



Protocol on Ireland and Northern Ireland (Protocol)

Ibec update

16 June 2022

Executive Summary

Background

- The EU and the UK were engaged in intermittent technical discussions on implementation of the Protocol until February 2022 when talks were halted in advance of the Northern Ireland Assembly elections. Even prior to this, the talks had reached an impasse due to the different approaches of a UK Government 'Command Paper' (July 2021) and European Commission proposals to improve the application of the Protocol (October 2021). The EU has continuously emphasised the need for the UK to seriously engage in technical discussions to resolve the issues identified for trade between NI and GB. However, the UK Government is insisting that the Commission seeks a new mandate from the Council to facilitate renegotiation of central elements of the Protocol. The EU state that the Protocol is not up for 'renegotiation' but is an important part of the Withdrawal Agreement negotiated and signed by the UK and hence is international law.

UK Bill

- In June 2022 the UK Government has introduced a Bill that would give UK ministers the power to unilaterally disapply articles of the Protocol, including key provisions relating to trade in goods between Great Britain (GB) and Northern Ireland (NI), the role of the Court of Justice of the EU (CJEU), state aid and VAT. The Bill will take around 12 months to undergo the scrutiny of the UK Houses of Parliament, firstly the Commons and then the Lords. At the time of writing a second reading of the Bill has not yet been tabled in the Commons.

EU response

- The EU has declared that the UK action is a breach of international law and is responding in a considered, proportionate and incremental manner.
 - Firstly, the EU is restarting infringement proceedings against the UK for the non-implementation of the Protocol, which had been put on hold, and secondly the EU has also decided to launch two new infringement proceedings against the UK. These proceedings will also take months and are not expected to lead to any significant impacts for business in the short term.
 - If the UK Bill eventually becomes law and operational, it is understood that the EU would then consider further action involving the EU-UK Trade and Cooperation Agreement (TCA). Suspension of the TCA would take 9 months to enter into force following notification while termination would take 12 months. In either circumstance, tariffs and quotas could be introduced for trade in goods possibly on a targeted basis.

Impacts & Next Steps

- In the immediate future, the Protocol will continue to operate under its present conditions, including grace periods, meaning that no changes are expected in the short term for Irish businesses. Ibec will closely follow the consideration of the Bill by the UK Parliament and the progress of the EU infringement procedures against the UK.
- Ibec is continuing to engage with the European Commission, Irish Government, and UK officials on behalf of Irish business to urge all parties to work together to achieve an agreed solution to ensure that the Protocol continues to respect both the Belfast / Good Friday Agreement (B/GFA) and the integrity of the EU single market.

Background

Since summer 2021, the Protocol on Ireland and Northern Ireland (Protocol) has been in a standstill period whereby the UK Government has extended some grace periods, meaning it has not been fully implemented. The EU and the UK were engaged in intermittent technical discussions until February 2022 when talks were halted in advance of the Northern Ireland Assembly elections on 5 May, but also due to a genuine impasse. Technical discussions have not resumed following the elections, as had been expected.

In July 2021, the UK Government Command Paper proposed a fundamental renegotiation of the Protocol including:

- Customs checks would only be necessary for goods entering NI from GB that were clearly destined for IE and/or the EU;
- A dual regulatory system would be introduced so that goods produced in GB would be recognised in NI and vice versa;
- Medicines would be taken out of the Protocol completely;
- There would not be a requirement for any information on most goods entering GB from NI;
- The role of Court of Justice of the EU (CJEU) would be removed completely.

