

'The UK Approach to the Northern Ireland Protocol' command paper (20 May 2020)

A Précis and Analysis¹

Summary

- It has been 7 months since the revised Protocol was agreed (October 2019) and 4 months since it came into force with the ratification of the Withdrawal Agreement and the UK's exit from the EU.
 - This [command paper](#) is the first official statement in which some of the consequences of that Protocol are being set out and acknowledged by the UK Government (UKG).
 - As such, this should allow more constructive engagement with the challenges and reality of implementing the Protocol than has been possible to date.
- This is a political/principles paper rather than a technical/details one.
 - The paper serves primarily to assure both the EU and UK unionists and it can be said, judging by reaction to its publication, to have served this difficult task in key respects.
 - It delivers important messages to the EU about the UK being ready to 'respect and abide by the legal obligations' the Protocol contains.
 - It also assures unionists that the implementation of the Protocol is in the hands of the UK authorities and that there is no 'international border' between GB and NI.
- The paper is focused primarily on the movement of goods across the Irish Sea.
 - It marks a critical juncture in recognising the 'headline' changes to occur in this area.
 - Many important aspects and effects of the Protocol are, however, merely skimmed over.
 - It contains omissions and ambiguities, some of which are to be discussed and decided at UK-EU level and others of which will cause lingering political difficulties within NI in particular.
- In light of the need to create a foundation for economic and political stability in Northern Ireland, there are three major areas of concern:
 - Despite the impression given (paragraph 50), the Protocol is not a document for political negotiation but for technical implementation.
 - This technical discussion will happen at UK-EU level and there will be no opportunity for NI elected representatives to directly shape or scrutinise those decisions.
 - The only form of input the UKG formally offers is a Business Engagement Forum to allow businesses (with NI Executive present) to 'put forward proposals and provide feedback'.
 - Virtually none the specific questions that have been raised by businesses in NI let alone [by the EU](#) since the revised Protocol was revealed have been addressed in this paper.
 - A false impression is given that the Protocol is temporary and can be voted away by MLAs
 - This is not true (the consent vote only applies to Articles 5-10 of the Protocol).
 - This impression only reduces the incentive for constructive, collaborative engagement in meeting the challenges of the Protocol at NI level.
 - At the same time, it actively increases the incentive to make the Protocol another divisive political touchstone in NI electoral politics here.
 - There is still a need for a reality check regarding readiness for implementation of the Protocol by 1 January 2021, especially if this is to occur with minimal disruption.
 - There is a risk that political obfuscation and denial on this issue could once again cause unnecessary confusion, tension and harm to the interests of NI.
 - Compounding the problem, there is no recognition of the costs to arise from this Protocol for the NI consumer and NI businesses and no promise to mitigate these in any way.

¹ Author: Katy Hayward (Queen's University Belfast and The UK in a Changing Europe). I write in a personal capacity.

Objectives and Principles of the UK

- The objectives of the arrangements set out in the Protocol (Article 1.3) are 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 Agreement in all its dimensions'
- The UK Government adds new (but not unfamiliar) objectives in its approach:
 - Respect the needs of all people in Northern Ireland²
 - Impact as little as possible on the everyday life of communities in NI³
 - Strengthen the economy in NI⁴
 - Protect the 1998 Belfast (Good Friday) Agreement⁵
 - Respect NI's place in the UK⁶
 - Provide appropriate protection for the EU Single Market
 - Protecting the interests of both the whole UK and the EU
- There is only one stated priority of the UK Government in this paper:
 - To 'ensure that we deliver the Protocol in a way which protects NI's place in the UK customs territory' (paragraph 14).
 - This is slightly odd, because NI's place in the customs territory of the UK is written into the Protocol (Article 4).
 - That said, *de facto* what it means for NI to be in the UK customs territory is changed by the terms of the Protocol itself. Whilst the UK can propose 'light touch' enforcement of the rules, it cannot change the rules themselves.
- The paper sets out **four principles** for the UK's approach to implementing the Protocol.⁷
 - No additional process or paperwork on trade from NI to rest of the UK
 - *The big ask of the EU:* to waive the requirement for export and exit summary declarations; how to be sure that EU VAT and excise rules will be applied to goods leaving NI to GB.
 - *The big give for the UK:* raises a big challenge when it comes to differentiating between NI goods and those transited through NI from elsewhere.
 - No tariffs on goods going from GB to NI
 - *The big ask of the EU:* in the one sense, this is not a big ask because the Protocol means that tariffs are payable on goods 'at risk' of entering the Single Market. The Protocol already allows that goods that stay in the UK ultimately don't pay tariffs. There are two differences in what is being indicated here:

