



Post-Brexit Governance NI

Post-Brexit Clinic

Prof. Katy Hayward

Dr. Billy Melo Araujo

Prof. David Phinnemore

Dr. Lisa Claire Whitten

24 February 2023

*Governance for 'a place
between': The multilevel
dynamics of implementing
the Protocol on
Ireland/Northern Ireland*

[https://www.qub.ac.uk/sites/
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[@PostBrexitGovNI](#)



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imminent deal?



Dynamic Regulatory
Alignment: a Two-
Year Review



UK-EU Discussions on the Protocol: an imminent deal?



A Deal on the Protocol?

FROM POLITICO PRO

Brexual healing? EU and Britain dream of a fresh start in 2023

Officials on all sides optimistic

Statement | 16 January 2023 | Brussels

Joint Statement by Vice-President Šefčovič and UK Foreign Secretary Cleverly following their video conference call today

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European Commission Vice-President Maroš Šefčovič, UK Foreign Secretary James Cleverly, and Northern Ireland Secretary Chris Heaton-Harris met via video conference today to discuss the work on the Protocol on Ireland/Northern Ireland since their last meeting on 9 January.

The two sides discussed the range of existing challenges over the last two years and the need to find solutions together to tackle comprehensively the real-life concerns of all communities in Northern Ireland and protect both Northern Ireland's place in the UK's internal market and the integrity of the EU's Single Market.

They agreed that this scoping work for potential solutions should continue in a constructive and collaborative spirit, taking careful account of each other's legitimate interests.



Sections

THE IRISH TIMES

‘Very real’ prospect of Northern Ireland protocol deal, Taoiseach says

Leo Varadkar downplays prospects of agreement by 25th anniversary of Belfast Agreement in April, saying it will take a ‘couple of months’

Expand



A Deal on the Protocol?

THE IRISH TIMES

Northern Ireland protocol: 'Technical issues nearly all worked out,' say Dublin sources

Expectations grow that EU and UK are on brink of a deal as Rishi Sunak meets party leaders

Expand

DUP warns Rishi Sunak 'very key issues' remain on any Northern Ireland Brexit deal

Donaldson says still some way to go to win over unionists, but key cabinet members are backing PM



Rishi Sunak held hostage by Tory 'malcontents' on Northern Ireland, says Labour

Keir Starmer on the attack as prime minister's hopes of a Brexit deal hit more problems



NI protocol deal unlikely to be reached until next week, say senior sources

Concerns raised that loss of momentum could raise chance of agreement unravelling

UK politics live - latest news updates



Maroš Šefčovič Retweeted

James Cleverly @JamesCleverly

United Kingdom government official

Good to speak again with @MarosSefcovic and @chhcalling about ongoing work on NI Protocol. We are focused on finding a durable solution for NI.

Intensive work continues and we agreed to talk again in the coming days.

104 63 93 208.1K

Maroš Šefčovič @MarosSefcovic · 15h

A productive video call with @JamesCleverly and @chhcalling, taking stock of our work to find joint solutions to everyday concerns in Northern Ireland. Our ^{top} priority is to succeed for the benefit of all communities.

Hard work continues. We've agreed to meet later this week.

56 68 187 64.3K

A Deal on the Protocol?

Issue	Speculated Content of a Deal
Goods movements: GB-NI	Green Lane/Red Lane for customs and regulatory checks? Businesses signed up to Trusted Trader Scheme will be allowed to avoid all GB-NI checks
Chilled meats	extended derogation for implementation of prohibitions and restriction?
State aid rules	'to be run from Westminster'; EU = more freedom to set rules in Northern Ireland but "strings attached"?
VAT	'to be run from Westminster'; EU = more freedom to set rules in Northern Ireland but "strings attached"? 'compromise without changing text of Protocol'?
Regulatory alignment	'Stormont Lock' with possible MLA vote on adoption of new Protocol applicable EU laws? Northern Ireland to have right to be heard but no veto right?
Court of Justice	More distant role as court of 'last resort' for disputes but no compromise on its role in ruling on EU law'? European Commission infringement proceedings to be considered by NI Court first?
Format	Declarations... and 'legal text'; EU = within the framework of the Protocol

Sources: *Financial Times* (<https://www.ft.com/content/53e3e30d-537c-4902-9faa-8bb5cd3c1f4b>); *Sky News* (<https://news.sky.com/story/rishi-sunak-has-so-far-kept-his-brexite-talks-trump-card-under-wraps-but-will-he-ever-get-to-play-it-12817026>); *Die Zeit* (<https://www.zeit.de/politik/ausland/2023-02/nordirland-protokoll-grossbritannien-eu-binnenmarkt-streit-rishi-sunak>)



The Courts and the Protocol: an update



Protocol and Judicial Review

Judicial review under
WA/Protocol

‘Domestic’ Judicial review

State-to-
State
Dispute
Settlement

CJEU
Jurisdiction

EU Judicial
review

UK Judicial
Review

Allister and others and Peebles v the Secretary of State for Northern Ireland and others [2023] UKSC



“The debate as to whether article VI created fundamental rights in relation to trade, whether the Acts of Union are statutes of a constitutional character, whether the 2018 and 2020 Acts are also statutes of a constitutional character, and as to the correct interpretative approach when considering such statutes or any fundamental rights, is academic. Even if it is engaged in this case, the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament. Furthermore, the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. The most fundamental rule of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme. A clear answer has been expressly provided by Parliament in relation to any conflict between the Protocol and the rights in the trade limb of article VI. The answer to any conflict between the Protocol and any other enactment whenever passed or made is that those other enactments are to be read and have effect subject to the rights and obligations which are to be recognised and available in domestic law by virtue of section 7A(2).”

A new role for the ECJ under the Protocol?

- ECJ final arbiter of EU law
- Exclusive competence re interpretation and validity of EU law
- Infringement proceedings?



The Guardian understands the final shape of the deal would involve a fudge on the European court of justice (ECJ), allowing Northern Ireland courts to adjudicate in disputes over food and agricultural products as they are devolved issues.

A new arbitration panel is also being mooted as part of the “architecture” to remove the ECJ as the sole arbiter in trade disputes - outside agrifood. Sources say this could remove the threat of the ECJ launching infringement proceedings but retain it as the ultimate arbiter of matters relating to EU law.

Rishi Sunak has so far kept his Brexit talks trump card under wraps - but will he ever get to play it?

The prime minister may have a Brexit negotiation success up his sleeve, but having left the DUP out of the loop during the talks, he may have undermined his ability to deliver on the agreement.



Sam Coates
Deputy political editor @SamCoatesSky

Under the terms of the proposed deal, the EU will have to give the UK notice of future EU regulations intended for Northern Ireland. The Joint Ministerial Committee will then be able to lodge an objection, which may then result in the EU voluntarily choosing to disapply the regulation in Northern Ireland.

