

Northern Ireland Business Brexit Working Group - Written evidence (NIP0034)

Northern Ireland Business Brexit Working Group Response to the Northern Ireland Protocol Bill

November 2022

The Northern Ireland Business Brexit Working Group (NIBBWG) is a collaboration of 14 industry bodies representing all industries across Northern Ireland's business community.

The NIBBWG is pleased to respond to this call for evidence on the UK government's Northern Ireland Protocol Bill (the Bill), which is currently progressing through the House of Lords after passing the relevant stages in the House of Commons, without amendment earlier this year.

The NIBBWG welcomes the fact that both the EU and the UK government continue to acknowledge that their preferred outcome from the current difficulties would be one agreed between them. We urge both parties to continue to use the current engagement process to achieve that shared objective without delay.

Since early 2020, we have identified what works, and where the difficulties are in the current and anticipated operation of the Protocol. We are in no doubt that an ongoing and protracted UK-EU dispute about the framework for trading in and through Northern Ireland is not conducive to either trade or investment in Northern Ireland.

Furthermore, whilst negotiations remain ongoing, we are mindful that a proportion of businesses, and consumers in Northern Ireland are bearing additional costs, reduced choice, and/or delays, while some exporters hold off on making strategic investment decisions that could benefit the economy.

It is our collective position that we need to see the following:

1. Overarching Goal: An Agreed Outcome is the Responsibility of the Joint Committee to Deliver at Pace

- **Context:** With inflation running at a 40 year high, and given the unique circumstances of NI, both sides have a responsibility to reach an agreement on the Protocol with urgency
- **Starting Point:** The floor for any agreed arrangements is the existing standstill arrangements – not full implementation of the Protocol
- **Focus on Outcomes:** Any agreed solutions must be durable, delivering stability, certainty, simplicity and affordability upon full implementation

2. Process: Learning from the Recent Past to Deliver Optimal Outcomes

To maximise the potential for an agreed outcome, we believe two key steps are required:

- **Scoping the Problem:** On the technical issues, a tripartite technical discussion between the EU, the UK and business is needed as a form of “due diligence” on agreeing what is working, and where there are problems. Unless it is tripartite, with the three groups simultaneously involved, it risks continuation of the same misunderstandings and contradictions, with varying emphases and interpretations, resulting in further delay and controversy.
- **An Inclusive Process:** There are questions to be addressed beyond the scope of trade and technical issues. For that reason any process for reaching durable solutions should involve a consultative NI stakeholder element, including the NI political parties

3. Protecting the NI Consumer: A Key Question to be Answered

- **Context:** 2 out of 3 goods moving between GB and NI are retail or wholesale, ie goods destined for the consumer. The NI consumer has the lowest discretionary spend in the UK, meaning our households are the least well placed to manage changes on choice and affordability.
- **Special Arrangements:** Business has long argued that where goods are for final sale to the consumer in NI, a special arrangement is required that (i) accommodates regulatory divergence and (ii) avoids any significant cumulative administrative burden
- **Unique and specific:** Given the limited scope and risk of such an arrangement it should facilitate divergence over time and eliminate/radically reduce the customs and SPS burden preserving access to the UK market, as both buyers and sellers, for all NI communities

4. Driving Prosperity: Protecting the EU single market, all-island/cross-border supply chains and the NI Producer

- **While producers acknowledge a unique and specific solution is required for the consumer,** this must be achieved in a way that does not put at risk access to the EU single market as it stands today nor unfettered access to the GB market. Dual market access has worked well for many industrial goods and integrated all-island agri-food sub-sectors
- **Bridging the gaps:** Questions of regulatory divergence could be addressed on a case by case basis, but for farming in particular a SPS Veterinary/Plant Health agreement would resolve a lot of these issues

5. Durability: Delivering a Stable Framework

- **Better framing of the “at risk” test:** Defining what is actually ‘at risk’ of going into the single market is key, and greater focus is required to bring more NI traders in to the “not at risk” category
- **A radical reduction in paperwork:** A radical reduction in customs bureaucracy for goods not at risk of entering the EU single market

