



**Re-uniting the Kingdom:
How and why to replace the Northern
Ireland Protocol**

February 2021

*With thanks to
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Executive Summary

1. The Northern Ireland Protocol (NIP) has had a profound and negative effect on the United Kingdom's internal market, as well as the constitutional position on Northern Ireland, as currently guaranteed by the Act of Union of 1800.
2. The NIP is contrary to the spirit of the Good Friday Agreement of 1998, changing the position of Northern Ireland within the UK's internal market, without the consent of the people of Northern Ireland.
3. Under the NIP, EU law applies by "direct effect" in Northern Ireland, meaning the United Kingdom Supreme Court still has to refer cases to, and follow the rulings of, the European Court of Justice (ECJ) in matters specifically relating to the Protocol, despite the U.K. having already Left the European Union and now the Transition Period as well.
4. The NIP replaced the "Backstop" in the 2019 Revised Withdrawal Agreement and the associated Political Declaration, thus allowing Parliament to vote to allow the U.K to Leave the EU, as subsequently happened on 31 January 2020.
5. However, the NIP was not necessarily intended to be permanent. It can be replaced via a vote in the Northern Ireland Assembly (but this would be difficult to achieve, given the nature of Northern Ireland politics). It was also envisaged during the Brexit negotiations that it could be replaced by "alternative arrangements" to ensure the integrity of the EU single market, whilst avoiding a hard border on the island of Ireland, indeed the Political Declaration specifically allowed for this.
6. Article 16 (Safeguarding) of the NIP, allows both parties to take unspecified "safeguarding measures" if it leads to: *"serious economic, societal, or environmental difficulties that are liable to persist, or to diversion of trade."*
7. The European Commission's bungled invocation of Article 16, regarding vaccines, in late January 2021 has, rightfully, been widely criticised. Nevertheless, it has created a unique political opportunity for the United Kingdom Government to seek to negotiate a replacement of the Protocol with alternative arrangements, based on the concept of "Mutual Enforcement."
8. If the EU remains unwilling to contemplate this, the U.K. Government should retain the option of invoking Article 16 itself and/or consider instigating domestic legislation, to replace the Protocol, via utilising Section 38 (The Sovereignty Clause) of the European Union (Withdrawal Agreement) Act, 2020.

Section 1: Introduction – How we got here

The Northern Ireland Protocol (NIP) is a complex document, which has been the subject of much political and media controversy of late. It was not a part of the recently concluded Trade and Co-Operation Agreement (TCA), negotiated by the Prime Minister and Lord Frost with the European Union (and which the EU has yet to ratify). In fact, it is part of the *earlier*, Revised Withdrawal Agreement, which Boris Johnson and Lord Frost renegotiated with the EU, to replace Theresa May's originally flawed version, which had repeatedly failed to pass the House of Commons, despite three attempts.

In essence, as a result of this re-negotiation in 2019, the NIP replaced the ill-fated "Backstop", by which the United Kingdom would almost certainly have been placed into a trade-restricting Customs Union, in perpetuity. The Revised Withdrawal Agreement, incorporating this significant change, was subsequently ratified by Parliament via the European Union (Withdrawal Agreement) Act 2020, on the understanding that it would only come into force in January 2021, at the end of the year-long Transition Period, designed to allow businesses and others to adjust to Leaving the EU rulebook.

Moreover, the accompanying Political Declaration (PD), allowed, *inter alia*, the for the NIP to be "superseded" by "alternative arrangements" for avoiding a hard border on the island of Ireland. Thus, it was envisaged that the NIP would not automatically become a permanent arrangement but could, either, be ended by a future vote to do so in the Northern Ireland Assembly or superseded by some form of future alternative arrangements instead.

However, in the event, the NIP was not superseded via negotiations and thus came into force on 1 January 2021, after the UK had left the Transition Period on New Years' Eve. Since then, the NIP has led to myriad problems in Northern Ireland, which are highlighted in detail in this report and which, as a result, are now threatening the peace and integrity of the United Kingdom. Given all of this, this latest report from The European Research Group sets out to achieve three objectives:

1. To explain exactly what the Northern Ireland Protocol is and how it came about, as part of the protracted Brexit negotiations.
2. To lay out why is unsustainable in its current form, both economically and politically and
3. To set out options for replacing it (including the ERG's preferred option of "mutual enforcement").

The NIP contains an "emergency clause" (Article 16) which permits either party to introduce unspecified "safeguarding measures" to protect its interests. In what is now widely regarded as an ill-judged move, the European Commission sought to temporarily invoke Article 16, in late January 2021 to potentially limit the flow of medicines, including critical vaccines, into the UK, via Northern Ireland. In other words, they sought to create exactly the hard border on the island of Ireland which, for several years, they had pledged faithfully to avoid and for which the Protocol was supposedly created in the first place. Moreover, they did so without giving any prior notice of their intent (including, it appears, even to the Irish Government themselves).

Following the General Election of 2019, when the new Prime Minister, Boris Johnson, won an 80 seat majority with a clear mandate to "Get Brexit Done", and in the aftermath of the Commission's bungled attempt to invoke Article 16, the United Kingdom Government, now has a unique political opportunity to address the failings of the Northern Ireland Protocol, once and for all. Ideally, this would be via a re-negotiation with the EU but, if not, the UK could itself invoke Article 16 and/or legislate domestically, using Section 38 of the European Union (Withdrawal Agreement) Act 2020. Either way, the Protocol in its current form cannot stand and must now be addressed, to maintain and preserve the harmony and integrity of the United Kingdom

Section 2: What is the Northern Ireland Protocol?

The Ireland/Northern Ireland Protocol (NIP) was attached to the 2019 'Revised' Withdrawal Agreement 'divorce settlement' agreed between the UK and EU. Having agreed the Withdrawal Agreement the EU finally allowed trade talks to commence from within a 'Transition' period. The product of the trade talks was the separate Trade and Cooperation Agreement (TCA) that came into force on 1 January 2021.

The NIP had its genesis in the December 2017 UK/EU Joint Report in which the UK agreed to ensure the north south border on the island of Ireland would be free of infrastructure. The Joint Report agreed by Theresa May's negotiating team itself led to her unratified 2018 Withdrawal Agreement that included the 'backstop'. The 'backstop' differed considerably from the current 'protocol' in its depth, but more importantly its breath – it was to be applied to the entire UK.

- **2017: The December Joint Report accepted principle of a border in the Irish Sea.**
- **2019: The 'old' Withdrawal Agreement – not ratified – that included the 'backstop'**
- **2019: The 'Revised' Withdrawal Agreement that replaced the backstop with the NIP.**
- **2020: The TCA – the Trade and Cooperation Agreement.**

Of these four, only two agreements are in force. The 2019 Revised Withdrawal Agreement including the NIP and the separate 2020 TCA. The NIP contains a number of measures including:

For Northern Ireland

- The EU regulation of goods (inc. food products) in domestic UK (NI) law by direct effect.
- European Court of Justice jurisdiction over the regulation of Northern Ireland's goods and electricity markets as well as State aid.
- Northern Ireland remains within the EU's single VAT area.

For the border in the Irish Sea

- A full EU 3rd country sanitary/phytosanitary border for food-stuffs entering Northern Ireland. This includes the banning on the importation of chilled meats and medicines from GB (subject to a temporary grace period).
- Customs declarations and rules of origin paperwork for goods entering NI from GB and the payment of tariffs if they are deemed 'at risk' of onward movement to the EU.

For mainland UK

- The application of EU State aid law in mainland UK in as far as it may affect trade between the UK and the EU across the border in Ireland or may affect trade between NI and other parts of the EU by different routes. The jurisdictional reach of this test is unknown, although the Commission published a paper stating that in its view, its jurisdictional reach is extremely wide and does not require evidence of an actual effect. Merely strengthening the position of a GB firm with sales to customers in NI would be sufficient¹. The Commission published this paper in direct breach of its commitments in the unilateral declaration of 17 December 2020 that it "must be established" i.e. with evidence that such an effect was liable to occur.

