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A Shared Responsibility for Northern Ireland

Why the EU and the UK Should Work Together to Find Flexible Solutions after Brexit

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Even after the Brexit treaties have come into effect, the conflict over how to deal with Northern Ireland is still straining relations between the European Union and the United Kingdom. From London's perspective, the Northern Ireland Protocol leads to unacceptable economic, political, and social disruptions, which is why it is calling for a fundamental renegotiation. The EU, for its part, is accusing the British government of failing to fully comply with its obligations under the protocol. The recent extension of some of the protocol's grace periods has mitigated the conflict somewhat, but it only works to postpone the difficult decisions into the future. A serious political dispute continues to simmer in the background, with negative implications for the still difficult UK-European relationship. But simply insisting on London's legal obligations is insufficient – the EU should show flexibility in implementation but demand that London unequivocally accepts the protocol.

When Boris Johnson agreed a new withdrawal agreement with the European Union (EU) in autumn 2019, he celebrated it as a major breakthrough in the Brexit negotiations. The most remarkable difference to the deal concluded by his predecessor, Theresa May, was the entirely revised Northern Ireland Protocol (NIP). A good six months after Brexit came into effect, however, Johnson and his chief negotiator, David Frost, are now calling for its renegotiation.

The main reasons for this are the obligations that the NIP entails for the United Kingdom (UK). In order to avoid a “hard” border between Northern Ireland and the

Republic of Ireland and accept the special circumstances of Northern Ireland, both the UK and the EU are committing themselves to a number of special measures: The first of which concerns customs controls. Although Northern Ireland remains part of UK customs territory, the British government has committed to carry out customs checks in the Irish Sea between Great Britain and Northern Ireland. Only goods “not at risk” of being further exported to the EU's internal market, that is, destined exclusively for Northern Ireland, will not be subject to customs duties; the catalogue of such goods is determined jointly by the EU and the UK. In return, the EU accepts that



customs controls at one of its external economic borders will be carried out by the UK government and that tariffs due will accrue to the UK.

On the other hand, the protocol stipulates that in Northern Ireland — in contrast to the rest of the UK — many EU standards continue to apply to the movement of goods such as food, motor vehicles, medicines and medical devices, animal welfare, toys, cosmetics chemicals, and many others. In addition, there are regulations on a single electricity market covering the Republic of Ireland and Northern Ireland, on VAT, and on the application of EU state aid rules. Changes or replacements to these regulations adopted by the EU also continue to apply in Northern Ireland, without the UK government or the Northern Ireland Assembly having a say. However, at the end of 2024 the Northern Ireland Assembly will have a vote on whether the key provisions of Articles 5–10 NIP should remain in force; if not, the NIP will continue to apply for two additional years to give the EU and the UK time to find a different solution to handle the Irish–Northern Irish border that is in line with the Good Friday peace agreement.

The NIP only came into full effect along with the hard Brexit that Johnson and Frost negotiated with the EU at the end of 2020. According to the Trade and Cooperation Agreement (TCA), the UK fully moved away from the EU's single market while prioritising maximum sovereignty and the ability to diverge from EU standards. As a result, the hard economic border between the EU and its former member state not only came into effect at Dover and Calais, but also within the UK between Great Britain and Northern Ireland. And this border is only set to deepen the more Great Britain deviates from EU standards, and thus from the regulations that also apply in Northern Ireland.

Difficulties in Implementation

The question of how to deal with Northern Ireland already proved to be one of the

most — if not the most — difficult questions in the Brexit negotiations between 2017 and 2020. However, even with the TCA coming into effect at the beginning of 2021, tensions between the EU and the UK have not diminished. Once again, the spotlight is on Northern Ireland and the implementation of the NIP. In an atmosphere of mutual mistrust, the UK has at times accused the EU of wanting to threaten its territorial integrity and being overly bureaucratic and inflexible, whereas the EU for its part accuses London of breaching its commitments. In this war of words, both sides would do well to consider the local effects of the protocol in order to find a way forward.

