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Northern Ireland – A ‘Place Between’ in UK-EU Relations?

David Phinnemore¹

Abstract: UK withdrawal from the EU – Brexit – poses particular challenges for Northern Ireland notably concerning its essentially invisible border with Ireland, an important feature of the peace process. With the EU having committed to finding ‘flexible and imaginative solutions’ during the withdrawal negotiations to address the ‘unique circumstances on the island of Ireland, the UK and the EU agreed differentiated withdrawal terms in a dedicated Protocol on Ireland/Northern Ireland. These effectively keep Northern Ireland in the EU customs territory and, through a process of dynamic regulatory alignment, its internal market for goods. A unique but contested status – a ‘place between’ in the UK-EU relationship – has thus been conferred on Northern Ireland. The Protocol has some important shortcomings and implementation poses significant challenges yet also offers opportunities. How the challenges are met will play an important role in determining whether in 2024 members of the Northern Ireland Assembly vote to retain these arrangements. If they do not, politicians and officials will once again be faced with the question of how to avoid a physical hardening of the border on the island of Ireland.

Keywords: Brexit, customs union, differentiated integration, flexibility, Ireland, Irish border, Northern Ireland, Protocol, United Kingdom, Withdrawal Agreement

1. INTRODUCTION

Withdrawal from the European Union (EU) has proven to be a far more complex and complicated process for the United Kingdom (UK) than many advocates of ‘Brexit’ envisaged. Few, if any, ‘Leave’

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voters acknowledged, let alone appreciated, the challenges that leaving the EU would pose. This was particularly evident in respect of Northern Ireland. Managing some of the consequences of Brexit for Northern Ireland, notably the 'Irish border' issue, became central to the conclusion of the Article 50 negotiations, and the initial, but contested, 'backstop' outcome a major reason for the protracted nature of the withdrawal process. More generally, few policymakers and analysts anticipated that dedicated arrangements for Northern Ireland within the UK-EU relationship could or would be agreed. The Withdrawal Agreement's *Protocol on Ireland/Northern Ireland* that sets out the Northern Ireland-specific arrangements contains a complex mix of arrangements that is unprecedented in the EU's external relations. As such, it establishes for Northern Ireland a unique position in the EU's system of differentiated external integration; a position that places Northern Ireland, at least as far as customs and the internal market for goods are concerned, very much between the UK and the EU.

Such a status complements the unique constitutional position of and governance arrangements for Northern Ireland established by the 1998 Belfast 'Good Friday' Agreement (the '1998 Agreement').² Confirming Northern Ireland's status as part of the UK, the 1998 Agreement also acknowledged the very close relationship with Ireland and established that it was for the people of Northern Ireland and Ireland to determine through concurrent referenda whether they wish Northern Ireland to be part of a united Ireland. In terms of governance, the 1998 Agreement placed Northern Ireland in a multi-level system with three dimensions involving a mix of devolved powers exercised by a Northern Ireland Assembly and power-sharing Executive (Strand 1), north-south cooperation on the island of Ireland overseen by a North-South Ministerial Council (NSMC) (Strand 2), and east-west cooperation under a British-Irish Council (Strand 3).

In this context, the Protocol and the position it establishes for Northern Ireland can be regarded as a pragmatic response to a particular set of challenges posed by the UK's withdrawal from the EU. However, for many pro-UK 'unionists' – and not just in Northern Ireland – the Protocol arrangements are regarded as further undermining Northern Ireland's constitutional position and so its future within the UK; for many, the Protocol is a betrayal of the 'union' that is the 'United Kingdom of Great Britain

² The Agreement is often referred to as the 'Belfast Agreement' or the 'Good Friday Agreement'. There is sometimes an implicit assumption of unionist or nationalist preference according to the descriptor used. In line with practice in the Withdrawal Agreement, the term '1998 Agreement' is used here.

and Northern Ireland'.³ On the one hand, therefore, the new and essentially unprecedented position that Northern Ireland occupies post-Brexit in the UK-EU relationship is an intriguing development in terms of differentiated integration with the EU. On the other hand, it remains contested, thus complicating the challenges around its implementation and the potential it may have for Northern Ireland's position within the European integration process.

This contribution reviews the implications of Brexit for Northern Ireland before considering the content of the Protocol and the nature of the relationship it establishes for Northern Ireland as – in several important respects – a 'place between' the UK and the EU. It also considers key challenges in the implementation of the Protocol and the potential for the development of this unique position that Northern Ireland as part of the UK has in the EU's external relations.

2. BREXIT AND ITS CHALLENGES FOR NORTHERN IRELAND

The implications of Brexit for Northern Ireland barely featured in most national level UK debates prior to the EU referendum in 2016; and it is generally accepted that the UK government, more out of ignorance and an absence of planning than wilful neglect, gave them hardly any thought. Once the decision to leave the EU had been taken, it soon became clear that the Northern Ireland dimension to Brexit posed particular challenges. With the UK government soon committing to leaving the customs union and the internal market, increased formalities, border checks and controls on at least the movement of goods between the UK and the EU became inevitable. It followed that there would have to be hardening of the essentially invisible 499km border between Northern Ireland (outside the EU) and Ireland (inside the EU). Not only would this prove disruptive to trade on the island of Ireland, the cross-border movement of goods and people, and the further development of the all-island economy, but it also raised the prospect of a return of physical infrastructure and border controls to a deeply political border that, importantly for the peace process in Northern Ireland, had over the last two-and-a-half decades seen almost all of its physical manifestations disappear through a combination of shared UK and Irish participation in the EU internal market and the implementation of the 1998 Agreement.⁴ This transformation had been fundamental to the border's de-politicization and its

³ The timing of the full entry into force of the Protocol on 1 January 2021 could arguably not have come at a more poignant moment for unionists. 2021 is the centenary year of Northern Ireland's establishment, which occurred with the partitioning of Ireland by the Government of Ireland Act 1920.

