



# NORTHERN IRELAND PROTOCOL

Implementation and the future

Oliver Pateman

### **About the author**

Oliver Pateman is currently reading for the Bar at the Inns of Court College of Advocacy. He has a degree in Jurisprudence. He is the 2019 Sir Gilbert Gray Scholar at Gray's Inn and holds an offer of pupillage to begin later this year at 5, Paper Buildings.

### **Acknowledgements**

The views expressed in this paper are those of the author alone, who takes sole responsibility for all errors and omissions. Oliver gratefully acknowledges the contribution and support of Sarah Bool, solicitor, and a member of the executive committee of the Society of Conservative Lawyers.

London, March 2021

---

The Society of Conservative Lawyers, an association of lawyers who support or are sympathetic to the aims of the Conservative Party. Members hold a range of different views within those parameters and the views expressed in its publications are only those of their authors, and not necessarily held by all members of the Society or by the Conservative Party.

## INTRODUCTION

The negotiations for the departure of the United Kingdom from the European Union concluded with the terms of the Withdrawal Agreement. This includes the Northern Ireland Protocol (the “Protocol”), which sets out a blueprint of the future relationship between the UK and the EU on the island of Ireland. It is designed to preserve the open border between Northern Ireland (“NI”) and the Republic of Ireland (“ROI”) and recognises that the North-South border on the island is unlike any other border with the EU.

On 29th January 2021, the EU Commission implemented regulation 2021/111, which made the export of COVID vaccinations subject to permits.<sup>1</sup> This regulation was enacted in response to the sluggish progress of the EU vaccination programme, and particularly to stop AstraZeneca from exporting COVID vaccines to the UK. In spite of the fact that no vaccines make their way into the UK through the ROI, and the NI vaccine programme does not require this, the EU decided to trigger Article 16 of the Protocol, which allows each side to take protective “safeguarding” measures.<sup>2</sup> That decision was heavily criticised. It

achieved the almost-impossible task of unified condemnation from almost all the politicians in Dublin and Stormont. Almost at once, the EU reversed this decision and the prospect of a ‘hard border’ on the island turned to (Ulster) Scotch mist.

Whatever the EU Commission was thinking, it would be folly for the Government to formulate the UK’s future relationship with the EU around this aberration. Matters have been complicated further by the United Kingdom’s unilateral extension of the ‘Grace Period’. Relations between the UK and the EU are reportedly strained. The Commission is said to be close to issuing legal proceedings.

Invocation of Article 16 (the taking by the UK of ‘Safeguarding Measures’) is not to be taken lightly. It carries serious political and economic ramifications, both for the UK and for the EU, but especially for the people of NI. The Protocol and the Joint Committee responsible for its continued implementation both offer considerable opportunities for consensus. These opportunities must be taken if the Protocol is to “impact as little as possible on the everyday life of communities”.<sup>3</sup>

---

<sup>1</sup> Commission Implementing Regulation (EU) 2021/111 of 29 January 2021 making the exportation of certain products subject to the production of an export authorisation [2021] OJ 2 31/1

---

<sup>2</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 16

<sup>3</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Preamble

## BACKGROUND TO NORTHERN IRELAND PROTOCOL

The Protocol is part of the Withdrawal Agreement. Its objectives are to set out “arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 [Belfast (Good Friday)] Agreement in all its dimensions”. It is a balancing act between preserving the existing open border between, and continued peace within, the island and withdrawing the UK from the sphere of influence of the EU.

Rather than a ‘once and for all’ treaty, the Protocol offers a blueprint for ongoing relations between the UK and EU on the matter of Ireland and is designed with future bilateral dialogue in mind. The implementation of the Withdrawal Agreement is the responsibility of the ‘Joint Committee’, co-chaired by representatives from the UK and EU sides.<sup>4</sup> Decisions are agreed by both the UK and EU,

---

<sup>4</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ 2 29/7, Article 164

though there is scope for each side to make unilateral declarations which are ‘noted’ by the other.<sup>5</sup> The Withdrawal Agreement and the Protocol envisage discussions into the future; it is a starting point, and not a destination.

However, as a result of the experience of many in NI following Britain’s withdrawal, many Unionists, including the DUP First Minister, Arlene Foster, have suggested that the UK invoke Article 16 of the Protocol now in order to protect the territorial integrity of the UK. Foster successfully petitioned for a Westminster debate on the subject (obtaining over 140,000 signatures).<sup>6</sup> She is seeking to challenge the implementation of the Protocol in the courts.<sup>7</sup> Prolonged food shortages in NI

---

<sup>5</sup> John Curtis, ‘Joint Committee Decisions on the Northern Ireland Protocol’ (House of Commons Library, 2020) p. 34

<sup>6</sup> Petitions committee, ‘Trigger Article 16 We want unfettered GB-NI Trade’ (*UK Government and Parliament*, 2 February 2021) <https://petition.parliament.uk/petitions/573209> accessed 8 March 2021

supermarkets, sanitary and phytosanitary (SPS) checks and seizure of parcels amongst other matters indicate that this is a problem which extends far beyond the issue of vaccine procurement.<sup>8</sup> Such problems may worsen in the short term as the grace period exempting businesses transporting certain goods from compliance with customs processes ends on 1st October 2021, and in the longer term as EU and UK regulations diverge. However, policymakers must resist the notion that invoking Article 16 of the Protocol might constitute a quick solution to these problems.

