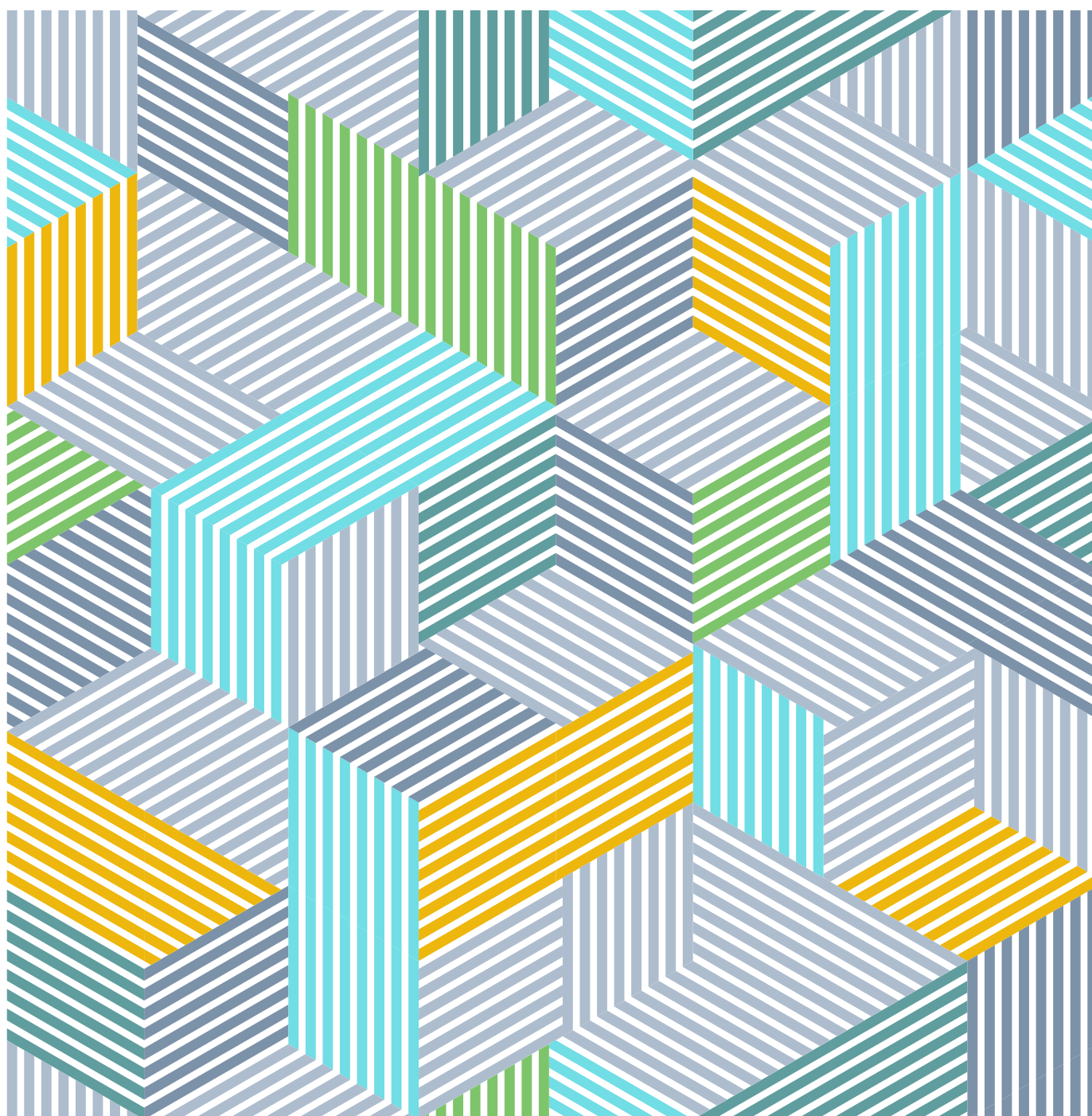


The Trade and Investment Advantages of the Protocol on Ireland/Northern Ireland

Blair Horan



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Glossary of key terms

CE **Conformité Européenne**

A marking used to indicate conformity with EU health safety and environmental protection standards.

CETA **Comprehensive Economic Trade Agreement**

A free trade agreement signed in October 2014 between Canada and the European Union

CHED **Common Health Entry Document**

A document used for the pre-notification of consignments arriving into the European Single Market from third countries.

CTA **Common Travel Area**

An open borders arrangement between Ireland and the United Kingdom which also includes the Channel Islands and the Isle of Man.

Diagonal Cumulation

A provision included in Free Trade Agreements to use products which allows two parties to combine their goods once processing takes place and also to include goods from the other FTA partners of the two parties involved.

EEA **European Economic Area**

The EEA refers to the Single Market of EU Member States, as well as non-Member States Norway, Liechtenstein and Iceland.

EFTA **European Free Trade Association**

A regional trade organisation consisting of Norway, Switzerland, Liechtenstein and Iceland. These countries participate in the European Single Market and the Schengen Area.

EHC **European Health Certificates**

A veterinary-signed document accompanying all animal products entering the EU that guarantees the health conditions for import have been met.

GSP **Generalised System of Preferences**

A system which allows products originating from certain developing countries to have preferential access into the EU's market.

MFN **Most Favoured Nation**

A status in international trade which requires a country to give any concessions, privileges and immunities granted in one trade agreement to all other WTO Member States. The purpose is to ensure equal treatment among all Member States.

RoO **Rules of Origin**

International trade law criteria that determines the national source of a product.

SPS **Sanitary and Phytosanitary**

Relates to the quarantine and biosecurity measures applied to food and feed to prevent against the spread of pests and disease and from risks arising from additives, toxins and contaminants.

TCA **Trade and Cooperation Agreement**

An agreement signed between the UK and the EU following the UK's withdrawal, which outlined the basis of their future relationship.

TRQ **Tarif Rate Quota**

The quantity of a product that may be imported at a lower import duty rate than normally available for that product.

UCC **Union Customs Code**

The UCC is the EU framework for customs rules and procedures and combined with the Official Control Regulations contains all the requirements that must be met for goods to enter free circulation in the EU.

UKCA **United Kingdom Conformity Assessed**

A certification mark indicating conformity with the requirements for goods to be sold on the market in Great Britain.

UKTS **United Kingdom Trader Scheme**

A scheme to help ensure traders do not pay any tariffs on the movement of goods into Northern Ireland from Great Britain when those goods will remain in the UK customs territory.

Executive Summary

This paper outlines how Northern Ireland stands to benefit from the unique trading status granted to it by the Protocol on Ireland/Northern Ireland, taking account of the proposals contained in the European Commission non-paper of 13 October 2021. The author argues that Northern Ireland has “the best of both worlds” as it continues to participate in the EU Single Market for goods whilst remaining in the UK Customs Union. This, the author argues, is a far superior outcome than that enjoyed by Great Britain under the terms of the Trade and Cooperation Agreement. The Protocol on Ireland/Northern Ireland is ultimately about trading relationships. It is not a constitutional matter.

The author argues that the UK’s May 2020 Command Paper “signalled in a very clear manner that the UK wished to reopen, what had been agreed”. The July 2021 Command Paper represents a further step in this direction. The author questions why a UK Government, which accepts the need for the “levelling up” of this less prosperous region of the UK, would try to remove the benefits of the Protocol and, at best, level Northern Ireland down to Great Britain’s inferior trade status with the EU.

The terms upon which the UK decided to withdraw from the EU necessitates redrawing the Single Market’s regulatory frontier. The UK is thus faced with a ‘border trilemma’, which requires a choice between a land border, an Irish Sea Border or a border in the Celtic Sea. Both the UK and the EU have committed to avoiding a ‘hard border’ on the island of Ireland in order to protect the Belfast/Good Friday Agreement. A so-called ‘Celtic Sea border’, not only undermines Ireland’s place in the Single Market and the integrity of the Single Market itself, but it is logistically impossible given the fact that reality of an all-island SPS area limits the flexibility that can be granted on SPS checks and controls on any point of entry to the whole island.

Any proposal that the Protocol should be removed should also examine what would be involved in removing the very clear benefits it brings for Northern Ireland. Such proposals should also clearly demonstrate how the alternatives would be better for Northern Irish residents, business and farming interests, and the author argues that the Protocol itself is much more significant than the GB-NI restrictions that most attention is focused on. Ultimately, Northern Ireland’s unique trading status makes Northern Ireland into a viable alternative distribution model to Great Britain, to sell into both Great Britain and into the EU, because Northern Ireland is in the UK Customs Union and also has free circulation in the EU.

About the author

Blair Horan is a member of the IIEA’s UK expert group. He was a member of the Irish Executive Committee of the ATGWU (Unite) trade union in the Belfast office from 1980-1988. He worked for the Civil Public and Services Union, trade union from 1988 becoming General Secretary and a member of the ICTU Executive Council from 1997-2011/12. He has represented ICTU on the following bodies. National Forum on Europe 2002-2009. Alternate member EU Economic and Social Committee 2010-2015. Full member European Social Fund Committee 2011-2021. Current member of EU North-South Interreg Steering, Evaluation, and Monitoring Committees since 2015. Blair led the negotiations for the CPSU on the integration of customs staff members into the wider Revenue structure as part of the EU 1992 Single European Market Programme. He has an Honours BA Degree in Economics, and an Honours MA Degree in International Relations.

Introduction

The Protocol on Ireland/Northern Ireland (the Protocol) gives Northern Ireland a unique trade status which allows many of the trade benefits of EU membership to continue, and is superior to the Trade and Cooperation Agreement (TCA) under which Great Britain now trades with the EU. The checks and controls on entry to Northern Ireland, from Great Britain and the Rest of the World, are an integral part of that unique status and arise because Northern Ireland is inside the EU's external trade border. If consent to the Protocol trade Articles is withheld by the Stormont Assembly in 2024, this would also automatically remove the unique trade status. It is surprising that the UK Government, which accepts the need for levelling up of this less prosperous UK Region, nevertheless tries to remove these benefits and, at best, level Northern Ireland down to Great Britain's inferior trade status with the European Union. This paper examines the key issues around the Protocol, assesses the proposals in the UK Government's July Command paper, and considers the new package of measures proposed by the EU on Wednesday 13 October.

On Wednesday, 21 July 2021 the UK Government issued a new command paper on the Protocol. These proposals confirm a pattern that began with the May 2020 Command Paper and continued when the UK sought a renegotiation around the Protocol's implementation, and followed through with the unilateral extensions in March 2021. This shows that the UK always intended to try and reopen the Protocol agreed on Thursday, 17 October 2019. The Commission made a serious error in January 2021, by indicating it might use Article 16 of the Protocol to prevent the diversion of EU vaccines. This gave the UK Government the opportunity to reopen discussions on the tenability of the Protocol. There is an extraordinary claim in the paper that Prime Minister Boris Johnson only agreed the Protocol, because Parliament had a veto on the UK leaving without an agreement. The new UK proposals involve a fundamental change to the essential structure of the Protocol, including removing sea border controls on Northern Ireland

destined goods, along with oversight by the Commission and Court of Justice of the European Union. The new UK proposals are not actually very new, but a version of ideas already rejected by the EU, because a back door would be opened to the Single Market and Ireland's place within it. The EU response was to rule out renegotiation, but to continue to explore available flexibilities and pause its legislative action.

The 'backstop' agreed by the May Government in November 2018 failed to command a majority in the House of Commons and led to a change of Government. On Wednesday, 2 October 2019, Prime Minister Johnson wrote to the European Commission President Jean-Claude Juncker proposing a common Sanitary and Phytosanitary (SPS) and regulatory zone for the island of Ireland, that Northern Ireland should remain in the UK Customs Union, and for there to be a consent mechanism for the Northern Ireland Executive/Assembly¹. The EU made significant concessions on these issues and agreed to replace the backstop with a revised Protocol. The core structure of the revised text involved a dual tariff system with goods entering Northern Ireland (other than from the EU) and at risk of Union entry liable for Union Customs Code (UCC) tariffs, while goods to be consumed in Northern Ireland and not at risk would be either tariff free or liable for the UK Global tariff (UKGT). Goods subject to commercial processing would always be at risk. An EU-UK Joint Committee had the task of deciding the criteria for goods at risk, along with the definition of commercial processing.

At the EU-UK Withdrawal Joint Committee on Thursday, 17 December 2020, the EU and UK agreed on the definition of commercial processing and the details of the criteria for goods at risk and set this out in JC Decision 4/2020. Article 2 of this decision defines non-commercial processing, and this includes food, but for UK consumption only. Article 3 stipulates that goods subject to commercial processing will always be at risk and liable for UCC tariffs. Under Article 3 a UK Trader Scheme (UKTS) was agreed which could verify that the goods were consumed in Northern Ireland, and thus

allow goods otherwise at risk to be declared not at risk and avoid UCC tariffs. A number of transitional arrangements were also agreed to give time for Northern Irish supply chains to adjust to the requirements of the Protocol. These involved a three month-delay on GB suppliers to NI supermarkets requiring Export Health Certificates (EHCs), a six-month grace period for chilled meats and a year-long transition on medicines. On Thursday, 24 December 2020, the EU and UK concluded the Trade and Cooperation Agreement (TCA) which agreed tariff and quota free trade between the parties. However, goods qualifying for preferential tariffs must meet very strict Rules of Origin (RoO) criteria, which limits EU-UK trade to bilateral cumulation, meaning it is confined to the two parties, and excludes the diagonal cumulation (including other FTA partners) which the UK sought. Diagonal cumulation, if conceded, would still fall far short of the Single Market status the UK enjoyed as an EU member state, a status which Northern Ireland retains because of the unique trade arrangement that the Protocol gives.

Although the Commission did not proceed with the Article 16 proposal, the UK responded by seeking a lengthy extension of grace periods with wider supplier access, along with the removal of a series of restrictions on pets, plants, seed potatoes and parcels. The EU raised non-compliance by the UK with the Protocol and indicated that some of the UK asks would require alignment with EU SPS rules. Following the UK's unilaterally extension of the grace periods in March 2021, and the removal of certain restrictions on prohibited products, the EU responded by announcing its intention to initiate legal action along with the Arbitration process. Over the next few months, the UK's position gradually shifted from grace period extensions to the application of the at-risk principle to SPS regulations, and finally a renegotiation of the Protocol. Following the appointment of Lord Frost, one of the Protocol's original negotiators, as the UK's Co-Chair of the Joint Committee, the UK soon declared the Protocol unsustainable in its present form and claimed that increased North-South trade was a problem.