¹ European Commission, Notice to Stakeholders "Withdrawal of the United Kingdom and EU rules in the field of State aid", published 18 January 2021

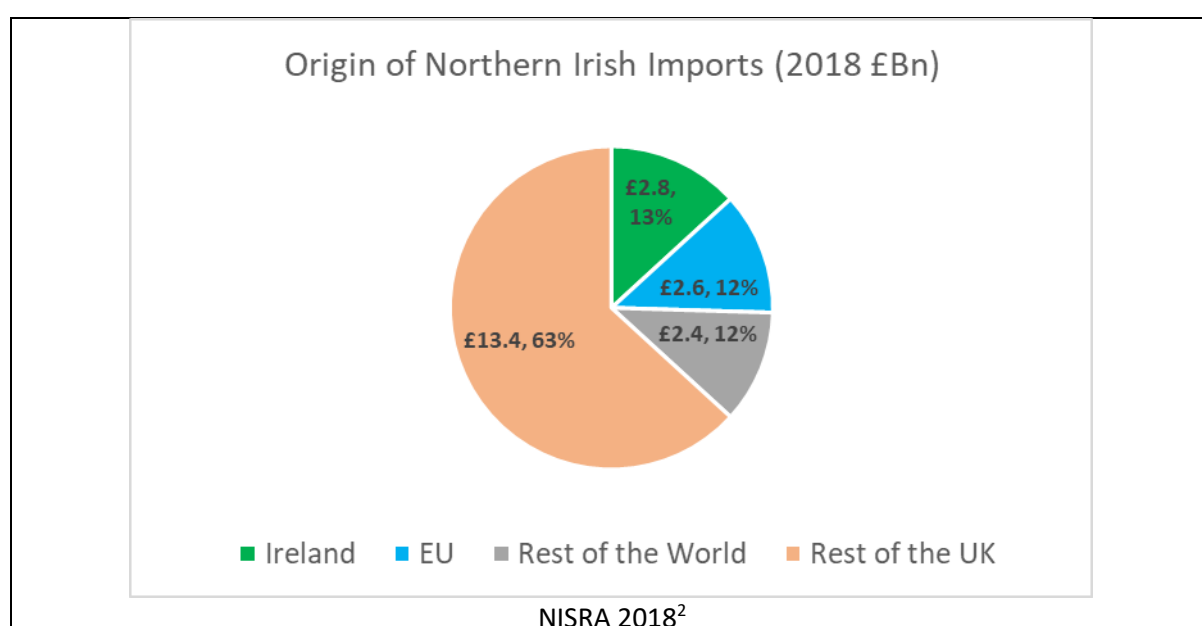
Section 3: The Problem: The border in the Irish Sea

The NIP now poses a serious economic and constitutional threat to the integrity of the United Kingdom. While empty shelves and higher costs are immediate, the damage done to the certainties of Northern Ireland’s constitutional and cultural place in the Union are just as important.

The economic threat to Northern Ireland

Northern Ireland’s trade is and always has been overwhelmingly with Great Britain. It is fully integrated into the UK’s internal market and supply chains. Before the NIP was introduced 63% of Northern Irish imports originated in the rest of the UK compared to only 13% from the Republic of Ireland.

Under the NIP this settled supply chain is being forced to change as some products are blocked and others become more expensive to source in GB as opposed to the EU.



While the dependence of Northern Ireland on the UK internal market is overwhelming in aggregate, it is even more dependant in specific areas. Goods originating outside of the UK are highly likely to enter Northern Ireland via the GB supply chain. In 2019, research from the Department of the Economy of the Northern Ireland Executive found that over ninety per cent of medicines, fruit and vegetables, books, clothes, household goods and baby equipment in NI were sourced from or transported via GB.³ In 2018, NI sales to GB were two and a half times greater than those to Ireland.⁴

In addition to the supply chain disruption and costs, Northern Ireland is obliged to implement EU law domestically, potentially ruling out for Northern Ireland some of the benefits of Brexit, including new policies such as subsidy control, levelling up and de-regulation in the areas of new gene editing

² NISR 2018: <https://www.nisra.gov.uk/statistics/business-statistics/broad-economy-sales-and-exports-statistics>

³ Northern Ireland Retail Study. Department of the Economy (2019), [https://www.economy-ni.gov.uk/sites/default/files/publications/economy/Retail study report March 2019.pdf](https://www.economy-ni.gov.uk/sites/default/files/publications/economy/Retail%20study%20report%20March%202019.pdf)

⁴ Esmond Birnie and Graham Brownlow. How is Brexit affecting Northern Ireland’s economy? <https://www.economicsobservatory.com/how-is-brexit-affecting-northern-irelands-economy>

science. Not only will Northern Ireland end up with an additional border in the Irish Sea but potentially end up with all the downsides of EU membership without some of the upsides of Brexit.

The economic cost to Northern Ireland

The most serious economic effect of the NIP on Northern Ireland results from the new border in the Irish Sea and in the front line of this are the hauliers. Whereas prior to the NIP's implementation hauliers required no formalities to travel from GB to Northern Ireland now the border in the Irish Sea composes of:

GB to NI

- Customs declarations. This includes Rules of Origin forms, and payment of tariffs if the goods are deemed 'at risk' of onward shipment to the EU.
- Sanitary/phytosanitary compliance and checks including export health certificates for foods of animal origin.
- Some goods to be prohibited at the end of the 'grace periods' (see below).

NI to GB

- 'Export' declarations for certain goods covered by international agreements. endangered animals and weapons.⁵
- 'Unfettered' access limited to goods produced in Northern Ireland, separate procedures for goods coming via the EU or made with non-NI components.

Additional costs

The additional costs imposed on the Northern Irish supply chain come in a number of forms:

- **Additional time spent on paperwork.** While the UK Trader Support Scheme (TSS) and health certification scheme is of benefit to supermarket chains it is of limited benefit to traders who supply the wholesale market or at point of collection don't know the final destination of the products being transported. The average time taken to organise a load from GB to NI has increased from twenty minutes to three or four hours. Once an application is submitted you cannot change anything except for arrival date and time. In January 2020 Blair International Transport described their difficulties with the system to the European Research Group as follows:

*"if we have a blow out, fridge breaks down en route to the boat and have to change trailer then we have to go back to the start and do the declaration... all over again.... We have two extra people downstairs to help with admin and load wise we are probably 70% less busy than last week."*⁶

- **Empty trailers GB to NI:** As a result of the NI to GB route containing less friction than the GB to NI route hauliers are reporting that NI exports to GB are holding up better than imports. This leads to hauliers having to return with empty trailers, leading to a new cost for all Northern Irish exports. GB customers are price sensitive and cannot pay NI manufacturers more than the cost at which they can source similar goods from existing suppliers in GB.

⁵ UK Gov: <https://www.gov.uk/guidance/moving-qualifying-goods-from-northern-ireland-to-the-rest-of-the-uk#qualifying>

⁶ Ibid.

- **Less flexibility.** Transit movements from NI to GB via Ireland do not have access to the Trader Support Service or grace period exemptions. The Road Haulage Association estimates that these movements accounted for thirty to forty per cent of GB to NI movements before the end of the transition period.⁷ The intensity of these movements varies depending on the weather: storms in the Irish sea can cause diversion of lorry routes from Belfast-Liverpool to Dublin-Holyhead.
- **Groupage.** A significant volume of GB to NI trade is undertaken via a “groupage” model: multiple products are collected from multiple sites in GB and transported to NI. This includes parcels for the online shopping suppliers. Neither the TSS nor hauliers are equipped to meet expected timeframes for delivery, given the need for complex contractual changes, additional resource requirements and training.

The border in the Irish Sea will get worse when the ‘grace periods’ expire.

In addition to the border formalities currently being observed the border in the Irish Sea will get tougher for businesses as three ‘grace periods’ expire. These temporary ‘grace periods’ are:

1. **Supermarkets:** A three-month grace period for authorised traders - supermarkets - “from official certification for products of animal origin, composite products, food and feed of non-animal origin and plants and plant products.” **This expires on 1 April 2021.**
2. **Chilled meats etc:** A six-month grace period for products including: minced meat of poultry, chilled minced meat from animals other than poultry, chilled meat preparations, including for meat initially imported into GB from the EU’s SPS area. **This expires on 1 July 2021.**
3. **Medicines:** A twelve-month grace period in respect of batch testing, regulatory importation requirements and the requirements of Falsified Medicines Directive for medicines including vaccines. **This expires on 1 January 2022.**

Visible symptoms

- **Empty shelves.** The new year in Northern Ireland saw a range of supermarkets struggle with the imposition of the new border in the Irish Sea and run out of day to day products. In addition to empty shelves customers have seen shorter sell by dates as products take longer to enter Northern Ireland from GB, less variety and in the some cases, such as Sainsbury’s, the substitution for brands from the EU – in this case Spa.⁸
- **Seeds, plants (including trees).** The imposition of EU SPS rules means that the importation into Northern Ireland of seeds, if allowed, requires a certificate. Some seeds, such as seed potatoes are prohibited all together, while even tea leaves may attract regulatory problems.⁹ This has led to Northern Irish gardeners being blocked from major GB seed merchants such as Suttons.¹⁰

⁷ Document proposed by the Road Haulage Association for the Northern Ireland Protocol

⁸ Newsletter, 5 January 2021: <https://www.newsletter.co.uk/news/politics/days-after-brexite-many-products-vanish-sainsburys-northern-ireland-and-are-replaced-spar-brand-3085106>

⁹ DAERA, import and export of plants 2021: <https://www.daera-ni.gov.uk/articles/import-and-export-plants-after-1-january-2021>

¹⁰ Newsletter, 29 January 2021: <https://www.newsletter.co.uk/news/politics/ni-gardeners-lose-hundreds-seed-varieties-major-company-suttons-withdraws-fruit-and-veg-seeds-due-irish-sea-border-3115211>

- **Soil.** The continuing application of the EU Plant Health Regulation 2016/2031 to the rest of the world including GB has had some unintended consequences. Second hand tractors and plants in soil are now regulated requiring certification / cleaning. Caught within this has been the importation of oak trees from Scotland for reforestation.^{11, 12, 13}
- **Sausages and chilled meats.** Chilled meats are banned for import into the EU from third countries. As a result sausages and other products from GB will not be allowed to be imported after the expiry of the grace period.¹⁴
- **Steel imports could carry a 25% tariff.** Steel imports into the EU carry a 0% tariff and are covered within the TCA. However, the EU (and UK) has in place a 'safeguarding' tariff of 25% against all its trade partners, in response to a glut in steel from China. Under the safeguarding measure the EU allocates a Tariff Rate Quota to each of a number of WTO states, including the UK. Unfortunately GB steel going to Northern Ireland at present falls under neither quota and unless an agreement is formalised (or the UK quota is used up) could carry a 25% tariff.¹⁵
- **Pets travelling from GB to NI.** While there were existing SPS requirements for agricultural animals, domestic pets could travel freely between GB and Northern Ireland. However, as a result of GB being treated as a 3rd country by the EU and EU rules (EU Pet Travel regulation (Regulation (EU) 576/2013) applying in Northern Ireland pets now require a pet passport and rabies vaccination, despite neither GB nor Northern Ireland being subject to rabies.¹⁶
- **Parcels.** Northern Irish consumers now face additional problems receiving parcels ordered and sent from GB, impacting their ability to purchase items online. Some companies now require customs declarations. Some firms have stopped sending packages all together and most have stopped sending parcels that may include food or plant material.¹⁷

Is Northern Ireland within the UK's external trading agreements?