Economic consequences of the protocol

The most severe economic issues for Northern Ireland were caused during the initial transition, due to the short preparation time. Partly because of the UK's negotiating strategy, the EU and UK did not agree on the TCA until 24 December 2020. As a result, businesses in Northern Ireland — as well as those in the UK with production or supply chains to Northern Ireland — had less than a week to adjust to the new regulations, which would come into effect in January 2021. This Brexit uncertainty hit Northern Ireland particularly hard. According to Manufacturing NI, 77 per cent of businesses reported that they had suffered a negative impact, with 36 per cent expecting to be permanently negatively affected. In particular, due to uncertainty over the necessary paperwork, many businesses in Great Britain temporarily or permanently suspended deliveries to Northern Ireland, including, for example, some product categories from Amazon. However, according to the Northern Ireland Retail Consortium, this did not result in any major supply bottlenecks in the agri-food sector, for example in supermarkets.

The medium-term consequences are more difficult to assess. Three aspects can be identified so far. First, trade from North-

ern Ireland to Great Britain as well as in the opposite direction, although intra-British, is now burdened with *non-tariff barriers to trade*. Depending on the product category, these barriers can drive up costs to the point of jeopardising economic viability. The agri-food sector belongs to those particularly hard-hit. For example, just between January and May 2021, there were 40,000 health certificates issued for live animals shipped between Great Britain and Northern Ireland. Furthermore, after the expiry of the next transition period, certain animal products such as chilled meats, including sausages, would no longer be allowed to be exported from Great Britain to the EU or Northern Ireland. This caused an uproar in Northern Ireland and was stylised by the British press as a “sausage war”. However, the British government extended these grace periods indefinitely in September 2021 with the quiet acquiescence of the EU.

Secondly, potential *problems in supplying the population with necessary goods* would be particularly concerning. The issue already arose to a limited extent in the food sector during the bumpy transition period, but it has since been resolved. The supply of medicines and medical devices is more of a cause for concern. Despite regulatory differences, they still can be traded freely between Northern Ireland and Great Britain until the end of the year. To date, around 80 per cent of medicines are imported from the UK to Northern Ireland on a “just in time” basis. In the long term, however, medicines and medical devices certified in the UK — but not in the EU — would not be allowed to be sold in Northern Ireland, or they would have to be subject to costly and time-consuming controls that would not work on a “just in time” basis. However, the UK-wide National Health Service cannot easily switch to EU medicines in Northern Ireland for legal and logistical reasons. To remedy this, the EU has already announced that it will pass legislation later this year to allow UK-certified medicines to continue to be sold in Northern Ireland without the need for separate EU approval.

In some classes of goods, thirdly, *shifting trade flows* in Northern Ireland away from the UK towards the EU and Ireland can already be observed, particularly in the food and agricultural sectors. In the first half of 2021, exports from Northern Ireland to the Republic of Ireland increased by 77 per cent and imports by 43 per cent, according to the Irish Statistics Office. Overall, trade between Northern Ireland and the rest of the UK is still much higher than with Ireland/EU. But in the long term, after a period of transition, the NIP may give a competitive advantage to Northern Irish companies that can access the UK and EU markets simultaneously — or even prefer the direct access to the EU market. While the EU sees this shift in supply and production chains as an intended side-effect of the NIP, for UK chief negotiator Frost, it is an expression of the unsustainable non-tariff barriers to trade that the protocol entails.

