

Brexit: a New Solution to the Irish Border Puzzle^{*}

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1. Introduction and Institutional Developments

Brexit has happened. On 31 January 2020 the UK has left the EU, and 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 has come into force. The Withdrawal Agreement was ratified by the UK on 29 January 2020 and approved by the EU on the following day.¹

In this short note, we would like to focus on the provisions regarding the border between Ireland and Northern Ireland introduced on 17 October 2019. On that day, the EU and British negotiators agreed new versions of the protocol on Ireland/Northern Ireland to the Withdrawal Agreement, and of the Political Declaration on future bilateral relations attached to the Withdrawal Agreement, and the European Council endorsed both texts.²

These events were the results of intense negotiations, whose premises can be found in the recent political developments in the UK. After failing three times to secure the British Parliament's support on the Withdrawal Agreement, Prime Minister (PM) Theresa May resigned in June and was replaced by Boris Johnson on 24 July. The new PM pledged to complete the UK's withdrawal by 31 October 2019, at the end of the extension of the Article 50(3) deadline granted by the European Council on 11 April. Notwithstanding continued bilateral meetings between the EU and UK negotiating teams over the summer, the UK government's initial strategy appeared to focus more on the need to respect the date for the exit rather than on reaching an agreement with the EU. From mid-September onwards, however, the pace and the substance of the EU-UK negotiations significantly increased. Two key political events in the UK may have also contributed to this shift. On 9 September the European Union (Withdrawal) (No. 6) Bill – requiring the PM to request an extension of the withdrawal date to 31 January 2020 – passed as an Act of Parliament.³ On

¹ Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of 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, OJ, L 29 of 31 January 2020, p. 1, with annexed text of the Agreement, *Ibid.*, p. 7.

² Special Meeting of the European Council (Art. 50) (17 October 2019) – Conclusions, EUCO XT 20018/19, Brussels 17 October 2019, p. 1.

³ The Act provides that, if by 19 October the House of Commons has not approved (and the House of Lords has not had the opportunity to discuss) either a withdrawal agreement with the EU, or a motion that the United Kingdom will leave without an agreement, the PM is required to ask the European Council for an extension of the withdrawal deadline. The Act also provides for the PM to accept this extension if it is offered.

24 September the UK Supreme Court ruled that the prorogation of Parliament from 9 September to 14 October decided by the government was unlawful and that the Parliament had to reopen immediately.⁴

On 2 October the UK government unveiled its proposal to replace the original Irish Protocol to the Withdrawal Agreement with a new arrangement, contemplating five steps: (i) a commitment to uphold the Good-Friday Agreement; (ii) a commitment to fostering UK-Ireland cooperation; (iii) the establishment of a single regulatory zone concerning all goods in the Island of Ireland (*i.e.*, including Northern Ireland); (iv) the so-called Stormont lock (*i.e.*, the Northern Irish Assembly and the Executive must approve and renew approval every four years); and (v) the independence of the UK trade policy. Few details on this proposal were publicly disclosed.⁵

The EU *de facto* treated the UK proposal as a starting point for the reopening of negotiations. The European Union agreed to renegotiate a part of the Withdrawal Agreement, which – unlike the Political Declaration – it had repeatedly declared closed, and this only because the British government was then willing to immediately find a “definitive” solution, *i.e.*, a solution that sets out a permanent regime likely to allow the preservation of an open border between Northern Ireland and Ireland.⁶ In this way, the need for a backstop clause disappeared and the way was opened for an agreement embodying a mutually acceptable settlement of the issue.⁷ The democratic consensus

⁴ R. (*on the application of Miller*) (*Appellant*) v. *The Prime Minister (Respondent)*, *Cherry and Ors (Appellants) v. Advocate General for Scotland (Appellant) (Scotland)*, Judgment given on 24 September 2019, [2019] UKSC 41. See, generally, P. J. Cardwell, *Naviguer en eaux inconnues. Les défis rencontrés par la recherche juridique au Royaume-Uni à l'heure du Brexit*, *Revue critique de droit international privé*, 2019, p. 335 ff., 342-343.

