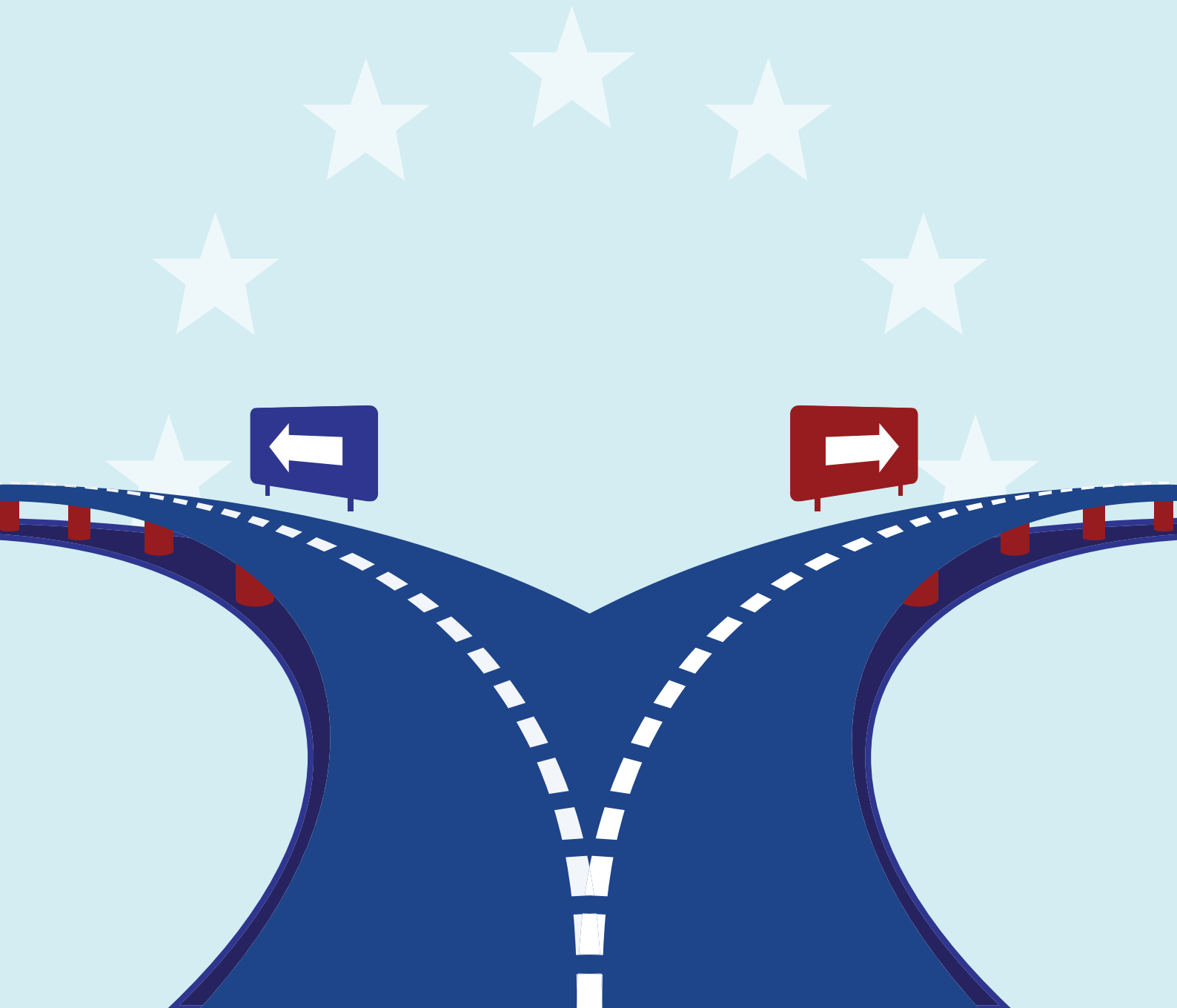


Brexit and the Implementation of the Protocol on Ireland/Northern Ireland

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On 8 September 2020, in the House of Commons, the Secretary of State for Northern Ireland, Brandon Lewis, announced that the Government intended to disapply key provisions of the Withdrawal Agreement, breaking International law in the process. It was evident from the 20 May 2020 UK Command Paper, and subsequent Ministerial statements, that the UK was intent on renegotiating the Protocol, but the decision to renege on the Withdrawal Agreements was a surprise. The EU reacted by setting a deadline of 30 September for the offending provisions in the Internal Market Bill to be withdrawn, and providing the UK with formal notice of same on 1 October, though it has nonetheless chosen to continue the negotiations. This paper examines the background to the implementation of the Protocol, and assesses the prospects for a successful outcome to the EU-UK negotiations by the 1 January 2021.

Introduction

The extraordinary decision to renege on the EU Withdrawal Agreement, announced by the UK Government on 8 September, put a question mark over the prospect for a successful outcome to EU-UK trade negotiations. While real difficulties were evident both in the trade negotiations and on the implementation of the Protocol, a decision to renege on an agreement signed by Prime Minister Johnson's Government was both shocking and unexpected. However, the pattern of the negotiations since Article 50 was triggered has always been that real progress is only ever made late in the day, so a successful outcome to the talks still cannot be ruled out. The difference on this occasion is that the UK is seeking to secure a trade agreement by threatening to renege on a Treaty with the EU, which raises a real issue of trust for the EU.

In the Withdrawal Agreement negotiations under Article 50 of the Treaty, which commenced in March 2017 and first concluded in November 2018, the UK revealed its negotiating position by degrees and the positions outlined were often general and of an incomplete nature. In August 2017 the UK issued two position papers, one on Customs and the other on Northern Ireland. The Customs paper only dealt with tariffs and rules of origin, and omitted regulatory alignment which is essential for frictionless trade. The NI Paper claimed that cross border trade should be exempted from customs controls,

on the basis that it was local trade. Neither paper did much to convince the EU that the UK was serious about avoiding a hard border. It was July 2018 before the Chequers Plan was announced, and in it the UK sought the best of both worlds of being 'inside and outside the customs union' at the same time. The proposal involved the UK operating a UK customs regime for goods imports destined for the UK market, and the Union Customs Code (UCC) for goods intended for the EU. The strategy of the Theresa May Government was to keep all the main issues in play until the final round of the negotiations. It didn't work for Theresa May, partly because she overplayed her hand at Salzburg, when she told the other EU leaders, it was either Chequers or No Deal.

