



# The new Irish Protocol could lead to the indefinite jurisdiction of the EU Court of Justice within the UK

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*The United Kingdom will hold a General Election on 12 December 2019. The result may determine whether Boris Johnson's renegotiated Withdrawal Agreement that removed the Irish backstop comes into force. One issue that has not been as prominent in the debate is that the new Irish Protocol could lead to the indefinite jurisdiction of the Court of Justice of the European Union within the United Kingdom.*

The [new Protocol](#) on Ireland/Northern Ireland in the Withdrawal Agreement between the United Kingdom and the European Union differs from the previous 'Irish backstop' in both content and function. The recasting of functions confirms the jurisdiction of the Court of Justice of the European Union (CJEU) as the legal default following a transition period. The new content means that this jurisdiction would apply to UK authorities acting on UK territory. The creation of a new legal test for when EU law will apply in and to the UK in relation to the movement of goods between Great Britain and Northern Ireland means there may be a higher likelihood of this jurisdiction being required.

## The changes in content and function

In terms of content, the new Protocol no longer mandates a single customs territory between the Union and the United Kingdom. Article 4 instead states that Northern Ireland is part of the customs territory of the United Kingdom. Border checks on the island of Ireland are prevented through a new legal test. EU law on customs duties, single market regulation, VAT and excise must be applied at ports between Great Britain and Northern Ireland when a good is 'at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing'.

A presumption is established in favour of a good being at risk unless certain conditions can be established. These conditions are that the goods will not be subject to commercial processing in Northern Ireland, and the fulfilment of criteria established by the Joint Committee. Four different considerations should inform the establishment of these criteria: (a) the final destination and use of the good; (b) the nature and value of the good; (c) the nature of the movement; and (d) the incentive for undeclared onward-movement into the Union.

Regarding function, the previous 'Irish backstop' operated as an insurance policy in the event that no satisfactory arrangements were established for the Irish border in a future relationship. This was established through the statement that '[T]he Union and the United Kingdom shall use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes the Protocol in whole or in part'. No such obligation persists in the new Protocol. Instead, it operates as the default mode of regulating the relationship between Northern Ireland and the European Union after the transition period.

## The jurisdiction of the CJEU in the new Protocol

Article 12 of the Protocol reiterates the responsibility of the United Kingdom for implementing relevant provisions of EU law. This

poses risks for the EU, as [highlighted](#) by Michel Barnier. The EU is effectively outsourcing the enforcement of its external border to a third country. The rest of Article 12 mitigates this risk by making provision for the EU institutions to supervise this application of EU law by the UK. Article 12(3) makes the practical working arrangements of the EU representatives dependent on Joint Committee determination. However, Article 12(4) reinforces the ultimate authority of the EU over the UK's application of EU law rules.

It confirms that EU actors have the powers conferred upon them by Union law in relation to the UK and the Protocol. Specific provision is made for the CJEU: 'in particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect'. The potential for litigation against the UK is increased by the confirmation that the Article 267 TFEU preliminary reference procedure shall apply to and in the United Kingdom. This means that economic operators or other individuals who are prevented from benefiting from the UK's enforcement of EU law will have the capacity to bring a claim before a domestic court in the United Kingdom, and that court will be obliged to refer the question to the Court of Justice if the criteria are fulfilled.

The main body of the Withdrawal Agreement makes provision for the continuing jurisdiction of the CJEU in Article 4. This jurisdiction is limited, however, to the end of the transition period on 31 December 2020, which can only be extended once with joint agreement between the UK and EU. The only jurisdiction provided for the CJEU beyond this date concerns cases commenced at first instance concerning Part II on citizens' rights within 8 years from the end of the transition period.

By contrast, the new Protocol on Ireland/Northern Ireland has been given jurisdiction to rule upon the actions of UK authorities within the territory of the United Kingdom potentially indefinitely. There are only two means to terminate this jurisdiction: the first is the Northern Irish assembly refusing to consent to the ongoing operation of the Protocol through a simple majority in accordance with Article 18. The UK government in Westminster would have no control over this decision. The second method is a future relations agreement coming into force which supersedes the Protocol. This could seek explicitly to supersede the jurisdiction of the CJEU as mandated through Article 13(8).

Article 14 of the previous Protocol in Theresa May's deal also made provision for the jurisdiction of the CJEU. However, this would have been accompanied by the obligation for the EU and the UK to engage in best endeavours so as to avoid the backstop coming into force. The legal nature of the new Protocol means that the default scenario after the transition period is continuing jurisdiction. Arguably, the potential for this litigation to arise has also been increased. Under the former Protocol the ECJ would merely have been assessing UK compliance with customs union rules that UK authorities already apply during membership. Under the new Protocol, however, the UK will be obliged to check goods movements against the criteria established by the Joint Committee.

The novelty of the new risk test means that ambiguities are likely to arise in practice which would require judicial confirmation. The possibility of discrepancies would be increased if the UK did establish different regulatory standards in future trade agreements with other third countries. This would test its authorities' capacity to continue to enforce EU law standards in relation to Northern Ireland alongside the new regime.

## **Conclusion**

The UK government has been keen to sell its Withdrawal Agreement as ending the jurisdiction of the Court of Justice within the United Kingdom. However, the changes to the Protocol on Ireland/Northern Ireland mean that continuing jurisdiction would become the default rather than a fall-back in the event that the Withdrawal Agreement is ratified.

*This piece is [cross-posted](#) by kind permission of the [LSE Brexit Blog](#).*

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