

# Article 16 of the Northern Ireland Protocol Quick guide

November 2021



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# Article 16 of the Northern Ireland Protocol

## Quick guide

November 2021

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# 1. Background

## What is the Northern Ireland Protocol?

The Protocol on Ireland/Northern Ireland is part of the UK-EU **Withdrawal Agreement**, which set the terms of the UK's exit from the EU. It is often referred to as the Northern Ireland Protocol ("the Protocol").

The Protocol sets out how the UK and EU will manage their land border between Northern Ireland (NI) and Ireland (I), which is an EU Member State. It was agreed at a late stage before the UK left the EU and provides that Northern Ireland:

- remains part of the UK's customs territory and the UK's trade agreements, but
- must follow the EU's customs rules for goods moving in/out of the EU and some other rules of the EU Single Market.

Outside the EU, the UK sets its own regulatory and customs rules which are different to the EU's.

This means that some goods moving between Great Britain (GB) and Northern Ireland (NI) must be checked and controls put in place to ensure they comply with the EU's rules. If they do, they can enter Northern Ireland and move on to Ireland, moving freely around the EU thereafter.

## What is the issue?

The Protocol is not yet fully in force because the UK and EU disagree on how it should work. They disagree on some procedures, such as:

- what checks and rules should apply to goods entering or being sold within Northern Ireland;
- what the requirements should be for goods entering Northern Ireland from Great Britain which are intended solely for the Northern Ireland market.

## What checks are in place between Great Britain and Northern Ireland?

As a result of the disagreement between the UK and EU, some goods have not yet been subject to full checks because:

1. the EU and UK have agreed to postpone the introduction of some checks (the delays to full checks are known as “grace periods”); and
2. the UK has **unilaterally postponed** some checks to provide more time for talks with the EU and to “give certainty and stability to businesses” while they take place.

This included rules on supermarket supply chains, chilled meats, parcels and some medicines. Queens University Belfast has produced **a timeline** showing the extension of these grace periods.

On 14 September 2021, the UK Government published a **new timetable** for introducing full import controls for goods imported from the EU to the UK.

### How do the UK and EU discuss the Protocol?

The UK and EU co-Chair the **Withdrawal Agreement’s Joint Committee**, which oversees its implementation.

The UK is represented by Lord David Frost, Minister of State at the Cabinet Office.

The EU is represented by Vice-President Maroš Šefčovič from the European Commission.

The Welsh Government has **requested to attend** when matters relating to the Protocol are discussed. On 23 November 2021, the First Minister confirmed that this **request had been refused**.

## 2. Article 16

Article 16 of the Protocol allows the UK and EU to take safeguarding measures in cases where the Protocol leads to difficulties, or to **trade diversions**. If the safeguarding measures cause further imbalances, the UK or EU can respond with rebalancing measures. Annex 7 of the Protocol sets out the procedure to follow for both safeguarding and rebalancing measures.

The key points of Article 16 are that:

### Article 16(1)

- The UK and EU are able to take unilateral safeguarding measures to remedy situations where the Protocol leads to *“serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.”*
- Safeguarding measures are limited. They must be:
  - i. Appropriate,
  - ii. Restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation, and
  - iii. Prioritised so as to cause the least disruption to the functioning of the Protocol overall.

### Article 16(2)

- If the safeguarding measures create ‘an imbalance between the rights and obligations’ under the Protocol, the UK or EU can take rebalancing measures in response.
- Rebalancing measures are limited. They must be:
  - i. Proportionate
  - ii. Strictly necessary to remedy the imbalance, and
  - iii. Prioritised so as to cause the least disruption to the functioning of the Protocol overall.

## Article 16(3)

Both safeguarding and rebalancing measures must be taken by following the procedure set out in Annex 7 to the Protocol. Annex 7 is explained in the next section.

### Article 16: in full

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#### Safeguards

1. If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.
2. If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol.
3. Safeguard and rebalancing measures taken in accordance with paragraphs 1 and 2 shall be governed by the procedures set out in Annex 7 to this Protocol.

## Annex 7

Annex 7 sets out the procedure to be followed by the UK or EU when invoking Article 16. The procedure applies to both safeguarding and rebalancing measures [point 6].