Alternatively, the Speaker of the Stormont Assembly could put the issue to a vote, which could delay when the forthcoming regulation comes into force. If the EU decides to take legal action because of a failure to implement the rule, then a Northern Ireland court would have to rule on the issue first, resulting in further delays.

This movement is likely to be welcomed by some. But this is arguably the biggest area of compromise for Brexiteers and unionists, since it does not give the outright veto on future EU regulations, which is something the DUP want.

Testing the Temperature VII: What do voters in Northern Ireland think about the Protocol on Ireland/Northern Ireland?

*LucidTalk/QUB poll
3-6 February 2023*

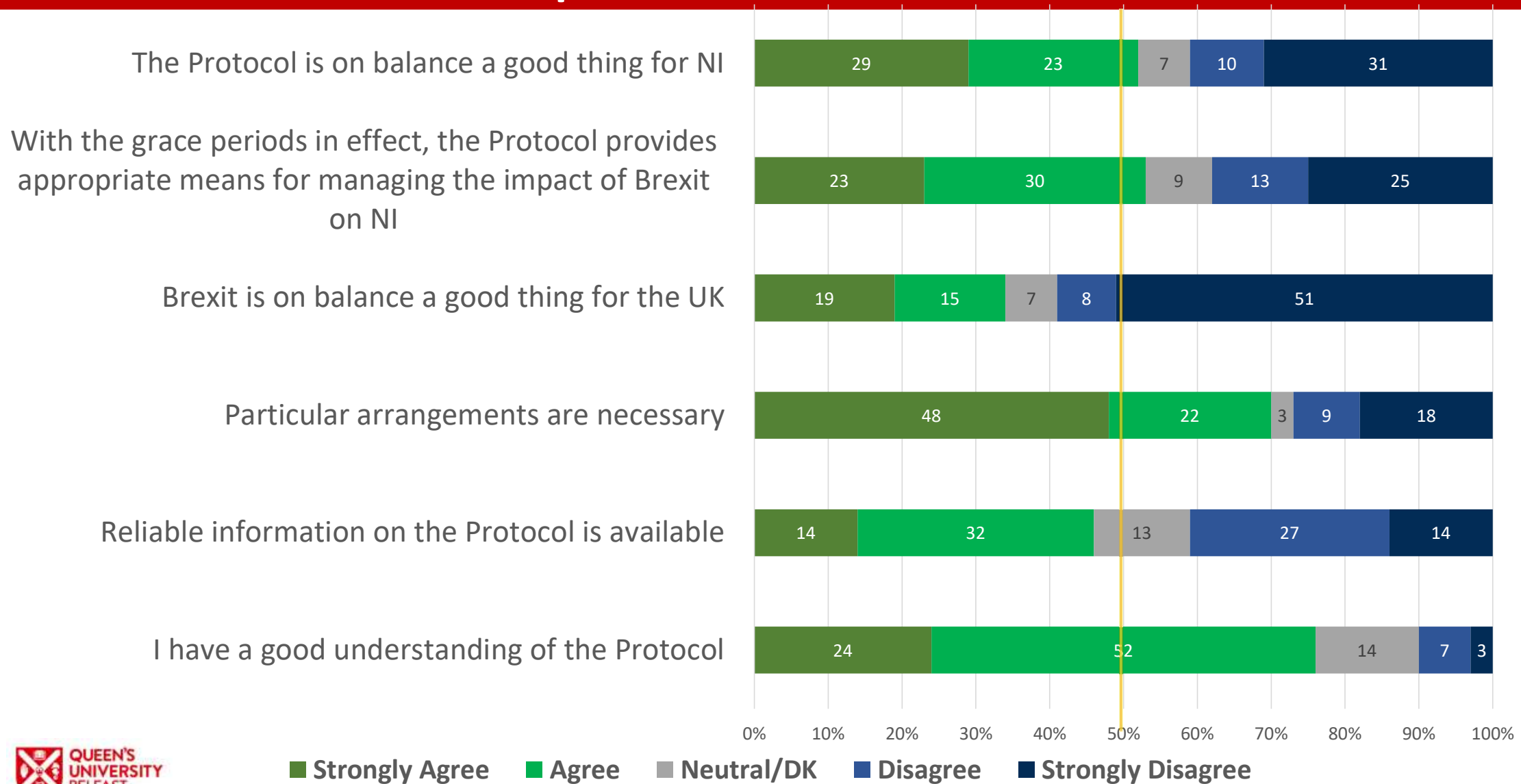
1,498 weighted sample [3,181 responses]

Margin of error +/- 2.6% at 96% confidence

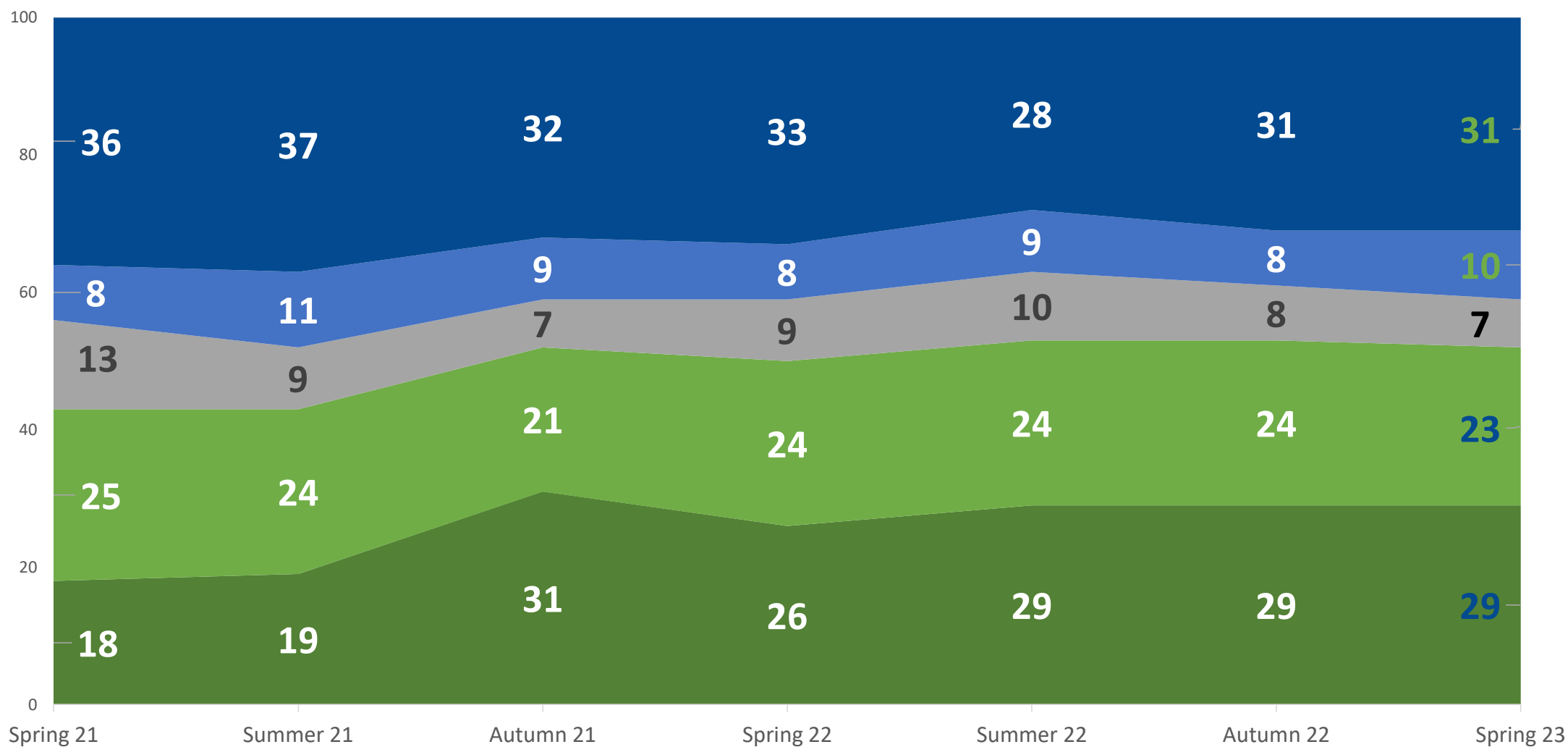
<https://www.qub.ac.uk/sites/post-brexit-governance-ni/>

