

## Joseph McMahon - Written evidence (NIP0019)

House of Lords, EU Environment sub-Committee

### 1. Best-case and worst-case scenarios?

Recently released trade statistics for Northern Ireland trade in 2018/19 suggests that trade with the rest of the United Kingdom (UK) fell by 9% just as trade with Ireland rose by 9%.<sup>1</sup> However, this simple statistic does not reveal that trade with Great Britain (GB) amounted to £10.6 billion whereas trade with Ireland amounted to only £4.2 billion – Northern Ireland is thus more dependent on the GB market than it is on the Irish market. However, Ireland was the most important third country market in terms of exports and imports with the most important agri-food products being dairy products and birds eggs and meat and meat preparations; together these two product groups amount to 51% of agri-food exports to Ireland. The best case scenario would allow for the continuation of the trading arrangements applicable during this period whereas the worst case scenario would involve changes that jeopardise the existing levels of trade.

One such example is regulatory alignment. At present and under the Northern Ireland Protocol to the Withdrawal Agreement, Northern Ireland will remain in regulatory alignment with the European Union but the Prime Minister has indicated in a statement to Parliament in February that: “The Government will work hard to achieve a balanced agreement that is in the interests of both sides, reflecting the wide range of shared interests. Any agreement must respect the sovereignty of both parties and the autonomy of our legal orders. It cannot therefore include any regulatory alignment ....”<sup>2</sup> He went on to indicate that “The UK will maintain its own autonomous sanitary and phytosanitary (SPS) regime to protect human, animal and plant life and health and the environment, reflecting its existing high standards. In certain areas it may be possible to agree equivalence provisions to reduce practical barriers to trade at the border.”<sup>3</sup> The Statement also noted that: “There should be provisions to address regulatory barriers to trade in goods, providing for cooperation on technical regulation, standards, conformity assessment procedures and market surveillance, building on the WTO Technical Barriers to Trade Agreement” with particular reference being made to the provisions of this Agreement facilitating trade in specific sectors (e.g. organic products) and “mutual recognition agreements focusing on conformity assessment.”<sup>4</sup>

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<sup>1</sup> Northern Ireland Statistics and Research Agency (NISRA) *Overview of Northern Ireland Trade* (15 April 2020), available at <https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/Overview-of-NI-Trade-April-2020.pdf>.

<sup>2</sup> Available at <https://www.gov.uk/government/speeches/the-future-relationship-between-the-uk-and-the-eu>.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

The move away from regulatory alignment will allow the UK a degree of flexibility as it seeks to conclude trade agreements with “old friends and new allies”. Whilst such agreements may be seen as part of the “Brexit dividend” they also pose dangers for the devolved administrations and for Northern Ireland in particular. For example, an agreement between the UK and the United States raises the prospect of a number of products being imported into the UK which until now have been restricted under EU law, such as chlorine-washed chicken and hormone treated beef. These restrictions will become part of UK law once the transition period ends and it is to be regretted that a proposed amendment to the Agriculture Bill to ensure that imports adhered to UK animal health and welfare, environmental, and food safety standards was defeated in the House of Commons.<sup>5</sup> The Conservative manifesto for the 2019 election promised to protect these standards and in the debate, the Victoria Prentis, the Parliamentary Under-Secretary for Environment, Food and Rural Affairs indicated that: “All the rules, regulations and robust processes are already in place for that.”<sup>6</sup> She went on to indicate that a vote in the House of Commons would be needed to amend existing regulations to allow chlorine-washed chicken but she also committed the Government to “a serious and rapid examination of what can be done through labelling.”<sup>7</sup> Irrespective of whether the trade deal with United States allows for the import of chlorine-washed chicken, the UK’s departure from the EU could lead to a change in the structure of UK food imports with those from non-EU countries rising. If existing standards are to be maintained, a new burden will be placed on those authorities responsible for food safety checks; the burden may also be increased by checks that may arise from the agreement concluded by the UK and the EU.<sup>8</sup>

Turning to the burdens to be placed on the Northern Ireland regulatory bodies, in May this year, the Government published a Command Paper entitled *The UK’s approach to the Northern Ireland Protocol* which broadly indicated how it intends to implement the Protocol as from 1 January 2021.<sup>9</sup> It must be noted that the approach presented is relatively high level with little practical information on how it will be implemented in practice. It is envisaged that no new infrastructure will be needed for customs checks on agri-food and live animals as this will be achieved using the existing infrastructure, for example, those in Larne and Belfast. These will be used to complete the necessary checks and controls on goods entering Northern Ireland from the rest of the UK but whether this will be

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<sup>5</sup> See <https://hansard.parliament.uk/commons/2020-05-13/debates/D4889925-5B63-498E-BC68-BFCF91691C66/AgricultureBill> for the debate on this and other amendments to the Agriculture Bill.

<sup>6</sup> Ibid, Columns 295-296. This point was also emphasised by the Secretary of State for the Environment, Food and Rural Affairs, George Eustice, in the third reading (ibid, 352).

<sup>7</sup> Ibid, Column 335.

<sup>8</sup> On this point, see Report by the Comptroller and Auditor General Ensuring food safety and standards (HC 2217, National Audit Office, 2019) available at <https://www.nao.org.uk/wp-content/uploads/2019/06/Ensuring-food-safety-and-standards.pdf>. The Report also noted that additional demands on food control officers may also arise if food export certificates are needed as a result of the UK-EU trade agreement.