While Northern Ireland is legally within the UK's 'customs territory' it is de facto also within the EU's customs territory. There is no customs border between North and South but goods entering Northern Ireland from GB pay EU tariffs if they are 'at risk'. Goods entering Northern Ireland from the rest of the world must pay EU (rather than potentially lower UK) external tariffs if they are "at risk" of moving on into the EU.

¹¹Newsletter, 2 February 2021, <https://www.newsletter.co.uk/news/politics/british-diggers-and-farm-machinery-now-banned-northern-ireland-without-soil-free-wash-certificate-due-irish-sea-border-3120482>

¹² DAERA, <https://www.daera-ni.gov.uk/articles/brexit-transition-gas-importing-plants-plant-products-wood-bark-used-agricultural-and-forestry>

¹³ Guardian, 17 February 2021, <https://www.theguardian.com/politics/2021/feb/17/brexit-forces-northern-ireland-buyers-to-cancel-orders-for-100000-trees>

¹⁴ Telegraph, 20 January 2022, <https://www.telegraph.co.uk/business/2021/01/20/british-bangers-feel-bite-brexit-northern-ireland/>

¹⁵ Belfast Telegraph, 16 January 2021, <https://www.belfasttelegraph.co.uk/news/uk/25-tariff-on-steel-imports-to-northern-ireland-ruinous-39974482.html>

¹⁶ DAERA NI, <https://www.daera-ni.gov.uk/articles/travelling-pets>

¹⁷ BBC, 22 January 2021; <https://www.bbc.com/news/uk-northern-ireland-55768788>

This raises a number of questions for Northern Irish manufacturing businesses that export outside of the EU.

- Where do they source their components from?
 - Would GB components sourced from a GB supply chain pay a tariff? They would be considered 'at risk' if they are to be incorporated into a product which itself may be sent into the EU.
 - If GB sourced components carry a tariff risk, would EU components count as domestic content if exported under a UK trade agreement?

While having access to both markets for exports has led the Northern Irish Office to claim Northern Ireland has 'the best of both worlds' this ignores the supply chains all manufacturers require and the need to export to non GB/EU destinations.

The political and constitutional threat to Northern Ireland

The United Kingdom is the most successful political union in history because it was also the most successful economic union in history. This was clearly set out in the 1800 Act of Union that brought Ireland (now Northern Ireland) into the United Kingdom.

The Act of Union 1800

Article 6 of the Act of Union was very clear what the Union was to mean. Ireland (later Northern Ireland) was to be on the same footing as Great Britain in the GB market and in relation to the UK's external trade agreements.

The Act of Union 1800

Sixth Article

The subjects of Great Britain and Ireland shall be on the same footing in respect of trade and navigation, and in all treaties with foreign powers the subjects of Ireland shall have the same privileges as British subject.

From January 1, 1801, all prohibitions and bounties on the export of articles the produce or manufacture of either country to the other shall cease.

All articles the produce or manufacture of either country, not herein-after enumerated as subject to specific duties, shall be imported into each country from the other, duty free, other than the countervailing duties in the Schedule No. 1. or to such as shall hereafter be imposed by the united Parliament; ...¹⁸

The Act of Union of 1800 has political salience in Northern Ireland in the manner the Act of Union 1707 has in Scotland. It, along with the 1998 devolution settlement, is currently the subject of ongoing legal action initiated by Unionist politicians seeking to demonstrate that the NIP is contrary to UK and international law.¹⁹

¹⁸ Act of Union 1800: <https://www.legislation.gov.uk/apgb/Geo3/39-40/67/contents>

¹⁹ BBC, 22 February 2021, <https://www.bbc.co.uk/news/uk-northern-ireland-56148441>

The Belfast Agreement (Good Friday Agreement) and the principle of consent

Proponents of the Protocol, from the Irish Government, the EU Commission to President Biden have all spoken of the importance of upholding the Belfast Agreement. However, these pronouncements bear little relation to the actual text, which was not premised on EU membership or the absence of borders and of course had nothing to say on the subject of Export Health certificates, tariffs or rules of origin.

What the Belfast Agreement does set out is the 'Principle of Consent'. The principle that the status of Northern Ireland should not be changed without the consent of the majority of its people.

The undemocratic nature of the Article 18 Consent Mechanism

The NIP does include, in Article 18, a mechanism for a vote on its continuance in the Northern Ireland Assembly.²⁰ However, this mechanism is not in line with the Belfast Agreement principles of 'cross community consent' allowing instead for a majoritarian vote in favour of the Protocol.

1. **It's a delayed decision:** Under Article 18 if the Assembly voted not to retain the Protocol this could only be in 4 years' time, and it would remain in force for a further 2 years after the vote. This means that the application of the Protocol is guaranteed for 6 years without any democratic consent at all. Even if the Assembly voted to remove Articles 5-10 of the Protocol there is no guarantee that it would be removed as Article 18 states *"In such a case the Joint Committee shall address recommendations to the Union and to the United Kingdom on the necessary measures, taking into account the obligations of the parties to the 1998 Agreement."*
2. **The Assembly vote in Article 18 is stacked against the unionist 'Anti-NIP' majority among the electorate:** The Northern Ireland Assembly is a 90 seat assembly voted for via 5 member constituencies by transferable vote. In order for a vote to remove the Protocol there would need to be 46 MLAs opposed to the NIP elected in 2022. At present there are three parties opposed to the NIP, the DUP, UUP and TUV. They currently hold 40 out of 90 seats. With the nationalist parties in favour of the NIP, the decision would come down to the cross-community Alliance and Green Parties – who benefit from the transferable vote and are in favour of the Protocol.

We are therefore left with the conclusion that the electoral system in conjunction with the NIP mean the Assembly elections in 2022 are highly unlikely to deliver an anti-Protocol vote.

²⁰ UK Gov: Withdrawal agreement NIP Article 18:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

The additional NIP risk to the Union with Scotland

While the constitutional damage to the union in Northern Ireland is direct the Northern Ireland Protocol also indirectly threatens the union in Scotland as well.

In Scotland we currently have a devolved government intent on using the Brexit referendum result to argue that Scotland should be treated differently, questioning the validity of the 'all UK' referendum. The fact that the UK has so far acquiesced in treating Northern Ireland differently from the rest of the UK and has called the NIP the 'Best of Both Worlds' between the UK and EU could easily (were it not for the evident economic damage) feature in the ongoing SNP campaign for independence – in the EU but with access to the UK market. At best the UK government has arguably accepted that the UK's internal market, on which the UK was based, is negotiable.

The NIP's precedent for intra UK borders is also a constitutional issue when faced with an SNP administration arguing that it, rather than the UK, should have control over the regulation of the UK's internal market so far as Scotland is concerned.

Section 4: The temporary nature of the Northern Ireland Protocol

The NIP was accepted, in 2019, as the only practical way out of the EU, despite it breaking the UK's obligations under the Belfast Agreement to gain consent in Northern Ireland to a change in its status. It was further agreed on the basis that it would be '*superseded*' with '*alternative arrangements*' in the trade negotiations which its acceptance was supposed to unlock.

This has not happened to date. There has been no genuine problem solving or flexibility shown by the EU. In fact the EU, as soon as the NIP was agreed, has shown a disregard for its obligations and the basis on which the NIP was agreed.

The NIP's genesis was the, non-legally binding, December 2017 Joint Report. Even though this was the product of a major failure in UK diplomacy it did include the aspiration that the then backstop would be removed via negotiations and '*specific solutions*'.

Paragraph 49 of the December 2017 Joint UK/EU Report (emphasis added)

"The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to **achieve these objectives through the overall EU-UK relationship**. Should this not be possible, the United Kingdom will propose **specific solutions** to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement."²¹

By the time this had become the NIP the assumption that it would be temporary was maintained.

