



## Northern Ireland Protocol: House of Lords committee reports and recent developments

### Debate on 13 September 2021

Author: Nicola Newson

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Under the terms of the Protocol on Ireland/Northern Ireland agreed between the EU and the UK as part of the Withdrawal Agreement, Northern Ireland has a unique status. It is part of the UK's customs territory but is subject to the EU's customs code, VAT rules and single market rules for goods, including sanitary and phytosanitary (SPS) rules to protect animal, plant and public health. The EU and the UK have disagreed over how to implement some of these rules, particularly for goods moving from Great Britain to Northern Ireland. Discussions between the two sides have been ongoing.

In July 2021, the UK Government published proposals for a “new balance” in the protocol. The EU has said it will continue to engage with the UK on practical solutions for implementing the protocol but that it will not renegotiate the protocol. Various grace periods that have allowed for delays in fully implementing aspects of the protocol are due to expire this autumn.

On 13 September 2021, the House of Lords is due to debate two committee reports about the Protocol on Ireland/Northern Ireland. The first report, from the European Union Committee, was published in June 2020, before the protocol came into operation. The second, from the newly appointed European Affairs Committee and its sub-committee on the protocol, was published in July 2021, assessing the protocol's impact in its first few months of operation.

This briefing summarises the committee reports and recent developments since the publication of the second report.

#### 1. European Union Committee report: June 2020

The House of Lords European Union Committee published its report on *The Protocol on Ireland/Northern Ireland* in June 2020.<sup>1</sup> At this point, the UK was still in the transition period, the protocol was not yet operational, and negotiations about the future relationship with the EU were ongoing.

The committee's report provided a guide to the protocol, analysing each of its articles in turn. The committee focused in particular on what it identified as the “apparent contradiction” at the heart of the protocol: on the one hand, Northern Ireland's place in the UK's customs territory and “unfettered market access” for goods moving from Northern Ireland to Great Britain, and on the other hand, the requirement for EU customs legislation to apply in its entirety to Northern Ireland.

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<sup>1</sup> House of Lords European Union Committee, [The Protocol on Ireland/Northern Ireland](#), 1 June 2020, HL Paper 66 of session 2019–21.

The committee had some criticisms of the approach of both the UK Government and the EU towards implementing the protocol. It said the Government had failed adequately to explain how new customs and regulatory processes would be undertaken. It said the Government had made “a series of seemingly contradictory statements, amounting to an inability to confirm and explain precisely what it had agreed with the EU”. For its part, the EU was insisting “‘the rules are the rules’, without indicating any flexibility over the interpretation or application of those rules”.

The committee urged both sides, and the Irish Government and political parties in Northern Ireland, “to work in a common endeavour to prioritise and urgently address the interests, stability and property of the people and communities in Northern Ireland”.

The Government’s response was published in August 2020.<sup>2</sup> The Government set out what it was doing in relation to the detailed recommendations the committee had made about actions needed to implement the protocol. It did not respond directly to the committee’s overarching points about the “apparent contradiction” at the heart of the protocol, or the two sides’ approaches.

## **2. Protocol on Northern Ireland/Ireland Sub-Committee report: July 2021**

The House of Lords established a new European Affairs Committee and a new Sub-Committee on the Protocol on Northern Ireland/Ireland Sub-Committee in April 2021.<sup>3</sup> The committee published its *Introductory Report* on 29 July 2021, setting out the sub-committee’s assessment of the impact of the protocol since it came into operation at the start of the year.<sup>4</sup>

Looking at the economic impact of the protocol, the sub-committee found “there has been significant disruption to trade between Great Britain and Northern Ireland”. In its assessment, the protocol’s initial impact on the availability of some goods in Northern Ireland at the start of 2021 was more limited than some media reports had suggested. However, the sub-committee argued that businesses were “significantly hindered” in preparing to implement the protocol because of the “lack of clarity” and “late provision of guidance” by the Government. The sub-committee identified the administrative business costs of complying with the protocol as having had the biggest impact on business. It argued that the supplementary customs declarations required for moving goods from Great Britain to Northern Ireland seem “wholly unsuited” to regional supply chains “where the risk of goods moving into the EU single market is low”. It noted “widespread fears that businesses in Great Britain will withdraw from the Northern Ireland market”, and that the impact on businesses and consumers could worsen when the grace periods currently in place expire and “the full economic impact of the protocol is felt”.

