

# Implementing Brexit

The Northern Ireland protocol



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## About this report

This report looks at the implementation of the Northern Ireland protocol. It outlines what it says, how it might work and the challenges of ensuring it is operational before the end of the transition period. It also looks at the long-term consequences of applying future EU law in Northern Ireland and for politics and policy making in the whole of the UK.

**Find out more at:**

[www.instituteforgovernment.org.uk/our-work/brexit](http://www.instituteforgovernment.org.uk/our-work/brexit)

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# Summary

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**The UK's decision to leave the European Union (EU) posed unique challenges for Northern Ireland. As the only part of the country to have a land border with a remaining member state and with a troubled history of violent conflict, changes to the UK–EU relationship presented particular problems for Northern Ireland.**

Brexit, and changes to the UK and EU's trading relationship, meant there was a significant risk of reintroducing a 'hard border' on the island of Ireland, disrupting economic activity and threatening the delicate balance achieved by the 1998 Belfast/Good Friday Agreement,<sup>1</sup> which gave legal recognition to the rights of the people of Northern Ireland to define themselves as Irish, British or both. Such risks would have been particularly acute in a no-deal scenario, the impact of which, the head of the Northern Ireland Civil Service warned, would be "longer and much more severe in Northern Ireland".<sup>2</sup>

In early 2017, the UK and the EU committed to finding a solution that avoided the need for a hard border on the island of Ireland, but finding a set of arrangements that achieved that while satisfying the UK's and the EU's priorities proved a sticking point in the first phase of negotiations.

The EU's initial proposed solution<sup>3</sup> – a Northern Ireland-only 'backstop', continuing to treat Northern Ireland, but not the rest of the UK, as part of the EU customs territory and single market for goods – was deemed constitutionally unacceptable, creating a customs border in the Irish Sea. Pro-Brexit MPs roundly rejected Theresa May's UK-wide alternative for keeping the whole of the UK in a customs union with the EU. On becoming prime minister in July 2019, Boris Johnson declared May's backstop "anti-democratic and inconsistent with the sovereignty of the UK as a state".<sup>4</sup>

By October 2019, the prime minister had made good on his promise to renegotiate the Withdrawal Agreement and 'ditch' the backstop. The revised protocol – the *Protocol on Ireland/Northern Ireland*<sup>5</sup> – required customs and regulatory alignment with the EU in Northern Ireland only, as the EU had initially proposed, with the addition of a 'consent mechanism' through which members of the Northern Ireland assembly (MLAs, members of the legislative assembly) could vote to leave the arrangements. It also clearly stated that Northern Ireland would formally remain part of the UK customs territory.

The new protocol made the Withdrawal Agreement acceptable to pro-Brexit Conservative MPs, who supported it based on the potential for an independent trade policy and regulatory divergence for Great Britain, if not the whole of the UK. But it drew strong criticism from the Conservative Party's then confidence-and-supply partner: the Democratic Unionist Party (DUP).

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After the Conservative victory in the December 2019 general election, the UK government pressed on with ratifying the deal despite the newly re-established Northern Ireland assembly unanimously rejecting it.

But ratifying the Withdrawal Agreement was just the first step in addressing the unique challenges that Northern Ireland faced. This report looks at the tasks that must be completed before the end of the transition period and concludes the following:

- **The protocol creates a customs and regulatory border in the Irish Sea, which the UK will be legally obliged to administer under supervision from EU institutions.** Northern Ireland will remain part of the UK customs territory but will be required to align with EU rules on customs and regulations. To avoid any checks and controls on the island of Ireland, more processes will be required for goods entering Northern Ireland from Great Britain to protect the integrity of the EU single market. The UK government will be responsible for administering the border but will be required to do so in compliance with EU law.
- **The UK and the EU should agree more time for the implementation of the protocol.** The timetable for putting arrangements in place for the Irish Sea border was very tight even before Covid-19 hit Europe. But now the pandemic has slowed the pace of negotiations on the future relationship, delaying key decisions that will have implications for how the protocol will work. Government capacity is being absorbed managing the crisis, with key staff who were working on the implementation of the Withdrawal Agreement having been redeployed. Key businesses such as freight transport associations and trading associations are focused on maintaining supply chains rather than getting ready for new border arrangements, and many businesses are focusing on staying afloat, not complying with new regulatory requirements. Against the background of a global pandemic, it is very difficult to see how preparations to implement the protocol can be completed before the end of the year – given the scale of both the decisions and practical work still required. The UK and the EU should extend the transition period or agree a separate longer implementation period for the Withdrawal Agreement.
- **The UK and the EU still need to resolve disagreements about how the protocol will work in practice.** The UK and the EU have signed up to a legally binding text in the form of the protocol, but much of the detail remains unclear. A number of key decisions have been explicitly delegated to the EU–UK body responsible for overseeing the Withdrawal Agreement: the EU–UK joint committee under the Withdrawal Agreement. But beyond these there is disagreement between the UK and the EU as to the scope for the committee to agree more flexibility in the application of EU law specifically for the Northern Ireland–Great Britain (NI–GB) border.
- **Additional checks and processes will be required on trade between Northern Ireland and Great Britain.** Customs formalities and potentially extensive regulatory checks will be required on goods entering Northern Ireland from Great Britain. There are opportunities to limit the extent of these checks and processes through the UK–EU future relationship, but many of these are incompatible with

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the UK's mandate for a UK–EU trade agreement. The UK instead intends to focus on streamlining and simplifying these processes. The UK government has more discretion over the requirements of goods moving west to east. It has committed to ensuring 'unfettered access' to the UK internal market for Northern Ireland businesses, but it needs to provide further clarity on how it intends to meet this commitment while ensuring customs and regulatory processes apply to goods from outside Northern Ireland entering the UK market through this trade route.

- **The UK must continue to show progress on implementing the protocol.** The UK sees the joint committee as an opportunity to 'develop' the protocol. But the UK will be responsible for applying EU law; any additional flexibilities agreed will only be available if the EU trusts the UK to manage the border. Reports that the UK was seeking to 'get around' the protocol have damaged that trust. The UK has now published its plans for implementing the protocol and recognises the extent of its obligations under international law, paving the way for more constructive discussions. But the EU has been clear that any future UK–EU deal is contingent on the successful implementation of the Withdrawal Agreement. The UK must continue to show progress on this or risk negotiations collapsing as a result, ending up with the hardest form of border in the Irish Sea.
- **It is in both the UK's and the EU's interests for the border to 'work' in a way that does least damage to the Northern Ireland economy.** To reduce the burden on Northern Ireland businesses and minimise the extent of politically contentious checks, options to 'de-dramatise' the protocol should be explored. The EU has a duty and incentive to consider flexibilities in the application of the protocol, proportionate to the risk posed to the single market. If the protocol does not work for Northern Ireland, there is a risk that the Northern Ireland assembly will withdraw consent for its continued operation when it is given the opportunity to vote four years after the end of the transition period. This could reintroduce the possibility of a hard border on the island of Ireland. Both the UK and the EU have an interest in ensuring that Northern Ireland remains politically and economically stable – the two are inextricably linked.
- **The UK government must recognise the scale of the implementation task and make it a government priority even in these difficult times.** The UK needs to scale up existing systems for customs administration; design and implement new systems for tariff administration and compensation; and develop new capacity for regulatory checks. Much of this can be, and needs to be, done regardless of the UK–EU trade talks and decisions in the joint committee. But with UK ministers only recently publicly stating what additional processes may be needed, progress so far has been slow. With 64 departments, public bodies and agencies across the UK with scope for involvement in the implementation of the protocol, clarity on what is required is key. Some of this work will be the responsibility of the devolved administrations, particularly the Northern Ireland executive; but the DUP agricultural minister has said that he will oppose infrastructure for new checks,<sup>6</sup> posing problems for the UK government, which remains legally responsible under international law. The biggest challenge will be ensuring that businesses are ready

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to facilitate or comply with new requirements, but as the UK has only just started to provide clarity on how they will work, little to no preparation has taken place. It is unlikely that border arrangements will be fully operational by 31 December 2020.

- **A failure to implement the protocol in time will have legal and reputational consequences for the UK and economic and political consequences for Northern Ireland.** The application of EU law in Northern Ireland is subject to oversight from the European Commission. If the protocol is not applied correctly, the UK could find itself before the European Court of Justice. If it appears the UK has not taken its international obligations seriously, this could damage its international reputation and harm its trade ambitions, particularly with the EU. A failure to ensure that the border is fully functioning when the protocol comes into force is likely to result in major trade disruption in Northern Ireland, and the risk that businesses in Great Britain cease trading with Northern Ireland to avoid legal risk – posing challenges for businesses in Northern Ireland. At its most severe, non-compliance with the protocol may generate the need for the Irish government to impose checks elsewhere on the island of Ireland, potentially creating political and security risks in Northern Ireland.

The protocol will have long-term implications for Northern Ireland, the UK and the EU. Once the protocol is in force:

- **The UK and the EU must take responsibility for the effective operation of the protocol in the long term.** The specialised committee on the protocol on Ireland/Northern Ireland is an essential forum for identifying problems with the protocol's operation. It should look to identify and resolve issues at the earliest possible opportunity and, where it has the power to do so, the joint committee must be prepared to make adjustments to the protocol where necessary. The UK government and the Northern Ireland executive must put arrangements in place to influence and scrutinise changes to EU law that will apply in Northern Ireland, to identify Northern Ireland-specific issues and interests and to feed these into decision making processes. As a last resort, the UK government and the Northern Ireland executive should agree a way to encourage compliance with Northern Ireland's obligations under the protocol, such as using the system for apportioning EU infringement fines, which was used with the devolved administrations when the UK was an EU member state.
- **The Northern Ireland assembly will vote on the protocol every four to eight years – it will remain a live and potentially destabilising issue in Northern Ireland politics.** The Northern Ireland assembly will be asked whether it consents to the protocol's measures on trade and regulation every four to eight years. These votes on 'consent' are why it is so important that the two sides do all they can to make the protocol helpful for the Northern Ireland economy. But ultimately, voting is likely to be split along community lines, which poses a risk to the stability of the executive. The UK government, working with the Irish government, must ensure the executive is supported during these periods, and meetings of the Good Friday Agreement institutions – such as the British–Irish Intergovernmental Conference (BIIGC) – are stepped up.



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- **All the governments of the UK need to take account of Northern Ireland's obligations under the protocol as they develop policy.** At the end of the transition period, the UK, Scottish and Welsh governments will no longer be bound by EU law. To prevent divergence affecting trade between different parts of the UK, they are developing 'common frameworks'. Where these areas intersect with areas covered by the protocol, the four governments will need to decide whether to commit to also maintaining EU standards, or to exclude Northern Ireland from certain common frameworks – placing it further outside the UK's internal market. The UK government will also need to consider Northern Ireland's international obligations when developing policy in areas it is solely responsible for, in particular on trade policy and human rights – even if this acts as a constraint on the UK government's ambitions. There is a risk that policy makers in the rest of the UK overlook the unique position of Northern Ireland, as a result of the protocol, and Northern Ireland unintentionally drifts further from the UK's own internal market.

A key purpose of the protocol was to protect the 1998 Belfast/Good Friday Agreement<sup>7</sup> – which helped to bring an end to violent conflict and restore devolution in Northern Ireland – and to ensure that Brexit did not destabilise Northern Ireland. But the UK and the EU should acknowledge that the Withdrawal Agreement can only achieve part of that. The success of the protocol in achieving its objectives will only be clear once it is up and running, with still serious questions unanswered about how it will work in practice. But there are many other cross-border issues – like trade in services, security and justice co-operation, and mutual recognition of professional qualifications – that remain unaddressed. The UK and the EU must resist the temptation to see Northern Ireland as 'sorted' and ensure that their commitment to the peace and prosperity of Northern Ireland endures.

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# 1 Introduction

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The 1998 Belfast/Good Friday Agreement<sup>1</sup> paved the way for peace after decades of violence. It struck a delicate balance, enshrining the rights of those living in Northern Ireland to identify as British, Irish or both. EU membership helped this by allowing goods to move freely across the island of Ireland, preventing the need to have physical symbols of division such as checks at the border between Northern Ireland and the Republic of Ireland.

The UK's decision to leave the EU posed particular questions for Northern Ireland. As the only part of the UK with a land border with the EU and with close economic integration with the Republic of Ireland, Northern Ireland will be particularly affected by any changes to UK–EU trading relationships.

The UK's and the Republic of Ireland's membership of the single market and customs union had rendered border formalities practically non-existent, but Brexit reintroduced the possibility that they would once again be required.

Once negotiations started, both the UK and the EU were quick to recognise the importance of issues related to Northern Ireland (even if they had not done so beforehand). But while the UK's preference was to address these through the future relationship, after pressure from the Republic of Ireland the EU pressed for a solution as part of the first phase of negotiations.

In the December 2017 *Joint Report*, the UK and EU parties committed to ensure that there would be no physical checks or infrastructure on the island of Ireland. They also agreed the need to have arrangements in place in the event that this aim is not achieved through the future relationship.<sup>2</sup> But finding solutions that maintain the integrity of the EU single market, while also enabling the UK the freedom to diverge from the EU so valued by the proponents of Brexit, has proved difficult.

Initially, the EU proposed a Northern Ireland-only backstop in which Northern Ireland would remain in the EU's customs territory and align with EU single market rules. But Theresa May, then prime minister, rejected this, saying that "no UK prime minister" could agree such a proposal that would "undermine the UK common market and threatens the constitutional integrity of the UK by creating a customs and regulatory border down the Irish Sea".<sup>3</sup>

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As part of the November 2018 draft Withdrawal Agreement,<sup>4</sup> May agreed a UK-wide backstop. This would have seen the whole of the UK remain in a customs union with the EU, with additional requirements for regulatory alignment for Northern Ireland only. This would have prevented the need for tariffs and significantly reduced the customs compliance burden on goods moving between Great Britain and Northern Ireland.

The majority of political parties and the business groups in Northern Ireland supported the deal as a way to avoid a no-deal scenario.\* But the Democratic Unionist Party (DUP) – Northern Ireland’s largest unionist party and the Conservative Party’s confidence and supply partner – opposed the deal on the basis that it could allow regulatory divergence between Great Britain and Northern Ireland.

May’s commitment to keep Great Britain aligned with Northern Ireland in areas covered by the backstop was not enough to allay unionist objections and also raised alarm among some pro-Brexit MPs who cited the backstop as a key reason for their rejection of May’s deal. Many raised concerns that the protocol would prevent the UK from embarking on an independent trade policy and, without a unilateral exit mechanism, the UK would risk remaining in the backstop arrangements indefinitely.

After May’s resignation in July 2019, Boris Johnson, the new prime minister, pledged to renegotiate the backstop. In a letter in August 2019 to European council president, Donald Tusk, he said that the backstop was “anti-democratic and inconsistent with the sovereignty of the UK as a state”. He went on to say that:

**By requiring membership of the customs union and applying many single market rules in Northern Ireland, it presents the whole of the UK with the choice of remaining in a customs union and aligned with those rules, or of seeing Northern Ireland gradually detached from the UK economy across a very broad range of areas. Both of those outcomes are unacceptable to the British Government.<sup>5</sup>**

Despite those concerns, in October 2019 the UK and the EU agreed a revised Ireland/ Northern Ireland protocol whose substance was very close to the first EU proposal from February 2018. Its provisions would apply to Northern Ireland only. Northern Ireland would remain formally part of the UK’s customs territory, but would be required to apply EU customs rules and align with EU single market provisions – placing a customs and regulatory border in the Irish Sea.

Unlike May’s backstop or indeed the original Northern Ireland-only backstop proposed by the EU, these new arrangements are intended to be permanent, and are not intended to be superseded by the future relationship. Instead, they create a separate trading relationship with the EU for Northern Ireland than the rest of the UK.

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\* More than half of all members of Northern Ireland’s legislative assembly signed a letter to the president of the European Council expressing their support for the backstop; McClements F, ‘Pro-remain NI parties write to EU over Brexit backstop’, *The Irish Times*, 22 August 2019, retrieved 3 October 2019, [www.irishtimes.com/news/politics/pro-remain-ni-parties-write-to-eu-over-brexit-backstop-1.3994482](http://www.irishtimes.com/news/politics/pro-remain-ni-parties-write-to-eu-over-brexit-backstop-1.3994482).

