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Time for Fresh Thinking on Northern Ireland and Brexit

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EXECUTIVE SUMMARY

The Good Friday/Belfast Agreement became, with considerable efforts over several years from so many involved, a broadly accepted if never fully stable political framework for Northern Ireland. A year after implementation, the prospect of the Northern Ireland Protocol delivering similar results is diminishing. Instead, there is a risk it entrenches divisions in which all sides believe others, not themselves, must be the ones to compromise most.

Such divisions around the Protocol have spread beyond the land and sea borders of Northern Ireland, increasingly overshadowing relationships between the UK and the EU, and the UK and the US. These are not in any of their wider interests. Talk of trade wars in Europe cannot strengthen any economy, while the UK's diplomatic relationships with the US remain strained. Finding unity on huge questions like Russia-Ukraine becomes harder against this backdrop.

To varying degrees, all of the parties involved in the Northern Ireland Protocol discussions were involved in reaching the 1998 Agreement that ended the 30-year period known as 'the troubles'. Drawing on the lessons from that time and the arrangements they put in place, there is a need for a new political process, outside of technical discussions on trade matters within the Protocol. A new shared endeavour is needed to resolve what otherwise threatens to be a long and damaging Northern Ireland and Brexit stalemate.

INTRODUCTION

The sudden resignation of Lord Frost as the UK Minister for EU negotiations in December 2021 brought a brief moment of optimism that long-running difficulties around Northern Ireland and Brexit might soon be settled. Within days, as his role was subsumed into the Foreign Commonwealth and Development Office under the lead of Liz Truss, that optimism was fading away, as she stuck to familiar lines in early discussions with the EU.

These lines include the potential for triggering safeguard measures, the by-now well-known Article 16. While this could be done in a limited and mutually acceptable way, it is usually assumed that the UK's intent would be to fatally undermine the Northern Ireland Protocol of the UK Withdrawal Agreement from the EU, of which it is part and which came into effect in January 2020.

Two months later, with the resignation of Northern Ireland First Minister Paul Givan, following an unfulfilled order to cease checks at local ports, we seem to be back to a familiar position of difficulty. While negotiations continue between the UK and the EU, there seems little prospect of mutual satisfaction from them, and concerns over what the coming months will bring, including in Northern Ireland's Assembly elections scheduled for May.

Northern Ireland, the only part of the UK to share a land border with the EU, has been an issue in Brexit since the 2016 referendum result was known. The desires of successive UK governments for a loose economic relationship with the EU, together with the EU's insistence on strong protection for the borders of its single market, hold particular difficulties in a contested territory.

While the 1998 Good Friday / Belfast Agreement largely confirmed the end of the troubles, the division between unionists (regarding themselves as intrinsically part of the UK) and nationalists (looking more towards a united Ireland) remains¹. This division now encompasses the Protocol, with unionists arguing incompatibility between new checks on goods trade with Great Britain and the peace process, while nationalists may note that new, less noticed, barriers to all-Ireland services trade in considering it a reasonable compromise to safeguard peace.

It is not new that an agreement pertaining to Northern Ireland requires intensive efforts to implement in a manner considered broadly acceptable, for this happened after 1998². What is

¹ A growing proportion of the population who do not strongly identify as unionist or nationalist should be noted

² See Great Hatred, Little Room by Jonathan Powell, a key figure in the UK government in these negotiations

different for the Protocol is the lack of appetite for such a process from any of those involved. The EU, and nationalists believe that the Protocol merely needs UK implementation in good faith, while the UK and unionists believe it needs to be significantly changed.

Such a political divide is dangerous, particularly when scarcely addressed through technical discussions. There are reasons to be concerned about where this situation may lead. Most obviously missing is a shared political commitment on the handling of Northern Ireland and Brexit, to build on previous agreements. Inspiration should come from 1998 in reaching a mutual accommodation, and also the process before and after.

Before returning to what a new political agreement may look like, this paper analyses how and why we have reached a position of stalemate with regard to post-Brexit arrangements for Northern Ireland. Reaching agreement now would not be easy given trust is in short supply, but failing to try is likely to mean being stuck in the same loop we have seen since 2016.

