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European Union Committee

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9th Report of Session 2019–21

# **The Protocol on Ireland/ Northern Ireland**

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Evidence is published online at <https://committees.parliament.uk/work/9/protocol-on-irelandnorthern-ireland/> and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence.

## SUMMARY

The agreement of the revised Protocol on Ireland/Northern Ireland in October 2019 paved the way for the UK to leave the EU on 31 January 2020. Yet the months since then have been characterised by uncertainty and an absence of momentum and of detail on how it will be implemented. On the one hand, the UK Government has been unable to explain precisely or consistently what it agreed with the EU. On the other, the EU's insistence that 'the rules are the rules' has left Northern Ireland businesses fearing that there will be no flexibility to apply the Protocol proportionately. This has led to a diminution of trust between the two sides, with the upshot, in the words of a witness, that Northern Ireland has felt like "a pawn in the game".

The Protocol is a complex document, both in terms of the exact meaning of its provisions and in its operational and verification requirements. The UK-EU Joint Committee, established under the Withdrawal Agreement (and the Specialised Committee reporting to it) is the body charged with overseeing the implementation of the Protocol, and with making key decisions determining its operation. In this context, Northern Ireland stakeholders have for months made a plea for more information on what the Protocol will mean for them in practice.

The publication on 20 May of the Government's Command Paper on the Protocol should have provided much-needed clarity on the UK's plans. While some detail was provided, the Command Paper's heavy reliance on the future tense underlines how little progress has been made thus far, how many issues remain to be resolved, and how much work still needs to be done before the Protocol becomes operational on 1 January 2021.

The combination of uncertainty, lack of momentum and lack of time, compounded by the shock of the COVID-19 pandemic, is a potent threat to economic prosperity and political stability in Northern Ireland.

This report provides a detailed guide to the Protocol, analysing each of its Articles in turn. It focuses in particular on the apparent contradiction at its heart. Article 4 states that Northern Ireland is part of the customs territory of the UK, and is reinforced by Article 6, which states that nothing in the Protocol "shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market". But these are off-set by Article 5, which applies the entirety of EU customs legislation, including the Union Customs Code, to Northern Ireland.

Article 5 thus retains a single regulatory zone for goods on the island of Ireland, achieving the key aim of avoiding a hard border between Ireland and Northern Ireland. Yet this requires the imposition of new customs processes and regulatory checks on goods moving from Great Britain to Northern Ireland. Other than in relation to sanitary and phytosanitary processes, which it acknowledges will be intensified, the Government in the Command Paper argues that no new bespoke customs infrastructure in Northern Ireland will be required. Be that as it may, it fails adequately to explain how these new processes will be undertaken.

Nor has the Government adequately addressed the continued uncertainty—and the contradictory statements of Ministers and officials—over whether Northern Ireland businesses will be required to complete exit summary declarations on

goods moving to Great Britain. While the Government, relying in part on the principle of ‘unfettered access’, now states that they should not be required, it has yet to explain how such a position can be reconciled with Article 5. The EU, in its statements, has thus far shown little flexibility on the matter.

The Joint Committee is tasked with important decisions on the operation of Article 5, including on the criteria for judging which goods brought into Northern Ireland are not at risk of moving on into the EU Single Market. Both sides need to approach these discussions in a constructive manner. The UK needs to explain how the exemptions it proposes are compatible with the terms and aims of the Protocol. The EU needs to allow the Protocol to be applied in a proportionate manner, so as not to damage the Northern Ireland economy. These decisions, together in particular with the terms of any future UK-EU free trade agreement, have the potential to mitigate the degree of friction that the Protocol creates. From Northern Ireland’s perspective, it is highly desirable that a comprehensive UK-EU Free Trade Agreement should be concluded by the end of 2020. If it is not, the consequences for Northern Ireland’s economy arising from the imposition of all the checks and processes envisaged in the Protocol will be significant.

Our report addresses many other issues, including the provisions on the rights of individuals, the Common Travel Area, the Single Electricity Market and North-South cooperation. We explore the complex new VAT and excise provisions set out in Article 8, which apply EU rules to the supply of goods, and UK rules to the supply of services. We note that Article 10 applies EU State aid rules to Northern Ireland in respect of goods, and the potential for these to constrain the shape of the UK’s independent State aid policy. We also address the unhelpful argument that has broken out about the EU’s request to open an office in Belfast, in order to facilitate its supervision of the application of EU law in relation to the Protocol. Finally, we note that the new democratic consent mechanism for the Northern Ireland Assembly in Article 18, while welcome, needs to be handled with care, given its potential to create political division and economic instability every four or eight years.

For Northern Ireland’s people, businesses and stakeholders, the Protocol represents what one witness called a “seismic change”, and very little time is left before it becomes operational. More than ever, it is incumbent on all parties, including the UK Government, the EU, the Irish Government, and the political parties in Northern Ireland, after the divisions of the past four years, to work in a common endeavour to prioritise and urgently address the interests, stability and prosperity of the people and communities of Northern Ireland. Anything less would diminish the efforts of all those who have worked so hard for peace and good relations across these islands.



# The Protocol on Ireland/Northern Ireland

## CHAPTER 1: INTRODUCTION

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### Overview

1. This report provides a detailed analysis of the revised Protocol on Ireland/Northern Ireland, agreed by the UK and the EU in October 2019. The report assesses each of the Articles of the Protocol in turn, and highlights key issues including:
  - The commitment to guaranteeing the rights of individuals (Article 2);
  - The welcome measures to uphold the Common Travel Area (Article 3), the Single Electricity Market (Article 9) and other areas of North-South cooperation (Article 11);
  - The tension between Article 4, which states that Northern Ireland is part of the customs territory of the UK, and Article 5, which applies the entirety of EU customs law, including the Union Customs Code, to Northern Ireland;
  - The implications of Article 5's retention of a single regulatory zone for goods on the island of Ireland for the movement of goods between Great Britain and Northern Ireland. These include the potentially significant negative economic consequences for Northern Ireland's economy of the imposition of new customs checks and process on goods arriving from Great Britain;
  - The tension between the commitment in Article 6 to ensure unfettered market access for goods moving from Northern Ireland to other parts of the UK internal market, and the requirement under Article 5 for exit summary declarations to be completed on goods moving from Northern Ireland to Great Britain;
  - The logistical challenge for firms based in or trading with Northern Ireland of satisfying the complex new provisions on VAT and excise, which apply EU rules to trade in goods, and UK rules to trade in services (Article 8);
  - The constraints that the Protocol's State aid provisions could potentially place on the UK's state subsidy policy (Article 10);
  - The mechanisms for implementation and supervision of the application of EU law in Northern Ireland, including the dispute over the EU's request to establish an office in Belfast (Articles 12 and 13); and
  - The political and economic consequences of the consent mechanism given to the Northern Ireland Assembly (Article 18).
2. The Government's intention is to agree a comprehensive free trade agreement (FTA) with the EU before the end of 2020, which could mitigate (although not eliminate) the Protocol's provisions on customs and regulatory checks

and processes. In Chapter 6, we analyse the impact of the agreement of such an FTA upon the practical operation of the Protocol.

3. The UK-EU Joint Committee created under the Withdrawal Agreement has a significant and enhanced role in relation to the implementation and operation of the Protocol. In Chapter 12, we explain the role of the Joint Committee, and the Ireland/Northern Ireland Specialised Committee and Joint Consultative Working Group that feed into its work. In Chapter 6, we analyse the key decisions that the Joint Committee will make before the end of the transition period in relation to customs and the movement of goods.
4. We conclude the report by setting out the need for parliamentary scrutiny of the implementation and operation of the Protocol, and for effective inter-parliamentary engagement between Westminster and the Northern Ireland Assembly, as well as with the Scottish and Welsh Parliaments, the Irish Oireachtas, and the European Parliament.

### Background

5. On 19 October 2019 the Government laid before Parliament the ‘Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and from the European Atomic Energy Community’<sup>1</sup> (hereafter referred to as the Withdrawal Agreement). Within it was a revised Protocol on Ireland/Northern Ireland.
6. The genesis of the Protocol was complex. In summer 2017 the UK and the EU agreed that the withdrawal negotiations would first address three specific areas: the protection of citizens’ rights after Brexit, the financial settlement, and issues relating to the border between Ireland and Northern Ireland. They also agreed that “sufficient progress” would be needed on these withdrawal issues before discussions could begin on the framework for the future EU-UK relationship.
7. On 8 December 2017 the EU and the UK published a Joint Report, agreeing, among other things, that both parties would respect the provisions of the 1998 Belfast/Good Friday Agreement and avoid the creation of a hard border between Ireland and Northern Ireland, interpreting a hard border as “including any physical infrastructure or related checks and controls”.
8. The Joint Report recorded the UK’s determination to resolve the issue of the Irish border within the context of an agreement on future relations; or, failing this, to propose technological solutions. But the two sides agreed that, “in the absence of agreed solutions”, the UK would “maintain full alignment with those rules of the Internal Market and the Customs Union which, now

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1 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, presented to Parliament pursuant to Section 1 of the European Union (Withdrawal) Act (No. 2) 2019 and Section 13 of the European Union Withdrawal) Act 2018 (19 October 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840655/Agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union\\_and\\_the\\_European\\_Atomic\\_Energy\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf) [accessed 19 May 2020]

or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement”.<sup>2</sup>

9. This agreement ultimately led to the adoption of what became known as the ‘Northern Ireland backstop’, which was attached as a Protocol to the November 2018 version of the Withdrawal Agreement. This original Protocol would have ensured that the UK and the EU remained part of a single customs territory, until such time as a UK-EU future relationship achieving the same objectives, such as avoiding a hard border, came into force. It also placed further regulatory and technical obligations deriving from EU law on the UK with respect to Northern Ireland. On four occasions the House of Commons voted against the Withdrawal Agreement and Political Declaration, leading to the announcement in May 2019 of the resignation of the then Prime Minister, Rt Hon. Theresa May MP.
10. On 19 August 2019 the new Prime Minister, Rt Hon. Boris Johnson MP, sent a letter to the then President of the European Council, Donald Tusk, indicating his wish to renegotiate elements of the Withdrawal Agreement. He confirmed that the changes sought by the Government related primarily to the Protocol on Ireland/Northern Ireland.
11. On 17 October 2019 the new Protocol on Ireland/Northern Ireland was published. There were two significant changes from the previous iteration:
  - Replacement of Article 6, which created a Single Customs Territory between the EU and the UK, with new Articles 4 and 5, on the customs territory of the UK and revised arrangements for customs and movement of goods;<sup>3</sup>
  - Deletion of the provisions for replacement of the Protocol with a new mechanism for the Northern Ireland Assembly to express consent to the continued application of Articles 5–10 of the Protocol.
12. The Government explained the changes as follows:
 

“The new Protocol abolishes the backstop entirely. Instead of the United Kingdom remaining in a customs union with the EU with no means to exit unless and until future arrangements were agreed, the new arrangements ensure that the whole of the United Kingdom will be a single customs territory with control of its independent trade policy, including as regards Northern Ireland. It replaces other backstop provisions with a system whereby Northern Ireland remains aligned with the EU on goods (including certain laws for VAT on goods), and applies EU tariffs in Northern Ireland except for movements within the

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2 HM Government and European Commission, *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union* (8 December 2018): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/665869/Joint\\_report\\_on\\_progress\\_during\\_phase\\_1\\_of\\_negotiations\\_under\\_Article\\_50\\_TEU\\_on\\_the\\_United\\_Kingdom\\_s\\_orderly\\_withdrawal\\_from\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint_report_on_progress_during_phase_1_of_negotiations_under_Article_50_TEU_on_the_United_Kingdom_s_orderly_withdrawal_from_the_European_Union.pdf) [accessed 19 May 2020]

3 [Withdrawal Agreement](#) (19 October 2019), New Article 8, on VAT and excise, was also as a consequence expanded from the original iteration.

single customs territory of the United Kingdom, but only for as long as Northern Ireland wishes this system to continue.”<sup>4</sup>

13. Following the December 2019 general election, the European Union (Withdrawal Agreement) Bill, giving effect to the revised Withdrawal Agreement and Protocol, was debated and agreed by both Houses of Parliament, receiving Royal Assent on 23 January 2020. The UK withdrew from the European Union on 31 January 2020.

### **This report**

14. This Committee has taken a close interest in the implications of Brexit for Ireland and Northern Ireland, including a number of visits to Belfast, Dublin and the border region. In December 2016, we published our report on *Brexit: UK-Irish relations*,<sup>5</sup> conducted a follow-up inquiry in early 2018,<sup>6</sup> and set out our analysis of the original iteration of the Protocol in our November 2018 report on *Brexit: the Withdrawal Agreement and Political Declaration*.<sup>7</sup>
15. We began taking evidence on the revised Protocol immediately after its publication in October 2019, including from the then Secretary of State for Exiting the European Union, Rt Hon. Stephen Barclay MP. Our work was paused during the Dissolution of Parliament, but we published an initial analysis in our January 2020 report *Brexit: the revised Withdrawal Agreement and Political Declaration*.<sup>8</sup> We then took further evidence in Westminster from academics and legal experts, in Belfast from Northern Ireland businesses and stakeholders (including a roundtable meeting with the Northern Ireland Business Network), and, following the COVID-19 outbreak, in a remote session with the Chancellor of the Duchy of Lancaster, Rt Hon. Michael Gove MP. This report draws on all the evidence taken since October 2019, and we are grateful to our witnesses for their assistance.
16. One of the key themes emerging from the evidence is the very high level of anxiety among Northern Ireland stakeholders over how the Protocol will be implemented, and the impact it will have on their lives and businesses.
17. Both the UK and the EU have contributed to this trepidation. On the Government’s part, there was a series of seemingly contradictory statements, amounting to an inability to confirm and explain precisely what it agreed with the EU under the terms of the Protocol. The EU, on the other hand, insisted that, the terms of the Protocol having been agreed, ‘the rules are the rules’, without indicating any flexibility over the interpretation or application of those rules.

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4 HM Government, *Explainer for the new Ireland / Northern Ireland Protocol and the Political Declaration on the future relationship* (28 October 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840653/EXPLAINER\\_FOR\\_THE\\_NEW\\_IRELAND\\_NORTHERN\\_IRELAND\\_PROTOCOL\\_AND\\_THE\\_POLITICAL\\_DECLARATION\\_ON\\_THE\\_FUTURE\\_RELATIONSHIP.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840653/EXPLAINER_FOR_THE_NEW_IRELAND_NORTHERN_IRELAND_PROTOCOL_AND_THE_POLITICAL_DECLARATION_ON_THE_FUTURE_RELATIONSHIP.pdf) [accessed 19 May 2020]

5 European Union Committee, *Brexit: UK-Irish relations* (6th Report, Session 2016–17, HL Paper 76)

6 Letter dated 27 February 2018 from Lord Boswell of Aynho, Chair of the European Union Committee, to Rt Hon. Karen Bradley MP, Secretary of State for Northern Ireland: <https://www.parliament.uk/documents/lords-committees/eu-select/UK%20Irish%20relations/27-02-18-Lord-Boswell-letter-to-Secretary-of-State-for-Northern-Ireland.pdf> [accessed 19 May 2020]

7 European Union Committee, *Brexit: the Withdrawal Agreement and Political Declaration* (24th Report, Session 2017–19, HL Paper 245)

8 European Union Committee, *Brexit: the revised Withdrawal Agreement and Political Declaration* (1st Report, Session 2019–21, HL Paper 4)

18. The gap between the two sides is exemplified by recent exchanges. On 30 April, the Commission published a technical note on the implementation of the Protocol, calling on the UK to clarify the steps it intends to take to ensure the Protocol is operational, and its timetable for doing so.<sup>9</sup> The Government responded on 20 May with a Command Paper on *The UK's Approach to the Northern Ireland Protocol*. While the Command Paper sheds helpful light on some areas, in others it is less illuminating, particularly with regards to practical steps.<sup>10</sup>
19. The upshot is that, as one of our witnesses said, Northern Ireland feels like a “pawn in the game”.<sup>11</sup> In the words of another, there is a “real lack of a detailed guide to what this all means”.<sup>12</sup>
20. We have sought to provide such a guide through this report. In so doing, we set out our analysis and understanding of the Protocol by analysing each of its Articles in turn.
21. But the Government and the EU still have a responsibility to provide a clear explanation of the Protocol's impact. We therefore set out a number of areas where further elucidation, by both sides, is needed. In that spirit, **we make this report for debate.**

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9 European Commissioner, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland/Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

10 Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

11 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

12 [Q 4](#) (David Henig)

## CHAPTER 2: OBJECTIVES (ARTICLE 1)

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### Summary

22. Article 1 sets out the Protocol’s objectives. It states that the Protocol:
- “is without prejudice to the provisions of the 1998 [Belfast/Good Friday] Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people”;
  - “respects the essential State functions and territorial integrity of the United Kingdom”; and
  - “sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions”.
23. The Chancellor of the Duchy of Lancaster, Rt Hon. Michael Gove MP, told us: “The real test of success is: does the Protocol safeguard the peace of Northern Ireland?”<sup>13</sup>
24. The Government’s May 2020 Command Paper on *The UK’s Approach to the Northern Ireland Protocol* developed this point:
- “Protection of the 1998 Agreement is a grave and solemn responsibility for both the UK and Irish Governments as its cosignatories, and indeed both the UK and the EU have affirmed in the Protocol that the Agreement must be protected in all its parts ... For the Protocol to work, it must respect the needs of all Northern Ireland’s people, respect the fact that Northern Ireland is an integral part of the customs territory of the United Kingdom and respect the need to bear as lightly as possible on the everyday life of Northern Ireland.”<sup>14</sup>

### Conclusion

25. **The stated objective of the Protocol is to set out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the Belfast/Good Friday Agreement in all its parts. It seeks to do this without prejudice to Northern Ireland’s constitutional status, while respecting the essential State functions and territorial integrity of the UK. While not listed as an explicit objective in Article 1, the Protocol is also designed to achieve these aims while protecting the integrity of the EU Single Market. Setting these principles down on paper is one thing; delivering a solution that successfully holds them in balance is quite another. The Protocol must ultimately be viewed through the lens of the peace process, and therefore judged by the impact it has on the people, communities and economic prosperity of Northern Ireland and Ireland.**

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13 Oral evidence taken on 5 May 2020 (Session 2019–21), [QQ 9–10](#) (Rt Hon. Michael Gove MP)

14 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) Foreword and para 3: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

### CHAPTER 3: RIGHTS OF INDIVIDUALS (ARTICLE 2)

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26. Article 2 of the Protocol, headed “Rights of individuals”, deals with the UK’s undertakings to ensure “no diminution of rights, safeguards and equality of opportunity”, as set out in Part 6 of the 1998 Belfast/Good Friday Agreement, including with respect to six EU Directives listed in Annex 1 to the Protocol that implement the principles of equal treatment.<sup>15</sup>
27. The UK undertakes to “continue to facilitate” the work of the bodies created by the 1998 Agreement “in upholding human rights and equality standards”. These include the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland.<sup>16</sup>
28. These commitments are legislated for in section 23 and Schedule 3 of the European Union (Withdrawal Agreement) Act 2020. Schedule 3 states that any legislation applying to Northern Ireland brought forward either at Westminster or in the Northern Ireland Assembly must be compatible with Article 2(1) of the Protocol. The Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) must monitor the implementation of Article 2(1), reporting to the Secretary of State for Northern Ireland and the Northern Ireland Executive upon request and as they deem necessary. They may also bring any appropriate matters to the attention of the Ireland/Northern Ireland Specialised Committee (see Chapter 12), bring judicial review proceedings, intervene in legal proceedings, and provide assistance to persons in legal proceedings on an alleged breach or potential future breach of Article 2. The Government has committed to ensuring that the NIHRC and ECNI have sufficient resources to undertake these new functions.<sup>17</sup>
29. By virtue of Article 13(3) of the Protocol, the obligation to adhere to the six EU Directives implementing principles of equal treatment extends to any new EU laws amending or replacing those Directives. The effect of this is that domestic legislation will need to be amended as the directives listed in Annex 1 develop.<sup>18</sup> We set out the process for amendment to domestic legislation in Chapter 11.
30. The Commission’s April 2020 technical note on the implementation of the Protocol called on the UK to clarify the “dedicated mechanisms” it intends to create to implement Article 2, and its timetable for doing so.<sup>19</sup>

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15 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Annex 1 headed Provisions of Union Law Referred to in Article 2(1)

16 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 2(2)

17 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 44: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

18 HM Government, *Memorandum concerning the Delegated Powers in the European Union (Withdrawal Agreement) Bill for the Delegated Powers and Regulatory Reform Committee* (19 December 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/854227/EU\\_Withdrawal\\_Agreement\\_Bill\\_-\\_Delegated\\_Powers\\_Memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854227/EU_Withdrawal_Agreement_Bill_-_Delegated_Powers_Memorandum.pdf) [accessed 19 May 2020]

19 European Commissioner, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland/Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

The Government subsequently reiterated its commitments in its Command Paper.<sup>20</sup>

31. **We welcome Article 2 of the Protocol, and the provisions set out in section 23 and schedule 3 of the European Union (Withdrawal Agreement) Act 2020, on safeguarding the rights of individuals, as set out in the Belfast/Good Friday Agreement. We welcome in particular the specific role set out under the Protocol for the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, and the Government’s commitment to ensure they are adequately resourced to undertake their new statutory tasks as set out in the 2020 Act.**
32. **We note that the obligation to ensure no diminution of rights extends to those protections against discrimination enshrined in the EU Directives listed in Annex 1 to the Protocol, as amended or replaced. The effect of this is that domestic legislation implementing these responsibilities will need to be amended as the Directives evolve.**

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20 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) paras 43–46: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

## CHAPTER 4: COMMON TRAVEL AREA (ARTICLE 3)

33. Our December 2016 report on *Brexit: UK-Irish relations* outlined the history and operation of the Common Travel Area (CTA) between the UK and Ireland, as well as the Channel Islands and the Isle of Man. We stressed the vital importance of the full retention and consolidation of its provisions post-Brexit.<sup>21</sup>
34. From the outset the UK and EU negotiators acknowledged the importance of upholding the CTA. Consequently, on 8 May 2019, the UK and Irish Governments published a Joint Statement<sup>22</sup> setting out their agreement to a Memorandum of Understanding reaffirming their commitment to the CTA, “and to maintaining the associated rights and privileges of Irish and British citizens under this longstanding reciprocal arrangement”.
35. The Memorandum of Understanding sets out the provisions of the CTA in relation to the movement of British and Irish citizens; the right to reside; the right to work (including recognition of professional qualifications); health care; social protection; social housing; education; and voting.<sup>23</sup>
36. Article 3 of the Protocol seeks to protect the CTA’s arrangements, “while fully respecting” the rights conferred on individuals by EU law. It provides that the UK will ensure that the CTA can continue to apply, in such a way as not to affect Ireland’s responsibilities under EU law to respect the free movement of EU citizens and their family members “to, from, and within Ireland”.<sup>24</sup>
37. **We welcome the publication in May 2019 of the Memorandum of Understanding between the UK and Irish Governments, setting out their shared understanding of and commitment to the operation of the Common Travel Area, and reaffirming that such arrangements are to continue. We also welcome the explicit commitment to the retention of the Common Travel Area in Article 3 of the Protocol on Ireland/Northern Ireland.**

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21 European Union Committee, *Brexit: UK-Irish relations* (6th Report, Session 2016–17, HL Paper 76)

22 Cabinet Office, *Joint Statement of 8 May 2019 between the UK Government and Government of Ireland on the Common Travel Area*, (8 May 2019): <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta/joint-statement-of-8-may-2019-between-the-uk-government-and-government-of-ireland-on-the-common-travel-area> [accessed 19 May 2020]

23 HM Government, *Memorandum of understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated reciprocal rights and privileges* (8 May 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/800280/CTA-MoU-UK.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800280/CTA-MoU-UK.pdf) [accessed 19 May 2020]

24 [Withdrawal Agreement](#) (19 October 2019), the Protocol on Ireland/Northern Ireland, Article 3(2). The EU Select Committee also reported on an international agreement relating to social security that underpins the operation of the CTA, drawing it to the special attention of the House (European Union Committee, *Scrutiny of international agreements: Treaties considered on 5 March 2019* (32nd Report, Session 2017–19, HL Paper 306)).

