

Written evidence submitted by Prof. David Phinnemore and Dr. Katy Hayward, Queen's University Belfast (FRE0023)

Q: What scope is there for the Joint Committee to agree derogations or a loosening of the requirements for customs and regulatory procedures in the Protocol?

The content of the Protocol was negotiated to contain the minimum level of regulatory alignment of the UK, in respect of Northern Ireland, with the EU in order to meet the shared objective of the UK and the EU to avoid a hard border on the island of Ireland. Given its insistence on maintaining the integrity of its internal market and customs union, the EU has arguably provided the maximum flexibility it can on the extent of regulatory alignment. Indeed, there are voices in the member states that believe too much flexibility has already been conceded and that without the full implementation of the Protocol as it stands, the integrity of the internal market and customs union will be at risk. The presence of representatives from several member states at the first meeting of the Specialised Committee on 30 April 2020 was a reflection, in part, of these concerns. It follows, that there is very little likelihood of the EU in the Joint Committee agreeing to any derogations from or loosening of the UK's customs and regulatory obligations in the Protocol.

The Joint Committee does have the authority under the Article 164(5) of the Withdrawal Agreement (WA) until the end of the fourth year following the end of the transition period to adopt decisions amending the Withdrawal Agreement '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'. Amendments to Parts One (common provisions), Four (transition) and Six (institutional and financial provisions) are excluded. Amendments to the Protocol may, however, be made. Indeed, the Commission has recently 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'. Three 'notes' have also been proposed for addition.¹

While, in theory, the existence of Article 164(5) provides an opening to review the content of the Protocol, there would appear to be limited scope for doing so unless the UK could demonstrate that there are situations 'unforeseen' when the Withdrawal Agreement was signed. This is unlikely to be the case seeing as, through EU membership, the UK is fully aware of expectations regarding the implementation of the Union Customs Code and EU single market legislation. Moreover, any amendment to the Protocol needs approval of the Joint Committee and so the agreement of both the UK and the EU.

Q: How should the Joint Committee define an 'at risk' good?

Reaching agreement on a definition of goods entering Northern Ireland from outside the EU 'at risk' of onward movement into the EU market is one of the most challenging tasks facing the UK and the EU in the Joint Committee; and agreement needs to be reached before the end of the transition period if any goods are to be exempted from applicable customs duties. In the absence of a UK-EU free trade agreement, the range of tariffs will be extensive.

¹ European Commission, *Proposal for a COUNCIL DECISION establishing the position to be adopted on behalf of the European Union in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards the adoption of a decision to amend the Agreement*, COM(2020) 195 final, Brussels, 15 May 2020.

One challenge here that is often overlooked concerns the route by which goods enter Northern Ireland from the rest of the UK. Much discussion assumes goods from the rest of the UK move directly from Great Britain into Northern Ireland. This is the case for the majority of goods. However, a significant minority of goods from the rest of the UK enter Northern Ireland via Ireland. The risk of those goods entering the EU internal market is higher given they will transit the internal market. It follows that 'at risk' definitions will need to consider not just the type of goods but also the route by which they enter Northern Ireland.

Q: What risks might unfettered access pose to the UK internal market and trade policy, and NI and UK economies?

The Protocol's customs arrangements for Northern Ireland are unprecedented: Northern Ireland is formally part of the UK customs union but, through adherence to the Union Customs Code, in practice it will be treated as if it were in the EU customs territory. Being part of the UK customs territory, it is expected (as per Article 4 of the Protocol and affirmed in the UK Command Paper) that products from Northern Ireland will be covered by the terms of trade agreements that the UK signs with third countries. However, there are concerns that third countries may seek to restrict or exclude goods from Northern Ireland in their deals with the UK given that, under the Protocol, the UK does not control the goods entering Northern Ireland from the EU. Moreover, with 'unfettered access' from Northern Ireland to Great Britain, the UK does not envisage controlling goods entering the rest of the UK from Northern Ireland. This means that Northern Ireland risks becoming an unchecked route from the EU into the UK(GB) market. This may prove an obstacle to the conclusion of trade agreements with third countries where they are seeking to ensure that the preferential access that they are securing to the UK market is not being compromised by the Protocol arrangements for Northern Ireland. Article 4 of the Protocol states:

'nothing in this Protocol shall prevent the United Kingdom from concluding agreements with a third country that grant goods produced in Northern Ireland preferential access to that country's market on the same terms as goods produced in other parts of the United Kingdom.'

This is the difference between the legal meaning of the text and the consequences of its implementation. Key to Northern Ireland being able to benefit from the UK's independent trade policy is a clear and careful definition of what constitutes goods from Northern Ireland.

