Trade in Goods under the Protocol on Ireland/Northern Ireland: an explainer

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Introduction

The Protocol on Ireland/Northern Ireland Protocol is a legal instrument annexed to the Withdrawal Agreement (WA) between the European Union (EU) and the United Kingdom (UK). It governs trade in goods between Northern Ireland (NI) and the EU. From a trade perspective, its primary objective is to avoid a hard border on the island of Ireland. To do so, the Protocol creates a complex and hybrid trading regime where Northern Ireland formally remains within the UK customs territory and internal market for goods but is also required to comply with EU customs, internal market and valued added tax rules.

This explainer provides an overview of the main features of the Protocol in relation to trade in goods and highlights some of the current and future implementation challenges.

This explainer is subdivided into six sections. Section 1 explains the purpose of the Protocol's provisions in relation to trade in goods. Section 2 provides an overview of the Protocol rules relating to tariff barriers. Section 3 addresses the issue of non-tariff barriers with a particular focus on regulatory barriers to trade. Section 4 addresses the impact of the Protocol on Northern Ireland's ability to benefit from EU and UK trade agreements. Sections 5 and 6 briefly discuss the value added tax and state aid regimes established by the Protocol.

1. Understanding the Protocol from a trade perspective

There are, very broadly speaking, three things that happen at a border with respect to trade in goods:

- First, customs authorities collect tariffs (customs duties) or apply tariff-rate quotas (TRQs) on imported goods. Tariffs are taxes imposed on imported goods. TRQs are mechanisms that allow countries to apply a low tariff on a specific import (typically agricultural goods) up to a predetermined quota and apply a higher tariff once the import quota is exceeded.

- Second, checks are carried out on imported goods to ensure that they comply with regulatory standards of the country of destination. This is typically done to ensure that goods brought into one's territory are safe, do not present a health
risk, and are not illicit. Some goods may be subject to stringent regulatory requirements whilst others may be banned entirely.

- Third, checks may be required to ensure compliance with taxation rules, notably checks on imported goods subject to value added tax (VAT).

When the UK was an EU member state, it was part of the EU customs union which removes all tariffs on intra-EU trade and applies a common external tariff on third countries. Regulatory compliance checks are also not required within the EU because of EU law on free movement of goods which requires all EU member states to abide by the principle of the mutual recognition of rules. This principle means that if a good can be lawfully produced and marketed in one member state it can be lawfully marketed in any other member state without being subject to restrictions. For this system to work, EU member states must comply with EU law (including minimum regulatory standards) which are enforced by both national and EU courts.

The UK’s decision to leave the EU customs union, internal market (and VAT regime) meant that checks on goods traded with the EU became inevitable and physical infrastructure would be needed to carry out such checks. Indeed, to date, the UK government has invested more than £750m on the development of border infrastructure, expertise and technology to handle checks resulting from the decision to leave the EU.

The return of border checks on traded goods between the EU and UK was problematic for Northern Ireland because of the view that the imposition of a ‘hard border’ would undermine the peace process established by the 1998 Belfast (Good Friday) Agreement. A hard border was understood to mean any physical infrastructure and installations that would mark the land border. To avoid such a hard border, the EU and UK negotiated the Protocol which requires Northern Ireland to comply with EU customs, internal market and VAT laws.

By keeping Northern Ireland subject to the EU’s customs and regulatory regime, the Protocol ensures that goods are traded between Northern Ireland and the EU as if Northern Ireland were still part of the EU. The upshot is that by placing Northern Ireland in a separate customs and regulatory regime to that of the rest of the UK, the Protocol has introduced certain barriers to trade in goods between Great Britain (GB) and Northern Ireland. Further, by creating a hybrid regime, where Northern Ireland is situated within the spheres of both the EU and the UK customs and internal market regimes, the Protocol raises questions concerning Northern Ireland’s place within the UK’s external trade policy.

2. The Protocol and tariffs

2.1 Import tariffs and the “goods at risk” regime

Northern Ireland is part of the UK customs territory. This much is expressly recognised in the Article 4 of the Protocol. Normally, this would mean that Northern Ireland should
apply UK tariffs on third country imports and that no tariffs would be applied to goods traded between GB and Northern Ireland.

In practice, however, this is not necessarily the case. Goods imported into Northern Ireland may be subject to EU tariffs.

