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The Protocol on Ireland/Northern Ireland: Past, Present, and Future Precariousness

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Abstract

This article considers the Protocol on Ireland/Northern Ireland in the UK–EU Withdrawal Agreement as a ‘flexible and imaginative’ response to the problems that Brexit has created for the island of Ireland. It looks at the purpose of the Protocol and its origins, noting the reasons why flexibility was required from both sides. It then considers the ways in which precariousness from its conception has been demonstrated in its first year of operation. This focuses upon four main areas: implementation, dynamic alignment, the democratic consent vote, and the UK–EU relationship. Its core argument is the ‘flexibility’ that the Protocol requires also means a certain degree of ambiguity. In the absence of a stable UK–EU relationship, this precariousness could exacerbate the difficulties of meeting the policy challenges that surround the Protocol for Northern Ireland, the UK, Ireland and the EU.

1 | INTRODUCTION

The Protocol on Ireland/Northern Ireland in the UK–EU Withdrawal Agreement is a response to a situation of complex precariousness invoked by Brexit. The complexity and scale of the challenge is reflected in the four objectives of the Protocol itself, as outlined in Article 1(3):

To address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border [on the island of Ireland], and to protect the 1998 Agreement in all its dimensions.¹

These are quite extraordinary objectives for any part of an international agreement – and particularly for one which concentrates in the main on such technical matters as the regulation and movement of goods, customs and VAT and excise rules. This article considers the difficulty of managing the instability and disruption caused by Brexit to an already precarious situation for Northern

Ireland (NI). The region's precariousness arises from its dependence on both Britain and Ireland. Our argument is that the origins, nature and implementation of the Protocol reflect this – centring upon the fundamental tension between the UK and the EU as embodied in the process of Brexit itself and the fact that as Brexit evolves it will inevitably create conditions that are more challenging for the Protocol's operation. This will have ramifications for policy making in key areas in Northern Ireland, the wider UK and Ireland – and even the wider EU – over time. We describe this condition as ‘precarious’ because of the prevalent notions that Northern Ireland post-Brexit and post-Protocol is in a heightened state of uncertainty and is liable to collapse.²

2 | NORTHERN IRELAND'S ALREADY-PRECARIOUS POSITION

The Protocol arises from recognition of the unique historical, geographical and political position of Northern Ireland. This position is one of deep and intrinsic

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connection to both Britain and Ireland (Murphy & Evershed, 2021; Walsh, 2019). The dependence upon them is not exclusively felt by unionists for Britain and nationalists for Ireland, but it is a dependence of the whole region – in economic, legal, cultural, social and policy terms – upon both of them, and thus of the relationship between them. Those connections were formalised and made mutually complementary through the 1998 Good Friday Agreement and by EU membership. However, there was always an element of fragility in such an unusual balance. Northern Ireland's constitutional status is the ultimate example of that. The potential for it to be moved, in the future, from UK to Irish sovereign jurisdiction – with the consent of a majority of its people – brought an element of precariousness that was reflected in its electoral system and results. The hardline unionist DUP and nationalist Sinn Féin parties were holding things in tension which at least brought a certain degree of predictability, if not progress. This is why the 'institutional and constitutional arrangements' of all three strands of the 1998 Agreement are, according to the declaration of support, 'interlocking and interdependent'.³ There is a careful balance achieved within and between each strand. All three strands were disrupted by the UK's withdrawal from the EU.

Strand one – which provides the structures for unionist–nationalist power sharing – was disrupted by two major effects of Brexit. The first is that a majority of unionists voted leave and a majority of nationalists voted remain (Garry, 2016). This has added a new layer of division and distinction between the two main political communities in Northern Ireland. A second consequence of Brexit for strand one relates to the nature of devolution itself. The fact that Northern Ireland, Scotland, Wales and England were all in the EU's single market meant a 'common basket' of legal and regulatory (and funding) frameworks across a wide range of policy areas keeping them in line, even while allowing a certain amount of policy innovation among them (Keating, 2021). Outwith EU membership, the assumptions and framework underpinning devolution in the UK have been fundamentally disturbed. Strand two – north/south cooperation on the island of Ireland – was formalised in institutional terms by bodies that implemented common policies in certain areas. Yet some of these are very much within the remit of EU frameworks, for example, food safety (Hayward, 2021; Komarova & Hayward, 2021). And, in informal ways, economic connections and informal ties steadily developed in the context of both peace and EU membership. The British–Irish relationship – strand three – underpinned it all. This was a relationship of greater familiarity and trust, enabled by common EU membership (Murphy, 2018). The 1998 Agreement – including the agreement from the multi-party talks and the British–Irish agreement – attempted to deal with a conflict over sovereign jurisdiction for Northern Ireland (unionists