In October 2021, the European Commission presented proposals to improve the application of the Protocol via four non-papers based on issues raised by Northern Ireland stakeholders. The Commission have suggested the following solutions for goods destined to stay in Northern Ireland:

- A guarantee that GB-licensed medicines could continue to circulate in NI after 1 January 2022.¹
- A NI-specific Sanitary and Phytosanitary (SPS) solution including simplified certification and reduction of official checks and controls for retail goods moving from GB to be consumed in NI by 80%.²
- A general reduction in customs formalities by 50% including simplified and fewer requirements through expansion of the pre-existing mechanism for 'goods not at risk of entering the SM'.
- No more individual certificates for agri-food products are required, instead a single certificate per lorry of only 3 pages is sufficient.
- GB-NI trade in chilled meats e.g. sausages are allowed on the basis of a simple individual certification.
- More choices for businesses: either a single simplified form per load or a single simplified monthly return with no supplementary declarations needed.
- Simplified customs procedures that reduce data requirements from more than 80 pieces of information to fewer than 30 and simplified commodity codes.
- A UK Scheme for Trusted Traders benefiting more businesses, particularly SMEs, including businesses established in Great Britain.
- A proposal to enhance engagement with NI stakeholders and authorities.

The European Commission emphasises that with political will on both sides all of the above is possible without changing the Protocol.

¹ In April 2022, the EU published legislation to facilitate the supply of British-licensed medicines to Northern Ireland. This agreement also includes derogations to facilitate the sale of UK medical exports to Ireland, as well as Cyprus and Malta, for a three-year period while the European Commission continues to work on a permanent solution via the EU Pharmaceutical Strategy.

² This would be subject to conditions for some products, including: Products would be labelled as UK-only and limited to for sale to end consumers in retail shops. Third country products would be excluded. Basic production alignment requirement for meat products.

UK Bill

On 13 June, the UK Government announced legislation that would, if passed into law, enable the UK Government ministers to unilaterally disapply most of the provisions of the Protocol in line with its Command Paper (July 2021). The principal impact would be on the ability of the UK Government to unilaterally disapply the provisions relating to movement of goods from GB to NI such as SPS rules and customs checks.

- For movements of goods from GB to NI, the UK Government would unilaterally introduce a 'green channel' for goods remaining within the UK and a 'red channel' for goods destined for Ireland / the EU, whereby no customs requirements would apply for 'green channel' movements.
- The legislation would allow the UK Government to establish a new "dual regulatory" model whereby UK businesses could choose whether to follow UK or EU legislation when placing goods on the market in Northern Ireland.

In addition, the Bill proposes that the UK Government would have the power to disapply the provisions of the Protocol on state aid and VAT and unilaterally remove the role of the European Court of Justice in interpreting EU law under the Protocol.

The UK has not triggered Article 16 of the Protocol on 'Safeguards', the mechanism that allows either party to introduce safeguard and rebalancing measures in the event the "...*Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade...*". However, Article 16 only provides for either party to suspend the implementation of the Protocol in a limited and temporary manner as any 'safeguard' or 'rebalancing' measures would be subject to three-month reviews.

The UK Government has continually reiterated that it will only negotiate on the basis of its Command Paper (July 2021), which would require the European Commission seeking a new mandate to negotiate from the European Council.

EU response

On 15 June, the European Commission stated that the proposed UK legislation would unilaterally break international law and announced that the EU would respond with legal action against the UK for not complying with significant parts of the Protocol.

In the first instance, the Commission will restart the infringement process launched in March 2021, and frozen in September 2021 to facilitate talks, for non-implementation of several aspects of the Protocol including the movement of agri-food products from GB to NI. If the UK does not reply within two months, the Commission may take proceedings to the European Court of Justice.

The Commission will also launch two new infringement proceedings against the UK Government for failing to fulfil legal commitments under the Protocol regarding:

- The UK's failure to conduct the necessary controls at border control posts in Northern Ireland, by ensuring adequate staffing and infrastructure; and
- The UK's failure to provide the EU with essential trade statistics data to enable the EU to protect its Single Market.

Each of these infringement actions is expected to take at least several months to proceed and will likely not impact on the UK Government's course of action in the short-term.