[@PostBrexitGovNI](https://twitter.com/PostBrexitGovNI)

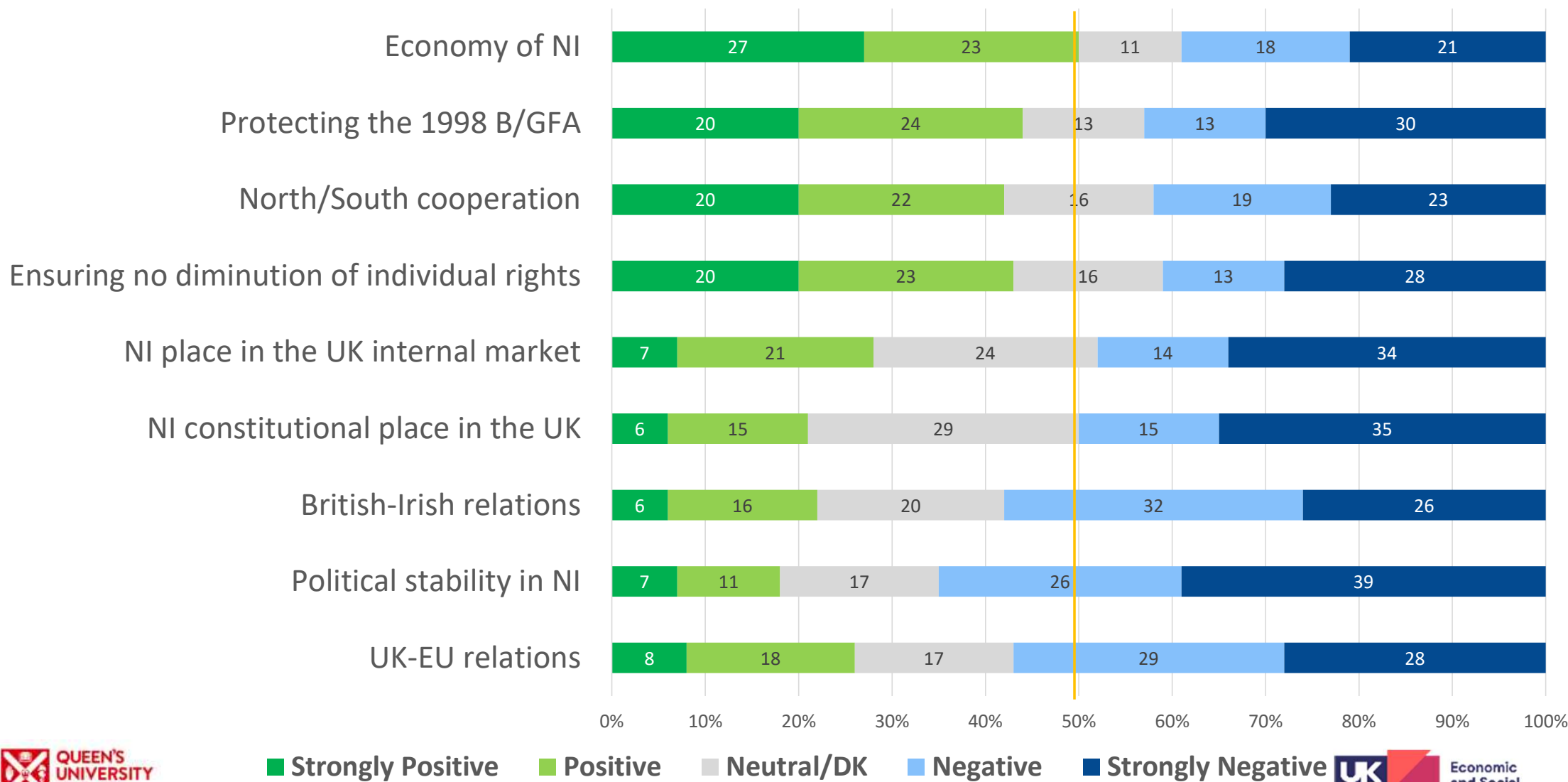
Opinion of the Protocol



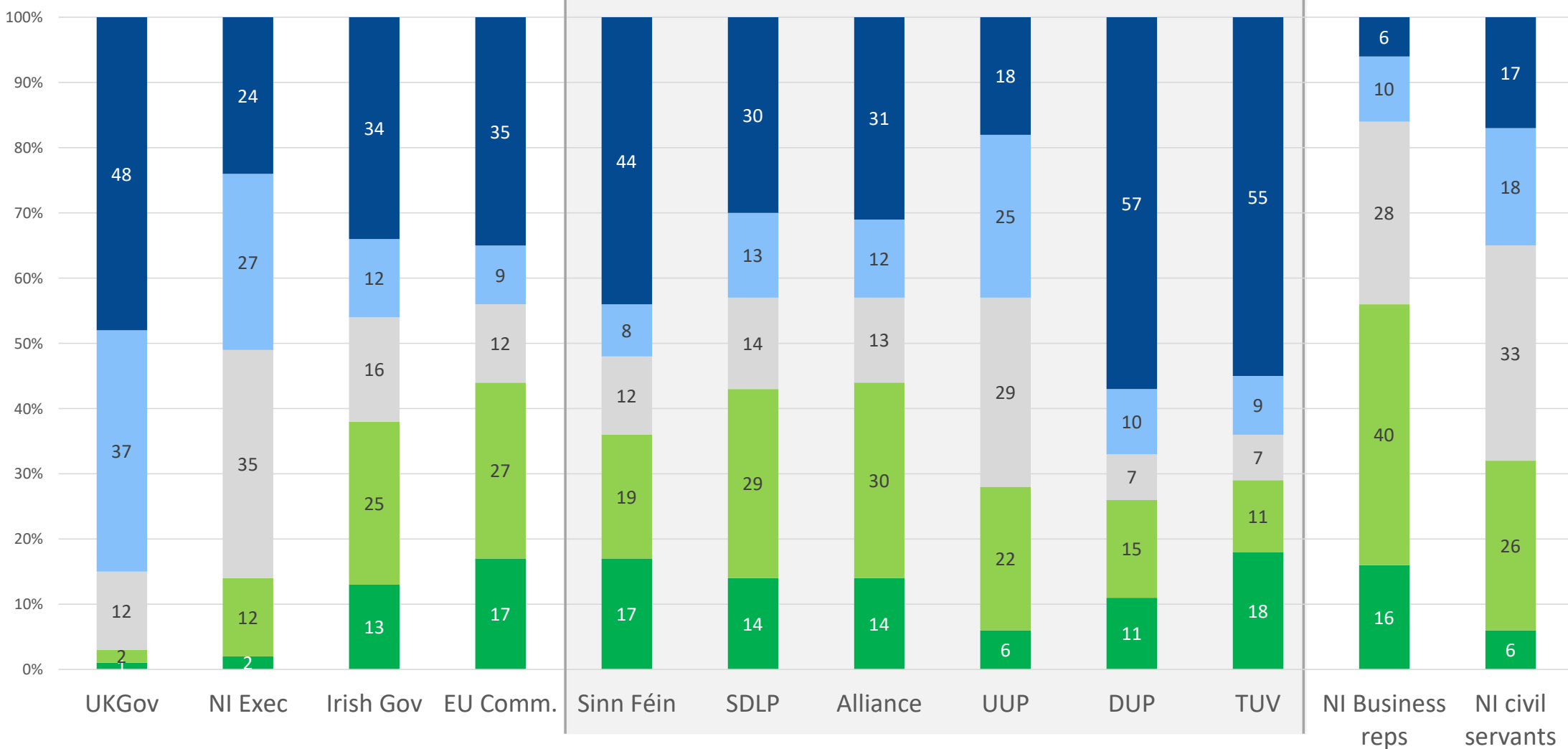
Is the Protocol on balance good? Time series