Trade Advantages of the Protocol

Since January 2021 the main focus of those who object to the Protocol has been on the Great Britain - Northern Ireland (GB-NI) trade frictions introduced by the Irish sea border. The trade advantages that Northern Ireland has under the Protocol are mentioned in the general sense of Northern Ireland having the 'best of both worlds', but without any details, though NI business interests know that it is better than trading under the TCA. The GB-NI trade frictions are similar to those for Great Britain - European Union 26 (GB-EU 26) trade crossing the Channel, and they also apply on an all-island basis, the same regime for goods moving through Dublin as Belfast. That is what would be expected for an all-island SPS and regulatory zone, which is what Prime Minister Johnson requested on Wednesday, 2 October 2019, and was agreed because it was the only means to avoid a hard land border. It is very important to note that the UK Explainer document on Johnson's letter of Wednesday, 2 October 2019 to the EU was very explicit on what the UK offer on a new Protocol involved and on page 3, paragraph 7, it stated that the revised Protocol would mean:

The introduction of a zone of regulatory compliance across Northern Ireland and the EU would remove the need for regulatory checks and related infrastructure at the border between Northern Ireland and Ireland'.

This was followed by a commitment that (bolded text is exactly as set out in the Explainer document):

*Northern Ireland would **align with EU SPS rules, including those relating to the placing on the market of agri-food goods[...]**They would be subject to identity and documentary checks and physical examination by UK authorities as required by the relevant EU rules'. In addition, **Northern Ireland would also align with all relevant EU rules relating to the placing on the market of manufactured goods** This would*

*reinforce the arrangements above by ensuring that regulatory checks can be implemented at the boundary of the zone, as appropriate and in line with EU law, minimising the potential for non-compliance.*ⁱⁱ

The Explainer document on Johnson's letter of Wednesday, 2 October 2019 to the Commission President also stated in paragraph 9 that prohibited products, including sausages and other chilled meats, would be unable to enter Northern Ireland:

...traders moving goods from Great Britain to Northern Ireland would need to notify the relevant authorities before entering Northern Ireland, in order to provide the necessary information to undertake the appropriate checks, and, where appropriate, prevent the entry of products prohibited or restricted by EU rules.

The context here is that the Prime Minister's proposal was for the customs border to be between Northern Ireland and Ireland and not Great Britain and Northern Ireland, but full regulatory alignment with Northern Ireland inside the EU external trade border for SPS and industrial goods controls was conceded by the UK in the aforementioned letter.

This was in advance of the negotiations that month, contradicting the explanation now given about how Boris Johnson was 'forced' to agree the Protocol, and also showing that the impact of EU regulations on a sea border was well known. The key issue for Johnson on Wednesday, 2 October 2019 was about the customs border, and not the regulatory border which involves the more onerous checks and controls with trade frictions the outcome. The agreement on the TCA on Thursday, 24 December 2020, changed somewhat the dynamic of the Protocol because all of the UK now had free trade with the EU. This was noticeable in the case of Northern Irish business interests, who now focused solely on significant flexibilities they required from the EU on the checks and controls GB-NI, which could put at risk the all-island nature of the regulatory zone which had been agreed.

This focus on flexibility from the EU to NI businesses once the TCA was agreed can be seen in evidence to the Northern Ireland Affairs Committee of the House of Commons over a period of time. On Friday, 30 April 2020, Angela McGowan, Director CBI (NI), said the following about the Protocol:

This saved the Northern Ireland economy from a no-deal Brexit [...] Northern Ireland would be very hard hit by a no-deal Brexit- the hardest out of all the UK Regions [...] From our perspective, this protocol was a lifeline.

On Wednesday 6 January 2021, Aodhán Connolly, Director of the Northern Ireland Retail Consortium, in a comment addressed to the Joint Committee, said "Thanks very much for what you have given us. Now what else can you do?". On Wednesday, 17 March 2021, Glynn Roberts, CEO of Retail Northern Ireland, said: "It is important to point out that the broader business community in Northern Ireland did not want or lobby for the Protocol", and later went on to add: "We did not seek this protocol and we are trying to make the best out of what is a difficult and cumbersome situation".

Northern Irish business and farming interests do support an EU-UK veterinary agreement as a means to ease checks and controls, but the main focus is on flexibility from the Commission. The UK's unilateral extensions in March were welcomed by NI business, which has also called for a trusted trader scheme which is an extension of the at-risk principle to SPS regulations, despite an all-island regulatory zone being a core principle of the Protocol. Trusted trader schemes allow inspections and controls to take place in traders' premises, but the EU does not extend this to SPS regulations. However, on Thursday, 15 July 2021 in further evidence to the Committee from NI farming and business interests, there was a recognition that the Protocol was better than the TCA and none called for its removal. However, it was also noticeable in the evidence that if a veterinary agreement was not concluded, that extensive additional flexibility was still expected from the EU by NI business interests, largely reflecting the narrative that

has emerged since March that a distinction should be drawn on whether goods were destined for Northern Ireland or Ireland. This fails to take account of the reasons that the Protocol is better than the TCA, which is because Northern Ireland is inside the EU's external trade border, and for this reason flexibilities can only be available on a strictly risk assessed basis.

The Protocol unquestionably brings trade frictions into GB-NI trade both for customs and regulatory issues, but that is unavoidable because of the common all-island regulatory zone. The same trade frictions apply to Great Britain - Ireland (GB-IE) trade and GB-EU 26, because the only way to avoid a hard land border was to allow Northern Ireland to continue to participate in the Single Market for goods. The key difference of course is that Northern Ireland is part of the UK, which is the reason that flexibilities within the Protocol were agreed. However, being inside the EU's external trade border also brings very substantial trade advantages for Northern Ireland, which is important for a small regional economy of the UK that needs development opportunities, particularly since those offered to Northern Ireland in the Protocol are better than those available in the TCA. Northern Ireland is very reliant on the public sector for employment, so additional trade opportunities that can arise from the unique trade status under the Protocol can be a jobs and investment benefit for Northern Ireland.

Under the TCA, Great Britain has tariff free trade with the EU, but it is highly constrained by restrictive rules of origin and non-tariff barriers. The UK has lost a key advantage of the EU Customs Union and Single Market which allowed global supply chains to be used with no RoO restrictions, once the common external tariff was paid. All goods, whether finished or intermediate, could be imported under the UCC paying the EU's World Trade Organisation (WTO) Most Favoured Nation (MFN) tariffs with most third countries, and with preferential tariffs (usually zero) for those with an EU Free Trade Agreement (FTA). The TCA only allows bilateral cumulation of EU and UK origin goods and the EU pointedly refused to countenance diagonal cumulation which would have extended this to respective FTA partners. This is because the EU will not allow the UK to leave the EU and become a manufacturing or distribution hub on its doorstep, and this now severely constrains the type of trade relationship that Great Britain can enjoy with the EU.

The latest available full Northern Ireland Statistics and Research Agency (NISRA). Broad Economy Statistics for goods trade for Northern Ireland are for 2018 and 2019. There are HMRC trade statistics available for 2019 and 2020 for imports and exports for Ireland, Rest of EU and RoW trade, but not purchases and sales for GB-NI. Also, these statistics use a different source and are not comparable. However, they do give information with regard to the composition of trade.

Sales and Exports	2018	2018		2019	2019	Purchases and Imports	2018	2018	2019	2019
GB	£6.6B	43.1%	GB	£6.8B	42.8%	GB	£10.4B	60.2%	£11.1B	61.3%
IE	£3.1B	20.2%	IE	£3.4B	21.4%	IE	£2.4B	13.8%	£2.6B	14.4%
REU	£2.1B	13.6%	REU	£2.0B	12.6%	REU	£2.4B	13.8%	£2.1B	11.6%
RoW	£3.5B	23.1%	RoW	£3.7B	23.2%	RoW	£2.1B	12.2%	£2.3B	12.7%
Total	£15.3B	100%	Total	£15.9	100%	Total	£17.3B	100%	£18.1B	100%

The 'best of both worlds' that Northern Ireland has, trading under the Protocol, is not just the tariff free and frictionless access to both GB and EU markets, important though this is, it is that NI has a unique trade status not available to Great Britain for its EU trade. Northern Ireland has retained the trade advantages of EU membership that Great Britain has lost and can access global supply chains to trade within the EU Single Market, as if Northern Ireland was still an EU member, even though Northern Ireland remains in the UK Customs Union, not the EU Customs Union.

In a Commission Guidance Note Wednesday, 23 December 2020, on the withdrawal of the UK and EU rules in the field of customs the unique status of Northern Ireland is set out showing that, although Northern Ireland is in the UK Customs Union, it is treated as if it were a Member State in respect of EU law and customs legislation and that it is also part of the customs territory of the EU and has access to EU FTAs for imports, but not exports.ⁱⁱⁱ

Thus, Northern Ireland can be a manufacturing and distribution hub on the EU's doorstep, a status denied to Great Britain by the EU's insistence on Rules of Origin confined to bilateral cumulation between the two TCA partners. EU Customs Union and Single Market membership is unique in allowing access to global supply chains once the Union tariff is paid with no RoO conditions. The equivalent of full cumulation does not exist in standard FTAs. This unique trade advantage is automatically lost if consent is withheld from the trade articles of the Protocol in 2024 by the Northern Ireland Assembly. These unique trade advantages give Northern Ireland a competitive advantage over Great Britain in trade with the EU and it will make Northern Ireland a more attractive location for investment, leading to more employment opportunities.

There are shortcomings in the level of involvement for Northern Irish officials and public representatives in the area of laws and regulations that will apply in Northern Ireland, particularly in respect of future changes. Northern Ireland has a superior

trade status to that of EEA/EFTA members, in the terms of access to the EU Single Market, but lacks the consultation levels available to EEA members, and this should be addressed. EEA/EFTA Member States are outside the EU Customs Union which means they cannot use global supply chains in the way EU members and Northern Ireland can, but they do have diagonal cumulation within the EEA.

From Brexit to the Backstop and the revised Protocol

To understand the role of the Protocol as a response to Brexit, it is important to look back over the key events that led to Brexit along with the evolution of UK policy approaches before the final agreement in October 2019. After the Maastricht Treaty in 1992 the Conservative party turned increasingly Eurosceptic. When David Cameron became leader in 2006, he seemed at first to wish to change course with his 'stop banging on about Europe' remarks, and then the euro crisis in 2010 intervened. His Foreign Secretary, William Hague, a former leader and convinced Eurosceptic, called in 2011 for reduction in the powers of the EU in the UK and a repatriation of powers back from the EU, pledging 'that when the right moments come this Party should set out to reduce it'.^{iv} Hague's thinking was that with the severity of the euro crisis, which he described as being in a burning building with no exits, there would be support among newer member states, in particular, for a move back from deeper integration towards a free trade structure for Europe. Cameron started by withholding consent to the Fiscal Compact Treaty in 2011, but Sarkozy and Merkel outmanoeuvred him with an Intergovernmental Treaty. In his Bloomberg speech in January 2013, Cameron set out an ambitious agenda for a new Treaty and new settlement where power could return to the member states. He effectively sought a structural change to the Single Market, proposing Treaty revisions which could restore national vetoes. If that failed to gain support, he sought additional concessions for the UK, to add to the vetoes

over foreign policy and opt-outs on the euro, Schengen and much of Justice and Home Affairs that the UK already enjoyed. He threatened an in/out referendum as a means to exert pressure on the EU. It was a disastrous failure and ended with Brexit.

Theresa May, as the new post-referendum Prime Minister tasked with delivering Brexit, set UK policy as leaving the Customs Union and Single Market in her speech to the October 2016, Conservative party Conference. It was soon evident that the 'have the cake and eat it' approach of the referendum campaign was now an integral part of UK Government policy for a new trade relationship with the EU. There was an early commitment to 'avoiding a hard border', in Ireland, but it soon became clear that this was part of a policy to have no borders at all. The UK Government's policy from day one was to devise every conceivable mechanism to avoid the regulatory border trilemma, that it seems everybody bar the UK knew existed. Once the UK decided to leave both the EU Customs Union and Single Market, the border trilemma required a choice to be made between a land border, an Irish Sea Border or a border in the Celtic Sea.

In August 2017, the UK issued two papers, one on customs and the other on Northern Ireland that still remain central to the UK Government's approach today, which is to deny and seek to avoid the consequences of the choices the UK made on Thursday, 23 June 2016. The customs paper outlined two options, a conventional border with streamlined facilitations, and the preferred Customs Partnership with a dual tariff structure with the aim of avoiding any border. This was developed into the Chequers Plan and was adopted by the UK Government in July 2018. The Northern Ireland paper focused on avoiding a hard border and did commit to that, but alongside a determination to avoid a GB-NI sea border as well. The UK approach was for regulatory equivalence on SPS with high standards to achieve the same outcomes, but with flexibility on the means to achieve it. This is really mutual recognition based on respective high standards, but the EU will not accept this as a way to remove SPS checks and controls. Mutual recognition

is accepted by the EU for its Member States based on the European Court of Justice precedent set in the *Cassis de Dijon* case of 1979, when the principle, "if its lawful in one country its lawful in all" was set. But this only applies to EU Member States, and generally covers around 20 % of EU goods regulations, and not the key harmonisation of standards that allowed national border controls to be removed in 1993. It cannot apply to a third country outside the EU and is certainly not a principle that the EU would concede to a departing member state.

