



The UK and the EU's approaches to the NI/Ireland Protocol. How do they compare and what do they mean for human rights?

November 2021

1. Introduction

Nearly a year after the end of the transition period (31 December 2020), the Northern Ireland/Ireland Protocol (referred to here as the Protocol) is at the center of continuing political instability and divisions. While the United Kingdom (UK) and European Union (EU) appear on face value to be [united](#) in their desire to overcome their ongoing disagreements regarding the Protocol, the reality is that the UK and EU approach to the future of the Protocol differs greatly and potentially forewarns of an even more difficult future ahead.

Both the EU and the UK have produced their proposed solutions to the perceived problems with the Protocol that have been identified since the Protocol started operating. The UK produced a [Command Paper](#) outlining their proposals on simplifying the operation of the Protocol and ensuring Northern Ireland (NI)'s place in the UK's Internal Market. In turn the EU published [four non-papers](#) (meaning non-legislative documents) outlining the EU's proposed practical solutions to the problems with the Protocol, such as customs checks, paperwork transparency in how the Protocol operates and is governed.

Both sides have expressed willingness to engage in productive conversations, but so far negotiations have been strained. On the UK side Lord Frost has committed to a December 2021 [deadline](#) for the UK and the EU to reach a mutual agreement on the future of the Protocol. In the meantime, there have also been threats [to collapse Stormont](#) if the perceived lack of progress on the Protocol continues.

In this briefing we outline the EU proposals, the UK proposals and the main differences between them. We also offer some thoughts on how the instability currently surrounding the Protocol might potentially impact on human rights protection in Northern Ireland.

2. UK's approach to the Protocol

The UK's proposals on the Protocol as per the Command Paper focus on three major issues.

The first issue is the burden on trade in goods within the UK due to the need to manage the risks to the EU Single Market.¹ All goods to NI, those staying in NI and those destined for Ireland and the rest

¹ HM Government, 'Northern Ireland Protocol: the way forward' July 2021, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible_1_.pdf para 39.

of the EU, must go through a rigorous paperwork and checks process to ensure that only goods that meet EU standards reach the EU market via NI.

The UK claims that the risk to the EU Single Market is ‘extremely limited’.² Therefore, the UK proposes a **‘light-touch’ scheme** where it would be the primary responsibility of any UK trader moving goods to NI to declare whether the final destination of those goods was NI or Ireland.³ Goods staying in NI would not require customs processes, only goods going to Ireland.

In addition, the movement of **sanitary and phytosanitary (SPS) goods** between Great Britain (GB) and NI would operate through the same internal UK trade scheme outlined above, which will be enforced by the UK. This scheme will see no need for certificates and checks for goods that are only ever intended to be consumed in NI.⁴ Instead of the current rigorous checks, the UK proposes to carry out ‘risk-based and intelligence-led controls’ on goods as they move into NI, although they have provided very few details on how these would work in practice.⁵ The UK command paper also has proposals for live animals and pets.⁶

The second issue is the need to ensure that ‘businesses and consumers in Northern Ireland can continue to have normal access to goods from the rest of the UK’.⁷ Currently, under the Protocol NI is aligned with all EU standards on the manufacture of goods, meaning goods placed on the NI market must meet EU rules. Goods that have met the UK rules are labelled as for sale only in NI and GB.⁸ There is a perceived danger that with future divergence of standards UK manufacturers will give up producing goods for NI because the system is too complicated.⁹

What the UK is proposing is a **‘full dual regulatory regime’** in NI. This would mean that goods (both manufactured and SPS goods) should be able to circulate freely in NI if they meet either the UK rules or the EU rules (UK or EU regulators will have the final say on this) and goods should be labelled accordingly. Those goods passing through NI for Ireland and the rest of the EU will have to fully meet EU standards and undergo normal EU customs rules.¹⁰ The UK proposal includes specific measures for **medicines**, suggesting that all medicines are removed from the scope of the Protocol entirely.¹¹

What is confusing is that despite the assurance that **risk** to the EU Single Market is minimal, the UK acknowledges that there is risk to the EU (goods made to UK rules moving onto the EU market) and to the UK (goods made to EU rules moving onto the UK market). But from ‘extremely minimal’¹² the risk is now seen as ‘manageable and acceptable’, as the UK is proposing stronger arrangements for enforcement, a clearer labelling system and stronger market surveillance, including legislation providing penalties for UK traders placing non-EU compliant goods on the EU market.¹³

The third major issue the UK proposals target is the perceived ‘policing’ by EU institutions, including the Court of Justice of the European Union (CJEU), of the new relationship between the UK and the

² Ibid, para 47.

