

# Queen's Policy Engagement: Post-Brexit Clinic

**Katy Hayward**

**David Phinnemore**

**Lisa Claire Whitten**

**17 May 2022**

Organized in cooperation with the ESRC-funded project on *Governance for 'a place between': the multilevel dynamics of implementing the Protocol on Ireland/Northern Ireland*.



# What's been happening with the Protocol?



Prof David Phinnemore

# What's been happening with the Protocol?

UK politics & policy

+ Add to myFT

## Truss replaces Frost in overseeing UK's Brexit talks with EU

Move follows resignation of Lord Frost over government's 'direction of travel'



Liz Truss tops poll  
Ben Stansall/VAP/PA

Laura Hughes

COMMENT

## I will trigger Article 16 if the EU does not cooperate

It is my absolute priority to fix the many flaws in the Protocol and safeguard peace in Northern Ireland



LIZ TRUSS

8 January 2022 - 9:50pm

The union between Great Britain and Northern Ireland has proved itself time and time again. But so much of the progress we have seen in Northern Ireland rests upon the Belfast (Good Friday) Agreement, which secured peace and stability. I have seen how people's lives improved in Northern Ireland and Great Britain through sustained peace and prosperity.

This is why, having taken on EU negotiations, my absolute priority is to deal with the... use in spite of... commitment to... are having a...

I'll be putting

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## UK Government will not intervene in order to halt NI Protocol checks

Updated / Wednesday, 2 Feb 2022 23:20



### An Ceann Comhairle

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Forghnaí na Parlaiminte  
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Cnoc an Acla  
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### The Speaker

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To: All Assembly Members

3 February 2022

Dear Member,

I want to inform you that I have this afternoon received a letter from Paul Givan MLA tendering his resignation as First Minister with effect from 12:01am on Friday 4 February.

In accordance with section 16B(2) of the Northern Ireland Act 1998, the offices of the First Minister and the deputy First Minister are now vacant and must be filled within a period of seven days. Therefore, the offices will have to be filled before 12.01am on Friday 11 February.



# Joint Committee... and a Joint Statement

## **Joint Statement by Vice-President Maroš Šefčovič and the Foreign Secretary of the United Kingdom, the Rt Hon Elizabeth Truss MP, co-Chairs of the Joint Committee of the Withdrawal Agreement**

Brussels, 21 February 2022

In relation to the Protocol, Vice-President **Šefčovič** and Foreign Secretary Truss underlined that the UK and EU share an overriding commitment to protect the Good Friday or Belfast Agreement of 10 April 1998 in all its dimensions. Vice-President **Šefčovič** and Foreign Secretary Truss took stock of the intensified and constructive talks that have taken place between them over the last months. They underlined the ongoing determination of both parties to ensure that the outstanding issues in the context of the Protocol are addressed, and durable solutions found for the benefit of citizens, businesses and stability in Northern Ireland. In addition, Vice-President **Šefčovič** and Foreign Secretary Truss reiterated the importance of further engagement, including with the Northern Ireland Assembly and Executive, and wider Northern Ireland civic society and business.

Vice-President **Šefčovič** and Foreign Secretary Truss noted that the joint bodies established by the Withdrawal Agreement should meet regularly, and agreed to discuss any point raised by the EU or the UK that is of relevance to the Withdrawal Agreement in general.

# What's been happening with the Protocol?

## March

	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

## April

				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

- 8 March** Tenth meeting of the Specialised Committee on the implementation of the Protocol. A joint statement issued.
- 14 March** Northern Ireland Court of Appeal dismisses appeals against the Protocol in the case of *re Jim Allister and others (EU Exit)*
- 30 March** EU Co-Chair of the Joint Committee, Maroš Šefčovič, writes to UK Co-Chair of the Joint Committee, Liz Truss, regarding progress on providing EU access to UK customs IT systems and Tariff Rate Quotas related to the implementation of the Protocol
- 20 April** Amended EU legislation governing arrangements for the supply of medicines into Northern Ireland enters into force.