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In another sense, they are not so permanent. Despite refusing May's requests for a mechanism through which the UK could unilaterally exit the backstop arrangements, the new protocol includes a 'consent mechanism'. This allows the Northern Ireland assembly the opportunity to vote on a regular basis on whether to continue to consent to the provisions on trade and regulation. If consent is refused, this would reopen the possibility of a land border, with the joint committee responsible for making recommendations on the "necessary measures" in this scenario.

The revised backstop made the Withdrawal Agreement acceptable to Conservative MPs, as it allows the rest of Great Britain autonomy on customs and regulation. But it has been subject to significant criticism in Northern Ireland, particularly from unionist parties. The DUP said that the protocol "undermine[d] the integrity of the Union"<sup>6</sup> and the leader of the Ulster Unionist Party described the deal as "awful" and said that it was worse than May's deal.<sup>7</sup>

The Withdrawal Agreement united Northern Ireland's political parties against the agreement – with unionist parties opposed to the protocol and nationalist and cross-community parties opposed to Brexit altogether. In January 2020, the recently reconvened\* Northern Ireland assembly voted unanimously to withhold consent for the Withdrawal Agreement Bill. Nevertheless, the UK government ratified the deal and its full effects will come into place at the end of the transition period, currently scheduled for 31 December 2020.

But reaching and ratifying a legal agreement was only the first step in the process of addressing the unique challenges in the Brexit process that Northern Ireland faced. This report, based on conversations with civil servants, business groups, and parliamentary and assembly staff in London and Belfast, examines the task ahead.

In Chapter 2 we look at what has been agreed already, and where further detail is needed.

In Chapter 3 we examine how the protocol will operate in practice; in particular, how negotiations on the UK–EU future relationship and decisions of the joint committee – the body responsible for overseeing the implementation of the Withdrawal Agreement – may affect what additional processes are required for goods crossing the Irish Sea. The Irish Sea border will look more like the border between Great Britain and France, than the border between England and Scotland, but opportunities to 'de-dramatise' new processes should be explored.

In Chapter 4 we outline the scale of the task of implementing new arrangements for an Irish Sea border. We consider whether, against the backdrop of a global pandemic and political disagreement between the administrations of the UK, it is feasible for the border to be operational by the end of December 2020 – the UK government's intended end date for the transition period. We conclude that more time to implement the protocol is necessary.

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\* The assembly had not sat since January 2017 when the executive collapsed. Power-sharing was restored in January 2020 after the agreement of the *New Decade, New Approach Deal*; Northern Ireland Office, *New Decade, New Approach, 2020*, retrieved 15 May 2020, [www.gov.uk/government/news/deal-to-see-restored-government-in-northern-ireland-tomorrow](http://www.gov.uk/government/news/deal-to-see-restored-government-in-northern-ireland-tomorrow)

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In Chapter 5 we examine the arrangements needed to ensure that the protocol operates well in the long term so that the Northern Ireland assembly can scrutinise and influence the EU laws that will apply to Northern Ireland for the foreseeable future.

In Chapter 6 we consider the long-term political implications of the protocol, both on domestic politics in Northern Ireland and on future decisions in the rest of the UK.

Finally, in Chapter 7 we highlight cross-border issues not addressed by the protocol, which need resolution.

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## 2 What the protocol says

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The protocol intends to give binding legal effect to the principles originally set out in the *2017 Joint Report*:<sup>1</sup> to protect the 1998 Belfast/Good Friday Agreement<sup>2</sup> and avoid a hard border on the island of Ireland. It commits to the maintenance of north–south co-operation, retaining the Common Travel Area (which allows British and Irish citizens to travel, work freely and access education, social security and health care services in either the UK or Ireland) and protecting the rights, safeguards and equality of opportunity under the Good Friday Agreement.

The protocol avoids the need for regulatory or customs checks on goods moving between Northern Ireland and the Republic of Ireland. While doing this, it aims to protect the integrity of the EU internal market, by ensuring that any products entering it comply with EU standards and pay the appropriate customs duties. Northern Ireland will be required to apply EU customs rules and align with a list of single market regulations, making updates to keep pace with changes to the EU 'acquis' (the accumulated legislation, legal acts, and court decisions which constitute the body of EU law). As a result, goods can move freely from north to south. But these rules will not apply in the rest of the UK.

This effectively puts the EU's external border in the Irish Sea. In a departure from EU practice, the protocol gives the UK – no longer a member state – responsibility for the border's administration. The EU has rights to oversee the application of EU law on customs and regulation, which the European courts will have a continued role in enforcing. These arrangements for maintaining alignment with the EU in Northern Ireland will apply for as long as Northern Ireland wishes the system to continue. Rules for defining ongoing consent are set out in the protocol.

A UK–EU joint committee will oversee the implementation of the Withdrawal Agreement, which will also direct a specialised committee on the Ireland/Northern Ireland protocol, and a Joint Consultative Working Group.

This chapter explores in more detail what is said in the legally binding text of the protocol.

### **Protecting the Good Friday Agreement**

The protocol contains a number of elements to protect the Good Friday Agreement. Article 2 commits the UK to ensure there is “no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement”.<sup>3</sup> The equality and human rights bodies set up by the Good Friday Agreement are given a role in ensuring that this objective is achieved, and they can raise issues with the joint committee in relation to this article.

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Article 3 of the protocol makes provisions for the continuation of the Common Travel Area, which allows British and Irish citizens to travel, work freely and access education, social security and health care services in either the UK and its Crown Dependencies or Ireland.<sup>4</sup>

Article 11 also recognises the need to maintain the conditions necessary for north-south co-operation on a range of cross-border issues, including the environment, health, agriculture, transport, justice and security, higher education and sport, as set out in the Good Friday Agreement.

## Customs

The protocol states that Northern Ireland is part of the UK customs territory and its exports may benefit from any future UK trade arrangements. But the UK will also have to apply EU customs rules, known as the Union Customs Code, in relation to Northern Ireland. This means that while the UK will remain a single customs territory on paper, the UK will be obliged to introduce customs formalities within it (that is, between Great Britain and Northern Ireland), raising questions as to whether this can be considered true in practice.

An importer bringing a good into Northern Ireland from Great Britain will be subject to EU tariffs if that good is considered 'at risk' of moving into the EU, "whether by itself or forming part of another good following processing".<sup>5</sup>

Article 5(2) states that all goods moving from Great Britain to Northern Ireland will be considered 'at risk' unless it can be established that they will not be subject to commercial processing and they fulfil certain criteria. The joint committee will establish the exact criteria before the end of the transition period, taking into consideration factors such as the destination of the goods, their use, their value, the nature of the movement and the incentive for onward movement. If there is no decision on the 'at risk' criteria, by default all goods will be considered 'at risk' and therefore be subject to tariffs.

For example, flour imported into Northern Ireland from Great Britain by a Northern Ireland-based baker would inevitably be subject to commercial processing and therefore would always be considered 'at risk'.\* A car, on the other hand, might or might not be subject to EU tariffs depending on whether that particular consignment met the criteria laid down by the joint committee. For example, if the car was imported under a free trade agreement between the UK and a country with which the EU did not have such an agreement, it would likely be considered 'at risk' given the incentive to move it on to the EU market.

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\* Although the UK government has proposed that goods sent from Great Britain to Northern Ireland for processing and then sent back to Great Britain should not be considered 'at risk'; Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, 20 May 2020, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper__UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf)

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The revenue from tariffs will accrue to the UK government, not the EU (at the moment, tariff revenue forms part of the EU's own resources). Article 5, part 6 says that the UK will be able to waive tariff debt or reimburse traders, but only in accordance with the EU's state aid rules. Reimbursements of more than €200,000 over three years (*de minimis*) would be subject to clearance by the European Commission, unless it could be proved that they would not affect Northern Ireland's trade with the rest of the EU or they were covered by another exemption in EU state aid rules.

## Regulation

Northern Ireland will stay bound by the rules of the EU's single market, in areas such as:

- product requirements and safety, including chemical and medicinal safety
- animal and plant health and welfare
- food safety and standards for animal products
- farming standards.

It will also be required to align with the EU on:

- rules on state aid in terms of government subsidies for businesses
- VAT on goods.

To maintain the functioning of the all-island single electricity market, EU laws on wholesale electricity markets will also continue to apply in Northern Ireland.

Alignment prevents the need to introduce regulatory controls for goods on the island of Ireland, but it also means there will be a new regulatory border between Northern Ireland and Great Britain. The extent of controls will depend on the type of good: for example, food products of animal origin (such as meat or butter) would have to go through border inspection posts before they could enter the Northern Ireland market; other, less tightly regulated goods can be self-certified to attest that they comply with EU standards. It will be up to the Northern Ireland importer to ensure that goods are compliant.

The EU state aid rules, which will apply in Northern Ireland, as noted above, are intended to prevent national governments from subsidising businesses, giving them a competitive advantage in the market. It is not clear what implications the state aid provisions will have for Great Britain. Under the protocol, any UK public subsidy or other state support for business that affects Northern Ireland goods trade with the rest of the EU may potentially be captured by state aid rules – and could be subject to challenge by the European Commission and the European Court of Justice.<sup>6</sup>

For VAT on goods (but not services), the arrangements require Northern Ireland to maintain alignment with the EU VAT and excise rules set out in Annex 3 of the protocol. HMRC will continue to be responsible for the operation of the system and the revenue will not be passed on to the EU. The UK may apply VAT exemptions and reductions, including zero rating, to goods in Northern Ireland if they are also applicable in the Republic of Ireland. The joint committee can adopt and review measures on the implementation of the provision on VAT.



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The protocol requires Northern Ireland to remain aligned with EU law as it changes and develops. The UK government, or Northern Ireland executive, will need to automatically adopt any changes to existing EU legislation listed in the annexes of the protocol. Where the EU adopts an entirely new act in a protocol area, it will only be added to the protocol if the UK and the EU agree to it at the joint committee.

## **UK internal market**

At the moment, trade can move freely between the four parts of the UK, without fetter or impediment – in effect creating the UK’s own ‘internal market’. The protocol introduces a customs and regulatory border within the UK’s customs territory, raising questions about how the UK’s internal market will continue to function with respect to Northern Ireland.

Article 6 of the protocol states that nothing in the protocol “shall prevent the UK from ensuring unfettered market access” for goods moving from Northern Ireland to the rest of the UK.<sup>7</sup> However, this provision does not itself *guarantee* unfettered access – the requirements on goods entering Great Britain from Northern Ireland are largely left to the UK’s discretion. But the protocol goes on to state that any parts of EU law “that prohibit or restrict” exports from Northern Ireland to Great Britain shall only be imposed “to the extent strictly required” by the EU’s international obligations.<sup>8</sup>

The UK and the EU have a duty to use their “best endeavours” to facilitate trade between Northern Ireland and the rest of the UK, “in accordance with applicable legislation and taking into account their respective regulatory regimes”.<sup>9</sup> This suggests that the degree of divergence between Great Britain and the EU could have a bearing on fetters to trade. The protocol states that the joint committee shall also “adopt appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible”.<sup>10</sup> It not clear whether this is intended to minimise additional border processes altogether or to allow flexibility on the geographical location at which such processes take place.

## **Enforcement and supervision**

Article 12 of the protocol deals with the implementation, application, supervision and enforcement of the protocol. It states that the UK government is legally responsible for implementing the protocol and applying EU law in Northern Ireland.

EU representatives have the right to be present to oversee the implementation and application of EU law and to request information on such matters, which the UK has a duty to provide. The joint committee will determine the practical arrangements for their oversight. EU representatives also have the right to require UK authorities to perform controls in individual cases – for instance, to inspect specific premises to determine whether they are complying with EU food safety standards.

Disputes over the interpretation of the Withdrawal Agreement will be resolved through the joint committee, and if necessary escalated through the dispute settlement process.<sup>11</sup>

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But Article 12 also states that EU institutions will have jurisdiction in the UK in respect to the articles on customs, regulation, VAT, state aid and the single electricity market. This means despite ending the jurisdiction of the EU courts being a 'red line' of the UK government in negotiations, the European Court of Justice will enforce EU law in those areas listed in the protocol, and the UK will take part in proceedings as if it were a member state.

## Implementation and oversight bodies

The Withdrawal Agreement sets up three bodies responsible for overseeing the implementation and application of the protocol. The first is the **joint committee**, which has responsibility for monitoring the application of the entire agreement. The committee, at which ministers will represent the UK, is a forum to settle disputes and make amendments to the Withdrawal Agreement; it has also been given specific roles and responsibilities with respect to the protocol. The joint committee will direct the work of the **specialised committee**, which will focus specifically on the Ireland/Northern Ireland protocol. This committee is comprised of officials; it has no decision making power itself but can make recommendations to the joint committee. It has specific responsibilities to examine proposals that the North South Ministerial Council – comprised of ministers from Northern Ireland and the Republic of Ireland – and its six implementation bodies put forward.\* It must also consider any matters that the human rights and equality bodies set up by the Good Friday Agreement raise, and will be a forum for discussion of any difficulty that the UK or the EU raises in relation to the protocol.

In addition to this, the specialised committee will direct the work of a **Joint Consultative Working Group** between the UK and the EU, which will act as a forum for the exchange of information on the implementation of the protocol in Northern Ireland. It will report directly to the Northern Ireland subcommittee and will meet monthly from the end of the transition period.

The protocol itself is silent on Northern Ireland representation in implementation and oversight bodies: it is up to the UK to determine the members of its delegation. But as part of the deal that restored Stormont, the UK government did commit to “ensure that representatives from the Northern Ireland Executive are invited to be part of the UK delegation in any meetings of the UK–EU Specialised or Joint Committees discussing Northern Ireland specific matters which are also being attended by the Irish Government as part of the European Union’s delegation”.<sup>12</sup>

The joint committee is opaque in nature and meetings are confidential by default. The House of Lords EU Committee called the lack of transparency an “unsatisfactory state of affairs”,<sup>13</sup> and the Institute for Government [has previously raised concerns](#) about the lack of UK parliamentary oversight of discussions.<sup>14</sup> Some key decisions on the details of the protocol will be made behind closed doors.

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\* Waterways Ireland, the Food Safety Promotion Board, InterTradeIreland, the Special European Union Programme Body, The Language Body, and the Foyle, Carlingford and Irish Lights Commission.

## Democratic consent

A key difference between Boris Johnson’s deal and previous proposals on the protocol is the inclusion of Article 18 on “democratic consent in Northern Ireland”. This article effectively provides an exit mechanism from the most controversial parts of the protocol on trade and customs if a majority in the Northern Ireland assembly vote against them.

It states that four years after the end of the transition period, the UK shall provide the Northern Ireland institutions the opportunity to consent to the continued application of Articles 5–10 – those provisions on customs and regulatory alignment that remove the need for a border on the island of Ireland and create the need for checks in the Irish Sea (see Table 1).