When Boris Johnson was elected Prime Minister in July 2019, he initially took a hard-line approach to the Backstop, before agreeing to a compromise in October 2019. There is a degree of truth in the general interpretation that he reverted to the NI specific Backstop, which had been expanded to a UK-wide one in his predecessor's failed deal, but there are also important differences, which makes the implementation of the Protocol more complicated. This relates to the fact that under the Backstop, NI would have been in the EU Customs Union, but under the Protocol, NI will be in the UK Customs Union. In the original Backstop tabled by the EU in February 2018 Northern Ireland would have remained in the EU Customs Union and key areas of the Single Market. The UK

objected and eventually secured a hybrid arrangement in the Withdrawal Agreement of November 2018, under which the UK and EU would be in a shared customs territory. This had the effect that the Backstop would involve a regulatory border down the Irish Sea, but it did not require customs or rules of origin procedures. Despite the UK presenting this as Northern Ireland being in the UK Customs Union, Geoffrey Cox, the then Attorney General, stated in a letter on 13 November 2018: "NI remains in the EU's Customs Union". Under the Backstop, all goods on entry into NI from GB or third countries would be in 'free circulation' in the EU, but under the Protocol, because it is similar to the dual tariff structure of Theresa May's Chequers Plan, there will be goods entering into NI that are not eligible for tariff-free entry into the EU.

Unlike the Backstop, which was intended only as a fall-back, the Protocol is a permanent solution, designed to operate irrespective of whether there is an EU-UK Free Trade Agreement (FTA) in place, and which gives NI tariff-free trade both within the UK along with UK FTAs, and also with the EU. In the absence of a trade agreement, goods for consumption in NI will be tariff free, if they are UK goods, EU goods or goods from UK FTA partners. If the goods are coming from third countries that do not have a UK FTA, they would pay the UK tariff. In the case of UK goods, UK FTA goods or third country goods that are deemed at-risk of entering the Union; those goods would be liable for EU tariffs. If the goods coming from GB or third countries are intermediate goods for processing in NI, they would be deemed at risk and liable for EU tariffs. Under a reimbursement and waiver scheme, duty could be rebated on goods which paid EU tariffs, if they were consumed in NI.

If an EU-UK FTA is agreed it would reduce - but not eliminate - the amount of goods entering NI that would be liable for EU tariffs, as not all UK goods or UK FTA goods may qualify for preferential trade on rules of origin grounds. While the EU rejected the Chequers Plan as risking the integrity of the EU Single Market, it accepted a similar ap-

proach for the Protocol because the volume of the GB-NI trade involved is much lower, at £10.4 Billion, compared to £170 Billion of UK-EU exports.

The UK Command Paper of 20 May 2020

The UK issued a Command Paper on 20 May outlining how it proposed to implement the Protocol. Articles 4, 5 and 6 of the Protocol contain the main clauses covering the customs and regulatory issues which will operate to avoid a hard land border, and at the same time protect the integrity of the EU Single Market, and Ireland's place within it. Whereas the Backstop Protocol only provided for a regulatory border between GB and NI, the 2019 Protocol provides for a full customs and regulatory border, though with certain EU commitments to avoid controls at ports and airports in Northern Ireland to the extent possible. Goods will be considered at risk, and liable for EU tariffs, unless it is established that the good will not be subject to commercial processing in NI, or they meet the criteria which the Joint Committee will agree this year, that classifies a good coming into NI as not being at risk of moving into the Union. It is important to note that the new UK tariff schedule involves tariffs, 55% of which are lower than corresponding EU tariffs, though some of the differentials are 3% or less. In all cases tariff income accrues to the UK and not the EU, so the purpose of applying an EU tariff relates to an economic policy of protecting producers/traders rather than for fiscal revenue. Tariff differentials between the UK and EU will give rise to friction in the absence of a free trade agreement but the main friction in GB-NI trade will arise in respect of animal and agri-food movements, even with an EU-UK FTA, because compliance checks and controls are very substantial when compared to those on industrial goods, in order to protect human and animal health in the EU Single Market.

The UK Government has re-defined the goods at-risk provision in the Protocol as a 'genuine and substantial risk'. This first appeared earlier this year as a UK commit-

ment in the 'New Decade New Approach' document for Northern Ireland, and is now included in the Command Paper titled 'The UK's Approach to the Northern Ireland Protocol'.¹ The only key customs issues which the Protocol leaves for decision by the Joint Committee is the criteria to designate which goods moving from GB to NI are not at risk of entering the Union, along with keeping the issue of avoiding controls at ports and airports to the extent possible under review. However, the main thrust of the UK position, as outlined in the Command Paper, is on the need for a flexible and proportionate approach to implementation, and also the need to explore additional flexibilities and sensible practical measures across all aspects of the Protocol so as to maximise the free flow of trade. The UK Government justify their approach to implementation on the basis that it should reflect changes since the Protocol was agreed, including the restoration of the NI institutions and the advent of COVID-19. The other justifications outlined by the UK for its proposed flexible approach is that the Protocol may only be temporary, due to the consent mechanism for the NI Assembly.

The UK Government has put the agreement in the Protocol for Northern Ireland to remain in the UK Customs Union as the centre point for their claim that a flexible approach to implementation is required in order to protect the Belfast/Good Friday Agreement (B/GFA). This appears to place an equivalence on the need to avoid a hard land border to also apply to a sea border, the latter being necessary because of unionist concerns. It is important to recall that to give practical effect to the identity provisions of the B/GFA of an entitlement to identify as British, Irish or both, it is essential that the customs border removed by the EU Single Market from 1 January 1993 should not return. Ideally, UK membership of the EU was the best means of delivering on the B/GFA in a manner that respected both commu-

nities, in particular, when a majority in NI supported continued membership. But the decision to leave the EU, and then to make the additional choice of also leaving the EU Customs Union, in order to facilitate a harder Brexit, meant that a border was unavoidable and the choice could only be whether it would be on land or sea. The Theresa May Government, at an early stage, committed to no hard land border and chose a softer form of Brexit to limit the nature of the sea border. But the Johnson Government refused to abide by this commitment, initially promoting alternative arrangements for the land border, before accepting a full customs and regulatory border in the Irish Sea, in order to have a harder Brexit with an EU-UK FTA. In such circumstances it is reasonable that the avoidance of a hard land border should get priority, because it best protects the principles of the B/GFA, when it is the UK Government that has made the choice for a harder Brexit than necessary. Thus, there really is no basis for the argument of the UK Government that the B/GFA requires an equivalence of 'borders' for land and sea, particularly when the Protocol is contingent on ongoing consent by a majority in the NI Assembly.