---

<sup>7</sup> David Young, ‘Foster and DUP members launch legal battle over Northern Ireland Protocol’ (The Times, 22 February 2021) [www.thetimes.co.uk/article/foster-and-dup-members-launch-legal-battle-over-northern-ireland-protocol-6sv6mhfs6](http://www.thetimes.co.uk/article/foster-and-dup-members-launch-legal-battle-over-northern-ireland-protocol-6sv6mhfs6) accessed 8 March 2021

<sup>8</sup> Petitions Committee, *Oral Evidence: The Movement of goods between Great Britain and Northern Ireland* (HC 2020–2021, 1232)

## CONTENT OF NORTHERN IRELAND PROTOCOL

The Protocol consists of 19 Articles and 7 Annexes that set out the future relationship of the UK and EU on the question of the Irish Border. The Protocol makes clear that NI is part of the Customs Territory of the UK and can therefore benefit from trade deals made with third countries.<sup>9</sup> Customs duties shall not be payable on goods moving from Great Britain (“GB”) to Northern Ireland, unless they are “at risk” of entering the EU.<sup>10</sup> The UK may ensure unfettered market access under Article 6 (Protection of the UK internal market) for goods moving in the other direction and the Joint Committee are to keep the application of this section under “constant review”.<sup>11</sup> The UK will also be responsible for

---

<sup>9</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 4

<sup>10</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 5.2

<sup>11</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 6.2

collecting VAT and excise duties that accrue in NI, which forms part of the UK’s VAT area.

In a Command Paper laid before Parliament in December 2020, the Chancellor of the Duchy of Lancaster, Michael Gove, summarised the principles of the Protocol as follows:

“This agreement in principle upholds unfettered access for Northern Ireland businesses to their most important market, eliminating any risk of Northern Ireland to Great Britain export declarations. It safeguards Northern Ireland’s place in the UK’s customs territory, establishing the platform to preserve tariff-free trade for Northern Ireland businesses, protect internal UK trade and maintain the UK’s VAT area. It keeps goods flowing between Great Britain and Northern Ireland, with important measures to maintain food supplies and the critical flow of medicines.”<sup>12</sup>

---

<sup>12</sup> Cabinet Office, *The Northern Ireland Protocol* (Cm 346, 2020) p. 3

There is, therefore, much in the Protocol to encourage Unionists. Its principles provide the foundations for strong trading relationships on the island and the preservation of peace and the open border, whilst also acknowledging NI's status as an integral part of the UK.

### **Safeguarding measures**

Article 16 sets out the “safeguards” that either the EU or the UK can take if necessary. This Article provides that if the application of the Protocol leads to serious “economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures”. These must be “restricted with regard to their scope and duration” and be “strictly necessary to remedy the situation”.<sup>13</sup> If measures are taken by either party, the other has the right to make “proportionate rebalancing measures”. These too must be “strictly necessary” and should “least disturb the functioning of this Protocol”.<sup>14</sup>

If either the EU or UK wish to enact safeguarding measures under Article 16, they must notify the other party through the Joint Committee and provide “all relevant information” save where “exceptional circumstances requiring immediate action exclude prior examination”, when either side may invoke Article 16 without recourse to this procedure.<sup>15</sup> In normal circumstances, the EU and

---

<sup>13</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 16.1

<sup>14</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 16.2

<sup>15</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Annex 7.3

UK must then immediately negotiate with a view to finding a commonly acceptable solution.<sup>16</sup> No safeguarding measures may be implemented for one month after notification, and they shall be the subject of consultations in the Joint Committee every three months from the date of their adoption “with a view to their abolition” or “limitation of their scope”.<sup>17</sup> These conditions similarly apply to retaliatory rebalancing measures.

