



THE VIEW FROM BRUSSELS: ARE WE HEADED FOR A UK-EU TRADE WAR?

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Legal Briefings - By **Lode Van Den Hende and Eric White**

Resolving the simmering post-Brexit dispute over the Northern Ireland Protocol is proving as tough as many predicted.

The Protocol on Ireland/Northern Ireland to the UK Withdrawal Agreement is proving hard to implement. The European Parliament Research Service has produced a useful [summary](#). The UK government has even suggested reneging on it but pulled back following howls of objections, not least from within the UK itself. It has since [proposed](#) changing or replacing the Protocol and there has been an intensive debate (see [here](#) for an account). Most recently, the UK Chief Negotiator on Brexit, Lord Frost, has now proposed, in a [speech in Lisbon](#), a complete rewriting of the Protocol. The EU, for its part, has steadfastly refused to reopen the text but the Commission has finally recognised that there are issues to be addressed with a [suite of proposals](#) published on 13 October 2021.

The Protocol is an extraordinary document and, as we pointed out in a [previous View from Brussels](#), is arguably illegal under EU law since it was concluded on the legal basis of Article 50 TEU rather than on the legal basis appropriate for an association or trade agreement (as was the Trade and Cooperation Agreement). It was also negotiated in haste and without adequate scrutiny. It contains conflicting principles such as the EU Common Customs Code being applicable in Northern Ireland which is also stated to be an integral part of the UK Customs territory as well as Northern Ireland being both within the single market and the UK internal market.

It is clear that some kind of negotiation will occur. However, negotiations normally require some kind of *quid pro quo* for each side and it is not at all what the UK is offering the EU.

The UK believes, however, that it has a powerful legal weapon to bring about change: the right, provided for in Article 16(1) of the Protocol to take unilateral "safeguard measures" where "the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade". The EU has reacted by warning that invoking this safeguard clause would provoke retaliation and possibly a trade war. In this note, we look at the nature of the safeguard clause, the conditions for its application, the legal consequences and try to give some guidance as to how events might unfold.

The nature of safeguard clauses

Safeguard clauses are typically inserted into international agreements to provide reassurance that an agreement will not have unforeseen negative consequences in exceptional or emergency circumstances. The Withdrawal Agreement and the Trade and Cooperation Agreement contain numerous examples.

Safeguard clauses take a variety of forms in international treaty practice. They generally allow temporary derogations from obligations in specified circumstances with only a requirement to consult and, often, the right of the other party to "rebalance" the agreement by suspending other obligations. They are often important politically in overcoming opposition to the conclusion of agreements. Scaremongers opposing ratification can be disarmed by pointing to the possibility of invoking a safeguard clause. There is an understanding amongst negotiators that these clauses are safety valves to be used in emergencies and in response to unforeseen developments – not as a means of avoiding the clear implications of obligations undertaken. Article XIX of the GATT, for example, expressly conditions trade safeguard action on the presence of "unforeseen developments" and describes such measures as "emergency action".

Article 16 of the Protocol follows this model insofar as it provides for an obligation of prior consultation (in the absence of urgency) and that its use gives rise to a right of "rebalancing" by the other Party. They are not, however, conditioned on the existence of unforeseen developments or even an "emergency". The economic, societal or environmental difficulties must be "serious" and "liable to persist". (Diversion of trade, interestingly, does not need to meet either of these conditions.)

There is already an example of sorts of how Article 16 of the Protocol can be used. When the Commission imposed export controls on COVID-19 vaccines, it argued in its original published draft (SEC (2021) 71 of 29 January 2021) that it could extend export controls to Northern Ireland on the basis of Article 16 "in order to avert serious societal difficulties due to a lack of supply threatening to disturb the orderly implementation of the vaccination campaigns in the Member States." This was to be done as an urgent measure without prior consultation. The original text was quickly modified, however, to exclude this provision.

What would the UK need to do to suspend certain of its obligations under the Protocol?

The first condition to be satisfied would be to invoke the existence of serious economic, societal or environmental difficulties that are liable to persist, or a diversion of trade, as a result of the application of the Protocol. The UK would presumably invoke a serious societal difficulty resulting from the opposition to the Protocol by important sections of the population in Northern Ireland and the resulting unrest, or risk thereof.

The second condition would be to follow the procedure set out in the Protocol, principally in Annex 7 to the Protocol. This is not particularly burdensome. The UK would have to provide the Joint Committee of the Withdrawal Agreement with "all relevant information" and this will presumably include details of the difficulties and also details of the measures that the UK proposes, probably a suspension of certain of its obligations under the Protocol.

Third, the Parties must then enter into consultations in the Joint Committee with a view to finding a "commonly acceptable solution". Unless the measures that the UK wishes to take are urgent, it will have to allow one month for consultations before it can apply the measures.

Fourth, the measures taken by the UK should be restricted to what is "strictly necessary to in order to remedy the situation" with priority being given to measures that least disturb the functioning of the Protocol. On this basis, it would seem difficult to argue that the whole of the Protocol should be suspended, rather than certain precise obligations. This will no doubt be one of the issues in the consultations although in the end safeguard measures can be unilateral and do not need the consent of the other Party.

Fifth, the safeguard measures finally adopted need to be notified to the Joint Committee and will be the subject of a continuing obligation of consultation. Paragraph 5 of Annex 7 to the Protocol requires the Joint Committee to discuss the measures every 3 months with a view to limiting them in scope and duration.

How could the EU react?

In response to the UK safeguard measures, the EU may be entitled to take "rebalancing measures" but again some important conditions need to be fulfilled.