Views on the Impact of the Protocol

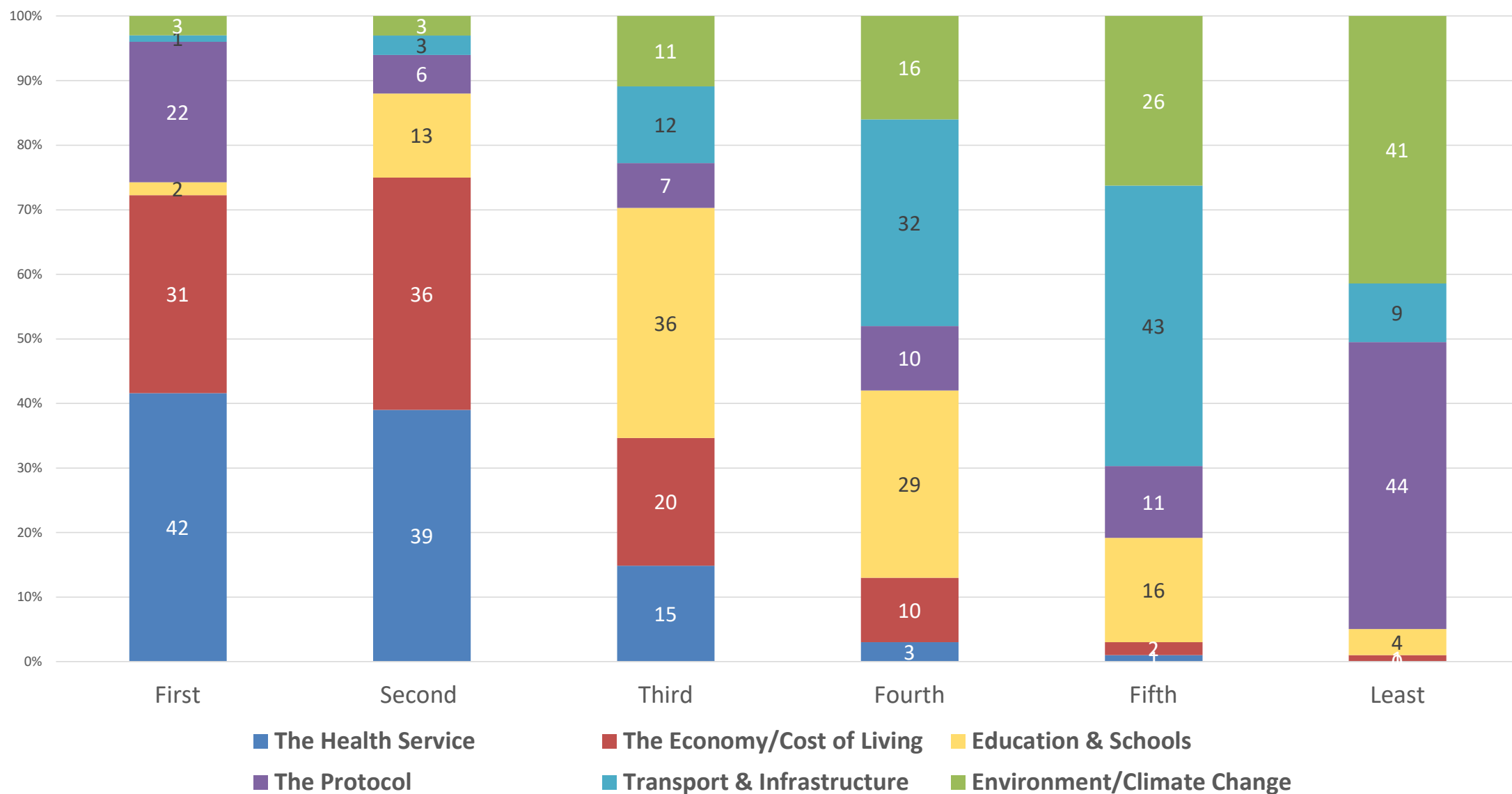


Trust to manage NI's interests on the Protocol

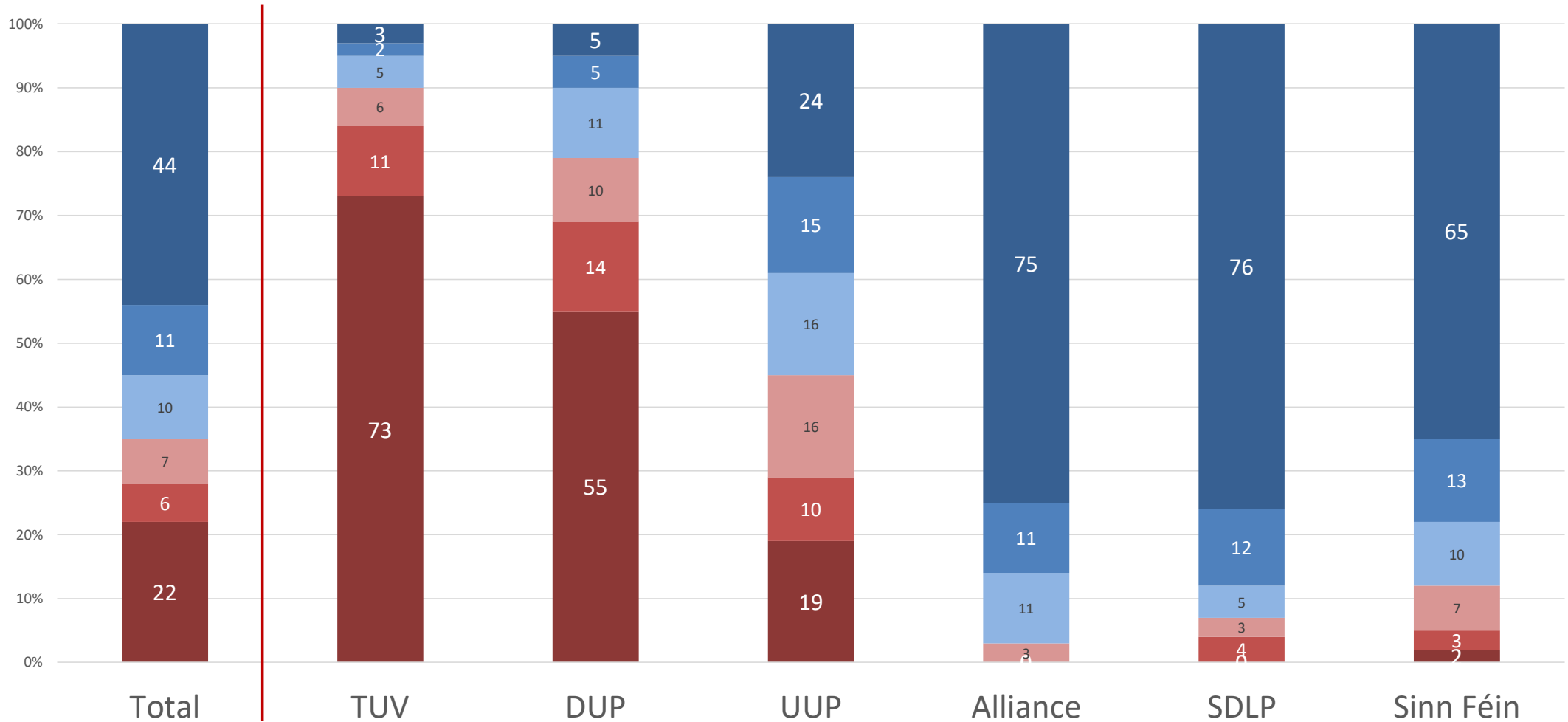


■ Trust A lot
 ■ Trust
