

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

The Northern Ireland Protocol impasse continues to challenge political leadership in Ireland, Britain and the EU, amid an extraordinary global context – Russia's continuing aggression and illegal annexations in Ukraine; political, economic and market crises in UK, with Bank of England interventions and IMF warnings; an Irish Budget framed in face of historic cost-of-living challenges; and EU efforts to find agreed policy responses to the continuing Energy crisis. Some positive noises, as the new UK government faces the Protocol issue, present all sides with opportunities which must be grasped.

Insight

The Belfast-based journalist and commentator, Malachi O'Doherty, delivered the following insight: "[...] Brexit not only took northerners out of the EU against their will, it also demonstrated that the Union was not in any meaningful sense a partnership, but rather a relationship in which the senior partner makes the crucial decisions."

Section One: State of Play

Constructive Šefčovič -Cleverly Talks

The new UK Foreign Secretary, James Cleverly, and EU Commission Vice-President, Maroš Šefčovič, spoke by videocall, on 30 September 2022. They agreed on the need

to look for practical solutions to the Northern Ireland Protocol impasse. It is now expected that talks will resume, at an official level, within the coming two weeks, potentially marking the first meaningful discussions since last February. It is accepted that serious divisions remain to be addressed at both political and technical levels.

Mr Šefčovič tweeted: "Good conversation with James Cleverly on Protocol on Ireland/Northern Ireland. Both sides agree to look for solutions around the Protocol to bring predictability and certainty to people in Northern Ireland. The EU is committed to joint efforts. Teams will meet soon. James and I will stay in contact."

For his part, Mr Cleverly commented: "Good to speak to Maroš Šefčovič today on important shared issues including the Northern Ireland Protocol. We agreed we want to look for solutions to protect the Belfast/Good Friday Agreement. We will speak again soon."

Northern Ireland Secretary Chris Heaton-Harris

The newly appointed Northern Ireland Secretary, Chris Heaton-Harris, with his deputy, Steve Baker, has started work with a series of meetings and conversations with all party leaders – Michelle O'Neill, Jeffrey Donaldson, Doug Beattie, Naomi Long, Colum Eastwood and Jim Allister. Chris Heaton-Harris urged politicians and commentators to judge him by his actions and words, rather than his rather hard-line reputation. He insisted, in all of those discussions, that "I will have to call an election on October 28 if there is no executive."

On 28 September 2022 the Irish Minister for Foreign Affairs, Simon Coveney, travelled to Hillsborough Castle to meet Secretary Heaton-Harris. The two men had served as MEPs and had established a good personal relationship which was evident in their remarks following their two-hour talks.

Simon Coveney said the meeting had focused on rebuilding partnership and overcoming the recent "unnecessary tension". Minister Coveney added:

We do believe there is a willingness now for an honest and open, serious dialogue about trying to put these issues to rest." He stressed the need to turn a good personal relationship into one that can get important things done for people... can people in Northern Ireland have their own government to deal with cost-of-living pressures or do they have to put up with another election and all of the polarisation and tension that flows from that.

Chris Heaton-Harris commented on their "fantastic conversation", noting that the joint top priority is "doing everything we can to ensure an executive is re-established before an election has to be called." Nonetheless, he insisted that the UK government was not retreating from the Northern Ireland Protocol Bill: "The protocol bill is passing through its stages and goes to the Lords next, we want a negotiated settlement here and we want to find the appropriate solutions."

Both men predicted that there would be intense UK-EU negotiations – under media blackout – designed to clinch a deal to cut customs checks on the Irish Sea border.

The Northern Ireland Secretary contributed an important policy statement to the Belfast Newsletter on 27 September 2022:

My priority is to see the formation of an executive as soon as possible. I have met all party leaders in the Northern Ireland executive to make clear that there is no excuse for the executive not to be formed. I will keep working with the parties to facilitate the restoration of the devolved institutions. But if the executive is not formed by October 28, I will come under a legal duty to call further elections to the Northern Ireland Assembly.

I will not take this action lightly, but the people of Northern Ireland are facing a challenging period due to high energy prices and cost of living pressures. They deserve an accountable, executive led government.

The UK government is playing its part in this. I was in the House of Commons last week to support the Chancellor's announcement on tax reforms and boosting growth which will encourage further investment in Northern Ireland businesses while people will be paying less taxes. The government will also work with the Northern Ireland departments to identify and establish NI investment zones to ensure that Northern Ireland benefits from the growth that will be enjoyed across the UK.

