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Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit

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Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit

Katy Hayward, David Phinnemore and Milena Komarova,
with Conor Campbell and James Greer

Queen's University Belfast & The UK in a Changing Europe

May 2020



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Executive Summary

From the research report *Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit* by Katy Hayward, David Phinnemore and Milena Komarova (Queen's University Belfast) (May 2020)

The unique post-Brexit position of NI

- Northern Ireland is unique in terms of its history, its constitutional position, and the (contested) nature of its geographical borders. The 1998 Belfast/Good Friday Agreement both formalised and created distinctive multilevel governance arrangements for the region. As a result, the effects of Brexit on its future governance, economy and residents are particularly consequential.
- The Protocol on Northern Ireland/Ireland in the Withdrawal Agreement adds to the complexity of the governance conditions for Northern Ireland by: (i) putting Northern Ireland in a different regulatory zone from the rest of the UK and (ii) ensuring that different customs and VAT procedures will be required from the rest of the UK come the end of the transition period.
- This means that, distinctively, the region continues to be bound simultaneously by the political principles, governance structures and legal frameworks of: (i) UK devolution, (ii) cross-border cooperation on the island of Ireland, and, to some significant extent, (iii) the EU single market.
- The UK's future relationship with the EU will have a distinct impact on Northern Ireland because what it negotiates at that level will have direct implications for Northern Ireland's relationship with the rest of the UK internal market.
- At the same time, what the UK negotiates with the EU about other matters (e.g. security, data-sharing) will also uniquely impact Northern Ireland given the nature and challenges of cross-border cooperation on the island of Ireland.
- This report addresses the challenges and opportunities for governing Northern Ireland in this context, including: (i) the structures for intergovernmental engagement and relationships within the UK, (ii) the bodies for implementing the Protocol in the Withdrawal Agreement, and (iii) NI direct representation within EU structures, Agencies, Programmes and other associated bodies.

Building on from the Article 50 process

- The negotiations of the UK's withdrawal from the EU became a subject of political tension within Northern Ireland, with unionist parties disagreeing with nationalist and other parties over the process and the priorities for Northern Ireland.
- The lack of functioning local government during most of the Article 50 process disadvantaged the balanced representation of Northern Ireland's (NI) interests vis-à-vis the UK and EU negotiations. Now the most needs to be made of the fact that NI's institutions are up and running again – not least as a means of getting consensus-based representation of Northern Ireland's interests.
- In the absence of a Stormont Executive and Assembly, there was more direct contact between policymakers/officials and stakeholders in NI than usual, including in NI, London, Dublin and Brussels. There were also more informal channels for communication and information-sharing between these groups.

- The Article 50 process (combined with the risks of No Deal and the absence of Stormont) saw a strengthening of coordination and confidence in public and policy engagement by civic actors within Northern Ireland at regional, UK-central, and EU levels. These groups and relationships represent new and crucial forms of knowledge, experience and expertise to be drawn upon in the future of Northern Ireland's governance.

Representing Northern Ireland's position in the UK

- The position that Northern Ireland will be in after Brexit (i.e. under regulations coming from the UK and from the EU) raises unique challenges for its devolved institutions. This poses a need for Northern Ireland's representation within the UK to be enhanced and effective.
- The NI Assembly withheld its legislative consent to the powers taken by the UK government in the Withdrawal Agreement Act (2020) in order for it to be able to legislate in areas within devolved competence through the use of statutory instruments. This means that there will be virtually no chance of NI MPs shaping the legislation that affects Northern Ireland vis-à-vis the implementation of the Protocol, let alone being able to annul that legislation if they object to it.
- In the New Decade, New Approach (NDNA) document, the UK Government states it would 'welcome close engagement with a restored Executive on Northern Ireland's priorities in the next phase [of Brexit]'. It also promises to consult with the Executive on its future trade policy. There is as yet no clarity on what such engagement will entail.
- There are also broad challenges for intergovernmental coordination within the United Kingdom at the moment, with all devolved governments seeking the means of more effective input into the formulation of Westminster government policy.

Representing Northern Ireland's position to the EU

- The governance mechanisms contained within the Withdrawal Agreement include bodies that will oversee the implementation of the Protocol and will thus have a crucial part to play in the post-Brexit governance of NI, e.g. the Joint Committee, the Specialised Committees on NI/IRL, and the Joint Consultative Working Group (JCWG).
- Northern Ireland's direct input to these bodies will be quite limited. The North South Ministerial Council and the B/GFA Strand II Implementation Bodies will be able to feed into the Specialised Committee.
- The UK government committed in NDNA to 'ensure that representatives from the Northern Ireland Executive are invited to be part of the UK delegation' in meetings of the Joint Committee and the Specialised Committee. It specifies that these invitations will happen only in instances where the Committee concerned is discussing Northern Ireland-specific matters and which are 'also attended by the Irish Government as part of the European Union's delegation'.
- Other, less formal means of influence, including relationships with EU agencies and participation in EU Programmes are also important but less than likely for the UK post-transition. Even EEA states cannot have full membership of, nor directly influence, the decisions taken by EU agencies.
- Lobbying of EU institutions, using regional and national offices in Brussels and informal networking have been proven invaluable during the Article 50 process and should be fully developed and further utilised after the end of the transition period.

- Many organisations in Northern Ireland have plentiful experience of engaging with specific EU committees and some have long-standing links with other bodies centred upon and active in Brussels. These relationships will need to be fostered and nurtured, rather than diminished, post-Brexit.
- However, as a sub-national region, Northern Ireland's representation vis-à-vis the EU will come primarily through the UK government. Ultimately, the future of Northern Ireland's relationship with EU institutions will therefore be shaped by what Westminster is prepared to allow de facto in the practical implementation of the Protocol and future relationship agreements.

Governing EU influence in Northern Ireland

- Northern Ireland will be assumed to adopt EU legislation in relation to the Protocol annexes on the basis of a dynamic arrangement.
- The process proposed in the Protocol for 'affording or withholding consent' from Northern Ireland allows NI MLAs to vote on whether to opt-out of alignment with the EU. This is a rather crude tool that offers a get-out clause rather than being a means of giving legitimacy to the consequences of the Protocol on Northern Ireland in the medium to long term.
- The NI Executive no longer has a Brexit sub-committee and needs to develop a more coherent committee structure arising from the unique challenges of Brexit. The NI Assembly also needs to improve the scrutiny work of committees.

Key Recommendations for NI/UK level

- The UK government should increase the frequency and importance of meetings of the Joint Ministerial Committee.
- The NI Executive should be consulted by the UK government in advance of all issues relevant to NI for decisions as part of the written procedure provided for in the Rules of Procedure for the UK-EU Joint Committee.
- The NI Executive should act on establishing a consultative forum to engage civil society representatives in (a) assessing the implementation of the Protocol, (b) drawing attention to issues of concern about the Protocol, and (c) requesting changes to the operation of the Protocol.
- A consultative forum will be an important contribution towards the public consultation that will be required prior to the 'democratic consent' vote to be held by MLAs on the application of the Protocol on Northern Ireland/Ireland within four years of the end of the transition period.
- To make best use of the fact that (a) the North South Ministerial Council (NSMC) is a pre-existing body used to finding common ground and common decisions on a north/south basis and (b) it has a direct route to the Specialised Committee, the NSMC should be given a formal role to monitor the implementation and the impact of the Protocol. This should be specifically but not exclusively in relation to the maintenance of north/south cooperation (Article 11 Protocol).
- The NSMC should also have the ability to draw the urgent attention of the UK government and the European Commission to joint NI Executive and Irish government concerns about threats to the B/GFA or to north/south cooperation that may require a joint UK and EU approach to address.

Key Recommendations for NI to EU level

- The Joint Committee, Specialised Committee and JCWG should provide regular detailed reports on Protocol's implementation to the NSMC, NSIPA and British-Irish Parliamentary Assembly and any future NI or cross-border consultative forum.
- The UK-EU future relationship agreement should contain explicit provisions requiring the EU to consult with the UK when drafting legislation that will likely be considered 'Protocol relevant' by the UK-EU Joint Committee and/or Specialised Committee. This would mean the European Commission 'informally seeking advice' from experts on and from Northern Ireland.
- Northern Ireland should be represented, with speaking rights, in all meetings of the Specialised Committee by relevant senior officials from the Northern Ireland Civil Service.
- The access of 'experts' to the JCWG should not be limited to 'officials' but be specified more precisely in terms of interest groups. Such groups must be inclusive of human rights bodies. It is also recommended that senior representatives of professional/umbrella bodies for the respective sectors are identified as 'the experts' to appear in front of the JCWG.
- The principle of UK participation in Commission committees and expert groups could be extended beyond the transition period with regard to NI and obligations under the Protocol.
- The NI Executive should recognise technical expertise as a means of enhancing reputation and 'decision-shaping' capacity in Brussels, aside from political and diplomatic routes.
- Priority should be given to equipping and preparing the Office of the NI Executive in Brussels for a new and, if anything, more important role post-Brexit.
- A diplomatic EU 'presence' should be re-established in Northern Ireland not only to contribute to the Protocol's implementation but to aid understanding and appropriate sensitivity at EU level.

Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit

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We would like to thank those stakeholders for their time as well those colleagues from academia and beyond with whom we have been able to engage so productively in discussing our findings. The data collection included interviews, online surveys and day-long workshops. This entailed considerable commitment from those we approached for engagement in the project. We are very grateful to all who gave of their time in order to share invaluable insights with us. We are obliged to Billy Vaughan and Niall Robb for their organisational assistance.

Among our Northern Ireland participants were the representatives of the sectors most directly affected by the implementation of the Withdrawal Agreement Protocol (e.g. transport, agri-food, hospitality, immigrant communities). The group further included representatives from devolved departments and agencies, cross-border bodies, private sector representation, civic society umbrella organisations, trade unions, human rights organisations, and local authorities. Their willingness to give considerable time to share their insight and experience with us, as well as to engage in stakeholder workgroup discussions about past and future challenges/opportunities, was invaluable. We are immensely grateful to all involved.

Interviews with non-EU member states and regions across Europe formed a vital part of this research. We are pleased to thank the representatives of the embassies, diplomatic missions, executive offices, non-member states' permanent delegations, representations and secretariats, most of whom we interviewed in Brussels.

We are very appreciative of the wide range of officials in Belfast, London, Dublin and Brussels who have been very helpful during a period of intense pressure and hard work. We hope we have done justice to the trust they have placed in us. We wish as well to acknowledge the valuable discussions we have had with other experts, not least of whom Paul McGrade.

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We hope that the findings and recommendations from this research will make a constructive contribution to Northern Ireland's future as a uniquely positioned, still-fragile region as the landscape of UK-EU relations is transformed.

This report is the product of research that has had to respond quite rapidly to changing conditions and evolving analysis. We are very grateful to all those who have shared their wisdom and insights with us, both confidentially and in the formal sessions, over the course of this period. Nevertheless, this remains the product of analysis conducted at a specific time, most substantially before the coronavirus pandemic. We acknowledge, therefore, that there will be limitations to our analysis and take responsibility as authors for errors or substantive omissions in the report. The analysis and recommendations contained in this report are those of the named authors alone.

All information was correct to the best of the authors' knowledge at the time of going to print but is subject to change.

List of Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
AMS	Andorra, Monaco and San Marino
BEREC	Body of European Regulators of Electronic Communications
B/GFA	1998 Belfast/Good Friday Agreement
BIC	British-Irish Council
BIIGC	British-Irish Intergovernmental Conference
BIPA	British-Irish Parliamentary Assembly
CBI	Confederation of British Industry
COSAC	Conference of the Committees of the National Parliaments of the European Union Member States
CCBS	Centre for Cross Border Studies
CJEU	Court of Justice of the European Union
DAERA	Department for Agriculture, the Environment and Rural Affairs (NI)
DEFRA	Department for Environment, Food and Rural Affairs
EASA	European Aviation Safety Agency
ECHA	European Chemicals Agency
ECHR	European Convention on Human Rights
EEA	European Economic Area
EESC	European Economic and Social Committee
EEA-EFTA states	Iceland, Liechtenstein, Norway
EFTA	European Free Trade Association
EMA	European Medicines Agency
EP	European Parliament
FCO	Foreign and Commonwealth Office

HMRC	Her Majesty’s Revenue and Customs
ICBAN	Irish Central Border Area Network
IfG	Institute for Government
JCWG	Joint Consultative Working Group
JMC	Joint Ministerial Committee (UK)
MEP	Member of the European Parliament
MLA	Member of the Legislative Assembly (Stormont)
MP	Member of Parliament
NCA	National Crime Agency
NDNA	<i>New Decade, New Approach</i> document (2020)
NGO	Non-governmental organisation
NI	Northern Ireland
NIAC	Northern Ireland Affairs Committee (House of Commons)
NI/IRL	Northern Ireland/Ireland
NILGA	Northern Ireland Local Government Association
NRA	National Regulatory Authorities
NSIPA	North–South Inter-Parliamentary Association
NSMC	North South Ministerial Council
PACAC	Public Administration and Constitutional Affairs Committee (Commons)
PSNI	Police Service of Northern Ireland
SEUPB	Special EU Programmes Body
SI	Statutory Instrument
TEO	The Executive Office (NI)
UFU	Ulster Farmers’ Union
WA	Withdrawal Agreement (October 2019, unless otherwise stated)

Introduction

Northern Ireland after the UK's Withdrawal from the EU

The purpose of this research

The 1998 Good Friday (Belfast) Agreement did not determine Northern Ireland's future but left it open for continued political contestation. It is this sense of being 'unsettled' that has made the Brexit process particularly consequential for the region. Now subject to unique and complex governance arrangements, Northern Ireland has been placed in a distinct position vis-à-vis both the UK and the EU. It has to manage a close relationship with each of these at the same time as the two are set on different trajectories.

This report considers the consequences of the decisions that have been made regarding Northern Ireland's unique position specifically as it relates to the UK's withdrawal from the EU. In particular, we focus on the implications for the governance of Northern Ireland and on what might be done to ensure that the objectives behind these unique arrangements (above all else, to protect the 1998 Agreement) are realised. Whilst conscious of the weighty academic literature and debate around 'governance' (see Bevir and Rhodes 2003, 2016), we use the term merely to indicate the wide range of processes by which Northern Ireland is governed – laws, networks, systems and policies – as well as the institutions, agencies and government *per se*.² The scope and complexity of this analysis is appropriate for such a complicated place as Northern Ireland.

Our main research task was to consider how any new governance arrangements that may be put in place for Northern Ireland after Brexit can operate effectively and ensure maximal representation and impact in promoting the interests of the region. We also found ourselves considering how the new post-Brexit conditions will affect the operation of existing governance arrangements for the region across the three strands of the Agreement: within Northern Ireland, north/south on the island of Ireland, and east/west between Britain and Ireland. The project included desk research and empirical research, including interviews and an online survey.³ It also involved extensive engagement activities, comprising four days of workgroups, including input from c.100 stakeholders,⁴ and an expert-practitioner seminar.

2 This is a useful concept particularly given the complexity of what constitutes the conditions for ordered rule and collective behaviour in Northern Ireland. For more on the multi-level governance of Northern Ireland, we recommend, *inter alia*, Bache and Flinders (2004), Birrell and Gormley-Heenan (2015) and Murphy (2011).

3 The research involved semi-structured interviews, conducted in Brussels with representatives that included those from the Embassy of San Marino, Embassy of the Principality of Liechtenstein, Mission of Switzerland to the EU, North Norway European Office, NI Executive Office, Oslo Regional Office, Permanent Delegation of Turkey to the EU, Representation of the Free State of Bavaria to the EU, and the Secretariat of EFTA.

4 Stakeholders represented the sectors most directly affected by the implementation of the WA Protocol (e.g. transport, agri-food, hospitality, immigrant communities). The research included civil servants from key departments and agencies in Northern Ireland who would be engaged in the operation of the Protocol, cross-border bodies including Implementation Bodies, private sector representation across a wide range of industries and across the region, civic society umbrella organisations including in human rights, trade unions and the voluntary sector, and local authorities. Before the workshops were conducted we invited the main political parties in NI to comment on and engage in project activities but this invitation was not taken up by any party.

The context for our project and analysis changed within months of it commencing in December 2018. When the project commenced, the expectation was that the context for post-Brexit governance would be the Withdrawal Agreement negotiated by Prime Minister May in November 2018 and the UK's exit from the EU on 29 March 2019. However, 2019 saw three extensions to the date of withdrawal, a new Prime Minister, a new Withdrawal Agreement (specifically new in terms of the NI/IRL Protocol), a General Election, and, early in 2020, the restoration of Stormont and a General Election in Ireland. All this has meant that we have continued to revise and update our analysis and findings. We produced four interim reports for this project covering the main themes of this research: the implications of the Protocol, multi-governance within Northern Ireland, pathways of influence for non EU-member states/regions, and an options paper. This final report fully reflects findings from all these strands of the research. It also includes our continuing scrutiny of the unfolding of political events and their impact on the future of Northern Ireland governance.

How we got to this point

The complexity of Northern Ireland's administrative as well as socio-political conditions had to be acknowledged by both sides in the Brexit negotiations. The UK-EU [Joint Report](#) (8 December 2017) affirmed the UK's commitments to avoiding a hard border on the island of Ireland, protecting north/south cooperation and upholding the Belfast/Good Friday Agreement in all its parts. The first version of the [Withdrawal Agreement reached in November 2018](#) contained a Protocol on Ireland/Northern Ireland, known as the 'backstop,' with specific solutions for meeting these commitments. These would only apply, if the still-to-be negotiated UK relationship failed to deliver on these commitments and then only temporarily – unless and until the UK-EU relationship did deliver. The 'backstop' envisaged the whole of the UK in a single customs territory with the EU. Northern Ireland was also to be in the EU's single market for goods in order to avoid barriers to trade on the island of Ireland. Notably, the UK government (in its January 2019 White Paper)⁵ committed to following the same EU rules that Northern Ireland would have to follow.

When in July 2019 Boris Johnson replaced Theresa May as leader of the Conservative Party, he ruled out the UK-EU customs union scenario that the 'backstop' had been founded on. This necessitated a broadening-out of what the UK government was prepared to accept for Northern Ireland and, with it, different arrangements and rules for the region compared to Britain. This resulted in a revised Protocol in the second version of the [Withdrawal Agreement](#) announced on 17 October 2019. Although Northern Ireland is formally part of the customs territory of the United Kingdom, the Protocol of October 2019 will see the EU's rules on customs applying in the region. Furthermore, in order to avoid the need for regulatory checks at the Irish border, Northern Ireland will still have to stay in line with EU single market rules for goods, as previously detailed in the 'backstop'. This will apply to areas such as technical regulation of goods, agricultural and environmental production and regulation, state aid. There is also continued regulatory alignment to maintain other areas of north/south cooperation between Northern Ireland and the Republic of Ireland, including the Single Electricity Market.

Brexit means a fundamental change in the system of governance in the UK. Law, policy and practice in central UK government are being adjusted to exclude the institutions and processes of the EU. However,

5 'UK Government commitments to Northern Ireland and its integral place in the United Kingdom', 9 January 2019. Available from: <https://www.gov.uk/government/publications/uk-government-commitments-to-northern-ireland-and-its-integral-place-in-the-united-kingdom> (accessed 8 May 2020).

the Protocol means that Northern Ireland will continue to have close economic, administrative and legal ties with the EU. More specifically, it will continue to have close integration with Ireland, not least for the maintenance of continued cross-border cooperation in areas of common concern and interest.

A number of authors from different areas of expertise have comprehensively set out some of the issues in relation to the interpretation and implementation of the Protocol (for example Connelly 2020; Jerzewska 2020; Sargeant et al. 2020; Weatherill 2020a). We look specifically at the matter of governance. There are three key problems that arise from the Protocol in relation to governance for Northern Ireland, and which need to be addressed:

- (i) the implementation of the Protocol (in all its dimensions, including cross-border);
- (ii) the longer-term implications of the Protocol, especially as the rest of the UK diverges from the EU;
- (iii) the operationalisation of *de facto* partial single market EU membership for a small region integrated in the UK but legally, politically and economically outside the EU.

Furthermore, these challenges need to be addressed in a way that is urgent (in good time before the end of the transition period, currently due to finish on 31 December 2020), sustainable, clear and inclusive.

The Protocol on Ireland/Northern Ireland

What the Protocol does

The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union concluded on 17 October 2019 and signed by the EU and the UK on 24 January 2020 contains specific provisions for Northern Ireland. The Protocol on Ireland/Northern Ireland attached to the Withdrawal Agreement sets out a range of provisions dedicated to Northern Ireland which will enter into force with the UK's withdrawal. The Protocol is a legally-binding agreement that gives Northern Ireland a very unique position within the UK and vis-à-vis the EU. It is also a potentially dynamic document in that it sets key parameters for Northern Ireland's ongoing relationship with the EU. This is no mere tokenism; the relationship will be substantive, with Northern Ireland set to follow EU regulations on goods and the Union Customs Code.

The Political Declaration that accompanied the Withdrawal Agreement shows that the UK is not seeking a 'close' partnership with the EU, and it is able to do so in a way that meets its commitments of the Joint Report as long as Northern Ireland is in a distinctive arrangement with the EU. The [negotiating mandates](#) of the EU and UK for the future relationship indicate that the trajectory is for growing distance between the two – which in turn would highlight the distinctive position of Northern Ireland. Indeed, it gives it a unique international position too, in that its status as provided for in the Protocol will have to be accepted within the World Trade Organisation, possibly citing Article 21 of GATT, i.e. exemption from usual rules on the grounds of an exceptional security situation (Henig 2019).

The arrangements for the transition period after withdrawal essentially involve the UK continuing to implement its previous obligations as a member state but without involvement in the EU's institutions. Post-transition, the UK as a whole is hoping to have far fewer obligations to the EU, and it will have no direct role in decisions on the adoption of new EU legislation or amendments. Although new

governance arrangements will be put in place to ensure the implementation of the Withdrawal Agreement, there is still much to be decided in terms of how to ensure their effective operation and minimise the risk of exacerbated democratic deficit.

Democratic consent mechanism

Perhaps the most significant addition to the Protocol agreed in October 2019 compared to its ‘backstop’ predecessor is on democratic consent in Northern Ireland. It is the responsibility of the UK to provide the opportunity for democratic consent in NI to the continued application of Articles 5-10 (i.e. customs, movement of goods, protection of UK internal market, technical regulations, VAT and excise, SEM, and State aid). This comes within 2 months of the end of the relevant period (in the first instance, four years after the end of the transition period, i.e. November/December 2024 if there is no extension to the transition period). And the Union should be notified of the outcome by the end of the period. If a majority of MLAs vote to leave, then there is a 2 year cooling off period (i.e. the earliest NI alignment could end would be end December 2026). In this instance, the Joint Committee is to make recommendations to the EU and UK on the necessary measures, ‘taking into account the obligations of the parties to the 1998 Agreement’. The Joint Committee ‘may seek an opinion’ from the institutions established by the 1998 Agreement.

The UK government has published a [unilateral declaration](#) to explain how the measures for ‘democratic consent’ are to work. This describes the process of allowing MLAs the privilege of ‘affording or withholding consent’. This is to be done via ‘a thorough process of public consultation’ led by the NI Executive, and will include cross-community consultation. The aim of that is ‘to achieve broad consensus across all communities to the extent possible’. This process of public consultation will be supported by the UK Government. It would include businesses, civil society groups, representative organisations, and trade unions. The unilateral declaration of the UK states that the North South Ministerial Council (NSMC) and British-Irish Intergovernmental Conference (BIIGC) ‘should be involved in any consultation’. The Assembly should be provided with explanatory materials for voting on the motion put forward, namely that Articles 5-10 of the Protocol will continue to apply in Northern Ireland.

The outcome of the MLAs’ vote is to be judged by the criterion of ‘cross-community consent’. This is defined (as per the rules of the NI Assembly itself) as being either 50% overall *and* 50% from unionist and nationalist MLAs, or else 60% overall and 40% of each of unionist and nationalist MLAs. If there is not cross-community consent, an independent review will be commissioned by the UK government, to conclude within two years of the vote. It will ‘include close consultation’ with the same groups mentioned above, plus political parties. The independent review would be on: (a) on the functioning of the Protocol and (b) the implications of any decision to continue or terminate alignment on social, economic and political life in NI. According to [the Explainer](#) produced by the government on the Protocol’s democratic consent mechanism, this independent review could have regard to ‘any new arrangements that could command cross-community support’.

North/South cooperation

Another important part of the Protocol as far as governance is concerned is the matter of north/south cooperation. The Preamble refers to ‘a mapping exercise which shows that North-South cooperation relies to a significant extent on a common Union legal and policy framework’ and thus needs protection

in an international agreement between the UK and EU. Article 11 of the Protocol seeks to do this. It states that:

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.

It adds:

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.

This means that north/south cooperation can be expanded if it is considered necessary by both the UK and Irish governments.

Direct monitoring and direct effect of the EU on Northern Ireland after Brexit

The United Kingdom is responsible for ‘implementing and applying the provisions of Union [EU] law made applicable by this Protocol’ in Northern Ireland (Art 12(1)). Notwithstanding this, according to Article 12(2) of the Protocol, EU representatives 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 [Customs, movement of goods], and the United Kingdom shall provide, upon request, all relevant information relating to such activities.

It goes on:

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.

