



**QUEEN'S
UNIVERSITY
BELFAST**

Brexit and the NI Protocol: changing constitutional relations?

Hayward, K. (2021). Brexit and the NI Protocol: changing constitutional relations? *The Writ – The Journal of the Law Society of Northern Ireland*, (236). https://www.lawsoc-ni.org/DatabaseDocs/med_4868367__writ_236_spring_2021_final_indexed.pdf

Published in:

The Writ – The Journal of the Law Society of Northern Ireland

Document Version:

Publisher's PDF, also known as Version of record

Queen's University Belfast - Research Portal:

[Link to publication record in Queen's University Belfast Research Portal](#)

Publisher rights

© Law Society of Northern Ireland 2021

This work is made available online in accordance with the publisher's policies. Please refer to any applicable terms of use of the publisher.

General rights

Copyright for the publications made accessible via the Queen's University Belfast Research Portal is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The Research Portal is Queen's institutional repository that provides access to Queen's research output. Every effort has been made to ensure that content in the Research Portal does not infringe any person's rights, or applicable UK laws. If you discover content in the Research Portal that you believe breaches copyright or violates any law, please contact openaccess@qub.ac.uk.

Open Access

This research has been made openly available by Queen's academics and its Open Research team. We would love to hear how access to this research benefits you. – Share your feedback with us: <http://go.qub.ac.uk/oa-feedback>

Brexit and the NI Protocol: a change in constitutional relations?



Katy Hayward,
Professor of Political
Sociology at Queen's
University, Belfast and
Senior Fellow in the 'UK in a
Changing Europe' think-tank

Thirteen pages and 19 Articles, including seven annexes, constitute the legal foundation for a sea change (no pun intended). The UK-EU Withdrawal Agreement, incorporating the Protocol on Ireland/Northern Ireland, transforms all three strands of the 1998 Agreement. This is in part because of Brexit itself, and in part because of the near-extraordinary implications of the Protocol.

Most obviously, the British-Irish relationship is no longer that of 'partners in the European Union'. The two states are not heading towards 'ever closer union' but into period of growing distance, if not mild estrangement. The good news that came on Christmas Eve 2020 of the Trade and Cooperation Agreement was primarily that, after months of mutual frustration, the UK and EU had managed to get something over the line. Beyond that, the substance of the deal was disappointing to most. It certainly does little to keep Britain and Ireland in close orbit. The Protocol itself also alters the conditions for British-Irish relations, whilst offering little to shore them up. Indeed, it exacerbates the Brexit disruption to east-west relations in the creation of a customs and regulatory border down the Irish Sea. Although they have some potential for future expansion and innovation,

the institutions of Strand Three have no power to mitigate this new east-west divide.

The reason the United Kingdom left the EU ten months later than originally planned is because of the out-workings of the shared UK and EU commitment to 'avoid a hard border on the island of Ireland'. More particularly, it was because of the difficulty in matching this commitment to the EU's insistence on protecting the integrity of its single market. And, even more precisely, it was because of the impossibility of meeting this objective at the same time as fulfilling the UK government's objective of leaving the EU single market and customs union. Impossible, that is, without changing the parameters; in this case, that meant shifting the border line at which the EU's single market and customs code would be enforced.

The Withdrawal Agreement means that Northern Ireland is now outwith the European Union, and the process of dis-integration from the EU will follow. It is inevitable that this will affect North-South cooperation. The Protocol charges the UK-EU Joint Committee with 'keeping under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation' (Article 11ii). However, (with the exception of the Single Electricity Market) there is no accompanying Annex or even explanatory memorandum on how the conditions 'necessary' for North-South cooperation will be measured, let alone maintained.

Central to it all, Strand One is also affected by the change of legal landscape. Northern Ireland now follows devolved legislation, UK legislation (in reserved matters), retained EU legislation (through the Protocol), and amended EU legislation. The latter includes regulations made by UK government ministers. The EU Withdrawal Act (2018) and EU Withdrawal Agreement Act (2020) granted powers to ministers of the UK government to make regulations in devolved areas of competence by way of statutory instrument (SI), where they intersect with EU law. In August 2020, the First Minister and deputy First Minister informed the Assembly that around a hundred potential SIs were to be made by UK Ministers to facilitate a smooth EU

exit in matters that were within NI devolved competence. In order to have some minimal scrutiny, relevant departmental committees in the Assembly attempted to consider in each case whether the proposed approach was necessary and whether a SI was the correct instrument to meet the challenge. However they were often inhibited in this task by both a lack of information and severely limited time to consider it. As a consequence, a considerable amount of secondary legislation applies now in Northern Ireland, to be implemented by devolved authorities, without its legislature having had any proper exploration of its potential impacts and implications.