wanting UK jurisdiction, nationalists wanting Irish jurisdiction) and over the Irish border (unionists wanting it to persist as the boundary that created Northern Ireland, nationalists wanting it removed as the boundary that partitioned Ireland). Crossborder cooperation north/south and east/west thus had real practical and symbolic weight in ameliorating an historic sense of tension and conflict between British and Irish nationalism. As a project to strengthen borders, to 'reclaim' sovereignty and to bolster British (or English) nationalism, Brexit posed a risk to the 1998 Agreement.

The particular challenges that UK withdrawal from the EU would bring to the 1998 Agreement, and the critical importance of the Irish border, was acknowledged early on in the process by both sides (Connelly, 2017). The UK government recognised this as it triggered Article 50 to begin the Brexit process. Prime Minister Theresa May's letter to Council President Donald Tusk (29 March 2017) notifying him of the intention to withdraw from the EU set it out as one of the UK's seven principles for the negotiations:

In particular, we must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland ... *We want to avoid a return to a hard border between our two countries....* We also have an important responsibility to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement.

(May, 2017, emphasis added)

The European Council recognised it also. The guidelines it entrusted to Michel Barnier and his team for the negotiations stated:

The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. *In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required*, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order.

(European Council, 2017, emphasis added)

Despite this common ground, the issue of Ireland/Northern Ireland became immensely problematic for the UK–EU negotiations for several reasons. In the first instance, just as European integration is about reducing

friction at borders with member states, so withdrawal from the EU is unavoidably about reintroducing friction across borders with member states. Avoiding a hard border therefore was contrary to the very logic of Brexit. And Brexit is a process not an event – with differences between the UK and the EU growing over time and, with that, the need for border controls. Formulating a specific UK–EU arrangement as part of the Withdrawal Agreement that would serve its purpose in a yet-unknown context of policy evolution in both the UK and EU was in and of itself immensely difficult. Add to this the fact that both parties want to preserve the integrity of their internal markets, into both of which Northern Ireland is integrally integrated. What is more, the issue of the Irish border is not just a practical concern – with its 280-odd crossing points across 500 km – but also a highly symbolic one. The openness of the Irish border was synonymous in people's minds with the success of the peace process (Carr, 2017; Cochrane, 2020; Daly, 2017; Hayward, 2017; McCall, 2021). Given that the majority (56 per cent) in Northern Ireland voted to remain, including the overwhelming majority of Irish nationalists, the prospect of tampering with the Irish border in order to satisfy the wishes of a slim English and Welsh majority was one that immediately raised concerns for the conditions of the peace process. The nervousness for the peace process 'on the ground' in Ireland/Northern Ireland was exacerbated by the recognition that the UK and EU were very far apart on several issues, not least of which was the nature of the 'Irish border problem' itself.

3 | THE PRECARIOUS ORIGINS OF THE PROTOCOL

Progress in the negotiations was slow. In the joint report of December 2017, the UK and EU outlined the three scenarios in which their shared objectives for Northern Ireland and the Irish border could be realised: (1) through the UK–EU future relationship; (2) through specific arrangements for Northern Ireland; or (3) through full UK alignment with the EU's single market and customs union, thus avoiding the risk of UK–EU divergence which would give rise to the need for checks and controls on movement across their borders (European Commission, 2017). The first scenario was not workable as long as the UK wanted to exit and diverge from the EU's customs union and single market. That this has been the intention of the UK government has been confirmed after its exit from the EU by Lord David Frost, its chief negotiator of the Withdrawal Agreement and the Trade and Cooperation Agreement (TCA):

Our influence on the EU now comes through the power of example, and hence also through a healthy degree of competition. *Brexit is about doing things*

differently – not for the sake of it but because it suits us and because it creates a greater variety of alternative futures ... That's why what some people call I quote 'hard Brexit' – in its original sense of leaving the EU customs union and single market – was essential. It was the only form of Brexit that allowed us freedom to experiment and freedom to act. This is already happening.

