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Northern Ireland Protocol: Implementation, grace periods and EU-UK discussions (2021)



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Summary

The Northern Ireland Protocol: Background and trading issues

Following the UK's decision to leave the EU, the two sides drew up a [Withdrawal Agreement](#) (WA) that set out how the UK's exit would work. This Agreement came into force on 31 January 2020.

The WA is separate from the [UK-EU Trade and Cooperation Agreement](#) (TCA), which sets out the future relationship between the UK and the EU.

The Northern Ireland Protocol (the Protocol) is an integral part of the WA. The Protocol sets out Northern Ireland's post-Brexit relationship with both the EU and Great Britain (the rest of the UK).

Trade in goods under the Protocol

The Protocol states that Northern Ireland (NI) remains part of the UK customs territory and so NI will be included in UK free trade agreements. UK authorities are responsible for implementing the Protocol in both GB and NI.

However, more significantly the Protocol states that NI must follow the EU's rules for bringing goods in and out of the EU (the customs code) and many EU single market rules for goods, while GB will set its own customs and regulatory rules. This allows for the free movement of goods between Northern Ireland and Ireland and the rest of the EU.

This approach means new checks and controls are needed for goods moving both from Great Britain to Northern Ireland but also, to a lesser extent, from Northern Ireland to Great Britain. This is often referred to as "putting a border in the Irish Sea".

Issues, negotiations, and grace periods

The full details of how the Protocol would operate were not decided by the EU-UK Joint Committee, set up under the WA, [until December 2020](#). This gave little time for business in NI and GB to prepare for the new regime. The EU and UK agreed therefore, to simplify some procedures for a short period and temporarily suspend the full application of EU law to NI that mandated checks and controls in several parts of the Protocol, in a series of what became known as "grace periods".

Some of the most consequential of these were:

- a three-month grace period for supermarkets and their suppliers, for EU agri-food rules;

- a six-month grace period for supermarkets for EU rules on certain types of chilled meats, such as sausages;
- a one-year grace period for implementing in full the EU's rules on testing and selling human and veterinary medicines.

Despite these grace periods, problems with moving goods between GB and NI have emerged, and [businesses are concerned](#) that these issues will get worse when the grace periods end and are looking for permanent solutions.

In response the UK has since asked the EU for flexibility in several other areas, such as steel quotas, the movement of livestock, and the movement of pets.

The UK unilaterally extended the three-month agri-food grace period in March 2021. In response the EU [started an enforcement mechanism](#), raising tensions between the two sides. In June 2021, the UK then asked the EU to extend the six-month grace period for fresh meats, which the EU has granted for a further three months, alongside announcing several proposals for new Protocol flexibilities.

Flexibilities requested and granted

The EU's [proposed solutions](#) included flexibilities for the movement of guide dogs, the movement of livestock from GB to NI, and a requirement for UK drivers to show motor insurance green cards. The EU also agreed to change the application of EU law to ensure that medicines from GB can move into NI without constraints that might affect supplies in the region.

Article 16

The Protocol includes an emergency brake mechanism that allows either party to introduce emergency measures to deal with serious difficulties arising from implementing the Protocol. This is set out in [Article 16](#).

Article 16 (1) states that if applying the Protocol leads to “serious economic, societal or environmental difficulties that are liable to persist”, or to “diversion of trade” then either side can impose “appropriate safeguard measures”. These measures, however, need to be targeted in scope and duration to directly address the problems they are trying to fix. The other side can also implement their own counter-balancing measures.

The EU briefly proposed using Article 16 to stop vaccine exports from the EU moving to GB through NI, but swiftly backed down after criticism from the Irish and UK Governments.

Unionist politicians in NI have been calling for the UK Government to trigger Article 16 to stop checks and controls on goods entering the region.

Command Paper on ‘the way forward’

On 21 July 2021, the UK Government published a Command Paper, [Northern Ireland Protocol: the way forward](#). The paper in part reiterated the Government’s calls for the EU to show more "flexibility" and "creativity".

Specifically, it suggested that the EU could use the “[at risk goods](#)” principle used under the Protocol for applying tariffs to GB-NI trade to both customs and Sanitary and Phytosanitary (SPS) checks (checks on agri-food, plants and animals), to differentiate trade based on its destination. Goods that were destined for Northern Ireland would not require customs processes and most SPS checks, while those moving to Ireland would have full customs and SPS formalities which the UK would enforce.

The Government asked for the grace periods to continue indefinitely and for the EU to halt its legal proceedings while the EU and UK negotiated.

The paper also proposed some significant new changes to the Protocol, asking for the jurisdiction of the Court of Justice of the EU (CJEU) over the Protocol to be removed, as well as restrictions on State Aid. It also requested new flexibilities in areas such as VAT and for medicines to be removed from the scope of the Protocol entirely.

On Article 16, the Government said it believed the threshold for triggering it had been reached but it would not do so yet, hoping for further solutions in the negotiations.

EU reaction

The EU rejected renegotiating the Protocol, pointing to the new flexibilities it had already proposed in areas such as medicines and the movement of live animals.

It said, however, it would continue to engage with the UK, including on the suggestions made in the paper. While it was ready to continue to seek creative solutions, they should be “within the framework of the Protocol”.

On 27 July the EU said that it would [halt legal proceedings against the UK](#) for breaching the Protocol, “in order to provide the necessary space to reflect on these issues and find durable solutions to the implementation of the Protocol”.

NI reaction

DUP leader, Sir Jeffrey Donaldson MP, welcomed the paper as a “[step in the right direction](#)”, but said permanent solutions were needed. His party wants the Protocol removed. Sir Jeffrey warned that if solutions are not found soon, he may remove his party from the Executive, also said he would direct DUP Ministers to not implement any new checks on goods at NI ports, and ask his Members of the Assembly to not pass any new legislation required to keep NI in line with EU single market regulations.

Sinn Féin rejected the paper, calling for the UK Government to implement the Protocol it negotiated and agreed to, saying it must not be allowed to “[renege on international law](#)”.

The Social Democratic and Labour Party (SDLP), Ulster Unionist Party (UUP), and Alliance parties all advocate for the EU and UK to sign up to some form of veterinary/SPS agreement aiming to significantly reduce the number of checks on agri-food products moving from GB to NI. However, while the UUP welcomed the Command Paper as “[providing a potential pathway](#)” to sorting out the Protocol, the SDLP and Alliance criticised the UK Government’s approach calling on them to engage with the EU.

UK extends grace periods indefinitely, pushes EU for answer

The UK has pushed the EU to respond to its Command Paper proposals. The Irish Foreign Minister, Simon Coveney, suggested that proposals would be coming in the “[second half of October](#)”.

On 6 September in a [Written Ministerial Statement](#), Lord David Frost said the Government will “continue to operate the Protocol on the current basis”, including grace periods and “easements” that are in place. This suggests that all grace periods have been extended indefinitely.

Proposals for permanent solutions

A more permanent solution to controls on animals and plants, (SPS checks) would be for the UK and EU to sign a veterinary agreement.

Two of the EU’s veterinary agreements have been suggested as models for an EU-UK deal, one with Switzerland, and another with New Zealand (NZ). The EU-Swiss agreement removes almost all checks and paperwork. However, it requires Switzerland to largely align to the EU’s food and plant safety and animal health rules.

The EU-NZ agreement is an ‘equivalence agreement’, in which both sides certify their rules and regulations are equivalent to each other, which would significantly reduce the number of checks. However, veterinary certificates would still be required under such an arrangement, and the EU prohibition on chilled meats would also still apply.

The UK Government has said it would consider a NZ-style equivalence agreement, but not one that constrains it from signing trade agreements with other countries.

Other suggested solutions for problems in trading goods include “[trusted trader schemes](#)” and building on the “at risk goods principle” used for applying tariffs on agri-food goods moving from GB to NI .

There have also been calls for Northern Ireland’s political institutions and civil society to have a [greater say on Protocol-related discussions between the EU and UK](#). This might result in greater acceptance of the arrangements by NI voters.

1

Background

1.1

The Northern Ireland Protocol

Following the UK's decision to leave the EU, the two sides drew up a [Withdrawal Agreement](#) (WA) that set out how the UK's exit would work. This Agreement came into force on 31 January 2020.

The WA is separate from the [UK-EU Trade and Cooperation Agreement](#) (TCA), which sets out the future relationship between the UK and the EU. The WA will continue to apply regardless of any future changes to the TCA.

The Northern Ireland Protocol (the Protocol) is an integral part of the WA. The Protocol sets out Northern Ireland's post-Brexit relationship with both the EU and Great Britain (the rest of the UK). One of its principal purposes is to maintain an open land border between Ireland and Northern Ireland (NI). The Protocol enables the seamless movement of goods between NI and Ireland and the rest of the EU.

1.2

Trade in goods under the Protocol

The Protocol states that NI remains part of the UK customs territory and so NI will be included in UK free trade agreements. UK authorities are responsible for implementing the Protocol in both GB and NI.

However, more significantly the Protocol states that NI must follow the EU's Customs Code: the bloc's rules for bringing goods in and out of the EU. NI must also follow many EU single market rules for goods, while GB will set its own customs and regulatory rules.

This approach necessitates implementing new checks and controls for goods moving both from Great Britain to Northern Ireland but also, to a lesser extent, from Northern Ireland to Great Britain. This is often referred to as "putting a border in the Irish Sea".

