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Post-Brexit dynamism: the dynamic regulatory alignment of Northern Ireland under the Protocol on Ireland/Northern Ireland

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ABSTRACT

Post-Brexit Northern Ireland faces a dual challenge of legal dynamism and political stagnation. Although these two issues have the same origin, this article focuses on the former. Agreed as part of the UK–EU Withdrawal Agreement to address the 'unique circumstances' on the island of Ireland, the provisions of the Protocol on Ireland/Northern Ireland break with precedent in both EU external relations and in UK internal governance. For the EU, these novel provisions breach the 'indivisibility' of the 'Four Freedoms'. For the UK, the Protocol challenges the fabric of its internal market and pushes the boundaries of its territorial constitution to a new extreme. The Protocol is politically controversial; related disputes have resulted in institutional collapse in Northern Ireland and severe decline in UK–EU diplomatic relations. While any resolution of political contestation over the Protocol is still pending, it is nonetheless possible to track its legal effects so far. Focusing on provisions which relate to Northern Ireland staying aligned with aspects of EU law, this article analyses the substance of UK(NI)'s post-Brexit dynamism and its implications for the two legal orders it cross-sects.

Keywords: European Union; United Kingdom; Brexit; Ireland /Northern Ireland Protocol; dynamic regulatory alignment; EU external relations; UK differentiation; Northern Ireland politics.

INTRODUCTION

In the process of the United Kingdom (UK) withdrawal from the European Union (EU) – Brexit – the EU and the UK agreed a Protocol on Ireland/Northern Ireland (hereafter the Protocol). Under its terms, 'the United Kingdom in respect of Northern Ireland' (or UK(NI))

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is: within the UK customs territory[1] but subject to the EU customs code;[2] Northern Ireland remains in dynamic regulatory alignment with the EU Single Market in respect to goods[3] while also (at least in theory) retaining 'unfettered access'[4] to the UK internal market; individuals living in Northern Ireland are guaranteed 'no diminution' in certain rights contained in EU law;[5] and Northern Ireland remains a recipient of dedicated EU PEACE and INTERREG funding, all despite being outside the EU territory. These complex arrangements have the stated purpose of addressing the 'unique circumstances on the island of Ireland' facing Brexit.[6] The Protocol sets out arrangements for 'the United Kingdom in respect of Northern Ireland' (or UK(NI) as per its article 7) that amount to *de facto* continued participation in the EU Customs Union and EU Single Market in respect to goods. Ongoing access to the EU market in goods, on the part of Northern Ireland, from within the now third-country UK, is facilitated by and contingent upon application of and alignment with parts of the EU legal *aquis*. Such an arrangement negated the need for checks and controls on the land border between Ireland and Northern Ireland; the corollary being, however, that, under the Protocol, new checks and controls are required on goods entering Northern Ireland from outside the EU, including those travelling across the Irish Sea from Great Britain (GB).

The effective creation of an 'Irish Sea border' for the regulation of goods has been politically controversial. In Northern Ireland, many from the Unionist and Loyalist tradition perceive the new burden of checks and controls, required by the Protocol, on goods moving from Great Britain and Northern Ireland (GB–NI) as a violation of their British identity and a threat to Northern Ireland's position in the internal market of the UK. Northern Ireland is without a fully functioning government due to the refusal of the largest unionist party – the Democratic Unionist Party (DUP) – to support the election of an Assembly Speaker or the formation of an Executive as part of its protest against the Protocol and its implications for GB–NI trade. As the situation had not changed six months after the last Assembly election, the Secretary of State for Northern Ireland was under a legislative obligation to call another one. However, in a play (all too) familiar for watchers of Northern Ireland politics, the UK Government fast-tracked new legislation –

1 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020) (hereafter WA) Protocol, art 4.
2 Ibid art 5.
3 Ibid arts 5, 13.
4 Ibid art 6.
5 Ibid art 2.
6 Ibid art 1(3).

the Northern Ireland (Executive Formation etc) Act (the NI(EF) Act) 2022[7] – to postpone that obligation for a further six weeks, until 8 December, with the possibility of a further extension to 19 January 2023. At time of writing, it does not look likely that agreement will be reached between Northern Ireland political parties even by the late date in 2023. In the interim, senior officials in Northern Ireland, under the NI(EF) Act, have been granted exceptional decision-making powers, but these fall far short of what would be necessary to address some of the more difficult outstanding societal challenges facing Northern Ireland.[8] Political disputes over the Protocol have not been limited by the (recently infamous) borders of Northern Ireland. In the wake of the UK Government's introduction of draft legislation – the Northern Ireland Protocol Bill (NIP Bill) – which would, if enacted, grant UK ministers (extensive) powers to disapply provisions of the Protocol in domestic law, the EU has launched (and relaunched) infringement proceedings against the UK for non-implementation of aspects of EU law made applicable to Northern Ireland under the Protocol.

Managing the new legal dynamism of Northern Ireland, aligned as it is with a potentially evolving body of the EU *acquis* from within a post-Brexit UK intent on forging new and divergent (from the EU) regulatory paths, is a complex legal task. Doing so against a backdrop of polarisation and endemic institutional instability is an inherently difficult political task. While it is unclear when and how the political contestation that surrounds the Protocol will be resolved, it is possible to make clear some of the legal complexities created by its implementation, alongside the wider process of Brexit. Focusing on provisions, primarily in the Protocol, for the alignment of Northern Ireland to aspects of EU law, this article presents a comprehensive analysis of what that alignment has looked like, in law and policy terms, so far.

The article has three sections: the first reviews the provisions of the Protocol with a focus on those related to UK(NI) alignment with aspects of the EU *acquis*; following this, the second section gives account of what the 'dynamic regulatory alignment' of UK(NI) under the Protocol has meant, in substantive terms, between the conclusion of the text, in October 2019, and July 2022, 18 months into full implementation; looking ahead, the third section reviews some of the legislative implications of post-Brexit Northern Ireland's dual participation in the internal market of the UK and the single market of the EU for their respective legal orders to date, before considering potential implications of UK(NI)'s new dynamism in the longer-term.

7 Northern Ireland (Executive Formation etc) Act 2022, c 48.

8 For analysis, see C Murray, 'A new period of "indirect" direct rule – the Northern Ireland (Executive Formation etc) Bill' (*UKCLA Blog* 29 November 2022).

THE PROTOCOL AND ALIGNMENT

An overview of the Protocol on Ireland/Northern Ireland

As stated, in the process of UK withdrawal from the EU, the two negotiating parties agreed the Protocol which, in its own terms, sets out arrangements necessary to 'address the unique circumstances on the island of Ireland' in the context of Brexit. Those 'unique circumstances' arise from the nature and history of the winding 500km land border between Ireland and Northern Ireland[9] and from the multidimensional structure of the governing architecture set up under the 1998 Agreement that ushered in the 'post-conflict' era in which Northern Ireland still resides.[10] Against this background, implementing the kind of checks and controls that would otherwise be necessary on a border separating an EU member state and a non-EU member state would be practically and politically extremely difficult, if not actually impossible. Thus, the UK and the EU (eventually) agreed a Protocol so as: 'to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 [Belfast/Good Friday] Agreement in all its dimensions';[11] its provisions are unique.