(Frost, 2021a, emphasis added)

There was, and still remains, a tension between the UK government's desire for 'freedom' and Northern Ireland's need for continuity and stability.

A hard Brexit, which Frost saw as 'essential', creates and requires a hard UK–EU border and so it is clear that scenario one alone was not compatible with avoiding a hard Irish border. The three versions of the Protocol on Ireland/Northern Ireland that were published between 2018 and 2019 involved the other two scenarios. The first was a draft by the EU, in February 2018, which saw NI remain in the EU's customs union and single market (i.e. scenario two from the joint report above) (European Commission, 2018a). In November 2018, prime minister May's version of the Withdrawal Agreement saw the 'backstop', in which the UK would align with EU rules in those areas in which the future UK–EU FTA was not close enough to avoid the need for checks/controls on the Irish border (i.e. scenario three above, although under the auspices of potentially allowing for scenario one) (European Commission, 2018b). In October 2019, Prime Minister Boris Johnson negotiated a 'frontstop' version of the Protocol, which saw NI formally remain in the UK's customs territory and internal market but applying the Union Customs Code and de facto remaining part of the EU's single market for goods (i.e. scenario two, with specific arrangements for NI allowing for a hard Brexit for Great Britain (GB)) (HM Government, 2019). This version also removed any commitment of the UK to align with EU rules to minimise the impact of the specific arrangements for Northern Ireland. The fact that this scenario was against the wishes of unionist politicians in Northern Ireland was well known to Boris Johnson, who had railed against his predecessor's deal for even less. Just two months beforehand, the prime minister had complained to Donald Tusk that the backstop:

Applies large areas of single market legislation in Northern Ireland. It places a substantial regulatory border, rooted in that treaty, between Northern Ireland and Great Britain ... and affords the people of Northern Ireland no influence over the legislation that applies to them.

(Johnson, 2019b)

The Protocol he negotiated, however, saw an even more substantial customs border added to that of a regulatory one between NI and Britain.

There is a tension at the heart of the Protocol which reflects the complex nature of the precariousness it sought to address; it also explains the reason why it has been presented in conflicting ways by the two parties to it. The Protocol states that NI is part of the UK's customs territory (Art. 4) and an integral part of the UK's internal market (Art. 6). However, the effect of Articles 5, 7–10 and their supporting annexes is to see the EU's customs code and rules applied to goods entering and produced in NI. This is because the principle worked from is that 'avoiding a hard border' means free circulation of goods across it, namely, that everything crossing the Irish border meets the criteria for entry into the EU's customs union and single market. To ensure this is the case, there are customs formalities and checks and controls on goods entering NI from outside the EU, including Great Britain (see Barnard and Leinarte in this special issue). Northern Ireland is aligned to EU law in relation to individual rights (as made necessary by the 1998 Agreement), trade in goods, VAT and excise, the single electricity market, and State aid. The vast majority of these legislative instruments are in relation to trade in goods. Northern Ireland is consequently in a unique position of having dual market access: free access to the EU's single market for goods and unfettered access to the UK market through the UK Internal Market Act (2020). However, it does not have free movement of people, services and capital across the Irish border into the EU. For such movements, the conditions negotiated in the TCA apply, plus the common travel area (which only benefits British and Irish citizens). What this means in practice is that it is inevitable that the borders around Northern Ireland – the sea border with Britain and the land border with Ireland – will become more significant over time, albeit in different ways. This is the broad picture of uncertainty for policy making in the post-Brexit and post-Protocol context which affects all parts of the UK and Ireland.

4 | PRECARIOUSNESS IN THE NATURE OF THE PROTOCOL

The Protocol is not a static treaty but a legal agreement which will evolve and change in terms of its scope over time. This occurs in three main ways. First, there can be amendments, additions or deletions to the contents of the Protocol until end 2024 if agreed by The Joint Committee (the body established to oversee the implementation, application and interpretation of the EU-UK Withdrawal Agreement). Until the end of the fourth year following the end of the transition period (i.e. end 2024), the Joint Committee has the authority under Article 164(5) of the Withdrawal Agreement to adopt decisions amending the Withdrawal Agreement (including the Protocol):

provided that such amendments are necessary to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed, and provided that such decisions may not amend the essential elements of this Agreement.