First, with respect to third country imports into Northern Ireland (i.e., goods from outside the UK), checks are still required to ensure that such goods are not moved on to the EU without having paid the applicable EU tariff.

Secondly, with respect to imports from GB, although the UK-EU Trade and Cooperation Agreement (TCA) provides for zero-tariff access for goods traded between the two parties, not all goods from GB qualify for tariff-free access into Northern Ireland. This is because of so-called rules of origin (RoO).

RoO are included in trade agreements to ensure that only goods originating from the parties involved can benefit from preferential tariff access. This is a straightforward determination to make with regard to ‘wholly obtained goods’ (e.g., unprocessed agriculture goods and raw materials), but the determination is far more difficult for processed and industrial goods which are the result of complex production/manufacturing processes and often rely on inputs from different parts of the world.

A good made in GB but which is composed of inputs sourced from both inside and outside the UK may not qualify as a ‘UK-originating’ product for the purposes of the TCA. For example, in order to qualify for tariff-free access under the TCA, **UK produced flour must not include more than 15% wheat originating from outside the UK.** Flour produced in GB that falls foul of this criterion would not benefit from tariff-free access into Northern Ireland (and the EU).

Similarly, EU goods exported to GB that then move on into Northern Ireland may be subject to EU tariffs unless they have undergone substantial processing in the UK. In this way, EU goods that are merely stored in GB and then moved on into Northern Ireland would also fail to qualify for tariff-free access.

For GB goods destined for the EU that do not comply with the TCA’s RoO, EU tariffs remain applicable. And checks are required to avoid goods entering Northern Ireland moving on to the EU without having paid the applicable EU tariff. Without the Protocol, those tariffs would be collected at the land border between Northern Ireland and Ireland.

However, to avoid this, the Protocol creates a regime where goods imported into Northern Ireland are subject to EU tariffs if they are deemed to be “at risk” of subsequently being moved on into the EU. In fact, the Protocol sets the payment of EU tariffs as the default option. EU tariffs are applied on third country goods (including goods from GB) entering Northern Ireland unless it is shown that the goods are not at risk of being moved on to the EU.

The Decision of 17 December 2021 of the UK-EU Joint Committee on the determination of goods “not at risk” regulates the circumstances where goods will not be considered to be at risk depending on whether imports originate from Great Britain or the rest of the world.
Where goods are being imported from GB into Northern Ireland they will not be considered at risk if they are not considered to be subject to further commercial processing and where:

- the applicable EU tariff is zero; or
- the goods are brought into Northern Ireland by a business registered with a UK Trader Scheme for sale to or final use by end consumers in Northern Ireland or for internal UK trade elsewhere in the UK.

However, goods subject to further commercial processing will not be considered at risk if the annual turnover of the importer is less than £500,000, or the goods relate to food sales to UK consumers or certain activities in construction, health or care services or not-for-profit activities.

Where goods are being imported from the rest of the world into Northern Ireland, they will not be considered at risk if:

- the applicable EU tariff is lower than or equal to the UK tariff; or
- the importer has been authorised, under the UK Trader Scheme, to bring goods into Northern Ireland for sale to or final use by end consumers in Northern Ireland, and the difference between EU and UK tariffs is lower than 3% of the value of the good.

In short, the extent to which goods entering Northern Ireland will be subject to UK, EU or no tariffs at all will depend on a variety of complex factors, from tariff differentials between the EU and the UK to the nature of the trade of the traded goods.

### 2.2 Waiver and reimbursement of tariffs

Where goods are considered to be “at risk” (and import tariffs due), Article 5(6) of the Protocol provides that the UK may provide for circumstances where duties are waived or reimbursed in respect of goods that have not entered the EU or compensate traders to offset the impact of tariffs.

The waiver scheme was set up by the UK in late December 2020. It remains, however, subject to a number of limitations. It does not apply to businesses involved in the primary production of agricultural products or the production, processing or marketing of fishery and aquaculture products. There are also limits to how much can be waived because the remittance of tariffs is subject to EU state aid rules. In practice, this means that firms cannot claim back more than €200,000 over a three-year period.