# What's been happening with the Protocol?

May						
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

**7 May** Northern Ireland Assembly Elections

**10 May** Queen's Speech: UK government to 'prioritise support for the Belfast (Good Friday) Agreement and its institutions'

EU Co-Chair of the EU-UK Joint Committee, Maroš Šefčovič statement following Queen's Speech

**12 May** Co-Chairs of the EU-UK Joint Committee, Maroš Šefčovič and Liz Truss hold telephone call

**15 May** *Belfast Telegraph* op-ed by Boris Johnson on seeking changes to the Protocol

**16 May** Boris Johnson visits Belfast

**17 May** Liz Truss announcement on proposed UK legislation allowing for unilateral UK disapplication of the parts of the Protocol



# Towards Unilateral UK Action to 'Scrap the Protocol'?

## Liz Truss puts plan to trigger Article 16 on hold because of Ukraine war

Foreign Secretary understood to have written to Boris Johnson to hold back tax cuts for Northern Ireland businesses

By Edward Malnick, SUNDAY POLITICAL EDITOR  
10 March 2022 - 9:00pm



## Boris Johnson urged expert warns Irish not to hold Stormont election

It comes after Liz Truss earlier this month warned the Ukraine crisis, but Brexiters fear a

By Edward Malnick, SUNDAY POLITICAL EDITOR  
26 March 2022 - 7:00pm



## UK prepared to 'unilaterally' tear up Northern Ireland post-Brexit trade deal

Rees-Mogg tells MPs if protocol with EU is not reformed London has sovereign right to take action alone



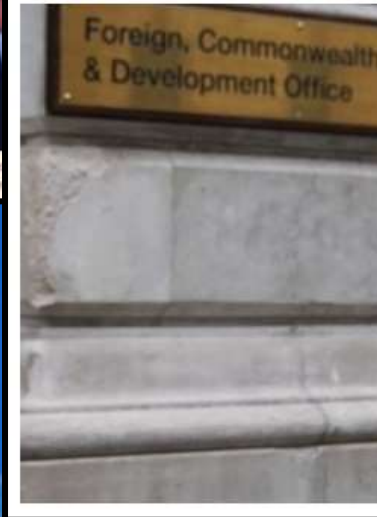
Brexit opportunities minister Jacob Rees-Mogg: 'The United Kingdom is a sovereign state. That must be the case' © Peter Summer

## Donaldson seeks 'imminent protocol – or unilateral action'

Mary Lou McDonald says 'stability' should be focus rather than 'positioning'

Mon, Jan 10, 2022, 20:08 Updated: Mon, Jan 10, 2022, 20:08

Denis Staunton London, Simon Carswell



## Liz Truss to give Northern Ireland a 'tough choice'

Tory backbenchers urge a tough choice for Boris Johnson likened to Vladimir Putin

By Joe Barnes, BRUSSELS CORRESPONDENT  
10 May 2022 - 8:43pm



## Boris Johnson set to sign off on plans to scrap part of Northern Ireland protocol

Move comes despite warnings it could collapse talks with Brussels and spark trade war with EU



# Or a continued focus on negotiation?



## Embracing change

But nor is there some perfect constitutional clockwork version of how the Union should be. Northern Ireland has always been a place in its own right, in which governance has been contested, broken, re-imagined and carefully nurtured.

Those arrangements continue to evolve. And far better, I think, is the Northern Ireland of today in which people look any way they want (north-south, east-west, or both) – depending on their identity, and their family, and their economic interests.

In today's debates about Brexit and the Protocol, let us embrace that hybridity. Let us make it work.

...

## Addressing the issues with the Protocol

...


## Seeking changes to the Protocol

...


There is without question a sensible landing spot in which everyone's interests are protected. Our shared objective must be to create the broadest possible cross-community support for a reformed Protocol in 2024.

I hope the EU's position changes. If it does not, there will be a necessity to act.





# Medicines: a problem solved?



Dr Lisa Claire Whitten

# Medicines: A Technical Solution



The EU amended two pieces of legislation that apply under the Protocol concerning the regulation of medicines for human use to ensure the supply of medicines from GB to NI can continue.

Removes need to relocate regulatory functions or testing facilities from GB to NI

Removes requirement for import licences for medicines moving GB-NI

Removes need for dual UK/EU authorisations/packaging for generic medicines moving GB-NI

Changes have retroactive effect, apply from 1 January (Regulation) and 31 January 2022 (Directive) respectively

Introduces 'bridging' solution for novel, innovative medicines authorised for use in GB to be available in NI

Temporary (3yr) derogations for Cyprus, Ireland and Malta to allow for industry adaptation

## REGULATION (EU) 2022/641 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

Show the previous page

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

## 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

# Medicines: A Political Problem

**Covid-19: Concern over potential shortages as EU rules on tests reportedly set to replace UK law in Northern Ireland**

Maintaining existing availability of medicines in NI

■ Highly concerned

■ Fairly concerned

■ Neither

■ Fairly unconcerned

■ Not at all concerned



For there even to be a question about the fast availability of medicines or medical testing in Northern Ireland (between two constituent parts of the same National Health Service) is incompatible with the post-Covid era.

