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'Flexible and Imaginative': The EU's Accommodation of Northern Ireland in the UK–EU Withdrawal Agreement

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journals.sagepub.com/home/isq**Katy Hayward¹****Abstract**

The 1998 Good Friday (Belfast) Agreement that cemented the peace process formalized Northern Ireland's position as a region integrally connected to both Great Britain and the Republic of Ireland. The multilevel governance and cross-border cooperation this entailed was enabled by common UK and Irish membership of the European Union. The UK's decision to leave the EU posed risks to this settlement. In response, they engaged in a quest for 'flexible and imaginative solutions' to this conundrum. The unique arrangements established through the Protocol on Ireland/Northern Ireland in the UK–EU Withdrawal Agreement (2019) mark an innovative and ambitious development for the EU. First, it de facto includes a region of a non-member state within its internal market for goods and, second, it delegates the enforcement of its rules to that non-member state. The Protocol represents a significant departure for the EU in terms of its typical engagement with external actors. Most significantly, it will not only represent a 'live' concern for the EU but a unique type of responsibility.

Keywords

1998 Good Friday (Belfast) Agreement, border management, dynamic alignment, multilevel governance, Protocol on Ireland/Northern Ireland, Withdrawal Agreement

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Introduction

On 29 March 2017, the British Prime Minister, Theresa May, wrote to the President of the EU Council, Donald Tusk, to trigger Article 50 of the Treaty on European Union and set the clock ticking on the UK's exit from the EU. In doing so, she proposed a set of principles for the UK–EU discussions. One such principle was that ‘we must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland’ (HMG, 2017b). She elaborated:

The Republic of Ireland is the only EU member state with a land border with the United Kingdom. We want to avoid a return to a hard border between our two countries, ...to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement. (HMG, 2017b)

For its part, the EU emphatically concurred. The guidelines issued by the European Council for the withdrawal negotiations also acknowledged ‘the unique circumstances on the island of Ireland’ and the need to support the Belfast (Good Friday) Agreement.ⁱ As such, it recognized that ‘*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’ (European Council, 2017, emphasis added). The common principle was clear and—from the perspective of people of all views across the island of Ireland—very welcome. However, as with so much in the Brexit process, the interpretation of this principle was very different between the two sides. What it meant to ‘avoid’ a ‘hard border’ on the island of Ireland, let alone what was required to achieve it, was to become one of the most bitterly contested aspects of the UK–EU negotiations.

This article considers the ‘flexible and imaginative’ solution that was ultimately found by the UK and EU to achieve this joint objective. This took the form of the Protocol on Ireland/Northern Ireland that was incorporated into the UK–EU Withdrawal Agreement that was ratified in January 2021. It notes the differences between the two sides that led to this point. It also outlines both the extensiveness and the limitations of the flexibility and imagination that had to be shown by both sides in coming to this arrangement. The argument put forward is that this marks a new undertaking in the self-conceptualization of the European Union—the full consequences of which will only be revealed over time.

Avoiding a Hard Border

The Conundrum

From the very beginning, there was a tension in the approach of British Government ministers to the challenge of avoiding a hard border on the island of Ireland in Brexit. The Prime Minister frequently used the phrase ‘no *return* to a hard border’, which (no doubt unintentionally) evoked memories among those who had been

closest to the effects of securing the border during the Troubles (Mulroe, 2017; Patterson, 2013).ⁱⁱ When people imagined a ‘return’ to a hard border, it was the experience of blocked roads, military watchtowers and armed checkpoints that they recalled. As such, what was intended to reassure people only served to heighten anxieties about the potential impact of Brexit on the border (Hayward, 2017, 2018). Such anxieties were made all the more acute by the degree to which European integration had changed the Irish border, most particularly since the peace process (Deiana et al., 2019). Some of this integration was a consequence of single market membership (e.g., harmonization of regulations, removing non-tariff barriers to trade) and EU investment in regional development in the poor border areas (Hayward, 2007), but the post-1998 Good Friday (Belfast) Agreement conditions for cross-border institutional cooperation in such areas as agriculture, health, waterways and food safety helped foster and normalize such connections (McCall & O’Dowd, 2008). As such, north–south cooperation on the island of Ireland is not primarily about trade but about things that matter to people in real terms: road safety, flood risk management, specialized health services, mobile phone roaming. In the context of the EU and the 1998 Agreement, it was possible to address such practical matters—many of which make sense purely given the geography of the place—with no implications for constitutional sovereignty or identity.

