



HM Government

Northern Ireland Protocol: the way forward

July 2021

CP 502



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Northern Ireland Protocol: the way forward

Presented by the Secretary of State for Northern Ireland

By the Command of Her Majesty

July 2021

CP 502

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ISBN 978-1-5286-2825-9

CCS0721914902 07/21

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

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FOREWORD BY THE PRIME MINISTER

In just over a year of negotiations, between November 2019 and the end of 2020, this Government completed our withdrawal from the EU and agreed a Trade and Cooperation Agreement – the broadest and most far-reaching bilateral trade agreement ever. Many said this would take years to complete or could not be done at all. We never believed that. Instead we delivered a platform for a new relationship between this country and the EU in record time.

Unfortunately one vital area of this partnership is not working well – the arrangements relating to Northern Ireland set out in the Northern Ireland Protocol.

These arrangements represented a huge compromise by the UK, designed to protect the peace process and the Belfast (Good Friday) Agreement in all its dimensions. We repeatedly proposed alternative means to achieve those ends, which we felt better reflected the reality of the situation. Nevertheless, having reached a difficult compromise on the final text of the Protocol, we expected both sides to recognise the need to apply and administer it in a way that took account of the unique context of Northern Ireland, as the Protocol itself requires. This was vital not just for trade and economic reasons, but also because of the sensitive issues around politics and national identity.

We as a Government have been trying to do just that. But it has already become clear that it is not possible to operate these arrangements in a way that can be sustained, particularly not in the inflexible way the EU seems to want.

The impact of the Protocol has been profound economically, politically, socially, and commercially. Within Northern Ireland it has placed strain on institutions which have already been challenged by the COVID-19 pandemic. Some have begun to fear – wrongly – a growing separation of Northern Ireland from the rest of the UK, notwithstanding the principle of consent enshrined in the Belfast (Good Friday) Agreement. And it has served as a drag on the new partnership between the UK and the EU. This is all before the full effects of the Protocol have taken shape and with mitigations in place to reduce its full impact.

It is increasingly clear that we cannot solve the problems simply by a rigid and unpurposive application of the Protocol in its current form. Indeed the difficulties are so profound that I have had to consider whether safeguarding action is necessary under the Article 16 framework which the Protocol provides. My conclusion is that the circumstances in which we find ourselves would justify such an approach. But I also conclude that there is still an opportunity to proceed differently and to agree with the EU a new balance in how the Protocol operates because I believe that there is still political will to address shared problems on all sides. The same sense of responsibility that brought the Protocol into being must be summoned again, in recognition of the fact that it is failing to deliver on what it set out to achieve.

To properly deal with these challenges, in an enduring rather than temporary way, this new balance must deliver significant changes to the existing Protocol. It must ensure that we can fully respect Northern Ireland's place in the United Kingdom, its customs territory and internal market, while playing our part in respecting the integrity of the EU's Single Market, and, of course, ensuring that the border between the Republic of Ireland and Northern Ireland remains without infrastructure or checks.

This paper sets out our proposals. They are necessarily ambitious. I make no apology for that: the spirit of the peace process has always required adaptation and evolution of solutions to meet the unique circumstances of Northern Ireland. If we can work on them together, I am convinced we can find a settlement that can endure.

In the negotiations for our Trade and Cooperation Agreement, both this country and the EU showed that we were equal to the challenge and could demonstrate great innovation to craft something new. If we can do the same here, we can deliver for Northern Ireland and we can put wider UK-EU relations onto a better and more positive trajectory, as we all want. That is a prize worth having. Let us work hard for arrangements that can last.

A handwritten signature in black ink, appearing to read "Boris Johnson". The signature is written in a cursive, flowing style.

INTRODUCTION BY DAVID FROST AND BRANDON LEWIS

After the UK's decision in 2016 to leave the European Union, and with the Republic of Ireland remaining a member, it was clear from the start that arrangements had to be found to protect the unique position of Northern Ireland. Maintaining the hard-won gains of the past 23 years, building on the foundations of the Belfast (Good Friday) Agreement, required solutions that fully respected and protected Northern Ireland's place within the United Kingdom, whilst keeping open the border with the Republic of Ireland.

The Northern Ireland Protocol, agreed in October 2019, explicitly recognises the importance of respecting all dimensions of the Belfast (Good Friday) Agreement. It reflects the need to reconcile multiple aims: maintaining the necessary conditions for North/South cooperation; respecting Ireland's obligations as an EU Member State; protecting the integral place of Northern Ireland in the UK's internal market; and minimising the impact on the lives of citizens.

Since then we have also put in place a successfully agreed and ratified Trade and Cooperation Agreement between the UK and EU. Devolved institutions have also been re-established in Northern Ireland under the *New Decade, New Approach* deal of January 2020. A positive context has emerged which compares favourably to the huge uncertainty and drift in which the Protocol originally took shape – and with it an opportunity.

But so far 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 commitments 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. We want to build a relationship with the EU that reflects our strong common interests and values, and our shared history together. Yet our relationship is currently developing in a way that is punctuated with legal challenges and characterised by continued disagreement and mistrust. This is in neither of our interests. We want to avoid a situation in which this becomes the established pattern of future relations with the EU – not least because this is unlikely to contribute to stability in Northern Ireland either.

This current situation is all the more regrettable because of the fundamental mutual interests that exist between the EU, the UK, the Irish Government, and the people and political parties of Northern Ireland, in supporting and upholding all of the fundamental objectives that the Protocol exists to protect. This constitutes a very strong basis on which to find more productive and sustainable arrangements to deliver more effectively on those objectives, while also addressing the political, societal, and economic difficulties that have developed since the Protocol was negotiated and implemented.