Some of the most onerous regulatory controls now required are those on animals and plants, known as Sanitary and Phytosanitary (SPS) checks.

1.3

Governance

Committees

The WA set up several joint EU-UK bodies to oversee the agreement. At the top an EU-UK Joint Committee (Committee), to oversee the implementation of the whole WA. Below it sits a Specialised Committee on Northern Ireland to facilitate the implementation and application of the Protocol.¹ A Joint Consultative Working Group reports to the Specialised Committee. The Working Group's main function is to act as a forum for sharing information and mutual consultation, in particular on proposed EU laws that will be applied to NI under the Protocol.

Dispute settlement

The UK and EU are expected to resolve any disputes regarding the application of the Protocol through “good faith” consultations in the Joint Committee.²

But if no solution can be reached, disputes will be referred to an independent arbitration panel.³ Arbitration panel rulings are binding on the UK and EU. Failure to comply can result in the imposition of a penalty payment, and noncompliance would ultimately entitle the complainant to suspend certain treaty obligations or elements of other UK-EU agreements.⁴

Role of Court of Justice of the EU (CJEU)

The Court of Justice of the EU (CJEU) has a role in providing interpretations of EU law, where a dispute submitted to arbitration raises such a question. When the CJEU gives such an interpretation this will be binding on the arbitration panel.⁵

The CJEU will continue to have jurisdiction over parts of the Protocol where Northern Ireland is implementing EU law, specifically Article 5 and Articles 7 to 10. Article 5 relates to the EU's customs code and EU single market regulations for goods. Article 7 covers rules for placing goods on the market, Article 8 VAT, Article 9 the Single Electricity Market and Article 10 State Aid.⁶

¹ There are five other Specialised Committees that report to the Joint Committee covering other areas of the Withdrawal Agreement such as citizen's rights.

² [Withdrawal Agreement](#) Article 169.

³ Withdrawal Agreement Article 170. The WA gave the Joint Committee the task of establishing a list of 25 persons able to serve on an arbitration panel. The two sides announced they had reached agreement on this issue in December 2020, the full list of the panel members can be found in the corresponding Council of the European Union decision.

⁴ Withdrawal Agreement Article 178. Other EU-UK agreements would include the [Trade and Cooperation Agreement \(TCA\)](#). However, these cross-retaliatory measures can only be used if after 1 month after an arbitration panel ruling “the respondent has failed to pay any lump sum or penalty payment imposed on it” or 6 months after the arbitration panel ruling “the respondent persists in not complying” with the ruling.

⁵ Withdrawal Agreement Article 174.

⁶ Article 12(4) of the Northern Ireland Protocol.

1.4

Consent for the Protocol from the Northern Ireland Assembly

Under what is known as the “[consent mechanism](#)”, the parts of the Protocol relating to the movement and labelling of goods, as well as VAT, State Aid, and the electricity market, will cease to operate if the Northern Ireland Assembly doesn’t give its regular consent. Its first opportunity to do so will be in late 2024.

If the consent motion is passed by cross-community support then the next consent decision isn’t required for eight years.⁷ However, if the motion is only passed by a simple majority, then the next consent decision is required within four years.

If the motion only passes by a simple majority the UK Government has said it will commission an independent review [into the functioning of the Protocol](#) and the “implications of any decision to continue or terminate alignment on social, economic and political life in Northern Ireland”. The review will be required to deliver recommendations, “including with regard to any new arrangements it believes could command cross-community support”.

If the Northern Ireland Assembly resolves **not** to pass a consent resolution, then Northern Ireland’s alignment with EU law will come to an end two years later. In the intervening period the Joint Committee would then be tasked with making recommendations to the UK and the EU on what should replace the Protocol arrangements.

⁷ Cross-community support is taken to mean: (a) a majority of MLAs present and voting, including a majority of each of the unionist and nationalist designations present and voting; or (b) a weighted majority (60%) of MLAs present and voting, including at least 40% of each of the nationalist and unionist designations. The [Petition of Concern mechanism](#) cannot be used to block a consent motion.

2

Article 16

Article 16 purpose

The Protocol includes an emergency brake mechanism that allows either party to introduce emergency measures to deal with serious difficulties arising from implementing the Protocol. This is set out in [Article 16](#).

Article 16 (1) states that if the application of the Protocol leads to “serious economic, societal or environmental difficulties that are liable to persist”, or to “diversion of trade” then either side can impose “appropriate safeguard measures”. These measures, however, need to be targeted in scope and duration to directly address the problems they are trying to fix.

For more information on how the process of triggering Article 16 works, and the countermeasures the other party can put in place see Commons Library Insight: [Northern Ireland Protocol: Article 16 and EU vaccine export controls](#).

EU Covid-19 vaccine measures and Article 16

On 29 January 2021 the European Commission released [new rules](#) controlling the export of Covid-19 vaccines out of the EU.

Alongside this announcement, the EU said it would also trigger Article 16, to prevent vaccines potentially being sent to Northern Ireland from the EU, and then onto Great Britain.

After condemnation of this move by [all of NI's major political parties](#), and the [UK](#) and [Irish](#) Prime Ministers, the European Commission took down the original proposal, and clarified that they would no longer plan to trigger Article 16, [describing](#) the move as an “oversight”.

Calls to trigger Article 16

Some Northern Ireland Unionist politicians were already [calling for Article 16 to be triggered](#) in early January, to stop customs controls and checks on goods moving from GB to NI that are causing disruptions to the flow of goods.

Experts [have suggested](#) such measures are not a quick fix for these problems. The EU's aborted attempt to impose its own measures gave further impetus to these calls with Arlene Foster, then Northern Ireland's First Minister, [calling for](#) it to be triggered on 30 January. Ms Foster [said again](#) in May 2021 that it “may well be the case” that the Prime Minister Boris Johnson, will have to use the provision because of the Protocol's impact on trade.

Command Paper

In a [Command Paper](#) published in July 2021, the Government set out a series of new requests for changing the Protocol, and reiterated its opposition to some of its features. It stated that it was “clear that the circumstances exist to justify using Article 16”, but it would not do so yet.⁸ Further details are in Section 5.1.

⁸ HM Government, '[Northern Ireland Protocol: the way forward](#)', CP502, July 2021.

3 Grace periods and easing of NI trade

3.1 Joint Committee decisions and grace periods

The WA set up an EU-UK Joint Committee (Committee), to oversee its implementation. The Protocol also left some decisions on the trading of goods up to the Committee, including how and under what conditions goods could enter NI tariff-free.

In December 2020 the Committee set out a [series of decisions](#) on how the Protocol would operate in the long term.

The Committee also responded to UK requests to temporarily relax some rules that were meant to apply to NI under the Protocol. These are often referred to as “grace periods”.

The following relaxations/grace periods were agreed:

- **Export declarations.** Most goods being sent by firms from NI to GB, will now not require pre-departure and/or export declarations. Instead HMRC will collect “equivalent” information from sources such as shipping manifests.
- **Supermarket Agri-food imports.** Supermarkets and their suppliers bringing agri-food products into NI, were given a **three-month** grace period before they must comply with the EU’s full [Sanitary & Phytosanitary \(SPS\) regime](#) (SPS measures exist to protect humans, animals, and plants from diseases, pests, or contaminants). During the grace period importers can move these goods using simplified processes.
- **Chilled meats.** Supermarkets were given a **six-month** grace period before having to comply with EU SPS rules for bringing in certain types of chilled meats, such as sausages, from Great Britain to Northern Ireland, subject to conditions on labelling, certificates and transport.
- **Medicines.** NI was granted a **year-long** grace period for implementing in full the EU’s rules on testing and selling human and veterinary medicines.

Separate to these declarations, on 31 December a three-month grace period for online retailers sending parcels into NI [was announced](#).

The European Commission [said at the time](#) that these grace periods were “temporary solutions” that are “subject to strict conditions to ensure that all

relevant stakeholders will be in a position to fully comply with the Protocol in the course of 2021”. On the chilled meats grace period specifically, it said that “all stakeholders are expected to use this time effectively to adapt supply chains for chilled meats sold in Northern Ireland”. Michael Gove acknowledged the time-limited nature of these grace periods in December 2020, but said he believed they would provide sufficient time for businesses to adjust.⁹

3.2 Trading problems

Despite these grace periods, there have been issues with trade in goods between Great Britain and Northern Ireland. Part of the reason was that the Committee decisions and grace periods were only announced a few weeks before the Protocol came fully into force on 1 January 2021. Aodhán Connolly, Director of the Northern Ireland Retail Consortium, told the Northern Ireland Affairs Committee (NIAC) on 6 January 2021, “the lack of information and the timeframe of getting that information from Government has been a real challenge”.¹⁰ On the parcels grace period he noted “we did not receive the guidance from HMRC until 31 December and, because of that, some retailers took the decision not to service Northern Ireland”.¹¹

On several occasions this year NIAC has taken evidence from industry and customs experts on some of these issues, why they are happening, and what can be done to help overcome them, [most recently in July 2021](#).

Having more time to familiarise themselves with new export and import processes will only assist NI companies so far. This is because the Protocol’s [placing of checks “in the Irish Sea”](#), rather than at the land border between Ireland and Northern Ireland, creates new processes and paperwork that create barriers to trade primarily for goods moving from Great Britain to NI.

