

Memorandum submitted to the House of Commons European Scrutiny Committee for the Inquiry on *UK parliamentary scrutiny of the Withdrawal Agreement Joint Committee and application of the Northern Ireland Protocol*.

**Submission from: Professor Katy Hayward, Professor David Phinnemore and Dr Milena Komarova (Queen's University Belfast; the views expressed here do not represent those of any institution)
(SJC0006)**

We welcome the European Scrutiny Committee's Inquiry on *UK parliamentary scrutiny of the Withdrawal Agreement Joint Committee and application of the Northern Ireland Protocol*. The decisions of the UK-EU Joint Committee, and the work of the Specialised Committee on the Ireland/Northern Ireland Protocol beneath it, will have direct impact on the future of Northern Ireland.

The Protocol on Ireland/Northern Ireland sets the parameters for Northern Ireland's *ongoing* relationship with the EU. Northern Ireland will uniquely be in both the EU and the UK's internal markets. Effective implementation of the Protocol should bring benefits for Northern Ireland, not least in helping to maintain the conditions for the 1998 Good Friday/Belfast Agreement and allowing businesses in Northern Ireland to continue to trade freely with the EU's single market.

But there are also risks of a democratic deficit. The Protocol involves application of the EU Customs Code and dynamic alignment with applicable EU internal market rules, primarily on the free movement of goods. The lack of ability of Northern Ireland's elected representatives to shape these rules is compounded by a lack of capacity for wider scrutiny of the decisions and work of the Joint Committee, the Specialised Committee and the planned Joint Consultative Working Group.

We wish to draw the attention of the Committee to a research report that we published in May this year: *Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit* (<https://ukandeu.ac.uk/research-papers/anticipating-and-meeting-new-multilevel-governance-challenges-in-northern-ireland-after-brexit/>). That report presented the findings and analysis of research conducted over a period of 18 months, beginning in December 2018. Our main research task was to consider how any new governance arrangements that may be put in place for Northern Ireland after Brexit can operate effectively and ensure maximal representation for the region in the operation and implementation of the Protocol. The research is highly original, not only because of the scope and quality of the empirical research conducted (see below), but also because it contains a substantial consideration of how other *non-member states and regions seek to have influence at EU level*.

The project included desk research and empirical research, including interviews, an online survey, four days of workgroups with input from c.100 stakeholders, and an expert-practitioner seminar. Our stakeholder workgroups covered the sectors most directly affected by the implementation of the Protocol (e.g. transport, agri-food, hospitality, immigrant communities). Participating stakeholders included: civil servants from key departments and agencies in Northern Ireland who would be engaged in the operation of the Protocol, cross-border bodies including Implementation Bodies, private sector representation across a wide range of industries and across the region, human rights bodies, trade unions, the voluntary sector, and local authorities. We also conducted semi-

structured interviews with representatives from the Secretariat of the European Free Trade Association and delegations/offices to the EU from countries such as Switzerland, Turkey, Norway and San Marino.

Northern Ireland is at risk of being subject to legislation coming from both Brussels and London without having full sight or scrutiny of it, let alone a chance to shape or object to those decisions. There is no automatic means by which Northern Ireland's devolved institutions will either be able effectively to scrutinise and shape EU law they need to 'download' or to 'upload' views into the EU and the Protocol's institutional arrangements.

The report contained some 80 recommendations for the post-Brexit governance of Northern Ireland in light of the Protocol. On the basis of this research we wish to highlight four main points for consideration by the Committee, with a specific consideration of the matter of scrutiny.

- Mechanisms for scrutiny and representation regarding the Protocol on Northern Ireland/Ireland are important because the decisions of the UK-EU Joint Committee will have a direct impact on Northern Ireland *for the foreseeable future*.
 - Despite the UK Government's repeated description of the Protocol as 'temporary' or 'not designed as a permanent solution' (as in the *Government's Approach to the NI Protocol* Command Paper in May 2020), the Protocol can be expected to determine the shape of Northern Ireland's economic, regulatory, and rights environment for the foreseeable future.
 - The democratic consent mechanism is a vote that will occur among the 90 MLAs at most every four years, with the first opportunity occurring at the end of 2024. This vote will be specifically on Articles 5-10 of the Protocol, i.e. whether NI should continue to align with EU rules on trade, customs and single electricity market thereby retaining unrestricted goods access to the EU. Even if the vote is to disapply Articles 5-10 and presumably align with the UK, then the remainder of the Protocol will continue in force.
 - Article 13(8) of the Protocol allows that it could be superseded in whole or in part by a subsequent agreement between the Union and the United Kingdom. However, the 'thinner' the future relationship between the UK and the EU, the less likely it is that future UK-EU agreements will supersede many, if any, of the Protocol's provisions.
- Northern Ireland adopts EU legislation in relation to the Protocol annexes on the basis of a *dynamic* arrangement.
 - Until the end of the fourth year following the end of the transition period, the Joint Committee has the authority under the Article 164(5) of the Withdrawal Agreement (WA) to adopt decisions amending the Withdrawal Agreement (including the Protocol) 'provided that such amendments are necessary to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed, and provided that such decisions may not amend the essential elements of this Agreement'.
 - Indeed, in May 2020 the Commission proposed, following an oversight, the addition to Annex 2 of the Protocol of 'eight acts which are essential for the application of the rules of the internal market for goods to Northern Ireland'.