In December 2017, the Joint Report was agreed and included the basis for the 'backstop' in paragraph 49. Following a last-minute Democratic Unionist Party (DUP) intervention, it was amended by adding a commitment to Northern Ireland unfettered access to the UK internal market and continued internal UK regulatory alignment. The EU and Ireland saw this as essentially a UK commitment that could lead to a softer Brexit. Despite agreeing the basis for the Backstop, May still outlined to Parliament on Monday, 11 December 2017 that the Government would avoid both a land border and a border down the Irish Sea, stating "So there can be no question about our commitment to avoiding barriers both north-south and east-west". The May Government gave the commitment on unfettered NI-GB access on the basis of the forthcoming Chequers Plan (Customs Partnership proposal of August 2017), along with an equivalence agreement on SPS which the UK Government believed could become the basis for the new EU-UK trade relationship. The Chequers Plan was adopted by Cabinet in July 2018, and led to Boris Johnson's resignation as Foreign Secretary. The Plan never had any realistic prospect of being agreed with the EU as a basis for a future trade deal, because it was based on a dual tariff structure to avoid a border, which represented an unacceptable risk for the EU given the high volume of UK-EU goods exports. However, it did lead the UK Government to finally abandon the mutual recognition approach that Prime Minister May had set out in her Florence and Mansion House speeches, when the UK finally accepted in the Chequers Plan that the UK would follow the common EU rule book

on goods including for agri-food produce. Between the Florence speech on Friday, 22 September 2017 and in the Mansion House on Friday, 2 March 2018, Prime Minister May had set out the UK view on regulation. The emphasis was on both parties having high standards and the need for creative solutions. She explicitly called for a system of mutual recognition, on the basis that standards would be substantially similar, and also called for a system of conformity assessment for products so that only one series of approvals in the UK or EU would be required. The EU never accepted this approach either, and it was not conceded in the TCA.

The May Government Backstop Protocol agreed in November 2018 still had the original Commission draft Protocol of February 2018 within it, with Northern Ireland still in the EU Customs Union, according to the UK Attorney General's legal advice of Tuesday, 13 November 2018, but by providing for a single customs territory between the EU and UK it meant no tariffs on EU-UK trade.¹ It aligned Northern Ireland with EU goods law including SPS regulations, but not the rest of the UK as the UK still planned to promote the Chequers Plan in the trade negotiations. It is not possible to predict what the final Protocol structure for Northern Ireland would have been had the May Withdrawal Agreement secured the support of Parliament. Chequers would never have been accepted by the EU and if the UK then decided on an independent trade policy, a full customs and regulatory border would have arisen for GB-NI goods movements. Even with only a regulatory border, customs processes such as proof of free circulation would arise once the UK was a third country outside the EU.

How Trade operates under the Protocol

In the revised Protocol agreed on Thursday, 17 October 2019, his proposal for an all-island SPS and goods regulatory zone was already in the 'backstop', but the EU did concede on Northern Ireland remaining in the UK Customs Union, and on a consent mechanism for the Assembly on the trade Articles 5-10 of the Protocol. The practical consequences

involved for GB-NI trade in terms of checks and controls was explicitly outlined by the UK Government in their Explainer paper of Friday 18 October 2019 on the Protocol which stated in paragraph 16:

Any processes normally required on goods entering the EU will be implemented at the Northern Ireland-Rest of the World border or on trade moving East-West between Great Britain and Northern Ireland.

This was a clear acceptance by the UK that the normal external border controls, both customs and regulatory, that the EU exercises on goods entering the EU Single Market would apply at the GB-NI sea border.^{vi} Nonetheless, the agreement that Northern Ireland would remain in the UK Customs Union was very important to unionist concerns around identity. This ensured that the same range of consumer products would be available across the whole UK internal market. It also meant that the main access for NI sales/exports outside the UK and EU would be under UK FTAs with goods from Northern Ireland and Great Britain treated the same as both would have UK origin. For exports to UK FTA partners both Northern Ireland and Great Britain goods could be included, subject to compliance with the terms of the TCA and Protocol. If Northern Ireland had stayed in the EU Customs Union, no GB goods could be included in EU FTAs confined to bilateral cumulation, and the origin status would be different for GB and NI goods.

In addition, a very detailed Impact Assessment of the Protocol issued as part of the Withdrawal Agreement Bill legislative process on Monday, 21 October 2019, made the consequences for Northern Ireland's purchases from GB very clear. They would require detailed customs and regulatory processes, and this would impact on SMEs, including in financial terms. All of these details were set out in paragraphs 264 to 270 of the 69-page paper. It actually overestimated the level of physical SPS checks involved, by using the 20% to 50% proportion which varies depending on the animal, and was then in place rather than a lower 15% to 30% proportion due to apply from December 2019.^{vii}

The EU's acceptance of a change to the Backstop, with Northern Ireland in the EU Customs Union, to the revised Protocol which keeps Northern Ireland in the UK Customs Union, necessitated a complex dual tariff structure, alongside the condition that goods subject to commercial processing are always at risk of Union entry. The dual tariff structure was a core part of the Chequers Plan, but the level of goods exports from the UK to the EU at £180 billion per annum made it too high a risk for tariff evasion, compared to the much lower risk for GB sales to Northern Ireland of £11.1 billion in 2019. Nonetheless, the terms of the Protocol were designed very tightly to minimise the risks. Under Article 5 (1) and (2) of the Protocol, goods moving GB-NI and Rest of the World (RotW)-NI and at risk of Union entry would be liable for EU tariffs, whereas goods consumed in Northern Ireland would either be tariff free or be liable for UK tariffs, depending on whether they were part of a Great Britain or RotW movement. Goods to be processed in Northern Ireland would be deemed automatically at risk, except for a small range of exemptions, deemed to constitute non-commercial processing. Goods travelling from Great Britain to Northern Ireland under an EU-UK FTA (which is now the TCA of Thursday, 24 December 2020) and comply with RoO, would qualify for preferential tariffs because the TCA is an EU FTA with a third country.

The definition of what constituted non-commercial processing agreed at the Joint Committee on Thursday, 17 December 2020 in Decision 4/2020, covered activities that are clearly either local, such as construction and health and social care, or non-profit, but allows Northern Ireland processing on agri-food produce due to be consumed in the UK. The position on at risk goods is set at a zero UCC tariff for GB-NI, and the UCC equal to or less than the UK Global Tariff (UKGT) for RotW-NI. The UKTS will verify that goods were consumed in Northern Ireland and thus an otherwise at-risk status can be deemed to be not at risk of Union entry. All final goods for end consumers in Northern Ireland can be moved under the UKTS, including goods that do not meet TCA RoO, along with Article 2 non-commercial processing goods, but not Article 3 goods which are always at risk and

are liable for UCC tariffs. The UKTS covers both GB-NI and RotW-NI goods movements and allows a tariff differential of 3% above the UCC for RotW goods, and can never include goods subject to commercial processing. An important impact of the Joint Committee decision is that it does ensure that the same consumer goods are available tariff free across the whole UK internal market.

The conditions in Article 5(1) and (2) of the Protocol on both goods at risk and processing is to prevent the UK gaining a competitive advantage through lower tariffs, and also to ensure that the terms of any future EU-UK FTA, now the TCA, cannot be bypassed by goods entering the EU Single Market without paying the appropriate tariffs. Goods subject to commercial processing that do not meet the terms of the TCA will always be at risk and liable for UCC tariffs, and this structure ensures that those conditions must be met. Most EU FTAs are confined to bilateral cumulation on rules of origin and the EU had already decided before 2019 that the TCA would be the same. The tariff risk would arise where UK tariffs were lower, or the UK had an FTA but the EU still had WTO Most Favoured Nation tariffs with that country, or the EU had a trade defence tariff which the UK did not. The condition that goods moving GB-NI for processing are automatically at risk prevents the TCA RoO constraints from being bypassed for GB-EU trade because non-compliant TCA RoO goods movements will be under the UKTS and must meet the terms of JC Decision 4/2020 which for food processed under Article 2 is confined to end use consumers in the UK, or in Northern Ireland in the case of a RotW-NI goods movement.

Goods movements GB-NI meeting TCA RoO will be tariff free and those not meeting TCA RoO can use the UKTS subject to the conditions of Decision 4/2020. For goods moving RotW-NI the UCC duty must be equal to or less than the UKGT and goods can also move under the UKTS subject to Decision 4/2020 including where there is a 3% tariff differential. Goods deemed at risk of Union entry are liable for UCC tariffs and all goods subject to commercial processing are deemed at risk and must move under the UCC. Goods moved under the UKTS

must be within the UK Customs Union only, but goods moved with a liability for UCC tariffs will be in free circulation in the EU and have unfettered access NI-GB. This UCC tariff liability ensures that whether the goods first entered GB under a UK FTA or a UKGT Most Favoured Nation tariff that both tariff avoidance and non-compliance with TCA RoO is prevented. Generally, the more processing carried out the higher tariffs will be on the final good and low tariff inputs when processed can result in higher tariffs, but goods movements are harder to control once they move beyond the trade border.

Joint Committee Decision 4/2020 of Thursday, 17 December 2020

The tariff structure for goods moving under the Protocol by direct transport, not to be at risk was agreed by the Joint Committee in Decision 4/2020. Article 2 defines non-commercial processing goods for movement under the UKTS and Article 3 provides that goods subject to commercial processing are always at-risk and must move under the UCC and never the UK Trader Scheme.

The Duty payable on goods moving GB -NI under the UCC must be equal to zero, or be brought in under the UKTS, which can verify NI consumption and so would be tariff free as NI remains in the UK Customs Union. This ensured tariff free trade for most UK goods within the UK internal market, even if no TCA had been agreed.

The Duty on goods moving RotW-NI under the UCC tariff must be equal to or less than the UKGT, or be imported under the UK Trader scheme which allows goods with a tariff lower than the UCC, but the difference between the duty payable if the UCC was applied and the duty under the UKGT must be less than 3% of the customs value of the good.

This Joint Committee decision 4/2020 will apply in all circumstances for Northern Ireland regardless of the status of the TCA, or even if Article 16 was invoked by the UK under the Protocol, and the EU then imposed balancing countermeasures on the UK. This

arises because Protocol Article 5 (5) applies Treaty Article 30 and 110 (TFEU) to NI-EU trade, and this precludes tariffs or trade restrictions of any kind.

Goods moving by direct transport cannot be in free circulation in any country or territory other than those of departure and destination. This is to ensure they can meet customs' direct transport/non-manipulation rules. However, goods can move under customs transit or warehouse procedures. They may also avail of inward/outward processing procedures and also meet these requirements.

Under Article 4 of the Protocol Northern Irish goods will have access to UK FTAs for both exports and imports, but with some restrictions in respect of imports in that EU goods Regulations must always be met and goods for processing will always be at risk and liable for UCC tariffs. This access to UK FTAs for NI exports does have the consequence that NI exports are not eligible for EU FTAs and also NI inputs into IE or EU exports to EU FTA partners are also excluded as NI goods do not acquire EU origin. However, Article 13 (1) of the Protocol provides for NI to be included in the EU's customs territory covered by Article 4 of UCC Regulation 952/2013 and this authorises NI to avail of UCC preferential tariffs for imports under EU FTAs.

Protocol Article 5 paragraphs (3), (4) and (5) covers the unique trade status that NI secures by trading under the Protocol, and gives NI opportunities and benefits which would not apply if NI was trading under the TCA on the same basis as GB. When the Assembly votes on the Protocol in 2024 the decision on Articles 5-10 will include both the GB-NI sea border restrictions, and the unique NI trade status under the Protocol and both will stand or fall together.

These Article 5 paragraphs cover the UCC, including GB-NI controls at the EU external trade border, and the main Customs Articles in the Treaty on the Functioning of the European Union (TFEU), Articles 30 and 110 which precludes customs tariffs or internal taxation of a protective nature in trade between NI and the EU.

In Article 5(3) of the Protocol, the UCC Regulation 952/2013 provides in Article 5 (2) of that Regulation for imports into NI from the EU to be tariff free, under EU FTAs preferential tariffs, usual zero, and using global supply chains from other third countries paying the UCC WTO MFN tariff. No processing restrictions arise for any of these goods being brought into Northern Ireland because the at-risk condition of goods subject to commercial processing is automatically met under the UCC. Also, under the UCC goods can move into or out of NI direct through ports and airports, indirectly through IE or by transit through GB. The customs aspects are covered in Implementing Regulation 2020/2163 of Friday 18 December 2020.^{viii}

This Regulation also provides that while the EU has authorised the import, the authorisation and proofs of origin for Northern Ireland must be secured in the exporting country to qualify for a preferential tariff under the EU FTA. It would be a matter for the Northern Ireland importer to secure the necessary proofs, and because it is an EU FTA and Northern Ireland goods do not have EU origin, these goods could not involve NI inputs. If necessary, an Irish importer could be used, as imports to Ireland will already be authorised under the relevant EU FTA. Indeed, this mechanism could possibly also be availed of to secure imports under Tariff Rate Quotas (TRQs) that were initially not possible under the UK's quota due to tariff trade defence restrictions. The EU views the Protocol as a bilateral arrangement between the EU and UK and extending an EU fixed TRQ to NI would be viewed by some third countries as reducing their EU TRQs entitlement. In many cases TRQs are on a first come first served basis so it should also be possible for an Ireland importer to use the EU TRQs to bring the goods into Ireland and then sell on to Northern Ireland. There is nothing in the Regulation to prevent an exporting country sending goods under their TRQ with the EU to Ireland or any EU 26 country for onward sale to NI. The only EU concern, to date, is not to oblige any country to use their EU TRQ in a non-EU territory.

The Protocol gives Northern Ireland business a wide range of options to access goods tariff free for consumption in NI and using global supply chains unrestricted to sell and export into GB and the EU. In some scenarios the TCA and UKTS will be the best options to serve the NI market and in other situations importing under the UCC by direct transport from the EU or RotW will be the better option. In that regard there is an element of a shift in trade and supply chains built into the structure of the Protocol quite apart from what might arise due to frictions around access.

Differences Trading under the Protocol and TCA

The key purpose of the Protocol is to avoid a hard land border on the island of Ireland, and this is achieved by NI being inside the EU's external trade border, but this also secures the benefits of free circulation within the EU that is frictionless and on exactly the same terms as EU member states, and allows NI access to global supply chains to export to the EU Single Market. The significance of this is that Northern Ireland retains the trade arrangements the UK had pre-Brexit, but GB has lost that access and is confined to bilateral cumulation in the TCA.