FACTS – A REVIEW OF NORTHERN IRELAND AND BREXIT

Many articles have been written about the events surrounding Northern Ireland and Brexit³, which this paper does not seek to replicate⁴. Rather this section draws out facts as broadly agreed, as a preface to discussing the failure to find mutual solutions. These observations start in 2016, but reach forwards and backwards, in line with the complexity of issues and history.

- Northern Ireland as a whole voted narrowly to remain in the EU in the 2016 referendum, but a majority of unionists voted to leave;
- Immediately prior to 2016 there were only a few, limited barriers to trade between Northern Ireland and the Republic of Ireland, and Northern Ireland and Great Britain, due to common membership of the EU, and a Common Travel Area between the UK and the Republic of Ireland;
- All major players publicly proclaim the 1998 Good Friday / Belfast Agreement as the foundation that needs to be protected through Brexit, with the principle of equal respect for the two primary communities in Northern Ireland central;
- Except between EU members sharing a regulatory and legal base, there is border infrastructure between all countries, to ensure goods and people enter a country in line with applicable regulations and duties. Such checks on goods are particularly important to the operation of the EU's single market given the absence of them between members;

³ Much of this has been reported breathlessly often in Saturday morning missives from Irish journalist Tony Connelly or periodic interventions from Queens University Belfast academics such as Professor Katy Hayward.

⁴ See for example my own article in the Journal of Cross Border Studies in Ireland 2021, “Balancing regulation, devolution, and trade, a global issue rendered acute in Northern Ireland”, <https://crossborder.ie/newsite/wp-content/uploads/2021/09/DH.pdf>

- While there were checks on agricultural products moving from Great Britain to Northern Ireland prior to 2016 due to there being a single epidemiological zone in Ireland, these were considerably less onerous than usual checks carried out at borders;
- Checks at borders can be reduced by alignment of regulations on goods, particularly for animal and plant products which are the most frequently checked, and also through trusted trader schemes;
- No country outside of the EU has completely removed border checks through technology or other processes, though it is common to seek streamlining;
- The absence of border checks on goods and people coming to or from Northern Ireland is not mentioned in the 1998 Agreement, but there is an assumption that greater checks to either Great Britain or the Republic will be a problem for unionists or nationalists⁵;
- The UK government has since 2016 sought a relationship with the EU that is outside the single market or customs union;
- The Republic of Ireland's government has no intention of leaving the EU or the Single Market, or allowing extra checks to its own exports to the rest of the EU.

In short, in what some have described as the Irish trilemma⁶, we have a situation in which international practice would normally mean the erection of border infrastructure between Northern Ireland and the Republic after Brexit, but where the 1998 Agreement, and importance of maintaining the associated peace process, does not appear to allow for this. This then leads to questions of whether the border should be moved or avoided in some way, which has been at the heart of post-2016 discussions.

A ZERO-SUM NEGOTIATION

The conversation regarding Northern Ireland and Brexit, in the UK and the EU, has changed little in five years. In itself, this is not a good sign.

The EU believes that with all-island goods checks impossible to reconcile with the 1998 Agreement the UK must either accept checks for goods travelling from Great Britain to Northern Ireland combined with Northern Ireland following EU rules, or that the UK as a whole must align. The UK alternately suggests that all border checks can be avoided while still respecting both single markets, perhaps through concepts such as a new 'shared market', mutual reliance, and alternative technological arrangements, or through checks between Ireland and the rest of the EU, or because the risk to the EU single market is in any case low.

⁵ Land-border checks have been assumed to be particularly sensitive given the legacy of the troubles and nationalist politics of border areas, but the 1998 Agreement does not explicitly state this

⁶ "Theresa May's Irish Trilemma", John Springford, CER, March 2018, <https://www.cer.eu/insights/theresa-mays-irish-trilemma>

In terms of negotiations there have been two proposed backstops – one just for Northern Ireland, the other for the whole UK – followed by a Protocol after Conservative backbenchers rejected both backstops. That the same individuals now reject the Protocol which they voted to support⁷ suggests either their vote was a short-term ploy or that they didn't fully understand the content.