Table 1 **Provisions of the Ireland/Northern Ireland protocol subject to democratic consent**

Provisions subject to consent	Provisions not subject to consent
<p>Northern Ireland alignments with EU customs rules and payment of tariffs for ‘at risk’ goods</p> <p>Application of EU law on:</p> <ul style="list-style-type: none"> <li>• product requirements</li> <li>• sanitary rules for veterinary controls</li> <li>• rules on agricultural production and marketing</li> <li>• VAT on goods</li> <li>• state aid</li> <li>• wholesale electricity markets</li> </ul>	<p>Northern Ireland remains part of the UK customs territory</p> <p>UK commitment to ‘no diminution’ of rights and equality under the Good Friday Agreement</p> <p>Continued operation of the Common Travel Area</p> <p>Protection of north–south co-operation</p> <p>Implementation, enforcement and supervision</p> <p>Arrangements for the specialised committee and the Joint Consultative Working Group</p> <p>Safeguard measures</p> <p>Co-operation on counter fraud and illegal activity</p>

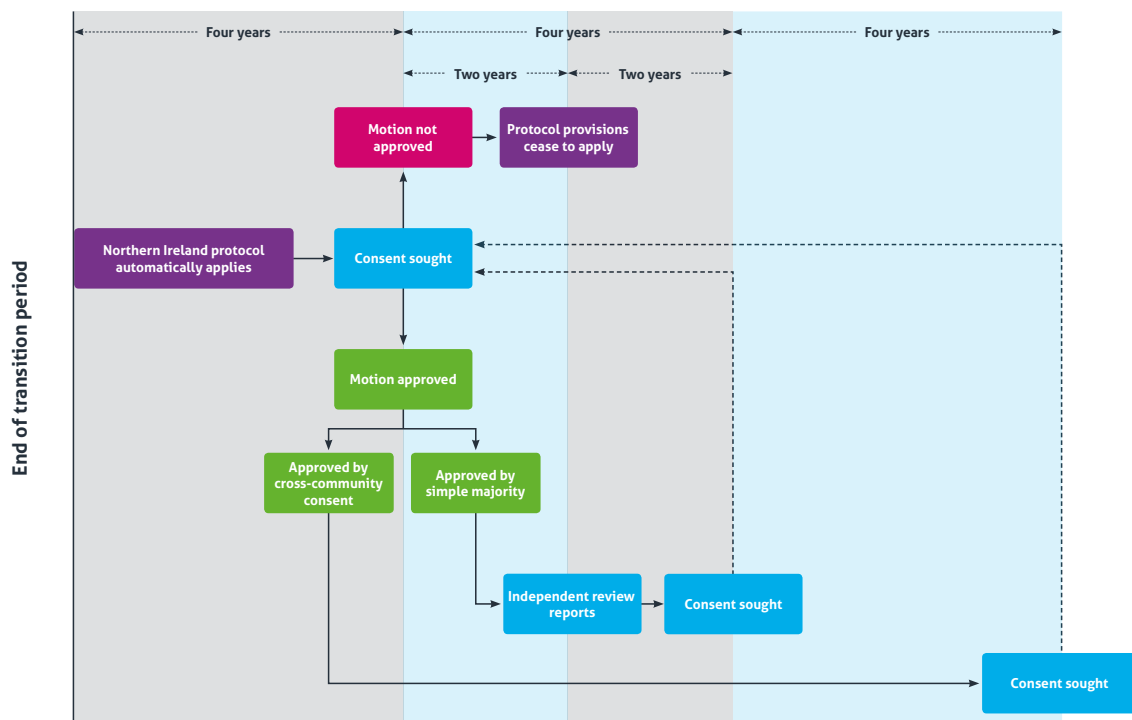
If consent is given, then the timing of the next vote will depend on the outcome of the vote just held. If the decision only secures a simple majority in the Northern Ireland assembly, the process will be repeated four years later. If it is achieved on a cross-community basis, that is, either:

- a majority of members of the legislative assembly (MLAs) and a majority of designated unionists and nationalists are present and vote, or
- Sixty per cent of MLAs and forty per cent of unionists and nationalists are present and vote

then there is no requirement for another vote for eight years. This process will continue for as long as the protocol applies.

If consent is not given, those provisions of the protocol will cease to apply two years later; during this period the joint committee must make recommendations to the UK and the EU on what measures will need to be taken. The default is that border infrastructure and formalities on the island of Ireland will be necessary, unless the UK and the EU can agree an alternative. Figure 1 shows how the Northern Ireland consent mechanism will work.

Figure 1 **How the Northern Ireland consent mechanism will work**



Source: Institute for Government analysis

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The Withdrawal Agreement does not state *how* Northern Ireland should give consent. It is for the UK to determine the process by which the decision is made. The UK government has set out its proposals for the consent mechanism in a unilateral declaration,<sup>15</sup> which it will legislate for before the first consent decision is required – under the current timeline that would be at the end of 2024.

The declaration states that consent can be given if a simple majority of MLAs vote in favour. UK ministers have said that the petition of concern – the mechanism through which a requirement for cross-community consent on a decision of the assembly can be triggered – will not be available. They have argued that as the vote is on a matter that is usually in the competence of the UK government, not a devolved matter, the normal assembly procedures should not apply.<sup>16</sup>

This has caused significant controversy among unionist politicians: the leader of the DUP, Arlene Foster, argued that this was a breach of the Good Friday Agreement.<sup>17</sup> Mary Lou McDonald, the leader of Sinn Féin, the largest nationalist party, strongly rejected the DUP's argument, claiming that a requirement for a cross-community vote would effectively give the DUP a veto.<sup>18</sup>

The UK government has, however, committed to launching an independent review into the operation of Articles 5–10 of the protocol and the implications of terminating it, if a simple majority gives consent and there is no cross-community consent.

Before we close this chapter, we present a summary of the Ireland/Northern Ireland protocol (see Table 2, overleaf).

Table 2 **Summary of the Ireland/Northern Ireland protocol**

Article	Area	Consent required	ECJ oversight	Applies now
1	Objectives	No	No	Yes
2	Rights of individuals	No	No	No
3	Common Travel Area	No	No	No
4	Customs territory	Yes	No	No
5	Customs, movement of goods	Yes	Yes	Partial <sup>a</sup>
6	Protection of UK internal market	Yes	No	No
7	Technical regulations, assessments, registrations, certificates, approvals and authorisations	Yes	Yes	No
8	VAT and excise	Yes	Yes	No
9	Single electricity market	Yes	Yes	No
10	State aid	Yes	Yes	Partial <sup>b</sup>
11	Other areas of north–south co-operation	No	No	No
12	Implementation, application, supervision and enforcement	No	No	Partial <sup>c</sup>
13	Common provisions	No	No	No
14	Specialised committee	No	No	Yes
15	Joint Consultative Working Group	No	No	Partial <sup>d</sup>
16	Safeguards	No	No	No
17	Protection of financial interests	No	No	No
18	Democratic consent in Northern Ireland	No	No	No
19	Annexes	No	No	No

Source: Institute for Government analysis. ECJ = European Court of Justice.

a = Only provisions requiring the joint committee to make decisions on the criteria for determining 'at risk' goods and the fisheries and aquaculture products exempt from duties apply now.

b = Only the provision requiring the joint committee to determine the maximum level of agricultural support is in force now.

c = Provision for the joint committee to determine practical working arrangements for the exercise of rights of Union representatives under Article 12 is in force now.

d = Provisions 1, 4 and 6 setting up the Joint Consultative Working Group and in relation to co-chairs and rules of procedure are in force now.

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## 3 How the protocol will work

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Initially the UK and the EU had clear differences in their interpretation of what had already been agreed in the Northern Ireland protocol. The prime minister repeatedly said that there will be no additional checks on goods moving between Great Britain and Northern Ireland unless they are going on to the Republic of Ireland. In December 2019, he said “there’s no question of there being checks on goods going NI/GB or GB/NI”.<sup>1</sup>

The UK government’s claims prompted a strong rebuttal from the EU. The EU’s chief Brexit negotiator, Michel Barnier, said that checks were an indispensable part of the protocol and that “in agreeing to the protocol, the UK has agreed to a system of reinforced checks and controls for goods entering Northern Ireland from Great Britain”.<sup>2</sup>

On 20 May, the UK set out its approach to the protocol,<sup>3</sup> which acknowledged that there would be checks, at least on certain types of goods, and additional processes for traders. But many of the details on how the protocol will work in practice remain unclear. As a result, traders face uncertainty about what new requirements they will have to comply with, when moving goods between Northern Ireland and Great Britain.

The extent and nature of additional processes required at the NI–GB border will depend on:

- the decisions of the joint committee
- the UK–EU future relationship, including a future free trade agreement
- unilateral measures that the UK undertakes to implement the protocol.

The UK is not seeking frictionless trade from the EU as part of the new relationship, which will mean some friction between Great Britain and Northern Ireland. While the UK sees the joint committee as an opportunity to ‘develop’ the protocol and agree additional flexibilities in the application of EU law that might limit the number of checks, the EU has argued that the joint committee will only determine how, not if, EU rules will apply

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## The protocol defers some specific decisions to the joint committee

Perhaps reflecting the haste with which the new protocol was negotiated, a number of significant decisions about how it will operate in practice were deferred to the UK–EU joint committee. The protocol gives the committee specific responsibility for the following during the transition period:

- determining the criteria according to which goods moving from Great Britain to Northern Ireland will be considered not ‘at risk’ of subsequently moving into the EU, and therefore will not be subject to EU customs duties
- establishing the conditions under which fisheries and aquaculture products landed by Northern Ireland vessels will be exempt from EU duties
- determining the initial maximum level of agricultural support for Northern Ireland farmers – any additional help would be subject to EU subsidy control
- determining the practical arrangements for the EU’s supervision of the UK’s implementation and enforcement of specific aspects of the protocol.

Some of these decisions will be significant for the operation of the protocol. In particular, the joint committee’s definition of what goods are ‘at risk’ of onward movement will determine what proportion of goods moving from Great Britain to Northern Ireland will have tariffs applied to them. The protocol assumes that all goods are ‘at risk’ of moving into the EU, unless traders can prove otherwise.

For these reasons, it is possible that a large majority of trade between Great Britain and Northern Ireland could be considered ‘at risk’ and so be subject to EU tariffs. Analysis from the UK Trade Policy Observatory suggests that up to 75% of Northern Ireland imports could be subject to tariffs.<sup>4</sup> The UK has argued that tariffs should only be applied if they present “a genuine and substantial risk” to the EU single market; it gives the example of supermarkets delivering to branches in Northern Ireland as trade that poses no risk. However, ultimately it will be for the UK and the EU jointly to agree on the criteria in the joint committee.

The joint committee will also have to address some specific issues that will arise as a result of the unique arrangements of the protocol. The protocol makes clear that the Union Customs Code will apply in Northern Ireland but not in the UK’s territorial waters adjacent to Northern Ireland. This creates a potential problem in that Northern Ireland fishermen landing fish in Northern Ireland would be subject to EU regulatory checks and controls and customs duties applicable to goods entering the EU customs zone. To avoid this, the joint committee is tasked with establishing the conditions under which exemptions from customs duties will apply.

Although many of the decisions deferred to the joint committee appear to be technical in nature, political disputes have already arisen, for example over how the EU will exercise its right to be present where EU law is being applied. The UK government has refused the EU’s request for an EU office in Northern Ireland.<sup>5</sup> UK representatives have



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argued that this would suggest joint administration of the protocol and infringe on UK sovereignty, while the EU has argued that such a presence is necessary for officials to exercise their rights under Article 12 of the protocol.<sup>6</sup>

The issue has also appeared to divide the political parties in Northern Ireland: the leaders of four political parties – the Alliance Party, the Green Party, the Social Democratic and Labour Party (SDLP) and Sinn Féin – writing a joint letter to Michael Gove arguing that an office is necessary; and unionist parties (the DUP and UUP) opposing a permanent EU presence.<sup>7</sup>

To provide clarity on some key details of how the protocol will operate in practice, the joint committee needs to make decisions on a number of difficult issues; there is a significant amount of work to be done before agreement is likely to be reached. But even before we know the outcome, based on what is already agreed we can make some assumptions about what new requirements will be necessary at the border.

### **There will be a range of new requirements for east–west trade**

While the protocol refers repeatedly to Northern Ireland’s “integral place in the United Kingdom’s internal market”,<sup>8</sup> its provisions mean that in practice Northern Ireland will be required to treat goods from Great Britain as though they were imports into an EU member state from a country outside the EU. Goods moving from Great Britain to Northern Ireland will therefore be subject to a significant increase in administrative requirements and checks at the border. These requirements can be divided into two broad categories: customs and regulation.

As a ‘base case scenario’, assuming there is no free trade agreement between the UK and the EU, and no changes to the application of EU law agreed in the joint committee, the following requirements will apply.

#### **Customs**

The protocol declares that “Northern Ireland is part of the customs territory of the United Kingdom”.<sup>9</sup> Despite this, it then goes on to make the entire body of EU customs legislation – euphemistically referred to as “legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013”<sup>10</sup> – directly applicable in Northern Ireland. This means that goods crossing the Irish Sea will need to be accompanied by additional paperwork.

**Safety and security declarations.** Carriers bringing goods into Northern Ireland from Great Britain will be required to lodge electronic entry summary declarations (ENS), also known as safety and security declarations. An ENS must be completed for each consignment, so a lorry carrying multiple loads would require multiple documents. Authorities use these to conduct a risk analysis so they can target interventions on goods that might be breaking the rules. The time at which the declarations need to be submitted depends on the mode of transport. For short sea crossings – for example, from Cairnryan in Scotland to Larne in Northern Ireland – the declaration must be submitted at least two hours before arrival. Such declarations are currently only required for imports from non-EU countries.

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**Customs declarations.** Once the goods arrive in Northern Ireland, the business responsible for them will have to submit a customs declaration, just as they would if they were bringing them in from a non-EU country. These declarations contain information about the type of goods, their value, the means of transport used and so on. The declarations are not currently required for any trade within the EU, let alone within the UK itself.

**Tariffs.** Goods moving from Great Britain to Northern Ireland will be subject to the same tariff that would apply to those goods if they were moving from Great Britain to an EU member state. The protocol provides for only three exceptions:

- goods that are not 'at risk' of subsequently being moved on to the EU, as defined in the protocol and by the joint committee
- certain aquaculture and fisheries products landed by vessels registered in Northern Ireland, under certain conditions that the joint committee is to establish
- the personal property of UK residents brought into Northern Ireland from another part of the UK.

Other goods will be subject to the full tariff applicable to imports from Great Britain and third countries to the EU. This could be zero, if the UK and the EU reach a free trade agreement that covers the goods in question or if the goods are not subject to tariffs (for example, whisky). But in the absence of a free trade agreement, it could be high. For example, the EU tariff on sugar – of which all of Northern Ireland's supply is brought in from Great Britain – is more than 100%.

**Rules of origin.** If the UK and the EU do not reach a free trade agreement, there will be no need for preferential rules of origin – but only if they do will the majority of goods be able to move from Great Britain to Northern Ireland duty-free. In order to do so, however, it will still be necessary to prove that the goods 'originate' in the UK. The criteria for determining whether a good is deemed to originate in the UK or not – in other words, rules of origin – will be those laid down in the UK–EU free trade agreement. These rules are likely to exclude some products produced in the UK using a high content of raw material imported from elsewhere. For example, sugar refined in Great Britain from sugar cane imported from Australia would be unlikely to qualify as originating from the UK under the EU's standard rules of origin. Such sugar would likely have to pay the full EU tariff of more than 100% on shipment to Northern Ireland – even if the UK and the EU have a trade deal in place.

## Regulations

Annex 2 of the protocol lists the body of EU legislation that will continue to apply in Northern Ireland even after the end of the transition period. It includes virtually the entirety of the EU acquis on product requirements. Any goods entering Northern Ireland from Great Britain will therefore need to comply with EU standards. To ensure that they do, additional certifications, controls and inspections will be required. The nature of these processes will depend on the type of good.

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**Food controls.** Checks on agrifood are likely to be the most extensive. Some checks on livestock being transported from Great Britain already take place, but once the protocol is in force, meat and other animal products will have to go through border inspection posts on shipment from Great Britain to Northern Ireland. They will need to be accompanied by a full certificate signed by a veterinarian, rather than the simple electronic document currently used. All such imports will have those documents checked at the border control posts in Northern Ireland. Depending on any agreement between the UK and the EU, a larger or smaller percentage of them will need to be physically inspected. If the UK and the EU do not reach an agreement, 100% of consignments of live animals, 30% of minced meat, poultry meat, dairy products and eggs, and 15% of other meat products will require physical inspection.<sup>11</sup>

**Medicines, chemicals and industrial goods.** These goods are not generally checked at the EU border. Their safety is maintained by behind-the-border checks (carried out by trading standards officers, among others) and product authorisations for more hazardous products. Taking medicines as an example of these more hazardous goods, medicines brought from Great Britain into Northern Ireland will be considered 'imported medicines' under the relevant EU legislation.<sup>12</sup> This means that they will have to have a marketing authorisation granted under EU law. Medicines sold in Northern Ireland will have to be labelled with the details of the holder of the marketing authorisation or their local representative. Both of these must be located either in Northern Ireland or in an EU member state – not in Great Britain.