There are also practical reasons why, if a border is unavoidable, that a sea border is less intrusive than a land border. There are over 200 land crossing points compared to 7 by sea. Evidence to the House of Commons NI Affairs Committee ² showed that the total number of person border crossings is 110 million annually, and between 23,000 and 30,000 persons cross the border daily for work. For freight transport, the NI Business Brexit Group identified 13,500 lorries (HGV/LGV) a day crossing the land border, compared to 2,500 lorries a day by sea, and figures from the Freight Transport Association show Roll on/ Roll off traffic in 2019 for GB-NI of 425,166 and 426,774 for NI-GB which supports those figures. Significant goods traffic also comes through Ire-

1. The UK's approach to the Northern Ireland Protocol. Available at <https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol>

2. House of Commons NI Affairs Committee, Unfettered Access: Customs arrangements in Northern Ireland after Brexit. Available at <https://committees.parliament.uk/publications/1857/documents/18478/default/>

land, but this could change, depending on the outcome of the trade negotiations. The NI Statistics and Research Agency (NISRA) estimates that two thirds of NI-IE trade is linked to cross border supply chains.

In a number of areas in the Command Paper the UK use direct quotes from the Protocol to support their case for a light touch approach. In paragraph 35 of the Command Paper the UK claims that controls, their frequency and the level of physical checks required needs to be discussed in the Joint Committee quoting Article 6.2 of the Protocol that both parties must use "best endeavours" in order to "avoid controls at Northern Ireland ports as far as possible". The use of best endeavours is a commitment in paragraph 6.2 to facilitating trade between NI and other parts of the UK, along with a commitment that the matter be kept under constant review and recommendations adopted with a view to avoiding controls at NI ports but qualified to the 'extent possible' rather than as far as possible. It is also qualified with respect to applicable legislation and respective regulatory regimes. The UK has made clear that this approach to seeking flexibility on controls also applies to GB ports facing NI. There is also reference made in the Command Paper to Michel Barnier's speech of 10 October 2018 in respect of conducting controls on ships while in transit, but this did not include agri-food, and at that time the Backstop involved the UK and EU being in a shared customs territory, and crucially Mrs May had committed in the Chequers Plan to the adoption of the EU rule book for all goods including agri-food.

The UK states in the Paper that it will not construct any new customs infrastructure at ports in NI or facing ports in GB, and it is clear from Michael Gove's reply to a question in the House of Commons on 20 May, that this is because they do not propose to carry out any checks on industrial goods. It is the case that there is a very low level of checks on industrial goods at the border, as most are inspected in the market, but a decision to have no checks is unlikely to be acceptable to the EU. Anti-dumping duties are an important mechanism to protect EU pro-

ducers from unfair competition. Last year, for example, the EU renewed anti-dumping tariffs of 48.5% on Chinese bicycles for a further five years, and a UK policy of having no checks at NI ports would be an open invitation to smugglers and this could risk paramilitary involvement where there was the potential for significant profits. One of the justifications outlined in the Paper for a light touch approach is that because there were Irish statements on having no physical infrastructure on the land border, in the event of a No Deal Brexit in 2019, that "Logically that must also be the case in the context of the agreed solution constituted by the Withdrawal Agreement".

On regulatory issues connected with agri-food, the UK accepts the need for checks, but the assertions on the need for flexibility and discussion in the Joint Committee on the frequency and level of physical checks required are also applicable to agri-food. The Union Customs Code (UCC), which will apply in NI, has very specific rules in respect of animal and agri-food produce checks and controls and flexibilities allowed by the EU will be restricted to those that will not threaten the integrity of animal and human health within the EU Single Market. The UK also places an emphasis on the need for the application of the Protocol to impact as little as possible on the everyday life of NI communities, but this applies to Ireland as well, and there is no mention of the commitment, also contained in the Protocol, to ensure that the rights and obligations of Ireland under the rules of the EU Single Market and Customs Union must also be fully respected.

Union Customs Code Regulations on Animal and Agri-Food

In a Revenue Commissioners/Department of Agriculture, Food and Marine video presentation on new customs and regulatory requirements arising from Brexit for Irish importers, a number of issues relevant to the implementation of the EU Union Customs Code and the Protocol emerged. Import regulations for agri-food produce which apply under the Union Customs Code (UCC) are harmonised and apply to all Member

States, and these will apply to GB-NI trade, subject to the agreed flexibilities built into the Protocol. Rather than COVID-19 leading to less control, as the UK seems to envisage, it is more likely to underscore the importance of robust animal and agri-food controls for the protection of human health. In the case of existing human diseases, 60% are zoonotic with 75% of emerging infections having an animal origin, with three of every five new diseases annually being of animal origin.

Under customs simplification procedures it would be possible to use trusted trader schemes to introduce flexibilities, and for industrial goods they do give scope to move controls to the trader's premises. This does not apply, however, to controls on agri-food produce which still take place at the customs border. There is the potential for an agreement on Sanitary and Phytosanitary standards (SPS), such as the EU has with New Zealand which would reduce the requirement for controls. Indeed, the paper of August 2017 on Northern Ireland and Ireland stated that 'it is important to note that the EU has reached deep agreements with near neighbours allowing for the free flow of agri-food products across borders', going on to point out that Switzerland has a common veterinary area with the EU, with no border controls at the EU-Swiss border. This makes clear that friction in GB-NI trade is a deliberate UK choice because to date the UK Government has prioritised the wish for regulatory divergence, rather than conformity to EU standards. The UK is basing the case for reduced controls on current alignment of SPS standards, and seeking in the trade negotiations that the UK should be deemed equivalent where the objectives are the same. This harks back to the earlier mutual recognition approach by the UK, but on food safety standards this would not satisfy the EU.

There are three different levels of checks for animal, plant and agri-food products, documentary, identity and physical. Frequency for documentary checks is 100%, and the same applies for identity checks, while physical checks vary under EU Reg-

ulation 94/360 with, for example, 50% of consignments checked in the case of poultry and poultry products, milk, milk products and egg products, and 20% for fresh meat, fish and eggs. In the case of identity checks, which are carried out on 100% of imports, there are two types of checks: a seal check and a full identity check. In the case of a check on the seal it involves ensuring that the information on the seal corresponds to the health certificate, while a full identity check involves breaking the seal and inspecting the consignment to ensure it matches the accompanying documentation. In the case of physical checks some are carried out on the spot, along with samples taken for laboratory tests. For random laboratory tests the goods can be released prior to the results being available, but if the veterinary officials have any concerns about the consignment the goods will be held pending the results of the tests

The UK Government proposes that raw produce coming from GB for agri-food processing in NI, and subsequently returning to the GB market, should not attract tariffs, and that in any event the UK now proposes to use the mechanism to waive and/or reimburse tariffs to also include goods at risk of entering the Union. It is difficult to imagine how waiving or reimbursing an EU tariff on an at-risk good could be consistent with the Protocol, unless it has been shown that the good was consumed in NI. The Protocol clearly puts intermediate goods due to be processed in NI in the at-risk category, with EU tariffs to be applied. However, even though trusted trader schemes, such as Authorised Economic Operator, do not reduce the frequency of agri-food checks at the border, it could allow for compliance audits to be used to defer tariffs on some at risk goods.

