

Scottish Parliament: Constitution, Europe, External Affairs & Culture Committee IMPLEMENTATION OF THE IRELAND / NORTHERN IRELAND PROTOCOL

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Executive Summary

This evidence, submitted to the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament in advance of an oral evidence session on 30 June 2022, summarises the form and substance of post-Brexit Northern Ireland's 'dynamic alignment' to a selection of EU laws under the Ireland / Northern Ireland Protocol from the perspective of one year of full implementation of the Protocol. Additionally, the evidence provides an overview of the particular position of Northern Ireland in relation to Common Frameworks that arises as a consequence of its alignment with Protocol-applicable EU law and the continuation of North-South cooperation on the island of Ireland. Content presented here is intended to be descriptive of the substance legal and policy environment. The implications of this evidence in terms of political and policy developments in and for Northern Ireland as well as any potential implications for the Scottish Government and Scottish Parliament are not explicitly addressed here but are anticipated to be subject of discussion in the upcoming oral evidence session.

1. Dynamic Regulatory Alignment and the Protocol: One Year Review²

The first section of this evidence sets out a summary of the substance and implications of the 'dynamic regulatory alignment' of Northern Ireland under the Protocol from the perspective of the first full year of implementation (grace-periods notwithstanding).

- 1.1 Under Article 13(3) of the Protocol, EU acts listed in Annexes to the Protocol apply 'as amended or replaced' to the UK in respect of Northern Ireland. When the text of the Protocol was agreed by UK and EU negotiators as part of the UK-EU Withdrawal Agreement in October 2019, 338 EU acts were listed in the Protocol and its Annexes.
- 1.2 Under Article 13(4) of the Protocol, the UK and EU acting jointly in the UK-EU Joint Committee can agree to make additions or deletions to EU acts already listed in the text of the Protocol.
- 1.3 Between the end of the Transition Period on 1 January 2021 and the 1 January 2022 the body of EU law that applies to and in Northern Ireland under the Protocol has changed in several ways that are relevant for and apply to Northern Ireland as a consequence of the 'dynamic alignment' provisions of Article 13 of the Protocol; relevant changes fall into three broad categories: (i) additions to and deletions from the Annexes to the Protocol; (ii) repeal, replacement, and expiry of applicable EU law; (iii) changes to EU legislation that implements applicable EU law.

¹ Queen's University Belfast but this evidence is submitted in a personal capacity and should not be read to represent the views of my employer.

² Content in this section presents key points from a longer report on the first year of the 'dynamic alignment' under the Protocol written by Lisa Claire Whitten and available on the Post-Brexit Governance NI (PBGNI) website [here](#).

- 1.3.1 **Additions and Deletions:** Before the end of the UK Transition Period, in December 2020, the UK and EU [agreed](#) to add eight EU acts to Annex 2 of the Protocol. Of the eight acts added, five related to legislation that the Joint Committee decided, following review, should have been included in the original text of Annex 2.³ The three other additions were new EU acts adopted since the content of the Protocol had initially been agreed in November 2018. The Joint Committee decided that the following three acts fell within the scope of the Protocol, so added these to Annex 2.⁴ The Joint Committee also agreed to remove two EU acts listed in the same Annex which were deemed unnecessary to achieve the objectives of the Protocol.⁵

Taking these changes into account, when the Protocol entered into force on 1 January 2021 following the end of the Transition Period, 344 EU acts were listed in its Annexes.

No further additions or deletions have since been made.

- 1.3.2 **Repeal, Replacement and Expiry:** Of the 338 EU legal acts originally listed in the Annexes of the Protocol, 48 had been repealed as of 1 January 2022. Not all were directly replaced by a new piece of EU legislation, however. This is because several relevant changes consolidated provisions previously spread over numerous pieces of (now repealed) legislation, into one or two new, more comprehensive acts.