## CHAPTER 5: CUSTOMS TERRITORY OF THE UNITED KINGDOM (ARTICLE 4)

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### Northern Ireland as part of the customs territory of the UK vs the application of the Union Customs Code

38. Article 4 of the Protocol states, simply, that “Northern Ireland is part of the customs territory of the United Kingdom”. The Government’s Command Paper states:
- “A customs territory generally involves the removal of all internal tariffs, and a common approach to external trade partners. Regulatory regimes can vary within a customs territory but the removal of internal tariffs and associated barriers is generally considered to be fundamental to the nature of a customs territory. This fundamental reality is central to the way the Protocol needs to be implemented, given its clarity that Great Britain and Northern Ireland form one customs territory.”<sup>25</sup>
39. Article 4 needs to be read in conjunction with Article 5(3), which states that EU legislation as set out in Article 5(2) of Regulation 952/2013 “shall apply to and in the United Kingdom in respect of Northern Ireland (not including the territorial waters of the United Kingdom)”. This defines EU customs legislation as the body of legislation made up of all of the following:
- (a) The Union Customs Code and the provisions supplementing or implementing it adopted at Union or national level;
  - (b) The Common Customs Tariff;<sup>26</sup>
  - (c) The legislation setting up a Union system of reliefs from customs duty; and
  - (d) International agreements containing customs provisions, insofar as they are applicable in the Union.<sup>27</sup>
40. According to the Commission, the Union Customs Code “defines the legal framework for customs rules and procedures in the EU customs territory”. Its aim is to:
- Offer greater legal certainty and uniformity to businesses and increase clarity for customs officials throughout the EU;
  - Complete the shift to a paperless and fully electronic customs environment;
  - Reinforce swifter customs procedures for compliant and trustworthy Authorised Economic Operators (AEO);
  - Enhance the competitiveness of European businesses and thereby advance the main goals of the EU strategy for growth and jobs;

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25 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 15: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

26 Also referred to as the Common External Tariff.

27 Regulation (EU) no 962/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, *OJ L 269/1*, 10 October 2013

- Protect the flow of goods transiting or moving in and out of the EU; and
  - Safeguard the financial and economic interests of the EU and of the Member States, as well as the safety and security of EU citizens.<sup>28</sup>
41. Article 5(3) thus applies the entirety of the EU’s customs legislation, with some exceptions for fishery and aquaculture products,<sup>29</sup> to Northern Ireland.<sup>30</sup>
  42. David Henig, Director, UK Trade Policy Project, told us that the reference in Article 5(3) appears to be “very innocuous”, but added that “when you look at it, that article references in turn the entire customs arrangements and laws of the European Union”.<sup>31</sup> Dr Sylvia de Mars, Senior Lecturer in Law, Newcastle University, agreed that, while the reference may sound innocuous, the Union Customs Code “is almost 2,000 pages long—it is insanely lengthy”.<sup>32</sup>
  43. **Notwithstanding the statement in Article 4 of the Protocol that Northern Ireland is part of the customs territory of the UK, the practical implication of Article 5(3) is that, with limited exceptions, the entirety of the EU’s customs legislation, including the Union Customs Code, will apply in Northern Ireland.**
  44. **This, combined with the creation through Article 5(4) of a single regulatory zone for goods on the island of Ireland, will create corresponding regulatory friction for goods travelling between Great Britain and Northern Ireland. However, the Joint Committee’s decisions on the definitions of the processing of goods and goods at risk of moving from Northern Ireland into the EU Single Market, together with the scope of any free trade agreement between the UK and the EU, will determine how far any friction can be mitigated.**

#### Northern Ireland’s participation in future trade agreements

45. Article 4 of the Protocol also states that “nothing” in it “shall prevent the United Kingdom from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries, provided that those agreements do not prejudice the application of this Protocol”. It also states that nothing in the Protocol “shall prevent the United Kingdom from concluding agreements” with third countries that “grant goods produced in Northern Ireland preferential access” to these countries’ markets, “on the same terms as goods produced” elsewhere in the UK, or from including Northern Ireland in the territorial scope of its Schedules of Concessions annexed to the General Agreement on Tariffs and Trade 1994.<sup>33</sup>

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28 European Commission, The Union Customs Code (UCC): Introduction (May 2019): [https://ec.europa.eu/taxation\\_customs/business/union-customs-code/ucc-introduction\\_en](https://ec.europa.eu/taxation_customs/business/union-customs-code/ucc-introduction_en) [accessed 22 May 2020]

29 See paras 119–123.

30 We explore potential mitigations, including the decisions of the Joint Committee on the definitions of goods ‘at risk’ and processing, and the potential impact of a UK-EU free trade agreement, at paras 94–142.

31 [Q 1](#)

32 [Q 2](#)

33 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 4

46. The Command Paper states:

“We will negotiate and deliver trade deals on behalf of the whole United Kingdom. International trade will benefit Northern Ireland exporters, whose goods will enjoy the preferential access we negotiate with trading partners around the world, as well as Northern Ireland importers and consumers, who will enjoy access to wider consumer choice. Our position on tariffs ... will also ensure that any new, lower UK tariffs are charged on goods entering Northern Ireland just as in the rest of the UK, where goods remain in the UK’s customs territory.”<sup>34</sup>

47. David Henig said that, while Northern Ireland should gain some advantage from UK trade agreements, it would not get the full advantage. While it could be included in future UK FTAs, the third countries in question may not be willing to accept goods from Northern Ireland at reduced or eliminated rates of tariff that could have come from the EU without further checks. Similarly, “a judgement will have to be made as to whether goods coming from elsewhere to Northern Ireland ... are at risk [of moving into the EU Single Market] and will have to have the EU tariff paid before, if applicable, it is rebated”.<sup>35</sup>
48. Our witnesses also reflected on whether Northern Ireland could benefit from the EU’s future trade agreements with third countries. Mr Henig told us that, in the case of countries with which the EU but not the UK have trade agreements, “in theory Northern Ireland products that go into Ireland and are then exported to trade partners should qualify. However, that is a bit of a grey area.”<sup>36</sup> The Northern Ireland Business Network, in contrast, assumed that Northern Ireland would not have access to EU trade or association agreements, meaning that it will lose access to import tariff rate quotas. They warned that Northern Ireland could fall between the cracks of UK and EU trade agreements with third countries.<sup>37</sup>
49. **Article 4 of the Protocol states that nothing in it prevents Northern Ireland from being part of, or benefiting from, future third country trade agreements that the UK signs, on the condition that those agreements do not prejudice the application of the Protocol. The precise impact of the Protocol on future third country FTAs is uncertain. While Northern Ireland may attain some benefit from such agreements, the friction and processes introduced by Article 5 on the movement of goods from Great Britain and third countries into Northern Ireland will act as a constraint.**
50. **The extent to which Northern Ireland could benefit (or lose out) from future EU trade agreements is equally uncertain. We note the concern of our witnesses that Northern Ireland might fall between the cracks of trade agreements signed by the UK and the EU.**

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34 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 36: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

35 [Q 17](#)

36 *Ibid.*

37 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

51. **In our recent report, *Scrutiny of international agreements: lessons learned*, we stressed the importance of engagement with the Devolved Administrations concerning the implications of future third country trade agreements for areas of devolved competence. This is particularly significant in the case of Northern Ireland, given the impact of the Protocol. We therefore recommend that the Government publishes at the start and conclusion of each new trade negotiation, beginning with the UK-US trade negotiations, its assessment of any agreement's likely impact on and application to Northern Ireland.**

## CHAPTER 6: CUSTOMS AND MOVEMENT OF GOODS (ARTICLE 5)

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### Overview

52. Article 5(4), by applying a host of EU regulations as set out in Annex 2 to Northern Ireland, creates a single regulatory zone for goods on the island of Ireland. This in turn requires provisions for customs and the movement of goods between Great Britain and Northern Ireland.
53. Article 5(1) states that, for any good moving from Great Britain to Northern Ireland, “no customs duties shall be payable”, unless the good “is at risk of subsequently being moved” into the EU, either on its own or, “following processing”, as part of another product. Similarly, for goods moving into Northern Ireland from outside both the EU and the UK, UK customs duties will be applied unless the good is “at risk of subsequently being moved into the EU”, whether by itself or following processing. Article 5(6) states that the UK will levy customs duties, and they are not remitted to the EU.<sup>38</sup>
54. In October 2019, shortly after the revised Protocol was published, Jim Harra, Interim Chief Executive, HM Revenue and Customs, gave evidence to the House of Commons Treasury Committee on the operation of Article 5. He explained that for goods moving from Great Britain to Northern Ireland there were various interlocking requirements. First, “any goods going into Northern Ireland from Great Britain will have to comply with EU regulatory standards.” Second, for goods categorised by the Joint Committee as at risk of being subsequently moved into the EU, “the UK will [have to] make sure that a tariff equivalent to the EU tariff is applied.”<sup>39</sup> These requirements will “necessitate declarations being made for goods moving from Great Britain to Northern Ireland”, in order to “ensure that regulatory standards are being met” and, for goods at risk of being moved into the EU, that “the correct tariff is charged”—even if that tariff is set at zero.<sup>40</sup>
55. Mr Harra affirmed that this “does not mean Northern Ireland is part of the EU’s customs territory”, as the controls necessary to police the rules “will be administered by HMRC”. Nevertheless, it meant that “administrative procedures, including a declaration, will be required for movements from Great Britain to Northern Ireland ... Yes, there will be declarations, which will feel like a customs declaration, because they will contain information that is used for regulatory purposes.” Mr Harra added that HMRC did “not envisage ... a significant level of physical checks of goods” but warned that such checks “could be required ... to give effect to EU regulatory standards”.<sup>41</sup>

### Uncertainty

56. Several months elapsed between the publication of the revised Protocol and the issuing by the Government of further guidance to Northern Ireland stakeholders about what its provisions would mean in practice. In February 2020 the Committee visited Northern Ireland to take evidence and assess the situation. Several witnesses expressed their deep frustration and

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38 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 5(1)

39 If and when the UK and EU agree a free trade agreement this may be zero. On goods coming from third countries a tariff may be payable.

40 Oral evidence taken before the Treasury Committee, 22 October 2019 (Session 2019), [Q 265](#) (Jim Harra)

41 *Ibid.*

dissatisfaction at the lack of engagement by the UK Government with the concerns of Northern Ireland businesses.

57. The Northern Ireland Business Network warned that the approach taken by both the UK and the EU made Northern Ireland feel like a pawn in the game. This was “untenable”, because it hindered Northern Ireland stakeholders from preparing for the “seismic change” that would happen on 1 January 2021.<sup>42</sup> They feared that if clarity only came late in the day, it would be too late for businesses to prepare. In the meantime, businesses were making investment decisions:

“It is a matter of simple equations. If there are new costs in terms of tariffs, paperwork or staff hours, and if costs exceed the product margin, then the product or business model becomes unviable.”<sup>43</sup>

58. Pamela Dennison, Chair of the Freight Transport Association Northern Ireland and manager of a family-run haulage SME, said that the Government should “stop telling businesses what you think they want to hear and tell them exactly what is going to happen”.<sup>44</sup> She added that Northern Ireland businesses “are in limbo. Our customers are asking us how to prepare, but I cannot tell them, because I do not know, the Government do not know and trade bodies do not know.” Les Stracey, Director, Stena Line Ltd, said that “we are totally uncertain about the level of checks and customs formalities that will be required ... It is fine having all of this on paper, but we really need information from government about what we need to do and what infrastructure arrangements will be required at ports.”<sup>45</sup>
59. There was also concern about the lack of specialist understanding of how the Protocol will operate in practice. Les Stracey was one of several witnesses who noted the “significant shortage of customs agents at the moment. If there are no customs agents around, who is going to complete the paperwork?”<sup>46</sup>
60. Given the significance of the agri-food sector in Northern Ireland, there was a particular call for clarity as regards the requirements for sanitary and phytosanitary checks. Some sanitary and phytosanitary (SPS) checks are already required between Member States. For instance, under the TRACES system health certificates accompanying consignments of animals may be checked by border control authorities as products move from one Member State to another.<sup>47</sup> Dr Viviane Gravey, Lecturer, Queen’s University Belfast, said that, for the EU:

“This is about protection of the EU single market. The EU takes SPS controls and food crime especially extremely seriously. ... farmers or agri-food suppliers in Europe [are] quite clear that they do not want a back door into the single market through Northern Ireland.”<sup>48</sup>

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42 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

43 *Ibid.*

44 [Q 23](#)

45 [Q 19](#)

46 [Q 21](#). See also [Q 27](#) (Dr Viviane Gravey) and European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

47 European Commission, ‘How does TRACES work’: [https://ec.europa.eu/food/animals/traces/how-does-traces-work\\_en](https://ec.europa.eu/food/animals/traces/how-does-traces-work_en) [accessed 19 May 2020]

48 [Q 27](#)

61. In its technical note on implementation of the Protocol, the Commission stated that “animals, plants, and their products entering Northern Ireland from either a third country or Great Britain must comply with EU SPS requirements and be subject to official controls as prescribed by Union law”. The Commission invited the Government to clarify whether it intended to designate additional posts to undertake such checks.<sup>49</sup>
62. Prior to publication of the Government’s Command Paper, Mr Gove suggested it would be possible “to have light-touch checks that can be conducted on the ferry—through transportation—which will ensure that all the requirements can be met”.<sup>50</sup>

### Shortage of time

63. These concerns were exacerbated by the shortage of time before the Protocol becomes operational on 1 January 2021. Colin Murray, Reader in Public Law, Newcastle University, said that, whereas the abandoned Northern Ireland ‘backstop’ was “an insurance policy”, implementation of the new Protocol had been “brought forward and accelerated, and consequently made much more difficult”.<sup>51</sup>
64. The Commission itemised the preparations that businesses need to make ahead of the Protocol becoming operational:
- the introduction of customs procedures and formalities for goods entering Northern Ireland from Great Britain, and for goods leaving Northern Ireland for Great Britain;
  - the introduction of regulatory checks and controls, including SPS controls, for goods entering Northern Ireland from Great Britain;
  - the introduction of prohibitions and restrictions in respect of goods entering Northern Ireland from Great Britain, and for goods leaving Northern Ireland for Great Britain;
  - the new regulatory environment in Northern Ireland, in particular as regards technical regulations, assessments, registrations, certificates, approvals and authorisations;
  - the new regulatory requirements for UK fishing vessels landing fish in Northern Ireland;
  - the application of VAT and excise rules concerning imports and exports to goods entering Northern Ireland from Great Britain and goods leaving Northern Ireland to Great Britain; and
  - the implementation of a dual VAT regime in Northern Ireland, with one set of rules applicable to a supply of goods, and a different set of rules applicable to a supply of services.<sup>52</sup>

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49 European Commission, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland/Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

50 Oral Evidence taken on 5 May 2020, [Q 9](#) (Rt Hon. Michael Gove MP)

51 [Q 8](#)

52 European Commission, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland/Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

65. The Northern Ireland Business Network told us in February 2020, before the full economic and societal impact of the COVID-19 outbreak had become apparent, that it would be a “Herculean task” to complete this work in the limited time remaining.<sup>53</sup> In his letter of 8 April, Mr Gove acknowledged that “in the immediate term the attention of Ministers, officials and businesses is focused predominantly on the response to COVID-19”. Yet he was equally clear that “the transition period ends on 31 December 2020, as enshrined in UK law, and both the UK and the EU remain fully committed to implementing the Protocol”.<sup>54</sup>

### The implications for Northern Ireland

#### *Northern Ireland’s economic model*

66. Given the uncertainty over the practical implementation of the Protocol, our witnesses were not able to estimate with any precision its likely economic impact. Nevertheless, the scale of current trade flows provides some indication of the consequences of the Protocol for Northern Ireland’s economic model.
67. In 2017, £13.3 billion of external purchases of goods and services in Northern Ireland were from Great Britain. In 2018, Northern Ireland sales to Great Britain totalled £10.6 billion, including £6.5 billion in goods and £4.0 billion in services. Northern Ireland exports to Ireland totalled £4.2 billion in 2018, including £3.1 billion in goods and £1.1 billion in services. £2.3 billion of goods were imported from Ireland to Northern Ireland in 2018. Overall UK exports to Ireland totalled £35.1 billion in 2018 (including £20.9 billion in goods and £14.2 billion in services), while imports to the UK from Ireland amounted to £21.6 billion (including £13.6 billion in goods and £8.0 billion in services). Northern Ireland exports of goods to the rest of the EU, excluding Ireland, totalled £2.2 billion in 2019, while imports from the rest of the EU to Northern Ireland totalled £2.9 billion. Exports from Northern Ireland to the rest of the world totalled £3.8 billion in goods in 2019, while imports from the rest of the world totalled £2.7 billion in goods.<sup>55</sup>
68. In total, nearly 23,000 Northern Ireland businesses trade to and from Great Britain, and that trade comprises 56% of Northern Ireland’s total external

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53 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

54 Letter dated 8 April 2020 from Rt Hon. Michael Gove MP, Chancellor of the Duchy of Lancaster to Lord Kinnoull, Chair of the European Union Committee: <https://committees.parliament.uk/publications/690/documents/3408/default/> [accessed 19 May 2020]

55 Northern Ireland Statistics and Research Agency, *EU Exit: Trade Analysis* (15 April 2020): <https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/Overview-of-NI-Trade-April-2020-Fact-Sheet.pdf> [accessed 19 May 2020] and House of Commons Library, *Statistics on UK trade with Ireland*, Briefing Paper, [CBP 8173](#), 14 January 2020. The Government’s May 2020 Command Paper on *The UK’s Approach to the Northern Ireland Protocol* provides different figures. It cites figures, some from 2017, showing that Northern Ireland goods sales to Great Britain are worth £8.1 billion, with goods purchases worth £10.5 billion. It states that export of goods from Northern Ireland to Ireland totalled £3.0 billion, while imports from Ireland to Northern Ireland totalled £2.3 billion. See Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 12: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

trade in goods, compared to 16% in the case of trade between Northern Ireland and Ireland.<sup>56</sup>

*The practical impact*

69. Notwithstanding the uncertainty we have described, our witnesses sought to illustrate the practical impact of Article 5 for Northern Ireland. Maurice Bullick, Finance Director, Belfast Harbour Commissioners, noted that 70% of Belfast Harbour's traffic is trade with Great Britain. At present, the port is primarily an infrastructure provider, so is not involved in checking cargoes. He said that the port needed clarity on the impact of the Protocol on its infrastructure, but could not undertake any planning until the Joint Committee had provided further details.<sup>57</sup>
70. Les Stracey said that Stena Line operates 140 sailings a week between Belfast and Cairnryan, Heysham and Birkenhead, involving seven ships and carrying 540,000 freight units, approximately 67% of which are unaccompanied. Stena Line estimates that 97% of those units are intra-UK trade, not crossing the Irish land border. Mr Stracey said that, for unaccompanied freight, Stena Line would be classed as the carrier under the Union Customs Code, obliging it to submit safety and security declarations: "If there are 100 consignments in the back of a trailer, we would technically need to know all the details for every single consignment ... To me, that is a nonsense. We are effectively being asked to collect data which we do not have."<sup>58</sup>
71. Mr Stracey added that these sailings typically have a port turnaround of one hour 36 minutes: "Delays because of customs checks on the inbound traffic may cause problems with discharging ships and therefore problems loading them. If there are significant checks at ports, that will give us great concerns about what the impact on our timetable will be."<sup>59</sup>
72. The Northern Ireland Business Network had been told that the EU expected the Irish Sea border to be the same as other EU external borders, and the same rules to be applied in Belfast as in Calais. But they noted that the Irish Sea was very different to the EU's other external borders. At the EU's eastern border a truck would typically move one item across the border, with a single customs and export declaration absorbed into the business model. In contrast, retail consignments made up 70% of crossings of the Irish Sea, and there could be hundreds of different items in any one lorry coming to Northern Ireland from Great Britain, to be dropped at a regional distribution centre, rebuilt and put out to shops.<sup>60</sup>
73. The Northern Ireland Business Network further noted that, for goods coming to Northern Ireland, this would mean: customs paperwork and export health certificates (which can cost £200 each); an entry summary declaration with 45 questions will have to be completed by the retailer; veterinary and professional standards checks; a requirement for certificates of origin to

56 Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 12: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

57 Q 19

58 QQ 19, 21

59 Q 19

60 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

ensure goods can enter the EU market tariff-free; and a requirement that these, export control certificates and sanitary controls are pre-lodged before shipments leave Great Britain. This could get particularly complicated if separate forms are required for each destination, given that there can be several ‘drops’ per truck arriving from Great Britain. They noted a recent case of a lorry carrying 1392 different items crossing the Irish Sea, including 576 products of animal origin. They warned that, under the Protocol, each item will require a different tariff code, without which the lorry wouldn’t get on the boat.<sup>61</sup>

74. David Henig noted that, during the negotiations on the Withdrawal Agreement, the Commission published the list of standard checks that it makes. Certain goods, and defined percentages of certain goods, are checked. In many cases, the check is merely a customs paperwork check, and many products do not require an at-the-border check. However, for SPS products, particular checks have to be made at the border.<sup>62</sup>
75. The Northern Ireland Business Network explained that checks would require a product to be taken off the lorry, opened, inspected, tested and quarantined until deemed legitimate. They would be disruptive and could jeopardise the freshness of products. If the ports needed to inspect a retail lorry travelling from, for example, the north of England to Cairnryan, this could cause problems for the just-in-time models on which supermarkets rely. They noted that lorries typically arrive 20 minutes before the boat sails, and everything in supermarkets’ 24-hour cycle to shelves relies on catching that boat, because they depart only every three or four hours. They warned that delays would create significant problems with availability, and the supply chain could collapse.<sup>63</sup>
76. The Northern Ireland Business Network warned that these requirements seem far beyond what is plausible as a business model; if this friction leads to costs exceeding profit margin, then products will become unviable to sell in Northern Ireland. They feared that ultimately it will mean less choice for consumers and higher prices. They also warned that businesses based in Great Britain are particularly unprepared for the new processes required for dealing with Northern Ireland in the future.<sup>64</sup>

### The Government’s Command Paper

77. On 20 May 2020, seven months after the Protocol was agreed, and seven months before it was due to become operational, the Government published its Command Paper on *The UK’s Approach to the Northern Ireland Protocol*. The Paper noted that “the core of the Protocol is the provisions on customs and trade”, and consequently the focus of the Paper is on these provisions.<sup>65</sup>

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61 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

62 Q 10

63 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

64 *Ibid.*

65 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), para 13: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

78. The Government confirmed the requirement on UK authorities to apply EU customs rules to goods entering Northern Ireland, and to collect tariffs on goods at risk of moving on into the EU at ports of entry.<sup>66</sup> This will entail:

“some new administrative process for traders, notably new electronic import declaration requirements, and safety and security information, for goods entering Northern Ireland from the rest of the UK. These are needed to make sure that tariffs are not paid on trade within the UK and that goods going to Ireland pay tariffs when they should.”