This allows NI business to import goods from around the world under the UCC, and without the at-risk processing condition of Article 3 of Joint Committee Decision 4/2020, paying the appropriate UCC tariffs, which for imports from the EU, and under EU FTAs and purchases from GB goods meeting TCA RoO will be zero, and then to have frictionless export to the EU Single Market the same as pre-Brexit. Goods not meeting TCA RoO can also be purchased from GB under the UCC and processed but would be liable for Union tariffs. Where a Union tariff arises, it may be a better option to import by direct transport RotW-NI or through the EU. The commitment to unfettered access for NI qualifying goods moving NI-GB approved by Parliament in S.I. 1454 of Sunday, 4 December 2020, would also allow these goods to be sold across the whole UK internal market. Goods processed in Northern Ireland along

with goods in free circulation in Northern Ireland meet the conditions for qualifying goods. Northern Ireland loses access to EU FTAs for exports, but this is directly offset by access to UK FTAs.

In contrast, the TCA restricts Great Britain to trade with the EU for exports that are solely UK origin or mixed UK/EU origin following processing, and with non-origin content confined to low tolerances by weight or value or product specific rules that limit non-origin materials. Inside the EU Single Market, Great Britain as part of the UK could access global supply chains paying the UCC tariff and produce products for a wide range of market segments, but this is all now lost under the TCA. Great Britain is now confined to using these mainly for the domestic GB market, because it was only as an EU member of the Single Market that unrestricted access to global supply chains was uniquely allowed. For GB-NI and RotW-NI trade the UK UKTS allows goods not meeting TCA RoO to move tariff-free for end use consumers, and covers goods under Article 2 of Decision 4/2020 of Thursday, 17 December 2020, which are deemed non-commercial processing but does not cover goods subject to commercial processing under Article 3.

For GB trade under UK FTAs access to global supply chains will not be possible as these FTAs will be confined to either bilateral cumulation the same as the TCA, or partial diagonal cumulation with the roll-over of EU FTAs where EU origin product can also be included. Even when Great Britain is trading under WTO MFN terms with other third countries, non-UK origin product may not be allowed in some countries especially for agri-food produce where wholly obtained can be a condition of trade. This puts the UK at a major disadvantage compared to the EU, because wholly obtained is EU wide and covers a much bigger market size and range of products. Arising from Brexit, the UK in respect of Great Britain has lost the one trade area where extensive use of global supply chains was possible and frequently used, which was when trading within the EU Single Market, but Northern Ireland has retained that benefit under the Protocol.

Export access under EU FTAs very Restricted

The revised Protocol provided for Northern Ireland to remain in the UK Customs Union rather than the EU Customs Union as originally proposed by the Commission. It is important to note that although the Protocol affords Northern Ireland free circulation and frictionless trade in the EU Single Market, Northern Ireland goods do not acquire EU origin status. This is the reason that NI does not have export access to the EU FTAs. The Preamble of Regulation 2020/2163 of 18 December 2020, makes clear that NI goods or processing in Northern Ireland does not count as EU origin or processing for exporting under EU FTAs. This means that EU exports to most EU FTA partners cannot contain NI inputs because these FTAs are mostly limited to bilateral cumulation, the same as the TCA. This impacts on Irish exports to EU FTA partners with NI inputs and, in particular, affects the agri-food sector which represents a high proportion of cross border trade.

One area that is somewhat less affected by this restriction is in respect of milk and dairy products. There is a mechanism called accounting segregation in many EU FTAs which covers fungible products such as milk, which is not easily separately stored. This allows milk of different origins to be mixed, and provided that at specified times such as production, delivery or sale it can be shown by audit that sufficient quantities of EU origin milk were available to produce equal quantities of the dairy product concerned, then Northern Irish and Irish milk can be mixed and used for exports to many EU FTA countries. There has been some optimistic comment by business and public representatives that access for exports to EU FTA countries might be possible for Irish exports with Northern Irish origin inputs, by counting them as EU origin. However, this seems firmly ruled out by Regulation 2020/2163 of Friday, 18 December 2020. Once an agreement was reached to have Northern Ireland in the UK Customs Union in the Protocol, this was the likely consequence. It may also affect other third country trade under WTO tariffs because some countries

will not accept mixed origin goods, and in particular for agri-food which is a significant proportion of Northern Irish exports to Ireland for processing. Indeed, it is noticeable that while the all-island economy covered in paragraph 49 of the December 2017 Joint Report was included in the Preamble to the Backstop Protocol, it was omitted from the October 2019 Protocol.

However, Irish inputs into Northern Irish exports under UK FTAs provided for in Article 4 of the Protocol do qualify for access to UK FTAs, even though they have different origin to Northern Irish goods. This is because many of the roll-over of EU FTAs by the UK allow partial diagonal cumulation that the TCA and most EU FTAs do not allow. The reason is that when the UK began negotiations to roll over the EU FTAs which the UK had used as an EU member state, the status-quo was that the supply chains then included the UK, EU and the FTA partner country concerned. It was therefore less disruptive to existing supply chains to allow partial diagonal cumulation to continue. Partial in the sense that the EU does not reciprocate for EU FTAs. However, in some cases such as the UK-Canada FTA there is a review clause. Sam Lowe at the Centre for European Reform told a meeting of the NI Affairs Committee on 24 February 2021 that in many instances NI inputs into EU products ineligible for EU FTAs could qualify for UK FTAs if moved through NI. This has not been confirmed but issues could well arise because the goods were not processed in the UK or, given the opposition by Frost to increasing Irish exports to NI, such goods might not be authorised as a UK export.

Article 4 of the Protocol covers NI imports under UK FTAs but is subject to the condition that it is “provided that those agreements do not prejudice the application of this Protocol”. This would mean that, if the UK concluded an FTA with the US that allowed chlorine washed chicken or hormone treated beef access to the UK market, it could not include Northern Ireland because only goods meeting EU SPS regulations can enter Northern Ireland. The first FTA the UK concluded where there is no existing EU FTA in place was with Australia. As the EU still does not have an FTA with Australia with preferential tariffs equal to

zero for agri-food imports, it is likely that the Protocol tariff differential constraints set out in Article 3(1)(b)(ii) of Decision 4/2000 of Thursday, 17 December 2020, will prevent tariff free access for Australian agri-food goods. Entry under MFN tariffs, which is the status quo, would remain, but that is unlikely to increase agri-food imports. Northern Irish goods would be eligible for tariff free export to Australia, subject to any initial quota restrictions. Consumers in Northern Ireland might see import restrictions as a disadvantage, but it is likely to offer protection to the high standards Northern Irish agri-food industry and to be welcomed at least by farming interests.

NI Qualifying Goods and Trade Opportunities

The Northern Irish qualifying goods condition for unfettered access from NI-GB was due to be amended in the latter part of 2021, but this has now been delayed. The UK Government has signalled that it will be restricted to genuine NI business, and also include quality standards protections for the NI agri-food sector. The UK Government placed a great deal of emphasis on the importance of unfettered access for NI businesses in both command papers last year and indicated that any revisions will be in consultation with Northern Irish business. Statutory Instrument 1454 of Friday, 4 December 2020 agreed by Parliament provides that all goods in free circulation in Northern Ireland qualify and also goods that are processed there, but also confines processing to Northern Ireland only. While this latter condition is not supportive of the all-island economy it is unlikely a distinction could be made between Ireland goods and EU-26, but overall, the definition allows goods in free circulation in Northern Ireland, including EU goods that are being moved by a Northern Irish business to have unfettered access NI-GB.

Goods in Northern Ireland must always meet EU standards and goods subject to a conformity assessment by an EU body will carry the CE mark and can circulate throughout the EU and will have unfettered access to GB, once an NI qualified good.

Alternatively, where a conformity assessment is carried out by an NI notified body it can carry a UK (Northern Ireland) mark alongside CE but can only circulate in the UK internal market and not the EU.

Discussions on NI qualifying goods took place at the NI Affairs Committee on Thursday, 15 July with the CEO of Northern Ireland Manufacturing, Stephen Kelly, expressing confidence that goods produced in Northern Ireland would continue to qualify and that RoO constraints would not arise. However, doubts were cast over goods moving through a distribution centre. The principles articulated by Ministers and in last year's command papers of genuine NI businesses and quality assurance for agri-food would indicate a continuation of the current definition with any additions to be those with NI business support. However, some of the recent comments by Lord Frost around trade diversion and the reference in paragraph 62 of the July Command paper around the risk of goods to EU standards moving into GB do give cause for concern.

The unfettered access commitment can only be met if EU standards goods meeting CE and CE-UK(NI) marks continue to be accepted on the GB market. GB-EU trade is very tightly constrained by TCA RoO, but no case can be made to pull Northern Ireland down to that level or constrain NI access to GB because of that. The unfettered commitment was given by May and the current Prime Minister insisted that Northern Ireland remain in the UK Customs Union which implies access to the whole of the UK internal market. Great Britain has full access to the NI market for all finished goods and also for goods subject to processing meeting Article 2 of 4/2020 under the UKTS. For goods subject to commercial processing full access is guaranteed by movement under the UCC. Where Union tariffs would apply to GB-NI movements, GB businesses can avoid that, and also secure free circulation in both the EU Single Market and UK internal market by re-locating to Northern Ireland. For NI businesses to have a comparable level playing field to GB in the UK internal market the existing arrangements for NI qualifying goods and use of EU standards

and conformity marks are required. For unfettered access NI-GB to be meaningful it should match the benefits the Protocol gives NI-EU trade, and reflect the need for NI to level up to the more prosperous UK Regions.

Alan Winters, Director of the UK Trade Observatory in Sussex University, in a Report on the Protocol concluded that 75% of NI imports from the RotW are intermediate goods for processing and that total in 2019 was £2.3B or 12.7% of total NI purchases and imports. A NISRA report based on HMRC statistics found that 79% of NI-RotW imports are in three product areas of Machinery and Transport Equipment, Manufactured articles and Metal/Textile inputs. However, the most important aspect of this benefit of the Protocol is not the existing NI trading arrangements but future trade and investment opportunities for Northern Ireland compared to other UK Regions. This is particularly the case because the NI trade status is unique in the UK and it is not available to Great Britain under the TCA. This competitive advantage Northern Ireland now has over Great Britain will make it potentially very attractive for GB based firms to invest as well as EU companies and others further afield.

Northern Ireland has a long tradition of manufacturing which is normally a good source of well-paid employment. An indication of NI priorities for future manufacturing can be seen from the Research and Innovation module of the current EU North-South Interreg Programme 2014-2021. This gives priority to the Health and Life Sciences area along with Advanced Manufacturing and Renewable Energy. All potentially sources of good well-paid employment for a UK Region that currently lags behind other UK Regions in terms of prosperity. Invest NI is already reported to be examining a range of investment enquires and opportunities that flow from the Protocol. Already it has emerged that flour exported from Great Britain to Ireland for baking sliced pans popular on these islands has a tariff because it cannot meet the strict TCA rules of origin due to the high Canadian wheat content required for the flour. However, the Canadian wheat can be imported into NI under the Comprehensive Economic Trade Agreement

(CETA), the EU-Canada FTA, and milled there and exported to IE which does not have the necessary milling capacity and can also serve the UK internal market. Where the import was under the UKTS the provisions of JC Decision 4/2020 would apply with end use by consumers in Northern Ireland only.

The availability of friction free access to the EU-27 is also a real opportunity for NI where the interplay between the Protocol and TCA gives trade access advantages over GB. Direct access to the EU-27 from Northern Ireland does not require any documentation and is without any checks and controls and is available to NI firms direct to the EU-27 from NI airports or sea ports and over land through Ireland at Dublin, Rosslare or Cork. Going through GB by land bridge under transit to the EU-26 is also an option for NI firms and avoids the extensive documentation and controls required for GB-EU trade movements, but is still not frictionless. Where Northern Ireland or Ireland use the land bridge under transit to EU-26 for SPS goods movements the EU requires an European Health Certificates (EHCs) for animal health reasons, and Ireland will also have additional UK SPS certification requirements from July 2022.

One area where an opportunity arises for Northern Ireland is in the area of the distribution models used by UK firms pre-Brexit for goods, such as textiles, to be imported under EU MFN tariffs or under EU FTAs at a zero preferential tariff and to distribute these goods with or without alterations within the EU Single Market. In some cases where the third country did not have an EU FTA it might still qualify for a zero tariff under the Generalised System of Preferences (GSP) for Developing Countries. However, that model is now no longer viable as imports into GB from third countries for onward distribution will fail the TCA rules of origin requirements for export to the EU, and would be liable for the EU's MFN tariff, even where the goods had already paid the UK MFN tariff. Goods imported into GB under the UK's GSP terms will also lose that status for onward export to the EU, where they have not met the direct transport/non-manipulation rule. However, if these

goods enter NI by direct transport under the UCC there is free circulation within the EU and unfettered access to GB and there are no restrictions on processing. This makes Northern Ireland a viable alternative distribution model to Great Britain, to sell into both GB and the EU, because Northern Ireland is in the UK Customs Union and also has free circulation in the EU.

Another issue that affects many GB SMEs is in relation to small consignments and, in particular, SPS products which are sent by post package or courier to EU small traders and consumers. Even when duty does not arise the model is no longer viable under the TCA, because more onerous national postal rules apply, the Rules of Origin proofs needed could be too costly and VAT also arises. In some cases, Northern Ireland may be a realistic option in place of or in addition to GB. In the case of SPS products this would require a transfer in sufficient quantities to Northern Ireland to make the SPS checks and controls viable, but once there, because Northern Ireland is treated as within the EU Single Market, distribution by post package or courier would be under Single Market rules with no duty, VAT or rules of origin proofs needed. Moreover Ireland is close by in the event that any temporary transport or postal issues arose in NI.

Before Brexit, Great Britain was a distribution hub for retail goods covering both the UK and Ireland markets. Under the TCA this has become complex because once EU products enter free circulation in GB, they lose EU origin and do not acquire UK origin unless sufficiently processed. They are liable for EU tariffs and VAT on re-entry to Ireland or Northern Ireland. Under Revenue eCustoms Helpdesk Notification 14/21 dated Wednesday, 27 January 2021 returned goods relief is allowed to avoid the tariff but VAT will still be an issue unless the same economic entity that originally exported the goods out of the EU also re-imports them. This has caused issues in both Northern Ireland and Ireland and cases can differ depending on the VAT issues, but it is more of a TCA rather than a specific Protocol issue.