Secondly, Article 13(3) provides for dynamic alignment to specific areas of the EU *acquis*. This means that where there are amendments, replacements or deletions of the EU acts that apply under the Protocol they should be automatically updated in their application in Northern Ireland. The UK cannot block them. As such the NI statute book will have to adjust as the legal instruments incorporated into the Protocol are updated and amended at EU level. At the time the Withdrawal Agreement was signed, 338 acts were listed in the Protocol. This was increased to 344 (eight additions, two deletions) by the Joint Committee in December 2020. Such additions/exclusions can only come with the agreement of its co-chairs. By July 2021, this stood at 313 (Whitten, 2021). This was due to the repeal of around 50 acts, mostly in the area of animal health. Many of these were replaced in the form of more broad pieces of legislation, such as the EU act (Regulation (EU) 2017/625) known as the 'official controls regulation'.

There is a third way in which the Protocol's scope might also change. Under Article 13(4), the UK–EU joint committee will decide whether a new EU law which falls within the scope of the Protocol should apply in Northern Ireland. Such additions can only be made with joint UK and EU agreement. One such act is the carbon border adjustment mechanism (CBAM), to be transitioned in from 2023. The UK has not yet agreed to this applying to NI. In principle, it would see imports of goods from all non-EU countries required to purchase CBAM certificates, although third countries with an emission trading system linked to the Union's will be excluded from the mechanism. After 'an exchange of views on the implications of the newly adopted act for the proper functioning of this Protocol' (Art. 13(4)), the joint committee then decides either to adopt the relevant acts or to 'examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect'. On what grounds these decisions will be made and whether and how there can be input from Northern Ireland in making these decisions remains, to date, unknown. In the absence of a decision by the joint committee, the EU may take 'appropriate remedial measures'. Presumably these will have a negative effect on NI's standing *vis-à-vis* the EU's single market. This all adds new potential unknowns and uncertainties to the Protocol context.

There is another cause of potential precariousness for Northern Ireland's legal and policy making conditions post-Brexit and post-Protocol. As regulatory divergence between the UK and EU increases, as EU regulation evolves and as UK regulation diverges, or

as the UK concludes its own trade agreements with non-EU countries, so the situation for Northern Ireland – balanced between the two – will become more difficult (Phinnemore, 2020a; Whitten, 2021). This is reflected in the three dynamic processes that the UK–EU Joint Committee is to keep ‘under constant review’. First, relating to the movement of goods to and from Northern Ireland, according to Article 6(2) of the Protocol, it is to review the facilitation of trade within the UK. Second, it has the competence to review the application of the rules relating to VAT and excise as set out in the Protocol (Art. 8). Third, relating to cross-border cooperation on the island of Ireland, according to Article 11(2) of the Protocol: ‘The Joint Committee shall keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North–South cooperation.’ The UK and the EU are obliged to implement the Joint Committee’s decisions, which will have the same legal effect as the Withdrawal Agreement itself. Overall, the Joint Committee retains a responsibility to meet the objectives of the Protocol at the same time as it is charged with monitoring and reviewing its implementation, making decisions on its scope and evolution, and maintaining dialogue between the UK and EU.

5 | PRECARIOUSNESS IN THE IMPLEMENTATION OF THE PROTOCOL

The UK left the EU on 31 January 2020. The Withdrawal Agreement, including the Protocol, was put into UK law by the EU Withdrawal (Agreement) Act (2020). Legislative consent for this act was not given by the newly restored NI Assembly due to unanimous opposition to it across the parties. Unperturbed, the government commenced its next round of negotiations with the EU on the subject of their future relationship. The transition period was set as short as possible, meaning a very tight timeline for negotiating the trade agreement and for preparing for implementation of the Protocol, both of which would come into force on 1 January 2021. Businesses immediately began to call for clarity about the Protocol and what it would mean for GB–NI trade. The UK government issued a command paper in May 2020 which acknowledged that there would be some checks and controls but was wholly geared towards downplaying their significance. The paper placed an emphasis upon flexibility, proportionality and simplicity when it came to implementation (Cabinet Office, 2020). For a command paper intended to set out the UK’s approach to implementation, it was full of intentions and light on detail. It focused, in particular, on the idea that the scope and scale of the checks and controls were still yet to be negotiated by the Joint Committee:

The process by which controls are conducted, and their frequency – including the level of physical checks required – will need to be discussed with the EU in the Withdrawal Agreement Joint Committee, within the context of the provision in the Protocol that both parties must use their ‘best endeavours’ to avoid controls at Northern Ireland ports as far as possible, and adopt recommendations in the Committee accordingly.