79. Notwithstanding these requirements, the Government asserted:

“We see no need to construct any new bespoke customs infrastructure in Northern Ireland (or in Great Britain ports facing Northern Ireland) in order to meet our obligations under the Protocol.”<sup>67</sup>

It is not clear if this rules out the use of existing infrastructure at ports.<sup>68</sup>

80. The Government suggested that any regulatory checks could take place through market surveillance authorities at business premises or on the market, and do not have to take place at ports. This would be on the basis of risk assessment, “both by taking a pragmatic view of the risk posed by goods from Great Britain, and by lowering their risk profile through increased on-the-market activity”. Where Northern Ireland traders gain product approvals and certification for the Northern Ireland market from EU authorities and bodies, the UK will recognise those for the purpose of placing goods on the Great Britain market.<sup>69</sup>
81. The Command Paper also responded to the Commission’s request to identify the market surveillance authority that would operate in respect of Northern Ireland.<sup>70</sup> The Government confirmed that the same authorities operating today will continue to be responsible for approving goods on the Northern Ireland market and enforcing EU rules.
82. The Government acknowledged that a more intensive arrangement was required for sanitary and phytosanitary checks:

“We will maintain existing facilities and designations for the purpose of processing arrivals of agri-food goods at Belfast Port, Belfast International Airport, Belfast City Airport and Warrenpoint Port. Expanded infrastructure will be needed at some of these sites for the purpose of agri-food checks and assurance. Working with the Northern Ireland Executive, at a minimum we expect to request additional categories of commodities at Belfast Port, and to designate Larne Port for live animal imports ... Subject to further work with the Northern Ireland Executive and delivery partners, further designations may also

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66 *Ibid.* para 16

67 *Ibid.* para 32

68 See RTÉ, *UK Protocol paper may be just enough to avoid fresh crisis* (20 May 2020): <https://www.rte.ie/news/analysis-and-comment/2020/0520/1139655-irish-protocol/> [accessed 27 May 2020]

69 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), para 39: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

70 European Commission, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland / Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

be required at other existing sites. There will be no construction at points of entry where no plant or animal health checks are currently carried out.”<sup>71</sup>

83. The Government stated that the process by which controls are conducted, their frequency, and the level of physical checks required will need to be discussed by the Joint Committee, and that the Government will “actively seek to simplify and minimise electronic documentary requirements for this trade”.<sup>72</sup> The Government will in principle cover the costs of the agri-food requirements under the Protocol.<sup>73</sup>
84. The Government also committed to establish a business engagement forum, “which will meet regularly to allow Northern Ireland’s businesses to put forward proposals and provide feedback on how to maximise the free flow of trade”, and to consider how to take advantage of the “new freedoms” available following UK withdrawal from the EU. The Northern Ireland Executive will also be invited to the forum.<sup>74</sup>

### Conclusions

85. **During our visit to Belfast in February 2020, Northern Ireland businesses and stakeholders expressed deep frustration at the Government’s lack of engagement with them, and with their concerns about the “seismic change” that the Protocol will require, in particular in relation to customs and the movement of goods. They were particularly frustrated by the high level of uncertainty over implementation of the Protocol, and the lack of guidance on the steps that they needed to take to prepare.**
86. **We therefore welcome the Government’s publication of a Command Paper on *The UK’s Approach to the Northern Ireland Protocol*, though we regret that it took seven months for it to appear.**
87. **The Government has confirmed that new administrative processes for traders, including electronic import declaration requirements and safety and security information (including entry summary declarations) will be required for goods moving from Great Britain to Northern Ireland. Nevertheless, the Command Paper leaves many questions unanswered. The Government has stated that it sees no need to construct new bespoke customs infrastructure in Northern Ireland, or in ports in Great Britain facing Northern Ireland, and that there will be no construction at points of entry where no plant or animal health checks are currently carried out. It is incumbent on the Government to explain how the new processes required under the Protocol can be undertaken, in the absence of new infrastructure. In particular, it needs to clarify whether and how existing infrastructure at ports will be used.**

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71 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 34: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

72 *Ibid.* para 35

73 *Ibid.* para 57

74 *Ibid.* paras 11, 58–59

88. **The Government has suggested that regulatory checks could take place through market surveillance authorities at businesses premises and in the market on the basis of risk assessment, rather than at ports. The Government needs urgently to detail what this will involve.**
89. **We welcome the Government’s confirmation in relation to sanitary and phytosanitary checks and processes that there will need to be expanded infrastructure at Belfast Port, Warrenpoint Port, Belfast City Airport and Belfast International Airport; and that Larne Port will be designated for live animal imports. We also welcome the Government’s commitment in principle to cover the costs of the agri-food requirements under the Protocol. Nevertheless, the Government needs to set out with urgency the detailed steps that it will take to ensure that the necessary infrastructure is in place before 1 January 2021.**
90. **In particular, the Government, through the Joint Committee, urgently needs to explain how agri-food controls will be conducted, their frequency and the level of physical checks. More detail is needed on the statement that “further designations may also be required at other existing sites”. The Government needs to clarify if the Chancellor of the Duchy of Lancaster’s suggestion that some checks could be conducted during the sea crossing from Great Britain to Northern Ireland remains a live proposal. The Government should also explain what it means when it states that it will “actively seek to simplify and minimise electronic documentary requirements” for agri-food.**
91. **The provisions of Article 5 ensure that Northern Ireland will continue to be able to participate in the EU Single Market for goods, thereby maintaining supply chains on the island of Ireland. However, the evidence of Northern Ireland businesses suggests that, unless the Joint Committee is able to take a flexible approach as regards the definitions of goods at risk and processing, the checks and processes on goods moving from Great Britain to Northern Ireland under Article 5 could have a serious detrimental impact upon the Northern Ireland economy. There is a real danger that businesses based in Great Britain could conclude that it is economically unviable to continue to operate in Northern Ireland, leading in turn to reduced choice and higher costs for Northern Ireland consumers, thus undermining Northern Ireland’s economic model, its future prosperity and, potentially, its political stability.**
92. **We welcome the Government’s commitment to establish a business engagement forum. Given the scale of the challenge of implementing the Protocol, the many unanswered questions, and the shortage of time, that body needs to begin its work immediately, and intense engagement with the business community must be maintained in the months ahead. Administering such complex new systems will require significant IT, financial and human resource. The Government must therefore set out how it will support businesses in Great Britain and Northern Ireland in adapting to the Protocol, including providing information on and explanation of its provisions, and providing opportunities to test the new requirements before they become operational.**

93. **Even before the COVID-19 outbreak, Northern Ireland stakeholders described preparing for the Protocol to become operational on 1 January 2021 as a Herculean task. That task has become even more difficult, given the impact of COVID-19 on the economy and the capacity of individual businesses to cope with the problems confronting them. Given its refusal to countenance an extension to the transition period, the Government must urgently explain to Northern Ireland stakeholders the practical steps that will be taken to ensure the Protocol is operational from 1 January 2021. The Joint Committee will also need to take the changed circumstances arising from COVID-19 into account.**

### Mitigating factors

94. Mr Gove offered the following reassurance:

“Article 5 is just an article; it needs to be read alongside the other articles, and the operation of it, therefore, needs to be agreed ... We want to ensure that the bureaucratic and administrative burdens placed on Northern Ireland businesses are as light as possible. It would be curious if, to safeguard the peace process in Northern Ireland and help the people of Northern Ireland, there was a requirement to impose upon them economic costs and bureaucracy ... whereby they would be poorer and potentially more prey to division. In that sense the cure would be worse than the underlying condition it professes to address.”<sup>75</sup>

95. The Command Paper developed the argument:

“The economy of Northern Ireland is heavily dependent on small and medium sized enterprises. Subjecting traders to unnecessary and disproportionate burdens, particularly as we wrestle with the economic consequences of COVID-19, would not serve the interests of the people of Northern Ireland for whom the Protocol was designed.”<sup>76</sup>

96. The Government therefore asserted that an “appropriate and proportionate” approach to the movement of goods was “the only way in which to support Northern Ireland’s prosperity and the economic development that the 1998 Agreement recognised was essential to a broader transition to a peaceful and shared society”.<sup>77</sup>

97. This view was shared by our witnesses. Professor David Phinnemore, Professor of European Politics, Queen’s University Belfast, told us: “I do not think you will find any economic operator in Northern Ireland who believes that this is a good deal for Northern Ireland. So it is imperative that any arrangements that create a degree of flexibility and create certainty for Northern Ireland, are put in place as soon as possible.”<sup>78</sup>

98. There are a number of potential means to mitigate the impact of Article 5 on Northern Ireland:

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75 Oral Evidence taken on 5 May 2020, [QQ 9, 12](#) (Rt Hon. Michael Gove MP)

76 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), Foreword: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

77 *Ibid.* para 12

78 [Q 29](#)

- The Joint Committee’s decisions on definitions of goods at risk and processing;
- Streamlined customs processes;
- Other exemptions under the Protocol;
- Technological solutions; and
- The agreement of a comprehensive UK-EU free trade agreement.

*Defining processing and goods at risk of being moved into the EU*

99. As we have seen, Article 5(2) explains that goods brought into Northern Ireland from outside the EU will be considered at risk of subsequently being moved into the EU unless it can be established by the importer that a good:
- (a) will not be subject to commercial processing<sup>79</sup> in Northern Ireland; and
  - (b) fulfils the criteria established by the Joint Committee tasked with overseeing the operation of the Withdrawal Agreement.
100. Before the end of the transition period the Joint Committee must establish
- a) the conditions under which processing will not fall within the definition set out in the Protocol (taking into account the nature, scale and result of the processing), and
  - b) criteria governing the operation of the provisions dealing with goods at risk of moving into the EU. In so doing, it must “have regard to the specific circumstances in Northern Ireland”, while taking into account, among other matters:
- (a) The final destination and use of the good;
  - (b) The nature and value of the good;
  - (c) The nature of the movement; and,
  - (d) The incentive for undeclared onward-movement into the Union, in particular incentives resulting from the customs duties payable (a general catch-all term covering potential criminal activity such as smuggling).<sup>80</sup>
101. From the EU’s point of view, the provisions of Article 5 are necessary to address the risk that Northern Ireland will become an open back door into the EU Single Market, leading to a substantial increase in the volume of goods from Great Britain or non-EU third countries passing through Northern Ireland and into Ireland. This perceived risk may have grown on 19 May when the Government published its proposed WTO schedules. These showed that many UK tariffs would be lower—though often only fractionally lower—than their EU equivalents.<sup>81</sup>

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79 Defined as “any alteration of goods, any transformation of goods in any way, or any subjecting of goods to operations other than for the purpose of preserving them in good condition or for adding or affixing marks, labels, seals or any other documentation to ensure compliance with any specific requirements.”

80 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 5(2)

81 Department for International Trade, ‘UK tariffs from 1 January 2021’, (19 May 2020): <https://www.gov.uk/guidance/uk-tariffs-from-1-january-2021> [accessed 28 May 2020]

102. Dr Sylvia de Mars observed that the drafting of Article 5 meant that the apparent exception (the payment of customs duties) was in reality the rule:

“It actually means that all goods that can move into Ireland—basically all goods—will be subject to customs duties. That is the rule. What they then have to define is the exception to the rule, whereby customs duties will not be applied ... if they do not agree a definition, my understanding is that the EU tariffs will simply apply to all goods because they will all maybe be at risk of moving from Northern Ireland to Ireland.”

Dr de Mars added that the Protocol is “beautifully silent” as to how any disagreement would be resolved, “but if there is no agreement and if the parties are not both happy with saying that EU tariffs apply on all products going from Great Britain to Northern Ireland, then one of the two parties is likely to start consultations in the Joint Committee leading to arbitration on that point”.<sup>82</sup>

103. Whereas the Protocol refers only to goods “at risk” of moving into the EU, the Command Paper strikingly introduces references to goods “at clear or substantial risk”, or at “genuine and substantial risk”, of doing so.<sup>83</sup> It gives some practical examples that, in the Government’s view, should be considered as ‘internal UK trade’:

“If a supplier in Great Britain sends goods to a business for sale in Northern Ireland, then that is internal UK trade. Raw produce from Great Britain for agri-food processing in Northern Ireland which is then sent back to Great Britain is another good example of trade which is internal and has no impact on the EU market. A supermarket delivering to its stores in Northern Ireland poses no ‘risk’ to the EU market whatsoever, and no tariffs would be owed for such trade.”<sup>84</sup>

104. Northern Ireland businesses are supportive of such exemptions. Pamela Dennison called for a derogation for goods destined for “dead-end hosts” in Northern Ireland. In the case of a supermarket delivery to its stores in Northern Ireland, for instance, “we know exactly where that comes from—its UK mainland distribution centres—and it goes straight to the final destination of the shop in Northern Ireland. There is no threat to the EU Single Market, because we know the route exactly and there is traceability on that side of things.”<sup>85</sup>

105. The Government argues that the principle of ‘no tariffs on internal UK trade’, inferred from Article 5(1), needs to be formalised with the EU within the Joint Committee:

“There are various ways of making it work in practice. There are many cases where goods could automatically be classified as internal UK trade, particularly where a business could certify that it was selling its goods in Northern Ireland and not the EU, or where, for example, goods

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82 [Q 8](#)

83 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), paras 17, 25: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

84 *Ibid.* paras 25–26

85 [Q 20](#)

were perishable or it would be uneconomical to try to divert them in to the EU market through Northern Ireland.”<sup>86</sup>

106. The Command Paper adds that “the Government will also work closely with the Northern Ireland Executive and businesses to develop these proposals. We will produce full guidance to business and third parties before the end of the transition period.”<sup>87</sup>
107. **The stated objective of the Protocol is to avoid a hard border on the island of Ireland, and the intention of Article 5 is to achieve this while protecting the integrity of the EU Single Market. If the Northern Ireland economy is to be protected, the Protocol needs to be implemented in a way that takes full account of the unique circumstances in Northern Ireland, and in particular the reliance of its economic model upon fast and efficient supply chains within both the United Kingdom and the island of Ireland.**
108. **The Joint Committee is tasked with establishing criteria for determining that goods brought into Northern Ireland from outside the EU are not at risk of subsequently being moved into the EU, and with establishing the conditions under which processing is to be considered outside the scope of Article 5(2). The default position is that all goods, with specific exemptions set out in the Protocol, will be deemed to be ‘at risk’ of moving into the EU Single Market (and therefore subject to customs processes), unless the Joint Committee agrees otherwise. Likewise, the definition of processing in Article 5(2) is the default.**
109. **Whereas the Protocol refers only to goods ‘at risk’, the Government’s Command Paper, in an apparent effort to reinterpret the Protocol, introduces references to goods at clear, genuine and substantial risk.**
110. **Northern Ireland businesses have warned that an inflexible approach to these issues could be economically disastrous. The Command Paper provides some practical examples of activity that should be considered as internal UK trade and therefore should not incur tariffs. The Joint Committee will need to take a proportionate approach as it discusses these issues.**
111. **The Government’s explanation of how such exemptions would work in practice is imprecise. It commits to providing full guidance before the end of the transition period, but time is running out, and businesses will need certainty well before 1 January 2021 if they are to make adequate preparations.**
112. **In order to make a compelling case to the EU, the Government urgently needs to explain in detail how its proposals for automatic classification of goods as internal UK trade would work in practice. The Government also needs to use the new business engagement forum to provide clarity to and support for Northern Ireland business.**

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86 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), paras 25–26: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol\\_gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol_gov.uk.pdf) [accessed 22 May 2020]

87 *Ibid.* para 28

*Streamlined customs processes*

113. In its Command Paper, the Government stressed that it would “ensure these electronic [customs] processes are streamlined and simplified to the maximum extent, and we will set out more detailed plans for extensive HMRC support for businesses engaged in them”. The Government also committed to reviewing these new procedures on an annual basis, and, “if they should turn out to impose a disproportionate burden on goods moving wholly within the UK, we will consider how this burden can be reduced further or removed”.<sup>88</sup>
114. The Government also stressed that UK authorities would administer these rules, and would be able to exercise discretion, including with regard to the risk assessment of goods. They suggested that, given the lower risk, the level of checks could be below the 4% rate operated by the UK for third country movements notified through customs declarations, and the 1% physical fiscal checks of consignments.<sup>89</sup>
115. **The Government states that it will seek to streamline and simplify customs processes, but provides little detail on how it will do so. We call on the Government in the Joint Committee to investigate the potential for bespoke forms, and for the completion of single forms per load rather than for each individual consignment, thereby minimising the checks required. Such flexibility will be vital in securing the continued viability of the supply chains on which the Northern Ireland economy depends.**
116. **The Government also commits to set out more detailed plans for HMRC support for businesses, but again, time is short: this engagement needs to start immediately, keeping businesses informed of the Joint Committee’s deliberations and the steps that HMRC will take to implement the new systems as they take shape. The Government commits to reviewing the new procedures on an annual basis, but it is unclear how much discretion the Government will have to reduce the administrative burden if they are found to be disproportionate.**
117. **The Government needs to explain what it means when it states that it has discretion in relation to the risk assessment of goods. Greater discretion on the Government’s part may inhibit the EU’s willingness to show flexibility in the operation of Article 5.**

*Other exemptions under the Protocol*

118. The Protocol sets out a number of other explicit exemptions or caveats.

*Fisheries and aquaculture products*

119. Northern Ireland’s fishing fleet comprises approximately 310 registered vessels, forming 6% of the UK’s fishing fleet. It takes a 17,000 tonne catch per year worth about £30 million in total.<sup>90</sup> However, the cultural and strategic

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88 *Ibid.* para 29

89 *Ibid.* para 30

90 ‘Northern Irish fishing community anxious over Brexit deal’, *The Guardian*, (26 November 2018): <https://www.theguardian.com/uk-news/2018/nov/26/northern-irish-fishing-community-anxious-over-brex-it-deal> [accessed 22 May 2020]

importance of the fishing industry for Northern Ireland goes beyond its economic significance.

120. Annex 2 to the Protocol applies a set of regulations on fisheries and aquaculture to Northern Ireland, including the Regulation establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. In its technical note on the implementation of the Protocol, the Commission acknowledged that under Article 5(3), Union customs legislation does not apply to and in the territorial waters of the UK. The Commission stressed, however, that UK fishing vessels are, for the purpose of the Protocol, considered third country vessels in Northern Ireland. They added that all landings in Northern Ireland of fish by UK or third country fishing vessels must be subject to EU customs rules, including EU customs tariffs, and SPS rules applicable in the EU to landings by third country vessels; and all landings in Northern Ireland of fish by UK or third country fishing vessels must be subject to the IUU Regulation, including as regards designated ports and prior notification requirements.<sup>91</sup>
121. Article 5(3) states that the Joint Committee will agree rules under which fisheries and aquaculture products brought into the Union by vessels flying the flag of the UK but registered in Northern Ireland will be exempt from duties.<sup>92</sup>
122. In its Command Paper, the Government acknowledged the importance of the fishing industry to Northern Ireland, and expressed its determination “to ensure that fishers from Northern Ireland are not placed at any disadvantage either through customs duties or associated barriers”.<sup>93</sup> We also note that during consideration of the Fisheries Bill, the Government reiterated its commitment to the maintenance of the Voisinage Agreement, an informal agreement which allows Ireland and Northern Ireland vessels reciprocal access to fish in the 0–6 nautical mile zone of each other’s territorial waters.<sup>94</sup>
123. **We call on the Government to explain the impact of Article 5(3) and Annex 2 of the Protocol on vessels registered both in Great Britain and in Northern Ireland and operating in UK territorial waters around Northern Ireland. The Joint Committee should, in implementing these provisions, take all the measures necessary to ensure the continued viability of Northern Ireland’s fishing industry.**

#### *Reimbursing duties*

124. Article 5(6) provides scope for the UK to reimburse duties on goods brought into Northern Ireland;<sup>95</sup> waive customs debts in respect of goods brought into Northern Ireland;<sup>96</sup> provide for the circumstances under which customs duties are reimbursed on goods “shown not to have entered the Union”;<sup>97</sup> and

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91 European Commission, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland/Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

92 *Withdrawal Agreement* (19 October 2019), Protocol on Ireland/Northern Ireland, Article 5(3)

93 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), para 52: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol\\_gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol_gov.uk.pdf) [accessed 22 May 2020]

94 Lord Gardiner of Kimble, HL Deb 11 February 2020, [col 2225](#)

95 *Withdrawal Agreement* (19 October 2019), Protocol on Ireland/Northern Ireland, Article 5(6)(a)

96 *Withdrawal Agreement* (19 October 2019), Protocol on Ireland/Northern Ireland, Article 5(6)(b)

97 *Withdrawal Agreement* (19 October 2019), Protocol on Ireland/Northern Ireland, Article 5(6)(c)

to “compensate undertakings to offset” the application of these provisions.<sup>98</sup> The ability to reimburse is subject to the provisions of Article 10, on State aid, though in taking decisions under Article 10, the Commission “shall take the circumstances in Northern Ireland into account as appropriate”.

125. David Henig told us that, in order to qualify for a rebate on any EU duties paid, consumers and businesses would have to prove that the good concerned had not been subject to onward processing or sale.<sup>99</sup> The Northern Ireland Business Network said that goods on supermarket shelves should be covered (for instance through an Authorised Economic Operator scheme), but it was not clear if intermediate processes would be. They were uncertain whether inward processing relief could be applied in a way that was viable for sectors with a 1–1.5% margin, taking into account other SPS costs.<sup>100</sup>
126. In its Command Paper, the Government implicitly acknowledged the risk that the EU will not accept its argument concerning the definition of goods at risk, when it stated that it would “in any case” make “full use” of the provisions for reimbursement where goods were deemed to be at risk, in order to ensure that “trade flows freely”. It did not, however, elaborate on how they would operate in practice.<sup>101</sup>
127. **We welcome the Government’s commitment, reflecting the provisions of Article 5(6), to reimburse duties, waive customs debt or provide compensation to offset the impact of customs duties. But such a system is likely to be complex, and the Government needs to explain how it will work in practice. We invite the Government to confirm whether it will reimburse businesses for intermediate processes incurred in paying customs duties, and to explain how it will support businesses with small profit margins, for whom the costs of paying and seeking reimbursement for customs duties may prove prohibitive.**
128. **We also note that the provisions of Article 5(6) are subject to the provisions of Article 10, on State aid. We invite the Government to explain the impact of the Protocol’s State aid provisions on its ability to reimburse duties and waive customs debt.**

*Personal property and goods of negligible value*

129. Article 5(1) states that no duties will be payable on the movement of UK residents’ personal property from Great Britain to Northern Ireland. Article 5(7) states that no duties shall be payable on consignments of negligible value, sent from one individual to another, or contained in personal baggage.
130. David Henig said that there were certain *de minimis* requirements below which customs duties and VAT were typically not payable. In Ireland’s case, consignments under €22 are exempted.<sup>102</sup>

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98 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 5(6)(d)

99 [Q 8](#)

100 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

101 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), para 27: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

102 [Q 8](#)

131. **We welcome the fact that, under Article 5(1) and 5(7), no duties shall be payable on consignments of negligible value or on personal possessions.**

*Technological solutions*

132. Several of our witnesses referred to the work of the Government’s technical advisory group on alternative arrangements before the revised Withdrawal Agreement and Protocol were agreed. Colin Murray noted that there had been no update on its work since September 2019, and it was not clear if it had met since then. However, “if we are looking to reduce friction at the sea border, that group needs to stay operative. The problem has not gone away, it has just moved ... Trusted trader schemes and assurance schemes are all much easier to do in a sea border framework than they ever would have been with a land border framework.”<sup>103</sup> David Henig agreed.<sup>104</sup>
133. The Northern Ireland Business Network expressed concern at the length of time it would take for trusted trader schemes and Authorised Economic Operator status to become operational.<sup>105</sup> Sylvia de Mars highlighted Michael Gove’s statement that it would take until 2025 for a smart border to become operational.<sup>106</sup>
134. The Government’s Command Paper makes opaque references to use of “sophisticated data on trade flows for goods entering Northern Ireland” and “the latest technology, risk and compliance techniques”, in particular to combat fraud and smuggling.<sup>107</sup> It provides no further detail.
135. **We note the potential for technology to reduce the friction arising from customs checks required under the Protocol. We therefore regret that the Government’s technical advisory group on alternative arrangements appears to have gone into abeyance since the revised Protocol was agreed. We invite the Government to provide an update on the work of the group, and in particular on the potential for technological solutions to reduce the friction arising from customs checks under the Protocol.**
136. **The Chancellor of the Duchy of Lancaster has stated that a smart border will not be ready until at least 2025. Technological solutions, important as they are, currently only have the capacity to mitigate rather than to eliminate friction arising from customs checks and processes.**

*A UK-EU free trade agreement*

137. Article 13(8) holds out the possibility of the Protocol (or parts thereof) being superseded by a future UK-EU agreement. The Government’s ‘Explainer’ for the revised Protocol states that Article 5 was “designed to operate without

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103 [Q 16](#)

104 *Ibid.*

105 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

106 [Q 16](#)

107 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 28: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

a Free Trade Agreement between the United Kingdom and the EU in place. If an ambitious agreement with low or zero tariffs and quotas is concluded before the Protocol comes into force, then a significant proportion of goods would qualify for zero tariffs in any case.”<sup>108</sup>

138. David Henig told us:

“If we agree a free trade agreement between the UK and the EU that has no tariffs and no quotas, we will all breathe a deep sigh of relief and say, ‘Thank goodness we don’t have to deal with this issue in the Northern Ireland Protocol.’ If that is not the case and we fail to reach a free trade agreement by the end of the year and have to implement the Northern Ireland Protocol with tariffs and quotas in place, it will be even more complicated than we are saying at the moment.”<sup>109</sup>

139. Mr Henig added that regulatory alignment between the UK and the EU could further reduce the level of checks. EU trade agreements such as the EU/Canada Comprehensive Economic and Trade Agreement (CETA) typically include an equivalence regime, which reduces the percentage of products which are checked to as low as 1 or 2%. He also highlighted the importance of mutual recognition of Authorised Economic Operators within trade agreements. He concluded:

“I cannot think of a thin free trade agreement in the style of the EU-Canada agreement that has removed all checks. It will not remove checks in their entirety, but some will be removed ... The more one agrees with the European Union, whether in the form of a free trade agreement or in other mutual recognition agreements, the more checks between Northern Ireland and Great Britain one should be able to remove.”<sup>110</sup>

140. As we have seen, the Northern Ireland Business Network feared that even if a deep and comprehensive UK-EU deal was struck, tariffs would still be payable on goods coming into Northern Ireland from third countries, which would place it at a competitive disadvantage.<sup>111</sup> Without some flexibility around the application of Tariff Rate Quotas, complex customs procedures would be required for trade into Great Britain to claim back EU tariffs paid on inputs for goods manufactured for the UK market.<sup>112</sup>

141. **Article 13(8) makes provision for a future UK-EU trade agreement to supersede the Protocol (or parts thereof). A UK-EU free trade agreement could reduce (but not eliminate) the friction caused by customs and regulatory checks on goods moving between Great Britain and Northern Ireland. The greater the future regulatory alignment between the UK and the EU, the less burdensome such checks will be.**

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108 HM Government, *Explainer for the new Ireland/Northern Ireland Protocol and the Political Declaration on the future relationship* (18 October 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840653/EXPLAINER\\_FOR\\_THE\\_NEW\\_IRELAND\\_NORTHERN\\_IRELAND\\_PROTOCOL\\_AND\\_THE\\_POLITICAL\\_DECLARATION\\_ON\\_THE\\_FUTURE\\_RELATIONSHIP.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840653/EXPLAINER_FOR_THE_NEW_IRELAND_NORTHERN_IRELAND_PROTOCOL_AND_THE_POLITICAL_DECLARATION_ON_THE_FUTURE_RELATIONSHIP.pdf) [accessed 19 May 2020]

109 [Q 12](#)

110 [Q 15](#)

111 See para 48.

112 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

142. **From Northern Ireland's perspective, it is therefore highly desirable that a comprehensive UK-EU free trade agreement should be concluded by the end of 2020. If it is not, the consequences for Northern Ireland's economy arising from the imposition of all the checks and processes envisaged in the Protocol will be significant.**

## CHAPTER 7: PROTECTION OF THE UK INTERNAL MARKET AND TECHNICAL REGULATIONS (ARTICLES 6 AND 7)

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### Article 6: Protection of the UK internal market and the movement of goods from Northern Ireland to Great Britain

143. The Government's Command Paper asserts that, because the Protocol neither creates, nor provides for the creation of, "any kind of international border in the Irish Sea between Great Britain and Northern Ireland ... its provisions must entail the minimum possible bureaucratic consequences for business and traders, particularly those carrying out their affairs entirely within the UK customs territory". In the Government's view, this means that trade from Northern Ireland to Great Britain "should take place as it does now. There should be no additional process or paperwork and there will be no restrictions on Northern Ireland goods arriving in the rest of the UK."<sup>113</sup>
144. This assertion needs to be read in the context of Article 6, on 'Protection of the UK internal market', which primarily covers matters relating to the movement of goods from Northern Ireland to Great Britain. Article 6(1) states: "Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market." Article 6(2) states that, "having regard to Northern Ireland's integral place in the United Kingdom's internal market, the Union and the United Kingdom shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom", while taking "into account their respective regulatory regimes".<sup>114</sup>
145. Article 6(1) states that the provisions of EU law applied to Northern Ireland via the Protocol "which prohibit or restrict the exportation of goods" shall "only be applied ... to the extent strictly required by any international obligations of the Union".<sup>115</sup> The Joint Committee is enjoined to keep the facilitation of trade between Northern Ireland and the UK "under constant review", and is instructed to adopt "appropriate recommendations" to avoid controls at Northern Ireland's ports and airports "to the extent possible".<sup>116</sup> This implies that some checks and controls will nevertheless be necessary.