The Government therefore seeks a new approach based on negotiation and the finding of a new and enduring consensus. Our hope and aim is to change the current trajectory, because it risks undermining the fundamental objectives of the Protocol. In the spirit of good neighbourliness, but also recognising the unique responsibilities placed upon it as the Government of the whole United Kingdom, the Government believes that negotiation and common working together with the EU is the best means of providing swift, stable and lasting solutions.

For this to stand a chance of success, it must be accompanied by ambition, imagination, genuine flexibility, and compromise. Accordingly, this Command Paper sets out a set of proposals which we believe will provide a stronger longer-term foundation to achieve shared interests. They will require significant change to the current Protocol. But they will not dispense with many of its concepts. We are ready to ensure that East-West processes are calibrated based on genuine risks, by removing undue frictions on goods remaining within the United Kingdom, but applying EU law processes in full to goods moving on to the EU.

We recognise that there could be political resistance and frustration at the prospect of revisiting significant aspects of the Protocol. But we believe there is a better way forward for all – and a shared responsibility to do all we can to find it as soon as possible.

Beyond the imperative of protecting the Belfast (Good Friday) Agreement in all its dimensions, there is also a significant opportunity to be seized. Most of the current friction between the UK and the EU more broadly stems from the situation relating to the Protocol. If we can eliminate this, there is a huge prize on offer: a better and more constructive relationship between the UK and the EU, without mistrust, and working effectively to support joint objectives.

A workable consensus can be reached in which all sides achieve their objectives and can begin to move on. There are no political gains for anyone in failing to address these issues conclusively, or in continuing rolling cliff-edges or periodic pressure points that persistently undermine stability. There is no reason why arrangements cannot be found that better achieve these goals while genuinely minimising disruption to everyday lives. And as such there is a real opportunity to move forward in a way that could bring profound benefits for EU-UK relations, for UK-Irish relations, for businesses and consumers in Northern Ireland, and above all for prospects for peace and stability. We have today set out an approach which we believe can do so. We urge the EU to look at it with fresh eyes, take full account of the issues at stake, and help deliver the brighter future that is within reach.

Rt Hon Brandon Lewis CBE MP
Secretary of State for Northern Ireland

Rt Hon Lord Frost CMG
Minister of State

SECTION ONE: How we got here: the process of agreeing the Protocol

1. The Government is unshakeable in its commitment to the Belfast (Good Friday) Agreement. The hard-won gains of the peace process have transformed the political and economic life of Northern Ireland since 1998. This commitment to the Belfast (Good Friday) Agreement has therefore framed every aspect of the Government's approach to Brexit negotiations around Northern Ireland and will continue to do so: recognising its position as a co-signatory of the Agreement, alongside the Irish Government; and its specific responsibilities for governance in Northern Ireland, including its economic well-being (identified in 1998 as a vital pillar of peace) and parity of esteem for all traditions.
2. The depth of this commitment to the Belfast (Good Friday) Agreement was reflected in the decision in 2019 to agree to the Northern Ireland Protocol. This was an unprecedented compromise that tried to reconcile the aims of protecting the EU Single Market with the successful protection of the different strands of the 1998 settlement. Indeed it was an exceptional measure for any Government to agree: to control goods moving within its own territory, in the interests of preserving the delicate and interwoven balance that the Belfast (Good Friday) Agreement had established. This had no precedent elsewhere in the world, requiring bespoke arrangements in the text, and was predicated upon a recognition that it would require a nuanced and sensitive approach to its administration.
3. The arrangements established by the Protocol are all the more remarkable because of the fact that there is a pre-existing international border between Northern Ireland and the Republic of Ireland amplified by the existence of two distinct economic entities – with different legal jurisdictions, currencies and tax and revenue systems. Nonetheless the Government has been committed from the outset to a border without infrastructure or checks – and remains so today. Although the 'all-island' dimensions to economic life between Northern Ireland and Ireland remain of smaller scale than its other dimensions (such as external or Great Britain-Northern Ireland trade), the Government understands that it is important to minimise disruption to all-island sectors and ensure the free flow of trade and people across the border. Concerns around border infrastructure involved both practical issues and matters of identity, with communities having grown used to the melting away of the visible border due to the improved security situation after 1998. The principle of parity of esteem demanded a particularly sensitive response to this issue.
4. The Government does not accept – and has never accepted – that the Northern Ireland Protocol was the only means of protecting the Belfast (Good Friday) Agreement, including this North-South dimension. It is clear, and was clear at the time, that other solutions are foreseeable both within and outside the framework of the Protocol that subsequently emerged. Indeed, at times over the period 2016 to 2019, the Government proposed alternative means to achieve the same ends, underlining that any such solutions would not involve checks at the border, while preserving the United Kingdom as a whole as a single customs territory. In a different negotiating context, such solutions would have been fully explored and tested to find the right balance of arrangements to apply in the unique circumstances of Northern Ireland.

