

# Why London should worry about the ECJ's external judicial politics when pushing for a revision of the Northern Ireland Protocol

*Boris Johnson will hold crisis talks in Belfast today in an attempt to resolve differences over the Northern Ireland Protocol. Robert Basedow writes the UK would be wise to carefully evaluate the EU's red lines before demanding a revision of the Protocol.*

Triggered by the recent [Northern Irish regional elections](#) and the [Queen's Speech](#), Brexit has made a return in the last weeks as a highly salient topic. The fresh stand-off between London and Brussels revolves yet again around British demands to revise the controversial Northern Ireland Protocol. London wants to facilitate the customs checks between Northern Ireland and mainland Britain as well as to revoke the powers of the ECJ to watch over the correct application of European law in Northern Ireland. The idea in London seems to be that one could replace the ECJ with a new international tribunal.

When analysing this controversy and its potential outcomes, most observers focus on the preferences and negotiating dynamics between the British government, the European Commission and the member states. Yet, the European Court of Justice (ECJ) may have a much bigger say over a revised Northern Ireland Protocol than is often acknowledged. Since the 1970s, the ECJ has been regularly prompted to assess the EU's ability to submit itself to international tribunals. And remarkably often, the ECJ has ruled against EU participation, often frustrating key policy projects of the European Commission and the member states.

While the ECJ has been justifying these decisions by arguing that it must defend the European legal order against short-sighted political action, critics see the ECJ as a rogue agent that seeks to protect its powers against international competitor tribunals. Regardless of the ECJ's motives, these observations imply that London should carefully analyse the [ECJ's external judicial politics](#) to understand where the EU's redlines really lie. The Commission and the member states – even if they wanted to – may be unable to deliver what the British government demands thus risking a lasting breakdown of post-Brexit relations. But to fully understand the ECJ's role in this affair, it is helpful to take a step back and recall the key issues that the Northern Ireland Protocol seeks to address.

## Brexit and the Irish border

Brexit in its current shape created the need to erect a customs border between the United Kingdom and the European Union's single market to avoid trading loopholes. This customs border would have normally been drawn along the borders of the United Kingdom. In other words, the border would run in the English Channel between the UK and France as well as over land between the Northern Ireland and the Republic of Ireland. The Good Friday Agreement and hard-fought Northern Irish Peace Process, however, have made European and British policymakers shy away from this default option.

The worry was and is that a customs border between the Republic of Ireland and Northern Ireland would rekindle what effectively was a deadly longstanding civil war in Northern Ireland between republican and unionist factions. Hence, European and British policymakers faced two options.

First, they could draw a customs border between Northern Ireland and mainland Britain in the Irish Sea – the solution now enshrined in the Northern Ireland Protocol – and keep Northern Ireland in the single market, subject to relevant European laws on goods and thus necessarily ECJ purview.

Or second, they could have agreed on a customs border between the Republic of Ireland and the rest of the single market. This arrangement would also have avoided a trading loophole in the EU's external customs border and Northern Ireland could have stopped applying European laws. The Republic of Ireland, however, would have had to deal with intra-EU trade frictions and run the risk that goods could enter its territory from Northern Ireland that do not conform with for instance European food safety or environmental standards. In short, negotiators were haggling over who had to bear the economic and political costs of Brexit – the UK or the EU and notably the Republic of Ireland.

In 2019, the UK consciously agreed with the EU in the Northern Ireland Protocol to the first solution but now seeks to revise the deal. While pragmatic solutions over its demand to facilitate customs checks between Northern Ireland and mainland Britain seem possible (for an overview see [here](#)), there is no easy fix for its demand to replace the ECJ with for instance a new international tribunal. As long as Northern Ireland remains part of the single market and thus subject to European laws, the fulfilment of the British demand would indeed shake the very foundations of the European legal and political order. To fully appreciate the gravity, it is necessary to clarify the practical implications.

### Real risks

The British demand to remove the ECJ's jurisdiction over European law in Northern Ireland would result in a situation where European law would still apply in Northern Ireland but a tribunal other than the ECJ would authoritatively interpret its meaning. This tribunal, in other words, would rival the ECJ and challenge its judicial monopoly. The ECJ's caselaw from the last 70 years leaves no doubt, however, that EU participation in such a tribunal would be deemed unconstitutional – or in EU speak 'to undermine the external autonomy of the European legal order'.

In the unlikely case that the Commission or the member states were willing to contemplate London's demand, the ECJ would almost certainly strike down a revised protocol and make EU participation in a novel tribunal impossible. Over the last decades, the ECJ has indeed never hesitated to defend its judicial powers and the integrity of the European legal order. It prevented for instance the EU from joining the court of the European Free Trade Area (EFTA Court), frustrated plans of the European Commission to create a pan-European patent court, and even prohibited the EU from joining the European Convention on Human Rights and its Court despite the fact that the Lisbon Treaty explicitly mandated the EU's accession.

In sum, London should carefully evaluate Brussels' red lines. If London insists on revoking the ECJ's jurisdiction, it would effectively render impossible Northern Ireland's participation in the single market and force the EU to either give up on the Good Friday Agreement or to create a customs border between the Republic of Ireland and the single market. Any one of these outcomes, however, would erode the basis for amicable relations between the EU and the UK in the next decade and furthermore destabilise the political situation in Northern Ireland.

After all, the regional elections on 5 May produced a [majority in favour of preserving the Northern Ireland Protocol](#) as well as the region's special status as part of both the British and single market. What is more, the republican Sinn Fein came in first in these elections thus putting a reunification of Northern and Southern Ireland back on the agenda. Hence, London's strategy to escalate the situation may well backfire and put into question the integrity of the country.

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*Note: This article gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics. Featured image credit: [Andrew Parsons / No 10 Downing Street \(CC BY-NC-ND 2.0\)](#)*

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