



Four reasons why the UK's Northern Ireland Protocol bill is a mistake

by Anton Spisak, 27 June 2022

The UK promises to “fix” the Northern Ireland protocol with unilateral legislation. This will be a major step backwards in trying to resolve genuine practical problems under the protocol.

Northern Ireland is, once again, at the centre of the political debate about Brexit. The future of the Northern Ireland protocol, part of the UK-EU withdrawal treaty – once described by Prime Minister Boris Johnson as an “excellent deal” – appears uncertain. The same prime minister now views the protocol as “unsustainable”, and his government is set to override the parts that it does not like through domestic legislation. The stated aim of the government’s plan is to resolve the political and practical difficulties that the protocol is causing in Northern Ireland. Yet, despite the promise that the bill will “fix” the protocol, the UK’s latest gambit is set to be a major step backwards.

Disagreements over the protocol are nothing new. Almost from the day that the UK and the EU negotiated the withdrawal treaty, the two sides have had different interpretations about how to implement the arrangements that govern trade between Northern Ireland, Great Britain and the EU. What was initially a dispute over how the protocol should be implemented has, over time, morphed into a more fundamental disagreement over whether the protocol should be rewritten altogether. Last summer, the British government [set out](#) an entirely new way of operating the protocol and demanded a redrafting of the agreement. The EU responded with its own proposals – the [October package](#) – which suggested ways of easing the practical burden for businesses but without reopening the treaty. Relations between Brussels and London briefly improved after Liz Truss, UK foreign secretary, took over the negotiations with the EU from Lord Frost, the Brexit minister who stepped down last December. But the talks quickly stalled, with British officials blaming the EU member-states for refusing to give the European Commission a mandate to reopen the treaty.

The Northern Ireland Assembly election in May made sorting out the protocol more urgent. It led to the Democratic Unionist Party (DUP), the largest unionist party in the region, [blocking](#) the formation of the devolved parliament and a government in Belfast by refusing to enter the ‘power-sharing’ arrangements that are central to governing Northern Ireland. The government in London argues that the unionist concerns over the protocol are creating political instability and undermining the Good

Friday Agreement. Its proposed solution has been a parliamentary bill that would alter the protocol and, the government hopes, bring the unionists back into Northern Ireland's governing institutions.

The Northern Ireland Protocol bill is an attempt by the UK to alter the protocol by forcing a change in the EU's position. It is effectively an ultimatum by the British government: agree to renegotiate the protocol – or we implement our own proposals unilaterally, like it or not. The legislation would, on the one hand, disapply most of the current protocol by switching off its legal effect in domestic law. On the other, it would grant British ministers extraordinarily wide discretionary powers to implement their alternative to the protocol. Although the bill was described by Boris Johnson as a “trivial set of adjustments”, it is more accurate to call it a near-complete rewrite of a binding international treaty, into which the government voluntarily entered, through domestic law.

However, as the government moves forward with its risky plan, it will encounter four significant challenges.

The first is that the government stands on a very thin ground in its [legal justification](#) for unilateral action. Ministers argue that the legislation is necessary because the government has “no other way of safeguarding its essential interests”. They also argue that the legislation is “consistent with our obligations in international law”. Yet the bill clearly puts the UK in breach of Article 4 of the withdrawal treaty, which expressly states that the UK cannot legislate contrary to its commitments through primary legislation. In an implicit admission of wrongdoing, the government has felt it necessary to justify its actions by invoking “a state of necessity” to give itself at least a partial legal cover to override its existing treaty commitments.

True, the concept of “necessity” is well-established in customary international law. But the government's case for invoking necessity is unconvincing for three reasons. First, necessity requires that a breach be “the only way for the state to safeguard an essential interest against an imminent peril”. Yet, the UK has not exhausted all options for protecting its interests because it has not used the safeguard clause of the protocol – the now-infamous Article 16 – prior to invoking necessity. Second, the invocation must not “seriously impair” an essential interest of the other party; it would be very hard for the UK to prove that its proposed solution does not create risks for the EU's single market. Third, international practice and case law make clear that necessity can be accepted only on “an exceptional basis”, as the International Court of Justice opined in a [landmark ruling](#) between Slovakia and Hungary in 1997. All these reasons make it highly implausible that the British government can reasonably claim necessity in the present circumstances and, subsequently, win the inevitable legal dispute that the EU will raise over its claims.

The second challenge faced by the UK is that the scale of changes that it seeks exceed the genuine problems thrown up by the protocol. It is true that trade friction in products moving into Northern Ireland from Great Britain is too high for some businesses, as is the fact that the protocol is destabilising governance in the region. The government's plans do include several reasonable ideas that address these concerns. Creating a system of a “green” and “red” lanes that treats goods according to their final destination and removes checks on the products only destined to Northern Ireland, as well as expanding the Trusted Trader Scheme, would make a material difference to businesses on the ground. There is a space here for finding a reasonable compromise with the EU, which has put forward a similar idea for an “express lane”. But there are two more problematic aspects of the government's proposals: dual regulation and governance.

The “dual regulation” system proposed by the UK would allow Northern Irish businesses to choose whether to produce to UK or EU standards, or whether to import goods that conform to either regime.

Businesses would decide for themselves and be penalised if they exported goods that fail to meet EU standards across the Irish border. As far as the theory goes, the plans are not unreasonable. But the practical risks with this proposal are considerable. A system with multiple standards would risk undermining competition on the Northern Irish market, introduce confusion for producers and consumers alike, and open the system to abuse. Only a small fraction of businesses would benefit from this elaborate regime – those firms based on the island of Britain that export exclusively to Northern Ireland.