On the positive side, the sub-committee concluded there are “potential economic benefits under the protocol” given Northern Ireland’s unique access to both the EU single market and UK internal market. It identified “early signs of a growth in North-South trade, and evidence that Northern Ireland businesses are stepping into the gap left by suppliers in Great Britain who have vacated the

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<sup>2</sup> HM Government, [Government Response to the House of Lords European Union Select Committee’s Ninth Report of Session 2019–21—‘The Protocol on Ireland/Northern Ireland’](#), August 2020.

<sup>3</sup> UK Parliament, [‘New European Affairs Committee and Sub-Committee on the Protocol on Ireland/Northern Ireland established’](#), 20 April 2021.

<sup>4</sup> House of Lords European Affairs Committee, [Introductory Report](#), 29 July 2021, HL Paper 55 of session 2021–22.

market in Ireland”. It also suggested Northern Ireland stands to benefit from foreign direct investment from firms wishing to sell into the UK and EU markets. However, the sub-committee cautioned that such economic benefits from the protocol “will only manifest themselves in the long-term, and on the basics of political and economic stability”.

The sub-committee also considered the political and social impact of the protocol. It found that while continued political instability and community unrest in Northern Ireland, including episodes of violence in March and April 2021, had “many deep-seated causes”, Brexit and the protocol “have once again brought borders and questions of identity to the fore”. It said unionists and loyalists “object to the protocol being imposed without their consent”, while at the same time, “nationalists and republicans point out that Brexit was imposed on Northern Ireland against the wishes of its people”. The sub-committee concluded there was “no doubt that Brexit and the protocol have had a destabilising effect on Northern Ireland and on community relations”. The report also pointed to a “democratic deficit” in the protocol’s arrangements, “whereby significant aspects of EU law apply to Northern Ireland without its prior consent”.

Like the previous European Union Committee report, this report was critical of the approach of both the UK and the EU. It identified a “lack of clarity, transparency and readiness” on the part of the UK. It reproached the Government for “not mak[ing] adequately clear to the people of Northern Ireland what the protocol would mean in practice” and “an apparent reluctance to accept its obligations under the protocol, and indeed the consequences of its own policy choices”. It accused the EU of a “lack of balance, understanding and flexibility”, finding that its “rigid focus on the protocol as a tool to protect the integrity of the single market has failed to [take] account of its impact on the sense of identity of unionists and loyalists”. The sub-committee found the two sides’ approaches were “exacerbated by a corrosive and mutual lack of trust”. It said this hindered the ability to find solutions, and risked making Northern Ireland “a casualty of the post-Brexit serious deterioration in relations between the UK and the EU” if urgent steps were not taken to restore trust.

The sub-committee noted that many practical solutions in specific areas had been put forward by witnesses and in UK-EU Joint Committee discussions. Commenting on proposals for replacing the protocol, the committee noted that every idea put forward so far presented challenges. It concluded that both the EU and the UK had a “continuing obligation to consider alternatives to the protocol”, and an “equal obligation on all sides to find resolutions within the protocol”. In the sub-committee’s view, technical solutions to “ease some of the burden of the protocol’s practical operation” could be found if there was goodwill and flexibility on all sides. It said that “addressing the issues of conflicting identity” highlighted by Brexit and the protocol “seems for the moment an insoluble problem” but pointed out that had also been true of the political situation in Northern Ireland during the Troubles, until the “slow and painstaking” peace process “took root and flourished”. The sub-committee concluded that similar “time, patience, dialogue and most of all trust” applied to addressing the problems that Brexit and the protocol presented for Northern Ireland. It therefore concluded there was “an urgent imperative for all sides to make concerted efforts to build trust” in the interest of communities in both Ireland and Northern Ireland.

### 3. Recent developments

#### 3.1 Ongoing EU-UK discussions over implementing the protocol

Since the text of the protocol was agreed in October 2019, there have been disagreements between the EU and the UK over how to implement aspects of it, particularly for goods moving from Great Britain to Northern Ireland. The European Affairs Committee report set out the state of play on the implementation of the protocol at the time of writing. Chapter 2 provides a narrative of key developments, including:

- December 2020: Agreement reached in the Joint Committee (the UK-EU body that oversees the Withdrawal Agreement and the protocol) allowing for grace periods before full implementation of the protocol's arrangements on testing and selling human and veterinary medicines in Northern Ireland, transporting certain meat products from Great Britain to Northern Ireland, and on certification requirements for supermarkets and trusted suppliers moving agrifood products from Great Britain to Northern Ireland.<sup>5</sup>
- January 2021: Short-lived announcement by the European Commission of its intention to invoke article 16 of the protocol to protect coronavirus vaccine supplies within the EU.<sup>6</sup>
- March 2021: Unilateral announcement by the UK that it was extending the grace period for certification requirements for agrifood products, delaying the introduction of customs declaration forms for most parcels travelling from Great Britain to Northern Ireland, and allowing products grown in Great British soil to be moved to Northern Ireland (prohibited under EU rules).<sup>7</sup> Announcement by the EU in response that it was launching legal proceedings against the UK for "breaching the substantive provisions" of the protocol, "as well as the good faith obligation under the Withdrawal Agreement".<sup>8</sup>
- June 2021: Meeting of the Joint Committee, following which the UK acknowledged there had been "some progress towards solutions on [...] limited areas", but a lack of "substantive progress [...] in many areas".<sup>9</sup> The European Commission said it remained "open to exploring technical solutions provided that the UK Government commits to the full implementation of the protocol".<sup>10</sup> Later in June 2021, the EU agreed to a UK request to extend the grace period on the transport of chilled meats from Great Britain to Northern Ireland from the end of June until the end of September 2021.<sup>11</sup>

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<sup>5</sup> For further details, see: House of Commons Library, [Joint Committee Decisions on the Northern Ireland Protocol](#), 23 December 2020.

<sup>6</sup> For further details, see: House of Commons Library, [Northern Ireland Protocol: Article 16 and EU vaccine export controls](#), 2 February 2021.

<sup>7</sup> For further details, see: House of Lords Library, [Queen's Speech 2021: UK-EU relationship](#), 4 May 2021, section on 'Implementing the Northern Ireland Protocol'.

<sup>8</sup> European Commission, [Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland](#), 15 March 2021.

<sup>9</sup> Cabinet Office, [UK statement on the meeting of the Withdrawal Agreement Joint Committee: 9 June 2021](#), 9 June 2021.

<sup>10</sup> European Commission, [Statement by the European Commission following the eighth meeting of the EU-UK Withdrawal Agreement Joint Committee](#), 9 June 2021.

<sup>11</sup> Cabinet Office, [Declaration by the United Kingdom on meat products](#), 30 June 2021.

### 3.2 Government command paper: a “new balance”

Since then, there have been further developments. On 21 July 2021, the Government published a command paper setting out its proposed approach to the protocol going forward.<sup>12</sup> This is not covered in the committee report, but the committee intends to set out its analysis of the command paper and the EU’s response in the autumn.

In the command paper, the Government set out its case for a “new balance” in the protocol. In the introduction, Lord Frost, Minister of State at the Cabinet Office, and Brandon Lewis, Secretary of State for Northern Ireland, argued that the protocol has “only partially delivered upon its objectives”:

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 commitment to protect Northern Ireland’s place in the UK internal market and to avoid disruption to everyday lives.

In particular, although most of the trade covered by the protocol remains within the UK customs territory and internal market, under its terms each and every movement is subject to the same extensive processes that are designed to manage third country trade into the EU. That is leading to disruption to supply chains, increased costs, and reduced choice for consumers, and unnecessary boundaries that risk causing wholesale diversion of trade or economic damage in Northern Ireland.

As a result, a situation has emerged that all sides find unsatisfactory.

The paper argued that the Government has made “unprecedented” efforts to implement the protocol, and has had some “constructive engagement” with the EU since January 2021 to resolve the economic, political and social challenges being felt in Northern Ireland. However, it said that “overall, the discussions we have had so far have not got to the heart of the problem”.

The Government suggested in the command paper that one way forward would be to invoke the safeguard mechanism set out in article 16 of the protocol. Article 16 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 unilaterally impose “appropriate safeguard measures”. The Government maintained it was “clear that the circumstances exist to justify using article 16”, given “significant disruption to longstanding trade flows between Great Britain and Northern Ireland”, “exacerbated [...] perceptions of separation and threat to identity within the unionist community”, societal and economic impacts of the protocol on consumers and businesses, and political and community instability.

However, the Government said it had concluded “that for the time being it is not appropriate” to exercise the UK’s rights under article 16, because of the limitations imposed on the actions that can be taken under the safeguard mechanism. Article 16 states that safeguard measures “shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy

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<sup>12</sup> HM Government, [Northern Ireland Protocol: The Way Forward](#), 21 July 2021, CP 502.

the situation”. The Government noted that any unilateral measures under article 16 would be temporary and “subject to the uncertainty of an as yet untested dispute settlement process”. However, the Government emphasised that “such action remains on the table as a possibility for the future if circumstances justify it”.