Under the terms of the Protocol, in respect to trade, post-Brexit Northern Ireland remains part of the UK customs territory,[12] and nothing in the text prevents the UK Government from ensuring 'unfettered access' for goods moving from Northern Ireland to the rest of the UK market.[13] Yet, at the same time, the 'United Kingdom in respect of Northern Ireland' is required to apply the EU customs code,[14] EU VAT and excise rules[15] and EU technical regulations[16] on goods entering Northern Ireland from outside the EU, including from GB. This means Northern Ireland is treated as if it is formally part of the EU customs territory (notwithstanding its *de jure* position within the UK customs territory), and goods crossing the Irish Sea (particularly from GB–NI) are, by default, subject to customs procedures. Northern Ireland is, however, not part of the EU Common Commercial Policy

9 Katy Hayward, *What Do We Know and What Should We Do about the Irish Border?* (Sage 2020).

10 David Phinnemore and Katy Hayward, 'UK Withdrawal ("Brexit") and the Good Friday Agreement' (European Parliament 2017); Lisa Claire Whitten, 'Northern Ireland and Brexit: An Explanation' (Constitution Society 2021).

11 WA (n 1 above) Protocol, art 1(3).

12 Ibid art 4.

13 Ibid art 6(1).

14 Ibid art 5(3).

15 Ibid art 8.

16 Ibid art 7.

and does not, therefore, have access to trade preferences deriving from EU third-country agreements.

Alongside provisions related to customs, the Protocol sets out arrangements for the dynamic alignment of Northern Ireland with sections of the EU internal market *acquis* concerning the free movement of goods, including sanitary and phytosanitary (SPS) rules.[17] In addition, EU state aid rules are to apply 'in respect of measures which affect that trade between Northern Ireland and the [European] Union';[18] meaning that goods produced elsewhere in the UK and traded into Northern Ireland need to comply with EU state aid law.[19] Beyond measures to facilitate the continued free movement of goods (and therefore avoidance of the need for physical checks on the land border) the Protocol provides for the continued operation of the Single Electricity Market (SEM) on the island of Ireland by requiring Northern Ireland's continued alignment with relevant EU legislation on electricity and energy markets, to the extent necessary to allow the SEM to function.[20] Notably, some EU law instruments included under article 5 regarding movement of goods and article 9 regarding the SEM also cover EU environmental legislation despite alignment in this area not being an explicit focus of negotiations or the text itself.[21]

The Protocol also contains a commitment on the part of the UK to ensure that there is no diminution of rights, as a consequence of Brexit, otherwise provided for in a relevant section of the 1998 Agreement and contained in key pieces of EU law.[22] Like all other EU laws made applicable to Northern Ireland under the Protocol, the latter – EU laws on individual rights – are to apply 'as amended or replaced',[23] but separate provision is made for the enforcement of this aspect of the Protocol: alignment in respect to rights is not covered by the continued jurisdiction of the Court of Justice of the European Union (CJEU), whereas alignment in respect to customs, free movement of goods, SPS

17 Ibid art 5(4).

18 Ibid art 10(1).

19 See George Peretz and Alfred Artley, 'State aid under the Northern Ireland Protocol' (*Tax Journal* 11 May 2020); George Peretz, 'State Aid' in Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022).

20 WA (n 1 above) Protocol, art 9, annex 4.

21 Viviane Gravey and Mary Dobbs, 'Environment and trade' in McCrudden (ed) (n 19 above); Viviane Gravey and Lisa Claire Whitten, 'The NI Protocol & the Environment: the implications for Northern Ireland, Ireland and the UK' (Environmental Governance Island of Ireland Network Policy Brief 1/2021 2022).

22 WA (n 1 above) Protocol, art 2.

23 Ibid art 13(3).

and electricity markets is covered by continued CJEU jurisdiction.[24] Notwithstanding the distinction made between articles 5, 7–10 and article 2 in respect to CJEU jurisdiction, article 13(2) of the Protocol provides that *any* EU law or concepts referred to in the Protocol shall in their 'implementation and application be interpreted in conformity with the relevant case law' of the CJEU, thus giving it a role in the application and enforcement of article 2 of the Protocol, albeit at one step removed to that afforded it in relation to provisions concerning movement of goods.

Taking all the relevant provisions together, when the text of the Protocol was concluded by the UK and EU in October 2019, it included almost 350 EU law instruments that would continue to apply (dynamically) in Northern Ireland at the end of the UK transition period and thereafter.

Alignment provisions in the Protocol on Ireland/ Northern Ireland

As already emphasised, Northern Ireland alignment with EU acts specified in the Protocol is dynamic. Under article 13(3) of the Protocol, EU acts listed in its articles and annexes are to apply 'as amended or replaced' to UK(NI). This means, in implementing the Protocol, the UK Government is obliged, according to its terms, to keep Northern Ireland aligned with any changes made to EU acts that are included in its scope. Uniquely, amendments and replacements to Protocol-applicable EU acts apply automatically, unlike in European Economic Area (EEA) states where changes are adopted through the EEA Joint Committee.

In addition to automatic updates, article 13(4) of the Protocol sets out a process by which any new EU acts that fall within the scope of its provisions and objectives can be added to its annexes and thereby made applicable in Northern Ireland. Doing so is, however, contingent on the agreement of the UK, acting together with the EU, in the Joint Committee set up to oversee the implementation of the UK–EU Withdrawal Agreement, including its Protocols. To support the Joint Committee, articles 14 and 15 of the Protocol established a Specialised Committee (SC) and a Joint Consultative Working Group (JCWG) to, respectively, consider issues related to the implementation of the Protocol and to serve as a forum for information exchange and mutual consultation between the UK and EU regarding the Protocol. Neither of these latter two bodies have decision-making powers; however, they can make recommendations or reports to the Joint Committee which does have power to make decisions based on consensus. All three dedicated oversight bodies are made up of UK and EU representatives.

24 Ibid art 12(4).

When it comes to UK(NI) alignment with EU law going forward, the tripartite institutional architecture overseeing the Protocol's implementation is important, or at least potentially so. At various points, the Protocol requires and/or enables the Joint Committee to review its implementation and operation with the possibility of making changes, including on foot of recommendations from the Specialised Committee or JCWG.