In the case of NI-GB trade and the requirement for Exit Summary Declarations under the Union Customs Code (UCC,) the UK states in the Command Paper that trade will be the same as now, and that Exit Summary Declarations will not be required, other than for a limited range of goods such as endangered species. Under the Backstop the is-

sue of Exit Summary Declarations for goods leaving NI for GB did not arise, because the EU and UK would have been in a shared Customs territory. Now, even though NI is in the UK Customs Union, and the UCC applied under both the Backstop and the current Protocol, the goods will be exiting the UCC area for GB which, unlike under the Backstop, will be a third country outside the EU Customs Union. In the UK Impact Assessment, which accompanied the Withdrawal Agreement Bill, both the Exit Declarations for NI-GB trade and the Import and Entry Declarations for GB-NI are set out, along with a table setting out the frequency of SPS checks under Regulation 94/360. There is no doubt that the approach to implementation set out in the Command Paper of 20 May is a departure from what was agreed and understood by the UK at the time the Protocol was agreed, and clearly signals the UK's intention to renegotiate key aspects of what was agreed in October 2019.

Evidence to the Lords EU Committee and Commons NI Affairs Committee

Michael Gove gave evidence to the Lords EU Committee on 5 May, and along with Brandon Lewis to the Commons NI Affairs Committee on 18 June, and when taken together with the Command Paper it shows that the UK's approach to the implementation of the Protocol is very different to what was originally agreed. The overall approach shows that the UK sees the Joint Committee as an area where the implementation of the Protocol needs to be discussed and agreed, rather than an agreement to be implemented, with certain aspects still to be agreed, such as the criteria on what constitutes a good that is not at-risk, or the commitment for reviews to avoid controls at ports and airports to the extent possible. Underlining the approach to the implementation of the Protocol which the UK is now taking is a focus on a key change from the Backstop to the Protocol that explicitly provides for NI to be in the UK Customs Union. That change is now being used by the UK to argue that a light touch approach to implementation is necessary, and also to justify their contention of an equivalence between the land border and sea border under the B/GFA. Af-

ter the first meeting of the Joint Committee on 30 March 2020, the EU issued a Technical Note on 30 April which stated, "The Commission recalled that the Protocol on Ireland and Northern Ireland cannot be renegotiated including in the Joint Committee and that a new partnership between the EU and UK can only be built on the faithful and effective implementation of the Withdrawal Agreement".

On 5 May, Mr Gove said that Article 5 of the Protocol on the movement of goods is an Article that needs to be read alongside other Articles, and that the operation of it needs to be agreed. In that regard, the UK claims that intermediate goods that enter NI for processing should not be considered at-risk if they are intended for the GB market. At the NI Committee, Mr Gove said that there were certain aspects of the operation of the Protocol that are to be agreed by the Joint Committee, including the definition of risk. Gove said that it is important for anyone arriving at a port in NI to see they were in the same customs territory, and that new infrastructure or a maximalist approach to the Protocol would risk its rejection, because it would be less acceptable to the majority community. For non-agri-food goods moving GB-NI, Lewis sets the bar as being as close to the business as usual which they have guaranteed for NI-GB movements.

The exchanges on 18 June between Hilary Benn and both Michael Gove and Brandon Lewis at the NI Committee gave some indications about how the UK intended to implement the customs processes. In the Impact Assessment issued alongside the Withdrawal Agreement Bill in October 2019, paragraph 241 stated that for GB-NI trade, both Import Declarations and Entry Summary Declarations would be required because NI came under the Union Customs Code. Mr Gove gave an evasive answer to Mr Benn's question about Entry Summary Declarations from GB-NI, but said there would be some Safety and Security information given. In response to a question on whether Import Declarations would be required, Mr Gove's answer was a straight 'No'. These are the two main customs documents required for importing goods. In

June, in a Power point presentation leaked to the Guardian, HMRC identify both Import Declarations and Entry Declarations as being required. The Command Paper also references these documents, but only in the context of the knowledge and information that they contain. In this part of the discussion, Brandon Lewis refers to the amount of information that business actually has, far more than Government needs or requests, and indicated that they were looking at ways that the information could be secured, but in a different way than is normally done. Mr Gove reinforced this point, when he said of Import Declarations that “We do not simply take the existing model and apply that in a rigid fashion [...] and it is the case that we are seeking to make sure that it is as light touch as possible”. Mr Gove stated that it will be the case that “we will provide the information that the Import Declaration provides, but we will do it in a different way”. The intention was, he said, to apply the UCC but consistent with the other principles the UK has brought out (in the Command Paper). Mr Gove also stated that the way in which the UK applied the UCC will be different to the way the EU does at its external border. The justification for this alternative approach given by Gove was that the goods movement would be within the UK Customs Union, and not from one customs territory to another.

The change from the Backstop to the Protocol with NI to remain in the UK Customs Union is central to understanding the UK’s approach. When Mr Benn asked Mr Gove to confirm that the UK would apply EU customs rules to goods entering NI, which is actually stated in the Command Paper, Gove replied, “No, not quite”, and went on to explain that it would be applied consistent with other principles. Mr Lewis then explained that it was about protecting NI’s place in the UK Customs Union. Another justification outlined in the Command Paper is that the majority of NI trade is within the UK Single Market.

Sales and Exports NI Goods			Purchases and Import Goods		
GB	£6.6B	43.1%	GB	£10.4B	60.2%
IE	£3.1B	20.2%	IE	£2.4B	13.8%
REU	£2.1B	13.6%	REU	£2.4B	18.8%

The most recent NISRA statistics (2018) show the following³: These goods trade statistics do indicate a small shift away from NI trade with the rest of the UK, with the 43% of sales down from 48% in 2017, and the 60.2% of purchases down from 63%, and in both instances GB trade is replaced by the EU 27.