⁴ At the time of the EU referendum, the only widely evident indicators of the border, except for the occasional – and in some cases vandalised – 'Welcome to NORTHERN IRELAND' signs on main roads, were changes in road

effective removal from day-to-day politics on the island of Ireland. Any hardening of the border through the reintroduction of formalities, checks and controls – even if only for the movement of goods – would not only re-politicize the border, there was also the risk that any new infrastructure would lead to violent protest and could become a target for terrorist activity. For many, particularly nationalists in Northern Ireland (i.e. those identifying as Irish), the de-politicized nature of the border was integral to the peace process. Any hardening would, psychologically at least, be considered a reversal of that process, and so had to be avoided.⁵

A second, and related, concern was what Brexit would mean for the 1998 Agreement itself. That the 1998 Agreement has very few references in it to the EU led to claims that there would be little if any impact. It was also argued, however, that the Agreement had been concluded on the assumption that both the UK and the EU would remain members of the EU and that the context of shared EU membership and especially shared regulatory and policy frameworks and programmes was fundamentally important to the implementation of the Agreement and realization of its objectives.⁶ This was particularly true for the cross-border free movement of people and services, for citizens' rights based on EU law, for the work of the Special EU Programmes Bodies in border regions, and for north-south cooperation both generally and in specific areas notably the single all-island electricity market. Brexit and its removal of the UK from EU legal and policy frameworks and the expectation of future regulatory divergence replacing convergence on either side of the border could seriously undermine the prospects for maintaining existing cooperation and realising the full potential of and aspirations contained in the 1998 Agreement. There were also concerns about what Brexit would mean not just for progress in developing the all-island economy, but also for existing cross-border supply and production chains. The UK leaving the customs union and internal market posed major

markings and the format of road signs. To all intents and purposes, the border had become invisible. See G. Carr, *The Rule of the Land: Walking Ireland's Border* (Faber and Faber 2017).

⁵ J. Garry, K. McNicholl, B. O'Leary & J. Pow, *Northern Ireland and the UK's Exit from the EU: What do People Think?*, UK in a Changing Europe (May 2018), <https://ukandeu.ac.uk/wp-content/uploads/2018/05/Northern-Ireland-and-the-UK%E2%80%99s-Exit-from-the-EU.pdf> (accessed 13 August 2020).

⁶ K. Hayward & D. Phinnemore, *UK Withdrawal ('Brexit') and the Good Friday Agreement*, European Parliament Policy Department for Citizens' Rights and Constitutional Affairs (November 2017) [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU\(2017\)596826_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf) (accessed 13 August 2020).

problems for many businesses particularly in certain agri-food sectors (e.g. dairy) where production processes involved goods crossing the border multiple times.⁷

Also of concern was the impact of Brexit on the future of the Common Travel Area (CTA) between the UK and Ireland, and whether the free movement, residency and other rights enjoyed by British and Irish citizens in, respectively, Ireland and the UK could be maintained with the UK outside and Ireland remaining in the EU. There was the question too of whether Northern Ireland could continue to benefit from EU Peace funding and participation in related and other forms of cross-border cooperation promoted by the EU.

3. WITHDRAWAL AND THE PROTOCOL ON IRELAND/NORTHERN IRELAND

Although appreciation of the implications of Brexit – particularly one seeing the UK outside a customs union with the EU and outside the EU’s internal market – improved in UK debates during 2016-17, the UK government was slow to formulate concerns and set out how they might be addressed. When the UK government triggered Article 50, it acknowledged its wish ‘to avoid a return to a hard border... to be able to maintain the [CTA]’ and its ‘important responsibility to make sure that nothing is done to jeopardize the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement’.⁸ How to do this was not indicated. In part, this reflected the general lack of UK government preparedness for withdrawal and a failure to appreciate, publicly at least, the tensions that clearly existed between its wishes regarding Northern Ireland and the red lines it had adopted regarding leaving the internal market, having an independent trade policy – and so remaining outside a customs union with the EU – and leaving the jurisdiction of the Court of Justice (CJEU). There was also, however, the insistence that the UK as a whole leave the EU on the same terms. Moreover, to consider differentiated arrangements for Northern Ireland would only lead to further calls from the pro-independence government in Edinburgh for Scotland – where a majority of voters (62%), as in Northern Ireland (56%), had voted for the UK to remain in the EU – to be granted differentiated terms

⁷ Another oft-cited example concerned the production of Guinness. See *Brexit: Guinness Border crossings highlights potential costs*, Irish Times (7 April 2018), <https://www.irishtimes.com/business/economy/brexit-guinness-border-crossings-highlights-potential-costs-1.3040315> (accessed 13 August 2020)

⁸ UK Government, *Prime Minister’s letter to Donald Tusk triggering Article 50* (29 March 2017), <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50/prime-ministers-letter-to-donald-tusk-triggering-article-50> (accessed 13 August 2020)

as well, thus in the eyes of unionists undermining the UK further as union.⁹ Indeed, the shadow of Scotland hung heavily over UK negotiators as they engaged with the EU on how to address the Northern Ireland dimension.

