

The steps HMG needs to take on the Irish Protocol

Dr Graham Gudgin, former special advisor to the First Minister of Northern Ireland, observes that the way the NI Protocol is being implemented ignores its stated aims. The Protocol's onerous requirements are having an adverse impact on Northern Irish people, while EU's aim of protecting its Single Market can be achieved with much lighter arrangements.

This article is a summary of Dr Gudgin's presentation to the Northern Ireland Assembly Finance Committee on June 23rd, the full written version of which is available on the Briefings for Britain website.

Introduction

The UK Government under Boris Johnson views the NI Protocol as what the Chinese call an unequal treaty, and in my view is correct to do so. The Protocol was accepted in October 2019 under conditions of acute political disarray and a parliamentary civil war culminating in the Benn Act which essentially gave the EU cart blanche to name its terms.

Not surprisingly, the EU, egged on by Dublin, took full advantage of this disarray and imposed terms for a UK:EU trade agreement which was maximally advantageous to themselves and the Republic of Ireland and maximally unfavourable to the integrity of the UK and to NI Unionists. It is this agreement that the UK Government is attempting to renegotiate and at a minimum wishes to agree major reforms.

It is unclear how well the Government understood the consequences of the Protocol it signed in 2019. Lord Frost has recently said that no-one could have anticipated the 'chill

effects' on GB firms supplying NI businesses and consumers. The refusal of a range of firms in GB to continue their previous business arrangements in supplying customers in NI are a key part of the negative impact of the Protocol on the NI economy, alongside EU rules either banning the imports of certain foods and medicines or imposing costly requirements for veterinary and other checks and certificates.

Ignoring the stated aims of the Protocol

Nor is it obvious that the outcome is consistent with several of the aims listed in the preamble to the Protocol. These include, and I quote:

- *'a shared aim of avoiding controls at the ports and airports of Northern Ireland to the extent possible in accordance with applicable legislation''*
- *'impacting as little as possible on the everyday life of communities in Northern Ireland'.*
- *'having regard to the importance of maintaining the integral place of Northern Ireland in the United Kingdom's internal market'.*
- *'Northern Ireland is part of the customs territory of the United Kingdom and will benefit from participation in the United Kingdom's independent trade policy,*

Once the Protocol came into operation in January 2021 it soon became obvious that these statements meant little in practice. Although there is allowance for an Assembly vote on the protocol after four years, most unionists do not regard this as an adequate realisation of the preamble's statements that

- *'there should be a process to ensure democratic consent in Northern Ireland to the application of Union law under this Protocol'.*
- *'reaffirming that the achievements, benefits and*

commitments of the peace process will remain of paramount importance to peace, stability and reconciliation there.

The key rules on customs and trade regulations are contained in article 5 of the Protocol.

How well was the Protocol understood?

Many people initially read the customs and regulatory barriers facing trade into NI as applying only to goods **at risk** of entering the EU via NI. Article 5, mentions the 'at risk' concept four times in its 2 pages of text. Only a careful reading reveals that this concept applies only to tariffs and not to technical or SPS regulations.

Since the Trade and Cooperation Agreement of December 2020 rules out most tariffs and all quotas, the 'at risk' concept became less important (applying only to goods not meeting EU rules of origin). However, the Protocol also stipulated that NI producers should observe EU regulations including customs rules on goods entering NI. All of this is obscure, to say the least.

Article 5(3) merely states that *'Legislation as defined in point 2 of article 5 of Regulation EU TEU 925(2013) shall apply to and in the UK in respect of NI'*. This refers to the entire EU Customs Code and in this single obscure sentence establishes the outer border of the EU at the coast of NI.

Article 5(3) then adds *"the provisions of union law listed in annex 2 of this Protocol shall apply to the UK in respect of NI"*. Annex 2 then lists 288 EU regulations covering the whole range of goods trade, including among many others, chemicals, medicines, food and agriculture.

The important thing is that these customs rules and these

product regulations are nowhere applied to goods at risk. Instead, they apply to all goods, and this does not seem to have been widely realised in NI until the protocol came into operation in January 2021.

Promises were made that NI businesses would have unfettered access to the wider UK market. and these promises have been honoured. But UK ministers made little effort to point up the fact that the promises referred to NI businesses having unfettered access to selling into GB markets, but not to GB businesses having access to NI. The 'access' referred to here is only to the sales of NI businesses and not to their purchases from GB.

In his evidence to the same session of the NI Assembly Finance Committee, law professor Ronan McCrae of UCL argued that even if the public underestimated the scope of the Protocol, the UK Government's lawyers would have been fully aware of its implications. This may be correct, although we should not forget that the UK had few trained trade lawyers and HMRC had to recruit lawyers with a range of non-trade experience. Some UK civil servants also took part in what were obvious examples of Irish over-reach such as the absurd 'mapping exercise' which listed 160 examples of north-south co-operation in Ireland, which it wrongly asserted depended on mutual membership of the EU. Even if HMRC lawyers understood the implications of the Protocol, which is not obvious, it is clear that politicians and the public in NI and across GB did not. Opposition to the Protocol was thus slow to build up.

Alternatives to the Protocol

Unionists have been strongly criticised for not realising that their support for Brexit implied a border in the Irish Sea, but this was not a necessary consequence of Brexit. There are at least three other options even if we accept no physical

infrastructure at the border.

- **Alternative Technology.** ProsperityUK published a major report *Alternative Arrangements for the Irish Border* authored by a Commission chaired by Greg Hands MP and Nicky Morgan MP. The report advocated the use of trusted trader status and checks away from the border supported by tracking technology on cross-border consignments. Technology that Fujitsu said was available
- **A Border in the Celtic Sea.** In the absence of a land border in Ireland, illicit goods could be prevented from entering the continental EU by checks at ports in the Republic of Ireland.
- **Mutual Enforcement** Mutual Enforcement entails each side making a reciprocal legal commitment to enforce the rules of the other with respect (only) to trade across the Each side maintains autonomy – but commits to the enforcement of whatever rules the other seeks to impose in respect of goods crossing the border. It would be unlawful (even a criminal offence) for a trader in Ireland to export a good to Northern Ireland (or vice versa) without complying with the latter's rules and duties. HMRC would collect all duties for the benefit of Irish customs authorities. And regulatory compliance for exports would be enforced.

The Way Forward

The EU should recognise that the Protocol is now too controversial and damaging to the NI economy and politics to survive in its present form. Its need to protect its Single Market can be achieved with much lighter arrangements than in the current Protocol.

- It should allow the 'at risk' principle to be applied to SPS regulations as well as to tariffs.

- It should recognise UK food and medicines regulations as equivalent to its own and forgo checks on all goods for as long as broad regulatory alignment remains in place

If the EU refuse to co-operate in reaching a reasonable compromise, then the UK might successively apply the following:

- Initially extend grace periods further whether unilaterally or not.
- Invoke article 16 of the Protocol in a way that avoids checks until a compromise is reached
- In extremis, replace the Protocol with a scheme of Mutual Enforcement at least on the UK side of the border

It is recognised that any or all of these steps could trigger a trade war. Careful diplomacy and transparency should limit this danger but, in any case, the imbalance in trade between the UK and EU means that the UK is well-placed to ride out a trade war. These should however only be rhetorical threats as part of negotiation. Now is a time for grown-up politics. The UK can agree reasonable measures to protect the EU's Single Market but in turn the EU should not turn a molehill into a mountain and should respect the preamble to the Protocol in making any measures as painless as possible for NI. It is in the interests of both sides to act as good and helpful neighbours and not as bitter divorcees.

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