

THE NORTHERN IRELAND PROTOCOL, ONCE AGAIN, HANGS IN THE BALANCE, LIKELY LEADING TO FURTHER DETERIORATION IN UK-EU RELATIONS

The [Northern Ireland Protocol](#) – or more precisely the intention of the British government to roll back the Northern Protocol – is back in the news and, once again, raises the spectre of a trade war between the United Kingdom and the European Union. This turn of events, foreshadowed countless times over the past year, also risks upsetting the United States.

The cause for the latest headlines is the [Northern Ireland Protocol Bill](#) (the “Bill”), the text of which was introduced by the UK government on Monday. The purported legal effect of the Bill is to unilaterally provide the basis to amend the operation of the Protocol in domestic UK law, disapply elements of the Protocol and empower ministers, in certain circumstances, to override remaining provisions of the Protocol. (*See also*, the [Explanatory Notes](#) and the [Press Release](#) that accompanied publication of the Bill.) A number of legal experts who have commented on the issue find the UK government’s legal analysis, that the operation of the Bill does not violate international law (based on the doctrine of “necessity”), to be extremely unpersuasive.

As many predicted, Britain’s exit from the single market and customs union merely presaged a raft of flashpoints across the Channel (*see* my previous briefing note, available [here](#)). This latest salvo in the ongoing set of skirmishes between the United Kingdom and the European Union over unfinished Brexit business was met yesterday by an [announcement](#) that the European Commission (the “EC”) is reviving infringement proceedings initially brought, and then suspended, in 2021 (over implementation of checks on certain goods entering Northern Ireland, including agri-food products). The EC also is initiating new legal challenges alleging the United Kingdom has failed to live up to its obligations under the Protocol to share trade statistics data and set up border inspection posts as required by EU sanitary and phytosanitary (“SPS”) rules.

A useful research briefing prepared by the House of Commons Library summarizing developments through yesterday is available [here](#).

The Protocol

The Protocol in effect cast the border for trade purposes in the Irish Sea (meaning that customs inspections and document checks for goods coming from Great Britain (England, Scotland and Wales) to Northern Ireland are conducted at Northern Ireland’s ports, rather than at the land border between the Republic of Ireland (which is in the European Union) and Northern Ireland. This fix to avoid a hard land border also means that Northern Ireland, while part of the United Kingdom, continues to follow EU rules on product standards based on the single market for goods and customs union. Admittedly, the Protocol has been a source of tension between the UK government and the EC since it came into force January 1, 2021 at the time the United Kingdom exited the EU single market and customs union. The Protocol was included as part of the UK-EU Withdrawal Agreement (the “Withdrawal Agreement”), which paved the way for the UK to exit the European Union on January 31, 2020,

Concerns that Boris Johnson’s government was prepared to trigger Article 16 of the Protocol, which would allow it to take “safeguard” measures to avoid “serious economic, societal or environmental difficulties,” and refuse to implement certain provisions of the Protocol,

formally surfaced in July 2021 (when the government published its [Command Paper](#)) and then burst back into the headlines in October-November. The British felt that the modifications proposed by the EC in October failed to address their concerns. Triggering Article 16, however, did not come to pass, in part perhaps because of COP26, which the British were hosting, followed by a series of domestic issues that put the Prime Minister in particular on the defensive. (See my previous briefing note on the Protocol, available [here](#).) In December, Foreign Secretary Liz Truss replaced David Frost as the lead UK negotiator on the fate of the Protocol; Lord Frost had resigned over the direction of travel on the Protocol – he favored a more hard-Brexit approach. Talks continued into the new year, but by April media began reporting on evolving legislation that eventually surfaced as the Bill. (See, generally, [Brexit and Protocol Timeline](#).)

Boris Johnson negotiated the Protocol – neither the Protocol nor its predecessor (the so-called “Irish Backstop”) was merely an incidental part of the Brexit process. In fact, from the very early days following the referendum, and as the withdrawal project careened through Westminster over many months, how the parties would deal with Northern Ireland was front and center. Admittedly, throughout the process, a myriad of concepts (including solutions to deal with Northern Ireland – “alignment,” “facilitated customs arrangements,” “max-fac,” “Norway plus” – also known as “common market 2.0”) were informally floated, formally proposed, debated, amended, discarded or adopted, or discarded and then resurrected. These may have sounded good in theory (and had political potency), but often lacked substantive detail. In some cases, proposals were placeholders for future negotiation.

The Protocol ultimately was no such placeholder. Either Boris Johnson did not comprehend (or wish to consider the details of) the impact of the Protocol or, with an electoral mandate, and determination, to “get Brexit done,” he never really intended to live with the Protocol. In any event, we are where we are.