To facilitate this, the EU and the UK ‘shall exchange information on the application of Article 5(1) and (2) on a monthly basis’ (Article 12(3)).

This indicates a close and proactive role for EU representatives in the implementation of the Protocol in Northern Ireland. The Protocol also ensures close cooperation between UK authorities and the European Commission to monitor compliance with state aid and competition law in Northern Ireland.

The Protocol means there will be ongoing jurisdiction for the Court of Justice of the European Union (CJEU) over UK actions with regard to EU law in Northern Ireland and relevant EU law will continue to have direct effect in Northern Ireland (Curtis et al. 2019: 53).

What the Protocol means

Article 13(8) of the Protocol allows that it could be superseded in whole or in part by a subsequent agreement between the Union and the United Kingdom. However, the ‘thinner’ the future relationship

between the UK and the EU, the less likely it is that future UK-EU agreements will supersede much of the Protocol (Curtis et al. 2019: 55). What is more, even if the democratic mechanism in the Protocol sees Northern Ireland's MLAs withholding their consent, this means that only Articles 5-10 will cease to apply within the subsequent two years. As such, the Protocol can be expected to determine the conditions of Northern Ireland's economic, regulatory, rights, etc. environment for the foreseeable future.⁶

The Protocol, therefore, means that Northern Ireland, although outside the EU and an integral part of the UK, will continue to have substantial obligations towards the EU. As yet, however, there are very limited arrangements for managing the two implications that the Protocol has for governance, i.e. 'downloading' relevant EU legislation into Northern Ireland law and 'uploading' views from Northern Ireland into the creation of that legislation.

The [*New Decade, New Approach*](#) (NDNA) document announced by the British and Irish Governments on 9 January 2020, and endorsed by the Northern Ireland political parties on 10 January, saw the restoration of the Northern Ireland devolved institutions. As such, it bears direct relevance to the operation of the new governance mechanisms set up through the Withdrawal Agreement. This means that Northern Ireland's interests now have a better chance to be represented within the UK and further afield. However, the NI Executive faces an enormous task list and set of challenges, not least of which is that of finding its feet in an environment that is considerably different after a 3-year hiatus.

The end of the transition period brings with it even greater challenges, especially coming on top of the shock of the coronavirus pandemic and the weaknesses that this has exposed in communication and coordination of high-level government decisions, both intra-UK and north/south on the island of Ireland (Colfer 2020; Wincott and Wager 2020).

Legislation that will continue to directly affect Northern Ireland (vis-à-vis the rest of the UK as well as the EU) will be decided at the UK-EU level through both the implementation of the Protocol and the future relationship. In a real way, Northern Ireland is at risk of being subject to legislation coming from both Brussels and London without having full sight or scrutiny of it, let alone a chance to shape/annul those decisions. There is no automatic means by which Northern Ireland's devolved institutions will either be able to effectively scrutinise and shape EU law they need to 'download' or be able to 'upload' views into the EU. This report explores some options in this regard.

In sum, from Day 1 after the end of the transition period, Northern Ireland will have specific arrangements to manage and to govern, i.e. different to the rest of the UK. The unprecedented nature of this position brings with it considerable challenges, particularly in an economic and intergovernmental environment so radically affected by the experience of the coronavirus pandemic. Nevertheless, these exceptional circumstances and specific solutions bring some opportunities for better governance for the region. We argue that there is need for continued flexibility and imagination from the EU as well as from the UK in accommodating Northern Ireland's unique needs and interests into the post-Brexit era, and we make some modest recommendations as to what this might look like in practice at all levels of governance. These recommendations are inserted throughout the report as we cover each 'level' of governance. They are further consolidated in a separate section at the conclusion of the report.

6 By way of illustrating the complexity of the governance challenge for Northern Ireland after Brexit and under the Protocol, Annex 1 outlines the multilevel dimensions of a set of major policy areas which are devolved in Northern Ireland and which are directly relevant to the implementation of the Protocol.

1. Using Northern Ireland's existing governance mechanisms after Brexit

The 1998 Agreement Architecture

The present-day governance of Northern Ireland is rooted in a complex history of both devolved and direct rule. What makes its governance arrangements unique is the architecture established as a result of the 1998 Belfast/Good Friday Agreement.

The 1998 Belfast/Good Friday Agreement (B/GFA) establishes three strands of institutional governance which formalise, first, power-sharing arrangements between unionists and nationalists in Northern Ireland (Strand I); second, extensive north/south cooperation on the island of Ireland (Strand II); and third, east/west cooperation between governments (Strand III). Through Strands II and III, the B/GFA also created different statutory fora that involve all of the government administrations in the British Isles in multi-level governance mechanisms.

The devolution of various competences down to Northern Ireland has been crucial in giving it a level of governance autonomy. At the same time, it has created the legislative space for cross-border arrangements with the Republic of Ireland without affecting the constitutional status of Northern Ireland. These will be tested by the fact that the legislative spaces for Ireland, Northern Ireland and Great Britain will be quite different to each other in key ways after the end of the transition period.

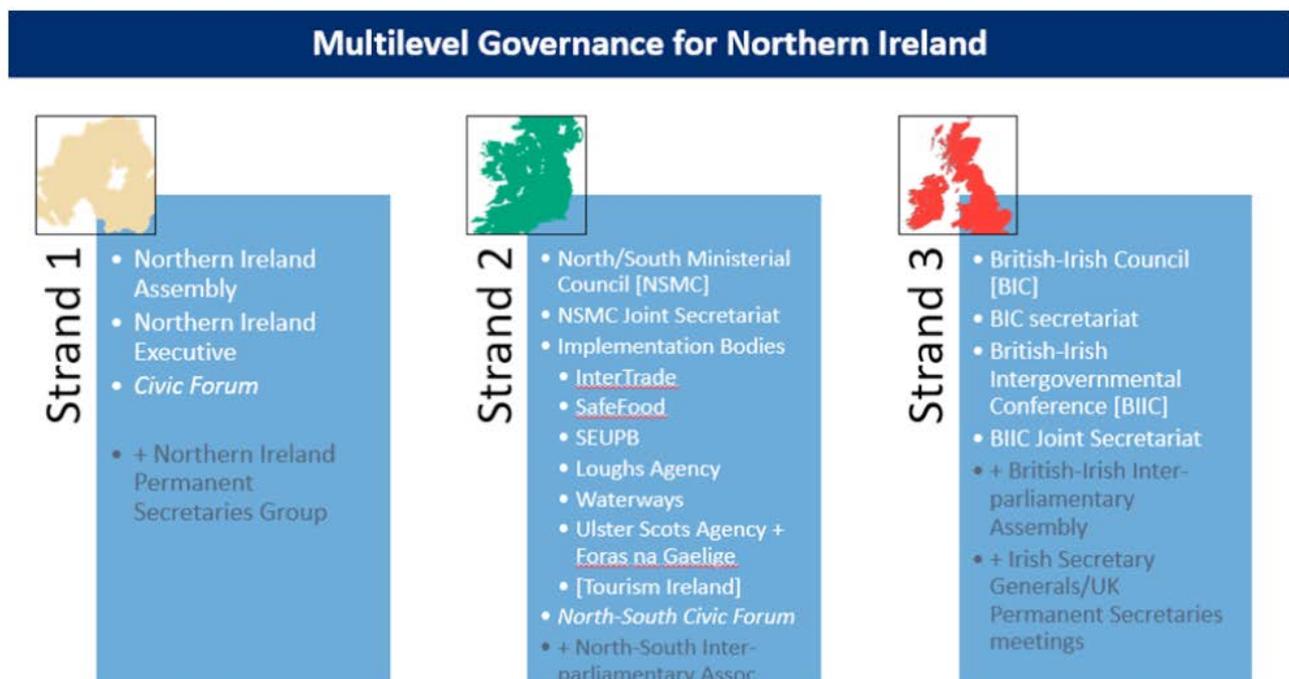


Figure 1. Overview of multilevel governance for Northern Ireland

Strand One

The Northern Ireland Assembly

There are 90 Members of the Legislative Assembly (MLAs), five elected from each of the 18 multi-member constituencies in Northern Ireland. Elections are conducted under the Single Transferable Vote (STV) system of proportional representation, and are usually held every five years. Members must designate themselves as ‘nationalist’, ‘unionist’ or ‘other’. These designations are key to determining cross-community support for important votes, such as in the election of the speaker and change to standing orders.

The next Assembly election is due to be held on or before 5 May 2022. This means that the 90 MLAs who will be eligible to vote in the democratic consent mechanism on Articles 5-10 of the Protocol will include those who are not currently in the NI Assembly.

Most decisions of the Assembly are taken by a simple majority vote. However, some ‘key decisions’ must have cross-community support (although what constitutes a ‘key decision’ is not defined by the B/GFA). There are two forms of cross-community support: *parallel consent*, where more than 50% of MLAs agree to the motion, including more than 50% of each nationalists and unionists; and a *weighted majority*, requiring the support of 60% of those voting, including 40% of nationalists and 40% unionists. These definitions of cross-community consent are used in the vote that will be held for Northern Ireland’s MLAs as the mechanism for democratic consent enabled in the Protocol.

Legislative powers of the Assembly

Distinctively, the Northern Ireland devolution settlement (as constituted under the Northern Ireland Act 1998) defines three categories of legislative powers for the Northern Ireland Assembly: transferred, reserved and excepted.

Transferred matters are those on which the Assembly can make primary and secondary legislation. These include: health and social services; education, employment and skills; agriculture; social security, pensions and child support; housing; economic development; local government; environmental issues, including planning; transport; culture and sport; the Northern Ireland Civil Service; equal opportunities; and justice, prisons and policing.

Many of these transferred matters would be relevant to Article 11 of the Protocol, which commits the UK and EU to maintaining the necessary conditions for north/south cooperation, e.g. environment, health, agriculture and education.

Reserved matters can also be legislated on by the Assembly but only with the consent of the Secretary of State for Northern Ireland. These are matters such as: firearms and explosives; financial services and pensions regulation; broadcasting; import and export controls; navigation and civil aviation; international trade and financial markets; telecommunications and postage; the foreshore and seabed; disqualification from Assembly membership; consumer safety; intellectual property.

Some of these matters relate to areas of north/south cooperation that need to be maintained after Brexit, e.g. telecommunications and broadcasting. Others relate to what will be negotiated between

the EU and UK, e.g. import/export controls, aviation, and intellectual property. Westminster retains the sovereign powers to legislate for Northern Ireland on non-devolved matters as well as for the purpose of ensuring that the UK's 'international obligations are met in respect of Northern Ireland.' (Paragraph 33 of Strand I) (Harvey and Holder 2017). The Assembly may request that a reserved matter becomes transferred. This happened in 2010 when powers over policing and justice were devolved, following the Hillsborough Agreement.

Excepted matters are subjects reserved to Westminster and can only be transferred under primary legislation. These include defence, international trade, foreign affairs, national security, UK-wide taxation, nationality, immigration and asylum, currency and the constitution. This is why the UK-EU negotiations on the future relationship, which focus on trade and security are being handled as a UK state concern rather than one in which devolved legislatures should have some sway. However, the Protocol means that what the UK negotiates in these areas will not only affect Northern Ireland vis-à-vis its relationship with other external states but also in relation to the rest of the UK.

It is also worth noting that when the First Minister and deputy First Minister [wrote to Prime Minister May](#) setting out their priorities through Brexit there was the potential for clear tension between UK and Northern Ireland when it comes to immigration policy. Northern Ireland wants policies 'sufficiently flexible to allow access to unskilled labour'. This is an area where we could see Northern Ireland pushing for some derogations from UK-wide rules, e.g. on the salary threshold for legal immigration.

The implementation of the Protocol and the Withdrawal Agreement Act (2020)

The implementation of the Protocol will involve powers given to the UK alone, powers to Stormont alone, and powers to both acting together. The working assumption is likely to be that the UK acts alone unless: (i) Stormont tries to act, (ii) the UK thinks it is not in devolved competences, or (iii) Stormont is advised that it is not solely in its competence. In which cases, they have to act together. Yet, it is not easy to know when (and how) the UK acts with the devolved legislatures.

It is worth noting that the WA Act was drafted before the restoration of the NI Executive and Assembly. It is possible to argue that the NIA needs to ensure it has the opportunity to scrutinise any secondary legislation that will affect its place in, and access to, the UK internal market. According to a letter from Lord Duncan (16 January 2020) to peers, the government has committed that it will not normally use the main power in Clause 21 in areas of devolved competence without the agreement of the relevant devolved administration. Clause 22 contains provision allowing for regulations to implement the Protocol to be made by a Minister and a devolved authority acting jointly. This is still to be spelled out.

It is already very difficult for the Assembly to do any meaningful scrutiny of statutory instruments (SIs). An initial step for the NIA is to screen SIs and then to determine which committees would look at them. This requires capacity and time – both of which will be likely to be in short supply unless set as a priority at this stage.

A key question is whether the NI Executive will have: (a) early sight of, or (b) an opportunity to input into the SIs that will directly affect NI. Whether this happens or not is an intergovernmental issue rather than a legislative one. If the Executive is given sight of SIs and its views sought, it will be up to the Executive as to whether this process and the details are reported to the NI Assembly.

Meaningful scrutiny of UK SIs by the NIA would be largely dependent on: (a) a special timetable that

allowed enough time for scrutiny by the NIA, and (b) whether the NIA had sufficient dedicated resources to examine the SIs to work out the potential issues of salience. The sifting procedure for negative SIs made under the Withdrawal Act 2018 has some potential here, with specific alerts relating to the Protocol or joint UK/devolved competence. At the very least, informal collaboration the Westminster officials could share what they receive with their equivalents in the NIA although this would be hard to ensure on a systematic basis.

Recommendations

- NI Executive ministers should notify the NIA within one working day of regulations being laid before the UK Parliament where UK Ministers are acting alone in devolved areas within the legislative competence of the NIA or the executive competence of the NI Executive Ministers. An explanatory memorandum as to the purpose and implications of the above regulation should be attached to that notification.
- The NIA Standing Orders should be amended to assign to a committee the function of recommending the appropriate procedure for the sifting process. Feeding into this, relevant committees should outline in advance, through a set of scrutiny standards, the precise criteria which should be applied to the scrutiny of SIs. It could be possible to have specific criteria that capture the sort of issues that are likely to arise in the context of SIs made under powers in the WA Act (2020).
- There needs to be enough time/flexibility in the NIA committee timetable to scrutinise regulations. An early warning system may be needed, and could be agreed with the NI Executive, to assist in managing the scrutiny of all subordinate legislation.

The Northern Ireland Executive

Whilst the First Minister and deputy First Minister together form the official headship of the Executive, it should be recalled that power-sharing characterises the nature of the Executive itself. The Executive comprises the First Minister and deputy First Minister (nominated by the two largest parties in the Assembly) and eight departmental ministers.⁷ The Northern Ireland Executive takes decisions on matters within individual departmental areas, including those which cut across the responsibilities of more than one Department. The Executive also agrees proposals for new legislation, develops the Programmes for Government and agrees budget which must be approved by the Assembly.

The current Departments include: Agriculture, Environment & Rural Affairs, Infrastructure, Economy, Education, Finance, Health, Justice, Executive Office, and Communities. Executive Ministers are nominated by political parties in numbers proportional to the respective party's share of seats in the Assembly (under the d'Hondt formula). The only exception is the Minister for Justice, appointed through a cross-community vote in the Assembly. An unusual feature of the devolution settlement in Northern Ireland, noted by Torrance (2020: 9) is that 'statutory powers are vested in individually constituted Executive departments led by their own permanent secretary.'

⁷ The number of Northern Ireland government departments was reduced from 12 to 9 in 2016.

In examining the challenges to the work of the Executive, Sargeant and Rutter (2019: 43) critiqued the structure of departments themselves which is seen as reinforcing ‘siloes’ and existing competition in the Executive, which ultimately has a detrimental impact on decision-making.⁸ In particular, they note that the unique role of the Executive Office (in covering complex issues that are too sensitive for individual departments and in being overly concerned about the special advisers to the First and deputy First Ministers) means that it has failed to develop ‘a central policy agenda or drive effective implementation across other departments’.

According to the *New Decade, New Approach* document, Brexit (and ensuring the best possible outcome from it for citizens and the NI economy) is top of the Executive’s priorities.

Recommendations

- The NI Executive should be consulted by the UK government in advance of all issues relevant to NI for decisions as part of the written procedure provided for in the Rules of Procedure for the Joint Committee.⁹
- The NI Executive should act on establishing a consultative forum to engage civil society representatives in (a) assessing the implementation of the Protocol, (b) drawing attention to issues of concern about the Protocol, and (c) requesting changes to the operation of the Protocol.¹⁰

Assembly Committees

The legislative and scrutiny functions of the Assembly are complemented by the work of Assembly Committees. Committees are groups of 11 MLAs, from different political parties, specialising in a particular area of government or carrying out specific functions. Committee powers derive from the 1998 B/GFA, from the Northern Ireland Act (1998), and from Standing Orders (the procedural rules governing how the Assembly works). Committees assist the Assembly in its legislative work by examining Bills at Committee Stage and further have the power to investigate issues, to send for persons and papers, and to introduce legislation to the Assembly. Ministers of the Northern Ireland Executive must consult Committees on new policies.

8 Specifically, they suggest the fact that powers are vested by statute in individual departments ‘reinforces the tendency for departments to act as individual fiefdoms and makes cross-cutting working’ very difficult. Other flaws in the culture of the departments run by the NI Executive identified by Sargeant and Rutter (2019) include: ministers still having to cope with divisive legacy issues; decision-making processes being slow and not guided by collective priorities; ministers avoiding difficult long-term decisions; lack of a value-for-money culture; and the small scale of the region allowing ministers to micro-manage.

9 ‘Written documents on which the deliberations of the Joint Committee are based shall be numbered and circulated to the Union and the United Kingdom by the Secretariat as documents of the Joint Committee’ (Rule 5, Annex VIII, WA).

10 See further discussion under the ‘Unimplemented B/GFA bodies’ section of this report.

The Assembly has four main types of committee:¹¹

- Statutory Committees (which advise, assist and scrutinise Ministers and their Departments);
- Standing Committees (that undertake specific roles, mostly concerned with running the Assembly);
- Joint Committees (considering matters of interest to more than one committee);
- Ad Hoc Committees (set up for a limited time to deal with a particular issue).

Committees of the Assembly take decisions by a simple majority vote (Torrance 2020: 10). This belies the rather complicated arrangements for allocation of committee chairs, which is done by appointment by party whips (rather than elected by MLAs) and with the intention of ensuring that chairpersons are normally from a different community to respective department ministers. This has resulted in what are frequently uncooperative relationships between ministers and individual committees. The recent Institute for Government report concluded that there are multiple structural and cultural challenges to the quality of committee scrutiny work in the NI Assembly (Sargeant and Rutter 2019). It also noticed a broader committee reluctance to engage in highly politically controversial matters, leaving serious gaps in committee scrutiny and analysis. For instance, ‘in the period between the 2016 referendum and the fall of the executive there were only two evidence sessions focused on Brexit – one by the Committee on Agriculture, Environment and Rural Affairs and one by the Justice Committee’ (Sargeant and Rutter 2019: 46).

Sargeant and Rutter (2019: 59) argue that the process of committee scrutiny should be enhanced, including in terms of improving access to a sufficient number of committee specialists to work on research and policy. They also advise considering ‘whether to permit some committee meetings to be held in private’ in the interest of promoting better cross-community working. This would seem to have particular resonance when it comes to the work of committees regarding the Protocol. Overall, the need for a more coherent committee structure in the Northern Ireland Assembly was also stressed by the participants in our research project. Some proffered suggestions for establishing new Assembly committees, following the example of the Westminster and the EU Select Committees’ structure and work.

Indeed, the *New Decade, New Approach* Agreement of January 2020 saw the establishment of a [Brexit sub-committee \[suspended May 2020\]](#). This is chaired by the First Minister and deputy First Minister with representatives from all parties in the Executive taking part [paragraph 3.5].¹² The Sub-Committee is to ‘consider Brexit-related issues’ as ‘a matter of urgency’, and initiate ‘an assessment of the impact of Brexit’ on the institutions and relationships along the three strands of the 1998 Agreement, i.e. devolved, north/south and east/west. The work of the committee is to be scrutinised by the Assembly, although how this will happen is yet to be determined. Enormous pressures are placed on this sub-committee by the political differences within the Executive both about Brexit itself and about the Protocol. This is further exacerbated by the differences in information coming from the UK government and EU commission regarding the implementation of the Protocol.

11 Committees formed during the 2017-2022 Mandate include: Statutory Committees: Agriculture, Environment and Rural Affairs; Communities; Economy; Education; Executive Office; Finance; Health; Infrastructure; and Justice. Standing Committees: Assembly and Executive Review; Audit; Business Committee; Chairpersons’ Liaison Group; Procedures; Public Accounts; Standards and Privileges.

12 This means that if a party chooses to go into Opposition, as the *NDNA* document allows for, it would lose its seat on the Sub-Committee.

Recommendations

- The Committee for the Executive Office should be formally consulted by the UK Government prior to it making submissions for the provisional agenda of the Specialised Committee on Ireland/Northern Ireland.
- The Committee for the Executive Office should receive full minutes of all JCWG/Specialised Committee meetings and all Joint Committee meetings where matters directly affecting Northern Ireland are discussed, even where these minutes are not made public.
- The House of Commons and NI Assembly could establish a joint standing committee to review implementation of the Protocol.
- A wide range of specialists should be drawn on by the committees, particularly relating to the scope of the Protocol.
- It should be ensured that the chairs of all NI Assembly committees relevant to the workings of the Protocol (e.g. Agriculture and Environment) receive regular briefings from the UK delegation to the Specialised Committee on Ireland/Northern Ireland.

Strand Two

The North South Ministerial Council (NSMC)

The North South Ministerial Council (NSMC) is the intergovernmental body tasked with agreeing common policies and approaches in each of the six areas of north/south cooperation (including food safety, trade and business development, EU programmes and tourism promotion). The body is supported by a *joint secretariat* and staffed by personnel from the Irish Civil Service and Northern Ireland Civil Service (which is separate from the Home Civil Service).

The NSMC is intended to exchange information, develop consultation, cooperation and action within the island of Ireland. The goal here, according to the text of the B/GFA, is to ‘reach agreement on the adoption of common policies’ where relevant, or alternatively to decide on policies for separate implementation. This includes through ‘implementation on an all-island and cross-border basis’ on ‘matters of mutual interest’ within the competence of the Northern Ireland Executive and Irish Government. Both the Northern Ireland Executive and the Irish Government can propose any matter for consideration or action by the NSMC.

From January 2017- January 2019, the NSMC was unable to meet at ministerial level due to the absence of a functioning Northern Ireland Assembly and Executive. This had limiting effects on the work of the six cross-border Implementation Bodies operating in the above policy areas because decisions on policy and action to be taken forward by these bodies are made by the NSMC through plenary meetings only.

The 1998 Agreement provision for the North South Ministerial Council allows it ‘to consider the European Union dimension of relevant matters, including the implementation of EU policies and

programmes and proposals under consideration in the EU framework.’ It also allows ‘Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings’ (Strand Two, paragraph 17).

In theory, the views of the North South Ministerial Council reflect an agreed position from the NI Executive. This could be useful when it comes to representation of concerns to the bodies established by the Withdrawal Agreement (see below). Indeed,

Recommendations

- To make best use of the fact that (a) the NSMC is a pre-existing body used to finding common ground and common decisions on a north/south basis, and (b) it has a direct route to the Specialised Committee, the NSMC should be given a formal role to monitor the implementation and the impact of the Protocol. This should be specifically but not exclusively in relation to the maintenance of north/south cooperation (Article 11, Protocol).
- According to the 1998 Agreement, it should be ensured that the views of the NSMC are ‘taken into account and represented appropriately at relevant EU meetings’. Thus, at minimum, the NSMC should also have the ability to draw the urgent attention of the UK government and the European Commission (as per the Joint Committee) to joint NI Executive and Irish government concerns about threats to the B/GFA or to north/south cooperation that may require a joint UK and EU approach to address.
- The North South Joint Secretariat could be remodelled to ensure adequate representation in areas of north/south cooperation (not implementation). This is because they will be affected by the Protocol but will not be covered in the B/GFA bodies, e.g. in health, tourism, education, agriculture.

Implementation Bodies

The six ‘Implementation Bodies’ working on an all-island basis are core features of the 1998 Agreement and demonstrate the integral role played by cross-border political cooperation in the governance of Northern Ireland. Powers with legislative authority have been transferred from the Governments to the North/South Implementation bodies.

In addition, Strand Two of the Agreement outlined a range of areas for possible cross-border cooperation that include (non-coincidentally) those now most exposed to change as a result of Brexit. These include agriculture, environment, (inland) fisheries, health, social security/social welfare, transport, tourism, and urban and rural development. In addition, there are areas of all-island cooperation that have been identified by the NSMC as ones for protection through the UK’s withdrawal, including education/higher education, justice and security, telecommunications, and sport.

Recommendations

- The Specialised Committee for the Protocol is to examine proposals regarding the implementation and application of the Protocol from the six North South Implementation Bodies. How these bodies identify, compile and relay such proposals needs to be formalised. This is something that could be coordinated by the NSMC Joint Secretariat.
- The Implementation Bodies also should be equipped to raise concerns (i.e. amber alert or red alert) with the Specialised Committee on a direct and urgent basis, not just to offer proposals.