So, in summary the Protocol is much more significant than the GB-NI restrictions that most attention is focused on, and gives Northern Ireland a unique trade status that gives enhanced access to two large markets. It is not just the frictionless trade and unfettered access to the EU Single Market and the UK internal market, it is also that the nature of the access to the EU Single Market is much different and better than that available for Great Britain. The primary purpose of the Protocol is to avoid a hard land border and that choice was made solely by the UK Government to secure the TCA along with their preferred hard Brexit. The only choice the EU made was that the UK could not have an EU trade agreement, the TCA, and also create a hard land border. Any proposal that the Protocol should be removed should also examine what removing the very clear benefits from Northern Ireland would involve and show how the alternatives would be better for NI residents, business and farming interests.

The NISRA 2019 trade statistics show that the breakdown of Purchases and Imports by NI are 61.3% from GB and 38.7% from the EU and the RotW. This means that for 38.7% of the NI total of purchases/ imports, goods can be sourced without any rules of origin constraints and with no at-risk processing restrictions once it is under the UCC and these can then be re-exported or processed and exported into the EU Single Market and under the current NI qualifying good definition have unfettered access to GB. Purchases from GB which meet TCA RoO standards would also have free circulation within the EU Single Market. The 2019 Sales and Export statistics show that 34% of total sales and exports are in the EU, where Northern Ireland now has a competitive advantage over GB, and can also continue with unfettered access to the GB market. This means that Northern Ireland retains the trade benefits of EU membership along with all of the benefits of the UK internal market, with the exception that on GB-NI goods movements regulatory and customs frictions apply.

Thus, the trade advantages of the Protocol are significant and they do genuinely give Northern Ireland the 'best of both worlds', with access to two large markets on similar terms, unfettered to GB and free circulation in the EU. There is no other way to deliver this

advantage other than under the terms of the Protocol, which has Northern Ireland inside the EU's external trade border. A range of options exist for NI business to choose from in terms of securing the cheapest imports and having a range of free trade options for exports that simply could not be available without the Protocol. For that reason, some changes to trade patterns are unavoidable because they make the best business sense. Lord Frost might wish that were otherwise, but he agreed to them and any dilution of unfettered access commitments or Protocol trade advantages would not be in the interests of NI business or citizens and residents.

Unless the UK agrees to re-join the Customs Union along with an EEA or Swiss style trade relationship with the EU, and there is no prospect of that in the medium term, there has to be a border either on land between Northern Ireland and Ireland, in the Irish Sea or the Celtic Sea. Neither the EU or Ireland will accept a land border, and a Celtic Sea border is also out of question because no Irish Government could accept it. The only possible resolution of this border trilemma is a border in the Irish Sea, unless the UK and including Northern Ireland is prepared to trade with the EU on WTO terms. The Johnson Government made the choice in October 2019 in the full knowledge of what was involved, and there was clearly no agreement to another round of negotiations on implementation terms. It is now a binding international treaty that must be respected and could only be changed through the mechanisms provided in Article 18, which if activated removes the unique trade benefits as well. All of the SPS checks and controls could be eliminated with Swiss style dynamic alignment, leaving only customs controls, but there does not appear to be any prospect of that either.

The Protocol provides that the EU's external trade border is now on the island of Ireland and Northern Ireland is inside that trade border. The EU must treat that in the same way as the rest of its external border, with due regard to the flexibilities for GB-NI goods movements that were agreed in the Protocol. This was confined to it being within EU law, but the EU has shown flexibility on

that recently. This reality was confirmed by the UK Government in October 2019 in its own detailed explanatory documentation. This is necessary to maintain the island of Ireland as a common regulatory zone for goods, including for animal and plant food products. The idea of making a distinction between whether the goods are destined for Northern Ireland or Ireland, does not take account of the fact that Northern Ireland is either inside or it is outside the EU's external trade border and regulatory zone. The border trilemma remains, so a choice must be made, and was in fact made by the Prime Minister through his letter of Wednesday, 2 October 2019 and the agreement he made on Thursday, 17 October 2019.

It is simply not possible to remove controls at the EU's external trade border on the island nor to distinguish between Northern Ireland and Ireland and apply the at-risk principle to SPS controls, without the real risk of opening a backdoor into the Single Market or risking Ireland's place within it. Friction on GB-NI trade is an unavoidable consequence of the choices made by the UK Government. The Department of Agriculture, Food and Marine (DAFM) in Dublin view on this was made clear in a webinar last autumn 2020, when in an answer to a question as to what importers could expect when moving goods through Belfast, the reply was the following:

If there are goods coming in through Belfast, they should expect the exact same as for goods coming in through Dublin. The port in Belfast has to operate as if it is a Border Control Post and goods entering the North from GB or other third countries will be expected to go through the same processes that goods entering Dublin port will.

This is essential on both animal and public health grounds, because goods whether high risk food, plants or invasive species could be harmful and damage biodiversity along with economic interests and livelihoods, if any get onto the island, as they cannot easily be contained. Indeed, for the angling and tourist industry invasive species are a problem in that once they are on the island, the spread cannot be prevented.

An invasive species that enters the Erne will be in the Shannon even with a land border. Non-compliant food in Newry will find a way south and prohibited plants in Northern Ireland will also do the same. Indeed, currently an invasive species of concern has been discovered this year in Lough Ree, having been in Great Britain since 2014, namely the Quagga mussel that represents an environmental and ecological risk and by the end of this boating season will be in the Erne. This contaminant entered the Single Market from the east and travelled westwards. In the US, states with key agricultural sectors operate state controls to prevent risks to that sector and particular stringent restrictions arise for an offshore state like Hawaii even on personal luggage for travellers to the US mainland to prevent any risk of contamination. The reality of an all-island SPS area limits the flexibility that can be granted on SPS checks and controls on any point of entry to the whole island.

Since the referendum on Thursday, 23 June 2016, a standard feature of the policy of successive UK governments has been to secure a trade relationship with the EU from outside the Customs Union and Single Market, without fully accepting the consequences of the choices made by Brexit. This was evident in Prime Minister May's statement to Parliament on Monday, 11 December 2017 on avoiding both a North-South and East-West border shortly after she had just agreed the Joint Report. In Prime Minister Johnson's case, it arises from agreeing to the Protocol, denying soon after that it meant a GB-NI trade border, and now attempting to renegotiate it.

The Assembly can vote to withhold consent to the Protocol in 2024, in respect of Articles 5-10. If it were to do so, it would automatically end the unique trade status Northern Ireland enjoys trading under the Protocol for the simple reason that these are also covered by these Articles. It is difficult to envisage that there could be significant changes to restrictions on GB-NI goods movements and still avoid a land border. The EU might even propose to return to the original solution of NI being inside the EU Customs Union, because if Northern Ireland is outside the

EU's external border there is no alternative but a hard land border. The EU agreement to switch to Northern Ireland remaining in the UK Customs Union did complicate the Protocol and has been used by the UK Government to undermine the agreement by using it as the basis to push for further flexibility. Just like no UK Government policy proposal since 2017 could make the border trilemma disappear, removing Articles 5-10 does not do it either. A decision to move Northern Ireland outside the EU's external trade border has unavoidable and predictable consequences. Even in the unlikely event that some currently unknown solution was to appear, the trade terms then available to Northern Ireland would be at best the TCA, the same as Great Britain, and that is vastly inferior to the Protocol. Much more likely would be the collapse of the TCA and the Protocol with the UK, including NI trading with the EU on WTO terms.

Extension of grace periods and declaration that Protocol is unsustainable

The initial reaction from the UK to the Commission's mistake over Article 16 was to seek a lengthy extension of the grace periods, and the removal of restrictions on pets, plants, seed potatoes and parcels. The Commission in return complained about the UK's non implementation of key aspects of the December 2020 Joint Committee agreements, but did indicate a willingness to explore practical solutions to many of the issues. The EU made clear it was unwilling to allow significant flexibility on SPS issues affecting animal and public health without an agreement, such as Swiss style dynamic alignment or an equivalence agreement similar to what countries such as Canada and New Zealand have with the EU.

After the UK unilaterally extended the three-month grace period on European Health Certificates on 3 March and removed restrictions on pets, and in relation to plants, seeds, bulbs, and vegetables with soil attached, the UK's position gradually hardened. A consistent narrative emerged

from UK Ministers that plants and other prohibited goods bound for Ballymena or Belfast were different to goods going South into the EU Single Market and for this reason did not require the restrictions and controls that were being applied. This position that Northern Ireland can be distinguished from Ireland, applies the goods at risk principle, which is confined to tariffs in the Protocol, to regulatory issues such as SPS controls. But to make a distinction between Northern Ireland and Ireland, for SPS checks and controls on agri-food produce or plants, by removing controls on NI goods, would move Northern Ireland outside the EU's external trade border and would have significant implications for the Single Market and Ireland's place within it. It would dismantle the structure of the Protocol which is based on an agreement that the whole island of Ireland is inside the common EU regulatory zone, which the UK proposed and then agreed in October 2019.

In June, the EU agreed to a UK request to extend the six-month grace period for the prohibited goods, including sausages and other chilled meats, to the end of September. The EU's position that this is to facilitate a change to new supply chains remains, but the UK continues to seek a permanent derogation. These restrictions on chilled meats apply in both directions, both in terms of GB-IE and GB-EU26. The EU confirmed on Wednesday, 30 June 2021 that it was prepared to agree solutions on a range of issues, including guide dogs, high risk plants, medicines, second hand car VAT margin, tariff rate quotas on steel and re-tagging and wait periods for animal returns, which in some cases would require the EU to amend its laws. The UK saw this as insufficient progress on what was by then emerging as an increasingly ambitious agenda by Lord Frost. By July 2021, Frost had declared the Protocol required the consent of both communities, and judged the increase in North-South trade to be a problem rather than the inevitable outcome of the hard Brexit chosen by the UK. He told the House of Lords Committee on the Protocol on Wednesday, 14 July 2021 that:

I do not think it totally makes sense to encourage a situation that generates

more of something that is a problem. There was always going to be some adjustment of supply chains and trade patterns after Brexit for wider reasons, but I think it is very clear that, over and above that, there is some trade diversion going on. It is clear that trade within the island of Ireland in both directions is going up. Given that that is, in many ways a problem rather than an advantage, I do not think it totally makes sense for us to encourage more of that development rather than deal with the consequences of it'

In June 2021, the EU produced a colour coded chart on SPS checks and controls which showed that Swiss style dynamic alignment removed all the documentary, identity and physical checks along with the need for EHCs and Common Health Entry Document (CHEDs). It would reduce the GB-NI controls mainly to customs because the UK and EU would be in a common SPS area, and this would be similar to EEA-EU border controls. An equivalence agreement on the lines of Canada or New Zealand still has 100% of both documentary and Identity checks with a reduction to between 1% to 10% for physical checks, except for composite products. A simplified EHC is allowed but CHED documentation which must be examined and approved by a veterinary official would still be required. One of the UK complaints about the Protocol that was made last March was that 20% of all EU external border checks were being done in Northern Ireland. This was disputed by the Commission, but it is no surprise they are quite high compared to Rotterdam where mostly bulk loads would enter the EU. GB-NI trade has a high proportion of retail consumer goods and small consignments with a lot of fresh food needing SPS controls and it is not a model used at other EU entry points. For Dublin and Rosslare there would also be a high proportion of GB-IE food imports though perhaps more shelf stable products compared to Northern Ireland. The most time-consuming checks are on EHCs and CHED documents by veterinary officials due to the detail involved and only dynamic alignment would remove these. It is also noteworthy, that in addition to the temporary

grace period on EHCs, supermarkets were granted an ongoing reduction in physical checks to close to zero by the Commission, based on a risk assessment.

EU Food Safety Regulations to protect animal and public health is based on the precautionary principle and are rigorous and detailed. Dynamic alignment requires EU regulations to be adopted in domestic law, and to be updated in line with the EU. Third country approval for exports to the EU require that EU standards are applied from farm to processing of the final animal or plant product for export and these goods still require extensive checks and controls at the EU external border. Equivalence agreements between the EU and a third country require that the relevant animal and public health standards can be objectively verified to match EU standards when agreed, but even then, only justify some reduction in physical checks not their elimination, and documentary and identity checks remain the same. The UK view of an equivalence agreement with the EU is that if the outcomes are similar then the means can differ, but the EU has never accepted this for food safety standards. Prime Minister May promoted it until it became clear the EU would not accept it, and while it was abandoned in the Chequers Plan, the UK still held off on an EU agreement while seeking acceptance of the Chequers Plan for a trade relationship, which never came.

Lord Frost admitted to the Lords Protocol Committee on Wednesday, 14 July 2021 that UK proposals on equivalence are not in line with existing EU agreements. That is because the UK has most likely reverted to the mutual recognition approach. The minutes of the EU-UK Partnership Council of Wednesday, 9 June 2021 confirm that the UK seeks an equivalence agreement while maintaining regulatory autonomy. The UK stated in the Command paper of December 2020 that it would not adopt the new EU food standard Regulation 2235/2020 of Wednesday, 16 December 2020 to apply in stages from Wednesday, 21 April 2021 which have increased restrictions on composite products and eliminates the previous 50% content threshold below which non-meat products

of animal origin did not require a health certification, but under the new Regulation all non-shelf stable non meat products of animal origin require a health certificate. The UK has continued with EU regulations for third country imports, but if the UK decide not to apply these amendments, then UK standards will diverge from the EU, and this will have an impact on traceability in GB supply chains.

Lord Frost has maintained that the mistake of the May Government was to accept that regulatory alignment was needed to deal with the NI border. Prime Minister Johnson's early statements that there would be no border after agreeing to one also confirms that there was never much intention to implement the terms of the Protocol as agreed. The moment the EU almost triggered Article 16 gave the UK an opportunity to reopen the matter, and Lord Frost was ultimately tasked with the responsibility to try to renegotiate it, but it is clear that this move was always coming at some point. The claim in the new Command paper that it was the Benn Act that 'forced' Prime Minister Johnson to agree the Protocol, as if that could ever be a valid excuse, simply does not stand up. The truth is that the UK Government agreed the Protocol as the only means to secure the TCA. The May 2020 Command Paper signalled in a very clear manner that the UK wished to reopen, what had been agreed. The Internal Markets Bill and then upcoming Finance Bill, then became the means, but the plan had to be abandoned to finalise the TCA. Article 16 then gave an excuse to start again, and to use the threat of unilateral action to try to secure fundamental changes.

