

EDITORIAL COMMENTS

Unfinished Brexit business: The Windsor Framework on the Northern Ireland Protocol

In his opening address to the European Parliament in 2014, then President-elect of the European Commission Jean-Claude Juncker noted that the EU and its citizens needed a break from enlargement.¹ Less than a decade, one withdrawal and a Russian military aggression later, the winds have drastically changed. Further EU enlargement now almost appears an accepted political fact, with Ukraine leading the queue of possible new EU entrants.² Preparing for a Union of possibly even up to 36 evidently poses a series of formidable challenges, not only for the accession countries, but also for the Union itself, in particular in terms of institutional reform, budgetary capacity, the functioning of the internal market, and security.³ The EU's absorption capacity may thus very well be the question for the next EU legislature after the upcoming European Parliamentary elections in June 2024.

Besides enlargement, the EU evidently has a couple of other hot potatoes to deal with: the future of the Green Deal, the migration issue, or ongoing concerns over respect for the rule of law in Hungary and Poland . . . Amidst all these developments, one would almost forget there is also still important unfinished *Brexit* business, as ongoing disagreements over the functioning of the Protocol on Ireland and Northern Ireland have continued to beset the bilateral relations between the EU and the UK. Recently, however, a perhaps small, but nevertheless noticeable upturn can be detected in these EU-UK relations. On 27 February 2023, EU Commission President von der Leyen and UK Prime Minister Sunak announced that a “political agreement in principle” had been reached to change the way the Northern Ireland Protocol operates.⁴

1. Juncker, “A new start for Europe: My agenda for jobs, growth, fairness, and democratic change”, Opening Statement in the European Parliament, 15 July 2014, available at <www.parlementairemonitor.nl/9353000/d/political%20guidelines%20-%20juncker%20commission.pdf>.

2. Tocci, “How the EU can enlarge”, 24 July 2023, available at <www.politico.eu/article/european-union-membership-enlargement-turkey-albania-north-macedonia-montenegro-ukraine-moldova/>.

3. “Preparing for a Union of up to 36”, Brussels Institute for Geopolitics, available at <big-europe.eu>.

4. Windsor Political Declaration by the European Commission and the Government of the United Kingdom, available at <commission.europa.eu/system/files/2023-02/political%20declaration.pdf>.

This agreement on “a new way forward” is called the Windsor Framework.⁵ It comes after long and often acrimonious negotiations. It intends to address, “in a definitive way, unforeseen circumstances or deficiencies that have emerged since the start of the Protocol”.⁶ In the sweeping terms of the political declaration, this new way forward is described as “a tangible manifestation of the shared desire for a positive bilateral relationship between the EU and the UK”, with both the European Commission and the UK Government expressing their intention to “seek to maximize the potential” of their relationship.⁷ Lofty declarations aside, the proof of the pudding is of course in the eating. Can the Windsor Framework break the current deadlock concerning the Northern Ireland Protocol? And will it be able to deliver on its promise to establish strong, lasting ties between the EU and the UK, hopefully ending a period of “fog in the Channel, Continent cut off”?

Where did it all go wrong? Brexit and the Northern Ireland Protocol

Before focusing on the Windsor Framework, it is worth briefly recalling the background and context within which it was concluded. As is commonly known, in the 23 June 2016 referendum on continued EU membership, a majority of almost 52 percent of the UK electorate voted for leaving the EU. The fact that nearly 56 percent of the voters in Northern Ireland (and for that matter, more than 60 percent of the voters in Scotland) chose to remain, displaying the utter division of the UK on the issue, was to no avail; the Conservative government in Westminster was determined to “carry out the will of the British people” and “take back control”. The Protocol on Ireland and Northern Ireland is an integral part of the EU-UK Withdrawal Agreement, which was concluded in October 2019 and ratified in January 2020, after a series of earlier unsuccessful attempts in Westminster.⁸ The Protocol proved to be the missing piece in the complex jigsaw of the Brexit negotiations, ultimately paving the way for the withdrawal of the UK from the European Union on 31 January 2020. Eleven months later, on 1 January 2021, when EU law as such formally ceased to apply in the UK, the Protocol entered into effect. This transition period was just long enough to enable the negotiators to

5. The agreement was named after the meeting of the UK Prime Minister and the President of the European Commission at the Fairmont Hotel at Windsor Great Park. The agreement was announced at the Windsor Guildhall.