The Bill

The British government now seeks the approval of Parliament to modify the Protocol in significant ways.

- Under the Bill, goods destined only for Northern Ireland (and not for onward export into the European Union) would enter free of checks and customs controls (via a “green channel”), while goods destined for Ireland or for onward export to the European Union would be subject to the same checks as they are now (via a “red channel”).
- The Bill would provide for a dual system of regulation, allowing goods sold in Northern Ireland to comply either with UK or EU rules, creating additional challenges as those rules invariably diverge from one another over time.
- The Bill would remove requirements that businesses in Northern Ireland remain subject to EU rules on VAT and state aid subsidies.
- Problematic for the European Union as a matter of principle – constituting a “red line” (and of great interest to the Tory Eurosceptics), the Bill would deprive the European Court of Justice (the “ECJ”) of jurisdiction to settle disputes relating to the Protocol.
- Most insidiously, the Bill (Article 15) would empower ministers going forward to disapply elements of the Protocol and relevant parts of the Withdrawal Agreement (except those provisions of the Protocol relating to individual rights, the common

travel area and North-South cooperation) for a significant number of enumerated “permitted” purposes. Ministers also would be empowered to add provisions via domestic law.

Issues Presented

The Bill presents a host of issues.

Politics in Northern Ireland

Implications of the May election. There is a domestic political issue in Northern Ireland in that the unionist parties continue to object to the current Brexit arrangement as it undermines the hard-fought positioning of Northern Ireland as part of the United Kingdom. The largest of such parties, the Democratic Unionist Party (the “DUP”), which in last month’s election came in behind the nationalist party Sinn Féin (which supports the Protocol, and won the most seats for the first time ever), has refused to take part in the power-sharing arrangements governing Northern Ireland, unless its objections are addressed. The DUP has steadfastly opposed the Protocol, and its refusal to enter Stormont (metonym for the devolved Northern Ireland Assembly (the “Assembly”)) set the stage for the latest escalation of tensions over the Protocol. The UK government revived its intention to override parts of the Protocol, and the Bill is the result.

On Monday, a [letter](#) signed by 52 of the 90 members of the Assembly, representing members of the Alliance Party, Social Democratic and Labour Party (“SDLP”), and Sinn Féin, condemned the proposed unilateral attempt to override of the Protocol, stating that the Bill “flies in the face of the expressed wishes of not just most businesses, but most people in Northern Ireland.” The Protocol, said the letter, “currently represents the only available protections for Northern Ireland from the worst impacts of [a] hard Brexit.” It is fair to assume from the outcome of the Stormont elections in May that a majority of voters in Northern Ireland support the Protocol, having backed parties that do support the Protocol. Polling supports this view (see [Queens University Poll](#)).

Democratic consent. It is unclear if the Bill effectively removes the right of the Assembly to vote on the fate of the Protocol. Under the Withdrawal Agreement (read together with the “democratic consent” mechanism [set out](#) by the UK government), the Assembly is to be asked periodically to consent to the trading arrangements under Articles 5-10 of the Protocol, as long as they remain in place. The first such vote is to take place in December 2024.

This consent mechanism takes on a new dimension following the outcome of the May election. In a departure from the 1998 [Good Friday Agreement](#) construct that embraced so-called “cross-community support” (giving both unionist and nationalist parties in the Assembly, under Strand One of the Agreement (Democratic Institutions in Northern Ireland), a veto on matters so designated in advance or via “petitions of concern”), the Protocol (Article 18) contemplates either a majority vote or a vote with cross-community support. There is *no requirement* for cross-community support, only procedural consequences if by majority vote. Approval by a simple majority means consent will next be sought in four years, and the UK government will commission an independent review of the Protocol and the consequences of its implementation or termination. Approval with cross-community support triggers an eight-years subsequent review period. The different notions of “consent” are usefully described in a blog from the Assembly Research and Information System, [Research Matters](#).

The new political configuration means that a greater proportion of the 90 members of the Assembly now favor the Protocol. Those hostile to the Protocol might reasonably have looked to 2024 as their opportunity to end it. Not surprisingly, since 2019, unionists have lamented the absence of a cross-community consent requirement and nationalists have embraced the simple majority provision.