² Relevant phrases include: 'Respect the needs of all NI's people'; 'Uphold the rights of all NI's citizens'; 'Ways forward which command the broadest possible support across the whole community'; 'impact as little as possible on everyday life in NI'; 'Respect the need to bear as lightly as possible on the everyday life of NI'; 'Protect the interests of the people and economy of Northern Ireland'.

³ This quotes (selectively) from a phrase from the Preamble to the Protocol which states that the UK and EU are 'Determined that the application of this Protocol should impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland'.

⁴ Relevant phrases include: 'Support business and the economy'; 'strengthening the economy in NI (as part of building a shared and stable future)'; 'lets NI boost its trade'; 'Making sure NI benefits most fully from its access to both the GB and EU markets and 'our trade deals across the world'.

⁵ The protection of the 1998 Agreement is a 'grave and solemn responsibility for both the UK and Irish Governments' (3).

⁶ Relevant phrases include: 'Respect the fact NI is an integral part of the UK's customs territory'; 'ensure the effective working of the UK's internal market'; 'preserving and strengthening Northern Ireland's place in our United Kingdom'; 'minimum bureaucratic consequences for businesses and traders'.

⁷ It is worth noting that these principles come under the objective of 'Protecting NI's place in the UK's customs territory'. This framing can be seen as crucial to justifying the asks that are being made of the EU by the UK Government, i.e. 'this is the bare minimum of what it could mean for NI to be part of the UK's customs territory, as per the Protocol'.

- The UKG is giving the impression that tariffs won't be paid at all; but what could happen is that they are required up front but reimbursed. This is why businesses are keen to learn how the rebate system will work, and there is no detail on that here.
- The UKG has added three adjectives to the term 'at risk', i.e. 'substantial', 'genuine' and 'clear'. This is an effort to urge a minimalist interpretation by the EU of what goods entering NI will be seen as 'at risk' and therefore subject to controls etc.
- *The big give for the UK:* there will need to be declarations on goods as they move from Great Britain to Northern Ireland.
- No new physical customs infrastructure:
 - *The big ask of the EU:* that existing infrastructure in NI can be used for what will be a different scale of customs facilitation and border management than currently used. There is no detail as to how and where checks would take place. The further away from the point of entry that the checks take place, the greater the risk of entry to the single market.
 - *The big give for the UK:* there will be 'limited additional process on goods arriving in NI' (17).
- NI to benefit from new UK FTAs
 - *The big ask of the EU:* the complexity of having two different customs regimes applying in the one place.
 - *The big give for the UK:* the complexity of having two different customs regimes applying. Plus, specifically the challenge of how to apply 'any new, lower UK tariffs' on 'goods entering NI just as in the rest of the UK', if they enter via Dublin rather than GB.
 - It is also worth bearing in mind that a consistent request from NI businesses has been to have access to the EU's FTAs.

What the UK Government is acknowledging

- There will be some new administrative requirements (on movement of goods)
- There will need to be declarations on goods as they move from Great Britain to Northern Ireland
- UK authorities apply EU customs rules to goods entering Northern Ireland (29)
- Tariffs will be collected on goods at risk of entering the EU's Single Market at ports of entry
- There will be 'wider regulatory alignment on industrial goods' in NI
- The Protocol 'gives effect to certain aspects of EU law in Northern Ireland' (8)
- Some checks will be needed on agri-food movements from GB to NI (33) 'as we have always acknowledged from the start'⁸
 - Furthermore, 'we expect to request additional categories of commodities at Belfast Port' and ... 'further designations may also be required at other existing sites' (34)
- EU state aid rules 'will apply in certain cases where it is relevant to trade between NI and the EU' (40)
- NI 'maintains alignment on some administrative processes included within the EU VAT and excise rules for goods' (41) [in truth, the Protocol means applying provisions of Union law relating to VAT and excise as if Northern Ireland were a Member State]
 - 'As regards VAT rates, NI remains bound by EU rules' (42)
- EU officials have the right to be present during certain activities of UK authorities related to the Protocol (53)