This is in addition to an unprecedented level of cost of living and energy bill support which will help support families, vulnerable households, businesses and communities in Northern Ireland through this difficult period with a £400 discount on their bills and an

additional £100 for those using Home Heating Oil. But, I must reiterate that what the people of Northern Ireland deserve more than anything else, is a stable and accountable devolved government, delivering for them during this challenging time.

Even in the absence of an executive, I am determined that the government continues to deliver on its commitments to the people of Northern Ireland. I understand that the Northern Ireland Protocol is causing real problems and that we must find a solution. I believe this can be found through a negotiated settlement with the EU but if this is not possible we will continue with our legislation to resolve the very serious issues with the protocol.

I want to do what is right for the people of Northern Ireland; from progressing legislation that will ensure all of Northern Ireland's identities, languages and cultures are respected as well as working with people across communities in seeking to address the legacy of the past.

I'm determined that women and girls should have the same access to safe and high quality abortion services in Northern Ireland as they do across the UK. A small team of experts within the Northern Ireland Office is working closely with the Department of Health to prepare a commissioning plan. If the health minister does not act, the government will intervene. There are undoubtedly tough times ahead, but as we look to the future, there is cause for hope.

The 25th anniversary of the Belfast (Good Friday) Agreement will be

an opportunity to give thanks for the progress we have seen, and to recommit ourselves to building greater prosperity, good governance, and a safer and more reconciled society. Such a future was the vision underpinning the agreement and delivering on it for the people of Northern Ireland will remain my absolute commitment as secretary of state.

Peter Kyle at Labour Party Conference

In his speech to the Labour Party Conference in Liverpool on 26 September 2022 the shadow Northern Ireland Secretary, Peter Kyle, addressed the Protocol issue:

It was the Tories who proposed, drafted, negotiated and signed the Northern Ireland Protocol into international treaty. Yes, there are problems with it, but they can be solved. We know that negotiation is the only path forward. But a year has already been wasted. A year in which politics in Northern Ireland has stumbled and the Tory government in Westminster looked the other way.

A Labour government would deliver rapid deals with the EU on the flow of goods, the sharing of data, and making it easier for agricultural products to move around the UK and the island of Ireland. We'll fight hard for our interests using statecraft, diligence and graft – not the Tory ways, which always seems to end, somehow, in breaking the law.

The difference in approach and ambition between the Tories and Labour couldn't be starker.

Labour delivered peace, prosperity and confidence to Northern Ireland. The Tories can't even negotiate a prawn sandwich across the Irish Sea. The people of Northern Ireland deserve better. With Keir Starmer and a Labour government they will have it.

Biden – Truss Meeting

President Joe Biden and Prime Minister Liz Truss held their first one-on-one meeting at the UN General Assembly in New York on 21 September 2022.

The two leaders agreed on the “priority” of preserving the gains of peace in Northern Ireland and to protecting the Good Friday Agreement. A negotiated resolution to the Protocol row was described as preferable by both sides. The discussion on Northern Ireland was described as a “short” element of a conversation dominated by the Ukraine war.

The US President is expected to visit the UK in the first half of 2023 to mark the 25th anniversary of the Good Friday Agreement.

Northern Ireland Protocol Bill / House of Lords

The Northern Ireland Protocol Bill, having passed the House of Commons, may move to the House of Lords in the second week of October. There are indications that the Lords debate may be delayed to enable the EU and UK to work on a negotiated solution to the Brexit dispute.

Commentators foresee a potential rebellion in the Lords as peers express concerns not just over the proposals to enable the government to tear up parts of the Protocol but that the Bill gives ministers ‘dictatorial’

powers to bring in new laws as long as they consider them 'appropriate'.

A group of some 50 Conservative, Labour and cross-bench peers have indicated serious concerns. "We do need to be very careful here that we are not ripping up international treaties. It would be very unwise not to have some element of parliamentary inspection. What is happening here is parliament going to give carte blanche to any minister to do whatever they want to do without any explanation including breaking international law."

The House of Lords 'Protocol on Ireland/Northern Ireland Sub-Committee' heard Oral Evidence from a number of experts at a session on 7 September 2022. Those who contributed to the session were: Roger Pollen, Head of Northern Ireland's Federation of Small Businesses (FSB); Peter Summerton, Managing Director at McCulla Ireland; Michael Hanley, Chief Executive at Lakeland Dairies; Professor Alan Boyle, Emeritus Professor of Public International Law at Edinburgh Law School, University of Edinburgh; and Professor Mark Elliott, Professor of Public Law and Chair of the Faculty of Law at Cambridge University. Each made some important interventions, which are reproduced below.