5. Instead the circumstances in which the current Protocol was agreed reflected the extraordinarily difficult context of the preceding three years of negotiations. Over that period, much time was spent in trying to set out shared assumptions and some fundamental propositions around which potential agreement might be reached.
6. The previous Government set out its proposals to address the unique circumstances of Northern Ireland and Ireland in the position paper, *Northern Ireland and Ireland*, published in August 2017.¹ This set out the aims of upholding the Belfast (Good Friday) Agreement in all its parts, maintaining the Common Travel Area and associated rights, and avoiding any physical border infrastructure on the island of Ireland. It stressed respect for the Agreement's institutional framework, and in particular for its 'three-stranded approach': devolution and power-sharing; North-South cooperation; and East-West cooperation. It recognised that these are equal, interlocking, and interdependent strands, which must be properly held in balance – both for reasons of economic prosperity but also in order to ensure full respect and equal treatment for the identity and aspirations of all communities. In so doing the Government underlined, in addition to the importance of preserving the basis for North-South cooperation as enshrined in the Agreement, the need to safeguard Strand Three of the Belfast (Good Friday) Agreement – which includes the relationships between the UK and Irish governments, between their various jurisdictions, and the broader links between Northern Ireland and Great Britain as part of one United Kingdom. The commitment to avoid infrastructure on the border between Northern Ireland and Ireland was allied with a commitment to prevent the creation of new barriers to doing business within the UK, including between Northern Ireland and Great Britain.
7. However, this initial UK approach, of holding all three strands to be interlocking and of equal importance in line with the Belfast (Good Friday) Agreement, was not fully reflected in the December 2017 'Joint Report'.² Although this document does refer to the importance of Strand Three, more weight is devoted to the protection of the North-South dimension. Moreover, and most significantly for the future, it was in the Joint Report that the UK committed – in order to avoid a "hard border" – either to find "specific solutions" for the "unique circumstances of the island of Ireland", or, if such solutions could not be found, to put in place "full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement". This was what became known as the 'backstop'. The UK further committed in the absence of such agreed solutions to "ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom" unless the Northern Ireland Assembly and Executive agreed – that is, to keep the rest of the UK aligned in these core areas with Northern Ireland.
8. These commitments in effect gave the EU the power to determine whether any other "specific solutions" proposed by the UK were in fact considered acceptable, and thereby to force the whole of the UK into the EU customs union and the Single Market for goods. In the then Prime Minister's letter to President Tusk of 19 March 2018, the Government conceded that there would indeed be operational legal text

¹ *Northern Ireland and Ireland: position paper*, UK Government, August 2017

² *Joint Report on progress during phase one of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*, UK Government and European Union, December 2017.

for at least the ‘backstop’ option.³ This also finally fixed the reality that the nature of Northern Ireland’s future trading arrangements would be included within the Withdrawal Agreement rather than in any future agreement.

9. This set a course which led ultimately to the Withdrawal Agreement agreed in principle in the autumn of 2018 and tailored in early 2019. This created a package of UK-wide alignment on the customs union and Northern Ireland-specific alignment in much of the Single Market for goods and related areas, commitments to keep Great Britain fully aligned with Northern Ireland in those areas to avoid divergence arising, and an EU lock on changes to any of these arrangements. Not surprisingly, this draft Agreement was rejected three times in Parliament and the political developments that followed led to the current Government taking office.
10. The current Government’s period in office began, therefore, in a situation in which there had been assumptions built in for more than a year that any agreed arrangements had to fit into the contours of the proposed ‘backstop’, but where Parliament would not agree to a deal within those parameters (or, as the other meaningful votes made clear, any other parameters either) and had shown that it preferred to put off exit from the EU rather than face up to these problems. The UK thus faced a prolonged and damaging period of uncertainty if a solution could not be found.
11. In that context it was imperative to find a solution that could respect Northern Ireland’s unique circumstances and protect the Belfast (Good Friday) Agreement, while ensuring both that the United Kingdom as a whole left the EU, and that that exit from the EU was meaningful, offering genuine future policy choices for everyone in the UK.
12. To try to balance all these different needs, and stressing from the outset the need to better protect the “delicate balance” of the Agreement in all its dimensions, the Government put forward a proposal which removed the backstop. Under it, Northern Ireland would have remained aligned with the EU for certain rules for manufactured and agri-food goods, but not for customs or other areas such as VAT. Recognising that such alignment without consent represented a denial of the normal democratic rights to approve laws, a major element of the proposal was a mechanism which would have required the consent of the Northern Ireland Assembly to enter into the new arrangements or to continue them after four years.
13. There is no doubt that this would have provided a more secure basis on which to proceed than the current Protocol. However Parliament’s insistence in the Benn-Burt Act that the UK could not leave the EU without an agreement radically undermined the Government’s negotiating hand; and the final compromise, while delivering the fundamental aim of a clear Brexit, and recognisably based on the UK’s proposal, included several elements which would prove to cause difficulties subsequently: notably, though not only, the EU’s insistence on customs arrangements between Great Britain and Northern Ireland, with detail to be worked out subsequently; and the failure to provide for Northern Ireland’s consent to enter the arrangements.

³ *A letter from Prime Minister Theresa May to Donald Tusk, President of the European Council*, UK Government, March 2018.

