CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE

INQUIRY ON THE NEGOTIATION OF THE FUTURE RELATIONSHIP BETWEEN THE EUROPEAN UNION AND THE UK GOVERNMENT

SUBMISSION FROM PROFESSOR DAVID PHINNEMORE

The Protocol on Ireland/Northern Ireland

1. The Protocol will enter into force from the end of the transition period and involve the UK in respect of Northern Ireland applying the Union Customs Code and maintaining regulatory alignment with the EU in a range of areas to ensure, in particular, that there is no physical hardening of the border on the island of Ireland. The focus of the regulatory alignment is on single market and state aid rules that enable the free movement of goods. Annex 2 to the Protocol lists c300 pieces of relevant legislation as well as other measures.

2. In order for the Protocol to be implemented, the UK-EU Joint Committee is required to take four sets of decisions during the transition period. These relate to exemptions from applicable EU customs duties payable on goods moving from the rest of the UK into Northern Ireland, permissible subsidies to agricultural producers in Northern Ireland, exemptions from EU customs duties on fish caught by UK vessels registered in Northern Ireland landed in Northern Ireland, and practical arrangements for EU monitoring of UK implementation of the Union Customs Code and Protocol-related checks ad controls on the movement of goods from the rest of the UK into Northern Ireland.

3. The Joint Committee has yet to take adopt any decisions relating to these issues. Discussions are ongoing, particularly regarding the first set of decisions which includes a need to define those goods entering Northern Ireland from the rest of the UK that are not ‘at risk’ of onward movement into the EU market and so can be exempted from applicable customs duties. Initial concerns that the UK government was contemplating either ignoring or not fully implementing its obligations under the Protocol have been assuaged, for the moment at least, by the publication in May 2020 of the government’s command paper The UK’s Approach to the Northern Ireland Protocol. In this the government was clear that “Whilst the Protocol is in force, both the UK and EU must respect and abide by the legal obligations it contains, as well as our other international law Obligations. The approach set out in this paper achieves that”. 1

4. Although the UK government’s carefully worded paper recognizes the legal obligations contained in the Protocol, there remains considerable differences between the UK and the EU about how those obligations should be implemented and in particular the definition of ‘at risk’ goods and the nature and extent of checks and controls required on the movement of goods from the rest of the UK into Northern Ireland.

1 UK Government, The UK’s Approach to the Northern Ireland Protocol, CP226, May 2020
5. There are also considerable differences over whether, in order to be able to monitor effectively UK implementation of relevant Protocol obligations, the EU should have an office in Belfast.  

6. There are advantages for Northern Ireland as well as the UK and the EU for having an EU office in Belfast. The most obvious is that it will facilitate effective monitoring and cooperation over the effective implementation of the Protocol. This is important in providing clarity and certainty for businesses as well as building capacities and trust and avoiding the possibility of infringement proceedings being initiated by the Commission.

7. An EU office in Belfast would also provide a valuable means for increasing the chances that the interests and views of Northern Ireland will be heard and represented at the EU level. Such means would be welcome as a complement to the formal mechanisms for UK-EU engagement over the implementation and potential evolution of the Protocol.

8. Among these is the dedicated Specialised Committee. This has met once, on 30 April 2020 and Northern Ireland was represented at the meeting at senior official level.

9. The work of the Specialised Committee is at an early stage, but given the importance of its role in overseeing the implementation of the Protocol and preparing the work of and making recommendations to the Joint Committee, assurances need to be provided that the view of the Northern Ireland Executive at least will be reflected in the positions it adopts. To this end, Northern Ireland should be represented, with speaking rights, in all meetings of the Specialised Committee.

10. The Northern Ireland Executive should also be formally consulted by the UK Government prior to it making submissions for the agenda of the Specialised Committee and receive minutes of the meetings. Arrangements also need to be put in place to ensure awareness and effective scrutiny of the work that the Specialised Committee does. To this end, the Northern Ireland Assembly should receive regular detailed reports on the Protocol’s implementation and chairs of the Northern Ireland Assembly committees relevant to the workings of the Protocol (e.g. Agriculture and Environment) should receive regular briefings from the UK delegation to the Specialised Committee.

