

BREXIT BRIEF

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The Brief seeks to provide up-to-date information on the progress and content of the UK-EU negotiations, and bring together relevant statements and policy positions from key players in Ireland, the UK and the EU.

The Brief is part of a wider communications programme covering the work of the IIEA's UK Project Group – including commentaries, speeches, texts and event reports – which are highlighted on the Institute's website. (www.iiea.com)

Introduction

An RTE newsreader summed up the Northern Ireland Assembly election results: "The voters have spoken. How long will they have to wait to see their needs addressed?"

The election on 5 May 2022 saw Sinn Féin become the largest party in the NI Assembly, with 27 seats to the DUP's 25. The Sinn Féin leader in Northern Ireland, Michelle O'Neill, will thus be nominated for the position of First Minister when the Assembly meets on Thursday 12 May 2022. Then, the fundamental problem at the heart of today's Northern Ireland politics will be made clear when the DUP leader, Jeffrey Donaldson, will carry out his well signalled refusal to join a new devolved administration until the London Government "deals with" the Protocol on Ireland/Northern Ireland (the Protocol). The voters thus face a possible six

month wait for action on their clearly stated policy priorities – not the Protocol, but health services, education, childcare and the cost of day-to-day living.

The centre ground Alliance Party which more than doubled its representation in the Assembly, to 17 seats, addressed the Protocol issue with its leader, Naomi Long, arguing that London is not "playing an open hand with the people of Northern Ireland, using and abusing the protocol as an issue to try to garner support for their own cause." She spoke of talking to business throughout the campaign "and they are very clear the biggest threat to business and prosperity in Northern Ireland is political instability. We've got to get this sorted once and for all with the EU, mutually agreed, and let's get government going."

A straw poll for *The Guardian* in Enniskillen

prior to the Assembly Election poll showed that young people, who have no memory of the Troubles, yearn for a day when polarised nationalist-versus-unionist arguments, which polls show are popular with older voters, are over. "It's just a bit of a circus this election," said one voter, "people focus too much on stopping the other side getting in. I'm not voting for people who want to bicker or fight over these silly issues. The issues for me are healthcare, the lack of childcare, support for young families." *The Guardian* concluded that "Away from the headline battles between Sinn Féin and the DUP and the turmoil within unionism, the question for post-conflict Northern Ireland is whether constitutional politics will ever be remote enough to be in the rear-view mirror."

And, as the votes were counted, and the historic outcome for Sinn Féin revealed, the BBC wrote that "after a decade where jitters, or delight, depending on your point of view, over the strains on the United Kingdom have focused on Scotland, now those strains start to become visible in Northern Ireland too. Parties that seek to unpick the very stitching that holds together the collection of nations that makes up the UK, are in Northern Ireland's case, in the ascendancy, in Scotland's case, continuing to dominate." While radical change is not to be expected immediately in either Scotland or Northern Ireland the BBC concludes that "step back, and there are two question marks now hanging over the United Kingdom's long-term future." Prime Minister Boris Johnson includes the title 'Minister for the Union' in his job description.

Section One: State of Play

After the Count

In the immediate aftermath, the *Irish Times*

summed up the key message: "The real story of the election – the deep, structural shift that it confirms – is the remarkable growth of the centre-ground. The Alliance Party, drawing support from those who do not wish to be identified primarily as unionist or nationalist, more than doubled its seats to 17, making it the third force in Northern politics. For the past 20 years, it has been clear that the unionist vote is in decline and the nationalist vote, despite demographic trends ostensibly working in its favour, has been broadly static. The once-silent – and sidelined – middle has now found its voice."

However, that voice is unlikely to be heard in a Northern Ireland Executive for some time as the DUP stance on the NI Protocol remains unchanged. The party insists that it will boycott Stormont and its institutions unless the Protocol is substantially reformed – for example by taking away the role of the European Court of Justice – and the boycott could be protracted even to the point of forcing a new election after six months.