Under article 14 of the Protocol the SC can 'consider any matter of relevance'[25] to article 2 of the Protocol – on individual rights – brought to its attention by the three rights bodies – the Northern Ireland Human Rights Commission, the Equality Commission and the Joint Committee of representatives of the Human Rights Commission of Northern Ireland and Ireland – tasked with monitoring the application of that article. The SC is also to 'examine proposals' concerning the Protocol if/when any are made by the North–South Ministerial Council or North–South Implementation Bodies established under Strand Two of the 1998 Agreement.[26] On this second matter, article 11 is also relevant. Under its terms, the Protocol is to be 'implemented and applied so as to maintain the necessary conditions for continued North–South cooperation', including in a stated list of 14 areas.[27] To this end, the UK and Ireland may, under article 11(1) 'continue to make new arrangements' building on the existing provisions of the 1998 Agreement as regards North–South cooperation and, importantly, the Joint Committee is to 'keep under constant review' the extent to which the implementation and application of the Protocol does, in fact, maintain conditions necessary for North–South cooperation.[28] Read together, then, articles 11 and 14 make it possible for institutions established under Strand Two of the 1998 Agreement to request or propose, via the SC, measures to further enable North–South cooperation, including greater alignment of UK(NI) in areas of EU law not currently within the scope of the Protocol.

Alongside rights and North–South cooperation, the Protocol contains provisions regarding the bilateral UK–Ireland relationship which could, in future, act as mechanisms for increasing UK(NI) alignment. Bilateral relations are primarily addressed in article 3 which provides for the continuation and development of the Common Travel Area between the UK and Ireland, provided its operation is without

25 Ibid art 14(c).

26 Ibid art 14(b).

27 Areas listed in the text are as follows: environment; health; agriculture; transport; education; tourism; energy; telecommunications; broadcasting; inland fisheries; higher education; sport; justice; and security.

28 WA (n 1 above) Protocol, art 11(2).

affect to the obligations of the latter under EU law.[29] A relatively minor provision related to UK–Ireland relations also exists in article 8 whereby the UK 'may apply to supplies of goods taxable in Northern Ireland VAT exemptions and reduced rates that are applicable in Ireland' in accordance with those EU laws concerning VAT and excise made applicable under that article. Linked to this, the Joint Committee is tasked with 'regularly discussing' and 'reviewing' the application of article 8 while 'accounting' for 'Northern Ireland's integral place in the United Kingdom's internal market' as needed.

A final provision in the Protocol worth highlighting in respect to the possibility of increasing, or indeed decreasing, the extent of UK(NI) alignment with aspects of EU law arises from article 6(2) which states that both parties 'shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom' albeit in accordance with relevant legislation and the regulatory regimes of both the EU and the UK. Application of this provision is to be kept 'under constant review' by the Joint Committee which 'shall adopt appropriate recommendations' with a view to avoiding checks and controls at the ports and airports of Northern Ireland.[30]

Any initiative to change the existing scope or terms of UK(NI) alignment with EU law required under the Protocol, in accordance with its terms, including those set out above which make specific provision for doing so, could be taken forward by the Joint Committee through the article 13(4) mechanism for adding EU acts to existing annexes. Alternatively, if necessary and requested, Ireland could use a provision in the European Council Decision on the UK–EU Withdrawal Agreement to seek authorisation to conclude a new bilateral agreement with the UK for the purpose of ensuring the 'proper functioning' of the Protocol, if an area of exclusive EU competence would be affected.[31] This latter option, for an EU-authorised bilateral UK–Ireland agreement, is not limited to any specific article: it could be used to achieve the 'proper functioning' of any aspect of the Protocol.

Notwithstanding the existence of avenues for potential expansion of the scope of alignment provided for under the Protocol, at present, the contested politics surrounding its implementation are such that these are unlikely to be used in the short to medium term. As considered further in the third section, unilateral actions have, however, been taken by both the UK and the EU with the same or similar purposes to those

29 Ibid art 3(2).

30 Ibid art 6(2).

31 Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29, 31 January 2020: art 4.

set out in the text of the Protocol regarding its potential development, albeit with the two parties differing on what that ought to substantively mean. Before discussing more recent (unilateral) developments regarding the implementation of the Protocol, and its future, in more detail, the next section sets out what has been happening as regards UK(NI)'s dynamic alignment with EU law under its terms so far.

DYNAMIC REGULATORY ALIGNMENT IN NORTHERN IRELAND

The Protocol puts contemporary Northern Ireland in a position of 'dynamic regulatory alignment' with a section of the EU *acquis*. While there are several legislative avenues by which the relationship established between UK(NI) and EU law by the Protocol could develop in future (see previous section), one of the most notable aspects of the current arrangement is that those EU laws made applicable under the Protocol are to apply 'as amended or replaced' to and in Northern Ireland. The automaticity of this dynamic arrangement is novel in terms of EU external relations and, importantly, is being implemented in the unique context of Northern Ireland remaining a full and integral part of the UK internal market, which is now, as a whole, in a divergent relationship with the EU single market.

Given the unprecedented nature of the Protocol arrangements, monitoring its substantive effects is both necessary and interesting. Focusing on the existing legal situation this section presents a detailed account of what the new dynamism of UK(NI) has meant in policy terms since the text was concluded in October 2019 through to July 2022, 18 months since entry into force. Throughout this period, changes arising from the alignment of UK(NI) with EU law under the Protocol have come through article 13: either from the article 13(4) option for EU acts to be added or deleted; or from the article 13(3) requirement for EU acts that already apply to do so 'as amended or replaced' in ordinary EU legislative processes. The latter legislative path – article 13(3) – accounts for a majority of changes evident to date; these fall into three broad categories:

- additions to and deletions from the annexes to the Protocol;
- repeal, replacement, and expiry of applicable EU law; and
- changes to EU legislation that implements applicable EU law.

Additions to and deletions from annexes to the Protocol

A small number of changes so far have arisen from article 13(4) of the Protocol whereby, acting together in the Joint Committee, the UK and EU can agree to add new EU acts that fall within the scope of the Protocol, or remove acts already listed.

Existing EU acts
• rules for monitoring trade between the EU and third countries in drug precursors[32] • use of indications or marks to identify the lot – or batch – to which food products belong[33] • rules on the marketing of fodder plant seed[34] • rules on the marketing of propagating material of ornamental plants[35] • rules on the marketing of vegetable propagating and planting material other than seed[36]
New EU acts (adopted after November 2018)
• bilateral safeguard clauses and other mechanisms for the temporary withdrawal of preferences in certain EU trade agreements with third countries[37] • measures to reduce the impact of certain plastic products on the environment[38] • and measures to control the introduction and import of cultural goods[39]

Figure 1: EU acts added to the Protocol under article 13(4) in December 2020

32 Council Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors [2004] OJ L22/1.

33 Directive 2011/91/EU of the European Parliament and of the Council of 13 December 2011 on indications or marks identifying the lot to which a foodstuff belongs [2011] OJ L334/1.

34 Council Directive 66/401/EEC of 14 June 1966 on the marketing of fodder plant seed [1966] OJ 125/2298.

35 Council Directive 98/56/EC of 20 July 1998 on the marketing of propagating material of ornamental plants [1998] OJ L226/16.

36 Council Directive 2008/72/EC of 15 July 2008 on the marketing of vegetable propagating and planting material, other than seed [2008] OJ L205/28.

37 Regulation (EU) 2019/287 of the European Parliament and of the Council of 13 February 2019 implementing bilateral safeguard clauses and other mechanisms allowing for the temporary withdrawal of preferences in certain trade agreements concluded between the European Union and third countries [2019] OJ 53/1.