As soon as the Article 16 controversy began after Friday, 29 January 2021, the UK listed a range of new flexibilities they required on the Protocol. By March, the UK had extended grace periods and removed restrictions on some prohibited goods and Frost was put in place to lead a renegotiation of the Protocol. Each indication of EU flexibility just led to increased UK demands for more flexibility. It began with an extension of the at-risk principle to cover SPS goods. The UK adamantly refused to contemplate any SPS alignment and instead sought to make progress on an

equivalence agreement that in reality was a return to mutual recognition. Increased volumes of Irish exports to Northern Ireland were then a major problem and consent was redefined as requiring both communities rather than the majority provided for by the Protocol. The Government managed to get support from business and farming interests for major concessions from the EU and the Protocol was declared unsustainable in its present form. The EU throughout have offered flexibilities on many of the problems, and where it involves changes to EU laws have gone beyond the flexibilities provided for in the Protocol.

Changes to trade patterns

The claim by Lord Frost that increased North-South trade was a problem was surprising because one of the North/South bodies established under the Belfast/Good Friday Agreement of 1998 was InterTrade Ireland which has promoting North-South trade for SMEs among its areas of responsibility. It was always likely that the hard Brexit decided on by the current UK Government would lead to trade diversion once trade frictions arose at any border, so blaming the Protocol in isolation from the UK Government's Brexit choices makes no sense.

Since January 2021, when customs and regulatory controls were applied to trade between the UK and EU and the Protocol also introduced them for GB-NI trade, the frictions involved were certain to have an impact on trade. Some trade and transport statistics for the early months of the year are available but early teething problems with unfamiliar customs and regulatory processes, and lockdowns during the COVID-19 pandemic means that it is still too early to draw firm long-term conclusions about future trade patterns.

There was evidence from expert witnesses to UK parliamentary committees that GB-NI ferry traffic has increased, though empty loads were also raised as an issue, and some GB businesses have stopped supplying Northern Ireland due to the complexity of customs paperwork and SPS checks and controls. The Welsh ports at Holyhead and

Fishguard and Pembroke were reporting a 50% fall off in volumes in the early months and were so concerned about the future they issued a Report with recommendations around measures to make IE-GB movements of NI goods as attractive as NI-GB. There is very likely an increase in NI-GB movements because the unfettered access for NI qualifying goods cannot operate NI-IE-GB in the same way because an export declaration will be required for the IE-GB movement and a transit declaration as well if that option is used. There are estimates that 20% of NI-GB trade pre-Brexit used Dublin-Holyhead mainly for journeys south of Birmingham, but this is now no longer as attractive because Northern Ireland remains in the UK Customs Union so more controls at Dublin for Roll-on Roll-off to GB compared to Belfast is unavoidable.

CSO trade statistics for 2021/2020 show that Northern Ireland exports to Ireland have increased by 60.5% for January to end July 2021, while NI imports from IE have increased by 45.5%. For Irish exports to GB these have increased by 25.7% over the same period

while imports are down by 31.7%. For IE-EU26 trade exports are down by 5.9% while imports are up 18%. Even allowing for late stockpiling at the end of 2020 due to the new controls coming at the beginning of January and the closure of much of hospitality due to the pandemic, these figures do indicate that trade patterns are changing. Much of the increase in Northern Irish exports to Ireland may be due to the reduction in imports to Ireland from Great Britain. Lord Frost does reference the all-island trade increases in both directions but seems more concerned about IE-NI with the objection that this increase is at the expense of GB-NI, but some changes were inevitable given the hard Brexit choice by the UK.

In July the Irish Marine Development Office issued its Unitised traffic Report Q2 2021 and this show very substantial shifts in transport patterns. The main findings are for the first six months of 2021 compared to 2019 which is the most relevant comparison period. These figures are for Roll-on Roll-off traffic only.

Year	IE-GB Total	Dublin	Rosslare	NI-GB	IE-EU Total	Dublin	Rosslare
2019	500,450	449,048	51,402	424,847	93,087	79,642	10,687
2021	355,242	331,924	23,318	460,991	183,809	124,852	56,625
% Growth	-29%	-26%	-55%	+ 9%	+97%	+57%	+430%

These are very significant increases and show that the advantages of the direct routes are shifting trade away from the GB land bridge. There are now 12 different direct EU Roll-on Roll-off services available to Irish traders compared to 5 in 2019. Dublin is the busiest Roll-on Roll-off route to Europe but Rosslare has increased direct sailings from 3 to 16 each way per week and now has a total of 32 crossings a week. A number of new companies have started services and it is now a viable, if somewhat longer and costlier, alternative to the land bridge. One of the key attractions is that it is paperless and friction free unlike transit through GB, with no customs, health certification (other

than live animals which was always the case) or SPS checks and controls. This also applies for NI which now has the option of transit through IE to EU 26. NI can also go direct and frictionless to EU 26 by Lift-on Lift-off sailings within the EU Customs Union and Single Market. Northern Ireland-EU26 direct and frictionless by Roll-on Roll-off ferry is also possible, but this may not be viable due to the established Dublin, Rosslare and Cork routes already in place.

For time sensitive goods GB land bridge is likely to remain an option but all Irish exports to and through GB will face additional complications from July 2022 when the UK

plan to add further SPS controls to both export goods for GB and goods in transit through GB for the EU. From July 2022 all SPS goods for export from IE to GB and under transit to EU 26 will require EHCs to be uploaded to the HMRC Imports of Products, Animals, Food and Feed System (IPAFFS) system. Currently, goods in transit through GB from IE to EU26 require a transit declaration and health certificate which is for animal health reasons while crossing a third country. At present, for the French, Brexit computer system a Common Health Entry Document (CHED) is also required for a transit termination in France even though IE got a derogation on this under Commission regulations. For transit termination in Belgium or Netherlands the CHED is not required and nor do IE require it for incoming transits. Northern Ireland has unfettered access to Great Britain and will not require EHCs for sales there as Ireland will by July 2022. The NI land bridge through GB to the EU26 will also require a transit health certificate the same as Ireland but will not require an EHC for HMRC IPAFFS.

UK Command Paper of 21 July 2021 and EU Commission Proposals of 13 October 2021

The revised proposals in the July 2021 Command paper are the latest in a consistent strategy by this UK Government to undermine the terms of the Protocol agreed on Thursday, 17 October 2019. Prime Minister Johnson almost immediately denied he agreed to a trade border, and stated in the Commons on Wednesday, 22 January 2020 that frictionless trade also applied GB-NI. In the May 2020 Command Paper the UK sought very substantial flexibilities on the implementation of the Protocol, far beyond what had been agreed. It also put a very specific emphasis on the EU's agreement that Northern Ireland would remain in the UK Customs Union, and used this revision of the Protocol to justify different terms to those the UK had agreed. Indeed, the terms agreed had been explicitly set out by the UK

Government in three of their own published documents in October 2019. These were the Explainer accompanying Prime Minister Johnson's letter to the EU President, dated Wednesday, 2 October 2019, the Explainer on the Protocol agreed on Thursday, 17 October 2019, dated Friday, 18 October 2019, and finally the Impact Assessment on the Withdrawal Agreement Bill presented to Parliament, dated Monday, 21 October 2019. In none of these documents was it suggested that the details of implementation of the Protocol still had to be negotiated, indeed the Impact Assessment actually set out all of the details.

In an Irish Times opinion piece by David Frost and Brandon Lewis on Friday, 2 July 2021, the Protocol commitment to try to avoid checks and controls at NI ports and minimise the impact on everyday lives in Northern Ireland was emphasised but the qualification that it was "to the extent possible in accordance with applicable legislation", which was included in the Preamble, was omitted as was the fact that minimising the impact on everyday lives, applies equally to both Ireland and Northern Ireland. The main point the opinion piece then put forward was that "*all this happens because of the inflexible requirement to treat the movement of goods into Northern Ireland as if they were crossing an EU external frontier*".

Despite the fact that this is actually what the UK agreed this remains the central point in the UK case made at every available opportunity since March 2021, and now developed in more detail in the Command paper. The other main point is that this should not happen because Northern Ireland is in the UK Customs Union.

But as all of the UK October Protocol documents clearly show that this is precisely what Frost and the Prime Minister offered the EU on Wednesday, 2 October 2019 and signed up to on Thursday, 17 October 2019. The point is that these goods are crossing the EU's external trade border, which is different to an international border, and are doing so because that is what the Prime Minister agreed to. And the evidence is there as well in the documents that they knew exactly the

consequences of their decisions. Without agreeing to the terms of the Protocol, there would be no TCA, it was as simple as that.

The July 2021 Command paper is now the latest instalment in a consistent British Government strategy of denying the consequences of the Brexit the UK chose, and a return to the UK Government policy of solving the border Trilemma by pretending that it doesn't exist.

The UK Government states in the Command paper that it does not accept and never accepted that the Protocol was the only means to protect the Belfast/Good Friday Agreement, and proceeds to outline proposals that it claims only draw on the mutual enforcement model, but are in fact just another version of various alternative arrangements models that have emerged since 2019, and most recently have been promoted by the European Research Group (ERG) and the Centre for Brexit Policy.^{ix} The UK now seeks a fundamental alteration to the core structure of the Protocol, by removing all customs and regulatory checks and controls on goods destined for Northern Ireland, allowing a dual standards EU and UK regulatory regime in NI, changing the VAT and State aid regime and removing oversight by the Commission and Court of Justice of the European Union.

The main proposal is for goods destined for Northern Ireland to have the at-risk principle, which applies to tariffs, extended to controls on goods, including SPS goods. A Green channel would be used for Northern Ireland bound goods and customs processes and SPS controls would not apply, other than on a risk or intelligence led basis with the supplier allowed to opt for this channel. For goods destined for the EU, the UCC official control regulations would continue to apply. A dual standards regulatory regime for all goods in Northern Ireland is also proposed, with goods made to UK Conformity Assessed standards allowed on the market alongside EU standards goods. The restrictions that EU official control regulations apply to pets, plants, seed potatoes or farm machinery with soil attached, and prohibited goods such as chilled meats would all end, with NI residents

entitled to purchase the same goods as all other UK residents.

The Command paper also proposes that the VAT regime should change so that it is more in line with the UK VAT regime, and that the state aid provisions should be brought in line with the subsidy provisions of the TCA. While it accepts that EU law would continue to apply in Northern Ireland, it claims that it should not be based on oversight by the EU Institutions of the Commission or the Court of Justice of the European Union. The UK also seeks to set aside the agreement of December 2020 for bulk collection of Exit Declarations on goods moving NI-GB with the exception of endangered species. It accepts that some high-risk goods might need additional controls and proposes an SPS agreement with the EU to cover these. This presumably would be in line with the UK's approach to an equivalence agreement. The UK claim that the current issue by issue examinations for flexibilities by the EU within the Protocol is no longer suitable, and that this is the reason the new proposals are needed.

The UK Government claims that it expected more flexibility through negotiations on the implementation of the Protocol, but that the EU would not accept many of the proposals made. The structure of the 'backstop' Protocol agreed by the May Government in November 2018, along with the Benn Act which prevented a UK exit without an agreement is now blamed by the Johnson Government as the reason why it was 'forced' to agree the Protocol in October 2019. Neither of these excuses is remotely credible. The Governments own documents show that the full details of the Irish sea border were well known, and the main UK concession on regulatory alignment of Northern Ireland with the EU was made on Wednesday, 2 October in advance of the final negotiations.

In the view of this author, the July 2021 Command paper is so similar to the Mutual Enforcement model of the Centre for Brexit Policy, that it can only be considered a slightly revised version of these proposals. The only difference is that checks and controls for EU bound goods are proposed to continue at the GB-NI Irish Sea border, rather than at

trader's premises, and goods meeting EU standards are still allowed on the NI market. However, Northern Ireland would no longer be inside the EU's external trade border, and non-compliant goods both SPS and industrial goods would be in free circulation within what the Protocol has determined to be a common EU regulatory and customs zone. Under the Command paper proposals, the EU's external trade border would be moved to the land border, because close to 61.3% (2019) of the total of purchases/imports would be in NI without checks or controls. For that reason alone, the EU could never contemplate accepting the proposals. Both the tariff at-risk principle, and the linked commercial processing conditions would be set aside, giving GB an opportunity to bypass the TCA RoO restrictions. Chlorine washed chicken and hormone treated beef along with cheap food under UK FTAs with Australia and other countries would have open access to Northern Ireland and the Single Market. This would leave the EU Single Market wide open to tariff evasion and the entry of goods that did not meet EU standards. Declaring such movements illegal would not prevent them. Laws decide what is legal, but can never prevent unlawful activity, especially where, it can involve illegal paramilitary organisations.

In paragraph 58 of the Command paper the standards and conformity mark structure is outlined that has all goods in NI obliged to meet EU standards with goods approved by EU bodies carrying the *conformité européenne* (CE) mark, while goods approved by an NI body can carry the CE mark along with the UK(NI) mark, but this is only for the UK market. It states that this is causing difficulties for GB firms putting goods on the Northern Irish market, and that this will increase in 2023 when the UKCA mark becomes mandatory in GB for all goods, except NI qualifying goods. It proposes that because the principle that there are parallel arrangements for different goods in Northern Ireland is already accepted that there should now be a move to a dual regulatory regime and UKCA mark goods should also be accepted in NI. However, a key difference is that the UKCA mark will cover goods that may only meet UK standards and not EU standards.