The DUP is to seek an urgent meeting with the Prime Minister to warn him that it will stall Stormont power-sharing until Christmas if the Protocol is not modified. "The Prime Minister and the government need to act on this. If he doesn't deliver he must recognise that means perpetual political instability. We will say he has a choice: Stormont or the protocol." Sir Jeffrey Donaldson is expected to lay out his concerns in a statement to the House of Commons following the Queen's Speech which will contain a commitment to protect the interests of the unionist community and the Good Friday Agreement.

With the parties due to meet in advance of the reconvening of the Assembly there have been

calls from political leaders - in Ireland, UK, the EU and US - for an early re-establishment of the Executive and action on the agenda clearly defined by voters across the spectrum. The Protocol issue, they argue, should be dealt with in intensive London-Brussels talks.

The Northern Ireland Secretary, Brandon Lewis, urged the parties to form an Executive as soon as possible, saying that "the people of Northern Ireland deserve a stable and accountable local government that delivers on the issues that matter to them." He went on to state that the people "want the issues around the Protocol addressed and they want politics to work better." He indicated that he will meet urgently with all the party leaders to urge them to restore the Stormont institutions at the earliest possible moment.

The Shadow Northern Ireland Secretary, Peter Kyle, commented on the Protocol issue, saying that "Unionism will still have a strong voice within power sharing and calls for progress on the remaining issues of the Protocol have been heard and should not prevent a return to the Executive. The government must now prioritise practical solutions through negotiation with the EU and not chase headlines with empty threats."

The EU Commission Vice President, Maroš Šefčovič, called on the UK to "dial down the rhetoric" on the Protocol. In a comment on the election result - and after a period of tactful silence during the campaign - Maroš Šefčovič insisted that the EU had proposed "durable solutions" to improve the operation of the protocol and said that the UK needs to "be honest" about what they had committed to in the deal. The UK should "show genuine determination and good faith to make the protocol work, rather than looking for ways to erode it. The EU has absolutely no interest in

interfering in the UK's internal affairs."

A spokesman for the US Department of State, Ned Price, called on NI parties to "take the necessary steps" to re-establish the power sharing Executive, arguing that "critical and immediate challenges concerning the economy, health and education are best addressed through the collective efforts of a devolved government chosen by, and accountable to, its people."

The Taoiseach, Micheál Martin, responded to the result by saying that it is "incumbent on all political parties" to form an Executive, delivering on their mandate by nominating a first and deputy first minister. "A new power-sharing Executive is vital for progress and prosperity for all in Northern Ireland." He further stated that the EU had shown great flexibility in relation to the protocol but this "has not been reciprocated." The Minister for Foreign Affairs, Simon Coveney, spoke of "a middle ground in Northern Ireland who don't want to be categorised as unionist or nationalist but want a middle ground politics to strengthen."

UK Plans for Protocol Legislation

Jacob Rees-Mogg's remarks about 'reforming' the NI Protocol led to much comment and criticism and to accusations of potential breaches of international law.

The *Irish News* commentator Newton Emerson wrote in advance of the Assembly vote:

The assembly election is next Thursday, May 5. The Queen's Speech at Westminster is five days later, on May 10. If it includes a bill to let ministers unilaterally switch off parts of the Brexit protocol, as expected, that would be perfectly timed for the formation of a Stormont executive. The first attempt

at nominations might see a placated DUP join Sinn Féin in office. After that, whether an executive is formed or not, things become complicated. The Queen's Speech sets the government's legislative priorities for the parliamentary term but there is no requirement for any of it to be delivered. So how long does the DUP wait for the bill to be commenced? Does Sinn Féin threaten to walk out if the bill is commenced? The last attempt at such legislation, the 2020 Single Market Act, had its "limited and specific" powers to breach the protocol removed after an international outcry. A further outcry is guaranteed. But perhaps the DUP leadership is not that concerned. Perhaps it just needs an excuse to get its feet under the executive table.

Then, on the eve of the election, government sources in London indicated that a specific piece of legislation relating to the Protocol would not be in the Queen's Speech. It was suggested that the Speech would include language about upholding the integrity of the Good Friday Agreement. A specific Bill could be introduced at a later stage.

The Northern Ireland Secretary, Brandon Lewis, told *ITV* that "we've not said that" when asked about the suggestion of specific legislation. He told Robert Peston that "What we've been clear about is, at the moment, the Protocol is causing problems in civic society, it's causing problems with the Good Friday Agreement. Our duty to the people of Northern Ireland is to resolve those issues. Yes, we want to do that with the EU."