Evidently, the EU initially took the view that “exceptional circumstances” applied when it decided to invoke Article 16 in relation to the supply of Covid vaccines – to the surprise of the UK and the ROI. There has still been no satisfactory explanation how the UK’s purchase of COVID vaccines manufactured within the EU justified this course of action, or what it was that “excluded prior examination”, or what rendered these “exceptional circumstances” or why “immediate action” was required. There is understandable disquiet that the EU triggered Article 16 over lifesaving COVID vaccines, so soon after the conclusion of the agreement, and provided no satisfactory reason for doing so. Whatever the EU’s thinking (mere clumsiness?), it does not allay growing suspicions on the part of some that the UK would be better off pulling the plug on the Protocol.<sup>18</sup>

---

<sup>16</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Annex 7

<sup>17</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Annex 7.5

<sup>18</sup> Jess Sargeant, ‘The article 16 vaccine row is over – but the damage has been done’ (*Institute for Government*, 30 January 2021) [www.instituteforgovernment.org.uk/blog/article-16-vaccine-row](http://www.instituteforgovernment.org.uk/blog/article-16-vaccine-row) accessed 8 March 2021

## **ARTICLE 16: SHOULD THE UK GIVE NOTICE?**

Not yet – the UK’s triggering of Article 16 would be inadvisable for at least these three reasons:

**1. Hard Border:** Triggering Article 16 could lead to a hard border for goods on the island of Ireland; an eventuality which both UK and EU negotiators wished to avoid at all costs. The Protocol itself

recalls the UK’s commitment to protect North-South co-operation and the guarantee of avoiding a hard border, including physical infrastructure and related checks.<sup>19</sup>

---

<sup>19</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Preamble

If Article 16 were triggered, the Common Travel Area (“CTA”) between the UK and ROI would continue to apply; the UK’s right to continue to make arrangements with ROI relating to the CTA is expressly preserved in Article 3 (*Common Travel Area*) of the Protocol.<sup>20</sup> Reciprocal rights and privileges between British and Irish citizens are created by this document, including free movement, the right to reside, work, and vote, and access education and healthcare. The Belfast (Good Friday) Agreement, referred to in the preamble to the Protocol, would similarly subsist were Article 16 to be triggered. This agreement encourages bilateral co-operation between the UK and ROI in its establishment of the North/South Ministerial Council and the British-Irish Intergovernmental Conference.<sup>21</sup> The spirit of these treaties and work of these organisations in promoting co-operation in areas such as agriculture, the environment and fisheries on the island of Ireland would be seriously undermined by the imposition of intrusive checks on goods at the border.

**2. Impact on EU-UK trading relationship:** Secondly, the invocation of Article 16 would have an adverse effect on the UK’s wider trading relationship with the EU.

Much of the dispute surrounding Article 16 has centred on the supply of fresh produce in NI supermarkets. During negotiations with the EU, the UK government consistently argued, without success, for solutions for trusted traders, like supermarkets, with stable supply chains and comprehensive oversight of warehousing and distribution who move pre-packaged produce solely for sale in NI.<sup>22</sup> In spite of this, shortages of fresh produce have been reported at NI supermarkets; Spar-branded products have been stocked in Sainsbury’s and M&S have been unable to provide items from their distribution centres in

GB.<sup>23</sup> Since fresh produce can take much longer to reach NI than much of the rest of the UK, products have a shorter shelf life, and there is an acute need to simplify distribution arrangements. Comprehensive SPS checks on meat, plants and composite products of animal origin (such as sausages) may be expected to worsen the availability of fresh produce.

Some argue that if Article 16 were invoked, the UK government might then be able to remove checks on goods going to and from NI. But the EU could introduce ‘rebalancing’ measures in response. These might constitute restrictions on goods being imported into the UK (as was proposed with the COVID vaccines), or quotas and tariffs. Such restrictions would not be limited to goods crossing the Irish border but would change the relationship of the EU with the whole UK and would apply at all UK ports. Since 26% of all food, and 65% of fresh food, consumed in the UK is imported from the EU, triggering Article 16 is unlikely to do much to improve the range or availability of food in NI; the EU could prevent goods from entering the UK completely, as opposed to their being delayed crossing the Irish Sea.<sup>24</sup>

Furthermore, the triggering of Article 16 could initiate an ever-spiralling sequence of “safeguards” and “rebalancing” measures. At the moment, this threat hovers like the sword of Damocles over our current “zero-tariff, zero-quota” arrangement with the EU. Abandonment of these principles could lead to significant harm to the UK economy overall. As it is very difficult to calculate exactly how much damage a particular regulation, tariff or quota may have on imports, it is also very difficult to calculate the scale of any rebalancing measures that ought

---

<sup>20</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 3

<sup>21</sup> Belfast (Good Friday) Agreement, 1998, Article 2

<sup>22</sup> Cabinet Office, *The Northern Ireland Protocol* (Cm 346, 2020) para. 32

---

<sup>23</sup> John Campbell, ‘Brexit: Supermarkets call for action on NI food supplies’ (BBC News, 12 January 2021) [www.bbc.co.uk/news/uk-northern-ireland-55641544](http://www.bbc.co.uk/news/uk-northern-ireland-55641544) accessed 8 March 2021

<sup>24</sup> Adam Kula, ‘NI supermarket business figure: No food shortages, only choice issues’ (*News Letter*, 18 January 2021) [www.newsletter.co.uk/business/ni-supermarket-business-figure-no-food-shortages-only-choice-issues-3103539](http://www.newsletter.co.uk/business/ni-supermarket-business-figure-no-food-shortages-only-choice-issues-3103539) accessed 8 March 2021

to apply.<sup>25</sup> As a result of this inexact science, there is every chance that the adoption of such measures might affect both importers and exporters disproportionately, to the detriment of the whole UK.