Of the 48 repealed acts, 18 have been replaced. In most instances, this dynamic alignment concerns changes to pieces of EU legislation that had been adopted prior to the UK's withdrawal from the EU on 31 January 2020. Of the 18 replacement acts, only three were adopted after the UK left the EU.

In terms of coverage, 23 of the repealed acts were replaced by the new EU 'Animal Health Law' Regulation ([Regulation \(EU\) 2016/429](#)) and a related, supplementary act ([Commission Delegated Regulation \(EU\) 2020/687](#)); while 7 of the repealed acts were replaced by the new EU 'Official Controls Regulation' ([Regulation \(EU\) 2017/625](#)).

Other policy areas where 'repeal and replacement' took place in the first year include: directives on medical devices; regulations on statistics; market surveillance of motor vehicles; controls on cash entering and leaving the EU single market; controls on trade in goods used in capital punishment; controls on the marketing of explosives and possession of weapons; rules on the labelling of tyres; provisions for the conservation of fisheries and marine ecosystems; controls on persistent organic pollutants; mutual recognition of goods between EU Member States; provisions for computerising the movement and surveillance of exercisable goods; and four EU acts relating to electricity markets and energy supplies.⁶

³ The five acts added concerned: rules for monitoring trade between the EU and third countries in drug precursors ([Council Regulation \(EC\) 111/2005](#)); use of indications or marks to identify the lot – or batch – to which food products belong ([Directive 2011/401/EU](#)); rules on the marketing of fodder plant seed ([Council Directive 66/401/EEC](#)); rules on the marketing of propagating material of ornamental plants ([Council Directive 98/56/EC](#)); and rules on the marketing of vegetable propagating and planting material other than seed ([Council Directive 2008/72/EC](#)).

⁴ The three acts added concerned: bilateral safeguard clauses and other mechanisms for the temporary withdrawal of preferences in certain EU trade agreements with third countries ([Regulation \(EU\) 2019/287](#)); measures to reduce the impact of certain plastic products on the environment ([Directive \(EU\) 2019/904](#)); and measures to control the introduction and import of cultural goods ([Regulation \(EU\) 2019/880](#)).

⁵ The two acts removed concerned CO₂ emissions standards for passenger cars ([Regulation \(EC\) 443/2009](#)) and light-duty commercial vehicles ([Regulation \(EU\) 510/2011](#)).

⁶ For more details including links to relevant old and new EU acts, please see the PBONI Explainer (n2).

In addition to the repealed acts, two acts originally listed in the Annexes of the Protocol expired after the UK withdrew from the EU. These concerned the regulation of imports from third countries affected by the Chernobyl disaster ([Council Regulation \(EC\) 733/2008](#)) and temporary trade measures for goods originating in Ukraine ([Regulation \(EU\) 2017/1566](#)).

Taking all of these changes into account alongside those agreed by the Joint Committee in December 2020, the number of EU acts that apply in post-Brexit Northern Ireland has decreased since the Protocol entered into force. As indicated in the Table below, as of 1 January 2022, 312 EU regulations, directives and decisions applied; 26 less than when the Protocol was first agreed in October 2019.

Annex	Area	Regulations, Directives, Decisions*		
		October 2019	July 2021	January 2022
1	Individual Rights	6	6	6
2	Trade in Goods	287	262	261
3	VAT and Excise	19	19	19
4	Single Electricity Market	7	7	7
5	State Aid	19	19	19
Total		338	313	312
<p>EU Acts listed in the Annexes to the Protocol on Ireland/Northern Ireland</p> <p>Change during first year of Protocol's implementation (2021) compared to when Protocol was agreed in October 2019</p> <p>* Not included are the small number of EU treaty articles referenced in the Articles of the Protocol, 'soft law' texts (e.g., commission communications) included in Annex 5, and two unspecific provisions noted in Annex 3 of the Protocol.</p>				

1.3.3 **Changes in Implementing Legislation:** The third category of change relates to legislation that implements the regulations, directives and decisions listed in the Annexes to the Protocol. As in the second category – repeal, replacement, and expiry – this type of change is the result of normal EU legislative processes. It also follows from Article 13(3) of the Protocol.