⁸ A reference to it making 'sense to protect supply chains and disease-free status on the island of Ireland', 'just as it has since the nineteenth century' seems bizarre. Did that logic not apply prior to the Act of Union? And the overriding historic memory of disease and plant health on the island of Ireland in the nineteenth century is, of course, one of immense national tragedy.

(Over-)sweetening the pill

- In order to make the legal obligations on the UK arising from the Protocol more palatable to a domestic audience, the paper attempts to emphasise several 'softeners'. There is a risk, in so doing, of misrepresentation of the facts and of neglect of the wider interests of NI.
- The 'electronic' light-touch
 - There is a stress on the administrative procedures being 'electronic' and 'streamlined and simplified to the maximum extent' (29). The UKG is also 'committed to using the latest technology, risk and compliance techniques' (28). It also promises to 'actively seek to simplify and minimise electronic documentary requirements' for agri-food trade (35).
 - Other than 'electronic processes' sounding less burdensome than bundles of paper, this can be noted to be the very same paperwork that it was long denied would exist.
 - More to the point, electronic processes are no more likely to conjure themselves out of thin air than wedges of duplicate customs declarations forms.
 - The effectiveness of any such processes will rely on quality of data provided. How will this be gathered? How will businesses be prepared for the new systems in place?
- The scope for flexibility
 - The paper describes the implementation of the Protocol as having to be 'demonstrably fair', 'practical', 'consensual, pragmatic and proportionate', 'appropriate'.
 - To some degree these are just adjectives and can be interpreted loosely, although it is certainly the case that the UKG should emphasise the unique post-Brexit circumstances of NI but at the same time it should equip and prepare NI for the consequences of its application.
- The definition of consent
 - On the other hand, there is a risk that the push for 'consensual' application of the rules will provide fuel for some who will always assert that they do not consent to the Protocol.
 - Whilst this is legitimate, so too are the equally passionate concerns of others in NI who will always be able to emphasise that they do not consent to being outside the EU.
 - Paragraph 16 states that regulatory alignment will happen 'on the basis of democratic consent'. This is an odd phrase, not least because it implies that there will be no regulatory alignment without consent, which is not true (it will apply for at least 6 years after transition).
 - Paragraph 8 states that 'certain aspects of EU law will have effect' in Northern Ireland 'on a provisional basis – subject to consent'. Again, this is misleading.
 - Aspects of EU law will continue to have effect in Northern Ireland indefinitely and without being subject to the 'consent vote' because it is beyond the scope of Articles 5-10 (e.g. see Annex 1 for the application of Article 2.1 on equal treatment).
- The scope and consequences of the consent vote
 - Paragraph 14 states 'Prior to the consent votes in the NI Assembly, which will determine the way forward in the longer term...'
 - There are several problems with this statement. The first is that the consent vote(s) by MLAs will not 'determine the way forward'; it will only indicate whether there is a majority of MLAs in favour of the continued application of Articles 5-10.⁹
 - If there is cross-community support, there won't be a vote for another 8 years. If there is a simple majority in favour, then there will be a vote in 4 years' time. If only a minority of MLAs are in favour then Articles 5-10 'and other provisions of the Protocol' (to the extent that

⁹ These articles cover customs, movement of goods, protection of the UK internal market, technical regulations etc., VAT and excise, the single electricity market, and state aid.

those provisions depend on those Articles for their application), 'shall cease to apply 2 years after' (Article 18).