 ■ Neutral
 ■ Distrust
 ■ Distrust A lot

Rank these six issues in order of their current importance to you

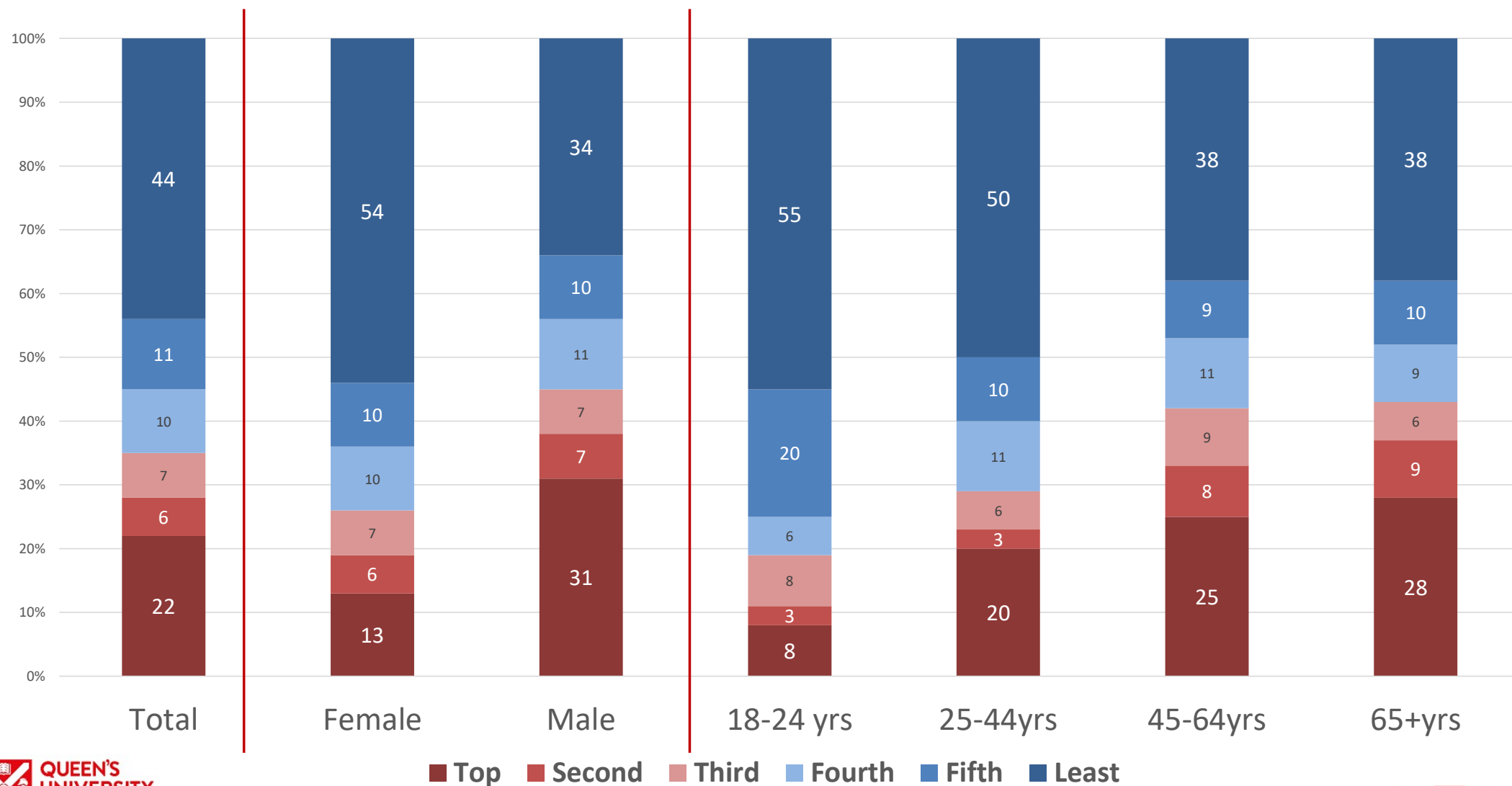


Relative importance of the Protocol (by Party)