EU implementing legislation – including that relevant under the Protocol – is regularly adopted by either the European Commission or the European Council. Each year over [1000](#) pieces of implementing legislation are adopted; this high figure reflects the extent to which implementing legislation is used as a tool in the application of EU law and policy. It is important to note, however, that most implementing acts concern technical and specific issues, and they always remain within the scope of the original 'parent' act.

This is not to suggest that changes in relevant EU implementing legislation are unimportant for post-Brexit Northern Ireland; it is rather to put their significance in context. By definition, implementing legislation implements law that already applies. Changes under the Protocol arising from implementing legislation are unlikely to have much impact in terms of substantive policy, at least not often. Changes nevertheless do need to be tracked.

Tracking change, however, is not straightforward. New EU legislation is published in the [Official Journal of the European Union](#), but determining which pieces of EU law apply to Northern Ireland, and which do not, requires detailed study and timely cross-referencing.

Currently, no comprehensive and publicly accessible register of all EU law applicable under the Protocol exists. The European Commission has committed to developing a website dedicated to providing a “clear and comprehensive” record of such legislation as part of its October 2022 [package of measures](#) for the implementation of the Protocol. At the time of submission of this evidence, that website has not been launched.

One way of tracking the amount of relevant change is by looking at ‘consolidated text’ versions of applicable acts. When a substantial amount of implementing legislation has been made under an EU Directive, Regulation or Decision, the original legal text – the parent act – is often ‘recast’ as a ‘consolidated text’ to incorporate changes since the parent act was adopted.

While not a providing a comprehensive means of tracking change, this process of ‘recasting’ can be taken as an indicator of the extent of changes made to the application of a given EU act via implementing legislation. Since the UK left the EU on 31 January 2020, almost a quarter of the EU acts that apply in Northern Ireland under the Protocol have been recast as consolidated texts. Of those 90 recast EU acts 62 were recast during 2021.⁷

1.4 What is clear from the first year of ‘dynamic alignment’ of Northern Ireland under the Protocol is that its alignment to a specific selection of the EU *acquis* while remaining a full and integral part of the post-Brexit UK, creates extensive legislative complexity. Importantly, the majority of the most substantive ‘amendments and replacements’ to Protocol-applicable EU law in the first year of its full implementation enact changes agreed while the UK was still part of the EU; the possibility of significant intra-UK divergence as a consequence of post-Brexit NI dynamic alignment has, therefore, not yet begun to take effect. To manage this in the longer-term and ensure that policy in post-Brexit NI is both clear and coherent more robust mechanisms for tracking relevant EU legislative change and its implications for NI need to be developed, and fast.

⁷ For a full list see PBGNI Explainer (n2).

2. Common Frameworks and the Protocol: An Overview⁸

The second section of this evidence provides an overview of the relationship between the Common Frameworks and the Protocol; while key issues are highlighted, it should not be taken as an exhaustive account.

- 2.1** By way of context, it is worth noting that legislation that applies in post-Brexit Northern Ireland includes that which comes through (i) Stormont on devolved areas, (ii) Westminster for reserved and excepted areas, (iii) retained EU law (through the EU Withdrawal Act 2018), and (iv) directly applicable EU legislation (through the Protocol given direct effect by s7A of the 2018 Act as amended by s5 the EU Withdrawal Agreement Act 2020).
- 2.2** Notwithstanding the UK government recent introduction of draft legislation – the [Northern Ireland Protocol Bill](#) – which would, if enacted, end the supremacy of Protocol-applicable EU law, at present, this supersedes domestic law. This means that Common Frameworks will apply in Northern Ireland only, and to the extent that, they do not conflict with EU law that applies under the Protocol. This was reflected in the original definition of a Common Framework set out in the [Joint Ministerial Committee \(EU Negotiations\)](#) of 16 October 2017 that described a CF as setting out “a common UK, or GB, approach” (*added*).
- 2.3** As such, the dynamic alignment of Northern Ireland to roughly 300 EU law instruments under the Protocol means that UK-EU divergence over time will, by default, result in GB-NI divergence. Some of Protocol-applicable EU law instruments fall within areas covered by a Common Framework, in some cases the whole policy area of a CF is covered by the Protocol while in other cases only part of the CF has some intersection with Protocol-applicable EU law.
- 2.4** Alongside the relationship between CFs and Protocol-applicable EU law, some also have implications for areas of North-South cooperation on the island of Ireland, which are covered, in principle, by Article 11 of the Protocol and which are continuing to develop independent from the Protocol architecture as they did pre-Brexit, albeit in a much changed legal and political context.
- 2.5** Focusing on ‘Category Two’ CFs for which non-legislative frameworks are being developed, the table below summarises the relationship between CFs, Protocol-applicable EU law and areas of N-S cooperation.⁹