He later tweeted that the government would do "whatever it takes" to protect the Good Friday Agreement: "We have to address the outstanding issues and we want to do that by agreement with the EU but as we have always

made clear we will not shy away from taking further steps if necessary."

Downing Street has briefed journalists that Prime Minister Boris Johnson, by issuing hints and threats of legislation, is "giving the EU one last chance" to enter into much more fundamental negotiation which could persuade the DUP to return to Stormont. *RTE's* Tony Connelly has further argued that Boris Johnson is playing a "long game" which would keep restive Tory eurosceptics on board at a moment of pressure on his leadership.

A further phase in the saga emerged as Foreign Secretary Liz Truss told the *Sunday Telegraph* that negotiations with the EU Commission have almost "run out of road" and suggested that the UK Government might act to override the Protocol. She said that EU Vice President Maroš Šefčovič had told her that Brussels will "never" back down on the Protocol and had "made clear that the EU did not have, and in his view never would have, a mandate to renegotiate the Protocol or go beyond their existing proposals." She tweeted that she had spoken to the Irish Foreign Affairs Minister Simon Coveney: "Discussed our sanctions on Russian energy to cut off funding for Putin's war on Ukraine. Also talked about the NI Protocol. I was clear it is not working. Our top priority will always be to protect the Belfast (Good Friday) Agreement."

NI Protocol Challenge referred to UK Supreme Court

Senior judges in Belfast have announced that a unionist legal challenge to the Protocol can proceed directly to the UK Supreme Court. The group of unionist/loyalist politicians - led by Traditional Unionist Voice (TUV) leader Jim Allister - were granted leave to appeal a ruling that the post-Brexit trading arrangement is lawful at the Supreme Court. Their arguments

have previously been rejected by the High Court and the Court of Appeal.

Lady Chief Justice Dame Siobhan Keegan confirmed: "We have considered the papers, and in the circumstances of this case we are going to grant leave to appeal to the Supreme Court." The Court of Appeal has said there are legal points of public importance which merit consideration by the Supreme Court. They include whether the Protocol's modification of the Act of Union amounts to a change in the constitutional status of Northern Ireland.

Jim Allister commented: "I am delighted the Court of Appeal has granted leave to proceed to the Supreme Court. This is a clear indication and recognition of the fact that there are significant legal and constitutional issues to be resolved by the highest court in our land. I pay tribute to our legal team and the supporting public who have got us to this point and look forward to definitive rulings which go to the very heart of Northern Ireland's position as a threatened integral part of the UK. This is a battle which must be fought both legally and politically."

DUP representative Diane Dodds said the Protocol was not supported by a single unionist party. "The Irish Sea Border must go. It doesn't represent the best of both worlds. It separates us from our main market, within our own country. Far from protecting political stability in Northern Ireland, it remains an existential threat to our place within the United Kingdom. It must be opposed both politically and legally. We have supported the joint unionist legal action and welcome this next step to the Supreme Court."

A separate challenge is also being mounted by loyalist pastor Clifford Peeples. Last year the High Court in Belfast found that the Withdrawal Agreement Act, which introduced the Protocol,

conflicts with Article 6 of the Acts of Union 1800, drawn up to ensure equal trade footing between Britain and Ireland. However, the court ruled that the new legislation overrides older law which cannot obstruct the clear specific will of Parliament. Those findings were contested on the basis that the Acts of Union has legal supremacy, with no power for the implied repeal of a constitutional statute. In March this year the Court of Appeal again held that the Protocol was to be lawfully enacted and must take precedence over the centuries-old legislative clause.

More Election Manifestos

Sinn Féin and the Alliance published their manifestos in the later stages of the campaign.

The Sinn Féin manifesto argued that the process of planning for a united Ireland, through the creation of an all-island Citizens' Assembly, can go on while efforts continue to deal with the day-to-day concerns of citizens such as rapidly rising living costs and growing health service waiting lists. The campaign "is fashioned to recognise the lived realities of people. Planning for unity does not mean you suspend everything else".