That notwithstanding, opportunities to trade freely with Ireland and the rest of the EU remain, and trade from NI to GB remains largely unaffected. The region could therefore become [potentially more attractive](#) to investors from outside the UK.¹²

The Government set out some of their concerns on the impact of trading under the Protocol in their July 2021 Command Paper, see [Section 5.1](#) for further details.

⁹ [HC Deb 9 December 2020 \[EU Withdrawal Agreement\]](#).

¹⁰ Northern Ireland Affairs Committee [Oral evidence](#): Brexit and the Northern Ireland protocol, HC 767, 6 January 2021.

¹¹ Ibid.

¹² See also: Northern Ireland Affairs Committee [Oral evidence](#): Brexit and the Northern Ireland protocol, HC 767, 24 February 2021, Qs 507-510, 527-530)

3.3

UK requests for further easing

On 2 February, after the EU’s Article 16 “oversight”, the then Chancellor of the Duchy of Lancaster, Michael Gove, UK Co-Chair of the Joint Committee, [sent a letter](#) to the EU Committee Co-Chair, Maroš Šefčovič, asking for further easing of rules for NI to help deal with delays and other problems UK firms were facing sending goods to the region. Mr Gove asked for the EU to agree to the following steps:

- Extending the grace period for supermarkets and their suppliers in time and scope, so it extends until at least 1 January 2023, and is widened to include “all relevant local businesses and services” as authorised traders, as well as a “proportionate, risk based long-term solution” for retailers;
- find a permanent solution for movement of chilled meat products from GB to NI which will be otherwise prohibited at the end of the grace period, with an extension of the grace period until at least 1 January 2023 while this is negotiated;
- extend the grace period for parcels until at least 1 January 2023 to allow time for a “light-touch permanent solution” for parcels to be agreed, and widen this extended grace period to deal with regulations affecting the delivery of items such as organic foods and plants;
- extend the grace period for medicines for a further year at least to 1 January 2023 and sort out other issues on the movements of medicine into NI;
- find a solution to restrictions on the amount of steel that can be imported into NI tariff-free (so called Tariff Rate Quotas); and
- negotiate a bilateral arrangement to deal with barriers on pet travel between GB, NI and Ireland.

3.4

EU response

On 10 February, Mr Šefčovič responded to Mr Gove’s letter with [his own](#). He suggested that the UK was not implementing the Protocol fully, giving several examples:

- The Border Control Posts (BCPs) or Entry Posts were not yet fully operational, and they were not performing a sufficient number of physical checks;
- packaging is not being labelled and consignments not monitored at their destination, and goods are entering without declarations or valid certificates;

- the EU had not been given full access to the UK's customs data and systems that the Protocol requires; and
- the UK was not implementing the decision on NI firms giving “equivalent information” rather than filling out customs declarations properly.

On the requests from the UK, Mr Šefčovič stated the following:

- The EU would look at solutions to steel and tariff rate quotas;
- for chilled meats, agri-food and parcels, the grace periods would not be extended, and were offered on the basis that firms would use the time to prepare for complying with EU rules, though they could look at “pragmatic solutions”; and
- for issues with pet travel and the movement of items like seed potatoes and plants, any flexibility would require the UK to align with EU rules in these areas.

3.5 End of grace periods

Lord Frost takes over as Joint Committee Co-Chair

On 17 February it [was announced](#) that former Brexit negotiator Lord David Frost would join the Cabinet with responsibility for UK-EU relations, including oversight of the implementation of the WA and the Trade and Cooperation Agreement.

Lord Frost also took over the role of Co-Chair of the WA Joint Committee from Michael Gove.

UK unilaterally extends supermarket agri-food and parcels grace periods

On 3 March 2021, the Secretary of State for Northern Ireland, Brandon Lewis, [announced that](#) the UK Government was unilaterally extending the three-month grace period for supermarket agri-food imports, for a further six-months to 1 October. Mr Lewis said this was part of a “pragmatic and proportionate implementation” of the Protocol.¹³

In addition, the Government unilaterally extended the grace-period for parcels, also to 1 October. All parcels entering Northern Ireland would have required customs declarations from 1 April, without the extension. The logistics industry [said](#) it was not ready to deal with that volume of new administration.

A UK Government spokesperson [said](#) Lord Frost in a call with his EU counterpart Mr Šefčovič, underlined the extension was needed for

¹³ [HCWS819, 3 March 2021](#).

"operational reasons" and such measures were "well precedented in other international trade arrangements, and that they were entirely consistent with our intention to discharge our obligations under the Protocol in good faith". The UK Government also said it would update its guidance to firms set out to help address practical problems on soil attached to the movement of plants, seeds, bulbs, vegetables and agricultural machinery. The EU's plant regulations that apply to NI under the Protocol, do not permit soil from Great Britain to enter the region.

Reaction to unilateral extension

On 3 March, Maroš Šefčovič, said in [a statement](#) that the UK's extension of the grace periods amounted to "a violation of the relevant substantive provisions of the Protocol", and "the good faith obligation under the Withdrawal Agreement". He added, in a reference to the UK Government's [original proposals for the Internal Market Act](#), that "this is the second time that the UK government is set to breach international law".

EU begins infringement proceedings

On 15 March, the Commission sent [a letter a formal notice](#) to the UK Government, using powers under the Northern Ireland Protocol to begin a formal infringement process against the UK. It also warned it could launch a dispute under the Withdrawal Agreement's dispute settlement mechanism, that could lead to provisions of both the WA and TCA being suspended. The EU has not so far taken any further steps in progressing this process, but is likely to be looking at what solutions can be found in Joint Committee discussions. See Section 5.2 for further details.

Reaction in Northern Ireland

Northern Ireland's then First Minister Arlene Foster, [welcomed](#) the Government's move and said the EU had refused to deal with an issue that "would have caused a huge amount of problems for us at our ports".¹⁴

Ms Foster added that it showed the UK government "can go further, so we need to see permanent solutions".

However, her deputy first minister, Sinn Fein's Michelle O'Neill, [described](#) the government's decision as "another unilateral attempt to override what has been agreed".¹⁵

Ms O'Neill added "what everyone should be focused on is achieving agreement to find solutions to the issues that are outstanding, but it's very clear the protocol must be made to work."

Simon Hoare, the chairman of the House of Commons NI Affairs Select Committee, [tweeted](#) that the case for extending the grace periods was

¹⁴ ['Brexit: EU says UK grace period extension breaches international law'](#), BBC News, 3 March 2021

¹⁵ ['Brexit: EU says UK grace period extension breaches international law'](#), BBC News, 3 March 2021.

"compelling" but that the unilateral move struck him as an "approach most likely to have negative/unhelpful consequences".

Glyn Roberts, Chief Executive of Retail NI told NIAC:

Looking at the situation with the protocol, and indeed the extension of the grace period, it is very clear that, if the UK Government had not taken the action they did, we would have had a triple-whammy on cost and complexity hitting our members. We would have much preferred the UK Government to have aligned and agreed this with the EU.¹⁶

EU floats the ideas of flexibilities

On 9 June, following a meeting of the Joint Committee, the European Commission [published a document](#) in which it suggested several areas where it had identified potential flexibilities in the implementation of the Protocol.

- **Sanitary and Phytosanitary (SPS) measures:** The Commission has suggested that the UK continues to follow, even if only temporarily, the EU's SPS rules, as it does now. Saying most checks on GB-NI trade would be removed if there was a so-called "Swiss-style veterinary agreement". The Commission noted, however, the UK has refused this option, "even though the EU has suggested that this temporary agreement could be reviewed once the UK concludes new trade deals". The Commission says it has also explored other solutions to SPS checks:
 - Connecting EU and UK SPS databases to enable a swift handling of entry/exit data for SPS goods;
 - Guide dogs: the EU is working with the NI Executive on operational details with the aim of facilitating guide dogs accompanying persons entering NI from GB;
 - Tagging of animals: moving from GB to NI: the EU is "open to considering a solution" to avoid multiple re-tagging when animals move multiple times between GB and NI during their life.
- **Medicines:** "currently exploring solutions to provide a long-term perspective for medicines supply to Northern Ireland";
- **VAT:** finding solutions "to sustain the access to affordable second-hand cars for citizens in Northern Ireland";
- **Tariff Rate Quotas:** Progress in this area is "expected over the coming weeks", although [EU] "Legislative changes would be necessary in this area".

¹⁶ Northern Ireland Affairs Committee [Oral evidence](#): Brexit and the Northern Ireland protocol, HC 767, 17 March 2021, Q539.

The Commission said in the document that the UK has not “adopted a similar constructive attitude”. It listed several areas where the UK has not complied with the Protocol:

- The construction work of permanent Border Control Posts (BCPs) has been halted.
- The temporary facilities in place in Northern Ireland do not work to their full capacity and have acute human resource problems.
- The traceability requirements agreed as part of the grace periods in December 2020 to ensure that the food products concerned are only sold to consumers in supermarkets in Northern Ireland are not being complied with.

4 EU & UK find some solutions to trading problems

4.1 June 2021, UK requests extension of chilled meats grace period

As the end of the six-month grace period for chilled meats approached in June 2021, the UK Government [considered](#) unilaterally extending this period also. However, it then [chose to ask the EU](#) to consider extending it, going through the Joint Committee.