Feeble instruments and procedures for scrutiny is not only an intra-UK concern. The Protocol is a UK-EU Agreement and, for all its many drafts, neither side proved to be particularly considerate of the devolved status of Northern Ireland and its need (let alone right) to a seat at the table. This is perhaps due to the fact that (non-coincidentally) its legislature and executive were in abeyance during the withdrawal negotiations. But we should not underestimate the significance of the Protocol for Strand One. Northern Ireland is dynamically aligned to a substantive portion of the EU acquis. This means that its statute book will have to adjust as the legal instruments incorporated into the Protocol are updated and amended at EU level. The EU is to inform the UK of such proposals through the Joint Consultative Working Group (which currently appears to exist in name only). How Northern Ireland officials and elected representatives can scrutinise these and inform the UK's response to them, let alone the process by which they will be incorporated into NI law, is still to be seen.

UK authorities are responsible for implementing the provisions of EU law that apply to Northern Ireland through the Protocol (Art 12ii). The EU Withdrawal Agreement Act (2020) states that a UK Minister or a devolved authority, including a Northern Ireland Executive Minister, 'either acting alone or jointly', may make regulations to give effect to the Protocol. (Sections 21 and 22). In correspondence (6 January 2021) to the Committee for the Executive Office, Chancellor of the Duchy of Lancaster, Michael Gove, said in respect of the Withdrawal Agreement that,



"Much of the legislation that will apply to Northern Ireland falls under the exclusive competence of its institutions, and it is important that oversight of devolved policy responsibilities continues to rest primarily with the Assembly."

What this means in practice is unclear. Also unclear is the matter of what will happen if NI Ministers are unwilling or unable to make regulations necessary to implement the Protocol, or if the Assembly chooses either to annul or not to approve any such regulations that are made. The potential for Stormont/Westminster tensions is evident. Lest we forget, the Assembly did not give its consent to the EU Withdrawal Act [it was not sitting], to the EU Withdrawal Agreement Act [which it unanimously rejected], to the UK Internal Market Act [it was not given the opportunity], nor to the EU (Future Relationship) Act [it was not asked].

All of this points to momentous adjustment for post-Protocol Northern Ireland. This is compounded by the fact that the two parties responsible for negotiating and managing it appear to interpret it very differently. To some degree, this is to be expected. The Protocol represents a set of compromises which neither side wanted to have to make. The UK conceded that the rules required by a hard Brexit would not be possible to enforce at the Irish land border. It thus allowed for an Irish Sea border; this makes the UK internal market rather lopsided, with unfettered access in one direction only. The EU conceded that the four freedoms of its internal market could, after all, be separated, and that free movement of goods could be granted to a

non-member region. In so doing it had to allow for the integrity of its internal market to be in the hands of non-EU authorities. Both sides had to cover the concessions in 2019 by making use of the fact that much was still to be determined by the UK-EU Joint Committee overseeing the Withdrawal Agreement. But the Joint Committee became increasingly mired by UK-EU mutual distrust. And we are long past seeing the benefits of 'constructive ambiguity'.

The UK government places so much confidence in its exclusive responsibility for operationalising the Protocol (notwithstanding the presence of EU observers) that it assumes the enforcement of the rules is, to all intents and purposes, in its bailiwick and thus ultimately subject to what it thinks best. Its unilateral decisions (announced on 3 March) to extend grace periods and, indeed, shelve some pre-existing Sanitary and Phytosanitary (SPS) rules can be seen as giving itself an unofficial period of transition (after having refused to extend the official one in 2020). They are technical and temporary measures, the argument goes, simply to relieve some of the pressure. However, the question of what comes next remains paramount and unanswered. The EU promised neither flexibility nor mitigations once the deal was done. Even the grace periods jointly agreed in December 2020 were never written into EU law; and they rested on UK unilateral declarations to align with necessary EU regulations. As such, they were markers of trust and good faith. Both qualities are gone. Within three months, the EU decided it to take legal proceedings against the UK for a second time over the Protocol. The UK's unilateral action has infringed the Withdrawal Agreement, it claims, both in letter and in

spirit. Where this leaves Northern Ireland can only be a more tenuous position. Just as commonplace reference to 'post-Agreement Northern Ireland' recognises that the 1998 document marked a turning point, so post-Protocol Northern Ireland will be very different to what came before. As we have seen, its legal environment has changed – both in terms of the legislation that will apply, and in the ways such legislation comes to apply in Northern Ireland. The challenge for policymakers in Northern Ireland has become more complicated. They will increasingly have to consider the possible implications of legislation coming from the UK and EU for its devolved competence, for North-South, and East-West integration and cooperation. And, even where they have no means of shaping the legislation itself, NI policymakers will have to seek to manage its consequences.

Yet in other ways, many fundamental principles and conditions have not changed at all. The 1998 Agreement provides for the NI Assembly to 'protect the rights and interests of all sides of the community'. Legislation applying in Northern Ireland must be compliant with the European Convention on Human Rights. 'All of the institutional and constitutional arrangements' in effect across all three strands are 'interlocking and interdependent'. And the British and Irish governments must still wish 'to develop still further the unique relationship between their peoples and the close co-operation between their countries'. To manage the sea change that is marked by the UK-EU Withdrawal Agreement and its Protocol on Ireland/Northern Ireland, we might steadfastly hope that Northern Ireland will remain – first and foremost – post-Agreement.