PM Johnson, *Belfast Telegraph*





# The Assembly Elections and the Protocol



Prof Katy Hayward

# 2022 Assembly Elections: Prospects for Democratic Consent

Party	Vote	Seats	Manifesto Position	2024	
				For	Against
Sinn Féin	29.0	27	Protocol as ‘an opportunity’	27	
DUP	21.3	25	‘Remove the NI Protocol’		25
Alliance	13.5	17	‘Protocol pragmatists’	17	
UUP	11.2	9	‘Unionists cannot accept an internal [UK] border’		9
SDLP	9.1	8	‘essential protection... huge economic potential’	8	
TUV	7.6	1	‘Protocol must go’		1
PBP	1.1	1	Oppose the politicisation of the Protocol	1	
Independents	1.6	2	-	1	1
Total		90		54	36

Assumed For/Against positions based on manifesto and other public statements



**Issues to be  
addressed**





# What is the Ask?

## UKG Concerns

- Supply of medicines
- Customs paperwork
- EU VAT & Excise rules
- Subsidy control & state aid
- Prohibitions/restrictions on GB plant/animal products
- ECJ jurisdiction on disputes
- Pet certs GB-NI
- Lack of NI elected reps/ civil society involvement

## Any new arrangements must:

- 1 Fulfil Article 6 of the Act of Union
- 2 Avoid any diversion of trade
- 3 Not constitute a border in the Irish Sea
- 4 Give the people of NI a say in making the laws which govern them
- 5 Result in "no checks on goods going from NI to GB or from GB to NI" (and remaining in NI)
- 6 Ensure no new regulatory borders develop between NI & the rest of the UK
- 7 Preserve the letter & spirit of NI's constitutional guarantee in the Belfast Agreement by requiring consent from a majority of its citizens for any diminution of its status as part of the UK.



## Business asks

- Stability & certainty; a dynamic solution that can evolve
- Tackle the cumulative burden of labelling, paperwork and other regulatory demand
- A radical reduction in customs bureaucracy
- A meaningful voice in the governance structures relating to laws and policies impacting trade here, and formal review mechanisms

# Possible Solutions

- **Continue the talks:**
  - Evidence-based demands
  - Recommendations from the Specialised Committee for adjustments through Joint Committee decisions
  - Limited mandate from the EU for Šefčovič; UK has rejected the non-papers
- **Article 16:**
  - Safeguard measures; limited in time and scope
  - After 30 days consultation; reviewed every 3 months
  - Possibility of rebalancing measures from EU
- **Unilateral action:**
  - Equipping the UKG to override/disapply parts of EU law applying under it
  - Time needed to pass legislation
  - No immediate benefit but symbolic gesture



# And if the UK takes unilateral action?



Lisa Claire Whitten



# What form might UK unilateral action take?

## How the UK may try to override the Northern Ireland Brexit protocol

The foreign secretary has a few legal arguments to consider, says a professor of EU law



*The Guardian*, 12 May 2022

<https://www.theguardian.com/politics/2022/may/12/how-the-uk-may-try-to-override-the-northern-ireland-brexit-protocol>

According to Prof. Catherine Barnard (@CSBarnard24)

1. Article 16 of the Protocol – safeguard measures
2. Article 4 of Section 7 (a) of the European Union (Withdrawal Agreement) Act 2018 – remove direct effect of Withdrawal Agreement (including Protocol)
3. Section 8 (c) of the European Union (Withdrawal Agreement) Act 2018 – remove dynamic regulatory alignment under the Protocol
4. Section 38 (b) of the European Union (Withdrawal Agreement) Act 2020 – asserts sovereignty of the UK Parliament
5. Article 62 of the Vienna Convention

# Judicial Review

## Post-Brexit Governance NI – Explainer No. 5



### Judicial Review and the Protocol on Ireland/Northern Ireland

Billy Melo Araujo and Lisa Claire Whitten

#### Introduction

The [Protocol on Ireland/Northern Ireland](#) entered into force on 31 January 2020 and became operational on 1 January 2021. Since then, there have been multiple legal challenges aimed at either the Protocol itself or measures deemed incompatible with it.

This explainer provides an overview of the judicial review mechanisms that apply in relation to the Protocol. Section 1 explains the architecture of the Protocol's judicial review system. Section 2 outlines the judicial review mechanisms available under the Withdrawal Agreement, namely the state-to-state dispute settlement mechanism and the jurisdiction of the Court of Justice of the European Union (CJEU). Sections 3 and 4 examine the judicial review mechanisms available under UK and EU law respectively and the main legal challenges that have arisen since the entry into force of the Protocol.