With respect to the reimbursement scheme, the UK had failed to put one in place three months after the entry into force of the Protocol, causing significant financial difficulties for businesses in Northern Ireland.
2.3 Tariff-rate quotas

Tariff-rate quotas (TRQs) are mechanisms whereby countries apply a lower tariff on an imported good up to a pre-determined import quota (in-quota tariff). The tariff is then increased once the quota is exceeded (out-quota tariff). One question which emerged following the conclusion of the Protocol concerned whether Northern Ireland would be able to benefit from EU TRQs once the UK left the EU. In other words, could Northern Ireland benefit from the lower in-quota tariff to imports from outside the EU covered by an EU TRQ?

The question is addressed in EU Regulation 2020/2170. It confirms that EU TRQs only apply with respect to imports released into free circulation in the EU. Third country imports entering Northern Ireland are therefore not covered by EU TRQs. Therefore, third country goods imported into Northern Ireland do not qualify for lower EU in-quota tariffs even if those imports are destined for the EU internal market.

2.4 Tariffs and NI exports

The situation is less complicated when it comes to goods exports from Northern Ireland. Northern Ireland is part of the UK customs territory and, as such, NI goods qualify as UK goods when exported to the rest of the world. NI goods therefore benefit from preferential tariffs negotiated under UK FTAs with third countries. This question of Northern Ireland’s status within UK FTAs is further explored in 4.1 below.

With respect to NI goods moving to GB, the UK has made, in Article 6 of the Protocol, a commitment not to impose any barriers to trade on NI goods exported to GB. NI goods can circulate freely within the UK territory and are, as such, not be subject to UK tariffs when entering the GB market.

The UK government’s commitment to ‘unfettered access’ for goods originating in Northern Ireland to the rest of the UK market means that it has accepted the risk of third country goods making their way into its territory, via Northern Ireland, without paying applicable import tariffs. This undermines the integrity of the UK internal market as goods imported into Northern Ireland from the EU can access the GB market without paying UK tariffs even if they do not comply with the rules of origin under the TCA.

2.5 Trade remedies

Trade remedies also present a potential challenge to Northern Ireland.

Trade remedies are legal mechanisms whereby countries can impose restrictive trade measures (e.g. increased tariffs) on imports to protect domestic industries either from unfair trade practices (dumping and illegal subsidies) or from the adverse effects of liberalisation on specific domestic industries (safeguards).

There has been some debate concerning whether Northern Ireland will be subject to the UK or EU trade remedies regime. The problem stems from the fact that under Article 4 of the Protocol, the “goods at risk” regime applies to normal customs duties but makes
no specific mention of additional duties resulting from trade remedies. This is further complicated by the fact that, under Annex 2 of the Protocol, Northern Ireland must comply with EU trade remedies legislation.

In other words, the Protocol appears to subject Northern Ireland to the EU trade remedies regime rather than that of the UK. If this is the case then, Northern Ireland will have to apply EU trade remedies on any non-EU goods subject to such remedies. This would be the case irrespective of whether the imported good entering Northern Ireland is originating from the UK or from a third country. This creates two problems:

- If the EU imposes trade remedies on an imported good from a third country, the UK in respect of Northern Ireland will have to impose additional duties on the goods in line with the relevant EU regulations. This would put NI producers/consumers at a disadvantage vis-a-vis their UK counterparts, as the final price of the good will be higher in Northern Ireland compared to GB.
- Conversely, if the UK subjects a good originating from a third country to a trade remedy but the EU does not, imports of the good into Northern Ireland will be exempted. This would mean that Northern Ireland could be used by third country exporters as a backdoor to circumvent UK trade remedies for goods accessing the GB market.

The UK government’s position is that Northern Ireland remains subject to the UK trade remedies regime. Further, EU Council Decision 2020/769 confirms that NI industries would be excluded from calculations relating to trade remedies investigations. This suggests that Northern Ireland is only subject to EU trade remedies to the extent that imports into Northern Ireland (whether from GB or the rest of the world) are covered by such remedies and are deemed to be at risk of being moved on into the EU. It is, however, an area that requires further clarification.

3. The Protocol and non-tariff barriers

3.1 Regulatory barriers

The Protocol ensures that Northern Ireland remains within the EU’s regulatory orbit with respect to goods. Northern Ireland is required to comply with EU treaty provisions on free movement of goods as well as a raft of EU legislation on goods listed in Annex 2 of the Protocol. These rules include, notably, EU product regulations and sanitary and phyto-sanitary (SPS) rules. Furthermore, Northern Ireland’s alignment with EU law is dynamic in that it will have to comply with these rules as amended and/or replaced in the future.