We suggest that the best way to ensure the availability of goods in NI is for the UK to reduce the extra cost of applying the Protocol to traders as much as possible, not to spurn our trading relationship with the EU. We encourage the UK Trader Support and Movement Assistance Schemes to provide education and guidance.

**3. Governance:** Finally, the UK's invocation of Article 16 would have serious consequences for the Stormont Government.

If the application of Article 16 were unacceptable to either Unionist or Nationalist Members of the Legislative Assembly ("MLAs"), then the power-sharing arrangements in Stormont could cease, and direct rule be imposed again. It would be difficult to claim that the Protocol enjoyed

---

<sup>25</sup> For a very detailed explanation of why this is so: Holger Spamann, 'The Myth of 'Rebalancing' Retaliation in WTO Dispute Settlement Practice' [2006] 9(1) *Journal of International Economic Law* <https://doi.org/10.1093/jiel/jgi054> accessed 8 March 2021

democratic support in NI, and thus the narrative that a poor Brexit deal had been forced upon NI by a disinterested UK Parliament could develop.

In addition, under Article 18 (*Democratic consent in Northern Ireland*) of the Protocol, a specific mechanism is introduced to ensure that the Protocol enjoys "cross-community support" and the democratic approval of the people of NI.<sup>26</sup> Under the agreement, MLAs will first be asked four years after the end of the transition period if they agree to the continued application of the Protocol, and regularly thereafter.<sup>27</sup> It is unclear how this exercise can be carried out if the Legislative Assembly is not sitting at all (as recent history shows). Any decision reached in these circumstances could have acrimonious political consequences.

For the reasons and principles above it is clear that triggering Article 16, and implementing safeguarding or rebalancing measures, is an option that ought to be avoided in all but exceptional circumstances.

---

<sup>26</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 18.6

<sup>27</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 18.5

## WHAT IS THE FUTURE FOR THE NORTHERN IRELAND PROTOCOL?

In the short term, it is important, whilst acknowledging the difficulties and issues experienced, that every effort is made to make the Protocol in its current form work.

On 22nd February 2021, Robin Walker MP, Minister of State in the NI Office ("NIO"), responding for the Government following the Article 16 Westminster Hall Debate said: goods were now "flowing effectively and in normal volumes between GB and Northern Ireland", and the UK Government would make £1 billion investment in the Trader Support Service and Movement Assistance Scheme to help businesses

importing and exporting goods to and from the Province.<sup>28</sup> The Government also hopes to resolve some outstanding issues with the EU through the Joint Committee, such as seeking Part 1 Listed status for the UK for Veterinary Controls to limit the requirements for the movement of animals across the Irish Sea.<sup>29</sup>

---

<sup>28</sup> Petitions Committee, *Oral Evidence: The Movement of goods between Great Britain and Northern Ireland* (HC 2020-2021, 1232)

<sup>29</sup> Petitions Committee, *Oral Evidence: The Movement of goods between Great Britain and Northern Ireland* (HC 2020-2021, 1232)

## The Grace Period: the UK's unilateral extension

The UK may also make unilateral declarations under the Protocol which may be 'noted' by the EU. Several of these have already been made and noted by both sides without the need to give notice under Article 16.<sup>30</sup> One such declaration on 17th December 2020 established a Grace Period until 1st April 2021 for SPS checks, which concluded that "the UK accepts this solution is *not renewable*".<sup>31</sup> The EU noted this and reminded the UK of their right to ask the Court of Justice of the European Union for a ruling on the matter.<sup>32</sup> Notwithstanding, on 3rd March 2021 the Secretary of State for Northern Ireland unilaterally announced that the UK would extend the Grace Period until 1st October.

Vice-President Šefčovič criticised the UK for departing from a "constructive approach that has prevailed up until now" and suggested that this was "the second time that the UK government is set to breach international law".<sup>33</sup> He challenged the decision of the UK Government in law as a violation both of substantive provisions of the Protocol and of the obligation to act in Good Faith in the Withdrawal Agreement.<sup>34</sup> However, we believe that in spite of the December declaration that the Grace Period would not be renewed, the extension may still be interpreted as furthering the objectives of the Protocol, and therefore lawful, rather than evidence of breach.