### Other

**VAT.** After the transition period, the operation of the protocol means that Northern Ireland will continue as part of the EU VAT area. HMRC will still be responsible for collecting VAT and the UK will be able to set the rate of VAT applicable in Northern Ireland, but it will do so within the constraints set by EU law. This means that trade between Northern Ireland and the rest of the EU will continue to be treated as now for VAT purposes: for business-to-business transfers, exports (technically despatches) will be exempt from VAT, which the purchaser of the good or service will pay at the rate applicable where they live. But there will be a new VAT border in the Irish Sea, because the rest of the UK will be outside the EU VAT area. This means that Northern Ireland customers buying goods from Great Britain will have to pay VAT to HMRC when they import the goods, rather than to their supplier (who would then pass the tax on to HMRC). In practice, this may not make much difference: the Treasury has decided to introduce what is called 'postponed accounting' for all imports, allowing importers to pay VAT as part of their normal VAT return rather than (as now) at the point of import.

**Non-fiscal checks.** The protocol provides that restrictions on exports from Northern Ireland to Great Britain are to be applied only "to the extent strictly required by any international obligations of the Union".<sup>13</sup> But even this will impose certain additional burdens on traders dealing in products such as specimens of endangered species under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Any goods covered by CITES moving from Northern Ireland to Great Britain will have to be accompanied by an export permit, which will have to

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be presented to authorities at the port in Northern Ireland before the goods leave. Such permits are not required for the movement of specimens within the EU.

In sum, the obligations that the protocol imposes create a trade border between Great Britain and Northern Ireland – at least as regards the movement of goods from east to west. As we discuss elsewhere in this chapter, some issues are left for the joint committee to determine and considerable flexibility is available for the movement of goods from Northern Ireland into Great Britain. But traders moving goods into Northern Ireland will face a border that looks far more like an EU external border than a UK internal border.

### **The UK–EU future relationship will not remove the burden on traders**

Under the protocol, the border between Great Britain and Northern Ireland will look very much like the border between Great Britain and any other EU member state. This means that the future UK–EU relationship will play a role in determining the degree of friction on goods moving from Great Britain to Northern Ireland, especially on tariffs.

The only way to remove the need for checks and controls between Northern Ireland and Great Britain would be to extend what has been agreed for Northern Ireland to the rest of Great Britain. That would mean aligning to EU rules in the area of goods regulation and agreeing to a customs union – in short, something very similar to Theresa May’s Chequers proposal.\* But the UK government has ruled this out.

In their opening negotiating positions, both the UK and the EU set out their ambitions for a tariff-free trade agreement that would remove duties and quotas on all UK goods entering the EU, although it is not clear whether the two parties will be able to reach agreement on what would be the best terms for such a trading relationship. Nonetheless, if this were achieved, it would mean that UK-origin goods travelling from Great Britain into Northern Ireland would not be subject to duties regardless of whether they were ‘at risk’ of moving into the EU. It should not be assumed, however, that all goods coming from the UK would be considered of UK origin. As we discussed above, traders would still need to prove compliance with rules of origin determining whether goods produced in the UK from imported inputs qualified for tariff-free treatment. The UK has suggested taking the rules of origin in the recently agreed EU–Japan deal as a basis for a UK–EU deal. These are somewhat more permissive than the EU’s standard rules of origin. That said, they would still not allow sugar refined in England from Australian sugar cane, or a hamburger produced in Scotland from American beef, to enter Northern Ireland without being subject to an EU tariff.

Agreeing a trade deal would not eliminate the need for customs declarations, although there would be scope to agree simplifications. The UK has not set out its intention to negotiate an exemption from safety and security declarations – although this is

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\* Theresa May’s white paper on the future relationship proposed a “common rulebook” for goods and the introduction of a “Facilitated Customs Arrangement” that would treat the UK as a combined customs territory, but the current prime minister among others rejected this. See HM Government, *The Future Relationship Between the United Kingdom and the European Union*, 2018, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786626/The\\_Future\\_Relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union\\_120319.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf)

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something it could ask for as part of a UK–EU trade deal – so exit and entry summary declarations would still be required, unless a specific exemption for trade between Great Britain and Northern Ireland were agreed.

The UK’s negotiating mandate does seek customs co-operation, such as data exchange between authorities, and endeavours to modernise and simplify requirements. This would not remove any of the customs requirements, but it could make some simplifications possible and it would allow authorities to share customs data to better understand trade flows and to co-operate on anti-smuggling operations. That could lead to better targeting of inspections, but it would not significantly reduce the burden on traders.

On regulation, the UK government has been clear that it is prioritising autonomy and regulatory control in the future relationship negotiations over frictionless trade. This position was most clearly outlined in a speech in Brussels by the UK’s lead Brexit negotiator, David Frost, in which he foregrounds the need to be able to “set our rules for our own benefit”.<sup>14</sup> Frost also accepts that, as a result, “there is going to be friction, there are going to be greater barriers”<sup>15</sup> in trade between the UK and the EU. Under the protocol, however, many of these barriers will also apply to movements in trade from Great Britain to Northern Ireland.

The UK’s negotiation position does, though, outline an ambition to establish regulatory co-operation. Regulatory co-operation has been a priority in many recent free trade agreements but has so far done little to remove regulatory barriers. In some cases, it could reduce the burden of certain checks and processes. In particular, the UK’s mandate outlines an ambition to do the following:

- Agree an equivalence mechanism through which the UK and the EU can recognise each other’s agrifood standards as equivalent to their own. Such an agreement, along the lines of the EU–New Zealand Veterinary Equivalence Agreement, could reduce the rate of physical inspections required for animal products moving from Great Britain to Northern Ireland – although all shipments would still have to be accompanied by veterinary certificates (and identity checks) and stop at a border control post for checks of these documents.<sup>16</sup>
- Agree that each side’s authorities can conduct testing to certify some products as compliant with each other’s rules without having to go through duplicate tests.
- Agree information sharing and notification requirements. This is about alerting each party to changes in regulatory requirements and would do nothing in itself to reduce the burden on traders.

In sum, while a UK–EU deal would make life easier for traders than a no-deal outcome in terms of tariffs, it would do little to mitigate the immense increase in procedural obligations that the protocol will impose on trade between Great Britain and Northern Ireland.

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For the future relationship to significantly ease much of the burden on trade between Great Britain and Northern Ireland, the UK government needs to go further than its current mandate. But the EU would probably insist on closer alignment with EU rules for the whole of the UK and a role for EU institutions. As long as the UK continues to rule that out, there will be friction in trade in the Irish Sea.

### **The UK government also has decisions to make about how border processes will work**

The decisions the UK government makes on how it will manage new customs and regulatory processes will also have significant implications for what traders are required to do on the ground.

The UK government will need to decide how to give practical effect to any decisions made at the joint committee. For example, the committee will determine the criteria for assessing whether goods are 'at risk' of moving into the EU, but the UK government will need to decide what information it needs to make a judgment based on those criteria and design forms and systems to collect that information. Therefore, decisions that the UK government makes will have implications for the new requirements for traders.

The protocol also allows the UK government to institute a tariff compensation scheme for goods travelling from Great Britain to Northern Ireland that do not meet the 'at risk' criteria. There remain a number of unanswered questions about how it will operate that will have significant implications for traders. For example, will traders have to pay the tariff upfront and wait for reimbursement – which could have significant cash-flow implications – or will the UK government allow traders to accrue debt that could be waived?

If the UK government wants to compensate traders above state aid limits, it may need to collect information to prove that goods have not affected Northern Ireland trade with the rest of the EU. To do so, traders may need to provide proof to show that goods have not entered the EU, or even that goods are not being sold on a significant scale to residents from the Republic of Ireland. As with the 'at risk' criteria, if meeting the evidence threshold is too burdensome for business, the costs could outweigh the benefits.

The UK could introduce facilitations to ease the customs burden on traders – as long as they are compliant with EU law. These could include trusted trader schemes, which could be implemented in Northern Ireland under the Union Customs Code. Or the UK could use 'transit', which allows controls to take place not at the border, but at the trader's premises, and could also be used for goods moving from Great Britain to Northern Ireland via the Republic of Ireland.<sup>17</sup> This idea was floated as one of the "alternative arrangements".<sup>18</sup> While the proposals were not accepted for the Northern Ireland–Republic of Ireland border, they could be explored as an option for easing the burden for the NI–GB border. The UK has already committed to remaining in the Common Transit Convention – which allows goods to move across borders and only submit declarations and pay duties at their final destination – after Brexit; this could provide the basis for such a proposal.<sup>19</sup>

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The EU has a right to audit the UK's system so it will want to make sure any measures the UK takes are compliant with EU law and do not put its customs border 'at risk'. These schemes will not remove the new costs and obligations imposed on traders; they will only help to manage them efficiently.

## **The UK has discretion on how to manage checks on goods moving from Northern Ireland to Great Britain**

According to the protocol, goods being exported from Northern Ireland to Great Britain will also need to comply with EU customs procedures on export such as exit summary declarations. However, the UK has argued that exemptions specifically for Northern Ireland trade with the rest of the UK should apply in this area.<sup>20</sup> Beyond that, the extent of checks and processes is largely at the discretion of the UK government.

The UK government is committed to legislate to ensure 'unfettered access' to the UK's internal market for Northern Ireland businesses.<sup>21</sup> The European Union (Withdrawal Agreement) Act 2020 also gives ministers powers to make provisions facilitating access for "qualifying Northern Ireland goods" to the Great Britain market.<sup>22</sup>

The UK government's plan for implementing the protocol states that there will be no tariffs, customs checks, regulatory checks or additional approvals for Northern Ireland goods entering the rest of the UK.<sup>23</sup> However, it has said that these terms will not apply to goods travelling from Ireland and the rest of the EU to which "the UK's customs and regulatory regime will apply".<sup>24</sup> But it is not clear how such arrangements would work in practice, and how a 'qualifying' Northern Ireland good will be defined. The UK government paper states that it will "engage with businesses and the Northern Ireland Executive on the means for delivering qualifying status as we take this work forward, ensuring that the needs of Northern Ireland businesses are met".<sup>25</sup>

The UK government will need to balance the risks to the UK internal market with the potential burdens it might place on Northern Ireland businesses in proving they qualify for 'unfettered access'. A low burden of proof would create a risk that such arrangements could be exploited to enable goods from the Republic of Ireland or elsewhere in the EU to enter Great Britain without paying tariffs or complying with regulatory requirements. A high burden of proof would place the kinds of obligations on Northern Ireland businesses that the commitment to 'unfettered access' is designed to avoid.

Even on qualifying Northern Ireland goods, UK government will need some means of knowing what is crossing. This means some documentary requirements – even if full customs declarations are not required. The government's impact assessment notes that "some practical information will need to be provided electronically on movement of goods West-East".<sup>26</sup> It will need some capacity to intervene and check cargo that looks to be very high risk or suspicious. The UK will need to monitor trade patterns to look for distortion. If evidence of circumvention is apparent, the UK government may need to take steps to protect its markets.

If the UK agreed trade deals with other countries, this may create further difficulties.

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## **The UK sees the joint committee as an opportunity to agree additional flexibility for the Irish Sea border**

Beyond the key responsibilities outlined in the protocol itself, the UK and the EU appear to disagree as to the scope of the joint committee.

The joint committee has the power to amend the Withdrawal Agreement “provided that such amendments are necessary to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed”.<sup>27</sup> This point was given its own item on the agenda of the first meeting of the specialised committee on 30 April 2020.

The UK sees this as an opportunity to negotiate additional flexibility and derogations, beyond what it may agree as part of the future relationship, in the application of EU law in Northern Ireland. Michael Gove, the minister responsible for implementing the Withdrawal Agreement, described the joint committee as an opportunity to “develop” the protocol.<sup>28</sup> The UK government also set out its ambition to agree an exemption for export or exit summary declarations on goods moving from Northern Ireland to Great Britain through the joint committee. It argues that this requirement goes beyond what is necessary to protect the EU single market as “self-evidently goods being sent away from the single market cannot create a back door into it”.<sup>29</sup>

In contrast, the EU sees the joint committee as a forum to discuss how the Union Customs Code and other EU law can be applied in Northern Ireland, not whether Northern Ireland will be exempted from it. The EU’s technical note on the implementation of the protocol stated that “the Protocol on Ireland/Northern Ireland cannot be renegotiated, including in the Joint Committee”.<sup>30</sup> As far as the EU is concerned, the protocol has already been agreed and the UK will be required to implement it to its full extent; the joint committee is not an opportunity to reopen it.

Nonetheless, the EU itself is proposing that the joint committee uses its power to correct errors and omissions to add additional EU acts to the annexes of the protocol.<sup>31</sup> Notwithstanding the EU’s reservations, the joint committee does offer an opportunity to ensure that the protocol works effectively and is manageable. The current arrangements were renegotiated in a matter of months, without adequate time to fully consult on them or consider all their implications for an Irish Sea border and Northern Ireland trade. The arrangements are also unique to Northern Ireland, with no precedent elsewhere in the world from which lessons can be learnt and applied.

Problems that were unforeseen or overlooked when the protocol was being negotiated will inevitably present themselves. Where solutions to such problems can be found, it would make little sense to be constrained by an agreement negotiated at speed, without much detail as to how the arrangements would work in practice. Proposals that could ease the burden on traders and make the protocol workable on a practical level must be adequately considered, and the joint committee is the appropriate place to do so.



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## Disputes over the protocol have damaged trust between the UK and the EU

In February 2018, when a Northern Ireland-only backstop was first proposed, Michel Barnier offered to “de-dramatise” the backstop. This could have involved monitoring trade flows and taking a risk-based approach to controls.<sup>32</sup> But the protocol means that UK authorities will essentially be responsible for policing the EU’s border with the rest of the world, and any flexibility will require significant levels of trust.

Statements by the prime minister and the secretary of state for Northern Ireland and reports that the UK government was seeking to “get around” the protocol,<sup>33</sup> raised alarm bells in Brussels. They have undermined EU confidence that the UK would implement the protocol, and related EU law, as agreed – potentially provoking a more hard-line approach to compliance with EU law, and a lack of flexibility on how the border could operate.

The EU commission’s statement following the first meeting of the joint committee on 30 March called for more specific signs of progress that the UK was taking practical steps to put arrangements required by the protocol in place. It spoke of an:

**urgent need to present a detailed timetable and proceed with the necessary measures, such as preparing for the introduction of customs procedures for goods entering Northern Ireland from Great Britain, and ensuring that all necessary sanitary and phytosanitary controls as well as other regulatory checks can be carried out in respect of goods entering Northern Ireland from outside the EU.**<sup>34</sup>

Since then, the UK has, as promised, published its plan for implementing the Northern Ireland protocol, in which it publicly acknowledges the extent of its obligations under this part of the Withdrawal Agreement. This is a welcome first step in restoring trust between the EU and the UK and paving the way for more constructive conversations on operationalising the protocol.

But the UK must now demonstrate the practical measures necessary to prepare for new checks and processes on the ground.

The EU mandate on a free trade agreement with the UK states clearly that “the negotiations of the envisaged partnership should be premised on the effective implementation of the Withdrawal Agreement and of its three Protocols”.<sup>35</sup> If there is not enough evidence of the UK government preparing for the protocol, the EU may halt negotiations.

Meanwhile, the UK has appeared fairly relaxed about the possibility of a no-trade-deal scenario – or an ‘Australia-style’ deal – for the Great Britain–EU trading relationship. As outlined above, this will also have implications for the Irish Sea border, which the UK government will still be legally required to implement.

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**The UK must continue to demonstrate that it will adhere to its international obligations and be able to show significant progress in the practical steps to implement the Northern Ireland protocol before the joint committee's next meeting in June.**

### **It is in both sides' interests to ensure that the protocol does the least damage to the Northern Ireland economy**

It is inevitable that the protocol will involve additional controls and processes for trade between Great Britain and Northern Ireland, but it is in both the UK's and the EU's interests to ensure that the protocol does the least possible damage to the Northern Ireland economy.

The protocol itself places a duty on both the UK and the EU to use "best endeavours" to facilitate trade between Northern Ireland and the rest of the UK as far as possible, in line with applicable EU law. It also states that the joint committee must keep this "under constant review" and where necessary make recommendations "with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible".<sup>36</sup>

But the EU has an incentive, as well as a duty, to ensure the arrangements work for Northern Ireland. Ultimately, if the costs outweigh the benefits of the protocol, then the likelihood that members of the Northern Ireland assembly will refuse consent for the continued operation of the protocol increases.