Political and social tensions in Northern Ireland

Of utmost concern, also from the EU’s perspective, are the political and social tensions triggered by Brexit and the NIP. The protocol’s main objective was to preserve the Good Friday (Belfast) Agreement, which settled the violent conflict between unionists and nationalists in Northern Ireland. For the nationalists, a core pillar of the peace process was the open land border between Northern Ireland and the Republic of Ireland, which the NIP is aimed to preserve. However, the Good Friday Agreement is also based on the principle of consent, and the Unionists, for their part, did not agree to the NIP and the special position it gave Northern Ireland in the UK. Both the Democratic Unionist Party (DUP) in Westminster and the Northern Ireland Assembly voted against the withdrawal agreement and the NIP. It should also be noted, however, that the majority of Northern Irish people did not vote for Brexit as such either.

Despite its technical nature, the protocol therefore has a direct impact on the much-contested political identities in Northern

Ireland. From the unionists' perspective, the NIP separates Northern Ireland from the UK, thereby potentially paving the way for a union with the Republic of Ireland. The fact that goods in trade between Great Britain and Northern Ireland must now be controlled — or may no longer be exported at all — is seen even by “moderate” unionists as an attack on their political identity. All this adds to an already fragile political situation. Between 2017 and 2020, Northern Ireland was without a government because, partly due to Brexit, the DUP and Sinn Féin could not agree on the joint government envisaged in the Good Friday Agreement. It was only in January 2020 that the Northern Ireland Executive was re-formed. However, in 2021 it was hardly capable of acting, *inter alia* due to considerable dissent in the unionist camp as to whether the protocol should be accepted in parts or rejected on principle. After infighting within the DUP, its long-time leader and Northern Ireland first minister, Arlene Foster, was forced to resign. Her immediate successor as DUP leader, Edwin Poots, was also forced to resign in less than three weeks after he promised Sinn Féin that Irish Language legislation would be put before the Northern Ireland Assembly. The new DUP party leader, Jeffrey Donaldson, in contrast doubled down on the rejection of the protocol and has united the DUP behind the ambition to abolish it entirely. In September 2021, Donaldson declared that the DUP would withdraw from the Northern Ireland Executive and all institutions agreed under the Good Friday Agreement if the protocol was not replaced. DUP ministers will not implement the NIP until then.

Rejection of the NIP has also contributed to increased street violence in Northern Ireland. In late March/early April 2021, violent clashes erupted in several Northern Irish cities, including Belfast, in what the Police Service of Northern Ireland described as the most serious in years. Representatives of the Loyalist Communities Council — a more violent manifestation of unionism — have withdrawn their support for the peace process under the Good Friday Agreement

in protest against the NIP. They openly declared violence as a legitimate means of fighting the protocol at a hearing in a House of Commons committee. However, given the extension of the grace periods by the UK and the tacit approval of the EU, fears of renewed outbreaks of violence during “Marching Season” in the summer of 2021 did not materialise.

This categorical rejection of the NIP causes additional difficulties, as the protocol needs democratic support in the Northern Ireland Assembly by 2024 at the latest. Beyond legal considerations, an NIP with its far-reaching provisions would be politically poisonous for the peace process if supported by only one of the two sides.

British Demands for a Renegotiation

The British government is using these difficulties to call for a renegotiation of the unloved protocol. Chief negotiator David Frost — who himself negotiated the protocol — sees the NIP and the EU's, according to the UK, overly inflexible interpretation of it as contributing to the disruptions in supply chains, increasing costs, and destabilising the political situation in Northern Ireland. According to Frost, the fallout from the NIP would also strain the EU-UK relationship as a whole. Consequently, the UK demands that key points should be renegotiated. In the strategy paper “Northern Ireland Protocol: The way forward”, presented in July 2021, the British government raises three core demands for reform of the NIP that, in its view, would create a more sustainable balance:

Firstly, necessary *controls* on exports from Great Britain to Northern Ireland should be drastically reduced. For example, EU standards should no longer apply when exporting food to Northern Ireland, but only when goods are exported to the EU's internal market. Declarations should be made by businesses on a basis of trust, and checks would be carried out by the British government at the producers' premises instead of the Irish

Sea. Given that exports from Northern Ireland to the EU single market account for only 0.5 per cent of total imports into the EU, from the UK's perspective this would be an acceptable risk to the EU single market.