- is needed, *regardless of sector*
- **Delivery-critical materials:** A TRQ regime which allows NI traders to serve and meet the demands of their UK market and ensures Northern Ireland and the Republic of Ireland's competitive position in the EU market
 - **Ensuring competitiveness:** Agreement is needed to progress a meaningful tariff reimbursement scheme, long promised by the UK government. The current arrangement means that in some cases firms are required to pay tariffs to HMRC for goods that ultimately remain in Northern Ireland (ie within the UK customs territory) for final sale and consumption, but these payments are not recoverable because, as yet, there is no mechanism for reimbursement
 - **Formal review mechanisms:** Periodic monitoring of the operation of the "at risk" test, economic impact assessments on regulatory challenges including divergence, and any mitigations and/or compensations needed to support and protect NI trade
 - **Meaningful representation:** That ensures Northern Ireland has an effective voice at the table in relation to EU and UK laws or policy impacting on NI trade

Since the publication of the Bill we have taken time to consult with our respective members on its contents. The Bill is, in essence, a legal framework for action, and the substance of what might take the place of the Protocol's provisions it will exclude is to be determined at a future point in time. It is not possible, therefore, to make a detailed assessment of its measures or ramifications. Instead, we set out below an initial (non-exhaustive) list of questions on behalf of our respective members in three parts for all policymakers engaged in the legislative process:

- A. Customs and Movement of Goods
- B. Dual Regulatory Regime
- C. Subsidy Control, VAT and Governance

Part A: Customs and the Movement of Goods

A	Questions
1.	<p>Risk and Responsibility:</p> <ul style="list-style-type: none"> i. <i>Which party assumes the risk as a trusted trader? Will the NI customer, the GB Supplier, the haulier or all such parties need to be a “trusted trader”?</i> ii. <i>If it is at the discretion of the parties, and bargaining power results in NI customers (particularly SMEs) acting as the importer of record, what protections will the UK government (UKG) provide to NI business customers for the increase in liability? Will they be compensated in any way? Has the UKG considered the possibility that if, on balance, the risk is too high for certain businesses or sectors, they may choose to de-risk supply chains away from the GB-NI route?</i> iii. <i>How will the UKG determine balancing this risk (of re-orientation of supply chains away from GB) with ensuring that the system is robust enough to provide the necessary assurances?</i> iv. <i>Given the scale and complexity of retail loads crossing GB to NI in particular, how will the level of bureaucracy associated with the Green Lane, i.e. the cumulative burden, be tested to ensure it is a workable and affordable solution?</i>
2.	<p>Locality and timescales for Green Lane/Red Lane:</p> <ul style="list-style-type: none"> i. <i>Does UKG envisage goods enter from any point via land or sea, and be declared as ‘red’ or ‘green’ goods under a Green/Red-lane model? Or must goods physically enter at an official Green/Red lane site?</i> ii. <i>If goods are required to enter at green/red lane sites – will lanes exist at all NI air and sea ports?</i> iii. <i>To what extent have the movements of rest of world goods been considered, will a trusted trader status be required?</i> iv. <i>What is the projected timescale for the creation of the necessary infrastructure?</i>
3.	<p>Qualifying Movements:</p> <ul style="list-style-type: none"> i. <i>What specific criteria will be applied to determine whether goods are “qualifying movements”, as defined, and thus <i>not at risk</i> of subsequently being moved to the EU (and therefore within the excluded provision)?</i> ii. <i>How will these criteria be applied for mixed loads? Will additional conditions and paperwork be required in these cases? How can these criteria be applied for goods that will be subject to further processing in NI?</i>
4.	<p>The determination of Green Lane goods:</p> <ul style="list-style-type: none"> i. <i>If goods cannot be definitively categorised as staying in NI/UK (i.e., as qualifying movements), will these not meet the criteria for Green Lane and must they default to Red Lane? Section 4(5) (C) seems to widen the scope for Green Lane, it indicates that there may be scope to determine whether final destination is NI/UK or EU at a later stage after goods have been moved to NI.</i>