6. Windsor Political Declaration cited *supra* note 4.

7. *Ibid.*

8. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, O.J. 2019, C 384 I/01.

reach agreement on the Trade and Cooperation Agreement, which also regulates wider EU-UK relations from that moment onwards.⁹

The unique situation on the island of Ireland is definitely responsible, at least in part, for the lengthy duration of the Brexit negotiations, and the often tense atmosphere in which they were held. When it came to the impact of the UK withdrawal on Ireland and Northern Ireland, three incompatible objectives clashed.¹⁰ First, a “hard” Brexit, entailing that the UK would also leave the Union’s internal market and customs union, would automatically result in the border between Ireland and Northern Ireland becoming an external EU customs border, requiring all goods crossing it to receive EU customs clearance, to protect the integrity of the EU’s internal market. Second, however, a reimposition of border infrastructure (a “hard border”) between Ireland and Northern Ireland was an absolute no-go for the negotiators – on both the EU and the UK sides – especially because this could jeopardize the relative peace that has held since the end of “the Troubles” after the conclusion of the Good Friday Agreement in 1998. And third, the only viable alternative, introducing a customs border in the Irish Sea, between Northern Ireland and Great Britain, was also categorically opposed by the UK Government, as it would de facto create an internal border within the UK. This was the Brexit trilemma the negotiators found themselves confronted with. Realizing all three goals was impossible, one of them had to give way.

A first attempt to resolve the trilemma was the Irish backstop as inserted in the November 2018 version of the Withdrawal Agreement under the May government.¹¹ Under that draft backstop, the UK as a whole would have continued to belong to one single customs territory with the EU, even after leaving the Union, until the EU and the UK were eventually to jointly agree on a different border arrangement. But in addition, Northern Ireland would also have remained aligned to a set of EU rules linked to the internal market, such as legislation on goods, sanitary rules for veterinary controls, rules on agricultural production and marketing, VAT and excise on goods, and State aid rules – thus implying some degree of regulatory differentiation and checks-and-controls between Northern Ireland and Great Britain. The whole idea of that proposed backstop, especially its potentially indefinite duration, proved indigestible for the UK Parliament and also the Democratic Unionist Party (DUP) in Northern Ireland. But in its place, the new Johnson government used its parliamentary

9. Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, O.J. 2021, L 149/10.

10. Quinn, “The Northern Ireland trilemma: Brexit’s final frontier”, available at <cepa.org/article/the-northern-ireland-trilemma-brexit-final-frontier/>.

11. Editorial Comments: “Brexit into extra time . . . again”, 56 CML Rev. (2019), 1447–1458.

majority to finalize a backstop that went even further in detaching Northern Ireland from Great Britain, i.e. by setting up an EU customs and regulatory border on UK territory, in the Irish Sea. Legally speaking, after Brexit, Northern Ireland is part of the customs territory of the UK only.¹² In practice, however, EU customs law remains applicable in Northern Ireland, and Northern Ireland must align with most EU regulation on goods. Two different customs regimes thus apply in Northern Ireland. All goods brought into Northern Ireland, either from outside the Union or from another part of the UK, are subject to EU customs duties when these goods “are considered to be at risk of subsequently being moved into the Union”.¹³ UK customs authorities bear the primary responsibility for customs controls and regulatory checks on goods entering the EU internal market from Northern Ireland.¹⁴ Importantly, more generally the EU also agreed to a mechanism of democratic consent for the continued application of the new customs and regulatory arrangements.¹⁵ Four years after the entry into force of the new customs regime, and periodically thereafter, the Northern Irish political institutions are to have the opportunity to continue or abandon it. If they choose to end it, the customs arrangements will cease to apply two years later.

The resolution of the trilemma was initially hailed as a success, but the enthusiasm was short-lived. The entry into force of the Protocol rapidly led to important economic and political problems.¹⁶ The wish to avoid customs checks on North-South trade, between Northern Ireland and Ireland, inevitably implied the imposition of checks on East-West trade, between Northern Ireland and Great Britain. Even without the UK ever fully complying with its obligations under the Protocol, the result proved to be greater administrative burdens, delays and higher costs for companies and businesses, while some UK suppliers stopped selling to Northern Ireland altogether.¹⁷ In fact, because of the applicable EU (Sanitary and Phyto-Sanitary) requirements in Northern Ireland, certain goods were no longer to be imported from Great Britain at all. To avoid the burdens and restrictions on goods coming from Great Britain, many companies in Northern Ireland instead

12. Art. 4 Northern Ireland Protocol.

13. Art. 5 Northern Ireland Protocol.

14. Art. 12 Northern Ireland Protocol.

15. Art. 18 Northern Ireland Protocol.

16. Arguably these problems would have been even bigger without the “grace periods”, during which the rules of the Protocol were not (fully) applied for certain products.