³ Ibid, para 48.

⁴ Ibid, para 50.

⁵ Ibid, para 50.

⁶ Ibid, para 51 and para 54.

⁷ Ibid, para 40.

⁸ Ibid, para 58.

⁹ Ibid, para 58.

¹⁰ Ibid, para 59.

¹¹ Ibid, para 61.

¹² See above n.2 (Command paper).

¹³ Ibid, para 62.

EU post-Brexit.¹⁴ The UK is insisting that the current arrangements are ‘highly unusual’ and have not worked well so far, although the Command paper does not reference specific examples of the relationship not working.¹⁵ Essentially the UK challenge the right that EU institutions have to enforce major elements of the Protocol.¹⁶ The perceived subjugation of the UK to the jurisdiction of the EU is quoted as a reason for heightened tensions in NI and a feeling of an artificial separation between the UK and NI.¹⁷

What the UK proposes is to make the UK and the EU ‘a partnership of equals’ (para 66) and to ‘normalise the governance basis for the Protocol’ (para 41) by **returning ‘to a normal treaty framework**, similar to other international agreements including our Trade and Cooperation Agreement, in which governance and disputes are managed collectively and ultimately through international arbitration’.¹⁸ This process envisions enhanced consultation and a subsequent agreement to amend certain provisions of the Protocol.¹⁹

3. The EU’s approach to the Protocol

The EU’s proposals focus on **four major themes** and take the form of **four non-papers** (a non-paper is document which is not legally binding and is often used in negotiations).²⁰ The first non-paper offers a bespoke solution for Northern Ireland on food, plant and animal health. The second non-paper outlines flexible customs formalities to facilitate the movement of goods from GB to NI. The third non-paper focuses on enhanced engagement with NI stakeholders and authorities. And the fourth non-paper offers a means of ensuring uninterrupted security of supply of medicines from Great Britain to Northern Ireland for the long-term.

The EU proposals are not necessarily a response to all the points that the UK made in the Command paper. The proposals seem to be a response to relevant NI stakeholders, such as NI business representatives and the NI civil society. Some of the EU’s proposals address issues raised by the UK, for example the non-paper on enhanced engagement. This non-paper is of particular importance to NI civil society, including **human rights organisations**.

The non-paper on enhanced engagement with NI civil society is a response to the UK’s concern that EU’s institutions are policing the UK and EU’s relationship.²¹ The EU recognises the need for greater transparency of Protocol governance in NI²² and recalls that it is the primary responsibility of the UK to engage with relevant stakeholders in NI.²³ Despite acknowledging the UK’s proposal to re-negotiate

¹⁴ Ibid, para 41.

¹⁵ Ibid, para 41.

¹⁶ Ibid, para 67.

¹⁷ Ibid, para 68.

¹⁸ Ibid, para 69.

¹⁹ Ibid, para 70.

²⁰ European Commission Press Release, ‘Protocol on Ireland/Northern Ireland: Commission proposes bespoke arrangements to benefit Northern Ireland’ 13 October 2021, available at https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/protocol-ireland-and-northern-ireland_en

²¹ European Union Commission, ‘Protocol in Ireland and Northern Ireland Non-Paper: Engagement with Northern Ireland Stakeholders and Authorities’ (2021), available https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-engagement-northern-ireland-stakeholders-and-authorities_en para 1.

²² Ibid, para 2.

²³ Ibid, para 4.

significant aspects of the Protocol made in the Command paper²⁴, the EU remains adamant that the **Protocol will not be renegotiated.**²⁵

Instead, the EU proposes **six practical measures** to improve transparency and enhance engagement with NI stakeholders. The **first measure** is to set up a website that ‘would in a clear and comprehensive way show the EU legislation applicable in Northern Ireland (covering also dynamic alignment aspect).²⁶ This website will include information on pending public consultations for measures that have relevance for Northern Ireland stakeholders.²⁷ The **second measure** is to re-emphasise the key importance of the Joint Consultative Working Group (JCWG) for communication and consultation with NI stakeholders. The EU proposes that structured groups with experts from various fields are set up within the JCWG structure to facilitate in-debt conversations and exchange of views and expertise on measures that are important for the Protocol.²⁸ Within this measure there is also a proposal to waive the confidentiality requirement for some JCWG deliberations and the possibility for the co-chairs of the JCWG to publish summaries of minutes on discussion that are important for the Protocol from an NI perspective.²⁹ The **third measure** is the creation of fora for structured dialogue with Northern Ireland stakeholders (or multiple forums for discussion of ideas). The creation of these fora would ensure that NI stakeholders have a better understanding of the EU rules applicable to NI via the Protocol and would allow for the EU to have a better understanding of how the Protocol impacts on NI stakeholders.³⁰ The **fourth measure** is to ensure structured dialogue between stakeholders and co-chairs of the Joint Committee.³¹ The **fifth measure** is to encourage the use of the Specialised Committee as a ‘high-level body that should be used as a platform to engage with wider Northern Ireland civic society and business.³² The **sixth measure** is to forge a stronger link between the Northern Ireland Assembly and the EU-UK Parliamentary Partnership and discuss further the creation of a Northern Ireland sub-structure to the EU-UK Parliamentary Partnership.³³

