



The Northern Ireland Protocol “Sausage Wars”: A case of “state civil disobedience”?

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The [present political upheaval](#) in Northern Ireland, which has seen [Arlene Foster](#) and [Edwin Poots](#) step down as leaders of the ruling Democratic Unionist Party in the last weeks, accompanies the ongoing legal stalemate on the Protocol on Ireland and Northern Ireland (NIP). Five years after the Brexit referendum, the impasse between the UK and the EU has continued, despite the conclusion of the Withdrawal Agreement and the Trade and Cooperation Agreement (TCA).

The [first meeting](#) of the TCA Joint Partnership Council in early June should have signified a new chapter of institutional collaboration. However, during the same days, the separate [Joint Committee](#) of the Withdrawal Agreement were unable to find a solution to the ongoing problem of the UK's implementation of the NIP. Meanwhile, in March, the European Commission confirmed that it had [issued formal notice](#) to the UK that it had commenced infringement procedures before the Court of Justice.

While the concept of "state civil disobedience" could be applied to the UK government's actions, this is an inappropriate means to conceptualise the conflict. Instead, the more familiar concept of legally justified exceptions to obligations would have been a more appropriate means of pre-empting the dispute during the creation of the Protocol.

Background context: "Sausage wars"

The ["sausage wars"](#) between the EU and the UK concerns the expiry on 30 June of [unilateral declarations](#) made by the UK government in December 2020, relating to the sale of chilled meat products imported from Great Britain to Northern Ireland. Ostensibly, following this period, the United Kingdom does not intend to apply EU law provisions on ["Official controls, veterinary checks"](#) found in title 43 of Annex 2 made applicable by Article 5(4) NIP. Instead, the UK government proposes a [further extension](#) of the grace period. The EU upheld its own December unilateral declaration that "[t]his practice [the UK's grace period] will inform the position of the Union as regards recourse to the exercise of the powers referred to in Article 12(4) of the Protocol" through commencing infringement proceedings. The quoted clause provides for the [jurisdiction of the Court of Justice of the EU](#) in dispute resolution. Latest updates suggest that the EU has informally accepted a [further three month extension](#) of the grace period. However this would only kick the can down the road rather than resolve the situation.

State civil disobedience?

The UK has derided the EU's position as ["legal purism"](#). This suggests recourse to political justifications beyond the confines of legal obligations. The unilateral nature of the UK government's action raises the possibility that this is an example of ["state civil disobedience"](#). This arises when states engage in non-compliance to ensure ["release from deleterious international obligations"](#). Francheschet justifies this as a form of self-protection against the preferences of the powerful in international relations, in order to ensure more just outcomes. The application of state civil disobedience to the present EU-UK debate over the NIP would require an interpretation whereby the EU is abusing its greater market power over the UK to impose its legal system upon UK territory, with

the deleterious consequence of compromising the territorial integrity of the UK and thus jeopardising peace within Northern Ireland, due to the effects upon Unionist communities. This reading requires endorsement of the narrative recently forwarded by David Frost that the UK government negotiated the Protocol "[under parliamentary duress](#)" of pro-Remain rebels due to the imposition of extension of the Article 50 period in autumn 2020.

Legitimising such an approach, however, would have even more profoundly negative consequences for respect for the Rule of Law in international relations, which has already been [jeopardised by the UK government](#) in relation to Northern Ireland with the Internal Market Bill. Markus Patberg cogently [argues](#) that "we need to be careful not to provide constituted powers - against whose arbitrary interference we safeguard ourselves with the rule of law - with an easy justification for illegal action". Justifying the UK's unilateralism over the Protocol through state civil disobedience would constitute a misappropriation of actions of last resort for the very weakest states over the imposition of laws that they have had minimal democratic input over. By contrast, the UK is one of the most powerful states in the world by many material metrics, and the Protocol forms part of an international treaty that was negotiated bilaterally and concluded through executive consent, and was approved by [domestic parliamentary ratification](#). Civil disobedience accounts have focused on the significance of [democratic authorisation](#), for example through referendums, for justification. The Protocol has indeed incorporated such a mechanism, but only after 5 years for the Northern Ireland Assembly through a [consent mechanism](#), which means that democratic authorisation through this in-built feature of the Protocol could not be provided for the UK government's present course of action.

An alternative? Public policy exceptions

Rather than state civil disobedience, the UK's stance on the implementation of the Protocol instead constitutes an attempt to establish disjuncture between law-in-action and the law-in-books. Charitably, the position could be presented as a clash between norms that are both contained within the Protocol as driving logics: the imperative for the EU of ensuring the functioning of the internal market (manifested through Article 5 NIP), and the imperative for the UK of ensuring the territorial integrity of its constituent nations (manifested through Article 4 NIP). Clashes between supranational and national issues are already regulated in EU law proper on free movement of goods, through the provision of exceptions. According to [Article 36 TFEU](#), the ban on restrictions of exports between Member States "shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security". The factual contexts are inverse: whereas the Treaties regulate restrictions on goods movements, the UK seeks relaxation of restrictions to enable goods to move. However, the legal normative issue is the same - the UK seeks to derogate from legal obligations with the EU due to its national interests. Concerns over preserving peace in Northern Ireland and the territorial integrity of the UK appear to be clear grounds of "public policy and public security" that would function as justifications for such exceptions under EU law.

This provides a lesson in how the current dispute could have been avoided if the parties had remained wedded to bilateral legalism rather than unilateral exceptionalism. If the pre-existing and familiar concept of exceptions to the application of EU free movement of goods law had been transposed into the Protocol, either in place or in addition to the novel and ambiguous test of risk of onward movement into the single market found in Article 5 NIP, the UK government could have sought to present its concerns in a legally justifiable manner. The role of the Court of Justice within the Protocol would have also enabled binding judgment upon whether such public policy reasons were persuasive. Instead, the resort to a unilateralism that cannot be justified as "state civil disobedience", but instead is merely legal disobedience, risks respect for the Rule of Law in international relations precisely at the moment when [multilateralism](#) appears to be returning to the world stage.

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