The North/South Inter-Parliamentary Association (NSIPA)

The establishment of a North–South inter-parliamentary forum was envisaged in the B/GFA and the St Andrew’s Agreement, but the NSIPA only held its first meeting in the Seanad Chamber, Leinster House, on 12 October 2012. For the ensuing four years, the body provided a forum for regular formal discussions between Members of the Northern Ireland Assembly and Members of the Houses of the Oireachtas on issues of mutual interest and concern.

It has tended to meet twice yearly on a rotational basis between the Houses of the Oireachtas and the Northern Ireland Assembly and its membership is drawn in equal numbers from both parliaments. It comprises 48 members plus two Joint Chairs. Due to the absence of a sitting NI Assembly, the [last plenary](#) of the NSIPA was (at the time of writing) December 2016.

Recommendations

- A standing item on the agenda of NSIPA plenary meetings should be Brexit and the implementation of the Protocol.
- Standing committees of the North/South Inter-Parliamentary Association and British-Irish Parliamentary Assembly on the Protocol implementation could be established to monitor the Protocol’s implementation.

Strand Three

The British-Irish Council (BIC)

Under Strand III, the B/GFA also established the British-Irish Council as an East–West counterpart to the NSMC, with a secretariat based (since 2012) in Edinburgh. Its purpose is to exchange information, discuss, consult and use best endeavours to reach agreement on matters of mutual interest.

This body is comprised of representatives of the UK Government, Irish Government, Northern Ireland Executive, Scottish Government, Welsh Government, Isle of Man Government, States of Jersey and the States of Guernsey. The BIC meets twice a year in heads-of-government plenary meetings and is supported by workstreams on matters of common interest.

In addition to the meetings of senior politicians, the BIC operates through *twelve task groups*: on collaborative spatial planning, creative industries, demography, digital inclusion, early years, energy, environment, housing, minority languages, misuse of drugs, social inclusion and transport. These task groups are established through direct requests of politicians and agendas are set by politicians and officials.

Recommendations

- Given the significance of Brexit to the environment in which the BIC will be working, the BIC should also have the Protocol (specifically the preamble priorities) set as a standing item on the agenda of the plenary meetings. It could also have a new task group focused on the implementation of the Protocol.
- The remit of the British-Irish Council could be expanded to include areas previously coordinated at EU level, e.g. criminal justice cooperation.

British-Irish Intergovernmental Conference (BIIGC)

A third body established under Strand III of the B/GFA is the British-Irish Intergovernmental Conference which subsumed the Anglo-Irish Intergovernmental Council and Intergovernmental Conference as established under the 1985 Anglo-Irish Agreement. No doubt the most significant component of this body in terms of ensuring a strong channel of communication between the two governments is the Joint Secretariat, with British and Irish offices based in Belfast. The Conference itself is limited to considering non-devolved matters, such as security, and – still a pressing obligation – the ‘implementation of existing agreements’ (NIAC 2018: 40). The BIIGC thus effectively formalises the scope for coordination with the Irish Government on areas of bilateral cooperation and on reserved and excepted matters. It met regularly between 1999 and 2007, after which time, although the Joint Secretariat remained active, the BIIGC was somewhat in abeyance for a decade. The BIIGC was reconvened amid the tempest of the withdrawal negotiations in July 2018. After this meeting, a joint communiqué was issued in which:

The Conference agreed that this level of bilateral co-operation needed to be maintained and, where possible, strengthened following the departure of the United Kingdom from the European Union. Officials were asked to take forward work in this area with a view to coming forward with proposals for future East-West cooperation, including at Cabinet and Ministerial level, for consideration by the Irish and UK Governments at a future meeting.¹³

The value of strengthening the British-Irish relationship after Brexit was affirmed in the Joint Communiqués issued after subsequent meetings in November 2018 and May 2019.¹⁴ However, progress still has to be made in identifying the particular structures and arrangements that could be developed; this will presumably only be possible once the future UK-EU relationship is more clear. Regular meetings of the BIIGC will remain elemental to securing good British-Irish relations and, thus, governance at Strand III in the interests of Northern Ireland.

13 Available from: <https://www.gov.uk/government/news/joint-communiqué-of-the-british-irish-intergovernmental-conference-25-july-2018> (accessed 8 May 2020).

14 The Joint Communiqué from the May 2019 meeting confirms that after the November meeting, ‘officials had been tasked to work together to identify and explore areas of mutual interest, with a view to developing a shared bilateral work plan. Ministers reviewed the progress made by officials to date and requested further proposals for new, reinvigorated and regular opportunities for future co-operation’. See: <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2019/may/joint-communiqué-of-the-british-irish-intergovernmental-conference.php> (accessed 8 May 2020).

Recommendations

- The BIIGC should continue to meet regularly and the bilateral work plan be developed that enables a coordinated approach to new areas for cooperation in light of the changed environment of the UK-EU relationship and in particular the challenges for Northern Ireland outside matters of devolved competence.

Rights and Equality Bodies

The B/GFA obliges the UK to incorporate the European Convention on Human Rights (ECHR) into Northern Ireland law. It also requires the UK to provide effective methods of national enforcement through the Human Rights Act 1998. In the [Political Declaration](#) on the Future Relationship (October 2019), the UK committed to ‘continued adherence and giving effect’ to the ECHR. It was agreed:

The future relationship should incorporate the United Kingdom’s continued commitment to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR (I.A.7).

However, in December 2019 the UK threatened to limit the application of the ECHR in NI law (over the issue of independent investigations into killings by the Security Forces during the Troubles). In February 2020, UK government sources briefed that the UK would no longer agree to be bound by the ECHR within the future UK-EU agreement. Future compliance with the ECHR and B/GFA is therefore under significant threat in the Brexit process.¹⁵

The Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland were established in 1999 and 1998 respectively. The 1998 Agreement stated that the Human Rights Commission ‘will be invited to consult and to advise on the scope for defining [...] rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland’. It was anticipated that these would together constitute ‘a Bill of Rights for Northern Ireland.’ However, a Bill of Rights for Northern Ireland has not yet come to pass (although it is again committed to in *NDNA*); nor has a dedicated Department of Equality, the establishment of which was also recommended by the Agreement. This leaves a gap within Northern Ireland governance that may become increasingly significant if there is a failure by the UK to adhere to the ECHR. It would be in accordance with the B/GFA and the Political Declaration for the UK to make a legally-binding agreement, as part of the future UK-EU relationship, to continue to be a party to the ECHR and provide effective methods of domestic enforcement in Northern Ireland.

Another point of relevance is that the UK has agreed, under Article 2 of the Protocol, that none of the civil and individual rights protected by the B/GFA that are enhanced or underpinned by EU law can be diminished. This means that Northern Ireland will continue to implement six EU equality directives, including in non-discrimination on the grounds of ethnicity, in access to goods and services, and in equal treatment in employment. Amendments and replacements to these directives will automatically apply in Northern Ireland. Relevant new acts will need to be adopted by the Joint Committee. In such ways, the rights of all citizens in Northern Ireland are a not-insignificant part of the region’s unique relationship with the EU post-Brexit.

15 The ECHR is further embedded in the GFA to safeguard the work of the democratic institutions in Northern Ireland. Therefore, any plans to withdraw from or repeal these protections has the potential to undermine the equivalence of a rights regime between both jurisdictions in Ireland, as well as the ability for structured north/south cooperation (CCBS 2018).

The B/GFA mandated the establishment of mechanisms to ensure strong cooperation between the human rights institutions in each jurisdiction on the island. Specifically, it led to the establishment of a Joint Committee with representatives of the Human Rights Commissions of Northern Ireland and Ireland. Under the terms of the Withdrawal Agreement, the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the *Joint Committee of the Human Rights Commissions of Northern Ireland and Ireland* are offered a consultative role in relation to the work of the Specialised Committee on Ireland/Northern Ireland.

Additional Institutions

British-Irish Parliamentary Assembly (BIPA)

The British-Irish Parliamentary Assembly (BIPA) was not established as part of the B/GFA but originated in 1990 as an inter-parliamentary body linking the Houses of Parliament and the Houses of the Oireachtas, with the mission to promote cooperation and build close relationships between political representatives in Britain and Ireland. In 2001 its membership expanded to include the Scottish Parliament, the Welsh Assembly, the Northern Ireland Assembly, the High Court of Tynwald and the States of Guernsey and Jersey. The BIPA Secretariat is drawn from the UK Parliament and the Houses of the Oireachtas.

Members engage in a wide range of non-legislative parliamentary activities, through bi-annual plenary meetings and ongoing Committee work. The body's four Committees (Sovereign Matters; European Affairs; Economic; Environmental and Social) meet regularly and take oral and written evidence on specific issues, whilst regularly interacting with the European Parliament. The Committee on Sovereign Matters has produced several reports on the implementation of the Belfast/Good Friday and St Andrews Agreements, identifying outstanding issues and considering recommendations for further action. Committee reports are presented to plenary BIPA sessions which usually comment on them in the form of a resolution. Formal replies from the Governments and the Executives to the committees' reports are published and considered in plenary session.

Recommendations

- The BIPA should continue to interact with the European Parliament; visits to Brussels should continue to be an option for Committees if not for the Assembly as a whole. Consideration should be given to sending reports from the Committees (especially Committee B) to the Joint Committee and/or the Specialised Committee. The BIPA secretariat should be able to feed into the Agenda of the Joint Consultative Working Group.

Unimplemented B/GFA Institutions

There are a number of institutions provided for by the B/GFA but which have not yet been fully implemented.

Strand I of the Agreement, for instance, provided for the establishment of a consultative *Civic Forum* ‘compris[ing] representatives of the business, trade union and voluntary sectors, and such other sectors as agreed by the First Minister and the Deputy First Minister [to] act as a consultative mechanism on social, economic and cultural issues’. The Forum was formed initially and consisted of a chairman and 60 representatives from across the different sectors. It operated between 2000 and 2002, until the devolved institutions were suspended, and was not restarted when devolution was restored in 2007.

Nevertheless, the need for some form of civic input has continued to be recognised. For example, the Stormont House and Fresh Start Agreements suggested the creation of ‘a smaller 6-member civic advisory panel to consider social, cultural and economic issues and issues relevant to the draft Programme for Government. This panel would advise and report back to the Executive’ (NIAC 2018: 44). The *New Decade, New Approach* document (NDNA 2020: 23 [para 3.8]) furthermore outlines the political parties’ recognition of ‘the value of structured and flexible engagement with civic society to assist the Government to solve complex policy issues.’ To this end the Stormont parties have agreed ‘that the existing Compact Civic Advisory Panel should be reformed to include a renewed membership appointed within 6 months by way of a Public Appointments process’.

The principles of consultation, civic engagement and consensus-building are also contained in the *NDNA* document. It proposes one Citizens Assembly per year, plus 1-2 issues per year to be considered via ‘civic engagement’ opens the potential for wider engagement on Brexit-related matters. The *NDNA* did not promise to re-establish the civic forum, which indicates that there is still political resistance to its constitution.

The scope for a civic forum on a cross-border basis is also an outstanding need. Strand II of the B/GFA recommended that ‘[c]onsideration [should] be given to the establishment of an independent consultative forum appointed by the two [Northern Ireland and Republic of Ireland] Administrations, representative of civil society.’ The 2006 St Andrew’s Agreement restated this recommendation, stressing that ‘the Northern Ireland Executive would support the establishment of an independent *North/South consultative forum*’. But such a forum has never been formally established, despite being agreed to by the NSMC almost two decades ago (NSMC 2002: 14).

Recommendations

- Consideration should be given to establishing and getting off the ground a North South Civic Forum such as recommended but not implemented under the B/GFA and the St. Andrews Agreement. The body should focus specifically on getting stakeholder engagement in managing transition. This could be a route through which cross-border bodies or projects identified through the North-South Cooperation Mapping Exercise could be incorporated.

High Level Civil Service Meetings

The imperative for close and good communication between civil servants in Belfast, Dublin and London has become quite evident through the Article 50 process. In addition to the frequent meetings of the Joint Secretariat of the British-Irish Intergovernmental Conference, the initiative to enable meetings between Permanent Secretaries from both governments hold particular value now given the absence

of regular meetings for officials and ministers at EU levels. Secondly, regular meetings between officials from The Executive Office (NI) and, at first, the Department for Exiting the EU and now the Cabinet Office focused on managing Brexit is a necessary up-step in communication. The effectiveness and value of such east-west meetings remain reliant on the quality of information shared within the respective civil services, including on the progression of UK-EU negotiations.

Recommendations

- Close and trusted communication between senior civil servants is vital. It would be worth exploring means of ensuring trilateral (Belfast/Dublin/London) communication as well as bilateral (east/west or north/south) and quadrilateral (among the regions and nations of the UK).

Local Government

The importance of local administration

In the absence of a functioning local devolved government between January 2017 and January 2020, the work of local authorities was crucial to the day-to-day local governance of Northern Ireland. In this respect, the role of local politicians in making practical decisions around governance issues, particularly in the absence of a functioning Executive, is widely acknowledged. However, local councillors are often themselves uncertain of the role they can play and the extent of their influence.

Following the Review of Public Administration, Northern Ireland's local councils were reduced from 26 to 11 in 2015. This occurred at the same time as the responsibilities of individual councils increased, with powers relating to planning, economic development and the public realm being transferred from central to local government. However, 'Northern Ireland's local authorities still have fewer powers and resources than their counterparts in England, Scotland and Wales. [C]urrently, Northern Ireland's local government has 4% of Northern Ireland's overall funding, compared to 27% for both Wales and Scotland' (NIAC 2018: 41).

Local authorities in Northern Ireland play a critical role in the implementation and oversight of an enormous spectrum of EU regulations governing everything from environmental protection to planning and building controls, employment rights, and, health and safety. Moreover, a significant proportion of EU Structural, Cohesion and Peace Funds are disbursed through or by local authorities in Northern Ireland, in conjunction with a range of government departments, social economy organisations, enterprise partners and cross-border agencies. Furthermore, EU funding for a variety of cross border collaboration and services has been directly relevant to councils near the border.

In 2018, the Northern Ireland Affairs Committee recommended an 'increased role for local government [to] improve democracy and make governance in Northern Ireland more robust in the future' (NIAC 2018: 43). These recommendations chime with the analysis of the Institute for Government report which suggested that issues that would fall to local government in other parts of the UK rest with ministers or civil servants in Stormont (Sargeant and Rutter 2019: 56).

Local Government Association

The Northern Ireland Local Government Association (NILGA) which is the representative body for the 11 local authorities in Northern Ireland, working in partnership with other key regional bodies and stakeholders, is a member of the Local Government Group of Associations in the UK, ROI and in Europe and has ongoing liaisons with the EU Committee of the Regions.

Furthermore, NILGA coordinates the Central-Local Government Political Forum which aims to assist policy deliberations in the absence of functioning local government, representing Northern Ireland at the Brexit Delivery Board of the Ministry for Housing, Communities and Local Government.

Local government networks

There are also main local-authority-led cross-border networks and development organisations made up of elected members from all political parties and senior officials from all border region local authorities in both jurisdictions. This includes the East Border Region (EBR) and the Irish Central Border Area Network (ICBAN). These bodies administer Interreg funding, among others, leading on a series of infrastructural and local development cross-border projects.

In the North-West region, recent development and cross-border plans have been progressed on an active basis by coordination between Derry Strabane Council and Donegal County Council. Cross-border cooperation in this sub-region is also developed through the North West Strategic Growth Partnership. This was established in 2016 through the North South Ministerial Council and brings together senior Government officials from all Government departments in the Republic of Ireland and Northern Ireland to meet with Donegal County Council and Derry City and Strabane District Council. The intention is to deliver on the strategic priorities aimed at bringing about the North West City Region. This is further recognised in the NDNA (2020).

Local authorities on both sides of the border are already in networks and some already hold civic forums. Local councils in the border region have worked collaboratively in response to the challenges arising from Brexit. This should be drawn upon in two ways post-Brexit: (a) utilising the forums for local engagement and cross-border collaboration, and (b) using their experience of being 'frontline' when it comes to matters that will be affected by Brexit, e.g. access to labour.

Recommendations

- [The Joint Consultative Working Group should have a stream of input from local authorities on both sides of the Irish border.](#)

2. Northern Ireland's position in the post-Brexit governance of the UK

What the Protocol means for NI's Status

Article 1 of the Protocol states that it is 'without prejudice to the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent'. It also confirms that it 'respects the essential State functions and territorial integrity of the United Kingdom'. Quite clearly, the Protocol does not affect the constitutional status of Northern Ireland.

Nonetheless, there have been concerns raised about the Protocol from all parties in Northern Ireland and from the business community relating to its implications for Northern Ireland's position within the UK's internal market. In response to concerns from unionists in particular about the previous version of the Protocol, the UK Government had issued 'additional unilateral commitments' to Northern Ireland in January 2019.¹⁶ It issued no similar document in relation to the final version of the Protocol. However, in *New Decade New Approach* (2020), the Government articulates its absolute commitment 'to ensuring that Northern Ireland remains an integral part of the UK internal market, in line with the clear guarantee in the Protocol that Northern Ireland remains in the customs territory of the United Kingdom' [Annex A:10].

The business community and all parties in Northern Ireland have requested that the Government seeks to flesh out the Protocol's guarantee of unfettered access from the region into Great Britain after Brexit. The *NDNA* commits the Government to legislate for this and to ensure that it is in force by 1 January 2021, i.e. by the end of the transition period. The Government commits, too, to negotiating with the EU 'additional flexibilities and sensible practical measures across all aspects of the Protocol'. This picks up on the language that we have long seen in the negotiations over the place of Northern Ireland in Brexit (i.e. the quest for what the EU referred to as 'flexible and imaginative solutions'). However, there is a risk that this will be seen as the UK pushing for stretch from the EU when it comes to the UK implementing in respect of Northern Ireland its obligations under the Protocol. This is particularly because this paragraph notes that these measures are to 'maximise the free flow of trade'.

Finally on this, the Government promises to 'engage specifically with the Executive on the unique circumstances of Northern Ireland and the Protocol' [Annex A:12] but there is no detail on this. There is a huge amount of the Protocol that reflects the unique position of Northern Ireland (rights protections, north/south cooperation, single electricity market, common travel area) that the UK Government could be pushing for flexibility from the EU on that would be in the interests of Northern Ireland.

16 The document also unilaterally committed the UK government to other things that would be considered useful for this version of the Protocol, including the requirement for consent from the NI Assembly prior to new areas of law applying to the Protocol, a role for the NI Executive through the UK's membership of all the Protocol's bodies, and a guarantee that the UK will ensure that all engagement and dialogue under the governance arrangements applying to the WA will be consistent with the B/GFA, with no change to the role of the UK or Irish Governments.

It is imperative that the UK implements the Protocol on Ireland/Northern Ireland. This is not only because it is part of the legally binding Withdrawal Agreement, it is also to assure the EU and other potential negotiating partners of its reliability. Furthermore, the B/GFA sets out the requirement that Westminster must legislate to ensure that the UK's international obligations with respect to NI are met.¹⁷ There are concerns about the Protocol from all parties in Northern Ireland; these need to be addressed through the detail and measures of its implementation, not by its non-implementation.

The Role of Westminster

Parliament

The House of Lords EU Committee (2019) pointed to the important role to be played by the UK Parliament in good governance after Brexit vis-à-vis the UK's relationship with the EU. This would come in continuing to scrutinise EU legislative proposals; engaging with and examining the work of the WA and Political Declaration's governance and institutional mechanisms; monitoring and scrutinising the negotiations on the future UK-EU relationship; and engaging in enhanced inter-parliamentary dialogue with the European Parliament, EU Member State national parliaments, and the devolved legislatures (2019: 3).

Delegated powers and the Withdrawal Agreement Act (2020)

The breadth of UK Executive power over the Protocol on Ireland/Northern Ireland is extraordinary. The Protocol may require amendments to domestic law as EU legislation develops. This will be in perpetuity for Northern Ireland. The WA Act will be the means by which such amendments will occur, primarily through the use of delegated powers, i.e. those which enable Ministers to act without the need for future bills. The powers are limited to the terms of the WA itself but the Delegated Powers and Regulatory Reform Committee report (2018) raises the point that the power can still be used to do other significant things (as long as it is not inconsistent with the WA).

The WA Act contains powers to implement the Protocol on Ireland/Northern Ireland through Statutory Instruments (SIs). Most SIs come under the negative procedure, in which once an SI is laid before Parliament, members have a set period of time to put forward a motion to annul it. If there is no motion to annul it, an SI automatically becomes law after the period ends. Other SIs come under the affirmative procedure, which means an SI has to be approved by both UK Parliament Houses before becoming law. Effective scrutiny of this procedure, even within Parliament, is difficult. It requires time and capacity.

The powers to pass secondary legislation (i.e. through SIs) in the WA Act under Clauses 21 and 22 (which are specifically about Northern Ireland) are intended to (i) implement the Protocol and (ii) to ensure unfettered access for NI businesses into the British market. For the most part they will use negative procedure. All regulations made under clause 41 (consequential and transition provision) would be subject to the negative procedure.

¹⁷ The one known precedent for such a situation relates to the transposition in NI law of the EU Gender Directive (2004/13/EC) in 2007 when UK Ministers intervened for the matter to be legislated for in Westminster (Harvey and Holder 2017).

The fact that there are only 18 NI MPs and the government (which will be putting forward this legislation) has such a large majority is a consideration and shows that it is extremely unlikely that – even if all NI MPs were to object to them – any such SIs dealing with Northern Ireland could be annulled. And when it comes to challenging/annulling an SI, NI cannot act alone if this is not within devolved competence. For the most part, it will be in the hands of NI MPs in Westminster.

Recommendations

Engagement with Stormont

- Securing the commitment and means by which it can shape secondary legislation relating to the WA would be a major ask from the NIA, but it could be argued for on the grounds of the exceptional significance of the Withdrawal Agreement Act for NI.
- The NI Assembly should be consulted on any decision about a potential extension of the transition period.
- In theory, there is some scope for the Protocol and the WA to be amended by the Joint Committee to address deficiencies or unforeseen situations, with the mutual consent of the UK and the EU.¹⁸ The identification of such problems – and solutions – should involve the NI devolved institutions and wider stakeholders.
- The UK government should systematically consult the NI Executive on positions to be adopted at all Withdrawal Agreement institutions that are of relevance to Northern Ireland.
- There should be an Annual Report prepared for the NI Assembly by the NI Executive and the UK Government on the implementation of the Protocol.
- Updates of existing laws covered by the Protocol will happen automatically. The UK Government should consult the NI Assembly on adoption of new areas of EU law applicable in the areas covered by the Protocol (as per the [White Paper](#), January 2019).

Procedures

- There should be an annual debate in the House of Commons and the House of Lords on the implementation of Protocol.
- House of Commons Northern Ireland Affairs Committee to receive oral and written reports from the UK Government on all issues relevant to NI following each meeting of the Joint Committee and written summaries of all meetings of the Specialised Committee on Ireland/Northern Ireland.

18 Article 64.5.d of the Withdrawal Agreement states that the Joint Committee may: ‘until the end of the fourth year following the end of the transition period, adopt decisions amending this Agreement, *provided that such* amendments are necessary to correct errors, to address omissions or other deficiencies, or to *address situations unforeseen* when this Agreement was signed, and provided that such decisions may not amend the essential elements of this Agreement’ [emphasis added].

Intergovernmental Dynamics within the UK

The United Kingdom is an ‘asymmetrical, devolved state, with specific settlements for each of its constituent nations’ (Keating 2018a: 13). Within this system, ‘foundational issues about sovereignty’ have been largely avoided, partly because the EU has provided a common policy framework and reference point which has compensated for the lack of UK-wide provisions (Keating 2018a: 13). Ultimately, the devolution settlements have reflected ‘a three-sided relationship, in which many key powers are exercised neither in Westminster, nor in Edinburgh, Cardiff and Belfast, but in Brussels’ (House of Lords 2017: 9/10); ‘The EU has, in effect, been the glue holding together the United Kingdom’s single market’ (House of Lords 2017: 10).

Aside from this, intergovernmental relationships within the UK have been informally structured, and are underpinned by Memoranda of Understanding and bilateral concordats between the UK and each devolved government. The emancipation from EU law that Brexit requires is, therefore, a difficult task, particularly where ‘complex overlapping central, devolved and shared competencies are concerned’ (House of Lords 2017: 12).

A challenge regarding Northern Ireland’s future governance arrangements stems from the ‘repatriation’ of competences to the devolved regions. Clause 11 of the EU Withdrawal Act 2018 stipulated that control over areas where EU and devolved law overlap would be passed to the devolved institutions. However, UK ministers can make regulations that ‘freeze’ the ability of devolved governments to change the law in some areas. In such cases Westminster will retain control pending agreement on what will replace EU law (IfG 2018).

‘Many of the concerns expressed by devolved institutions in relation to the European Union (Withdrawal) Bill were addressed through amendments. Even so, the Bill eventually passed into law without the legislative consent of the Scottish Parliament’ (PACAC 2018:4). The Scottish Government in particular has worried that policy areas covered by the new ministerial regulations under Clause 11 would be treated by UK ministers as ‘reserved’ rather than devolved, even if these regulations are meant to be temporary in nature. Similarly, the Welsh Assembly (2019a, b) has expressed concerns with establishing a good degree of scrutiny over the development of legislative and non-legislative common frameworks, as well as over the representation of Welsh interests in any future UK international negotiations. And when it was restored, the first substantive debate of the Northern Ireland Assembly (taking place on 20 January 2020) concluded with unanimously agreeing a motion to deny consent to the passing of the Withdrawal Agreement Bill by the UK Parliament.