14. Nevertheless, the revised Protocol delivered the fundamental requirement of enabling the UK as a whole to leave the EU in a genuine and meaningful way. The status of Northern Ireland was enshrined in clear commitments in the Protocol text: for the Protocol to be without prejudice to the provisions of the Belfast (Good Friday) Agreement in respect of the constitutional status of Northern Ireland at Article 1(1); to respect the essential state functions and territorial integrity of the UK at Article 1(2); to protect the Belfast (Good Friday) Agreement in all its dimensions at Article 1(3); to recognise Northern Ireland's place in the UK customs territory at Article 4; to use best endeavours to facilitate trade between Great Britain and Northern Ireland, with a view to avoiding controls at Northern Ireland ports and airports at Article 6(2); and to "impact as little as possible on the everyday lives of communities in both Ireland and Northern Ireland".
15. Key elements of the new Protocol's operation were left to be worked through during the course of the transition period. In some cases, this was explicit in the text, as with the tasks delegated to the Joint Committee in Article 5 (such as to agree the terms under which goods were "at risk" of entering the EU market). In others, and particularly regarding the administration of processes between Great Britain and Northern Ireland, it was clear that further discussions would be necessary to determine arrangements in practice.
16. In a prolonged negotiation during 2020, in parallel with the negotiations on the future Trade and Cooperation Agreement, the UK and the EU sought to pin down the practical arrangements in many of these areas through the Joint Committee. These finally concluded in December 2020, though again many UK proposals that would have subsequently made the Protocol easier to operate were rejected. There were also "grace periods" which provided additional time for operators in specific sectors, particularly those moving agri-food goods, to adapt.
17. However, by their nature, these agreements could not be informed by the as yet unknown real impacts on the ground or the lived experience of administering the underpinning systems. As such, they did not fundamentally shift the default assumption that goods moving from Great Britain to Northern Ireland would be subject to the full checks and controls applied to goods moved from third countries into the EU, regardless of the ultimate destination of those goods. Though the principle of a more tailored approach was developed through negotiations on an "at risk" scheme for tariffs and through the grace periods, this principle was not applied more broadly, and thus did not underpin the operation of checks and controls as a whole. This has had very significant negative consequences in practice.

SECTION TWO: How the Protocol is working

18. The Government has since then made huge, indeed unprecedented, efforts to implement and deliver the underpinning arrangements for the Protocol.
 - We have delivered four major IT systems, including the declaration, transit, safety and security, and goods movement systems.
 - We have put in place extensive support schemes costing over £500 million for business:

- The Trader Support Service, which is forecast to cost around £360 million through to the end of 2022, has supported the movement of more than three quarters of a million consignments, with nearly 40,000 traders registered for the scheme.
 - The Movement Assistance Scheme, now confirmed in place until 2023, has already supported more than 140 businesses, covering the cost of more than 11,400 certificates and 1,300 inspection hours.
 - The Government has pledged a further £150 million for a Digital Assistance Scheme to provide an end-to-end digital solution for agri-food certification.
 - We have explained the Protocol at all levels with businesses in Great Britain and Northern Ireland – including bespoke, general, and targeted support at nearly 350 industry forums which have reached a combined audience of more than 50,000 people in the trade community; 200,000 calls to businesses; webinars for businesses across agri-food, customs and other requirements; 59 separate communications delivered to traders, reaching an audience of nearly 70,000; and Government-led forums such as the Brexit Business Taskforce.
- We have funded the development of points of entry for agri-food goods in Northern Ireland, with nearly £50 million of investment (alongside more than £20 million in funding this year to support the Executive in operating the Protocol).
 - We have increased the capacity for veterinary checks, with the number of official veterinarians qualified to sign Export Health Certificates doubled to more than 1,800.
 - We are giving access, beyond any granted before, to the EU into UK customs systems, providing assurance and visibility of consignments as part of a longer-term programme.
19. The scale of these processes makes clear the scale of the new requirements faced by traders. Businesses of all sizes have faced new requirements for customs declarations whether goods are staying in Northern Ireland or not. Those moving agri-food goods have faced additional burdens in securing multiple health certificates for each of the thousands of items making up consignments, even when they are destined for sale on shelves in Northern Ireland. Indeed, 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. 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.
20. Supply chains have been disrupted and costs increased, with staff redeployed to deal with new bureaucracy, impacting investment and growth. Consumers have seen real impacts: at least 200 companies in Great Britain have stopped servicing

the Northern Ireland market⁴; 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 effects are felt more broadly too. Medicines are at risk of discontinuation because the hurdles to clear to reach the small Northern Ireland market make supply unviable. And pet owners, including those reliant on assistance dogs, have faced the prospect of unnecessary vaccinations and treatments, and bureaucratic certification hurdles simply to travel within the United Kingdom.

21. In turn we have seen changes to longstanding trade flows as businesses in Northern Ireland either divert their supply chains, or businesses in Great Britain decide to no longer supply into Northern Ireland. One survey indicated that almost 30% of small businesses in Northern Ireland had reported a decrease in sales to Great Britain.⁵ Another survey of Northern Ireland manufacturers found that more than three quarters reported a negative impact on their business in the first three months of 2021, with almost 40% suggesting this was liable to persist to the continued detriment of their operations.⁶ Half of the membership of the Northern Ireland Chamber of Commerce believed Northern Ireland's trade relationship with Great Britain under the existing arrangements had been negatively impacted, and half considered this would remain the case in the future – with only 8% seeing positive benefits.⁷ Many more have noted the increased costs and the challenge that poses to their viability in the longer-term. Meanwhile trade between Northern Ireland and Ireland has increased: Irish exports to Northern Ireland are now nearly 50% higher than in May 2018, with Irish exports overall up by only 15% in the same period; with that intensification even more pronounced in sensitive commodities such as pharmaceuticals and chilled meats.⁸
22. These burdens will grow, not reduce, as time goes on. The grace periods, during which the full burdens of EU rules do not apply to Northern Ireland traders, are set to expire from this autumn. So far these have provided a measure of stability for agri-food, medicines, parcels and pet movements, without any evidence of any reaching the Single Market. Once these grace periods end, in particular the one applying to supermarket supplies, the burdens posed will multiply several times over, imposing extra costs and potentially unsustainable challenges for authorities and for businesses.
23. Finally, the cumulative impacts of all these barriers are felt socially and politically as well as economically. The Belfast (Good Friday) Agreement recognised an interlocking and interdependent set of institutions and interests that needed to be balanced together. It established the conditions in which different aspirations and identities could be fully respected, in line with the principle of parity of esteem. Events since the beginning of the year have, however, disrupted that balance.
24. In particular, the EU's action on 29 January in attempting to use Article 16, without warning or consultation, to establish a vaccine frontier at the border between Ireland

⁴ Written evidence submitted by the Consumer Council to the Northern Ireland Affairs Select Committee (NIP0034), June 2021.

