with respect to not only customs and the movement of goods entering NI and technical regulations and certification on goods, but also the Single Electricity Market (SEM). Article 13 Protocol has it that the implementation and application of the provisions referring to EU law, concepts or provisions should be interpreted in conformity with the relevant CJEU case law. The operation of the SEM on the island of Ireland comes under the jurisdiction of the CJEU and is required to be interpreted in light of CJEU case law. The scope of Clause 13 and Clause 14 of the Northern Ireland Protocol Bill makes this impossible, despite the Government's stated wish to protect the SEM.

29. On the proposal to replace CJEU jurisdiction with UK-only enforcement mechanisms, we note the very heavy reliance on discretionary ministerial powers. When asked whether the UK government should grant its ministers discretionary powers to legislate in place of the Protocol without the need for prior parliamentary approval, a majority of respondents (56%) in our latest poll disagreed and fewer than one in three (29%) agreed.

Q12: What is your overall assessment of the EU's approach in relation to the Protocol? Is the EU going far enough in addressing the problems that have arisen under the Protocol?

30. The European Commission in October 2021 issued four non-papers outlining ways in which customs, SPS, medicines and governance issues concerning the Protocol that were being raised within Northern Ireland could be addressed. Updated versions of the customs and SPS papers were published in July 2022. While there have been repeated statements from the UK side that these proposals do not go far enough to address the issues that the UK government and stakeholders have with the Protocol, the papers do demonstrate a willingness to negotiate flexibilities around the management of arrangements for the GB-NI movement of goods and have been not been presented as final offers. It is also worth noting that the flexibilities are not ones on offer to any of the EU's other partners and so do represent, from an EU perspective, notable concessions.
31. We also note that dedicated arrangements have been put in place to maintain the supply of human medicines into Northern Ireland under the Protocol. While there are reportedly outstanding issues to be addressed, the EU in adapting its laws has demonstrated a commitment to address issues arising out of agreed arrangements. In amended EU laws applicable under the Protocol, it has also set a precedent.
32. We further note that the EU has engaged with stakeholders in Northern Ireland to identify issues of concern regarding the implementation of the Protocol and potential solutions and that it has proposed enhancing and formalising such engagement.
33. There is an evident willingness on the part of the EU to engage on finding solutions to concerns arising from the Protocol. Steps have been taken and proposals made. Flexibility, even if not as much as the UK government would like to see, has been shown; and in principle more could be secured.

However, the extent to which further flexibility is likely will depend on how far the UK government is willing to make concessions itself. A negotiated solution to the current concerns on the Protocol is possible but does require flexibility on all sides.

Q13: What is your assessment of the EU’s response to the publication of the Bill, including the recommencement of paused and the launching of new infringement proceedings?

34. The EU’s response to the Northern Ireland Protocol Bill has been to bring proceedings in areas where it maintains that the UK is in breach of its obligations. Under the terms of the Withdrawal Agreement, it is within its rights to do so, and due process is being followed. We note also that there has been a willingness on the part of the EU to respond favourably to UK requests to extend the period in which the UK government may respond to letters of formal notice. We further note that in processing UK responses, there is currently evidence of a willingness in the European Commission not to rush assessments and issue reasoned opinions and thereby potentially undermine the new more positive mood informing UK-EU talks on resolving Protocol issues.

Q14: What, in your view, is the best way forward to resolve the current impasse?

35. Recent polling indicates a clear preference for a negotiated solution

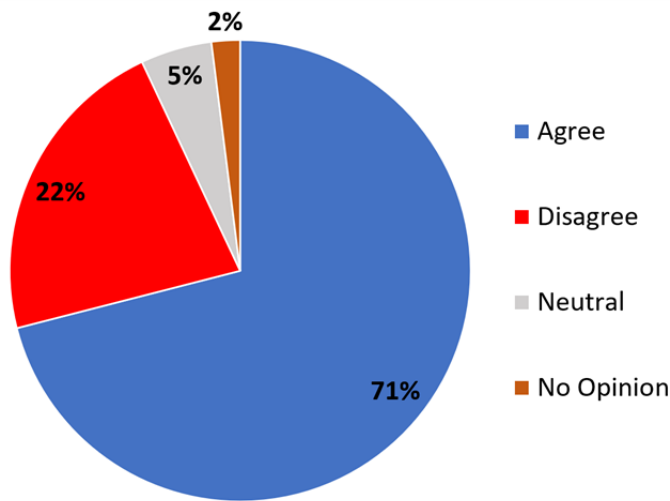


Fig. 6. A negotiated EU-UK settlement of outstanding issues regarding the implementation of the Protocol is preferable to the UK taking unilateral action.

Q16: Do you see, and how would you describe, a potential landing zone for compromise and agreement between the two sides?

36. We note the evidence of EU willingness to agree more flexible arrangements for the implementation of the Protocol (see paras 28-31). However, while there is a shared UK-EU commitment through the Protocol to address ‘the unique circumstances on the island of Ireland’, this does not mean that the scope for EU flexibility is limitless. Safeguarding the integrity of the EU internal market is, as a matter of principle, a priority of the EU. There is also the issue of ensuring broad consistency in the

management of the EU's external trade border and the avoidance of precedent-setting.

37. UK and EU positions on the implementation of Protocol have often prioritised principle rather than evidence. With increased data available on the movement of goods into Northern Ireland from GB, there has been a welcome shift towards being able to undertake more evidence-based assessments of the risk that movements pose for the internal market. Establishing an effective regime of data-sharing and risk monitoring is essential for a negotiated settlement.

38. Also essential would be either UK regulatory equivalence or alignment with EU law applicable under the Protocol regarding the movement of goods. This is reflected in the long-standing calls from traders for a veterinary and for a SPS agreement. While evidently there is a question here of political principle, pragmatism is needed. We note that polling data indicates that the issue of regulatory alignment with the EU is not a matter of majority concern in Northern Ireland.

3 November 2022