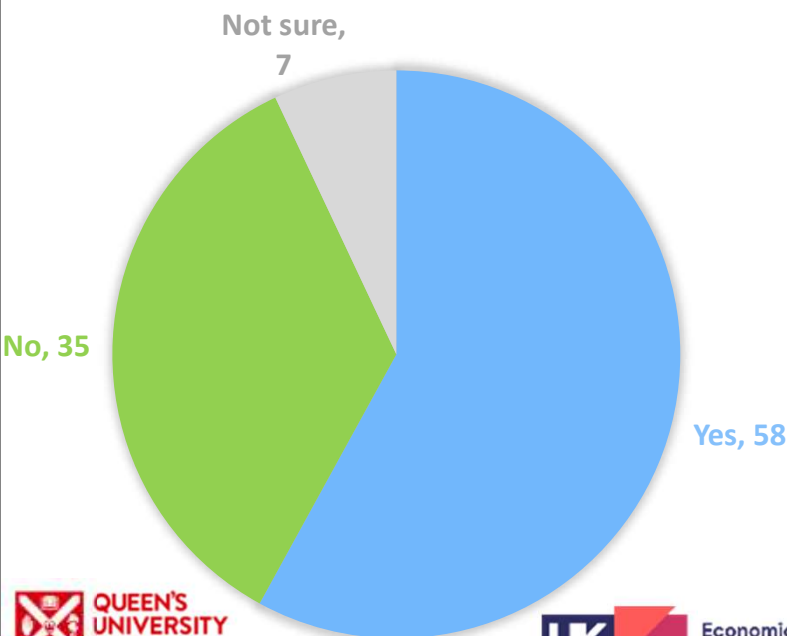
■ Top ■ Second ■ Third ■ Fourth ■ Fifth ■ Least

Relative importance of the Protocol (by sex/age)



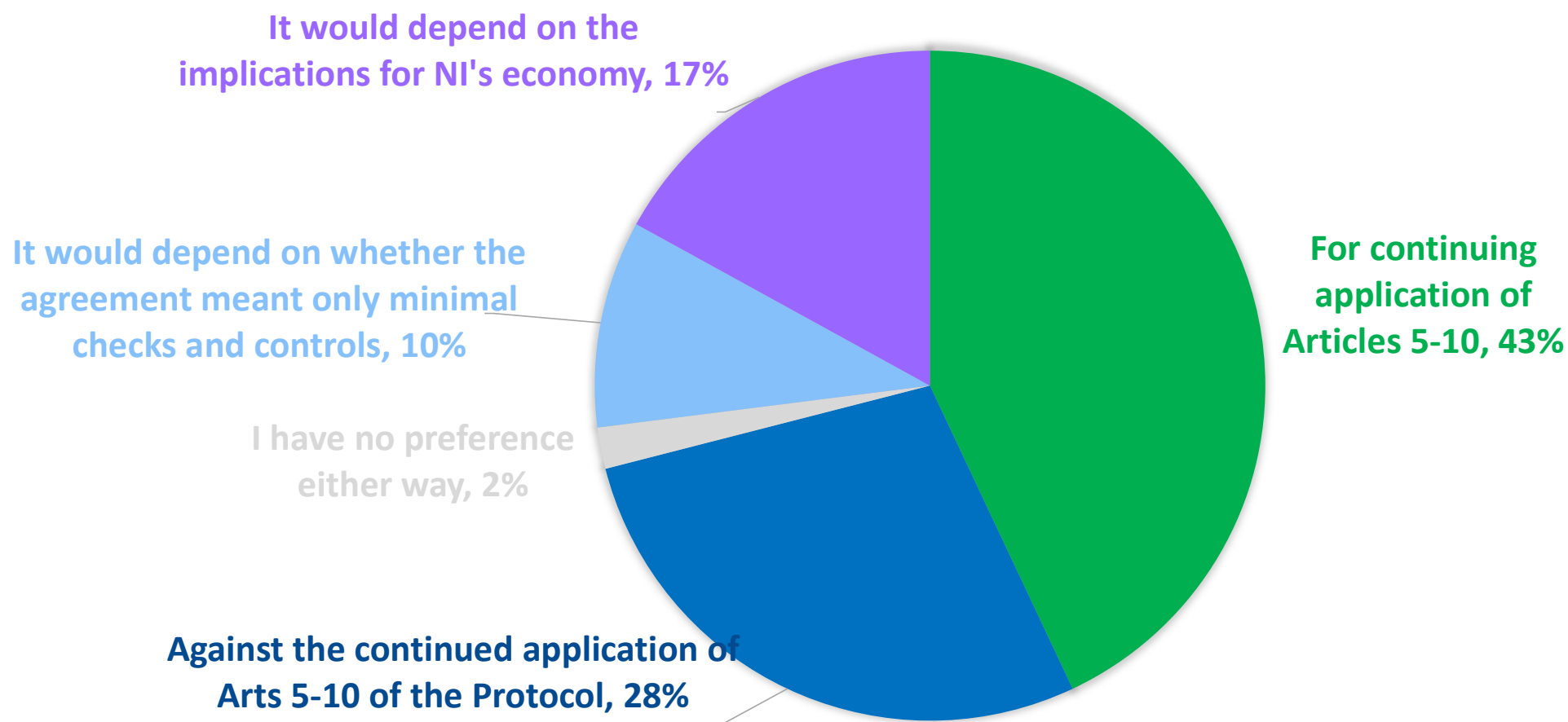
How concerned are you about the following aspects of the scope and impact of the Protocol if it were fully implemented?

Do you have concerns about the full operational scope of the Protocol?