The Revised Withdrawal Agreement and Political Declaration agreement was based on the assumption the NIP was temporary, to be superseded by 'alternative arrangements'

Article 13 (8) of the NIP contains a revised provision to supersede the Protocol in the context of the future trade talks:

*"Any subsequent agreement between the Union and the United Kingdom shall indicate the parts of this Protocol which it **supersedes**. Once a subsequent agreement between the Union and the United Kingdom becomes applicable **after the entry into force of the Withdrawal Agreement, this Protocol shall then, from the date of application of such subsequent agreement and in accordance with the provisions of that agreement setting out the effect of that agreement on this Protocol, not apply or shall cease to apply, as the case may be, in whole or in part.**"*

Paragraph 35 of the Revised Political Declaration envisages EU agreement to superseding the NIP with alternative arrangements.

*"Such facilitative arrangements and technologies will also be considered in **alternative arrangements** for ensuring the absence of a hard border on the island of Ireland."*

²¹ UK/EU Joint Report December 2017, https://ec.europa.eu/info/sites/info/files/joint_report.pdf

As Rt Hon Mark Francois MP, Chairman of the European Research Group, explained in a Westminster debate regarding a petition on the NIP on 22 February 2021:

“However, in fact the Northern Ireland Protocol, is actually part of the Revised Withdrawal Agreement, which Prime Minister Boris Johnson successfully re-negotiated, after his predecessor, Theresa May, had failed to get her deeply flawed original version through the House of Commons three times. In essence, the Northern Ireland Protocol replaced the dreaded “Backstop” in the subsequent re-negotiation. The Backstop would, almost certainly, have locked us into a trade-restricting Customs Union, forever, without any unilateral exit clause. This threatened to create the so-called “Hotel California dilemma” - i.e. you can check out but you can never leave.

My friends and I in the ERG voted for the Revised Withdrawal Agreement, with the Protocol in place of the Backstop and with our eyes open, as by far the lesser of two evils and so that we could legally exit the EU on 31 January 2020, which we then did.

However, we made it very plain to No 10 at the time, including to the new Prime Minister personally, that we regarded the NIP as very much “unfinished business”, which would have to be amended or even replaced entirely, at a future date. As this did not happen via the TCA negotiations, as we had originally hoped, this matter remains extant.”²²

²² UK Parliament, Common’s Petitions Committee 22 February debate on a petition to “Trigger Article 16”.

The EU has not acted in good faith to minimise the NIP's impact

While the EU has consistently failed to engage with the UK on developing alternatives to the NIP it has also failed to seek to minimise its impact. The EU has shown no flexibility in terms of its own laws. This has led to an impact on Northern Ireland far beyond anything justified by the EU's desire to protect its internal market from "leakage" on the island of Ireland.

- **No mutual recognition of SPS**

While the UK has shown willing to agree to mutual recognition of each parties high standards of SPS, reducing the need for compliance and checks, the EU has insisted on implementing the full SPS rulebook on GB/NI trade. This has led to the EU imposing a full SPS border within the Irish Sea as if GB were a "third country" from NI. It is noted that the EU has agreed an SPS agreement with New Zealand but has not done so with the UK, despite the UK & EU rules being identical.

- **No exemptions for Trusted Traders such as supermarkets etc.** While the professed purpose of the NIP for the EU was to keep the North/South border open, it has insisted on the application of its law across the entire economy of NI, regardless of the risk of goods crossing the border. While the supply chains of the established supermarkets are predictable, trusted and present no significant 'risk' of leakage across the border the EU has insisted they and their supply comply fully with EU SPS rules. This appears to be an attempt to use the NIP to divert trade away from GB and towards Irish and EU suppliers.

- **Grace Periods are only temporary.** The EU's insistence on applying its full external SPS border between NI and GB will lead to the prohibition on goods such as medicines and chilled meats. Rather than acknowledge the special circumstance of Northern Ireland within the UK supply chain the EU has granted only temporary extensions to 'grace periods' – time to source the goods from the EU.

- **EU State aid law applied in Great Britain.** The EU has used the wording of the NIP to attempt to capture a large proportion of the mainland UK economy within its State aid regime . This is due to the expansive interpretation of the wording of what constitutes State aid "*in respect of measures which affect that trade between Northern Ireland and the Union*" as contained in Article 10 NIP. The jurisdictional reach of this test is unknown²³, although the Commission published a paper stating that in its view, its jurisdictional reach is extremely wide and does not require evidence of an actual effect. Merely strengthening the position of a GB firm with sales to customers in NI would be sufficient²⁴. The Commission published this paper in direct breach of its commitments in the unilateral declaration of 17 December 2020 that it "must be established" (i.e. with evidence) that such an effect was liable to occur. The key problem is that deciding on the reach of this test is within the direct jurisdiction of the ECJ under the NIP, which provides for courts in the UK (including courts in GB if the issue comes up in front of them) to make preliminary references to the ECJ. The NIP requires the UK Supreme Court to make a reference to the ECJ if an issue of law under the Protocol is unclear.

²³ See discussion by James Webber, Politeia, see attached at page 12 *et seq* <https://www.politeia.co.uk>

²⁴ European Commission, Notice to Stakeholders "Withdrawal of the United Kingdom and EU rules in the field of State aid", published 18 January 2021

Section 5: Introduction to Article 16

Article 16 of the NIP the so called “safeguards” Article is designed as a safety valve in exceptional circumstances allowing the EU or UK to neutralise the effect of the NIP.

These circumstances in which this is possible are if there are “*serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.*” If these circumstances exist either party may invoke the Article as set out in Annex 7 (see below).

ARTICLE 16 Safeguards (Emphasis added)

1. If the application of this Protocol leads to **serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade**, the Union or the United Kingdom may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.
2. If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol.
3. Safeguard and rebalancing measures taken in accordance with paragraphs 1 and 2 shall be governed by the procedures set out in Annex 7 to this Protocol.

ANNEX 7 PROCEDURES REFERRED TO IN ARTICLE 16(3)

1. Where the Union or the United Kingdom is considering taking safeguard measures under Article 16(1) of this Protocol, it shall, without delay, notify the Union or the United Kingdom, as the case may be, through the Joint Committee and shall provide all relevant information.
2. The Union and the United Kingdom shall immediately enter into consultations in the Joint Committee with a view to finding a commonly acceptable solution.
3. The Union or the United Kingdom, as the case may be, may not take safeguard measures until 1 month has elapsed after the date of notification under point 1, unless the consultation procedure under point 2 has been concluded before the expiration of the state limit. **When exceptional circumstances requiring immediate action exclude prior examination, the Union or the United Kingdom, as the case may be, may apply forthwith the protective measures strictly necessary to remedy the situation.**
4. The Union or the United Kingdom, as the case may be, shall, without delay, notify the measures taken to the Joint Committee and shall provide all relevant information.
5. The safeguard measures taken shall be the subject of consultations in the Joint Committee every 3 months from the date of their adoption with a view to their abolition before the date of expiry envisaged, or to the limitation of their scope of application. The Union or the United Kingdom, as the case may be, may at any time request the Joint Committee to review such measures.
6. Points 1 to 5 shall apply, mutatis mutandis, to rebalancing measures referred to in Article 16(2) of this Protocol.

What retaliation could the EU impose if the UK invoked Article 16?

The triggering of Article 16 may not be cost free. Either party may then seek to “retaliate” in terms of the NIP mechanisms itself and potentially via the TCA.

Firstly, Article 16 (2) allows a party to “*take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance.*” In terms of the UK removing the entire NIP in circumstances where the EU fails to agree an alternative a proportionate rebalancing measure would have to take into account that the volumes of trade are small, and the one measure they could impose – a customs border on its own border – is one the EU is pledged not to consider.

Secondly, the EU may seek retaliation via the TCA. Currently, the TCA is unratified by the European Parliament. The original deadline for ratification was the 28 February 2021, which has recently been extended until the 30 April 2021 by the mutual agreement of both parties.

The EU’s decision to use Article 16

Having instigated a row with AstraZeneca on the import and export of COVID-19 vaccines on the evening of the 29th January 2021, without warning (and without informing the Irish government) the European Commission announced its intention to invoke Article 16 of the NIP.²⁵

The EU’s decision was doubly controversial as it sought to block the export of vaccines to Northern Ireland by way of the use of the Article 16 ‘safeguarding’ measure contained within the NIP. If followed through, this would have created a hard border on the island of Ireland for that most sensitive of commodities – vaccines. It is worth noting that had this decision been taken after the expiry of the ‘grace period’ for the import of medicines from GB, Northern Ireland could have been in the position of having no access to vaccines whatsoever.

The EU’s decision to invoke Article 16 has fundamentally changed the nature of the NIP. The EU was prepared, on no notice, to implement a border on the island of Ireland, disregarding the procedures contained within the NIP for a matter unrelated to Northern Irish trade into the EU, rather inspired by the EU’s own internal political considerations.

The European Commission was heavily criticised for this precipitate and disproportionate action, which was at variance with the rationale of the NIP in the first place. Nevertheless, this has now provided the UK Government with a unique opportunity to push for a change in the whole situation, up to and including the replacement of the NIP itself with “alternative arrangements”.