A related issue, as yet unresolved, is whether and to what extent goods produced in Northern Ireland, and so within the territory to which the Union Customs Code applies, can benefit from the terms of trade agreements that the EU has concluded with its partners. It is understood that this was originally envisaged. If the Protocol is to establish anything like the 'best of both worlds' status for Northern Ireland – benefitting from being part of the EU and the UK internal markets for goods – continued access to the benefits of EU trade agreements needs to be secured. Of course, this is in some tension with the promise of access to UK trade agreements. The definition of a Northern Ireland qualifying good is also key to this.

Q: How might different types of future relationship between the UK and EU affect how the Protocol operates? To what extent does the Protocol maintain the UK internal market and the all-island economy?

The relationship that the UK concludes with the EU will affect the operation of the Protocol in at least three respects.

First, the relationship could, assuming it delivers on the objectives of the Protocol, see the disapplication of related provisions in the Protocol. Given the UK has refused to consider a customs union relationship or regulatory alignment with the EU this is unlikely. Indeed, the draft agreements that the UK recently published (having previously only shared them with European Commission negotiators) provide no indication as to whether they would lead to the

disapplication of any provisions in the Protocol. This reflects the fact that the relationship is unlikely to lead to a level of UK-EU integration that would negate the need for the Protocol or any of its provisions. It follows that, subject to democratic consent votes, differentiated treatment of Northern Ireland will become a permanent feature of the UK-EU relationship.

Second, if the UK diverges significantly from EU regulations this will increase the need for checks and controls on the movement of goods between the rest of the UK and the Northern Ireland. This will be necessary in order for the integrity of the EU internal market to be maintained, as the EU requires. This would most likely increase costs to those trading goods, with those costs being passed on to consumers unless mitigations or compensation is put in place – and this is hardly a long-term solution. One should not lose sight of the risk that the consequences of the Protocol will be felt most acutely by the Northern Ireland consumer.

Related to the above, it is notable that, although Article 6 of the Protocol is about the ‘Protection of the UK internal market’, there is nothing in the Protocol to actively protect the UK internal market. This is primarily a domestic concern. The UK and the EU are to ‘use their best endeavours’ to facilitate trade between Northern Ireland and the rest of the UK. It is for the UK-EU Joint Committee to keep this ‘under constant review’ and it ‘shall adopt appropriate recommendations with avoiding controls at the ports and airports of Northern Ireland to the extent possible’. Notably, this is about avoiding controls at ports of entry/exit, rather than avoiding administrative restrictions on the movement of goods or on frictions to trade in the UK internal market that may arise from the Protocol. And the extent to which avoiding controls ‘is possible’ is likely to be a subject of significant contention between the UK and the EU.

Third, a UK-EU agreement, or agreements, will be key to determining Northern Ireland’s relationship, via the UK, with the EU beyond the areas covered by the Protocol. This could be highly disruptive in key areas of the economy, notably the services sector, if regulatory alignment is not included. As such, that will undermine the all-island economy to which the UK government originally committed its support in the Withdrawal Agreement of November 2018 and the Joint Report of December 2017. Although the Protocol avoids a hardening of the goods border on the island of Ireland, the avoidance of a hardened services border depends on the UK-EU relationship. The same applies to the movement of people beyond Irish citizens, who are covered by the Common Travel Area.

Q: To what extent have NI stakeholders been consulted by the UK Government about the operation of the Protocol? Have they been listened to? What role would you expect NI stakeholders to play in the Specialised Committee on Northern Ireland and its working groups?

There is very limited publically available evidence to suggest that the UK government has had any meaningful and substantive engagement with stakeholders in Northern Ireland on the operation of the Protocol. The one possible exception concerns Article 2(1) of the Protocol on citizens’ rights where the government in its recent command paper on *The UK’s Approach to the Northern Ireland Protocol* maintains that it has engaging ‘with a wide range of stakeholders, including human rights and non-governmental organisations, academics and trade unions’.² The paper is conspicuously silent on engagement on other aspects of the Protocol, and this is reinforced, by the commitment only now to set up a ‘business engagement forum’ on the trade dimension.

Engagement with stakeholders is imperative if the Protocol is to be effectively implemented and meet its objectives in a manner that genuinely works in the interests of Northern Ireland. The Protocol contains a set of regulatory and other arrangements that, absent a consent vote by Members of the Northern Ireland Assembly against them, are likely remain, potentially indefinitely, the basis for ongoing differentiated treatment of Northern Ireland within the UK-EU relationship. These are arrangements that did not receive the support of Northern Ireland’s MPs

² UK Government, *The UK’s Approach to the Northern Ireland Protocol*, CP226, May 2020

during parliamentary approval of the Withdrawal Agreement. They are also arrangements being imposed on a Northern Ireland that saw the majority of its people voting remain in the 2016 referendum. If the Protocol is to gain some legitimacy in Northern Ireland it needs to be viewed as a set of arrangements working in the interests of Northern Ireland.