⁵ See HM Government, Explanatory Note, *UK Proposals for an Amended Protocol on Ireland/Northern Ireland*, 2 October 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836116/Explanatory_Note_Accessible.pdf.

⁶ See the Letter by Jean-Claude Juncker, President of the European Commission, to Mr. Donald Tusk, President of the European Council, Brussels, 17 October 2019, https://ec.europa.eu/commission/sites/beta-political/files/letter_president_juncker_to_president_tusk_0.pdf, and the Communication to the Commission on the endorsement by the Commission of the Revised Protocol on Ireland/Northern Ireland included in the Withdrawal Agreement and of the revised Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, as agreed at negotiators' level, as well as on their transmission to the European Council, Brussels, 17 October 2019, Doc. C(2019) 8000 final.

⁷ E. Maurice, *Brexit: un nouvel accord et des incertitudes renouvelées*, Fondation Robert Schuman Policy Paper, *Question d'Europe*, No. 532, 21 October 2019, p. 2-3.

mechanism made it tolerable for the EU that the solution prefigured by the protocol would not have an indefinite duration, being subject to a periodical review by the Northern Ireland Assembly, in principle, every four years. For its part, the UK government accepted a customs border of a sort on the Irish Sea and the application, in Northern Ireland, of EU law in the field of standards relating to goods; at the same time, however, the UK would regain a full freedom as concerns trade policy. These key points having been resolved, on 17 October, after intense negotiations, an agreement was reached.⁸

The new text of the Withdrawal Agreement embodying the amended Protocol on Ireland/Northern Ireland and the Political Declaration on future bilateral relations were then to be ratified by the EU and the UK, a process that in the UK was predicted to be extremely uncertain.⁹ Indeed opposition to a possible no-deal Brexit in the UK parliament was so strong that the PM was forced to request an extension of the Article 50(3) deadline by the EU to 31 January 2020, and the House of Commons, while approving the main principles of the ratification bill, European Union (Withdrawal Agreement) Bill, rejected the tight timetable proposed by the government to approve it in full by the end of October.

On 29 October 2019, the European Council granted the extension,¹⁰ while the House of Commons passed a law calling early elections on 12 December to break the political gridlock. The Conservative Party won the general elections by a large majority and B. Johnson was confirmed as PM. The UK government subsequently presented the European Union (Withdrawal Agreement) Bill to the House of Commons, which was eventually approved without amendments, and received Royal Assent on 23 January 2020.¹¹

Ratification by the EU was a much smoother process: on 23 January 2020 the Constitutional Affairs Committee of the European Parliament voted in favour of a positive recommendation regarding the Withdrawal Agreement, on 29 January the European

⁸ See the Proposal for a Council Decision amending Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of 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, Brussels 18 October 2019, Doc. COM(2019) 880 final, p. 2.

⁹ P. J. Cardwell, *Naviguer en eaux inconnues. Les défis rencontrés par la recherche juridique au Royaume-Uni à l'heure du Brexit*, *supra* note 5, p. 345-347; T. Aidt, J. Chadha, H. Sabourian, *Breaking the Brexit impasse: Achieving a fair, legitimate and democratic outcome*, *VoxEU.org*, 11 January 2019; C. Tyson, *The parliamentary Brexit endgame*, *Ibid.*, 7 August 2019.

¹⁰ European Council Decision taken in agreement with the United Kingdom extending the period under Article 50(3) TEU, Brussels, 28 October 2019, Doc. EUCO XT 20024/2/19 Rev 2.

¹¹ European Union (Withdrawal Agreement) Act 2020, 2020 Chapter 1.

Parliament gave its consent, and on 30 January the Council adopted the decision to conclude the Agreement, by written procedure.¹²

2. The new Protocol on Ireland/Northern Ireland: its Main Rules

The main provisions of the new protocol on Ireland/Northern Ireland – which fully replaces the one negotiated by the T. May government – may be summarized as follows.