In paragraph 62 it is suggested that this arrangement would represent a risk for both the EU and UK because goods not meeting the required standard could enter either market, but judges the risks manageable. The key issue here is that all goods in Northern Ireland must meet EU standards but can carry two separate marks depending on which body approves the conformity assessment. Both the CE and CE-UK(NI) mark goods that are Northern Ireland-qualifying-goods can be placed on the market in Great Britain, but the latter mark can only be used in the UK and not the EU. This allows NI goods to have a UK mark that will help their acceptability in the UK market. What is now proposed is a dual regulatory standards system for all goods including SPS to be allowed in Northern Ireland, which is an entirely different system to a dual conformity mark regime to the same EU standards. Also, the reference to dual risks of non-compliant goods entering both markets, could imply a change that either only goods to UKCA standards will be allowed in GB after 2023, or if EU standard goods access continued, that only goods with the CE-UK(NI) mark could be placed on the GB market.

This is a step beyond the extension of the at-risk principle to Northern Ireland which still presumes that the goods entering at the GB-NI sea border would meet EU standards, but they would not need to be checked if remaining in Northern Ireland. The Command Paper proposal is that all goods in Northern Ireland can meet either the EU standards with the CE mark or UK standards with the UKCA mark. This is the Mutual Enforcement approach, but with the only difference that goods to EU standards are allowed in Northern Ireland. But for how long would this be likely to last, if the EU accepted this approach. Would NI goods still be able to access GB meeting EU standards with either the CE or CE-UK(NI) marks or would the UK insist that NI qualifying goods must meet UKCA standards only, in order to access the GB market as all other EU exports will have to do from 2023 onwards. Even if Northern Ireland qualifying goods NI-GB were restricted to the CE-UK(NI) mark, it would represent a significant change as those goods could not access the EU market. If

either happened it would not be long before goods in the NI market moved towards UKCA or CE-UK(NI) marks. The strong objections by Lord Frost to increased IE-NI trade and to any reductions in GB-NI trade, along with the risks mentioned in paragraph 62 about EU standard goods movements, suggests that this could well be the UK's intended direction of travel.

The EU has ruled out a renegotiation of the Protocol, but has paused its legal action and will continue to look carefully at what flexibilities it can allow and still maintain the EU's external border and Ireland's place within it, which could be put at risk by too many concessions. Already, the EU proposals of Wednesday, 30 June 2021 are significant, particularly where the EU has agreed changes to EU regulations. Other areas are likely to be considered on a case-by-case basis, including prohibited goods such as sausages and chilled meats. Perhaps supermarkets could be risk assessed and allowed, but it is unlikely this could be extended to all retail and hospitality. Likewise, a permanent trusted trader scheme to remove health certificates for all retail would be unlikely to be acceptable, but if confined to small number of large supermarkets with proven supply chains it might be different. On parcels an exemption for parcels of a low value for NI residents from customs processes might be considered. Such approaches, however, could be problematic and give an unfair advantage to large companies. Any Regulation or the manner of its implementation is ultimately subject to potential challenge before the Court of Justice of the European Union, and the Commission will be very aware of that. A compromise between dynamic alignment and equivalence has also been proposed. The main problem is that it would be unlikely to reduce checks and controls to a significant degree, and in any event could fall foul of the Court if another body was involved, even indirectly, with interpreting EU law. Opinion 1/91 of the Court of Justice in which the Court rejected the concept of the EEA Court proposed in the original EEA agreement made that very clear. The EU also confirmed at a meeting of the Partnership Council on Wednesday, 9 June 2021 that an equivalence agreement was not an option because even

in the most advanced equivalence agreement only 14 legislative acts were included whereas Northern Ireland has more than 100, and that in any event only dynamic alignment can waive checks and controls. This EU position on an equivalence agreement limited the scope for the flexibilities the Commission could offer on reducing SPS checks.

However, since June and after the issue of the Command paper in July, the Commission actively engaged with NI business, social partners and civil society, which has led to a new approach to the implementation of the Protocol. A range of new measures were announced on 13 October 2021 which will be the subject of intensive discussions with the UK Government. These are very significant and have the potential to bring about a resolution of the contentious issues around the Protocol.

On SPS the EU reiterates that Northern Ireland and Ireland are treated as a single SPS region for health outbreaks and are part of the EU's SPS area and must fully comply with the relevant EU SPS requirements. However, in a move that could remove up to 80% of checks (identity and physical) the EU now proposes a bespoke solution of simplified certification and reduced checks on a range of NI retail SPS goods based on a thorough risk assessment and analysis of changes to supply chains taking place. This would allow one Health Certificate to certify all SPS products on an individual lorry, but detailed documentation would still be required for each product and documentary checks would still be needed. Prohibited products (eg sausages and other chilled meats) would be allowed but would need an individual certificate and basic production requirements in GB would need to remain aligned with the EU. This might need to be considered for other areas as well, the Commission non-paper notes.

These arrangements only apply to NI retail and not to other businesses buying SPS products. It also only applies to primary products originating in the UK or EU and not other third countries. However, the TCA is referenced and it may allow for TCA compliant goods to be included, though these could contain small quantities of other

third country produce which is limited to 15% by weight or 10% by value.

This proposal is subject to EU access to real time information and the completion of Border Control Posts. It is also subject to packaging and labelling for sale in UK only, and reinforced monitoring of supply chains. There would be a review clause with Union representatives in NI to have an active monitoring role and termination for authorised traders in the event of non-compliance.

On Customs the non-paper is less detailed, but the EU predicts a 50% reduction in customs paperwork. In some cases, businesses such as supermarkets would be allowed to make a monthly declaration rather than per transaction. As a further example, a firm ordering car parts would only need to include the invoice value of the goods and the parties to the transaction. This approach reflects the fact that the combination of the TCA and UKTS reduces significantly the proportion of goods entering NI where a tariff is due but currently full documentation is still required. It is subject to the UK meeting existing commitments on goods leaving NI and on entry of B2B parcels along with the standard review and termination clauses.

On medicines the EU had already signalled a new approach based on the fact that Health is primarily a national competence within the Union. The new proposals exceptionally allow that regulatory compliance functions and testing of medicines for the NI market may continue to be carried out in GB. Wholesale distribution authorisation in NI will still be within EU law as will other aspects of the revised arrangements for medicines and safety features will be required on each pack to ensure that use is confined to NI where authorisation is only for the NI market. The EU states that where European Medicines Agency authorisation is sought but pending in any situation emergency use in NI would still be possible.

A new arrangement for enhanced consultation for NI public authorities and stakeholders such as businesses, social partners and civil society is also proposed. This includes an enhanced role for NI public

authorities in the EU-UK existing structures and also provision for the involvement of NI experts to discuss new Union measures related to the Protocol. For NI stakeholders a new structure for involvement around meetings of the Specialised Committees is proposed and also a regular structured dialogue around the co-Chairs of the Joint Committee. There is also a commitment to explore a role for NI public representatives around a sub structure of the EU-UK Parliamentary Partnership Assembly.

The EU proposals around SPS and Customs are very significant and pointedly reference some of the issues raised in the Command paper around Green channels and the at-risk principle around goods remaining in NI. The EU refers to the combination of SPS and Customs facilitations as an Express Lane and also gear the offer on SPS around the goods remaining in NI. Nonetheless, the EU approach is still a risk assessed approach to SPS predicated around maintaining the island as a single SPS zone in terms of preventing risks to animal or consumer health. It could best be described as a reduction of checks alongside an increase in controls using access to detailed real time information.

In a speech in Lisbon on Tuesday 12 October, Lord Frost sought to place the Court of Justice of the EU (CJEU) as a red-line in the negotiations and said that the UK had submitted a draft of a new Protocol for discussion. He also made clear that the UK favoured a proportionate approach to risk and stated on Border controls that the UK are never going to adopt the same level of checks and controls as the EU because *'we don't believe the level of risk requires them'*. It is important to note in respect of the CJEU that NI cannot have the trade advantages of the Protocol detailed in this paper without being subject to the oversight of the CJEU.

The new package of measures does stretch the EU's approach on the precautionary principle of animal and public health and a real challenge for the Commission will be to ensure that, should the UK for GB significantly diverge in terms of SPS, this new model of SPS control can respond and maintain the all-island SPS zone and Ireland's place in the Single Market.

What is the UK Government trying to achieve?

It has often been difficult to know what the UK is trying to achieve by its negotiating strategy on the Protocol, because of the frequency with which it has demanded much and settled for much less. It is clear that the UK was always intent on a very different Protocol, but the priority to secure and then allow the TCA to be ratified, of necessity took precedent, requiring compromise. The UK gamble may now be that with the TCA in place, that the threat of unilateral action could force yet more compromise, and that the German carmakers might finally drive to the rescue, and induce the type of political compromise that a large country like the UK considers is deserved. This would be in line with the UK approach since 2016, not to be treated just like the third country voters chose. Such a concession, however, seems unlikely given the EU's determination to protect the integrity of the Single Market and to rule out any "cherry picking".

In the Command Paper, the UK claims that what it agreed for an internal UK customs border has no precedent, but in fact there is, and it shows that resiling from an international treaty, can be very difficult. Under Treaties dating to 1602 and 1603 for Savoy and Pays de Gex in respect of France, the unique circumstances of the city of Geneva on the south west corner of Lake Geneva and with only France and Savoy as its hinterland, provided for a free zone cordon around the city giving duty free access to local agricultural products. In the Congress of Vienna in 1815 these arrangements were continued and included in the Treaty of Paris of 1815 for Pays de Gex, and Treaty of Turin of 1816 for Savoy. Then with the accession of Savoy to France after Italian unification in 1861, the Franco-Swiss Customs Border arrangement was continued and Article 1 of the Treaty of Paris of 1815 had provided, in respect of Pays de Gex, that:

The line of the French customs house shall be placed to the West of the Jura so that the whole of the Pays de Gex shall be without that line.

In both cases it placed the customs border at the inner border line of the two districts, well within French territory and a significant distance from Switzerland. After World War 1, France decided to move the customs posts to the international border, but when discussions with Switzerland failed to reach an agreement, France then unilaterally moved the customs posts to the international border on the grounds that Article 435 of the Treaty of Versailles had annulled the previous Treaties. However, following inconclusive negotiations and a successful appeal by Switzerland to the Permanent Court of International Justice of the League of Nations on 7th June 1932, France had to move the customs border back again and did so in 1933.

The UK Government will not be able to easily change or unilaterally amend the core structure of the Protocol without risking retaliation on tariffs or even the collapse of the TCA. Invoking Article 16 is no panacea for the UK because it allows the EU to take immediate countermeasures affecting GB, but not NI. The EU has the patience to take this issue calmly stage by stage and return to its legal action if or when it becomes clear that the UK will not fully implement the Protocol, notwithstanding any case-by-case flexibilities offered by the EU. It may be that the ideology of the Brexiteers, and this UK Government is increasingly in tune with their thinking, is leading Lord Frost and others to believe that a persistent hard-line stance will eventually triumph., because EU member state trade interests will reassert themselves.

That would be a mistake, but British opposition to EU integration has always underestimated the motives and determination behind integration. Eurosceptics who believe Customs Unions are redundant, forget that the Spaak Committee deliberately chose a Customs Union as the preferred form of European integration, because it allowed both a fair balance between industrial and agricultural exporters and was also a suitable structure for economic and monetary union which was essential for deeper integration. Brexit is really just a return to the traditional UK preference for a free trade area in Europe without political integration, but the TCA does not deliver that.

And it comes with the significant costs of loss of global supply chains, major border frictions and exclusions in practice for many GB SMEs exports, along with very little on services. Had de Gaulle allowed it in November 1958 it might have become an alternative economic model for Europe, but once the EU Single Market was created in 1993, there really was no going back.

It seems unlikely, at this point that the UK could be trying to become a pole of attraction for other European states which might prefer a free trade area in place of the deeper integration that successive crises are driving the EU towards. Not even the free trade-oriented member states, nor the so called “frugal four” nor Poland and Hungary seem keen on leaving the Single Market, because they realise the TCA alternative is such a poor substitute.

The UK agenda could be limited to more flexibilities such as modest permanent extensions of grace periods for key retailers, medicines and some prohibited products and a limited trusted trader scheme but it seems unlikely given the ambition of the July Command paper. It may be primarily aimed at the May 2022 Assembly elections in the hope that the 50:50 polling on the Protocol’s acceptance could produce a majority for renegotiation. Even if it is not the main reason behind the UK strategy, it is likely a part of it. Another factor may be Scotland and a heightened fear in London that the SNP is in the ascendant and might be able to secure a majority for independence. Controversy over borders and constant illustrations of the problems for goods and citizens from border restrictions may be a welcome demonstration of the problems that could arise on the Scottish-English border. Also, the obvious trade benefits that Northern Ireland will have over GB under the Protocol, compared to the TCA, as time passes may make London keen to try to change it.

The idea of the EU having a significant role in the goods trade element of the EU-UK relationship is anathema to the Brexit ideology of the English nationalism that drives it, and the goal is to remove or minimise it as much as possible. Prime Minister Johnson is at heart a risk taker and Lord Frost seems

to truly believe in Brexit. That would indicate that Northern Ireland or indeed unionists are not the main concern, because the end result would be at best to reduce NI to TCA terms, in place of the unique trade status and opportunities available under the Protocol.

It is also possible that the real grievance is the TCA rather than the restrictions that arise at the GB-NI trade border. The evidence shows that no credible case can be made by Frost or the Prime Minister that they expected anything different on GB-NI checks and controls. But they did expect a different outcome for the TCA and in particular to achieve diagonal cumulation so that UK FTA partners could be included in the TCA. This would have given the UK much greater flexibility around exports to the EU. The Protocol gives Northern Ireland the same trade benefits with the EU as the EU-27, and also gives NI unfettered access to GB on similar terms provided it is a genuine Northern Irish business. The competitive advantage that Northern Ireland has over Great Britain may be the real issue, not unionists’ concerns. It is difficult to see how the UK Government could justify introducing any new restrictions on unfettered access because it only applies to Northern Ireland-qualified-goods. After all, this Government insisted that Northern Ireland remain in the UK Customs Union. Better then to seek changes from the EU and try to undermine the EU’s external trade border. It is hard to imagine that the UK Government could think that they could use the Protocol to in any way reopen the TCA and gain more concessions, but if the trade advantages of the Protocol and Northern Ireland’s competitive advantage over Great Britain remains, NI as the only UK Region with EU trade benefits might question the wisdom of Brexit.