	<ul style="list-style-type: none"> ii. Does this mean initial use of Green Lane (for trusted traders) with a subsequent determination, or is it proposing a third lane for “don’t know at the point of entry” destinations? How would EU customs rules and customs declarations be applied in these cases?
5.	<p>Operation of the Green Lane:</p> <ul style="list-style-type: none"> i. Given the scale and complexity of retail loads crossing GB to NI, <i>how will the level of bureaucracy associated with the Green Lane, i.e. the cumulative burden, be tested</i> to ensure it is a workable solution? ii. What is the exact <i>notification</i> importers are required to give prior to dispatching goods to NI for red/green lane? iii. Will there be random <i>checks</i> completed on green lane imports? iv. What data/documents would be required for entry through the Green Lane?
6.	<p>Green Lane and Agri-Food:</p> <ul style="list-style-type: none"> i. What, in detail, will be the <i>control regime for products of animal origin (POAO)</i> imported into NI via the proposed Green Lane? ii. Will the competent authority have sufficient data on the volume, value, product detail, destination at the point of import, in order to assess the risk to the Single Market? iii. How will the competent authority reconcile Green Lane imports to verify that goods have not leaked into the EU Single Market?
7.	<p>Parcels:</p> <ul style="list-style-type: none"> i. How will the system apply to parcels? ii. Will Business 2 Consumer parcels be automatically cleared?
8.	<p>Requirements for use of the Red Lane:</p> <ul style="list-style-type: none"> i. Would a trusted trader still be required to use the Red Lane for goods that do not meet the NI/UK final destination criteria? <i>Or is the Bill proposing that a business registered as a trusted trader can put all goods through the Green Lane?</i> ii. What data/documents are required for entry through the Red Lane, for example pre-notification, customs declarations, global certificate, commodity codes of products? What is the dataset/documentation required and to what level?
9.	<p>Provisions applying to Red Lane goods:</p> <ul style="list-style-type: none"> i. <i>Do all of the provisions of Union Law listed in Annex 2 of the Protocol apply to goods that travel through the Red Lane, including the UCC Regulation (EU) No 952/2013? Alternatively, is the Bill saying that these Annex 2 provisions do not legally apply to Red Lane goods either, but that UKG will apply its own domestic rules that are similar to EU requirements?</i>

	<ul style="list-style-type: none"> ii. If so, what reassurances can HMG give business that they will not be in breach of the EU provisions given that many businesses have an EU footprint/supply chain? iii. For goods that are not qualifying movements, that are “at risk” of movement to the EU, will the Article 5(2) at risk criteria set out in the Protocol along with Joint Committee Decision No 4/2020 still be applied, or <i>will UKG unilaterally seek to re-write the criteria for at risk goods?</i>
10.	<p>Efficient use of the Red Lane:</p> <ul style="list-style-type: none"> i. The Digital Assistance Scheme is a key tool to digitise full EU documentation to help traders use the red lane efficiently. <i>How can effectiveness and efficiency be achieved without collaboration with/from the EU?</i> ii. The existing <i>apportionment system</i> has worked relatively well to date; is a similar system anticipated? iii. <i>Where tariffs have been overpaid</i> i.e. a greater proportion of goods remained in NI than originally forecast, a clear and transparent process for tariff recovery is needed, including upfront clarity on what evidence is required and prompt time-frames for re-payment. How is this being prioritised? (This has been a significant gap in processes to-date)
11.	<p>Dis-applying Article 5 of the Protocol:</p> <ul style="list-style-type: none"> i. Section 4(2) seeks to disapply Articles 5(3) and 5(4) of the Protocol for qualifying movements where final destination is not the EU. <i>For non-qualifying movements, is it envisaged that Articles 5(3) and 5(4) will apply in full?</i> ii. Article 5(5) of the Protocol provides NI with access to the EU Single Market for goods. What assurances can UKG provide that it can disapply Article 5(3) and 5(4) for qualifying movements and at the same time guarantee that the EU will continue to allow NI businesses access to the Single Market for Goods through continuance of Article 5(5) of the Protocol?
12.	<p>De Minimis:</p> <ul style="list-style-type: none"> i. Current rules use a turnover threshold to determine goods at risk or not at risk. <i>Is it envisaged that a new “UK or non-EU destined” system will have a turnover threshold/de minimis?</i> ii. Will, for example, self-employed businesses transporting single packages or small numbers of goods benefit from being seen as ‘non-commercial’ i.e. as consumers?
13.	<p>Authorisation Process:</p> <ul style="list-style-type: none"> i. <i>What is meant by “detailed supply chain information”?</i> ii. What sort of data points and how many data points are needed? How long is it envisaged that the application process will be from opening to gaining a place on the scheme? iii. Can further clarity be given on what an authorisation process might look like, even at this juncture? iv. Will there be an authorisation process, a periodic review, and what upfront costs are envisaged?