Neither unionists nor nationalists command a majority in the Northern Ireland assembly, so the result of any vote is likely to be decided by non-aligned parties who hold the balance of power. The strong opposition of Northern Ireland parties, like the Alliance Party, to a no-deal Brexit and the creation of a land border is likely to have given the EU confidence that a majority of MLAs will continue to support the protocol. This perceived in-built majority for the protocol is likely to have been hugely persuasive in agreeing to the consent mechanism as part of the Withdrawal Agreement – the EU had previously rejected any kind of exit mechanism when Theresa May requested it.

But these underlying political positions may change if the economic implications of the protocol are severe. Reports have suggested that a single 'mixed' container of grocery goods going from Great Britain to Northern Ireland will incur an extra £6,000 in costs as a result of customs and regulatory processes.<sup>37</sup> If the costs of new processes and checks on goods are higher than the profit margins, these products become unviable, affecting consumer choice in Northern Ireland or increasing costs.

If border processes become too onerous or tariffs apply to a wide range of goods, businesses based in Great Britain may move manufacturing processes from Northern Ireland to other parts of Great Britain, leading to job losses and costs for the Northern Ireland economy. No one can take for granted that consent will be given.

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Inflexibility from the EU could make arrangements overly onerous for Northern Ireland businesses, risking that the Northern Ireland assembly will withhold consent for the continued operation of the arrangements for trade. This would reintroduce the possibility of a hard border – the very thing the protocol is designed to prevent.

**The EU must be willing to consider flexibilities proportionate to the risk to the single market the arrangements pose.**

The UK and the EU have already shown flexibility in carving out the unique arrangements for Northern Ireland agreed in the protocol. This progress should not be lost because either or both are not prepared to bend just a little more. Neither political posturing by the UK government nor inflexibility from the EU will serve the interests of businesses in Northern Ireland. Both the UK and the EU have an interest in ensuring that Northern Ireland remains politically and economically stable – the two are inextricably linked. The protocol is designed to protect just that and neither side should lose sight of that.

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## 4 Preparing for an Irish Sea border

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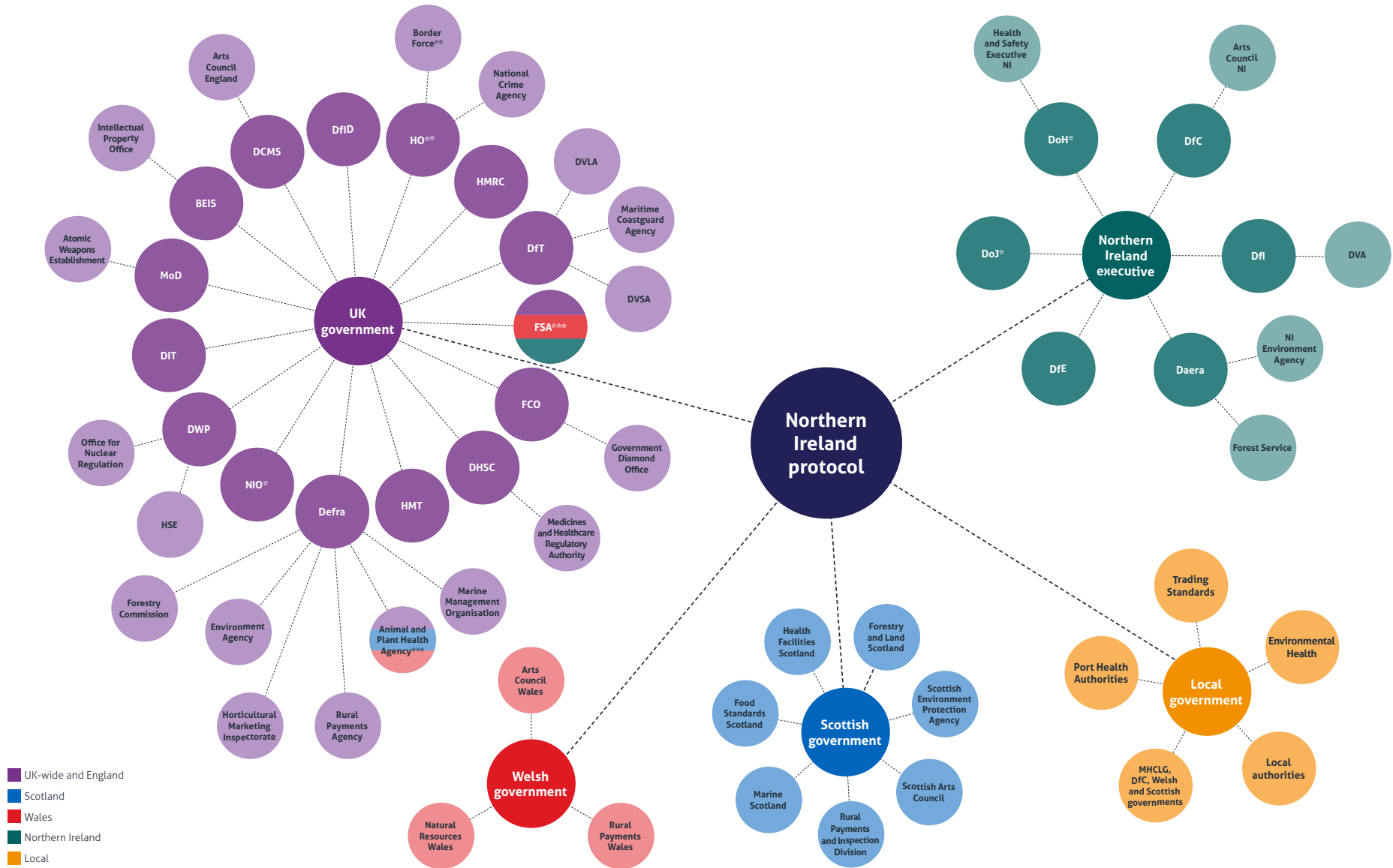
Creating a functioning border in the Irish Sea will be hard. Now that the UK has set out its proposals for implementing the protocol,<sup>1</sup> it needs to begin work on the Irish Sea border. There are significant decisions and actions that the UK government needs to take, and where competencies are devolved, those that the devolved administrations need to take. Co-ordination and consultation with a wide range of agencies, public bodies, trade associations and private companies across the UK and with local government will also be needed.

As shown in Figure 2, overleaf, we have identified 64 different administrations, departments and public bodies and agencies that may have a role in administering the Irish Sea border. The UK government will need to ensure that its planning assumptions are shared with all of these. It will be directly responsible for new customs and tax processes required on goods imported into Northern Ireland, and the Northern Ireland executive for requirements in devolved areas such as sanitary and phytosanitary checks, which are required for animal and plant products for disease control purposes.

With key ports for Northern Ireland trade located in Cairnryan in Scotland and Liverpool in England, the UK and Scottish governments will also have a role in facilitating any processes for goods required before they are exported. In Wales, although Holyhead Port's primary trade route is to Dublin, the Welsh government may be required to facilitate new processes on goods transiting north. In many cases, operational responsibilities, such as port health, will fall to local authorities.

There are a range of UK-wide and devolved public bodies and agencies with responsibility for regulation in protocol areas that may also need to undertake additional administrative responsibilities under the protocol. Co-ordinating the various stakeholders in the new border arrangements will itself be a major task.

Figure 2 Government, departments, agencies and public bodies with scope for involvement in the administration of the Irish Sea border



\*Have been added to reflect NI-specific arrangements. Special force Local Branch and National Measurement Office have been excluded.

\*\* Unlike the UK-rest of world border, there will be no role for the Home Office and Border Force in carrying out immigration controls. However, they may still have a role in customs controls, monitoring criminal activity and law enforcement.

\*\*\* The Animal and Plant Health Agency is a GB-wide agency, covering England, Scotland and Wales. The FSA covers England, Wales and Northern Ireland.

Source: Figures have been compiled using the HMRC list of UK government departments and bodies involved in the border between the UK and the rest of world and Institute for Government analysis of additional processes required under the Northern Ireland protocol and division of responsibilities under the devolution settlements; HM Revenue and Customs, 'Letter from Jim Harra GB to The Rt Hon Andrew Tyrie MP, Annex D: Government at the border', 21 February 2017, [www.parliament.uk/documents/commons-committees/treasury/Correspondence/Jim-Harra-response-to-Tyrie-21-02-17.pdf](http://www.parliament.uk/documents/commons-committees/treasury/Correspondence/Jim-Harra-response-to-Tyrie-21-02-17.pdf). Scottish and Welsh government agencies may have an operational role in implementing the protocol. A list of abbreviations is found at the end of this report.

Table 3 **Actions necessary to implement the Ireland/Northern Ireland protocol**

Area	Action(s)	Responsibility
Customs administration	<p>Collect data on goods moving between Great Britain and Northern Ireland and expand existing customs administration systems to trade between Great Britain and Northern Ireland.</p> <p>Prepare British and Northern Ireland businesses to comply with new customs formalities.</p> <p>Recruit customs officers.</p>	UK government
Tariff administration	Decide on the criteria according to which goods are assessed as not 'at risk' of moving into the EU.	Joint committee
	<p>Design forms and develop an IT system to administer a dual-tariff regime, including specific requirements to determine the destination of goods, and collect information on 'at risk' criteria.</p> <p>Prepare businesses to comply.</p>	UK government
Tariff compensation	<p>Develop a system for waiving or reimbursing tariffs on goods considered 'at risk'.</p> <p>Prepare businesses to comply.</p>	UK government
VAT	Determine practical arrangements for the collection of VAT in Northern Ireland, and put such arrangements in place.	Joint committee and UK government
Fisheries	Decide on conditions under which Northern Ireland fisheries and aquaculture products will be exempt from duties.	Joint committee
Agrifood regulation	Develop the infrastructure for sanitary, phytosanitary and livestock checks at ports and airports.	Northern Ireland executive and local authorities
	<p>Increase the capacity for animal health checks, including recruiting veterinary professionals.</p> <p>Expand administrative systems, for example increasing the capacity for export health certificates.</p>	UK government and devolved administrations

Manufactured goods regulation	Develop market surveillance systems to monitor compliance with EU standards.	UK government
EU oversight	Determine the practical working arrangements for EU supervision of the UK's implementation of the protocol in accordance with Article 12.	Joint committee

Source: Institute for Government analysis of: Department for Exiting the European Union, Protocol on Ireland/Northern Ireland, 2019, retrieved 15 May 2020, [www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration](http://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration); and Department for Exiting the European Union, Impact Assessment for European Union (Withdrawal Agreement) Bill, 2019, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/841245/EU\\_Withdrawal\\_Agreement\\_Bill\\_Impact\\_Assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841245/EU_Withdrawal_Agreement_Bill_Impact_Assessment.pdf)

It is unlikely that there will be certainty over a future trade agreement until close to the end of 2020, and decisions of the joint committee are unlikely to be agreed until the summer at the earliest. But the UK has a legal responsibility to ensure that the protocol is fully operational by the end of the transition period – currently scheduled for 31 December 2020. Given the scale of the implementation task, work is already under way. Government and agencies will need to plan for a 'base case scenario', as they have done for no deal – this should assume no zero-tariff free trade agreement, a strict application of the Union Customs Code, and a wide definition of goods 'at risk' of moving into the EU.

Unlike other UK external borders, the possibility of a border in the Irish Sea did not become a serious prospect until shortly before the new Withdrawal Agreement was concluded in October 2019, when the Johnson government reverted to the earlier proposal for a Northern Ireland-only protocol. This means that less preparation or scoping work has taken place to assess trade between Great Britain and Northern Ireland than other trade routes.

There had been little research into goods crossing the Irish Sea. The UK government will need to have a clear picture of trade flows from Great Britain to Northern Ireland, and in particular, their end destination, in order to pitch a reasonable definition of 'at risk' to the joint committee and to design border arrangements that are appropriate for the scale and nature of trade – for example, to determine the capacity needed to process different types of goods such as agricultural or industrial goods. Government will need to rely on data from port operators, who will need to collect data from hauliers and then from their customers. Such a process is a significant undertaking, but only the first step in the implementation process.

The UK government will need to scale up existing systems for customs administration. Most of this work will involve expanding existing processes and IT systems currently in place for trade between the UK and the rest of the world and applying them to the Irish Sea trade route, at the same time as they are being readied for UK–EU trade more generally. UK agencies will need to build capacity to manage the increase in customs formalities, including recruiting and training additional customs officers, particularly in Northern Ireland.

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In other areas, the UK government will need to design bespoke systems for the specific requirements of the protocol. A new system for tariff administration will also need to be put in place. Working on the assumption of no zero-tariff trade deal, this would need to administer a dual-tariff regime, ensuring that goods considered not 'at risk' of moving into the EU can move tariff-free and all others are subject to the EU tariff. The protocol also enables the UK to create a tariff compensation scheme, which will need to be administered. In July 2018, then chief executive of HMRC, Jon Thompson, said it would be possible to have a similar UK-wide dual tariff regime in place by 2021, but that a repayment scheme would take "a bit longer".<sup>2</sup> With less than eight months until the end of the transition period, it is not clear that there will be enough time to complete either.

Capacity for regulatory checks will also need to be developed, especially for agrifood. Currently, Northern Ireland has two border control posts: Belfast Port and Belfast International Airport. These posts are approved only for animal *products*: Northern Ireland has no border control posts approved for the import of live animals.<sup>3</sup> The UK government's plan for implementing the protocol states that "expanded infrastructure will be needed at some of these sites for the purpose of agri-food checks and assurance";<sup>4</sup> including expanding the categories of goods that can be checked at existing border control posts and designating Larne Port for live animal import.

Under the devolution settlement, the Northern Ireland executive is responsible for making preparations for and carrying out new agrifood checks – including ensuring that specialist facilities are built and specialised staff are recruited. Recruiting the number of trained veterinary professionals necessary to manage the increased quantity of animal products and the increased frequency of checks may pose a particular challenge.

Departments and agencies in Great Britain will also be required to build capacity to manage agrifood exports to Northern Ireland. Agriculture is a devolved competence, but the three devolved nations of Great Britain jointly fund the Animal and Plant Health Agency, which will be responsible for issuing export health certificates. Its operations will need to be scaled up to deal with the new requirements for trade between Great Britain and the EU, but there are also likely to be some specific considerations for trade from Great Britain to Northern Ireland.

Building a fully operational border from scratch will involve a huge amount of work from a wide range of bodies.

**To have any hope of delivering on such a tight timescale, the UK government and the devolved administrations must devote significant capacity to this mammoth task.**



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## The devolved administrations may refuse to implement the protocol

All three devolved administrations objected to the EU–UK Withdrawal Agreement. The Scottish parliament, the Welsh assembly (as it then was) and the Northern Ireland assembly (this last unanimously) all refused consent for the European Union (Withdrawal Agreement) Act 2020, which the UK government sought in line with the Sewel Convention on legislative consent.\* There is therefore a risk that the devolved administrations may not be prepared to implement the parts of the protocol for which they are responsible.

This risk is particularly acute in Northern Ireland, where unionist parties have been vocal in their opposition to the protocol. In a statement to the Northern Ireland assembly on 2 March 2020, the DUP minister for agriculture, environment and rural affairs, Edwin Poots, stated that the protocol was “hugely damaging” for Northern Ireland. He said that neither Northern Ireland ministers nor Scottish ministers would be willing to put infrastructure in their ports to facilitate checks on goods moving from Great Britain to Northern Ireland.<sup>5</sup> The UK government has committed to work with the Northern Ireland executive on this issue, and would be willing to fund the costs of any new agrifood preparedness.<sup>6</sup> But on 15 May, Mr Poots repeated his opposition to the plans.<sup>7</sup>

Should the devolved administrations refuse to undertake the work necessary to implement the protocol, this could pose a problem for the UK government, which remains legally responsible under the Withdrawal Agreement. In this circumstance, there are several tools at the UK government’s disposal.