For the EU, however, the Irish government had already been signalling the need to think creatively about how to address the challenges Brexit posed for both Northern Ireland and the island of Ireland more generally.¹⁰ The EU institutions and the other member states supported the Irish position. Consequently, when the European Council in April 2017 responded to the UK government's Article 50 notification, it noted that the EU had 'consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts' adding that 'continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance'. A way forward was offered:

'In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognize existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law'.¹¹

The EU(27) also later agreed with the Irish position that arrangements addressing the 'unique circumstances on the island of Ireland' needed to be agreed as part of the withdrawal agreement and not the future UK-EU relationship. The commitment to finding 'flexible and imaginative solutions'

⁹ Although in 2014 just over 55% of voters in Scotland had voted against independence and thus seemingly settled the question for the foreseeable future, the outcome of the EU referendum in 2016 led to demands for a further vote. The UK government's poor handling of Scottish concerns in the Brexit process and the COVID-19 pandemic saw support for Scottish independence grow. By summer 2020, opinion polling was indicating a majority in support for Scottish independence. See M. Dickie *Johnson's handling of pandemic and Brexit fuels separatist sentiment*. Financial Times (24 July 2020), <https://www.ft.com/content/3039f172-d7e7-466e-a63f-145fc1d04f0d> (accessed, 13 August 2020)

¹⁰ On the Irish government's lobbying in the EU, see T. Connelly, *Brexit and Ireland: The Dangers, the Opportunities, and the Inside Story of the Irish Response* (Penguin 2017)

¹¹ European Council, *European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU* (29 April 2017), <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines> (accessed 13 August 2020)

initially led to agreement on a set of specific ‘backstop’ arrangements for Northern Ireland that would enter into force if and where the post-withdrawal UK-EU relationship failed ‘to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions’.¹² Given this would have involved the UK as a whole remaining in a customs union relationship with the EU – thus significantly constraining the prospect for its red line of being able to pursue an independent trade policy – and was seen as establishing a permanent basis for relations, it proved impossible for the UK government under Theresa May to secure parliamentary approval. May duly announced her resignation in May 2019. Boris Johnson became Prime Minister in July 2019 and promised to ‘ditch the backstop’.¹³

The ‘backstop’ was soon abandoned. It was replaced by a revised set of essentially Northern Ireland-only arrangements agreed in October 2019 and included in the *Protocol on Ireland/Northern Ireland* attached to the Withdrawal Agreement.¹⁴ In contrast to its ‘backstop’ predecessor, the entry into force of the revised arrangements is not conditional on the outcome of negotiations on the post-Brexit UK-EU relationship; instead, it occurs automatically at the end of the transition period (i.e. 1 January 2021). Moreover, the revised arrangements lack the temporary ‘unless and until’ status of the ‘backstop’ arrangements, although they can be replaced by arrangements agreed as part of a UK-EU agreement. Moreover, and importantly, members of the Northern Ireland Assembly have the

¹² *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – Protocol on Ireland/Northern Ireland* (19 January 2019), OJ C 66 I/86, Article 1(3)(i), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2019:066I:FULL&from=EN> (accessed 13 August 2020)

¹³ D. Boffey, *Johnson sends 'ditch the backstop' message to EU via Brexit adviser* (31 July 2019), *The Guardian*, <https://www.theguardian.com/politics/2019/jul/31/johnson-sends-ditch-the-backstop-message-to-eu-via-brexit-adviser> (accessed 13 August 2020).

¹⁴ The revised Protocol therefore reflects more the original proposal from the European Commission to have arrangements specific to Northern Ireland. The subsequently rejected UK-wide customs union arrangement with the EU was included at the behest of the UK government, which maintained that it could not contemplate the possibility of tariffs and customs checks and controls on the movement of goods across the Irish Sea between Great Britain and Northern Ireland. See European Commission, *Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (28 February 2018), TF50 (2018) 33, https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf (accessed 13 August 2020).

opportunity to vote every four or eight years from 2024 to dis-apply as a single package core provisions of the Protocol as part of a 'democratic consent' mechanism (see below).¹⁵

For its unionist critics, the Protocol sets up arrangements that undermine Northern Ireland's position in the UK. At the core of their objections is the fact that despite the assertion that 'Northern Ireland is part of the customs territory of the United Kingdom' (Article 4) and a UK government commitment to 'unfettered access' for goods moving from Northern Ireland to 'other parts of the United Kingdom's internal market' (Article 6), the Protocol provides for the continued application in Northern Ireland of the Union Customs Code (UCC). In effect therefore, Northern Ireland is in the customs territory of the EU and so goods moving from the rest of the UK into Northern Ireland and *vice versa* are by default subject to EU customs procedures.¹⁶ And, in the absence of a comprehensive UK-EU free trade agreement covering all goods, EU import tariffs will be applied to these goods unless it is agreed jointly by the UK and the EU that the goods are not at risk of onward movement into the EU.

The customs arrangements contained in the Protocol are part of a set of provisions designed to ensure that there is no physical hardening of the border between Northern Ireland and Ireland. Other provisions relate primarily to the dynamic regulatory alignment of Northern Ireland with the EU's internal market *acquis* allowing for the free movement of goods and the continued application in Northern Ireland of the EU's sanitary and phytosanitary rules. With these arrangements come formalities for, and checks and controls on, the movement of goods from the rest of the UK into Northern Ireland. EU rules on VAT and excise and some environmental legislation will also apply in Northern Ireland. All this treats Northern Ireland differently from the rest of the UK. In addition, EU state aid rules remain applicable and in fact generally in the UK 'in respect of measures which affect

¹⁵ The democratic consent provisions were included in the revised Protocol in an attempt to address unionist concerns around the perceived permanency of the Protocol's provisions. These concerns were most vocally expressed by MPs of the Democratic Unionist Party (DUP) on whom the first Johnson government (2019) relied for a parliamentary majority. The DUP MPs were unimpressed, however, and opposed the revised Protocol, just as they had the 'backstop' version. With the Conservative Party securing a parliamentary majority in the December 2019 general election, Johnson no longer required the support of the DUP whose opposition to the revised Protocol could not prevent the UK government securing parliamentary approval of the Withdrawal Agreement in January 2020. None of the MPs representing constituencies in Northern Ireland voted in favour of the Withdrawal Agreement.