### *Checks and controls in relation to the prohibition or restriction of the export of goods*

146. The reference to prohibitions or restrictions being applied only "to the extent strictly required by any international obligation of the Union" is significant, since a number of EU sanctions or restrictive measures derive from binding Resolutions of the UN Security Council, for instance in relation to trafficking in firearms, endangered species or diamonds.<sup>117</sup> In its technical

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113 Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), paras 16–17: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

114 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 6(2)

115 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 6(1)

116 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 6(2)

117 European Commission, *EU Prohibitions and Restrictions for Customs* (June 2018): [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/prohibition\\_restriction\\_list\\_customs\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/prohibition_restriction_list_customs_en.pdf) [accessed 19 May 2020]

note on the implementation of the Protocol, the Commission interpreted this requirement as meaning that “all goods leaving Northern Ireland to either a third country or Great Britain are subject to prohibitions and restrictions applicable to exports under relevant Union law, without prejudice to Article 6(1) of the Protocol.”<sup>118</sup>

147. The Government’s Command Paper confirmed that checks and controls will be required on:

“goods falling within the very limited number of procedures relating to specific international obligations binding on the UK and the EU— for example, obligations on the movement of endangered species—and where traders want to use special procedures like duty suspense where we would continue to provide facilitations. We will ensure that the necessary procedures apply only to very minimal volumes of relevant trade necessary to comply with those obligations. For goods affected, the processes put in place in these very specific cases will have negligible implications for trade as a whole. We will provide guidance to the small number of traders affected before the end of the transition period.”<sup>119</sup>

148. **We welcome the Government’s confirmation that checks and controls will be required on goods moving from Northern Ireland to Great Britain to the extent necessary to meet the UK and the EU’s international law obligations (for instance to comply with resolutions of the UN Security Council imposing economic sanctions) regarding the prohibition or restriction of the export of goods. We invite the Government to set out the nature, scale and location of such checks and controls.**

*Exit summary declarations*

149. Article 6 also needs to be read in conjunction with Articles 5(3) and 5(4), which, as we have seen, apply EU customs legislation, including the Union Customs Code, to Northern Ireland.<sup>120</sup> In its technical note on the implementation of the Protocol, the Commission states that the UK has “committed to apply the relevant Union Customs Code formalities in respect of all goods leaving Northern Ireland to either a third country or Great Britain”.<sup>121</sup> The Union Customs Code implies a requirement to complete exit summary declarations on goods moving from Northern Ireland to Great Britain (or third countries), as a ‘Safety and Security Declaration’, which the EU uses to help enforce its international restrictions and prohibitions, referred to above.<sup>122</sup>

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118 European Commission, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland/Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

119 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), para 22: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

120 See paras 38–44.

121 European Commission, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland/Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

122 BBC, ‘Will Northern Irish ‘exports’ within UK need checks?’ (24 October 2019): <https://www.bbc.co.uk/news/business-50172896> [accessed 19 May 2020]

*The Government's view*

150. The Government's position on the requirement for exit summary declarations has lacked clarity in the months since the Protocol was published. When we asked Mr Barclay whether Northern Ireland businesses would have to complete export declarations when sending goods to Great Britain, he initially replied: "No. We have said, in terms of from Northern Ireland to GB, that it will be frictionless."<sup>123</sup> He then revised his answer: "Exit summary declarations will be required in terms of Northern Ireland to GB."<sup>124</sup> Shortly afterwards, in an apparent reference to Mr Barclay's widely quoted evidence, the Prime Minister said: "The great thing that has been misunderstood about this is, and I speak as the Prime Minister of the United Kingdom and a passionate unionist, there will not be checks on goods going from Northern Ireland to Great Britain."<sup>125</sup>
151. In the meantime, Jim Harra had told the Treasury Committee on 22 October 2019 that there would be "some administrative process, an electronic form, which will apply to goods moving from Northern Ireland to Great Britain", but said that the detail was yet to be settled: "In the coming months, we need to work both within the UK and together with the EU to understand precisely what those administrative processes will be."<sup>126</sup>
152. Mr Harra said that HMRC had predicted the cost of each such declaration would be between £15 and £56, "depending on the complexity of the declaration and the nature of the arrangement you use to make it".<sup>127</sup> He acknowledged that HMRC did not know what the precise impact of these provisions would be, because during the transition period "we have to go through a process with the EU to agree what these procedures are ... it is impossible to be definitive". He stated that it "will be intended to keep the paperwork as light as possible while addressing the obligations that we have agreed with the EU that we will meet in terms of protecting its market".<sup>128</sup>
153. At his appearance before the Committee on 5 May 2020, we asked Mr Gove if the completion of exit summary declarations was a requirement under the Protocol. He replied:
- "To my mind unfettered access is the single most important thing. One question that I ask is whether we can ensure that we are safeguarding the UK's internal market as well as the EU's single market. That is the approach that we will take, so we will see how that develops in the course of the conversations that we have."<sup>129</sup>
154. In its Command Paper the Government stated:
- "Our view is that it makes no sense for Northern Ireland businesses to be required to complete an export or exit summary declaration as

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123 Oral evidence taken on 21 October 2019 (Session 2019), [Q 9](#) (Rt Hon. Stephen Barclay MP)

124 Oral evidence taken on 21 October 2019 (Session 2019), [Q 10](#) (Rt Hon. Stephen Barclay MP)

125 BBC, 'No checks on goods between NI and GB, says PM' (8 November 2019): <https://www.bbc.co.uk/news/uk-northern-ireland-50344110> [accessed 19 May 2020]

126 Oral evidence taken before the Treasury Committee, 22 October 2019 (Session 2019), [Q 265](#) (Jim Harra)

127 Oral evidence taken before the Treasury Committee, 22 October 2019 (Session 2019), [Q 281](#) (Jim Harra)

128 Oral evidence taken before the Treasury Committee, 22 October 2019 (Session 2019), [Q 284](#) (Jim Harra)

129 Oral evidence taken on 5 May 2020, [Q 23](#) (Rt Hon. Michael Gove MP)

they send goods directly to the rest of the UK. Self-evidently goods being sent away from the Single Market cannot create a back door into it; and any such goods subsequently leaving the UK would be subject to both exit and entry checks anyway *en route* to their new destination. We believe that this pragmatic approach is a sensible one and should be agreed between the UK and the EU in the Withdrawal Agreement Joint Committee.”<sup>130</sup>

155. The Command Paper clarifies that these arrangements “will not cover goods travelling from Ireland or the rest of the EU being exported to Great Britain. The UK’s customs and regulatory regime will apply to EU goods and businesses exporting to Great Britain, subject ... to any preferential terms we agree through a Free Trade Agreement.”<sup>131</sup> While the Government intends to define a qualifying status for goods and businesses in Northern Ireland benefiting from unfettered access,<sup>132</sup> it has not explained how it will in practice distinguish between goods originating from Northern Ireland, or from Ireland and the rest of the EU, for the purposes of exit summary declarations.

*Witnesses’ view*

156. David Henig said that a failure to complete exit summary declarations on goods moving from Northern Ireland to Great Britain could, *prima facie*, lead to a most favoured nation breach under WTO terms, as well as creating an incentive for the movement of goods from mainland Europe into Great Britain via Ireland and Northern Ireland, in order to avoid checks at the Channel ports.
157. The Northern Ireland Business Network said that their understanding was that exit summary declarations would be required as a stock-take of goods leaving the Single Market. They pointed out that under the standard EU exit summary declaration form, 31 data elements (i.e. answers to questions) needed to be completed, and there was a €300 fine if the form was completed incorrectly. If the typical EU regime applied to Northern Ireland to Great Britain movement, there would be one form per consignment. They said that this could require 70 forms for a single lorry, and that completion of these forms would mostly be delegated to the logistics providers, who would be relying on the exporter for information.<sup>133</sup>
158. The Northern Ireland Business Network also pointed out that many Northern Ireland businesses had no experience in this area, but would suddenly have to comply with new rules and procedures for moving goods to Great Britain. While large companies were making preparations in terms of training, SMEs did not have the staff to do the same. They called for the Government to negotiate a bespoke arrangement for exit summary declarations.<sup>134</sup>

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130 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), para 20: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

131 *Ibid.* para 23

132 See paras 170–171.

133 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

134 *Ibid.*

*Conclusion*

159. **The continued debate over whether or not exit summary declarations will be required on goods moving from Northern Ireland to Great Britain, with differing views expressed by Ministers and officials, has been unhelpful to Northern Ireland businesses, who urgently need clarity.**
160. **Articles 5(3) and 5(4) apply EU customs law, including the Union Customs Code, to Northern Ireland. This includes a requirement for the completion of exit summary declarations on goods moving from Northern Ireland to Great Britain. We therefore concluded in our January 2020 report that “exit summary declarations are likely to be required for goods moving from Northern Ireland to Great Britain, unless and until the parties agree alternative arrangements to facilitate the movement of such goods”.**
161. **Northern Ireland stakeholders have expressed serious concern at this new administrative burden. They have drawn attention to the complexity of the standard EU exit summary declaration form, and the lack of readiness of many Northern Ireland businesses, particularly SMEs.**
162. **In contrast to its previous statements, the Government now argues that Northern Ireland businesses should not be required to complete an exit summary declaration as they send goods directly to the rest of the UK. Given the concerns of Northern Ireland businesses, the EU should take this argument seriously, but the Government in turn needs to explain how such an exemption can be reconciled with the EU’s international obligations under the Union Customs Code. The Government also needs to explain how it will in practice distinguish between goods originating in Northern Ireland, or in Ireland and the rest of the EU, for the purposes of exit summary declarations.**
163. **The EU also, as part of its wider commitment to support Northern Ireland, has a duty to ensure that these processes do not place an intolerable burden upon businesses. If exit summary declarations cannot be eliminated, the Joint Committee should consider means to streamline and simplify the process, in particular in the context of declarations for multiple consignments on a single load.**
164. **After months of uncertainty, this issue now needs to be resolved. If exit summary declarations are required, Northern Ireland businesses need to know precisely what will be required, and how, when and where declarations will need to be made. This in turn will require a programme of training for Northern Ireland businesses, and arrangements to support businesses after the Protocol has come into effect.**

*Unfettered market access to the UK internal market*

165. **Notwithstanding these provisions, Article 6(1) states that “nothing” in the Protocol will “prevent the UK from ensuring unfettered market access” for goods travelling from Northern Ireland to Great Britain. The Government has repeatedly made a unilateral commitment to guarantee in legislation**

before 1 January 2021 unfettered access for Northern Ireland’s businesses to the whole of the UK internal market, most recently in its Command Paper.<sup>135</sup>

166. The key question, in the context of the Government’s opposition to the completion of exit summary declarations, is the balance between the Protocol’s requirement to apply the Union Customs Code and its statement that nothing in the Protocol should prevent the UK ensuring unfettered access. Colin Murray acknowledged the “uneasy relationship” between Articles 5 and 6, which he said could lead to arbitration. David Henig observed that, while Article 6 states that nothing within the Protocol shall prevent unfettered access, “that does not mean that that is true of any other agreement, such as the commitments under World Trade Organization rules.” Dr Sylvia de Mars said that the EU and UK may disagree as to whether filling in some paperwork amounts to an infringement of unfettered access.<sup>136</sup>
167. The Northern Ireland Business Network stressed that, in order to access the Great Britain market in an unfettered manner, Northern Ireland businesses needed to be able to maintain relationships with suppliers, engage in the UK market, source raw material (such as meat) from Great Britain, process goods in Northern Ireland and then send them back. They explained that in some cases items cross the border back and forth several times in the course of production. They therefore needed to maintain supply chains across the island of Ireland, as businesses based in Northern Ireland sourced products from Ireland in order to supply the Great Britain market. They stressed that this should be a concern for the whole of the UK, given the important role that Northern Ireland businesses play in meeting UK-wide demand.<sup>137</sup>
168. In his evidence to us, Mr Gove repeatedly stressed the importance of the commitment to unfettered access:
- “We take that very seriously and want to make sure that the EU appreciates that as well. ... We stand by our determined obligation to help the Republic of Ireland and the EU to protect the integrity of the EU’s single market, but the Protocol holds in balance with that the requirement to ensure that the UK’s internal market operates effectively as well.”<sup>138</sup>
169. In a letter dated 8 April, Mr Gove described ‘unfettered access’ as meaning “no tariffs, no import processes, and no checks as these goods arrive in Scotland or Liverpool”.<sup>139</sup> In its Command Paper, the Government defined unfettered access as follows:
- No import customs declarations as goods enter the rest of the UK from Northern Ireland;

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135 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (20 May 2020), para 19: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

136 [Q 11](#)

137 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

138 Oral evidence taken on 5 May 2020, [Q 12](#)

139 Letter dated 8 April 2020 from Rt Hon. Michael Gove MP, Chancellor of the Duchy of Lancaster to Lord Kinnoull, Chair of the European Union Committee: <https://committees.parliament.uk/publications/690/documents/3408/default/> [accessed 19 May 2020]

- No entry summary ('safety and security') declaration as goods enter the rest of the UK from Northern Ireland;
  - No tariffs applied to Northern Ireland goods entering the rest of the UK in any circumstances;
  - No customs checks;
  - No new regulatory checks;
  - No additional approvals required for placing goods on the market in the rest of the UK; and
  - No requirement to submit export or exit summary declarations for goods leaving Northern Ireland for the rest of the UK.<sup>140</sup>
170. The European Union (Withdrawal Agreement) Act 2020 includes provision for the Government to define a qualifying status for goods and businesses in Northern Ireland benefiting from unfettered access. The Government committed in its Command Paper to engage with businesses and the Northern Ireland Executive on the means for delivering qualifying status, ensuring that the needs of Northern Ireland businesses are met.<sup>141</sup> However, it did not explain how it will in practice distinguish between qualifying Northern Ireland goods and goods originating in Ireland and the rest of the EU, in order to avoid Northern Ireland becoming a back door for goods entering the UK market from the EU without checks.
171. The Northern Ireland Business Network stressed that, in order to make it an attractive destination for investment, Northern Ireland goods will need to be treated as domestic in both the UK and EU markets. They said that it was largely in the gift of the UK Government to provide a unique definition for Northern Ireland goods for tariff, customs and goods of origin provisions in order for UK customs not to be applied.<sup>142</sup>
172. **We note the apparent contradiction between the commitment in Article 5 to apply the Union Customs Code in Northern Ireland, and that in Article 6, that nothing in the Protocol shall prevent the UK from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the UK. The Government needs to explain how this will be resolved in practice.**
173. **The key concerns for Northern Ireland businesses in terms of unfettered access are maintaining the practical ability to service the Great Britain market, maintaining supply chains both across the UK and the island of Ireland, and sourcing and processing raw material to and from Great Britain. In bringing forward legislation to give effect to its commitment, the Government must prioritise these concerns. We urge the Government to intensify its engagement and consultation with Northern Ireland stakeholders.**

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140 Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 19: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol\\_gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol_gov.uk.pdf) [accessed 22 May 2020]

141 *Ibid.* para 24

142 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

174. **The Government has committed to defining a qualifying status for Northern Ireland goods and businesses. It needs to provide more information on this definition, and in particular to explain how it will in practice distinguish between qualifying Northern Ireland goods, and goods originating in Ireland and the rest of the EU, in order to avoid Northern Ireland becoming a back door for goods entering the UK market from the EU without checks. It also needs to set out if it will allow for Northern Ireland products to be treated as qualifying domestic goods in both the UK and EU markets.**

*UK common frameworks*

175. The tension between Articles 5 and 6 in turn calls into question Northern Ireland’s participation in UK-wide common frameworks, which the UK Government has been developing with the Devolved Administrations “to create a common approach across the UK in a range of policy areas ... ensuring it remains simple for businesses from different parts of the UK to trade with each other ... and ensure the effective functioning of the UK internal market.”<sup>143</sup>
176. **We invite the Government to explain the impact of the Protocol upon Northern Ireland’s participation in UK-wide common frameworks being developed with the Devolved Administrations, which the Government has stressed are necessary to ensure the effective functioning of the UK internal market.**

**Article 7: Technical regulations, assessments, registrations, certificates, approvals and authorisations**

177. Article 7 of the Protocol imposes additional regulatory and technical obligations on Northern Ireland. These include the application to goods moving from the EU into Northern Ireland<sup>144</sup> of the EU’s rules prohibiting quantitative restrictions on imports and measures having equivalent effect,<sup>145</sup> a requirement to introduce a “United Kingdom (Northern Ireland)” or “UK(NI)” marking for the labelling of goods produced in Northern Ireland,<sup>146</sup> and provisions regarding technical regulations, assessments, registrations, certificates, approvals and authorisations.<sup>147</sup>

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143 HL Deb, 4 April 2019, [col HLWS1449](#)

144 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 7(1)

145 Articles 34 and 36 of the [Treaty on the Functioning of the European Union](#)

146 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 7(2)

147 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 7(3)

## CHAPTER 8: VAT AND EXCISE (ARTICLE 8)

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178. Article 8 of the Protocol applies a range of EU rules on VAT and excise to Northern Ireland, as set out in Annex 3 to the Protocol.<sup>148</sup> It states that “in respect of Northern Ireland” the UK authorities will be responsible for the implementation of these rules, including the “collection of VAT and excise duties”, adding that “revenues resulting from transactions taxable in Northern Ireland shall not be remitted to the Union”. It also states that the UK may apply “VAT exemptions and reduced rates”, including zero rating, to goods in Northern Ireland corresponding to those that are applicable in Ireland (for example sanitary products).<sup>149</sup>
179. In its technical note on the implementation of the Protocol, the Commission interprets the provisions of Annex 3 as follows:
- EU VAT and excise rules applicable to imports into and exports out of the EU must be applied both on goods entering Northern Ireland from either a third country or Great Britain, and on goods leaving Northern Ireland to either a third country or Great Britain;
  - in respect of Northern Ireland, the supply of goods, to which the EU VAT and excise rules apply pursuant to the Protocol, must be distinguished for VAT purposes from the supply of services, to which the UK’s VAT rules apply;
  - for the proper application of VAT and excise rules to trade in goods between Northern Ireland and EU Member States, specific VAT identification and excise numbers will be required;
  - the “VAT e-commerce package” must be implemented in respect of Northern Ireland.<sup>150</sup>
180. Article 8 states that the Joint Committee will discuss the implementation of this aspect of the Agreement “regularly”, including any excise reductions and/or VAT exemptions. Where “appropriate” the Joint Committee can adopt measures for the “proper application” of these rules. It can also review their application, “taking into account Northern Ireland’s integral place in the United Kingdom’s internal market”, and adopt “appropriate measures” as necessary.
181. Jim Harra confirmed to the Treasury Committee that under these new arrangements “Northern Ireland would stay aligned with the EU’s VAT rules” in relation to goods.<sup>151</sup> However, Aodhán Connolly, Director of the

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148 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Annex 3

149 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 8. In its May 2020 Command Paper on *The UK’s Approach to the Northern Ireland Protocol*, the Government reaffirmed its intention to eliminate the 5% VAT rate on sanitary products across the UK from 1 January 2021, including in Northern Ireland. This is possible because Ireland also employs a zero VAT rate for sanitary products. See Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 41: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

150 European Commission, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland/Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

151 Oral evidence taken before the Treasury Committee, 22 October 2019 (Session 2019), [Q 295](#) (Jim Harra)

Northern Ireland Retail Consortium, told us that “the situation is just not ... clear”. He said that the VAT provisions in the Protocol “were desperately complicated” and stressed the need for urgent clarification.<sup>152</sup>

182. The Northern Ireland Business Network said that its understanding was that Northern Ireland-Great Britain trade would be zero-rated for export for VAT purposes, but businesses receiving goods in Great Britain from Northern Ireland would need to declare them as imports. They also observed that excise duty is normally paid at the point of arrival unless VAT and duty are different, but this requires firms to maintain a large working capital requirement. They warned of the impact on firms’ cashflows.<sup>153</sup>
183. In its Command Paper the Government confirmed that Northern Ireland remained bound by EU rules as regards VAT rates for goods. However, it argued that these provided “a good deal of flexibility already”. The Government expressed confidence that “we can use the flexibilities available, in the context of the wider commitments to Northern Ireland’s place in the UK internal market, to implement these aspects of the Protocol in a way which minimises new costs and burdens on businesses in Northern Ireland”.<sup>154</sup>
184. **The VAT and excise rules proposed in the Protocol, in particular the rules dealing with excise reductions and/or VAT exemptions, are complex, and Northern Ireland stakeholders urgently need to know how they will operate in practice.**
185. **We therefore call on the Government to provide detailed explanation of what the VAT provisions will mean for businesses based in or trading with Northern Ireland, including:**
- **their implications for trade from Great Britain to Northern Ireland;**
  - **their implications for trade from Northern Ireland to Great Britain, including confirmation that such trade is to be zero-rated for export for VAT purposes, but businesses receiving goods in Great Britain from Northern Ireland will need to declare them as imports;**
  - **the practical means by which the supply of goods (to which EU VAT and excise rules will be applied) will be distinguished from the supply of services (to which UK VAT rules will be applied);**
  - **The scope for the UK to take advantage of its ability to apply VAT exemptions and reduced rates in Northern Ireland that are applicable in Ireland;**
  - **Its response to concerns that the new rules could impose onerous working capital requirements upon firms, leading to cashflow problems.**

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152 Oral evidence taken on 29 October 2019 (Session 2019), [Q 10](#) (Aodhán Connolly)

153 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

154 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) paras 41–42: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

186. **We note that the Joint Committee will keep these provisions under review, taking into account Northern Ireland's integral place in the UK's internal market. We urge the Joint Committee to ensure that the VAT and excise provisions do not place unsustainable burdens on businesses based in or trading with Northern Ireland.**

## CHAPTER 9: STATE AID (ARTICLE 10)

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### Introduction

187. Article 10 sets out provisions binding Northern Ireland to a whole range of the EU's State aid rules, as set out in Annex 5 to the Protocol.<sup>155</sup> As we have seen, the mechanisms permitting the UK to reimburse customs duties or waive customs debt are also subject to State aid provisions, although, in taking decisions under Article 10, the Commission “shall take the circumstances in Northern Ireland into account as appropriate”.<sup>156</sup> Where the Commission examines information regarding a measure by the UK authorities that may constitute unlawful State aid, it shall ensure that the UK is kept fully informed of the progress and outcome of the examination of that measure.

### The implications for UK State aid policy

188. George Peretz QC, Monckton Chambers, in evidence to the EU Internal Market Sub-Committee, explained that Article 10 provides that any UK measure that has an effect on trade in goods between Northern Ireland and the EU (and Ireland in particular) “is subject to the full panoply of the EU State aid regime from the end of transition onwards”. Mr Peretz said:

“When the UK Government signed up to that, they did not quite understand what they were signing up to ... because it applies to any UK measure. It is not confined to things done by the Northern Ireland [Executive] or to Northern Irish measures; it potentially affects anything that the UK Government do. A UK measure is anything that any UK public authority does.”

189. Mr Peretz summed up the position as follows:

“Provided that Northern Ireland remains very integrated in the UK economy, there will be a very large number of examples where things that the UK Government do are subject to the full panoply of EU State aid rules. That means the European Commission investigating, the European Commission ordering the UK Government what to do, and national courts, critically, applying State aid rules.”