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Extending the transition period

11. In providing for a transition period in the Withdrawal Agreement, the UK and the EU agreed a period of 21 months, extendable by up to two years, to conclude the terms of the future UK-EU relationship. That initial period was reduced to 11 months with the delay to the UK’s withdrawal from the EU beyond the originally planned date of 29 March 2019.

12. Although the UK government’s intention with regard to the level of ambition of the future UK-EU relationship has been reduced, negotiating, agreeing and ratifying one or more agreements with the EU that cover free trade and cooperation in a range of other areas within such a very short time would be an unprecedented achievement in the external relations of the EU.

13. Given the differences that exist between the UK and the EU, it would be sensible to make use of the option to extend the transition period. The UK is no longer a member of the EU and needs to prepare for the end of the transition period in an orderly manner and so ideally in full knowledge of the post-transition relationship.

14. The need for such clarity is only heightened by the need to minimize uncertainty in the context of the significant economic, social and political challenges facing the UK and the EU with the COVID-19 pandemic.

15. Moreover, from a Northern Ireland perspective, clarity is needed on how the Protocol on Ireland/Northern Ireland will be implemented, particularly as regards arrangements for the movement of goods between the rest of the UK and Northern Ireland.

16. A wise position to adopt would be to opt for the maximum two-year extension and allow for the future UK-EU relationship, assuming it is agreed, to enter into force before the end of the two-year period and the transition period to then end. The revised terms of the Withdrawal Agreement, following each extension, allowed for such an arrangement, and that precedent should be followed.

Leaving transition with a deal

17. UK and EU negotiators face an extraordinarily difficult task in seeking agreement on the future relationship in the time available in 2020. To do so would be unprecedented at any time. To achieve agreement in the context of the economic, political and social disruption and uncertainty caused by the COVID-19 pandemic only makes it more difficult.

18. Given the divergent positions of the UK and the EU, a substantive and ambitious agreement looks very unlikely. Unless either side makes significant concessions, even agreement on an unambitious free trade agreement is unlikely.

19. There is also the matter of ratification. Concluding negotiations on an agreement is one thing; the agreement will also need to be approved by both parties. For the
UK parliamentary approval will be required; for the EU, the EP will need to give its consent and the member states in the Council will need to agree the terms. An agreement that would go beyond the competences of the EU would also need to be ratified by each of the EU member states.

20. The time required for ratification is probably at least two months. In addition to this, any agreed text needs to be translated and subjected to rigorous checking. Negotiations would have to be concluded in October 2020 for there to be any realistic chance of formal agreement and entry into force on 1 January 2021. A sensible position for the UK government to take would be to agree to an extension.

Leaving transition with no free trade agreement in place

21. There is a distinct possibility that the UK could leave the transition period without a trade agreement in place. As a consequence, UK-EU trade would revert to WTO terms and importantly tariffs would become applicable. The change and uncertainty would seriously disrupt trade and supply chains, including to foodstuffs and basic consumer goods.

22. The impact on Northern Ireland would be significant given that tariffs would exist and, except where an exemption from the ‘at risk’ application of tariffs had been agreed – and assuming exemptions had been agreed, these would be payable on goods moving from the rest of the UK into Northern Ireland.

23. In addition, with the UK no longer under any commitment or obligation to maintain regulatory alignment with the EU, the need and most probably the demand for checks and controls on the movement of goods across the Irish Sea into Northern Ireland would increase significantly, potentially overburdening capacities and most certainly increasing costs and disrupting movements.

24. It is unlikely, however, that the absence of a UK-EU free trade agreement for when the transition period ends will lead to a rupture in UK-EU relations. Negotiations would most likely continue, given both parties’ interest in and commitment to concluding an agreement.

25. As to whether the UK is prepared for leaving the transition period at the end of 2020 without a free trade agreement in place, there is no compelling evidence at present to suggest that it is.

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