17. Montgomery, “Protocol problems for both parts of Ireland: North and South”, (2021) *Fortnight*, 2–5; UK House of Commons library, Research briefing on “The Northern Ireland Protocol”, available at <commonslibrary.parliament.uk/research-briefings/cbp-9548/>. For a more popular account, see e.g. *The Irish Times*, “What is the problem with the Northern Ireland Protocol”, available at <www.irishtimes.com/news/politics/q-a-what-is-the-problem-with-the-northern-ireland-protocol-1.4880069>.

turned their attention to goods coming from Ireland and the rest of the EU, leading to a surge in North-South trade.¹⁸ All this negatively impacted trade between Northern Ireland and Great Britain.¹⁹

From a political perspective, in Northern Ireland, continuing unionist opposition to the Protocol caused the collapse of the devolved Executive. After the May 2022 Assembly elections, the DUP also stood in the way of a new power-sharing agreement, which led to the political stalemate that still continues. The political instability at Stormont fuels fears over the possibility of renewed sectarianism. Political discontent about the Protocol did not only grow in Northern Ireland though. UK PM Johnson, who had only in 2019 agreed to the Protocol, was subsequently quick to claim that it was not working effectively and therefore needed revision. On 13 June 2022, the UK threw a large spanner in the works by proposing a new Northern Ireland Protocol Bill, which purported radically yet entirely unilaterally to overhaul key elements of the Protocol:²⁰ in particular, customs processes would be minimized for goods coming from Great Britain and intended to stay in Northern Ireland; a dual regulatory regime would be introduced in Northern Ireland, allowing business to market goods according to EU or UK rules; and disputes over the Protocol would be resolved by independent arbitration, rather than by the European Court of Justice.²¹ The EU responded by stating that any unilateral action would amount to a breach of the basic principle of *pacta sunt servanda*, recognized under international law,²² and launched a series of infringement procedures against the UK for failing to comply with the terms of the Protocol.²³

The Windsor Framework: "A new way forward"

Against this background, the Windsor Framework has been negotiated. The negotiations took place on the basis of Article 164 of the Withdrawal

18. Central Statistics Office Ireland, 2022, available at <www.cso.ie/en/releasesandpublications/ep/p-gei/goodsexportsandimportsapril2022/>.

19. Duparc-Portier and Figus, "The impact of the new Northern Ireland Protocol: Can Northern Ireland enjoy the best of both worlds?", (2021) *Regional Studies*, DOI: 10.1080/00343404.2021.1994547.

20. It is remarkable that this course of action was taken, despite the fact that Art. 16 of the Protocol specifically provides for the possibility for the Union or the UK to unilaterally take appropriate safeguard measures if the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.

21. Northern Ireland Protocol Bill, available at <bills.parliament.uk/publications/47552/documents/2181>.

22. Art. 26 of the International Vienna Convention on the Law of Treaties.

23. EU Commission, Press release, 15 June 2022, available at <ec.europa.eu/commission/presscorner/detail/en/ip_22_3676#:~:text=The%20European%20Commission%20has%20today,has%20failed%20to%20do%20so>.

Agreement.²⁴ The new way forward rests primarily on a series of new customs arrangements. Concerning goods moving from Great Britain to Northern Ireland, a clearer distinction is made between goods that are at risk of moving to the EU Single Market, and goods that are destined for final consumption in Northern Ireland.²⁵ The former will pass through a “red lane” and remain subject to full EU customs checks and SPS procedures. The latter will go through a “green lane”, with smoother processes, simplified documentation, and fewer checks and controls for trusted traders. Detailed and micro-level rules and procedures have been agreed on, amongst others in relation to agri-food:²⁶ in particular, a “Not for EU” labelling system will gradually be introduced, between 1 October 2023 and 1 July 2025, to ensure that products remain in Northern Ireland; as those labelling requirements are fully completed, identity checks will be progressively reduced; lorries carrying different products will only need a single certificate (plus a description of shipped goods), instead of different certificates being required for each constituent product. UK public health standards will apply to “Not for EU” goods, allowing previously prohibited chilled meats, such as sausages, to be sold in Northern Ireland. Furthermore, a solution has been found for previously prohibited seed potatoes and certain plants for planting and agricultural machinery, on the basis of a special plant health label. Travelling between Great Britain and Northern Ireland with pets will also become easier: a simple pet travel document and a declaration from the owner that the pet will not go to the EU suffice. Here, EU requirements for animal health and plant health do remain fully in place, to prevent any risk of transmissible diseases on the island of Ireland and such diseases spreading to the rest of the Single Market. All medicines marketed in Northern Ireland will be regulated by the UK Medicine and Healthcare products Regulatory Agency, rather than the EU’s regulator. All UK-approved medicines are also available for sale in Northern Ireland.²⁷

24. Art. 164 WA allows the Joint Committee to adopt decisions to correct errors, address omissions or other deficiencies or other situations unforeseen when the Withdrawal Agreement was signed. The Protocol can only be amended in this way during the first four years after the end of the transition period (thus until the end of 2024).