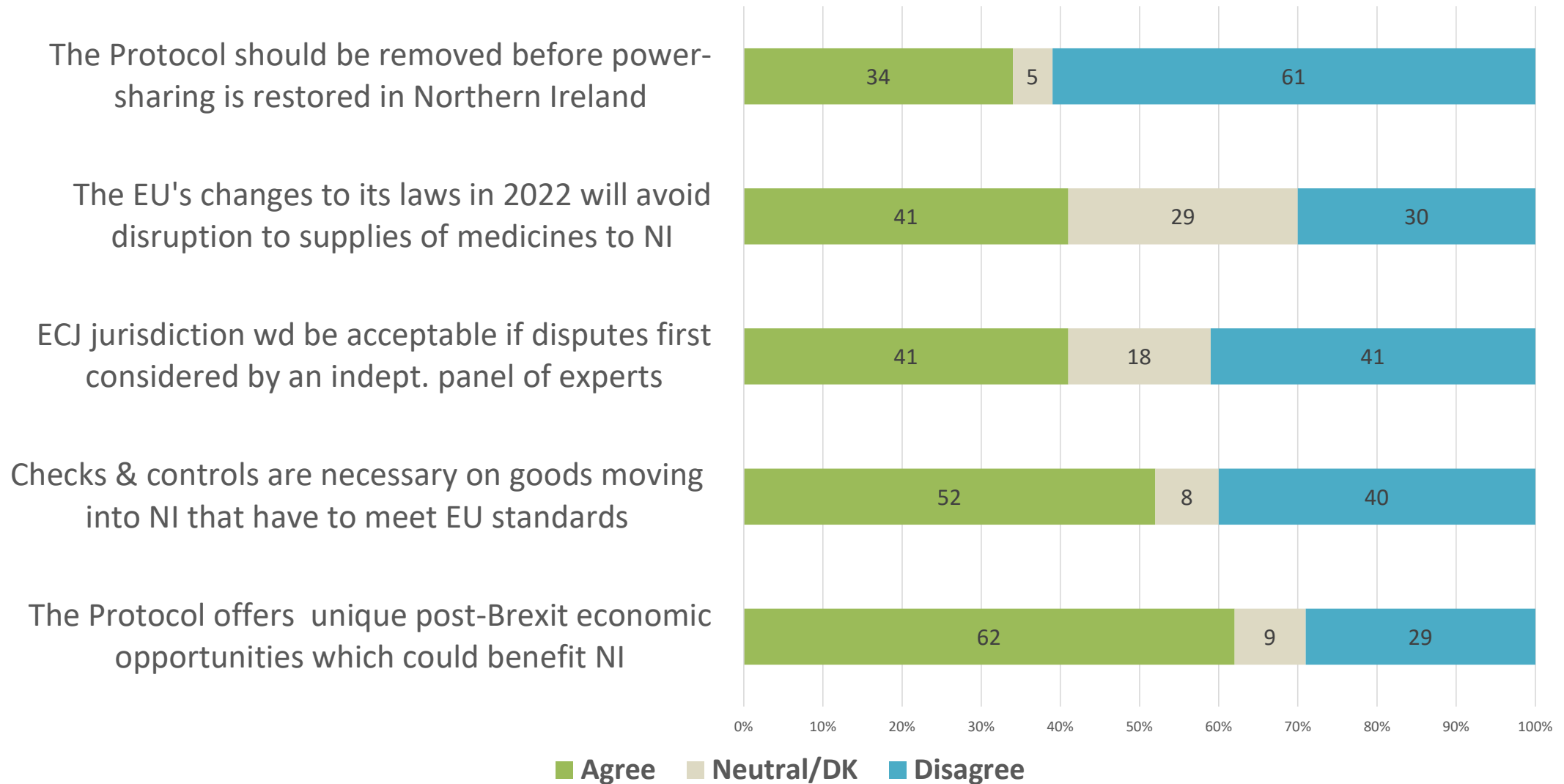


Of the 58% with concerns... February 2023 (June 2022)	'Highly Concerned' %	'Not at all concerned' %	Overall (%)
Customs Declarations for parcels being moved into Northern Ireland from GB	64 (67)	3	37
Restrictions on plants and seeds being moved from GB to Northern Ireland	63 (58)	6	37
The jurisdiction of the EU Court of Justice for disputes re: provisions of EU law applicable under the Protocol	63 (58)	12	37
Restrictions on the movement of chilled meats (e.g. sausages) into Northern Ireland from GB	58 (55)	8	34
Vaccination and certification requirements for bringing pets into Northern Ireland from GB	57 (56)	7	33
Northern Ireland applying EU VAT and Excise rules for goods, although VAT rate remains set by the UK	57 (54)	8	33
Checks in NI ports to ensure rules for the protection of the EU's internal market are being followed	53	11	31
Northern Ireland following some EU rules on subsidy control and state aid	53 (48)	9	31
Northern Ireland aligning with the EU's standards on the production of goods	49 (47)	16	28

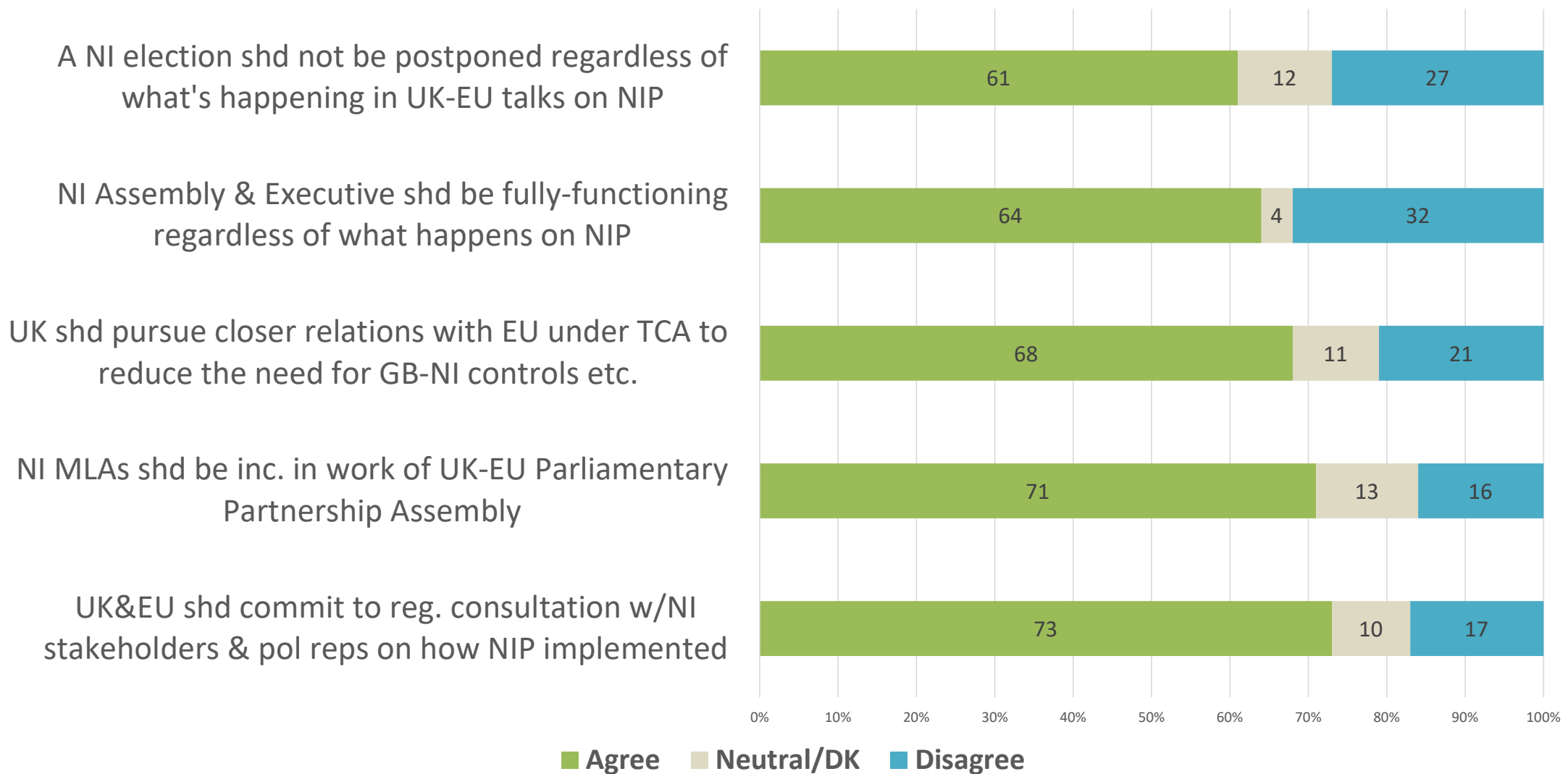
If the UK and EU agreed a reduction on required checks & controls on goods moving from GB to NI, how would you like MLAs to vote on the Protocol?