⁵ Pulse Survey of Micro and Small Businesses in Northern Ireland: Dealing with the New Trading Environment NI Protocol, Enterprise Northern Ireland, February 2021.

⁶ Tughans Manufacturing NI Survey of Businesses in the Manufacturing Industry, April 2021.

⁷ Northern Ireland Chamber of Commerce and Industry's Quarterly Economic Survey, July 2021.

⁸ External Trade, Goods Exports and Imports, Central Statistics Office, May 2021.

and Northern Ireland had a dramatic effect on perceptions in Northern Ireland. However quickly withdrawn, it showed to many that the EU prioritised protection of its Single Market above other elements of the Protocol, at a time of extreme anxiety for many about vaccine supply in the middle of a pandemic. The effects of this action continue to reverberate and have had significant political consequences. Overall, a situation has emerged in which the extent, breadth and unanimity of opposition from those in the unionist tradition raise serious questions about parity of esteem, risking undermining the functioning of the Belfast (Good Friday) Agreement institutions and the three strands. There is now a 50/50 split in opinion in Northern Ireland on the Protocol,⁹ which is not a sustainable basis on which to proceed. This has been against the backdrop of growing protests, including instances of disorder, in Northern Ireland and multiple changes in the leadership of Northern Ireland's largest unionist political party.

25. Since January the Government has tried to work with the EU to look to find means to resolve these challenges. There has been some constructive engagement through the structures established by the Withdrawal Agreement, including joint engagement with businesses and civic society in Northern Ireland. There has been a clear recognition that efforts need to be made to ensure that the Protocol can support, not undermine, stability in Northern Ireland. In some areas, this has identified avenues for progress. This was demonstrated most clearly through the extension of the grace period for chilled meat movements.
26. However, overall, the discussions we have had so far have not got to the heart of the problem. The EU's immediate resort to legal action following the UK's extension of some of the grace periods in March has not improved the atmosphere. Moreover, as discussions have proceeded it has become increasingly clear that the current issue-by-issue approach, which looks to fix specific problems as they arise, cannot address the broader underlying difficulties.
27. This is why the current situation is not sustainable. The way the Protocol is working needs to change. That requires us to address the significant issues that the Protocol has caused, and to do so in a fundamental way.

SECTION THREE: One way forward: our assessment of Article 16

28. The Protocol itself provides a safeguard mechanism, under Article 16, which is in place to address circumstances where the application of the Protocol has led or would lead to serious societal and economic difficulties liable to persist, or where diversion of trade is borne out in practice or would occur. Unlike the EU, the UK has not sought to invoke this safeguard mechanism so far, notwithstanding the very considerable challenges that we have seen since the turn of the year and particularly in recent months.
29. It is nevertheless clear that the circumstances exist to justify using Article 16:
 - There has been significant disruption to longstanding trade flows between Great Britain and Northern Ireland, and a significant, measurable increase in trade on the island of Ireland. The value of Ireland's exports of goods to Northern Ireland is trending far above historical levels in 2021: up by nearly

⁹ *Testing the Temperature II*, David Phinnemore, Katy Hayward, Lisa Whitten and Billy Melo Araujo, June 2021.

40% this year compared to the same period in 2020, and by more than 50% on the same period in 2018.¹⁰ Some sectors particularly susceptible to that diversion, such as food and pharmaceuticals, have experienced even stronger growth. Meanwhile, as set out above, surveys continue to underline the disruption being caused to business with Great Britain, with movements of specific commodities (such as chilled meats) seeing particular impacts.

- Such disruption to trade has in turn exacerbated the 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.
- Further societal and economic impacts are also clear: consumers face higher costs and real risks to goods supplies on which they rely; businesses face increased operating costs that put their survival in jeopardy; and, as many businesses and business organisations have made clear, if the flexibility provided by the grace periods were to be removed, there would be questions as to whether food supplies and parcel deliveries would continue without serious disruption, with significant knock-on impacts for day-to-day lives.
- There has also been political and community instability (with changes of First Minister and the leadership of both main unionist parties), at a time when the challenges of COVID-19 are already acute. There were instances of disorder at Easter across Northern Ireland, with the Protocol cited as one of the significant contributing factors. 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.¹¹ Early surveys of attitudes have reflected these concerns and unease, with two-thirds of respondents concerned about the effects of the Protocol on Northern Ireland's economy and on political stability in Northern Ireland.¹² And the absence of buy-in to the existing arrangements from the unionist community leaves an ongoing tension within the power-sharing institutions, undermining the basis which the Belfast (Good Friday) Agreement established for those institutions to function effectively.

30. Taken together, these are very serious effects which have put the functioning of the devolved government in Northern Ireland under strain and placed significant pressures on people and businesses in Northern Ireland.
31. This combination of serious economic and societal difficulties, along with the obvious diversion of trade, would justify a serious response under the framework of the Protocol. Indeed the unusually broadly drawn text of Article 16 was designed precisely with such circumstances in mind, allowing for either party to act unilaterally with appropriate measures, in a proportionate way and in a manner necessary to remedy the situation.
32. Against this background, the Government has carefully considered what action would be open to it. It is clear that the situation would justify a package of

¹⁰ *External Trade, Goods Exports and Imports*, Central Statistics Office, May 2021.

¹¹ *PSNI investigating dozens of unlawful parades over NI Protocol*, BBC News, May 2021.