By remaining within the EU internal market for goods, Northern Ireland has retained the ability to trade with the rest of the EU without being subject to any trade restrictive measures. This is important, not only in light of the aim of avoiding a hard border on the island of Ireland, but also because of highly integrated nature of the island’s agriculture
and the food and drink sectors. North-South trade barriers in these sectors would have produced significant adverse consequences for the NI economy.

By contrast, goods imported into Northern Ireland from outside of the EU are subject to additional certification, product safety checks and food inspections to show compliance with EU rules. In some cases, products are even prohibited from entering Northern Ireland. This applies to both third country and GB imports.

The fact that the UK has, so far, largely continued to comply with EU product rules does not obviate the need for regulatory compliance checks. This is because the mutual recognition of rules relies not only on the equivalence of rules and standards but also mutual trust between states and regulators that such rules are complied with and enforced in practice. For the EU this is achieved through a common legal and institutional framework, which ensures that EU rules are enforced at domestic level. Outside the EU, the conditions for cross-sectoral mutual recognition of rules are no longer present, meaning that compliance checks on imported goods are required.

GB goods entering Northern Ireland are subject to a number of barriers such as pre-notification requirements, the production of health certificates, and sanitary controls at border inspection posts. Some notable examples of the increased barriers to GB-NI trade include:

- **Trade in eels.** The EU imposes a ban on trade in eels with third countries for conservation purposes. As the UK is now a third country, Northern Ireland producers of eels can no longer sell their product in GB and vice versa. The upshot is that both GB and NI producers have lost access to lucrative markets and have, as a result, been forced to source eels from other markets.

- **Trade in cattle.** All cattle imported into Northern Ireland must be accompanied by an EU Export Health Certificate signed by an approved vet. This is in addition to a number of post-import conditions which range from the requirement to keep cattle in a holding destination for at least 30 days, to the retagging of cattle.

- **Trade in soil and plants.** The EU imposes prohibitions on the import of soil and stringent import requirements on growing media attached to and associated with plants. This has meant that plant products grown in soil can no longer be imported into Northern Ireland from GB. Also, industrial goods, such as tractors, cannot access the NI market unless they are shown not to contain traces of soil. This has led to significant delays and additional costs for importers of horticultural products from GB into Northern Ireland. Plant imports must have a phytosanitary certificate.

- **Trade in halloumi cheese.** ‘Halloumi’ has recently been recognized as an EU geographical indication, meaning that only halloumi cheese produced in Cyprus can be labelled and marketed as such within the EU internal market. Consequently, halloumi cheese produced in GB can no longer be marketed as ‘Halloumi’ in Northern Ireland.
A number of surveys have shown that GB-NI trade has suffered because of the new barriers to trade resulting from the operation of the Protocol. A report from the London School of Economics found that 20% of businesses surveyed experienced additional barriers to trade moving goods from GB to Northern Ireland. Another survey, carried out by Manufacturing Northern Ireland, reported that a fifth of businesses surveyed said that GB suppliers were reluctant to navigate the additional requirements and costs involved in moving goods from GB to Northern Ireland and, in some cases, refused to supply to the NI market.

3.2 Grace periods

The transition from a trade relationship between Northern Ireland and GB based on almost unfettered market access to one where significant regulatory barriers would be put in place was always going to lead to difficulties. The additional checks and controls on products of animal origin moving from GB to Northern Ireland has proved particularly problematic with Northern Ireland experiencing some product shortages in early 2021.

Such adverse effects were anticipated. It is why the EU and the UK agreed, via declarations, grace periods which temporarily suspended the application of certain customs and regulatory checks on goods coming into Northern Ireland from GB. This was done to allow time not only for traders to adapt to the new border processes resulting from the Protocol’s implementation in the light of the limited nature of the TCA, but also for companies operating in Northern Ireland to reconfigure and adapt their existing supply chains. The declarations exchanged by the UK and the EU in December 2020 covered:

- A three-month grace period for compliance with the EU SPS regime for agri-food products brought into Northern Ireland.
- A six-month grace period for application of EU SPS rules for certain meat products that would otherwise be banned from the EU.
- A twelve-month grace period on the application of EU rules on testing and selling human and veterinary medicines.