25. Windsor Political Declaration cited *supra* note 4.

26. European Commission, Position paper on agri-food, plants and pet animals, available at <commission.europa.eu/system/files/2023-02/position%20paper%20SPS.pdf>; European Commission, Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland/Northern Ireland, available at <ec.europa.eu/commission/presscorner/detail/en/qanda_23_1271>.

27. See Proposal for a Regulation from the European Parliament and the Council on specific rules relating to medicinal products for human use intended to be placed on the market of Northern Ireland, COM (2023)122 final, available at <commission.europa.eu/system/files/2023-02/COM_2023_122_1_EN_ACT_part1_v2.pdf>.

Besides customs arrangements, the Windsor Framework also contains a variety of other arrangements, dealing *inter alia* with VAT and excise and State aid control, as well as specific instruments “designed to ensure that the voices of the people of Northern Ireland are better heard on issues particularly relevant to the communities there”.²⁸ In this respect, a new “Stormont brake” mechanism has been introduced.²⁹ This is a new emergency mechanism that will allow 30 members of the Northern Ireland Assembly from at least two political parties to object to the application of some updated or amended EU legislation, mainly concerning goods, that would have otherwise automatically applied in Northern Ireland under the existing Protocol. The Stormont brake mechanism does not apply to changes or amendments to EU legislation on State aid, the single electricity market or most of the Union’s customs code. Furthermore, it can only be triggered as a matter of last resort, after having exhausted every other available mechanism, and in the most exceptional circumstances, where the amended or replacing EU act “significantly differs” in scope or content from the previous one, and its application would have “a significant impact” specific to everyday life of communities in Northern Ireland in a way that is “liable to persist”. If triggered, and the conditions are met, the Stormont brake would result in the EU act not becoming automatically applicable in Northern Ireland. Hereupon, an exchange of views will take place between the UK and the EU in the Joint Committee on the implications of the act for the proper functioning of the Protocol. If both parties fail to find an agreement, the EU can take appropriate remedial measures, as is the case under Article 13(4) of the Protocol.

28. In relation to State aid, in particular, a Joint Declaration clarifies the conditions of application of Art. 10(1) of the Windsor Framework setting out the particular circumstances in which it is likely to be engaged when subsidies are granted in the UK. Importantly, the UK for the first time accepts that the State aid rules in the Protocol also apply to aid/subsidies that are given to companies in Great Britain; and thus not just to aid to companies in Northern Ireland. Further, the joint declaration clarifies, *inter alia*, that there cannot be an effect on trade between Northern Ireland and the EU if the economic benefit of an aid measure to a British company is not passed on to the Northern Irish market, e.g. because the subsidy is exclusively used for the production lines in Great Britain. See European Commission, Annexes to the Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards a decision to be adopted, and recommendations and joint and unilateral declarations to be made, 27 Feb. 2023, COM(2023)123 final/2, available at <commission.europa.eu/system/files/2023-02/COM_2023_123_1_EN_annexe_proposition_cp_part1_v5.pdf>.

29. UK House of Commons library, Research briefing “Northern Ireland Protocol: The Windsor Framework”, available at <commonslibrary.parliament.uk/research-briefings/cbp-9736/>.

Et maintenant?

The Windsor Framework is a compromise, just like the Northern Ireland Protocol that it is trying to amend, and therefore almost by definition imperfect. The original Protocol tried the impossible, reconciling irreconcilable interests – protect the integrity of the EU’s internal market, avoid “a hard border” on the island of Ireland, and no internal border in the UK across the Irish Sea. The solution finally chosen, entailing that Northern Ireland be part of the UK customs union, but also that customs checks be established at the ports in Northern Ireland, was politically accepted by both the EU and the UK Government, but in reality not given a fair chance and politically shot down before the agreed Protocol rules had even properly been implemented. The Windsor Framework primarily seeks to placate the most important UK objections against the original Protocol. It at least appears to stand a better chance of actually being operationalized.³⁰ The wind of change that seemingly is blowing from Westminster under the Sunak government is cause for prudent optimism. As an illustration of the shared desire to move forward anew, the UK Government agreed to drop the Northern Ireland Protocol Bill, in return for which the European Commission terminated its infringement procedures before the European Court of Justice. Both parties have also explicitly committed to “taking all possible steps to address future disputes over the operation of these seeking dispute settlement”.³¹ The same more constructive approach cannot (yet?) be attributed to the DUP in Northern Ireland, which maintains its hardline opposition against any solution that entails a differential treatment for Northern Ireland from Great Britain. Yet, so long as the DUP refuses to return to power-sharing government, the Stormont brake mechanism, giving devolved institutions a greater say in the operation of the Windsor Framework, is destined to remain dead letter.³²