Perhaps unsurprisingly, EU officials see the “dual regulation” system as a non-starter. They fear the level of risk for the single market would increase substantially with goods of multiple standards circulating on the Northern Irish market, and with no barrier to stop them moving into Ireland. Ultimately, they think an arrangement like this would require either an imposition of stricter risk management practices on particular goods moving from Northern Ireland to Ireland, or some controls on goods going from the island of Ireland into the rest of the single market. Either is clearly undesirable.

Why invest so much political capital into a plan that diverts attention from reasonable ideas and is non-negotiable from the outset? British officials say that ‘dual regulation’ is the only viable way to address problems arising from future regulatory divergence between Great Britain and Northern Ireland. The government has a valid point about divergence pulling the region away from the UK internal market over time, but there is no apparent reason why the proposals should go as far as removing the default of compliance with EU rules for Northern Irish businesses. Rather, as it appears, there is a political appeal in the idea of “dual regulation” as it would remove an obligation for Northern Irish businesses to align with EU rules and eliminate the role for European institutions in policing the protocol. This set of issues have been the bugbear of the hardline European Research Group (ERG) in the Conservative parliamentary party from the very moment that the protocol was agreed.

The UK’s plans for changing the governance of the protocol present another set of difficulties. The bill seeks to remove most of the arrangements governing how EU rules are updated, how they are overseen by the Commission and how they are enforced by the European Court of Justice (ECJ). The Court would continue to be involved only insofar as the independent arbitration panel required an opinion of the European judges on the specific point of interpretation of EU law. What is less clear is what governance, if any, would apply to EU rules that Northern Irish businesses continue to abide by voluntarily, or to parts of the protocol that stay in place such as Northern Ireland’s participation in the EU’s single electricity market.

The third problem is that the bill will make the EU more, not less, entrenched in its current position. The initial response from Brussels has been moderate. The Commission [announced](#) that existing legal proceedings against the UK, which had been paused last year, would be restarted, and unveiled two new cases for alleged breaches of the protocol, neither of which were directly related to the bill itself. For now, the strategy on the EU’s side is to wait patiently until the draft legislation passes through Parliament. But if the bill becomes law, there is little question among the Commission and member-states that the EU would have to launch further legal action and retaliate more decisively, including by imposing tariffs on sensitive British exports to the European continent.

It is not only some of the substantive proposals but also the method with which the government intends to implement them – a unilateral rewrite of the binding international treaty – that gives the EU little reason to show any goodwill. Any concessions would be seen as legitimising a breach of international law and fuel concerns in European capitals, such as Berlin, about the signal this sends to Moscow or Beijing at the time when the rules-based international order is under severe threat. The irony

of the present situation is that the EU institutions as well as many member-states have increasingly come to recognise that the protocol does need to change. The Commission has been eyeing new ways to consider exempting a wider array of goods moving into Northern Ireland from Great Britain from requirements under EU law. But with the provocation of the Johnson government's new bill – and the international law on its side – the EU is unlikely to give in when any concessions would look like bowing to pressure from a unilateral threat.

The final challenge is that the legislation risks creating even more uncertainty in Northern Irish politics. Although the DUP has regarded the bill as a vindication of its position, the party is unlikely to soften its stance and return to power-sharing until it feels under electoral pressure to do so. As the DUP is trying to pull votes away from the more radical Traditional Unionist Voice (TUV), its position is unlikely to change at least until the bill has a realistic chance of being enacted. Following May's election, Northern Irish parties have a six-month window to form an executive before the British government is obliged to call a new election. Unless the bill is on the statute book before mid-October, or the DUP softens its stance, a fresh assembly election in Northern Ireland will be unavoidable. The overall effect of the government's attempt to rewrite the protocol may well be an even more divided politics in the region, which would leave very few reasons for hoping that the governing institutions can be restored to life anytime soon.

It is very hard to see what productive outcome the British government hopes to achieve with its strategy. With the bill following the proposals of the ERG, Prime Minister Boris Johnson has given himself a little room for manoeuvre. He can either retreat and undermine his precarious position by alienating the hardliners, or he can double down on the bill and close any route to a negotiated solution with the EU in the short term.

All this points to a significant step backwards in trying to resolve the genuine challenges that the people and businesses in Northern Ireland are experiencing under the protocol. It should be possible to think that the protocol needs to change while rejecting this bill on the grounds that it is an ineffective and illegitimate instrument for achieving that change. It should also be possible to believe that meaningful changes to the protocol can only be achieved by mutual agreement with the other side, not by throwing new rocks on the road.

There is a landing zone for a deal that would reduce the practical and political problems under the protocol, as I have suggested in a [recent paper](#). Achieving these changes is even possible without reopening the treaty, as long as the EU is willing to grant Northern Ireland a special derogation within EU law.

However, the biggest barrier to getting to resolution on this issue is not the absence of viable solutions, but the politics. Finding a way forward requires the UK to accept responsibility for the protocol and to use treaty mechanisms, not unilateral means, to achieve reforms. It would also require the EU to do more to recognise grievances raised by all communities and to show flexibility in the application of its rules for the unique circumstances in Northern Ireland.

Until trust can be restored between the two sides, any durable resolution to this long-standing problem appears as elusive as it has ever been.

Anton Spisak is a senior fellow at the Tony Blair Institute for Global Change.