Claims by the UK government that the Bill is intended to protect the Good Friday Agreement can be read as a critique of the Protocol for undermining cross-community support. (The DUP certainly has made the connection – the Protocol “undermined the cross-community consensus on which the political institutions operate,” [said](#) the DUP leader, Sir Jeffrey Donaldson) The Alliance, SDLP and Sinn Féin letter takes issue with this: “To complain the [Protocol] lacks cross-community consent, while ignoring the fact that Brexit itself – let alone hard Brexit - lacks even basic majority consent [in Northern Ireland], is a grotesque act of political distortion.”

The nationalist parties are not alone in that view. Jonathan Powell, former chief of staff to Tony Blair and lead negotiator in Northern Ireland (1997-2007), [writing on Twitter](#) on Wednesday, characterizes the UK government’s position as disingenuous by conflating “consent” and “cross-community support.” The Good Friday Agreement, he emphasizes, was based on the idea that change required the consent of the people of Northern Ireland, via a referendum and simple majority, and not with “cross-community support.” Consent does not apply to all issues. If it did, Brexit would not have happened in Northern Ireland as over 60% voted against it; therefore, it is “bizarre” to suggest that consent applies to one part of Brexit (the Protocol) but not the rest, particularly as the election results evidence support for the Protocol. And even if cross-consent were applicable, he argues, that should mean all parties are relevant to this conversation, not just the DUP. The solution then must be negotiation among the British, the European Union and all parties in Northern Ireland. Ultimately though that solution must recognize the issue of the border is a binary one – the Irish Sea or the land border on the island. Negotiation, he concludes, requires trust, and that is in short supply at the moment.

There is one other interesting angle presented by the Good Friday Agreement – one flowing from another British cultural war issue that has been percolating throughout the Brexit process, immigration. The most recent plan to deter asylum seekers is to deport them to Rwanda. In recent days, the PM and various ministers are reported to have floated the idea of withdrawing from the European Convention on Human Rights (ECHR) in response to the European Court of Human Rights’ dramatic 11th hour [order](#) on Tuesday grounding a deportation flight to Rwanda. The twist is that the ECHR is firmly embedded throughout the Good Friday Agreement.

Politics in Westminster

The Bill must be approved by Parliament, which raises another set of issues. Recall that only a week ago, the vote of no confidence saw a significant number of Tory MPs rebel (see my previous briefing note, available [here](#)). There is a certain irony that when the prospect of changing the Protocol surfaced in May following the DUP ultimatum, former PM Theresa May, in a statement directed at her successor, in effect reminded him that on two occasions, he (together with the DUP) had rejected her Brexit deal, which would have created neither a

border down the Irish Sea nor a land border. While campaigning during the 2019 general election, Boris incorrectly [insisted](#) that his Brexit deal would require no border checks on goods going from “GB to NI, or NI to GB” and characterized his deal as “[oven-ready](#),” which characterization came under scrutiny in September 2020 when he first sought to override parts of the Withdrawal Agreement.

Some see the Bill as part of the manoeuvring to determine who is best positioned to succeed Boris Johnson as PM. Many commentators see the hard line taken by Liz Truss, who presented the Bill, as an effort to woo the Tory Eurosceptic wing, represented by the hard-Brexit European Research Group (“ERG”), for a future leadership contest. (She is viewed as one the principal contenders to succeed Boris, whenever that contest comes to pass.) In the meantime, introduction of the Bill presumably has burnished Boris’ credentials among the hard-Brexit wing, as well – critical given the size of the rebellion last week in the vote of no confidence. The ERG is reported to have resurrected its so-called “Star Chamber” of legal experts to analyze the Bill and to have been consulted on the drafting of the Bill. The number of ERG members is unknown, but it could surpass the current 77-seat Tory majority.

It appears that, with the pandemic now largely off the radar screen, the internecine battles within the Conservative Party that animated Westminster for the better part of four years could soon dominate the headlines again.

International Law

A third issue is that the Protocol has the status of a treaty under international law, and many commentators believe that the proposed Bill would violate international law. A spokesperson for the Irish Foreign Affairs Department characterized the Irish Foreign Minister’s view of the proposed Bill as violating international law. The Bill is unmistakably a unilateral act and a significant modification, notwithstanding the PM’s characterization of its provisions as “a relatively trivial set of adjustments” representing “bureaucratic simplifications.” Ultimately, ministers are empowered to override obligations enshrined in a treaty.

The British government position is that action “is necessary to respond to the urgent and serious context in Northern Ireland and cannot await [a negotiated solution].” In a separate [paper](#) setting out its legal position, the UK government stated that its assessment of the situation in Northern Ireland (in particular, “the strain that the arrangements under the Protocol are placing on institutions in Northern Ireland [(namely the barrier to forming a government)], and more generally on socio-political conditions”) constitutes a “state of necessity.” This is their justification for non-performance of the Protocol as a matter of international law.

