Non-implementation of the NI Protocol

Introduction

This paper is provided to provide an explanatory resource primarily for local councillors, many of whom who have been misled or confused about what is related to the Protocol, and what a policy of non-implementation actually requires.

The fundamental misunderstanding of the difference between Retained EU law and EU law via Annex 1 and 2 of NI Protocol

There appears to be a fundamental misunderstanding as to the distinction between 'Retained EU law' and 'EU law' which continues to apply because of Annex 1 and 2 of the Protocol.

This fundamental misunderstanding has led many councillors into error, in so far as they seemingly believe that if Retained EU law mirrors EU law as listed in Annex 1 and 2 of the Protocol, then this is a UK wide regulatory regime and this accordingly has "*nothing to do with the Protocol*".

On Exit Day from the European Union, EU law was retained in domestic law. It was effectively 'copy and pasted' into the new domestic UK regulatory regime, for the most part applicable only to GB in terms of geographical extent. This is Retained EU law.

In regards Northern Ireland, a large swathe of EU law, as listed in Annex 1 and 2 of the Protocol, continued to have effect in Northern Ireland. This is EU law which applies pursuant to Annex 1 and 2 of the Protocol.

This, in some instances, meant that Retained EU law in GB, and EU law which has effect in NI due to Annex 1 and 2 of the Protocol was- at least immediately post Exit Day- mirrored.

It seems there has been a failure to appreciate two things: *firstly*, that even if Retained EU law and EU law applying pursuant to Annex 1 and 2 were mirrored immediately post Exit Day (and perhaps even now), that is not a permanent position. GB can amend or repeal that which applies via their Retained EU law regime, created by section 3 of the European Union (Withdrawal) Act 2018.

In regards NI, the EU law applying through Annex 1 and 2, cannot be amended or repealed by the UK Parliament in a manner compatible with the NI Protocol, rather it applies in perpetuity, inclusive of the EU having the right to change it or add to it, and thus make law in Northern Ireland.

Secondly, the EU law applying via Annex 1 and 2 is a different regime than Retained EU law which was retained in UK law via section 3 of the 2018 Act.

It is also important to note that EU law which applies via Annex 2 is not Retained EU law due to the fact section 3 (2) (bi) of the 2018 Act makes clear that anything which applies by virtue of section 7A (the Protocol inclusive of Annex 1 and 2 comes down the conduit pipe in section 7A) is not Retained EU law.

Therefore, implementing the EU law regime applying through Annex 1 and 2 is implementing the Protocol because it embeds the differential regulatory regime applicable to NI *vis-à-vis* GB.

If you operate within the structure of a different regulatory regime, you legtimise that structure. That is as true in relation point of entry checks as it is in relation to in-market checks.

The domestic law status of EU law applying pursuant to Annex 1 and 2 and Retained EU law

The Protocol comes into domestic law via section 7A of the 2018 Act; this is the conduit pipe through which the Protocol (and thus Annex 1 and 2) flows into domestic law.

As a technical matter of law, both EU law applying via Annex 1 and 2 and Retained EU law are part of domestic law, the former via section 7A of the 2018 Act and the latter retained post Exit-Day via section 3 of the 2018 Act.

However, the true position is that Annex 1 and 2 EU law is only domestic law in so far as the EU regulatory regime is given domestic law authority via the conduit pipe of section 7A of the 2018 Act.

Retained EU law which was 'copy and pasted' into domestic law via section 3 of the 2018 Act essentially used that provision as the pathway from the EU regulatory regime, which was already effective in domestic law, to create the new GB regulatory regime. That is what now applies as a UK regulatory regime in regards Retained EU law.

Put simply, a failure to appreciate the difference between Retained EU law and EU law applying due to Annex 1 and 2 leads to the somewhat muddled position of believing that implementing EU law in NI is not implementing the Protocol, so long as what is being implemented mirrors that which has been retained in GB.