¹⁶ For a detailed discussion of the Protocol, see S. Weatherill, *The Protocol on Ireland/Northern Ireland: protecting the EU's internal market at the expense of the UK's*, 45 *ELJ*. 222 (2020).

that trade between Northern Ireland and the Union which is subject to [the] Protocol' (Article 10(1)). Goods produced elsewhere in the UK and traded in Northern Ireland need to comply with EU state aid rules.¹⁷ The specific pieces of EU legislation that will continue to apply in Northern Ireland under the Protocol are listed in a series of annexes. The lists include almost 350 regulations, directives, decisions and other acts.

Beyond arrangements to maintain the free movement of goods on the island of Ireland, the Protocol provides for Northern Ireland's continued alignment with relevant EU legislation for the functioning of the single electricity market. There are also provisions relating to the rights of individuals and the UK's commitment to ensure that as a consequence of leaving the EU there is no diminution of the rights, safeguards or equality of opportunity as set out in the 1998 Agreement and contained in key pieces of EU legislation. A commitment exists as well to implement and apply the Protocol 'so as to maintain the necessary conditions for continued North-South cooperation' on the island of Ireland in at least 14 specified areas, i.e. 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. This suggests further regulatory alignment might be needed, although the Protocol provides no detail.

Implementation of the Protocol is the responsibility of both the UK and the EU. To oversee this there are three UK-EU bodies: the Joint Committee which is the decision-making body for the Protocol; a Specialised Committee to 'facilitate the implementation and application' of the Protocol' and which can make recommendations to the joint Committee; and a novel Joint Consultative Working Group (JCWG) that provides 'a forum for the exchange of information and mutual consultation' and reports to the Specialised Committee. The Joint Committee and the Specialised Committee meet at least annually, whereas the JCWG meets 'at least once a month'. As the Protocol's decision-making body, the Joint Committee, whose decisions are binding on the EU and the UK, is co-chaired by either a UK government minister and a member of the European Commission or high-level officials from the UK and the EU. The Specialised Committee and the JCWG – also co-chaired – comprise designated representatives of the UK government and the European Commission; 'experts or other persons' may be invited to attend. Reflecting the significance of the Protocol for the continued implementation of

¹⁷ On the state aid provisions, see G. Peretz & A. Artley, *State aid under the Northern Ireland Protocol* (11 May 2020) Tax Journal, <https://www.taxjournal.com/articles/state-aid-under-the-northern-ireland-protocol> (accessed 31 August 2020)

the 1998 Agreement, the institutional arrangements for the Protocol also involve the North-South Ministerial Council (NSMC), the North-South Implementation bodies established by the 1998 Agreement, 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. The NSMC and the North-South Implementation bodies may make formal proposals to the Specialised Committee on the implementation and application of the Protocol; this suggests a sense of dynamism in the Protocol. The other bodies are charged with bringing to the Specialised Committee's attention 'any matter of relevance to Article 2 [individual rights]'.

The work of the Joint Committee and Specialised Committee actually began during the transition period with the former having to take decisions to prepare for the Protocol's full implementation. These related to future exemptions, in the absence of a comprehensive UK-EU free trade deal, from EU tariffs for goods entering Northern Ireland from the rest of the UK and third countries but not 'at risk' of onward movement into the EU as well as tariff exemptions for fish and other aqua-cultural products landed in Northern Ireland by UK vessels registered in Northern Ireland. Decisions were also needed on maximum subsidies for agricultural producers in Northern Ireland, and arrangements for the European Commission to monitor UK implementation of EU law under the Protocol. The Joint Committee also considered adding some previously overlooked and other new EU acts relating to the free movement of goods. This was a foretaste of a key role for the Joint Committee: determining which *new* EU acts relevant to the Protocol should be added to its annexes and applied in Northern Ireland. Demonstrating a dynamic dimension to the integration that the Protocol entails, where an EU act revises or replaces an existing act applicable under the Protocol, the act is automatically added to the relevant annex. The JCWG, still to be established at the time of writing (September 2020), exists so that the UK can have some input to the process of EU policy formation here.

On dispute settlement, matters relating to the implementation of EU law are addressed essentially using normal EU processes. The European Commission therefore retains an important monitoring function, notably around the implementation of the UCC, and can initiate infringement proceedings.¹⁸

¹⁸ The Protocol provides that 'Union representatives shall have the right to be present during any activities of the authorities of the United Kingdom related to the implementation and application of provisions of Union law made applicable by this Protocol, as well as activities related to the implementation and application of Article 5 [customs, movement of goods], and the United Kingdom shall provide, upon request, all relevant information relating to such activities' (Article 12(1)). The understanding when the provision was drafted was that there would therefore continue to be an EU office in Belfast. With the UK government leaving the EU in 2020, and with

Furthermore, and contrary to the UK government's insistence that with Brexit there would be no role for the CJEU in the UK, the CJEU retains jurisdiction in Northern Ireland as regards the provisions of EU law covered by the Protocol. This creates an unusual, indeed almost unprecedented, situation where part of the territory of a non-EU state – as opposed to the state as a whole – is subject to jurisprudence of the CJEU.¹⁹ For other aspects of the Protocol, the dispute settlement procedures established for the Withdrawal Agreement generally apply. The initial step involves consultations in the Joint Committee. Unresolved matters are then passed to an arbitration panel.