The devolution statutes require the devolved administrations to comply with the UK’s international obligations and give UK ministers the power to direct devolved ministers to give effect to such obligations.<sup>8</sup>

The European Union (Withdrawal Agreement) Act 2020 gives powers to both ministers in the UK government and those in the devolved administrations to implement the protocol, but the Act’s explanatory note makes it clear that the UK government may still use its powers in areas of devolved competence.<sup>9</sup> It goes on to state that it will “not normally do so without the agreement of the relevant devolved administration”, consistent with the Sewel Convention on legislative consent, but a failure to adhere to an international agreement is likely to be considered an exceptional circumstance.<sup>10</sup>

However, the UK government acting in devolved areas may be politically more difficult. Facilitating checks in Northern Ireland despite resistance from local ministers is likely to result in significant backlash. On a practical level it may also be difficult to co-ordinate Northern Ireland departments, public bodies and agencies from Westminster.

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\* The Sewel Convention on legislative consent states that the UK parliament “will not normally legislate with regard to devolved matters without the consent” of the devolved legislatures. If a bill falling within the scope of the Sewel Convention is introduced into the UK parliament, the devolved legislatures normally vote on a legislative consent motion before the final amending stage. See Akash P and Sargeant J, ‘Sewel Convention’, Institute for Government, explainer, [www.instituteforgovernment.org.uk/explainers/sewel-convention](http://www.instituteforgovernment.org.uk/explainers/sewel-convention)

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Every effort should be made to avoid this scenario; political rather than legal solutions must be found.

**Like the UK government, the devolved administrations should also take their obligations under international law seriously.** A failure to give effect to an international treaty will have serious reputational consequences for the devolved governments and lead to a risk particularly that Northern Ireland will be seen as a “cowboy state”.<sup>11</sup> Scotland, with its ambition to seek EU membership if it becomes independent, should be particularly mindful of the implications of non-compliance.

**The UK government must lead by example, showing that it is taking steps to put border arrangements in place, and it must work with the devolved administrations to ensure that they do the same.**

### **Business will very likely not be ready**

Although the challenges for the governments are enormous, perhaps the biggest challenge will be to ensure that business is ready. Some businesses – such as ports, customs agents and freight forwarders – will need to build infrastructure and capacity to be able to handle the new processes that will be required for goods moving from Great Britain to Northern Ireland.

The lack of clear direction from the UK government on the practical implications of the protocol has been a major barrier to readiness. In evidence to the House of Lords EU committee, stakeholders in Northern Ireland highlighted how the lack of certainty was hampering businesses’ ability to prepare. The Freight Transport Association told the committee: “Our customers are asking us how to prepare, but I cannot tell them, because I do not know, the Government do not know, and trade bodies do not know”; and representatives from Belfast International Airport said: “Unless we have clarity and we know what is actually happening, we cannot plan and we cannot operate because we do not know what the processes are.”<sup>12</sup>

As the UK government’s impact assessment acknowledges, small and medium-sized businesses will need to outsource compliance in many areas, particularly customs, using customs agents for advice and declarations.<sup>13</sup> But a report from Northern Ireland’s Department for the Economy found that there are currently very few specialised customs clearing agents in Northern Ireland and new agents will take six months to train.<sup>14</sup> Recruitment will need to begin immediately to ensure there is enough capacity when the protocol is in force, but ongoing social distancing restrictions may pose challenges to recruitment and training processes.

Businesses will need to ensure they are able to comply with any new requirements for exports or imports between Great Britain and Northern Ireland. Businesses trading across the Irish Sea will need to ensure they have the right paperwork – which could include import and export summary declarations, rules of origin, safety and security declarations, export health certificates for products of animal origin and phytosanitary certificates for plants – and ensure they have the necessary information to make such declarations. They may also be required to comply with new VAT requirements.

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Many of these companies will have had to comply with none (or very few) of these obligations before.

Businesses will need clarity on what will be required as well as enough time to make the necessary preparations, including hiring new staff, and support with 'familiarisation costs'.<sup>\*</sup> But early government schemes like HMRC's £26m customs support scheme clearly stated that they were intended for Great Britain/EU traders only, as the "approach does not apply to the flow of trade between Northern Ireland and Ireland, or between Northern Ireland and GB".<sup>15</sup> The UK government's plan for the protocol, promises to "set out more detailed plans for extensive HMRC support",<sup>16</sup> but with businesses expected to be able to comply with the new customs requirements in just over seven months' time, the need to provide practical support for business is now urgent.

Business readiness was a major problem in no-deal preparations for the March and October 2019 Brexit deadlines. In the lead-up to October 2019, the UK government forecasted that 30–60% of traders would be ready overall, but that only 5–20% of small and medium-sized businesses would be ready.<sup>17</sup> If the UK government wants to improve on those levels, it will need to **significantly ramp up engagement with businesses involved in trade between Great Britain and Northern Ireland as a matter of priority, providing financial support, information and advice in the processes that may be required.**

## **The border is unlikely to be working by 31 December 2020**

Unless there is agreement otherwise, the border will need to be working on the first day after the transition period ends. This could be as early as 1 January 2021, leaving less than eight months to prepare.

By refusing to acknowledge publicly the existence or extent of the processes the protocol will involve until recently, the UK government has already lost valuable time. It has failed to talk with business and other stakeholders to understand the implications of new requirements and help them prepare. Given the extent of the implementation task outlined above, it is not clear that this work can be completed on this timescale.

In the lead-up to a possible no-deal scenario in October 2019, the government acknowledged that there was not enough time to ensure that a fully effective border was operational. It put in place an operating model that prioritised flow over compliance, introducing temporary easements and a transitional approach to compliance with customs requirements, and not implementing any additional checks on goods.<sup>18</sup> But this approach will not be possible in relation to the Irish Sea border; to meet the UK's obligations under the protocol, the border must be fully compliant with EU law.

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\* The UK government's impact assessment notes that businesses will incur familiarisation costs during the transition period to enable them to comply with new customs and regulatory requirements; see Department for Exiting the European Union, *Impact Assessment for European Union (Withdrawal Agreement) Bill*, 21 October 2019, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/841245/EU\\_Withdrawal\\_Agreement\\_Bill\\_Impact\\_Assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841245/EU_Withdrawal_Agreement_Bill_Impact_Assessment.pdf)

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The coronavirus pandemic has made the chances of meeting a December 2020 deadline even more remote. Restrictions on travel and social distancing measures have meant that negotiations on the future relationship were paused and have only recently resumed virtually. The joint committee and the specialised committee have been able to meet via videoconference, but the barriers to joint working will be increased. This means that important decisions relevant to the practical operation of the protocol will be significantly delayed.

Responding to the crisis has absorbed a significant amount of government capacity, with many civil servants who were working on the implementation of the Withdrawal Agreement being temporarily moved on to Covid-related work. Completing all the work outlined in this chapter would have been a tall order for a government able to dedicate extensive resources and attention to it, but now the UK government is focused elsewhere.

Trade associations, freight operators, ports and airports are currently occupied keeping supply chains running and securing the supply of essential goods. They will have little time to make preparations for new checks and processes at the border. Traders will be dealing with disruption that Covid will have caused; many will be focused on staying afloat, not on thinking about the customs forms and regulatory checks they may need to complete in 2021. And it would be unfair to expect them to do so.

The UK government continues to insist that it will not agree to an extension of the transition period, but it is only just starting work on putting the arrangements for the border in place. The chances of completing this work in the current circumstances in less than eight months are remote.

More time is required to prepare for the implementation of the protocol. **The UK and the EU should agree an extension of the transition period or agree additional time for the implementation of the Withdrawal Agreement.** The option to extend the transition period is provided for in the Withdrawal Agreement and would be relatively straightforward to agree, but as noted above, the UK government's position remains that it will not agree to or seek an extension. The two sides could agree a new implementation period as part of the future relationship agreement, but this would be both politically and legally more complicated.\* However it is achieved, to avoid legal, political and economic consequences, the two sides need to make sure that there is enough time to ensure the protocol has been implemented, that businesses are prepared and that there have been opportunities to test the arrangements.

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\* The options for securing more time are explored in detail in an upcoming Institute for Government publication.

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## **A failure to implement the protocol in time could have legal and political consequences for the UK government**

Ending the jurisdiction of the European Court of Justice in the UK was a key red line in the Brexit negotiations, but if the UK fails to comply with the protocol, it could find itself before the court. In general, disputes in the interpretation of the Withdrawal Agreement are to be resolved through the joint committee and an arbitration panel,<sup>19</sup> but Article 12 of the protocol makes it clear that implementation of the protocol and the application of EU law are subject to oversight by the European Commission. Should the UK fail to comply with the areas of EU law that apply to Northern Ireland under the protocol, the commission could launch infringement proceedings in which the UK will take part as if it were a member state (see Box 1).

The UK's national courts will also be required to uphold EU law in relation to the protocol, so it is also possible that a case may be brought through domestic judicial review.

### **Box 1: EU infringement proceedings**

If an EU member state fails to comply with an obligation under EU law, as an initial step the European Commission will deliver a reasoned opinion, explaining why the commission thinks EU law has been breached and requesting information on measures being taken to rectify this.

If the commission considers that the action taken is insufficient, it may refer the case to the European Court of Justice (ECJ), which may issue a judgment setting out what measures are to be taken, usually within a two-month period. In cases where irreversible damage may be done by inaction, the commission may request that the ECJ issues interim measures before a judgment is given.

If the member state fails to comply with a judgment of the ECJ, the court may impose a fine.<sup>20</sup>

The attitude the EU takes to enforcement may depend on the reasons for the UK's failure to comply. If it is clear that the UK is trying to put the required processes in place, but is coming up against practical challenges, there may be some wriggle room. But if the UK is purposely evading its legal obligations, the EU is likely to take a more hard-line approach to compliance.

As well as harming the UK's trade ambitions with the EU, as discussed earlier, if the UK fails to take its binding international obligations seriously, this may have an impact on its trade ambitions. There is strong support for the Good Friday Agreement in the US: in April 2019, the Speaker of the House of Representatives, Nancy Pelosi, warned that a UK–US trade deal was “not on the cards if there's any harm done to the Good Friday accords”.<sup>21</sup> If the UK's actions destabilise the Northern Ireland economy or reintroduce the possibility of a land border on the island of Ireland, the US government could find itself under pressure not to engage in free trade agreement talks and the likelihood of a trade deal passing Congress would also be reduced.

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More broadly, non-implementation would violate one of the most basic principles of international law: *pacta servanda sunt* (agreements must be kept).<sup>22</sup> It would seriously damage the UK's international reputation at a time when it hopes to strengthen relationships and ramp up diplomatic efforts throughout the world.

## **Non-compliance could also have severe consequences for Northern Ireland**

If border arrangements are not in place or business is not ready to comply with new requirements when the protocol comes into force, this could result in major disruption for Northern Ireland businesses and consumers.

Businesses do not want to break the law inadvertently. If it is not clear how they can comply with the new requirements, businesses in Great Britain may cease trading with Northern Ireland altogether. The chief executive of Manufacturing Northern Ireland, Stephen Kelly, has said that a failure to implement the protocol will create "massive legal chaos in Northern Ireland", which could affect UK-wide businesses' trusted trader status and therefore their ability to trade with the rest of the EU.<sup>23</sup> For many, this will not be a risk worth taking.

This is a particular concern for businesses in Northern Ireland reliant on suppliers in Great Britain for whom Northern Ireland makes up only a small part of their overall trade. In 2017, 63% of goods purchased from Northern Ireland businesses were from businesses based in Great Britain, and analysis from the Northern Ireland Statistics and Research Agency concluded that many local manufacturing companies were dependent on these purchases.<sup>24</sup>

If border arrangements are not operational and working well on 1 January 2021, there could be major trade disruption. If traders and hauliers do not have the required paperwork, this could result in delays at the border. Northern Ireland businesses told the House of Lords EU Committee: "Lorries typically arrive 20 minutes before the boat sails. Everything in supermarkets' 24-hour cycle to shelves relies on catching that boat because they depart only every three or four hours."<sup>25</sup> So delays would affect just-in-time supply chains and supermarkets carrying perishable goods; this would have implications for food availability in supermarkets in Northern Ireland.

In the longer term, if the UK continues to fail to implement the border and the EU considers that non-implementation poses a threat to the single market, then ultimately the Irish government may be forced to put border arrangements in place on the island of Ireland. This brings with it significant political and security risks. In the lead-up to a possible no-deal Brexit last year, the Police Service of Northern Ireland raised concerns that border infrastructure could become a target for paramilitary attacks.<sup>26</sup> It would, of course, also cause disruption to the Northern Ireland economy and the lives of people who live on the border. This outcome should be avoided at all costs.

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# 5 Ensuring future EU law works for Northern Ireland

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Ensuring the border is operational by the end of the transition period will be one major challenge of implementing the protocol, but work does not end there. The provisions on trade and regulation will apply to Northern Ireland unless members of the Northern Ireland assembly withdraw their consent. To avoid this risk, both the UK and the EU will need to ensure that the arrangements continue to work for Northern Ireland.

EU law in protocol areas will continue to apply in Northern Ireland and will evolve over time. Each time EU legislation listed in the annexes of the protocol is amended, updated or added to, there will be a potential flashpoint for the Northern Ireland executive, where the protocol is likely to remain controversial. It is in the interests of both the UK and the EU to ensure that potential issues are identified and managed as early as possible – if problems stack up, the protocol could end up being too unpopular for consent to be maintained, reopening the question of the Irish border.

As the UK is no longer a member state, the Northern Ireland executive and the UK government will need to find new ways to influence EU policy making to try to get Northern Ireland's voice heard in areas that will affect it. The UK government will need to be ready to ensure that the interests of Northern Ireland feature prominently in its post-Brexit engagement strategy with the EU – both through formal engagement in the structures established by the protocol, and through informal channels. The UK parliament and the Northern Ireland assembly will also need to put in place new arrangements to scrutinise EU law coming down the line. Finally, the UK government will need to make sure there are mechanisms in place to ensure compliance if the Northern Ireland executive does not adhere to its legal obligations.

## **The joint committee must address issues with the protocol's operation as early as possible**

The protocol is not all about downsides for Northern Ireland. The protocol presents a potentially significant economic opportunity for Northern Ireland. The prime minister has said it is a "great deal" for Northern Ireland, allowing it to benefit from access to both the EU single market and the UK's internal market.<sup>1</sup> The Scottish government has called for similar arrangements for Scotland, arguing that the protocol provides Northern Ireland "the opportunity for a competitive advantage".<sup>2</sup> But there are also political and economic risks associated with the protocol – particularly if it creates additional costs for Northern Ireland businesses, importers and therefore consumers.

If, after four years, businesses in Northern Ireland are still suffering from disruption to trade with Great Britain caused by the protocol, there may be greater support for withholding consent.

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As well as a responsibility for making specific decisions on how the protocol will operate, the joint committee also has a duty to oversee the implementation and operation of the protocol. In particular, the committee must continually review the implications of the protocol for both the UK's internal market and north–south co-operation.

The impacts of the protocol will only really become clear once the arrangements have been in place for a year or two. The joint committee, the specialised committee and the Joint Consultative Working Group present opportunities to identify and address any issues related to the operation of the protocol that arise at an early stage. Even once the protocol is in place, their work should not be considered to be done. Both the UK and the EU should take a strong interest in how it is working. They should send high-level representatives to meetings and ensure that there are officials on both sides with dedicated responsibility for regularly monitoring the impact of the protocol.

If and when any serious issues about the functioning of the protocol are presented, it is in both sides' interests to leave open the possibility of amending the operation of the protocol. The joint committee has the power to correct 'errors or omissions' in the Withdrawal Agreement up to four years after the transition period ends. This could be used to address issues that may become apparent once the arrangements under the protocol are put into practice. The protocol also states that the joint committee "may amend at any time" any decision it takes on the criteria for establishing goods 'at risk' of entering the EU.<sup>3</sup> It is preferable to tweak the existing agreement based on experience than to risk reopening it completely if consent is withheld.

### **Northern Ireland law will need to be updated in line with EU law**

Until the end of the transition period, EU regulations continue to be in force in the UK and the UK administrations continue to transpose new or amended directives into domestic law. On the day the protocol enters into force, therefore, Great Britain and Northern Ireland will be equally compliant with the EU acquis. But in future, the laws for Northern Ireland – unlike the rest of the UK – will need to be updated to stay in line with the rules of the EU and its single market. The annexes to the Ireland/Northern Ireland protocol list more than 300 regulations and directives that will continue to apply in Northern Ireland.

Over time, this is likely to create divergence between Northern Ireland and the rest of Great Britain. This could present new issues for the functioning of the UK internal market and potentially the Northern Ireland economy. There is a risk that minor technical regulations will blow up into much larger political issues.