²⁵ Irish Times 31 January 2020, Irish Taoiseach Micheál Martin “The commission issued a public announcement on the issue and that’s when we first became aware of it” <https://www.irishtimes.com/news/politics/eu-did-not-grasp-political-reality-of-move-on-ni-protocol-says-mcguinness-1.4472282>

Section 6: Alternatives to the Northern Ireland Protocol

In responding to the clearly unsustainable situation regarding the NIP, the United Kingdom has four main options:

- Firstly, the UK could seek to use the Joint Committee of the NIP to seek easements, changes and solutions to minimise the impact of the NIP.
- Secondly, to follow the lead of the EU and seek to use the Article 16 ‘safeguarding’ provisions to remove the NIP. This would require UK legislation, as the NIP has direct effect in UK law.
- Thirdly, the UK could now legislate to disapply the NIP in UK domestic law under the doctrine of the ‘Sovereignty of Parliament’.
- Lastly, the UK can seek to work with the EU on an alternative that meets their stated objectives such as ‘Mutual Enforcement’.

Option 1) Use the Joint Committee to seek to address the most serious problems with the NIP

Following the EU’s invocation of Article 16 the UK Government sought to raise a number of issues via the Joint Committee. These were set out in correspondence between the two co-chairs.

Exchange of Letters:

- The Rt. Hon Michael Gove MP, Chancellor of the Duchy of Lancaster to Vice-President of the European Commission Maroš Šefčovič²⁶
- Maroš Šefčovič Sefcovic to Michael Gove²⁷

In Michael Gove’s letter of 2 February 2021, he raised a number of issues for the Joint Committee to solve, saying that “*there are a number of pressing problems with the operation of the Protocol that need to be addressed and we must do so **this week**...*” These issues included:

- I. The ban on GB chilled meat.
- II. Extending the ‘grace periods’
- III. Pet travel between GB and NI.
- IV. Issues with GB parcels.
- V. Tariff rate Quotas on items such as steel.

While the Joint Committee has some flexibility on how the NIP is implemented, this is limited by the the NIP and the EU’s willingness to change its law. In his reply of 10 February 2021 Maroš Šefčovič demonstrated the limits of this flexibility stating that both sides should “*work tirelessly in order to make the protocol work. It requires full and faithful implementation..*”

²⁶ UK Gov, Letter 2 February 2021, <https://www.gov.uk/government/publications/letter-from-the-chancellor-of-the-duchy-of-lancaster-to-the-vice-president-of-the-european-commission-2-february-2021>

²⁷ EU Commission, Letter 10 February, https://ec.europa.eu/info/publications/letter-vice-president-maros-sefcovic-uk-chancellor-duchy-lancaster-rt-hon-michael-gove-10-february-2021_en

Option 2) The UK invokes Article 16

Under the NIP the UK could invoke Article 16 if there are “*serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.*”

The UK could make a case based on all three headings, but the strongest would potentially be that of “*diversion of trade*” the fact of which is accepted by both sides.

- Environmental: Ban on trees for woodland and need to use peat.
- Societal: Pressure on society and GFA leading to threats of violence and pressure on Stormont.
- Trade diversion: Northern Irish supermarkets and other companies are being forced to source supplies from the EU to avoid NIP compliance.

Having made the case the UK would need to exercise its domestic power to act via a new Act of Parliament.

Option 3) Domestic legislation – a new UK Internal Market Bill

Whether the UK seeks to utilise Article 16 to remove the NIP or the sovereignty of Parliament there will be a requirement for domestic legislation to give domestic legal effect to the change.

The NIP is a part of UK law and given direct effect via sections 7A and 8C of the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020. These have a very similar effect to the provisions 2(1) and 2(4) of the European Communities Act 1972.

While it is arguable that the power in 8C could be used to apply necessary regulations under article 16 of the NIP, this is unlikely to be sufficiently clear cut not to be at risk via judicial review, leading to a requirement for a new UK Act of Parliament. Similarly, while the Royal Prerogative to make Treaties could potentially be used to ‘unmake’ or denounce a Treaty and thus arguably remove the NIP, and the remainder of the Withdrawal Agreement, from UK domestic law this could also raise uncertainties best avoided by domestic legislation.

A UK Act, similar to the Internal Market Act, would need to give Ministers a general power to disapply provisions of the NIP and to make substitute arrangements, including applying a new mutual enforcement regime if the EU agrees.

In seeking to override the ‘direct effect’ of the NIP in UK law, the UK should legislate in line with Sir William Cash’s Section 38 (Sovereignty of Parliament) provisions contained in the European Union (Withdrawal Agreement) Act 2020.^{28, 29}

²⁸ <https://www.legislation.gov.uk/ukpga/2020/1/section/38>

²⁹ While this option utilises domestic law the Vienna Convention on the Law of Treaties give the UK an international law option courtesy of the Vienna Convention on the Law of Treaties (VCLT). Firstly, under the VCLT Article 46 “*Provisions of internal law regarding competence to conclude treaties*” the UK could argue it is not bound by the WA/NIP if there is a “manifest” violation of “*its internal law of fundamental importance*”. Arguably the Act of Union 1800 that created the United Kingdom is of fundamental importance. Secondly, under Article 56 if a treaty “*contains no provision regarding its termination and which does not provide for denunciation or withdrawal*” and “*it is established that the parties intended to admit the possibility of denunciation or withdrawal*” or “*a right of denunciation or withdrawal may be implied by the nature of the treaty... A party shall give not less than twelve months’ notice of its intention to denounce or withdraw from a treaty.*” In the case of the NIP and the Withdrawal Agreement generally there is no UK right of exit (the

Simultaneous negotiation with the EU on alternatives

Concurrently with these options open to the UK, the Government could offer to work with the EU on alternatives to a N/S border.³⁰ In addition to repairing the UK's constitutional and economic settlement the alternative to the NIP would seek to address EU concerns regarding non-compliant goods leaking from Northern Ireland into the Republic of Ireland. This would involve a proportionate approach to protection of the single market.

The EU's legitimate concern is limited to the leakage into the EU single market of untaxed or unregulated goods. What is sold within Northern Ireland or imported into NI from GB is not a legitimate EU concern. Subsidy policy in GB, on the other side of a customs border from the EU, is of absolutely no legitimate concern to the EU beyond the provisions of the TCA – already the most extensive subsidy control provisions of any trade agreement in the world.

A generous offer to help the EU to solve its border problem would be focused on the small amount of trade going north to south. The UK should work with the EU to ensure that NI is not a back route into the EU for these types of goods.

Option 4) Mutual enforcement: An offer the EU should not refuse

In essence, “Mutual Enforcement” replaces the need for a hard physical border with a reciprocal guarantee by each party that it will prevent the export of goods that do not meet the other parties regulatory requirements. In terms of Northern Ireland, the UK authorities would guarantee to prevent UK traders, or others, moving non-EU compliant goods into the EU from Northern Ireland and, in return, the EU would prevent non UK compliant goods entering the UK, hence “Mutual Enforcement”. This enforcement would be done “*at source*” within Northern Ireland and so would obviate the need for a physical hard border.

Mutual enforcement was originally advocated in this context in a paper co-written by, Sir Jonathan Faull – now retired but formerly one of the UK's most senior European Commission officials as a way to break the logjam of Brexit.³¹ This idea has since been worked on by senior lawyers such as James Webber and Barnabas Reynolds. Unfortunately, representations to Michel Barnier, although initially successful, were dropped when it became clear the UK would agree to the 2017 Joint Report instead.

Assembly being a devolved body) and yet the NIP was not designed or intended to be permanent. As such it could be argued that the UK has a right to leave the WA/NIP on 12 months' notice.

³⁰ Alternatives to the N/S border could come as either a best in class new border arrangement as set out previously and rejected by the EU. Another alternative could be the use of ‘mutual enforcement’ (see below). See ERG, 2018, Practical proposals for the United Kingdom's border with the European Union with particular emphasis on Northern Ireland <http://christopherhowarth.uk/wp-content/uploads/2014/10/Northern-Ireland-paper-18-October-2018-FINAL.pdf>

³¹ Weiler, Joseph H.H., Sarmiento, Daniel; Faull, Jonathan: An Offer the EU and UK Cannot Refuse: A Proposal on How to Avoid a No-Deal Brexit, VerfBlog, 2019/8/22, <https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse/>, DOI: 10.17176/20190822-201355-0

How does the Mutual Enforcement Concept work?³²

1. Each side makes a reciprocal treaty commitment to enforce the rules of the other with respect to goods trade which crosses the border. Each side maintains autonomy – but commits to the enforcement of whatever rules the other seeks to impose in respect of goods crossing the border.
2. A customs border post is usually the first (or main) opportunity that a territory has to assert their jurisdiction over goods movements – i.e., enforce their rules and collect their duties. The obligation to pay duties and ensure compliance rests with the importer, since this is the party within the jurisdiction of the importing territory.
3. In a Mutual Enforcement approach, the obligation to comply with the importing territory's rules and pay duties owed is placed on the **exporter** as a matter of law of the exporting territory. The importing territory relies on the structures of the exporting territory to obtain confidence that its rules will be applied beyond its border, in respect of exports from the exporting territory. By placing trust and confidence in the exporting territory, the importing territory can dispense with a customs border post to do this job.
4. The concept can apply to any rule that the importing state wishes to enforce at its border - except, importantly, those rules that themselves prescribe a particular mode of enforcement at the border such as SPS. Those rules would need to be adjusted for the relevant areas to operate under the solution also.

