

DISAGREEMENTS OVER THE NORTHERN IRELAND PROTOCOL ARE FAR FROM SETTLED – COULD A UK-EU TRADE WAR BE LOOMING?

At the time of the signing of the Trade and Cooperation Agreement that paved the way for UK withdrawal from the EU single market and customs union, a number of observers cautioned that the relationship between the UK and the EU would continue to be fraught for years to come. The UK and the EU continue to find themselves at loggerheads over the future of the [Northern Ireland Protocol](#), raising the spectre of a trade war between the UK and the EU.

The Protocol left Northern Ireland in the EU single market, meaning that goods could move freely between Ireland and Northern Ireland, obviating the need for a hard border between the two. The border in effect was moved to the Irish Sea; goods exported to Northern Ireland from the rest of the UK became subject to border checks and controls. The compromise was designed to preserve the 1998 Good Friday Agreement that ended decades of sectarian conflict in Northern Ireland, while maintaining the integrity of the single market.

Back in October, the UK wanted, as part of negotiations that had been ongoing since July, to roll back border controls on goods shipped to Northern Ireland from the rest of the UK. As set out in its July 2021 [Command Paper](#), the UK position was premised on assurances that Northern Ireland would not be used as a means for goods to find their way via Ireland to the rest of the EU in contravention of single market principles. The Command Paper also called for rewriting Article 5 (customs documents). The UK also sought modification of state aid rules in Northern Ireland (Article 10) and elimination of the jurisdiction of the European Court of Justice (ECJ) over issues involving Northern Ireland (Article 12) in favour of an alternative dispute settlement mechanism.

There were well founded concerns that the British were prepared to trigger Article 16 of the Protocol (which allows either side to take “safeguard” measures to avoid “serious economic, societal or environmental difficulties”) and refuse to implement, for example, Articles 5 (customs duties) and 7 (certification and standards) of the Protocol. Invoking Article 16 was foreshadowed in the Command Paper, as well as in statements made by the UK Brexit Minister David Frost at the Conservative Party conference, in which he urged “the EU to be ambitious” and exclaimed that it is “no use tinkering around the edges. We need significant change.”

At the time there were suggestions that the UK might also include Article 10, which requires notification of state subsidies benefitting UK businesses exporting goods to Northern Ireland. The UK would need to give one month’s notice of the intention to invoke Article 16, unless it claims “exceptional circumstances.” Article 16 provides that any unilateral measures should be limited in scope and duration to what is “strictly necessary” to remedy the situation.

On October 13, the European Commission offered [concessions](#) on a significant number of customs checks (80%) and reducing paperwork for trade between Great Britain and Northern Ireland (by 50%). It did not budge on the jurisdiction of the ECJ over disputes under the Protocol. Since then, however, while negotiations continue, there have been suggestions that Article 16 is back on the table at No. 10. The UK and the EU remain far apart on ECJ jurisdiction and state aid; in fact, the former is a fundamental red line for the EU. Other less fundamental areas of dispute could be solved; the French seemed to have backed down on their threats to take retaliatory action as part of a dispute over access by French fishing vessels to

British fishing waters. And discussions continue on customs and sanitary and phytosanitary checks on fresh food exported from Great Britain to stores and supermarkets in Northern Ireland.

Should the UK trigger Article 16, the EU would have the option of retaliating under Article 16 with “proportionate rebalancing measures.” The EU could also re-activate two lawsuits that it filed in March 2021 following the UK’s unilateral delay in introducing border checks for certain goods entering Northern Ireland from the rest of the UK. The two lawsuits were suspended in July 2021. Other casualties of the Protocol dispute could include progress on the financial services memorandum of understanding or UK participation in EU R&D effort known as Horizon Europe. The most extreme response would be the imposition of tariffs.

As the adverse effects of Brexit (more precisely, departure from the single market and the customs union) on the British economy and daily life continue to mount (shortages of food on supermarket shelves, of fuel, of truck drivers and of doctors and nurses, among them), and it becomes more difficult to attribute these effects to the pandemic, Britons are increasingly likely to make the connection between those adverse effects and Brexit. (A [statista poll](#), published October 25, shows 49% believing it was wrong for the UK to leave the EU and 38% believing it was right to leave, and the chairman of the Office for Budget Responsibility was reported to have said that the adverse Brexit impact on the economy would be twice as great as the adverse impact of the pandemic.) At this point, taking action against a “recalcitrant” EU over the issue of ECJ jurisdiction could be a convenient way to divert voter attention from Brexit-related hits to the economy.

The question then is whether the brinkmanship is designed to obtain further concessions or whether the UK government is ready to walk away from the Protocol – a deal that both sides entered into freely and whose consequences were largely predictable – despite the consequences, including adverse reactions from the United States. The President and the Speaker of the House, among others, have expressed steadfast support for the Good Friday Agreement and have cautioned against actions that would undermine it. Lord Frost, writing in the foreword to a [paper](#) published by the Policy Exchange on November 1, risks heightening tensions as he accuses the EU of behaving “without regard to the huge political, economic and identity sensitivities” in Northern Ireland and of destroying “cross-community consent” by insisting on treating the Protocol like other parts of single market and customs union rules. He concludes that the Protocol was the result of “extreme weakness” of the British government after the June 2017 election and that the UK “must return to the Protocol and deliver a more robust, and more balanced, outcome than [it] could in 2019.”

Presumably we will only see action on the Protocol once COP26 is behind us. It is impossible to predict the likely resolution of the current source of friction between the UK and the EU. These are political differences, and seeking leverage to recast the deal by relying on provisions (and the related processes called for in the Protocol) designed to address disagreements over implementation, at the very least, will be messy, may have a questionable legal basis and could call into question whether the UK is respecting the sanctity of international agreements. The only certainty is that Brexit will continue to be a flashpoint.

Mark S. Bergman
Washington, D.C.
November 3, 2021