Overall, no progress whatsoever has been made in reaching a shared understanding of the implications of Brexit for Northern Ireland. One side (the UK government, unionists and Brexit supporters) thinks that the EU is exaggerating the issues to punish the UK; the other side (the EU, nationalists, Congressional opinion in the US) thinks that the UK government is ideologically, and to an extent naively, putting a pure Brexit ahead of peace. That the weight of what may be considered neutral opinion, including the non-aligned community in Northern Ireland, is generally more inclined to side with the EU over the UK may be an interesting pointer, but not one that necessarily takes us closer to a solution.

The harsh reality is that there is a partially concealed a zero-sum game of mutually conflicting objectives, in which the EU is currently ahead by virtue of trade and power politics, plus US support. However, given that Northern Ireland is UK territory in which actions cannot be forced, such advantage cannot be absolute⁸. Even worse, little of this is publicly admitted, that the UK government would overturn the Protocol if it could and that the EU would want it more fully enforced if it had the power.

This is causing strains between western partners, and more immediately deepening divisions in Northern Ireland. There are Assembly elections in May 2022, in the run-up to which the Democratic Unionist Party has collapsed devolved government over the Protocol through the resignation of First Minister Paul Givan. Worse, some on the extremes of the unionist community have taken more direct and frightening actions (bus burning).

There appears to be little high-level political dialogue or attempt to create a shared understanding among all of those involved, which includes Northern Ireland political parties, communities, and the Irish government, as well as UK government and the EU. The UK-EU negotiation over the specific rules pertaining to Northern Ireland in products such as food and medicines under the Protocol is thus a proxy. It does not appear to be working well as such, given particularly a hostile semi-public play through various position papers, visits, and social media commentary.

⁷ No unionists voted for either the backstops or the Protocol in Parliament.

⁸ This paper makes no comment on a potential future 'Border Poll' in which the voters of Northern Ireland may be asked to choose between being part of the UK and a new united Ireland, as laid down in the Good Friday / Belfast Agreement, whether of it happening or the likely outcome.

Putting aside views on who is right and wrong, or has behaved well or badly, we should recognise something obvious. The overall framework of the Northern Ireland Protocol as the mechanism under which we reconcile the Good Friday / Belfast Agreement and Brexit is not working.

TRADE DETAIL AND A ZERO-SUM POLITICAL DISAGREEMENT ARE NOT A GOOD MIX

In essence, the Northern Ireland Protocol is a trade agreement. Behind a deceptively short 19 Articles sit thousands of pages of technical minutiae, referred to simply in the annexes as the titles of around 300 individual EU regulations. These essentially form the single market for goods, to be interpreted in the case of Northern Ireland for a territory not formally part of the bloc.

It is often said that trade and politics are very different fields, but this isn't true because trade agreements cover many controversial areas – from food to visas. However, there is normally some shared commitment between countries before they start negotiations, for example that they want the same kind of trade relationship and understand the need to compromise, to provide a stable foundation.

The absence of such joint ambition to the Northern Ireland Protocol is its primary weakness. In theory, both the UK and the EU agree that some special arrangement is needed to protect the peace process, but little beyond including on what the 1998 Agreement means, and how differing regulations and borders lead to the trilemma.

In particular, both the UK government and the EU want to preserve their single markets as being of equal importance to avoiding any checks, whether between Great Britain and Northern Ireland, or Northern Ireland and the Republic. However, divergence between these single markets becomes highly problematic given a core understanding of the Good Friday / Belfast Agreement is the right of citizens to identify either with the UK or Ireland. Given the overlap of trade and identity, the failure to reach acceptable accommodations thus far is not surprising.

This is exacerbated further by an obvious problem with the Protocol, that Northern Ireland has to follow rules over which it has no democratic say. The finality of the European Court of Justice as an arbiter equally does not appear neutral to those for whom its jurisdiction was a reason for leaving the EU.

From the point of view of the EU, the Protocol or previous suggestions of a backstop were essential to ensure the UK government did not think trade could carry on as usual after Brexit, while protecting both peace and its single market. There was thus a strong signalling intent, which is arguably still required given the UK government approach.

For the UK government that signed the Withdrawal Agreement, the Protocol was the way to ‘Get Brexit Done’ in the face of a Parliament which would not support leaving without a deal. However, as regulatory autonomy is seen by many Conservative MPs as an essential part of Brexit, including for Northern Ireland, there was always a possibility that their agreeing to the Protocol was simply tactical, to be renegotiated later.