In addition, the UK unilaterally introduced a three-month grace period with respect to parcels exempting on-line retailers in GB, under certain conditions, from having to make customs declarations for parcels sent to customers in Northern Ireland.

The three-month grace period applying to agri-food products was particularly important as it exempted authorized traders, such as supermarkets, from official certification of products of animal origin, composite products, food, and plants and plant products. This significantly reduced the physical and documentary checks required on agri-food products imported by supermarkets and others from GB.

These grace periods were always viewed as exceptional and temporary measures. The declarations themselves acknowledge this. The declarations covering agri-food products states that during the grace period the UK should take all necessary measures
to ensure compliance by 1 April 2021. It further states that the UK “accepts that this solution is not renewable”.

However, on 3 March 2021, Brandon Lewis, the Secretary of State for Northern Ireland, declared that the UK would unilaterally extend the three-month grace periods, including the agri-food grace period, for a further six months. The EU has, unsurprisingly, viewed the unilateral extension of the grace period as a violation of the Protocol and has triggered the arbitration mechanism under the Withdrawal Agreement and launched infringement proceedings before the Court of Justice of the European Union.

The mere existence of grace periods shows that, irrespective of political claims to the contrary, both the EU and the UK were fully aware that the Protocol would lead to trade frictions for GB-NI trade. These frictions will, to a greater or lesser extent, remain in place as long as Northern Ireland and GB are subject to different regulatory and customs regimes. It is also worth noting that since some of the grace periods are yet to expire, as things stand, we are yet to see the full extent of barriers to the movement of goods between GB and Northern Ireland. The ramifications of the impending expiration of the medicines grace period, for example, have become a recent topic of discussion in the media with reports that cancer treatments available in GB might not be available for patients in NI.

3.3 **An EU-UK SPS Agreement?**

Recent evidence shows that the additional paperwork and compliance checks associated with the Protocol have led to an increase in barriers to GB-NI (i.e. ‘east-west’) trade and that the effects of the additional bureaucracy have been felt especially in the agri-food sector. Indeed, the UK government’s unilateral extension of the grace periods on SPS checks is largely a reflection of the importance of this sector for the Northern Ireland economy. And the legal challenge brought against the UK over the unilateral action has only further highlighted the need to address east-west trade barriers resulting from SPS checks.

A number of solutions have been put forward. The EU favours the conclusion of a UK-EU agreement on common animal health and food safety standards. Such an agreement would follow the template set by the EU-Switzerland Agreement, which creates a common veterinary area where veterinary controls for trade in animals and animal products between Switzerland and the EU are not required. For such a system to function, however, the UK would have to apply EU SPS rules and probably agree to compliance monitoring and enforcement by the EU institutions.

The UK government has ruled out such ‘dynamic regulatory alignment’ as it would remove its ability to diverge from EU rules. Instead, it has proposed the conclusion of an agreement, which would create a mechanism for the determination of equivalence of regulatory standards on agri-food goods on a case-by-case basis. This would then allow for reduced border checks and simplified certification requirements for those agri-food goods where equivalence has been agreed.
The attractiveness of this solution for the UK is that it allows it to retain the ability to deviate from EU rules. However, it also presents certain drawbacks. First, the agreement would not provide for regulatory equivalence across the board meaning that plenty of agri-food goods would remain subject to the full spectrum of EU border checks. Second, any such agreement is likely to be extremely unstable and therefore difficult to maintain in the long-term. In the absence of common rules and institutions ensuring compliance with relevant regulatory standards, any amendment of existing EU or UK standards or failure to enforce such standards would create an incentive for parties to remove the recognition of the equivalence.

Another solution, put forward by NI business interests, and reportedly backed by the UK, is to extend the “goods at risk” customs regime to regulatory standards. GB imports to Northern Ireland would not be subject to EU regulatory compliance checks where the goods are deemed to be ‘not at risk’ of onward movement into the EU. Such an arrangement would reduce the regulatory burdens on GB-NI trade but, as with the tariff regime, would not remove them entirely.