To be clear, the UK government did not trigger Article 16, which would have been consistent with the terms of the treaty and therefore consistent with international law, but that move would have hardly accommodated the litany of items now served up in the Bill.

Interestingly, the UK government’s legal justification also states that “the UK has not contributed to the situation of necessity” and, while it exercised its “sovereign choice to leave the EU single market and customs union, ... the peril [in Northern Ireland] that has emerged was not inherent in the Protocol’s provisions.”

The EU Responds

As noted above, the EC is reviving infringement proceedings [initially brought](#) under the provisions of the Protocol (together with provisions of the Treaty on the Functioning of the European Union), and then suspended, in 2021. Technically, it has moved on from the first phase of the proceeding by delivering a reasoned opinion. The EC is also initiating new legal challenges alleging the United Kingdom has failed to live up to its obligations under the Protocol to share trade statistics data and set up border inspection posts as required by EU SPS rules.

Yesterday's EC [press release](#) also calls on the United Kingdom to return to the negotiating table and announced the publication of two position papers on possible solutions (see [customs](#) and [SPS](#)) initially [put forward](#) in October 2021.

In respect of the revived infringement proceeding, the United Kingdom now has two months to reply, failing which the EC has the option of taking the matter to the ECJ. It is unclear how, and over what period of time, this proceeding and subsequent referral to the ECJ play out. At the very least, this process buys time, and allows the EC to be seen as taking action and exhausting its available avenues of redress.

In the meantime, the European Union may seek to hold up progress on other bilateral arrangements currently under discussion (*e.g.*, associate membership by British universities in the Horizon Europe funding network, financial services, asylum seekers), or begin a process under the Withdrawal Agreement, which among other things ultimately could result in the suspension by the European Union of compliance with the Trade and Cooperation Act (the "TCA") and the imposition of tariffs.

In a [statement](#) released on Monday, Maroš Šefčovič, the EU point person on Brexit, stated that "[r]enegotiating the Protocol is unrealistic. ... [T]he European Union will not renegotiate the Protocol." In a not-so-subtle threat, he continued, "The European Commission recalls that the conclusion of the Withdrawal Agreement was a pre-condition for the negotiation of the [TCA]. Today's decision by the UK government undermines the trust that is necessary for bilateral EU-UK cooperation within the framework of the [TCA]." In March 2022, the EC had proposed a [legislative roadmap](#) for enforcing the Withdrawal Agreement and the TCA.

What Next?

Many questions remain.

- The government may not have the votes to pass the Bill. Will it pass in the Commons?
- How will the Bill fare in the House of Lords?
- Will the Bill survive the inevitable legal challenges?
- How firm is the position of the DUP, which may not "return to Stormont" (and re-join the power-sharing arrangements) until the Bill has passed. The DUP was burned before by the PM over the border issue when the Protocol was signed.
- Why now? While some suggest the move was designed to divert attention from the outcome of the recent vote of no confidence and Boris' troubles over Partygate, this

project has been in the works for months. Nonetheless, stoking now two culture war issues has benefits for the PM and the Eurosceptics.

- Is introduction of the Bill designed to provide the British with leverage in future discussions with the European Union, while also allowing Boris Johnson and Liz Truss to curry favor with the ERG? Or is the move simply for one or both to curry favor with the ERG? Did members of the cabinet succeed in watering down some of the more aggressive provisions of the Bill? It is hard, by the way, to understand how threats to violate international law bring the EC negotiators to the table.
- What is the ultimate timetable, first for passage of the Bill, and then for ministers to deploy their new powers under UK law granted by the Bill to “fix the perceived problems” in the Protocol.

The Protocol was a negotiated solution, and its impact was predictable, and predicted. As noted above, the Protocol has treaty mechanisms to address disputes; those mechanisms have not been triggered. Negotiations have not been held since February. If the Bill becomes law, it will represent the achievement of an objective Boris Johnson has threatened before – reneging on a negotiated deal, which so happens to have the force of international law. It is reasonable to ask how future treaty negotiations with the British will proceed if there is a track record of breaching a central precept of international law (*pacta sunt servanda* – agreements must be kept/treaty obligations must be fulfilled – enshrined in Article 26 of the 1969 [Vienna Convention on the Law of Treaties](#)).

The UK Law Society president, [commenting](#) Tuesday on the Bill, stated that “Britain’s standing in the world depends in part on being known as the nation that keeps its word. The [Bill] represents a direct challenge to the rule of law as it gives the UK government the power to break international law.”