The Common Travel Area between Ireland and the United Kingdom will be maintained (Article 3). Article 4 affirms that Northern Ireland will belong to the customs territory of the United Kingdom, in particular as regards the territorial scope of UK trade agreements with third countries and that of the UK's WTO schedule of tariffs and quotas. Trade agreements entered into by the UK with third countries including Northern Ireland in their territorial scope, nonetheless, shall not prejudice the application of the Protocol.¹³ As concerns the customs arrangements in Northern Ireland (Article 5), EU goods entering the region will be tariff-free and will face no customs checks; third-country goods will be subject to UK tariffs and customs check, while goods brought from the rest of the UK (*i.e.*, goods from Great Britain) will be tariff-free and face no customs checks. However, third-country goods and UK goods “at risk of being subsequently moved into the EU” will face EU tariffs and customs checks upon entry in Northern Ireland (Article 5, para. 1). Article 6 explicitly allows for the possibility for the UK to grant free access to its internal market to goods produced in Northern Ireland. In this respect, UK law will be entitled to regulate the placing on the market in the other parts of the UK of Northern Irish goods complying with or benefiting from technical regulations, assessments or certifications pursuant to the EU rules applicable to them pursuant to Annex 2 to the Protocol. Instead, the placing of goods on the market in Northern Ireland will be subject to UK regulations and standards, without prejudice for the application of the EU rules on the subject as referred to in Annex 2 to the Protocol (Article 7). These concern namely general customs aspects, with particular regard to the Union Customs Code (Regulation (EU) No 952/2013), the protection of the Union's financial interests, trade statistics, other general trade related aspects, trade defence instruments, Regulations on bilateral safeguards, and an articulated

¹² Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of 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, *supra* note 1.

¹³ Article 4, second sentence. See, generally, E. Maurice, *Brexit: un nouvel accord et des incertitudes renouvelées*, *supra* note 7, p. 1, aptly describing the situation as «l'Irlande du Nord, en dedans et en dehors».

list of measures concerning manufacturing and trading of the various types of goods. In Northern Ireland, EU rules on VAT and excise duties as specified in Annex 3 to the Protocol shall apply, but the UK authorities are charged with their application and implementation (Article 8). The Joint Committee shall oversee the application of the rule under Article 8 and shall – where appropriate – adopt measures for the purposes of ensuring its proper implementation. All EU regulations cited in the protocol that will apply in Northern Ireland will be dynamically updated to maintain alignment with EU legislation in force at the time. This might imply a decision by the Joint Committee either to adopt a decision adding a newly adopted legal act to the list of EU measures contemplated in the relevant Annex to the Protocol, or – where agreement on such an addition cannot be reached – to take such other measures as might appear necessary to preserve the proper functioning of the Protocol itself (Article 13). Finally, the Northern Ireland Legislative Assembly will exercise democratic consent on the continuation of the regime envisaged by the Protocol, pursuant to a mechanism providing for a periodical review (Article 18), to which we shall revert in more detail later on.