With its *de facto* inclusion of Northern Ireland in the EU customs territory and the EU internal market for goods, dedicated institutional arrangements and the extra-territorial jurisdiction of the CJEU, the Protocol confers in terms of integration an interesting and unique status on Northern Ireland. A constituent element of the UK, Northern Ireland is constitutionally part of a state that is no longer a member state of the EU. However, whereas the UK government – albeit subject to the development of its relationship with the EU – is firmly in a process of pulling back from the regulatory alignment and policy commitments that have arisen through EU membership and eschewing any substantive further integration, Northern Ireland finds itself post-Brexit still legally integrated – at least as far as the movement of goods and other areas mentioned are concerned – with the EU. Moreover, with the obligations to continued regulatory alignment, there is an element of in-built dynamism to the relationship. There scope for the Joint Committee, to maintain the necessary conditions for north-south cooperation, and to make 'appropriate recommendations' to the UK and the EU. There is also the general provision in Article 5 of the Withdrawal Agreement allowing the UK and the EU to 'take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement'. Consequently, and despite the absence of an evolutionary clause, the Protocol-based position of Northern Ireland between the UK and the EU could evolve further, so reinforcing Northern Ireland's status as 'a place between' in the UK-EU relationship.

particular opposition from unionist politicians in Northern Ireland, the UK government rejected repeated EU requests to open a new office in Belfast.

¹⁹ One precedent would be the Austrian exclaves of Jungholz and Mittelberg in Germany which prior to Austrian accession to the EU in 1995 were, through application of the UCC from 1968, part of the customs territory of the then European Community. *Regulation (EEC) No 1496/68 of the Council of 27 September 1968 on the definition of the customs territory of the Community* (28 September 1968) OJ L 238, <https://op.europa.eu/en/publication-detail/-/publication/2806f377-b960-43b7-8b18-79f2dc4e4862/language-en> (accessed 13 August 2020).

The arrangements that the UK and the EU have agreed for Northern Ireland, while substantial, clearly fall short, however, of the ‘special status for Northern Ireland within the EU’ that nationalist political parties in Northern Ireland sought. Nor do they come close to such ideas of ‘a reverse Greenland’ or membership of the EEA floated in the aftermath of the referendum in 2016.²⁰ Moreover, the extent to which the Protocol either is an optimal solution for addressing ‘the unique circumstances on the island of Ireland’ (Article 1(3)) or provides Northern Ireland with a ‘best of both worlds’ solution to Brexit has to be challenged. In several respects, the Protocol is a minimalist solution.²¹ It does not provide for the free movement of services, capital or people, and, as such, cannot claim to support the all-island economy.²² In terms of avoiding a hardening of the border on the island of Ireland, the Protocol’s contribution is limited to avoiding physical manifestations of the border on the island of Ireland. For services, however, the border is back, and so cross-border provision will be disrupted. How much and in which sectors will depend on the still unknown terms of the UK-EU relationship. And there could be implications for the free movement of goods. Goods may still move freely, but companies and workers transporting them may no longer be as free to move them as they were with the UK in the EU internal market. Cabotage restrictions may apply, and whereas UK and Irish citizens benefit from the CTA and can move freely across the border, other EU citizens cannot. For people living in the border regions and those moving in these areas and across the border, there is the costly inconvenience of the likelihood that mobile phone roaming charges will return.

²⁰ On options for Northern Ireland, see N. Skoutaris, Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?, *Cambridge Yearbook of European Legal Studies* 11 (2017) 1, <https://doi.org/10.1017/cel.2017.11> (Accessed 13 August 2020). Also: B. Doherty, C. McCrudden, L. McGowan, D. Phinnemore, D. Schiek & J. Temple Lang, *Northern Ireland and Brexit: the European Economic Area Option*, European Policy Centre (7 April 2017), <https://www.epc.eu/en/publications/Northern-Ireland-and-Brexit-the-European-Economic-Area-option~20b124> (accessed 13 August 2020)

²¹ See D. Phinnemore, *The Protocol on Ireland/Northern Ireland: a flexible and imaginative solution for the unique circumstances on the island of Ireland?* in *Outside the EU: Options for Britain* (M. Westlake ed, Agenda Publishing, forthcoming)

²² Of note is that the ‘backstop’ version of the Protocol included reference in its preamble to its arrangements supporting the ‘all-island economy’. The reference does not appear, however, in the revised Protocol. The reference’s removal was less an admission of the Protocol’s limitations and more an attempt by the UK government to secure DUP and wider unionist support for the Protocol by strengthening references to Northern Ireland’s position within the UK customs territory and removing references to the all-island [of Ireland] economy.

A further concern regarding the Protocol is that although the UCC applies in and Northern Ireland is therefore in effect part of the EU customs territory, it does not mean that it is part of the EU customs union and can therefore benefit from EU trade agreements with third countries. With the end of the transition period, the only trade preferences that will be applicable to goods exported from Northern Ireland to non-EU countries will be those contained in agreements concluded by the UK. The agri-food sector is expected to be particularly affected. Of much greater concern to nearly all traders, however, will be the application of EU customs formalities and regulatory checks to the movement of goods into Northern Ireland from the rest of the UK. Although the revised Protocol states that 'Northern Ireland is part of the customs territory of the United Kingdom', the UCC, as noted, applies in Northern Ireland, as does the EU's internal market *acquis* in respect of the movement of goods. Moreover, application of the UCC means exit summary declarations are by default necessary on the movement of goods from Northern Ireland into the rest of the UK.

The UK government has therefore found it difficult to deliver on its commitment to provide 'unfettered access' to the rest of the UK market for goods produced in Northern Ireland and maintain Northern Ireland's position in the UK internal market. This became clear in September 2020 when it announced plans to empower ministers to take unilateral decisions to waive the requirement of exit summary declarations for goods moving from Northern Ireland to the rest of the UK and to determine those goods moving into Northern Ireland that were 'at risk' of onward movement into the EU and therefore subject to any applicable tariffs. Although the plans were welcomed by unionists insistent that the Protocol ignored their concerns and undermined Northern Ireland's position in the UK, they would clearly breach the terms of the Protocol and called into question more generally the UK government's commitment to uphold its treaty obligations. Indeed, publication of the UK internal market bill led the EU to call an extraordinary meeting of the Joint Committee. With representatives of all 27 member states attending the meeting, the European Commission Vice President, Maroš Šefčovič, called on the UK government to remove offending clauses 'in the shortest time possible and in any case by the end of the month' and made it clear that the EU would 'not be shy' in using the Withdrawal Agreement's mechanisms and legal remedies to address 'violations of... legal obligations'.²³