On 30 June, the EU agreed to the request for a period of three months (ending on 30 September 2021). It [stated that](#) the purpose of this additional period “is to allow stakeholders, and in particular supermarkets in Northern Ireland, to complete the adjustment of their supply chains”. It also said the “temporary solution is subject to strict conditions”:

- Meat products remain “under the control of the Northern Ireland competent authorities at all stages of that procedure”;
- These meat products must be accompanied by official health certificates; and
- They must be exclusively sold to end consumers in supermarkets located in Northern Ireland, and must be packed and labelled accordingly.

The EU also underlined “the importance of ensuring that Border Control Posts in Northern Ireland have the necessary infrastructure and resources to be able to perform all the controls required by the EU's Official Controls Regulation”.

4.2 Other solutions found

As well as extending the grace period for chilled meats, the Commission said in its [statement on 30 June](#), it had found other flexibilities and practical solutions to some of the most pressing issues related to the implementation of the Protocol:

- **Medicines:** The Commission has identified a “creative solution to ensure the continued long-term supply of medicines from Great Britain to

- Northern Ireland”. It will require the EU to change its own rules, and the Commission will put forward a legislative proposal in the early autumn.
- **Guide dogs:** The Commission identified a solution to facilitate the movements of guide dogs accompanying persons travelling from Great Britain to Northern Ireland.
 - **Green Card:** The Commission announced a decision to waive the obligation to show the motor insurance Green Card for drivers from the UK. This will be “particularly helpful for Northern Irish motorists crossing the border into Ireland”.
 - **Movement of certain animals:** The Commission has identified a solution to facilitate the movement of livestock from Great Britain to Northern Ireland, removing the need for re-tagging when animals move multiple times between Great Britain and Northern Ireland during their life. The Commission adopted an implementing act to that effect on 29 June 2021. The Commission is also working on a regulatory solution to facilitate the swift return of livestock to Northern Ireland from exhibitions or trade fairs in Great Britain, saying the relevant implementing acts will be adopted in October 2021. Work is also ongoing on a solution regarding the risk control of scrapie, to facilitate the movement of sheep and goats between Great Britain and Northern Ireland.¹⁷

4.3

July 2021, Lord Frost and Brandon Lewis write an open letter

On 2 July, in a [joint article in the Irish Times](#), Brexit minister Lord Frost and Northern Ireland secretary Brandon Lewis, wrote that while the decision a few days before to extend the grace period for chilled meats was “welcome”, it “addresses only a small part of the underlying problem”.¹⁸

They diagnosed the problem as “in short, a seriously unbalanced situation is developing in the way the protocol is operating”. This situation “risks economic harm in Northern Ireland and damage, in turn, to the essential balance within the Belfast Agreement itself”.

The Ministers said that they “assumed that the requirements to facilitate trade between Northern Ireland and the rest of the UK, and to try to avoid checks and controls at Northern Irish ports, both spelt out in the protocol, would be meaningful”.

¹⁷ European Commission, ‘[EU-UK relations: solutions found to help implementation of the Protocol on Ireland and Northern Ireland](#)’, 30 June 2021.

¹⁸ ‘[David Frost and Brandon Lewis: We must find a new balance in how NI protocol is operated](#)’, Irish Times, 2 July 2021.

Mr Frost and Mr Lewis argued that the way forward is to “find a new balance in the way the protocol is operated”, and to do so “rapidly”. This new balance “has to mean that goods must be able to move as freely as possible within the customs territory of the UK and that goods important to Northern Irish consumers supplied from Great Britain continue to be available”.

Reaction to letter

The Irish Foreign Minister, Simon Coveney, [said](#) the letter was “a very strange way to make friends and build a partnership” in a week when the EU had offered concessions.¹⁹

The Irish Taoiseach, Micheál Martin, [asked the UK Government](#) to show the same “generosity of spirit” and “goodwill” that the EU had shown by extending the grace periods, adding that “the time for warning each other is over. It’s time for engagement, constructive engagement, with a view to reaching a resolution”.²⁰

On 6 July, Maroš Šefčovič, referred to the EU’s infringement procedure on the UK’s unilateral extension of the supermarket agri-food grace period, and [warned that](#) “without satisfactory steps by the UK to remedy these measures we will have no choice but to step up these legal proceedings”.²¹ Mr Šefčovič said however, that legal steps over the protocol were not the EU’s preferred option and that the three-month extension for free movement of chilled meats into Northern Ireland showed its willingness to find pragmatic solutions.

¹⁹ [‘Brexit protocol has damaged relationships with Britain and Ireland, says new DUP leader’](#), Irish Examiner, 4 July 2021

²⁰ [‘Irish taoiseach urges No 10 to match EU generosity over NI protocol’](#), The Guardian, 3 July 2021.

²¹ [‘EU will step up legal action if UK does not adhere to NI obligations – Šefcovic’](#), Irish Times, 6 July 2021.

5 New UK Command Paper, reaction and EU halts legal action against UK

5.1 UK Government publishes Command Paper

On 21 July 2021, the UK Government published a Command Paper, '[Northern Ireland Protocol: the way forward](#)'. The paper in part reiterated the concerns the Government had been expressing for some time urging the EU to show more "flexibility" and "creativity", and repeated some of the proposals discussed in the previous Section. But the paper also proposed some significant new changes to the Protocol, particularly around governance, as well as hardening the Government's messaging on issues such as Article 16, and requesting new flexibilities in areas such as VAT.

The Prime Minister, Boris Johnson said in a foreword to the Paper that the proposals were "necessarily ambitious".

Lord Frost in his foreword said so far the Protocol "has only partially delivered upon its objectives" stating further that:

The border between Ireland and Northern Ireland has been successfully maintained without infrastructure or checks, and the EU Single Market has been protected. However the Protocol has not delivered on some of its other core objectives, notably the explicit commitments to protect Northern Ireland's place in the UK internal market and to avoid disruption to everyday lives.

In the paper the Government describes its commitment to the Belfast (Good Friday) Agreement as "unshakeable".

Main points

Volume of checks and disruption caused

In the Paper the Government argues that the Withdrawal Agreement and TCA it agreed with the EU "could not be informed by the as yet unknown real impacts on the ground or the lived experience of administering the underpinning systems", and that these have caused "very significant negative consequences in practice".

It cites examples of the new administrative burdens in NI, saying authorities in Northern Ireland have conducted more than 40,000 documentary checks and 3,000 physical checks on agri-food goods arriving in Northern Ireland, and

that decisions are being made on more than 300 entry documents for products of animal origin every day.

The Northern Ireland Executive has estimated that from January to March this year, “the volume of checks represented approximately 20% of the EU total, and more than any single EU Member State – despite Northern Ireland’s population of 1.8 million people being 0.5% of that of the EU as a whole”.²²

It states further that:

At least 200 companies in Great Britain have stopped servicing the Northern Ireland market; plants and trees long-sourced from Great Britain can no longer be stocked in nurseries or garden centres in Northern Ireland; supermarkets have reduced their product lines due to the delays and barriers in moving goods; and the costs of deliveries for those who do serve the market have continued to increase.

The Government warns that with the ending of the various grace periods burdens on businesses will grow not lessen over time.

Article 16

For the first time the Government explicitly states that the threshold for using the safeguarding measures has been reached, saying in the Paper it is “clear that the circumstances exist to justify using Article 16”.

It cites as evidence among other things:

- “significant disruption to longstanding trade flows between Great Britain and Northern Ireland, and a significant, measurable increase in trade on the island of Ireland”.
- “perceptions of separation and threat to identity within the unionist community which, in the context of Northern Ireland, constitute a particularly serious and pressing societal difficulty”
- “political and community instability (with changes of First Minister and the leadership of both main unionist parties)”.
- “instances of disorder at Easter across Northern Ireland, with the Protocol cited as one of the significant contributing factors” and in May, the Police Service of Northern Ireland “noted that of 35 unlawful parades or protests being investigated, 30 related to action against the Protocol”.

The Government acknowledges the limits of actions that can be taken under Article 16, saying:

²² It is not clear if this is a proportion of checks on goods coming from third countries into EU Member States, or for intra-EU trade. The Paper does not reference how these figures were calculated.

They are limited to the specific difficulties faced, are subject to the uncertainty of an as yet untested dispute settlement process, and would be temporary (though could nevertheless persist, provided they remained strictly necessary to remedy the situation).

The suggestion that the temporary measures “could nevertheless persist” indicates the Government believes they could justify using such measures over the longer term.

The Government, however, says because of these limitations it will not trigger Article 16 yet, but reserves the right to use it later:

For the time being it is not appropriate to exercise its rights under Article 16. Nevertheless, such action remains on the table as a possibility for the future if circumstances justify it.

Governance and role of CJEU

The Government calls for new institutional arrangements, making the EU and UK into a “partnership of equals”, and in particular removing the jurisdiction of the CJEU from the Protocol.

It calls the role of the CJEU “highly unusual”, notes the UK refused to accept the Court’s jurisdiction over the TCA, and says it only agreed to it in the Protocol “because of the very specific circumstances of that negotiation”. It calls for a dispute resolution process like the TCA, but suggests that “enhanced consultative processes” might be required.