### Annex 7: procedure

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**Step 1:** If the UK or EU are considering using safeguarding measures under Article 16, they must immediately notify the other party through the Joint Committee and provide “all relevant information”.

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**Step 2:** After this notification, the UK and EU must immediately enter into consultations in the Joint Committee to find a solution.

**Step 3:** Safeguarding measures cannot be used until 1 month after the notification to the Joint Committee, mentioned in Step 1 above. There are **important exceptions to this:**

**Exception 1:** If the consultation process has concluded in agreement sooner than 1 month after the notification, the agreed measures can be used sooner;

**or**

**Exception 2:** In “exceptional circumstances” that require urgent action before they can be examined at the Joint Committee, the UK or EU can apply safeguarding measures immediately (“forthwith”). Only measures which are ‘strictly necessary to remedy the situation’ are permitted and the Joint Committee must be notified immediately.

**Step 4:** Every three months, the Joint Committee must review the safeguarding measures that have been taken (or sooner, on request from the UK or EU). Such consultation must be held with a view to either:

- i. the abolition of the measures before their intended date of expiry; or
- ii. to the limitation of their scope of application.

Annex 7: in full

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1. Where the Union or the United Kingdom is considering taking safeguard measures under Article 16(1) of this Protocol, it shall, without delay, notify the Union or the United Kingdom, as the case may be, through the Joint Committee and shall provide all relevant information.
2. The Union and the United Kingdom shall immediately enter into consultations in the Joint Committee with a view to finding a commonly acceptable solution.
3. The Union or the United Kingdom, as the case may be, may not take safeguard measures until 1 month has elapsed after the date of notification under point 1, unless the consultation procedure under point 2 has been concluded before the expiration of the state limit. When exceptional circumstances requiring immediate action exclude prior examination, the Union or the United Kingdom, as the case may be, may

apply forthwith the protective measures strictly necessary to remedy the situation.

- 4.** The Union or the United Kingdom, as the case may be, shall, without delay, notify the measures taken to the Joint Committee and shall provide all relevant information.
- 5.** The safeguard measures taken shall be the subject of consultations in the Joint Committee every 3 months from the date of their adoption with a view to their abolition before the date of expiry envisaged, or to the limitation of their scope of application. The Union or the United Kingdom, as the case may be, may at any time request the Joint Committee to review such measures.
- 6.** Points 1 to 5 shall apply, *mutatis mutandis*, to rebalancing measures referred to in Article 16(2) of this Protocol.

### 3. Article 16: domestic process

The UK Government's Lord Frost has said he expects secondary legislation to be used to implement action taken under Article 16. Others disagree and argue that primary legislation would be needed. The role of the devolved governments and legislatures in implementing Article 16 will depend on how they are implemented by the UK Government.

On 26 October 2021, Lord Frost told the **House of Lords' EU Affairs Committee** that he expects that secondary legislation could be used to implement action taken under Article 16:

Simplifying massively, there is a provision in the 2021 Withdrawal Act that gives direct effect to a European Communities Act-like provision that gives direct effect to the Protocol; therefore, it also gives direct effect to Article 16, because that is part of the Protocol.

But I think you probably would still want some secondary legislation, so that there was doubt about the intention of the Article 16 action and to make sure that the UK legal order was completely clear and that we knew where things stood. That is my expectation at this point.

However, others argue that primary legislation would be needed.

For example, **George Peretz QC**, has set out how domestic constraints severely limit the options available to the UK Government in navigating a path forward that avoids breaching the Withdrawal Agreement. He concludes that:

...if as a matter of domestic law the UK government wishes to do anything (whether executive action or omission or subordinate legislation) that is inconsistent with the Protocol, it can do so only after persuading Parliament to pass an Act that, in words visible from outer space, modifies, or expressly allows the government to modify, section 7A. If it fails to get that cover – and the political difficulties in getting it are obvious – then any such act, omission, or legislation would have to be declared unlawful, or quashed, by a domestic court.

## Devolution

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If and until the UK Government decides to trigger Article 16, the role and requirements of the devolved government and legislatures remains uncertain.