Border communities were, therefore, alarmed at the very prospect of the Irish border becoming an external border of the EU (Hayward, 2017, 2018). The British government was slow to outline the challenge of managing a land border between the EU and a third country in practical terms (Cochrane, 2020; Murphy, 2018). This is in no small part due to the fact that it was generally reluctant to acknowledge (let alone confront) the realities of being a non-EU member state. If EU membership meant being part of the same customs territory and regulatory sphere, leaving it meant that a customs and regulatory border would come between the UK and the EU, and it would have to be managed. As the Prime Minister repeated the promise to ‘take back control of our borders, money, and laws’ (HMG, 2018), the difficulties in doing so were most evident on an island to the west of Britain and along a border that had been drawn just a century before, namely in the creation of Northern Ireland.

Yet, the British government made little effort to mitigate the difficulties by softening the terms of the UK’s exit. Even prior to triggering the Article 50 process, Prime Minister Theresa May had been unequivocal that the UK would leave the single market and the customs union (HMG, 2017a). Not only would there be a customs and a regulatory border to manage between the UK and the EU, the expectation could only be that divergence between them would increase over time. It was inevitable, therefore, that the challenge of ‘avoiding a hard border’ between the UK and EU on the island of Ireland would not only be intensely complicated but increasingly so. What is more, the particularities of the Irish border exacerbated the sensitivities required when addressing the problem. Only as the peace process had become embedded in Northern Ireland had the benefits of European integration on the island of Ireland begun to be realized (Buchanan, 2014; Hayward, 2009; McCall, 2014; Murphy, 2014). This meant that, for many (especially Irish citizens), the experience of EU membership was

inseparable from the achievement of peace and the 1998 Agreement (Lagana, 2020; Phinnemore et al., 2012). The UK and the EU had to find a way to manage the post-Brexit Irish border in a way that preserved the conditions of integration and stability in the region as far as possible. In and of itself, this would be difficult; it was made all the more so by the fact that the conditions of integration and stability between the UK and the EU were themselves about to change.

From the start of the Brexit negotiations, the UK had been keen to move to discussing the future shape of the UK–EU relationship, whereas the EU was insistent on managing the terms of exit first. For this reason, the withdrawal negotiations were broken into two phases. First, addressing priority issues in withdrawal: EU citizens' rights in the UK (and vice versa), the financial settlement and the Irish border. Then the scope and shape of the future relationship would be outlined. Given the recognition that the EU's typical rules when it came to managing its external border would not work on the post-Brexit Irish border, there was a concern that 'avoiding a hard Irish border' would in effect allow the UK to steer its way into a post-Brexit arrangement that would undermine the EU's legal order. For this reason, the Joint Report on progress made in phase one of the UK–EU withdrawal negotiations, of December 2017, was clear that this issue had to be dealt with separately:

The commitments and principles outlined in this joint report will not pre-determine the outcome of wider discussions on the future relationship between the European Union and the United Kingdom and are, as necessary, specific to the unique circumstances on the island of Ireland. They are made and must be upheld in all circumstances, irrespective of the nature of any future agreement between the European Union and United Kingdom. (European Council & HMG, 2017, Paragraph 46)

Three Scenarios

The Joint Report set out three scenarios in which the challenge of avoiding a hard Irish border would be addressed. It recognized that the UK's intention was to avoid a hard Irish border through a future UK–EU relationship, but 'should this not be possible', it was to 'propose specific solutions' to address the 'unique circumstances' of the case. Failing agreement on such specific solutions, the default would be that:

the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement. (EC & HMG, 2017, Paragraph 49)

The Joint Report was a milestone in terms of setting out these three scenarios, not least because the EU was under no illusion that the first scenario was a non-runner. This was because of the UK's insistence on leaving the single market, which in turn meant that the rules between the UK and the EU would diverge so much that implementation of border controls would be necessary.