Common Frameworks

The UK Government initially published a list of 153 areas where EU and devolved law currently intersect, in some of which new UK-wide frameworks (legislative and non-legislative) would likely be required after Brexit in order to prevent undesirable degrees of internal UK regulatory and policy divergence.¹⁹ A Revised Frameworks Analysis by the Cabinet Office (2019: 4-5) shows ‘an increase in

19 ‘One of the key reasons these new agreements are necessary is to ensure the functioning of the ‘UK internal market’, by avoiding new barriers to doing business across the UK and unfair competition between businesses based in different parts of the UK. Frameworks will also be important enablers for the UK government as they pursue new international agreements and trade deals’ (Thimont-Jack et al. 2018: 3).

the number of policy areas' (from 153 to 160) 'and some change in the number of policy areas in each category', as follows:

- *Can be immediately devolved*: 63 areas (increased from 49), comprising aspects of transport, environmental and energy policy;
- *Non-legislative common frameworks*: required in 78 areas (reduced from 82) i.e. voluntary arrangement between central and devolved governments to cooperate in these areas which will not be enforced in law. These include aspects of justice and policing. 'In some of these areas, consistent fixes to retained EU law (made using secondary legislation) will create a unified body of UK law alongside the non-legislative framework agreement' (Cabinet Office 2019: 22);
- *Binding 'legislative common frameworks'*: may be needed for a group of 21 areas (reduced from 24), in whole or in part, in order 'to preserve the functioning of the UK internal market or to ensure the Government can implement trade and other international agreements' (Thimont-Jack et al. 2018: 2). These include policy areas such as agricultural support, animal welfare and fisheries management and support, within the responsibility of the Department for the Environment, Food and Rural Affairs (DEFRA);
- *Reserved policy areas*: confined to 4 policy areas, including State Aid (although see our discussion further below regarding the Protocol on Ireland/Norther Ireland arrangements with respect to State Aid/Agricultural subsidies until the end of the transition period), Food Geographical Indications, Elements of Product Safety and Standards Relating to Explosive Atmospheres and Data Sharing (Eurodac). These areas remain subject to ongoing discussion with the devolved administrations.²⁰

Of the above list, 157 devolved policy areas apply to Northern Ireland, most of which fall under relevant Sections and Annexes of the Protocol on Ireland/Northern Ireland (WA).

Of the above list, 157 devolved policy areas apply to Northern Ireland, most of which fall under relevant Sections and Annexes of the Protocol on Ireland/Northern Ireland (WA).

All this suggests that the disentanglement from EU law which is associated with Brexit will require the strengthening of internal UK-wide governance mechanisms for policy coordination between the constituent regions of the UK. One relevant to this task level of governance concerns the institutions of intergovernmental relationships.

20 Two policy areas appear twice in this analysis, albeit in different categories (Cabinet Office 2019).

The Joint Ministerial Committee

The JMC (EN)

A Joint Ministerial Committee (JMC) between the devolved Governments/Executives and the UK Government is convened on an *ad hoc* basis. The structure of the JMC and its terms of reference were established on the basis of the UK's membership of the EU. As such, it has been strongly recommended that the four governments should urgently review how the JMC's structure and principles of operation may be reformed (PACAC 2018; Thimont-Jack et al. 2018).

To date, the four governments' position *vis-à-vis* Brexit negotiations has been represented at JMC level through a *Joint Ministerial Committee (European Negotiations) (JMC-EN)*, established after the precedent of the Joint Ministerial Committee (Europe) (JMC-E), which meets regularly to discuss the UK line in EU negotiations where devolved competences are involved. The JMC-EN does not take decisions but merely consults the devolved administrations (Keating 2018a: 16).

The JMC (EN) has agreed three broad principles in relation to the proposed establishment of UK-wide frameworks in the devolved policy areas currently managed at EU level:

- That they will be employed to fulfil functions related to the UK's internal market, international obligations, international agreements and trade deals, cross-border justice issues, the management of common resources, and security;
- They would respect the devolution settlements and the democratic accountability of the devolved legislatures; and
- They will recognise the economic and social linkages between Northern Ireland and Ireland, whilst adhering to the Belfast/Good Friday Agreement (McEwen et al. 2018).

Northern Ireland's disadvantage without a sitting Assembly

In our workgroups for this project and wider research, we have found general consensus that the JMC(EN) did not work well – and certainly not as had been anticipated at the start. The devolved administrations perceive there to be too little sharing of information by the UK government and an outstanding need for better prioritisation of issues as they come for quadrilateral consideration.²¹ It was also recognised that, during the absence of devolved government, Northern Ireland's representation through civil servants at such committees was limited to the feeding of information, rather than negotiation. This was seen as a disadvantage to Northern Ireland, although the JMC(EN) was never conceived of as a decision-making body per se.

21 A good report of investigation into the workings of the JMC and limitations of the JMC(EN) was published early on in the Brexit process by the House of Lords EU Committee (2017) and a number of its conclusions remain valid (<https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/9/910.htm>).

Challenges to the work of the JMC after Brexit

There are several key challenges to the work of the JMC after Brexit, given the pressure placed on intergovernmental relations by the process.

- Reaching agreement on new frameworks (to replace EU legislation applicable to the devolved policy areas currently managed at EU level);
- '[D]etermining how disagreements or disputes are to be managed' in the future (IfG 2018: 5);
- Distributing new funding (to replace EU funds) between the devolved regions/nations;
- Coordinating UK-wide input into international negotiations; and
- Establishing new regulators and public bodies across the UK to replace the role of EU agencies managing the implementation of functions currently exercised by the EU.

These challenges no doubt require reform of the JMC.²²

Recommendations

- The UK Government should increase the frequency and importance of meetings of the Joint Ministerial Committee (JMC) to help coordinate Brexit among the devolved regions and nations.
- New thematic committees should be established under the JMC, including on internal and international trade and relations, ensuring a coherent UK domestic approach while closely reflecting the interests and positions of the devolved regions.
- The four governments within the UK should establish a new JMC sub-committee on international trade.²³

UK Intergovernmental Relations

Brexit propelled the already-present belief among the devolved governments and administrations that there was a need to improve arrangements for the conduct of intergovernmental relations across the UK (Scottish Government 2018). A review of intergovernmental relations was commissioned by the Joint Ministerial Committee (Plenary) on 14 March 2018. On 3 July 2019 the then Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster David Lidington presented a [written statement](#) in Parliament with details of draft principles for intergovernmental relations on which, he explained, a working group of representatives of all four devolved administrations continued to work closely.²⁴ The principles were to be presented for formal adoption to a future Joint Ministerial Committee (Plenary) and, subject to the timing of its re-establishment, to a new Northern Ireland

22 The National Assembly of Wales (2018) recommended fundamental reform to the JMC to become a decision-making UK council, with proper transparency and accountability in its operation.

23 As recommended by number of analysts (IfG 2018; McEwen et al 2018).

24 Available from: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-07-03/HCWS1687/> (accessed 8 May 2020).

Executive for its endorsement.²⁵ Further work on the review of intergovernmental relations includes agreeing a joint plan of next steps, and developing a clear timeline for work on avoiding disputes and on developing an independent element in any future intergovernmental dispute resolution.

The principles build upon and sit alongside the existing Memoranda of Understanding (MoU) between the governments and will inform its future development. They include:

- Maintaining positive and constructive relations, based on mutual respect for the responsibilities of governments across the UK and their shared role in the governance of the UK;
- Building and maintaining trust, based on effective communication;
- Sharing information and respecting confidentiality;
- Promoting understanding of, and accountability for, their inter-governmental activity;
- Resolving disputes according to a clear and agreed process.

The Scottish and Welsh Governments sent a [joint letter](#) to David Lidington on 4 July 2019 calling for immediate steps to improve ‘the current ‘weak and ineffective’ government structures, guarantee respect for devolved responsibilities and strengthen the dispute resolution process.’²⁶ The letter expressed the view that little progress has been made by the review.

Capacity in the Civil Service

There is a need to assess UK governmental and organisational capacity to sustain engagement with Northern Ireland-specific issues through withdrawal. The ‘bandwidth’ available in Whitehall and the UK government generally is a matter of concern given (i) the complexity of the future UK-EU negotiations, (ii) the additional complication of other FTA negotiation and (iii) the unique situation for Northern Ireland after the transition period and under the operation of the Protocol. Key to questions of capacity are relationships between government departments, both regional and central, some of which have flourished (notably DAERA-DEFRA) and others of which have been slower to develop.

The growth of such links is shaped by the need for Northern Ireland-specific legislation to be developed in Whitehall as part of the withdrawal process. Greater understanding of Northern Ireland and institutional memory is being developed in Whitehall and government departments, and stakeholders and workshop participants reported increasing levels of trust and communication through civil servant to civil servant contacts between Whitehall and the NICS. However, churn in Whitehall, conflicting priorities between departments, and limited exchange of information both within Whitehall itself and with devolved administrations (notably Scotland) have placed constraints on effectiveness. The absence of planning assumptions for post-Brexit UK has made it difficult to proceed and has led to further internal divergence.

25 See Update on common frameworks and intergovernmental relations: Written statement - HCWS1687. Available from: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-07-03/HCWS1687/> (accessed 8 May 2020).

26 See Brexit Brief Newsletter, July 2019. The Northern Ireland Assembly. Available from: <http://www.niassembly.gov.uk/assembly-business/brexit-brief/brexit-brief-newsletters/issue-11--july-2019/> (accessed 8 May 2020).

The UK needs to undertake a proper assessment of trade implications arising from the Withdrawal Agreement and future UK-EU Agreement(s) that includes devolved administrations who would be instrumental in providing information, analysis and evidence. There is, however, a lack of clarity regarding the extent and means of involvement of devolved administrations in future negotiations with the EU, including in areas beyond trade and security. Despite the above discussed process of reviewing intergovernmental relations, and the express discontent of the Scottish and Welsh administrations with the progress of review so far, no proper mechanisms have been put in place as yet to allow a voice to the devolved administrations.

At present the relationship between the UK and the devolved governments in the field of international relations in particular is described in a non-binding Memorandum of Understanding (MoU), appended to which are concordats binding in honours only. These establish arrangements for the UK Government to consult the devolved administrations in formulating the UK's position for international negotiations, only insofar as negotiations concern devolved matters. Unsurprisingly, and particularly in the context of Brexit, there has been concern among devolved administration with establishing a higher level of scrutiny and influence over significant future UK international agreements.²⁷

3. Using new governance mechanisms after Brexit

The Bodies of the Withdrawal Agreement

Three new bodies each comprised of representatives from the EU and UK will have important responsibilities regarding the implementation of the Protocol on Ireland/N. Ireland:

- The Joint Committee;
- The Specialised Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland;
- The Joint Consultative Working Group.

The Rules of Procedure for the Joint Committee and Specialised Committees are set out in Annex VIII of the Withdrawal Agreement.

As a House of Lords European Union Committee Report (2019: 3) noted, the effectiveness of these three bodies 'will depend on the frequency of their meetings, the flexibility of their remit, senior political representation on both sides, and a mutual commitment to effective communication, appropriate powers, and full accountability'.

The Joint Committee

The operation of the Joint Committee

The body with overall responsibility for managing the implementation of the Withdrawal Agreement (WA) is the Joint Committee. It also has specific responsibilities relating to the Protocol. The Joint Committee is co-chaired by European Commission Vice-President Maroš Šefčovič and the UK Chancellor of the Duchy of Lancaster, the Rt Hon Michael Gove. It can also be chaired by high-level officials designated to act as their alternates.

The *Secretariat of the Joint Committee* shall be composed of an official of the European Commission and an official of the UK Government. Where appropriate and by decision of the co-chairs, experts or others may be invited to attend meetings of the Joint Committee in order to provide information on a particular subject. The Joint Committee shall hold its meetings alternately in Brussels and London, unless the co-chairs decide otherwise. Its first meeting was held on 30 March 2020. It is to meet at least once a year, and at the request of the Union or the United Kingdom. According to Rules of Procedure for the Joint Committee (Annex VIII), the provisional agenda for all meetings of the Joint Committee are to include items requested by the Union or the United Kingdom.

The purpose of the Joint Committee (see Article 164 of the WA) is to govern the implementation and application of the WA. As set out in paragraph 3 of Article 166, the Joint Committee will make all its decisions and recommendations 'by mutual consent' of the parties. In other words, it cannot act if the United Kingdom does not agree.

The UK and the EU are obliged to implement the Joint Committee's decisions, which will have the same legal effect as the Withdrawal Agreement itself (see Article 166). In the absence of agreement on an issue at the Joint Committee, under Article 170, the issue will then be referred to the arbitration panel, whose decision will be final and binding. At no point is there an obligation for the UK or European Parliaments to discuss such issues, and they will not be asked or required to ratify decisions taken by the Joint Committee as a rule.

Both the UK Parliament and the European Parliament expect to be able to undertake scrutiny of the work of the Joint Committee but this will not operate in terms of direct accountability. Instead, it arises from the fact that Ministers or others will attend the Joint Committee with a mandate from Parliament. Secondly, a decision that constitutes an amendment to part of the treaty or replaces part of the treaty made by the Joint Committee would require ratification (House of Lords Debate 20 March 2019, c1436).

The remit of the Joint Committee

The Joint Committee has flexible powers and responsibilities enabling it to *supervise and facilitate* the overall WA. These include:

- deciding on the tasks of the Specialised Committees and supervising their work;
- 'preventing problems' and resolving disputes that emerge;
- considering 'any matter of interest' relating to the WA;
- establishing new Specialised Committees, or removing committees as required;
- issuing an annual report on the functioning of the WA.

In the analysis of Curtis et al. (2019), in relation to the Ireland/Northern Ireland Protocol, the Joint Committee has responsibility to:

- Carry out several tasks before the end of the transition period that include agreeing definitions and criteria applying to customs processing in Northern Ireland [Art 5(2)];
- Establish the conditions under which certain 'fishery and aquaculture products' are exempt from customs duties [Art5(3)];
- Oversee implementation of the new VAT and excise regime, including to regularly 'discuss the implementation' of the Protocol's VAT and Excise provisions (Art 8);
- Set up the level to which production of and trade in agricultural goods in Northern Ireland would be exempted from state aid controls;
- Decide by the end of the transition period on the criteria for the risk assessment of goods entering Northern Ireland from Great Britain or from outside the EU which may then enter the single market; and
- Make recommendations to the UK and the EU in case the Northern Ireland Assembly fails to give 'democratic consent' for the region to continue to abide by the arrangements for customs, the movement of goods and aspects of participation in the EU single market (under either the standard or the alternative process arranged for in the Protocol at specified points in time).

The monitoring/review role of the Joint Committee

Furthermore, the Joint Committee carries an extraordinary responsibility when it comes to keeping under constant review three dynamic processes.²⁸ First, relating to the movement of goods to and from Northern Ireland, according to Article 6(2) of the Protocol, it is to review the facilitation of trade within the United Kingdom:

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.

Secondly, it has the competence to review the application of the rules relating to VAT and Excise as set out in the Protocol (Article 8):

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.

According to Curtis et al. (2019: 26), 'such a review role suggests that the Joint Committee will oversee implementation of the new VAT and excise regime before the transition period ends as well as afterwards'.

Thirdly, relating to cross-border cooperation on the island of Ireland, according to Article 11(2) of the Protocol:

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.

This means that *the review role of the Joint Committee is potentially pivotal to the future governance of Northern Ireland, including in relation to its position vis-à-vis both Britain and Ireland.*

A substantial commitment in the *New Decade, New Approach* document comes in the form of the UK Government's commitment to 'ensure that representatives from the Northern Ireland Executive are invited to be part of the UK delegation' in meetings of the UK-EU Joint Committee. These invitations will happen only in instances where the Committee concerned is discussing Northern Ireland-specific matters *and* which are 'also attended by the Irish Government as part of the European Union's delegation'.

All action and final decisions relating to issues arising from the implementation of the Protocol will be in the hands of the Joint Committee.

28 The UK and EU may also request the Joint Committee reviews safeguard measures (Annex 7[5] of the Protocol).

Recommendations

- It is imperative that the UK not only adheres to its commitment to have representatives from the NI Executive present at relevant meetings of the Joint Committee, but that it ensures that the most is made of this commitment. For example, there needs to be close communication between the NI Executive and the UK delegation in forming a position prior to the meeting.
- The United Kingdom should consult with the Northern Ireland Executive (and other devolved governments) about items that should be on the agenda for the meetings of the Joint Committee. This should happen in a timely manner.
- Given the importance of the work of the Joint Committee for the implementation of the Protocol, the UK and EU should, where reasonable, use their powers (as per the Rules of Procedure) to decide to make the agenda, or any part thereof, public before the beginning of the meeting.

If devolution is functioning:

- First Minister and Deputy First Minister should attend all meetings of the Joint Committee held at a ministerial level where those meetings discuss Northern Ireland, and then report on all meetings to a relevant committee of the NI Assembly.
- The NI Executive could have speaking rights for the First Minister and deputy First Minister at all relevant meetings of the Joint Committee.
- The Joint Committee's annual report should be considered by the NI Assembly as well as the UK parliament.
- NI Executive should receive all UK government papers relating to meetings of the Joint Committee. The Executive should also be consulted by the UK government in advance of all issues of relevance to NI to be discussed by the Joint Committee.
- NI Executive could be allowed to advise on which experts should accompany the First Minister and deputy First Minister or senior officials to meetings.

In the absence of devolution:

- Representation should as a minimum be ensured through senior officials from the NICS. When the Joint Committee meets at ministerial level, representation for NI should be through the Secretary of State for NI.
- The Northern Ireland Office should establish consultative sectoral fora in which relevant interests from Northern Ireland can be represented and the Northern Ireland voice established for the Secretary of State to represent at meetings of the Joint Committee.

The Specialised Committee on Ireland/Northern Ireland

The operation of the Specialised Committees

The Joint Committee is supported by six Specialised Committees co-chaired by representatives of the EU and UK. The assumption is that those sitting on the Specialised Committees will be senior officials rather than elected representatives. It is standard practice in EU relations with non-member states that in bodies subordinate to the main decision making body – here the Joint Committee – the Commission represents the EU and senior government officials (not ministers) represent the non-member state. There is a Specialised Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland. The other five committees, many with direct relevance for Ireland/Northern Ireland, are:

- Committee on citizens' rights;
- Committee on the other separation provisions;
- Committee on issues related to the Sovereign Base Areas in Cyprus;
- Committee on issues related to the implementation of the Protocol on Gibraltar;
- Committee on the financial provisions.

According to Article 165 of the Withdrawal Agreement, unless the co-chairs decide otherwise, the Specialised Committees shall meet at least once a year but additional meetings may be held at the request of the EU, the UK or of the Joint Committee. The meeting schedule and agenda of the Specialised Committees shall be set by mutual consent.

According to Art.165(3), 'The Union and the United Kingdom shall ensure that their respective representatives on the Specialised Committees have the appropriate expertise with respect to the issues under discussion'. In the *New Decade, New Approach* document, the UK committed to allowing representatives, presumably officials from the NI Civil Service, to attend the Specialised Committee on Ireland/Northern Ireland (which is a body composed of officials overseeing the operation of the Protocol) [Annex A:9]. As per the Joint Committee, these invitations will happen only in instances where the Committee concerned is discussing Northern Ireland-specific matters and which is also attended by Irish delegates.

The Specialised Committee may also receive proposals from the North South Ministerial Council and six North South Implementation Bodies and from 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 this way, the Northern Ireland Executive will not have a direct input into the work of the Specialised Committee except where invited to be part of the UK's delegation or when come through the NSMC.

Recommendations

- [The UK should consider including representatives from Northern Ireland in delegations to other Specialised Committees when they are discussing matters of direct relevance to Northern Ireland, e.g. when the Specialised Committee on citizens' rights is discussing frontier workers.](#)

The remit of the Specialised Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland

From the entry into force of the Withdrawal Agreement, the Specialised Committee on Ireland/Northern Ireland will be responsible for:

- facilitating the implementation and application of the Protocol;
- examining proposals regarding the implementation and application of the Protocol from the North South Ministerial Council (NSMC) and its six North South Implementation bodies, which cover aspects of policy and governance relating to transport, agriculture, education, health, environment, and tourism. These include Waterways Ireland, the Food Safety Promotion Board, SEUPB and InterTrade Ireland;
- considering ‘any matter of relevance’ brought to its attention by designated bodies relating to the implementation of the Protocol’s human rights provisions;
- a broader power to discuss ‘any point...of relevance’ to the Protocol that ‘gives rise to a difficulty’, as raised by either the UK or EU;
- making recommendations to the Joint Committee as regards the functioning of the Protocol.

With regular meetings, the Specialised Committee will be the main vehicle for work and dialogue relating to Ireland/Northern Ireland after Brexit. The nature of its work ensures the respective delegations are anticipated to contain mostly experts rather than political representation.

The Withdrawal Agreement (Art.165[4]) notes that ‘The creation or existence of a specialised committee shall not prevent the Union or the United Kingdom from bringing any matter directly to the Joint Committee.’ It is important that the existence of the Specialised Committee on Ireland/Northern Ireland is not allowed to slowdown a matter that requires a high-level decision by mutual consent, rather than a recommendation. One might expect that such an issue arises from a direct concern from Ireland.

Recommendations

- Assuming the level of representation is officials, Northern Ireland should be represented, with speaking rights, in all meetings of the Specialised Committee by relevant senior officials from the Northern Ireland Civil Service.
- It would be useful if a series of themed/sectoral groups could be established under the Specialised Committee in order to focus expertise on the different parts and implications of the Protocol. This would enable better scope for direct representation from Northern Ireland stakeholders and experts.
- There should be mandatory communication of Commission proposals relevant to the functioning of the Protocol to the Specialised Committee.
- Experts or other persons can be invited to provide information on specific subjects. The NI Executive should be permitted to determine which experts and other persons with subject expertise should accompany senior officials to meetings.
- NI Assembly should receive reports from UK government and NI Executive on all meetings of Specialised Committee.

Joint Consultative Working Group

The operation of the JCWG

Reporting to the Specialised Committee on issues related to the implementation of the Protocol is the Joint Consultative Working Group (JCWG). The working group comes into being on exit day, but the provision that it meets ‘at least once a month’ does not come into force until the Protocol is enacted (Curtis et al. 2019: 54). The JCWG exchanges information and acts as a forum for mutual consultation in respect of the Protocol between the UK and the EU. The focus is on ‘planned, on-going and final relevant implementation measures’ relating to changes in EU or UK acts covered by the Protocol.

The working group shall be composed of representatives of the EU and the United Kingdom and shall carry out its functions under the supervision of the Specialised Committee, to which it shall report. As with the other Protocol bodies and committees, the make-up of the UK delegation potentially includes roles for Northern Ireland officials and/or representatives.

The working group shall be co-chaired by the EU and the United Kingdom, and shall meet at least once a month, unless otherwise decided by the EU and the United Kingdom by mutual consent.

The potential value of the JCWG

The JCWG will be an important body for ensuring the interests of Northern Ireland feature in EU consultative fora. It will meet more frequently than either the Joint Committee or the Specialised Committee and so has potential for providing officials from Northern Ireland with valuable opportunities to develop networks of contacts with EU officials. This can supplement other informal mechanisms for ensuring Northern Ireland interests are fed as effectively as possible into EU decision-making process.

Given the loosely defined nature the Joint Consultative Working Group (JCWG), there is a lack of clarity regarding how it would actually work, especially given that the rules of procedure for this body were yet to be defined. This needs to be done carefully to avoid tensions with some of the existing bodies created under the B/GFA over who has jurisdiction over certain issues. And although the JCWG provides potential routes for influence with the EU, it is still only consultation as a third state. There are some means to ensure it functions as well as possible, from Northern Ireland’s point of view.

Recommendations

- There should as a rule be representation from relevant B/GFA Strand II and Strand III bodies at JCWG meetings.
- A secretariat, or perhaps a rapporteur, could be established to try and filter out some of the more politicised or inconsequential contributions a body such as the JCWG is likely to attract. Such a position would have to be entirely apolitical and technical, and would be responsible for investigating submissions to the JCWG for their validity and relevance to the body’s remit.²⁹

29 One model recommended for this body was the Dutch model of rapporteurs on Brexit, who perform a similar function.

- The JCWG could adopt a social partnership approach, as an absence of civil society representatives from the body could potentially have serious repercussions for its legitimacy.³⁰
- The access of ‘experts’ to the JCWG should not be limited to ‘officials’ but be specified more precisely in terms of interest groups. Such groups must be inclusive of human rights bodies. It is also recommended that senior representatives of professional/umbrella bodies for the respective sectors are identified as ‘the experts’ to appear in front of JCWG.
- The Joint Committee, Specialised Committee and JCWG should provide regular detailed reports on Protocol’s implementation to the NSMC, North/South Inter-Parliamentary Association and British-Irish Parliamentary Assembly and any NI or cross-border forum for social dialogue. Representatives of the Joint Consultative Working Group are to come from the UK and the EU. If the rules follow those of other committees, the representatives from both sides will have ‘appropriate expertise with respect to the issues under discussion’.
- Participation in meetings should not be limited to officials. To ensure effective representation of sectoral expertise from Northern Ireland participants should include representatives of relevant trade and professional bodies and interest groups.
- Effective oversight of the JCWG should be established, with UK representatives reporting orally and in writing to the relevant committee of the NI Assembly.
- Mechanisms should be established within Northern Ireland to ensure that relevant trade and professional bodies and interest groups are consulted by officials from Northern Ireland attending meetings of the JCWG.