14.	<p>Final Destination:</p> <ul style="list-style-type: none"> i. Arguably the UK Command paper from July 2021 assumes destination of goods into NI are known prior to arrival at NI Ports; this is not the case, especially for wholesale, foodservice and commercial processing. <i>Will goods that have an unknown destination at the point of entry automatically be red lane or green?</i> ii. What data, if any, will be required to provide to confirm goods have been received at a location in NI?
15.	<p>Data Sharing:</p> <ul style="list-style-type: none"> i. The Green Lane/Red Lane model will rely heavily on a <i>robust real time data sharing system</i> with the EU. Does this IT data system already exist or is it still to be built and when could this be delivered? ii. How does this proposed data system differ from the current data provided to the EU (bearing in mind that the EU has said it does not provide them with the required risk assessment to protect the EU Single Market)? iii. Will EU personnel be provided with real time direct access to this data system? iv. How will existing elements such as the Trader Support Service interact with provisions in this Bill as a ‘lasting’ solution?
16.	<p>NI-GB movements:</p> <ul style="list-style-type: none"> i. How will this Bill affect and manage the movement of goods from NI to GB? ii. The process and framework for qualifying status for unfettered access has not been completed, what are the UK governments intentions for this trade route?
17.	<p>Resources and burden on NI Business:</p> <ul style="list-style-type: none"> i. Given the potential for mis-use (innocently or otherwise) of the Green Lane, <i>how will the final destination of goods be verified?</i> Will regular customs audits take place at business premises in NI to do so? ii. Are HMRC sufficiently resourced to manage this and how can this operate so as not to impose significant burden on businesses, i.e. by pushing the compliance burden from the Irish Sea to the business premises?
18.	<p>Enforcement and Penalties:</p> <ul style="list-style-type: none"> i. Is it envisaged that penalties be applied on a proportional basis? ii. Are strict liability offences envisaged? iii. Would the <i>penalty regime</i> be based on a similar basis to current Customs, VAT and excise regimes, i.e. depending on businesses’ behaviour and reasonableness of their actions? Is an appeals process envisaged?

Part B: Dual Regulatory Regime

B	Questions
1.	<p>Modelling for a Dual Regulatory Regime:</p> <ul style="list-style-type: none"> i. What assessment has been made prior to the publication of the Bill on the <i>infrastructure required to establish and operate a dual regulatory regime</i> effectively? ii. What modelling has been carried out to date in respect of the requirements for resourcing (staffing) the competent authority control regime, cost to industry and government?
2.	<p>Administering and Enforcing a Dual Regulatory Regime:</p> <ul style="list-style-type: none"> i. Is the UKG satisfied that it has sufficient resources and capacity to <i>manage, monitor and enforce</i> a dual regulatory regime in NI to a satisfactory standard? ii. What about the capacity and resources of the NI devolved administration?
3.	<p>Competent authorities:</p> <ul style="list-style-type: none"> i. Can the government now confirm which Departments or government agencies will be the <i>competent authorities</i> charged with the responsibility for administering both (a) the specific EU regulations under Annex II of the Protocol and (b) the corresponding UK regulations?
4.	<p>Timescale for adaptation:</p> <ul style="list-style-type: none"> i. What assessment has been made of the timescales required for establishing and operating a dual regulatory regime? ii. Will there be a <i>phased approach</i> to the introduction of the proposals under this Bill specific to the dual regulatory regime?
5.	<p>Interim position and decisions on compliance:</p> <ul style="list-style-type: none"> i. In the interim, how will the UKG treat changes in EU legislation until the Bill comes into force to override them? ii. On future food safety issues for example, such as the one with titanium dioxide, would the DEFRA Secretary of State take a decision on compliance on a case by case basis? Given the volume of issues that are devolved, how would that be managed?
6.	<p>Resources and Capacity of NI Businesses to Manage a Dual Regulatory Regime:</p> <ul style="list-style-type: none"> i. To what extent has the UKG considered the <i>risk of negative competition for NI businesses</i>? E.g. if dual regulatory systems mean that a business is forced to choose UK or EU standards, it may then have to choose only one and lose sales as a result or in the alternative