(Cabinet Office, 2020)

Differences between the UK and EU interpretation of the Protocol were becoming more apparent and began to affect the UK–EU negotiations. The Irish border issue – one that dogged and delayed the Withdrawal Agreement – thus began to trouble the future relationship talks too. It was not until two weeks before the transition period expired that some decisions were issued. While broadly welcomed, these decisions only prolonged the uncertainty.

On 17 December 2020, the UK–EU Joint Committee agreed to grace periods on some aspects of the Protocol that required the greatest adjustment for GB/NI movement of goods. The most substantial was a 12 month adaptation period for human and veterinary medicines moving from GB to NI. This was to enable a phasing in of medicines regulations/adjustment of supply chains until 31 December 2021. There was a three month adaptation period on sanitary and phytosanitary (SPS) rules (e.g. products of animal origin, plant products) to enable authorised traders to use simplified official certificates in place of an export health certificate. There was a six month grace period on chilled meat products (e.g. mince, sausages) entering NI from GB, after which they would be banned from entry as is the case for all such products entering the EU’s single market from a third country. On 31 December, a three month grace period on the need for customs declarations for parcels from GB to NI was also issued. These grace periods were conditional. Border control posts needed to be constructed in NI entry points, requiring specialised facilities to complete the required inspections. And the UK also promised to provide the EU data on the movement of goods across the Irish Sea and full and real time access of Union representatives to the UK IT systems in order to carry out their monitoring duties properly. This is important because the UK government is responsible for ‘implementing and applying the provisions of Union [EU] law made applicable’ by the Protocol in Northern Ireland (Art. 12.i). This includes enforcing the Union’s customs code. This is one reason why the EU considers itself to have shown an unprecedented level of flexibility for NI, given its reliance on the authorities of a third country securing what is in effect its external single market and customs territory boundary.

On 1 January 2021, the Protocol came into force. Despite the NI secretary of state's now-infamous tweet that 'there is no Irish Sea border',⁴ there were immediately new requirements in force for the movement of goods from GB into NI. Many of the difficulties in the implementation of the Protocol in early 2021 – which compounded the sense of imminent collapse – could have been avoided. First there was a lack of preparation and information issued in advance. Aside from the diplomatic wrangles over what the Protocol meant, the focus in information-giving from the UK government in preparation for the end of the transition period was on GB–EU movement. Such information as there was on GB–NI movement was sparse and hard to locate and distributed over different webpages. This general lack of awareness of the new rules made for an unfortunate background to the rollout of the systems that were set up to manage the new arrangements. The development of the new IT systems had too little time for testing and familiarisation. The trader support service, which was intended to be used for most GB to NI movement, only went live on 21 December 2020. And the UK trader scheme, on which businesses had to register to self-declare goods coming from GB into NI not at risk of entering the EU (and thus to avoid customs formalities), was only launched on 14 December. Practical problems in the IT systems, the inappropriateness of the forms used for some of the tasks associated with customs formalities and the lack of trained staff were compounded by the sheer complexity of the task.

The nature of the GB–NI movement is also unlike those of typical cross customs and regulatory border trade. Mixed loads (e.g. supermarket lorries) and just-in-time products were particularly problematic to manage. The integration of the UK and Irish markets made the task of introducing new controls within the supply chains all the more difficult. And the fact that this east/west integration had as much symbolic significance for unionists as north/south integration held for nationalists meant that it was inevitable that the new frictions in GB–NI movement would be politically contentious. As the stories of difficulties grew, so too did vocal unionist criticism of the Protocol. This escalated with leadership from the DUP in the spring of 2021 – possibly partly in response to the opinion polls which showed it was leaking support to the vehemently anti-Protocol Traditional Unionist Voice (TUV) party. By April, there were anti-Protocol protests being organised by loyalists, some of which resulted in riotous behaviour, including that causing injury to over 80 police officers (Hayward, 2021b). By September, the leaders of all the unionist parties had issued a declaration stating their wish to see the Protocol replaced (Donaldson, 2021). In November, the cultural unionist and Protestant organisation of the Orange Order kept up the pressure by opening its halls for people to sign declarations of opposition to the Protocol (Bain, 2021). With the elections to the NI

Assembly due to be held by 5 May 2022, it was becoming clear that the Protocol was to be an issue placed high on the agenda by unionists. There is a certain logic to this. First, the fact that a majority of unionists are critical of the Protocol, particularly DUP supporters. And the second is that the Protocol was made an electoral issue by its own terms, namely via Article 18 and the 'democratic consent vote'.