That is a fundamental error and is wrong both intellectually in terms of claiming opposition to the Protocol, and legally in terms of failing to appreciate the distinction and how it embeds the Protocol as a matter of differential regulatory regimes.

The EU law which applies due to Annex 1 and 2 is an EU regulatory regime, given domestic law authority via section 7A of the 2018 Act.

The Retained EU law which applies is a UK regulatory scheme (albeit copy and pasted from the former EU regulatory regime which applied prior to Exit Day) which retained EU law via section 3 of the 2018 Act.

It seems obvious to point out therefore that implementing checks, market surveillance or embedding in any way the EU law which now applies only to NI pursuant to Annex 1 and 2 of the Protocol, *is* implementing the EU regulatory scheme created by the Protocol which unionists oppose.

There can be no credible riposte to the suggestion that implementing such arrangements *is* implementing the Protocol.

It follows that to truly adopt a position of non-implementation of the Protocol, this must include non-implementation of the EU law regime created by Annex 1 and 2 of the Protocol. Whether any of the relevant regulations are mirrored by Retained EU law in GB, or not, is a red herring.

The conduct of point of entry checks (the Irish Sea border) OCR 2017/625

The obligations to conduct point of entry checks is derived from some councils being designated primarily by DAERA or others as competent authorities. This applies primarily to councils in areas whereby there are points of entry.

It is obvious to point out in the first instance that if being designated by DAERA is seen as creating a statutory obligation (there may well be a dispute as to whether a statutory obligation is created by such designation, or merely a contractual arrangement) which would act as a barrier to a council stopping doing checks, then the logic of such an impediment would be that it is a designation bestowed by a unionist Minister (Edwin Poots) that would stand in the way of unionist councillors adopting a policy of non-implementation of the Protocol.

That would be indefensible and as such Minister Poots could (and should) simply remove the designation from various councils, in so far as it is designated by DAERA. This wouldn't be significant and controversial within the meaning of section 20 of the NI Act 1998 because (i) the nationalist Ministers have already wedded themselves to the position that the Executive designated implementation of the Protocol to DAERA, and therefore (ii) designating relevant bodies for the purposes of implementation is a matter of Ministerial discretion rather than the discharge of an obligation itself. Put simply, it relates to the mode of implementation, rather than implementation itself.

However, that matter doesn't even arise for the following reason. In the legal challenge to Minister Poots order to halt Irish Sea border checks, DAERA has adopted the position of pointing out that OCR 2017/625 does not in fact require point of entry SPS checks at the point of entry into Northern Ireland.

In short form, OCR 2017/625 applies through Annex 2 of the Protocol. It is the regulation which creates obligations to conduct SPS checks. So, whilst much of what comes via Annex 1 and 2 creates the standards etc. to be adhered to, OCR 2017/625 creates the obligation to conduct checks at the point of entry into the European Union.

Article 5 (4) of the Northern Ireland Protocol commits the United Kingdom to apply the provisions of Union law listed in Annex 2 of the Protocol. This obligation has the

force of domestic law pursuant to section 7A of the European Union (Withdrawal) Act 2018.

The applicable regulations in relation to checks and controls is Regulation 2017/625. This is what requires checks to be carried out on animals and goods. Again, so far, so good. Then if we turn to the EU's technical briefing note on the Protocol and go to (b) (iii) it can be seen it says what the UK-EU has agreed "*implies*" there will be checks on goods moving GB-NI.[1]

But hold on, if this only implied, where is the legal obligation?

So, let us go back to regulation 2017/625- but not the updated GB version post Exit Day, but rather the original version. Remember the updated GB version has no applicability to NI, because the EU Law, as it was prior to Exit Day, is what continues to apply in NI.

