

Spotlight on the UK's decision to extend grace periods under the Northern Ireland Protocol to the Withdrawal Agreement

10/03/2021

Public Law analysis: In this analysis, Stephen Fietta, Laura Rees-Evans and Miglena Angelova of Fietta LLP discuss the circumstances and potential implications of the UK's announcement to take unilateral steps 'to avoid disruptive cliff edges' associated with the ongoing implementation of the Northern Ireland Protocol to the Withdrawal Agreement.

Between 3 and 5 March 2021, the UK announced decisions unilaterally to extend the grace period for post-Brexit requirements on some goods entering Northern Ireland from Great Britain under the Northern Ireland Protocol (NI Protocol) to the [Withdrawal Agreement](#) (WA). The EU has criticised the UK's decision and threatened to bring legal action over what it said would amount to a breach of international law.

As a further response to the first of the UK's announcements on 3 March, the European Parliament postponed setting a date for its vote on ratifying the EU-UK [Trade and Cooperation Agreement](#) (TCA). The TCA is yet to enter into force and has been provisionally applied by both parties since 1 January 2021. On 23 February 2021, the UK and EU agreed to extend provisional application until 30 April 2021. The European Parliament had been expected to hold a vote on the TCA at the end of March 2021. Any delay to the vote could mean that the parties will need to agree another extension to the deadline for ratification of the TCA, which is something the UK has made clear that it wishes to avoid.

The UK's decision unilaterally to extend grace periods under the NI Protocol

The NI Protocol is a protocol to the WA aimed at avoiding a hard border on the island of Ireland at the end of the Brexit transition period. The grace periods under the Protocol are designed to allow businesses in Northern Ireland time to adapt to new rules on customs and product standards. At the time of writing, the UK has decided unilaterally to extend grace periods for checks on agri-foods, for customs declarations on parcels and for health rules applicable to plants moving from the UK to Northern Ireland, from the end of March to October 2021.

The UK government has defended its decision as a necessary step to ensure the 'pragmatic and proportionate' implementation of the NI Protocol. In a [written ministerial statement](#) made to the House of Commons on 3 March 2021, the Secretary of State for Northern Ireland, Brandon Lewis, explained that this was a 'temporary' measure designed to avoid major disruptions and 'support the effective flow of goods between Great Britain and Northern Ireland'.

Earlier on 3 March, Lewis [told the House of Commons](#) that the UK's action was 'partly' prompted by the EU's recent decision to invoke [Article 16](#) of the Protocol as part of its coronavirus (COVID-19) vaccine export authorisation scheme. Mr Lewis highlighted that EU's decision to invoke Article 16 had 'significantly undermined cross-community confidence', which required the UK to take 'further temporary operational steps...to ensure that people in Northern Ireland are able to continue to have access to products in the way that the protocol envisaged'.

[Article 16\(1\)](#) of the NI Protocol permits either Party 'unilaterally [to] take appropriate safeguard measures' where 'the application of [the NI] Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade'. Reliance on that provision is, however, governed by the procedures set out in [Annex 7](#) to the Protocol, which includes the obligation to notify 'without delay' the other Party when a Party is considering adopting safeguard measures. Only where 'exceptional circumstances requiring immediate action exclude prior examination' may either Party 'apply forthwith the protective measures strictly necessary to remedy the situation' (Annex 7, para 3 of the NI Protocol).

As reported, on 29 January 2021, the European Commission announced that it had adopted a new implementing regulation, subjecting exports of certain coronavirus vaccines to certain countries to mandatory pre-authorisation by Member States (a regulation that Italy was the first to use in blocking a shipment of the

Oxford-AstraZeneca vaccine to Australia). In introducing the measure, the Commission invoked [Article 16](#) of the NI Protocol as the basis to adopt unilateral safeguards overriding its commitment not to introduce quantitative restrictions on exports moving between the EU and Northern Ireland. Following sharp criticism from the UK and elsewhere, the Commission quickly reversed its decision to trigger Article 16. The way that the UK has so far justified its unilateral introduction of these measures suggests that it may itself now be seeking to rely on Article 16 of the NI Protocol.

The EU's response to the UK's extension of grace periods and possible legal actions

In response to the UK government's announcement, Commission Vice-President, Maroš Šefčovič, issued a [statement](#) expressing 'the EU's strong concerns over the UK's unilateral action' in relation to the NI Protocol. Šefčovič stated that the UK's decision 'amounts to a violation of the relevant substantive provisions of the Protocol on Ireland/Northern Ireland and the good faith obligation under the Withdrawal Agreement'. He referred to this action as 'the second time that the UK government is set to breach international law' (the first being when the UK introduced the UK Internal Market Bill).