6 | THE PRECARIOUSNESS OF DEMOCRATIC CONSENT OVER THE PROTOCOL

In what might be seen as an effort to address the 'anti-democratic' label he had given the backstop, Johnson's version of the Protocol added a 'democratic consent vote' (Art. 18) to a portion of it. Johnson described this vote as being 'to ensure that those arrangements are acceptable to the people of Northern Ireland ...no arrangements can be imposed on Northern Ireland if they do not work for Northern Ireland' (Johnson, 2019a). The democratic consent mechanism included in the revised Protocol of October 2019 means that a vote will occur in the Assembly every four to eight years, with the first opportunity occurring at the end of 2024. This vote will be specifically about the continued application of the Protocol's provisions on customs, movement of goods, protection of UK internal market, technical regulations etc., VAT and excise, the single electricity market, and state aid (Arts. 5–10). It is the responsibility of the UK to provide the opportunity for the democratic consent vote in Northern Ireland. A vote of the 90 Members of the Legislative Assembly (MLAs) present is to be preceded by 'a thorough process of public consultation' led by the NI Executive, to include cross community consultation (Phinnemore, 2020b).

There are three possible outcomes of the vote: (1) a vote with cross community support in favour of alignment (to be followed by another possible vote in eight years' time); (2) a majority vote in favour of continued alignment but one that does not meet the conditions of cross community consent (to be followed by public consultation and another possible vote in four years' time);⁵ (3) a majority vote to opt out of alignment, after which there will be a two-year? period to agree replacement arrangements, the default being the current UK–EU relationship (and so the earliest Northern Ireland could leave alignment would be at the end of 2026). If a majority of MLAs vote to disapply Articles 5–10, the Joint Committee is to make recommendations to the EU and UK on the necessary measures to be put in place instead of Articles 5–10, 'taking into account the obligations of the parties to the 1998 Agreement'. In this sense, the vote is not a 'get out clause' *per se* but puts responsibility back in the hands of the UK and EU to negotiate an alternative to a hard border on the island

of Ireland. The effects of this vote are twofold in terms of exacerbating the sense of precariousness around the Protocol. The first is that it raises the likelihood of the Protocol being a live issue of contention in regional elections. The second is that it does open up the prospect of the post-Brexit Irish border coming back on the UK–EU table as early as 2025, with new arrangements to follow by end 2026. It is no wonder, therefore, that a survey in the central border region of Ireland/Northern Ireland in summer 2021 found a majority of respondents still fearing that there might yet be a hard Irish border (Hayward & Komarova, 2021). The prospect of such a border had come out of nowhere with the Brexit referendum to dominate local, national and international speculation over the course of the withdrawal negotiations. Although the Protocol was explicitly intended to ‘avoid a hard border on the island of Ireland’ (Art. 1.3), that experience inevitably has a legacy, particularly among the communities most affected. Notably, such concerns have grown at a time where there is an increasing proportion of people on the island of Ireland who think that Irish unification – and the removal of the border altogether – is likely to happen (Hayward, 2021a; Humphreys, 2018). NI Life and Times Survey results since 2016 have shown a rise in those thinking that a united Ireland is likely within the next 20 years and a decline in those thinking that the UK will exist by then (see Figure 1). Connected to this is the fact that a majority now believe that Brexit has made a united Ireland more likely. The reason for such apparently contradictory expectations and fears rests with the poor UK–EU relationship, especially over the Protocol.