3. The Customs Arrangements Dictated by the New Protocol

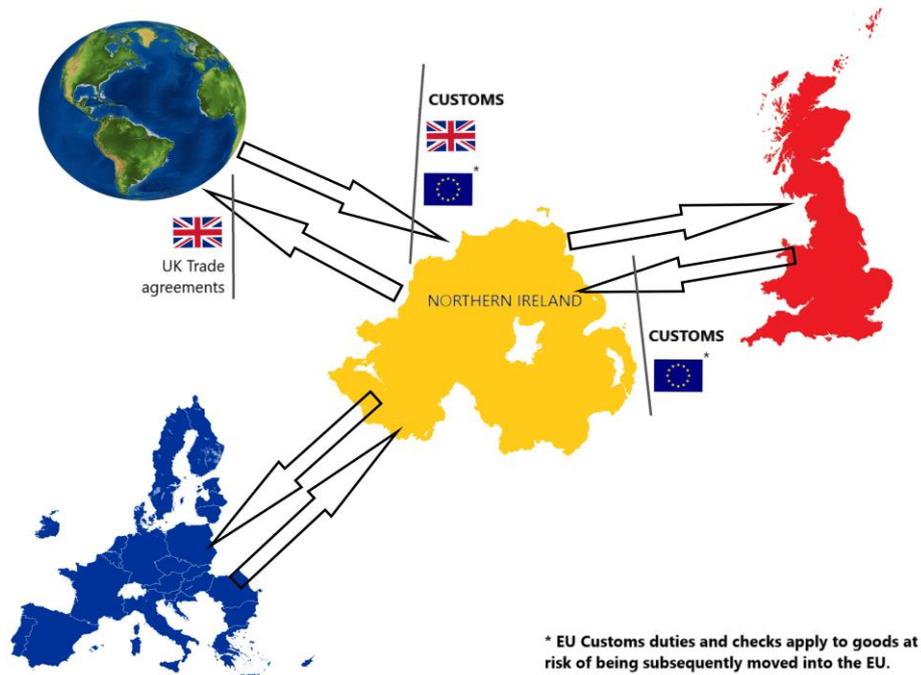
Let us now look more in depth at the customs arrangements dictated by the new version of the Protocol (Fig. 1). According to Article 5, in substance all of Northern Ireland imports of intermediate goods (and not those of final goods from other parts of the UK or from third countries) will be subject to the European Customs Code, including the Single Customs Tariff. The regime applicable to UK and third-country goods is an exception, applicable to goods that are not subject to alterations or transformations in Northern Ireland.¹⁴ Those coming from the rest of the United Kingdom will be exempt from duties, while those from third countries will be subject to British duties (para. 1, second sentence). In addition, the UK has the right to reimburse EU duties “unduly” paid by Northern Ireland importers (para. 6).

As regards exports from Northern Ireland to the rest of the UK (*i.e.*, Great Britain), Article 6 confirms that access of Northern Irish goods to the British domestic market shall be tariff-free and unaffected in terms of both quantity and sector (para. 1). It also implies that British law can establish that Northern Irish goods produced according to European

¹⁴ This is the condition that imports must respect in order not to be at risk of entering the EU. Cf. Article 5, para. 2, of the Protocol, as amended.

standards are freely placed on the domestic market of the United Kingdom, even if British standards diverge. The placing of such goods on the said market remains nonetheless open to regulation by UK law (para. 4).

Figure 1. Trade regime for Northern Ireland



In Northern Ireland there will still be a dual regulatory regime concerning goods' standards and approvals.¹⁵ The placing of goods on the market will be governed by British rules, but full recognition of assessments, registrations, certifications, approvals or authorizations issued pursuant to EU standards as made applicable by the Protocol will also be explicitly guaranteed (Article 7, para 1, and para. 3, fourth sentence). The supervision on the correct implementation of applicable EU rules and standards by the UK authorities and on the overall application of Article 5 of the Protocol shall be ensured by means of the participation of Union representatives¹⁶ (Article 12, para. 2). The EU judicial system –

¹⁵ See E. Maurice, *Brexit: un nouvel accord et des incertitudes renouvelées*, *supra* note 7, p. 2-3.

¹⁶ This is the solution found to contain the risks for the EU of delegating the implementation of its own rules to a third country, highlighted by M. Barnier in the joint press conference with D. Raab on 26 July 2018 in Brussels.

including the EU Court of Justice – will have jurisdiction over the application of EU customs rules, regulatory issues, the VAT regime, the integrated Irish electricity market and State aid in the territory of the United Kingdom as contemplated by the Protocol (para. 4). It is interesting to note that the Protocol explicitly refers to the fact that the applicable European legislation, as specified in the Annexes to the Protocol, will be that as applicable at the relevant time, including further legal acts amending or replacing pre-existing acts, with the exclusion of newly adopted acts, and not that as in force at the time the withdrawal agreement was stipulated (Article 13, paras. 3-4). Regard shall also be paid to the interpretation of such legislation as provided by the European Court of Justice (para. 2), thus establishing the dynamic nature of the alignment of Northern Ireland's regime to the EU legal system.