After another 11 months of difficult deliberations, the UK and the EU announced a Withdrawal Agreement in November 2018 (European Council & HMG, 2018). This contained a Protocol on Ireland/Northern Ireland that was described as a ‘backstop’. It allowed for the third scenario in the Joint Report, with the UK maintaining alignment with necessary rules of the single market and customs union in order to avoid border controls, only in the eventuality that scenario one (avoiding a hard border through the UK–EU future relationship) proved impossible. The very inclusion of a commitment to align with EU rules (albeit in a temporary and limited way) was strongly objected to by the majority of members of the UK House of Commons, and they voted down the Withdrawal Agreement three times. The deadline for exit was extended in an effort to avoid a ‘crash-out Brexit’, and the UK returned to the negotiating table. With a change of Prime Minister in July 2019, the language from the British government was even more hard line, and the tack of the negotiations changed. A revised Withdrawal Agreement was announced by Prime Minister Boris Johnson and Commission President Jean-Claude Juncker in October 2019, including a new Protocol on Ireland/Northern Ireland (European Council & HMG, 2019b). This time, the second scenario envisaged by the Joint Report was put into legally binding form. There were to be ‘specific solutions’ for Northern Ireland that would enable the absence of new border controls on the island of Ireland. The flipside to this, of course, was that any border controls that were necessary between the UK and the EU would now come to apply between Northern Ireland and Great Britain, that is, within the UK and ‘down the Irish Sea’. What this would mean in practice would be largely dependent on the degree to which the UK decided to diverge from the EU after the end of the transition period. The Trade and Cooperation Agreement (TCA) reached on 24 December 2020 contains level playing field commitments (e.g., on state aid), but it does not prevent the governments of the UK (including Scotland and Wales as well as Westminster) from setting their own standards in areas of high regulation, such as agri-food. Indeed, TCA does not even go as far as the EU’s trade agreements with Canada or Japan in this area, given that it does not allow for sanitary and phytosanitary measures in the UK to be recognized as equivalent to those of the EU. The greater the divergence from EU rules in Britain, the greater the need to ensure non-compliant products do not enter the EU single market via Northern Ireland.

A Protocol that Places Northern Ireland Both Within and Between the UK and EU

The Scope of the Protocol

It is important to recognize, at this point, that much of the Protocol has nothing to do with trade; for example, there is a commitment from the UK to no diminution of rights, safeguards and equality of opportunity as set out in the 1998 Agreement; this is intended to assuage fears that the UK’s expressed intention to leave the European Convention on Human Rights in the future would leave a gaping hole

in the foundations of the 1998 Agreement. Second, Article 11 of the Protocol states that it ‘shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation’, including in such areas as environment, telecommunications, health and education. This reflects the findings of a mapping exercise conducted in 2017 (though not published in full until 2019), prior to the Joint Report, which identified over 150 areas of formal cooperation across the border, around two-thirds of which was directly or indirectly underpinned by EU law (European Council & HMG, 2019a). The Protocol also acknowledges that the UK–Ireland Common Travel Area (which, simply put, gives reciprocal rights to British and Irish citizens in the respective jurisdictions) stands unaffected. However, this is a limited range of ‘continuity’ amidst what otherwise constitutes a huge adjustment.

The Protocol is part of the Withdrawal Agreement which saw the UK as a whole (including Northern Ireland) outside the European Union, but it places Northern Ireland in a very distinct legal position in order to ensure that the Ireland/Northern Ireland border is not a customs or regulatory border, that is, that there is no need to manage that border for those purposes. The Protocol thus ‘frees’ the UK to have a distant relationship with the EU in the future even whilst adhering to the commitments and principles of the Joint Report. The ‘specific solution’ for Northern Ireland is unique and even exceptional, not just in the UK but for the European Union itself.