¹² *Testing the Temperature II*, David Phinnemore, Katy Hayward, Lisa Whitten and Billy Melo Araujo, June 2021.

appropriate safeguards under Article 16 insofar as these are responding to serious societal or economic difficulties or diversion of trade. These could include a range of measures to deal both with the current issues arising in the application of the Protocol (for example, chilled meats, parcels and so on) and also the broader arrangements under which goods enter Northern Ireland from Great Britain.

33. There are of course limits on the actions that can be taken under Article 16. 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).
34. For these reasons the Government has concluded that 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. We must always have available to us all the necessary options to meet our overriding responsibilities for peace, prosperity and stability in Northern Ireland and to support the Belfast (Good Friday) Agreement.

SECTION FOUR: An alternative way forward: finding an agreed new balance

35. Notwithstanding that assessment, these societal and economic difficulties, and the trade diversion we have seen, require significant measures to address them. Those impacts derive from fundamental issues with the existing Protocol arrangements, not least the extensive customs and agri-food burdens they impose, and any solutions must fundamentally address those burdens for internal UK trade. That requires significant change to the Protocol, through a new balance of arrangements which can operate pragmatically and accord with the unique circumstances of Northern Ireland.
36. Rather than use Article 16, we would prefer to find a consensual path. We now need urgent talks that can 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. We need to get onto this path quickly, to give Northern Ireland the stability and certainty it needs. The EU has indicated its willingness to continue to engage and find solutions. We recognise the significant efforts that have been put into considering responses to some specific issues, such as livestock movements, the movement of assistance dogs, and aspects of the issues we have faced on medicines. This is welcome and important, as of course is the EU's own commitment to protecting the Belfast (Good Friday) Agreement.
37. These talks need not look at all aspects of the Protocol. The longstanding arrangements for the Common Travel Area, the workings of the all-island Single Electricity Market, and the provisions that ensure there is no diminution of human rights in Northern Ireland as a result of the UK's withdrawal from the European Union are not controversial. The focus should be on the arrangements covering trade in goods and on the overarching institutional framework put in place by the Protocol. It is in those aspects that the current provisions have led to the perceptions of unfairness and imbalance. It is here that we must find the new balance.

38. In particular we think these talks need to address three sets of fundamental concerns.
39. 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 processes are applied only to goods destined for the EU. (See paras 47-57 below.)
40. 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. (See paras 58-65 below.)
41. 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, 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. (See paras 66-72 below.)
42. We also recognise the UK's share of responsibility, in these circumstances, to help the EU protect its Single Market. Our proposals aim to provide a rigorous regime that maintains the integrity of UK and EU markets – but with processes carefully calibrated based on the risk goods pose and where they are headed. Goods moving on to the Republic of Ireland and the rest of the EU would be subject to normal customs processes, just as the Protocol requires now.
43. We are also ready to look at exceptional arrangements for deep, reciprocal sharing of data on trade, close cooperation with authorities across the EU and in Ireland, inspection processes, collective analysis of trade flows, and if necessary specific arrangements for certain categories of goods and movements to give the assurance required that these arrangements respect the mutual interests of the UK and EU. We also stand ready to bring in new legislation to deter anyone in Northern Ireland looking to export to Ireland goods which do not meet EU standards or to evade these enforcement processes. These are set out in the appropriate section below.
44. Finally, these new arrangements should of course continue to ensure, as now, that there are no infrastructure or checks at the international border between Ireland and Northern Ireland.
45. A negotiations process that covers this ground can ensure that the new settlement we reach is a true balance of interest: putting the operation of a rebalanced Protocol

onto an equitable footing which all sides own and are ready to operate fully, without being a constant source of tension as at present.

SECTION FIVE: Establishing this new balance

46. We look to discuss the detail of these aspirations with the EU urgently. We are not over-prescriptive about solutions. We set out below one possible compromise model as to how this might work, using the broad contours of the current Protocol. This stops short of the alternative and more innovative solutions, such as the Mutual Enforcement proposals that have been set out by some expert observers, though we have drawn upon elements of these in our proposals.

i. Trade in goods within the United Kingdom

Customs

47. The Protocol is clear that Northern Ireland is fully part of the United Kingdom's customs territory. But this principle does not apply in practice due to the burdens of paperwork facing all trade moving from GB to Northern Ireland, and due to the absence of entirely tariff-free trade (for example where Northern Ireland traders, uniquely, have been unable to access either the UK's or the EU's Tariff Rate Quotas on products such as steel, and therefore face higher tariffs, because of legislation introduced by the EU after the Protocol was agreed). Now, with the increasing evidence of the extremely limited risks to the Single Market in practice, there is an opportunity to build on the "at risk" concept already in the Protocol to genuinely differentiate trade based on its destination.
48. One possible alternative would be arrangements under which it would be the primary responsibility of any UK trader moving goods to Northern Ireland to declare whether the final destination of those goods was Northern Ireland or Ireland. Full customs formalities would be required for goods going to Ireland and the UK would undertake to enforce them. Other goods would not require customs processes. Assurance for these arrangements would be provided by the requirement for all such traders to register in a light-touch scheme: in so doing, they would be agreeing to complete transparency of their supply chains to enforcement authorities, and to openness of their shipments to controls or checks on a risk-based and intelligence-led basis. These arrangements would also address tariff burdens for traders bringing goods from the rest of the world into Northern Ireland that remain in the UK's customs territory, and would be available to businesses and individuals moving consignments in post or parcels (with no requirement for declarations or tariffs on any consignments destined for Northern Ireland consumers).