Secondly, there should be no EU standards in Northern Ireland but rather a dual regulatory regime in which EU and British standards apply simultaneously, both to manufactured goods and to the food sector. Goods from Northern Ireland should thus be able to circulate freely towards both the EU single market and the UK's internal market. The regulation of state aid, which falls under EU responsibility according to the NIP, is to revert to the UK, where it would now be subject to state aid control that differs from EU rules.

Finally, the Johnson government also rejects the *governance* of the Northern Ireland Protocol, which in its view indicates subordination to the EU and is thus a relic of the asymmetrical Brexit negotiations under Theresa May. Fundamentally, the Johnson government rejects the role of the European Court of Justice and its jurisdiction in Northern Ireland, calling instead for a switch to a dispute settlement system in accordance with the TCA, which, like other trade agreements, relies on arbitration rather than on legally binding enforcement.

Overall, the British government wants to completely rewrite the core provisions of the protocol. In doing so, it is largely taking up proposals that the EU repeatedly rejected during the Brexit negotiations. The EU argued that an open border to its single market would only be acceptable if EU standards were to apply in Northern Ireland, if those standards were enforced in a legally binding manner, and if the flow of goods into the single market were controlled. The British government now wants to lift these control mechanisms and switch to a regime essentially based on trust, thus creating an open flank in the EU's single market.

Loss of confidence in the UK government

But from Brussels' perspective, trust is the one thing that the Johnson government has severely shaken in recent years — by initially denying the contractual obligations arising from the NIP, fulfilling them late or inadequately, or even openly threatening a breach of contract.

Virtually since negotiating the Northern Ireland Protocol, the Johnson government has disavowed core elements. For example, during the autumn 2019 election campaign, Johnson assured Northern Ireland exporters that there would be no additional red tape on trade with the rest of the UK — although the protocol he negotiated envisaged the opposite. Denying the protocol's consequences also contributed to particularly pronounced transition difficulties because companies were not informed in time and therefore inadequately prepared.

British rhetoric intensified in parallel with Brexit trade negotiations in 2020. Although the Johnson government gradually acknowledged the need for border controls under the NIP, it was slow to fulfil its treaty obligations. It belatedly began investing in building the infrastructure and IT systems needed to implement the NIP: To this day, according to the EU, the UK government is denying it the necessary access to these IT systems. This, in turn, increases trade barriers, as the necessary controls are more burdensome without fully ready IT systems. The EU's inadequate access also makes it difficult to agree on which goods can be classified as "not at risk".

The antagonistic rhetoric was given a further boost in autumn of 2020, when the UK government sought to use the Northern Ireland issue to exert pressure in trade negotiations. As part of the UK Internal Market Bill, the government wanted to give itself the competence to override key parts of the NIP in case the Brexit transition period ended without a trade agreement. In accompanying parliamentary debates, Prime Minister Johnson accused the EU of

threatening the territorial integrity of the UK. He therefore asked the Parliament to authorise him to break the obligations under international law stemming from the NIP through national law. Such a breach of treaty would not only have undermined the NIP but, from the EU's perspective, also called into question the basis of the Brexit withdrawal agreement.

However, after an agreement on the trade deal, the British government removed the treaty-breaking clauses from its single market legislation. Since then, however, it has repeatedly criticised the NIP as “harmful” for Northern Ireland and, with its attacks against the protocol, has also contributed to increased political tensions in Northern Ireland. The British government first extended the transition periods unilaterally in March 2021 in breach of the treaty, now with the acquiescence of the EU, which is, however, keeping open the possibility of resuming its infringement proceedings. With its new demands, the British government has accepted the principle of the protocol, but it continues to question its core elements – and also reserves the right to suspend parts of the protocol under Article 16 NIP.