Under such circumstance, the EU will not therefore just accede to UK demands to drop the Protocol. However, it becomes increasingly clear that this UK government will not publicly accept the underlying principle of internal checks, even though it signed a treaty to this effect. There is no easy solution to such a fundamental difference.

While partial agreements on individual product rules may ease immediate tensions, underlying problems will remain. Even worse, there are all manner of rumours increasing bad faith, from suggestions leading Conservative and Unionist politicians want to end a 1998 Agreement they never liked, to the EU thinking of Northern Ireland as the price the UK government has to pay for Brexit. Even a future UK government more well-disposed towards the EU would face considerable opposition to changing their approach to Northern Ireland.

These discussions and processes could therefore go on fruitlessly for many years, but at increasing cost to the stability of Northern Ireland, and the network of transatlantic relations⁹. We need to break out of this pattern, and that almost certainly has to mean moving attention away from an increasingly divisive Protocol.

A NEW NORTHERN IRELAND POLITICAL AGREEMENT IS NEEDED

When looking for inspiration on how to reconcile Brexit with the Good Friday / Belfast Agreement it is worth returning to that 1998 text. Even though it deals with huge constitutional and legal issues – including the structure of government, relations between the UK and Ireland and parts within, policing, decommissioning of weapons and much else – it is a short document of around 30 pages¹⁰.

⁹ The US role in the 1998 peace process and large Irish-American community explains their continued level of high interest, which has arguably been consistently under-estimated by the UK

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf

At its foundation lie the principles of consent and respect, drawing upon the indefatigable work of the late John Hume, whose ‘Single Transferable Speech’ had emphasised the common interests of the people of Northern Ireland within an acknowledgment of different ultimate objectives. It is in particular worth recalling one paragraph of the 1998 Agreement, also a treaty between the UK and Irish governments, stating that they:

“(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities;”

While the opening recitals of the Northern Ireland Protocol may reflect this, the textual commitments do not. It is ultimately the EU single market that is prioritised over that of the UK in terms of goods, with discussion only on how this is best achieved. While the opposite is the case for services, this is not specified, and becomes part of the conflicting narrative accompanying the Protocol.

Refreshed relationships developing the Protocol after signing were possible, but did not happen. Instead, divisions became entrenched, making progress ever harder, and thus necessitating the consideration of a fresh approach. A new political agreement on Northern Ireland and Brexit would be a way to deliver this, learning from what has gone wrong after Brexit, and building upon the Good Friday / Belfast Agreement, rather than potentially undermining it.

Such a new agreement should recognise the competing principles at stake, rather than seeking to conceal them. Those principles would include protection of the UK and EU Single Markets, and the ambiguities around identity. Other recognised factors would include Ireland’s position in the EU, regulatory autonomy for both EU and UK, and the aspirations of communities in Northern Ireland who would prioritise the absence of barriers north-south or east-west.

All those involved, to be defined broadly to include Northern Ireland political parties as well as the EU and the UK, should then recognise that compromises must be made in order to reconcile Brexit and the peace process. They should commit to seeking these in an

inclusive and peaceful manner. Solutions should in turn be prioritised that cause the least impact on the objectives of others, and threats to use safeguard or judicial measures seen as inappropriate.

Given the state of relations over Northern Ireland it is hard to imagine the UK and the EU even agreeing on a starting point, in terms of the current Protocol. There is a lack of trust between them: both are suspicious of concessions which they suspect will be pocketed by the other side. Then there are the constant issues of what the EU has a mandate for, and the relationship between the Northern Ireland communities and the negotiating parties.

Some initial steps could be taken. The UK could recognise the current Protocol text as the valid starting point for goods trade affecting Northern Ireland, while the EU would agree that the ECJ will only be referenced for matters of EU law but not in disputes between the parties, and that clauses relating to state aid in Northern Ireland are superseded by those in the Trade and Cooperation Agreement.

Both the EU and the UK could commit to significantly developing the involvement of Northern Ireland institutions in discussions and regulations affecting them. A renewed role for the US could also be considered. Confidence building measures could also include greater openness as to the nature of current checks and how these could be avoided.