Customs procedures

The Government proposes lighter touch customs procedures for GB to NI goods, using the “at risk goods” concept used for tariffs, to differentiate trade based on its destination.²³ Goods that were destined for Northern Ireland would not require customs processes, while those moving to Ireland would have full customs formalities which the UK would enforce. Assurance would come from a requirement for all traders to “register in a light-touch scheme”, and “controls or checks on a risk-based and intelligence-led basis”.

Using the “at risk goods” concept to simplify customs procedures has been advocated by trade experts such as Sam Lowe of the Centre for European Reform.²⁴

One of the flexibilities the Joint Committee agreed to in December 2020 was that goods moving from NI to GB would not have to provide export declarations. In their place the UK said it would collect equivalent data from companies instead, using sources such as shipping manifests. In the Paper

²³ For more information on the “at risk goods” concept see Commons Library CBP: ‘[Joint Committee decisions on the Northern Ireland Protocol](#)’, Section 3.3.

²⁴ Northern Ireland Affairs Committee, [Oral evidence: Brexit and the Northern Ireland Protocol](#), HC 767 24 February 2021, Q531.

the Government says this system is not operable "without putting in place burdensome new requirements to collect further information". They suggest eliminating these requirements "except in the narrow cases of specifically controlled goods".²⁵

SPS checks

The Government wants to reduce SPS checks on agri-food by also using the "at risk" concept. It acknowledges live animals are more risky and would require a "specific approach", it advocates that using the pre-Brexit procedures where all movements of animals are pre-notified, accompanied by health documentation and subject to 100% checks

The Government acknowledges that an "appropriately designed" SPS/Veterinary agreement could help provide the EU with assurance to operate this lighter-touch regime, but this would be an agreement along the lines of what it has proposed before, so no alignment with EU SPS rules (see Section 6.1 for further details of UK proposals for SPS/Veterinary agreements).

Medicines

The Paper stated that the current arrangements are "creating considerable challenges with medicine supply to patients in Northern Ireland being put at risk for a number of products from the end of 2021" (when the grace period ends). While acknowledging the solution [proposed by the EU in June](#) "was a welcome start", it said it would be:

[P]otentially complex to operate because of its need to work within the broader EU framework for regulating medicines; and furthermore it would not satisfactorily deal with certain medicines (such as new cancer drugs) which must be licensed by the European Medicines Agency.

The Government conclude, therefore, "given the range and depth of these challenges, the simplest way forward may be to remove all medicines from the scope of the Protocol entirely".

Regulation of goods and placing them on the market

Under the Protocol, NI follows EU rules for placing goods on the market. The Government says the current arrangements have already caused difficulties for businesses trying to put goods from Great Britain onto the NI market.²⁶

²⁵ The Government says "this involves no risk to the EU since any goods moving to the rest of the UK will either be consumed there or be subject to further processes if later re-exported". Para 57.

²⁶ The Government adds that these difficulties "will be exacerbated further" once the UK moves fully onto its new UKCA product safety regime, with "significant risks that many businesses in Great Britain simply give up trying to produce goods for the Northern Ireland market". However, in August 2021, the Government announced the UKCA scheme that was due to be in place by the end of the year will be delayed until January 2023 ([UK manufacturers win big concession on post-Brexit quality mark](#), Financial Times, 24 August 2021).

Instead, the Government wants a "full dual regulatory regime in Northern Ireland" for labelling and placing goods on the market. This would mean goods, whether manufactured or SPS goods, "should be able to circulate within Northern Ireland if they meet either UK or EU rules, as determined by UK or EU regulators, and should be labelled accordingly".

While the Government believes the risk of EU goods moving onto the GB market is "manageable and acceptable", it acknowledges the EU may wish for more reassurance and suggests "stronger arrangements for enforcement":

[I]ncluding clearer rules for product labelling, extensive reciprocal data-sharing arrangements with the EU and Ireland, enhanced forums for cooperating on market surveillance and calibrating it to specific levels of risk, and awareness work with traders. Once again we are also ready to put in place legislation to provide for penalties for UK traders seeking to place non-compliant goods on the EU market.²⁷

VAT

On VAT the Government mentions specific issues it says the Protocol is causing such as the application of the margin-scheme for second-hand cars. But it says these issues "may multiply" as the GB and NI regimes diverge, so it wants a "more flexible settlement", with "greater freedom to set VAT and excise rates and structures in Northern Ireland". At present the Protocol has NI following the EU's VAT legislation, and so such flexibilities would require re-writing that part of the Protocol (Article 8).

State Aid

On State Aid, the Government wants to scrap the current arrangements under Article 10 of the Protocol. Article 10 states that EU state aid law shall apply to the UK "in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol".²⁸ This means that state aid rules would not apply solely to business activity in NI but could be applied to aid given to businesses in Great Britain (when that aid can affect NI trade). The Government is particularly concerned by this aspect of the Protocol.²⁹

²⁷ Para 62.

²⁸ This only applies to trade in goods, not services. For further details of see Section 4.6 of Library CBP '[Joint Committee decisions on the Northern Ireland Protocol](#)'.

²⁹ The EU issued a [unilateral declaration](#) in December 2020, clarifying that "effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland". However, the UK Government believes this is not sufficient. For more details see Section 4.6 of Commons Library CBP '[Joint Committee decisions on the Northern Ireland Protocol](#)', 23 December 2020.

It says that the “comprehensive and robust commitments” under the TCA, and the UK [Subsidy Control Bill](#) currently going through Parliament, mean that the Article 10 system is no longer necessary.

The Government acknowledges that since NI “would continue to have some privileged access to the Single Market”, it would be prepared to establish “enhanced processes” for any subsidies on a “significant scale relating directly to Northern Ireland”. To address EU concerns there could be “enhanced referral powers or consultation procedures for subsidies within scope”.

Greater input from NI political institutions and civil society

The Government proposes “more robust arrangements” for consultation with Northern Ireland’s democratic institutions and society/businesses on EU laws applying to NI, while also keeping the consent mechanism in place. It provides no details on how this could work.

UK asks for halt to legal action and for a “standstill” on grace periods

To provide “space” for discussions on its proposals in the Command Paper, and to “provide certainty and stability” for business in NI, the UK asked the EU to agree “a ‘standstill’ on existing arrangements, including the operation of grace periods in force, and a freeze on existing legal actions and processes”.

5.2

EU reaction

Statement from Maroš Šefčovič

On 21 July 2021, the day the UK Command Paper was published, Maroš Šefčovič released a [statement](#). Mr Šefčovič said that the Protocol “must be implemented”, and doing that was the only way to achieve the objectives of the Protocol which were to “protect the Good Friday (Belfast) Agreement in all its parts, maintain peace and stability in Northern Ireland, avoid a hard border on the island of Ireland, while preserving the integrity of the EU Single Market”.³⁰

His statement asserted that the EU “has sought flexible, practical solutions to overcome the difficulties citizens in Northern Ireland are experiencing regarding the implementation of the Protocol”, pointing to the package of measures it set out in its statement of 30 June as an example of this approach.

He added that:

³⁰ European Commission, ‘[Statement by Vice-President Maroš Šefčovič following today's announcement by the UK government regarding the Protocol on Ireland / Northern Ireland](#)’, 21 July 2021.

We will continue to engage with the UK, also on the suggestions made today. We are ready to continue to seek creative solutions, within the framework of the Protocol, in the interest of all communities in Northern Ireland. **However, we will not agree to a renegotiation of the Protocol.**³¹

Statement from MEPs

On 22 July, the European Parliament’s UK Contact Group set out its own statement reiterating its “unwavering commitment to the full implementation of the Protocol”, and supporting Šefčovič’s assertion that that the EU will not agree to a renegotiation of the Protocol.³² The Group urged the UK Government:

To show flexibility and pragmatism, as the European Union has done so far, and to continue working with the EU side to find workable and practical solutions for people and businesses on the island of Ireland within the current legal framework.³³

EU halts infringement legal proceedings

On 27 July the EU said that it would halt legal proceedings against the UK for breaching the Protocol, a Commission spokesperson said: “In order to provide the necessary space to reflect on these issues and find durable solutions to the implementation of the Protocol, we have decided, at this stage, not to move to the next stage of the infringement procedure”.³⁴

Šefčovič delivers speech in Belfast

On 10 September Maroš Šefčovič delivered [a speech](#) at Queen’s University in Belfast. The speech came during a two-day visit by the Commission Vice President, during which he met the Speaker of the NI Assembly, party leaders, First Minister Paul Givan, and junior Minister Declan Kearney. He also met with business leaders and civil society.

In his speech Mr Šefčovič said that he and his colleagues have been “going through our rules with a fine tooth comb to respond to outstanding problems with creative and solid new solutions”, but that the “spirit of compromise needs to be a mutual one.”³⁵

He emphasised that while he was aware of Unionist unease about the Protocol, it was the solution not the problem:

³¹ Ibid.

³² European Parliament Liaison Office in the UK, ‘[Brexit: MEPs push back against UK attempts to overhaul the NI Protocol](#)’, 22 July 2021.

³³ Ibid.

³⁴ ‘[EU halts legal action against UK over Northern Ireland Protocol breaches](#)’, Euronews, 27 July 2021.

³⁵ European Commission, ‘[Speech by Vice-President Maroš Šefčovič at the Queen's University, Belfast](#)’, 10 September 2021.