---

<sup>30</sup> John Curtis, 'Joint Committee Decisions on the Northern Ireland Protocol' (House of Commons Library, 2020) p. 34

<sup>31</sup> HM Government, 'Unilateral declarations by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on official certifications', 17 December 2020

<sup>32</sup> *ibid.*

<sup>33</sup> (The first time being the tabling of clauses 44,45 and 47 of the Internal Market Bill 2020) Maroš Šefčovič, 'Statement by Vice-President Maroš Šefčovič following today's announcement by the UK government regarding the Protocol on Ireland/Northern Ireland' (*European Commission*, 3 March 2021)

[https://ec.europa.eu/commission/presscorner/detail/en/statement\\_21\\_1018](https://ec.europa.eu/commission/presscorner/detail/en/statement_21_1018) accessed 8 March 2021

<sup>34</sup> *ibid.*

Firstly, the Grace Period goes to the implementation of the Protocol rather than a refusal to implement the rules *per se*. Under Article 12, the UK is responsible for implementing and applying the relevant provisions of EU law (including border checks). Responsibility for how this is done within the bounds of EU law is left to the UK; though EU officials have the right to be present, and to information regarding the implementation.<sup>35</sup> Where there is disagreement about how this should be done, the ideal course is for the Joint Committee to come to a collective decision. However, where this is impossible, there is scope for the use of unilateral declarations, as when the Grace Period was first introduced.

Secondly, if the establishment of the Grace Period by unagreed unilateral declaration was lawful, it is difficult to see how an unagreed extension might not be. Unilateral declarations noted by the EU have previously been held to be non-binding, though under the Vienna Convention they may be used to interpret treaties.<sup>36</sup> This declaration is not a new measure but a continuation of a pre-existing state of affairs, with a clear plan for the introduction of full checks in accordance with the Protocol in the near future.<sup>37</sup> It is time limited and unlikely to lead to diversion of trade. If correct, this also means that the conditions for the EU to give notice of rebalancing measures in light of the UK's unilateral declaration under Article 16 are not made out.

Finally, we believe that the unilateral extension is lawful to allow the UK government to fulfil the objectives of the Protocol, especially the principle that it should impact on the everyday life of communities as little as possible. The Secretary of State told the House that the steps taken by the UK government are temporary, to "avoid disruptive cliff edges as engagement with the EU continues

---

<sup>35</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 12.1–4

<sup>36</sup> John Curtis, 'Joint Committee Decisions on the Northern Ireland Protocol' (House of Commons Library, 2020) p. 36

<sup>37</sup> HM Government, 'Updated Arrangements for Authorised Traders from 1 April 2021'



through the Joint Committee”.<sup>38</sup> The Trader Support and Movement Assistance Schemes would not have been fully ready to handle the requisite volume of GB-NI trade by 1st April.<sup>39</sup> The duties imposed on the UK by the Protocol are not to be implemented regardless of cost. Delaying the phased introduction of export health certificates until October is a mature and proportionate response, in-keeping with the spirit and the letter of the Protocol. The alternative is that the people of NI should have curtailed access to GB food.

### **The duty to act in good faith**

The UK also has an overriding duty to act in good faith, even if not in breach of Article 12 of the Protocol. Under Article 5 of the Withdrawal Agreement, the duty of Good Faith compels each side to “take all appropriate measures (...) to ensure fulfilment of the obligations arising from this agreement and shall refrain from any measures which could jeopardise the objectives of this Agreement”.<sup>40</sup> This is a relatively low threshold; the measure of laying the unamended UK Internal Market Bill before the House for instance was clearly capable of constituting a breach of good faith.<sup>41</sup> However, the question of whether the UK has acted in bad faith will largely depend on one’s conception of the “objectives” of the agreement. In the event of an irreconcilable dispute under the

Withdrawal Agreement, the Joint Committee must establish an arbitration panel to determine this question.<sup>42</sup>

Other commentators disagree with our view, arguing that the UK declaration is “indisputably a breach of faith”, or even an argument “conjured to inspire popular loyalty”.<sup>43</sup> Such criticisms, however, miss the principle that the Protocol should impact as little as possible on the everyday lives of communities, minimise disruption, preserve the Belfast (Good Friday) Agreement in all its aspects and that an important objective of the Protocol is to ensure peace and co-operation on the island of Island, not erode it. Delaying the introduction of checks on sausages by six months is a fair price to pay for these benefits.

### **No indefinite postponement of implementation**

However, the UK government should not rely on being able to postpone full implementation of the Protocol indefinitely. Such a tactic would undoubtedly constitute acting in bad faith, and a measure which could jeopardise the objectives of the agreement.