A Specific Solution

This is most clearly the case when we consider the position it places Northern Ireland—a region of 1.85 million people—in when it comes to trade. Articles 5–10 of the Protocol are the critical ones here. They cover customs, movement of goods, value-added tax (VAT), the UK internal market, technical regulations (which are listed in Annex 2, in the form of some 287 EU legislative instruments) and the single electricity market on the island of Ireland (Weatherill, 2020). First, although Northern Ireland remains officially part of the customs territory of the UK and incorporated into future UK trade agreements, the EU’s Union Customs Code applies in Northern Ireland. In practice, what this means is a border down the Irish Sea—and one that is to be managed and controlled by the UK authorities, albeit with an EU monitoring ‘presence’. All commercial goods moving from Britain into Northern Ireland require customs declarations and some of these goods (those deemed to be at risk of entering the single market) have to have tariffs paid in advance. Products of animal and plant origin moving from Britain into Northern Ireland have to be subject to the EU’s rules for entry, including Export Health Certificates, plus physical checks on entry through designated and EU-approved Border Control Posts. Northern Ireland will enforce the EU’s VAT rules on goods, which will not apply in Britain; this means that sales of goods across the Irish Sea will be considered as exports for VAT purposes, even though they are occurring within a single state. The EU’s rules on state aid will apply to all trade relevant to the Protocol, most directly on businesses trading in Northern Ireland.

In effect, the Protocol means that Northern Ireland is de facto within the EU's single market for goods. Thus, even as the rest of the UK diverges, Northern Ireland is to continue to follow the EU's rules and regulations which affect trade in goods, including product regulations, sanitary and phytosanitary standards, plus the EU's regulations governing wholesale electricity markets. There is a grave concern about the 'rule taking but not rule making' position that this puts Northern Ireland in. This is no minor complaint, given that the whole of the peace process is dependent on the argument that democracy works and that people should use democratic institutions and voting to see political change, not violence. As discussed below, there are no means of 'rule shaping' for Northern Ireland, however, when it comes to the implementation of the Protocol; instead, by way of compensation, the Protocol includes a mechanism for 'affording or withholding consent' for the application of Articles 5–10. The 90 members of the Legislative Assembly of Northern Ireland will have a vote every 4 (or possibly eight) years on the continued application of these Articles (Phinnemore, 2020; Sargeant, 2019). If they vote to discontinue them, then the UK–EU Joint Committee overseeing the Withdrawal Agreement is to make recommendations on that all-too-familiar problem, that is, how to avoid a hard border on the island of Ireland. What these are would depend on the nature of UK–EU relationship at that point.

This marks a considerable concession on the part of the European Union: every 4 years, the future of its single market and customs union could depend on the votes of a few dozen elected representatives in a region outside the EU. What it means in practice is that the implementation of the Protocol has to be done in such a way that it makes it likely that it will continue to be accepted by the majority of people (and elected representatives) in Northern Ireland. This means that a balance is required between implementing the Protocol in a way that assures member states that the legal order of the EU's single market is protected, whilst at the same time not imposing too heavy a pressure on what is an economically and politically fragile region. As a consequence, a great deal of pressure rests on the mechanisms and institutions for the governance of the Protocol on Ireland/Northern Ireland.

Governance of the Protocol

The Joint Committee

Three new bodies, each comprised of representatives from the EU and UK, have been established to oversee the Protocol on Ireland/Northern Ireland. The Joint Committee is to oversee the implementation of the Protocol. The Specialised Committee on the Implementation of the Protocol on Ireland/Northern Ireland is to facilitate and administer the Protocol. The Joint Consultative Working Group (JCWG) is to inform the work of the Specialised Committee. As a House of Lords European Union Committee Report on the Protocol (2019, p. 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 body with overall responsibility for governing the implementation and administration of the Withdrawal Agreement is the Joint Committee (see Article 164 of the Withdrawal Agreement). It also has specific responsibilities relating to the Protocol. 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. 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, and they will not be asked or required to ratify decisions taken by the Joint Committee as a rule (House of Lords, 2020).