Loss of trust in the EU

When it comes to handling Northern Ireland, the EU, in turn, has lost British and Northern Irish trust. On the one hand, unionists in Northern Ireland accuse the EU of unilaterally taking sides with the nationalists at the insistence of the Irish. According to this perspective, the Northern Ireland Protocol violates the principle of consent, which sits at the core of the Good Friday Agreement, including that constitutional decisions in Northern Ireland are to be made only with agreement on both sides, which is not the case for the Northern Ireland Protocol.

The involvement of the NIP in the dispute over vaccine procurement has caused particular resentment. At the end of January 2021, with the UK moving ahead at a rapid pace on vaccination and the EU

lagging far behind, the EU Commission introduced a transparency and approval mechanism for Covid-19 vaccines. The implicit target was the British-Swedish group AstraZeneca, which had drastically reduced its supplies to the EU while still supplying the UK extensively. According to AstraZeneca's chief executive, London had concluded a contract with the group earlier than the EU, and therefore had priority.

In this already politically charged dispute, in which British media accused the EU of wanting to block vaccine exports to the UK, Northern Ireland came into play. The EU Commission announced that it would trigger Article 16 of the NIP, under which the Union (or the UK) could unilaterally adopt safeguard measures if the application of the protocol would lead to severe – and likely lasting – economic, social, or environmental difficulties. Indeed, given the open border between the Republic of Ireland and Northern Ireland, the EU could only have fully controlled the export of vaccines if controls had also been in place at the Irish-British border.

The threat to introduce controls at the border shortly after the end of the transition period and on something as important as vaccines caused indignation in Northern Ireland, Great Britain, and the EU member state Ireland, which had not been consulted prior. Within hours, the EU Commission retracted its announcement and brought back the transparency mechanism for vaccine exports without reference to Article 16 NIP. Commission President Ursula von der Leyen later apologised for the uncoordinated move. In the British and especially Northern Irish debate, however, the Commission's announcement of its intention to activate Article 16 NIP is nevertheless repeatedly cited as evidence that the EU has only used the Irish – Northern Irish border as a pretext and is biased in the conflict. In the view of the British government, this EU announcement alone had a “dramatic effect on public perception in Northern Ireland”. Although the British government has instrumentalised the mistake, it has reinforced the tendency among Northern Irish union-

ists to view the EU not as a neutral force but as clearly partisan, further complicating a resolution of the Northern Ireland issue.

Five Guidelines for Further Negotiations

Overall, the situation in Northern Ireland remains highly complex, bringing together post-Brexit competition, real and scandalised negative consequences, a tense peace process, and mutual mistrust between the EU and the UK. Meanwhile, there is no prospect of a quick deal. The UK has now extended some of the NIP grace periods indefinitely, while the EU has paused its action before the European Court of Justice for the time being. This buys time for negotiations but is not a sustainable state of affairs in the long term. Meanwhile, the British government is still threatening to activate Article 16 of the NIP to suspend parts of it or to take unilateral action once more. A continuation of this situation threatens to damage the British-European relationship in the short term and put it under permanent strain. If the EU wants to achieve a long-term solution, it should consider five guidelines at the political level in addition to a settlement of the technical issues.

The EU shares responsibility for Northern Ireland: First, with the protocol, the EU and all its member state have to acknowledge that they assumed part of the responsibility for the peace process in Northern Ireland. Many negative consequences for Northern Ireland are undoubtedly rooted in Brexit. But as a peace project and with its own member Ireland in mind, the EU has a vested interest in ensuring that the peace process in the north of the island continues. The Union has thus irrevocably become a factor in Northern Ireland's politics. The EU cannot and should not shirk its share of responsibility by referring to London's breaches of trust. Despite — not because of — Britain's aggressive negotiating strategy, the EU has an interest in showing flexibility in resolving the real problems

in Northern Ireland. Many EU rules now apply in Northern Ireland without the people having any say via the Northern Ireland Assembly or the British government. The EU should therefore reach out to Northern Irish stakeholders on its own initiative and develop a deeper understanding of the local complexities, for example through consultations with the Northern Ireland Executive, Assembly, businesses, and civil society, not least to avoid future mistakes such as the proposed activation of Article 16. In addition, Northern Ireland should be consulted in a comparable way to the European Economic Area countries before new binding EU rules for Northern Ireland are adopted.