There are two reasons why laws will need to change.

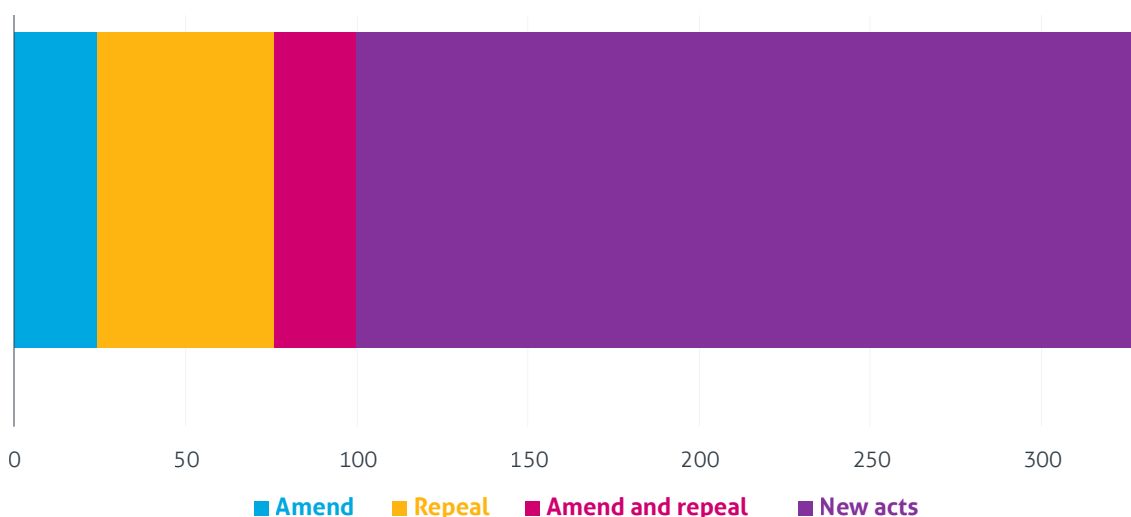
First, if and when the EU amends or replaces any of the rules included in the protocol, Northern Ireland will have to adopt those EU regulations and directives in tandem with member states.

Second, if the EU adopts entirely new acts that fall within the scope of the protocol – which, in the absence of a clear definition, may itself be subject to debate – the joint committee will decide whether Northern Ireland will also be required to adopt the new rules. If a decision cannot be reached, alternative measures to ensure the good functioning of the protocol will be explored.

Ministers in the UK and Northern Ireland will need to make these changes once the protocol is in force, allowing them to transpose updated or newly adopted EU law in protocol areas into domestic law. The powers to do so have been conferred on both UK and devolved ministers by the European Union (Withdrawal Agreement) Act 2020. Whether it is ministers in Westminster or ministers in Stormont who need to make these changes will depend on whether legislation is in reserved or devolved areas.

If amended EU law is not seen to benefit Northern Ireland, there is a risk that ministers may refuse to transpose new provisions or disagreement in the executive may arise. Frequent changes to EU law in protocol areas could be destabilising for Northern Ireland’s political institutions. It is impossible to predict how often EU law will be updated or added to. As Figure 3 shows, only around a third (100 out of 329) of the EU acts listed in the protocol’s annexes have been updated or amended since their introduction.

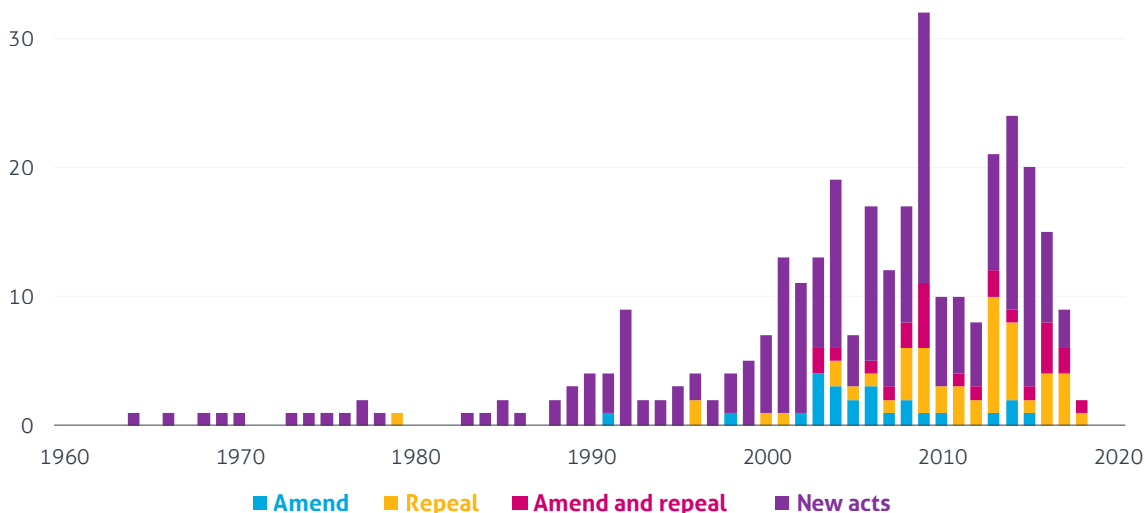
Figure 3 EU legislation listed in the annexes of the Ireland/Northern Ireland protocol by type



Source: Institute for Government analysis of the Ireland/Northern Ireland protocol; Department for Exiting the European Union, Protocol on Ireland/Northern Ireland, 2019, retrieved 15 May 2020, [www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration](http://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration). Only provisions of union law directly referred to as regulations or directives have been considered. Each regulation or directive may amend or repeal more than one act. New acts are considered acts that institute a new provision rather than amend and/or repeal another.

However, as Figure 4 shows, there has been a high volume of new acts or updates in the past two decades. In the 2010s alone, 119 (around 40%) of the EU regulations and directives listed in the protocol were made, ranging annually from 24 in 2014 to two in 2018.

Figure 4 **EU legislation listed in the annexes of the Ireland/Northern Ireland protocol by year**



Source: Institute for Government analysis of the Ireland/Northern Ireland protocol; Department for Exiting the European Union, Protocol on Ireland/Northern Ireland, 2019, retrieved 15 May 2020, [www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration](http://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration). Only provisions of union law directly referred to as regulations or directives have been considered. Each regulation or directive may amend or repeal more than one act. New acts are considered acts that institute a new provision rather than amend and/or repeal another.

To mitigate the risk of changes to EU law frequently embroiling the Northern Ireland institutions in arguments at the point of transposition, the UK government, the Northern Ireland executive and the EU will need to put mechanisms in place to identify and resolve issues at an earlier stage.

The UK government and the Northern Ireland executive will need to systematically examine publicly available EU documents – such as policy proposals, European Commission reports on the implementation of EU law, and draft European Council positions on EU negotiations – to identify proposed changes that will affect the working of the protocol.

There are concerns about the lack of capacity within the Northern Ireland Civil Service to scrutinise the volume of EU documents required. Previously, when the UK had been a member state, the Northern Ireland executive relied on UK government outputs for information and analysis in devolved areas. There are also concerns about the resources the UK government intends to dedicate to this significant task, and evidence already suggests that the UK government has failed to recognise the implications for the protocol of EU law coming down the line in relation to its own domestic agenda.<sup>4</sup>

The UK government and the Northern Ireland executive should agree a systematic approach to the scrutiny of EU documents and ensure there are adequate resources devoted to do so.

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## Northern Ireland will need to explore opportunities to influence EU law that will apply to it

Once the protocol comes into force, Northern Ireland will be bound by EU law, without being part of a member state. This means that it will not have formal representation in, or direct access to information on discussions around EU law that will apply to it.

Nonetheless, there are informal opportunities for both the UK government and the Northern Ireland executive to obtain information on EU proposals and highlight any specific concerns that they have. Both will maintain a presence in Brussels through the UK Mission to the European Union and the Office of the Northern Ireland Executive in Brussels.

Our Institute for Government report [Influencing the EU after Brexit](#) explores how the UK and the devolved administrations can continue to influence EU decision making now the UK is no longer a member state. It recommends:

- improving diplomatic relationships
- bringing in technical expertise
- lobbying the EU institutions at an early stage
- engaging at a ministerial level
- co-ordinating with business groups and civil society
- strengthening bilateral relationships.<sup>5</sup>

On matters related to the protocol, the UK government and the Northern Ireland executive should make use of their well-established relationships with the Irish government.

Informal networks for consulting Northern Ireland institutions and stakeholders at an official level when developing positions of the Irish government already exist, particularly when EU policy relates to areas of north–south co-operation. For example, the single electricity market operates on an all-island basis and so the Republic of Ireland represents the interests of Northern Ireland – which will be closely aligned with its own – in discussions on EU energy policy. Officials in the Northern Ireland Civil Service should make full use of these networks once the protocol comes into effect.

Northern Ireland should also use the more formal institutions set up by the Good Friday Agreement, including the North South Ministerial Council (NSMC), to enable ministers to discuss upcoming EU regulations, share information and potentially even develop joint positions. Where powers are reserved to the UK government, it should also make use of bilateral forums like the British–Irish Intergovernmental Conference, and the British–Irish Council, which is also attended by representatives of all the devolved administrations.

Such close co-ordination with the Republic of Ireland on matters of domestic policies may be uncomfortable for unionist parties. It is important, therefore, that any future approach for EU influence is supported by both communities and all parties in the Northern Ireland executive.

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**The Northern Ireland executive should agree a strategy for engaging with the EU and influencing the EU once the protocol comes into force, working closely with the UK and Irish governments.**

### **The Northern Ireland assembly and the UK parliament need new systems for scrutinising EU law**

With the prospect of regular changes to laws that affect large parts of the Northern Ireland economy and its trade with Great Britain, the UK parliament and the Northern Ireland assembly will need mechanisms to scrutinise proposed and upcoming changes to EU law in protocol areas. Such scrutiny is important to consider any Northern Ireland-specific issues related to new law and to highlight any concerns that members of the legislative assembly (MLAs) and MPs raise. These could be fed into EU decision making processes through the routes discussed above, or raised in the joint committee.

Until the end of the transition period, the House of Commons European Scrutiny Committee, the House of Lords EU committee in the UK parliament<sup>6</sup> and relevant departmental committees in the devolved legislatures will scrutinise EU documents, accompanied by an explanatory memorandum. But once the transition period ends and the protocol is in force, it is not clear whether the mechanisms used to scrutinise EU law throughout the UK's membership of the EU will stay in place to scrutinise the continued implications of EU law for Northern Ireland. In May 2020, the chairs of eight House of Commons committees wrote to Cabinet Office minister, Michael Gove, to ask the government to propose a new system for scrutiny.<sup>7</sup> But the different nature of the task will pose new scrutiny challenges for the UK parliament and the Northern Ireland assembly.

In reserved areas, EU law would need to be updated in Westminster, but the fact that legislation will apply to Northern Ireland only will raise new questions about the appropriate arrangements for scrutiny. Northern Ireland is represented by only 18 of 650 MPs, seven of whom are from Sinn Féin, who do not take their seats. This means that Northern Ireland MPs have no representation on most select committees, including the European Scrutiny Committee. And there is no guarantee that Northern Ireland MPs will be present on delegated legislation committees, which may be responsible for considering the statutory instruments that transpose EU legislation by default if no alternative scrutiny system is put in place.

So it is currently unclear where examination of protocol law will happen – whether the European Scrutiny Committee will continue in its current form and adopt the protocol as its focus, the Northern Ireland Affairs Select Committee will contribute or whether a new committee will be founded specifically to consider delegated legislation that will transpose EU protocol law, in place of ad hoc committees. Whatever arrangements are eventually adopted, it is important that Northern Ireland MPs are included in the process wherever possible.

In devolved areas, the Northern Ireland assembly will have primary responsibility for scrutiny of new EU proposals, but there are concerns about capacity. The assembly is a small legislature – there are 90 MLAs compared with 650 MPs – with comparatively few resources. Unlike Westminster committees, assembly committees have no subject

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specialists; the Renewable Heat Incentive inquiry<sup>\*</sup> highlighted the weakness of committee scrutiny of secondary legislation and recommended steps to strengthen it.<sup>8</sup> Currently, statutory committees rely heavily on information from the UK government, and reports and assessments from UK parliamentary committees, to scrutinise EU law. If the UK parliament pulls back and overlooks the issue of how changes to EU law affect Northern Ireland, Stormont will lose a vital resource.

So, the Northern Ireland assembly lacks the resources, and the UK parliament lacks the representation to properly scrutinise new law in protocol areas. One way to address both these issues would be to **create a Westminster–Stormont joint committee**. We do not underestimate the political sensitivities that will need to be negotiated in the establishment of such a forum, nor the significant procedural challenges.<sup>\*\*</sup> But allowing MLAs from all political parties to directly scrutinise EU proposals in reserved issues and increasing the resources available to scrutinise devolved legislation would be in everyone’s interests.

One blueprint for further Westminster–Stormont co-operation is the proposal for inter-parliamentary committee work set out by the 2009 Calman Commission into Scottish devolution. Although plans were never instituted, the commission recommended setting up a joint liaison committee and sub-committees on specific issues. It also suggested that the UK government should reduce barriers to UK and Scottish parliamentary committees working together, including more effective information sharing.<sup>9</sup> The House of Commons standing orders allow for members of the Welsh parliament to attend meetings of the Welsh Affairs Committee; at a minimum, similar provisions could be made to allow MLAs to attend Northern Ireland Affairs Committee meetings.

The Northern Ireland assembly should also work closely with the Irish parliament, the Oireachtas. The Oireachtas schedules dedicated committee sessions on EU scrutiny for every committee, including on areas where Northern Ireland is directly affected by the protocol. Again, there are political sensitivities to be considered here but sharing information with the Oireachtas would be particularly useful for Northern Ireland, as it shares many similarities with the Republic of Ireland, particularly in protocol areas, and Irish parliamentarians would be able to raise issues with Irish ministers who will be present during EU discussions.

The NSMC provides an opportunity for intergovernmental co-operation between Northern Ireland and the Republic of Ireland but there are no formal mechanisms for inter-parliamentary work. The British–Irish Parliamentary Assembly,<sup>10</sup> which brings together political representatives from the Houses of Parliament, the Houses of the Oireachtas, the Scottish and Welsh parliaments and the Northern Ireland assembly, could be a good starting point, but **further opportunities for joint working between committees in the Oireachtas and Stormont on matters related to the protocol should be explored**.

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\* The inquiry into the so-called ‘cash-for-ash’ scandal.

\*\* The Northern Ireland assembly committees are defined in the Northern Ireland Act 1998.

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## **Mechanisms will need to be put in place to ensure ongoing compliance**

The UK, the EU and the Northern Ireland executive should make every effort to ensure that Northern Ireland's interests are represented and considered when developing EU legislation in protocol areas, and any issues are addressed before the changes come into force. But the risk remains that Northern Ireland ministers may refuse to implement EU legislation, so it is important that the UK government has leverage to encourage compliance.

The UK government will be legally responsible for ensuring that any obligations under the protocol, including updating EU law in protocol areas, are met. This will be the case even if the Northern Ireland executive has responsibility for doing so under the devolution settlement. If either fails to implement EU law, the European Commission can undertake infringement proceedings, which can result in a lump-sum fine, or daily penalty payments issued by the European Court of Justice.<sup>11</sup>

The UK government can direct devolved administrations to take action to comply with their international obligations. This action can include executive acts (such as making regulations) and introducing a bill to the devolved legislature. It cannot instruct the devolved legislature to pass a bill, but parliamentary sovereignty means that the UK parliament can, if necessary, legislate in devolved areas (see Chapter 4). But continual use of the UK government's coercive powers is not a sustainable strategy in the long term, and may in fact incentivise non-compliance if the Northern Ireland executive can be confident that the UK government will step in.

When the UK was an EU member state, it produced a 'Concordat on Co-ordination of European Union Policy Issues',<sup>12</sup> which set out the devolved consequences of infractions proceedings. If a devolved government was alleged to have failed to implement EU law, it would prepare a draft reply independently, with some co-ordination from central government, and submit its response through the UK's permanent representative to the EU. If the UK was subsequently penalised for the actions of a devolved administration, the UK would pass the costs down to the relevant administration proportionally to its involvement and the fine would be taken from the block grant.<sup>13</sup> The UK government and the Northern Ireland executive should agree an equivalent mechanism, including financial penalties for non-compliance, to ensure compliance with the Ireland/Northern Ireland protocol.