One way of providing an incentive for both sides to be seen to comply with their duties of good faith would be to improve the openness of negotiations under the Protocol. The mandatory publication of reasons for triggering Article 16 by the relevant party for instance, even under the emergency procedure, would be a positive development in this regard. Under the Protocol, the Joint Committee may amend its rules of procedure, and Lord Frost should consider whether the EU should provide (retrospectively) reasons for invoking Article 16 in

---

<sup>38</sup> HC Deb 3 March 2021, HCWS 819

<sup>39</sup> Business Readiness Team Northern Ireland directorate, ‘Detailed Guidance for Authorised Traders’ (*Department of Agriculture, Environment and Rural Affairs*, 3 March 2021) [www.daera-ni.gov.uk/publications/detailed-guidance-authorised-traders](http://www.daera-ni.gov.uk/publications/detailed-guidance-authorised-traders) accessed 8 March 2021

<sup>40</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ 2 29/7, Article 5

<sup>41</sup> John Bell, ‘The Commission’s argument for breach of good faith against the United Kingdom: an in-depth analysis from the standpoint of public international law’ (*European Law Blog*, 12 October) <https://europeanlawblog.eu/2020/10/12/the-commissions-argument-for-breach-of-good-faith-against-the-united-kingdom-an-in-depth-analysis-from-the-standpoint-of-public-international-law> accessed 8 March 2021

---

<sup>42</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ 2 29/7, Article 170

<sup>43</sup> Matthew Parris, ‘Frost’s fight with the EU is political thuggery’ (*The Times*, 6 March) <https://www.thetimes.co.uk/article/frosts-fight-with-the-eu-is-political-thuggery-cdpzs3k0t?shareToken=d2a8cc207bfc74a0291e1ed0604dfa09> accessed 8 March 2021

January.<sup>44</sup> The giving of publicly accountable reasons for the decision to trigger Article 16 would serve to calm tensions, clear heads and promote dialogue on both sides of the Joint Committee and ultimately help the Protocol to achieve its objectives.

### **The impact of the UK Internal Market Act 2020 ('UKIMA')**

Finally, when considering the trade in goods between GB and NI, the Protocol is not the only relevant document. UKIMA establishes principles of “mutual recognition” and “non-discrimination” of goods to ensure unfettered access for NI goods to the UK market.<sup>45</sup> UKIMA Part 5 effectively requires that Ministers may only ever make GB-NI trade easier and simpler, subject to the requirements of international law, by placing obligations on “appropriate authorities”. These are people who exercise functions of a public nature, but especially Ministers of the Crown and NI Ministers.<sup>46</sup> Under s. 46(1), when considering the exercise of any function, an appropriate authority must have “special regard” to a number of matters:

- (a) The need to maintain NI’s integral place in the UKs internal market,

- (b) The need to respect NI’s place as part of the customs territory of the UK, and
- (c) The need to facilitate the free flow of goods between GB and NI with the aim of:
  - (i) Streamlining trade between GB and NI, and
  - (ii) Maintaining and strengthening the integrity and smooth operation of the internal market in the UK.<sup>47</sup>

These matters must be considered whenever appropriate authorities deal with the Protocol or the UK internal market. Further, under s.47(1), an appropriate authority must not exercise any function in a way that would result in a new kind of NI-GB check, control or administrative process being introduced or used, or existing checks becoming more onerous.<sup>48</sup> This section does not in terms prohibit Ministers from introducing new checks or arrangements between NI and GB where international law (such as the Protocol) requires it. Nevertheless, even when exercising these functions, Ministers must still have special regard to the s.46(1) factors. Any new impositions on the GB-NI flow of goods following regulatory divergence between the UK and EU must therefore by law be as light-touch as possible. UKIMA should therefore offer Unionists on either side of the Irish Sea some comfort for our future relationship of the UK with the EU.

---

<sup>44</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ 2 29/7, Article 164.5.e

<sup>45</sup> United Kingdom Internal Market Act 2020 s. 2, s.5

<sup>46</sup> United Kingdom Internal Market Act 2020 s. 46(3)

---

<sup>47</sup> United Kingdom Internal Market Act 2020 s. 46(1)

<sup>48</sup> United Kingdom Internal Market Act 2020 s. 47(1)

## **THE EUROPEAN RESEARCH GROUP PROPOSAL: ‘MUTUAL ENFORCEMENT’ IN PLACE OF THE PROTOCOL**

The ERG has recently published a paper, *Re-Uniting the Kingdom: How and Why to Replace the Northern Ireland Protocol*. Identifying many of the same problems with the Protocol as this paper, the ERG recommends the invocation of Article 16 followed by the introduction of a system of ‘Mutual Enforcement’. This was originally proposed by Sir Jonathan Faull, a UK official at the European Commission, and subsequently adopted by the

ERG as an alternative to the ‘Backstop’.<sup>49</sup> Mutual Enforcement would place duties in UK law on businesses exporting from NI into the EU, and reciprocal duties would be placed on EU businesses exporting into the UK.<sup>50</sup> The ERG

---

<sup>49</sup> European Research Group, ‘Re-uniting the Kingdom: How and why to replace the Northern Ireland Protocol’, February 2021, p. 22

<sup>50</sup> *ibid.*

argue that bilateral guarantees would obviate the need for customs posts and checks to be carried out at the border “by placing trust and confidence in the exporting territory”.<sup>51</sup> In our view, however, such an approach is inferior to the current Protocol.