The approach outlined in the Command Paper, and in subsequent statements by Ministers should be seen in a particular context: no sooner had the Protocol been agreed than Boris Johnson began to tell NI business to put any requests for paperwork in the bin. Then in a reply to Jeffrey Donaldson MP in the House of Commons on 22 January 2020, when he was asked to confirm that the promised unfettered access NI-GB would also apply GB-NI, he replied, “Emphatically it does”.

Assessments of the Command Paper by Independent Commentators

The Institute for Government, in a Report on the Protocol in June 2020, stated that the UK sees the Joint Committee as an opportunity for negotiating additional flexibilities and derogations, whereas as far as the EU is concerned the Protocol is agreed and it is a matter for the UK to implement it. In a comment piece on the Protocol for Public Network in May, Roger Liddle a former Labour MEP said that there is a belief in Brussels that the UK is intent on radical changes to the Protocol that it agreed a few months previously. In a Briefing paper on the Protocol from the UK Trade Policy Observatory at the University of Sussex, a view was ex-

3.NISRA, Broad Economy Sales and Export Statistics 21 May 2020 Available at -<https://nisra.gov.uk/publications/current-publication-broad-economy-sales-exports-statistics>

pressed that the UK was using the consent mechanism of the Protocol to secure a more flexible interpretation of the measures to be implemented. This Trade Policy Observatory Briefing identified the figure of 55% for the total of UK tariffs which are lower than the equivalent EU tariffs, and it also revealed that 82% of rest of the world goods imports of £2.1b could be considered at risk because they are intermediate goods. However, the EU and UK tariff differentials involved may also be a factor.

Implications of the difference between the Backstop and the Protocol

The Joint Report of December 2017 was given a legal basis in the draft EU Protocol of February 2018 with a Northern Ireland specific Backstop that envisaged NI alone being in the EU Customs Union. The then UK Prime Minister, Theresa May, said no British Prime Minister could accept that designation for NI, and the EU finally agreed to a shared customs territory between the EU and UK in the Withdrawal Agreement of November 2018. This left NI in the EU Customs Union with the application of the UCC between GB and NI, which required a regulatory but not a customs border in the Irish Sea. For GB-EU trade there would be a customs and regulatory border at Dover-Calais because GB would be outside the UCC, but no tariffs or rules of origin would apply. Northern Ireland would have been covered by EU FTAs and no independent UK trade policy would have been possible, while the Backstop remained in place. The UK would have required agreement with the EU to exit the Backstop, and if it wished to pursue an independent trade policy, the original NI specific Backstop, including both a customs and regulatory border in the Irish Sea, would have been the minimum requirement to avoid a hard land border and protect the integrity of the EU Single Market. Under both the Backstop originally proposed by the EU, and the version finally agreed with Theresa May, all goods that entered NI would be 'in free circulation' in the EU Single Market.

An important change to the Backstop that Boris Johnson secured with his version of the Protocol was to remove the shared customs territory approach, resulting in a

customs as well as a regulatory border in the Irish Sea. The Political Declaration was amended to have an EU-UK FTA as the planned future trade relationship. Northern Ireland would still be under the EU UCC but a key difference was that it would remain in the UK Customs Union and UK FTAs would apply, subject to being consistent with the Protocol. This latter provision would mean that agri-food produce, in particular, could only enter NI if it was compliant with EU food standards. Under the Protocol all goods that enter NI will not be in 'free circulation' in the EU, because whether an EU-UK FTA is agreed or not, there will be goods in NI ineligible to enter the EU for tariff or rules of origin reasons. In theory the at-risk provision in the Protocol could capture all such goods, but that could be too disruptive to internal UK trade. While all versions of the Protocol had the potential to do the job as intended, if implemented in good faith, it turns out that the dual tariff structure with NI remaining in the UK Customs Union gave more scope to the UK Government to promote an 'alternative Protocol' to the one agreed in October 2019. The UK Trade Policy Observatory estimates that 64% of the £10.4 B of GB-NI goods trade will be at risk, and thus liable for EU tariffs, either because they are intermediate goods or the UK tariff is lower than the EU. However, many of the tariff differentials are small, so the actual figure is likely to be less than that. In any event most trade friction will arise in relation to regulatory control on animal and agri-food products, which will also depend on the extent to which the UK deviates from EU SPS standards or allows, to give the infamous example, chlorine-washed chicken into GB.

Northern Ireland goods will have access to UK FTAs and the UK Government has confirmed that NI goods exports with EU inputs will also be eligible for UK FTAs, by agreement with those countries who have already concluded agreements with the UK, provided there is sufficient processing in NI. Some commentators expected that NI goods would also have access to EU FTAs, and while to date there has been no definitive clarification, it seems unlikely that they will. While imports under UK FTAs that are ineligible for preferential EU trade terms

will be captured by the at-risk mechanism of the Protocol, there will be no mechanism to prevent imports from EU FTAs having access to NI. It is likely that EU goods with NI inputs will have access to EU FTAs, as otherwise the all-island economy aspect of the Protocol would not be fully effective. The main area affected in terms of inputs to finished goods both for Northern Ireland and Ireland would be the extensive agriculture cross border supply chains. Over 400,000 pigs move North for processing annually, with 800,000 litres of milk and 400,000 sheep moving in the opposite direction.

Some commentators have queried whether NI goods with EU inputs, such as those animal or agri-food inputs from Ireland, would have access to GB, if no EU-UK FTA was agreed and high agri-food tariffs applied to EU goods going to the UK. This has been raised on the basis that the definition of a NI qualified good for the UK market has yet to be decided. It would be inconsistent with the Protocol, designed to operate irrespective of the outcome of the trade negotiations, for NI goods with EU, mainly Irish, inputs to be excluded from GB, and unlikely that the UK would be announcing that NI goods with such inputs would qualify for UK FTAs if they could potentially be excluded from GB. However, if the trade talks fail and WTO tariffs apply, and then inputs from Ireland into NI goods increased as a means of bypassing UK tariffs, the UK Government might take a different view on that. While the UK have stated their intention not to require Exit Declarations on NI trade going to GB, Irish exports that continue to go through NI to GB will be subject to standard customs processes, irrespective of whether there is an EU-UK trade agreement. If there is no EU-UK FTA in January 2021, with WTO tariffs applying to trade flows between the two islands, there could be an incentive for some traders of high tariff products to use NI-GB and GB-NI crossings to try and bypass these tariffs.