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## 6 The consequences for politics and policy making in the UK

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The protocol will have wider implications for politics in policy making in the UK. In Northern Ireland, members of the assembly will continue to vote on the provision on trade and regulation every 4–8 years, undoubtedly bringing constitutional issues to the fore each time. The other governments of the UK will need to consider the implications of Northern Ireland’s obligations under the protocol for their own regulatory regimes. And the UK government must ensure Northern Ireland’s specific circumstances are taken into account when developing UK-wide policy.

### **The consent mechanism means that the protocol will remain a live issue in Northern Ireland politics for as long as it applies**

Under the terms of the protocol, the UK “shall provide the opportunity for democratic consent in Northern Ireland”;<sup>1</sup> and the Northern Ireland assembly will vote on whether it continues to consent to the continued operation of Articles 5–10 of the protocol every four to eight years.<sup>\*</sup> While these articles are about trade and regulation, it is impossible to divorce the practical arrangements from issues of identity.

The Belfast/Good Friday Agreement recognises the right of people in Northern Ireland to identify as Irish, British or both. Brexit has threatened that careful balance. The possibility of reintroducing regulatory and customs borders as a consequence of Brexit has brought the constitutional debate in Northern Ireland to the fore. Polling conducted in September 2019, when the threat of an October no deal loomed large, found a narrow majority (51%) in favour of reunification with Ireland.<sup>\*\*2</sup> A different poll after the agreement of the new Ireland/Northern Ireland protocol found that 67% either agreed or strongly agreed that the new Brexit deal was a threat to the union of the UK.<sup>3</sup> The consent mechanism threatens to destabilise politics in Northern Ireland over the long term, keeping issues of identity close to the top of the agenda.

The institutions will essentially be asked to choose whether to align with the EU (and Republic of Ireland) or the UK. As such, voting is likely to be split down community lines. Unionist parties object to the protocol on the basis that it effectively puts a trade border in the Irish Sea, creating barriers between Northern Ireland and the rest of the UK. But for nationalist parties, the risk of a new border on the island of Ireland if Northern Ireland were to refuse consent to the protocol means they are likely to support the continued application of the protocol.

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\* See Table 1 in Chapter 2 for an explanation of which provisions are subject to consent, and which are not.

\*\* Excluding don’t knows.

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The regular votes on whether to stay aligned with the EU (and the Republic of Ireland) to ensure no land border, or cut free and remove the border down the Irish Sea, will put pressure on Northern Ireland's fragile political institutions. These depend on collaboration between the two communities and require strong personal relationships to function effectively. There is a danger that the need for repeated consent will put pressure on the Northern Ireland executive that it may not be able to bear.

It is worth remembering that ministers have only recently returned from a three-year hiatus, triggered by the Renewable Heat Incentive scandal, but ultimately the result of a long-term breakdown of trust between Sinn Féin and the DUP. The political institutions remain fragile.

**To reduce the risk of government collapse triggered by consent votes, the UK government should work closely with the Irish government to support the executive during these periods.** This could include:

- ensuring frequent meetings of the strand three\* institutions established by the Belfast/Good Friday Agreement such as the British–Irish Intergovernmental Conference and the British–Irish Council
- making sure that the Northern Ireland Office has the resources, capability and relationships to identify problems at an early stage
- ensuring that the secretary of state for Northern Ireland is a figure trusted by both communities.

### **The protocol poses a challenge to the UK's internal market**

The protocol will place obligations on Northern Ireland to comply with parts of EU law that will not automatically apply to the rest of the UK, to allow Northern Ireland to access the EU's single market. But at the same time, the UK is thinking about what mechanisms may be necessary to protect the functioning of its own internal market now that three of its four parts are no longer bound by EU law.

Many areas covered by the protocol are devolved to Scotland, Wales and Northern Ireland. The four governments of the UK are in the process of developing 'common frameworks' in devolved areas – such as the environment, agriculture and procurement – that had previously been part of EU competence. The purpose of these frameworks is to prevent policy divergence between different parts of the UK to the extent that that would create barriers to trade.

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\* The 1998 Belfast/Good Friday Agreement sets out a three-strand approach to governance in Northern Ireland. Strand three established east–west institutions to encourage co-operation between the UK and Irish governments.



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UK government analysis has identified 160 policy areas where EU and devolved competence intersects; of these, 78 were considered to require non-legislative frameworks and 21 were considered to need legislative frameworks to “implement common rules and ways of working”.<sup>4</sup> But 17 of the 21 areas identified for legislative frameworks are also areas covered by the Ireland/Northern Ireland protocol, in which Northern Ireland will stay bound by EU law. The May 2020 update on common frameworks stated that both the UK government and the Northern Ireland executive were carrying out analysis “to determine the impact of the Protocol on both individual frameworks and the programme as a whole”.<sup>5</sup>

If the aim of the common frameworks is to ensure standards are consistent across the UK, either the rest of the UK will need to meet the same standards as Northern Ireland, effectively binding itself to follow EU law in those areas, or Northern Ireland will need to be excluded from future legislation. The former option would de facto force the UK government to comply with EU standards – something it has ruled out in any UK–EU free trade agreement – without the benefits of reducing friction on goods moving from Great Britain to Northern Ireland (or indeed the rest of the EU) that formal alignment would bring.<sup>6</sup> But if Scotland, England and/or Wales diverge from EU single market rules, this could place Northern Ireland further outside the UK’s internal market.

The UK has committed to legislate for ‘unfettered access’ to the UK internal market for Northern Ireland businesses, but this operates on the assumption that anything that is acceptable on the EU market is acceptable in Great Britain. If Scotland, Wales and Northern Ireland decide to raise standards above what is required by EU regulation and ensure that products entering Great Britain from Northern Ireland meet those standards, additional processes could be required for trade between Northern Ireland and Great Britain to provide this certainty.

The decision is, of course, not for the UK government to make alone. All four nations of the UK must agree the common frameworks, and Scotland and Wales have shown a strong desire to maintain close alignment with the EU.

**Agreement must be reached between all four administrations of the UK as to how they will approach the internal market and common frameworks with respect to the Ireland/Northern Ireland protocol.**

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\* The remaining 63 areas require no further action. Two policy areas appeared in the analysis twice, in different categories.

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## **The UK government will need to consider Northern Ireland when developing UK-wide policy**

Institute for Government research has found a lack of knowledge or understanding in Whitehall and Westminster of Northern Ireland's special circumstances – in terms of both its political sensitivities and practical realities, for example its cross-border transport network.<sup>7</sup> The protocol will add an additional layer of differences that UK officials and politicians will need to consider when developing policy.

Trade policy is one area where UK civil servants and ministers will need to think carefully about the implications of their plans for Northern Ireland. The prime minister and members of his cabinet have repeatedly stated that Northern Ireland will benefit from future UK trade deals. The UK's plan on implementing the protocol clearly states:

**We will negotiate and deliver trade deals on behalf of the whole United Kingdom. International trade will benefit Northern Ireland exporters, whose goods will enjoy the preferential access we negotiate with trading partners around the world, as well as Northern Ireland importers and consumers, who will enjoy access to wider consumer choice.<sup>8</sup>**

But in practice this could create difficulties for the UK government when negotiating.

Most of the benefits of trade deals come from increases in imports, which help lower prices and raise productivity. Given that the majority of imports to Northern Ireland are likely to be subject to EU trade policy, a UK free trade agreement would not deliver significant growth in non-EU imports to Northern Ireland. While Northern Ireland exporters might be able to benefit from preferential tariff rates under a UK free trade agreement, this could prove a tough sell to UK trading partners who would be unable to improve their own access to Northern Ireland markets, either through tariff cuts or through more compatible regulations. If the prime minister is to keep his promise, ensuring Northern Ireland is included in any new trade deals will need to be a negotiating red line, even if this means walking away.

Future trade deals will also need to be compatible with the protocol. For example, the protocol requires Northern Ireland to adhere to EU rules on genetically modified organisms and food standards; this area is likely to be a major negotiation point in a future UK–US free trade agreement.

Stakeholders in Northern Ireland will also have specific concerns related to the protocol. For example, agriculture is a significant part of the Northern Ireland economy, accounting for 1.6% of its economic output (in terms of gross value added, or GVA) compared with 0.5% in England.<sup>9</sup> Farmers in Northern Ireland have raised concerns that as they will be required to maintain EU standards of animal welfare and hygiene, a trade deal that allowed lower-standard and cheaper products into the UK would affect their ability to compete in the market in Great Britain.<sup>10</sup>

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**If it is to keep its commitment to allow Northern Ireland to benefit from the UK's independent trade policy, the UK government will need to develop a trade policy that works for all of the UK – even if this acts as a constraint on its ambitions.**

Human rights are another area where the specific circumstances of Northern Ireland, and the UK's obligations under the protocol, must be considered. Reports suggest that the UK does not intend to commit to remaining part of the European Convention on Human Rights as part of its future relationship with the EU, and the 2019 Conservative Party manifesto committed to "update" the Human Rights Act 1998.<sup>11</sup> However, the Belfast/Good Friday Agreement makes multiple references to the European Convention on Human Rights,<sup>12</sup> and Article 2 of the protocol commits the UK government to ensuring that there is "no diminution of rights, safeguards and equality of opportunity" as set out in the Agreement.<sup>13</sup> The UK government will need to consider carefully its obligations in Northern Ireland before committing to a course of action.

Under the terms of the protocol, EU state aid law will apply to any act by a UK authority, if it would affect trade between Northern Ireland and the rest of the EU. This reflects the general test in EU state aid law that a subsidy has an "effect on trade between Member States"; this has been a "notoriously low bar".<sup>14</sup> Therefore, this commitment under the protocol will put a constraint on any future subsidy scheme, which the European Commission or any businesses could challenge through the domestic and European courts. Legal commentators have suggested that the protocol is so wide-reaching in this area that the UK government should seek to supersede it through an anti-subsidy agreement as part of the UK–EU future relationship.<sup>15</sup> But if this is not possible or the UK is not willing to do so, the UK government will need to consider this when making policy.

The UK has also set out its ambition to create its own subsidy control regime\* once it is no longer subject to EU state aid law, but it will need to be mindful of the implications of creating two different regimes – this could simply double the opportunity for UK businesses to challenge state subsidies and tax policies.

Beyond these high-profile and pressing examples, there will be many more policy areas where UK government decisions may have unintended or underexplored consequences for Northern Ireland. For this reason, **all government legislative acts should be accompanied by an Ireland/Northern Ireland protocol impact statement.**

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\* Although it is worth noting that there are ongoing disputes as to whether state aid is in the exclusive competence of the UK government.

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## 7 The implications of Brexit for Northern Ireland that have not been resolved

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Implementing the Ireland/Northern Ireland protocol will be a major challenge, as this report sets out, but it remains just one element of ongoing work on UK–EU relations and their implications for Northern Ireland. The UK and the EU have conducted a mapping exercise and identified 156 areas of north–south co-operation.<sup>1</sup> The protocol only covers a small number of the cross-border issues that the UK’s departure from the EU has affected.

In terms of trade, the protocol only covers goods, not services; according to statistics from InterTradeIreland, the total cross-border trade in goods in 2018 was £3.43 billion, compared with £3.07bn for total cross-border trade in services.<sup>2</sup>

There is currently no agreement on the mutual recognition of qualifications, meaning that once the UK leaves the transition period, the EU will no longer automatically recognise UK professional qualifications, unless there is agreement otherwise. This could create problems for cross-border workers. For example, the Irish National Teachers’ Organisation has raised concerns about how teaching qualifications from Northern Ireland will be recognised in the Republic of Ireland and vice versa, in the event that the EU framework for qualifications falls away without a replacement.<sup>3</sup> This could pose challenges for individual teachers and cross-border education co-operation. An agreement between the UK and Irish governments, or individual professional bodies, could address this issue, but with the end of the transition period growing ever closer, certainty is needed as soon as possible.

[Security and justice](#) is another area where close co-operation through EU mechanisms, such as the European Arrest Warrant, has been beneficial to authorities in both Northern Ireland and the Republic of Ireland. The EU’s tools support close working between police forces and other law enforcement bodies to tackle cross-border crime. But [the UK’s refusal](#) to accept any oversight from the European Court of Justice or to guarantee ongoing membership of the European Convention on Human Rights means that the EU is unlikely to grant any special form of co-operation on these issues in the future relationship. The UK and the Republic of Ireland can negotiate bilateral arrangements or use international tools to replace some EU mechanisms, but the replacements are not as effective as EU arrangements.

Divergence in data standards, too, could make information sharing between police forces, hospitals and businesses more difficult, unless there is an agreement on [data adequacy](#).

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This should be addressed through the future relationship agreement. But with the two sides still far apart and the UK clearly prepared to contemplate ending the transition period with no trade agreement in place if the EU does not drop some of its demands, an agreement cannot be taken for granted, and planning needs to take that into account.

There is anxiety too in Northern Ireland about whether residents will continue to be able to access public services in the Republic of Ireland. Patients in Northern Ireland often travel to hospitals in the Republic of Ireland for specialist services and vice versa – for example, children with heart defects have been treated in Dublin since the closure of services in Belfast, while cancer patients from Donegal receive radiotherapy in Derry.<sup>4</sup> The Common Travel Area guarantees reciprocal access to health care and education, but Brexit may present some practical challenges, such as in terms of the sharing of data, which will need to be considered.<sup>5</sup> The fact that these continue to be concerns shows the continuing uncertainty facing the people of the island of Ireland since the UK's departure from the EU.

The purpose of the Ireland/Northern Ireland protocol was to protect the Belfast/Good Friday Agreement and to ensure that Brexit did not destabilise Northern Ireland. The protocol has only done some of that. Ratifying the Withdrawal Agreement with the accompanying Ireland/Northern Ireland protocol was just the first step in addressing the unique challenges that the UK's exit from the EU posed to Northern Ireland. Implementing the protocol will be the next major task, but even once it is operational, there are many more issues to resolve and undoubtedly more that will reveal themselves in time. The EU and the UK and Irish governments must resist the temptation to see Northern Ireland as 'sorted' and ensure that their commitment to the peace and prosperity of Northern Ireland and its people endures.

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# List of abbreviations

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<b>BEIS</b>	Department for Business, Energy and Industrial Strategy
<b>Daera</b>	Department of Agriculture, Environment and Rural Affairs (Northern Ireland)
<b>DCMS</b>	Department for Digital, Culture, Media and Sport
<b>Defra</b>	Department for Environment, Food and Rural Affairs
<b>DfC</b>	Northern Ireland Department for Communities (Northern Ireland)
<b>DfE</b>	Department for the Economy (Northern Ireland)
<b>DfI</b>	Department for Infrastructure (Northern Ireland)
<b>DfID</b>	Department for International Development
<b>DfT</b>	Department for Transport
<b>DHSC</b>	Department of Health and Social Care
<b>DIT</b>	Department for International Trade
<b>DoH</b>	Department of Health (Northern Ireland)
<b>DoJ</b>	Department of Justice (Northern Ireland)
<b>DUP</b>	Democratic Unionist Party
<b>DVA</b>	Driver and Vehicle Agency (Northern Ireland)
<b>DVLA</b>	Driver and Vehicle Licencing Agency
<b>DVSA</b>	Driver and Vehicle Standards Agency
<b>DWP</b>	Department for Work and Pensions
<b>FCO</b>	Foreign and Commonwealth Office
<b>FSA</b>	Food Standards Agency
<b>HMRC</b>	HM Revenue and Customs
<b>HMT</b>	HM Treasury
<b>HO</b>	Home Office
<b>HSE</b>	Health and Safety Executive
<b>MHCLG</b>	Ministry of Housing, Communities and Local Government
<b>MLA</b>	Member of the Legislative Assembly (Northern Ireland)
<b>MoD</b>	Ministry of Defence
<b>NICS</b>	Northern Ireland Civil Service
<b>NIO</b>	Northern Ireland Office
<b>UUP</b>	Ulster Unionist Party

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