Arbitration Panel and the CJEU

Reaching consensus on disputes arising from the WA is a core function of the Joint Committee. If, however, consensus is not possible an arbitration process is codified within the WA. Arbitration commences if after three months no resolution to a dispute sent to the Joint Committee has been reached by consensus. The EU or UK must formally lodge the specific complaint with the other party and the International Bureau of the Permanent Court of Arbitration. Then, under an arbitration procedure, the Joint Committee would be required to establish an arbitration panel. Nominees would ‘possess the qualifications required for appointment to the highest judicial office’, and possess specialist knowledge or experience of EU and international law.

The panel would usually be expected to issue a binding decision within twelve months. If either party fails to comply with a ruling of the arbitration panel, then after the reasonable period of time the other party may request the arbitration panel to impose a lump sum or penalty payment as a temporary remedy to enforce compliance. If the party in breach fails to pay, or to abide by the panel’s decision, after a further six months then the other party may suspend obligations arising from the WA, other than those related to citizens’ rights. In matters where the arbitration panel requires an interpretation of EU law the panel must ask for the Court of European Justice’s ruling on the matter.

30 One model recommended for this body was the Dutch model of rapporteurs on Brexit, who perform a similar function.

4. Influencing the EU from the outside

Northern Ireland's Relationship with the EU Post-Brexit

A dynamic arrangement

EU agreements with non-member states provide for two main approaches to the adoption and implementation of EU legislation: *static* and *dynamic*. In *dynamic arrangements*, the adoption of relevant new or amended EU legislation (the *acquis*) is automatic. In exchange, institutional arrangements are put in place to ensure a degree of 'decision-shaping' influence for the non-member state over the new or amended *acquis*.

The best example of a dynamic arrangement can be found in the European Economic Area (EEA). The EEA Agreement involves a complex two-pillar system between the EU and the three member states of the European Free Trade Association (EFTA) that participate in the EEA, namely Iceland, Liechtenstein and Norway. In these EEA-EFTA states, common rules are continuously updated by incorporating new EEA-relevant EU legislation into the EEA Agreement.

In *static arrangements*, the EU *acquis* is only adopted at certain predefined points of time, e.g. at the time of an agreement's entry into force, and subsequently by joint agreement of the EU and the non-member state concerned. The non-member state generally has little or no ability to shape the relevant legislation, but has some control over which aspects of the EU *acquis* they are willing to implement.

States with essentially static arrangements with the EU include Andorra, Monaco and San Marino (the so-called 'AMS' states) and states that are part of the EU's Eastern Partnership (e.g. Ukraine, Georgia and Moldova). Some states can have primarily static arrangements with the EU, but with dynamic adaptation provided for in certain areas. For example, the EU-Turkey Customs Union contains dynamic aspects, given that Turkey must maintain alignment with the EU's common external tariff. The EU-Swiss relationship also includes dynamic adoption of aspects of the EU *acquis* relating to Schengen and air transport. The AMS states are also required to maintain alignment with aspects of the EU *acquis*, most notably regarding use of the Euro.

Dynamic arrangements generally provide for a greater degree of decision-shaping. If a state is required to adopt automatically aspects of the EU *acquis*, the EU considers it appropriate for that state to have some limited influence over that legislation. Northern Ireland, according to the terms of the Protocol, is set for some dynamic alignment with the EU. Its small size and unique circumstances also mean that it could aim for exemptions from certain legislation. However, it is more likely to have effect by not looking for exemptions as a rule but instead seeking to have decision-shaping influence similar to that that other dynamic states have. This by rights would mean a decision-shaping role with the EU. But it is constrained by three key points:

- (i) it is a sub-national region, with limited resources and capacity;
- (ii) its representation vis-à-vis the EU will come primarily through the UK government, not directly;
- (iii) the UK as a whole will have a different trade relationship with the EU post-transition, compared to NI, and this may mean that it is the UK-wide rather than the regional interests that predominate in the future scope for decision-shaping.

In this section, we consider the options open to Northern Ireland, drawing on experience and lessons from other non-member states who have close and particularly dynamic alignment with the EU.

Direct Input into the EU as a Non-Member State

Institutional arrangements in the EEA

During the transition period UK representatives, or experts designated by the UK, may, upon invitation, exceptionally attend meetings of EU bodies. This exceptional allowance for a non-member state will be made when the EU decides ‘the presence of the United Kingdom is necessary and in the interest of the Union, in particular for the effective implementation of Union law during the transition period’ (WA Art 128[5]).³¹ This condition will end at the end of the transition period. From that point on, the UK will have no automatic right to participation or attendance in EU bodies and institutions other than those established by the Withdrawal Agreement (see previous section).

Non-member states with the closest relationship to the EU are those that are in the European Economic Area (EEA) but even the three EEA-EFTA states do not have direct access to the EU’s central legislative bodies.³² However, they are deeply affected by EU decisions. The *homogeneity principle* of the EEA sees the dynamic incorporation of relevant new *acquis* into the EEA Agreement and thus to be applied by the EEA members. It also requires that interpretation of this *acquis* be as uniform as possible. The *two-pillar system* facilitates this homogeneity by creating bodies among the EEA-EFTA states that essentially mirror relevant EU institutions.

There are four shared EEA bodies. The *EEA Council* meets twice a year at ministerial level and provides the political impetus for the development of the EEA.³³ The *EEA Joint Committee* is attended by officials. It meets approximately ten times a year and is responsible for the ongoing management of the EEA, as well as deciding about the incorporation of new or amended EU legislation into the EEA agreement.³⁴ The *EEA Joint Parliamentary Committee* contains members of both the European Parliament (EP) and the parliaments of the EEA-EFTA states. Finally, the *EEA Consultative Committee* contains representatives from the ‘social partners’ of the EU and EEA-EFTA states.³⁵ It is possible, at least theoretically, for social partners in the EEA-EFTA states to use this route to attempt to shape decision-making in the EU.

- 31 The arrangements provided for in Article 128(5) WA to apply in the transition period: ‘representatives or experts of the United Kingdom, or experts designated by the United Kingdom, may, upon invitation, exceptionally attend meetings or parts of meetings of the committees referred to in Article 3(2) of Regulation (EU) No 182/2011, meetings or parts of meetings of Commission expert groups, meetings or parts of meetings of other similar entities, and meetings or parts of meetings of bodies, offices or agencies, where and when representatives or experts of the Member States or experts designated by Member States take part’.
- 32 An exception concerns Justice and Home Affairs, where the EEA-EFTA states (and Switzerland) have secured participation rights in the EU’s Council of Ministers.
- 33 In addition to assessing the overall functioning of the EEA Agreement, it provides a forum for broader political dialogue. Its relevance is formal and is generally limited by the brevity and low political profile of meetings.
- 34 The Joint Committee has the power to create subcommittees or working groups to assist it. In practice, these subcommittees function as a single committee, with several working groups beneath them, which are responsible for processing the EU legislation which is due to be incorporated into the EEA Agreement.
- 35 The Joint Committee has the power to create subcommittees or working groups to assist it. In practice, these subcommittees function as a single committee, with several working groups beneath them, which are responsible for processing the EU legislation which is due to be incorporated into the EEA Agreement.

Overall, however, there is no escaping the fact that, despite having the closest relationship with the EU of any non-member states, *the EEA-EFTA states have no formal access to EU decision-making processes*. Moreover, even though the EEA-EFTA states have a wide-ranging institutional relationship with the EU, it does not mean that the institutions, particularly the more high-profile – relatively speaking at least – work effectively. Some bodies that could potentially be used for decision-shaping (such as the EEA Joint Parliamentary Committee) are undermined by the fact that not many MEPs turn up to its meetings. Within the wide range of formal mechanisms provided for decision-shaping by the EEA states, Frommelt (2017: 63-4) maintains that expert groups and comitology committees are two of the most important bodies for decision-shaping.

The decision-shaping process

If the EEA states are to influence the content of the legislation that applies to the EEA, they need to engage in the process by which it is drafted. This has become known as the *'decision-shaping' process*. This is defined by the EFTA Secretariat as 'the process of contributing to and influencing policy proposals up until they are formally adopted' by the EU (EFTA Secretariat 2009: 20).

The EEA Agreement contains explicit provisions requiring the EU to consult with the EEA-EFTA states when drafting legislation that will likely be considered 'EEA relevant' by the EEA Joint Committee. As soon as new legislation is being drawn up, the European Commission 'informally seek[s] advice from experts of the EFTA states in the same way as it seeks advice from experts of the EC member states for the elaboration of its proposals' (Article 99 EEA). The European Commission also 'ensure[s] experts of the EFTA states as wide a participation as possible according to the areas concerned, in the preparatory stage of draft measures to be submitted subsequently to the committees which assist the EC Commission in the exercise of its executive powers' (Article 100 EEA).

There are several different groups, committees and routes through which the EEA-EFTA states are consulted by the EU, and many of these areas can be used by the EEA-EFTA states to try to shape decision-making in the EU.

Expert groups: EEA-EFTA states participate in many of the 750+ expert groups established by the Commission to assist in the drafting of new legislation. These groups comprise independent experts who provide input based on their areas of expertise, be it judicial, ethical, scientific etc. As the *experts are not official government representatives, their positions are theoretically meant to be independent of those of their respective states, but often there is significant overlap between their positions and those of their governments*. These expert groups – EEA-EFTA states take part in more than 300 – are advisory and do not take decisions or vote, and everyone who participates has the same formal status.

'Participation in expert groups provides several benefits for the EEA-EFTA States. It gives access to important information from the Commission and makes it possible to clarify and communicate national positions at an early stage. It also provides a key channel to influence and contribute to emerging EU policies and legislation.' (EFTA Secretariat 2009: 22).

Secondment of experts: EEA-EFTA and other states also second national experts to the European Commission and other EU institutions. These experts are staff employed by a public administration or an international government organisation, and the EU uses their expertise in a particular field.

Secondment can be for between six months and four years, and during their secondment these experts work under the instructions of EU officials and are ‘governed by rules that help avoid the risk of any conflicts of interest’ (Frommelt 2017: 59).

Seconded national experts (who make up approximately 10% of the Commission’s administrative staff) mainly see themselves as representatives of their state governments, and therefore primarily advocate their home countries’ interests. For the EEA-EFTA states, the most important function of the seconded experts is not actually to influence EU legislation in their favour, but rather establish professional networks and gather information that they then take back to their home countries.³⁶

Submitting comments: EEA-EFTA states also submit comments and written contributions to the European Commission in order to express their views on a specific legislative proposal or policy initiative. Between 2001 and 2016, the EEA-EFTA states sent 159 joint comments to the EU. Many of the EEA-EFTA states also submit comments and written contributions individually. For comments to have influence, they need to be submitted before the adoption of a legislative proposal, or else soon thereafter and ideally before a draft report is discussed by a committee in the EP. Additionally, comments can be submitted before the Council has agreed on a common position.

Committees: In addition, the EEA-EFTA states can also exercise influence in various Commission committees. Their influence in comitology committees and expert groups has been described as the ‘two most important elements of decision-shaping’ (Frommelt 2017: 63-4). There are two main types of committee in which the EEA Agreement provides for participation: programme committees and comitology committees.

Programme committees are responsible for the development and management of the EU programmes, and the EEA-EFTA states participate in 16 such programmes. Participation in programme committees can provide very important routes to decision shaping, with certain sub-national representations making particular use of them. The European Commission is responsible for the implementation of detailed technical measures for certain legislative acts, and they are assisted in this task by ‘comitology’ committees. These committees were established to allow the Council to supervise the implementation work (although their ability and willingness to do so has been debated), and they have the power to approve or reject the measures proposed by the Commission. The EEA-EFTA states only have observer status on these committees, so no voting rights.³⁷

Agencies: EEA-EFTA states also participate in some EU agencies. Where they do, they normally have a seat on the management board, and in some instances on the agency’s Board of Appeal. Participation involves the EEA-EFTA states contributing to the agency’s budget and ensuring their relevant national laws correspond to EU law. Most of these agencies are decentralised agencies (also known as regulatory agencies), and they regulate a number of highly sensitive areas such as police cooperation, disease control, aviation safety etc. Participation in an EU agency usually provides access to certain committees or other bodies of the agencies, but no right to vote. This is further discussed below.

36 In March 2017 there were 49 EFTA state experts seconded to the European Commission, most of whom were working on EU programmes.

37 Jonsdottir (2011: 43-4) found that, whilst almost two thirds of the comitology committees were available to the EEA-EFTA states, their engagement with these committees was less than they were entitled to.

Participation in EU Agencies

EU agencies are not formally among the *political* institutions of the EU. Nevertheless, they form an important part of its institutional landscape. Many of them help to prepare crucial decisions for the EU Commission, ‘carry out specific legal, technical or scientific tasks’, help ‘to implement EU policies, supervise the application of EU law’, ‘provide in-depth expertise to improve policy-making’, and some may even take binding decisions (von Ordanza and Borrett 2018: 5). As such, they are important means of influence, including for non-member states.

There are two types of EU agency: 6 executive and 36 regulatory agencies. Executive agencies help manage EU programmes and are under the full control of the Commission. It is the regulatory agencies, however, that have an important role in supporting and regulating the EU single market as well as in coordinating between the member states in specific policy areas. The decision-making powers of the regulatory agencies are important but limited in their technical or preparatory nature. Final decisions are taken by the Commission.

The cooperation of EU agencies with third countries tends to be limited to exchanges of technical expertise, and to information and staff exchanges. Any agreements with third countries are typically Memoranda of Understanding (MoU). These are not legally binding and can be terminated by either party with little notice. It is important to note, that there is no precedent for a non-member state to have a direct say in the decision-making process of an EU agency via any form of voting rights within them.

The UK’s withdrawal from the EU means that it has ceased to be a member of these agencies. The UK Government has expressed an interest in continuing its membership in and cooperation with some of the EU agencies, though it has been noted that ‘the terms of such engagement are ill-defined’ (House of Lords 2019: 24). Regulatory agencies in particular remain relevant to Northern Ireland’s relationship with the EU after Brexit. This is because under the Protocol, the UK in respect of Northern Ireland will be subject to the relevant decisions and authority of the EU agencies in those areas of the *acquis* covered by the Protocol.

A worst case scenario for Northern Ireland is outlined by von Ordanza and Borrett (2018: 27), who suggest that even ‘after the UK has concluded a general framework for the relationship to the EU, it will both have to duplicate the functions currently fulfilled by the 36 EU agencies and negotiate an individual cooperation arrangement with most of them’. This risks enormous lag for Northern Ireland, which will be directly affected by the work of EU Agencies in several key market sectors. [See Annex 2].

Making the most of limited but direct influence

There is a ‘broad consensus that the greatest influence can be achieved at the early stages of EU policy-making. This applies in particular to the drafting of an EU act by the European Commission. After the European Commission has submitted the proposal of an EU act to the EU legislators, the possibilities for the EEA-EFTA states to influence its content diminish’ (Frommelt 2017: 67). Influence at the later stage of EP and Council engagement in EU decision-making is also important, although opportunities to influence the Council are limited, especially when compared to the EP. The fact that the EEA-EFTA states dedicate resources to lobbying the EP reflects the increased role that the EP has in EU decision-making, something that has not been reflected in any adjustment to the institutional arrangements provided for in the EEA Agreement.

However, each of the EEA-EFTA states is relatively small in comparison to many if not most or all of the EU member-states. They do not have the resources to participate in all of the committees and agencies they are entitled to attend, and therefore must prioritise their participation.³⁸ Furthermore, ensuring the EU takes the opinions of non-member states seriously generally depends on the level of expertise that the representatives of those states bring to meetings.³⁹

The potential for direct influence on the EU from Northern Ireland

Sub-national regions have a double disadvantage: size and profile. Poor political relations between the parent state and the EU can greatly hinder diplomatic relations for offices based in Brussels. However, it should be remembered that Northern Ireland is in a legally unique position (thanks in part to the B/GFA) and its closeness to Ireland as a member state offers the scope for a closeness to influencing the EU that is exceptional. It is possible for Northern Ireland to prepare for direct influence, recognising that this will come in different forms and that now it is somewhat in the gift of the EU to offer.

To prepare for this as best as possible, Northern Ireland will need to concentrate on three things. First, *what the UK needs to ask for Northern Ireland at the EU level will have to be different and more ambitious to what it asks for itself* in terms of channels of influence. Second, *Northern Ireland will need to be proactive in monitoring the legislative agenda of the EU* because it will be seeking a decision-shaping role. This will need resources and access to relevant platforms. Finally, it should be recognised that *decision-shaping at the EU level tends to be much more effective through engagement in technical matters*, as opposed to over heavily politicised issues. In relation to this, and taking lessons from experiences of the Article 50 process, Northern Ireland bodies seeking influence in the EU should seek to establish a reputation as having something to offer, e.g. publishing reports in areas of expertise as an essential tool for lobbying. *This will require growth in Northern Ireland's local base of (technical) expertise*; to date, given its size, Northern Ireland has relied a lot on expertise from elsewhere in the UK or, to some degree, in Ireland. This is a medium-term challenge for the region that could bring long-term benefit in terms of informal influence.

Recommendations

Make the most of the unique status and multilevel governance of the B/GFA

- Institutions of the B/GFA, including the Northern Ireland Executive, the North
- South Ministerial Council, and the British-Irish Intergovernmental Conference, should be enabled to make written statements to the European Commission prior to the adoption of legislative proposals that will directly affect the operation of the Protocol, e.g. relating to the regulation of goods or telecommunications.

38 Liechtenstein has by far the least resources of the three EEA-EFTA states, and so prioritises its participation in committees and expert groups by three levels of priority – one being the highest, three being the lowest. As of January 2017, Liechtenstein had identified 57 bodies as priority one, 111 as priority two, and 119 as priority three. This gives some indication of the scale and complexity of the task facing Northern Ireland even in mapping out, let alone prioritising, potential access to such groups.

39 'It is likely that the extent to which the EFTA states are taken note of depends on their degree of expertise on the subject and the extent to which they have a clear interest in the area' (Jonsdottir 2013: 41).

- It is necessary to clarify the role EU ‘single market’ agencies will play with regards to Northern Ireland. If the UK is not represented in the decision-making process of the agencies to which Northern Ireland may be bound, then special arrangements should be made for representation from Northern Ireland in regulatory EU agencies that are relevant to the areas of Protocol.
- The Committee of the Regions has been excellent formal platform for Northern Ireland representation of local government and a case should be made for continued representation on it.
- Representation of the Northern Ireland position to the EU via Dublin, although acknowledged as potentially politically sensitive, is espoused by business at both formal and informal levels.
- Representation through EU funding Programmes, which Northern Ireland has traditionally benefitted from through the work of the SEUPB, has ensured a high degree of both formal and informal access and should be built upon. This gives NI a unique formal and direct connection to EU programmes.

Work with the European Parliament

- Arrangements should be made for effective parliamentary scrutiny of the Joint Committee. This should be a UK-EU Joint Parliamentary Committee, which could contain members of the NI Executive, UK parliament, and EP.
- The NI Assembly and European Parliament could establish ad hoc joint committee to review implementation of the Protocol.
- A UK-EU Parliamentary Committee could be established either as part of the implementation of the WA or as part of the future relationship to regularly consider the implementation of the Protocol. It could also establish a COSAC-type arrangement involving NI Assembly and Oireachtas to regularly review implementation of the Protocol.
- There could be an annual debate in the European Parliament on the Protocol.

Agencies and committees

- By way of a complement to the JCWG and in line with proposed arrangements in the draft Withdrawal Agreement of February 2018, the principle of UK participation in Commission Committees and expert groups could be extended beyond the transition period with regard to Northern Ireland and obligations under the Protocol.
- Access should be maintained for NI civil servants to the agencies and bodies which the UK has access to during the transition period. Through these bodies, NI civil servants could exercise a degree of influence, as has been seen in EEA/Swiss representation in similar bodies. Note that access to certain EU committees is only permitted if you are aligned in that area of the *acquis*, so this will be different for NI compared to the UK as a whole.

Invest in and use technical expertise

- The UK-EU future relationship agreement should contain explicit provisions requiring the EU to consult with the UK when drafting legislation that will likely be considered ‘Protocol relevant’ by the UK-EU Joint Committee and/or Specialised Committee on Ireland/Northern Ireland. This would mean the European Commission ‘informally seeking advice’ from experts on and from Northern Ireland (including UK and Ireland).
- The UK-EU agreement should also ensure experts from Northern Ireland ‘as wide a participation as possible’ in the preparatory stage of draft measures relevant to the Protocol before they go to EU committees.
- The UK and Ireland should make a case for Northern Ireland experts to be included in relevant advisory expert groups and to have observer status on certain committees.
- The practice of secondment of experts from Northern Ireland to EU institutions should be continued and supported.
- The process of prioritisation and best use of expertise should be one that is managed by the Northern Ireland Executive.

‘Strand IV’

- Consideration should be given to the establishment of a ‘Strand IV’ of the B/GFA. This could involve a British-Irish Forum for External Relations or such like. It can be used to coordinate prioritised positions from Strands II and III when it comes to informing the position of the UK and Ireland. It could also oversee the protection and operation of the 1998 Agreement in light of changes to the external environment, e.g. US-UK FTA, UK-EU Security partnership.
- To facilitate all this, the NI Executive should receive from the UK government all relevant papers and be formally consulted in advance on the agenda for and positions to be taken at meetings. The Executive should also be formally consulted on issues of relevance as part of the written procedure provided for in the Rules of Procedure for the Joint and Specialised Committees.

Means of Indirect Influence for Non-Member States

The work of regional offices in Brussels

A well-staffed, visible presence in Brussels, and a reputation for expertise on specialised issues, are two of the strongest factors in ensuring that the EU is receptive to a regional office’s representations. A Brussels-based office can enable a region to gain a reputation in certain areas of technical expertise.⁴⁰ Core functions for these offices include increasing the profile of the region, explaining its unique needs, and gathering information for officials, policy-makers and stakeholders ‘back home’, particularly on upcoming EU legislation.

40 Some of the offices interviewed for this research had managed to achieve a situation in which the Commission actually consulted them when considering specialised legislation.

Attempting to influence EU legislation is another essential role for non-member state offices based in Brussels. Many non-member-state offices in Brussels send letters and comments directly to the Commission, but their ability to do so depends on the capacity of the office. Non-member-state offices in Brussels also engage with MEPs. Some have staff dedicated to these relationships; some organise trips for willing MEPs to their region. A key purpose is to secure ‘friends’ for when issues come before the EP.⁴¹ Other offices are more selective and prioritise interacting with MEPs only when legislation particularly relevant to their state is on the agenda. *This requires effective monitoring of the legislative agenda.*

A few non-member-state offices do not actively lobby the MEPs, and this is often due to capacity. *Many of the offices of non-member-states in Brussels suffer with capacity issues, and struggle to monitor effectively the legislative pipeline of the EU.* Some offices with a comparatively high level of formal access to decision-shaping opportunities are unable to take significant advantage of the opportunities presented to them simply because of a general lack of personnel. Conversely, it is possible for an office with less formal decision-shaping opportunities to lobby more effectively given the greater resources at its disposal. In some cases, offices with limited resources may rely on other routes through which to approach the EU institutions, e.g. the EFTA Secretariat for EEA matters.

Informal networking is an essential aspect of the effectiveness of EU decision-shaping. Non-member state offices in Brussels frequently host events both on their premises and around Brussels, which help develop good professional and personal relationships with individuals associated with the EU institutions. Events can be organised with a diverse range of interest groups and states.

Sustained and frequent interaction is important for developing relationships. Consistency appears to boost an office’s profile among EU personnel, and gradually informal networks can develop through presence in formal bodies. By returning the same individuals to meetings it is possible to develop a rapport, and for the representatives of EU institutions to develop trust with those individuals.⁴² This is particularly the case where the individual can demonstrate expertise and can provide constructive inputs into discussions.

Many non-member-state offices in Brussels try to develop *relationships with individual member states*. One well-staffed mission highlighted in interview how decent relations with individual member states allowed them some limited indirect degree of decision-shaping influence in the Council, the EU institution typically seen as most inaccessible to non-EU states. This particular office has multiple embassies across the member states, all working towards a set objective set by the national government. For offices with more limited resources, developing close relationships with the representatives of member states is challenging. However, where policy interests converge, opportunities exist to share information and positions, and use their respective institutional relationships with the EU to promote issues.

41 A 2018 survey of 230 MEPs, institution staff and ‘opinion formers’ found that 60% of respondents considered personal contacts ‘very influential’ and another 33% considered them to be ‘fairly influential’ in providing information for making informed decisions (ComRes/Burson-Marsteller 2018: 6).

42 For example, if a non-member-state consistently sends the same representative to a committee in which they have a right to attend but hold limited formal influence, it may be possible for that individual to develop professional relationships with the other committee members and to exercise a degree of decision-shaping informally outside of the meeting.