⁸ Content in this section partly draws on two evidence submissions made to the House of Lords Common Frameworks Scrutiny Committee together with QUB colleagues Prof Katy Hayward, Dr Viviane Gravey and Dr Milena Komorova, both are available [here](#).

⁹ This analysis is based on cross-reading of: EU law instruments listed in the Annexes of the Protocol (relevant links available [here](#)); EU law instruments identified by UK and EU negotiators as part of the ‘Joint Mapping Exercise’ carried out in 2017 to determine the extent to which North-South cooperation on the island of Ireland relied upon EU law and policy (see Scoping Document available [here](#)); and from the UK government ‘Frameworks Analysis 2021’ document (available [here](#)).

Common Framework	Protocol	N-S coop	Common Framework	Protocol	N-S coop	Common Framework	Protocol	N-S coop
Company Law	No		Agriculture (Zootech)	Yes	Indirectly	Resources & Waste	Yes	Yes
Late Payment	No		Animal Health & Welfare	Yes	Yes	Commercial Transport & Operator Licensing	No	Yes
Mutual Recognition Professional Qualifications	No	Yes	Air Quality	No	Yes	Rail Technical Standards	Yes	Yes
Radioactive Substances	Yes	Yes	Best Available Techniques	Indirectly	Indirectly	Driver Licensing	No	Yes
Services Directive	Indirectly	Indirectly	Chemicals & Pesticides	Yes	Yes	Roads – Motor Insurance	No	Yes
Specified Quantities and Packaged Goods Legislation	Yes	Indirectly	Food Compositional Standards & Labelling	Yes	Yes	Nutrition Labelling, Composition & Standards	Yes	Yes
Public Procurement	No	Yes	Ozone Depleting Substances	Yes		Blood Safety & Quality	Yes	
Agriculture (Fertilisers)	Yes	Indirectly	Plant Health	Yes	Yes	Organs, Tissues and Cells	Yes	Yes
Agriculture (Organic Production)	Yes	Indirectly	Plant Varieties & Seeds	Yes	Yes	Public Health Protection & Health Security	No	Yes
Hazardous Substances	Yes	Yes	Food and Feed Safety & Hygiene Law	Yes	Yes			

2.6 As indicated above, of the 29 category 2 CFs, 19 cross-sect with areas of EU law that still apply to NI under the Protocol and a different 19 cross-sect with pre-existing areas of N-S cooperation on the island of Ireland.

2.7 In the three CF policy areas where competence is currently disputed between the UK government and devolved governments, relevant EU laws apply to NI under the Protocol in relation to two areas – Food and Drink Geographical Indicators and State Aid – and, while the third area – data-sharing (Eurodac) – is not touched on by the Protocol, data-sharing between Ireland and Northern Ireland is a key facilitator of N-S cooperation across a range of areas.

2.8 Where CFs cross-sect in NI either with obligations under the Protocol or in relation to N-S cooperation, this does not *necessarily* prevent the operation of the relevant CF, it does however mean that the particular position of NI will need to be accounted for and accommodated in the outworking of the relevant CF.