²³ European Commission, *Statement of the European Commission following the extraordinary meeting of the EU-UK Joint Committee* (10 September 2020), STATEMENT/20/1607, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1607 (accessed 20 September)

The challenge of delivering ‘unfettered access’ is compounded by the fact that new frictions to trade between GB and NI and *vice versa* are even greater where goods are transported via Ireland and so the EU. Moreover, the UK government’s insistence that producers in Northern Ireland will be able to benefit from UK trade agreements with third countries has also been called into question. With the free movement of goods between the EU and Northern Ireland, it is not clear how the UK can assure a third country that the goods have been produced in Northern Ireland and are therefore eligible to be treated as UK goods.

A further concern regarding the Protocol is that it is underdeveloped in terms of how it supports the maintenance of the necessary conditions for North-South cooperation, and this is despite an extensive mapping exercise demonstrating how shared EU membership underpinned much cooperation.²⁴ And although the EU has committed to further cross-border PEACE funding, no special arrangements are made in the Protocol for Northern Ireland to participate in EU programmes or Ireland or Northern Ireland to access additional EU funding streams in the name of supporting activities to address the unique circumstances on the island of Ireland. Any participation is contingent on what is agreed for the UK-EU relationship overall. No provision was made either for facilitating Northern Ireland’s continued participation in EU measures, programmes and bodies supporting cross-border police and judicial cooperation. As such, in negotiating the Protocol, the UK and the EU were not as ambitious as they might have been in their pursuit of the ‘flexible and imaginative solutions’ to which the EU at least was committed.²⁵

That said, the Protocol does achieve the most oft-stated aim of the UK and the EU in relation to Northern Ireland and the island of Ireland generally: avoiding [the return of] a hard border. For the EU

²⁴ See European Commission, *Negotiations on Ireland/Northern Ireland, Mapping of North-South cooperation* (21 June 2019), TF50 (2019) 63 – Commission to EU 27, https://ec.europa.eu/commission/sites/beta-political/files/mapping_of_north-south_cooperation_0.pdf (accessed 13 August 2020)

²⁵ The opportunity to develop a more comprehensive and detailed set of ambitious arrangements for Northern Ireland did exist, yet at no point during the Article 50 negotiations did the UK government show any particular enthusiasm for differentiated treatment of Northern Ireland. Nor did it produce – at least according to what is publicly available – any substantive proposals until the Johnson government in October 2019 forwarded to the European Commission its proposals for an amended protocol. These sought to reduce the scope and application of arrangements. HM Government, *Explanatory Note: UK Proposals for an Amended Protocol on Ireland/Northern Ireland* (2 October 2019), <https://www.gov.uk/government/publications/uk-proposals-for-a-new-protocol-on-irelandnorthern-ireland> (accessed 13 August 2020)

it does so while respecting the integrity of its legal order, and assuming effective implementation, of its customs union and of its internal market. For businesses in Northern Ireland, unlike their counterparts in the rest of the UK and irrespective of the scope and content of the UK-EU relationship, they do have unfettered access for goods to not only the Irish market but the rest of the EU market as well. The Protocol also provides for the maintenance of the CTA and has in fact provided a catalyst for placing its various elements on a firmer legal footing. Moreover, EU member states through the Council have agreed that Ireland may seek authorization to conclude bilateral agreements with the UK in areas of exclusive EU competence to ensure the proper functioning of the arrangements in the Protocol.²⁶ The potential exists to address some of the shortcomings of the Protocol to ensure all its objectives are addressed.

4. NORTHERN IRELAND UNDER THE PROTOCOL: WHAT NEXT?

The differentiated Brexit arrangements for Northern Ireland contained in the Protocol have received a mixed reaction. For Michel Barnier, the EU Chief Negotiator, the EU has been ‘creative and flexible’ and agreed with the UK in the Protocol ‘a workable system, built to last’ that ‘avoid[s] a hard border and protect[s] the all-island economy’.²⁷ For the UK government, the Protocol is ‘as a practical solution to avoiding a hard border on the island of Ireland, whilst ensuring that the UK, including Northern Ireland, could leave the EU as a whole’.²⁸ Most unionists in Northern Ireland regard it, however, with suspicion if not open hostility, primarily because of the ‘border in the Irish Sea’. For Arlene Foster, leader of the DUP, the effects of the Protocol are tantamount to the ‘annexation’ of Northern Ireland

²⁶ Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L29 (31 January 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D0135&from=EN> (accessed 13 August 2020)

²⁷ M. Barnier, *Speech at the William J. Clinton Leadership Institute, Queen’s University Belfast* (27 January 2020), SPEECH/20/133, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_133 (accessed 13 August 2020)

²⁸ UK Government, *The UK’s approach to the Northern Ireland Protocol* (20 May 2020), CP226, 4, <https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol> (accessed 13 August 2020)

(RTÉ 2018).²⁹ Other unionists have presented it is an act of ‘betrayal’ by the UK government.³⁰ Nationalists and others have far fewer concerns about the differentiated treatment of Northern Ireland. Indeed, for many nationalists, Brexit and the UK government’s handling of the process have been a godsend for the cause of Irish unity. Although opinion polls generally do not suggest there would be a vote in favour of unification if a ‘border poll’ were called,³¹ the European Council, at Ireland’s behest, acknowledged in April 2017 that if there were a vote in favour and a united Ireland brought about, ‘the entire territory of such a united Ireland would... be part of the European Union’.³² Nationalists, and others, have nevertheless been critical of the Protocol arguing that the abandoned ‘backstop’ version provided a far less disruptive set of arrangements as regards trade between Northern Ireland and the rest of the UK.