Lobbying

Direct lobbying of the EU institutions can give EU non-member-states access to institutions to which they are generally not afforded formal access. *Effective access to EU institutions is attributed to frequency of interactions, early participation and alliances with friends.* EEA states have found that waiting until the formal EEA process is too late – they need to participate early in decision-shaping (Gullberg 2015: 1544). Lobbying institutions is an essential part of this. Lobbying tends to be most effective at an early stage in the legislative process, especially during the Commission drafting process.⁴³

There are a large number of lobbyists who attempt to influence the EU.⁴⁴ Lobbyists focus their activities on the EP and the Commission. Generally, access to the Council and the European Council is limited, although some scope does exist for large bodies.⁴⁵ The EP is accessible due to the public nature of many of its proceedings and is important because of its increasing role in EU decision-making. The Commission is important because it initiates legislation and develops legislative and policy proposals. For almost all pieces of EU secondary legislation, the Commission has exclusive rights of initiative. Additionally, the Commission is the EU's competition regulator and the EU's negotiator of trade agreements with third states. Opportunities to interact with the Commission exist because it is eager to interact with lobbyists as a means of acquiring 'resources that are indispensable in order to fulfil its institutional role.' (Bouwen 2009: 22).⁴⁶

One study on lobbying in the EU found that third-country governments tend to have a low level of effectiveness in this regard: 'governments outside the EU cannot be relied upon to articulate a case effectively' (Burson-Marsteller 2005: 8). That said, national distinctions generally dissolve in discussions of a technical nature, although they tend to return when matters become more political. And political context matters: the more fractious relations are between the third state and the EU, the more difficult engagement with the Commission and other EU institutions becomes.

Transnational European associations and other representative bodies are often effective vehicles for lobbying and provide opportunities for sand other interests in both EU member and non-member states to be represented (Gullberg 2015: 1539). However, these bodies are only effective when interests align with those of other members and participants. Influence in Brussels can often depend on the size of an organisation, its economic significance, and experience: smaller groups can organise together to enhance their profile in all three respects.

Even the larger and well-resourced regions can miss opportunities for influence by poor lobbying practices, such as: providing inappropriate briefing materials; being too early or too late with their lobbying; failing to understand EU processes and procedures; and approaching the wrong person

- 43 However, some EEA-EFTA states use opportunities to seek exemptions once legislation is actually adopted, although this method is only moderately effective in ensuring that unfavourable legislation is not imposed. Exemptions can normally only be secured if the legislation has no reasonable function in the state concerned owing to its small size or geographical location. Exemptions are not seen as available to larger states.
- 44 In 2015, there were 138,000 individuals involved in lobbying the EU as part of their job, and 95,000 involved in lobbying the EU as a full-time job.
- 45 As non-member states, Switzerland and Norway spend by far the greatest amount of money on lobbying EU institutions. This has secured access and influence, particularly regarding the Commission and, to a lesser extent, the EP; access to the Council has been less readily achieved.
- 46 For example, the Commission occasionally approaches Norwegian regional representatives on certain issues for which they are deemed experts.

(ComRes/Burson-Marsteller 2018). *In instances of sub-national governments seeking to influence EU legislation and policy, strong message discipline is important.*⁴⁷ While regional representatives are not generally required to push the exact same message as the national government, it is generally recognised that it is more beneficial to have a degree of coordination.

Potential for Northern Ireland to have indirect influence at the EU level

Northern Ireland is a region with a unique profile and one which has been shown flexibility already through Brexit and indeed throughout its EU membership (Murphy 2014; Murphy 2018; Hayward and Murphy 2018). The Northern Ireland Task Force established by Commission President Barroso was intended to ensure that Northern Ireland made the most of its EU membership and built closer links with other regions and bodies in the EU (Hayward and Murphy 2012). This should have a lasting legacy. Many organisations in Northern Ireland have experience of engaging with specific EU committees (for example, ongoing liaison with the Committee of the Regions or the European Economic and Social Committee [EESC]). And a wide range of Northern Ireland organisations have long-standing links with other bodies centred upon and active in Brussels.⁴⁸ Making the most of such links will be vital.

The European Commission Office in Belfast played a vital liaison function in enabling communication between Northern Ireland and the European Commission. Crucially, it also helped to ensure that levels of awareness and understanding about the situation in Northern Ireland were good and up to date, including during the UK exit negotiations. This has now formally closed down and there is no permanent presence in the region as part of the EU Delegation of the European Union to the United Kingdom. This constitutes a significant loss for the indirect representation of Northern Ireland interests to Brussels.

The NI Executive Office in Brussels

Northern Ireland also has the advantage of already having a strong regional office in Brussels, with significant networks and experience of its own. Effectiveness in influencing decisions at the EU level for smaller states and non-EU states is generally a result of frequent interactions, early participation and careful alliances. The Office of the Northern Ireland Executive in Brussels needs to be equipped to make early representations to the Commission when legislation is being drafted. Because capacity will be an issue (it cannot flood Brussels with personnel), prioritisation from the NI Executive for the work of its Office will be essential, e.g. targeting of specific issues and establishing a reputation for expertise in certain areas. Given its small size, consistency in personnel is particularly important as a means of building relationships and trust. It is also important to develop strong personal and professional relationships with EU staff outside of the formal institutional frameworks.

47 One office with a large staff and limited regional representation (and a wide range of offices based in other European capitals) told us that it considers message discipline and coordination one of the most important aspects of their lobbying success.

48 For example, one stakeholder reported productive engagement with the Commission of the Bishops' Conferences of the EU (COMECE). These have the potential to enable ongoing lobbying/decision-shaping/information-sharing functions for Northern Ireland bodies after Brexit. Similarly, another participant pointed out that Belfast was a member of a series of informal city networks within and beyond the EU (such as the 100 resilient cities, Eurocities, the global network of mayors, etc.). These relationships, it was suggested, should now be actively mapped and become an integral part of the city's strategy after Brexit. Participants also pointed out that business organisations such as the CBI and IBEC already have an office in Brussels which could and should be further utilised.

The NI Executive will also have to take care to develop and enhance relationships with other regions and states, especially non-member states, as they may be more open to collaborating on legislative issues at EU level. The NI Office will have to be prepared for scenarios in which relations between the UK and EU (and, indeed, Ireland and EU) are better and are worse. Even if political relations are under strain, it will need to be in such a position that its staff and experts are still trusted and communicated with. Diplomacy will be essential. Even if there are overt tensions in the UK-EU relationship, Northern Ireland will have to be careful not to lobby contrary to the UK's interests but yet still be able to set out its own stall, given its unique position within that relationship. A clear set of its own priorities will thus be essential. Overall, however, there is no escaping the fact that what will make the biggest negative or positive effect will be the UK's general approach to the EU and whether the conditions for close partnership, trust and goodwill are fostered.

Recommendations

- Priority should be given to equipping and preparing the Office of the NI Executive in Brussels for a new and, if anything, more important role under the Protocol.
- Northern Ireland needs to be selective and realistic in its efforts to shape EU policy. It will need to have: strong message discipline (including with the rest of the UK), a good understanding of EU processes, appropriate briefing materials, a good sense as to the right time to lobby, information as to whom to approach, and good relationships with personnel in Brussels that extend beyond EU bodies (including other sub-national regions).
- Continued participation/membership in European-wide sectoral or thematic bodies and federations is an important route of representation of Northern Ireland's interests at the EU level, including from outside NI public institutions (e.g. the UFU as a member of the Farming Unions of Europe, or PSNI membership of police associations).
- A diplomatic EU 'presence' should be re-established in Northern Ireland. This need not necessarily have a public-facing office but it should be there not only to contribute, as appropriate, to the implementation of the Protocol but also to fill the liaison/communication gap left by the loss of the Commission Office in Belfast. This will aid understanding and appropriate sensitivity at EU level. Moreover, the fact that it is in Belfast is a constructively 'neutral' location for NI liaison, rather than relying solely on presence in London and Dublin.

5. Building on from Northern Ireland's experience to date

Lessons from the Article 50 Process and Dysfunctional Devolution

The matter of how Northern Ireland's views are represented and its interests taken on board in the period after transition is one of concern to a wide range of actors in the region. It is therefore pertinent to take lessons from the ways in which the Article 50 process was experienced in Northern Ireland. This section draws on research with c.100 stakeholders across a wide range of sectors in Northern Ireland. It brings forward analysis from the experiences from that process to make recommendations about what needs to be done for the post-transition phase to ensure good governance for the region.

Cooperation among Northern Ireland's social partners

It is clear that the process of the UK's withdrawal has had a stimulating effect on the options for engagement between civil society – broadly defined – and different levels of governance for Northern Ireland. This is interesting because it has come in the context of a lack of formal representative devolved governance for the region. It is undeniably the case that such engagement has arisen from concern about the potential negative effects of Brexit on Northern Ireland, rather than in relation to future opportunities.

Partly because of the lack of functioning devolved institutions, engagement and communication with and among civil servants in Northern Ireland increased in the period 2017-2020. For the public sector more generally and for local government, engagement with particular NI departments as well as departments in the other devolved regions has been important. For example, a healthcare respondent mentioned the Department of Health in Northern Ireland, the EU Exit planners in the Department of Health and Social Care England, and the Departments of Health in Scotland and Wales. The effectiveness of these relationships has been enhanced by a growth of generally informal social partner networks within and across sectors affected by Brexit.

An important development in the Article 50 process – engendered in part by the urgency and intensity of Brexit-related concerns and by the absence of functioning political institutions in the region – has been the emergence of a more structured engagement between the key social partners in Northern Ireland (including trade unions, business lobby, the voluntary and community sector). Such a social partnership approach was seen by stakeholders as 'positive', 'novel' and 'important', and as demonstrating broad agreement regarding the negative effects of Brexit on Northern Ireland.

Informal alliances among business organisations have become a strong feature of Northern Ireland's representation and were described as 'extremely helpful' for and beyond Brexit-related engagements. These informal alliances include both 'ad hoc business groupings' among smaller bodies and long-standing associations, such as the Northern Ireland and the British Retail Consortia, the Confederation of British Industry, and the Northern Ireland Chamber of Commerce.

Indeed, we asked the respondents to our online survey if they were aware of new networks or initiatives relevant to the Brexit-related priorities of their organisation/institution which may have emerged or been set up since the 2016 Referendum. A wide range of examples were offered, including everything from the Central - Local Government Political Forum coordinated by NILGA; the Ministry for Housing, Communities and Local Government Brexit Delivery Board; informal new inter-church networks; the Border Corridor Group comprising 11 Local Authorities; the Inter-Parliamentary Forum on Brexit; a strengthening of Organised Crime Task Force (OCTF) partnerships; and the Brexit Committee at Belfast City Council level using direct established relationships with European cities. Many of these initiatives enjoy direct connections to departments or institutions in the UK and/or Ireland.

This may be looked upon as an important indicator of the readiness and ability of civil society and business in the region, should it be called upon, to provide advice for and be engaged in the mechanisms for governance and consultation provided for in the Withdrawal Agreement.

Lessons for NI Relating to UK Engagement

Access does not equate to influence

No one is under any illusion as to the importance of Northern Ireland in the UK government's considerations of its future relationship with the EU compared to other pressing concerns that have more immediate impact on the economic interests of the UK as a whole, not to mention party political electoral prospects.

Most of our stakeholders perceived there continues to be a lack of knowledge and understanding of Northern Ireland's distinct circumstances among many in the political establishment in London. Participants repeatedly expressed a sense of frustration with their experience of explaining Northern Ireland's position to the UK government who was perceived as 'unreceptive'. These views were indeed confirmed by a recent Institute for Government Report suggesting that '[i]n Westminster and Whitehall, the NI-specific implications of policies or issues are rarely considered, the Northern Ireland Office (NIO) is marginalised, and there is a poor general understanding of local issues' (Sargeant and Rutter 2019: 7).

In this context, direct engagement with Westminster and Whitehall entailed an education/awareness-raising process first, and then an information-sharing and lobbying process second. During the long hiatus in the functioning of the devolved administration, this became particularly important. It included submissions to and appearances before committee inquiries, participation in central departmental workgroups, and the canvassing of MPs, Peers, government ministers and civil servants, among others.⁴⁹ Ultimately, a range of lobbying techniques were used by the attendees, who were often uncertain which (if any) had been effective.

49 Such inquiries initiated by Westminster Committees included the House of Lords EU Committee and, from the House of Commons, the Northern Ireland Affairs Committee [NIAC], the All Party Political Group on Post Brexit Funding [APPG], and the Exiting the EU Committee.

Most participants stressed that being able to talk to legislators does not necessarily mean that they are willing to amend legislation/policy accordingly. There were mixed experiences of engaging with officials in London. Some stakeholders described British officials who had visited Northern Ireland as ‘listening to but not hearing’. That said, some departments in Westminster were seen to have performed well, with the establishment of engagement initiatives (such as the Future Food Farming and Forestry at DEFRA or the EU Exit seminars from the Department for Business, Energy and Industrial Strategy) considered positive developments.

One business respondent noted a significant difference in the approach of the UK compared to the Irish government to stakeholder engagement:

[T]he Brexit Stakeholder Forum that has been set up in the Republic has been very useful and would hope that it continues after Withdrawal until the conclusion of the future trade talks at a minimum. Similar engagement at a UK level has been less forthcoming. While we have met with relevant Departments and partaken in UK government briefings, these are not at the same level as those experienced with the Irish government. Engagement at the previously described level in the UK is quite closed with many interest groups excluded from the conversation.

Correcting this imbalance could be considered useful to the UK in the transition period, including as it negotiates its future relationship with the EU, even if only to inform if not to consult.

Various routes of influence

Input into the Article 50 negotiations was most particularly channelled through UK government departments by public sector actors. As would be expected, levels of engagement with different government departments varied according to the nature of the work of the stakeholder (e.g. regulatory actors engaged most with the Department for Business, Energy and Industrial Strategy; human rights with the NIO and Cabinet Office).

The peculiar conditions of 2017-2020 (e.g. the confidence and supply arrangement between the DUP and the Conservative government, the lack of a sitting NI Executive and Assembly, the heated debate surrounding the ‘backstop’) helped give rise to a situation in which some civic actors in Northern Ireland (including some of our research participants) had access to very senior levels of the UK government. This was recognised as being exceptional and probably unsustainable in the longer term.

In the absence of a devolved Executive, participants expressed appreciation for the expansion of the channels for representing Northern Ireland’s position at the UK central level. These included departmental devolved working groups and ‘ministerial quadrilaterals’, including a devolved forum for economy and trade convened by DEFRA.

Interestingly, Dublin has been a locus for engagement from Northern Ireland with UK government ministers and officials, primarily facilitated through the British Embassy there. A number of respondents mentioned Ambassadorial staff in Dublin. Such engagement is perhaps reflective of the cross-border nature of the market economy and the associated willingness and interest of the business sector to work on an all-island basis, which extends to utilising UK representation in Ireland.

Lessons Relating to EU Engagement

Direct influence

Participants reported far more direct engagement with various forums for representation and decision-making at the EU level during the Article 50 process than might have been expected. This included with MEPs (including non-UK and Irish MEPs), EC officials, the Article 50 Taskforce, and various committees. During the Article 50 negotiations, some of the participants enjoyed very high levels of access to the most senior individuals involved in the negotiations on the EU side, but they expected such channels to be more limited in the future, not least given the sensitivities around the UK-EU future relationship and the fact that Northern Ireland as part of the UK is now outside the EU.

Nonetheless, it was clear that there was an established culture of communication between Northern Ireland, Brussels and Dublin that came into its own (albeit not without tensions) during the Article 50 negotiations. Long-term engagement through regular networking events and 'longstanding relationships' with EU officials and MEPs was seen as having been 'invaluable' in promoting Northern Ireland's voice since the EU referendum. The term 'coffee cup diplomacy' was used to describe this kind of engagement.

Brussels was also considered by our research participants to be generally sympathetic towards and well-informed on Northern Ireland issues. This is in part related to the fact – particularly for border region actors – that some stakeholders enjoy 'longstanding relationships with EU officials and MEPs' and have engaged directly with Brussels in the past (e.g. holding regular networking events in Brussels). Some, however, considered their informal access to Brussels limited unless the issue was of particular interest to them. MEPs in Brussels were frequently brought up as potentially effective routes of influence, and the Commission was considered receptive to expertise.

There has also been more contact with the Office of the NI Executive in Brussels than was the case prior to the Brexit referendum. This is also true in terms of contact with the Permanent Representatives of the Irish government and the offices of other devolved UK regions in Brussels. The European Commission's Office in Belfast is a frequent port of call for the Voluntary and Community Sector.

The Dublin connection

Dublin was considered to be 'on the same page' in many ways when it came to appreciation of the importance of the B/GFA and the unique circumstances of the island of Ireland. A number of respondents from various sectors in Northern Ireland credited good direct engagement with the Irish government and with its individual departments and initiatives for giving a sense of 'being heard' in the Article 50 process. These include such bodies as the Department of Foreign Affairs and Trade, the Brexit working group in Ireland's Department of Health, and the All-Island Civic Dialogue on Brexit.

One participant described the All-Island Civic Dialogue as 'a useful forum in which an inclusive range of North/South issues are considered with representatives from across business trade unions, civic society and politics on the island'. Frequent Brexit stakeholder forums organised by the Irish government on Chatham-House-rules were also considered positive initiatives by a number of respondents. Finally, in relation to Dublin, good personal contacts and relationships of trust (including through the Joint Secretariat in Belfast) built with Irish officials (rather than politicians) were considered useful for smaller organisations in particular.

The efficacy of the Strand II and III institutions had clearly been affected by the lack of a sitting Assembly and an Executive. However, although the North South Ministerial Council had not met in plenary since the collapse of Stormont, some stakeholders found the NSMC secretariat very useful outside of formal meetings. The importance of certain bodies under the Agreement, it was commented, had grown in the absence of a working government in Northern Ireland.

Indirect influence

Such representation is not always direct. Engagement with ‘Brussels’ via the UK (e.g. the NIO) and Irish government departments was mentioned equally often. The European Commission’s Office in Belfast was also valued by stakeholders in Northern Ireland and commended for enabling two-way communication between Northern Ireland and the EU at a time of tension in UK-EU relations. This was particularly appreciated by those in the voluntary sector. Mention was also made of the European Parliament Liaison Office in London in a similar regard.

Respondents from the business sector strongly emphasised the importance of business alliances when engaging at EU level, including both through longstanding networks and *ad hoc* formations. Similarly, for many, the bodies representing the business sector at the UK level are also those best engaged with in terms of representation at the EU level. A representative of a ‘food chain’ organisation stated that the ‘CBI, British Retail Consortium, NI Chamber of Commerce [are] taking our views to Brussels’, while another respondent suggested that ‘[a] recent[ly] combined business community group with over 20 groups did give us a voice’. Business sector alliances and networks were described by business bodies as ‘extremely useful’ for Brexit-related engagement at EU and UK level.

Indeed, a number of informal new networks among organisations and bodies from various sectors on the island of Ireland were further cited as having been particularly valuable forms of engagement, in a manner akin to social partnership. This kind of engagement, it was suggested, has been ‘less forthcoming’ at a UK level – possibly a consequence of the type of challenges facing the island of Ireland in relation to the Irish border, and which may change as the challenge with implementation of the Protocol becomes the Irish sea border.

Different Approaches to Engagement from NI

Proactive engagement

When it comes to seeking influence at both the UK and EU levels during the Article 50 process, the majority of stakeholders described either a mainly proactive approach or a mixture of being proactive and relying on invitations for engagement from others. Being proactive in looking for engagement opportunities at both the UK and EU levels –as opposed to relying on invitations – was perceived as a way to gain most influence. A proactive approach was more commonly claimed by private sector respondents. As one representative of a business organisation explained:

In our experience these [forms of engagement] aren’t mutually exclusive and one form ... begets the other. However, I would say that it is through our proactive engagement that we have had most influence.

This was not confined to the private sector, however. Responding to the need for information as well as the perceived need to influence decisions being made, Northern Ireland actors used opportunities to write and publish reports in their respective areas of expertise (e.g. a respondent from a human rights body commissioned research and used that ‘in lobbying the UK government to ensure that the wider human rights and equality discussions were widened to listen to the views of wider civic society’). Publishing papers and reports ‘on matters of concern for our organisation and stakeholders’ was seen as a vital means of action by those in the voluntary and community sector in Northern Ireland when seeking to engage directly ‘with decision-makers across the island of Ireland, the UK and in the rest of the EU’.

Others took it upon themselves to arrange delegations to and meetings in Brussels and London (e.g. the Irish Council of Churches organised an Inter Church delegation to the European Commission and Parliament). Still others lobbied for a ‘seat at the table’ when they realised Northern Ireland was being excluded from key discussions (e.g. a local authority lobbied for inclusion on the Ministry of Housing, Communities and Local Government’s Brexit Delivery Board).

Accepting invitations

A small portion of the stakeholders consulted said that they mainly relied on invitations for engagement rather than taking the initiative themselves; this appears to be true more of third sector than private sector groups. This approach brought benefits too, although it relied on the bodies being known in the first place – something that is harder for smaller, more specialised organisations. Invitations for engagement came from government departments, professional bodies and national networks. All stakeholders consulted, without exception, reported that they responded positively to every invitation for engagement where possible. However, some stakeholders experienced several difficulties in initiating or responding to invitations for engagement (see below). Many respondents noted that they are aware of new initiatives relevant to their Brexit-related priorities at regional, UK, Ireland and EU levels. Whether they had been able to participate in such initiatives depended on capacity rather than on willingness or interest.

Constraints on Influence-Seeking

Finding ways to get on the radar

If Northern Ireland is to make the most of its potential for influence and engagement at UK and EU levels, lessons need to be taken from the experience of social partners in the Article 50 process regarding what prevented them from taking up opportunities to have such influence.

The primary difficulty to be overcome by some social partners, especially coming from Northern Ireland – a small region on the periphery of the UK and the EU – was simply receiving an initial invitation. One respondent from a business membership organisation described the challenge and then a strategy for overcoming this difficulty:

the main difficulty is getting the initial meeting or invitation. As an organisation, we would not have been as well-known as other business group so getting the first run of meetings was a

challenge. However, we found that when you have something concrete to offer to the debate, politicians are more likely going to want to meet with you and furthermore are more likely to invite you back so that your ideas can be heard by their colleagues.

The work of the likes of the Joint British-Irish Secretariat, the British Embassy in Dublin, the Irish Embassy in London the Irish Department of Foreign Affairs and Trade, the European Commission Office in Belfast, as well as political parties, was invaluable in correcting this omission, meaning that there was a good array of social partners known in Westminster/Whitehall and Brussels by the end of the Article 50 process. However, many of these depend on personal relationships and need to be sustained, particularly given the overhaul of civil service in the UK and the regularity of changing personnel in relevant positions in the diplomatic service. Care should be taken to formalise these connections to be organisation- rather than person-based.

Political sensitivities

Although all stakeholders – it was clear from workshop discussions – are very aware of the political sensitivities around Brexit and Northern Ireland’s position in the process, the only one to cite it as a factor that hindered engagement was a respondent working in the area of law enforcement:

The continuing seemingly endless sensitivity around the Irish land border which at times has meant different agencies working in silos to address their specific remits [is] frustrating because in the field of law enforcement there are obviously many overlapping priorities.

That said, the absence of a sitting NI Executive for 3 years during 2017-2020 created unusual conditions in Northern Ireland. Political sensitivities are closely connected to the power-sharing within the NI Executive and informal evidence would suggest that these have increased since the Executive was reconvened, as one might expect.

Lack of capacity

A number of respondents mentioned ‘resources’ as being the main difficulty in their attempts at engagement. Lack of resources was seen as an obstacle either directly (e.g. inability to cover associated travel expenses to the degree necessary for direct engagement) or indirectly (e.g. through insufficient funds to hire additional staff working on the implications of Brexit for the organisation). Added to this, either because of other day-to-day work or tight deadlines for responses/meetings, a number of our research participants cited a lack of time as the reason why they were not able to engage in such opportunities as they would have liked.

Separate but perhaps not unrelated to the above, was the question of limited organisational capacity, mentioned as a difficulty by a few respondents (e.g. ‘Understaffed for people who would understand the detail of Brexit’). A respondent from the Public Sector suggested that their difficulty was the lack of appropriate organisational structure to feed information back into.

The need for clear, accessible information

Many stakeholders complained about the problems caused by a general lack of clarity coming from government departments in relation to Brexit – something not exclusively experienced in Northern Ireland of course, but exacerbated by the particular uncertainties felt here with regard to the future of the Irish border. The lack of information was stated as a difficulty by respondents from a range of sectors. One used the example of a briefing on the EU Settlement Scheme by the Home Office in which complicated data was presented with no circulation of the slides (even for those dialling-in to such meetings). The sense of the profound importance and complexity of the information being shared dissuaded some bodies from further engagement, despite their direct expertise and responsibility for the on-the-ground implementation of schemes relating to this information.

More broadly and fundamentally, however, stakeholders cited the uncertainty surrounding the outcome of the Article 50 process (including ‘No Deal’) as making it very difficult to engage as they might have wished, simply because they were unsure as to the parameters of what they were being asked to discuss.