He noted also that a person could go to a UK court on judicial review and argue that a particular UK measure contravenes Article 10 of the Protocol. The court could order the measure to be quashed on that basis, because Section 7A of the European Union (Withdrawal) Act 2020 provides that the Protocol has direct effect, therefore overriding an Act of Parliament.<sup>157</sup>

190. Dr Sylvia de Mars shared this analysis:

“If, for instance, a car manufacturer in Nottingham got a subsidy and traded its cars in Northern Ireland, that would run into the problem of aid affecting the single market, because those cars moving from Northern Ireland to the EU market would have an advantage in the sense that they had been subsidised in one way or another. Due to the way that Article 10 and Annex 5 of the Protocol work together, a lot of

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<sup>155</sup> [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 10. The list of applicable EU legislation on State aid is set out in Annex 5 to the Protocol.

<sup>156</sup> See para 124.

<sup>157</sup> Oral evidence taken before the EU Internal Market Sub-Committee, 5 March 2020 (Session 2019–21), [Q 17](#) (George Peretz QC)

the State aid decisions that the UK would make would not appear to be connected to Northern Ireland specifically but, none the less, would be captured by the idea of trade between Northern Ireland and the EU being affected. So there is very limited space for movement in terms of big State aid action that the UK can take that would not be covered by EU law.”

Dr de Mars said that “to play it safe, the UK Government might in general wish to keep EU State aid rules in mind when deciding on any subsidies.”<sup>158</sup>

191. Colin Murray agreed with this analysis, and also stressed that the Commission retains the capacity to mount enforcement actions where it believes these State aid rules are being breached, and that under Article 12(4) the CJEU retains full jurisdiction over disputes under these elements of the Protocol.<sup>159</sup>
192. In evidence to the House of Commons Committee on the Future Relationship with the European Union, Mr Gove was asked if businesses based in Great Britain and trading with Northern Ireland would be subject to EU State aid regulations. He replied:
- “No, we do not believe so. The subsidy regime that the UK proposes to put in place after we have left the EU will be one that the EU will recognise as a robust system. More than that ... the effective working of the Protocol is a matter for the Joint Committee to resolve.”<sup>160</sup>
193. **Article 10 and Annex 5 of the Protocol apply EU State aid rules to the United Kingdom in respect of Northern Ireland. Article 5(6) places a requirement on the Commission, in taking decisions under Article 10, to take the circumstances in Northern Ireland into account as appropriate. It will therefore be for the Commission to show sufficient flexibility in its application of State aid rules to ensure that reasonable measures to support the Northern Ireland economy can be taken.**
194. **The effect of Article 10 and Annex 5 is also to apply EU State aid rules to the UK in any instance in which the support at issue affects trade in goods between Northern Ireland and the EU27. Our expert witnesses agree that this could mean that a UK State aid provision applying to the UK in general, which is above the minimum threshold provided by EU law, would be subject to the application of EU State aid rules under the Protocol, and potentially to EU intervention and judicial review.**
195. **The only certain way for the UK to avoid EU intervention in its State aid decisions would be to ensure that its independent State aid policy does not allow for the level of support available to industry to exceed that available under the EU regime. This may be implied in the Chancellor of the Duchy of Lancaster’s acceptance that the UK will maintain a State aid regime “that the EU will recognise as a robust system”. We therefore invite the Government to clarify the implications of Article 10 for the UK’s independent State aid regime,**

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158 [Q 13](#)

159 [Q 13](#), and written evidence from Colin Murray to the EU Internal Market Sub-Committee ([LPI0004](#))

160 Oral evidence taken before the Committee on the Future Relationship with the European Union, 11 March 2020 (Session 2019–21), [Q 25](#) (Rt Hon. Michael Gove MP)

**and the extent to which it will require the UK to adopt a model of support not exceeding the EU’s approach.**

### **Exemptions and caveats**

196. There are some limited exemptions and caveats to these provisions.

#### *Agricultural support*

197. Article 10(2) states that EU State aid provisions will not apply to measures by UK authorities “to support the production of and trade in agricultural products in Northern Ireland up to a determined maximum overall annual level of support”, and subject to compliance with the WTO Agreement on Agriculture. Annex 6 to the Protocol sets out the process whereby this determination will be made by the Joint Committee (including taking account of the UK’s future agricultural support scheme and expenditure incurred in Northern Ireland under the 2014–2020 Multiannual Financial Framework). If the Joint Committee fails to make a determination by the end of the transition period or within one year of the 2021–2027 Multiannual Financial Framework coming into force, the exemption for agricultural products will be suspended until the Joint Committee does so.

198. Dr de Mars explained that “the point of Article 10(2) is to avoid [agricultural support] being an issue and ensure that whatever replaces the CAP is not prohibited because of the Protocol”.<sup>161</sup> Mr Gove said that the principle that State aid support for the agricultural sector in Northern Ireland should not be dramatically at variance with the level of State aid available through the Common Agricultural Policy “seems to me an entirely fair approach”.<sup>162</sup>

199. In its Command Paper, the Government confirmed its support for maintaining the current maximum level of support for Northern Ireland’s agricultural sector, “whilst also providing suitable flexibility to respond to any market uncertainty and disruption”.<sup>163</sup>

200. **We welcome Article 10(2), which provides an exemption from EU State aid provisions for measures taken to support the agricultural sector in Northern Ireland. We note, however, that the Joint Committee will determine the initial level and percentage of support, and that, if it fails to do so, the exemption will be suspended until a determination is made.**

#### *Regional aid*

201. Colin Murray explained that Annex 5 to the Protocol provides for Northern Ireland to continue to benefit from regional aid exemptions to EU State aid rules, which enable support to be granted to new commercial projects within Northern Ireland as a proportion of the overall costs of a business’ planned project in Northern Ireland. Regional aid exemptions primarily operate on the basis of regional GDP per capita relative to an overall EU average. This automatic designation as an Assisted Area does not apply to Northern Ireland; rather, it is designated as such by the UK because it is a region

161 [Q 14](#)

162 Oral evidence taken on 5 May 2020 (Session 2019–21), [Q 22](#) (Rt Hon. Michael Gove MP)

163 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 51: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

which has been subject to long-standing difficulties. Annex 5 enables the UK to continue to designate Northern Ireland as an Assisted Area for as long as it meets the relevant requirements under EU law, even though it is no longer part of the EU.<sup>164</sup>

202. **We welcome the fact that Annex 5 to the Protocol allows the UK to continue to designate Northern Ireland as an Assisted Area in line with EU law, thereby allowing it to continue to benefit from regional aid. We invite the Government to confirm that it will take up this option.**

*Services*

203. In its Command Paper, the Government pointed out that the Protocol's provisions on State aid in relation to Northern Ireland only covered goods and the Single Electricity Market. Consequently, Northern Ireland will enjoy new flexibilities with respect to support for its service industries. The Government committed to provide further information before the end of the transition period on how these provisions should be operated by public authorities.<sup>165</sup>
204. **We note that the provisions of Article 10 do not cover services, and we invite the Government to provide clarity on the operation of the future State aid regime for services in Northern Ireland.**

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164 Written evidence from Colin Murray to the EU Internal Market Sub-Committee ([LPF0004](#))

165 Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 40: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

## CHAPTER 10: THE SINGLE ELECTRICITY MARKET AND OTHER AREAS OF NORTH-SOUTH COOPERATION (ARTICLES 9 AND 11)

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### The Single Electricity Market

205. Article 9 of the Protocol, alongside Annex 4, secures the continuation of Northern Ireland’s participation in the Single Electricity Market on the island of Ireland.<sup>166</sup> In our 2017 report on *Brexit: energy security* we expressed our support for preservation of the Single Electricity Market, noting that it benefited both Northern Ireland and Ireland in terms of energy security, decarbonisation and energy prices.<sup>167</sup>
206. In its technical note on implementation of the Protocol, the Commission interpreted the provisions in Annex 4 as follows:
- Internal energy market rules must apply in Northern Ireland insofar as they concern the generation, transmission, distribution, and supply of electricity, trading in wholesale electricity or cross-border exchanges in electricity; and
  - EU rules concerning industrial emissions and greenhouse gas emissions must apply in respect of the generation of electricity in Northern Ireland.<sup>168</sup>
207. The Command Paper confirmed that the Northern Ireland Executive would have primary responsibility for implementing the provisions of the Protocol pertaining to the Single Electricity Market.<sup>169</sup>
208. **We welcome the commitment in Article 9 and Annex 4 of the Protocol to the continuation of the Single Electricity Market on the island of Ireland. This will benefit Northern Ireland and Ireland in terms of energy security, decarbonisation and energy prices.**

### Other areas of North-South cooperation

209. Article 11 will require the Protocol, “in full respect of Union law”, to be implemented in such a way as to maintain the “necessary conditions for continued North-South cooperation” in the following areas: environment, health, agriculture, transport, education and tourism, energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. The operation of this provision will be kept “under constant review” by the Joint Committee, which may make “appropriate recommendations to the Union and the United Kingdom in this respect, including on a recommendation from the Specialised Committee”.

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166 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 9

167 European Union Committee, *Brexit: energy security* (10th Report, Session 2017–19, HL Paper 63), para 150

168 European Commission, Task Force for Relations with the United Kingdom, *Technical note on the implementation of the Protocol on Ireland / Northern Ireland* (30 April 2020): [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/20200430\\_note\\_protocol\\_ie\\_ni.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf) [accessed 19 May 2020]

169 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 47: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

210. Section 21 of the European Union (Withdrawal Agreement) Act 2020, in contrast, prohibits a UK Minister from agreeing to the making of a recommendation by the Joint Committee to alter the arrangements for North-South cooperation provided for by the Belfast/Good Friday Agreement, to establish a new implementation body, or to alter the functions of an existing implementation body.
211. Professor David Phinnemore said that “what we have in the Protocol is the bare minimum that one needs. For example, all Article 11 of the Protocol on North-South cooperation does is list the areas, even though we have an extensive mapping exercise undertaken”.<sup>170</sup> This joint mapping exercise, published in June 2019, identified the cross-cutting issues required to enable North-South cooperation to function.<sup>171</sup>
212. The Northern Ireland Business Network told us that it should not be assumed that North-South cooperation was preserved by the Protocol. The less comprehensive the final UK-EU agreement, the greater the risks posed to North-South cooperation in essential areas, such as security and healthcare provision.<sup>172</sup>

### *Immigration*

213. The Protocol does not cover immigration. Yet the Northern Ireland Business Network highlighted the potential disruptive effects of different immigration systems in Ireland and Northern Ireland. We were told that over half of employees in some companies in Northern Ireland were EU migrants. Such businesses, if they were unable to employ such low-paid migrant workers in future, would look enviously across the Irish border. This would place Northern Ireland businesses at a significant commercial disadvantage. It also opened up a risk of labour exploitation by criminal gangs, which could in turn require additional measures by Northern Ireland businesses to ensure the integrity of their employment practices.<sup>173</sup>

### *Services*

214. Professor David Phinnemore argued that the Protocol was a “missed opportunity” to tackle North-South cooperation in services, and “to look for a broader understanding of how to support the all-Ireland economy and minimise the disruption of a border on the island of Ireland”.<sup>174</sup>
215. The Northern Ireland Business Network cited the flow of data, movement of people and mutual recognition of qualifications as three cross-cutting issues that affect cross-border cooperation. They stressed the need for a UK-EU

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170 Q 27

171 See HM Government, *Technical explanatory note: North-South cooperation mapping exercise* (7 December 2018): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/762820/Technical\\_note\\_-\\_North-South\\_cooperation\\_mapping\\_exercise\\_\\_2\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762820/Technical_note_-_North-South_cooperation_mapping_exercise__2_.pdf) [accessed 19 May 2020], Cabinet Office, *North-South Scoping Exercise* (20 June 2019): [https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Correspondence/UK%20Government%20scoping%20document%20\(1\).pdf](https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Correspondence/UK%20Government%20scoping%20document%20(1).pdf) [accessed 19 May 2020] and Cabinet Office, *North-South cooperation on healthcare: draft UK non-paper to support scoping work* (20 June 2019): [https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Correspondence/UK%20Government%20scoping%20document%20\(2\).pdf](https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Correspondence/UK%20Government%20scoping%20document%20(2).pdf) [accessed 19 May 2020]

172 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

173 *Ibid.*

174 Q 27

data adequacy agreement in order for the Protocol to function effectively. They also noted that, while the Protocol enables free movement of goods on the island of Ireland, it does not provide assurances about the capacity of haulage companies to move them, because services are not included. There is therefore still a question as to whether transport providers can drive products across the border.<sup>175</sup> Our Internal Market Sub-Committee explored this issue in its May 2019 report on *Brexit: road, rail and maritime transport*, which found that “the island of Ireland’s unique social and economic ties placed unique demands on its future transport arrangements”. The Committee stressed that, in contrast to the modest benefit to the UK of GB-EU cabotage for goods transport, it was vital to maintain cabotage rights on the island of Ireland.<sup>176</sup>

*Bilateral agreements between the UK and Ireland*

216. Professor David Phinnemore pointed out that the Council of the European Union has adopted a Decision<sup>177</sup> allowing the Council to authorise Ireland to conclude bilateral arrangements with the UK in areas of exclusive EU competence to ensure that the Protocol can be implemented effectively. He said: “There is very little talk about what that might mean, but once we move beyond the implementation period, there may be a mechanism there to address some of the issues on the island of Ireland that critics of the Protocol would say need to be addressed.”<sup>178</sup>
217. The Northern Ireland Business Network suggested that there may, for instance, be a need for a bilateral UK-Ireland deal on haulier services to enable busses, trucks and lorries to move goods around the island of Ireland.<sup>179</sup> The EU Internal Market Sub-Committee concluded that unique conditions on the island of Ireland may not be best served by broader negotiations on UK-EU transport arrangements, and that a solution may be found in an integrated bilateral approach.<sup>180</sup>
218. **We welcome the commitment in Article 11 that the Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation on the island of Ireland.**
219. **Nevertheless, we recognise that effective North-South cooperation is dependent on a wider framework than that contained in the Protocol, including effective cooperation in services. North-South cooperation across a range of sectors will depend heavily on the UK and the EU reaching agreement on trade in services, including a data adequacy decision governing the flow of data, movement of people to deliver services, and the recognition of professional qualifications.**

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175 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

176 European Union Committee, *Brexit: road, rail and maritime transport* (39th Report, Session 2017–19, HL Paper 355)

177 Articles 3 and 4 of Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ L 29*, 31 January 2020

178 [Q 30](#)

179 European Union Committee, Note of roundtable meeting with Northern Ireland Business Network (25 February 2020): <https://committees.parliament.uk/publications/409/documents/1540/default/> [accessed 19 May 2020]

180 European Union Committee, *Brexit: road, rail and maritime transport* (39th Report, Session 2017–19, HL Paper 355)

220. **We also acknowledge the concerns of Northern Ireland businesses about the potentially disruptive impact of any divergence of immigration policies in Ireland and Northern Ireland, including the risk of labour exploitation and competitive disadvantage for Northern Ireland businesses. We urge the Government to set out the steps it will take to mitigate any negative consequences of its post-Brexit immigration policy for Northern Ireland businesses.**
221. **Article 11 provides for the Joint Committee to keep under review and make recommendations to the UK and the EU on the impact of the Protocol on North-South cooperation. However, we note that Section 21 of the European Union (Withdrawal Agreement) Act 2020 prohibits a UK Minister from agreeing to the Joint Committee making any recommendation to alter the arrangements for North-South cooperation as provided for by the Belfast/Good Friday Agreement. We underline that any future changes to arrangements for North-South cooperation should be based on the principle of consent.**
222. **In this context, we note that the Council of the European Union may authorise Ireland to conclude bilateral arrangements with the UK in areas of exclusive EU competence to ensure that the Protocol can be implemented effectively. Such bilateral arrangements may in particular be necessary to maintain effective transport arrangements, including cabotage rights, on the island of Ireland. We invite the Government to explain in what areas of exclusive EU competence such bilateral agreements may be necessary or desirable.**

## **CHAPTER 11: IMPLEMENTATION, APPLICATION, SUPERVISION AND ENFORCEMENT, AND OTHER PROVISIONS (ARTICLES 12, 13, 16, 17 AND 19)**

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### **EU law applicable to Northern Ireland**

223. The Protocol at various points sets out the provisions of EU law that will apply, directly or indirectly, to the UK in respect of Northern Ireland:
- Article 2(1): the UK shall ensure no diminution of rights, safeguards or equality of opportunity, including protection against discrimination, as enshrined in the provisions of EU law set out in Annex 1;
  - Article 5(3) applies EU customs legislation to Northern Ireland;
  - Article 5(4) creates a single regulatory zone for goods on the island of Ireland by applying a host of EU technical rules and product standards as set out across 38 pages of the Annex 2 to the Protocol. These areas are summarised in our January 2020 report on the Withdrawal Agreement;<sup>181</sup>
  - Article 5(5): Articles 30 and 110 TFEU apply, prohibiting customs duties, internal taxation and quantitative restrictions on exports and imports between the EU and Northern Ireland;
  - Article 7(1): Articles 34 and 36 TFEU (restricting quantitative restrictions on imports other than in specified circumstances), together with the law of the UK, shall govern the lawfulness of placing goods on the market in Northern Ireland;
  - Article 8: The provisions of EU law on VAT and excise set out in Annex 3 are applied;
  - Article 9: The provisions of EU law governing wholesale electricity markets listed in Annex 4 are applied;
  - Article 10(1): The provisions of EU law on State aid set out in Annex 5 are applied;
  - Article 12(4): Elements of Article 267 TFEU as regards the powers of EU institutions and agencies are applied;
  - Article 13(7): Articles 346 and 347 TFEU as regards measures taken for the purposes of security are applied.
224. Professor David Phinnemore and Dr Sylvia de Mars said that these provisions in total amounted to around 300 pieces of EU legislation.<sup>182</sup>

### *Amendments or replacements of EU law listed in the Annexes to the Protocol*

225. As we have noted in respect of the rights of individuals (see Chapter 3), Article 13(3) states that, unless otherwise provided, references in the Protocol to a Union act “shall be read as referring to that Union act as amended or

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181 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 5(4). See European Union Committee, *Brexit: the revised Withdrawal Agreement and Political Declaration* (1st Report, Session 2019–20, HL Paper 4), Box 1

182 [Q 2, Q 24](#)

replaced”. Article 15(3) sets out how the UK will be notified of such changes: within the Joint Consultative Working Group, the EU shall inform the UK about planned Union acts that amend or replace Union acts listed in the Protocol.

226. Professor Phinnemore confirmed that the UK will be committed in respect of Northern Ireland to maintaining dynamic alignment with the legislation listed in the annexes, and that the UK will not be able to block the application of that legislation, or additions or amendments to it. He noted that while much of the *acquis* in these areas dates from the 1960s, some elements had been brought forward in the last 10 years: “The growth areas in EU legislation are not necessarily in the free movement of goods, so we should probably not overstate how much change there will be to that body. That said, there will be changes coming through.”<sup>183</sup>

*New EU legislation within the scope of the Protocol but which does not amend or replace EU acts listed in the Annexes*

227. In the case of a new act that falls within the scope of the Protocol, but which neither amends nor replaces a Union act listed in the Annexes, the EU is obliged first, under Article 15(3)(b), to inform the UK through the Joint Consultative Working Group of any such planned act, and second, under Article 13(4), to inform the UK in the Joint Committee of the adoption of that act. Upon the request of either side, the Joint Committee shall hold an exchange of views within six weeks of the request on the implications of the new act for the proper functioning of the Protocol. Following this, the Joint Committee shall either a) add the newly adopted act to the relevant Annex to the Protocol, or b) where agreement cannot be reached, examine “all further possibilities to maintain the good functioning of this Protocol” and take any necessary decision. If the Joint Committee fails to take a decision within a reasonable time, the EU shall, after giving notice to the UK, be entitled to take appropriate remedial measures.
228. Professor Phinnemore said that, while the UK would be able to resist entirely new pieces of legislation, “we do not know what the implications—the possible sanctions for non-implementation—will be if the EU deems it necessary for this legislation to apply in Northern Ireland. This will all have to be worked out in the Joint Committee in due course.”<sup>184</sup>
229. Dr Sylvia de Mars also noted the option for the EU, within six months, to take remedial action, which might involve raising tariffs, trying to pull back responsibilities or different types of cooperation: “In the event that the UK does not accept any new EU law coming in, the ways in which the EU can rebalance the Protocol are very general.”<sup>185</sup>
230. **Article 13(3) provides for Northern Ireland to remain subject to EU law in the Annexes to the Protocol on a dynamic basis, as they are amended or replaced. Under Articles 15(3)(b) and 13(4), the EU is also obliged to inform the UK of planned or adopted EU law that falls within the scope of the Protocol, but which neither amends nor replaces an EU act listed in the Annexes to the Protocol. Article 13(4) sets out a structured process by which the Joint Committee shall**

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183 [Q 25](#)

184 *Ibid.*

185 [Q 2](#)

**consider whether such laws should be added to the relevant Annex to the Protocol and thereby be applied to Northern Ireland.**

231. **While the UK is obliged to apply in Northern Ireland EU law which amends or replaces EU acts listed in the Annexes to the Protocol, it has no obligation in relation to new legislation that falls within the Protocol's scope but does not amend or replace the EU law listed in the Annexes. However, should it fail to agree to the addition of such acts to the relevant Annex to the Protocol, the EU is entitled to take "appropriate", but otherwise unspecified, remedial action.**
232. **We recommend that the Government establish a clear process to share any information it receives on planned and adopted EU law within the scope of the Protocol with the Northern Ireland Executive, Parliament, and, where relevant, the other devolved administrations.**

### **Implementing and applying EU law in Northern Ireland**

233. Article 12(1) of the Protocol states that the authorities of the UK will be responsible for implementing and applying the provisions of EU law that will be applied to Northern Ireland by the Protocol.<sup>186</sup> The means of doing so is set out in the European Union (Withdrawal Agreement) Act 2020 ('the 2020 Act'), and through the insertions it makes to the EU (Withdrawal) Act 2018 ('the 2018 Act').<sup>187</sup>
234. The rights and obligations arising under the Withdrawal Agreement are available in domestic law by virtue of new section 7A of the 2018 Act, inserted by section 5 of the 2020 Act. This includes those rights and obligations contained within the Protocol and its Annexes, meaning that some provisions in the Protocol will not require any further domestic legislation. For example, the obligation on the UK, under Article 2(1) of the Protocol, to ensure that no diminution of the rights set out in the Belfast/Good Friday Agreement results from the UK's withdrawal from the EU, is given effect in domestic law through new section 7A of the 2018 Act.
235. However, there will also need to be further domestic legislation to ensure that the Protocol is given full effect in the UK. The UK will be required to set up the framework necessary to give effect to the obligations contained in the Protocol. Furthermore, the provisions of Article 13(3) mean that domestic legislation will need to be amended as the Directives listed in the Annexes evolve. Section 21 of the 2020 Act therefore inserts new section 8C(1) into the 2018 Act, in order to provide a power to Ministers required to give effect to parts of the Protocol which require further implementation.

### *The responsibilities of the UK Government and the Northern Ireland Executive*

236. Sections 21 and 22 of the 2020 Act state that a UK Minister or a devolved authority (including a Northern Ireland Executive Minister), either acting alone or jointly, may make regulations to give effect to the Protocol. The Act does not define precisely the circumstances in which each of these options will be utilised, save that only a UK Minister may by regulations

186 *Withdrawal Agreement* (19 October 2019), Protocol on Ireland/Northern Ireland Article 12(1)

187 HM Government, *Memorandum concerning the Delegated Powers in the European Union (Withdrawal Agreement) Bill for the Delegated Powers and Regulatory Reform Committee* (19 December 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/854227/EU\\_Withdrawal\\_Agreement\\_Bill\\_-\\_Delegated\\_Powers\\_Memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854227/EU_Withdrawal_Agreement_Bill_-_Delegated_Powers_Memorandum.pdf) accessed 19 May 2020]. Much of the material in paras 233–237 draws directly on this memorandum.

define “qualifying Northern Ireland goods” for the purposes of the 2018 Act,<sup>188</sup> and a devolved authority may only make a regulation alone if it falls within its devolved competence. The Government has also reiterated the terms of the Sewel Convention, that it will “not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration”.<sup>189</sup> It has also confirmed that the Northern Ireland Executive will have primary responsibility for implementing the provisions of the Protocol covering the Single Electricity Market.<sup>190</sup>

237. The 2020 Act also specifies circumstances in which the necessary Statutory Instruments must be subject to the affirmative resolution procedure, at Westminster and/or the Northern Ireland Assembly (and other devolved legislatures), as applicable.<sup>191</sup> Any other Statutory Instrument is subject to the negative resolution procedure.<sup>192</sup>
238. Dr Sylvia de Mars said that, from a legal standpoint, the Protocol, as an international agreement, was wholly the UK Government’s responsibility: “That said, the EU will be wholly ambivalent about who in practice regulates. It does not care as long as it gets done, so it can be the responsibility of the Executive.”<sup>193</sup> Colin Murray agreed that, while the Northern Ireland Executive could give effect to EU law within its competence, “the [legal] obligation will continue to rest with the UK as the state responsible for Northern Ireland”.<sup>194</sup>
239. Colin Murray said that the powers set out in sections 21 and 22 were “skeletal” as regards the respective responsibilities of the UK Government and the Northern Ireland Executive, although he assumed that the devolved institutions would deal with matters of devolved competence. He also noted that they allowed “some opportunity for shared competences”.<sup>195</sup> Dr Gravey observed that there was some overlap between reserved and devolved competence, and in some areas it was not really clear where the competence currently lay.<sup>196</sup>

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188 See para 170.