The Protocol, however, is a reality and so from the end of the transition period Northern Ireland will be treated differently to the rest of the UK. Northern Ireland will occupy a unique position in the UK-EU relationship. Whether and how that status evolves, and indeed whether it survives given unionist opposition, will depend on how the Protocol operates, the substance of the UK-EU relationship, and what tangible effects the Protocol has – or is perceived to have – economically, politically and constitutionally on Northern Ireland and its position within the UK.

Indeed, a first test will come in 2024 when the Protocol’s ‘democratic consent’ mechanism is first available for use. This provides members of the Northern Ireland Assembly (MLAs) with an opportunity to vote on the continued application of Articles 5-10 of the Protocol, the provisions governing application in Northern Ireland of the UCC, regulatory alignment with the EU *acquis* on the free movement of goods, single electricity market, VAT and excise, and state aid. If MLAs vote by a simple

²⁹ Foster says no deal better than EU ‘annexation’ of Northern Ireland (13 October 2020) RTÉ, <https://www.rte.ie/news/2018/1013/1002900-brexit> (accessed 13 August 2020).

³⁰ NI newspapers: Unionist fury over Brexit ‘betrayal’ (18 October 2019) BBC News, <https://www.bbc.co.uk/news/uk-northern-ireland-50094038> (accessed 13 August 2020)

³¹ Polling data suggests that three-quarters of nationalists believe that Brexit has made Irish unity more likely; less than a quarter of unionists are of the same view. See K. Hayward and B. Rosher, *Political attitudes at a time of flux* (June 2020) ARK Research Update, <https://www.ark.ac.uk/ARK/sites/default/files/2020-06/update133.pdf> (accessed 13 August).

³² European Council, *Special meeting of the European Council (Art.50) held on 29 April 2017* (23 June 2017), EUCO XT 20010/17, <http://data.consilium.europa.eu/doc/document/XT-20010-2017-INIT/en/pdf> (accessed 13 August 2020)

majority in favour of continued application, the Protocol will continue to be implemented in full. MLAs will, however, be provided with further opportunities to vote: after four years if there is only a simple majority of MLAs endorsing the Protocol; after eight years if there is cross-community support – i.e. a majority of self-designated nationalists and unionists or a 60% overall majority comprising at least 40% of both nationalists and unionists. If there is no majority in favour of continued application, Articles 5-10 will cease to apply after two years. Before then, the Joint Committee will make recommendations to the UK and the EU on the undefined ‘necessary measures’ to be taken ‘into account the obligations of the parties to the 1998 Agreement’ (Article 18(4)). The default position is that Northern Ireland would revert to the terms of the UK-EU relationship. The likelihood, therefore, is that, unless there is UK-EU agreement otherwise, application of the UCC and regulatory alignment allowing the free movement of goods between Northern Ireland and the EU – and so Ireland – would cease. A physical hardening of the border – the main reason for the Protocol’s existence – would ensue.

It is important, therefore, that the Protocol is implemented in such a way as to ensure its broadest possible acceptance in Northern Ireland. Whether this is possible remains to be seen, not least given the tensions between a UK government willing to breach the terms of the Protocol and seemingly intent on politicizing the Protocol, and an EU insistent on full implementation of the Protocol and maintaining the integrity of its customs union and internal market. Such tensions were prominent as soon as the UK withdrew from the EU when serious doubts were raised as to whether the UK government was intent on meeting its obligations under the Protocol. A particularly cavalier approach by Johnson to the Protocol and lack of evident plans for implementation caused serious alarm in the EU, such that the European Commission, following a first meeting of the Specialised Committee, felt compelled to publish a technical note setting out the obligations on the UK arising out of the Protocol and reminding the UK government of the urgent need for progress with implementation.³³

The UK government’s approach to the Protocol during the transition period demonstrated limited enthusiasm for its arrangements and indeed a barely concealed unwillingness at times to acknowledge what they entailed. Details of how the UK government intended to implement its obligations and what this would mean for producers in Northern Ireland and those in the rest of the UK moving goods into

³³ European Commission, *Technical note on the implementation of the Protocol on Ireland / Northern Ireland* (30 April 2020), UKTF (2020) 16, https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf (accessed 13 August 2020)

Northern Ireland were only produced at a painfully slow rate and even then in only a very piecemeal manner. Moreover, the UK government sought – unsuccessfully – to downplay the effects on and implications for Northern Ireland of the Protocol, preferring to focus on its aspirations for negotiations with the EU on its implementation rather than the legal commitments that the Protocol entailed.³⁴ Then came the UK government’s plans in September 2020 to breach the Protocol. This and the UK government’s emphasis on the Protocol’s potentially temporary existence given the democratic consent vote in 2024 did not bode well for engagement with the Protocol beyond at best a guarded approach to its implementation.

The impact that the Protocol will have on and its reception in Northern Ireland as well as Northern Ireland’s actual and perceived position within the UK will depend on a range of issues. These include the extent to which the UK delivers on ‘unfettered access’ and ensures – for unionists at least – that Northern Ireland’s position in the UK is not being undermined. The as yet unmeasurable economic impact will be significant too. For all these questions, much will depend on the wider UK-EU relationship. Also significant is whether and how the Protocol evolves, and the extent to which the Northern Ireland voice will be heard in its operation.