Both the UK and Welsh Governments have powers to implement the Protocol using specific powers granted to them by the EUWA18 and the EU (Withdrawal Agreement) Act 2020 (“EUWAA20”) which provide a number of possible avenues.

In the meantime, the **First Minister has made it clear** that triggering Article 16 would “make a difficult situation worse, not better”. He added:

A larger percentage of our exports goes to the European Union than any other part of the United Kingdom.

We will be particularly badly affected by any deterioration in those trading relationships, and that’s why we have a direct Welsh interest in seeing that the triggering of Article 16 is avoided.

## 4. Possible changes to the Protocol

The UK has called for the Protocol to be renegotiated, which the EU has said it will not do. Instead, the EU has agreed to seek solutions through intensive discussions, which are currently ongoing. The UK and EU have both put forward proposals on which to base their discussions.

### Article 16: a route to renegotiation?

Article 16 does not provide for renegotiation or permanent changes to the Protocol. Academics have demonstrated how its language points to temporary measures designed to resolve issues, to be reviewed every 3 months.

**Professor Robert Howse** of New York University Law School says that Article 16:

.....is not the kind of provision designed to trigger renegotiation or even permanent adjustment of specific commitments or mechanisms in the Protocol.

The UK and EU are in discussion on how to move forward. Each has published its proposals setting out possible solutions, which are summarised below.

### UK proposals

In July 2021, the UK Government issued **a command paper** which outlined its view that full implementation of the Protocol on its current terms is not possible. The paper calls for the re-negotiation of some of its requirements.

The command paper set out the UK's view that the current societal and economic issues caused by the Protocol's implementation are of such severity that they could warrant the UK invoking Article 16.

**The command paper states that the UK's preference is to re-negotiate some of its terms rather than to invoke Article 16.** Paragraph 36 states:

Rather than use Article 16, we would prefer to find a consensual path.

Some of the UK Government's key calls are to:

- **Remove the role of the European Court of Justice**, which is described as to "normalise the governance basis of the Protocol so that the relationship

between the UK and the EU is not ultimately policed by the EU institutions including the Court of Justice” and replace with a system of international arbitration;

- **Remove the “burdens” on trade in goods**, so that full customs and SPS processes are applied only to goods destined for the EU;
- **Replace the application of EU subsidy control rules** (under Article 10 and Annex 5 of the Protocol) with new “enhanced processes for any subsidies on a significant scale relating directly to Northern Ireland”. Article 10 and Annex 5 apply to any UK subsidies that affect NI-EU trade and subsidies over a certain amount must be approved by the European Commission;
- For **Northern Ireland to have “normal” access to** goods from the rest of the UK;
- Introduce “exceptional arrangements” for **trade data sharing and cooperation**;
- Legislate to **deter Northern Ireland exporters from exporting goods to Ireland that do not meet EU standards**.

The EU originally responded to the command paper stating that technical discussions on how the Protocol is implemented in practice should continue but that it will not renegotiate its terms. It stated in September that it hopes to find a solution to the ongoing issues by the end of the year.

## EU proposals

On 13 October, the EU Commission published non-legislative proposals designed to simplify procedures under the Northern Ireland Protocol:

The proposals call for a “jointly agreed permanent solution as soon as possible”.

The EU has repeatedly stated it will not renegotiate the Protocol, and so proposes the following changes as a starting point for “intensive discussions” with the UK over the coming weeks:

- iii. For **food safety and phytosanitary rules** (measures to protect humans, animals, and plants from diseases, pests, or contaminants): The Commission offers a “bespoke solution”, leading to approximately 80% reduction in checks. This is contingent on the UK completing construction on new Border Control Posts (BCPs), among other measures. Three Senedd Committees recently received correspondence between David Frost and the Welsh Government, which described their construction

at Welsh ports as “one of the largest and most complex infrastructure delivery programmes Welsh Government is engaged in”.