	apply two sets of rules, adding to red tape, compliance and production costs. Has the UKG considered the impact of this upon NI business competitiveness?
7.	Prohibited and Restricted Goods: i. How will a dual regulatory regime interact with the existing P&R list? Will this now be removed for all NI-only bound goods?
8.	Impact on International Trade: i. Do the provisions of Section 6 (a) (iv) mean that goods included in UK FTAs, irrespective of their standards, that are imported into UK can have access to NI? ii. Does this remove the requirement for UK to include in its FTAs, provision for NI goods that are produced to EU standards?
9.	Rules of Origin: i. Is the intention of Section 5 3 (c) to remove the need for documentation to satisfy rules of origin?
10.	North-South Agri-Food Supply Chains: i. Is it intended that a dual regulatory regime will be implemented with respect to domestic food production, whereby NI farmers and processors can avail of technologies, processes and products that would otherwise be banned under the protocol and EU rules? ii. To what extent have UKG considered the implications of this for businesses operating to EU standards and their unfettered access to the Irish / EU market? iii. Have UKG considered the operation of these proposals in the management of <i>complex supply chains</i> ? iv. How does the UKG propose, for example, NI food processors, sourcing goods across thousands of NI farms and other local businesses verify adherence to EU standards if divergent UK goods are legally in free circulation? Is this practicable? v. What documentation or evidence is envisaged to ensure that, for example, ex-farm milk moving from NI to RoI for processing has been produced to EU standards, given that the dual regulatory regime will permit grain, and other products used in the production of milk to enter NI? vi. What is the position regarding NI produced agri food goods which have used intermediary products from GB in their production, for example, milk/lambs fed with feed containing GB origin cereals or vegetables grown using GB origin plant protection products?
11.	Environmental and Animal Welfare: i. What assessments have been made on the potential environmental and animal health and welfare risks that will arise if agri-food sub-sectors, such as dairy or meat, cannot move goods to RoI for processing as they do today? ii. What provisions are intended to be put in place to mitigate and compensate for this risk?
12.	Enforcement and Penalties:

	<ul style="list-style-type: none"> i. Which enforcement body would have responsibility for ensuring that EU destined goods are produced to EU standards? ii. What will market enforcement look like in practice given the <i>lack of border surveillance</i> confirmed per section 22 (3)? iii. Have the PSNI been consulted to provide an assessment of the increased risk a dual regulatory regime poses in respect of economic crime? iv. Is the UKG satisfied that the enforcement mechanisms uphold international trade norms to the satisfaction of 3rd countries and commercial customers or partners operating in 3rd countries? v. Is it envisaged that penalties be applied on a proportional basis? Are strict liability offences envisaged? vi. Would the penalty regime be based on a similar basis to current Customs, VAT and excise regimes i.e., depending on businesses behaviour and reasonableness of their actions? vii. What is the rationale for not replicating the potential enforcement powers provided for under section 5(3) in section 9 (for the dual regulatory regime)? viii. Is an appeals process envisaged?
<p>13.</p>	<p>Precedent:</p> <ul style="list-style-type: none"> i. Can the UKG confirm whether there are any international precedents for introducing a full dual regulatory regime of a similar size and scale with an open land border which it is using to inform its decision making?