The Joint Committee carries an extraordinary responsibility when it comes to keeping under constant review three dynamic processes relating to the Protocol. 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. Second, it has the competence to review the application of the rules relating to VAT and Excise as set out in the Protocol (Article 8). Third, according to Article 11(2) of the Protocol, it is to ‘keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation’ on the island of Ireland. All action and final decisions relating to issues arising from the implementation of the Protocol will be in the hands of the Joint Committee.

The Bodies Informing Joint Committee Decisions

The Specialised Committee is constituted of officials appointed by the UK and the EU. Although not obliged to, both the UK and the EU have said that they will allow representatives from Northern Ireland (invited by the UK) and from Ireland (invited by the EU) to attend. It will be where the heavy lifting on the application and monitoring of the Protocol will be done, although any new decisions on it will remain the preserve of the UK–EU Joint Committee. Recognising the complexity of the task, the Withdrawal Agreement made special provision for an additional body to feed into the work of this particular committee. The purpose of the JCWG is to ‘serve as a forum for the exchange of information and mutual consultation’. It is a unique body, even in terms of the vast range of organizations involved in the implementation of EU agreements with non-member states. According to the Protocol (Article 15.2), it ‘shall be composed of representatives of the Union and the United Kingdom’ and co-chaired by them. Its rules of procedure allow that the representatives from both sides will have ‘appropriate expertise’ with respect to the issues under discussion. Despite its obscurity, the importance of its role is seen

in the fact that the Withdrawal Agreement provides for it to meet ‘at least once a month’, which is rather more frequent than at-minimum-annual meeting of the Specialised Committee it reports to.

The EU commits (in Article 15) to ensuring that ‘all information provided by the United Kingdom in the working group, including technical and scientific data, are communicated to the relevant institutions, bodies, offices and agencies of the Union without undue delay’. This is an opportunity to prevent undue harm and draw attention to concerns, as well as addressing omissions. As such, JCWG should be considered as much more than an opaque addition to the EU bureaucratic machinery. It will be an important body for ensuring that the interests of Northern Ireland (and those in common with Ireland) can be reported into EU decision-making fora—a space it has now been ‘Brexitied’ from. This will be of particular importance because neither Northern Ireland nor the UK in respect of Northern Ireland has been granted formalized decision-shaping opportunities similar to those of other non-member states implementing EU law.

Differentiated Integration

Dynamic and Static Arrangements

As a rule, EU agreements with non-member states provide for two main approaches to the adoption and implementation of EU legislation: static and dynamic (Fossum, 2015; Leuffen et al., 2013). In static arrangements, the EU *acquis* is only adopted at certain predefined points of time, for example, at the time of an agreement’s entry into force and, subsequently, by joint agreement of the EU and the state concerned. Some states can have primarily static arrangements with the EU, but with dynamic adaption provided for in certain areas.ⁱⁱⁱ In dynamic arrangements, the adoption of relevant new or amended EU legislation is automatic (Petrov, 2006). In exchange, institutional arrangements are in place to ensure a degree of ‘decision-shaping’ influence for the non-member state over the new or amended *acquis* (Doherty et al., 2017; Gstöhl & Phinnemore, 2019). The best example of a dynamic arrangement can be found in the European Economic Area (EEA) (Gstöhl & Frommelt, 2017). The EEA Agreement (1994) is 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. The homogeneity principle requires the dynamic incorporation of relevant new *acquis* into the EEA Agreement, and that interpretation should be as uniform as possible. In these EEA-EFTA states, common rules are continuously updated by incorporating new EEA-relevant EU legislation into the EEA Agreement.

Dynamic arrangements generally provide for a greater degree of decision shaping. If a state is required to adopt aspects of the EU *acquis* automatically, the EU considers it appropriate for that state to have some limited influence over that legislation^{iv}; for example, 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

(Hayward et al., 2020).^v As soon as new legislation is being drawn up, the European Commission shall ‘informally seek 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). Altogether 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 in turn by the EEA-EFTA states to try to shape decision-making in the EU. That said, even these highly institutionalized arrangements are inadequate, mainly due to inconsistency in selection of relevant decisions and in terms of delay in implementation (Gstöhl & Frommelt, 2017).

