

THE VIEW FROM BRUSSELS: THE KEY QUESTIONS RAISED BY THE NEW BREXIT DEAL'S IRISH BACKSTOP REPLACEMENT

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Legal Briefings

The draft Withdrawal Agreement [has finally been amended](#) to replace the previous Protocol on Ireland/Northern Ireland with a new Protocol taking a rather different approach to securing the objective of avoiding a hard border between Northern Ireland and the Republic of Ireland. We will describe below the main features of the new approach and then highlight some of the outstanding questions that will need to be resolved during its implementation.

A SUMMARY OF THE NEW APPROACH

Under the new approach, Northern Ireland will remain subject to EU customs laws and most of its regulatory regime for goods, both agricultural and manufactured, will remain aligned with EU internal market rules for goods.

The attempt to avoid creating a regulatory and customs border between Northern Ireland and the rest of the UK has largely been abandoned. While the original Protocol required the UK to also apply a large amount of EU law, under the new Protocol, Northern Ireland alone will have to apply EU customs laws, including the provisions of its free trade agreements and its trade defence measures and respect a raft of EU internal market legislation on goods.

To maintain the principle of Union with the rest of the UK, it is expressly provided in the new Protocol that Northern Ireland shall be part of the UK customs territory, covered by the UK GATT Schedule and benefit from UK trade agreements.

To reconcile these rather conflicting provisions, the new Protocol provides that imports into Northern Ireland can be exempted from EU duties where there is no risk that the goods concerned will move across the uncontrolled border into the EU and will not be subject to processing. The Joint Committee is tasked with drawing up the detailed rules, requiring consensus between the parties. In addition, the UK is permitted to rebate any EU duties that have been paid and compensate for duties paid, provided that this does not constitute state aid to be policed by the European Commission.

This part of the new Protocol may be terminated four years after its entry into force and periodically thereafter if so decided following a democratic process in Northern Ireland.

This complex balancing act, apparently drafted in 36 hours of intense negotiations on the fifth floor of the Commission headquarters in Brussels, leaves many questions open. The precise outcome of these arrangements will depend on how they are implemented and applied by both parties. This may of course be greatly facilitated by the terms of the future free trade agreement between the UK and the EU to be negotiated during the transition period and thus before the application of the new Protocol.

We will not attempt to predict the outcome of this process but will endeavour to help achieve an understanding of the issues by listing some of the questions that will need to be resolved.

THE OPEN QUESTIONS

1. In view of the fact that there will be no controls on the border between Ireland and Northern Ireland, it could be argued that there will nearly always be a risk of a good imported into Northern Ireland moving into the EU. The Joint Committee is to establish criteria for this purpose based on some general considerations listed in the Protocol. The Joint Committee will only be able to take such a decision if both parties agree. The EU has been extraordinarily risk-averse when considering customs matters, rejecting various proposals for customs facilitation from the UK. However, adopting too strict an approach to exemptions will transfer the burden of providing relief to the rebating of duties by the UK, albeit subject to state aid control. This could poison future relations with the UK and it may therefore be an incentive to establish workable and realistic criteria.
2. One of the objectives of the UK after leaving the EU is to negotiate ambitious free trade agreements with the rest of the world and the UK attaches importance to these being applicable in Northern Ireland. However, will other countries be willing to include Northern Ireland within the scope of these trade agreements when they know that EU single market regulations will have to apply and that the preferential tariffs on their goods imported into the territory of Northern Ireland will depend on the criteria to be established with the EU in the Joint Committee? And will they be willing to allow duty free access of goods from Northern Ireland into their territories when they know that there are no controls on the border between Northern Ireland and the EU? It may well be that this will provide the future free trade partners of the UK further reason to delay the negotiation of such agreements until the future relationship between the UK and the EU

is settled. It also makes the negotiation of the future relationship between the UK and the EU an urgent priority.

3. A related problem arises from the fact that Northern Ireland will be bound by and benefit from existing and future EU trade agreements. These rules may conflict with commitments that the UK wishes to undertake including for Northern Ireland. Might this lead to Northern Ireland being covered by special protocols to both future EU and future UK trade agreements?
4. According to the new Protocol, Northern Ireland will have to apply EU trade defence measures (unless there is no risk of imports into Ireland moving to the EU). What will happen when the UK also imposes trade defence measures and includes Northern Ireland within the scope (as will be entitled to)? The parties will need to coordinate their trade defence measures at least in relation to Northern Ireland.
5. Under the new Protocol, Northern Ireland will remain subject to EU VAT rules on goods, although HMRC will administer those rules. Northern Ireland will be able to match the VAT exemptions and reduced rates for goods applicable in Ireland (which may differ from those currently applicable in the UK). The fact that Northern Ireland will remain subject to EU VAT rules for goods will give rise to complexity, as effectively there will be separate VAT regimes for goods in Northern Ireland and the rest of the UK. It appears therefore that exports from Northern Ireland into Ireland will not give rise to liability to import VAT but exports from the rest of the UK to Ireland will. In order to avoid this giving rise to distortions of competition and possibly opportunities for fraud, further cooperation in VAT will be necessary, as is foreshadowed by the Protocol's reference to the Joint Committee adopting further measures in this area.
6. The new Protocol, including the rules on VAT, do not appear to apply to services. However, services are now often traded bundled together with goods and the borderline between the two will have to be defined.

One possible outcome of the application of the Protocol is that Northern Ireland will become a privileged economic area with preferential access to both the EU and its trade partners and to the UK and its future trade partners attracting investment from all over the world. This might suit the UK and the EU – or it might not.

One thing is certain. The new Protocol leaves many questions unanswered and the future of Northern Ireland will depend on decisions yet to be taken in the EU and the UK, as well as a democratic consent process in Northern Ireland itself.

We previously commented on the text of the revised deal [here](#). Please also see a comparison of the changes that have been made to the [Protocol on Ireland/Northern Ireland](#) and [Political Declaration on the future relationship](#) since the last version agreed between the UK Government and European Commission in November 2018.

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KEY CONTACTS

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