38 Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L155/1.

39 Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods [2019] OJ L151/1.

Before the end of the transition period, in December 2020, the UK and the EU agreed to add eight EU acts to annex 2 of the Protocol and to remove two EU acts listed in the same annex. Of the eight acts added, five related to legislation that the Joint Committee decided, following review, should have been included in the original text. The three other additions were new EU acts adopted since the content of the Protocol had initially been agreed in November 2018 and which, the Joint Committee decided, fell within its scope and so were added, also to annex 2.

Two acts were removed by the Joint Committee from annex 2, these concerned CO_2 emissions standards for passenger cars and light-duty commercial vehicles.[40] Their original inclusion in the text was deemed to have been unnecessary.

Taking these additions/deletions into account, when the Protocol entered into force on 1 January 2021 at the end of the transition period, 344 EU acts were listed in its annexes. Although the Joint Committee has met on three occasions since then – 14 February 2021, 9 June 2021 and 21 February 2022 – it has not adopted any decision to add or delete any more EU acts. It is, however, worth noting that the European Commission has signalled that certain proposed legislation being considered for the EU *may* fall, in part at least, within the scope of the Protocol. For example, this includes the proposed Carbon Border Adjustment Mechanism Regulation.[41] UK and EU officials have discussed the matter, but no definitive position has yet been taken.[42]

Repeal, replacement and expiry of applicable EU law

The second category of change covers the repeal, replacement and expiry of EU acts – regulations, directives and decisions – listed in the Annexes to the Protocol. Changes in this category are the result of normal EU legislative processes and follow from the provision in article 13(3) of the Protocol stating that relevant EU acts apply as 'amended or replaced' to and in Northern Ireland.

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40 Regulation (EC) No 443/2009 of the European Parliament and of the Council of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO 2 emissions from light-duty vehicles [2009] OJ L140/1; and Regulation (EU) No 510/2011 of the European Parliament and of the Council of 11 May 2011 setting emission performance standards for new light commercial vehicles as part of the Union's integrated approach to reduce CO 2 emissions from light-duty vehicles [2011] OJ L145/1.

41 Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism [2021] 0214(COD).

42 European Scrutiny Committee, '10871/21: Proposal for a Regulation establishing a carbon border adjustment mechanism (41916)'.

Of the 338 EU acts originally listed in the annexes, 51 had been repealed as of 1 July 2022. Only two of these had been repealed in the previous six months. Not all of the EU acts repealed so far have, however, been directly replaced by a new piece of EU legislation. 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.

The 51 repealed acts have been replaced by 19 new acts. Even 18 months since the Protocol entered into force, in most instances, this dynamic alignment in large part continues to relate to 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 19 replacement acts, only six were adopted after the UK left the EU on 31 January 2020 and three since the end of the UK transition period on 1 January 2021.

In terms of coverage, 23 of the 51 repealed acts concerned controls on animal health and were replaced by two new pieces of legislation: Regulation (EU) 2016/429[43] and Commission Delegated Regulation (EU) 2020/687.[44] The former is known as the 'Animal Health Law' and the latter is a related, supplementary act. Together these two new acts incorporate and update pre-existing provisions set out in the 23 repealed acts. The changes laid down in the Animal Health Law were agreed in March 2016, before the UK's EU referendum and therefore with the UK taking full part in their adoption. The original text included transitional measures and allowed for the repeal of the earlier acts to take effect in April 2021. As a supplement to the 2016 Regulation, the Commission Delegated Regulation (EU) 2020/687 sets out measures to prevent and control the spread of certain diseases. The relevant diseases were listed in the 2016 regulation but required more specific provisions; these are laid down in the later act.

In a similar way, seven of the other repealed acts concerned EU rules on official controls and checks on food and feed, animal health and welfare standards, plant health and plant protection. These were replaced by a single overarching EU act: Regulation (EU) 2017/625, known as the

43 Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law') [2016] PJ L84/1.

44 Commission Delegated Regulation (EU) 2020/687 of 17 December 2019 supplementing Regulation (EU) 2016/429 of the European Parliament and the Council, as regards rules for the prevention and control of certain listed diseases [2020] OJ L174/64.

'Official Controls Regulation'.[45] It incorporates and updates pre-existing provisions in the repealed acts. It was agreed in April 2017, shortly after the UK triggered article 50 announcing its intended withdrawal from the EU, and so with the UK participating in the regulation's adoption. The new regulation included transitional measures and allowed for the repeal of the earlier acts to take effect in December 2019.

Also repealed were two directives – Council Directive 93/42/EEC[46] and Council Directive 90/385/EEC[47] – concerning the production of and trade in medical devices. This had been provided for in Regulation (EU) 2017/745[48] which was already listed in annex 2 to the Protocol, so the repealed directives were not replaced directly.

In addition, two regulations concerning requirements for the use of statistics on (respectively) trade in goods between EU member states and with non-EU countries – Regulation (EC) No 638/2004[49] and Regulation (EC) No 471/2009[50] – were repealed and replaced by Regulation (EU) 2019/2152[51] on European business statistics that incorporates and updates requirements from the earlier acts. The new regulation was agreed in November 2019, when the UK was still an EU

45 Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Controls Regulation) [2017] OJ L95/1.

46 Council Directive 93/42/EEC of 14 June 1993 concerning medical devices [1993] OJ L169/1.

47 Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the Member States relating to active implantable medical devices [1990] OJ L189/17.

48 Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC [2017] OJ L117/1.

49 Regulation (EC) No 638/2004 of the European Parliament and of the Council of 31 March 2004 on Community statistics relating to the trading of goods between Member States and repealing Council Regulation (EEC) No 3330/91 [2004] OJ L102/1.

50 Regulation (EC) No 471/2009 of the European Parliament and of the Council of 6 May 2009 on Community statistics relating to external trade with non-member countries and repealing Council Regulation (EC) No 1172/95 [2009] OJ L152/23.

51 Regulation (EU) 2019/2152 of the European Parliament and of the Council of 27 November 2019 on European business statistics, repealing 10 legal acts in the field of business statistics [2019] OJ L327/1.

member state; it also included transitional measures for the scheduled repeal of earlier acts to take effect at the end of 2021.

A further 17 repealed regulations and directives originally listed in the Protocol have been replaced directly by new acts. Of these replacement acts, four concern the regulation of electricity markets and energy supplies[52] and were originally listed in annex 4, supplementing article 9 of the Protocol which makes provision for the continued operation of the SEM on the island of Ireland. These four acts were replaced by four updated acts[53] between July 2019 and December 2020. The replacement acts cover the same policy areas and implement changes agreed in June 2019 – again while the UK was still a member state of the EU.

The 13 remaining acts have been repealed and replaced directly: 11 of these were repealed in the first year of implementation, 2021, and two in the first six months of 2022; they concern:

- the approval and market surveillance of motor vehicles and related products[54] replaced by Regulation (EU) 2018/858[55] adopted in June 2018;

52 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15; Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1; and Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment [2005] OJ L33/22.