Part C: VAT, Subsidy Control, Supervision and Enforcement

C	Questions
1.	<p>Continued application of EU rules on VAT:</p> <ul style="list-style-type: none"> i. Leaving aside Regulations referred to in Section 17 that may be introduced on specific matters, is it the case that the <i>VAT rules of Council Directive 2006/112/EC</i> would still apply in respect of goods movements from and to NI if/when this Bill is enacted? ii. If these EU VAT rules (and EU excise rules) are not applied in respect of NI, what guarantees can UKG provide that NI businesses will continue to enjoy access to the EU Single Market for goods as provided for in Article 5(5) of the Protocol? iii. What assurances can be given to ensure that NI businesses operating in the EU will not be penalised if the EU VAT rules are not applied in respect of NI?
2.	<p>Command Paper on VAT:</p> <ul style="list-style-type: none"> i. Is it the case that the UKG believes the provisions for VAT in the Bill will address <i>all</i> issues outlined in paragraph 54 of the UK Command paper including competition concerns? ii. As VAT is not an excluded provisions, how would <i>ministerial powers to make VAT regulations in Northern Ireland</i> work? iii. What are the parameters for this? Can they <i>only</i> do so if they comply with Article 8?
3.	<p>Rationale for Legislating for VAT Changes:</p> <ul style="list-style-type: none"> iv. Why does UKG believe that differences between VAT and excise measures, including rates that may be introduced in the UK, could not be dealt with through the <i>existing provisions of Article 8</i> of the Protocol? v. For example, was the recent matter of introducing a zero-rate VAT rate on Energy Saving Materials brought to the Joint Committee to consider implementation in NI? Was this approach considered, and if not why not?
4.	<p>New EU VAT Directive:</p> <ul style="list-style-type: none"> i. In light of new EU VAT rules Directive which provides greater flexibilities for member states to set VAT rates, <i>why has the UKG not taken advantage of these amendments to the EU VAT rate rules</i> along with existing provisions in Article 8 as the basis of resolving future VAT rate issues that may arise?
5.	<p>Role of the CJEU:</p> <ul style="list-style-type: none"> i. Whilst Clause 17 does not specifically state that Article 8 of the Protocol is an excluded provision, does Clause 20 of the Bill (referring to the role of the European Court) mean that VAT and excise decisions of the CJEU relating to supplies of goods, will not be followed in NI?

	<ul style="list-style-type: none"> ii. Section 20 Subsection (2) provides that domestic courts and tribunals are not required in domestic law to follow the jurisprudence of the CJEU, an explanation is required to confirm how this aligns with proposed retention of the Single Electricity Market which is underpinned by an EU framework
6.	<p>Subsidy Control:</p> <ul style="list-style-type: none"> i. Per paragraph 65 of the UK Command Paper, how would the application of a <i>UK-wide subsidy system</i> in NI function as NI businesses continue to have unfettered EU market access? ii. Is it envisaged that subsidy controls included the UK-EU TCA would apply to Northern Ireland?
7.	<p>Existing Agreement on Article 10 of the Protocol:</p> <ul style="list-style-type: none"> i. The UKG and the EU agreed an interpretation of Article 10 of the existing Protocol on 17 December 2020, in which the EU unilaterally declared that “the European Union underlines that, in any event, an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland. It must be established why the measure is liable to have such an effect on trade between Northern Ireland and the Union, based on the real foreseeable effects of the measure”. To date, no guidance has been issued by the Joint Committee or by the UK Government as to how this would apply in practice. What status does this interpretation of Article 10 hold? ii. Can the UKG confirm whether it has used the mechanisms within the Withdrawal Agreement to agree practical guidance on this existing agreement?
8.	<p>Governance:</p> <ul style="list-style-type: none"> i. To date, NI Protocol Governance structures appear to be underutilised. The Bill is unclear as to UKG intentions in this regard. Is it envisaged existing governance structures will (a) continue, (b) be fully utilised and/or (c) be replaced entirely under future arrangements?

THE NORTHERN IRELAND BUSINESS BREXIT WORKING GROUP

For avoidance of doubt, the NIBBWG is a time-limited informal and voluntary collaboration of industry bodies that operates by consensus. It is the agreed view of the NIBBWG that the breadth of representation in the group clearly demonstrates the diversity of experiences in trading under the Protocol insofar as it has been implemented. For ease of reference, this includes:

Industry Body	Representing
Confederation of British Industry NI	All industries and sectors, including GB headquartered suppliers and operators
Federation of Small Businesses NI	NI-based business <i>owners</i> from micro, small and medium businesses in all sectors
Institute of Directors NI	NI directors, with an emphasis on governance and strategy
NI Chamber of Commerce and Industry	All industries and sectors, with an emphasis on NI exporters
NI Retail Consortium	Retail
Ulster Farmers Union	Farming
NI Meat Exporters Association	Meat processing
NI Dairy Council	Milk processing
NI Grain Trade Association	Agri-supply trade of animal feed and fertiliser
Manufacturing NI	Manufacturing and processing

Logistics UK	Logistics and haulage, including fast parcel operators
Hospitality Ulster	Hospitality and foodservice
NI Food and Drink Association	NI food and drink
Mineral Products Association NI	Construction materials