Sanitary and phytosanitary (SPS) measures

49. In addition to the arrangements above, additional arrangements should apply as follows for SPS goods.
50. For agri-food, this model would operate through the same internal UK trade scheme proposed for customs. The full SPS requirements of EU law would be applied for goods going to Ireland and the UK would undertake to enforce them. There would also still be the means to apply risk-based and intelligence-led controls on consignments as they move into Northern Ireland. But there would be no need for

certificates and checks for individual items that are only ever intended to be consumed in Northern Ireland.

51. Live animals pose a different order of risk and require a specific approach. This was recognised in UK national rules before the United Kingdom left the EU, where all movements (including internal UK movements) were pre-notified, accompanied by health documentation and subject to 100% checks. We would propose to maintain broadly these arrangements in this model. Similarly, recognising the potential biosecurity risk posed by certain plants and plant products, there should be an appropriate regime for those movements, without obstructing the movement of standard products such as seeds and plants for garden centres and personal use.
52. Additional confidence in these arrangements could if necessary be provided by an appropriately designed SPS agreement covering these movements on the lines already proposed by the UK, setting out where UK and EU SPS legislation provided for the same high standards, and providing a means to identify areas of significant difference where the level of risk-based controls might need to be higher.
53. Pets remaining in the UK, while meeting existing UK legal requirements such as microchipping for dogs, would be able to move freely between Great Britain and Northern Ireland. This would ensure ease of movement for pets and assistance dogs as a priority, negating the need for onerous certification, tapeworm treatment or unnecessary rabies vaccinations.

VAT and excise

54. Northern Ireland also forms part of the United Kingdom's VAT and excise territory. Northern Ireland applies EU VAT and excise rules for goods, with limited exceptions, but the Government has implemented the Protocol so as to minimise the impacts on the movement of goods. Even so we have still seen problems in some areas, such as the application of the VAT second-hand margin scheme and requirements for eCommerce traders. These issues may multiply as UK and EU VAT and excise rules evolve. So we believe we need to look at a more flexible settlement here, with greater freedom to set VAT and excise rates and structures in Northern Ireland, but underpinned by clear safeguards where changes would introduce significant distortions on the island of Ireland; and enhanced consultative mechanisms to ensure that risks of double taxation and significant divergence within the UK internal market are avoided.

Enforcement

55. In all these areas effective monitoring and enforcement is crucial. Though the risks to the EU would be extremely low in practice given that trade from Northern Ireland to Ireland is less than 0.5% of all imports into the EU, all these arrangements need to be underpinned by strong reciprocal data-sharing arrangements, building on the access to information in IT systems already provided by the UK, and other law enforcement cooperation, to provide assurance that all necessary requirements are being met. On SPS goods, there would need to be particularly strong oversight and visibility of supply chains; appropriate labelling requirements so that goods could only be sold in the UK; and increased market surveillance to monitor compliance, with penalties for non-compliant traders.

Unfettered access

56. Protection of the UK internal market also entails preserving access for Northern Ireland goods to the UK market. The Government has already put in place robust protections to that effect: enshrining in the UK Internal Market Act 2020 full unfettered access for qualifying Northern Ireland goods to all parts of the United Kingdom market.
57. The UK and EU agreed in December not to require export declarations for goods moving to Great Britain from Northern Ireland other than in certain very limited circumstances (for example CITES endangered species movements). This was on the basis that other data sources, such as shipping manifests, could provide equivalent information. Following work with carriers and others however, it is clear that this model is not operable without putting in place burdensome new requirements to collect further information. We suggest that a new settlement should definitively eliminate these requirements except in the narrow cases of specifically controlled goods. 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.

ii. Circulation of goods within Northern Ireland

58. Under the Protocol, Northern Ireland aligns with all relevant EU rules relating to the placing on the market of manufactured goods. This requires products to meet EU rules if they are to be placed on the market in Northern Ireland, but goods approved to these rules by UK bodies are marked for sale only in Northern Ireland and Great Britain. The current arrangements have already caused difficulties for businesses trying to put goods from Great Britain onto the market. These will be exacerbated further once the UK moves fully onto the new UKCA product safety regime, leading to significant risks that many businesses in Great Britain simply give up trying to produce goods for the Northern Ireland market. The current system nevertheless enshrines the principle that there can be parallel arrangements for different goods in Northern Ireland, underpinned by risk-assessed regulatory checks performed by market surveillance authorities to limit the sale of goods beyond Northern Ireland.
59. We suggest that the right way forward would be to extend this principle to provide for a full dual regulatory regime in Northern Ireland. 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. Of course, goods destined or produced for the EU Single Market would need to meet EU rules in full. Goods exported from Great Britain via Northern Ireland to Ireland or beyond would, under the arrangements set out above, need to meet full normal EU customs processes.
60. It may be necessary to build into these arrangements specific provisions for medicines (and a small number of other key sectors). Arrangements for medicines, for example, are so closely linked to the delivery of national health services, an essential state function for a modern state, and the associated regulation and control arrangements are so substantial, that the risk of diversion into the Single Market is extremely minimal.
61. Moreover 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. The solution proposed by the EU in June was a welcome start, but is potentially 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. 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.

62. Arrangements of this nature involve risk to both sides: that goods made to UK rules move onto the EU market, and that goods made to EU rules move to the market in Great Britain. For our part we believe that risk is manageable and acceptable, given existing strong market surveillance. For the EU's part we are ready to agree stronger arrangements for enforcement, including 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.