Alliance called for reform of the Stormont system so that MLAs are no longer designated as nationalist or unionist. The manifesto pledged progress on the health service, integrated housing and education, a 'green new deal' for the economy and immediate action on fuel poverty. "This is not just an election about who will be in government, but about whether or not we will have a government."

Section Two: The Evolving Debate

Lord Frost Accuses Dublin

In a paper delivered to the right-wing London think tank Policy Exchange the former UK Brexit negotiator, Lord Frost, accused the Dublin Government of 'disrupting the balance' in Northern Ireland, prioritising protection of the EU Single Market over 'working collaboratively' with the UK on Northern Ireland and 'constantly using vague and destabilising language about tectonic shifts in the North.' Lord Frost directed direct personal criticism to the former Irish Ambassador in London, Bobby McDonagh, who had written in the *Irish Times* of the UK planning to renege on the legally-binding Protocol, referring to "improper legislation" which would undermine relations between the UK and its natural partners in Europe.

Much of Lord Frost's paper was devoted to a review of his work as negotiator:

I was the Government's Brexit negotiator in 2019 when the current Protocol was agreed, again in 2020 when it, and the UK Internal Market Bill, were part of the backdrop to our trade negotiations; and in 2021 I was the responsible Minister as the Protocol settlement – much earlier than expected, and in ways we did not predict – started to come apart.

It seems to me that the Protocol has become a symbol – of different things to different people. For some in unionism it is a symbol of betrayal – by HMG – again. Many nationalists see it, whether they admit it or not, as a step on the path to a border poll and a united Ireland. For Remainers and many in the EU it is a symbol of the UK's supposed failure to understand what was possible and what it had signed up for. Equally, for some Brexiteers it symbolises the EU's own carelessness in insisting on arrangements that prioritised their single market over

sustaining the very fragile politics in Northern Ireland. For other Brexiteers, there is a frustration that we pushed through Parliament a deal which was less than perfect as regards sovereignty and did not deliver absolutely everything that was wanted. There is some truth in all these judgements, but more in some than others. Certainly, none is a complete picture. Yet it seems impossible for the representatives of the different perspectives to engage with each other. As a result, discourse about the Protocol has become disconnected from reality.

Our relations with the EU cannot endlessly be bound up with Northern Ireland. The inability to reach a durable Protocol settlement means that a huge, indeed an unbearable, amount of weight has been put on Northern Ireland's fragile politics as a result. Those politics may now be reaching breaking point and making the current arrangements unworkable. It is time to put our own interests first – the integrity of the UK first – the British people first. I hope that the Government will do so.

It was reported that Lord Frost's remarks were greeted in Dublin with disdain, but there was worry that the UK government was reopening wounds on the Protocol in advance of the elections in Northern Ireland. A spokesman for Foreign Affairs Minister, Simon Coveney said: "The EU remains fully committed to working with the UK to find pragmatic solutions for genuine issues raised by people and businesses in Northern Ireland on the working of the deal the UK government negotiated in partnership with the EU, following the chaos caused by Brexit."

Andrew McCormick on UK responsibility for Protocol

The former Senior Stormont official, Andrew McCormick, has argued that responsibility for the Northern Ireland part of the Brexit deal – and notably the NI Protocol – lies “fairly and squarely” with the London Government. Andrew McCormick was the NI Executive on Brexit, including in the 2017-2020 period when the Executive was suspended. Until 2021 he represented the NI Executive on the Specialised Committee on the Protocol. He worked on the implementation of the North-South institutions set up under the Good Friday Agreement.

In an extensive paper for the London-based Constitution Society in April 2022 he wrote:

However, responsibility for the Withdrawal Agreement of 2019 and the Protocol lies fairly and squarely with the UK government. It is hard to imagine anything (other than Brexit itself) with greater democratic legitimacy under the UK constitution than something that was the very centre of the manifesto on which a government secured a clear majority in a general election. There is little credibility in any argument that the UK government either did not anticipate the implications of what it had agreed, or was constrained and unable to choose any other option. The facts and choices had been spelt out clearly over the whole period from 2016 onwards and the detail of the provisions (notably most of the applicable EU law contained in Annex 2 to the Protocol) were known at latest in autumn 2018. And the time constraint to ‘get Brexit done’ was entirely self-imposed. Indeed, as some have pointed out, the UK government could not explain the Protocol without having to explain properly the wider consequences of Brexit.