53 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125; Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity [2019] OJ L158/54; Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators [2019] OJ L158/22; and Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC [2019] OJ L158/1.

54 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) [2007] OJ L263/1.

55 Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1.

- controls on cash entering or leaving the EU[56] replaced by Regulation (EU) 2018/1672[57] adopted in November 2018;
- controls on trade in goods that could be used in capital punishment or torture[58] replaced by Regulation (EU) 2019/125[59] adopted in January 2019;
- the mutual recognition of goods between member states[60] replaced by Regulation (EU) 2019/515[61] adopted in March 2019;
- controls on persistent organic pollutants[62] replaced by Regulation (EU) 2019/1021[63] adopted in June 2019;
- the marketing and use of explosives precursors[64] replaced by Regulation (EU) 2019/1148[65] adopted in July 2019;

56 Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community [2005] OJ L309/9.

57 Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No 1889/2005 [2018] OJ L284/6.

58 Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2005] OJ L200/1.

59 Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2019] OJ L30/1.

60 Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC [2008] OJ L218/21.

61 Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 [2019] OJ L91/1.

62 Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC [2004] OJ L158/7.

63 Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (recast) [2019] OJ L169/45.

64 Regulation (EU) No 98/2013 of the European Parliament and of the Council of 15 January 2013 on the marketing and use of explosives precursors [2013] OJ L39/1.

65 Regulation (EU) 2019/1148 of the European Parliament and of the Council of 20 June 2019 on the marketing and use of explosives precursors, amending Regulation (EC) No 1907/2006 and repealing Regulation (EU) No 98/2013 [2019] OJ L186/1.

- provisions for the conservation of fisheries and marine ecosystems[66] replaced by Regulation (EU) 2019/1241[67] adopted in July 2019;
- provisions for computerising the movement and surveillance of exercisable goods[68] replaced by Decision (EU) 2020/263[69] adopted in February 2020;
- rules on the labelling of tyres[70] replaced by Regulation 2020/740[71] adopted in June 2020;
- controls on the acquisition and possession of weapons[72] replaced by Directive (EU) 2021/555[73] adopted in April 2021; and
- the EU regime for the control of exports, transfer, brokering and transit of dual-use items[74] repealed by Regulation (EU) 2021/821[75] adopted in May 2021 but with provision for the

66 Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms [1998] OJ L125/1.

67 Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005 [1998] OJ L198/105.

68 Decision No 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerising the movement and surveillance of excisable products [2003] OJ L162/5.

69 Decision (EU) 2020/263 of the European Parliament and of the Council of 15 January 2020 on computerising the movement and surveillance of excise goods (recast) [2020] OJ L58/43.

70 Regulation (EC) No 1222/2009 of the European Parliament and of the Council of 25 November 2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters [2009] OJ L342/46.

71 Regulation (EU) 2020/740 of the European Parliament and of the Council of 25 May 2020 on the labelling of tyres with respect to fuel efficiency and other parameters, amending Regulation (EU) 2017/1369 and repealing Regulation (EC) No 1222/2009 [2020] OJ L177/1.

72 Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons [1991] OJ L256/51.

73 Directive (EU) 2021/555 of the European Parliament and of the Council of 24 March 2021 on control of the acquisition and possession of weapons [2021] OJ L115/1.

74 Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons [1991] OJ L256/51.

75 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit, and transfer of dual-use items (recast) [2021] OJ L206/1.

continued application of authorisations made under the earlier act and before 9 September 2021.

Those repealed and replaced in the first six months of 2022 are:

- the EU code relating to veterinary medicinal products[76] replaced by Regulation (EU) 2019/6[77] adopted in December 2018; and
- conditions governing the preparation, placing on the market and use of medicated feeding stuffs in the EU[78] replaced by Regulation (EU) 2019/4[79] adopted in December 2018.

In addition to the 51 repealed acts, two acts originally listed in the annexes expired after the UK withdrew from the EU. These concerned the regulation of imports from third countries affected by the Chernobyl disaster[80] and temporary trade measures for goods originating in Ukraine.[81]

Considering all changes arising from repeal, replacement and expiry, alongside those article 13(4) changes 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 of 1 July 2022, 312 EU regulations, directives and decisions applied; 26 fewer than when the Protocol was first agreed in October 2019 (see Table 1).

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76 Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products [2001] OJ L311/1.

77 Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC [2019] OJ L4/43.

78 Council Directive 90/167/EEC of 26 March 1990 laying down the conditions governing the preparation, placing on the market and use of medicated feedingstuffs in the Community [1990] OJ L92/42.

79 Regulation (EU) 2019/4 of the European Parliament and of the Council of 11 December 2018 on the manufacture, placing on the market and use of medicated feed, amending Regulation (EC) No 183/2005 of the European Parliament and of the Council and repealing Council Directive 90/167/EEC [2019] OJ L4/1.

80 Council Regulation (EC) No 733/2008 of 15 July 2008 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station [2008] OJ L210/1.

81 Regulation (EU) 2017/1566 of the European Parliament and of the Council of 13 September 2017 on the introduction of temporary autonomous trade measures for Ukraine supplementing the trade concessions available under the Association Agreement [2017] OJ L254/1.

Annex	Area	Regulations, directives, decisions*				
		2019	2021		2022	
		Oct	Jan	July	Jan	July
1	Individual rights	6	6	6	6	6
2	Trade in goods	287	284	261	261	261
3	VAT and excise	19	19	19	19	19
4	Single electricity market	7	7	7	7	7
5	State aid	19	19	19	19	19
Total		**338**	**335**	**312**	**312**	**312**

* Not included are the small number of EU treaty articles referenced in the Protocol, 'soft law' texts (eg commission communications), mostly included in annex 5, and a small number of unspecific provisions noted in the annexes.

Table 1: EU acts listed in the annexes to the Protocol (changed since the Protocol was agreed in October 2019)

Changes to EU legislation implementing applicable EU law

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 Commission or the Council. In the first six months of 2022, the EU adopted 599 pieces of implementing legislation.[82] Not all of these apply to Northern Ireland under the Protocol. Of the 599 implementing acts adopted, 355 were within the scope of the Protocol (see Table 2).

Figures for both total implementing acts adopted in January to June of 2022 and the number that are Protocol-applicable may seem high. It is important to note, however, that most implementing acts concern very technical, minor and specific issues, and they always remain within the scope of the original 'parent' act. Moreover, while all implementing acts made under 'parent' acts listed in the Protocol and its annexes are applicable to Northern Ireland, not all of them are significant in terms of policy.

For example, implementing acts will be adopted to correct errors in different language versions of other EU acts: Commission Implementing

82 EUR-Lex, 'Legal acts – statistics'.

	Delegated legislation*			**Implementing legislation†**		
	Total	Protocol applicable		Total	Protocol applicable	
January	9	5	56%	82	48	59%
February	15	4	27%	102	56	55%
March	16	6	38%	89	61	69%
April	3	1	33%	89	44	49%
May	5	4	80%	89	64	72%
June	1	0	56%	99	62	63%
Total	49	20	41%	400	335	61%

Collated from information available on EU official EUR-Lex website.
* Includes Commission delegated regulations, directives and decisions.
† Includes Council implementing regulations and decisions, Commission implementing regulations, directives and decisions.