In parallel, the EU has restated its offer to restart talks with the UK on the basis of its October 2021 proposals. Given the UK legislation is not expected to become law for at least 12 months, there is a clear window for talks to take place between the EU and the UK towards the sustainable implementation of the Protocol. However, there will be a prolonged period of uncertainty as talks, hopefully, begin and continue.

Timeline & Next steps

The UK legislation must pass through the House of Commons, in which the Conservative party has a working majority of 75 MPs, and the House of Lords before it may become law. This process to adopt an amended version of the Bill into law could potentially take at least a year and possibly up to two years given it is believed that a majority in the House of Lords oppose the Bill as presented and will likely make significant amendments.

In the absence of the introduction of the legislation, the Protocol is expected to continue to operate under the present conditions that have been in place since the informal 'standstill' agreed in summer 2021. This should mean that there will not be any short-term operation change risks for Irish businesses based on the current actions of the UK Government and responses from the EU.

Given the time it will take to pass the UK legislation, there is a clear window for talks to take place between the EU and the UK towards the sustainable implementation of the Protocol. However, there will be a prolonged period of uncertainty as talks, hopefully, begin and continue.

While the Commission has recalled that the conclusion of the Withdrawal Agreement, which includes the Protocol, was a pre-condition for the negotiation of the Trade and Cooperation Agreement (TCA), the EU is expected to continue to respond to the UK's unilateral action in a considered, proportionate and incremental manner.

It is understood that the Commission would only propose the suspension and/or termination of the EU-UK TCA if the UK legislation becomes law and is expected to become operational. In the case of suspension, the TCA would cease to apply temporarily 9 months following notification. In the case of termination, the TCA would cease to apply 12 months following notification. Irrespective of any such action, the Withdrawal Agreement, and the Protocol, would continue to apply as a separate agreement.

In a worst-case scenario, considering the timeline for the UK Bill to become law and for any corresponding EU action concerning the TCA to enter into force, trade in goods between the EU and UK would revert to WTO terms within 21-24 months. For trade in goods, this would mean the introduction of tariffs and quotas.

Ibec Actions

Ibec is continuing to engage with the European Commission, Irish Government, and UK officials on behalf of Irish business to urge all parties to work together to achieve an agreed solution to ensure that the Protocol continues to respect both the B/GFA and the integrity of the EU single market.

The new legislation published by the UK Government, if enacted, would significantly undermine both the Protocol and the Trade and Cooperation Agreement. The Protocol, as a solution to a series of mutually exclusive problems to facilitate the UK's departure from the EU while at the same time protecting the B/GFA, is not perfect, but it can be made to work and so underpin peace and prosperity on the island of Ireland. It has successfully protected the functioning of the all island economy and business stakeholders right across the island, appreciate its merits. It has also demonstrated flexibility concerning the challenges for importers in Northern Ireland in addressing issues such as the importation of medicines and parcel delivery.

For the business community a key priority is to sustain the stability that has delivered more than two decades of investment and growth in Northern Ireland and across the island of Ireland. A positive EU-UK relationship is needed to do so. Stability and legal certainty are key for businesses in Ireland, Northern Ireland, Great Britain and the EU, particularly in the current situation where we are facing the impacts of the Russian invasion of Ukraine. It is important that the EU and the UK find a mutually acceptable solution that will allow both sides to deepen their cooperation on issues that will be key for the future competitiveness of EU and UK businesses.



About Ibec

Ibec is Ireland's largest lobby and business representative group. Our purpose is to help build a better, sustainable future by influencing, supporting and delivering for business success. With over 250 employees, Ibec engages with key stakeholders in Ireland and internationally through our six regional offices and our Brussels office, along with an extensive international network in the UK and US.

Ibec positions are shaped by our diverse membership, which range from small to large, domestic to multinational and our 40 trade associations cover a wide range of industry sectors. Ibec members employ over 70% of the private sector workforce in Ireland.

As well as lobbying, Ibec provides a wide range of professional services and management training to members on all aspects of human resource management, occupational health and safety, employee relations and employment law.

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