I will not mince my words. The Protocol is not the problem. On the contrary, it is the only solution we have. Failing to apply it will not make problems disappear, but simply take away the tools to solve them.

I am, of course, acutely aware of how some in Northern Ireland feel about the Protocol, in particular in the Unionist community.

That is why my team and I have been actively engaging with political representatives, stakeholders, civil society and people in Northern Ireland from all communities since the beginning.³⁶

Mr Šefčovič said he had to be “honest” and while the EU would continue to look for “solutions to minimise the effects of Brexit on your everyday lives, we will never be able to remove them entirely – such are the consequences of Brexit and of the choices of the UK Government”.

Addressing the UK Government’s demand to remove the CJEU’s jurisdiction over the Protocol he said:

I believe that our focus should be on those issues that matter the most to the people of Northern Ireland, and not on requests, such as removing the role of the European Court of Justice.

Doing this would effectively mean cutting Northern Ireland off the EU's Single Market and related opportunities.³⁷

5.3 Reaction from NI politicians and businesses

Democratic Unionist Party (DUP)

On 9 September, the DUP leader Sir Jeffrey Donaldson laid out the DUP's stance on the Protocol, in [a speech](#).

Sir Jeffrey said the problems of the Protocol “are not simply unionist issues, but affect the lives and livelihoods of everyone in Northern Ireland”.³⁸

While the Command Paper was a “step in the right direction, in the absence of actual progress, we cannot remain in this political limbo”. Sir Jeffrey also said the extension of the grace periods was not sufficient and a long-term solution was required.

³⁶ Ibid.

³⁷ European Commission, ‘[Speech by Vice-President Maroš Šefčovič at the Queen's University, Belfast](#)’, 10 September 2021.

³⁸ ‘[IN FULL: DUP leader Sir Jeffrey Donaldson’s keynote speech on the NI Protocol](#)’, The Newsletter, 9 September 2021.

While he agreed with the UK Government that “conditions already exist to trigger Article 16”, he supported their action in trying to negotiate a solution with the EU first.

However, he made clear that his party will take action to stop the Protocol from working, saying DUP Ministers will block additional checks at NI ports, “regardless of what the position of the UK Government or of the EU [is], in the future”. He added “if the choice is ultimately between remaining in office or implementing the protocol in its present form, then the only option for any unionist Minister would be to cease to hold such office.”

Sir Jeffrey also said when the Northern Ireland Assembly is asked to pass new legislation to ensure it stays in alignment with relevant EU Single Market laws under the Protocol, it will be “the policy of the DUP to seek to frustrate and prevent such alignment”.

He said it would be clear “within weeks” if there was a basis for the assembly and executive to continue, or if an election was needed. This was [interpreted as a threat to collapse the Executive](#) should action on the Protocol not be taken soon.

Sinn Féin

Junior Minister and Sinn Féin Brexit Spokesperson, Declan Kearney, said after the Paper was published that the British government must not be allowed to “renege on international law” and must implement the protocol.

“It is not acceptable for the Tories to adopt an a la carte approach towards the protocol, to rewrite history, and now attempt a renegotiation,” he said. “If the protocol is to achieve its goals, then it needs to be implemented fully, not hollowed out by the British government,” added Mr Kearney.³⁹

Mr Kearney, during the visit of Maroš Šefčovič to NI in September, said he welcomed the Vice-President’s commitment to resolving outstanding issues, and his support for an inter-parliamentary group between the European Parliament and the NI Assembly. He said that the Protocol “provides unprecedented access to both the EU and British markets, and offers our economy and businesses a very unique opportunity to attract new foreign investment and support existing jobs”. He added “there is no credible alternative to the Protocol. It is not going to be renegotiated”.⁴⁰

Deputy First Minister Michelle O’Neill described the DUP’s suggestion they may withdraw their ministers from the Executive if the UK takes no action over the Protocol as “reckless” and “irresponsible”.⁴¹

³⁹ [‘London protocol move a ‘significant step in right direction’](#) – Jeffrey Donaldson’, Irish Times. 21 July 2021.

⁴⁰ Sinn Féin, [‘European Commission Vice President’s positive engagement in North is welcome – Kearney’](#). 10 September 2021, accessed 4 October 2021.

⁴¹ [‘DUP threat to withdraw ministers from Executive ‘reckless’ – Michelle O’Neill’](#), Evening Standard, 20 September 2021.

Ulster Unionist Party (UUP)

Ulster Unionist Party leader Doug Beattie said that the Paper “provides a potential pathway out of the Protocol mess and unionism should be using its influence within the democratic structures to hold the Government to account for delivering on it”.⁴² While acknowledging his party shared with the DUP a policy of opposing the Protocol, he said “where we absolutely differ is that the UUP will provide pragmatic solutions and engagement”. Mr Beattie said his party did not support Sir Jeffrey Donaldson’s policy of withdrawing Ministers from the Executive.

In early September [the UUP published a paper on alternatives to the current Protocol](#). It states that medicines should be removed from the scope of the Protocol, and proposes a “bespoke SPSs treaty” between the UK and EU, and a “cross-border compliance body Treaty” with the Republic of Ireland to educate manufacturers and hauliers, but also check their compliance with EU rules, on both sides of the border.

Alliance Party

Alliance North Down MP Stephen Farry said the British government statement and command paper on the protocol was “full of bluster and a rewriting of history” and “they will bring even more uncertainty and instability for businesses and the wider community.” Mr Farry added “the government is choosing more wishful thinking and confrontation with the EU rather than taking the most obvious solution available, which is a comprehensive veterinary agreement with the EU.”

Alliance leader Naomi Long [Tweeted](#) after meeting with Mr Šefčovič during his NI visit that she had raised the need for legal certainty around medicines, and the democratic deficit. Ms Long said the idea of a consultative forum between Executive Ministers and the EU “would avoid new problems being created down the line”.

Social Democratic and Labour Party (SDLP)

SDLP leader Colum Eastwood said the Command Paper was the “latest in a car-crash attempt by the British government to distance themselves from an agreement they negotiated, campaigned for and signed up to”.⁴³ “It is a shameless position based on political expedience rather than providing the stability that people, businesses and communities in Northern Ireland need,” he said.

Mr Eastwood added that the British government should take up the proposal for a Swiss-style veterinary agreement working “with all of those around the table”.

⁴² Ulster Unionists, ‘[Statement from UUP Leader Doug Beattie, MC, MLA](#)’, 9 September 2021, accessed 4 October 2021.

⁴³ ‘[London protocol move a ‘significant step in right direction](#)’ – Jeffrey Donaldson’, Irish Times. 21 July 2021.

The SDLP has said as well as solving East-West trading problems a strategy is required to “maximise the investment and broader economic potential offered by the dual market access” under the Protocol.⁴⁴

Joint Statement from Unionist parties at end of September

On 4 October the leaders of the four Northern Ireland Unionist Parties, DUP Leader, Sir Jeffrey Donaldson, Doug Beattie, head of the Ulster Unionist party; Jim Allister, leader of the Traditional Unionist Voice; and Billy Hutchinson, leader of the Progressive Unionist party, released a joint statement:

We, the undersigned Unionist Political Leaders, affirm our opposition to the Northern Ireland Protocol, its mechanisms and structures and reaffirm our unalterable position that the Protocol must be rejected and replaced by arrangements which fully respect Northern Ireland’s position as a constituent and integral part of the United Kingdom.⁴⁵

5.4

Reaction from commentators

Customs and SPS

Dr Anna Jerzewska, customs and trade advisor, [tweeted](#) some observations on the Paper.

She noted that the light-touch customs scheme the Government proposed would be “a big task” that would require “some serious thought on how to design it so it’s not too burdensome for traders but does the job (plus an IT solution)”. Dr Jerzewska added that while “risk and intelligence-based checks are always the right way forward”, they “require there to be a robust risk analysis system in place, based on trade and shipment data”.

She summarised that even if the EU were to agree to the UK’s proposals (despite the fact it had already ruled out similar ones in the past) they would require “a lot of work” and would take “months/years” to put in place.

Professor Michael Gasiorek, and Professor Alan Winters of the UK Trade Policy Observatory (UKTPO), said the Paper was significant in four regards

- Firstly, it explicitly recognises that the Protocol is not working (at least not for the UK) and needs to be modified in form or in implementation. They say “this is almost certainly correct”;
- Secondly, because it “fails to recognise the UK Government’s culpability in signing up to the Protocol in the first place”;

⁴⁴ SDLP, ‘[SDLP sets out plan to maximise inward investment](#)’ accessed 4 October 2021.

⁴⁵ DUP website, ‘[Joint Unionist Declaration in opposition to the Northern Ireland Protocol](#)’, 28 September 2021. Accessed 4 October 2021.