In terms of substance, the Windsor Framework essentially refines the path chosen by the EU and the UK under the Protocol, rather than seeking any radical changes to it: the border remains in the Irish Sea, the role of the European Court of Justice is unchanged. From the perspective of the EU, the Framework thus does not bring about a paradigm shift.³³ But the Framework

30. Although the UK Government keeps struggling with the timeline for implementation; see *Le Monde*, “Le Royaume-Uni contraint de reporter une nouvelle fois le contrôle complet des importations agro-alimentaires”, available at <www.lemonde.fr/economie/article/2023/08/30/le-royaume-uni-contraint-de-reporter-une-nouvelle-fois-le-contrôle-complet-des-importations-de-produits-agroalimentaires_6187115_3234.html>.

31. Windsor Political Declaration cited *supra* note 4.

32. McClafferty, “Is the Windsor Framework now a Windsor knot?”, 5 Aug. 2023, available at <www.bbc.com/news/uk-northern-ireland-66408557>.

33. This probably explains, at least in part, the relatively little attention it – so far – received in the EU, e.g. in the media or in legal doctrine.

still goes to considerable effort to make “meaningful changes and refinements to resolve practical challenges and provide lasting certainty and stability for citizens and businesses in Northern Ireland”. This explains the special arrangements made for chilled meat, plants, pets, medicines or VAT. Furthermore, customs paperwork will no longer be required for individuals sending parcels to Northern Ireland to other individuals, and online businesses sending parcels to individual consumers will only be subject to minimal customs processes. The new two-lane system for goods moving from Great Britain to Northern Ireland does not differ that much in substance from the system in the original Protocol, but will nevertheless, if properly implemented, drastically simplify customs procedures for goods moved by trusted traders that are not at risk of entering the EU Single Market.³⁴

To be able to benefit from these customs facilitations, traders must be qualified as trusted traders by the relevant UK authority. This new trusted trader system will be open to a wider number of operators than before, and become more robust, in terms of what it takes to become a trusted trader.³⁵ Crucially, for this system to become operational and truly effective, it will have to be properly monitored by the relevant UK authorities. Equally importantly, EU representatives will have to get access to the relevant UK customs databases and IT systems used to record movement of goods between Great Britain and Northern Ireland. This way, the EU can carry out proper risk assessments and request UK customs officials to stop and check the goods, if considered necessary. Additionally, as part of the smoothing of the customs processes, also the frequency rate of identity checks will drastically be reduced: down to 10 percent of all consignments of retail goods from 1 October 2023, and ultimately to 5 percent by 1 July 2025 when all retail goods should be individually marked. Taken together, these measures could very well produce the desired effects of facilitating trade between Great Britain and Northern Ireland in goods destined to remain in Northern Ireland, and making the lives of citizens and businesses easier. This, however, presupposes the arrangements to be timely operationalized, and subsequently properly surveilled by the European Commission and the UK Government together.

If there is enough political goodwill, and the European Commission and the UK authorities manage to make this work, the Windsor Framework could go a

34. Compared to the more than 80 data elements required for a standard customs declaration, the simplified customs declarations include only 21 data elements, mostly based on commercial and transport data such as exporter, importer, means of transport, weight, goods description or item value.

35. Commission Delegated Regulation (EU) 2023/1128 of 24 March 2023 amending Delegated Regulation (EU) 2015/2446 to provide for simplified customs formalities for trusted traders and for sending parcels into Northern Ireland from another part of the United Kingdom, O.J. 2023, L 149/26.

long way in addressing the perceived shortcomings in the operation of the original Northern Ireland Protocol. Then it might actually become a gamechanger and “mark a turning point in how the UK and the EU work together collaboratively and constructively”.³⁶ In these uncertain times, characterized by war, trade disputes or climate concerns, it would be mutually beneficial for both parties if the winds of change could rise and disperse the fog over the Channel ...

36. Windsor Political Declaration cited *supra* note 4.