Michael Hanley, Chief Executive at Lakeland Dairies:

As far as we are concerned, there are no issues with the Northern Ireland protocol as it currently stands. Although well intended, the Northern Ireland Protocol Bill is creating significant unintended negative consequences in complex food supply chains. That is in relation to the dual regulatory regime. We have been able to continue to supply all our

customers around the world due to the protocol. We would like this to continue as it stands. Although the dual regulatory regime is well intended, as I say, and will possibly work for retail, it will not work where you are in primary processing and where product has to be certified by vets otherwise the product will not move. If our product is not certified by the vets by DAERA in Northern Ireland, it cannot move to southern Ireland, the EU or export markets. It is as simple as that. The issue is certification, and the dual regulatory regime puts a question mark over all of that.

Roger Pollen, Head of Northern Ireland's Federation of Small Businesses:

A negotiated solution has to be the most attractive and robust endpoint, because anything unilateral is always open to challenge. Therefore, we see that the Bill maps out a very sensible landing ground. It would be hard for anybody to go out and talk to businesses and not see that there are problems for which the Bill could provide solutions. The Bill proposes a lot of good solutions if we can get into a sensible dialogue about whether these are the right solutions and what mitigations we would need to put in place to make sure that the other side of the negotiation is not negatively impacted and that everybody sticks to the principle behind the original agreement but delivers it in a more subtle and responsive way.

I have certainly picked up strongly from within our membership a deep concern about the continuing stalemate at Stormont and the connection that has been made—some people would argue that it is right and others that

it is wrong—between the protocol Bill and the resolution and resumption of activities at Stormont. I will leave you to connect those two as much or as little as anybody else can.

Peter Summerton, Managing Director at McCulla Ireland:

Whenever we look forward at the protocol Bill, one key thing we really need to do here is to make sure that the science of logistics, not just the art of politics, is sitting in the room. Over the last number of sessions, and after maybe 40 months of technical conversations, we are seeing suggestions that simply do not work logistically for the supply chain between Britain and Northern Ireland. That even comes down to the current proposals around green lanes. We need to be really careful how we understand a green lane or a red lane will work and, even more notably, how products that have an undetermined end use whenever they enter Northern Ireland will fit into the model. That is key to keeping costs down and goods freely moving, and resource properly allocated across the Irish Sea.

Professor Mark Elliott, Professor of Public Law and Chair of the Faculty of Law at Cambridge University :

My general view is that, although the Bill obviously tries to address a practical, economic and political difficulty, there are some legal difficulties with it as it currently stands. Fundamentally, it seems there is a good argument, at least, that there is an incompatibility between the Bill and the provisions that lie at its conceptual heart, as I see it, and the obligations by which the UK is

bound under international law through the UK-EU withdrawal agreement.

Professor Alan Boyle, Emeritus Professor of Public International Law at Edinburgh Law School, University of Edinburgh, concluded:

What Professor Elliott has just said is interesting. I am not an EU lawyer; that might be my weakness. He says that he is not an international lawyer but he is an EU lawyer. I have not studied the withdrawal agreement in any great depth but the key point is that I have read a lot of politicians here and in Europe saying, "Oh, this protocol violates international law". I have not heard a single one, nor have I read anybody, explaining in what respect it violates international law. It does not violate international law in the slightest unless it violates either the withdrawal agreement or the protocol itself. But, for me, the Bill can be justified in terms of Article 16—the derogation provision. If you can justify it under Article 16 then it cannot be a violation of the protocol or of the withdrawal agreement or of international law in general.

The collapse of devolved government in Northern Ireland is a societal difficulty, and part of the purpose of the protocol was to sustain power-sharing under the Belfast agreement. Well, it has not exactly succeeded in that, has it? It seems to me that the Government's purpose is to try to restore power-sharing; that is consistent with the objective of the protocol and the Government are entitled to pursue that objective. I do not have any difficulty with their derogations in terms of Article 16. Let me put it this way: I would be happy to defend those derogations

in an arbitration, and that would not be very difficult. I would be lost for arguments if I were on the other side trying to attack them.

Northern Ireland Census

There are more Catholics than Protestants in Northern Ireland for the first time since its creation, according to census results published on 22 September 2022.

According to the new figures a total of 45.7 per cent of people in the North are either Catholic or from a Catholic background, compared to 43.5 per cent who are Protestant or from other Christian denominations. Some 1.5 per cent come from other non-Christian religions. The remaining 9.3 per cent of the population — 177,400 people — neither belonged to nor were brought up in any religion. This represented an increase since the last census in 2011, when 5.6 per cent — or 101,200 people — were recorded in this category.