Views on the Protocol on Ireland/Northern Ireland



Views on the Protocol on Ireland/Northern Ireland



Spectrum of Views on the Protocol in Qualitative Comments

	Examples (October-22)
Protocol Positive & Beneficial	<i>"The Protocol is a good thing for Northern Ireland."</i>
Protocol Positive & Potentially Beneficial	<i>"The Protocol has the ability to ensure a positive surge and growth of the economy in NI compared to [the] rest of the UK"</i>
Protocol Positive as Least Worst Option	<i>"Brexit was bad, NI voted against it, and it was forced on us. The Protocol helps us mitigate the impact of Brexit to the benefit of all NI citizens"</i>
Protocol Negative in Effect	<i>"I run a small retail business and we find the paperwork really bad since Brexit. I am upset that we are treated differently to the rest of the UK."</i>
Protocol Negative in Principle	<i>"The Protocol is an immoral attack on Northern Ireland's status under the Belfast Agreement, strongly divisive, and prejudicial to political cooperation within Northern Ireland"</i>

LucidTalk, October 2022



Dynamic Regulatory Alignment: a Two- Year Review



Dynamic Regulatory Alignment: Two Year Review

Post-Brexit Governance NI – Explainer No. 10



Dynamic Regulatory Alignment and the Protocol on Ireland/ Northern Ireland: Two Year Review

Lisa Claire Whitten

Introduction

Northern Ireland occupies a unique position in the relationship between the United Kingdom (UK) and the European Union (EU). The [Protocol on Ireland/Northern Ireland](#) provides that aspects of EU law continue to apply in Northern Ireland despite it having left the EU with the rest of the UK on 31 January 2020.

<https://www.qub.ac.uk/sites/post-brexit-governance->

[ni/ProjectPublications/Explainers/DynamicRegulatoryAlignmentandtheProtocolonIrelandNorthernIreland-TwoYearReview/](https://www.qub.ac.uk/sites/post-brexit-governance-ni/ProjectPublications/Explainers/DynamicRegulatoryAlignmentandtheProtocolonIrelandNorthernIreland-TwoYearReview/)

Dynamic Regulatory Alignment: Two Year Review

*“...where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act **as amended or replaced**...*

*Where the Union adopts **a new act that falls within the scope of the Protocol**, but which neither amends nor replaces a Union act listed in the Annexes to this Protocol, the Union shall inform the United Kingdom of the adoption of that act in the Joint Committee. Upon request of the Union or the United Kingdom, the Joint Committee shall hold an **exchange of views** on the implications of the newly adopted act for the proper functioning of this Protocol...”*

Article 13(3) and 13(4)

Dynamic Regulatory Alignment: Two Year Review

EU Law applicable under the Protocol

additions and deletions

repeal, replacement & expiry

amendments

changes to EU implementing legislation

Dynamic Regulatory Alignment: Two Year Review

Additions & Deletions...

30.12.2020 EN Official Journal of the European Union L 443/3

**DECISION No 3/2020 OF THE JOINT COMMITTEE ESTABLISHED BY THE AGREEMENT ON THE
WITHDRAWAL OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
FROM THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMUNITY**

of 17 December 2020

**amending the Protocol on Ireland and Northern Ireland to the Agreement on the withdrawal of the
United Kingdom of Great Britain and Northern Ireland from the European Union and the European
Atomic Energy Community [2020/2247]**

THE JOINT COMMITTEE,

Having regard to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement'), and in particular point (d) of Article 164(5) thereof,

December 2020: 8 acts added – 2 acts removed – 3 explanatory notes added

Dynamic Regulatory Alignment: Two Year Review

Repeal, Replacement & Expiry...

Annex	Area	Regulations, Directives, Decisions*					
		2019	2021		2022		2023
		Oct	Jan	July	Jan	July	Jan
1	Individual Rights	6	6	6	6	6	6
2	Trade in Goods	287	284	261	261	261	258
3	VAT and Excise	19	19	19	19	19	19
4	Single Electricity Market	7	7	7	7	7	7
5	State Aid	19	19	19	19	19	19
Total		338	335	312	312	312	309

Table 1: EU Acts listed in the Annexes to the Protocol on Ireland/Northern Ireland

Change since the Protocol was agreed in October 2019

* Not included are the small number of EU treaty articles referenced in the Protocol, 'soft law' texts (e.g., commission communications) mostly included in Annex 5, and a small number of unspecific provisions noted in the Annexes.

- Number of applicable EU acts decreased since Protocol text was agreed – this is largely due to consolidation of previous EU laws
- Majority of changes via repeal, replacement, expiry so far were agreed while UK was an EU member state
- Implications of dynamic regulatory alignment of NI under the Protocol are likely to become more visible and extensive over time

Dynamic Regulatory Alignment: Two Year Review

Amendments & Implementing Law

- A majority of the changes made via amendment or implementing legislation are highly technical and have little/no policy significance for NI
- A small number of changes of this type do have policy significance for NI and some directly address UK(NI)
- Monitoring is therefore very important to determine extent and nature of impact on NI

	Delegated and Implementing Legislation*		
	Total	Protocol Applicable	
January	91	57	63%
February	119	58	49%
March	113	66	58%
April	98	49	50%
May	99	72	73%
June	123	72	59%
July	135	78	58%
August	81	55	68%
September	110	76	69%
October	102	47	46%
November	81	46	57%
December	91	40	44%
Total	1243	716	58%

Table 2: EU Delegated and Implementing Legislation and Protocol Applicable Law: 2022

Collated from information available on EU official EUR-Lex website: <https://eur-lex.europa.eu/statistics/2022/01/legislative-acts-statistics.html>.

*Includes implementing regulations, implementing decisions, implementing directives, delegated regulations and delegated directives.



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