Advantages vs Protocol

5. Obligations and rights are in balance. The scheme is mutual – each side depends on the other. This removes the asymmetry and inherent instability of the Protocol, where the UK must apply EU rules but not vice versa.
6. Removes the border in the Irish Sea. The trade border is north / south. Mutual Enforcement operates only to remove the need for border infrastructure. It does not remove the border or require the harmonisation of substantive rules, although note the approach proposed for SPS below.
7. Allows NI to benefit from the same freedom as GB, with single market rules, such as State aid control, not applying. Mutual Enforcement does not remove the border through alignment with EU rules. It is a legal technique to remove the need for border infrastructure.

³² James Webber, partner of Shearman & Sterling LLP (Brussels & London), in the July 2021 paper *Replacing the Withdrawal Agreement by the Centre for Brexit Policy*, page 58 *et seq.* Based on thinking originally described in a paper published by Joseph H.H. Weiler, Daniel Sarmiento and Sir Jonathan Faull (*ibid*).

Section 7: Conclusions

The Northern Ireland Protocol poses an ongoing challenge to the UK's constitutional settlement as well as the economic wellbeing of the people of Northern Ireland. It is a challenge that cannot be avoided. While with goodwill the UK and EU could have worked on alternatives and replacements either during the negotiation of the Trade and Cooperation Agreement or afterwards, this has not happened, at least to date.

Northern Ireland is fully integrated into the GB supply chain with 63% of its imports coming from GB and much of the remainder being sourced via GB. Any border in the Irish Sea would impose a cost on Northern Ireland.

Far from seeking to minimise the impact on Northern Ireland the EU has shown its intention to demand full implementation and has shown no appetite for flexibility or changing one word of its own customs law.

The EU's intention to use Article 16 itself has brought the issue to a head. By seeking to override the NIP to block the importation of vaccines into Northern Ireland and Great Britain the EU has shaken confidence in its previously avowed respect for the provisions of the Belfast/Good Friday Agreement.

The Northern Ireland Protocol was not intended to be permanent; it was the product of its circumstances and is now imposing real economic and constitutional stress on Northern Ireland. The UK government must act and has the legal justification to act already contained within the NIP.

Fortunately, there are alternatives to the NIP that should be acceptable to the EU, were it acting in good faith. Foremost among these is the proposal for 'mutual enforcement'.

Recommendations

The UK can and should act in the interests of Northern Ireland. In order to act UK law must be changed to give the Government the power to disapply the NIP and implement an alternative. It is vital therefore that:

- 1. The Government should notify the EU under Article 16 that it intends to redress the trade diversion and societal pressures by legislating.**
- 2. The Government should work on a draft Bill to ensure free trade within the UK, restoring the UK's internal market as set out in 1801. Parliament has the sovereign power as reaffirmed in section 38 of the European Union (Withdrawal Agreement) Act 2020.**
- 3. The Government should extend a generous offer to help the EU meet its stated concerns. An answer to this is Mutual Enforcement of the North/South border by the UK and EU to ensure that exporters abide by the rules of their counter-party.**

Appendix

PROTOCOL ON IRELAND/NORTHERN IRELAND

The Union and the United Kingdom,

HAVING REGARD to the historic ties and enduring nature of the bilateral relationship between Ireland and the United Kingdom,

RECALLING that the United Kingdom's withdrawal from the Union presents a significant and unique challenge to the island of Ireland, and reaffirming that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation there,

RECOGNISING that it is necessary to address the unique circumstances on the island of Ireland through a unique solution in order to ensure the orderly withdrawal of the United Kingdom from the Union,

AFFIRMING that the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations (the "1998 Agreement"), which is annexed to the British-Irish Agreement of the same date (the "British-Irish Agreement"), including its subsequent implementation agreements and arrangements, should be protected in all its parts,

RECOGNISING that cooperation between Northern Ireland and Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland, and recalling the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly and the North-South Ministerial Council (including cross-community provisions), as set out in the 1998 Agreement,

NOTING that Union law has provided a supporting framework for the provisions on Rights, Safeguards and Equality of Opportunity of the 1998 Agreement,

RECOGNISING that Irish citizens in Northern Ireland, by virtue of their Union citizenship, will continue to enjoy, exercise and have access to rights, opportunities and benefits, and that this Protocol should respect and be without prejudice to the rights, opportunities and identity that come with citizenship of the Union for the people of Northern Ireland who choose to assert their right to Irish citizenship, as defined in Annex 2 of the British-Irish Agreement "Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship", EMPHASISING that in order to ensure democratic legitimacy, there should be a process to ensure democratic consent in Northern Ireland to the application of Union law under this Protocol,

RECALLING the commitment of the United Kingdom to protect North-South cooperation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls,

NOTING that nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom's internal market,

UNDERLINING the Union's and the United Kingdom's shared aim of avoiding controls at the ports and airports of Northern Ireland, to the extent possible in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof,

RECALLING the commitments of the Union and the United Kingdom reflected in the Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union of 8 December 2017,

RECALLING that the Union and the United Kingdom have carried out a mapping exercise which shows that North-South cooperation relies to a significant extent on a common Union legal and policy framework,

NOTING that therefore the United Kingdom's withdrawal from the Union gives rise to substantial challenges to the maintenance and development of North-South cooperation,

RECALLING that the United Kingdom remains committed to protecting and supporting continued North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks for cooperation, including the continued operation of the North-South implementation bodies,

ACKNOWLEDGING the need for this Protocol to be implemented so as to maintain the necessary conditions for continued North-South cooperation, including for possible new arrangements in accordance with the 1998 Agreement,

RECALLING the Union's and the United Kingdom's commitments to the North South PEACE and INTERREG funding programmes under the current multi-annual financial framework and to the maintaining of the current funding proportions for the future programme,

AFFIRMING the commitment of the United Kingdom to facilitate the efficient and timely transit through its territory of goods moving from Ireland to another Member State or to a third country, and vice versa,

DETERMINED that the application of this Protocol should impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland,

UNDERLINING their firm commitment to no customs and regulatory checks or controls and related physical infrastructure at the border between Ireland and Northern Ireland,

RECALLING that Northern Ireland is part of the customs territory of the United Kingdom and will benefit from participation in the United Kingdom's independent trade policy,

HAVING REGARD to the importance of maintaining the integral place of Northern Ireland in the United Kingdom's internal market,

MINDFUL that the rights and obligations of Ireland under the rules of the Union's internal market and customs union must be fully respected,

HAVE AGREED UPON the following provisions, which shall be annexed to the Withdrawal

Agreement:

ARTICLE 1

Objectives

1. This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.
2. This Protocol respects the essential State functions and territorial integrity of the United Kingdom.
3. This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.

ARTICLE 2

Rights of individuals

1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.

ARTICLE 3

Common Travel Area

1. The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the "Common Travel Area"), while fully respecting the rights of natural persons conferred by Union law.
2. The United Kingdom shall ensure that the Common Travel Area and the rights and privileges associated therewith can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality.

ARTICLE 4

Customs territory of the United Kingdom

Northern Ireland is part of the customs territory of the United Kingdom. Accordingly, nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries, provided that those agreements do not prejudice the application of this Protocol.

In particular, nothing in this Protocol shall prevent the United Kingdom from concluding agreements with a third country that grant goods produced in Northern Ireland preferential access to that country's market on the same terms as goods produced in other parts of the

United Kingdom.

Nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of its Schedules of Concessions annexed to the General Agreement on Tariffs and Trade 1994.

ARTICLE 5

Customs, movement of goods

1. No customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing.

The customs duties in respect of a good being moved by direct transport to Northern Ireland other than from the Union or from another part of the United Kingdom shall be the duties applicable in the United Kingdom, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing.

No duties shall be payable by, as relief shall be granted to, residents of the United Kingdom for personal property, as defined in point (c) of Article 2(1) of Council Regulation 1186/2009¹, brought into Northern Ireland from another part of the United Kingdom.

¹ Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty (OJ L 324, 10.12.2009, p. 23).

2. For the purposes of the first and second subparagraphs of paragraph 1, a good brought into Northern Ireland from outside the Union shall be considered to be at risk of subsequently being moved into the Union unless it is established that that good:

- (a) will not be subject to commercial processing in Northern Ireland; and
- (b) fulfils the criteria established by the Joint Committee in accordance with the fourth subparagraph of this paragraph.

For the purposes of this paragraph, "processing" means any alteration of goods, any transformation of goods in any way, or any subjecting of goods to operations other than for the purpose of preserving them in good condition or for adding or affixing marks, labels, seals or any other documentation to ensure compliance with any specific requirements.

Before the end of the transition period, the Joint Committee shall by decision establish the conditions under which processing is to be considered not to fall within point (a) of the first subparagraph, taking into account in particular the nature, scale and result of the processing.

Before the end of the transition period, the Joint Committee shall by decision establish the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently being moved into the Union. The Joint Committee shall take into consideration, inter alia:

- (a) the final destination and use of the good;

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- (b) the nature and value of the good;
- (c) the nature of the movement; and
- (d) the incentive for undeclared onward-movement into the Union, in particular incentives

resulting from the duties payable pursuant to paragraph 1.

The Joint Committee may amend at any time its decisions adopted pursuant to this paragraph. In taking any decision pursuant to this paragraph, the Joint Committee shall have regard to the specific circumstances in Northern Ireland.

3. Legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 shall apply to and in the United Kingdom in respect of Northern Ireland (not including the territorial waters of the United Kingdom). However, the Joint Committee shall establish the conditions, including in quantitative terms, under which certain fishery and aquaculture products, as set out in Annex I to Regulation (EU) 1379/2013 of the European Parliament and of the Council¹, brought into the customs territory of the Union defined in Article 4 of Regulation (EU) No 952/2013 by vessels flying the flag of the United Kingdom and having their port of registration in Northern Ireland are exempted from duties.

¹ Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 (OJ L 354, 28.12.2013, p. 1).

4. The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland.

5. Articles 30 and 110 TFEU shall apply to and in the United Kingdom in respect of Northern Ireland. Quantitative restrictions on exports and imports shall be prohibited between the Union and Northern Ireland.

6. Customs duties levied by the United Kingdom in accordance with paragraph 3 are not remitted to the Union.

Subject to Article 10, the United Kingdom may in particular:

- (a) reimburse duties levied pursuant to the provisions of Union law made applicable by paragraph 3 in respect of goods brought into Northern Ireland;
- (b) provide for circumstances in which a customs debt which has arisen is to be waived in respect of goods brought into Northern Ireland;
- (c) provide for circumstances in which customs duties are to be reimbursed in respect of goods that can be shown not to have entered the Union; and
- (d) compensate undertakings to offset the impact of the application of paragraph 3.

In taking decisions under Article 10, the European Commission shall take the circumstances in Northern Ireland into account as appropriate.

7. No duties shall be payable on consignments of negligible value, on consignments sent by one individual to another or on goods contained in travellers' personal baggage, under the conditions set out in the legislation referred to in paragraph 3.

ARTICLE 6

Protection of the UK internal market

1. Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market. Provisions of Union law made applicable by this Protocol which prohibit or restrict the exportation of goods shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international

obligations of the Union. The United Kingdom shall ensure full protection under international requirements and commitments that are relevant to the prohibitions and restrictions on the exportation of goods from the Union to third countries as set out in Union law.

2. Having regard to Northern Ireland's integral place in the United Kingdom's internal market, the Union and the United Kingdom shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom, in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof. The Joint Committee shall keep the application of this paragraph under constant review and shall adopt appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible.

3. Nothing in this Protocol shall prevent a product originating from Northern Ireland from being presented as originating from the United Kingdom when placed on the market in Great Britain.

4. Nothing in this Protocol shall affect the law of the United Kingdom regulating the placing on the market in other parts of the United Kingdom of goods from Northern Ireland that comply with or benefit from technical regulations, assessments, registrations, certificates, approvals or authorisations governed by provisions of Union law referred to in Annex 2 to this Protocol.

ARTICLE 7

Technical regulations, assessments, registrations, certificates, approvals and authorisations

1. Without prejudice to the provisions of Union law referred to in Annex 2 to this Protocol, the lawfulness of placing goods on the market in Northern Ireland shall be governed by the law of the United Kingdom as well as, as regards goods imported from the Union, by Articles 34 and 36 TFEU.

2. Where provisions of Union law made applicable by this Protocol provide for the indication of a Member State, including in abbreviated form, in markings, labelling, tags, or by any other means, the United Kingdom in respect of Northern Ireland shall be indicated as "UK(NI)" or "United Kingdom (Northern Ireland)". Where provisions of Union law made applicable by this Protocol provide for the indication in the form of a numeric code, the United Kingdom in respect of Northern Ireland shall be indicated with a distinguishable numeric code.

3. By way of derogation from Article 13(1) of this Protocol and from Article 7 of the Withdrawal Agreement, in respect of the recognition in one Member State of technical regulations, assessments, registrations, certificates, approvals and authorisations issued or carried out by the authorities of another Member State, or by a body established in another Member State, references to Member States in provisions of Union law made applicable by this Protocol shall not be read as including the United Kingdom in respect of Northern Ireland as regards technical regulations, assessments, registrations, certificates, approvals and authorisations issued or carried out by the authorities of the United Kingdom or by bodies established in the United Kingdom.

The first subparagraph shall not apply to registrations, certifications, approvals and authorisations of sites, installations or premises in Northern Ireland issued or carried out by competent authorities of the United Kingdom, where the registration, certification, approval

or authorisation may require an inspection of the sites, installations or premises. The first subparagraph shall not apply to veterinary certificates or official labels for plant reproductive material that are required by provisions of Union law made applicable by this Protocol.

The first subparagraph is without prejudice to the validity, in Northern Ireland, of assessments, registrations, certificates, approvals and authorisations issued or carried out, on the basis of provisions of Union law made applicable by this Protocol, by the competent authorities of the United Kingdom or by bodies established in the United Kingdom. Any conformity marking, logo or similar required by the provisions of Union law made applicable by this Protocol which is affixed by economic operators based on the assessment, registration, certificate, approval or authorisation issued by competent authorities of the United Kingdom or by bodies established in the United Kingdom shall be accompanied by the indication "UK(NI)".

The United Kingdom in respect of Northern Ireland may not initiate objection, safeguard or arbitration procedures provided for in provisions of Union law made applicable by this Protocol to the extent that those procedures concern the technical regulations, standards, assessments, registrations, certificates, approvals and authorisations issued or carried out by competent authorities of the Member States or by bodies established in Member States. The first subparagraph does not prevent the test and release by a qualified person in Northern Ireland of a batch of a medicinal product imported into or manufactured in Northern Ireland.

ARTICLE 8 VAT and excise

The provisions of Union law listed in Annex 3 to this Protocol concerning goods shall apply to and in the United Kingdom in respect of Northern Ireland.

In respect of Northern Ireland, the authorities of the United Kingdom shall be responsible for the application and the implementation of the provisions listed in Annex 3 to this Protocol, including the collection of VAT and excise duties. Under the conditions set out in those provisions, revenues resulting from transactions taxable in Northern Ireland shall not be remitted to the Union.

By way of derogation from the first paragraph, the United Kingdom may apply to supplies of goods taxable in Northern Ireland VAT exemptions and reduced rates that are applicable in Ireland in accordance with provisions listed in Annex 3 to this Protocol.

The Joint Committee shall regularly discuss the implementation of this Article, including as concerns the reductions and exemptions provided for in the provisions referred to in the first paragraph, and shall, where appropriate, adopt measures for its proper application, as necessary.

The Joint Committee may review the application of this Article, taking into account Northern Ireland's integral place in the United Kingdom's internal market, and may adopt appropriate measures as necessary.

ARTICLE 9 Single electricity market

The provisions of Union law governing wholesale electricity markets listed in Annex 4 to this Protocol shall apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland.

ARTICLE 10

State aid

1. The provisions of Union law listed in Annex 5 to this Protocol shall apply to the United Kingdom, including with regard to measures supporting the production of and trade in agricultural products in Northern Ireland, in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol.
2. Notwithstanding paragraph 1, the provisions of Union law referred to in that paragraph shall not apply with respect to measures taken by the United Kingdom authorities to support the production of and trade in agricultural products in Northern Ireland up to a determined maximum overall annual level of support, and provided that a determined minimum percentage of that exempted support complies with the provisions of Annex 2 to the WTO Agreement on Agriculture. The determination of the maximum exempted overall annual level of support and the minimum percentage shall be governed by the procedures set out in Annex 6.
3. Where the European Commission examines information regarding a measure by the United Kingdom authorities that may constitute unlawful aid that is subject to paragraph 1, it shall ensure that the United Kingdom is kept fully and regularly informed of the progress and outcome of the examination of that measure.

ARTICLE 11

Other areas of North-South cooperation

1. Consistent with the arrangements set out in Articles 5 to 10, and in full respect of Union law, this Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport.

In full respect of Union law, the United Kingdom and Ireland may continue to make new arrangements that build on the provisions of the 1998 Agreement in other areas of North-South cooperation on the island of Ireland.

2. The Joint Committee shall keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation. The Joint Committee may make appropriate recommendations to the Union and the United Kingdom in this respect, including on a recommendation from the Specialised Committee.

ARTICLE 12

Implementation, application, supervision and enforcement

1. Without prejudice to paragraph 4, the authorities of the United Kingdom shall be responsible for implementing and applying the provisions of Union law made applicable by this Protocol to and in the United Kingdom in respect of Northern Ireland.
2. Without prejudice to paragraph 4 of this Article, Union representatives shall have the right to be present during any activities of the authorities of the United Kingdom related to the implementation and application of provisions of Union law made applicable by this Protocol, as well as activities related to the implementation and application of Article 5, and the United Kingdom shall provide, upon request, all relevant information relating to such activities. The United Kingdom shall facilitate such presence of Union representatives and shall provide

them with the information requested. Where the Union representative requests the authorities of the United Kingdom to carry out control measures in individual cases for duly stated reasons, the authorities of the United Kingdom shall carry out those control measures. The Union and the United Kingdom shall exchange information on the application of Article 5 (1) and (2) on a monthly basis.

3. The practical working arrangements relating to the exercise of the rights of Union representatives referred to in paragraph 2 shall be determined by the Joint Committee, upon proposal from the Specialised Committee.

4. As regards the second subparagraph of paragraph 2 of this Article, Article 5 and Articles 7 to 10, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.