Let's go first to Article 3 (40) of regulation 2017/625 and look at the definition of "*entering the Union*" or "*entry into the Union*" (references to the 'Union' is to European Union"):

> *"(40) 'entering the Union' or 'entry into the Union' means the action of bringing animals and goods into one of the territories that are listed in Annex I to this Regulation from outside these territories, except in relation to the rules referred to in point (g) of Article 1(2) for which these terms mean the action of bringing goods into the 'Union territory' as defined in the second subparagraph of Article 1(3) of Regulation (EU) 2016/2031;"*

We then turn to Annex 1 of 2017/625 and to the territories listed: Northern Ireland is included at (28) as part of the United Kingdom of Great Britain and Northern Ireland.

Therefore, when you move goods for example from Liverpool to Belfast, you are not "*entering the Union"* from one of the territories, rather you are moving within one of the territories.

The point of entry into the Union is when you enter the Republic of Ireland.

Accordingly, due to the failure to amend the EU law to change the definition of UK to exclude Northern Ireland, Regulation 2017/625 does not in fact impose a legal obligation to conduct checks and controls pursuant to Article 5 (4) of the Protocol.

As such, there is not (nor never was) any legal obligation to conduct checks on items moving GB-NI. The 'implication' as set out in the technical note was never actually legislated for and remains no more than an implication or pious wish.

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[1] https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf

There has been no credible answer to this point. The most common claim has been a reference to Article 7 of the Withdrawal Agreement and 13 (1) of the Protocol as justification for the requirement, but neither of these provisions can change the meaning of Union territory, so they add nothing.

Therefore, the DUP Minister is quite rightly adopting the position that 2017/625 doesn't require checks. In that regard, councils could not possibly have any obligation to conduct point of entry checks- because OCR 2017/625 doesn't in fact do what many mistakenly believed it did.

It would obviously be absurd if unionist dominated councils adopted a position contrary to that adopted by Minister Poots, namely in asserting there was an obligation to conduct checks pursuant to OCR 2017/625, when the Minister was adopting a different approach of saying there was no such obligation.

This is true regardless of what happens at first instance in the High Court, the Minister and councils would still be entitled to maintain such a position until any onward appeal is disposed of.

The non-food 'product market surveillance' MoU

It is not proposed in this paper to canvass this in detail. There can be no credible dispute that the purpose of this funding is to enhance the operationalisation of the Protocol. It literally states it.

There should never have been support from this by any unionist whatsoever. It is designed to build capacity to not only implement, but to enhance the Protocol.

This scheme is not an obligation, it is voluntary.

It is obvious therefore that a motion to adopt a position of non-implementation of the Protocol would require not only a termination of this MoU, but a cessation of any similar work which is designed to build capacity for either enhancement of the Protocol or implementing EU law.

The food MoU between DAERA and councils

There appears to be some (for whatever reason) confusion being generated around this MoU, on the basis that it appears it is being suggested by some elected representatives (seemingly on foot of plainly erroneous claims by officials in Ards and North Down Council at least) that this has "*nothing to do with the Protocol*".

This is, to be frank, arrant nonsense. A whole raft of the relevant EU regulations listed in Clause 2.1 of the MoU are listed in Annex 2 of the Protocol. They therefore apply in NI as part of a bespoke EU regulatory scheme, differentiating them in that crucial respect from that which applies in GB, even if those in GB are presently mirrored (although will obviously diverge in future).

The somewhat muddled and intellectually dishonest argument being put forward seems to be that the regulations being enforced were being enforced prior to Exit Day and continue to be applicable across the entire United Kingdom, and therefore this is only doing what was always done and mirrors the standards in the rest of the UK.

This is based on a fundamental misunderstanding of the distinction between the concept of Retained EU law and EU law which applies pursuant to Annex 1 and 2 of the Protocol.

Northern Ireland and GB are now in two distinct regulatory regimes. It may well be the case that some Retained law applicable in GB mirrors that which continues to apply in NI via Annex 1 and 2 of the Protocol, but that for constitutional purposes is irrelevant.

The difference between enforcing the standards prior to Exit Day and post Exit Day is that during the former period all constituent parts of the UK were on an equal footing (as required by Article VI of the Acts of Union) under the same regulatory regime, and currently (because of the Protocol) GB and NI are in two separate regulatory regimes.