4. The Mechanism for Ensuring Democratic Consent in Northern Ireland

The above-mentioned mechanism for ensuring democratic consent in Northern Ireland (Article 18) functions as follows. The consent of the Northern Ireland Assembly on the Protocol, which is going to come into force alongside with the Withdrawal Agreement, shall be renewed four years after the end of the transitional period established in the agreement itself, in a manner consistent with the 1998 Agreement (the so-called Good Friday Agreement). Every four years, the Northern Ireland Assembly shall renew by simple majority its consent to the continued application of the Protocol (*rectior*, of Articles 5 to 10 thereof); if, however, the Assembly renews its consent with a cross-community majority,¹⁷ this would have effect for a further period of eight years (instead of four). If the Assembly refuses to renew its consent, the said Articles as well as other provisions of the Protocol depending on their application shall cease to apply after two further years, and the Joint Committee will have to devise and recommend to the EU and the UK the necessary measures to uphold the 1998 Agreement (para. 4).¹⁸

5. The Amendments to the Political Declaration on the Future Relationship

¹⁷ A cross-community majority is defined in Art. 18(6) as a majority of the members of the Legislative Assembly (present and voting) and of each of the two designations (nationalists and unionists); alternatively it means a 60% majority of the members of the Legislative Assembly (present and voting) and at least 40% of the members of each designation.

¹⁸ See E. Maurice, *Brexit: un nouvel accord et des incertitudes renouvelées*, *supra* note 7, p. 3, describing the arrangement set out in this respect under the revised protocol as giving rise to a state of «*pérennité conditionnelle*».

Also the Political Declaration on the future relationship was amended. Two points are particularly noteworthy as conveying the weakening of the trade relations envisaged therein (from a “closest possible relationship” to a generic reference to a free trade agreement with modern rules of origin) and a stronger reference to level-playing-field provisions (see especially para. 17 of the Declaration as amended).¹⁹ We have already seen in the current debate and, in particular, in PM Johnson’s written statement of 3 February²⁰ and in the Commission’s draft mandate for the negotiations on the future EU-UK relationship,²¹ that level playing field provisions will be crucial in finding an agreement on trade in goods and services.

6. An Overall Assessment

All in all, the new Protocol is pretty much in the spirit of the remedies outlined in our previous paper.²² The regime as now envisaged only applies to Northern Ireland (and not to the whole of the UK, as it was the case under the previous version of the Protocol) and applies the remedies we had devised. On the one hand, the UK unilaterally grants free access to its internal market to Northern Irish goods, levying no tariffs, and accepting EU standards. On the other hand, Northern Irish importers of goods produced in Great Britain will face no EU tariffs for goods imported for local consumption or will be entitled to a rebate of the paid tariffs; UK regulations and standards apply for those goods.

¹⁹ As noted by E. Maurice, *Ibid.*, p. 3-4, the terms used in the Revised Political Declaration are particularly telling of a shift in the approach taken, in line with the amendments introduced into the Ireland-Northern Ireland Protocol, insofar as the revised text states that «the Parties agree to develop an ambitious, wide-ranging and balanced economic partnership [...] encompassing a Free Trade Agreement» (Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators’ level on 17 October 2019, to replace the one published in OJ C66I of 19.2.2019, Doc. No. TF50 (2019) 65 – Commission to EU 27, para. 17), as compared to the previous text agreed in 2018, where the goal was set to «build and improve on the single customs territory provided for in the Withdrawal Agreement» (Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, Council Doc. No. XT 21095/18 of 22 November 2018, para. 23).

²⁰ B. Johnson “UK / EU relations”, Written statement - HCWS86 3 February 2020.

²¹ European Commission: “Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland”, COM(2020) 35 final, 3 February 2020.

²² F. Marongiu Buonaiuti, F. Vergara Caffarelli, *La Brexit e la questione del confine irlandese*, *Federalismi.it*, No. 24/2018, p. 1 ff., p. 12-20; Id., *Brexit and the Irish border issue*, *VoxEU.org*, 20 February 2019.