- We have seen already from the read-outs of the Joint Committee meetings that there is insufficient detail provided for us to be aware of whether such rules are adopted, the arguments for/against, or on what grounds the final decision is made. There is a very real sense of decisions being made ‘about us, without us’ and the need for greater transparency is evident.
- Article 13(3) of the Protocol provides for dynamic alignment, which means that any amendments or direct replacements of EU legislative instruments currently listed in the Annexes to the Protocol will automatically apply in Northern Ireland, and cannot be blocked by the UK.
- Under Article 13(4) of the Protocol, the Joint Committee will decide whether a new EU law which falls within the scope of the Protocol should apply in Northern Ireland. On what grounds these decisions will be made and whether and how there can be input from Northern Ireland in making these decisions remains, to date, completely unknown and apparently unconsidered.
- With this in mind, our report made several recommendations about how it might be possible for Northern Ireland to be made aware of ‘Protocol relevant’ legislation being considered by the EU Commission well in advance.
- The Joint Committee, the Specialised Committee, and the Joint Consultative Working Group will play an important part in the post-Brexit governance of Northern Ireland, but direct input from Northern Ireland to these bodies will be limited.
 - The UK government committed in the *New Decade, New Approach* (9 January 2020) document to ‘ensure that representatives from the Northern Ireland Executive are invited to be part of the UK delegation’ in meetings of the Joint Committee and the Specialised Committee. It specifies that these invitations will happen only in instances where the Committee concerned is discussing Northern Ireland-specific matters *and* which are ‘also attended by the Irish Government as part of the European Union’s delegation’.
 - To date, representatives from the NI Executive have attended these meetings and have then reported back to the Committee for the Executive Office. However, they have not been able to brief the Brexit sub-committee of the NI Executive because that committee was suspended in Spring 2020.
- Information and communication is vital to democratic accountability. There has been a level of secrecy around the meetings of the Joint Committee and Specialised Committee that has meant that the Northern Ireland institutions (not to mention public agencies, business organizations and citizens) charged with implementing the Protocol in practice have been kept in the dark about much of what is being discussed, let alone agreed upon.
 - This may be understandable during a negotiating period (although the Withdrawal Agreement is for implementing, not re-negotiating). However, there are concerns that this practice will continue. It is a distinct possibility if there are ongoing negotiations between the UK and EU after the end of the transition period, as looks set to be the case.
 - We recommended in our report that the Joint Committee, Specialised Committee and Joint Consultative Working Group should provide regular detailed reports on the Protocol’s implementation to the Northern Ireland Assembly, the North/South

Ministerial Council, the North South Inter-Parliamentary Association and the British-Irish Parliamentary Assembly and any future Northern Ireland or cross-border consultative forum.

- In the evidence session from the Paymaster General and Brendan Threlfall on 5 October, Threlfall noted that there would be a need for UK Parliamentary scrutiny on occasions where the UK has to decide whether to accept new legislative provisions under the Protocol. The Paymaster General noted that the European Scrutiny Committee in particular would have an important role to play.
 - We would concur with this but we would go further and argue that there is also a need for scrutiny and input from Northern Ireland's devolved institutions in the operation of the Joint Committee more broadly, not just when the scope of the Protocol may be expanded.
 - As well as effective parliamentary scrutiny of the Joint Committee by Westminster, our report recommended that there should be scrutiny of the Joint Committee from other elected bodies, including the Northern Ireland Assembly, the Oireachtas and the European Parliament.
 - Moreover, we noted that there also needs to be effective scrutiny of how the UK Government implements the Protocol. Clauses 21 and 22 of the Withdrawal Agreement Act give the Government powers to pass secondary legislation to implement the Protocol. We would have concerns about the limited capacity of Northern Ireland elected representatives in Stormont and in Westminster to scrutinise Statutory Instruments.

The greater the opportunity for scrutiny over and input into the arrangements of the Protocol from Northern Ireland, the greater the sense of legitimacy of the post-Brexit arrangements for Northern Ireland. Given the sense of insecurity and resentment that all political sides have in Northern Ireland vis-à-vis Brexit and the Protocol, such conditions are essential and need to be fostered as a priority. We see this as imperative for the peace process, the maintenance of which depends on the effective operation of 'democratic and peaceful means' of politics.