Subsidy control

63. The Protocol at present means that Northern Ireland remains part of the EU's subsidy control framework in certain areas. This is in part a result of the fact that the Protocol was negotiated in 2019 when neither the UK nor the EU knew the nature of commitments to be made on subsidy control in the future Trade and Cooperation Agreement or indeed whether it would be agreed at all.
64. We now know that there are comprehensive and robust commitments in place on subsidy control, based around shared principles underpinning both the UK and EU regimes agreed in the Trade and Cooperation Agreement. These are being further strengthened through the UK's Subsidy Control Bill which is currently before Parliament. These arrangements provide a more than sufficient basis to guarantee that there will be no significant distortion to goods trade between the UK and EU, whether from Great Britain or Northern Ireland, thus making the existing provisions in Article 10 redundant in their current form.
65. Nevertheless, given that Northern Ireland producers would continue to have some privileged access to the Single Market in this model, we would be prepared to establish enhanced processes for any subsidies on a significant scale relating directly to Northern Ireland – for example enhanced referral powers or consultation procedures for subsidies within scope, to enable EU concerns to be properly and swiftly addressed.

iii. Governance

66. As we have set out above, the institutional arrangements of the Protocol have not proven conducive to finding shared solutions. Nor have they provided a sense of common ownership, instead placing problems too quickly into an adversarial setting. We should aim at putting in place new institutional arrangements making the UK and EU into a partnership of equals, both with a strong and direct interest in operating the Protocol effectively.

67. The most unusual feature of the current Protocol is Articles 12(4) to 12(7), which give the institutions of the EU, up to and including the Court of Justice, the right to enforce major elements of the Protocol's provisions. It is highly unusual in international affairs for one party to a treaty to subject itself to the jurisdiction of the institutions of the other, all the more so when the arrangements concerned are designed to mediate the *sui generis* relationship between the EU and its Member States. The UK refused to accept this in the negotiations on the Trade and Cooperation Agreement, and only agreed to it in the Protocol because of the very specific circumstances of that negotiation.
68. These arrangements are highly unusual and have not supported problem-solving in the context of a divided society – indeed they have arguably increased rather than reduced tensions. They have also contributed to a false sense of separation between Great Britain and Northern Ireland, as trade arrangements operated within one part of the United Kingdom are ultimately overseen outside of it.
69. In devising alternative dispute settlement arrangements, our starting point should be to return to a normal treaty framework, similar to other international agreements including our Trade and Cooperation Agreement, in which governance and disputes are managed collectively and ultimately through international arbitration. It may be desirable to also put in place enhanced consultative processes to provide a framework for effective discussion and resolution of issues that arise.
70. These changes will of course require a subsequent agreement, as envisaged under Article 13(8) of the Protocol, in order to amend, at least in part, certain provisions. We consider that such an amendment would fundamentally strengthen the Protocol's ability to meet its core objectives and, in particular, Article 1(1) and 1(3).

Consultation and legislative processes

71. We should also take the opportunity to ensure that in any areas where EU law is applied or replicated in Northern Ireland under a rebalanced settlement, there are more robust arrangements to ensure that, as rules are developed, they take account of their implications for Northern Ireland – and provide a stronger role for those in Northern Ireland to whom they apply (including the Northern Ireland Assembly and Executive, and wider Northern Ireland civic society and business).
72. Of course, for as long as some legislation affecting Northern Ireland continues to be made outside the United Kingdom, the consent mechanism will need to continue to apply.

SECTION SIX: Next steps

73. In addition to its commitments as a co-signatory of the Belfast (Good Friday) Agreement, the Government has specific responsibilities to Northern Ireland and its people as the sovereign Government of all of the United Kingdom.
74. These responsibilities are why the Government is so concerned by the very significant – and deepening – issues with the operation of the Protocol in its current form. This situation poses risks for stability in Northern Ireland; challenges the viability of businesses in Northern Ireland; is causing unacceptable disruption to day-to-day lives; and is driving shifting patterns of trade away from the critical flows

between Great Britain and Northern Ireland on which so many lives and livelihoods rely.

75. Our discussions so far show that there is no desire on any side for this trajectory to continue unaddressed. Across the island of Ireland, within the EU and across all parts of the United Kingdom, there is a desire to support the peace process in Northern Ireland, bolster the institutions, and support them in delivering prosperity, stability and a genuinely shared society in the longer-term. We must take the opportunity to support this shared drive and endeavour, and find a new balance which can address the trade diversion, and the economic and societal difficulties, we have seen so far this year.
76. The best way to do this is through finding new and durable arrangements agreed by the UK and the EU together, in which there is a shared ongoing interest in their success. This will best serve businesses and citizens in Northern Ireland; and provide the strongest platform for the productive long-term relationship between the UK and EU that we all want.
77. To provide space for these discussions, the Government believes it is vital to provide certainty and stability for businesses in Northern Ireland in the short term. Accordingly, we believe we and the EU should agree a 'standstill' on existing arrangements, including the operation of grace periods in force, and a freeze on existing legal actions and processes, to ensure there is room to negotiate without further cliff edges, and to provide a genuine signal of good intent to find ways forward.
78. The prize at hand is a settlement with the ability to endure, with practical arrangements capable of commanding support right across the spectrum, within Northern Ireland and beyond; and a new and more productive relationship between the UK and the EU more broadly. We hope that there will be a strong common interest, and a mutual desire, to take this consensual approach to finding the new balance that is so much required.
79. The Government stands ready to take these discussions forward at pace. The issues faced are genuine and urgent. As the Government of the whole of the United Kingdom, we believe a resolution can be found that ensures arrangements for Northern Ireland fully respect all dimensions of the Belfast (Good Friday) Agreement, and protects the interests of all parties. We invite the EU to join us in an intensive process that resolves these issues on a durable, sustainable basis, and enables us to look forward to the better future beyond.

CCS0721914902
978-1-5286-2825-9