HERBERT SMITH FREEHILLS

THE VIEW FROM BRUSSELS: THE NORTHERN IRELAND PROTOCOL BILL STOKES GROWING EU/UK TENSIONS

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We assess UK moves to override terms of its withdrawal deal with the EU as post-Brexit friction builds

On 13 June, the UK Government introduced before Parliament the Northern Ireland Protocol Bill that would unilaterally override the main content of the Northern Ireland Protocol (the Protocol) contained in the Withdrawal Agreement by which the UK left from the European Union.

This is the culmination of a long period of dissatisfaction with the Protocol in the UK. The UK is not implementing the parts of the Protocol concerning customs checks in full and has been requesting a number of changes. The absence of full implementation has led the European Commission to initiate infringement proceedings as allowed under the Protocol, but also to present a package of measures to ease the main points of friction.

Discussions have failed to advance and the UK is now proposing to take unilateral action, which the European Commission negotiator has asserted to be illegal.

This note will briefly explain the content of the Bill and then examine the legal justification advanced by the UK and compare it with the taking of safeguard measures as allowed under the Protocol and discussed in a previous View from Brussels. We will also comment on the important and difficult issue of the jurisdiction of the Court of Justice of the European Union (CJEU) over the interpretation of the Protocol and the trade regime for Northern Ireland that it introduces. The conflict over the Protocol is also complicating cooperation between the EU and the UK more generally and the EU has taken a number of unfriendly actions such as refusing to continue UK participation in the Horizon research program.

WHAT THE NORTHERN IRELAND PROTOCOL BILL CONTAINS

One of the most remarkable features of the Withdrawal Agreement is that it requires the UK to make the Withdrawal Agreement and certain EU law directly effective in the UK legal system. The Protocol goes further and requires this direct effect to apply also to many regulations adopted by the EU after withdrawal. The UK complied with the requirement to give the Withdrawal Agreement direct effect in the UK legal system through Sections 7A and 7C of the European Union (Withdrawal) Act of 2018.

The direct effect of international agreements is normally excluded by both the UK and the EU in their modern agreements. It has unpredictable consequences. That is why the UK and the EU were quickly able to agree that the Trade and Cooperation Agreement should not have direct effect in their legal systems. This is clearly stated in Article 5 of the Trade and Cooperation Agreement and stands in stark contrast to Article 4 of the Withdrawal Agreement.

The Northern Ireland Protocol Bill would end this direct effect for the main provisions of the Protocol, designating them "excluded provisions". It would then empower ministers, and in some cases HMRC, with wide discretion to adopt the alternative arrangements that they consider appropriate.

This applies first and foremost to all the provisions that keep Northern Ireland in the Single Market (including those on customs and excise and VAT). While the Protocol provided for goods entering Northern Ireland that were "at risk" of entering the EU Single Market to be subject to EU customs duties and regulations, it effectively presumed the existence of such a risk and allowed goods to be exempted only if the absence of a risk was established jointly by the EU and the UK. The Bill creates concepts of "qualifying movements" of "UK or non-EU destined" goods to which the Protocol would not apply and would allow these to be defined and regulated by a UK minister. The way in which this is intended to be implemented, through green and red customs lanes, is explained in an accompanying Policy Paper.

The Bill would also allow operators to choose whether to follow the EU or UK regulatory regimes (or indeed both). The implementation of this principle will no doubt give rise to significant complications and, again, the details are to be set out in regulations to be adopted by a minister.

A further major change to the legal regime envisaged in the Protocol that the Bill would introduce is to completely disapply its State Aid regime, which effectively provided for the application of EU law by the European Commission. The UK's own new subsidy regime would instead apply. This is intended to meet international standards and the UK's obligations to the EU in the Trade and Co-operation Agreement.

This outline of a new regulatory regime for Northern Ireland is supported by a further set of provisions that render decisions of the CJEU relating to the Protocol or any related provision of the Withdrawal Agreement non-binding on UK courts. It also prohibits UK judges and tribunals from referring such questions to the CJEU. Significantly, this is not limited to the trade and subsidy provisions outlined above, but to the whole Protocol and related provisions of the Withdrawal Agreement. There is, however, provision for a UK minister to establish by regulation a possibility for courts and tribunals to refer questions to the CJEU for guidance.

THE DOCTRINE OF NECESSITY AND ARTICLE 16 OF THE PROTOCOL

The UK Government has stated that the setting aside of its international obligation to implement the Protocol is justified by the international law doctrine of necessity. It states that preserving peace in Northern Ireland is an essential interest of the UK, but does not explain why each of the various measures contained in the Bill are necessary to prevent a grave and imminent danger as required by that doctrine. This section does not explore this issue further, but rather considers to what extent the UK approach goes further than what could have been done by invoking the safeguard clause contained in Article 16 of the Protocol.

The first point to note is that Article 16 can be considered an expression of the doctrine of necessity since it requires that a safeguard measure be appropriate to respond to "serious economic, societal or environmental difficulties" and that its scope and duration should be restricted to what is strictly necessary to remedy the situation. It would therefore appear that the Bill could just as easily have been justified as a safeguard measure as under the doctrine of necessity.

It may well be that it would be difficult to argue that a wholesale setting aside of the trade regime provided for in the Protocol and in particular the ouster of the jurisdiction of the CJEU are appropriate and strictly necessary safeguard measures within the meaning of Article 16, but the same difficulty also arises under the doctrine of necessity.