Northern Ireland’s Dynamic Alignment to the EU

Given the potential—indeed the presumption—that the Protocol provides a permanent basis for Northern Ireland’s post-Brexit relationship with the EU, the substance of the Protocol should not be regarded as definitive. It is striking that the Protocol contains no evolutionary clause allowing for the consensual development of the relationship, something that would be standard for a forward-looking arrangement between the EU and a non-member state; instead, we just have the specific terms of the Protocol itself, with a focus on notifications and agreement, or else arbitration. Article 13(3) of the Protocol on Ireland/Northern Ireland provides for dynamic alignment to specific areas of the EU *acquis*. The EU will inform the UK (through the JCWG, see above) about ‘planned Union acts within the scope’ of the Protocol (Article 15(3)). Where these acts amend or directly replace EU acts listed in the Protocol, they will be automatically updated and apply in Northern Ireland. They cannot be blocked by the UK. Where there are new EU acts that fall within the scope of the Protocol, the EU will formally inform the UK (through the JCWG) before these acts are adopted. The Joint Committee will ‘hold an exchange of views on the implications of the newly adopted act for the proper functioning of this Protocol’ (Article 13(4)). The Joint Committee then decides either to adopt the relevant acts or to ‘examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect’. The situation for the operation of the Protocol will become more complicated over time as regulatory divergence between the UK and EU increases and the UK concludes its own trade agreements with non-EU countries.

The Protocol is occasionally presented as offering Northern Ireland ‘the best of both worlds’ (Gove, 2020). However, in actual fact, the arrangements have the potential to see Northern Ireland, over time, increasingly facing barriers to trade with and at a competitive disadvantage *vis-à-vis* both the internal UK market and the EU market. Indeed, the Protocol establishes a situation of dynamic alignment between Northern Ireland and the EU. It provides for the continued application of certain existing EU acts in Northern Ireland and for replacements and amendments to those acts also to be applied. In addition, decisions may be taken to apply relevant new EU acts. Responsibility for ensuring that these obligations are met

and for taking decisions on new acts to be applied lies with the UK government. This risks disruption on two fronts. First, the UK's decision to abandon regulatory alignment with the EU in those areas where Northern Ireland is to remain aligned. Ultimately, the nature and extent of checks and controls between Britain and Northern Ireland will depend heavily on the future UK–EU relationship and the extent to which the United Kingdom diverges from the EU in terms of regulation.

Second, the EU's standards may increase over time, and thus, (where automatically updated or added to the Protocol as agreed) Northern Ireland will potentially be pulled that bit further from Great Britain. Of course, it is possible that standards will also increase in Great Britain, but the fundamental principle remains true: where the UK and EU rules differ, Northern Ireland is left having to navigate what this means in practice. The low-ambition UK–EU Trade and Cooperation Agreement provides little assurance to Northern Ireland about being able to avoid such a precarious position. The Council Decision on adopting the Withdrawal Agreement provides for Ireland to be authorized to conclude with the United Kingdom bilateral agreements in areas of exclusive EU competence (e.g., trade, fisheries, competition) 'as may be necessary for the proper functioning of the arrangements provided for' in Protocol. This is reassuring to a degree, but much depends on how the functioning of the Protocol is interpreted—and facilitated—more generally, and with an eye to its long-term stability. The effectiveness of any dynamic arrangement with the EU depends on the capacity of the non-member state to respond to the challenge and keep up with the requirements of alignment. As Gstöhl and Frommelt (2017) argue:

any dynamic form of deep and comprehensive integration requires an efficient institutional set-up for taking over relevant new EU acts and case law and for ensuring the surveillance and enforcement of these obligations.

There are several reasons why there may be concerns about the institutional set-up to manage the obligations of the Protocol (Hayward et al., 2020). Much depends on how both the UK and the EU approach their joint responsibility towards this highly complex and original arrangement. The final part of this article considers exactly what this challenge is for the EU.