This necessitates the meaningful engagement of stakeholder views and the visible representation of Northern Ireland's interests in the institutional arrangements overseeing its implementation whether those be within the UK or the UK-EU bodies established by the Withdrawal Agreement and the Protocol. The greater the opportunity for scrutiny over and input into the arrangements of the Protocol, the greater the sense of legitimacy for the Protocol – something which cannot be ignored given the sense of insecurity that all political sides have in Northern Ireland vis-à-vis Brexit and the Protocol. The risks and challenges here are addressed at length in a recent report on *Anticipating and meeting new multilevel governance challenges in Northern Ireland after Brexit*.³ In addressing these, the legitimacy of the Protocol as to be established. This could be facilitated by the democratic consent vote currently envisaged for November/December 2024. In advance of then, and given that a cross-community majority in favour of the Protocol can in no way be assured, that legitimacy can only come through the effective engagement of Northern Ireland in the governance of the Protocol.

To this end, Northern Ireland should be represented, with speaking rights, in all meetings of the Specialised Committee by relevant senior officials from the Northern Ireland Civil Service. The Northern Ireland Executive should also be formally consulted by the UK Government prior to it making submissions for the agenda of the Specialised Committee Ireland and receive minutes of the meetings. The Specialised Committee should provide regular detailed reports on the Protocol's implementation to the Northern Ireland Assembly. Chairs of the Northern Ireland Assembly committees relevant to the workings of the Protocol (e.g. Agriculture and Environment) should receive regular briefings from the UK delegation to the Specialised Committee.

There also needs to be effective representation of Northern Ireland's interests and expertise in the work of the Joint Consultative Working Group. Indeed, the access of 'experts' to the Joint Consultative Working Group should not be limited to 'officials' but be specified more precisely in terms of interest groups. It is also recommended that senior representatives of professional and other umbrella bodies for sectors affected by the Protocol be identified as 'the experts' to contribute to the work of the Joint Consultative Working Group. It is vital that these mechanisms be used specifically to enable input from Northern Ireland, and are neither bypassed nor used merely as another means of presenting the UK's (rather than Northern Ireland's) views. This is the bare minimum required given that the Protocol could have consequences for Northern Ireland that extend far beyond the spheres of business and trade.

May 2020

³ Hayward, K., Phinnemore, D. and Komarova, M. *Anticipating and meeting new multilevel governance challenges in Northern Ireland after Brexit*, London: UK in a Changing Europe, May 2020 (<https://ukandeu.ac.uk/research-papers/anticipating-and-meeting-new-multilevel-governance-challenges-in-northern-ireland-after-brexit/>)



Committee on the Future Relationship with the European Union

House of Commons, London, SW1A 0AA

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01 May 2020

Professor David Phinnemore
Professor of European Politics
Queen's University Belfast

Dear Professor Phinnemore,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our [call for evidence](#), which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on issues that fall within your area of expertise. Such submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

Interpretation

- As a baseline, what customs and regulatory procedures do you understand will have to be in place for goods moving east to west? What scope is there for the JC to agree derogations or a loosening of the requirements?
- How should the Joint Committee define an 'at risk' good? What criteria might it use? What would a permissive approach look like, versus a stricter interpretation? What would be the consequences of these differing approaches for the NI and all-island economies?
- What is your understanding of the term 'unfettered access' as it applies to goods moving from NI to GB? What checks may be needed on such goods? What risks might unfettered access pose to the UK internal market and trade policy, and NI and UK economies?
- Might there be different arrangements for different sectors of the economy - for example how would the protocol apply to fish caught by boats based in NI or lorries bringing goods from GB to NI supermarkets
- How might different types of future relationship between the UK and EU affect how the Protocol operates? If the UK diverges significantly from EU regulations would this lead to a hardening of the border in the Irish sea? What happens if no future relationship agreement is reached? How might the Protocol interact with future trade deals between the UK and third countries?
- What would happen if the UK and EU do not agree on how the Protocol should work? If this were to happen, what are the UK's obligations under the Withdrawal Agreement and UK domestic law? How might these obligations be enforced?

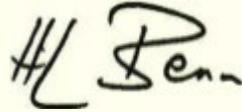
Implementation

- How much do we know about how the Protocol will operate in practice? What remains unclear?
- What information will NI businesses and other stakeholders need in order to operate under the Protocol? When will they need this information in order to properly prepare? What would be the consequences if this time is not available? What financial support has been offered by the UK Government/NI Executive to help NI businesses prepare?
- What steps may be needed to implement the Protocol, for example: new infrastructure and staff? Whose responsibility will it be to take these steps? How much progress has been made so far? How are preparations being affected by the Covid 19 pandemic?

- To what extent have NI stakeholders been consulted by the UK Government about the operation of the Protocol? Have they been listened to? What role would you expect NI stakeholders to play in the Specialised Committee on Northern Ireland and its working groups?
- To what extent does the Protocol maintain the UK internal market and the all-island economy? What challenges might businesses in NI face as a result of the Protocol? Which sectors of the Northern Irish economy and types of businesses may be most affected?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at freu@parliament.uk.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'H/ Benn'.

Hilary Benn
Chair of the Committee