4. Preferential access to third countries

4.1 Northern Ireland and UK Free Trade Agreements

Prior to leaving the EU, the UK was included in over 50 EU free trade agreements (FTAs) which allowed UK exporters to access non-EU markets on a preferential basis. The decision to leave the EU meant that the UK would no longer benefit from these agreements. To ensure that UK businesses would maintain preferential treatment to third country markets, the UK embarked on the renegotiation and conclusion of so-called “roll-over” or continuity trade agreements with the non-EU partners.

So far, the UK has been able to roll over more than 30 trade agreements, including with Japan, Canada, Mexico, Iceland, CARIFORUM states, Colombia and South Korea. It recently announced the imminent conclusion of a FTA with Australia and plans to conclude new preferential trade agreements with New Zealand and the United States, and to join the Comprehensive and Progressive TransPacific Partnership (CPTPP).

As part of the UK customs territory, Northern Ireland is included in and subject to UK trade agreements. NI firms are able to export goods under the preferential terms negotiated under UK trade agreements. By the same token, Northern Ireland must allow imports from the UK’s trading partners to access the NI market under terms negotiated in trade agreements.

However, Northern Ireland’s position within such agreements is complicated by the operation of the Protocol.

The most obvious issue concerns tariffs. Should a UK trade agreement allow third country imports to access the UK market by paying a tariff lower than the tariff applicable to access the EU, such imports may well be considered to be goods at risk and,
therefore, subject to higher EU tariffs. EU tariffs would be applied if the applicable tariff is lower than that of the EU or, in case of a trader licenced under the Trusted Trader Scheme, exceeds a 3% differential range. This could increase costs for NI importers and, from the perspective of the UK’s trade partners, potentially affect the balance of the negotiated outcome. It also means that the same imports accessing the UK via GB would potentially be barred from the Northern Ireland market. This issue has recently come to the fore with the prospect of a supposedly “tariff-free” UK-Australia trade FTA.

The operation of rules of origin may also be an issue. As an example, in the CPTPP, the origin of goods can be self-certified by the importer. This contrasts with most other FTAs where the origin is only certified by the exporter or the manufacturer, after which the Certificate of Origin must be issued by the competent authority of the exporting country. The CPTPP takes a more simplified approach where importers are allowed to complete the origin certification for the goods they import. Accordingly, CPTPP member country importers who meet certain conditions set forth by the regulator in their country may self-certify the origin of the product they are importing. This could constitute a problem for Northern Ireland as the certification of the imported goods is subject to the rules of the Union Customs Code, which does not allow importers to self-certify. Instead, exporters must provide a certificate of origin before the goods enter Northern Ireland.

The fact that goods entering Northern Ireland must comply with EU internal market rules could also give rise to difficulties. For example, the US has previously signalled that it wishes to use negotiations with the UK as an opportunity to address barriers to trade which result from the UK’s regulatory approach with respect to biotechnology. The removal of such barriers could be problematic for Northern Ireland, which is required to comply with EU rules. Goods entering the UK under a UK FTA with a non-EU partner will presumably not be able to enter the NI market if they do not comply with EU rules applicable under the Protocol.

In light of these challenges, the UK is including ‘escape clauses’ in its trade agreements allowing either party to deviate from their obligations where there is an inconsistency between the Protocol and the trade agreement. Any deviation should be applied in a manner that that would not constitute a means of arbitrary or unjustified discrimination or a disguised restriction. Article 1.9(5) of the UK-Japan Comprehensive Economic Partnership Agreement is one example. It is possible then that the UK’s FTA partners may consider suspending concessions made in the agreements in response to barriers to trade imposed as a consequence of the Protocol.

The operation of the Protocol could place NI importers in an unfavourable position with respect to trade with countries that have trade agreements with the UK. Imported goods may be subject to EU tariffs if they are deemed at risk of being moved on into the EU and may face regulatory requirements that are higher than those faced by GB importers.
4.2 Northern Ireland and EU Free Trade Agreements

The Protocol requires Northern Ireland to comply with EU FTA obligations insofar as they relate to trade in goods. However, as things currently stand, Northern Ireland has not retained preferential treatment in those third-party countries. Northern Ireland will therefore not benefit from preferential tariffs or preferential tariff rate quotas granted by third countries to the EU.

Prior to the entry into force of the Protocol there was some debate as to whether Northern Ireland could benefit from EU FTAs. As the geographical scope of EU FTAs is set in the text of those agreements, any extension of their scope to a non-EU member state territory, such as Northern Ireland, would have to be jointly agreed by the EU and the relevant partner(s). This was done for the UK as a whole during the transition period where, in line with Article 129 of the Withdrawal Agreement, the EU requested its trading partners to continue treating the UK as a member state.

