

## UK/EU: Time for the annual post-Brexit antics

- The UK government seems increasingly determined to introduce legislation that would empower it to unilaterally scrap key customs provisions under the Northern Ireland protocol.
- As in the past, the annual peak in post-Brexit tensions is driven by the seismic and unresolved shifts in domestic UK electoral politics.
- Procedurally, EU retaliation would link the withdrawal treaty with the trade agreement and could also involve the EU courts.

---

In the UK cabinet, the protocol issue pits Foreign Secretary Liz Truss against proponents of a more liberal conservatism, including Chancellor Rishi Sunak and Levelling Up Secretary Michael Gove. Meanwhile, the equally more liberal majority in the House of Lords might delay respective legislation by several months. Unlike in previous years, there is no end-of-year deadline, as the UK parliament can simply prolong the timeframe for parties in Northern Ireland to cobble together a working cross-community administration.

It is not even clear how much interest the unionists in Belfast would have in a quick resolution, as this would remove the current obstacle preventing the republican Sinn Fein from fielding their first-ever regional first minister. However, the key political driver for the standoff with the EU remains English Conservative party politics. At least since the referendum decision of 2015, the party remains in government but is entirely paralyzed on the policy front. To resolve the tensions within its diverse pro-Brexit electorate, at least another general election will be required. This, however, might not occur much before 2024 and provides no guarantees. After all, the UK has already gone to elections twice and currently has its third PM since 2015 – to no avail regarding the Tory policy outlook.

Against the backdrop of a looming recession, PM Boris Johnson has every incentive to reheat the row with the EU over UK unity and sovereignty questions. While the protocol issue goes to the heart of the unresolved question haunting the Tories since at least 2015 – sovereignty vs. the economy – it does at least provide the chance of distracting from the cost-of-living crisis and might allow Johnson to partly blame the EU for it.

Meanwhile, US opposition to the UK undermining the Northern Ireland protocol remains important. Still, Washington's direct influence is limited, as the big prize of a meaningful US-UK trade agreement remains politically unrealistic. More interesting regarding the prospect of EU retaliation could be the UK's military guarantees provided this week for bloc members Finland and Sweden as they head towards NATO membership. Ironically, however, a UK decision to scrap parts of the Brexit agreement would create doubts about the UK's true commitment to its international obligations.

### EU reaction: Arbitration, infringement, France

Procedurally, the key point to consider is that the Northern Ireland protocol is part of the withdrawal agreement, while the EU's likely retaliation would occur under (and affect the provisions in) the post-Brexit trade agreement. This is mandated by the trade agreement, but only if and when it has been established under the arbitration mechanism introduced by the withdrawal agreement that one side has not complied with its obligations under the exit treaty.

The UK's unilateral move against the protocol would likely lead the EU to respond with countermeasures ultimately revoking some of the benefits UK companies currently enjoy under the trade agreement. The EU might start the arbitration process

that would have been the next step in the (previous) scenario that the UK triggers Article 16. Brussels could also re-launch infringement procedures if it deems the UK's moves to amount to non-compliance with EU law as it continues to pertain to Northern Ireland. As the protocol rules that the region effectively remains in the single market and customs union, any legal questions related to the protocol must ultimately be adjudicated by the Court of Justice of the EU.

The upshot is that the proceedings could at some stage involve the CJEU. The Luxembourg court is well known for its practically non-existent track record of deciding against the Commission (or, more specifically, further integration). This is something several highest courts in key EU member states keep pointing to as a major weakness on the path towards a densification of the EU's internal constitutional order. Anything other than a ruling in favor of Brussels would be a surprise in EU-domestic legal standoffs, but it would be outright sensational in a case pitting the recently departed UK against the Commission acting as "guardian of the treaties".

Against this backdrop, the seemingly endless Brexit drama is almost guaranteed to simmer on. In the meantime, a major risk remains that, whatever the response agreed by member states in Brussels, the geographical situation of key ports into the single market provides French authorities (as the enforcers of the union customs code on their territory) with considerable leeway to increase the price tag attached to the UK's annual antics. For instance, France could inflict major damage by deciding to significantly re-increase the density of border checks for incoming UK exporters and/or travelers.

[Client Portal >>](#)

---

**Carsten Nickel**

Deputy Director of Research  
+44 20 7186 8873  
carsten.nickel@teneo.com

© 2022 Teneo. All rights reserved. This material was produced by Teneo for use solely by the recipient. This communication is intended as general background research and is not intended to constitute advice on any particular commercial investment or trade matter or issue and should not be relied upon for such purposes. The views expressed here represent opinions as of this date and are subject to change without notice. The information has been obtained from sources believed to be reliable but no guarantees can be given as to its accuracy, completeness or reliability. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic or otherwise, without the prior consent of Teneo.