Šefčovič criticised the UK for not informing the EU through the Withdrawal Agreement Joint Committee in advance of its decision, underlining that all issues relating to the Protocol 'should be dealt with through the structures provided for by the Withdrawal Agreement'. Šefčovič concluded that the Commission will respond to these developments 'in accordance with the legal means established by the Withdrawal Agreement and the Trade and Cooperation Agreement'.

Both the WA, including the NI Protocol, and the TCA, set out a framework to oversee their implementation and mechanisms for resolving disputes that might arise between the EU and the UK.

Under [Article 131](#) of the WA, the institutions of the EU continued to have the powers conferred upon them by EU law in relation to the UK, and the Court of Justice of the European Union continued to have jurisdiction as provided for under [the Treaty on the Functioning of the European Union \(TFEU\)](#), including as regards the interpretation and application of the WA, during the Brexit transition period. It is likely that the EU was acting in reliance on this provision when it commenced infringement proceedings against the UK in relation to the UK Internal Market Bill.

[Article 12](#) of the NI Protocol contains a similar provision, but which gives the institutions of the EU—beyond the end of the Brexit transition period, 'the powers conferred upon them by Union law' in relation to Articles 5, 7–10 and 12(2) of the NI Protocol. Moreover, Article 12(4) NI Protocol confirms that the Court of Justice of the European Union 'shall have the jurisdiction provided for in the Treaties in this respect'. The UK would participate in such proceedings 'in the same way as a Member State' (Article 12(7)(a) of the NI Protocol). It is Article 12 of the NI Protocol to which the EU is likely to be referring in threatening to bring 'infringement proceedings', a procedure which is governed by [Article 258](#) TFEU. The culmination of an infringement procedure, in the event of non-compliance with the Commission's 'reasoned opinion', is a proceeding before the Court of Justice of the European Union.

Separately, the EU can have recourse to the general dispute resolution procedure under [Title III of Part 6](#) of the WA, which covers 'any dispute' between the EU and the UK arising under the WA (including after the Brexit transition period). Under Article 169 of the WA, such disputes are to be resolved in the first place by consultations in the UK-EU Joint Committee. If no agreement is reached within three months, either party may request the establishment of an arbitration panel (Article 170 of the WA), with the power to adopt binding decisions upon the parties (Article 175 of the WA). A dispute concerning whether the UK had breached its overarching obligation to act in good faith under Article 5 of the WA would arguably be covered only by the provisions in Part Six, Title III (Dispute Settlement).

The TCA sets out a similar dispute settlement process. As explained in an article written by Laura Rees-Evans and Rhys Carvosso for LexisNexis and published on 21 January 2021 ([Dispute settlement under the EU-UK Trade and Cooperation Agreement](#)), most disputes arising under the TCA are to be resolved by binding ad hoc arbitration directly between the Parties. The TCA's dispute settlement mechanisms are exclusively for any disputes concerning the interpretation or application of its provisions, or of any 'supple-

menting agreement' (ie bilateral agreements between the EU and the UK subsequent to the TCA) (Article INST.11 of the TCA).

However, where a measure allegedly breaches an obligation under the TCA and a 'substantially equivalent obligation' under another international agreement that binds both Parties, the Party seeking redress has a choice of forum (Article INST.12(1) of the TCA). Once it has initiated a dispute settlement procedure in one forum, it may only subsequently engage the other forum if the first selected forum 'fails to make findings for procedural or jurisdictional reasons' (Article INST.12(2) of the TCA).

Accordingly, the EU can also initiate proceedings under Article INST.12(1) of the TCA, if it can show that the UK has breached a 'substantially equivalent obligation' under both the TCA and the WA. It would not be possible, however, for the EU to initiate parallel proceedings under both the WA and the TCA.

The text of the WA and the NI Protocol are available [here](#).

The text of the TCA and the parties' agreement to extend its provisional application are available [here](#).

If you wish to discuss these or other issues raised in our Brexit Insights, please contact [Stephen Fietta](#), [Laura Rees-Evans](#) or [Miglena Angelova](#).

By Stephen Fietta, Laura Rees-Evans and Miglena Angelova of Fietta LLP. First published as '[Spotlight on the UK's decision to extend grace periods under the NI Protocol to the Withdrawal Agreement](#)' by Fietta LLP on 5 March 2021. Republished with permission.

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