It follows as a matter of the most compelling logic that to enforce regulations which flow through Annex 1 or 2 of the Protocol is to legtimise and embed the distinct bespoke EU regulatory scheme which applies in Northern Ireland.

This is not only wholly inconsistent with the collective position of unionism in opposing the NI Protocol, it would also be inconsistent with the quite proper commitment of the DUP leader (party conference 8 Oct 22) that there should be no EU law applying in NI.

It is trite to point out that enforcing a bespoke NI-only EU regulatory scheme would not be consistent with ensuring there should be no EU law applying in Northern Ireland.

Moreover, it really shouldn't be necessary to point out that those who say EU law applies in GB are plainly wrong. This demonstrates a complete misunderstanding of the concept of Retained EU law. On Exit Day EU law falling within section 3 of the 2018 Act became <u>solely domestic UK law</u> described as Retained EU law, rather than EU law.

At the same time, section 7A of the 2018 Act created a conduit pipe which filtered into domestic law a bespoke EU regulatory scheme for NI only, which ensured the continued application of <u>EU law</u> in Northern Ireland.

<u>Conclusion</u>

The necessity, and stated position of unionism, is to adopt a policy of non-implementation of the Protocol. There is no room for ambiguity on this. The implementation or enforcement of <u>any EU law</u> applying via Annex 1 or 2 of the Protocol *is* implementation of the Protocol. This really ought to be obvious.

The somewhat confused position that it is ok to implement some EU law which applies via Annex 1 or 2 of the Protocol because it is mirrored by Retained EU law in GB is quite simply fundamentally flawed and demonstrates a worrying lack of understanding.

EU law which applies via Annex 1 and 2 of the Protocol comes through a domestic law conduit pipe in section 7A of the 2018 Act, <u>but remains EU law</u> which can be amended by the EU at any time.

In contrast Retained EU law is <u>solely UK domestic law</u>.

It follows from all the above that there is only one course of action open which is consistent with the commitment made to adopt a policy of non-implementation of the Protocol and to resist the application of EU law to NI. It is as follows:

(1) In unionist dominated councils which are not designated authorities in relation to points of entry, the way forward is straightforward. The new policy should be adopted whereby the council will not implement the Protocol, and in regards checks or enforcement of standards/market surveillance, this should be defined as the council not taking any steps which implements, enforces or otherwise builds capacity for the implementation of any regulations which flow through Annex 1 or 2 or any other element of the NI Protocol.

(2) In councils whereby there is the additional complication of being designated as competent authorities, the council should adopt a policy of agreeing with the DAERA Minister's interpretation of OCR 2017/625 which does not require checks on that which is travelling from GB to NI because entering NI is not "*entering the Union*" as defined within OCR 2017/625, but rather moving within the territory of the United Kingdom of Great Britain and Northern Ireland. In unionist dominated councils the adoption of this policy is straightforward. It is simply marrying up with the approach of the DUP Minister, and ensuring a consistent approach across unionism.

(3) In nationalist dominated councils which are designated by DAERA as competent authorities, the DAERA Minister should simply un-designate them as competent authorities, therefore removing any obligation and/or contractual requirement to conduct checks.

It is imperative that unionism is collectively clear and consistent on this. Whilst it is acknowledged much of this is somewhat complex, when there is clear first principles, it is in truth really rather straightforward.

In summary, no self-respecting unionist should be implementing any EU law which applies pursuant to Annex 1 or 2 or any other aspect of the Protocol, as doing so embeds the bespoke EU regulatory regime. Whether similar standards apply in GB is irrelevant, they apply via a different regulatory regime.

The existence of these two regulatory regimes is a fundamental breach of Article VI of the Acts of Union, and therefore to operate willingly within such arrangements is to acquiesce to the breach. This is inconsistent with unalterable opposition to the Protocol.

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11 October 2022