Other options were explored. Northern Ireland’s Department for the Economy (DfE) commissioned a study that highlighted the supply chain participation of NI inputs into Irish exports destined for countries with trade agreements with the EU. It showed that approximately 25% of goods exported from Northern Ireland to Ireland are then exported to such third countries. If NI goods are no longer considered to be originating content under EU FTAs, Irish producers exporting to these third countries may have to switch suppliers in order to satisfy rules of origin requirements.

The study proposed, as a potential solution the inclusion of diagonal accumulation rules in trade agreements with countries that have signed trade agreements with both the EU and the UK. This would then allow inputs from Northern Ireland to count as EU originating goods for the purpose of EU FTAs.

Another solution, which was reportedly raised by the Irish government, would have been to amend existing EU FTAs to count NI goods as EU goods. This would have facilitated the maintenance of existing all-island supply chains. If NI inputs are not considered as EU originating goods, Irish goods incorporating such inputs may struggle to qualify for preferential tariff treatment under EU FTAs. However, as the UK never formally made such request to the EU, the issue was never considered.

The exclusion of NI goods from EU FTAs is unfortunate. To the extent that Northern Ireland may not get the full benefits of preferential treatment under UK FTAs and that it is required to comply with obligations derived from EU FTAs, a reasonable case could have been made that NI exporters should benefit in some way from the latter.

5. Value added tax

Northern Ireland is required to apply EU law on Value Added Tax (VAT).
VAT is an indirect tax on the sale of goods and services. It is charged to the final consumer as a percentage of the final price of the product but paid to the revenue authorities by the seller.

Cross-border sales of goods and services in the EU are governed by the ‘destination principle’, meaning that VAT is paid in the member state where consumption takes place. The aim of this system is to address the trade distortionary effect of export tax refund practices. By requiring that items be taxed in the country of importation all items are taxed at the same level irrespective of origin. The EU VAT system is, therefore, an important part of the internal market in goods.

Northern Ireland’s VAT regime under the Protocol is, again, a hybrid one. Northern Ireland must ensure alignment with EU VAT rules, but it remains subject to UK VAT. The VAT rules applicable to sale of goods will vary depending on the circumstances.

In very simplistic terms, as Northern Ireland remains subject to the EU VAT regime, all sales between Northern Ireland and the EU count as intra-EU transactions. Goods dispatched from Northern Ireland to the EU are exempt from VAT in Northern Ireland and the goods will be taxed at the rate applicable in the member state of destination. The reverse applies where EU goods are sold in Northern Ireland.

NI-registered business moving goods to GB will not have to account for VAT as Northern Ireland remains subject to the UK VAT regime. However, this is not the case for GB-registered businesses moving goods from GB to Northern Ireland who will be considered as exporting such goods into the EU.

6. State Aid

In accordance with Article 10(1) of the Protocol, EU state aid rules apply to the UK in respect of measures that affect trade between Northern Ireland and the EU.

State aid concerns any form of contribution by public authorities conferring an advantage on firms in a way that distorts or may distort competition. Such measures include direct government grants, tax exemptions, loans at preferential rates, debt write-offs, disposal of land or infrastructure at favourable terms, and sweeteners to attract investment. Unless a measure falls under an exemption, it must be notified and approved by the European Commission.

EU state aid rules prohibit such measures to the extent that they affect trade between member states. In doing so, EU state aid rules play a vital role in furthering EU market integration – the aim is to ensure that the member states are unable to reverse the removal of trade barriers by applying domestic policy measures that distort markets. Applying such rules to measures affecting trade in goods between Northern Ireland and the EU makes sense to the extent that Northern Ireland is part of the EU internal market for goods. The aim is to avoid a scenario where subsidised UK goods can enter the EU internal market via Northern Ireland.
However, there is some controversy surrounding the scope of Article 10(1) of the Protocol. It applies to any UK measure meaning that its scope is not limited to measures adopted in or for Northern Ireland. Any measure whether adopted at devolved level or national level that affects trade between Northern Ireland and the EU would, in principle, be subject to EU state aid rules.