Table 2: EU delegated and implementing legislation and Protocol-applicable law – January to June 2022 Source: EUR-Lex Legal Acts – statistics.

Regulation (EU) 2022/176[83] made on 9 February 2022 corrects certain language versions of a particular annex of the Official Controls Regulation mentioned earlier and applies under article 5 and annex 2 of the Protocol; similarly Commission Implementing Regulation (EU) 2022/827[84] made on 20 May corrects the Danish language version of an Implementing Regulation[85] that concerns arrangements for adjusting allocations of greenhouse gas emission allowances and applies under article 9 and annex 4 of the Protocol. While both of these implementing acts make changes to EU acts that apply to Northern Ireland under the Protocol, they have no 'on-the-ground' impact.

83 Commission Implementing Regulation (EU) 2022/176 of 9 February 2022 correcting certain language versions of the annex to Implementing Regulation (EU) 2021/632 laying down rules for the application of Regulation (EU) 2017/625 of the European Parliament and of the Council as regards the lists of animals, products of animal origin, germinal products, animal by-products and derived products, composite products, and hay and straw subject to official controls at border control posts [2022] OJ L29/4.

84 Commission Implementing Regulation (EU) 2022/827 of 20 May 2022 correcting the Danish language version of Implementing Regulation (EU) 2019/1842 laying down rules for the application of Directive 2003/87/EC of the European Parliament and of the Council as regards further arrangements for the adjustments to free allocation of emission allowances due to activity level changes [2022] OJ L147/25.

85 Commission Implementing Regulation (EU) 2019/1842 of 31 October 2019 laying down rules for the application of Directive 2003/87/EC of the European Parliament and of the Council as regards further arrangements for the adjustments to free allocation of emission allowances due to activity level changes [2019] OJ L282/20.

Some technical changes do have more significance, or potential significance, in and for Northern Ireland. For example, 17 of the EU implementing acts adopted in the first six months of 2022 and which apply under the Protocol concern emergency measures being taken across the EU and in Northern Ireland to address bird flu. While the primary purpose of these 17 implementing acts was very technical – making amendments to lists of geographic regions where bird flu was or had been present – they also concern a very real issue facing the agrifood sector in Northern Ireland, so they are, in this respect, important.

A small number of implementing acts that address Northern Ireland and its position under the Protocol directly have been adopted. Examples include: a Commission Implementing Regulation (EU) 2022/250[86] made on 21 February 2022 to amend existing EU implementing legislation to introduce a new model of animal health certificate for movements of certain livestock GB–NI, which delays the requirement for certificates regarding scrapie disease to be provided to allow time for GB holdings to be approved as 'controlled risk' despite being outside EU regulation. A similar example is in Commission Implementing Regulation (EU) 2022/680,[87] adopted on 27 April 2022, to amend a standardised poster (provided for in Implementing Regulation (EU) 2020/178)[88] concerning the bringing of plants, fruits, vegetables, flowers or seeds into the EU so as to include the 'United Kingdom (Northern Ireland)' in the list of non-EU territories for which there is an exemption from the ordinary requirement of an SPS certificate for doing so. Again, the actual change here is very minor; yet it reflects the fact that the Protocol has provided for the continued free flow of goods on the island of Ireland, thereby negating

86 Commission Implementing Regulation (EU) 2022/250 of 21 February 2022 amending Implementing Regulation (EU) 2021/403 as regards the addition of a new model animal health/official certificate for the entry into Northern Ireland of ovine and caprine animals from Great Britain and amending Implementing Regulation (EU) 2021/404 as regards the list of third countries authorised for the entry into the Union of ovine and caprine animals [2022] OJ L41/19.

87 Commission Implementing Regulation (EU) 2022/680 of 27 April 2022 amending the information in the annex to Implementing Regulation (EU) 2020/178 by including United Kingdom (Northern Ireland) as an origin for which a phytosanitary certificate is not required for the introduction into the Union of plants, fruits, vegetables, flowers or seeds [2022] OJ L125/1.

88 Commission Implementing Regulation (EU) 2020/178 of 31 January 2020 on the presentation of information to passengers arriving from third countries and to clients of postal services and of certain professional operators concerning the prohibitions as regards the introduction of plants, plant products and other objects into the Union territory in accordance with Regulation (EU) 2016/2031 of the European Parliament and of the Council [2020] OJ L37/1.

the necessity for an SPS certificate that would otherwise be required in view of Brexit.

While the examples cited underline the often-technical nature of provisions made in EU implementing legislation, they also demonstrate the potential for wide variation in terms of policy significance and sectoral impacts in and for Northern Ireland. Legislative changes deriving from UK(NI)'s dynamic alignment under the Protocol ought to therefore be understood as occurring on a spectrum from no impact to noticeable impact with potential long-term effect. This being so, tracking relevant changes is an imperative for UK(NI) yet presents a considerable challenge, not only due to the complexity of the task, but also due to the polarised political context in which it must be carried out. This challenge and the others facing post-Brexit Northern Ireland as a consequence of the Protocol are considered further in the conclusion. Before this, however, the third section places UK(NI)'s dynamic regulatory alignment in broader context by reviewing some of its impacts, so far, in the legal orders it cross-sects.

POST-BREXIT NORTHERN IRELAND'S DYNAMIC FUTURE

The substantive implications of the dynamic regulatory alignment of UK(NI) with aspects of EU law can be considered in relation to the different legal orders impacted. Broadly, implementation of the Protocol takes place at the intersection of the UK–EU relationship, however, its effects also occur at various levels within the two polities. While it is beyond the scope of this article to review all the legislative implications of post-Brexit Northern Ireland's dynamic (in regulatory terms) future, this section sets out some of the most prominent effects evident so far in both the UK and EU contexts.

Implications for the United Kingdom

For the UK, the alignment of UK(NI) with aspects of the EU *acquis*, has implications that are: specific to Northern Ireland; those which play out, directly and indirectly, in GB (including at devolved level); as well as those which take effect on the UK national level.