It has been suggested that Article 16 (taken together with Annex 7 to the Protocol) would only allow temporary measures and would require the consent of the EU. That is not borne out by the text which restricts duration of the measures to what is necessary (as does the doctrine of necessity) meaning that a safeguard measure can be maintained for so long as it is necessary. Article 16 also expressly allows such measures to be imposed unilaterally. Prior consultations are required where possible, but need not last more than one month.

One important difference is that Article 16 provides for the other party to the agreement to adopt proportionate rebalancing measures to restore the balance of rights and obligations under the Protocol. As we pointed out in our previous View from Brussels, the rebalancing measures that the EU could take under the Protocol are rather limited. It is only after successfully challenging the safeguard measure in dispute settlement that the EU would possibly be entitled to adopt retaliatory measures under the broader Withdrawal Agreement or under the Trade and Cooperation Agreement.

However, by not using the safeguard procedure specifically provided for under the Protocol, the UK opens itself to broader retaliatory action by the EU. The EU would not have been able to accuse the UK of violating fundamental principles, including the rule of law, if the UK had relied on a right to adopt a safeguard measure according to the principles and procedures specifically provided for in the Protocol. It would have to have recourse to the dispute settlement procedures first. Indeed, a draft regulation proposed by the EU Commission would specifically allow the EU to adopt retaliatory measures "restricting trade, investment or other activities within the scope of the Trade and Cooperation Agreement, if adjudication is not possible because the United Kingdom is not taking the steps that are necessary for a dispute settlement procedure under that Agreement or the Withdrawal Agreement to function, including unduly delaying the proceedings amounting to non-cooperation in the process." This seems to be designed to allow retaliation against a measure such as the Bill, which removes the jurisdiction of the CJEU.

THE PROBLEM OF THE CJEU

As noted above, the restrictions on the jurisdiction of the CJEU proposed in the Bill go further than simply preventing references to the CJEU in relation to the excluded provisions. It covers the whole Protocol and also related provisions of the Withdrawal Agreement.

Indeed, since the Bill also allows other provisions of the Withdrawal Agreement to be made "excluded provision" by a Minister for a wide range of "permitted purposes" that include not only social or economic stability, but also, for example, health and the environment, the legal effect of the Protocol in the UK could be even further restricted.

There has been extensive discussion of the adverse effect of the Protocol on the ability of Northern Irish consumers and businesses to access certain products manufactured in the UK and on the chilling effect of the intensive level of frontier checks. Concerns about the adverse effect on the Unionist Community's acceptance of the Good Friday Agreement and the power-sharing regime in Northern Ireland have been associated with the implementation of the NI Protocol to date. However, this would seem a different issue from the question whether the jurisdiction of the CJEU over the Protocol in itself contributes to or underlies these concerns. It could become so if the CJEU were to render a judgment that is perceived to be biased or wrong, but that has not happened to date. The grant of jurisdiction in an international agreement to the courts of one of the parties may be virtually unprecedented in international relations between developed countries, but it is clearly provided for in the Withdrawal Agreement and cannot be said to have been hidden in obscure provisions and annexes as was the case of some of the other points of friction. It was accepted by the UK Parliament in the European Union (Withdrawal Agreement) Act 2020.

It is interesting to note that despite some of the rhetoric, the Bill does leave open the possibility of some role for the CJEU. The general dispute settlement mechanism of the Withdrawal Agreement contains an arbitration mechanism for the resolution of disputes. This provides for disputes to be resolved by *ad hoc* arbitrators selected by the parties who are obliged, on request, to refer questions of interpretation of EU law to the CJEU for a preliminary ruling that would be binding on the arbitrators. The arbitrators would nevertheless remain responsible for applying the law to the facts of the dispute and rendering a decision that would be binding on the parties. The Bill would prohibit any "court or tribunal" from referring questions to the CJEU as provided for in the Protocol, but would not prohibit arbitration panels under the Withdrawal Agreement from doing so. Indeed, it would appear that the arbitration mechanism of the Withdrawal Agreement is unaffected by the proposals in the Bill. It is noteworthy that Clause 20(4) of the Bill permits a UK minister to provide in regulations for UK courts and tribunals also to be able to request preliminary rulings from the CJEU on questions of interpretation of EU law, although it is unclear whether they would be bound by the answers received.

This indirect control by the CJEU over the interpretation of EU law in the UK may well become the compromise solution, although the EU currently rejects it.

WHAT HAPPENS NEXT?

The Northern Ireland Protocol Bill marks a significant escalation of the conflict between the EU and the UK over the implementation of the Protocol. It will therefore continue to complicate cooperation between the EU and the UK in many areas. We cannot predict how the politics will play out.

As noted above, the EU has revived the infringement proceedings that it had commenced against the EU in March 2021 in relation to its failure to implement some aspects of the Protocol in a timely fashion. It has also started two new proceedings on the day the Bill was published. If the Bill was to become law, it would probably also bring a further infringement proceeding against the UK. Infringement actions can eventually lead to the imposition of fines, including daily penalty fines, by the CJEU.

In addition to opposing the Bill and the incomplete implementation of the Protocol through legal action, there are other actions that the EU may well take that should be mentioned.

The EU has already refused to allow formal adoption of the Protocol necessary to allow the UK continued access to the EU's Horizon scientific research programme and various other research programmes despite the fact that this was agreed during the negotiations for the Trade and Cooperation Agreement and only not included because of technical difficulties. Similar fate may await further envisaged cooperation in other fields such as in the regulation of financial services and energy. Even forms of cooperation that are currently anchored in the Trade and Cooperation Agreement could be endangered because of the review clauses and notice periods that are provided for throughout the Trade and Cooperation Agreement.

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