As we had argued in our previous paper²³ such a regime is fully consistent with both EU and WTO rules. Notably, as concerns WTO rules, the regime contemplated under the revised protocol would be eligible to fall either under the exception contemplated under Article XXIV, para. 3, lit. a), GATT, concerning the advantages granted by a party to neighbouring countries in order to facilitate frontier traffic²⁴, or under the exceptions contemplated in respect of customs unions or free trade areas under Article XXIV, para. 5, lit. a) or b), of the same agreement, insofar as the establishment of these, while enhancing trade among the partners, would not have as a side effect to make trade relationships with the other parties more burdensome, particularly in terms of a sensible increase in the level of duties as applicable beforehand.²⁵

As concerns EU rules, the said regime would not affect the proper functioning of the EU customs union and more generally to the proper functioning of its internal market, due regard being had to the fact that the envisaged mechanism of rebate of paid tariffs would not amount to an unlawful measure of State aid, first, considering that the rebate of tariffs which were in principle not due would not be likely to cause an undue advantage as required for a measure of State aid to materialize, and, secondly, even conceding it would, such a measure would appear eligible to fall under the exemption contemplated under Article 107, para. 3, lit. b), TFEU, in respect of State aid measures granted for the purposes of remedying a serious disturbance in the economy of a Member State, as might be easily identified with Ireland in the circumstances.²⁶

7. The Way Ahead: the Steps towards the Implementation of the Protocol

²³ F. Marongiu Buonaiuti, F. Vergara Caffarelli, *La Brexit e la questione del confine irlandese*, p. 17-20.

²⁴ See V.A. Seyid Muhammad, *The Legal Framework of World Trade*, London, 1958, p. 247 f.; A. Tevini, *Article XXIV*, in R. Wolfrum, P.-T. Stoll, H. P. Hestermeyer (eds.), *WTO – Trade in Goods, Max Planck Commentaries on World Trade Law*, Vol. 5, Leiden-Boston, 2011, p. 648; G. Sacerdoti, *Il regime degli scambi del Regno Unito con l'Unione europea e i paesi terzi dopo la Brexit: opzioni e vincoli internazionali*, in *Rivista di diritto internazionale*, 2018, p. 685 ff., 698 f.

²⁵ See, with particular regard to the Report by the WTO Appellate Body of 22 October 1999 in the case of *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para. 52 ff., among others, A. Tevini, *Ibid.* p. 628 ff.; P. van den Bossche, *The Law and Policy of the World Trade Organization*, 2nd ed., Cambridge, 2008, p. 699 ff.; J. H. Mathis, *Regional Trade Agreements in the GATT/WTO. Article XXIV and the Internal Trade Requirement*, The Hague, 2002, p. 209 ff.; see also G. Sacerdoti, *Ibid.*, p. 694 f.

²⁶ See, generally, T. M. Rusche, C. Micheau, H. Piffaut, K. Van de Castele, *State Aid*, in J. Faull, A. Nikpay (eds), *Faull & Nikpay, The EU Law of Competition*, 3rd ed., Oxford, 2014, p. 1944 f., p. 1973 s.

Some questions, nonetheless, remain open and will need to be settled in the coming months. Indeed, the implementation of the Protocol on Ireland/Northern Ireland is a complex matter and the COVID-19 pandemic adds further difficulties. Since the day withdrawal took effect, the Joint Committee, established by Article 164 of the Withdrawal Agreement, has held two meetings, on 30 March and 12 June, 2020, respectively, while the Specialized Committee on the Protocol on Ireland/Northern Ireland (Article 165 of the Agreement) met once only so far, on 30 April 2020.