In domestic law, the requirement to implement changes arising from the dynamic regulatory alignment of UK(NI), under article 13(3) of the Protocol, at present, flows through section 7A of the European Union (Withdrawal) Act 2018[89] which gives the Protocol direct effect in UK law.[90] For Northern Ireland, relevant 'amendments and replacements' in Protocol-applicable EU law have largely been made,

89 As amended by the European Union (Withdrawal Agreement) Act 2020.

90 See Gordon Anthony, 'The Protocol in Northern Ireland law' and Catherine Barnard, 'The status of the Withdrawal Agreement in UK law' in McCrudden (ed) (n 19 above).

so far, via secondary legislation passed at Westminster. Examples include: the Medical Devices (Northern Ireland Protocol) Regulations 2021[91] brought in to implement EU Regulation 2017/745 on medical devices[92] which came into effect in Northern Ireland, by dint of the Protocol, in May last year; the Market Surveillance (Northern Ireland) Regulations 2021[93] which implements Regulation (EU) 2019/1020[94] on Market Surveillance and Compliance which came into effect in Northern Ireland under the Protocol in July last year; the Hydrocarbon Oil and Biofuels (Northern Ireland Private Pleasure Craft) Regulations 2021[95] is another example, this instrument prohibits the use of rebated fuel (red diesel) for use in private pleasure craft in Northern Ireland and marked the final step required to implement a 2018 ruling by the CJEU on the matter;[96] the same changes were not made in UK(GB) legislation. To date, due to the relative stability in retained EU law across the whole of the UK, there are only a handful of examples of domestic legislation being used to implement changes arising directly from article 13(3) of the Protocol.

There are also examples of changes being made in UK(GB) law which do not apply in UK(NI) due to obligations under the Protocol, again these are relatively few in number and those that do exist tend, so far, to implement minor or technical changes. Examples include: the Pesticides (Revocation) (EU Exit) Regulations 2022,[97] which revoke various aspects of 'direct EU legislation' regarding the regulation of plant protection products and maximum reside levels in UK(GB), the amended EU law instruments apply in UK(NI) as Protocol-applicable EU law; and the Organic Production (Amendment) Regulations 2022,[98] which amend retained EU law in UK(GB) to extend existing derogations for the use of non-organic pullets (young chickens) and non-organic gellan gum in organic production – the explanatory memorandum to SI 2022/360 states the view of the Government that it 'do[es] not anticipate' that the resultant divergence 'will disadvantage Northern Ireland industry'.[99] Such examples underline the often-

91 SI 2021/905.
92 See n 48 above.
93 SI 2021/858.
94 Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 [2019] OJ L169/1.
95 SI 2021/780.
96 Case C–503/17 *Commission v United Kingdom of Great Britain and Northern Ireland* [2018] ECLI:EU:C: 2018:831.
97 SI 2022/144.
98 SI 2022/360.
99 Explanatory Memorandum to SI 2022/360, para 10.1.

technical nature of intra-UK divergence arising from the dynamic regulatory alignment of UK(NI) so far, but this is not likely to remain the case.

Two, currently draft, pieces of legislation introduced by the UK Government have the potential to change the domestic legislative effect of provisions on UK(NI) alignment under the Protocol very significantly. The NIP Bill,[100] if enacted, would enable ministers to disapply (or 'except') core provisions of the Protocol while also changing the terms of its enforcement by removing CJEU jurisdiction and granting UK Ministers *very* sweeping discretionary powers to make law in areas covered (or previously covered) by the Protocol, including in respect to enforcement mechanisms.[101] Effectively replacing an agreed international legal framework, even a politically contested one, with a domestic legal framework that is almost entirely reliant on the future whims of UK ministers is, arguably, not an approach that will lend itself to economic certainty, policy clarity or political stability. Potentially layering on top of the ministerially contingent NIP Bill system there is the Retained EU Law (Revocation and Reform) (REUL) Bill,[102] which proposes to disapply or 'sunset' almost all retained EU law that remains on the UK statute on 31 December 2023. While Protocol-applicable EU law would not, under the REUL Bill, be subject to the 'sunset' it introduces, the removal of UK(GB) retained EU law versions of UK(NI) Protocol-applicable EU law via the REUL Bill sunset could have substantial intra-UK divergence implications along this axis. Not much consideration appears to have been given on the part of the UK Government to the relationship between these two Bills and the possible interaction of both the provisions they would make and the powers they would create. Suffice to say, from the perspective of Northern Ireland, there are a significant number of unanswered questions.[103]

In terms of UK national policy-making, the impact of UK(NI)'s dynamic alignment under the Protocol (if it continues) is most evident in relation to trade policy. Trade agreements signed by the UK Government since the withdrawal of the UK from the EU, and which are not 'roll-over' agreements, have included a 'without prejudice' clause in respect to the application of the Protocol in and for Northern

100 Northern Ireland Protocol HC Bill (2022–23) 52 [as brought from the Commons].

101 For a summary of the NIP Bill, see Nicola Newson, Northern Ireland Protocol Bill HL Bill 52 of 2022–23 (5 October 2022).

102 Retained EU Law (Revocation and Reform) HC Bill (2022–23) [as introduced].

103 For an initial mapping of the implications of the REUL Bill read together with the NIP Bill, see Jane Clarke, Lisa Claire Whitten and Viviane Gravey, 'The known unknowns of the Retained EU Law (Revocation and Reform) Bill in Northern Ireland' (Brexit & Environment Policy briefs 1/2022 17 October 2022).

Ireland.[104] A further implication of the relative stability *so far* in UK(GB) retained EU law in respect to goods is that the potential effects of the differentiation of UK(NI) in new UK free trade agreements as regards divergence of standards and/or access to third-country goods/markets have not yet emerged. Again, anticipated primary law changes via the REUL Bill and/or NIP Bill are very likely to shape the extent and nature of these dynamics.

Implications for the European Union

For the EU, the implementation of the Protocol represents a splitting of the Four Freedoms. Throughout UK–EU negotiations, and in the agreed text, strong emphasis is placed on the '*unique* circumstances' the Protocol is designed to address.[105] From the EU perspective it has thus been consistently made clear that the bespoke arrangements agreed for UK(NI) should remain as such – bespoke. This notwithstanding, the application of the Protocol and the development of the novel relationship it establishes between UK(NI) and the EU *acquis* is an interesting and important exercise in EU external governance. Although perhaps a lesser discussed aspect of its implementation so far, operationalising the Protocol has already resulted in and required changes in EU law, largely in the form of derogations, to further recognise and facilitate the persistently 'unique circumstances' on the island of Ireland; such processes are likely to repeat.

The most prominent example of EU legislative change to facilitate implementation of the Protocol is on the issue of medicines. A possible risk to the supply of medicines to UK(NI) was identified during the UK transition period with industry and stakeholders suggesting to the UK and EU that adaptation to new requirements for moving medicines GB–NI would take more time. A temporary 'grace period' arrangement was thus made as part of a package of Joint Committee decisions reached in December 2020.[106] On medicines, the 'grace period' amounted to a temporary removal of the obligation to decommission safety features applied to medicines for human use supplied to the UK

104 Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership [Tokyo, 23 October 2020] CP 311 vol 1: 1.9.5(a); Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand (28 February 2022) Chapter 1: Initial Provisions and General Definitions: art 1.2.3; Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia [16 December 2021] ch 1: Initial Provisions and General Definitions: art 1.2.3.