Pacta sunt servanda is insufficient: Second, it is not enough to insist on compliance with the Northern Ireland Protocol. Prime Minister Johnson's prolonged denial of the commitments made and repeated attempts to disregard the protocol have noticeably damaged trust in the British government. The late implementation and the protracted information campaign have undoubtedly had an aggravating effect. Nevertheless, it is not enough for the EU to retreat to an accusatory position and point fingers at London. Indeed, notwithstanding the aggressive British negotiation tactics, there are certainly longer-term, structural problems that a narrow interpretation of the protocol would exacerbate. If the EU wants to preserve the Good Friday Agreement — the original intention behind the protocol — it needs to show understanding, willingness to negotiate, and flexibility in its implementation and adaptation.

The protocol is the best of all bad options: Third, we are left with the realisation that the protocol, while requiring painful compromises for both sides, is nevertheless better than all other options that have been brought forward and rightly discarded in the last five years of Brexit negotiations. Now that a hard Brexit has become a reality, a customs and regulatory border will have to be drawn somewhere between the UK and the EU single market. Both sides reject a hard border between Northern Ireland

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and the Republic of Ireland. Controls between the island of Ireland and the rest of the EU single market would be unacceptable to the EU, as Brexit would then isolate one of its member states. Therefore, controls and the management of regulatory differences between Northern Ireland and the UK remain the most viable option.

Protection of the single market in principle, flexibility in implementation: Fourth, this compromise should be cushioned as much as possible by simplifications. Some of the proposals put forward by the UK government in July 2021 should remain non-negotiable for the EU. This is particularly true of the demands for a full transformation of the institutional structure towards a trust-based model. Given the actions and rhetoric of the UK government, such a model is neither credible nor sustainable. The EU, on the other hand, should be open to negotiation when it comes to making maximum use of existing flexibilities. An important signal here would be the rapid adoption of EU legislation to ensure the continued supply of British medicines in Northern Ireland. The EU should also allow for as much leeway as possible in the list of goods that the EU and the UK classify as “not at risk” of being resold in the EU’s internal market, such as agri-food products from the UK destined exclusively for supermarkets in Northern Ireland.

Arrange for confidence-building measures: Last but not least, a lasting solution with regard to the Northern Ireland Protocol can only succeed if the British government also takes responsibility and ownership for the protocol. In every agreement on the protocol to date, the Johnson government has subsequently denied obligations and/or almost immediately attempted to repeal parts of it. In doing so, London has also signalled – particularly to unionists in Northern Ireland – that it wants to abolish the protocol. This approach has undermined the credibility of the agreements, increased mistrust, and contributed to the erosion of the peace process in Northern Ireland. Therefore, any

move forward should include confidence-building measures. For example, the EU and the UK could arrange for a timetable to, step by step, expand the number of goods “not at risk” in parallel with the full implementation of the Northern Ireland Protocol.

Even if these five guidelines are followed, it will be exceedingly difficult for the EU and the UK to agree on the Northern Ireland Protocol. But the alternatives are just as unattractive for Brussels as they are for London: a protracted political conflict that would permanently strain relations between the two as well as between the British and individual European states, ever new grace periods, and court cases that would be used in the UK to mobilise against the EU politically. Above all, the severe negative impact on the people of Northern Ireland cannot be in the interests of any of the parties involved. Whereas a stable solution for Northern Ireland would be an important building block for achieving a partnership between the EU and the UK that is in the interests of both sides after the painful Brexit process.

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