First, the safeguard measures would have to create an imbalance between the rights and obligations **under the Protocol**. This may be considered a given if the UK suspends some of its obligations but it may be possible to design "balanced" safeguard measures that can be argued not to create an imbalance.

Second, the rebalancing measures must be proportionate and "strictly necessary to remedy the imbalance" with priority being given to measures that least disturb the functioning of the Protocol. This condition would seem to be a major constraint on the rebalancing measures that the EU could take. The Protocol mostly contains obligations on the UK and it is difficult to see, realistically, how the EU could suspend its obligation to avoid customs controls on the border between Ireland and Northern Ireland, especially since that is the whole purpose of the Protocol and its suspension would disturb its functioning more than almost anything else.

Third, all the procedural obligations described above that apply to safeguard measures also apply to the rebalancing measures, including prior consultation.

What happens in the event of disagreement?

The above analysis assumes that both Parties act in accordance with their obligations and this is mutually accepted. It is, however, important to also take into account the real possibility that there will be disagreement and conflict.

Indeed, rebalancing is a reaction to a safeguard measure that is accepted as being legal. Other remedies come into play if the legality of the safeguard measures is contested and also if rebalancing measures are not accepted as satisfying the conditions laid down in the Protocol and described above.

While the Protocol provides for a Specialised Committee charged with managing and monitoring the implementation of the Protocol, it does not have its own dispute settlement mechanism. It is the dispute settlement mechanism of the Withdrawal Agreement that applies in the event of a dispute. This is an obligatory mechanism for the settlement of disputes and involves consultations and arbitration with the possibility of references to the Court of Justice of the EU for preliminary rulings in cases where a dispute raises an issue of interpretation of EU law.

It is only after the conclusion of an arbitration and the exhaustion of a reasonable period of time for a losing party to take any necessary measures to comply with a finding that there is a violation of the Withdrawal Agreement that retaliatory measures could be taken. There is procedure to be followed before retaliation can be imposed, including consideration of offers of various forms of compensation. Retaliation can occur through the suspension of obligations under the Withdrawal Agreement but also under the Trade and Cooperation Agreement. The suspension of obligations must also be "proportionate to the breach of the obligation concerned" and if there is disagreement the matter can be referred to the arbitration panel for a binding decision. The suspension cannot be applied until the arbitration panel has taken a decision on the proportionality of the suspension.

An immediate trade war would not be legal

Talk of a trade war therefore seems premature. Talk of cutting off the UK's energy supplies or imposing tariffs on cars would appear to be bluster. An appropriate and proportionate rebalancing measure for the suspension by the UK of some of its obligations under the Protocol might conceivably be suspension of the "single electricity market" provided for in Article 9 and Annex 4 of the Protocol but not the broader cooperation in electricity trade, including interconnectors, provided for in the Trade and Cooperation Agreement.

However, there is the law but there is also politics. As we have seen in relation to recent measures taken by the United States, China and others as well as the reactions thereto, States are capable of inventing justifications for the measures they wish to take and cynically playing for time while the processes designed to prevent such abuses rumble on.

The EU could, rather than follow the dispute resolution procedures outlined above, take many retaliatory actions against the UK with various forms of justification. For example, the Trade and Cooperation Agreement contains many review and termination clauses, including for specific chapters that can be invoked without justification being required. The whole agreement can be terminated on 12 months' notice and the trade part on only nine months' notice. Also some chapters such as those on energy cooperation and fisheries expire in 2026 unless prolonged by negotiation. Of course, termination parts of the Trade and Cooperation Agreement will have impacts on the EU itself and may not be easy politically. It may also lead to the unravelling of the whole agreement if the UK retaliates against the retaliation in like manner.

It should also be borne in mind that the Trade and Cooperation Agreement also has a safeguard clause (Article 773) in very similar terms to that of the Withdrawal Agreement. If the EU considers that the UK has unjustifiably invoked a safeguard under the Withdrawal Agreement it might feel itself justified to take a safeguard measure under that provision, which, significantly, specifically mentions fisheries as a sector in which there might be serious economic, societal or environmental difficulties.

This is of course all speculation and events may take very different courses. What is clear, however, is that a process has started to adapt the Protocol to political reality and the EU and the UK are already jockeying for advantage in the forthcoming complex legal and political negotiations.

Northern Irish Consent

There is an additional complication to the dispute concerning the implementation of the Protocol. Article 18 of the Protocol expressly provides for a democratic consent mechanism to the continued application of EU law required by Articles 5 to 10 of the Protocol. Article 18 provides a rather complex mechanism for periodic expressions of continued consent, which if withheld could lead to Articles 5 to 10 ceasing to apply after a period of two years. This would leave a vacuum in relation to arrangements for Northern Ireland and, if no revised arrangements are agreed during that period, could lead to the EU imposing border controls at the Irish border. There is express provision for this process to involve the institutions created by the 1998 Agreement (also known as the Good Friday or Belfast Agreement) that established the peace process.

As the UK and Irish Governments and the EU wish to avoid rejection of the Protocol in the interests of maintaining the peace process in Northern Ireland, there is a strong political incentive on both sides to find a solution that would mean that arrangements can be accepted by the majority in Northern Ireland. Any such solution will no doubt need to address the high profile difficulties arising from the Protocol such as the availability of certain iconic foodstuffs, medicines sourced in the UK and the transport of pets. The need to address at least some of these problems is reflected in the Commission's 13 October proposals.

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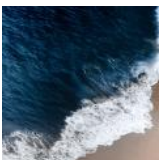
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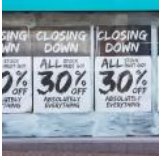
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