Yet, before the end of the transition period, the Joint Committee has to adopt a decision establishing the criteria to identify what goods imported into Northern Ireland are not at risk of entering the EU, even if they are subject to processing in Northern Ireland (Article 5, para. 2 of the Protocol). Moreover, upon a proposal from the Specialised Committee, the Joint Committee will also have to define the practical working arrangements relating to the exercise of the right of Union representatives to be present during any activity of UK authorities related to the application of EU law provided for in the Protocol (Article 12, para. 3).²⁷ Practical implications of the right to be present are quite significant and, in particular, involve the EU request to maintain an office in Belfast, which is discussed below.

The meeting of the Joint Committee held on 12 June last probably offered the opportunity of drawing more light on the still unsettled issues along the way of the implementation of the Protocol. To begin with, the head of the UK delegation, the Chancellor of the Duchy of Lancaster Michael Gove, officially declared that the UK will not seek an extension of the transition period, which, accordingly, will come to an end on 31 December 2020.²⁸ From the EU side, the European Commission's Vice-President Maroš Šefčovič declared EU's availability to consider instead the opportunity of an extension had the UK considered to apply for it. More substantially, he noted that much was still to be done in order to secure a

²⁷ Even if Article 12 of the Protocol does not explicitly state a deadline, these arrangements clearly need to be set out by the end of the transition period.

²⁸ See the *Press statement by Vice-President Maroš Šefčovič following the second meeting of the EU-UK Joint Committee*, Brussels, 12 June 2020, Statement/20/1055, p. 2, and, from the UK side, the News story *Government accelerates border planning for the end of the Transition Period*, <https://www.gov.uk>, 12 June 2020, p. 1. This is just the formal announcement of a decision that was repeatedly anticipated by the UK government. The Withdrawal agreement states (Art. 132, para. 1) that an extension decision should be taken by the Joint Committee before 1 July 2020. Yet, according to general international law of treaties rules as codified under the Vienna Convention on the Law of the Treaties, in a later date the EU and the UK, as the Contracting Parties, may well amend the Withdrawal agreement and allow for an extension to be agreed after the deadline.

timely implementation of the Protocol before 1 January 2021. Referring in particular to the Command Paper²⁹ issued by the UK Government in May 2020 providing some detail as for the path to be followed in order to secure the implementation of the Protocol, the Commission's Vice-President noted that such a document, while stressing the goals sought by the UK Government, appeared rather vague concerning the relevant operational aspects.³⁰

In the same Joint Committee meeting the UK declared its intention to implement border controls on imports from the EU by stages. These would start respectively in January 2021, when the transitional period will have come to an end, then in April and finally in July 2021. Even though such an arrangement would not affect imports of goods coming from Northern Ireland as governed by the Protocol,³¹ it would still be tantamount to a *de facto* unilateral prorogation of the transitional period, in contradiction to the expressly declared intention to renounce to any such extension. The unilateral establishment of such a regime is also likely to raise concerns in terms of compatibility with the UK's WTO obligations, since it would imply a discriminatory treatment in favour of goods coming from the EU, which could not find a justification in a trade agreement or customs union. Nonetheless, as the WTO Director General Roberto Azevêdo stated in a recent interview, doubts as to the compatibility of the proposed arrangement with WTO rules might be dispelled having regard to its transitional nature, even if this would not exclude the need for an agreement to support it.³² Such a prerequisite would be missing in respect of purely unilateral measures such as those announced by Michael Gove. In this respect, a statement from the Cabinet Office pointed to the need to allow firms affected by the adverse consequences of the COVID-19 pandemic to take time to prepare for the introduction of tariffs and customs checks to secure their enforcement.³³ Actually, circumstances such as these, however serious, do not fall squarely under any of the exceptions contemplated under GATT rules; it appears rather bold to contend that they might fall under the general

²⁹ H.M. Government's Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, May 2020, CP 226.

³⁰ *Press statement by Vice-President Maroš Šefčovič*, p. 1.

³¹ *Government accelerates border planning for the end of the Transition Period*, p. 3.

³² Andrew Marr Show, 14 June 2020 – Roberto Azevedo, WTO, Interview transcript available at <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/14062003.pdf>, p. 3. See also James Randerson, *UK's light-touch customs plan not a 'no-go,' says WTO chief*, Politico Pro Alert, 14 June 2020.