What the Protocol Means for the European Union

Flexibility and Imagination Shown

For a considerable period of time during the UK–EU withdrawal negotiations, there appeared to be a zero-sum stand-off between upholding the 'integrity of the EU's internal market' and the 'integrity of the United Kingdom's internal market'. The Protocol marks a genuinely imaginative means of finding a path to compromise between these two blocs, namely by placing Northern Ireland simultaneously in and between both markets. This marks a considerable degree of flexibility on the part of the European Union. First, it is doing for Northern Ireland what it

steadfastly refused to do for the UK as a whole in the Brexit process, that is, it is separating the four freedoms. Northern Ireland is out of the single market for capital, services and people, but it benefits from freedom of movement of goods to and from the EU. Second, it is allowing the Protocol to be a dynamic rather than a static arrangement and with no evolutionary clause. Whilst it is possible to see why it would demand this through the Protocol (to make sure what is produced in Northern Ireland will not undermine its single market over time), what this requires of the EU is an unusual level of ‘keeping watch’. As noted above, it is necessary for the EU to put in place arrangements whereby it will keep track of which planned acts in the future may be within the scope of the Protocol. It is also necessary for it to be able to inform all relevant institutions, directorates-general, bodies and agencies as appropriate about information and views shared in the bodies overseeing the Protocol.

Third, the EU is trusting the enforcement of the Protocol into the hands of non-member state authorities. Although it has the right to be present when UK authorities are administering the terms of the Protocol (e.g., veterinary inspections in Border Control Posts in Belfast port), this is different to constant presence, monitoring and joint enforcement. This requires a great deal of trust from the EU in the UK, and it is for this reason that the UK Internal Market Bill caused quite such concern among EU member states. In the latter part of the transition period, the UK government attempted to equip itself with powers to breach the direct effect of the Withdrawal Agreement in domestic law, specifically in relation to the implementation of the Protocol (Hayward, 2020). There was a strong presence from member states at the extraordinary meeting of the Joint Committee that was called in response, which shows how concerned they are regarding the potential for the UK to breach the Withdrawal Agreement (European Commission, 2020a).^{vi} Indeed, more broadly, member states have expressed both wariness and caution when it comes to the meaning and implementation of the Protocol. It is for this reason that the joint decisions on implementation of the Protocol were made with some concessions in terms of an adaptation period in the cases of complexity (e.g., export health certificates for plant and animal products). However, there is an overall expectation that the relevant EU practices and legislation will ultimately apply in full to what has become known in the Official Journal of the European Union as ‘United Kingdom (Northern Ireland)’ (see, e.g., European Commission, 2020b).

A Continued Responsibility

Although the Protocol on Ireland/Northern Ireland is part of the UK–EU Withdrawal Agreement, it is evident that it is an ongoing concern for the UK and the EU and one that will last indefinitely. This is not just because the arrangement established for Northern Ireland is a dynamic one, with the expectation that the scope of the Protocol will evolve over time (this is not to say that it will necessarily expand). At heart, the Protocol brings areas of strong policy relevance for Northern Ireland under the auspices of joint responsibility between the UK and the EU. As such, it establishes a close and continuing relationship between the UK and the

EU that will require mutual consultation, information exchange and decision-making. In a very particular way, the EU now has a certain amount of direct responsibility over the future of a region that is outside it and even outside the EEA. The decisions that the UK and the EU will make will have a significant impact in economic terms. This brings us to the fundamental point about the Protocol. It is unprecedented because the circumstances it sought to address are quite unique.