The second non-paper is specifically on the problem of supply of medicines to NI.³⁴ Similarly to the UK, the EU is also concerned with supply of medicines for NI and avoiding the risk of a public health crisis. Unlike the UK, however, which only mentions medicines in relation to the overall movement of goods and proposes that medicines are left outside of the Protocol’s scope, the EU has proposed a specific non-paper dedicated to ensuring **uninterrupted security of supply of medicines** from Great Britain to Northern Ireland for the long-term.³⁵

The EU proposes an **amendment of existing EU law on the medications** (Directive 2001/83/EC, a framework directive for medicinal products for human use) that will allow GB pharmaceutical companies to ‘keep all their regulatory functions where they are currently located’.³⁶ GB companies will still have to apply all EU standards on medications when supplying medications to NI. But they

²⁴ Ibid, para 1.

²⁵ Ibid, para 8.

²⁶ Ibid, para 10.

²⁷ Ibid, para 11.

²⁸ Ibid, para 14.

²⁹ Ibid, para 15.

³⁰ Ibid, para 18.

³¹ Ibid, para 20.

³² Ibid, para 22.

³³ Ibid, para 23.

³⁴ European Commission, ‘Protocol on Ireland and Northern Ireland - Non-Paper – Medicines’ (2021) available at https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-medicines_en

³⁵ As above No 20 (Press Release).

³⁶ Ibid.

would not have to move their infrastructure, such as laboratories and quality control facilities, to the EU or NI as currently mandated under the Protocol. This proposal only applies to medications which will be sold in NI.³⁷

The third non-paper covers customs.³⁸ This non-paper is also a response to the difficulties with medications in the Protocol that the UK has raised in the Command Paper. The EU acknowledges these difficulties but sees the root cause not being the functioning of the Protocol, but the fact that both the UK and the EU firmly agreed there will be no hard border on the island of Ireland. Both sides agreed to establish a border in the Irish Sea, which is an external for the EU border requiring rigorous customs controls.³⁹

With their proposals on customs the EU aim to **reduce the paperwork needed for the movement of goods from GB to NI by 50%** and thus alleviate the difficulties outlined by the UK. The EU is proposing to achieve this by using the existing framework of the Protocol to produce an innovative solution that will simplify the movement of goods between GB and NI.⁴⁰ The EU proposes that the category of goods deemed to be ‘not at risk’ of being moved to the EU’s market is expanded to include more beneficiaries and products covered, as well as providing simplification for the businesses importing goods to NI.⁴¹

The fourth non-paper is focussed on the movement of SPS goods between GB and NI.⁴² Although the EU does not respond directly to the criticism of the Protocol’s functioning in relation to goods that the UK made in the command paper, the EU acknowledges that both the UK and NI stakeholders have pointed to problems, including lack of access to ‘national identity goods’ from GB.⁴³ Again, the EU does not see the problem with the Protocol itself (unlike the UK). The EU instead views it as a problem with the EU’s law on SPS goods being applied incorrectly by the UK in relation to NI.⁴⁴

To help ease the movement of goods the EU is proposing a ‘**genuine simplification of processes and procedures** for a significant range of goods destined solely for sale to end consumers in retail shops in Northern Ireland (“retail goods”).⁴⁵ The EU once again relies on the existing Protocol provisions and framework to achieve this.⁴⁶ The EU proposes to simplify the certification and to reduce the physical checks on goods from GB to NI to include a significant range of goods.⁴⁷ The EU projects that this will reduce checks on goods by approximately 80%. Despite being simplified, the customs process will still have certain conditions attached to it.⁴⁸

These **conditions** include some GB production requirements being aligned with EU ones (for example those for the production of meat and meat products, but also in other areas); appropriate labelling of goods that will either stay in NI or move to EU; the limiting of this arrangement to retail shops only

³⁷ As above No 34 (Medicines Non-Paper), para 10.

³⁸ European Commission, ‘Protocol on Ireland and Northern Ireland - Non-Paper – Customs’ (2021) available at https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-customs_en

³⁹ Ibid, para 1.