³³ *Government accelerates border planning for the end of the Transition Period*, p. 1.

exception related to the protection of health.³⁴ The proposed solution rather appears to be aimed at helping firms whose business has been disrupted by the adverse consequences of the restrictive measures adopted to fight the spreading of the pandemic; accordingly, the protection of health is rather an indirect source of justification for the arrangement proposed.

Moving to the unsettled issues more directly raised by the implementation of the Protocol on Ireland/Northern Ireland itself, a thorny issue concerns the mode of enforcing the EU's right to be present during any activities of the UK authorities concerning the implementation and application of the customs provisions in the Protocol, pursuant to its Article 12, briefly mentioned above. In this respect, further steps will need to be taken in order to reach a solution acceptable for both sides, as made clear by Commission's Vice-President Šefčovič in a press statement delivered after the second meeting of the Joint Committee held on 12 June last, pointing out that, as stated under Article 12, para. 2, second sentence, of the Protocol, the UK should facilitate the EU's presence in the said context and provide EU representatives with the required information.³⁵

In this respect, the UK position has been set out to some extent in the above-mentioned Command Paper issued in May 2020. The said paper points to the need to put into place practical arrangements that are proportionate in their intrusiveness on trade between Northern Ireland and the rest of the UK, in such terms as to respect the UK's territorial integrity and support at the same time the aims of the Good Friday Agreement. Critically, the Command Paper (§ 55) points to the need, particularly felt from the UK side, to avoid any return to the idea of joint controls, as contemplated under the previous drafting of the Protocol endorsed by the EU but discarded from the UK side. Specifically, the Command Paper points out that the UK Government would not agree to a permanent EU presence in Northern Ireland, contending that such a presence would risk being perceived as a return to the unwelcome solution based on joint controls and would be unnecessary for the proper functioning of the Protocol.³⁶

³⁴ Namely, under Article XX, lit. *b*), GATT.

³⁵ *Press statement by Vice-President Maroš Šefčovič*, p. 2.

³⁶ H.M. Government's Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, p. 18, paras 53-55.

Ultimately, a compromise solution might be found in considering the EU presence required in order to ensure satisfactorily the exercise of the right of participation contemplated under Article 12 of the Protocol not as strictly permanent, but, rather, as part of a transitional implementing arrangement. Indeed rather than a permanent EU office in Belfast, the EU request more properly concerns a stable presence in Belfast for the duration of the regime established under the Protocol, limited to the discharge of the activities concerning the implementation of EU law in Northern Ireland. Indeed, one shall not lose sight of the fact that the Protocol itself is subject, as to its substantive provisions, to the democratic consent mechanism embodied in its Article 18, through which the political and community sensitivities voiced in the Command Paper³⁷ may be channeled towards finding, in the middle to long term, more broadly shared solutions.

Abstract

This article comments on the new solution contemplated in respect of the Irish border issue in the new text of the Protocol on Ireland/Northern Ireland enclosed to the Withdrawal Agreement as entered into force on 31 January, 2020. The authors point out the changes introduced by the new text of the Protocol as compared to its earlier version as agreed at negotiators' level in November 2018 and discuss the still unsettled issues, which will need to be addressed by the EU-UK Joint Committee in the short time left for its implementation.

Questo articolo esamina la nuova soluzione per la questione del confine irlandese prevista dal Protocollo su Irlanda/Irlanda del Nord allegato all'Accordo di recesso del Regno Unito dall'Unione europea entrato in vigore il 31 gennaio 2020. Gli autori evidenziano le modifiche che il nuovo testo del protocollo ha apportato rispetto alla precedente versione convenuta a livello di negoziatori nel novembre 2018 ed esaminano le questioni ancora irrisolte, che dovranno essere affrontate dal Comitato congiunto UE-UK nel poco tempo rimasto per l'adozione delle disposizioni attuative.

³⁷ *Ibid.*, par. 55.