189 HM Government, *Memorandum concerning the Delegated Powers in the European Union (Withdrawal Agreement) Bill for the Delegated Powers and Regulatory Reform Committee* (19 December 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/854227/EU\\_Withdrawal\\_Agreement\\_Bill\\_-\\_Delegated\\_Powers\\_Memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854227/EU_Withdrawal_Agreement_Bill_-_Delegated_Powers_Memorandum.pdf) [accessed 19 May 2020]

190 See paras 205–208. See also Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 47: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

191 A regulation is subject to the affirmative resolution procedure if it: amends, repeals or revokes primary legislation or retained direct principal EU legislation; establishes a public authority; relates to a fee in respect of a function exercisable by a public authority in the UK; creates, or widens the scope of, a criminal offence; creates or amends a power to legislate; or defines or facilitates the access to the market within Great Britain of qualifying Northern Ireland goods.

192 HM Government, *Memorandum concerning the Delegated Powers in the European Union (Withdrawal Agreement) Bill for the Delegated Powers and Regulatory Reform Committee* (19 December 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/854227/EU\\_Withdrawal\\_Agreement\\_Bill\\_-\\_Delegated\\_Powers\\_Memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854227/EU_Withdrawal_Agreement_Bill_-_Delegated_Powers_Memorandum.pdf) [accessed 19 May 2020]

193 Q 6

194 Q 3

195 Q 2

196 Q 26

240. Colin Murray expressed concern over the capacity of the Northern Ireland Executive to deal with Protocol-related issues. He also noted the “fragility” of the power-sharing institutions, which have only just been re-established. He suggested that the UK Government would therefore be obliged to step in if the Northern Ireland Executive “did not find itself in a position to fulfil its EU obligations”.<sup>197</sup> Dr Viviane Gräveley noted that, when the UK was in the EU, if Northern Ireland had devolved competence to implement a piece of legislation and was found to be in breach, legally and internationally the UK was in breach but the fine was taken from the block grant.<sup>198</sup>
241. **Sections 21 and 22 of the European Union (Withdrawal Agreement) Act 2020 provide for UK Ministers or the Northern Ireland Executive (and other devolved authorities) to make regulations to implement the Protocol, either alone, or together.**
242. **We invite the Government to set out the likely scale of the regulations required before 1 January 2021 to give effect to the obligations contained in the Protocol that it intends a) to make alone, b) to invite the Northern Ireland Executive (or other devolved authorities) to make, and c) to make jointly with the Northern Ireland Executive (or other devolved authorities). We also invite the Government to set out its criteria for deciding which of these approaches will be adopted. In particular, the Government should explain the rationale for making regulations jointly with the Northern Ireland Executive (and other devolved authorities), and the principles underpinning the emerging concept of shared competence in the context of the Protocol.**
243. **We call on the Government to set out the process by which it will consult and notify the Northern Ireland Executive and other devolved authorities on its proposed approach to making domestic regulations required under the Protocol. We also invite the Government to set out what action it will take if Northern Ireland Executive Ministers (or other devolved authorities) are unwilling or unable to make regulations necessary to implement the Protocol.**

*Primary legislation*

244. In addition to the powers to make regulations, issues relating to the implementation of the Protocol are relevant to at least three further pieces of primary legislation currently before Parliament: the Agriculture Bill, the Environment Bill and the Fisheries Bill.<sup>199</sup> The Northern Ireland Assembly Research and Information Service has published briefing papers on each of these bills, setting out the need for clarity on whether, and if so how, they take account of and are compliant with the terms of the Protocol. They have also raised queries concerning the potential for such legislation to lead to divergence between Northern Ireland and the rest of the UK, given the

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197 [QQ 2–5](#)

198 [Q 26](#)

199 See paras 122–123.

requirements of the Protocol as regards the application of EU law in these fields.<sup>200</sup>

245. **We note concern that the Agriculture Bill, the Environment Bill and the Fisheries Bill will lead to regulatory divergence between Northern Ireland and the rest of the UK in these areas. We therefore call on the Government to explain the interaction between these bills and the Protocol, and to set out whether, and if so how, these bills are compliant with the terms of the Protocol. We also invite the Government to confirm whether or not it anticipates issues of compliance with the Protocol arising in relation to any other current or planned primary legislation.**

### **EU supervision of the implementation and application of the Protocol**

246. Article 12(1) states that UK authorities shall be responsible for implementing and applying EU law applicable to Northern Ireland under the Protocol. Nevertheless, Article 12(2) states that EU representatives will have a right to be present at “any activities of the United Kingdom related to the implementation and application of provisions of Union law made applicable” by the Protocol, as well as activities related to the implementation and application of Article 5, on customs and movement of goods. The UK shall facilitate such presence, and, upon request, carry out control measures in individual cases for duly stated reasons.
247. The UK shall also provide, upon request, all relevant information relating to such activities, and the EU and UK authorities will “exchange information ... on a monthly basis” on the customs arrangements pertaining to goods moving from Great Britain into Northern Ireland and those governing goods at risk of subsequently moving into the EU.<sup>201</sup> Article 15(3) suggests that this exchange of information will take place in the Joint Consultative Working Group. Article 12(3) states that the Joint Committee shall determine the practical working arrangements for such exercise of the rights of EU representatives.
248. The Protocol does not specify if the exercise of such rights is confined to Northern Ireland, or if EU representatives can also exercise such rights in relation to measures in Great Britain falling within the scope of the Protocol.
249. Dr Sylvia de Mars said that it remained to be seen how intensive the EU’s systems of supervision would be, but the EU “has the right to send them to stand there with clipboards and take notes on whatever they see fit”. Colin Murray agreed that “the Commission has very broad powers in terms of point inspection ... The Commission will be very alive to any move to de-align regulations between the UK and the EU.”<sup>202</sup> Dr Viviane Gravey also

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200 See Northern Ireland Assembly Research and Information Service, *Briefing Paper: UK Fisheries Bill 2019–20* (5 March 2020): <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017–2022/2020/aera/1020.pdf> [accessed 19 May 2020]; Northern Ireland Assembly Research and Information Service, *Briefing Paper: Environment Bill 2019–20* (27 February 2020): <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017–2022/2020/aera/0820.pdf> [accessed 19 May 2020] and Northern Ireland Assembly Research and Information Service, *Briefing Paper: UK Agriculture Bill 2019–20* (19 February 2020): <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017–2022/2020/aera/0620.pdf> [accessed 19 May 2020]

201 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 12(2)

202 [Q 12](#)

said that, given how seriously it takes SPS controls, the EU was likely to treat such supervision in the same vein.<sup>203</sup>

250. **Article 12(2) of the Protocol gives EU representatives the right to be present during relevant activities of the authorities of the UK, and obliges the UK to facilitate this presence, provide all relevant information, and to carry out control measures in individual cases for duly stated reasons. While the scale of the EU’s supervisory activity remains to be seen, its potential scope is broad, particularly given the emphasis placed by the EU and its Member States on the need to protect the integrity of the EU Single Market.**
251. **We call on the Government to confirm whether the EU is able to exercise such rights only within Northern Ireland, or also within Great Britain in relation to measures taken under the Protocol.**

*The request to open an EU office in Northern Ireland*

252. In February and March 2020, the Secretary General of the European External Action Service, Helga Schmid, and the EU’s Chief Brexit Negotiator, Michel Barnier, twice wrote to the Permanent Secretary of the Foreign and Commonwealth Office, Sir Simon McDonald, asking for permission for the EU to open a Belfast office of the EU Delegation to the UK. On 27 April, the Paymaster General, Rt Hon. Penny Mordaunt MP, replied, stating:

“The UK cannot agree to the permanent EU presence based in Belfast which you propose. While Article 12 gives EU officials the right to be present during the activities of UK authorities related to the implementation and application of the Protocol, we do not accept that that necessarily requires an EU Delegation office in Belfast, or indeed any other permanent EU presence in Northern Ireland. Such work can be undertaken by other means, for example through ad hoc visits, which we would of course facilitate as necessary.”

253. Ms Mordaunt wrote that the Government rejected the request on three specific grounds:

- Given that proposals for joint UK-EU controls were consistently rejected by successive UK Governments, a permanent EU office with permanent staff whose primary purpose would be to engage in a form of supervision of UK implementation of the Protocol “is not consistent with the delicate balance of rights and responsibilities, on both Parties, set out in the Protocol.”
- The proposal would be politically divisive between the political parties and communities in Northern Ireland: “Both parties should therefore work to find a way to implement the Protocol’s requirements which is less contentious and more likely to deliver the necessary results.”

- While the Protocol states that the working arrangements will be determined by the Joint Committee, these discussions have yet to take place.<sup>204</sup>

254. The Government subsequently confirmed in its Command Paper that, for the purposes of Article 12, “the UK Government will not agree to a permanent EU presence in Northern Ireland”.<sup>205</sup> Mr Gove told us:

“Does the EU want to establish a diplomatic mission in Northern Ireland? If so, why not establish one in Edinburgh or Cardiff? The key thing also is that the Belfast Agreement is at the core of why the Protocol is necessary, and the presence of an EU mission of the kind outlined has certainly excited a degree of concern among the majority community in Northern Ireland.”<sup>206</sup>

255. **We note the EU’s request to open a Belfast office of the EU Delegation to the UK to allow EU officials to undertake the tasks envisaged under Article 12(2) of the Protocol, and the Government’s response. The disagreement on this issue is indicative of the lack of trust between the two sides. Yet the central issue is one of modalities, not principle: what matters is that EU technical staff can do their jobs so as to minimise delay and disruption. It is incumbent on the Joint Committee to find an early solution, satisfactory to all communities in Northern Ireland.**

*The jurisdiction of the CJEU and the EU’s executive agencies*

256. The Protocol will also confer full jurisdiction on the CJEU to oversee the operation of EU law applying to Northern Ireland in relation to customs and the movement of goods, technical regulations, VAT and excise, the Single Electricity Market and State aid; including the jurisdiction to hear applications for preliminary rulings<sup>207</sup> submitted by the courts of Northern Ireland.<sup>208</sup> The UK will have the right to participate in these proceedings as if it were a Member State. The EU’s executive agencies will also enjoy their normal powers within Northern Ireland in relation to these fields.<sup>209</sup>

257. Dr Sylvia de Mars said that the CJEU “still has the jurisdiction over the UK with respect to Northern Ireland that it has over the member states, which is to say on infringement proceedings and then an ability to fine. The Commission can chase up these things if there is a lack of compliance.”<sup>210</sup> Colin Murray observed that because the enforcement proceedings only cover specific Articles of the Protocol, “it is a very specific remedy focused on the protection of the European single market”.<sup>211</sup>

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204 Letter dated 27 April 2020 from Rt Hon. Penny Mordaunt MP, Paymaster General and Minister of State, to Michel Barnier, European Commission: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/881458/2020.04.27\\_Paymaster\\_General\\_to\\_Helga\\_Schmid\\_and\\_Michel\\_Barnier\\_1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881458/2020.04.27_Paymaster_General_to_Helga_Schmid_and_Michel_Barnier_1.pdf) [accessed 27 April 2020]

205 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 55: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

206 Oral evidence taken on 5 May 2020, Q 23 (Rt Hon. Michael Gove MP)

207 Under Article 267 of the [Treaty on the Functioning of the European Union](#)

208 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 12(4)

209 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland, Article 12(5)

210 Q 5

211 Q 8

258. **Northern Ireland’s compliance with EU rules in relation to customs and movement of goods, technical regulations, VAT and excise, the Single Electricity Market and State aid will be policed and enforced by the European Commission, the EU’s executive agencies and the CJEU, including the possibility of infringement proceedings and the imposition of fines for State liability. Save for the UK’s right to participate in Northern Ireland-based CJEU proceedings, this enforcement will take place without the additional privileges inherent in EU membership, such as membership of and full participation in the EU’s institutions and agencies.**

#### **Article 13: Common provisions and safeguards**

259. Article 13 deals with common provisions and essentially addresses the practicalities of the Protocol’s operation. We have already noted the provisions of Article 13(3) that any reference to a Union act, unless otherwise provided, “shall be read as referring to that Union act as amended or replaced”; of Article 13(4) concerning the adoption of a new act that falls within the scope of the Protocol, but which neither amends nor replaces a Union act listed in the Annexes to the Protocol; and of Article 13(8), regarding the impact of the Protocol of any subsequent agreement between the EU and the UK. Other matters covered include territorial scope;<sup>212</sup> application and interpretation of the CJEU’s case law;<sup>213</sup> and the exclusion of the UK from EU databases unless UK access is “strictly necessary”.<sup>214</sup>

#### **Article 16: Safeguards**

260. Article 16 enables either party to the agreement to take unilaterally “appropriate safeguards” if the application of the Protocol leads to “serious economic, societal or environmental difficulties”. Such safeguards must be “restricted” in their scope and “strictly necessary” to remedy the precise situation.<sup>215</sup> A procedure for the Joint Committee to resolve the imposition of safeguards<sup>216</sup> is set out in Annex 7 to the Protocol.

#### **Article 17: Protection of financial interests**

261. Article 17 imposes an obligation on both parties to counter fraud and other illegal activities affecting either’s financial interests.

#### **Article 19: Annexes**

262. Article 19 states that Annexes 1–7 shall form an integral part of the Protocol.

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212 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 13(1)

213 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 13(2)

214 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 13(5)

215 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 16(1)

216 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 16(3)

## CHAPTER 12: THE JOINT COMMITTEE, SPECIALISED COMMITTEE AND JOINT CONSULTATIVE WORKING GROUP (ARTICLES 14 AND 15)

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### The Withdrawal Agreement Joint Committee

263. The Withdrawal Agreement Joint Committee is responsible for the implementation and the application of the Withdrawal Agreement. It met for the first time on 30 March 2020, and its second meeting is expected to take place on 12 June. The Joint Committee Co-Chairs are Maroš Šefčovič, Commission Vice-President for Inter-institutional relations (with Michel Barnier acting as his alternate) and Rt Hon. Michael Gove MP, Chancellor of the Duchy of Lancaster (with the Paymaster General, Rt Hon. Penny Mordaunt MP, as his alternate). The Joint Committee's decisions and recommendations will be made by mutual consent and will be binding on the EU and the UK.
264. The EU has provided for Member States to attend meetings of the Joint Committee, and specifically for Ireland to attend meetings both of the Joint Committee, where the Protocol is under discussion, and of the Ireland/Northern Ireland Specialised Committee.<sup>217</sup> In its unilateral commitments as part of the January 2020 *New Decade, New Approach* document, which led to the restoration of the power-sharing institutions in Northern Ireland, the Government made a reciprocal commitment to “ensure that representatives from the Northern Ireland Executive are invited to be part of the UK delegation in any meetings of the UK-EU Specialised or Joint Committees discussing Northern Ireland specific matters which are also being attended by the Irish Government as part of the European Union's delegation”.<sup>218</sup> The Chancellor of the Duchy of Lancaster subsequently confirmed that the Northern Ireland Executive (and the Irish Government, on the EU side) had participated in the first meeting of the Joint Committee on 30 March.<sup>219</sup>

### The Joint Committee's role in relation to the Protocol on Ireland/Northern Ireland

265. There are various provisions in the Protocol that confer upon the Joint Committee specific tasks with regard to the operation of the Protocol. These are summarised in Table 1.

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217 Council Decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [2018/0427 \(NLE\)](#), 18 October 2019

218 HM Government, *New Decade, New Approach* (January 2020): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/856998/2020-01-08\\_a\\_new\\_decade\\_a\\_new\\_approach.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf) [accessed 19 May 2020]

219 Letter dated 5 April 2020 from Rt Hon. Michael Gove MP, Chancellor of the Duchy of Lancaster, to Lord Kinnoull, Chair of the European Union Committee: <https://committees.parliament.uk/publications/691/documents/3409/default/> [accessed 19 May 2020]

**Table 1: The functions of the Withdrawal Agreement Joint Committee in respect of the Protocol on Ireland/Northern Ireland**

<b>Article/Annex</b>	<b>Function</b>	<b>Timescale</b>	<b>Remedy</b>
Article 5(2)	Deciding and establishing the conditions under which commercial processing of goods is to be considered not to fall within the prescribed definition.	Before the end of the transition period, with power to amend its decision at any time.	Not specified
Article 5(2)	Deciding and establishing the criteria under which goods moving into Northern Ireland from the UK, or outside the EU, will be considered at “risk of subsequently being moved into the Union”.	Before the end of the transition period, with power to amend its decision at any time.	Not specified
Article 5(3)	Establishing the conditions under which fishery and aquaculture products will be exempt from duties.	Not specified	Not specified
Article 6(2)	Keeping under constant review the facilitation of trade from Northern Ireland to Great Britain, and to adopt appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible.	Ongoing	Not specified
Article 8	Discussing “regularly”, adopting measures for the proper application of, and reviewing the overall application of the provisions on VAT and excise.	Ongoing	Not specified

<b>Article/Annex</b>	<b>Function</b>	<b>Timescale</b>	<b>Remedy</b>
Article 10(2)/ Annex 6	Determining and adjusting the initial levels of support and initial minimum percentage in relation to exemptions from State aid rules for measures taken by the UK to support the agricultural sector in Northern Ireland.	By the end of the transition period, or within one year of entry into force of the 2021–2027 Multiannual Financial Framework	Suspension of the exemption on measures to support the agricultural sector.
Article 11	Keeping under constant review the impact of implementation and application of the Protocol for the maintenance of the necessary conditions for North-South cooperation, and the possibility of making recommendations to the EU and UK in this respect.	Ongoing	Not specified
Article 12(3)	Determining the practical arrangements under which EU officials will be present alongside the UK authorities responsible for implementing and applying the EU law applied by the Protocol within Northern Ireland.	Not specified	Not specified
Article 13(4)	Addressing the ramifications for Northern Ireland of subsequent EU legislation that falls within the scope of the Protocol but does not amend or replace legislation listed in its Annexes.	Exchange of views within six weeks of a request to do so, leading to a decision within a “reasonable time”.	The EU can take remedial measures from six months after informing the UK about a newly adopted Act.

Article/Annex	Function	Timescale	Remedy
Article 14	Considering recommendations on the functioning of the Protocol from the Ireland/Northern Ireland Specialised Committee.	Ongoing	Not specified
Article 16(3)/ Annex 7	Discussion, consultation and review in the event that either the UK or the EU takes, or is considering taking, safeguarding measures to address “serious economic, societal or environmental difficulties”.	Immediately after notification of an intention to take safeguarding measures; consultation on safeguarding measures every three months after their adoption.	Safeguarding measures can be taken one month after notification of the intention to do so.
Article 18(4)	In the event that the Northern Ireland Assembly decides not to extend the application of Articles 5–10 of the Protocol, making recommendations to the EU and the UK on necessary measures, taking into account the 1998 Belfast/Good Friday Agreement, with the possibility of seeking the views of the institutions created by it.	Within two years of the Northern Ireland Assembly deciding not to extend the application of Articles 5–10.	Articles 5–10 cease to apply two years after the Northern Ireland Assembly decides not to extend their application.

266. Dr Katy Hayward, Reader in Sociology, Queen’s University Belfast, said that it was “very significant” that the Joint Committee “in effect becomes a managing body for ... the Protocol”. She noted that its role had been “greatly increased” in the revised Protocol, and that “its decisions will ... have very direct implications for NI-GB relations on practical matters”. Yet the fact that so many matters were left to the Joint Committee to decide increased the uncertainty inherent in the Protocol.<sup>220</sup>
267. Table 1 shows that the functions of the Joint Committee fall into two broad categories. It is tasked with reaching key decisions in relation to customs and the movement of goods, State aid, the mechanisms for EU supervision, and new EU law within the scope of the Protocol. There is a weaker requirement to review or adopt recommendations in relation to the facilitation of trade between Northern Ireland and Great Britain, North-South cooperation, safeguards, and necessary measures if the Northern Ireland Assembly decides that Articles 5–10 should no longer apply. The provisions on VAT and excise cover both categories.
268. It is also noticeable that the Joint Committee’s powers of decision are narrowly defined. For instance, its power of decision in relation to customs and movement of goods is limited to the definitions of goods ‘at risk’ and processing, and exemptions for fisheries and aquaculture products. Similarly, its only power of decision in relation to State aid is with regard to the exemption of agricultural support. By contrast, the duties to review and adopt recommendations are broadly drawn.
269. The Protocol is also more specific about the timeframe for action and the remedies available in the event that the Joint Committee is unable to reach agreement, in relation to the Joint Committee’s powers of decision. For instance, the Joint Committee is tasked with reaching decisions on the definitions of goods ‘at risk’ and processing before the end of the transition period. Specific and detailed remedies are also set out in relation to State aid exemptions for the Northern Ireland agricultural sector, the application of new EU law within the scope of the Protocol, and safeguarding measures. By contrast, powers of review and to adopt recommendations tend to be open-ended both in terms of timeframe and remedy.
270. The Protocol is, however, notably silent in a number of areas about the remedies available if the Joint Committee cannot reach agreement. This is particularly so in relation to the provisions under Article 5 on customs and movement of goods, including on the definition of goods ‘at risk’. Given that the Joint Committee’s rules of procedure specify that its decisions should be reached by consensus, this raises the question as to the consequences of a failure to reach agreement in areas where the remedy is not specified. In its Command Paper, the Government noted that “the Withdrawal Agreement and the Protocol include rules for settling any disagreements between the UK and the EU on its interpretation.”<sup>221</sup> As we have seen, our witnesses stated that in cases where the remedy is not explicitly set out in the Protocol,

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220 Oral evidence taken on 29 October 2019 (Session 2019), [QQ 8, 11](#) (Dr Katy Hayward)

221 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 8: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

arbitration under the terms of the Withdrawal Agreement will be the end result.<sup>222</sup>

**271. The Withdrawal Agreement Joint Committee will play a vital (and, under the revised text, substantially enhanced) role in the operation and application of the Protocol on Ireland/Northern Ireland. The Joint Committee will review, adopt recommendations or make decisions on issues key to the functioning of the Protocol, including:**

- **in relation to the movement of goods from Great Britain to Northern Ireland, the definition of processing and goods ‘at risk’ of moving into the EU, and the potential duties payable on fisheries and aquaculture products;**
- **the impact of the Protocol on trade between Northern Ireland and Great Britain;**
- **the operation of the Protocol’s VAT and excise provisions;**
- **exemptions from State aid rules for Northern Ireland’s agricultural sector;**
- **the impact of the Protocol on North-South cooperation on the island of Ireland;**
- **the rights of EU representatives to be present at activities related to the implementation and application of EU law under the Protocol;**
- **the adoption of new EU law falling within the scope of the Protocol; and**
- **recommending necessary measures in the event that the Northern Ireland Assembly decides not to support the continued application of Articles 5–10 of the Protocol.**

**272. In view of the significance of its work, we welcome the Government’s commitment to ensure that representatives of the Northern Ireland Executive participate in meetings of the Joint Committee where the Protocol is under discussion. We note that the Northern Ireland Executive participated in the first meeting of the Joint Committee on 30 March.**

**273. The Joint Committee’s functions under the Protocol fall into two broad categories: powers of decision; and powers of review and to adopt recommendations. The scope, timeframe and remedies**

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<sup>222</sup> See paras 102, 166. Article 168 of the Withdrawal Agreement contains an ‘exclusivity clause’ which makes clear that: “For any dispute between the Union and the United Kingdom arising under this Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement.” Under Article 170 of the Withdrawal Agreement, if a dispute arises in the Joint Committee, and if no mutually agreed solution has been reached within three months after a written notice has been provided to the Joint Committee in accordance with Article 169(1), the Union or the United Kingdom may request the establishment of an arbitration panel. Under Article 174, the arbitration panel must refer issues raising questions of EU law to the CJEU. If there is no compliance with the ruling of an arbitration panel then temporary remedies can be granted by the panel including a lump sum or penalty payment to be paid to the complainant. Under Article 178, if there is continued non-compliance, or non-payment then the complainant would be entitled, upon notification to the respondent, to suspend relevant obligations under the Withdrawal Agreement.