In 2011, 48 per cent of people were either Protestant or from a Protestant background, compared to 45 per cent who were Catholic. Initial findings from the Northern Ireland census, which was carried out on March 21st, 2021, were released in May and showed the NI population had risen to 1.9 million.

Paul Gillespie, writing in the *Irish Times*, commented that it is “hazardous to infer preferences for Irish unity or UK union from these latest census figures. Increasingly such choices will be made on more pragmatic grounds by larger numbers of voters concerned with their likely wellbeing in either a new Ireland or a reformed UK.”

Section Two: The Evolving Debate

Bertie Ahern seeking Common Ground

The *Business Post* has reported that the former Taoiseach, Bertie Ahern, has been operating as a low-key diplomat by meeting individuals from all sides of the Northern Ireland debate, at the request of the former Northern Ireland minister, Conor Burns. He has been feeding information back to Conor Burns, the Irish government and the European Commission in an effort to establish where genuine compromise might be achieved on the Protocol issues.

Bertie Ahern’s standing in key areas were leveraged to bring about a meeting in Brussels involving members of the Northern Ireland Assembly with MEPs and Commission officials. Barry Andrews MEP played a central role in setting up the meeting at which Ahern was a keynote speaker, reported as “imploring all sides to put their ideologies aside as a solution to the protocol arguments was not rocket science.” After the event, Mr Ahern met for dinner with Commission Vice-President and EU chief negotiator Maroš Šefčovič.

Bertie Ahern is quoted as saying: “I would feel more confident than I have at any stage since last October but there is probably one bit on this. If that bite isn’t taken, we run straight into two things: the British protocol legislation in the House of Lords, and the Northern elections which would have to be called. Liz Truss’s policy platform is tax, energy and health. Why would she want to continue having this thing going on? Why would she do that with just two years until their next election. It doesn’t make sense to me.”

Michel Barnier Address

The former EU negotiator, Michel Barnier, delivered an address to the EU50 Conference Iveagh House Lecture Series, 29 September 2022, in which he offered his views on the current state of play in the EU-UK relations, and the Protocol:

Since 2016, the EU has worked with patience, objectivity and without ideology just to find operational solutions to the problems caused by Brexit and only by Brexit. Although we faced dogmatism from the consecutive conservative British governments, we finally reached an agreement with Boris Johnson.

The European Union must not and will not back down as the Protocol on Ireland / Northern Ireland must and has to be respected by the British government. This is international law.

The current context can only be seen as a window of opportunity. An opportunity to put the Protocol into effect. And an opportunity to strengthen our partnership with the United Kingdom. The European Union has an outstretched hand towards the United Kingdom once again. It wants to find pragmatic solutions.

Neither the United Kingdom nor the European Union want a resurgence of conflict on this island. A positive outcome on the Protocol would also result in a more positive outcome in other areas of our relationship with the United Kingdom.

Two important points are to be noted: The utmost respect for principles of democracy and the rule of law should be the mutual guiding star in our bilateral engagements, through the implementation of ratified international law agreements. The respect of partners, listening to all stakeholders and building trust by choosing dialogue rather than unilateral actions.

That said our interests, European interests, Irish interests must strongly be defended. The Protocol, an integral part of the Withdrawal Agreement, protects the Good Friday (Belfast) Agreement in all its dimensions, and avoids a hard border. We need legal certainty and predictability around the Protocol.

I am convinced that with political will and commitment, solutions can be found. And in that context, I think it's important to underline that above and beyond Brexit, it is clear that there are still very strong ties between the people of Europe and the people of the UK. There is nevertheless a single condition for this outstretched hand by the European Union it is that the British government respect its signature, assume frankly and lucidly the consequences of Brexit here in Ireland and elsewhere.

Business Voices

A number of British firms including Vodafone and Airbus have expressed concern that an escalating row over the Northern Ireland Protocol could hinder them in securing EU contracts. According to the *Daily Telegraph*, the companies are leaning on Prime Minister Liz Truss to ensure a negotiated settlement with the EU over the post-Brexit trading arrangements.

Vodafone, which is headquartered in London but whose biggest market is in Germany it was “important to avoid barriers or friction” in the UK-EU relationship. Airbus, another company with significant presence in the UK also waded into the efforts to persuade the Government to find a negotiated path. A spokesperson said: “Given our shared industrial footprint, we remain vigilant on the evolution of all applicable laws and regulations, but at this stage we would look for the agreed level playing field between the EU and the UK to be maintained to allow Airbus to plan our operations for the future.”

Section Three: Background Material and Further Reading

Background Material

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