<sup>9</sup> Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/887532/The\\_UK\\_s\\_Approach\\_to\\_NI\\_Protocol\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887532/The_UK_s_Approach_to_NI_Protocol_Web_Accessible.pdf).

sufficient for the sanitary and phytosanitary checks required under EU law, or to protect the integrity of the single market, is questionable. The EU may well seek more substantive implementation of the Protocol than that suggested by the Government.

## 2. UK Common Frameworks

### a. NI dimension

On the issue of Common Frameworks and trade policy, I have argued elsewhere that “the UK government’s current approach to involving the devolved nations in post-Brexit trade policy development lacks clarity” and argued for the creation of a Trade Policy Committee to set out the role of Parliament and the devolved legislatures and administrations with respect to the negotiation of, and final agreement on, international trade agreements.<sup>10</sup> One aspect of post-Brexit trade policy is that the UK will become a full member of the World Trade Organisation (WTO) with responsibility for ensuring it respects its obligations under various WTO Agreements, such as:

- the Agreement on Agriculture with respect to the agricultural support offered by the devolved administrations;
- the Agreement on the application of Sanitary and Phytosanitary Measures (SPS Agreement) with respect to measures necessary to protect human, animal or plant life and health; and,
- the Agreement on Technical Barriers to Trade (TBT Agreement) with respect to technical regulations and standards necessary to achieve legitimate policy objectives such as the protection of human health or the protection of the environment.

In the both the SPS and the TBT Agreements, the relevant Committee is a forum to address specific trade concerns raised by other Members. Given their competence in the area, most of the specific trade concerns raised in the SPS Committee have been addressed by the EU but post-Brexit, this will be the responsibility of the UK Government. However, areas falling within the SPS Committee (and TBT Committee), such as animal health and welfare or food labelling, also fall within the competence of the devolved administrations, hence the need for a UK legislative framework to implement common rules. Such rules should also ensure the integrity of the UK’s internal market.

The problem here is, as recognised by the Cabinet Office’s in April 2019: “Frameworks also need to ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement.”<sup>11</sup> The Northern Ireland Protocol will also need to be

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<sup>10</sup> See Switzer and McMahon “Devolution and post-brexit trade agreements: Towards a joint trade policy committee?” (2019) 23 *Edinburgh Law Review* 266.

<sup>11</sup> See Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland (April 2019) Available at

recognised in the Common Frameworks. The legislation, for example in the area of SPS, that must be recognised in the Common Frameworks will not be that of the Northern Ireland Assembly but of the EU. The Common Frameworks will have to accommodate the fact that in the event of policy divergence between the UK and the EU affected goods from Northern Ireland must continue to have access to the UK internal market.

#### b. Great Britain (GB) dimension

The Northern Ireland Protocol provides that for goods entering Northern Ireland from the rest of the UK, EU customs duties will be applied if the goods are at risk of entering the Single Market and for agri-foods the necessary SPS checks must be conducted. Under Article 12(2) of the Protocol the EU has “the right to be present during any activities of the authorities of the United Kingdom related to the implementation and application of provisions of Union law made applicable by this Protocol.” At the first meeting of the Specialised Committee on the Protocol the Commission underlined “the importance of the UK setting out its plans with regard to all implementation measures prescribed by the Protocol on Ireland/Northern Ireland and providing a detailed timetable.”<sup>12</sup> Those plans, as noted above, contained little practical information on how it will be implemented in practice with the existing infrastructure being used for customs and SPS checks. Following the second meeting of the Joint Committee, the Commission Vice President, Maroš Šefčovič, considered that the paper did not provide sufficient operational details.<sup>13</sup> The opportunity to provide such details arose at the Northern Ireland Affairs Committee hearing on *Unfettered Access: Northern Ireland and Customs Arrangements after Brexit* on 18 June 2020 with the Rt Hon Michael Gove indicated that further details would be forthcoming later in the summer. It is unlikely that the arrangements will be tried and tested by the date set for the entry into force of the Protocol.

Goods moving from Northern Ireland to Great Britain, if the proposed “light touch” is maintained will still require an export summary declaration but goods moving from Great Britain to Northern Ireland are more problematic. It is arguable that as Northern Ireland has to comply with the EU Customs Code, the UK cannot make changes to the customs arrangements in Northern Ireland save through the Joint Committee and/or the trade arrangement concluded between the UK and the EU. SPS checks are already undertaken for goods coming into Northern Ireland and customs (and other) checks could be introduced for those goods going to Northern Ireland at points of exit in Great Britain.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/792738/20190404-FrameworksAnalysis.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf), p 3. See also *The European Union (Withdrawal) Act and Common Frameworks 26 December 2019 to 25 March 2020* available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886372/TheEuropeanUnion-Withdrawal-ActAndCommonFrameworks.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886372/TheEuropeanUnion-Withdrawal-ActAndCommonFrameworks.pdf), paras 1.37 and 1.38.

<sup>12</sup> Available at [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_20\\_787](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_787), the meeting took place on 30 April by videoconference as a result of the COVID-19 pandemic.

<sup>13</sup> Available at [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_20\\_1055](https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1055).

*Due to the impact of COVI-19 it was not possible to complete this submission within the time-frame allocated. I would have liked to address the nature of the UK-EU relationship being negotiated which would have examined issues relating to Mutual Recognitions Agreements and Equivalence under both the SPS and the TBT Agreement. I would have liked the opportunity to address the whether the Protocol will solve the problems it was intended to address.*

*Joseph A McMahon  
23 June 2020*