The UK government’s former legal adviser, Jonathan Jones QC characterizes the reliance on the doctrine of “necessity” as the basis for violating international law “as ‘weak,’ perhaps more bluntly as ‘hopeless’.” (Jones resigned over the introduction of an earlier effort to override the Protocol, the Internal Market Bill 2020 – legislation, incidentally, that the Secretary of State for Northern Ireland admitted at the time broke international law “in a specific and limited way.”) Jones [advances](#) various arguments.

- First, the doctrine should only apply, he argues, “where a state must act to safeguard essential interests against ‘grave and imminent peril’.” He finds it “inherently implausible that an agreement entered into only in 2020, at what the prime minister described as a ‘fantastic moment’” could prove to be such a disaster as to represent “grave peril” to the United Kingdom.
- Second, the government has failed to advance arguments as to why lesser measures (such as Article 16) have not been tried first. How can it be possible, he asks, that ECJ jurisdiction poses “grave and imminent peril.”
- Finally he notes, there is a temporal aspect – it is hard to imagine that a process that will take months to conclude is the appropriate response to an imminent peril.

Presenting the opposing view, Lord Frost, in a [speech](#) given in April, justified any future move to override the Protocol on the grounds that the government he represented was the victim. “The UK was not a fully sovereign power when it negotiated it. The detail of the Protocol’s provisions was essentially imposed under duress because we had no ‘walk away’

option. And it makes huge intrusions on UK domestic policy-making which can only be justifiable in circumstances of consensual, collaborative arrangements between the two treaty signatories, circumstances which clearly do not exist. ... Moreover the Protocol is not a permanent feature of our relationship. It is explicitly temporary.” Earlier in that speech, he stated that his “negotiating team was treated brutally as the supplicant representatives of a renegade province. ... We put up with it because we wanted to get this done.” This complaint certainly did not feature in any of the public debates over Brexit at the time.

There is a US dimension to this as well. Various members of Congress and the administration, including President Biden, view attempts to undermine the Good Friday Agreement as anathema. In May, House Ways and Means Committee Chair Rep. Richard Neal led a delegation to Belfast, Brussels, Dublin and London to express their concerns. House Speaker Pelosi has from the early days of the Brexit process expressed concerns as well, noting [most recently](#) that, “It is deeply concerning that the United Kingdom is now seeking to unilaterally discard the Northern Ireland Protocol. Negotiated agreements like the Protocol preserve the important progress and stability forged by the Good Friday [Agreement].” According to the [readout](#) of the call Monday between Secretary of State Blinken and Liz Truss, the Secretary urged his counterpart to continue good faith negotiations with the European Union to preserve the gains of the Good Friday Agreement.

It is reasonable to expect that the issue will be raised by both EU leaders and President Biden at the G7 Leaders’ Summit in Germany later this month.

Concluding Thoughts

Ivan Rogers, the former UK Permanent Representative to the European Union (from 2013 until he resigned in January 2017 over the Brexit process) [speaking](#) at the European University Institute last week, noted that the Protocol dispute likely will remain as a crucial impediment to improvement of the UK-EU relationship, at least for so long as the current UK Parliament remains in place and the current EC leadership remains in place. “Both sides,” he said, “continue to misread each other’s political incentives and ‘reaction functions’ and the dispute over the Protocol is only ever likely to be solved on terrain which one side or the other cannot currently access politically.” Neither side wants to be seen as killing off negotiations, but the Protocol likely will remain a dominant issue and relations will likely continue to deteriorate over the next two years.

Sir Ivan concludes that “narcissist politics of self-preservation will continue to dominate” in Westminster, but also notes that the entire Brexit project and Johnson premiership has made it easy for European elites to not “think seriously about the British question.”

As this was a speech on the future of UK-EU relations post-Ukraine, not surprisingly he returns to the bigger picture and calls on the parties to capitalize on recent cooperation in confronting Russia over its war against Ukraine, and work together to strengthen liberal democracies and combat the rise of authoritarian adversaries. He also calls out the benefits of finding a new forum to address pressing policy issues. Finally, moving past the intractable issues and finding common ground from the bottom up may herald a healthier relationship. Shorter term, though, it will “continue to be bumpy, conflictual, tortuous.”

It is hard to find fault with that analysis, so we should all buckle our seatbelts. This story will play out over the coming months, and will likely be overshadowed by the pressing geopolitical (starting with Ukraine), economic (including surging gas prices and inflation)

and other issues (such as climate change) vying for our attention. Equally important to watch will be how the internal battles in Westminster (and Stormont) play out over the coming weeks.

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