⁴⁰ Ibid, paras 4-12.

⁴¹ Ibid, para 21.

⁴² European Commission, ‘Protocol on Ireland and Northern Ireland - Non-Paper - Sanitary and Phytosanitary (SPS) issues’ (2021) available at https://ec.europa.eu/info/files/protocol-ireland-and-northern-ireland-non-paper-sanitary-and-phytosanitary-sps-issues_en

⁴³ Ibid, para 2.

⁴⁴ Ibid, para 2.

⁴⁵ Ibid, para 3.

⁴⁶ Ibid, paras 4-7.

⁴⁷ Ibid, para 8.

⁴⁸ Ibid, para 12.

(not to other food chains or food processors); the limiting of this arrangement only to goods which originate in GB or the EU (not products from other non-EU countries); the reinforcement of supply chains (with special monitoring from the point of entry to the point of destination); and double listing of those establishments in Great Britain (points of departure) and in Northern Ireland (points of destination) which would be authorised to participate in the scheme.⁴⁹

4. Comparisons and contrasts

Movement of goods from GB to NI

In relation to goods, there is a difference between the 'light touch' scheme that the UK is proposing and the much more rigorous monitoring by Union representatives and relevant market surveillance authorities that the EU is demanding.⁵⁰ There is some agreement here, for example the need to simplify the movement of goods destined for NI only. Whilst the UK appears to be supportive of ensuring appropriate labelling of goods, it is far less likely to agree to some GB production standards being aligned with EU ones. The EU is unlikely to accept that the risk for the Single Market is minimal, particularly when the UK's own assessment of risks has been contradictory.

The UK is preoccupied with softening the sea border and ensuring there is no de-facto border for goods between GB and NI, a clear concern of some NI stakeholders. At the same time the UK continues the negotiations with the EU to try and reach a compromise, on how to make the Protocol work. These two processes appear to be at odds with each other. The EU is clear that the proposed easements on SPS goods will reduce the existing checks on goods, particularly SPS but will not abolish checks and certification altogether.⁵¹

Medicines

The approach to medicines, although recognised by both sides as an extremely important issue, is also very different. The UK simply want medicines to be removed from the Protocol altogether, meaning that NI will not have to comply with EU rules on medicines despite remaining in the EU's single market for goods. In their proposals the EU have not entertained this proposal at all. Instead, the EU has gone to great lengths to amend the rules on medicines for the whole of the EU to accommodate NI. There are conditions attached to this proposal, such as greater regulation and control (para 11 non-paper on medicines). The UK's approach is very different indeed. The dual regulatory regime, or the removal of medications altogether, is not compatible with the EU's vision.

[Some have argued](#) that the EU's proposals may not address [all industry concerns](#) as they fall short of the call to have a UK wide regulatory regime for medicines. Further, any future divergences between EU standards and UK standards have not been discussed at this stage.

Disagreement over the CJEU and the implications for human rights

Perhaps the biggest point of disagreement between the UK and the EU concerns the role of the Court of Justice of the European Union (CJEU). In the command paper the UK argue that the oversight the CJEU has over key aspects of the Protocol amounts to policing of the Protocol with a detrimental effect on the relationship between NI and the UK.⁵² The Command Paper builds the case for the CJEU's authority over the Protocol to be removed and replaced by mutual agreements and international

⁴⁹ Ibid, para 12.

⁵⁰ As Above No 38 (Customs Non-Paper), para 24.

⁵¹ As above No 42 (SPS Non-Paper), para 8.

⁵² As above No 1 (Command paper), para 68.

arbitration.⁵³ The EU [has indicated](#) that this key oversight role of the CJEU cannot and will not be negotiated. Since the Protocol ensures that NI will remain in the EU's Single Market and Customs Union, EU law continues to be applicable to NI. As the president of the European Commission has noted, 'there's one institution that is ruling on European law and it is the European Court of Justice'.⁵⁴ The EU's position is clear: without the CJEU being able to exercise oversight over EU law as it applies to NI the protocol cannot function.