He concluded that much depends on what the UK government decides to do next.

Precedents where a UK government has faced down unionist opposition (such as over the Anglo-Irish Agreement of 1985) are no more inspiring than the occasions when a UK government allowed a unionist minority view to prevail (notably the opposition to power sharing and an ‘Irish dimension’ in 1974). Surely the most positive precedent is 1998, where the UK government (alongside the Irish government and with US and EU support) facilitated a process where no side had a veto, and where an agreed outcome (however imperfect) was sought – and secured.

In summary, the 1998 Agreement depended on radical compromises. The change of context as a result of Brexit required – and still requires – a determined engagement based on recognition that no party or grouping has an absolute right of decision on the way ahead. For unionists to conclude that the Protocol is a reason to reject the 1998 Agreement is potentially much more harmful to their future than to the future of Irish nationalists and republicans. In nearly six years of work, no credible solution that is better than the Protocol has been identified and hence its collapse would create uncertainty and instability – which cannot be in the interests of those who want Northern Ireland to succeed.

Unionist Collective sets ‘red lines’ for Powersharing

A collective of sixteen unionist and loyalist groups, including the Apprentice Boys of Derry and the Loyalist Communities Council,

have published an open letter to the leaders of the main unionist parties – DUP, UUP, TUV and PUP – calling on them to declare support for a series of “red lines” for restoring power sharing. These relate to issues such as protecting UK sovereignty, overriding the Protocol, preventing the scenario of a first minister not being drawn from the largest community designation in the Assembly, and party attitudes to implementation of the cultural provisions of the New Decade, New Approach agreement and legislative protections for Irish and Ulster Scots.

The letter states that “It is our view that in the absence of these key tests being satisfied there is no sustainable basis for unionist/loyalist support for the power sharing institutions in Northern Ireland.”

Brexit rules hit UK-EU trade

A study by the London School of Economics (LSE) Centre for Economic Performance has found that UK imports from the EU fell by 25% relative to those from other regions in 2021. The study editors suggest that the new rules had caused many UK firms to cease exporting to the trade bloc. Thomas Prayer of the LSE called the decline in exports to the EU “remarkable. It appears the UK simply stopped selling a lot of products to smaller countries in the EU.”

Analysis of changes in trade patterns for 1,200 products found a “sharp drop” in the number of trade relationships between UK exporters and EU importers, with “lower-value relationships” affected. The researchers behind the report say that extra red tape, customs controls and taxes may have hit European businesses hard. Full border checks are yet to be implemented though. They have been delayed until July and there have been suggestions they might

be put back again.

Dharshini David, BBC Global Trade Correspondent, commented:

The government may have its ambitions sighted further afield for Global Britain - deepening ties with the US, and the growing Pacific Rim nations - but two-fifths of the UK's overseas customers remain closer to home, in the EU. The recovery in level of exports towards the end of last year suggests many British exporters have successfully got to grips with the extra red tape - paperwork and checks. But that rebound partly reflects the sale of bulky, expensive items such as machinery. Beyond that, a sharp drop in the variety of goods sold tallies with surveys which have shown some smaller exporters, particularly those selling lower value items, may have given up selling to Europe as the costs of the formalities prove prohibitive.

That's problematic for two reasons. First because it's those small exporters which are the engine of trade growth, the success stories of tomorrow. And second, as the government's own forecasters note, the new trade agreements struck with the likes of Australia and New Zealand are not yet sufficient to greatly boost the UK's trade prospects. It's a reminder, even as exporters discover new markets, that reducing obstacles in existing ones remains an issue for some.

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Further Reading

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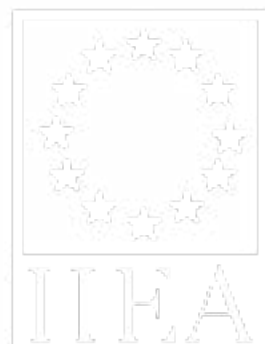
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