First, to state what is quite obvious: Northern Ireland is a sub-national region with limited resources and capacity. The end of the transition period is coming at a time of economic recession for Northern Ireland that is only partly pandemic-induced. This recession is not expected to end until after it does so for the rest of the UK. There are economic vulnerabilities in Northern Ireland that have been persistent and, so far, unresolved. Areas of multiple deprivation are those in which paramilitary organizations are active and exert control over local communities (IRC, 2018; Smyth, 2020). Second, the representation from Northern Ireland when it comes to the governance arrangements for the Protocol are primarily through the UK government (Hayward et al., 2020). This is problematic in part because the British government is resented and distrusted by many in Northern Ireland, not only by ‘Remainers’ (who constitute the majority in the region) or among Irish nationalists, but also among unionists, who feel betrayed by the terms of the Withdrawal Agreement (Cochrane, 2020). It is also problematic because of Northern Ireland’s peripherality to policymaking in Westminster, and the simple lack of familiarity that London-based officials have with Northern Ireland. Third, and related to this, the politics and governance of Northern Ireland is profoundly complicated. The multilevel governance arrangements established through the 1998 Agreement mean that there is no singular view of Northern Ireland’s interests on any matter. The mandatory power-sharing within the Northern Ireland Executive may be necessary for post-conflict stability, but it does mean that profound differences (including on Brexit) are written into the deliberations of the executive (Potter, 2020). As such, there is a tendency to avoid or delay decisions, rather than to come up with a clear position. Furthermore, the north/south cross-border and the east/west British–Irish dimensions to policy in Northern Ireland are often quite significant. It is simply not possible to consider any serious policy for Northern Ireland without taking into consideration what it might mean for its relationship to the rest of the United Kingdom and the rest of the island of Ireland.

Conclusion

The deliberations between the UK and the EU during the transition period over the Protocol proved painfully difficult, even after the ratification of the Withdrawal Agreement (Gasiorek & Jerzewska, 2020). There were deep sensitivities on both sides that the implementation of the Protocol could cause risks to the integrity of the respective single markets. There was a balance to be struck in the form of yet more compromises (European Commission, 2020c). This is what the EU should

continue to expect to see when it comes to the operation of the Protocol. The circumstances on the island of Ireland are unique not just in geographical terms, but also constitutional ones, and political ones too. Above all else, it is worth recalling precisely why a specific solution for Northern Ireland was seen as necessary in the first place. It was not because Northern Ireland wanted a half-in, half-out arrangement. The majority in Northern Ireland wanted to remain fully in the European Union; at the same time, most people in Northern Ireland still want to remain in the United Kingdom (Leroux, 2021). It is important, for the stability of Northern Ireland now, that the EU's determination not to allow a 'breach' in its legal order does not lead it to a position of inflexibility and dogmatism when it comes to the implementation of the Protocol. If bridges between the UK and the EU are burnt, or if one side pulls too hard against the fragile compromise, it will risk undermining the very purpose of the Protocol:

to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions. (Article 1.3)

Flexibility and imagination brought the UK and the EU to the point of agreeing to the Protocol on Ireland/Northern Ireland. Its successful implementation will require those same qualities to continue to be demonstrated on both sides.

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Notes

1. The Good Friday (Belfast) Agreement of 10 April 1998 was reached after a series of multiparty talks in Northern Ireland and underpinned by Agreement between the British and Irish governments. It forms the legal basis for governance of Northern Ireland, including many dimensions aimed at establishing the exclusive use of democratic and peace means to resolve political differences in the post-conflict region.
2. The violent conflict, often known as the 'Troubles', that emerged in Northern Ireland in the late 1960s and lasted until the ceasefires of paramilitary organisations in the mid-1990s saw particularly harsh effects in the border region of Ireland/Northern Ireland, including the establishment of British Army fortified bases and efforts to control movement across the Irish border.
3. 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 is a static arrangement, but it does include dynamic adoption of aspects of the EU *acquis* relating to Schengen and air transport (Hayward et al., 2020).

4. This is seen in the case of Switzerland's bilateral relations with the EU. Despite being a much larger trading partner with the EU than any of the other EFTA states, Switzerland has significantly less formal access to decision shaping than the EEA-EFTA states (except in areas where it dynamically aligns) because it is only set for static alignment (Jenni, 2016).
5. The EEA Joint Committee meets approximately 10 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. The Joint Committee has the power to create subcommittees or working groups to assist it.
6. On 7 December 2020, the UK Government issued a statement underlining its intention to act unilaterally to breach the Protocol if needs be (10 Downing Street, 2020). On 8 December, after having come to an agreement with the EU in the Joint Committee over the operation of the Protocol, it announced it would withdraw the proposed legislation that would have given it such powers (Cabinet Office, 2020).

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