The UK now knows that a restrictive TCA is the only model it can achieve for trade in Europe. It may be able to improve on that somewhat by seeking to be part of the Pan-Euro-Mediterranean Convention (PEM) which would allow diagonal cumulation, provided the RoO were identical. As of March 2021, the UK had not sought affiliation to the PEM. The Brexit ideology is to promote global free

trade, but multiple FTAs limit the scope for UK MFN tariff reductions because that devalues the FTA deals. This UK thinking is bound up with the days of Empire and Commonwealth and the successful trade model the UK achieved, but those days are long gone and will not return. “Buying cheap and selling dear” is available to EU Member States but not to the UK under the FTA trade model. The UK will not see reducing Northern Ireland to GB’s TCA terms as a problem because it could be seen as an overall benefit to the UK negotiating position on future FTAs.

North-South trade with a land border

The UK has now unilaterally extended the current grace periods and easements indefinitely. The EU has not given its consent, but has indicated it will continue talks. It is unlikely that any signals will be given that real progress could be made on the substance of the agenda set out in the UK Command Paper, for the simple reason that it would effectively dismantle the Protocol. The UK might then be tempted to exert more pressure on the EU by unilaterally implementing the Command Paper measures. Once checks and controls are eliminated for any significant amount of SPS or industrial goods, and the majority of the GB-NI controls are on NI destined goods, a land border would very quickly become unavoidable. Ireland could not afford to take a similar approach to that of the Schengen opt-out that allowed the Common Travel Area (CTA) to continue, because full and unhindered access to the EU Single Market is a cornerstone of the Irish foreign direct investment (FDI) focused economic model. Despite all the claims by Brexiteers that mutual enforcement or alternative arrangements can avoid a hard land border, alternatives are lacking because the EU will not agree to a backdoor into its Single Market and Ireland will not agree to be removed to facilitate a hard Brexit. The long history of smuggling around the border once an economic opportunity exists is well known, as are the links to paramilitary activity.

In this situation the UK would be gambling that EU trade interests would act to sideline Ireland and allow the TCA to continue,

perhaps after some initial trade sanctions. That would be highly unlikely to happen. But any EU response would still probably take time to be effective, and in the meantime, there would be no option but in consultation with the EU to agree to place controls on the land border to prevent an open door into the EU Single Market. It is clear that the UK is intent as a matter of principle, on full divergence from all EU goods standards both industrial and for animal and public health. All exports have to meet the standards and specifications marks of the importing party. Northern Ireland currently meets EU standards and uses CE for EU trade and can use CE or CE -UK(NI) for UK trade. Any situation where UKCA goods were made legal in Northern Ireland would very quickly have very significant implications for the land border.

The introduction of a land border would quickly lead to UKCA and the CE goods standards being the only acceptable standards in respective jurisdictions. There might be a transition but it would develop in that direction over a short period of time. Even in the unlikely event that the TCA continued, this would still result in a very different border to that of the past.

Other than knowing that there would be a hard land border, if the UK had left the EU without an agreement, there was no real discussion around what that border might look like. When customs posts were erected on the land border in 1923 the Free State traded mainly with the UK, including Northern Ireland, and a substantial proportion was in live animals and agricultural goods. For industrial goods the British Standard (BS) was then a global standard for the Commonwealth and also further afield. Ireland followed BS and other UK standards on agriculture because trade was predominantly with the UK. In that period there were both formal and informal arrangements for reciprocal acceptance of national standards among the main trading nations with smaller nations adopting the standards of their nearest large neighbour. That began to change in the 1980s and in the run up to the creation of the Single Market, and the CE mark was formally adopted on

Thursday, 22 July 1993 and became the EU industrial standard and alongside EU animal and public health standards over time both have become globally recognised standards.

Even if the TCA continued following the introduction of a land border it would be a very different border to the customs posts of the past because RoO and goods standards would have a much more central role in border controls. Before moves began to create the Single Market there were a number of core standards used by the larger trading nations and standards in Ireland were similar to British standards. The focus on trade outside the EU was on reducing WTO tariffs through various negotiating rounds with some FTAs in place, but nothing like today. Since the Uruguay Round in 1995, there has been no new rounds agreed and the Doha Round which was launched 20 years ago remains to be finalised. The American administration of President G.W. Bush stepped into that vacuum and led the development of FTAs to be a standard trade model today with RoO as a critically important component of that model.

EU and UK standards are likely to diverge with different standards for animal and public health and CE and UKCA standards for industrial goods. Production for export will have to meet the standards of the importing party. If the land border returned this would mean that Northern Ireland would mainly sell into Great Britain, and those production facilities could also export to Ireland. Similarly, Ireland exports to Great Britain would also serve the Northern Ireland market. But a very large proportion of cross border trade is carried on by micro enterprises and SMEs. Most of these would not have the capacity to trade under a dual standards regime for industrial and SPS goods. The development of the all-island economy since 1993 under the Single Market and further developed since 1998 with the Belfast/Good Friday Agreement would largely go into reverse. Add in WTO tariffs which is the most likely scenario if the UK reneges on the Protocol, and a virtual wall would be built across the land border for goods movements. It is very unlikely that many of those in the unionist community

who object to the Protocol desire that outcome, but that is the most likely outcome if the Protocol and TCA fall away.

Trade in SPS agri-food animals and goods would depend on the level of divergence but if the UK moved towards US standards it would be severely curtailed. Whether trade is under WTO MFN or FTA terms would influence the volume of trade, but in either case it would be a very hard border and very different to the past.

NI in the UK Customs Union or EU Customs Union

The key change between the “backstop” Protocol of 2018 and the revised October 2019 Protocol was for Northern Ireland to remain in UK Customs Union rather than the EU Customs Union. This had important differences in trade terms, but most important, it was more supportive of unionist identity by ensuring there was no distinction in the origin of goods within the UK, and treating NI and GB the same in terms of access to UK FTAs, but this change had a significant impact on the all-island economy and on how Irish exports with NI inputs would be impacted.

The “backstop” Protocol was based on an interim ‘shared EU and UK customs territory’, so if the UK decided to leave to pursue an independent trade policy, it would not have done that until an FTA was agreed. This would have meant that the complex arrangements of the UKTS, and the at risk and processing conditions would not have been necessary. The UCC tariff and rules of origin would always apply at the GB-NI sea border. Northern Ireland would use the EU FTAs for exports and imports and would benefit from other EU trade arrangements such as the EEA and Pan-Euro-Mediterranean Convention. While Great Britain goods could be mixed with EU goods after processing for the EU-UK FTA trade, these goods would not be eligible for EU FTAs, and Irish exports under EU FTAs would include NI inputs but not GB. There was no commitment to a UK Trader scheme to allow GB-NI free trade in a No Deal scenario or for access regardless

of RoO, which now allows mostly the same range of goods across the UK internal market. This is because unlike the current position, NI would have been outside the UK Customs Union which is the basis for the UKTS.

The October 2019 Protocol agreed that Northern Ireland would remain in the UK Customs Union and this required a more complex structure as tariffs depended on whether the goods were bound for the EU or stayed within the UK. This resulted in the at-risk tariff issue, and processing conditions to reflect that Northern Ireland was in the UK Customs Union, but also inside the EU's customs territory and regulatory zone. It also required the UKTS to be agreed to allow tariff free trade within the UK internal market, particularly, if the EU and UK failed to reach a free trade agreement. Northern Irish exports and imports under the Protocol are under UK FTAs. In the case of NI imports under UK FTAs some restrictions are necessary for reasons of tariffs and regulatory standards. Unlike under the EU Customs Union "backstop" where NI and GB goods were different for origin purposes under the Protocol, they are the same. This excludes Northern Ireland from EU FTAs but that is then covered by access to UK FTAs but it also prevents NI inputs from being included in EU/IE exports under EU FTAs, with some exceptions for dairy. This has a major impact on all-island supply chains because it reverses some of the gains of the all-island economy. Because many UK FTAs have partial diagonal cumulation this does not impact on IE inputs to NI/UK exports but overall, there is still a significant impact. Because Northern Ireland also is under the UCC it is treated as if it were still inside the EU Customs Union for EU trade and also has access to EU FTAs for imports, provided it does not involve Northern Ireland origin cumulation. Taken together with unfettered NI-GB access it is in many respects as if Northern Ireland never left the EU for goods trade which does reflect the wish of the majority in NI who voted on Thursday, 23 June 2016.

Overall, then the effect of the changes is to be more supportive of unionist identity concerns, by ensuring no origin distinctions

between NI and GB goods and ensuring most consumer goods have access to the whole UK internal market

However, this could not be achieved without a significant impact on the all island economy with a €1billion of Irish agri-food exports under EU FTAs potentially affected by the exclusion of NI inputs and this has an impact on nationalist identity. There is no guarantee these could go under UK FTAs and also that new UK FTAs rather than roll over FTAs could also include any EU inputs. Brexit is the reason for the border trilemma. Under both an EU and UK Customs Union options for Northern Ireland, the restrictions at GB-NI sea border would essentially be the same but switching from EU to UK Customs Union did support unionist identity concerns, but at an unavoidable cost to the all-island economy. NI is a contested and shared space where having winners or losers should be avoided. The revised October 2019 Protocol is an attempt to reflect that because there is no escape from the border Trilemma and the necessary GB-NI controls are there because Northern Ireland is inside the EU's external trade border but offset by the unique trade status for Northern Ireland, which significantly lessens the impact of Brexit that the majority in Northern Ireland democratically rejected.

To abandon the Protocol would at best reduce Northern Ireland to TCA terms with a hard land border and at worst risk WTO terms, and bring the hardest ever land border which would impact on the identity of the nationalist community

The identity of both communities is equally important in Northern Ireland, but it is inconsistent to suggest that Brexit is acceptable, despite complete opposition from one community in Northern Ireland and with no democratic mandate for it either, and then go on to propose that the choice of the hardest possible Brexit which requires a border but avoids a land border and gives Northern Ireland a special trade status is then invalid, because it must have the support of both communities.

Conclusion

There is no doubt that the Irish sea border does raise real concerns among the unionist community, but the restrictions are unavoidable, and arose because the Prime Minister on Thursday 2 October 2019 proposed that Northern Ireland would be inside the EU's external trade border. More onerous restrictions are applied at the GB-IE border because the flexibilities in the Protocol do not apply to Ireland, even though the island is a common regulatory zone. The problem is Brexit not the Protocol and the border trilemma it throws up. Once the UK insisted on a hard Brexit there were only three realistic options for a border, sea or land, and there is no point pretending as the UK Government and the Brexiteers have done since Thursday, 23 June 2016, that there are arrangements that can make this Trilemma disappear.

The EU concession in October 2019 on Northern Ireland remaining in the UK Customs Union does try to address unionist identity concerns, and this did have a real impact on the all-island economy, an important issue for nationalists. In practical terms, once a border is unavoidable because the UK Government will only accept the hardest of Brexits, a sea border is less intrusive and more secure than a land border. A previous UK Government in May 1940 drew the same conclusion, when the CTA was suspended and people from both Northern Ireland and Ireland had to show identity cards and passports respectively to enter Great Britain, and this continued until 1952.

Any flexibilities on GB-NI goods movements have to be risk based and protect Ireland's place within the EU Single Market and the integrity of that market. Proposing that Northern Ireland bound goods are free to enter through a Green Channel is moving the trade border to the land border and takes Ireland out of the Single Market, because Northern Ireland is then outside the EU's external trade border. Once that happens a land border is unavoidable. If that comes to pass, it will be like a virtual wall across the island for goods movements and be the hardest border ever seen. Services are already outside the Single Market and such

a land border would severely impact on local cross border trade. In those circumstances, where the fundamental choice has been made by the UK and not the EU, the Protocol is a reasonable compromise between both communities. Yes, it involves restrictions that many do not like but it comes with a unique trade advantage as well.

The 13 October EU package of measures are a real attempt to bring a conclusion to the controversy over the Protocol and involve a significant reduction in SPS checks and Customs paperwork. It does not remove NI from the all-island regulatory zone and SPS area. For that reason it does not follow the UK proposal in the Command paper that all SPS goods for consumption in NI should go through a Green channel without the need for certification and the normal checks and controls. But by introducing a new model with more emphasis on real time monitoring and controls and reduced checks it goes a long way, if not all the way, to addressing the concerns of the business community and other stakeholders.

It may well not satisfy Lord Frost and the UK Government but if it does not that in itself will raise the question of whether the real agenda is to secure Brexit for NI by removing the CJEU and thus reduce NI to the TCA trading terms with the EU, which would do economic damage to a UK Region that needs prosperity and stability.

Those who oppose the Protocol should explain how Northern Ireland trading, at best on TCA terms, or at worst under WTO, after its removal, would be a better deal for Northern Ireland, as all the evidence indicates it would be inferior. Those who recognise the border trilemma but still consider that the border must be on the island, in place of the compromise that the Protocol represents, are actually saying NI should have Brexit too, even though a majority in Northern Ireland voted against it.

The reality is that the current UK July 2021 Command paper proposals could only reduce Northern Ireland to inferior TCA terms not improve NI terms. The gravity model of trade which holds that trade is inversely related

to geographic distance would suggest that UK global FTAs can never replace the unique trade status the Protocol brings for Northern Ireland. The UK Government may claim it could but few economists other than committed Brexiteers would agree.

The Protocol is about trade relationships. It is not related to the constitutional issue. It is worth reflecting, if the hardest land border ever would be more polarising of the communities in Northern Ireland rather than the compromise of the Protocol with its compensating economic benefits for Northern Ireland, which could lead to a more stable and prosperous Northern Ireland, and remove the constitutional issue from the pressure of events.

Endnotes

- i Letter Prime Minister, Boris Johnson to President European Commission Jean Claude Juncker of 2nd October 2019
- ii UK Government Explanatory Note: UK proposals for an Amended Protocol on Ireland/Northern Ireland
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836116/Explanatory_Note_Accessible.pdf
- iii European Commission, Guidance Note: Withdrawal of the United Kingdom and EU Rules in the Field of Customs including Preferential Origin 23rd December 2020. Available at https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/guidance-customs-procedures_en_0_0.pdf
- iv William Hague UK Foreign Secretary Conservative party Conference Manchester 2 October 2011
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- viii Commission Implementing Regulation 2020/2163 of 18 December 2020
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2163&from=EN>
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