Rules of Origin Impact on EU-UK FTA and the Protocol

Rules of origin issues do not arise for EU member states trading within the Single Market, but they are the main criteria for deciding which goods can qualify for preferential treatment in a free trade agreement. Trading in the EU Single Market, firms can operate supply chains on a global basis with no constraints on where inputs are sourced. Inputs can be tariff-free if sourced in a country with an EU FTA, and, if there is no FTA in place, the EU common external tariff will apply to the intermediate goods involved. In an FTA, rules of origin are designed by the parties involved to encourage trade in both intermediate and finished goods between the parties and cumulation of inputs is limited to achieve that. Rules of origin also prevent countries from using an FTA with one country to gain preferential trade access to that country's other FTA partners. Normally, inputs above a certain value or weight sourced outside of the parties to an FTA would render the good ineligible for tariff-free trade. A Report by the UK Food and Drink Federation on Rules of Origin³ showed that even if there is an EU-UK FTA agreed, there are a range of prepared consumer foods (PCF) that Ireland currently imports from the UK such as wholemeal bread, pizzas and chicken curry ready meals which would not be tariff-free, because the Canadian wheat, Thai chicken or Indian rice content would disqualify these goods, unless the sources of wheat, chicken or rice supply were changed to either that of the EU or UK.

The rules of origin for most EU FTAs is bilateral cumulation, where the main source of inputs must be either that of the EU or the other trade partner. There are other more extensive models such as regional cumulation which applies in the EEA and among countries in the EU neighbourhood called the Pan Euro-Mediterranean Convention (PEM). There are also examples of what is termed

4. UK Food and Drink Federation, Rules of Origin in an EU-UK FTA, A 'hidden hard Brexit' for food and drink exporters? Available at https://fdf.org.uk/corporate_pubs/EDF-Rules-of-origin-report/PDF

diagonal cumulation where two partner countries allow other countries with which they both have an FTA to be included in the supply chain. The UK is seeking to go beyond the standard cumulation arrangement in the trade negotiations with the EU. This would allow the UK to maintain existing supply chains that are used by firms exporting into the Single Market and also to use future UK FTAs where there was also an EU FTA with the country concerned. Another feature of rules of origin is that non origin content can be allowed, where sufficient processing has been carried out in one of the FTA partners.

However, Michel Barnier has been clear that allowing the use of extended supply chains is not in the EU's long-term interests as he set out in his presentation to the Institute (IIEA) on 2 September: "British proposals on rules of origin would help the UK to develop its role as an assembly hub for the EU. They would allow the UK to source goods from around the world and export them, with very little alteration, to the EU as British goods: tariff- and quota-free". Irrespective of what agreement the EU and the UK come to on rules of origin for an EU-UK FTA, and bilateral cumulation seems the most likely, both parties will find that existing supply chains in some sectors will have to change to secure preferential tariffs in FTAs.

In none of the UK Papers issued on the implementation of the Protocol, or in follow up comments by Ministers, has the issue of rules of origin been dealt with, probably because the UK still hopes to get an agreement with provisions that go beyond bilateral cumulation. So even in an EU-UK FTA that has tariff and quota free trade, these preferential arrangements will only apply to goods that meet the agreed rules of origin requirements. Goods from UK FTA countries could be ineligible for tariff free trade with the EU, either because the EU does not have an FTA with that country, or where it does, it still does not qualify under the rules of origin of the EU-UK FTA. Thus, while such goods would be eligible for consumption in NI, they would be

an at-risk good in terms of moving into the Union and liable for EU tariffs. The wholemeal bread, chicken curry ready meals and pizzas identified as ineligible if the EU-UK FTA provides for bilateral cumulation, would be tariff free for consumption in NI, but not in the EU. For the UK automotive industry which currently sources a high proportion of components from EU Member States, this will have to continue or be replaced by UK components to maintain access to the EU Single Market. The UK would not be able to source components from Japan under the UK-Japan FTA and export such vehicles to the EU. If the UK did make vehicles in future with UK and Japanese components, they would be eligible for the NI market, but would be an at risk good under the Protocol and liable for EU tariffs

Trader Support Service

On 7 August 2020, Michael Gove, the Chancellor of the Duchy of Lancaster, visited Belfast and announced a range of measures to facilitate NI traders purchasing from GB or importing from third countries. A number of new papers were also issued with more details on how the Protocol would be implemented. The key development was the establishment of a Trader Support Service (TSS) to assist business and traders dealing with customs processes under the Protocol. This service would have £200 million in funding and in addition a further £150 million would be spent on developing IT infrastructure to facilitate digitalisation of the process. Currently the systems in use at NI ports are not geared to the level of digitalisation the UK wishes to use to implement the Protocol.

The new UK paper of 7 August on GB-NI trade provides much greater clarification than either the Command Paper of 20 May or comments from Gove and Lewis to various Parliamentary Committees on how the administrative customs aspects of the process will be implemented. At the heart of the UK approach is the TSS, which will be an interface between the trader and HMRC to carry out the customs process. The trader will need to give the relevant information to

the TSS in respect of goods description, value, supporting documentation as required, but the customs processing of Import Declarations and Entry Summary Declarations for GB-NI trade will be carried out by the Trader Support Service on the trader's behalf and will be free of charge. Mr Gove had stated to the Commons NI Committee on 18 June that Import Declarations would not be needed. The indications from Lewis at that meeting was that the information normally required would be given, but not as part of a standard customs process. The 7 August GB-NI paper shows that the intention now is to follow standard customs administrative processes, but that this will be carried out by the Trader Support Service rather than the trader or haulier. The Trader Support service, which will act as the customs agent for the trader, is set to follow standard customs procedures for Import Declarations and Entry Summary Declarations, despite earlier indications that the required information would be supplied but not in a conventional manner. This certainly meets the cost concerns which had been expressed by NI business and also helps to make a 'customs border' less visible.

However, the paper continues with the signals given in the 20 May Command Paper and by Mr Gove and Mr Lewis to Parliamentary Committees that checks and controls will be as light touch as possible and that full use will be made of waivers and reimbursements in all scenarios. In respect of supermarket goods movements, the UK stated in August that they are looking for specific solutions for this sector but did not give any further details. There were indications that the Trader Support Service might also have a role in relation to regulatory issues around animal and agri-food movements but no details were set out. The UK intention to use waivers and reimbursement in all scenarios, including for goods at risk, will be constrained by state aid limits anyway, but the main purpose of applying tariffs to at-risk goods is to ensure that if they did enter the Union that they would have paid the appropriate EU tariff.