Rather than resorting to article 16, the Government argued urgent talks were needed to “try to find a new balance for the protocol: one that fully respects Northern Ireland’s place in the UK market, while maintaining the integrity of the EU’s own market”. The Government identified three main areas where it said “fundamental concerns” needed to be addressed:

First, they need to look at ways of **removing the burdens on trade in goods within the UK while managing the real risks to the EU single market**. The protocol itself already accepts the principle of different treatment of goods depending on their ultimate destination, and that the parties must use best endeavours to streamline trade and avoid controls at Northern Ireland ports and airports. We need to find a way of ensuring that full customs and SPS [sanitary and phytosanitary] processes are applied only to goods destined for the EU.

Second, we need to look at how to **ensure that businesses and consumers in Northern Ireland can continue to have normal access to goods from the rest of the UK on which they have long relied**. Applying the same principle of differentiation, the regulatory environment in Northern Ireland should tolerate different rules, allowing goods made to UK rules and regulated by UK authorities to circulate freely in Northern Ireland as long as they remain in Northern Ireland.

Thirdly, we should look to **normalise the governance basis of the protocol** so that the relationship between the UK and the EU is not ultimately policed by the EU institutions including the Court of Justice. The existing arrangements are highly unusual and have not proven conducive to solving the issues that have arisen. We should return to a normal treaty framework, similar to other international agreements including our Trade and Cooperation Agreement [with the EU], in which governance and disputes are managed collectively and ultimately through international arbitration. As part of this, we also need to find ways of ensuring that institutions representing Northern Ireland can be more deeply involved in shaping and bringing into force legislation which binds Northern Ireland.

The Government set out more detail on these proposals in section 5 of the command paper. For instance, on trade in goods, it proposed that it would be the responsibility of UK traders moving goods into Northern Ireland to declare whether their ultimate destination was Northern Ireland or Ireland. Only if the goods were going to Ireland would full EU customs procedures be required; for goods staying in Northern Ireland, there would be no customs processes. Commentators have dubbed this an ‘honesty box’ arrangement. Similarly, the UK proposed that agrifood goods would only require full SPS checks, to be enforced by the UK, if they were destined for Ireland, although there would be full checks on all live animal movements, and special arrangements for plants and plant products to combat biosecurity risks.

The Government also called on the EU to agree a ‘standstill’ on existing arrangements, including the grace periods currently in force, and a freeze on existing legal actions, to create room to negotiate without further cliff edges.

While the timing of the command paper meant it was not covered in the European Affairs Committee report, the sub-committee had already considered the question of invoking article 16. The report noted that some witnesses strongly believed the “disruptive effect” of the protocol was already sufficient to justify the triggering of article 16.<sup>13</sup> On the other hand, other witnesses had argued any unilateral action, including the use of article 16, “has destabilising political and economic consequences”. In the committee’s own view, it would be “preferable for the UK and the EU [...] urgently to identify mutually agreeable solutions”.

### 3.3 EU response

In response to the command paper, European Commission Vice-President Maroš Šefčovič said the EU would continue to engage with the UK, including on the Government’s latest suggestions, but the EU would “not agree to a renegotiation of the protocol”.<sup>14</sup> Mr Šefčovič said the EU had sought “flexible, practical solutions” to overcome difficulties citizens in Northern Ireland were experiencing over the implementation of the protocol. Ursula von der Leyen, the European Commission President, delivered a similar message during a phone call with Boris Johnson.<sup>15</sup>

On 26 July 2021, the European Commission made public several non-papers (informal negotiating documents) setting out some of the solutions Mr Šefčovič had referred to.<sup>16</sup> The non-papers contained the EU’s proposals for marketing authorisations for medicines in Northern Ireland and sanitary and phytosanitary measures (covering: the movement of guide dogs from Great Britain to Northern Ireland; the tagging of cattle, sheep and goats; exemptions from animal health requirements to make it easier for animals from Northern Ireland to be taken to agricultural shows in Great Britain; and allowing animal products to re-enter the EU single market after being stored in Great Britain).

A UK government spokesperson described the EU’s proposals as “a welcome start”, but said they represented “only a small subset of the many difficulties caused by the way the protocol is operating”.<sup>17</sup>

On 27 July 2021, a European Commission spokesperson said the EU was pausing legal action it had started against the UK in March 2021.<sup>18</sup> The spokesperson said this would “provide the necessary space to reflect on these issues and find durable solutions to the implementation of the protocol”. The UK had also asked for a standstill on the current arrangements, including the grace periods currently in place. The spokesperson said: “With regards to the request for a standstill, the [European] Commission will carefully assess the new proposals made by the UK, in accordance with the necessary consultation procedures, both internally and with the European Parliament”.

<sup>13</sup> House of Lords European Affairs Committee, [Introductory Report](#), 29 July 2021, HL Paper 55 of session 2021–22, p 70.