- In such an eventuality, the matter transfers into the hands of the Joint Committee, which 'shall address recommendations to the Union and to the UK on the necessary measures', i.e. how to achieve the objective of the Protocol of avoiding a hard border (Article 18).
- Before doing so, 'the Joint Committee *may* seek an opinion from institutions created by the 1998 Agreement' (Article 18, emphasis added), which hardly counts as enabling NI elected representatives to 'determine the way forward'.
- The scope for discretion
 - The paper emphasises that 'these rules are administered by the UK authorities, who retain operational responsibility and are able to exercise discretion, including with regard to the risk assessment of goods' (30).
 - This serves both to assure domestic audience and perhaps to remind the EU that the operationalisation of the Protocol rests primarily in the hands of the UK authorities
 - However, whilst the UK authorities will be able to exercise discretion in the checking of goods, for example, they will not be able to do so with regards to the application of the rules or, indeed, the readiness to apply the rules.
 - This is why the EU authorities will have the right to be present as the UK authorities exercise the enforcement of the Protocol (Article 12).

Analysis

- In notable contrast to rhetoric 7 months ago, this paper does not even attempt to present the Protocol as a 'win-win' for Northern Ireland. Indeed, there is little to consider exactly what gains could be made for Northern Ireland as a result of its access to the EU's single market.
 - This is a task left to the NI Executive and others; it is pertinent to ask whether this paper helps create the political environment and the clarity needed for that type of policymaking and strategy to be developed.
- The unique position of Northern Ireland is insufficiently recognised; this is exemplified in the section on 'Maximising NI's use of new regulatory freedoms'.
 - This section says that NI 'along with the whole of the UK' will benefit from several things, but none of these things fully recognise either NI's position or the implications of the Protocol.
 - For example, it says NI can benefit from 'our new sovereign immigration system' - a system which contradicts the [stated wishes](#) of the First and deputy First Minister of Northern Ireland.
 - It says NI will benefit from 'control of our waters', despite the fact the UKG has committed to apply in NI the provisions of Union law listed in Annex 2 to the Protocol relating to fisheries.
 - It also says NI will benefit from 'no alignment with EU rules' on social or broader environmental laws, overlooking the commitment to maintaining north/south cooperation and the difficulties posed by diverging rules either side of the border, e.g. on water quality.
- The frequent emphasis upon the 1998 Agreement is welcome but this needs to be matched with action in terms of creating the conditions in NI most conducive to the stability of that Agreement.
 - There is a danger that the fragility of Northern Ireland is used as some kind of lingering threat (by both sides) whilst the 'middle ground' on which the stability of NI depends continues to be undermined.
 - The reference to the prospect of 'a permanent EU presence' as being 'divisive in political and community terms' (55) is a writing-in of contention where it need not exist, especially if the proper distinction were made between a technical and a diplomatic presence of the EU.

- In relation to this, the UKG needs to be careful to act in a way that avoids any sense of conflict or competition with the Irish Government, but rather makes stringent efforts to recognise the importance of the Irish dimension.¹⁰
 - The presentation of a direct comparison between the value of goods flowing from NI to GB compared to those from NI and ROI is misleading and gratuitously provocative (12).
 - The Protocol means that NI has unfettered access to the whole of the EU's single market, not just ROI. To present the two as if the choice were a direct competition is ill-advised because it implies that the Protocol forces NI to sacrifice GB trade for the much smaller value of trade with the ROI.
 - This 'Ireland v. GB' conflict undermines the type of constructive collaborative politics needed at every level of governance in NI if the challenges of the Protocol and Brexit are to be met.
- The attempt to assure unionism is perhaps necessary, but it would have been far better for there to have been open acknowledgement of the implications of the Protocol from an early stage. Moreover, future UKG communications about the Protocol should aim for further clarity and less overt bias.
 - Put simply, a consequence of this approach could be that the UK Government can be seen to be acting in the defence of unionism rather than in the interests of NI as a whole, by implication assuming that the task representing/assuring nationalists in NI is the responsibility of the Irish Government.
 - This is dangerous in three respects:
 - (i) it ignores the 'middle ground' of those who are neither unionist nor nationalists;
 - (ii) the Irish Government is acting as part of the whole EU in the UK-EU negotiations and is not positioned to 'represent' NI, or nationalists, formally in that regard, and
 - (iii) it gives credence to the idea that UK/EU tension is reflected on the ground and in the political sphere in Northern Ireland – thus giving the impression that the future consent vote is very much about 'the UK v. Ireland' (i.e. by implication, about the status of NI in the Union) rather than about the economic interests of NI as a whole.
- Furthermore, if the UKG's intention is to find an approach that commands 'the broadest possible support across the whole community' (5) then future action on the Protocol needs to be different.
 - First, the wider scope of the Protocol should be given due attention, including in relation to the protection of rights of individuals and to the maintenance of north/south cooperation.
 - It also needs to avoid all means of making the Protocol a subject of unionist/nationalist division, rather than stoking the impression that 'elections in NI' can 'decide the outcome' of the Protocol itself (4).
 - More broadly, the engagement with the NI Executive and businesses proposed here is insufficient; substantial, serious and regular consultation with those involved in keeping Northern Ireland functioning on a day to day basis across a wide range of sectors is vital.
 - This includes stakeholders from all those areas most affected by the Protocol (see the recommendations of this [report](#) on the post-Brexit governance of Northern Ireland).
 - The 'democratic principle' is far from being at the heart of the Protocol and the consent vote is far from adequate when it comes to proper democratic representation, accountability and scrutiny.
 - The UK Government's approach from this point forward should be in accordance with such principles as those, which truly would be in accordance with the overarching objective of 'protecting the huge gains from the peace process and the 1998 Agreement' (3).