The 7 August Papers confirms the UK's intention not to require Exit Summary Dec-

laration for NI-GB trade, except in limited cases such as for endangered species. The Trader Support Service will also be available to traders for NI-GB trade in these limited cases where the UK accepts that Exit Declarations are required and also for imports from the rest of the world. Another of the 7 August papers confirms that NI-EU trade will continue to operate in line with existing arrangements, including in respect of transit arrangements where the land bridge is the access point for continental Europe. While the UK announcements on 7 August indicated progress around the implementation of the Protocol, on a visit to Belfast on 12th August, the UK Prime Minister, Boris Johnson said that there would be a border in the Irish Sea '*over my dead body*'.

That statement by the Prime Minister was picked up by Michel Barnier the end of the 7th round of the trade negotiations on 24 August, when he indicated that there was also insufficient progress on the implementation of the Protocol, and stated:

Regarding the Protocol on Ireland/Northern Ireland, recent statements by Prime Minister Johnson show just how sensitive this issue is.

But we are waiting for the UK to do what is necessary to ensure the precise and rigorous implementation of the legal obligations contained in the Protocol for both sides. Indeed, the proper implementation of the Protocol is the only way to preserve Ireland's all-island economy, to protect the integrity of the Single Market and, above all, to ensure continued peace and stability on the island of Ireland

Similarly, in a presentation to the Institute (IIEA) on the EU-UK negotiations on 2 September he said in relation to the Protocol,

In recent months under the influence of Michael Gove the UK has started to make progress on the implementation of the Protocol. This is encouraging.

But important questions remain open.

The EU needs to be sure that the Union Customs Code will be applied in its entirety for goods arriving in Northern Ireland

Similarly, we need to know that goods leaving Northern Ireland respect all applicable EU export procedures and formalities.

And we need to be certain that all necessary controls are carried out on live animals and animal derived products arriving in Northern Ireland from Great Britain and the rest of the world.

Move by UK to disapply provisions of the Withdrawal Agreement and Protocol

Both the EU and the Irish Government were caught completely by surprise by the UK's dramatic move on 8th September to renege on key provisions of the Withdrawal Agreement signed only months earlier, particularly when some progress had been made in August. The Financial Times carried a story on 6 September that the UK Government intended to use the Internal Market Bill that week to unilaterally disapply key clauses of the Withdrawal Agreement and the Protocol. On 7 September 2020, the RTÉ correspondent, Tony Connelly, revealed that the UK had asked the Irish Government to help persuade Brussels to allow controls on live animals and those for supermarket goods to take place in Great Britain, rather than at entry points in NI. In return the UK was offering unspecified assistance for Irish hauliers accessing continental Europe via the land bridge.

On 24 May 2020, the Policy Exchange Economic Advisor Graham Gudgin reported that the UK had sought independent legal advice on the implementation of the Protocol in the event that an EU-UK trade agreement was not agreed. Also, Sam Lowe of the Centre for European Reform had written in a paper on 18 August on the trade

negotiations that, "It is difficult to see how this arrangement (Protocol) could survive a presumably acrimonious failure to conclude a trade agreement".

It was very clear from the Command Paper of 20 May and follow-on statements by Gove and Lewis that there would be difficulties with the implementation of the Protocol and that the UK was also likely to use it as leverage in the trade negotiations where little real progress had been made. However, there were no indications that the UK would risk reneging on an agreement with the EU, as a strategy to try and secure a new agreement. On 8 September, at the dispatch box in the House of Commons, the Secretary of State for Northern Ireland, Brandon Lewis, duly made the stunning announcement that the UK intended to break international law and disapply the Withdrawal Agreement and the Protocol in a number of key respects, through clauses in the Internal Market Bill. The provision for the Withdrawal Agreement to have direct effect would be disappplied, the requirement for Exit Declarations for NI-GB trade in the Protocol would be removed by Clause 42 of the Bill and the provisions on State aid to reach back into GB in Article 10 of the Protocol would be amended by Clause 43. Clause 45 of the Bill would then also provide that these measures would be lawful notwithstanding a breach of international or domestic law. The UK Government also confirmed that other provisions in respect of GB-NI trade would be covered in the Finance Bill. This is certain to relate to the definition of what goods will be deemed at-risk, with the UK likely to insert its own definition of at-risk in UK law. It also cannot be ruled out that the UK would seek to define the level and location of SPS checks, nor that it might exempt some goods from the customs process on the grounds that it was internal UK trade.

The Irish Government and the EU reacted with astonishment that the UK would so casually renege on Treaty commitments, made in the full knowledge of their requirements, and flout international law in the process. Following an emergency meeting of the Joint Committee, the EU gave the UK until the end of September to remove the

offending provisions from the Internal Market Bill or face legal action by the EU for a breach of the Withdrawal Agreement. The Withdrawal Agreement provides for either party to initiate binding Arbitration procedures under Article 170 if there is a dispute about the interpretation of the agreement. The UK Government's document, 'EU Exit, Legal position on the Withdrawal Agreement', confirms that the dispute settlement mechanism only arises at the end of the implementation period and is then the only course available to resolve disputes between the EU and UK. During the transition period the European Commission can refer a case to the Court of Justice of the European Union (CJEU) that the UK has failed to fulfil its obligation under the Withdrawal Agreement in certain circumstances. The EU considers the UK's move to disapply key provisions of the Agreement to be a breach of Article 5 on Good Faith, which obliges both sides to act in good faith to fulfil the obligations of the Agreement. On 1 October 2020, the President of the Commission, Ursula van der Leyen, announced that the Commission would immediately commence infringement proceedings which is the first phase of this legal process.

The UK advised the EU that it would not amend the Bill, and dealt with some internal party dissent about the breach of international law by proposing to accept a lock of a final Parliamentary vote before the legislation would be implemented. In a statement on 17 September, the UK Government announced that the powers to disapply key aspects of the Protocol would only be applied if the EU was in material breach of its duty to show good faith in the implementation of the Protocol and outlined the areas of GB-NI tariffs, Exit Declarations and State aid, as areas where the Protocol needed to be changed.

In the case of GB-NI tariffs, the position set out by the UK in the 17 September statement is that the UK will deem the EU not to be showing good faith, if it implements the default at-risk provision that the UK accepts is actually in the Protocol, and fails to accept instead the new 'genuine and substantial risk' interpretation that the UK

has unilaterally decided should now apply, even though it is not actually in the Protocol. While the UK states that it will use the dispute procedures in the Withdrawal Agreement, by unilaterally setting aside the Protocol in advance, it is clearly trying to frustrate the binding nature of the Arbitration process.