One major problem with the ‘Mutual Enforcement’ approach is that the obligations imposed are not truly mutual, since it places duties on the ROI over and above those expected of other EU Member States. Under such a system, it would become an offence in UK law knowingly to export goods from the UK into the EU, and vice versa.<sup>52</sup> This would rely on the enactment of similar provisions in the criminal law of the ROI for businesses exporting to the UK.

Not only would these laws need to be passed in the ROI, but ROI resources would be expended on enforcement.<sup>53</sup> Since there would be no border posts under this system, it would be difficult to gather evidence of what goods were in fact crossing the border. Any exporter would presumably say that non-conforming goods found in the exporting country were not intended for export at all. Additionally, a preliminary reference procedure would be introduced so that litigants in the ROI might refer matters relating to UK regulatory standards to a judge in the UK.<sup>54</sup> This would entail ROI judges accepting and applying judgments made in British courts.

We ask, why would ROI impose criminal liability on its own companies in order to give the UK an easier Brexit? ‘Mutual Enforcement’ would also treat ROI differently from any other EU Member State exporting to the UK. This would not only put them at a competitive disadvantage but might in fact be contrary to EU Law.<sup>55</sup>

The second major problem with ‘Mutual Enforcement’ is the proposal that EU regulatory standards should be enforced in the UK by EU officials. In order to ensure that goods crossing the Irish Border from the UK are compliant, the ERG recommend the imposition of strict controls, EU official presence and participation in control sites.<sup>56</sup> Since NI is “very sensitive to being treated differently from the Mainland” there would be “spot checks” on manufacturers and producers throughout the UK to ensure that they continue to comply with the latest changes in EU law.<sup>57</sup> The fact that UK inspectors would be permitted to do the same throughout the EU would not prevent this completely negating one of the most important aspects of Brexit – the freedom to deregulate industry in the UK to make it more globally competitive. Businesses would have to choose between supplying clients in the EU or Third Countries and would lose the flexibility to adapt their business to changing needs.

Alternatively, the ERG suggest “EU Centres” could be established throughout the UK, where businesses could take goods that they intend to export to the EU before crossing the border.<sup>58</sup> This would do nothing to improve the efficiency of ‘just in time’ supply chains, for which delays of even a few hours can mean the difference between profit and loss. Indeed, one huge advantage of the Protocol is that the UK is placed in charge of enforcing EU regulatory standards.<sup>59</sup> This means that checks may be carried out with minimum fuss, placing as little onus as possible on UK businesses, in accordance with UKIMA.<sup>60</sup> The ERG’s enthusiasm for EU inspectors permanently based in the UK and testing goods for export in their own good time and according to their rules is surprising!

---

<sup>51</sup> Ibid. 23

<sup>52</sup> Joseph H.H. Weiler, Daniel Sarmiento, Jonathan Faull ‘An Offer the EU and UK Cannot Refuse’ (Verfassungsblog, 22 August 2019) <https://verfassungsblog.de/?s=an+offer+the+EU+can%27t+refuse> accessed 8 March 2021 para. 19

<sup>53</sup> *ibid.* para. 29

<sup>54</sup> *ibid.* para. 20

<sup>55</sup> Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837

---

<sup>56</sup> Joseph H.H. Weiler, Daniel Sarmiento, Jonathan Faull ‘An Offer the EU and UK Cannot Refuse’ (Verfassungsblog, 22 August 2019) <https://verfassungsblog.de/?s=an+offer+the+EU+can%27t+refuse> accessed 8 March 2021 para. 25

<sup>57</sup> *ibid.* para. 22, 25

<sup>58</sup> *ibid.* para. 25

<sup>59</sup> Protocol on Ireland/Northern Ireland [2020] OJ 2 29/7, Article 12.1–4

<sup>60</sup> United Kingdom Internal Market Act 2020, Part 5

## LONGER TERM? RENEGOTIATION? OTHER OPTIONS?

What we say above does not mean the UK government should never give notice under Article 16. Resolution of difficulties through the Protocol itself is the best option in the short- and medium-term. However, the UK Government ought also to consider the possibility of renegotiating the Protocol in the long-term if trading relations with the EU change substantially, or if there is significant regulatory divergence. Indeed, in the longer term, it is conceivable that the UKIMA 2020 may place Ministers under a duty to trigger Article 16, as the best (or “least worst”) measure available to them for the purpose of implementing or dealing with matters arising out of the Protocol, having regard to s.46(1), and the express prohibitions in s.47(1).