## Protocol and Judicial Review

Judicial review under  
WA/Protocol

'Domestic'  
Judicial review

State-to-  
State  
Dispute  
Settlement

CJEU  
Jurisdiction

EU Judicial  
review

UK Judicial  
Review

# Judicial Review

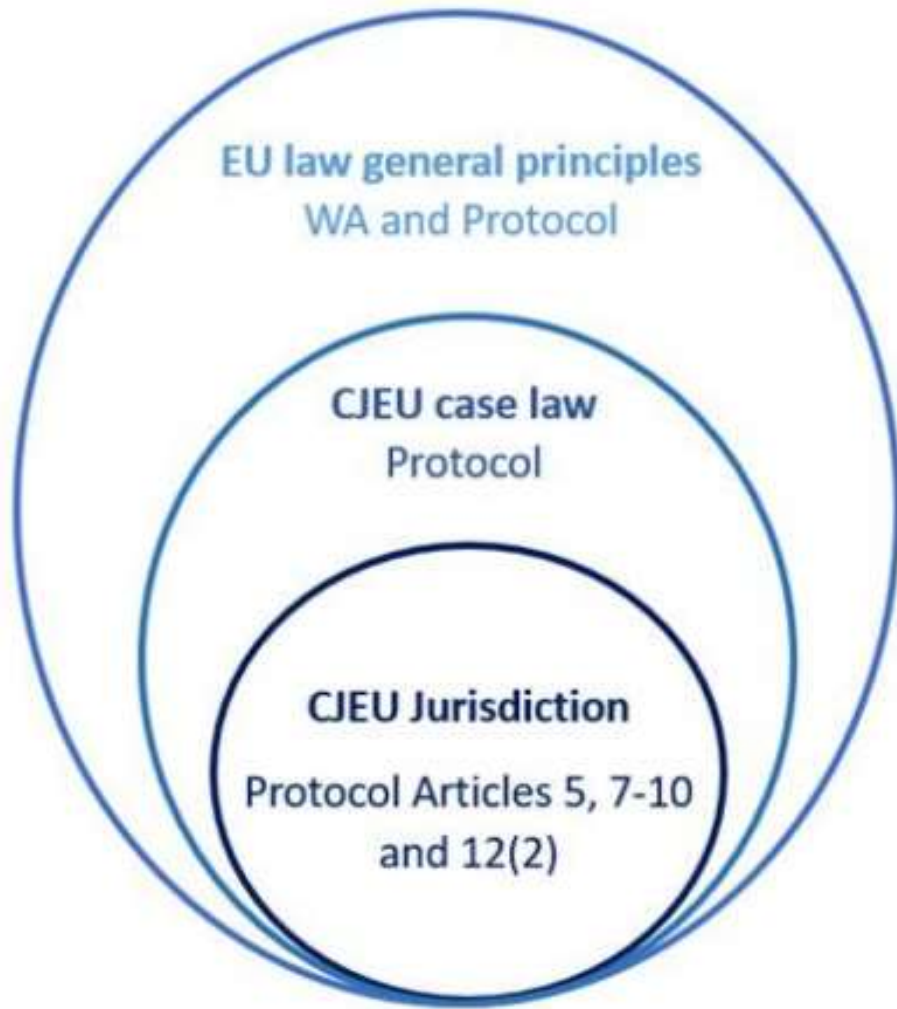


Figure 2: EU Law, the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland

Arrangements for enforcement = novel in both UK and EU contexts

Applicability or otherwise of different enforcement mechanisms depend on which Article of the Protocol is in question and, therefore, the extent to which EU vs. UK procedures apply.