- iv. For **customs**: The Commission offers flexibility to facilitate the movement of goods from Great Britain to Northern Ireland, signifying a 50% reduction in paperwork. This is described as an “Express Lane”.
- v. For **medicines**: The Commission offers long-term “uninterrupted security of supply” of medicines moving from Great Britain to Northern Ireland. The EU states that further discussions are needed.
- vi. On **governance**: The Commission offers “enhanced engagement” with Northern Ireland stakeholders and authorities.

## 5. Withdrawal Agreement: dispute settlement

In the event that a dispute arises between the UK and EU regarding the Withdrawal Agreement, including the Northern Ireland Protocol, the agreement contains its own dispute settlement procedure, set out in Title III of Part Six. Each article is summarised below.

Experts, **including Professor Rob Howse and Professor Catherine Barnard**, agree that the wording of Article 16 does not exclude it from being subject to the general dispute settlement mechanism.

### **Article 167: Cooperation**

The UK and EU must:

at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

### **Article 168: Exclusivity**

Article 168 is an 'exclusivity' clause. This means that, for disputes related to the Withdrawal Agreement, the UK and EU agree to only follow the Withdrawal Agreement's own dispute settlement procedure (as opposed to, for example, an international court or tribunal).

### **Article 169: Consultations and communications within the Joint Committee**

The UK and EU will endeavour to resolve disputes via consultation at the Joint Committee, the body which oversees the Withdrawal Agreement's implementation and application. Importantly, Article 169 must be carried out "in good faith" and with the aim of reaching a mutually agreed solution.

#### **Good faith: explainer**

"Good faith" is a general principle of international law and forms Article 26 of the Vienna Convention on the Law of the Treaties (1969). It requires parties to treaties to perform their duties in good faith. It is a common feature of international agreements.



For example, Article 5 of the Withdrawal Agreement places a general duty on the UK and EU to assist each other in carrying out tasks which flow from the Agreement “in full mutual respect and good faith”.

To enter into consultations, the UK or EU must provide written notice to the Joint Committee and all communications/notifications between the UK and EU regarding the dispute must be made in the Joint Committee.

### **Article 170: Initiation of the arbitration procedure**

If no solution is agreed within 3 months of the written notice detailed in Article 169 **or** if they both agree to do so sooner, the UK or/and EU can request that an arbitration panel be established.

The request must:

- be made in writing to the Joint Committee and to the International Bureau of the Permanent Court of Arbitration (PCA);
- identify the subject matter of the dispute to be brought before the arbitration panel; and
- summarise the legal arguments in support of the request

### **Permanent Court of Arbitration: explainer**

The **Permanent Court of Arbitration**, established by treaty in 1899, is an intergovernmental organization providing a variety of dispute resolution services to the international community.

The PCA provides administrative support in international arbitrations involving various combinations of states, state entities, international organizations and private parties.

### **Article 171: Establishment of an arbitration panel**

#### **a. Composition**

The arbitration panel will be composed of five members.

Before the end of the transition period, the Joint Committee was tasked with establishing a list of 25 persons to serve as members of an arbitration panel. The

UK and EU each proposed 10 persons and proposed 5 persons jointly to act as chairperson. The Joint Committee **established the list** on 22 December 2020.

**b. Process**

The arbitration panel will be established within 15 days of the request for its establishment.

The UK and EU will nominate two members each.

The chairperson will be nominated by consensus by members of the panel from the joint UK-EU list of 5 potential chairpersons. If the members of the panel can't agree on a chairperson within the aforementioned 15 day time limit, the UK or the EU can ask the Secretary-General of the Permanent Court of Arbitration to select a chairperson by lot from the list within 5 days of the request. Representatives of the UK and EU can be present at the selection.

The remaining subsection of Article 171 cover the procedure to follow in the event that the UK and EU fail to establish the list of persons to serve on the arbitration panel (Article 171(8) and (9)).

**Article 172: Rules of procedure**

The dispute settlement procedure itself is set out in Part A of Annex IX, which the Joint Committee will keep under “constant review” and can amend.

**Article 181: Members of an arbitration panel**

Members of the arbitration panel must comply with the Code of Conduct contained in Part B of Annex IX, which the Joint Committee can amend.

Members are also immune from legal proceedings in the UK and EU with respect to acts performed by them in the exercise of their functions on that arbitration panel.