7 | PRECARIOUSNESS IN THE UK–EU RELATIONSHIP

The UK government's command paper on the Protocol (HM Government, 2021) set out the UK government's wish that the Protocol now be renegotiated with the

EU. The command paper put forward a rationale for this request that includes an argument that the government did not expect the Protocol to be applied as it has been, and which also sets out grounds of particular difficulties in its application. The areas it seeks changes in are customs procedures on goods entering NI from GB, on SPS (sanitary and phytosanitary) checks and controls, on the areas currently covered by the grace periods, and on governance (specifically, the jurisdiction of the EU's Court of Justice as the final arbiter in the eventuality of disputes between the UK and EU over interpretation of EU law under the Protocol). The paper also claimed that the conditions for invoking Article 16 safeguard measures are already present in NI but noted that this would be a temporary and limited action, and it would be preferable to have a negotiated outcome.⁶ It requested a ‘standstill’ on the legal action being taken by the EU over its unilateral extension of the grace period on export health certificates in March, and a standstill on all grace periods while talks were in progress. The EU agreed to this. This was followed by talks between the teams of Lord Frost and European Commission Vice-President Maroš Šefčovič in August in which the UK government went through the command paper in detail. Consistently then, until his resignation in late December 2021, Lord Frost made it clear the government was seeking an alternative to the Protocol (Frost, 2021b), namely a new document, and claimed that this is allowed for by the terms of the Protocol itself, namely Article 13.8.⁷

In response, the European Union was unequivocal that it would not ‘renegotiate’ the Protocol (PA, 2021). It claimed that Article 13.8 was intended merely to allow for the possibility that the TCA (if creating the conditions for a soft Brexit) would make parts of the Protocol unnecessary. Instead, the EU agreed to talks with the UK that will make adjustments to the Protocol in order to put it on a more sustainable footing. The EU has been clear that this willingness to make changes

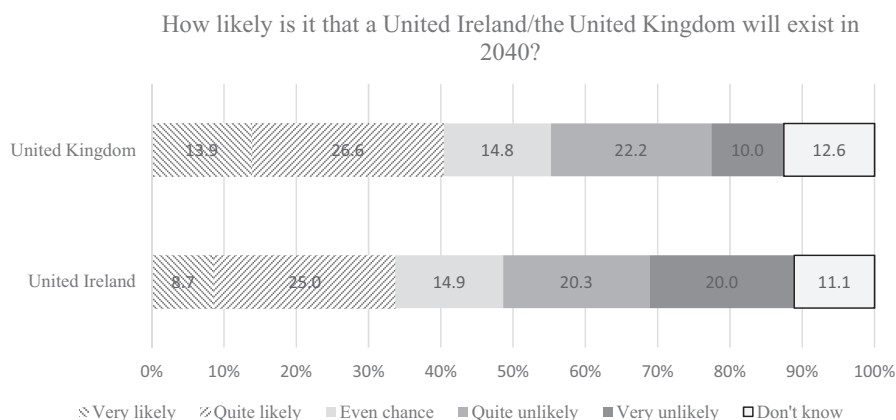


FIGURE 1 Opinion on likelihood of a United Ireland and the United Kingdom existing in 20 years' time. Source: Northern Ireland Life and Times Survey (2020).

comes in response to concerns and issues that it has heard directly from NI elected representatives, businesses and civil society, most especially when Šeščovič visited in NI in early September 2021. The EU produced four non-papers on 13 October which were intended to outline possibilities as to where the talks between the UK and EU might lead (European Commission, 2021). They covered customs, SPS, medicines and engagement with NI stakeholders and authorities. The EU used the non-papers to point out what the UK government had thus far not fulfilled in terms of its obligations (e.g. building more border control posts in NI harbours) as well as to show it recognised some of the difficulties around full application of the Protocol. The presentation by the EU of these non-papers emphasised a best case scenario, for example, with a purported 50 per cent reduction in customs paperwork and 80 per cent reduction in SPS checks. However, the detail on how this would be achieved was not spelled out, and the achievement of any of these new flexibilities were, the commission stressed, conditional on reciprocity and adjustment on the UK side.

Ultimately, it is quite impossible to move far from the fact that fewer checks and controls require other conditions that can give the EU confidence that the risk to the single market posed by GB to NI movement is low. Such conditions would require commitment from the UK to align with ‘basic standards in production’ of meat products, for example, and also greater access for the EU to information that would allow it to see what is entering NI. It would also introduce review and (instant) termination clauses to any such measures bringing flexibility in the application of its rules to NI under the Protocol. In this way, we see an effort to build some structures for certainty and recourse in a situation of attempting to manage precariousness. As the end of the first year of implementing the Protocol approached, the sheer fact that the UK and EU officials were continuing to hold technical talks and the co-chairs were meeting every week was taken as a welcome sign of relative – albeit temporary – stability.