The still-to-be-determined nature and scope of the post-transition UK-EU relationship is particularly important. This is most obviously the case as regards trade. Without a comprehensive free trade agreement covering all goods and extensive customs cooperation, tariffs are likely to be payable on at least goods moving from the rest of the UK into Northern Ireland. Customs formalities could be the same as they are for any non-EU goods coming into Northern Ireland unless the Joint Committee can agree otherwise. With the UK expected to eschew any commitment to maintaining alignment with the EU, regulatory and policy divergence will undoubtedly occur. In so far as this relates to matters covered in the Protocol, it will simply confirm the need for regulatory checks on the movement of goods from the rest of the UK into Northern Ireland. Beyond trade in goods, there is the question of services. What is agreed here will condition the movement of services between Northern Ireland and Ireland and so the development of the services sector on an all-island basis. If the UK-EU relationship fails to deliver acceptable terms, it may lead to pressure for the agreement of additional Northern

³⁴ See UK Government, *The UK’s approach to the Northern Ireland Protocol* (20 May 2020), CP226, <https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol> (accessed 13 August 2020); K. Hayward, ‘*The UK Approach to the Northern Ireland Protocol*’ *Command Paper* (20 May 2020) – *A Précis and Analysis* (May 2020), <http://qpol.qub.ac.uk/wp-content/uploads/2020/05/The-UK-Approach-to-NI-Protocol-Analysis.pdf> (accessed 13 August 2020).

Ireland-specific arrangements. The same applies to participation in EU programmes and policies. Indeed, in theory any UK-EU agreement could include Northern Ireland-specific provisions.³⁵ The spirit of finding ‘flexible and imaginative’ solutions to address the unique circumstances on the island of Ireland is not by definition exhausted by the adoption of the Protocol. Ireland will be sure to pursue what it sees as best for the island of Ireland. And, Barnier has stated: ‘we [the EU] will never lose sight of the unique situation on the island of Ireland’.³⁶ Whether within the EU the political will would exist for further special treatment of Northern Ireland – for example on the free movement of services for Northern Ireland or producers in Northern Ireland having access to the trade preferences in EU agreements with third countries – remains to be seen. One window of opportunity with the withdrawal negotiations has passed. Moreover, there is the question of whether a future UK government would be open to further differentiated treatment. That remains to be seen.

A second and related consideration is the extent to which UK governments and the EU ultimately regard the Protocol as addressing satisfactorily the unique circumstances on the island of Ireland and therefore, beyond the dynamic alignment with the *acquis* for which provision is already made, as establishing an essentially static arrangement for Northern Ireland or one that has scope to evolve. As noted, the Protocol lacks an evolutionary clause and early indications are that the EU interprets provisions in the Withdrawal Agreement allowing the Joint Committee to adopt amendments ‘to address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed’ (Article 164(5)(d)) very narrowly and certainly not as general revision clause. However, there are, as discussed, provisions of the Protocol that at least infer options for further developments. The most obvious relate to how conditions are to be maintained ‘for continued north-south cooperation’ where the Protocol lacks specifics. There is also scope for the NSMC to make proposals to the Specialised Committee, although the UK government has sought to close down this route for the development of activities.³⁷

³⁵ Any agreement could also include provisions that would allow, by agreement, provisions in the Protocol to be disapplied. There was no indication, however, during the first six months of UK-EU negotiations that the UK was proposing any relevant arrangements.

³⁶ Barnier, *op cit*.

³⁷ Under the *European Union (Withdrawal Agreement) Act 2020*, no minister may agree to a Joint Committee recommendation that ‘alter[s] the arrangements for North-South co-operation as provided for by the Belfast Agreement... establish a new implementation body, or... alter the functions of an existing implementation body’ (Section 24(3)).

This leads to a third consideration: will the Protocol be treated as an arrangement implemented by the UK and the EU *for* Northern Ireland or one which involves and is shaped *by* Northern Ireland interests? Much depends here on the extent to which the UK representation at the Joint Committee and Specialised Committee includes Northern Ireland ministers and senior officials and provides for their active involvement. Initial commitments and actual Northern Ireland representation at each meeting bode well in terms of attendance. However, a clear sense of Northern Ireland's interests is required, and among the many challenges here is for a fractious Northern Ireland Executive, often struggling to move beyond the politics of Brexit, to engage as appropriate and pragmatically through the Protocol with the challenges Brexit poses. It then needs to ensure that its voice is heard. Moreover, fundamental to the effective operation of the work of both committees is the preparatory work of officials and the extent to which this involves effective engagement by UK government officials with inputs from their Northern Ireland counterparts remains to be seen. Also, important will be the involvement of expertise on and from Northern Ireland in the work of the still-to-be-established JCWG. Added to this, there needs to be transparency around and parliamentary scrutiny of the work of the committees and the JCWG that extends beyond the annual report of the Joint Committee on the function of the Withdrawal Agreement overall. The absence of any inter-parliamentary dimension to the institutional arrangements could also be addressed.

5. CONCLUSION

With Brexit, Northern Ireland is clearly entering an economically and politically challenging period, and one full of unknowns. With the Protocol, a degree of continuity is maintained. In particular, the free movement of goods on the island of Ireland is ensured and a physical hardening of the border is avoided, albeit at the expense of greater friction on the movement of goods between Northern Ireland and the rest of the UK. Notwithstanding the UK government's preparedness to breach certain provisions, the Protocol is the agreed UK-EU response to the challenges that Brexit poses for Northern Ireland and the island of Ireland more generally. As such, its negotiators regarded it as a pragmatic and workable set of arrangements, albeit one that has its opponents, notably within unionism in Northern Ireland. And overcoming that opposition is an important challenge given that in 2024 members of the Northern Ireland Assembly will have an opportunity to vote on the continued application of most of the Protocol. Their vote will determine whether the unique status within European integration that the Protocol establishes – a 'place between' the UK and the EU in certain respects – will be more than a brief flirtation with differentiated integration for post-Brexit Northern

Ireland or whether politicians and officials will need to consider whether there are other 'flexible and imaginative solutions' that can avoid the UK's withdrawal from the EU leading to a physical hardening of the border on the island of Ireland and compromising the context for implementation of the 1998 Agreement.