- Thirdly, because it “proffers a previously unheard-of solution, which to our knowledge has never been used to manage international trade, which is to trust firms to report honestly and correctly what they are selling where”. They add “The EU cannot accept this.”
- Fourthly, because of the threat to invoke Article 16, which they label “crude diplomacy” and caution that even if it were invoked “it is not clear what safeguarding or rebalancing measures would be consistent with the Protocol”.⁴⁶

State aid

Several prominent UK subsidy lawyers described the Government’s proposals on State Aid as a “sensible basis for negotiation” and “should be taken seriously by the EU, whatever its views of the Command Paper as a whole”.⁴⁷

CJEU jurisdiction

Dr Oliver Garner, of the Bingham Centre for the Rule of Law, described the UK’s proposals to remove the jurisdiction of the CJEU as “bold”.⁴⁸ He suggested that perhaps the Government “does not recognise how jealously the EU guards its autonomy whenever there is even the possibility that an external court could apply EU law”. This is “particularly acute” in relation to NI, as “specific EU legislation is determined as applying via the Protocol”. He suggested further:

As the Command Paper proposals would still see “the full SPS requirements of EU law” applied if goods were self-declared as moving to Ireland, it seems the best the UK government could hope for would be application of the preliminary reference style procedure to activate the jurisdiction of the CJEU in the main Withdrawal Agreement whenever the interpretation or application of EU law is at stake.

Political dimensions

Professor Katy Hayward of Queen’s University Belfast wrote that “in terms of ambition, this is quite some command paper”.⁴⁹ She says the Paper’s underlying aim is to create a new settlement to replace the Protocol. “But, without putting too fine a point on it, this won’t happen”, she argues saying there are no legal grounds for (re)opening negotiations, or an appetite for ‘Brexit: Round III’ from any member state.

⁴⁶ “[Honesty is such a lonely word...](#)”, UK Trade Policy Observatory (UKTPO), M Gasiorek & A Winters, 22 July 2021.

⁴⁷ George Peretz, James Webber, [The UK’s Proposed Revisions to Article 10 of the Northern Ireland Protocol: a Sensible Basis for Negotiation](#), 2 September 2021

⁴⁸ ‘[The UK Command Paper on the Protocol on Ireland/Northern Ireland: Future Relationship à la carte?](#)’, Brexit Institute, Dublin City University, 29 July 2021.

⁴⁹ [Protocol on Ireland/Northern Ireland and the new command paper](#)”, UK in a Changing Europe, 26 July 2021.

Professor Hayward points to what she sees as an inconsistency, in that the paper notes the intended purpose of the grace periods is to allow businesses ‘to adapt’ to the new arrangements and that such adaptation includes adjustment to avoid barriers to trade, but that:

[B]usiness efficiency in sourcing locally and making use of free access to the Single Market (i.e. across the Irish land border) to lower costs and offer consumers choice is seen here as wholly negative. So much so, in fact, that it is labelled as ‘diversion of trade’ [...] and thus reasonable cause to use Article 16.⁵⁰

She argues that the Government’s references to protests and acts of disorder as evidence of serious “societal difficulties” that could justify the use of Article 16, potentially incentivise Loyalist protestors, and that these groups are [aware of this dynamic](#), and believe further protests will strengthen the Government’s hand to remove the Protocol. She goes onto say:

However sincere the government’s concerns are for stability and the 1998 Agreement, the language it is using about the Protocol is currently encouraging and incentivising those who seek instability and the collapse of the Agreement’s institutions.⁵¹ Professor Hayward adds that “the absence of buy-in from nationalists (and the majority of NI voters) to Brexit similarly brings tensions to heart of the Executive and Assembly – but the UK government never does say this”.⁵²

Dr Graham Gudgin, Chief Economic Adviser at Policy Exchange, states that

Although the paper talks in measured tones of changing aspects of the Protocol, we should be no doubt that what is being proposed is a radically different set of arrangements, much more amenable to unionist opinion in Northern Ireland. A head-on clash between London and Brussels now looks inevitable.⁵³

Dr Gudgin suggests the EU may well still agree to negotiate as “sensible heads in Brussels, Berlin and Paris may decide that this is a clash they probably cannot win”, because “checks have to be operated by the British” and “the new DUP leader says he will not operate the current protocol”.

If the EU “blankly refuses to renegotiate”, he says the UK still has article 16 “in reserve” as an option. “There is little Brussels can do to prevent the UK simply suspending important aspects of the current trade arrangements” he says. This would “constitute a temporary stand-off but could drift into permanence depriving the EU of the necessary protections to their single market”.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ “[David Frost rewrites the NI Protocol](#)”, Briefings for Britain, 24 July 2021.

“Since this would cause the EU few real difficulties” he argues, “it would reinforce the British case that the complex arrangements of the current Protocol are unnecessary”.

5.5

UK extends grace periods indefinitely and further developments

UK proposes indefinite extension of grace periods

On 6 September in a [Written Ministerial Statement](#), Lord Frost said since the EU’s announcement at the end of the July that it would pause its infringement proceedings against the UK, there had been “initial technical talks” between the two sides.

He went on to say to “provide space” for potential further talks and to “give certainty and stability to businesses”, the Government will “continue to operate the Protocol on the current basis”, and “this includes the grace periods and easements currently in force”. Lord Frost said “reasonable notice” will be provided if any of these arrangements were to change.⁵⁴

This appears to make the deadlines for the end of some of the grace periods on 30 September, moot.

UK presses for response; EU indicates this will come soon

On 23 September, [Lord Frost tweeted](#) that

The Protocol is clearly having a continued negative effect on everyday life and business in Northern Ireland. The outstanding issues now need to be dealt with urgently. I and my team are in contact with the EU daily, but we need a full response to our July Command Paper soon.

On 1 October, Simon Coveney, the Irish Foreign Minister, told the Irish broadcaster RTE, ““I think what you can expect now is that in the second half of October, you will see a package of proposals coming from the EU side, in consultation with Lord Frost and his team.”

Asked about “chatter” in Westminster that the UK Government would trigger Article 16 in the coming days, Mr Coveney responded ““I think that's unlikely. I've heard that chatter too, of course. but in terms of what the people who

⁵⁴ [HL Deb](#)

really matter say on this issue, my understanding is that the British government is not likely to trigger Article 16”.⁵⁵

He added:

The idea that in the middle of this - when both sides know this month is going to be a very important month, particularly the second half in terms of trying to come up with compromise solutions to solve the Protocol issues - that the British government would announce the triggering of Article 16, politically that would be a huge mistake.

Specialised Committee meets

The Specialised Committee on the NI Protocol held its ninth meeting on 24 September.

The [UK Government released a statement](#) on the meeting, noting that while “substantive discussions on the future of the Protocol” were not for the Specialised Committee, it recalled the proposals put forward in its Command Paper. The UK updated the Committee on “the basis for operating the Protocol during the ‘standstill’, including the delivery of new IT systems, extensive support for UK businesses, and the completion of a new secure database for customs information sharing.”⁵⁶

The [EU’s statement](#) reiterated its position that it would not renegotiate the Protocol, and that the Protocol was part of an international agreement, the Withdrawal Agreement, that was agreed between the two sides, and both are “legally bound to fulfil their obligations”.⁵⁷

It “recalled the need that all work [on real-time access to relevant databases] should be finalised by the end of the year” and “expressed its concerns regarding the lack of progress on Border Control Posts, as well as the issue of export declarations from Northern Ireland to Great Britain”. The Committee took note of work in the Joint Consultative Working Group, and the Commission gave an update on how information on EU legislation, which falls under the scope of the Protocol, is shared.

⁵⁵ ‘[Johnson unlikely to play Article 16 card just yet](#)’, RTE News, 2 October 2021.

⁵⁶ Prime Minister’s Office, ‘[Statement following the ninth meeting of the Specialised Committee on the implementation of the Protocol on Ireland and Northern Ireland: 24 September 2021](#)’.

⁵⁷ European Commission, ‘[Statement by the European Commission following the ninth meeting of the Specialised Committee on the implementation of the Protocol on Ireland and Northern Ireland](#)’, 24 September 2021.

5.6

Lord Frost's comments at Conservative Party conference

On 5 October, speaking at the Conservative Party conference, Lord Frost said that the Protocol arrangements were "going to come apart even more quickly than we feared", and support for the Protocol had "collapsed" across Northern Ireland.

He added "We still await a formal response from the EU... but from what I hear, I worry that we will not get a response that enables the significant change we need". He urged the EU to "be ambitious", and said "there is no use tinkering around the edges. We need significant change".⁵⁸

On the same day at a conference fringe event, Lord Frost said that he expected to get a response to the UK's proposals within the next two weeks, adding: "We need a short, intensive and good faith talks process to happen quite soon. We need to show we've tried everything."⁵⁹

And at another event, he referred to the negotiations, which, he indicated, could last "three weeks or so".⁶⁰

⁵⁸ [‘Conservative conference: NI protocol coming apart and we must act, says Frost’](#), BBC News, 5 October 2021.

⁵⁹ Ibid.

⁶⁰ Ibid.

6 Proposals for permanent solutions

6.1 Veterinary agreement

A more permanent solution to controls on animals and plants, known as Sanitary and Phytosanitary (SPS) checks, would be for the UK and EU to sign a veterinary agreement.

The EU has several such agreements in place, including one with [Switzerland](#), and another with New Zealand (NZ), both of which have been suggested as models for an solution to meet the needs of Northern Ireland. The EU-Swiss agreement removes all documentary and identity checks, and most physical checks, as well as most veterinary certificates. However, it requires Switzerland to largely align to the EU's food and plant safety and animal health rules.

The EU-NZ agreement is an “equivalence agreement”, in which both sides certify their rules and regulations are equivalent to each other, allowing them to reduce border processes for agri-food. However, veterinary certificates would still be required, and the EU prohibition on chilled meats would also still apply. It could, however, simplify border processes, particularly the frequency of physical inspections.