Legal complexity + political contingency = caselaw will be very significant





# Democratic Consent:

## Article 18... and the 2024 vote



Prof David Phinnemore

# Democratic Consent

## Post-Brexit Governance NI – Explainer No. 6



### Democratic Consent and the Protocol on Ireland/Northern Ireland

David Phinnemore and Lisa Claire Whitten

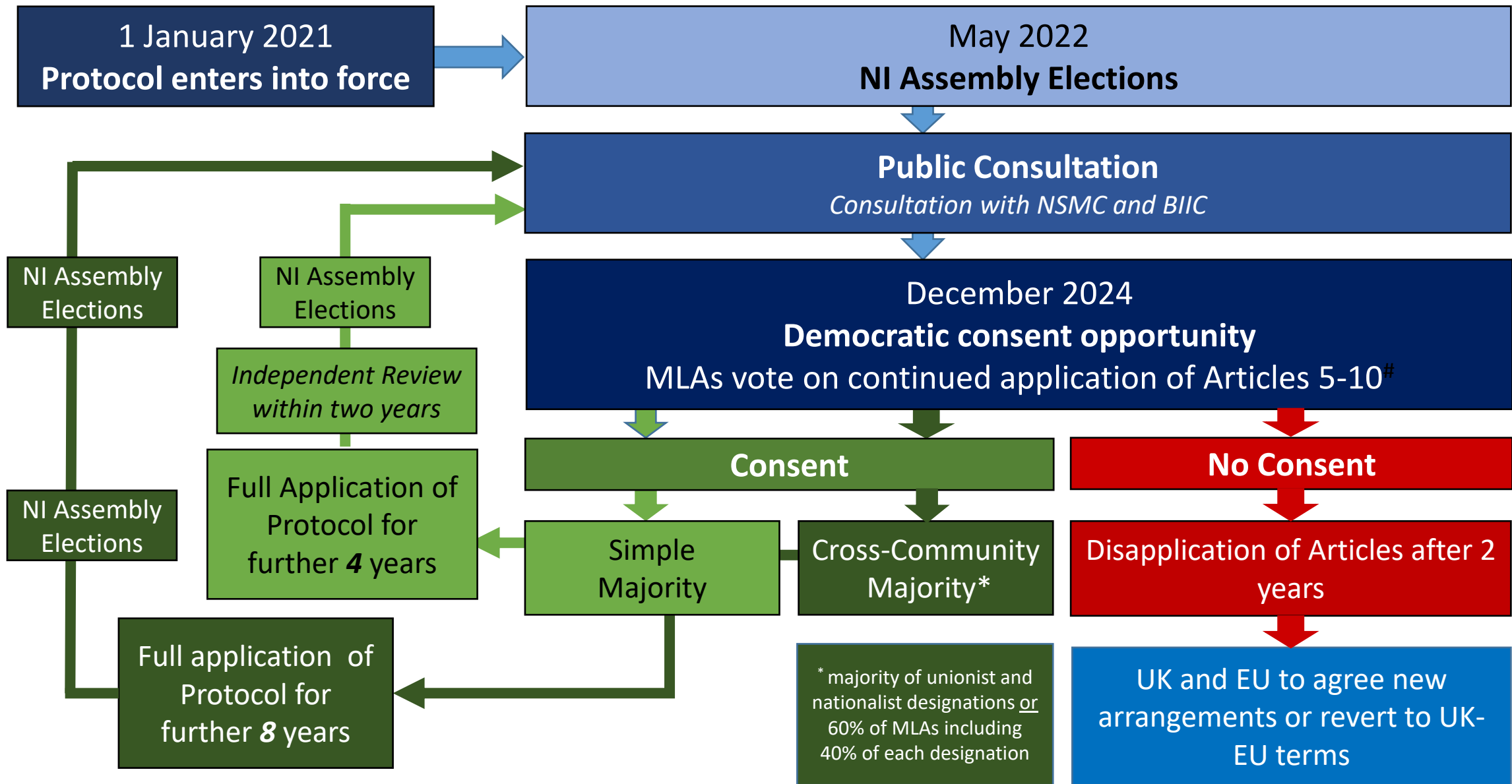
Preamble	
1. Objectives	
2. Rights of Individuals	
3. Common Travel Area	
4. Customs Territory of the United Kingdom	
5. Customs, Movement of Goods	
6. Protection of the UK Internal Market	
7. Technical Regulations, Assessments, Registrations, Certificates, Approvals and Authorizations	
8. VAT and Excise	
9. Single Electricity Market	
10. State Aid	
11. Other Areas of North-South Cooperation	
12. Implementation, Application, Supervision and Enforcement	
13. Common Provisions	
14. Specialised Committee	
15. Joint Consultative Working Group	
16. Safeguards	
17. Protection of Financial Interests	

18.
Democratic Consent in Northern Ireland
MLAs to vote in November/December 2024

Majority	Threshold	Next Opportunity
Simple	a simple majority (50%+1) of MLAs present and voting	after 4 years
Cross-community (a)	a simple majority (50%+1) of MLAs present and voting 'including a majority of the unionist and nationalist designations present and voting'	after 8 years
Cross-community (b)	a 60 % majority of MLAs present and voting 'including at least 40% of each of the nationalist and unionist designations present and voting'	after 8 years

Figure 1: Democratic Consent Majorities

# Democratic Consent



# 2022 Assembly Elections: Prospects for Democratic Consent

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