**available in the event of non-agreement are all more specific in the case of the Joint Committee’s powers of decision, compared to the open-ended provisions in relation to the powers of review and to adopt recommendations. The ability of the Joint Committee to adjust the operation of the Protocol in a way the UK would wish may therefore be more constrained than the Government allows for.**

274. **The remedies available in the event that the Joint Committee is not able to reach agreement are undefined in a number of areas. This is particularly so in relation to the provisions in Article 5 on customs and the movement of goods, including the definition of goods ‘at risk’. In the event of a failure to reach agreement in these areas, arbitration under the terms of the Withdrawal Agreement will be the outcome.**

### **The Ireland/Northern Ireland Specialised Committee**

275. Article 165 of the Withdrawal Agreement states that, as well as supervising and facilitating the implementation and application of the agreement, the Joint Committee will oversee at least six ‘Specialised Committees’, including one on “issues related to the implementation of the Protocol on Ireland/Northern Ireland.”
276. Article 14 of the Protocol sets out the following tasks for the Ireland/Northern Ireland Specialised Committee:<sup>223</sup>
- Facilitate the implementation and application of the Protocol;
  - Examine proposals concerning the implementation and application of the Protocol from the North-South Ministerial Council and North-South Implementation Bodies set up under the Belfast/Good Friday Agreement;
  - Consider any matter of relevance to Article 2 (rights of individuals) brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland;
  - Discuss any point raised by the EU or the UK that is of relevance to the Protocol and gives rise to a difficulty; and
  - Make recommendations to the Joint Committee as regards the functioning of the Protocol.
277. The Protocol sets out two other specific functions for the Specialised Committee. As we have seen, Article 11(2) envisages the Specialised Committee making recommendations to the Joint Committee as regards the maintenance of the necessary conditions for North-South cooperation, although the Government has legislated to prevent a UK Minister from agreeing to the making of any subsequent recommendation by the Joint Committee.<sup>224</sup>

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223 There is some inconsistency between the UK and the EU as regards the name of the Specialised Committee. While the UK Government refers to it as the ‘Ireland/Northern Ireland Specialised Committee’ (INISC), the EU refers to it as ‘the Specialised Committee on the Protocol on Ireland/Northern Ireland’. We have followed the Government’s terminology.

224 See paras 209–210.

278. Article 12(3) states that the Specialised Committee shall make a proposal to the Joint Committee regarding the practical working arrangements regarding the exercise of the rights of EU representatives to be present during any activities of the UK related to the implementation and application of EU law made applicable by the Protocol.
279. Mr Gove confirmed that the work of the Specialised Committee will be conducted by representatives of the Commission and the UK Government. A senior UK Civil Servant, Brendan Threlfall, is the UK lead on the Specialised Committee.<sup>225</sup>
280. The Specialised Committee met for the first time on 30 April, with a Northern Ireland Executive representative forming part of the UK delegation, and a representative of the Irish Government forming part of the EU delegation.<sup>226</sup>
281. **The Ireland/Northern Ireland Specialised Committee has a number of strategic functions set out in Articles 11(2), 12(3) and 14 of the Protocol. In particular, it has a valuable role as a conduit for dialogue with the Northern Ireland Executive (which will be present at its meetings), the North-South Ministerial Council, the North-South Implementation bodies set up under the Belfast/Good Friday Agreement, and the Equality and Human Rights Commissions operating in Ireland and Northern Ireland. We invite the Government to clarify how the Specialised Committee will engage with these bodies.**

### **The Joint Consultative Working Group**

282. Article 15 states that a “Joint consultative working group on the implementation of this Protocol” shall be established. It will be composed of and co-chaired by EU and UK representatives, and will carry out its functions under the supervision of the Specialised Committee, to which it shall report. It must meet at least once a month, and information may be exchanged between meetings.<sup>227</sup> However, the UK and the EU did not agree to convene the Joint Consultative Working Group until the first meeting of the Specialised Committee on 30 April.<sup>228</sup> No details of its schedule of meetings have yet been released.
283. The Working Group will “serve as a forum for the exchange of information and mutual consultation”,<sup>229</sup> but does not have the power to issue “binding decisions”.<sup>230</sup> It will be a forum for exchange of information between both parties about implementation measures under the Protocol, for the EU to provide information on planned EU acts within the scope of the Protocol, for the EU to provide information necessary for the UK to comply with its obligations, and for the UK to provide information as required under the

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225 Evidence taken before the Committee on the Future Relationship with the European Union, 11 March 2020 (Session 2019–21), [Q 162](#) (Rt Hon. Michael Gove MP)

226 Cabinet Office, *Ireland/Northern Ireland Specialised Committee 30 April 2020—UK post-meeting statement* (30 April 2020): <https://www.gov.uk/government/news/irelandnorthern-ireland-specialised-committee-30-april-2020-uk-post-meeting-statement> [accessed 19 May 2020]

227 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 15(5)

228 Cabinet Office, *Ireland/Northern Ireland Specialised Committee 30 April 2020—UK post-meeting statement* (30 April 2020): <https://www.gov.uk/government/news/irelandnorthern-ireland-specialised-committee-30-april-2020-uk-post-meeting-statement> [accessed 19 May 2020]

229 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 15(1)

230 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 15(2)

Protocol that Member States are required to provide to each other or to EU agencies and institutions.

284. Professor David Phinnemore said that the Joint Consultative Working Group was a unique concept in EU external relations, which presented opportunities to ensure Northern Ireland's voice was heard and fed into the EU policy-making process. Dr Viviane Gravey also stressed the importance of drawing on the expertise of Northern Ireland civil society, including business groups, trade unions and environmental groups.<sup>231</sup> However, Professor Phinnemore noted that the extent to which the Government would permit Northern Ireland voices to feed into the Working Group had yet to be confirmed.<sup>232</sup>
285. The Government proposed in its Command Paper that the Joint Consultative Working Group should hold a dedicated meeting, involving external stakeholders, on implementation of Article 2 of the Protocol, on the rights of individuals.<sup>233</sup>
286. **The Joint Consultative Working Group, as established by Article 15 of the Protocol, is a unique concept in EU external relations. While it does not have decision-making powers, it will play an important function as the means by which the UK and the EU will exchange information about the implementation of the Protocol, planned EU acts within the scope of the Protocol, and the fulfilment of mutual obligations. Given its less formal mandate, and given the requirement on it to meet at least once a month, it has the potential to act as a productive and intensive facilitator of dialogue, not only between the UK and the EU, but also with stakeholders in Northern Ireland. It will also be in a position to anticipate, and assist in avoiding, potential problems.**
287. **We therefore regret the delay in convening the Joint Consultative Working Group. We urge both the EU and the UK Government to ensure that this embryonic body is developed to the full, as a means for both sides together to engage with and take account of the concerns of businesses, communities, and civil society in Northern Ireland. We call on the Government to set out more details of how the Working Group will operate, including its schedule of meetings, how it will engage with stakeholders, and how transparency and visibility of its work will be ensured, as well as the steps the Government proposes to take to ensure that the Working Group's full potential is realised.**

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231 [Q 27](#)

232 [Q 25](#)

233 Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 44: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

## CHAPTER 13: DEMOCRATIC CONSENT (ARTICLE 18)

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### Overview

288. Article 18 of the Protocol provides a mechanism for the UK to “provide the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5 to 10”, namely the Articles on: customs and movement of goods; protection of the UK internal market; technical regulations etc.; VAT and excise; the Single Electricity Market; and State aid. The other Articles of the Protocol, including on: the rights of individuals; the Common Travel Area; the customs territory of the UK; North-South cooperation; implementation, application, supervision and enforcement; common provisions; the Specialised Committee and Joint Consultative Working Group; safeguards; and protection of financial interests; are not subject to the consent mechanism, and, other than where they relate to Articles 5–10, will therefore continue to apply (unless, in line with Article 13(8), any of these provisions are superseded by a subsequent UK-EU agreement).
289. The democratic consent mechanism works as follows. Two months before the end of an “initial period”<sup>234</sup> of four years after the transition period expires, the UK will seek the Northern Ireland Assembly’s view on these arrangements, “in a manner consistent with the 1998 Agreement”. In other words, assuming the transition period ends on 31 December 2020, the UK Government will have to seek the Assembly’s views on extension of the Protocol’s provisions no later than 31 October 2024.
290. The Protocol states that the UK retains the unilateral right to decide the precise decision-making process.<sup>235</sup> Alongside the Protocol, the Government published a ‘unilateral declaration’ detailing its interpretation of the consent mechanism. Its provisions are set out in Box 1.

### **Box 1: Declaration by the Government concerning the operation of the ‘Democratic consent in Northern Ireland’ provision of the Protocol on Ireland/Northern Ireland**

At the time that the Government published the revised Withdrawal Agreement it also issued a ‘unilateral declaration’ detailing its interpretation of the consent mechanism set out in the Protocol. It includes contingency arrangements if, at the time that the deadline arrives for the Northern Ireland Assembly to express its view, Northern Ireland’s devolved institutions are suspended.

The unilateral declaration affirms that the “objective of the democratic consent process” in the Protocol “should be to seek to achieve agreement that is as broad as possible in Northern Ireland and, where possible, through a process taken forward and supported by a power sharing Northern Ireland Executive which has conducted a thorough process of public consultation”. It continues that this should “include cross-community consultation, upholding the delicate balance of the 1998 Agreement, with the aim of achieving broad consensus across all communities to the extent possible”.

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234 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 18(5)

235 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 18(2)

The Government undertakes to provide appropriate assistance to the Northern Ireland Executive in “any prior consultation with businesses, civil society groups, representative organisations (including of the agricultural community) and trade unions; and to do the same for Members of the Legislative Assembly, if at the time that consent is sought, neither the Northern Ireland Executive or the Legislative Assembly are operating”.

The declaration emphasises that the process for seeking consent to the ongoing operation of the Protocol on Ireland/Northern Ireland will have no bearing on the “constitutional status of Northern Ireland”, which remains subject to the provisions of the 1998 Belfast/Good Friday Agreement.

Paragraph 1 commits the Government to legislate for the requisite “democratic consent process”. Paragraph 2 sets out the Government’s promise to notify the relevant Northern Ireland officials of the date of any vote and the outcome to the EU. Paragraph 3 reflects the process set out in the Protocol. Paragraph 4 sets out a mechanism under which “any Member of the Legislative Assembly” can table a motion for the consent process where one “has not been proposed by the First Minister and deputy First Minister, acting jointly”.

Paragraphs 5 and 6, headed ‘Alternative process’, enjoin the UK Government to “provide for an alternative democratic consent process in the event that it is not possible to undertake the democratic consent process in the manner provided”. Such an alternative process must permit “democratic consent to be provided by Members of the Legislative Assembly if the majority of the Members of the Legislative Assembly, present and voting, vote in favour of the continued application of Articles 5 to 10 of the Protocol on Northern Ireland and Ireland in a vote specifically arranged for this purpose”.

*Source: HM Government, Declaration by Her Majesty’s Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the ‘Democratic consent in Northern Ireland’ provision of the Protocol on Ireland/Northern Ireland (19 October 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840232/Unilateral\\_Declaration\\_on\\_Consent.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf) [accessed 28 May 2020]*

291. If a “majority of Members of the Northern Ireland Assembly” vote in favour of continued application of Articles 5–10 of the Protocol, they will be extended for a “subsequent period” of four years.<sup>236</sup> If the Assembly’s decision in addition reflects “cross-community support”, the arrangements will be extended for a “subsequent period” of eight years. The Protocol defines “cross-community support” as either “a majority of those Members of the Legislative Assembly present and voting, including a majority of the unionist and nationalist designations”, or a “weighted majority (60%) of Members ... including at least 40% of each of the nationalist and unionist designations present and voting”.<sup>237</sup> Further votes will follow at the end of each subsequent period.
292. Paragraphs 7–9 of the unilateral declaration state that, in the event that consent is provided by a simple majority but without cross-community support, the UK Government will also commission an “independent review into the functioning of the Northern Ireland Protocol and the implications of any decision to continue or terminate alignment on social, economic and political life in Northern Ireland”. Such a review will make recommendations on a way forward and will conclude within two years of the vote.

<sup>236</sup> [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 18(5)

<sup>237</sup> [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland Article 18(6)

293. If the Assembly does not express its consent, then Articles 5–10 of the Protocol will cease to apply to Northern Ireland two years after the “initial” or, as the case may be, “subsequent” period expires. In this eventuality, the Joint Committee will make recommendations to the UK and the EU on necessary measures, which must take into account the obligations imposed by the 1998 Belfast/Good Friday Agreement. In so doing, the Joint Committee may seek an opinion from the institutions created under that Agreement.

### Analysis

294. The then Secretary of State for Exiting the European Union, Rt Hon. Stephen Barclay MP, described the inclusion of a consent mechanism as the “overarching change” the Government had secured in its renegotiation of the Protocol. In his view, it created a “shared incentive to minimise [the] burdens and impacts” created by the application of the trade rules proposed in the Protocol.<sup>238</sup> He argued that “there is a strong interest” for the EU to make the trade rules set down in the Protocol “work in the most proportionate and pragmatic way because it is subject to consent by the Northern Ireland Assembly at the end of four years”.<sup>239</sup>
295. The Government’s Command Paper developed this point:
- “The Protocol is not codified as a permanent solution; it is designed to solve a particular set of problems and it can only do this in practice as long as it has the consent of the people of Northern Ireland ... The implementation of the Protocol must therefore reflect the reality that the alignment provisions may not be in place for ever. The only arrangement that is likely to be enduring is one that is flexible and can adapt.”<sup>240</sup>
296. On the other hand, Colin Murray said that “there is almost an unreality to the question in that the call is massive for the Northern Ireland economy. It is a one-stop question. There are no gradations of being in or out; you take this call and potentially everything changes as soon as that happens.” He believed that there was thus “almost a chimera of democratic accountability in the process”.<sup>241</sup> Dr Viviane Gravey stressed that the perpetual prospect of changes to arrangements for trade “could be very problematic for all businesses here, not knowing which way to turn”.<sup>242</sup>
297. Professor David Phinnemore said that there was a lack of awareness that the democratic consent provisions only applied to Articles 5–10 of the Protocol. He said that the consent mechanism meant that the Protocol would remain a politically sensitive issue in Northern Ireland, particularly in the lead-up to votes. He was concerned that the Protocol would become “very politicised, particularly in the context of increasing discussion about the constitutional future of Northern Ireland”. While the assumption was that there was likely to be a majority in favour of keeping the Protocol, “we have the lived experience of the implications of checks, controls and differentiation between

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238 Oral evidence taken on 21 October 2019 (Session 2019), [Q 5](#) (Rt Hon. Stephen Barclay MP)

239 Oral evidence taken on 21 October 2019 (Session 2019), [Q 6](#) (Rt Hon. Stephen Barclay MP)

240 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226 (20 May 2020) para 4: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886289/2020-05-20\\_Command\\_Paper\\_UK\\_s\\_Approach\\_to\\_the\\_Northern\\_Ireland\\_Protocol-gov.uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf) [accessed 22 May 2020]

241 [Q 18](#)

242 [Q 28](#)

Northern Ireland and the UK to come. We do not know what the economic implications of those arrangements will be.”<sup>243</sup>

298. The Government has stated that, in the event that the Northern Ireland Assembly withdrew its consent to Articles 5–10, “the default in these circumstances would be standard EU-UK arrangements”.<sup>244</sup> However, Professor Phinnemore was concerned as to what would happen in practice:

“You then have a two-year period in which the provisions continue to apply, but there is no clarity about what happens at the end of that period. The default position is that Northern Ireland would simply be covered, in relation to the free movement of goods, by whatever arrangements are in place for the UK and the EU. Given where we are currently with UK ambitions for the future relationship and the UK’s refusal to contemplate signing up to a single market and customs arrangement with the EU, the consequence is that you are back to the prospect of checks and controls on the movement of goods on the island of Ireland ... That simply moves us back to a position in which the Irish border question is centre stage. If there is one benefit of the Protocol, it is taking the Irish border question out of the debate at the moment.”<sup>245</sup>

299. Dr Sylvia de Mars said that the Joint Committee’s consideration of what to do if the Assembly votes against retention of the Protocol would be “the world’s most unpleasant discussions”:

“This goes back to the pre-Withdrawal Agreement situation when we said that we needed an alternative to replace the backstop. We did not get very close to finding an alternative to the backstop when that was the goal. This is saying that we have something that resolves the border issue, but Northern Ireland does not want it any more, so now please find us something that avoids all borders for ever. I wish the politicians the best of luck.”<sup>246</sup>

300. **Given the sensitivity of the Protocol, we welcome the inclusion of a mechanism for members of the Northern Ireland Assembly to express democratic consent to the continued application of Articles 5–10 of the Protocol.**
301. **We note, however, that the democratic consent mechanism could exacerbate political division in the lead-up to each vote. It guarantees that the Assembly will be required repeatedly to debate the arrangements for trade within the UK and across the island of Ireland. The mechanism also creates the potential for significant economic instability and dislocation every four or eight years.**
302. **It is therefore incumbent upon the UK Government, the EU, the Irish Government, and the political parties in Northern Ireland to handle this process with care, taking full account of the political, economic**

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243 *Ibid.*

244 HM Government, *Explainer for the new Ireland/Northern Ireland Protocol and the Political Declaration on the future relationship* (18 October 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840653/EXPLAINER\\_FOR\\_THE\\_NEW\\_IRELAND\\_NORTHERN\\_IRELAND\\_PROTOCOL\\_AND\\_THE\\_POLITICAL\\_DECLARATION\\_ON\\_THE\\_FUTURE\\_RELATIONSHIP.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840653/EXPLAINER_FOR_THE_NEW_IRELAND_NORTHERN_IRELAND_PROTOCOL_AND_THE_POLITICAL_DECLARATION_ON_THE_FUTURE_RELATIONSHIP.pdf) [accessed 19 May 2020]

245 [Q 28](#)

246 [Q 18](#)

**and societal impact of the Protocol upon Northern Ireland. To that end, we welcome the provisions in the Government's unilateral declaration to facilitate consultation with Northern Ireland businesses and civil society in the lead-up to each vote.**

303. **There has been an assumption that, given the uncertainties that would result from a vote against continuation of Articles 5-10, the Assembly is almost certain to vote for their continued operation. But much depends on the implementation and operation of the Protocol, underlining how important it is that the UK and the EU, through their discussions in the Joint Committee, ensure that the Protocol is implemented in a proportionate way that protects, rather than damages, the Northern Ireland economy.**

## CHAPTER 14: PARLIAMENTARY SCRUTINY AND INTER-PARLIAMENTARY ENGAGEMENT

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### Introduction

304. The Northern Ireland Assembly has an explicit role through Article 18 in expressing democratic consent for the continuation of Articles 5–10 of the Protocol. However, given the UK Government’s overarching responsibility for the Protocol under international law, it is incumbent not only on the Assembly but also on the UK Parliament to scrutinise its implementation and operation.
305. Professor David Phinnemore said that there were “clear gaps” in terms of scrutiny of the Protocol, and “we need appropriate institutions in place to ensure that there is effective oversight and scrutiny of what is going on”.<sup>247</sup>
306. We have already reflected on the mechanisms for scrutiny of domestic regulations necessary to implement the Protocol.<sup>248</sup> There is also a particular requirement for parliamentary scrutiny of planned and adopted EU legislation within the scope of the Protocol;<sup>249</sup> and the work of the Withdrawal Agreement Joint Committee, the Ireland/Northern Ireland Specialised Committee and the Joint Consultative Working Group.<sup>250</sup>

### Scrutiny of planned and adopted EU legislation within the scope of the Protocol

307. During the years of the UK’s membership of the EU, this Committee’s primary function was to scrutinise draft EU legislation on behalf of the House. The European Scrutiny Committee performed an equivalent function in the House of Commons. Both Committees have stated that they will continue to exercise this scrutiny function for the duration of the transition period, given that EU law agreed during the transition period will continue to apply to the UK, and the EU Committee’s terms of reference were recently amended to reflect this. The Government has committed to continuing to provide Explanatory Memoranda on draft EU legislation during the transition period, and to setting out within them whether the draft legislation in question falls within the scope of the Protocol. Given the application of significant elements of EU law to Northern Ireland after the end of the transition period, there is also a question concerning the continued provision of information to Parliament about planned and adopted EU law within the scope of the Protocol.
308. **A significant body of EU law will continue to apply on a dynamic basis to Northern Ireland after the end of the transition period. Parliament will thus need to reflect on the mechanisms for scrutiny of draft EU legislation within the scope of the Protocol, and in particular on the balance between scrutiny in Westminster, the Northern Ireland Assembly, or both. Given the provisions of Article 13(4), this scrutiny should cover any new draft legislation that falls within the scope of the Protocol, whether or not it amends or replaces EU law listed in the Annexes to the Protocol.**

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247 [Q 27](#)

248 See para 237.

249 See paras 225–232.

250 See Chapter 12.

309. **The Government in turn has an obligation to facilitate such scrutiny. We therefore call on the Government to establish formal mechanisms for prompt communication to Parliament of information received from the EU in the Joint Committee and Joint Consultative Working Group on planned or adopted EU legislation falling within the scope of the Protocol.**

**Scrutiny of the Joint Committee, Ireland/Northern Ireland  
Specialised Committee and Joint Consultative Working Group**

310. The mechanisms for ensuring the transparency of the Joint Committee, the Ireland/Northern Ireland Specialised Committee and the Joint Consultative Working Group are limited. The Withdrawal Agreement states that meetings of the Joint Committee are confidential, unless otherwise decided by the co-chairs. The EU and UK will each be able to decide (individually) whether to publish the decisions and recommendations adopted by the Joint Committee, but there is no obligation to do so. Minutes will not be made publicly available, although the co-chairs can opt to make summaries public.<sup>251</sup>
311. In our March 2019 report *Beyond Brexit: how to win friends and influence people*, we expressed concern both over “the lack of transparency in the work of the ... Joint Committee”, and over the lack of any provision for Parliament to oversee or influence its work. We called for meeting schedules, agendas, decisions and recommendations of the Joint Committee to be made available to Parliament in timely fashion.<sup>252</sup>
312. The Government’s intention is to publish a Written Ministerial Statement ahead of each meeting of the Joint Committee, including the agenda, and also afterwards, outlining the decisions taken. Mr Gove published a Written Ministerial Statement before the first meeting of the Joint Committee on 30 March,<sup>253</sup> and wrote to Committee Chairs in both Houses after the meeting in lieu of a Written Ministerial Statement, as Parliament had adjourned for the Easter recess.<sup>254</sup>
313. In a letter to a number of Chairs of House of Commons Committees on 25 March, Mr Gove stated that “the work of the Specialised Committees will be undertaken by officials ... Specialised Committees cannot take decisions, so it is appropriate for Parliamentary scrutiny to focus on the [Withdrawal Agreement Joint Committee].” As a result, the agenda of the first meeting of the Ireland/Northern Ireland Specialised Committee was not notified to Parliament, but instead appeared on social media.<sup>255</sup> However, the

251 [Withdrawal Agreement](#) (19 October 2019), Annex VIII. See European Union Committee, *Brexit: the revised Withdrawal Agreement and Political Declaration* (1st Report, Session 2019–21, HL Paper 4), para 26. Dr Sylvia de Mars stated that it “appears that the Commission, via [UK Task Force], appears to wish to treat the [Withdrawal Agreement] as any other international agreement concluded by the EU, which comes with information obligations to [the European Parliament] and the Council both. What is missing is the detail of a) what body in the [European Parliament] and Council is assuming responsibility for the relevant information, and b) if the information that the Commission will extend actually satisfies what the [European Parliament] wishes to see for the purposes of ‘scrutiny’, per its Resolution of January 2020.” See supplementary written evidence from Dr Sylvia de Mars ([ZPI0001](#)).