A range of different reasons were outlined by the UK for the decision to disapply key provisions of the Protocol, from an untenable claim to be protecting the B/GFA to the most bizarre: Mr Johnson's claim that the EU were threatening a food blockade of NI. This related to an EU statement that the UK must provide additional information to secure third country status as a food exporter, a normal EU requirement for all third country exporters. The consequence of the UK's actions when implemented in law would be to remove the direct effect provisions in the Act implementing the Withdrawal Treaty and have the UK's unilateral interpretations of the Protocol enshrined in UK law. Since the UK Government announced the key changes to the Protocol the statements about the need for smooth trade between GB-NI have grown much stronger. On 8 September, in the House of Commons, Brandon Lewis was asked if GB-NI trade would be unfettered, and answered in the affirmative.

Also at the NI affairs Committee on 16 September Mr Lewis emphasised the need for GB-NI trade to have no border because of the B/GFA, with trade to be as smooth and free flowing as possible and for SPS checks to be light touch. At the dispatch box in the House of Commons on 14 September, Prime Minister Johnson set out that the purpose of the Internal Market Bill included unfettered access for both NI-GB and GB-NI and stating he had only agreed to some light touch processes on goods passing GB-NI. He then went on to assert that "the EU is threatening to carve tariff borders across our own country to divide our land [...] and to ride roughshod over its own commitments under article 4 of the protocol whereby Northern Ireland is part of the customs territory of the United Kingdom". In a letter to MPs on 11 September, Mr Johnson stated that having any border between Northern

Ireland and the rest of the United Kingdom was contrary to the Belfast/Good Friday Agreement, and that having no hard border in the Irish Sea was just as important as no hard border on the island of Ireland.

Conclusion

It is difficult to assess the real purpose behind the dramatic move by the UK Government to renege on an international Treaty it so recently signed, in the full knowledge of what it contained. The assertions that the Protocol has tensions between different clauses or that the EU is acting in bad faith by not agreeing to the UK's view of at-risk goods or the EU demand for robust level playing field provisions are purely for domestic consumption. The State aid and level playing field issues were in the Political Declaration, and Mr Johnson opted to go well beyond the Theresa May Backstop to secure a harder Brexit. It was clear from the 20 May Command Paper and follow up statements that the UK had developed a new unilateral interpretation of the Protocol, based on NI being in the UK Customs Union, and intended to both try and renegotiate its provisions and use it as leverage in the trade negotiations.

It now seems clear that the UK never intended to implement the Protocol in good faith, if there was no free trade agreement. There are credible reports that Conservative MPs with concerns were reassured by commitments that the Protocol would be revisited. The Policy Exchange report of 24 May that independent legal advice would be sought in the context of a failure of the trade negotiations has also turned out to be correct. Indeed, the three lawyers from whom advice was sought are viewed as sympathetic to Brexit and two of them had previously written on how domestic law should take precedence over international law. Also, Graham Gudgin of Policy Exchange told the NI Affairs Committee on 23 September that the Protocol was signed to get Brexit done on the grounds that the difficulties would be sorted out later.

Some commentators have suggested that Boris Johnson feels unable to conclude an

agreement with the EU that would prove to be unpopular with the extreme Brexiteers, but that seems unlikely because the impact of the UK trading under WTO tariffs for such a high volume of its goods trade would be very significant.

The strategy is most likely a high stakes gamble to use the Protocol as leverage in the trade negotiations on issues such as fisheries, State aid and level playing field commitments, and also to try and secure a light touch implementation of the Protocol. A consistent UK strategy since Article 50 was initiated has been to try and have all the key issues in play in the final round of negotiations. But tabling legislation to dis-apply key aspects of an agreement already signed as a means to put pressure on the EU is an extraordinary gamble to take and is more like something from the 'Trump play-book' than international diplomacy. The EU has decided to continue the negotiations, but as its decision to follow through on the threat of legal action demonstrates, it is unlikely to be pressured into concessions by the Johnson strategy. Indeed, if an agreement can be reached it is more likely to require stricter conditions to ensure there is no repeat by the UK.

There are areas of the Protocol where the UK can likely secure further movement from the EU. An agreement on an alternative means to secure the information that Exit Declarations would provide for NI-GB trade seems possible to achieve. Similarly, an arrangement to cover regular supermarket deliveries from GB being checked at loading depots rather than at NI ports is an area where an agreement could be reached. However, there will be limits to the degree of flexibility that the EU can concede on agri-food checks and controls, particularly if the UK diverges on SPS standards or imports food for GB consumption that is not compliant with EU food standards. Agri-food related controls can be onerous, where a ham and cheese sandwich could need two separate health certificates, but that is the consequence of the UK's wish to diverge. It is less likely that the UK will succeed in securing any significant leverage in the trade negotiations as a result of its move on the

separate health certificates, but that is the consequence of the UK's wish to diverge. It is less likely that the UK will succeed in securing any significant leverage in the trade negotiations as a result of its move on the Protocol. While the Member States most affected want a trade agreement, they are also insistent that the UK must not gain any unfair advantage in the EU Single Market and the UK's demand for the more limited Canada style level playing field conditions or WTO State aid provisions will not be conceded.

Given the compromises that the UK finally made in the Article 50 negotiations, both in November 2018 and again in October 2019, to secure an agreement, an agreement again this year cannot be ruled out. However, it would require substantial compromises on the UK's part in the trade negotiations on fisheries, State aid and labour and environmental standards, because the EU will insist on strict measures to ensure fair competition. Although some of the areas of the Protocol of concern to the UK look capable of being resolved, the UK made the choice of a customs and regulatory border in the Irish Sea that cannot be wished away by the accusations of Boris Johnson that "the EU is trying to carve a tariff border across our country to divide our land". The hard-line positions the UK has now openly adopted on both trade and the Protocol make the compromises needed to secure an agreement more difficult to make.

There is a real risk that the extraordinary gamble of the UK Government may make an agreement this year more difficult to achieve. Some in the Johnson administration may see the move to disapply the Protocol as creating pressure on the EU even if the 'No trade deal, No Protocol' does not secure a trade agreement by year end. From January 2021 the economic consequences of no trade agreement and a move to WTO tariffs would be severe for Ireland, and a failure to implement the Protocol properly would have consequences for the integrity of the EU Single Market. However, it is still unlikely that this would force the EU to make concessions. Rather, Ireland would move to protect the integrity of the Sin-

gle Market, with financial support from the EU. An abrupt exit from the Single Market and Customs Union would be very serious for the UK in economic terms and with job losses resulting from disruption to supply chains. At some point an EU-UK FTA will be agreed, but the question remains: can Mr Johnson make the necessary compromises now or only in the chaos of early 2021?

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