<sup>14</sup> 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.

<sup>15</sup> Ursula von der Leyen, [Twitter Account](#), 22 July 2021.

<sup>16</sup> European Commission, [Non-Paper: Medicines and the Implementation of the Protocol on Ireland and Northern Ireland](#); and [Non-Papers on Sanitary and Phytosanitary Measures](#), both 26 July 2021.

<sup>17</sup> Daniel Boffey, [UK rejects EU’s Northern Ireland moves, saying Brexit deal must be renegotiated](#), *Guardian*, 26 July 2021.

<sup>18</sup> John Campbell, [Brexit: EU pauses legal action against UK over NI Protocol ‘breaches’](#), 27 July 2021.

### 3.4 Grace periods due to expire

If no agreement on a standstill is reached, various grace periods are set to expire over the next few months:

- 30 September 2021: Temporary arrangements agreed between the UK and EU allowing certain meat products to be moved from Great Britain to Northern Ireland are due to expire. Under EU rules, some meat products, such as sausages and mince, can only be transported from outside the single market if they are frozen. Meat products going from Great Britain to Northern Ireland have typically been transported chilled.
- 1 October 2021: UK's unilateral delay to the introduction of certification requirements for supermarkets and their trusted suppliers moving agrifood products from Great Britain to Northern Ireland is due to end. The Government said certification requirements would be introduced in phases after 1 October 2021.
- 1 October 2021: Temporary arrangements exempting most parcels going from Great Britain to Northern Ireland from customs declarations are set to expire for business-to-business movements. The Government has said further guidance for longer-term requirements for other types of movements (eg business-to-consumer and business-to-business) will be published in due course.
- 31 December 2021: Grace period for Northern Ireland to fully implement EU rules on testing and selling medicines is set to expire, although [the EU is working on a legislative proposal to mitigate this](#).<sup>19</sup>

## 4. Read more

### *Protocol and committee report*

- House of Commons Library, [The Northern Ireland Protocol](#), 13 July 2021
- Lord Jay, '[Without trust and dialogue, Northern Ireland risks becoming a permanent casualty of Brexit](#)', Politics Home, 29 July 2021

### *Commentary on the Government's command paper*

- Lord Frost, '[We can do better for Northern Ireland](#)', *Times* (£), 22 July 2021
- Simon Usherwood, '[tl;dr—The UK's command paper on the Northern Ireland protocol](#)', EU at OU (Open University), 21 July 2021
- Michael Gasiorek and L Alan Winters, '[Honesty is such a lonely word...](#)', UK Trade Policy Observatory blog, 22 July 2021
- Tobias Lock, '[Towards a radical revision of the Northern Ireland protocol?](#)', Verfassungsblog, 23 July 2021
- Maddy Thimont Jack, '[Trust and compromise needed to change the Northern Ireland protocol](#)', Institute for Government, 23 July 2021

<sup>19</sup> European Commission, [Non-Paper: Medicines and the Implementation of the Protocol on Ireland and Northern Ireland](#), 26 July 2021.

- Graham Gudgin, '[David Frost rewrites the NI protocol](#)', Briefings for Britain, 24 July 2021
- Katy Hayward, '[Protocol on Ireland/Northern Ireland and the new command paper](#)', UK in a Changing Europe, 26 July 2021
- Anand Menon and Jill Rutter, '[Protocol on Northern Ireland: if Britain wants to resolve it, this is not the way to do it](#)', UK in a Changing Europe, 27 July 2021
- Aodhán Connolly, '[UK command paper raises as many questions as it answers](#)', *Ulster Grocer*, 27 July 2021
- Oliver Garner, '[The UK command paper on the protocol on Ireland/Northern Ireland: Future relationship à la carte?](#)', Bingham Centre for the Rule of Law, 29 July 2021

### ***Northern Ireland political parties' response to command paper***

- Democratic Unionist Party, '[DUP leader announces seven tests for HMG plans on NI protocol](#)', 15 July 2021; and '[Sir Jeffrey—"a significant first step by HMG on protocol"](#)', 21 July 2021
- Sinn Féin, '[British Government must stop evading protocol obligations and ensure full implementation](#)', 21 July 2021
- Alliance Party, '[UK Government choosing wishful thinking and confrontation rather than obvious solution over protocol, says Farry](#)', 21 July 2021
- Social Democratic and Labour Party, '[Eastwood: British Government shamelessly ignoring responsibilities](#)', 21 July 2021
- Ulster Unionist Party, '[Space must be created for serious conversations on UK Government's NI protocol proposals—Beattie](#)', 21 July 2021

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