This has raised concerns that national measures will be subject to EU state aid rules even if the connection between the measure and the Northern Ireland economy is marginal.

The EU responded to this concern by issuing a unilateral declaration in December 2020 stating that:

“…an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland. It must be established why the measure is liable to have such an effect on trade between Northern Ireland and the Union, based on the real foreseeable effects of the measure”.

The EU therefore accepts that, to be covered by EU state aid rules, the effect of a measure on trade between Northern Ireland and the EU cannot be merely abstract or theoretical and that the measure must have a genuine link with the territory of Northern Ireland.

However, the EU’s unilateral declaration – noted by the UK government – merely restates EU law on state aid. EU state aid law covers measures that affect or are liable to affect trade. EU case law has confirmed that this does not mean that an effect on trade within the EU can be ‘merely hypothetical or presumed’. Instead, there is a requirement to establish and to examine the effects which the aid is likely to have on intra-EU trade and competition. As such, the simple fact that aid might affect trade is sufficient to trigger the application of EU law, including the requirement to secure prior approval for measures from the European Commission. The EU’s reading seems in line with Article 13(2) of the Protocol which states that the EU law or concepts referred to in the Protocol “must be interpreted in conformity with the relevant case law of the Court of Justice of the European Union”.

In January 2021, the European Commission published a notice to stakeholders that made it clear that GB measures fall within Article 10(1) of the Protocol if they are considered to affect trade between Northern Ireland and the EU. This includes, for example, tax schemes granting direct or indirect benefits to firms in Northern Ireland or aid to manufacturers in difficulty if goods are available for sale in Northern Ireland.

The scope of Article 10 of the Protocol is, therefore, a hot topic and one that is likely to generate further controversy in the near future.
Concluding remarks

Much of the recent discussion surrounding the Protocol has, naturally, focused on the frictions it has caused, especially with regard to GB-NI trade. It is easy to forget the positives.

If a legal instrument is judged purely by its ability to deliver on stated objectives, then the Protocol has arguably been a resounding success. A core objective of the Protocol is to avoid a hard border on the island of Ireland. This has unquestionably been achieved. At the same time, the Protocol also delivers on key UK-side demands as Northern Ireland remains (formally) in the UK customs territory and unfettered access to the GB market is maintained for NI goods.

The unique customs and regulatory regime created for Northern Ireland under the Protocol presents a number of economic advantages. By remaining in the EU internal market for goods, Northern Ireland continues to trade with the EU internal market as it did when the UK was an EU member state. Furthermore, as the UK has committed not to erect barriers to NI goods moved to GB, NI firms are in the unique position of being able to export goods to two major and hugely lucrative markets (EU and GB), which also happen to be its main exports markets, without facing any barriers to trade.

The Protocol confers a considerable competitive advantage on Northern Ireland compared to the rest of the UK, as it offers an attractive location for firms who wish to trade freely with both the UK and the EU. The economic development agency for Northern Ireland – Invest NI – has already presented Northern Ireland’s dual market position with the Protocol as a tool to attract inward investment.

However, the Protocol is also problematic, even if difficulties arising from its implementation are not unexpected.

Foreseen difficulties include the potential exclusion of Northern Ireland from some of the benefits of UK FTAs and the outright exclusion of NI goods from EU FTAs – an issue that was reportedly flagged by DfE and the Irish government but ignored by the authors of the Protocol. There was also an understanding, from the outset, that there were a number of unresolved issues concerning the Protocol which would need to be addressed after its entry into force. These included the operation of the complex “goods at risk” regime, Northern Ireland’s status with respect to trade remedies, and the scope of Article 10 of the Protocol on state aid. And, as discussed, the very existence of grace periods confirms the understanding that the Protocol would lead to barriers to trade between GB and Northern Ireland. More difficulties will emerge in time as remaining grace periods expire and, as the EU and the UK’s trade policies and regulatory regimes progressively diverge.

Some of the challenges around the implementation of the Protocol could possibly be addressed via technical solutions. But many of the main difficulties are simply a by-product of political decisions made by the UK and the EU when negotiating the Protocol, and the nature of the UK-EU relationship established by the TCA. The SPS checks on
GB-NI trade, for example, are a natural consequence of the UK’s decision to maintain its ability to diverge from EU rules and standards. Until there is some movement on these fundamental stances, significant barriers are likely to remain in place.

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