5. Acts of the institutions, bodies, offices, and agencies of the Union adopted in accordance with paragraph 4 shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

6. When representing or assisting a party in relation to administrative procedures arising from the exercise of the powers of the institutions, bodies, offices, and agencies of the Union referred to in paragraph 4, lawyers authorised to practise before the courts or tribunals of the United Kingdom shall in every respect be treated as lawyers authorised to practise before courts or tribunals of Member States who represent or assist a party in relation to such administrative procedures.

7. In cases brought before the Court of Justice of the European Union pursuant to paragraph 4:

- (a) the United Kingdom may participate in the proceedings before the Court of Justice of the European Union in the same way as a Member State;
- (b) lawyers authorised to practise before the courts or tribunals of the United Kingdom may represent or assist a party before the Court of Justice of the European Union in such proceedings and shall in every respect be treated as lawyers authorised to practise before courts or tribunals of Member States representing or assisting a party before the Court of Justice of the European Union.

ARTICLE 13

Common provisions

1. For the purposes of this Protocol, any reference to the United Kingdom in the applicable provisions of the Withdrawal Agreement shall be read as referring to the United Kingdom or to the United Kingdom in respect of Northern Ireland, as the case may be.

Notwithstanding any other provisions of this Protocol, any reference to the territory defined in Article 4 of Regulation (EU) No 952/2013 in the applicable provisions of the Withdrawal Agreement and of this Protocol, as well as in the provisions of Union law made applicable to and in the United Kingdom in respect of Northern Ireland by this Protocol, shall be read as including the part of the territory of the United Kingdom to which Regulation (EU) No 952/2013 applies by virtue of Article 5(3) of this Protocol.

Titles I and III of Part Three and Part Six of the Withdrawal Agreement shall apply without prejudice to the provisions of this Protocol.

2. Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union.

3. Notwithstanding Article 6(1) of the Withdrawal Agreement, and unless otherwise provided, where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced.

4. Where the Union adopts a new act that falls within the scope of this Protocol, but which neither amends nor replaces a Union act listed in the Annexes to this Protocol, the Union shall inform the United Kingdom of the adoption of that act in the Joint Committee. Upon the request of the Union or the United Kingdom, the Joint Committee shall hold an exchange of views on the implications of the newly adopted act for the proper functioning of this Protocol, within 6 weeks after the request.

As soon as reasonably practical after the Union has informed the United Kingdom in the Joint Committee, the Joint Committee shall either:

- (a) adopt a decision adding the newly adopted act to the relevant Annex to this Protocol; or
- (b) where an agreement on adding the newly adopted act to the relevant Annex to this Protocol cannot be reached, examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect.

If the Joint Committee has not taken a decision referred to in the second subparagraph within a reasonable time, the Union shall be entitled, after giving notice to the United Kingdom, to take appropriate remedial measures. Such measures shall take effect at the earliest 6 months after the Union informed the United Kingdom in accordance with the first subparagraph, but in no event shall such measures take effect before the date on which the newly adopted act is implemented in the Union.

5. By way of derogation from paragraph 1 of this Article and from Article 7 of the Withdrawal Agreement, unless the Union considers that full or partial access by the United Kingdom or the United Kingdom in respect of Northern Ireland, as the case may be, is strictly necessary to enable the United Kingdom to comply with its obligations under this Protocol, including where such access is necessary because access to the relevant information cannot be facilitated by the working group referred to in Article 15 of this Protocol or by any other practical means, in respect of access to any network, information system or database established on the basis of Union law, references to Member States and competent authorities of Member States in provisions of Union law made applicable by this Protocol shall not be read as including the United Kingdom or the United Kingdom in respect of Northern Ireland, as the case may be.

6. Authorities of the United Kingdom shall not act as leading authority for risk assessments, examinations, approvals and authorisation procedures provided for in Union law made applicable by this Protocol.

7. Articles 346 and 347 TFEU shall apply to this Protocol as regards measures taken by a Member State or by the United Kingdom in respect of Northern Ireland.

8. Any subsequent agreement between the Union and the United Kingdom shall indicate the parts of this Protocol which it supersedes. Once a subsequent agreement between the

Union and the United Kingdom becomes applicable after the entry into force of the Withdrawal Agreement, this Protocol shall then, from the date of application of such subsequent agreement and in accordance with the provisions of that agreement setting out the effect of that agreement on this Protocol, not apply or shall cease to apply, as the case may be, in whole or in part.

ARTICLE 14
Specialised Committee

The Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland established by Article 165 of the Withdrawal Agreement ("Specialised Committee") shall:

(a) facilitate the implementation and application of this Protocol;

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(b) examine proposals concerning the implementation and application of this Protocol from the North-South Ministerial Council and North-South Implementation bodies set up under the 1998 Agreement;

(c) consider any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland;

(d) discuss any point raised by the Union or the United Kingdom that is of relevance to this Protocol and gives rise to a difficulty; and

(e) make recommendations to the Joint Committee as regards the functioning of this Protocol.

ARTICLE 15
Joint consultative working group

1. A joint consultative working group on the implementation of this Protocol ("working group") is hereby established. It shall serve as a forum for the exchange of information and mutual consultation.

2. The working group shall be composed of representatives of the Union and the United Kingdom and shall carry out its functions under the supervision of the Specialised Committee, to which it shall report. The working group shall have no power to take binding decisions other than the power to adopt its own rules of procedure referred to in paragraph 6.

3. Within the working group:

(a) the Union and the United Kingdom shall, in a timely manner, exchange information about planned, ongoing and final relevant implementation measures in relation to the Union acts listed in the Annexes to this Protocol;

(b) the Union shall inform the United Kingdom about planned Union acts within the scope of this Protocol, including Union acts that amend or replace the Union acts listed in the Annexes to this Protocol;

(c) the Union shall provide to the United Kingdom all information the Union considers relevant to allow the United Kingdom to fully comply with its obligations under the Protocol; and

(d) the United Kingdom shall provide to the Union all information that Member States are required to provide to one another or to the institutions, bodies, offices or agencies of the Union pursuant to the Union acts listed in the Annexes to this Protocol.

4. The working group shall be co-chaired by the Union and the United Kingdom.

5. The working group shall meet at least once a month, unless otherwise decided by the

Union and the United Kingdom by mutual consent. Where necessary, the Union and the United Kingdom may exchange information referred to in points (c) and (d) of paragraph 3 between meetings.

6. The working group shall adopt its own rules of procedure by mutual consent.

7. The Union shall ensure that all views expressed by the United Kingdom in the working group and all information provided by the United Kingdom in the working group, including technical and scientific data, are communicated to the relevant institutions, bodies, offices and agencies of the Union without undue delay.

ARTICLE 16

Safeguards

1. If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.

2. If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol.

3. Safeguard and rebalancing measures taken in accordance with paragraphs 1 and 2 shall be governed by the procedures set out in Annex 7 to this Protocol.

ARTICLE 17

Protection of financial interests

The Union and the United Kingdom shall counter fraud and any other illegal activities affecting the financial interests of the Union or the financial interests of the United Kingdom.

ARTICLE 18

Democratic consent in Northern Ireland

1. Within 2 months before the end of both the initial period and any subsequent period, the United Kingdom shall provide the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5 to 10.

2. For the purposes of paragraph 1, the United Kingdom shall seek democratic consent in Northern Ireland in a manner consistent with the 1998 Agreement. A decision expressing democratic consent shall be reached strictly in accordance with the unilateral declaration concerning the operation of the 'Democratic consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland made by the United Kingdom on 17 October 2019, including with respect to the roles of the Northern Ireland Executive and Assembly.

3. The United Kingdom shall notify the Union before the end of the relevant period referred to in paragraph 5 of the outcome of the process referred to in paragraph 1.

4. Where the process referred to in paragraph 1 has been undertaken and a decision has been reached in accordance with paragraph 2, and the United Kingdom notifies the Union that the outcome of the process referred to in paragraph 1 is not a decision that the Articles of this

Protocol referred to in that paragraph should continue to apply in Northern Ireland, then those Articles and other provisions of this Protocol, to the extent that those provisions depend on those Articles for their application, shall cease to apply 2 years after the end of the relevant period referred to in paragraph 5. In such a case the Joint Committee shall address recommendations to the Union and to the United Kingdom on the necessary measures, taking into account the obligations of the parties to the 1998 Agreement. Before doing so, the Joint Committee may seek an opinion from institutions created by the 1998 Agreement.

5. For the purposes of this Article, the initial period is the period ending 4 years after the end of the transition period. Where the decision reached in a given period was on the basis of a majority of Members of the Northern Ireland Assembly, present and voting, the subsequent period is the 4 year period following that period, for as long as Articles 5 to 10 continue to apply. Where the decision reached in a given period had cross-community support, the subsequent period is the 8-year period following that period, for as long as Articles 5 to 10 continue to apply.

6. For the purposes of paragraph 5, cross-community support means:

(a) a majority of those Members of the Legislative Assembly present and voting, including a majority of the unionist and nationalist designations present and voting; or

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(b) a weighted majority (60 %) of Members of the Legislative Assembly present and voting, including at least 40 % of each of the nationalist and unionist designations present and voting.

ARTICLE 19

Annexes

Annexes 1 to 7 shall form an integral part of this Protocol