105 WA (n 1 above) Protocol, art 1(3) (emphasis added).

106 See: Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] L29/1.

from EU suppliers alongside an abstention from sanctioning certain breaches of EU law arising due to the absence of manufacturing authorisation holders in UK(NI); these provisions were to last for one year. Consultations with pharmaceutical industry stakeholders throughout 2021 underlined long-term risks to the supply of medicines to Northern Ireland if the requirement to comply with EU procedures under the Protocol were to be applied without amendment, primarily due to the small size of the UK(NI) market and prohibitive costs of UK(GB) suppliers developing separate UK(NI) production lines. Attempts were made at UK–EU level to develop an agreed solution, but none was forthcoming. Instead, the EU decided to unilaterally change its laws on medicines that apply under the Protocol to address (at least some) of the issues pertaining to UK(NI). In April 2022, the European Parliament and Council, respectively, approved new legislation introducing derogations to address post-Brexit supply of medicines for human use in Northern Ireland.[107] While there are some outstanding issues as regards medicines,[108] the process and fact of EU adopting dedicated derogations for UK(NI) is itself notable.

Other cases of more minor changes in EU law to recognise or facilitate the Protocol have also taken place – examples of this level of amendments are included in the previous section.[109] Similar to some of the UK secondary law changes cited above, these have tended to be technical in content and have only minor effects on policy.

Given, in EU law terms, the unprecedented nature of the Protocol (the automaticity of alignment with and participation in the Single Market for goods) and the exceptional context of its implementation (in a post-Brexit UK actively pursuing divergence from the EU market), it is reasonable to assume that its implementation will continue to involve amendments and/or derogations in Protocol-applicable EU law. On this issue, the political contestation that surrounds the Protocol is also relevant because it is not only the legally unprecedented nature of the Protocol that is likely to beget future EU derogations; the possibility

107 Directive (EU) 2022/642 of the European Parliament and of the Council of 12 April 2022 amending Directives 2001/20/EC and 2001/83/EC as regards derogations from certain obligations concerning certain medicinal products for human use made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta [2022] OJ L118/4; Regulation (EU) 2022/641 of the European Parliament and of the Council of 12 April 2022 amending Regulation (EU) No 536/2014 as regards a derogation from certain obligations concerning investigational medicinal products made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta [2022] OJ L118/1.

108 James Cleverly, 'Official correspondence: Northern Ireland Protocol and medicines supply' (28 March 2022).

109 See nn 86 and 87 above.

of UK non-compliance with its obligations to keep pace with Protocol-applicable acts does the same. This latter scenario will raise questions as to how much risk the EU is willing to tolerate to its Single Market for goods, particularly, if/when the UK begins to diverge from the standards it currently (largely) retains. At present, the EU has seven separate infringement proceedings against the UK for various issues of non-compliance or non-implementation of EU laws under the Protocol. As time goes on and the respective regulatory orders of the UK and the EU chart separate paths, the potential for UK(NI) to fall behind EU law requirements under the Protocol will increase.

Whether intentionally in protest against its terms, or unintentionally due to its inherent complexity and constrained capacity in UK(NI) to implement it, the future operationalisation of the Protocol carries risk for the integrity of the EU Single Market.

CONCLUSION

Prima facie, the implications of UK(NI)'s dynamic regulatory alignment are most pressing for Northern Ireland. Its alignment with aspects of EU law under the Protocol present a tripartite governance challenge regarding capacity, scrutiny and legitimacy. Operationalising the novel arrangements of the Protocol in Northern Ireland has placed new burdens on its political and civic institutions, with the latter being, at present, suspended as a result. Going forward, monitoring and (potentially) adapting to relevant changes in EU law as well as tracking relevant changes in UK(GB) law which may have divergence implications is a complex task for officials and stakeholders in Northern Ireland and questions linger regarding their capacity to do so. At the same time, implementing or dealing with practical impacts of alignment will likely add to the workload of Northern Ireland departments and industry unused to having to apply specific UK(NI) policies on such differentiated terms. Moreover, such strains on the capacity of officials and businesses in Northern Ireland make the difficult task of scrutinising changes arising from its dynamic alignment with EU law even harder.

At present, there is limited formal provision for those directly impacted by Northern Ireland's position under the Protocol – Northern Ireland business, industry stakeholders, rights organisations and community representatives – to input into the process of dynamic regulatory alignment. This is problematic on grounds of legislative scrutiny, democratic accountability and public/political legitimacy regarding the Protocol. Existing mechanisms, such as the JCWG or respective UK and the EU proposals for greater involvement of

NI stakeholders could, if realised, improve the situation;[110] these could also be used to convey the position of the UK Government in respect of Northern Ireland on proposed EU legislation that the EU may seek to have applied – subject to the agreement of the UK in the Joint Committee – under the Protocol. Yet, at time of writing (October 2022) the prospect of the UK and EU agreeing a system for enhanced Northern Ireland engagement on relevant EU legislative developments seems unlikely as relations between the two sides hit a nadir in the wake of the UK Government introduction of the NIP Bill and the European Commission's subsequent announcement of revived, new, and then additional infringement proceedings.[111] Whether and with what amendments, if any, the Northern Ireland Protocol Act is adopted will determine the future of UK(NI) dynamic alignment; with its proposed dual regulatory regime, implementation of the NIP Bill system will involve acceptance of dynamic regulatory alignment with some EU law, at least for those goods expected to be traded across the land border and into the EU market. While the prospect of operationalising such a system has not been widely welcomed in Northern Ireland, the idea of some kind of 'dual regulatory' market will mean that the need for monitoring EU law developments will remain, as will the tripartite challenge for Northern Ireland governance regarding capacity to implement as well as scrutinise its newly differentiated arrangements.

Perhaps the most difficult challenge presented by the Protocol in and for Northern Ireland relates to perceptions of its legitimacy or otherwise. New checks and controls on goods crossing the Irish Sea, required by the Protocol, are viewed by many Unionists/Loyalists as a violation of British identity and a threat to Northern Ireland's position within the UK internal market. In protest against the Protocol, the DUP First Minister resigned from office in February 2022, thus collapsing devolved government in Northern Ireland, and the party has so far refused to elect an Assembly Speaker or agree to form an Executive in the wake of May 2022 elections, thus leaving Northern Ireland without a fully functioning government and facing the prospect of another election in the near future. Although not arising directly from the legal provisions of the Protocol, but rather political reactions to them, the evident instability of Northern Ireland institutions is very concerning.

110 European Commission, 'Protocol on Ireland and Northern Ireland non-paper engagement with Northern Ireland stakeholders and authorities' (2021); HM Government, 'Northern Ireland Protocol: the way forward' (2021).

111 See European Commission, 'Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland' (15 June 2022) and 'Protocol on Ireland/Northern Ireland: Commission launches four new infringement procedures against the UK' (22 July 2022).

As this article has demonstrated, the implementation of the Protocol has important implications for the legislative trajectories of both the UK and the EU markets. Regardless of if, or how, or when, the latest dispute between the Protocol's two authors and signatories gets resolved, the 'unique circumstances' it was designed to address will linger on. For this reason alone, post-Brexit Northern Ireland is likely, for better and worse, to continue to be a legally dynamic and politically dramatic place.