Formulating the Northern Ireland Position

The need for inclusivity and diversity

Before Northern Ireland can have any clear ‘voice’ in Brussels or, indeed, in London, there is a need to be sure as to how that voice is constructed and formulated. Participants in our research repeatedly noted the complexities of discussing and formulating one clear voice on behalf of Northern Ireland, particularly given the political sensitivities and differences with regards to Brexit. Indeed, participants were of the opinion that due to the politically contentious nature of Brexit, functioning devolution complicates the challenge of formulating a clear Northern Ireland position. That said, as Michel Barnier noted in his speech at Queen’s University Belfast (20 January 2020),⁵⁰ whilst he had to meet the Northern Ireland political parties separately during the Article 50 negotiations, now he can meet the DUP and Sinn Féin in the same room, as First Minister and deputy First Minister, and they are articulating common concerns for Northern Ireland.

When it comes to articulating common ambitions for Northern Ireland post-Brexit, there may be problems ahead. This is why it is important to include a wide range of actors in formulating the view from Northern Ireland. In all these discussions, the necessity of political oversight and legitimacy to decision making was widely acknowledged. And one thing that cannot go unrecognised is the importance of a strong evidence-base to support Northern Ireland’s position-making. To this end, and building on the recent widening of policy engagement across Northern Ireland, Sargeant and Rutter (2019) suggest developing greater independent *think-tank activity* in Northern Ireland.

50 Available from: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_133 (accessed 8 May 2020).

Social Partner Coalition

Social Dialogue

Most participants in our research stressed the importance of a coalition of social partners in the development of a clear Northern Ireland position. Our research participants strongly suggested that this dimension of governance should be given due regard in any new post-Brexit dispensation. Several suggestions were raised as to how this might be formalised. One thing that is clear is that Northern Ireland has a lot of experience in social partnership and civic engagement vis-à-vis the peace process. However, this has tended not to include business-civic collaborations. And these initiatives have faltered without cross-community political support.

One option is to formalise an *ad hoc social partner network* (including trade unions, voluntary and community sector organisations, and business bodies etc.), a version of which has been gathered together to raise cross-sectoral concerns arising from Brexit to policy audiences in the United States.⁵¹ The EEA *Consultative Committee* contains representatives from the ‘social partners’ of the EU and EFTA states. This could be a model on which social representation could be organised for Northern Ireland interests. Another possible model is seen in the *Civil Society Platforms* used in the Ukraine-EU Association Agreement (AA), which provide a permanent forum for the exchanging of views between civil society representatives and the AA institutions.⁵²

The unimplemented institutions under the B/GFA relate particularly to the civil society dimension of governance on the island of Ireland – something that has as yet unrealised potential for giving deeper and wider scope to the governance of NI. For instance, the idea of ‘resurrecting’ the *Civic Forum* is often returned to, and it was among our research participants.⁵³ A related suggestion focused on the example of the *Citizens’ Assembly for Northern Ireland* convened in October/November 2018 with which the Department of Health was said to have engaged.⁵⁴ However, whilst this example has demonstrated that Citizens Assemblies can work productively, a difficulty was seen with taking forward any agreed decisions and proposals in the absence of a functioning government.

Specifically, the establishment of a *Forum for Social Dialogue* consisting of four pillars – Unions, Employers, Community and Voluntary sector, and the Agricultural sector – was suggested by a research participant and workshop discussions indicated support for such an initiative. While inclusivity was seen as the main strength of such a forum, difficulties were anticipated with political support and with reaching an agreement around the Forum’s precise role and remit.

51 See for example, the letter to Speaker Nancy Pelosi (September 2019), <https://static.rasset.ie/documents/news/2019/09/nancy-pelosi-letter.pdf> (accessed 8 May 2020).

52 Eastern Partnership Countries have a Civil Society Platform, which can make recommendations to the Association Council, and the Association Committee and the Parliamentary Association Committee are obliged to organise regular contacts with the Civil Society Platform to obtain their views on the progress of the Association Agreement.

53 This was seen as a possible extension of the democratic process, and a development of a regional voice outside the political sphere, through a wider and more inclusive dialogue, allowing for a greater focus on rights. It was noted that an eventual revival of the Civic Forum, however, should go hand-in-hand with a closer review of its structure, and its operation should be made more thematic.

54 The Northern Ireland Affairs Committee (NIAC) suggested that Citizens’ Assemblies should be considered as an alternative mechanism for civic engagement which ‘could assist with addressing future political deadlock thereby supporting institutional stability’ (NIAC 2018: 45).

Our research participants saw value in social partnerships not just in formulating clear NI-positions but also in representing the regional voice at the UK central level and at the EU level too. Experience with social partnerships from the Republic of Ireland was regarded as a model that could be built upon, requiring the UK government to formally consult with social partners in the region. Examples of social dialogue bodies and social partnerships in Scotland and Wales were discussed and seen as an opportunity for learning.

Role for business

The role of business in informing public debate in the context of Brexit – both locally and nationally – was also seen as crucial. In this respect, the necessity of finding stable structures that will best express this role while going beyond a more traditional mode of lobbying, was discussed. A recently launched alliance between the Chamber of Trade and Commerce, Retail NI and the Hospitality services in Northern Ireland was pointed out as an instance of strengthening the voice of regional business networks. Business Alliance has also been revived as a means of offering a common, high level and well-respected voice for Northern Ireland’s private sector at a critical time. At the same time, the necessity to find a formalised way of representing different business sectors was acknowledged. One suggestion was the establishment of a *Business Assembly* involving business lobbyists, people from businesses, with regular renewal of membership structure.

Astute and multi-layered active engagement was described by a representative of a business membership organisation in response to our online survey:

We mainly represent the interests of our members through direct canvassing of MPs and Ministers of our members’ concerns. We have accepted invitations and spoken in front of relevant Commons and Lords committees. We have hosted cross party briefings and spoke at informal Party fora on issues relating to Brexit. Through this work we have established a network of contacts from across parties and houses who we regularly liaise with regarding our members’ priorities and concerns. We work closely with the UK Embassy team in Dublin who have helped connect us into the civil service system in the UK dealing directly with those working ...on Brexit in various departments across government. We also work with representatives of the Welsh and Scottish governments on sector specific and broader Brexit issues. We also engage with other business organisations and think-tanks in the UK.

The general opinion that informal mechanisms of influence and representation were ‘better’ than the formal ones prevailed among participants. It was agreed that Northern Ireland already had good established networks, seen by some as superior to those of the UK as a whole (in part because of Northern Ireland’s unique connections to Ireland).

Recommendations

- [The NI Executive should establish thematic working groups comprising civil society representatives in an advisory role.](#)
- [Cross-border forums for local authorities \(e.g. ICBAN\) should be used for consultation and stress-testing specific cross-border implications of the Protocol.](#)

6. The post-Brexit governance of Northern Ireland: Recommendations

Recommendations for the Levels of the 3 Strands

Strand I

Scrutiny of secondary legislation

1. NI Executive ministers should notify the NI Assembly (NIA) within one working day of regulations being laid before the UK Parliament where UK Ministers are acting alone in devolved areas within the legislative competence of the NIA or the executive competence of the NI Executive Ministers.
2. The NIA Standing Orders should be amended to assign to a committee the function of recommending the appropriate procedure for the sifting process. Feeding into this, relevant committees should outline in advance, through a set of scrutiny standards, the precise criteria which should be applied to the scrutiny of Statutory Instruments (SIs). It could be possible to have specific criteria that capture the sort of issues that are likely to arise in the context of SIs made under powers in the Withdrawal Agreement Act (2020).
3. There needs to be enough time/flexibility in the NIA committee timetable to scrutinise regulations. An early warning system may be needed, and could be agreed with the NI Executive, to assist in managing the scrutiny of all subordinate legislation.

The NI Executive

4. The NI Executive should be consulted by the UK government in advance of all issues relevant to NI for decisions as part of the written procedure provided for in the Rules of Procedure for the Joint Committee.
5. The NI Executive should act on establishing a consultative forum to engage civil society representatives in (a) assessing the implementation of the Protocol, (b) drawing attention to issues of concern about the Protocol, and (c) requesting changes to the operation of the Protocol.

Assembly Committees

6. The Committee for the Executive Office should be formally consulted by the UK Government prior to it making submissions for the provisional agenda of the Specialised Committee on Ireland/Northern Ireland.
7. The Committee for the Executive Office should receive full minutes of all Joint Consultative Working Group (JCWG)/Specialised Committee meetings and all Joint Committee meetings where matters directly affecting Northern Ireland are discussed, even where these minutes are not made public.

8. The House of Commons and NI Assembly could establish a joint standing committee to review implementation of the Protocol.
9. A wide range of specialists should be drawn on by the committees, particularly relating to the scope of the Protocol.
10. It should be ensured that the chairs of all NI Assembly committees relevant to the workings of the Protocol (e.g. Agriculture and Environment) receive regular briefings from the UK delegation to the Specialised Committee on Ireland/Northern Ireland.

Strand II

North South Ministerial Council

11. To make best use of the fact that (a) the North South Ministerial Council (NSMC) is a pre-existing body used to finding common ground and common decisions on a north/south basis, and (b) it has a direct route to the Specialised Committee, the NSMC should be given a formal role to monitor the implementation and the impact of the Protocol. This should be specifically but not exclusively in relation to the maintenance of north/south cooperation (Article 11 Protocol).
12. According to the 1998 Agreement, it should be ensured that the views of the NSMC are ‘taken into account and represented appropriately at relevant EU meetings’. The NSMC should also have the ability to draw the urgent attention of the UK government and the European Commission (as per the Joint Committee) to joint NI Executive and Irish government concerns about threats to the Belfast/Good Friday Agreement (B/GFA) or to north/south cooperation that may require a joint UK and EU approach to address.
13. The North South Joint Secretariat could be remodelled to ensure adequate representation in areas of north/south cooperation (not implementation). This is because they will be affected by the Protocol but will not be covered in the B/GFA bodies, e.g. in health, tourism, education, agriculture.

Implementation Bodies

14. The Specialised Committee for the Protocol is to examine proposals regarding the implementation and application of the Protocol from the six North South Implementation bodies. How these bodies identify, compile and relay such proposals needs to be formalised. This is something that could be coordinated by the NSMC Joint Secretariat.
15. The Implementation Bodies also should be equipped to raise concerns (i.e. amber alert or red alert) with the Specialised Committee on a direct and urgent basis, not just to offer proposals.

North/South Inter-Parliamentary Association

16. A standing item on the agenda of North/South Inter-Parliamentary Association plenary meetings should be Brexit and the implementation of the Protocol.
17. Standing committees of the North/South Inter-Parliamentary Association and British-Irish Parliamentary Assembly on the Protocol implementation could be established to monitor the Protocol’s implementation.

Strand III

British-Irish Council

18. Given the significance of Brexit to the environment in which the British-Irish Council (BIC) will be working, it should have the Protocol (specifically the preamble priorities) set as a standing item on the agenda of the plenary meetings. The BIC could also have a new task group focused on the implementation of the Protocol.
19. The remit of the British-Irish Council could be expanded to include areas previously coordinated at EU level, e.g. criminal justice cooperation.

British-Irish Intergovernmental Conference

20. The British-Irish Intergovernmental Conference should continue to meet regularly and the bilateral work plan be developed that enables a coordinated approach to new areas for cooperation in light of the changed environment of the UK-EU relationship and in particular the challenges for Northern Ireland outside matters of devolved competence.

British-Irish Parliamentary Assembly

21. The British-Irish Parliamentary Assembly (BIPA) should continue to interact with the European Parliament; visits to Brussels should continue to be an option for Committees if not for the Assembly as a whole. Consideration should be given to sending reports from the Committees (especially Committee B) to the Joint Committee and/or the Specialised Committee. The BIPA secretariat should be able to feed into the agenda of the Joint Consultative Working Group.

Other routes

22. Consideration should be given to establishing and getting off the ground a North South Civic Forum such as recommended but not implemented under the B/GFA and the St. Andrews Agreement. The body should focus specifically on getting stakeholder engagement in managing transition. This could be a route through which cross-border bodies or projects identified through the North-South Cooperation Mapping Exercise could be incorporated.
23. Close and trusted communication between senior civil servants is vital. It would be worth exploring means of ensuring trilateral (Belfast/Dublin/London) communication as well as bilateral (east/west or north/south) and quadrilateral (among the regions and nations of the UK).
24. The Joint Consultative Working Group should have a stream of input from local authorities on both sides of the Irish border.

UK level

Engagement with Stormont

25. Securing the commitment and means by which it can shape secondary legislation relating to the Withdrawal Agreement (WA) would be a major ask from the NI Assembly, but it could be argued on the grounds of the exceptional significance of the WA Act for Northern Ireland.
26. The NI Assembly should be consulted on any decision about a potential extension of the transition period.
27. In theory, there is some scope for the Protocol and the WA to be amended by the Joint Committee to address deficiencies or unforeseen situations, with the mutual consent of the UK and the EU. The identification of such problems – and solutions – should involve the NI devolved institutions and wider stakeholders.
28. The UK government should systematically consult the NI Executive on positions to be adopted at all Withdrawal Agreement institutions that are of relevance to Northern Ireland.
29. There should be an Annual Report prepared for the NI Assembly by the NI Executive and UK Government on the implementation of the Protocol.
30. Updates of existing laws covered by the Protocol will happen automatically. The UK Government should consult the NI Assembly on adoption of new areas of EU law applicable in the areas covered by the Protocol.

Westminster procedures

31. There should be an annual debate in the House of Commons and the House of Lords on the implementation of Protocol.
32. The House of Commons Northern Ireland Affairs Committee should receive oral and written reports from the UK Government on all issues relevant to NI following each meeting of the Joint Committee and written summaries of all meetings of the Specialised Committee on Ireland/Northern Ireland.

Joint Ministerial Committee

33. The UK Government should increase the frequency and importance of meetings of the Joint Ministerial Committee (JMC) to help coordinate Brexit among the devolved regions and nations.
34. New thematic committees should be established under the JMC, including on internal and international trade and relations, ensuring a coherent UK domestic approach while closely reflecting the interests and positions of the devolved regions.
35. The four governments within the UK should establish a new JMC sub-committee on international trade.

Recommendations for EU-Level Representation

New governance mechanisms

UK-EU Joint Committee

36. It is imperative that the UK not only adheres to its commitment to have representatives from the NI Executive present at relevant meetings of the Joint Committee, but that it ensures that the most is made of this commitment. For example, there needs to be close communication between the NI Executive and the UK delegation in forming a position prior to the meeting.
37. The United Kingdom should consult with the Northern Ireland Executive (and other devolved governments) about items that should be on the agenda for the meetings of the Joint Committee. This should happen in a timely manner.
38. Given the importance of the work of the Joint Committee for the implementation of the Protocol, the UK and EU should, where reasonable, use their powers (as per the Rules of Procedure) to decide to make the agenda, or any part thereof, public before the beginning of the meeting.

If devolution is functioning:

39. First Minister and Deputy First Minister should attend all meetings of the Joint Committee held at a ministerial level where those meetings discuss Northern Ireland, and then report on all meetings to a relevant committee of the NI Assembly.
40. The NI Executive could have speaking rights for the First Minister and deputy First Minister at all relevant meetings of the Joint Committee
41. The Joint Committee's annual report should be considered by the NI Assembly as well as the UK parliament.
42. NI Executive should receive all UK government papers relating to meetings of the Joint Committee. The Executive should also be consulted by the UK government in advance of all issues of relevance to NI to be discussed by the Joint Committee.
43. NI Executive could be allowed to advise on which experts should accompany the First Minister and deputy First Minister or senior officials to meetings.

In the absence of devolution:

44. Representation should as a minimum be ensured through senior officials from the NI Civil Service. When the Joint Committee meets at ministerial level, representation for NI should be through the Secretary of State for NI.
45. The Northern Ireland Office should establish consultative sectoral fora in which relevant interests from Northern Ireland can be represented and the Northern Ireland voice established for the Secretary of State to represent at meetings of the Joint Committee.

Specialised Committee

46. The UK should consider including representatives from Northern Ireland in delegations to other Specialised Committees when they are discussing matters of direct relevance to Northern Ireland, e.g. when the Specialised Committee on citizens' rights is discussing frontier workers.
47. Assuming the level of representation is officials, Northern Ireland should be represented, with speaking rights, in all meetings of the Specialised Committee by relevant senior officials from the Northern Ireland Civil Service.
48. It would be useful if a series of themed/sectoral groups could be established under the Specialised Committee in order to focus expertise on the different parts and implications of the Protocol. This would enable better scope for direct representation from Northern Ireland stakeholders and experts.
49. There should be mandatory communication of Commission proposals relevant to the functioning of the Protocol to the Specialised Committee.
50. Experts or other persons can be invited to provide information on specific subjects. The NI Executive should be permitted to determine which experts and other persons with subject expertise should accompany senior officials to meetings
51. NI Assembly should receive reports from UK government and NI Executive on all meetings of Specialised Committee.

Joint Consultative Working Group

52. There should as a rule be representation from relevant Belfast/Good Friday Agreement Strand II and Strand III bodies at Joint Consultative Working Group (JCWG) meetings.
53. A secretariat, or perhaps a rapporteur, could be established to try and filter out some of the more politicised or inconsequential contributions a body such as the JCWG is likely to attract. Such a position would have to be entirely apolitical and technical, and would be responsible for investigating submissions to the JCWG for their validity and relevance to the body's remit.
54. The JCWG could adopt a social partnership approach, as an absence of civil society representatives from the body could potentially have serious repercussions for its legitimacy.
55. The access of 'experts' to the JCWG should not be limited to 'officials' but be specified more precisely in terms of interest groups. Such groups must be inclusive of human rights bodies. It is also recommended that senior representatives of professional/umbrella bodies for the respective sectors are identified as 'the experts' to appear in front of JCWG.
56. The Joint Committee, Specialised Committee and JCWG should provide regular detailed reports on Protocol's implementation to the NSMC, North/South Inter-Parliamentary Association and British-Irish Parliamentary Assembly and any NI or cross-border forum for social dialogue.

Seeking direct influence at EU level

Make the most of the unique status and multilevel governance of the B/GFA

57. Institutions of the Belfast/Good Friday Agreement, including the Northern Ireland Executive, the North South Ministerial Council, and the British-Irish Intergovernmental Conference, should be enabled to make written statements to the European Commission prior to the adoption of legislative proposals that will directly affect the operation of the Protocol, e.g. relating to the regulation of goods or telecommunications.
58. It is necessary to clarify the role EU ‘single market’ agencies will play with regards to Northern Ireland. If the UK is not represented in the decision-making process of the agencies to which Northern Ireland may be bound, then special arrangements should be made for representation from Northern Ireland in regulatory EU agencies that are relevant to the areas of Protocol.
59. The Committee of the Regions has been excellent formal platform for Northern Ireland representation of local government and a case should be made for continued representation on it.
60. Representation of the Northern Ireland position to the EU via Dublin, although acknowledged as potentially politically sensitive, is espoused by business at both formal and informal levels.
61. Representation through EU funding Programmes, which Northern Ireland has traditionally benefitted from through the work of the Special EU Programmes Body (SEUPB), has ensured a high degree of both formal and informal access and should be built upon. This gives NI a unique formal and direct connection to EU programmes.

Work with the European Parliament

62. Arrangements should be made for effective parliamentary scrutiny of the Joint Committee. This should be a UK-EU Joint Parliamentary Committee, which could contain members of the NI Executive, UK parliament, and European Parliament.
63. The NI Assembly and European Parliament could establish *ad hoc* joint committee to review implementation of the Protocol.
64. A UK-EU Parliamentary Committee could be established either as part of the implementation of the WA or as part of the future relationship to regularly consider the implementation of the Protocol. It could also establish a COSAC-type arrangement [Conference of the Committees of the National Parliaments of the European Union Member States] involving NI Assembly and Oireachtas to regularly review implementation of the Protocol.
65. There could be an annual debate in the European Parliament on the Protocol.

Agencies and committees

66. By way of a complement to the Joint Consultative Working Group (JCWG) and in line with proposed arrangements in the draft Withdrawal Agreement of February 2018, the principle of UK participation in Commission Committees and expert groups could be extended beyond the transition period with regard to Northern Ireland and obligations under the Protocol.

67. Access should be maintained for NI civil servants to the agencies and bodies which the UK has access to during the transition period. Through these bodies, NI civil servants could exercise a degree of influence, as has been seen in European Economic Area/Swiss representation in similar bodies. Note that access to certain EU committees is only permitted if you are aligned in that area of the *acquis*, so this will be different for Northern Ireland compared to the UK as a whole.

Invest in and use technical expertise

68. The UK-EU future relationship agreement should contain explicit provisions requiring the EU to consult with the UK when drafting legislation that will likely be considered ‘Protocol relevant’ by the UK-EU Joint Committee and/or Specialised Committee on Ireland/Northern Ireland. This would mean the European Commission ‘informally seeking advice’ from experts on and from Northern Ireland (including UK and Ireland).
69. The UK-EU agreement should also ensure experts from Northern Ireland ‘as wide a participation as possible’ in the preparatory stage of draft measures relevant to the Protocol before they go to EU committees.
70. The UK and Ireland should make a case for Northern Ireland experts to be included in relevant advisory expert groups and to have observer status on certain committees.
71. The practice of secondment of experts from Northern Ireland to EU institutions should be continued and supported.
72. The process of prioritisation and best use of expertise should be one that is managed by the Northern Ireland Executive.

‘Strand IV’

73. Consideration should be given to the establishment of a ‘Strand IV’ of the Belfast/Good Friday Agreement. This could involve a British-Irish Forum for External Relations or some such. It can be used to coordinate prioritised positions from Strands II and III when it comes to informing the position of the UK and Ireland on EU proposals. It could also oversee the protection and operation of the 1998 Agreement in light of changes to the external environment, e.g. a US-UK Free Trade Agreement or a UK-EU Security partnership.
74. To facilitate all this, the NI Executive should receive from the UK government all relevant papers and be formally consulted in advance on the agenda for and positions to be taken at meetings. The Executive should also be formally consulted on issues of relevance as part of the written procedure provided for in the Rules of Procedure for the Joint and Specialised Committees.

Means of indirect influence for Northern Ireland at EU level

75. Priority should be given to equipping and preparing the Office of the NI Executive in Brussels for a new and, if anything, more important role under the Protocol.

76. Northern Ireland needs to be selective and realistic in its efforts to shape EU policy. It will need to have: strong message discipline (including with the rest of the UK), a good understanding of EU processes, appropriate briefing materials, a good sense as to the right time to lobby, information as to whom to approach, and good relationships with personnel in Brussels that extend beyond EU bodies (including other sub-national regions).
77. Continued participation/membership in European-wide sectoral or thematic bodies and federations is an important route of representation of Northern Ireland's interests at the EU level, including from outside NI public institutions (e.g. business alliances, technical experts, non-governmental bodies).
78. A diplomatic EU 'presence' should be re-established in Northern Ireland. This need not necessarily have a public-facing office but it should be there not only to contribute, as appropriate, to the implementation of the Protocol but also to fill the liaison/communication gap left by the loss of the Commission Office in Belfast. This will aid understanding and appropriate sensitivity at EU level

Expanding the input

79. The NI Executive should establish thematic working groups comprising civil society representatives in an advisory role.
80. Pre-existing cross-border forums for local authorities should be used for consultation and stress-testing specific cross-border implications of the Protocol.

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Annex 1: Governance of key policy areas: illustrating the challenge

By way of illustrating the complexity of the governance challenge for Northern Ireland after Brexit and under the Protocol, this Annex briefly outlines a set of major policy areas which are devolved in Northern Ireland and which – in their entirety or in part – are directly relevant to:

- (i) the implementation of the Protocol on Ireland/Northern Ireland under the WA,
- (ii) to the future maintenance of cross-border cooperation with the Republic of Ireland, and
- (iii) to potential divergence across the constituent parts of the United Kingdom. Each topic looks at the Northern Ireland-specific, the UK-wide, the cross-border and the EU dimensions of the policy areas.

Environmental Governance

NI-specific context

Environmental governance falls under the remit of the NI Department of Agriculture, Environment and Rural Affairs (DAERA) as well as its namesake Statutory Committee of the NI Assembly. During the three years of no functioning local devolved government, civil servants in DAERA continued to convene stakeholder working groups (on fisheries, rural affairs, environment, agriculture etc.) set up after the 2016 referendum.

Northern Ireland is seen as lagging behind the UK (and most of the EU) in terms of the quality of its environmental governance (Gravey et al. 2018). The region lacks an independent environmental agency, a local Assembly Environmental Audit Committee, and a specific environmental tribunal (or environmental experts) within the judiciary and prosecution services. Gravey et al. (2018) recommend that to further align Northern Ireland with best practice in environmental governance, an independent environment agency should be established as a matter of urgency and that a separate environment commissioner should be appointed to participate in a UK-wide environmental watchdog.

UK-wide dimensions

Under the present Cabinet Office Framework Analysis, elements of environmental law fall under the 63 Policy areas where no further action to create a common framework is required, and the UK government and devolved administrations will continue to cooperate. At the same time, areas such as Marine Environment and Natural Environment and Biodiversity fall under the group of 78 policy areas where Cabinet Office believes new UK-wide common rules or ways of working will be needed and may be implemented through non-legislative common framework agreements (e.g. a concordat).

Gravey et al. (2018) recommend that, in anticipation of ‘repatriating’ devolved environmental competences, common UK environmental frameworks must be created such that can flexibly enable the continuation of both East–West and North–South cooperation under the umbrella of the B/GFA, in areas such as water quality, waste management, electricity generation, and animal welfare.