This disagreement has implications for human rights as well, despite the CJEU having no authority over human rights protection under the Protocol. Human rights protections, as envisioned by the Protocol is exclusively the prerogative of domestic Courts.⁵⁵ However, the UK Government Explainer to the Protocol (an Explainer document is a document produced to clarify the position on a legally binding document, such as the Protocol, without the Explainer being legally binding itself) states that when considering the interpretation of any of the directives listed in Annex 1 (non-discrimination and equal treatment provisions) domestic Courts should do so in conformity with relevant case-law of the CJEU. Further, when dealing with issues around retained EU law, domestic Courts are 'free' to have regard for relevant CJEU judgements and make enhanced provisions for EU jurisprudence.⁵⁶

This rather vague phrasing on the relationship between domestic courts and the CJEU post-Brexit in terms of human rights suggests that the relationship was not meant to be hostile. To ensure no diminishment of rights in NI as a result of Brexit, domestic courts would have to pay attention to CJEU jurisprudence, in order to ensure the highest possible standard of rights protection. One clear concern is that this surprisingly recent opposition by the UK Government to the role of the CJEU may have the potential to unravel more than the CJEU's ability to oversee those aspects of the Protocol that deal with trade and customs. If something as central to the EU's vision of the operation of the Single Market and the Custom's Union as the oversight of the CJEU can be entered as a cause for concern by the UK Government at this late stage, then the protections surrounding the Article 2 non-diminution provisions also seem less secure. Particularly given the current UK Governments determination to break with previous EU standards and its ongoing opposition to existing human rights provisions domestically.⁵⁷

Future of the Protocol

The contrasts between the two approaches outlined above are staggering at times. A key difference that concerns the stability of the Protocol overall are the end goals for the Protocol. For the UK the end goal for the Protocol seems to be renegotiating it profoundly, as they have called for 'new and

⁵³ Ibid, para 69.

⁵⁴ Christina Gallardo, 'Ursula von der Leyen rejects UK call to change EU court's Northern Ireland role' Politico 18 October 2021, available at https://www.politico.eu/article/commission-president-rules-out-changes-to-eu-court-in-northern-ireland/?utm_source=POLITICO.EU&utm_campaign=ee2ac45654-EMAIL_CAMPAIGN_2021_10_29_05_03&utm_medium=email&utm_term=0_10959edeb5-ee2ac45654-190744128&utm_source=EU+Matters&utm_campaign=9626dd1558-EMAIL_CAMPAIGN_BREXIT_BRIEF_21-10-20_COPY_01&utm_medium=email&utm_term=0_e23b97fbd4-9626dd1558-544542219&mc_cid=9626dd1558&mc_eid=e7670eeb7d

⁵⁵ HRM Government, 'UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?' August 2020, available at <https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2> para 7.

⁵⁶ Ibid, para 16.

⁵⁷ Charles Hymas, 'Dominic Raab vows to overhaul 'nonsensical' Human Rights Act' (2021) The Telegraph online, available at <https://www.msn.com/en-gb/news/world/dominic-raab-vows-to-overhaul-nonsensical-human-rights-act/ar-AAPa19z>

durable arrangements’ to be agreed between the UK and the EU. Still, [the UK Prime Minister](#) has indicated that in the case of negotiations failing Article 16 could be triggered and that the conditions for this have already been met. For the [EU](#) renegotiation of the Protocol is not something they will agree on. The Protocol must stay and any accommodation to be reached with the UK must be within its broader framework.

This makes the future of the Protocol very uncertain in a political environment that includes a possible collapse of Stormont, early elections in NI, and a unilateral triggering of Article 16. The EU may also renew the [infringement proceedings](#) against the UK for unilaterally extending grace periods and violating aspects of the Protocol.

5. Conclusion

While recent polling suggests that a majority of people in NI now consider the [Protocol to be a good thing](#), the political tension over its operation continues. There have been reassurances that the human rights elements of the Protocol are an uncontroversial matter⁵⁸ and it is clear that they would not be directly threatened by a triggering of Article 16 for instance. But the obvious concern is that any destabilization of the Protocol may have a knock-on impact on the stability of other areas of the Protocol, including the human rights protections. A concern made even more feasible if new elements continue to be raised as ‘negotiable’ by either of the parties to this international agreement. In an environment where such divergent views exist between the EU and UK on the Protocol it can be hard to envisage a compromise outcome. What is clear is that the minimal protections for existing human rights in the provisions of the Protocol must be protected. Beyond that, the emerging gaps following the UK’s exit from the EU must be further filled by prioritizing the development of additional rights protections for Northern Ireland. shows that the vast majority of people in NI continue to support the development of new rights protections in a local Bill of Rights. Adding a new layer of protections locally in this manner, would certainly be a welcome development in what is clearly a time of much uncertainty. [Latest data](#) shows that the vast majority of people in NI continue to support the development of new rights protections in a local Bill of Rights. Adding a new layer of protections locally in this manner, would certainly be a welcome development in what is clearly a time of much uncertainty.

www.humanrightsconsortium.org

[@BillofRightsNI.org](#)

⁵⁸ As above no1 (UK Command Paper), para 37.