8 | CONCLUSION

The Protocol places Northern Ireland both inside and outside the UK’s internal market and the EU’s internal market – it gives it an extraordinary position of being ‘in between’ the two of them. This seems quite appropriate in many ways because the 1998 Good Friday (Belfast) Agreement was about finding a balance and an institutional form for Northern Ireland’s integral connections to Britain and Ireland. However, there are three fundamental differences now. The first is that the Protocol is an effort to manage a process of disruption

and disconnection, as Britain and Ireland are following different trajectories post-Brexit. The second is that the Protocol is about (international) trade and regulation in a way that the 1998 agreement was not; as such there is a bluntness to the rules that apply that does not sit easily with political sensitivities and the need to ‘soften’ or ‘fudge’ areas of divergence. And the third is that there is all too little common ground between the two sides underwriting the agreement, leaving Northern Ireland in a place of particular vulnerability. That position will be affected by the evolution of Britain and the EU after Brexit – and Northern Ireland will have to attempt to keep up with both in order to minimise disruption in the longer term. This is a difficult enough task for any small region – for one with a fragile power sharing administration and a deeply divided society, it is a particularly challenging. The task is made all the more difficult by the fact that, a year on from the beginning of the Protocol’s implementation, the UK and EU are pulling in different directions at the same time as they are seeking to find some form of settled arrangement for the fragile position of Northern Ireland.

Although the UK and the EU both recognised the precarious situation that Northern Ireland was placed in by Brexit, and the fact that the greatest vulnerability lies along the Irish land border, they have disagreed on much else. The first year of implementing the Protocol repeated the pattern of its negotiation. Even if UK–EU talks and the Joint Committee can produce technical adjustments, much of the difficulty is now political. There is a clear unionist/nationalist divide when it comes to opinions about the very necessity for and existence of the Protocol. What is more, the DUP support base is unlikely to be easily persuaded by any agreement that will keep the Protocol operational. Either the UK government will follow that hard unionist, anti-Protocol line, and thus be set for no agreement with the EU in this sensitive area – or it will ultimately disappoint unionists all over again. Neither scenario bodes well for political stability in Northern Ireland.

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ENDNOTES

1. Protocol on Ireland/Northern Ireland, 19 October 2019. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf
2. Although we recognise that ‘precariousness’ is a well-used and valuable concept in sociology and anthropology, particularly since the 2000s, we are not endeavouring to make any such association with that body of literature and theory which focuses upon ontological condition or a phase of neoliberal development.
3. The Belfast/Good Friday Agreement, 10 April 1998. Available from: <https://www.gov.uk/government/publications/the-belfast-agreement>
4. ‘There is no ‘Irish Sea Border’. As we have seen today, the important preparations the Govt and businesses have taken to prepare for

the end of the Transition Period are keeping goods flowing freely around the country, including between GB and NI.' Tweet by Brandon Lewis @BrandonLewis, Secretary of State for NI, 1 January 2021, subtweeting a BBC News NI piece titled: 'Brexit: First goods cross Irish Sea trade border', <https://twitter.com/brandonlewis/status/1345057483887411200?lang=en>

5. All Members of the Legislative Assembly (MLA) in Northern Ireland have to designate as either unionist, nationalist or other. The conditions for cross community consent on a vote to be deemed to have been achieved are either (1) 60 per cent of all MLAs including 40 per cent of nationalist MLAs and 40 per cent of unionist MLAs or (2) the majority of all MLAs including a majority of unionist and a majority of nationalist MLAs.
6. Article 16.1: 'Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.'
7. Article 13.8: 'Any subsequent agreement between the Union and the United Kingdom shall indicate the parts of this Protocol which it supersedes. Once a subsequent agreement between the Union and the United Kingdom becomes applicable after the entry into force of the Withdrawal Agreement, this Protocol shall then, from the date of application of such subsequent agreement and in accordance with the provisions of that agreement setting out the effect of that agreement on this Protocol, not apply or shall cease to apply, as the case may be, in whole or in part.'

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