Cross-border dimensions

The two jurisdictions on the island cooperate on environmental issues through the work of specific cross-border agencies (e.g. the Loughs Agency), while the NI Environment Agency and the Irish Environment Protection Agency implement jointly EU environmental directives.⁵⁵ Moreover, all-island environmental strategies involve city councils, government departments and agencies on both sides of the border (e.g. All-Ireland Pollinator Plan). Environmental NGOs from both jurisdictions typically put together joint bids for European funding.

The NSMC meets regularly to discuss and oversee joint effort in environmental protection, pollution, water quality management, managing shared water resources, waste management (including tackling waste crime), and sharing information on funding and research opportunities in a cross-border context. During the period without a functioning devolved government (January 2017- January 2020), however, the NSMC was unable to meet in plenary form (e.g. with ministers) and, therefore, unable to take new decisions in this area.

EU-level dimensions

Environment and energy efficiency (in relation to state aid) is included in Annex 5 of the WA's Protocol on Ireland/Northern Ireland as necessary for the continued free movements of goods. This implies the need to continue to participate in the European Environment Agency (EEA) which acts as 'a hub for environmental knowledge-sharing and capacity building at EU level' and 'is tasked with supporting sustainable development by providing reliable information to policy makers' (von Ondarza and Borrett 2018: 10).

The UK currently contributes to the European Environment Agency (EEA), which gathers comparable cross-national data to inform EU and national policy development and implementation. However, whilst the UK government has expressed a preference to participate in some EU agencies after Brexit, it has not included the EEA in that list.

If avoiding a hard border on the island of Ireland is also relevant to environmental governance, then this may require the UK – at least with respect to Northern Ireland – to remain bound by the EEA in order to facilitate regulatory alignment in this area. Should this be the case, then a key question is how Northern Ireland will be represented in the decision-making process of this and other EU agencies to which it may still be bound [a matter this report attempts to address].

55 For example, cooperation on international water catchments for the Water Framework Directive and joint reporting under the Birds Directive and Habitats Directive.

Policing and Justice

NI-specific context

Policing and Justice fall under the remit of the NI Department of Justice as well as the Justice Statutory Committee of the NI Assembly. Policing and criminal justice have been devolved matters in Northern Ireland since 2010 – as negotiated for through the St. Andrew’s Agreement of 2006. Northern Ireland has distinctive legal traditions, and its own specific concerns in relation to policing; the contentious history of which has been just as closely intertwined with conflict as its reform – a condition for post-conflict political agreement (CCBS 2019).

Law enforcement is organised separately in each of the legal systems of the UK and is carried out by regional police services in each regional jurisdiction. Because of the land border, the Police Service of Northern Ireland (PSNI) would be required, after Brexit, ‘to provide significant additional support to UK Government agencies involved in border control, such as Border Force, UK Visas and Immigration, Immigration Enforcement and UK Revenue and Customs. This would necessitate additional funding, staffing and training at a significant cost (Marnoch 2018). Indeed, it was announced in December 2018⁵⁶ that, after receiving £16.5m funding from the Treasury to address potential challenges to border policing after Brexit, the PSNI was to recruit an extra 308 officers and staff by April 2020’ (CCBS 2019: 16).

The PSNI will also be required to provide support for border control under The Counter Terrorism and Border Security Act (2019) which introduces anti-terror checks ‘within one mile of the Northern Ireland land border, including at train stations connecting the north and south’.

UK-wide dimensions

There has been increasing divergence in the way policing is exercised in England, Wales, Scotland and Northern Ireland. This is primarily a result of devolution itself, rather than the process of applying EU laws (Tierney and Redmond, 2018). Regional services are complemented by UK-wide agencies, such as the National Crime Agency (NCA). Other policing units and bodies that operate across the UK include: the Criminal Records Office, the National Police Coordination Centre, the UK National Counter Terrorism Policing HQ, and the National Police Freedom of Information and Data Protection Unit. Most of these bodies have primarily coordinating functions, with the National Police Chiefs’ Council bringing the Chief Constables of each regional service together to help coordinate policing operations.

A number of aspects of Police and Criminal Justice Cooperation are outlined in the Cabinet Office’s (2019) current Framework Analysis as falling under the group of 78 Policy areas expected to require common rules or ways of working, and implement through non-legislative common frameworks.

Cross-border dimensions

For historical reasons and because of Northern Ireland’s shared border with the Republic of Ireland, and the free movement of individuals stemming from the Common Travel Area, access to EU agencies and alignment with EU law have been particularly important for the exercise of policing and criminal justice powers in the region.

56 BBC News (19 December 2018) [‘Brexit: PSNI to recruit an extra 308 officers after funding boost’](#).

The Republic of Ireland repealed its domestic legislation providing for the European Convention on Extradition meaning that extradition of individuals between the UK and Ireland came to depend heavily on the European Arrest Warrant. The Brexit Omnibus Bill⁵⁷ published by the Irish Government in February 2019 provided for the possibility of extradition between the UK and the Republic of Ireland in the absence of common EU legislation by amending a previous extradition Act, dating back to 1965. Commentators note, however, that such an arrangement would be ‘slower and a lot more cumbersome’ than at present (Finn 2019).

The UK and Ireland have a long history of cooperation in tackling the risks of terrorism and organised crime groups operating on a cross-border basis. The Police Service of Northern Ireland (PSNI) and UK security services are in regular contact with their colleagues in An Garda Síochána. This relationship includes information sharing, operational partnership and mutual capacity building. The NCA, HMRC, the Metropolitan Police, and FCO Counter Terrorism and Extremism Network representatives have an established presence in the British Embassy in Dublin (Foreign Affairs Committee 2019: 2).

North-South Intergovernmental Agreements on Co-operation on Criminal Justice Matters (July 2005 and April 2010) have provided a structured framework to enhance and develop more effective all-island cooperation, information sharing and coordination in this area. The Organised Crime Task Force – a multi-agency partnership between central and NI Government Departments, law enforcement, the Policing Board, the business community and the community at large – has continued to work on a cross-border basis in providing an operational response to organised crime across both jurisdictions. Our research suggests that the experience and framing of the Brexit withdrawal process has already placed pressure on the more strategic aspects of the relationship between the PSNI and the Garda. Nonetheless, cooperation on issues such as organised crime and mundane criminality has continued to be strong (Project Workgroups, Round 1, April 2019).

EU dimensions

The Lisbon Treaty 2009 made policing and criminal justice cooperation a shared EU competence, with both the European Parliament and the European Council taking an equal role in the development of new legislation which is overseen by the European Court of Justice (ECJ). Cooperation between member states is guided by a ‘toolkit’ of different mechanisms aiming to provide greater security across the EU (IfG 2018). Though being devolved competences, the exercise of policing and criminal justice powers in the UK devolved regions is closely linked to the Justice and Home Affairs (JHA) pillar of the EU treaty architecture, with its two dimensions – civil justice, and police and criminal justice (the latter now including border controls, immigration and asylum).

The UK’s participation in the field of police cooperation and judicial cooperation in criminal matters covers cooperation between member state authorities, information and data exchange, membership in EU agencies, and procedural harmonisation with respect to specific criminal offences. In 2014 the UK opted into 35 EU police and criminal justice measures.

There are two types of cooperation agreements – strategic and operational – that Europol can enter into with non-EU countries. Strategic agreements extend to exchanging general intelligence, and

57 General Scheme of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019

strategic and technical information. Operational agreements provide for exchange of information, such as personal data, and the hosting of Liaison Officers from third countries at Europol's headquarters. However, as Ondarza and Borrett (2018: 19) warn, 'The Europol agreements are... not legally binding and can be terminated by either party with little notice'.

The WA covers arrangements around the winding down of current arrangements in police and judicial cooperation in criminal matters, other administrative and judicial procedures, and the use of data and information exchanged before the end of the transition period. It stipulates that any procedures in these areas, begun before the end of the transition period, should still be completed according to existing EU rules.

The Political Declaration Setting out the Framework on the Future Relationship between the EU and the UK outlines a shared view of the importance of establishing 'a broad, comprehensive and balanced security partnership' comprising of 'law enforcement and judicial cooperation' (paragraphs 78 and 79). It further stipulates the intention to continue cooperation in the areas of: 'data exchange; operational coordination between law enforcement authorities and judicial cooperation in criminal matters; and anti-money laundering and counter terrorism financing' (paragraph 82). The continuation of such cooperation will significantly facilitate the cross-border dimensions of policing and justice on the island of Ireland, particularly in cross-jurisdictional bodies.

Agriculture/Fisheries

NI-specific dimensions

Agriculture is among the key competencies currently devolved within the United Kingdom but subject to EU law. The devolution statutes for Scotland, Wales and Northern Ireland devolve large parts of the competencies in agricultural support (farmer payments) and regulation (e.g. sanitary, phytosanitary and food standards). This policy area falls under the remit of the NI Department of Agriculture, Environment and Rural Affairs and its namesake Statutory Committee in the NI Assembly. In Northern Ireland, agriculture is more significant than in other parts of the UK in terms of the high degree of employment it creates and its substantial overall economic contribution. Under the current devolved powers Northern Ireland has control over its own commercial fishing fleets⁵⁸ within a UK wide system.

Despite the lack of a working devolved government, public opinion research in Northern Ireland, still shows that the most popular level of decision-making for 'agriculture and fisheries' is the devolved level, in contrast to the rest of the UK (Menon 2018: 26). Additionally, research shows that farming unions in Scotland, Wales and Northern Ireland 'want powers over support and rural policy to come back to the devolved level where more coherent policies, linked to supply chains and the rural environment, can be forged' and are 'strongly in favour of common standards and regulatory frameworks in order to retain access across the UK and avoid duplication' (Keating 2018a: 14)

58 According to the House of Commons, Exiting the EU Committee Fisheries [Sector Report](#) (n.d.), these employ 800 out of the 12000 fishermen in the UK (with a further 600 jobs in Fish Processing).

The Government has expressed its intention to move away from direct support to a system of ‘public money for public goods’,⁵⁹ originally envisioned for England. However, concerns have been expressed of the suitability of such a funding system for Northern Ireland’ (NIAC 2018: 3).

UK-wide dimensions

Agricultural trade is a reserved matter. Analysts suggest that to avoid disruption in agricultural trade within the UK and across the international border on the island of Ireland after Brexit, further divergence in agricultural support and regulation (beyond the already existing divergence within the UK) should be avoided, and that some degree of continued internal and external regulatory harmonisation will be needed (Keating, 2018a).

Under the EU Withdrawal Act (2018) agriculture competences are ‘repatriated’ to Westminster as part of ‘retained EU law’ and should be released to the devolved regions pending any necessary agreement of ‘legislative common frameworks’ (IfG 2018). Divergence in implementing EU directives with respect to the two devolved agricultural competencies - support and regulation - is already the norm among the different regions of the UK. The different devolved regions also receive different shares of CAP funding. According to estimates, between 50-60% of farm income in the UK comes from CAP payments. In Northern Ireland it is the highest at 87% (in Wales 80% and in Scotland 75%) (Keating 2018a: 18).

The UK Government’s analysis demonstrates that even where legislation at the UK Level may be needed in areas linked to agriculture and fisheries, this may only be ‘in part’. Legislation could be supplemented with other forms of cooperation and non-legislative agreements (Thimont-Jack et al. 2018). The Institute for Government has also suggested that the four governments will also ‘need to agree a new funding framework to ensure agricultural [CAP replacement] subsidies are consistent with the constraints of international obligations (including potential provisions in a UK–EU trade deal) and avoid undermining the UK internal market’ (Thimont-Jack et al. 2018: 18). The decision on how to divide agricultural funding between the UK regions after Brexit could be either to add it to the existing block grants, managing it through the Barnett formula, or to create a new ring-fenced budget and use ‘needs-based’ allocation (Thimont-Jack et al. 2018).

Cross-border dimensions

Agriculture is one of the areas of cross-border cooperation stipulated in the Good Friday Agreement. The NSMC meets regularly to discuss Common Agricultural Policy issues, animal and plant health policy and research and rural development. Agri-food business in particular ‘operate[s] on an all-island basis, with produce frequently crossing the border to be processed, packaged or sold’ (NIAC 2018). This means Northern Ireland farm businesses are reliant on the continued easy movement of goods and people across borders to an extent that those in other parts of the UK are not. To date, cross-border regulatory harmonisation has been a core means of facilitating the growth and depth of supply chains.

59 i.e. paying farmers for goods not delivered by the market, particularly to do with environmental enhancement, including clean air and water, beautiful scenery and protection of rare species.

EU dimensions

The Ireland/Northern Ireland Protocol of the Withdrawal Agreement means that the region will still need to comply to EU standards in the production of certain goods, and in areas related to the environment, sanitary and phytosanitary standards (Weatherill 2020b). Annex 2 of the Protocol contains regulations for the production and placement of agricultural goods and foods with respect to Northern Ireland, including required compliance with: European standards on pesticides and biocides, European food law principles, the European Food Safety Authority, European standards on food hygiene, food marketing standards, and standards on additives, traces, and GMOs (genetically modified organisms), among others.

Fisheries, particularly inland fisheries, are mentioned in the Protocol as part of the commitment to ‘maintain the necessary conditions for continued North-South cooperation’ (Article 11. 1). Fish and other aquaculture products are also referenced in Article 5 on customs and the movement of goods where provision is made for the Joint Committee during the transition period to decide the conditions under which UK vessels registered in Northern Ireland can be exempted from tariffs and quotas on bringing such products ‘into the customs territory of the Union defined in Article 4 of Regulation (EU) No 952/2013’. Significantly, that customs territory, through the Protocol, includes Northern Ireland. Consequently, absent a Joint Committee decision or a wider UK-EU agreement, fish and aquaculture products caught by UK vessels registered in Northern Ireland will be subject to the provisions of the union customs code on entering Northern Ireland.

According to a NIAC report (2018) it is vital for Northern Ireland fishing industry to continue to have access to EU markets for its products and it is possible that the trade-off for this in the future negotiations may be EU States continued access to fish in Northern Ireland waters (House of Commons Exiting the EU Committee 2018).

The WA also includes provisions in Article 10 and Annex 5 of the Protocol on Ireland/Northern Ireland on the continued application of EU state aid rules to goods produced in Northern Ireland and entering the EU market. Alongside these provisions, Annex 6 requires that the Joint Committee before the end of the transition period determine the permissible levels of agricultural subsidies available to producers in Northern Ireland. These are to be informed by the design of the United Kingdom’s future agricultural support scheme, and by the average annual total expenditure incurred in the Northern Ireland under the current CAP financing round.

A free trade agreement with the EU, would probably require a degree of harmonisation of agricultural support (even if the UK does not simply mirror CAP rules on permissible subsidies). The UK would also have to meet EU standards in production, environment and sanitary and phytosanitary standards which would apply across the country (Keating 2018a: 12). In the case of trade under a WTO regime, new rules for permissible state subsidies for agriculture and on standards will need to be taken into account, with variable effects across regions. Some suggest such a scenario is likely to ‘take more agricultural powers and authority away’ from the devolved regions, ‘not least because the World Trade organisation will negotiate only with the UK government as the relevant negotiating authority’ (Sanford and Gormley-Heenan 2020: 120).

Annex 2: EU Agencies relevant to post-Brexit NI under the Protocol

Models for Non-Member States

In order to understand how the Brexit-related disentanglement of the UK from the legal order of the EU will affect the future UK-EU relationship, it is important to consider if and under what conditions the UK might (at least with respect to Northern Ireland) retain access to some of the 36 agencies which help the EU regulate its single market and coordinate between member states across different policy areas.

The EU's regulatory agencies have existing arrangements for cooperation with, or even the participation of, third countries. The UK government has already voiced interest in participating in agencies like the European Aviation Safety Agency (EASA) and the European Chemicals Agency (ECHA).

At first sight, EU agencies enjoy a high degree of flexibility in their relationships with third countries. As von Ondarza and Borrett (2018) maintain, however, on closer inspection it is difficult to see how the UK may fit into existing models. One model of third-country relationships is that of the EEA (the 'Norwegian' model). In this *EEA model*, EEA member states fully participate in the agencies linked to the single market but under strict conditions: the adoption of relevant EU law or regulatory alignment with the EU, the acceptance of the CJEU remit, and financial contributions to the budget of the agencies – all of which without voting rights.

A second model is the *cooperation model*, an example of which is Canada's relationship with EU agencies. This, however, is limited to the exchange of information and best practice. As von Ondarza and Borrett note, 'the one fringe case is the EASA, which is of particular interest to the UK, where the Canadian, the US and the Brazilian aviation agencies are part of a Certification Management Team structure with the EASA'. This Certification Management Team works very closely, enabled by entering into a prior agreement with the EU on civil aviation safety. This 'allows for the mutual acceptance of aircraft approvals, decisions and certificates' (2018: 25 - 26).

Finally, the *Swiss model*, is a mixture of the two previous models. While the EU has been more flexible towards Switzerland, allowing it to choose the sectors with which to align its national legislation and the work of its associated agencies, this relationship does not stem from the agencies themselves but from the fact that Switzerland already accepts the rules of the single market or the Schengen agreement through its bilateral agreements with the EU. Moreover, the extension of the Swiss model to the UK has been ruled out by the EU as posing a risk to the integrity of its legal order.⁶⁰

60 E.g. R. Atkins and A. Barker, 'The Brexit effect: Brussels tries to blunt the Swiss model', *The Financial Times*, 2 October 2018, <https://www.ft.com/content/574ce2e6-c49d-11e8-bc21-54264d1c4647>

The Role of EU Agencies in Key Areas of Regulation

Chemicals and related products

In 2015 chemicals and related products were the largest category of goods traded between the UK and Ireland (von Ondarza and Borrett, 2018). With Northern Ireland aligned to the EU *acquis* in this field, the decisions of the European Chemicals Agency (ECHA) and the European Medicines Agency (EMA) will be very significant.

Chemicals and related products are also broadly present in a large variety of goods and products, which is why the ECHA and the EMA have a broader significance for the free movement of goods. Only chemical products that have been registered and approved by the ECHA can circulate in the single market. As von Ondarza and Borrett (2018) elaborate: ‘The ECHA authorises the circulation of chemical products and verifies their compliance with EU law, notably in terms of labelling requirements’. And, for its part, the European Medicines Agency makes recommendations to the European Commission on marketing authorisations for pharmaceuticals. Once in circulation, it is the EMA which monitors the side effects of those drugs (von Ordanza and Borrett 2018: 9).

Agriculture and Fisheries

The UK and Ireland are each other’s largest export markets for agricultural and food produce (Hederman and Durkin 2018). Agri-food is particularly critical to the economy of Northern Ireland and to its rural communities (NIAC 2018). The sector across the entire island of Ireland is vulnerable to the impact of Brexit.

The European Food Safety Authority (EFSA) and the European Fisheries Control Agency (EFCA) play a central role in this sector. The EFSA carries out risk assessments and its scientific opinions form the basis for European policies and legislation in food safety, animal welfare and plant protection. The EFCA ensures the compliance of Member States with the Common Fisheries Policy and helps to coordinate the work of national inspection authorities.

Various provisions of EU law regulating trade in fish and aquaculture products are part of the Protocol on Ireland/Northern Ireland, even if the terms under which fish and other aquaculture products caught by vessels registered in Northern Ireland can be imported into the EU customs union are still to be negotiated.

Electricity

Being part of an all-island Single Electricity Market is of particular importance to Northern Ireland. Under the terms of the WA, the continued operation of the Single Electricity Market across the island of Ireland is provided for under Article 9 of the Protocol on Ireland/Northern Ireland. Annex 4 outlines how the detailed provisions EU law which govern wholesale electricity markets are to apply to Northern Ireland after Brexit.

Central to the regulation of the European energy market is the Agency for the Cooperation of Energy Regulators (ACER). ACER complements and coordinates the work of national energy regulators. It ‘can issue non-binding opinions and recommendations to national energy regulators, transmission system operators, and the EU institutions’.⁶¹ ACER can also take binding decisions on specific individual and on cross-border infrastructure issues.

Environment

EU membership has strongly shaped environmental policy across the UK, with EU minimum standards for environmental protection applying to all of the UK’s constituent regions. Environmental policy, however, has evolved differently in the constituent parts of the UK and has been uniquely shaped in Northern Ireland which is said to have ‘a poor history of environmental governance’ (Gravey et al. 2018: 10).

Given their common EU membership and the sharing of common environmental challenges due to their shared geography, the two jurisdictions on the island of Ireland have developed extensive cooperation on environmental issues, and environmental policy is a focus of the NSMC.

EU membership has implied participation in the European Environment Agency as ‘a hub for environmental knowledge-sharing and capacity building at EU level’ (von Ordanza and Borrett 2018: 10). Part of this function is to provide reliable information to policy makers. It is ‘tasked with supporting sustainable development by providing reliable information to policy makers’

The European Environment Agency’s ‘task is to provide sound, independent information on the environment. The Agency aims to support sustainable development by helping to achieve significant and measurable improvement in Europe’s environment, through the provision of timely, targeted, relevant and reliable information to policymaking agents and the public’.⁶²

Transport

Transport is one of six Areas of Co-operation between Northern Ireland and the Republic of Ireland. Common policies and approaches are agreed in the North South Ministerial Council but implemented separately in each jurisdiction. Cooperation covers strategic transport planning in road and rail infrastructure and public transport services and road and rail safety

The European Railway Agency facilitates the development and implementation of EU transport policy, enhances the interoperability of railway infrastructure, and promotes common safety norms. It is further responsible for issuing single EU-wide safety certificates to railway companies and multi-country vehicle authorisations.

61 See https://www.acer.europa.eu/en/The_agency/Mission_and_Objectives/Pages/Acts-of-the-agency.aspx (accessed 8 May 2020).

62 See <https://www.eea.europa.eu/about-us> (accessed 8 May 2020).

Communications

Although not officially one of the six areas of cross-border cooperation under the auspices of the NSMC, telecommunications has been the focus of significant on-the-ground practical cooperation initiatives on the island of Ireland. For instance, building on the positive commitment of the Governments in each jurisdiction to support and improve the provision of broadband telecommunications infrastructure, local-authority led cross-border networks from the border region have actively lobbied for further support from the Governments to fully address the broadband requirements of the region (e.g. ICBAN 2012).

The agency which assists the Commission and national regulators in implementing EU laws in the field of electronic communications is the Body of European Regulators of Electronic Communications (BEREC). BEREC assists the Commission and the national regulatory authorities (NRAs) in implementing the EU regulatory framework for electronic communications. In fulfilling this function, BEREC issues guidelines on several topics; reports on technical matters; keeps registers, lists or databases; and delivers opinions on internal market procedures for draft national measures on market regulation. Furthermore, 'it provides advice on request and on its own initiative to the European institutions and complements at European level the regulatory tasks performed at national level by the NRAs'.¹ As such, this body forms a crucial hub of coordination between states which need to implement EU rules and access to it is one means of enabling more effective governance in this policy area.

This Annex is not intended to be a comprehensive overview of the range of policy areas affected by EU law (regulations and directives) which will have a direct relevance to Northern Ireland after Brexit. However, it does give an indication of the significance and complexity of some of these areas, and why access to EU agencies and bodies is a matter of considerable technical consequence.

1 See https://berec.europa.eu/eng/about_berec/what_is_berec/ (accessed 8 May 2020).

Annex 3: Online survey to stakeholders

Sample Questions from the Online Survey (distributed and collected May 2019)

With this short survey we aim to gather further information on your views and experiences with how the interests and concerns of your organisation/department are represented at each the UK and the EU level, in the transition to and after Brexit. The survey has 12 questions, most open-ended. Your responses will help us to make our workgroup sessions in June 2019, as useful and informative as possible for all participants.

This survey is confidential and your answers will remain anonymous. We will not quote anything you write. Because the survey is conducted online, we would still ask and advise you not to use it to share sensitive information.

Your responses need not be long. We have allocated around 150 words maximum for each. This should take you approximately 15 minutes. At the end of the survey we have provided you with an opportunity to add any further comments you may wish.

Q1. What specific issues and concerns have been a priority for your organisation/department in the process of Brexit?

Q2. When seeking channels of representation, which level of contact has been the most useful to engage with? (please tick all that apply)

- London
- Dublin
- Belfast
- Brussels

Q3. What specific channels of representation in London have you been able to use in this respect? Please give examples of organisations, networks or events you have engaged with and on what issues.

Q4. Which of those organisations, networks or events have been the most useful or have best represented the concerns and interests of your organisation in London so far?

Q5. Can you continue relying on the same channels of representation in London after Brexit or can you see another way for you to be best represented?

Q6. What specific channels of representation in Brussels have you been able to use so far? Please give examples of organizations, networks or events you have engaged with and on what issues.

Q7. Which of those organisations, networks or events have been the most useful or have best represented the concerns and interests of your organisation in Brussels so far?

Q8. Can you continue relying on the same channels of representation in Brussels after Brexit or can you see another way for you to be best represented?

Q9. Would you say that on the whole you have relied on invitations for engagement or have you mostly been proactive in seeking opportunities for engagement and representation? Can you please give examples?

Q10. What have been the main difficulties for your organisation/department (e.g. resources, structure, staff, lack of information) in either initiating or responding to invitations for such engagement?

Q11. Can you suggest new networks or initiatives on the issues/concerns that are a priority for your organisation that have been set up since the 2016 Referendum on exiting the EU? Have you been able to engage with/participate in these?

Q12. Have you any other comments regarding the ways in which the priorities and main concerns of your organisation/department are being represented in the transition to and after Brexit?



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