At the moment, such checks as must exist in the Irish Sea are the price of a comprehensive trade deal with the EU and peace within Ireland. It is likely to be a long time, if ever, before EU imports and exports form a materially smaller proportion of UK trade in goods than they do currently.

Time and advances in technology may also become a saving grace in this debate. The UK Government is continually investigating and investing in new technology to make border checks as light as possible. If they really can, one day, be made with the help of little more than cameras and numberplate recognition, then Article 16 might be invoked, and these checks carried out at the Irish Border with little overall damage to North-South co-operation. Furthermore, as already noted, the triggering of Article 16 need not affect the CTA, and so the movement of people up and down the island of Ireland could likely continue unimpeded as before. However, this scenario is not a viable option at the moment.

Finally, the debate so far has centred on whether one of three options should be enacted, namely on whether checks should be conducted at the Irish Border, in the Irish Sea, or not at all, and the UK

remain in the Single Market and the Customs Union.<sup>61</sup>

However, we ask whether there might be a fourth option - the establishment of a UK/Republic of Ireland Customs Area along the lines of the CTA. This paper makes no comment on the viability of any such scheme, and we doubt there is political appetite for it in Dublin as yet. However, many Irish hauliers have expressed frustration at the difficulties of using the UK ‘landbridge’ (the route that connects the ROI to the rest of the EU via mainland Britain). Journeys over the landbridge from Ireland to the EU take under 20 hours, compared to a 40-hour roll-on roll-off sea route, and 60-hour load-on load-off sea route.<sup>62</sup> 150,000 trucks use the landbridge annually, carrying trade worth an estimated €18.2 billion to the Republic of Ireland’s economy.<sup>63</sup> Such a proposal could therefore be attractive to Irish exporters, as well as GB exporters who use the ROI landbridge to access NI.

We suggest that just as the UK and ROI negotiated an exception to the pan-European Schengen Area for their people, a similar exception could be made for goods. This would depend to a large extent on the direction of British, Irish and European politics over the next few years. There might one day be scope for the UK and ROI to negotiate a joint proposal for the EU of this nature. This would have the advantage of removing the need for customs checks anywhere within our islands, promoting North-South co-operation, and

---

<sup>61</sup> Oxford University, ‘The Brexit impossibility triangle’ (Medium, 1 May 2019) <https://medium.com/oxford-university/the-brexit-impossibility-triangle-788d2400e8a> accessed 8 March 2021

<sup>62</sup> Nick Jones, ‘Trade: the UK landbridge’ (*Institute for Government*, 12 November 2020) [www.instituteforgovernment.org.uk/explainers/trade-uk-landbridge](http://www.instituteforgovernment.org.uk/explainers/trade-uk-landbridge) accessed 8 March 2021

<sup>63</sup> *ibid.*

protecting it in the event that EU and UK regulations diverge significantly. The ROI would have full membership of the EU while the UK would not need to re-join the Customs Union or Single Market. In the meantime, the UK must still take

steps to make use of the UK landbridge easier again for businesses in the ROI and continue to work with both Stormont and Dublin whatever happens, both inside and outside the structure of the Joint Committee.

## CONCLUSION

Overall, for Brexit to be a success for the UK, the EU, and particularly for the inhabitants of the island of Ireland, the Joint Committee ought to be like the swan. It is only with hard paddling that the Protocol may glide above. Working to enforce the Protocol is the best way for the deal to fulfil its stated aim of causing as little impact as possible on the everyday life of communities.

Whilst the temptation to trigger Article 16 now, particularly for Unionists, may be strong, the possible consequences of an immediate invocation could be extremely damaging to Britain's post-COVID economic recovery, international reputation

and peace within the island of Ireland. It is important to recall that the Protocol is not a final destination, but a framework for co-operation and agreement long into the future.

That said, the full suite of potential options, including giving notice under Article 16, should be kept under constant review. While its use now would undoubtedly come at a heavy price, it would not be right to rule out altogether its use in the future.

Oliver Pateman



For further information on the Society of Conservative Lawyers contact:  
The Administrative Secretary, The Lodge, Deaks Lane, Cuckfield RH17 5JB  
[administrator@conservativelawyers.com](mailto:administrator@conservativelawyers.com)  
[www:conservativelawyers.com](http://www.conservativelawyers.com)

© Society of Conservative Lawyers  
Rights to be identified as publisher have been asserted by the in accordance  
with the Copyright, Designs and Patents Act 1988

March 2021