The European Commission have [published a document](#) showing what import requirements, authorisations and prohibitions for animal products exist under the EU-Swiss agreement, EU-NZ agreement, and for third countries without any such arrangements.

Views on EU-UK veterinary agreement

An EU-UK veterinary agreement has been [advocated](#) by NI Alliance MP Stephen Farry. While the Ulster Unionist Party advocates removing the Protocol entirely, its former leader Steven Aiken said in February 2021 that he [supports](#) a Swiss-style deal. Also in February, former DUP leader and First Minister, Arlene Foster, [acknowledged](#) that such a deal would help with SPS checks, but said it would not help with customs checks and other barriers to trade.

Shanker Singham, trade policy advisor and Brexit advocate, has suggested a New Zealand-style veterinary agreement. He acknowledged that it would not take requirements for checks away, but said “what that would do, and it is really helpful, is lower the intensity of physical checks. For New Zealand-EU,

for example, the physical check is down to 2%. The documentary check is down to 10% or so”.⁶¹

The Ulster Farmers’ Union have also said [they support the principle of UK-EU alignment on agri-food standards](#), as has [Glyn Roberts](#), the Chief Executive of Retail NI. The CBI have [argued for](#) a “bespoke” EU-UK Veterinary agreement.

Asked in the House of Lords, whether the Government would consider an EU-Swiss style veterinary agreement, Lord Frost responded in March 2021:

On the question of a SPS or veterinary agreement, we proposed in the TCA negotiations last year that there could be an equivalence arrangement between us and the EU. Unfortunately, the EU was not open to that. We continue to be open to such an equivalence arrangement, if the EU is interested in it.⁶²

One of the concerns critics of an EU-UK veterinary agreement have raised is that it could make trade deals with other countries such as the US more difficult, as it would create barriers to their agri-food products coming into the UK.

It was [reported](#) in June 2017 that President Biden told the Prime Minister, Boris Johnson, that a temporary UK-EU agreement on food standards would pose no barrier to a separate UK-US trade deal. Asked about these reports when giving evidence to the Northern Ireland Affairs Committee on 16 June, Lord Frost responded:

We have aspirations to agree FTAs with a large number of countries and trading blocs, and obviously the US will be a big and important one, but that does not change the nature of the problem. The fact is that you need control of your own rules to conclude any trade agreements with anybody.⁶³

Lord Frost was asked by the Committee if it was true that the EU had offered the UK a temporary SPS agreement that wouldn’t require the UK to permanently align to its standards. He acknowledged that the EU had offered a temporary agreement, which they said could be “negotiated in a matter of weeks”. He was, however, sceptical that it could be agreed that quickly and the longer-term sustainability of such an approach:

I’ve got to say, on the basis of how long these things take, even with goodwill, given what is at stake here. The timetable is very short. As I said, we have already agreed a deal with Australia, and we have aspirations with New Zealand, the CPTPP and so on, so even if we were willing to contemplate a temporary agreement—we are not—it

⁶¹ Northern Ireland Affairs Committee, [Oral evidence: Brexit and the Northern Ireland protocol](#), HC 676, 21 April 2021, Q968.

⁶² [HL Deb 25 March 2021 \[Northern Ireland and Great Britain: Trade\]](#).

⁶³ Northern Ireland Affairs Committee, [Oral evidence: Brexit and the Northern Ireland Protocol](#), HC 157, Q969.

might be very temporary. Indeed, I could imagine that developments make it irrelevant even before we finish the negotiation.⁶⁴

6.2 Other solutions to trade in goods issues

Raoul Ruparel, Theresa May's special adviser on Europe when she was Prime Minister has [suggested two other longer-term solutions](#).

Firstly, a UK-wide "novel SPS agreement based on managing divergence" to try and limit the need for any checks or certification.

The concept of managing divergence has been used on the parts of the EU-UK Trade and Cooperation Agreement (TCA), that relate to labour and social employment law, subsidy policy and climate and environment policy, often called the "level playing field". Under a system of "[rebalancing measures](#)" if one side raises its standards and the other does not, the former can take reciprocal action. These rebalancing measures could include temporary suspension of parts of the Agreement (which could involve imposition of tariffs). There is possible recourse to an arbitration tribunal where such measures are taken.

Secondly, a Northern-Ireland specific scheme, that would use the concept of "at risk goods", used in the Protocol to decide whether to apply tariffs on goods moving from GB to NI. Agri-food goods deemed "not at risk" of moving on from Northern Ireland to the EU's single market would be exempt from the EU's agri-food requirements. Mr Ruparel acknowledges that this approach would "require some derogation from EU law", meaning that EU institutions and all EU Member States would have to agree to pass new EU law.⁶⁵ He also advocates setting up "extensive monitoring and data sharing", to "bolster confidence in such a plan".⁶⁶

This second solution is also known as a "trusted trader scheme". As with the "at risk goods" solution to tariffs, only certain trusted traders registered with the UK Government can access the scheme. Food groups such as the British Retail Consortium and the Federation of Wholesale Distributors are [said to be](#) pressing for such a scheme. However, Peter Hardwick, trade policy advisor at the British Meat Processors Association, [said such a scheme](#) "wouldn't work" and argues those advocating such a scheme "don't quite get where the Commission is coming from with this", adding "it doesn't matter how trusted the traders are, once it's in Northern Ireland you can't prevent its movement across the EU".⁶⁷

⁶⁴ Ibid. 968.

⁶⁵ '[How to fix Brexit's Northern Ireland protocol problem](#)', Politico, 26 March 2021.

⁶⁶ Ibid.

⁶⁷ '[What could a fully loaded trusted trader scheme look like for Northern Ireland?](#)', The Grocer, 18 June 2021.

6.3

Governance and greater involvement of NI politicians & communities

Calls from commentators

Academics Professors Katy Hayward and David Phinnemore have advocated involving the democratic institutions and the people of Northern Ireland more directly in the workings of the Protocol, saying “doing so should improve their perceived legitimacy”.⁶⁸

They say there is an “urgent need to shift perceptions of the protocol”, and “Put simply, it needs to move from being seen as something that has been imposed “on” Northern Ireland to being something clearly developed and implemented “with” Northern Ireland”.

They propose six actions that could help improve the acceptance of the Protocol among Northern Ireland voters:

- More information about what the protocol actually entails and means for Northern Ireland, particularly in the context of the overall EU-UK relationship. This should be “easily accessible, reliable and regularly updated”.
- Greater transparency around the activities of the Joint Committee, the Specialised Committee and the Joint Consultative Working Group (JCWG). Their meetings should be regularised and publicised, and agenda and minutes should be published.
- Informal consultation mechanisms, such as meetings between Joint Committee co-chairs Maroš Šefcovic and David Frost, with NI businesses and civil society, as well as the Northern Ireland Assembly’s Committee for the Executive Office, should be placed on a formal footing.
- The UK and EU should consider allowing officials or experts from Northern Ireland to attend meetings of relevant EU committees, Commission expert groups and EU agencies where the discussion concerns EU law covered by the protocol.
- Expert panels should be established to inform the deliberations of the JCWG. The panels should reflect the range of issues covered by implementation of the protocol.
- Developing formal mechanisms that involve the institutions established by the 1998 Belfast Agreement in monitoring and contributing to the operation of the protocol. The UK and EU should consider additional

⁶⁸ [‘Northern Ireland’s voice on the protocol needs to be heard’](#), Irish Times, 5 September 2021.

consultation and information mechanisms for the Northern Ireland Assembly, the Northern Ireland Executive, the British-Irish Council and the British-Irish Intergovernmental Conference.

Jess Sargeant of the Institute for Government, [supported these initiatives](#), saying in order to make the Protocol work better, “the UK and the EU must find ways to ensure that Northern Ireland voices, and not just politicians, are central to the discussion”.⁶⁹

House of Lords committee report

The House of Lords European Affairs Committee Sub-Committee on the Protocol on Ireland/Northern Ireland, published [a report on the Protocol](#) in July 2021, that looked at the involvement of NI civil society and political institutions.

Addressing protests and dissatisfaction in parts of the Unionist community, the Committee states that this dissatisfaction is:

[E]xacerbated by the pervasive sense that the Protocol creates a democratic deficit, in that significant aspects of EU law with wide-ranging political and economic implications apply to Northern Ireland subject neither to UK Government participation in the EU institutions, nor to consent from parliamentarians either at Westminster or Stormont.⁷⁰

They recommend, therefore, that “given the implications of the Protocol for people in Northern Ireland”, both the UK Government and the EU:

[M]ust develop and expand formal mechanisms for long-term engagement with all sectors of Northern Ireland civic society. As part of this, there should be a particular effort to engage those who have so far felt side-lined in discussions of Brexit and the Protocol, including young people and women.⁷¹

⁶⁹ Institute for Government, ‘[How the EU and the UK can use extra time to make Northern Ireland protocol work](#)’, 9 September 2021.

⁷⁰ House of Lords, European Affairs Committee, 2nd Report of Session 2021-22, Sub-Committee on the Protocol on Ireland/Northern Ireland: ‘[Introductory report](#)’, 29 July 2021, para 204.

⁷¹ Ibid para 206.

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