¹⁰ For example, the Foreword notes that 'lives and livelihoods are intertwined right across our United Kingdom' but the same is true across the island of Ireland and there should be no compunction in saying this.

The Action Points for the UK Government arising from this paper

- Action to be taken:
 - The UKG will create a *Business Engagement Forum*:
 - 'which will meet regularly to allow NI businesses to put forward proposals and provide feedback on how to maximise the free flow of trade' (11)
 - UKG is committed to using this forum 'to facilitate and consider all proposals for NI to make maximum use of these new [regulatory] freedoms, alongside guaranteed unfettered access it will have to the markets in the rest of the UK and the EU' (59)
 - The NI Executive will also be invited.
 - The UKG will 'work closely with the NI Executive and businesses to develop these proposals' relating to the movement of goods¹¹ (28)
 - UKG 'will review these new procedures [for goods entering NI from GB] on an annual basis' (29)
 - 'if they should turn out to impose a disproportionate burden on goods moving wholly within the UK we will consider how this burden can be reduced further or removed' (29)
 - The UKG is to 'explore with the European Commission' the scope to hold a dedicated session of the Joint Consultative Working Group, 'to consider the implementation of the 'no diminution' commitment in the Protocol' (44)
 - The UKG will support the NI Executive in continuing to operate the Single Electricity Market (47)
 - The UK Government is committed to work closely with the Irish Government to explore how to strengthen cooperation and bilateral work over the coming years (48)
 - The UKG 'will have sophisticated data on trade flows for goods entering NI and will work with the Irish authorities' in clamping down on exploitation of the Protocol arrangements (27)
- Information to be provided:
 - The UKG 'will set out more detailed plans for extensive HMRC support for businesses engaged in new electronic processes' (29)
 - The UKG 'will produce full guidance to business and third parties before the end of the transition period' (28) on the movement of goods GB into NI
 - Further guidance will be provided by the UKG for NI traders placing certain highly regulated goods on the GB market (39)
 - The UKG 'will provide further information on how these (state aid) provisions should be operated by public authorities before the end of the transition period' (40)
- Funding to be given:
 - The UKG 'will ensure that the NI Human Rights Commission and Equality Commission of NI will have the resources they need to properly carry out their new statutory functions as part of the dedicated mechanism [in the EU WA Act 2020]' (44)
 - The UKG has confirmed in principle agreement to find the costs of implementing the agri-food requirements set out in this paper (57)
 - The UKG is committed to support and contribute financially to a new PEACE+ programme (49)
- Legislation to be made:
 - Legislation for unfettered access for NI to GB to be in force by 1 January 2021 (10,19)
 - The Government needs to define a qualifying status for goods and businesses in NI to benefit from unfettered access, as per the EU (Withdrawal Agreement) Act 2020 (24)
 - The UK Government remains committed to a New Deal for NI (56)
- There are no timelines placed on any of the commitments made in this command paper.

¹¹ Unclear what proposals are being referred to here; either on the use of technology etc. or on combatting smuggling and organised crime related to it.