Beyond this starting point, all parties would recognise that reconciling Northern Ireland's trade relations with Brexit is a long-term process, requiring a level of shared endeavour and dropping of zero-sum aims. Consideration of how to balance barriers to north-south or east-west trade equally alongside questions of alignment will need considerable political efforts and potential arbitration. While longer term possibilities such as expanded trusted trader schemes and forms of mutual reliance or alternative arrangements are plausible and should be shared work streams, they could not be seen as short-term solutions.

The overall aim therefore would be to construct a more robust joint process to handle Brexit and Northern Ireland, sitting alongside existing institutions. Experience from the past suggests that this would require intensive engagement by the UK government, the EU, and Northern Ireland political parties and community groups. It will not be a smooth process. Some parts of Northern Ireland society may reject such a process as they did in 1998, but the aim would be for majority consent in both nationalist and unionist communities.

Above all, what we are looking for in such a political agreement is a shared understanding to replace contractual rules with consent as a basis for Northern Ireland's future trade

relations. Like the 1998 Agreement, this also draws upon the idea that contracts are an insufficient basis for stability, and that a covenantal relationship – one of joint, open-ended commitment – is needed. After all, a treaty can easily be broken with difficult consequences, as we have seen, whereas a deeper relationship is likely to endure¹¹.

Of course, building such joint commitment is difficult from a position of disagreement is difficult. But it is that which all involved should be seeking, and what is so obviously lacking right now in discussions relating to Northern Ireland and Brexit.

CONCLUSION – WHEN A FRESH APPROACH IS DIFFICULT BUT NECESSARY

Outsiders typically see the virtue of compromise and shared goals, but those involved in a zero-sum disagreement have to give up the idea that they can get everything they want. The UK cannot have full freedom over all its territories and regulations, and the EU cannot protect its single market absolutely.

The outsider can more specifically point out that the UK government cannot achieve its Northern Ireland aims without huge damage to relations with the EU and the US, and that the EU cannot force a non-member to do internally what it thinks unnecessary or damaging. That even if there is justifiable demonstration of bad faith from the other party, it does not deliver a solution.

However, it may take many more rounds of frustrating attempts at renegotiation before sufficient numbers involved come to this conclusion. That they have to do so simultaneously points to the use of outside help, the source of which is not currently obvious.

Perhaps equally there is not yet the broader recognition of the totality of the issues around Northern Ireland and Brexit, in that there are few if any people who equally respect the current UK government view of its post-Brexit choices, and the EU's insistence on protection of its single market. Those on the outside have made their choices of who is right and wrong.

There is therefore no obvious reason why, notwithstanding the issues the Northern Ireland Protocol is causing, a change in approach from UK or EU is likely to come quickly. Possible trade advantages to Northern Ireland of a trading arrangement with privileged access to EU and UK is unlikely to outweigh deeper issues of politics and identity, and hasn't so far.

¹¹ Jonathan Sacks, *The Dignity of Difference*, 2002 – Chapter 8

It is possible that the current negotiations will come to a fruitful conclusion and both sides will start building a common view. A UK government looking for a way out without the loss of face might be the ones to start indicating a new direction. The EU have in the past suggested more flexibility, and might be able to respond. Expectations are however low.

In consequence, uncertainty is growing about the future, sufficient to say the Northern Ireland Protocol isn't working, particularly in a still-fragile polity. Even a short-term agreement is probably not going to be stable.

Over five years of discussion, and one year of implementation, have not resolved the complex issues that arose in Northern Ireland from the UK's decision to leave the EU. There is currently a kind of stalemate because of political differences, relative trade and political power, and both sides not wanting to push disputes too far. Consequently, neither side can achieve their goals, or retreat.

Something new is needed, an agreement and institutions to manage Brexit and Northern Ireland which draw on a shared sense of purpose. There is a precedent in Northern Ireland. The Good Friday / Belfast Agreement did not come easily, but it built on many years of effort from many different individuals representing different communities.

The 1998 Agreement succeeded because it was able to encompass different objectives in what became a sort of covenant. We now require something similar to overcome the Northern Ireland and Brexit impasse, and build on that success.