252 European Union Committee, *Beyond Brexit: how to win friends and influence people* (35th Report, Session 2017–19, HL Paper 322), paras 122–125

253 HC Deb, 25 March 2020, [col HCWS190](#)

254 Letter dated 5 April 2020 from the Rt Hon. Michael Gove MP, Chancellor of the Duchy of Lancaster, to Lord Kinnoull, Chair of the European Union Committee: <https://committees.parliament.uk/publications/691/documents/3409/default/> [accessed 19 May 2020]

255 @JenniferMerode, Tweet on 16 April 2020: <https://twitter.com/JenniferMerode/status/1250707746367905793> [accessed 27 May 2020]

Government did publish a statement after the first meeting.<sup>256</sup> Mr Gove's position appeared to have softened by 5 May, when he told us that "we will do everything we can to update" Parliament on the work of the Specialised Committee, "and allow it to interrogate the approach that we and the EU are taking".<sup>257</sup>

314. Neither the Government nor the EU have indicated whether, and how, they will provide information about the work of the Joint Consultative Working Group.
315. **The mechanisms to ensure transparency of the Withdrawal Agreement Joint Committee, the Ireland/Northern Ireland Specialised Committee and the Joint Consultative Working Group are extremely limited, and the Government's commitments thus far do not go far enough. In particular, we repeat our call for meeting schedules, agendas, decisions and recommendations of the Ireland/Northern Ireland Specialised Committee and the Joint Consultative Working Group to be published. We also call for full and informative Written Ministerial Statements at appropriate points.**
316. **The provision of such information on the work of these bodies is not only necessary to provide transparency and accountability, but also to provide Parliament, the Northern Ireland Assembly, and other stakeholders in Northern Ireland, with a means to engage with their work.**

#### **Inter-parliamentary engagement**

317. Westminster and the Northern Ireland Assembly have a common interest in such scrutiny. Dr Viviane Gravey noted that the Northern Ireland Assembly had a specific role to play in: scrutinising the contribution of Northern Ireland Executive Ministers and officials to the development of UK positions and to meetings of the Joint and Specialised Committees; scrutinising the Joint and Specialised Committees themselves; and engaging with the institutions established under the Belfast/Good Friday Agreement as regards their own input to the Protocol's implementation.<sup>258</sup> The *New Decade, New Approach* deal mandates the Executive to undertake an assessment of the impact of Brexit on the power-sharing institutions and on North-South and East-West relationships, and states that this work should be scrutinised by an Assembly Committee.<sup>259</sup>
318. Colin Murray called for the creation of mechanisms for coordinated scrutiny, between Westminster and the Northern Ireland Assembly, for instance the formation of joint committees.<sup>260</sup> Dr Viviane Gravey also suggested that Westminster and Northern Ireland Assembly Committees could take joint

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256 Cabinet Office, Ireland/Northern Ireland Specialised Committee 30 April 2020: UK post-meeting statement (30 April 2020): <https://www.gov.uk/government/news/irelandnorthern-ireland-specialised-committee-30-april-2020-uk-post-meeting-statement>. [accessed 19 May 2020] See also European Commission, *Statement following the first meeting of the Specialised Committee on the Protocol on Ireland/Northern Ireland*, (30 April 2020): [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_20\\_787](https://ec.europa.eu/commission/presscorner/detail/en/statement_20_787) [accessed 19 May 2020]

257 Oral evidence taken on 5 May 2020 (Session 2019–21), [Q 11](#) (Rt Hon. Michael Gove MP)

258 [Q 26](#)

259 HM Government, *New Decade, New Approach* (January 2020): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/856998/2020-01-08\\_a\\_new\\_decade\\_a\\_new\\_approach.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf) [accessed 19 May 2020]

260 [Q 5](#)

evidence on both reserved and devolved matters.<sup>261</sup> Professor Phinnemore suggested that parliamentary bodies should be brought together on a North-South and East-West basis to scrutinise the Protocol and hear evidence from UK and Irish Ministers as appropriate.<sup>262</sup>

319. During our visit to Belfast in February 2020 we met the Chairpersons and Deputy Chairpersons from the Assembly’s Committee for the Executive Office (which has overall responsibility for scrutinising Protocol-related issues) and from a number of the Assembly’s subject-specific committees to whose remits the Protocol is particularly relevant, representing parties across the political spectrum. We were able at that meeting to discuss the potential avenues for cooperation between our Committees in relation to the Protocol.
320. We also note that Committees in the House of Commons, including the Northern Ireland Affairs Committee, are conducting inquiries into the Protocol.<sup>263</sup> Committees in the Scottish and Welsh Parliaments are also investigating the implications of the Protocol for Scotland and Wales.<sup>264</sup> The Inter-parliamentary Forum on Brexit, comprising the Chairs and Conveners of Committees scrutinising Brexit-related issues in the legislatures of the UK, has met quarterly since October 2017, and has provided an invaluable opportunity for inter-parliamentary exchange.
321. On the EU side, the Irish Oireachtas and the European Parliament will have a particular interest in scrutinising the Protocol. Since 2016 we have enhanced our already intensive engagement with our equivalent committees in the Oireachtas, including through reciprocal visits to Dublin and London. This engagement has built on the important work of the British-Irish Parliamentary Assembly in facilitating interparliamentary engagement between Westminster, the Oireachtas and the devolved legislatures.
322. At the time of writing, the structure for future engagement between the UK and European Parliaments remains unclear. The EU has proposed a ‘Parliamentary Partnership Assembly’, which would review the implementation of the future relationship agreement, and “make recommendations” to the overarching governance body established under that Agreement. It can be assumed that, while any such Assembly would be established under the future relationship agreement, not the Protocol, it would be used by parliamentarians of both sides to discuss issues concerning Northern Ireland. The Government has yet to respond to the EU proposal.
- 323. In view of the UK Government’s overall legal responsibility, the UK Parliament has a vital role to play in scrutinising the implementation and operation of the Protocol, and in holding the Government to account for its actions. It is in that spirit that we make this report.**

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261 [Q 26](#)

262 [Q 27](#)

263 Northern Ireland Affairs Committee, ‘Northern Ireland Affairs Committee to scrutinise “unfettered access”’ (5 March 2020): <https://committees.parliament.uk/committee/120/northern-ireland-affairs-committee/news/145377/northern-ireland-affairs-committee-to-scrutinise-unfettered-access/> [accessed 19 May 2020]

264 Oral evidence taken before the Culture, Tourism, Europe and External Affairs Committee, Scottish Parliament, 16 January 2020 (Aodhán Connolly, Professor David Phinnemore, Mairi Spowage): <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12464&mode=pdf> [accessed 22 May 2020] and External Affairs and Additional Legislation Committee, National Assembly for Wales, The Withdrawal Agreement: Implications for Wales (January 2020): <https://senedd.wales/laid%20documents/cr-ld12971/cr-ld12971-e.pdf> [accessed 22 May 2020]

324. **Given our mutual interest in effective scrutiny, there is also a need and an opportunity for enhanced inter-parliamentary engagement between Westminster and the Northern Ireland Assembly. We were pleased in the context of our visit to Belfast in February 2020 to meet the Chairpersons and Deputy Chairpersons of various Committees of the Northern Ireland Assembly, representing parties from across the political spectrum in Northern Ireland. We look forward to strengthening this dialogue and cooperation in the months ahead.**
325. **Scrutiny of the Protocol is also a high priority for Committees in the House of Commons, and, given the intensity of their trade, transport and cultural ties with Ireland and Northern Ireland, for the Scottish and Welsh Parliaments. We will seek to maintain our engagement with them, including through the work of the Inter-parliamentary Forum on Brexit.**
326. **On the EU side, the Irish Oireachtas and the European Parliament also have particular interests in scrutinising the Protocol's operation. We will seek to intensify UK-Irish inter-parliamentary dialogue, including through our bilateral engagement with equivalent Committees in the Oireachtas, and building on the work of the British-Irish Parliamentary Assembly.**
327. **This Committee has consistently endorsed close and structured dialogue between the UK and European Parliaments. We note the EU's proposal for a 'Parliamentary Partnership Assembly', and while we have not within the terms of this inquiry considered the detail of that proposal, we welcome the principle underlying it. We shall return to this issue in coming months.**

## CHAPTER 15: CONCLUSION

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328. **In our December 2016 report on *Brexit: UK-Irish relations*, we concluded that closer UK-Irish relations and stability in Northern Ireland were too important to be put at risk as collateral damage of the Brexit decision. The process of UK withdrawal from the EU, and the negotiations leading to the agreement of the revised Protocol on Ireland/Northern Ireland, have regrettably placed these relations and that stability under considerable strain, with a concomitant diminution of trust on all sides.**
329. **However, the agreement of the Protocol does not mean these tensions have been removed. On the contrary, with implementation and the practical operation of the Protocol still to come, significant challenges lie ahead. There are now seven months to go until the Protocol becomes operational on 1 January 2021. Clarity on the practical measures that will be necessary to implement the Protocol, and the steps that businesses based in or trading with Northern Ireland need to take to prepare, is now required as a matter of acute urgency if damage to the Northern Ireland economy is to be avoided.**
330. **More than ever, it is incumbent on all parties, including the UK Government, the EU, the Irish Government, and the political parties in Northern Ireland, after the divisions of the past four years, to work in a common endeavour to prioritise and urgently address the interests, stability and prosperity of the people and communities of Northern Ireland. As we concluded in our 2016 report, anything less would diminish the efforts of all those who have worked so hard for peace and good relations across these islands.**

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

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### Objectives (Article 1)

1. The stated objective of the Protocol is to set out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the Belfast/Good Friday Agreement in all its parts. It seeks to do this without prejudice to Northern Ireland's constitutional status, while respecting the essential State functions and territorial integrity of the UK. While not listed as an explicit objective in Article 1, the Protocol is also designed to achieve these aims while protecting the integrity of the EU Single Market. Setting these principles down on paper is one thing; delivering a solution that successfully holds them in balance is quite another. The Protocol must ultimately be viewed through the lens of the peace process, and therefore judged by the impact it has on the people, communities and economic prosperity of Northern Ireland and Ireland. (Paragraph 25)

### Rights of individuals (Article 2)

2. We welcome Article 2 of the Protocol, and the provisions set out in section 23 and schedule 3 of the European Union (Withdrawal Agreement) Act 2020, on safeguarding the rights of individuals, as set out in the Belfast/Good Friday Agreement. We welcome in particular the specific role set out under the Protocol for the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, and the Government's commitment to ensure they are adequately resourced to undertake their new statutory tasks as set out in the 2020 Act. (Paragraph 31)
3. We note that the obligation to ensure no diminution of rights extends to those protections against discrimination enshrined in the EU Directives listed in Annex 1 to the Protocol, as amended or replaced. The effect of this is that domestic legislation implementing these responsibilities will need to be amended as the Directives evolve. (Paragraph 32)

### Common Travel Area (Article 3)

4. We welcome the publication in May 2019 of the Memorandum of Understanding between the UK and Irish Governments, setting out their shared understanding of and commitment to the operation of the Common Travel Area, and reaffirming that such arrangements are to continue. We also welcome the explicit commitment to the retention of the Common Travel Area in Article 3 of the Protocol on Ireland/Northern Ireland. (Paragraph 37)

### Customs territory of the United Kingdom (Article 4)

5. Notwithstanding the statement in Article 4 of the Protocol that Northern Ireland is part of the customs territory of the UK, the practical implication of Article 5(3) is that, with limited exceptions, the entirety of the EU's customs legislation, including the Union Customs Code, will apply in Northern Ireland. (Paragraph 43)
6. This, combined with the creation through Article 5(4) of a single regulatory zone for goods on the island of Ireland, will create corresponding regulatory

friction for goods travelling between Great Britain and Northern Ireland. However, the Joint Committee's decisions on the definitions of the processing of goods and goods at risk of moving from Northern Ireland into the EU Single Market, together with the scope of any free trade agreement between the UK and the EU, will determine how far any friction can be mitigated. (Paragraph 44)

7. Article 4 of the Protocol states that nothing in it prevents Northern Ireland from being part of, or benefiting from, future third country trade agreements that the UK signs, on the condition that those agreements do not prejudice the application of the Protocol. The precise impact of the Protocol on future third country FTAs is uncertain. While Northern Ireland may attain some benefit from such agreements, the friction and processes introduced by Article 5 on the movement of goods from Great Britain and third countries into Northern Ireland will act as a constraint. (Paragraph 49)
8. The extent to which Northern Ireland could benefit (or lose out) from future EU trade agreements is equally uncertain. We note the concern of our witnesses that Northern Ireland might fall between the cracks of trade agreements signed by the UK and the EU. (Paragraph 50)
9. In our recent report, *Scrutiny of international agreements: lessons learned*, we stressed the importance of engagement with the Devolved Administrations concerning the implications of future third country trade agreements for areas of devolved competence. This is particularly significant in the case of Northern Ireland, given the impact of the Protocol. We therefore recommend that the Government publishes at the start and conclusion of each new trade negotiation, beginning with the UK-US trade negotiations, its assessment of any agreement's likely impact on and application to Northern Ireland. (Paragraph 51)

### Customs and movement of goods (Article 5)

10. During our visit to Belfast in February 2020, Northern Ireland businesses and stakeholders expressed deep frustration at the Government's lack of engagement with them, and with their concerns about the "seismic change" that the Protocol will require, in particular in relation to customs and the movement of goods. They were particularly frustrated by the high level of uncertainty over implementation of the Protocol, and the lack of guidance on the steps that they needed to take to prepare. (Paragraph 85)
11. We therefore welcome the Government's publication of a Command Paper on *The UK's Approach to the Northern Ireland Protocol*, though we regret that it took seven months for it to appear. (Paragraph 86)
12. The Government has confirmed that new administrative processes for traders, including electronic import declaration requirements and safety and security information (including entry summary declarations) will be required for goods moving from Great Britain to Northern Ireland. Nevertheless, the Command Paper leaves many questions unanswered. The Government has stated that it sees no need to construct new bespoke customs infrastructure in Northern Ireland, or in ports in Great Britain facing Northern Ireland, and that there will be no construction at points of entry where no plant or animal health checks are currently carried out. It is incumbent on the Government to explain how the new processes required under the Protocol can be undertaken, in the absence of new infrastructure. In particular, it

needs to clarify whether and how existing infrastructure at ports will be used. (Paragraph 87)

13. The Government has suggested that regulatory checks could take place through market surveillance authorities at businesses premises and in the market on the basis of risk assessment, rather than at ports. The Government needs urgently to detail what this will involve. (Paragraph 88)
14. We welcome the Government's confirmation in relation to sanitary and phytosanitary checks and processes that there will need to be expanded infrastructure at Belfast Port, Warrenpoint Port, Belfast City Airport and Belfast International Airport; and that Larne Port will be designated for live animal imports. We also welcome the Government's commitment in principle to cover the costs of the agri-food requirements under the Protocol. Nevertheless, the Government needs to set out with urgency the detailed steps that it will take to ensure that the necessary infrastructure is in place before 1 January 2021. (Paragraph 89)
15. In particular, the Government, through the Joint Committee, urgently needs to explain how agri-food controls will be conducted, their frequency and the level of physical checks. More detail is needed on the statement that "further designations may also be required at other existing sites". The Government needs to clarify if the Chancellor of the Duchy of Lancaster's suggestion that some checks could be conducted during the sea crossing from Great Britain to Northern Ireland remains a live proposal. The Government should also explain what it means when it states that it will "actively seek to simplify and minimise electronic documentary requirements" for agri-food. (Paragraph 90)
16. The provisions of Article 5 ensure that Northern Ireland will continue to be able to participate in the EU Single Market for goods, thereby maintaining supply chains on the island of Ireland. However, the evidence of Northern Ireland businesses suggests that, unless the Joint Committee is able to take a flexible approach as regards the definitions of goods at risk and processing, the checks and processes on goods moving from Great Britain to Northern Ireland under Article 5 could have a serious detrimental impact upon the Northern Ireland economy. There is a real danger that businesses based in Great Britain could conclude that it is economically unviable to continue to operate in Northern Ireland, leading in turn to reduced choice and higher costs for Northern Ireland consumers, thus undermining Northern Ireland's economic model, its future prosperity and, potentially, its political stability. (Paragraph 91)
17. We welcome the Government's commitment to establish a business engagement forum. Given the scale of the challenge of implementing the Protocol, the many unanswered questions, and the shortage of time, that body needs to begin its work immediately, and intense engagement with the business community must be maintained in the months ahead. Administering such complex new systems will require significant IT, financial and human resource. The Government must therefore set out how it will support businesses in Great Britain and Northern Ireland in adapting to the Protocol, including providing information on and explanation of its provisions, and providing opportunities to test the new requirements before they become operational. (Paragraph 92)

18. Even before the COVID-19 outbreak, Northern Ireland stakeholders described preparing for the Protocol to become operational on 1 January 2021 as a Herculean task. That task has become even more difficult, given the impact of COVID-19 on the economy and the capacity of individual businesses to cope with the problems confronting them. Given its refusal to countenance an extension to the transition period, the Government must urgently explain to Northern Ireland stakeholders the practical steps that will be taken to ensure the Protocol is operational from 1 January 2021. The Joint Committee will also need to take the changed circumstances arising from COVID-19 into account. (Paragraph 93)
19. The stated objective of the Protocol is to avoid a hard border on the island of Ireland, and the intention of Article 5 is to achieve this while protecting the integrity of the EU Single Market. If the Northern Ireland economy is to be protected, the Protocol needs to be implemented in a way that takes full account of the unique circumstances in Northern Ireland, and in particular the reliance of its economic model upon fast and efficient supply chains within both the United Kingdom and the island of Ireland. (Paragraph 107)
20. The Joint Committee is tasked with establishing criteria for determining that goods brought into Northern Ireland from outside the EU are not at risk of subsequently being moved into the EU, and with establishing the conditions under which processing is to be considered outside the scope of Article 5(2). The default position is that all goods, with specific exemptions set out in the Protocol, will be deemed to be ‘at risk’ of moving into the EU Single Market (and therefore subject to customs processes), unless the Joint Committee agrees otherwise. Likewise, the definition of processing in Article 5(2) is the default. (Paragraph 108)
21. Whereas the Protocol refers only to goods ‘at risk’, the Government’s Command Paper, in an apparent effort to reinterpret the Protocol, introduces references to goods at clear, genuine and substantial risk. (Paragraph 109)
22. Northern Ireland businesses have warned that an inflexible approach to these issues could be economically disastrous. The Command Paper provides some practical examples of activity that should be considered as internal UK trade and therefore should not incur tariffs. The Joint Committee will need to take a proportionate approach as it discusses these issues. (Paragraph 110)
23. The Government’s explanation of how such exemptions would work in practice is imprecise. It commits to providing full guidance before the end of the transition period, but time is running out, and businesses will need certainty well before 1 January 2021 if they are to make adequate preparations. (Paragraph 111)
24. In order to make a compelling case to the EU, the Government urgently needs to explain in detail how its proposals for automatic classification of goods as internal UK trade would work in practice. The Government also needs to use the new business engagement forum to provide clarity to and support for Northern Ireland business. (Paragraph 112)
25. The Government states that it will seek to streamline and simplify customs processes, but provides little detail on how it will do so. We call on the Government in the Joint Committee to investigate the potential for bespoke forms, and for the completion of single forms per load rather than for each individual consignment, thereby minimising the checks required. Such

flexibility will be vital in securing the continued viability of the supply chains on which the Northern Ireland economy depends. (Paragraph 115)

26. The Government also commits to set out more detailed plans for HMRC support for businesses, but again, time is short: this engagement needs to start immediately, keeping businesses informed of the Joint Committee's deliberations and the steps that HMRC will take to implement the new systems as they take shape. The Government commits to reviewing the new procedures on an annual basis, but it is unclear how much discretion the Government will have to reduce the administrative burden if they are found to be disproportionate. (Paragraph 116)
27. The Government needs to explain what it means when it states that it has discretion in relation to the risk assessment of goods. Greater discretion on the Government's part may inhibit the EU's willingness to show flexibility in the operation of Article 5. (Paragraph 117)
28. We call on the Government to explain the impact of Article 5(3) and Annex 2 of the Protocol on vessels registered both in Great Britain and in Northern Ireland and operating in UK territorial waters around Northern Ireland. The Joint Committee should, in implementing these provisions, take all the measures necessary to ensure the continued viability of Northern Ireland's fishing industry. (Paragraph 123)
29. We welcome the Government's commitment, reflecting the provisions of Article 5(6), to reimburse duties, waive customs debt or provide compensation to offset the impact of customs duties. But such a system is likely to be complex, and the Government needs to explain how it will work in practice. We invite the Government to confirm whether it will reimburse businesses for intermediate processes incurred in paying customs duties, and to explain how it will support businesses with small profit margins, for whom the costs of paying and seeking reimbursement for customs duties may prove prohibitive. (Paragraph 127)
30. We also note that the provisions of Article 5(6) are subject to the provisions of Article 10, on State aid. We invite the Government to explain the impact of the Protocol's State aid provisions on its ability to reimburse duties and waive customs debt. (Paragraph 128)
31. We welcome the fact that, under Article 5(1) and 5(7), no duties shall be payable on consignments of negligible value or on personal possessions. (Paragraph 131)
32. We note the potential for technology to reduce the friction arising from customs checks required under the Protocol. We therefore regret that the Government's technical advisory group on alternative arrangements appears to have gone into abeyance since the revised Protocol was agreed. We invite the Government to provide an update on the work of the group, and in particular on the potential for technological solutions to reduce the friction arising from customs checks under the Protocol. (Paragraph 135)
33. The Chancellor of the Duchy of Lancaster has stated that a smart border will not be ready until at least 2025. Technological solutions, important as they are, currently only have the capacity to mitigate rather than to eliminate friction arising from customs checks and processes. (Paragraph 136)

34. Article 13(8) makes provision for a future UK-EU trade agreement to supersede the Protocol (or parts thereof). A UK-EU free trade agreement could reduce (but not eliminate) the friction caused by customs and regulatory checks on goods moving between Great Britain and Northern Ireland. The greater the future regulatory alignment between the UK and the EU, the less burdensome such checks will be. (Paragraph 141)
35. From Northern Ireland's perspective, it is therefore highly desirable that a comprehensive UK-EU free trade agreement should be concluded by the end of 2020. If it is not, the consequences for Northern Ireland's economy arising from the imposition of all the checks and processes envisaged in the Protocol will be significant. (Paragraph 142)

### **Protection of the UK internal market and technical regulations (Articles 6 and 7)**

36. We welcome the Government's confirmation that checks and controls will be required on goods moving from Northern Ireland to Great Britain to the extent necessary to meet the UK and the EU's international law obligations (for instance to comply with resolutions of the UN Security Council imposing economic sanctions) regarding the prohibition or restriction of the export of goods. We invite the Government to set out the nature, scale and location of such checks and controls. (Paragraph 148)
37. The continued debate over whether or not exit summary declarations will be required on goods moving from Northern Ireland to Great Britain, with differing views expressed by Ministers and officials, has been unhelpful to Northern Ireland businesses, who urgently need clarity. (Paragraph 159)
38. Articles 5(3) and 5(4) apply EU customs law, including the Union Customs Code, to Northern Ireland. This includes a requirement for the completion of exit summary declarations on goods moving from Northern Ireland to Great Britain. We therefore concluded in our January 2020 report that "exit summary declarations are likely to be required for goods moving from Northern Ireland to Great Britain, unless and until the parties agree alternative arrangements to facilitate the movement of such goods". (Paragraph 160)
39. Northern Ireland stakeholders have expressed serious concern at this new administrative burden. They have drawn attention to the complexity of the standard EU exit summary declaration form, and the lack of readiness of many Northern Ireland businesses, particularly SMEs. (Paragraph 161)
40. In contrast to its previous statements, the Government now argues that Northern Ireland businesses should not be required to complete an exit summary declaration as they send goods directly to the rest of the UK. Given the concerns of Northern Ireland businesses, the EU should take this argument seriously, but the Government in turn needs to explain how such an exemption can be reconciled with the EU's international obligations under the Union Customs Code. The Government also needs to explain how it will in practice distinguish between goods originating in Northern Ireland, or in Ireland and the rest of the EU, for the purposes of exit summary declarations. (Paragraph 162)
41. The EU also, as part of its wider commitment to support Northern Ireland, has a duty to ensure that these processes do not place an intolerable burden

upon businesses. If exit summary declarations cannot be eliminated, the Joint Committee should consider means to streamline and simplify the process, in particular in the context of declarations for multiple consignments on a single load. (Paragraph 163)

42. After months of uncertainty, this issue now needs to be resolved. If exit summary declarations are required, Northern Ireland businesses need to know precisely what will be required, and how, when and where declarations will need to be made. This in turn will require a programme of training for Northern Ireland businesses, and arrangements to support businesses after the Protocol has come into effect. (Paragraph 164)
43. We note the apparent contradiction between the commitment in Article 5 to apply the Union Customs Code in Northern Ireland, and that in Article 6, that nothing in the Protocol shall prevent the UK from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the UK. The Government needs to explain how this will be resolved in practice. (Paragraph 172)
44. The key concerns for Northern Ireland businesses in terms of unfettered access are maintaining the practical ability to service the Great Britain market, maintaining supply chains both across the UK and the island of Ireland, and sourcing and processing raw material to and from Great Britain. In bringing forward legislation to give effect to its commitment, the Government must prioritise these concerns. We urge the Government to intensify its engagement and consultation with Northern Ireland stakeholders. (Paragraph 173)
45. The Government has committed to defining a qualifying status for Northern Ireland goods and businesses. It needs to provide more information on this definition, and in particular to explain how it will in practice distinguish between qualifying Northern Ireland goods, and goods originating in Ireland and the rest of the EU, in order to avoid Northern Ireland becoming a back door for goods entering the UK market from the EU without checks. It also needs to set out if it will allow for Northern Ireland products to be treated as qualifying domestic goods in both the UK and EU markets. (Paragraph 174)
46. We invite the Government to explain the impact of the Protocol upon Northern Ireland's participation in UK-wide common frameworks being developed with the Devolved Administrations, which the Government has stressed are necessary to ensure the effective functioning of the UK internal market. (Paragraph 176)

#### **VAT and excise (Article 8)**

47. The VAT and excise rules proposed in the Protocol, in particular the rules dealing with excise reductions and/or VAT exemptions, are complex, and Northern Ireland stakeholders urgently need to know how they will operate in practice. (Paragraph 184)
48. We therefore call on the Government to provide detailed explanation of what the VAT provisions will mean for businesses based in or trading with Northern Ireland, including:
  - their implications for trade from Great Britain to Northern Ireland;
  - their implications for trade from Northern Ireland to Great Britain, including confirmation that such trade is to be zero-rated for export for

VAT purposes, but businesses receiving goods in Great Britain from Northern Ireland will need to declare them as imports;

- the practical means by which the supply of goods (to which EU VAT and excise rules will be applied) will be distinguished from the supply of services (to which UK VAT rules will be applied);
- The scope for the UK to take advantage of its ability to apply VAT exemptions and reduced rates in Northern Ireland that are applicable in Ireland;
- Its response to concerns that the new rules could impose onerous working capital requirements upon firms, leading to cashflow problems. (Paragraph 185)

49. We note that the Joint Committee will keep these provisions under review, taking into account Northern Ireland's integral place in the UK's internal market. We urge the Joint Committee to ensure that the VAT and excise provisions do not place unsustainable burdens on businesses based in or trading with Northern Ireland. (Paragraph 186)

#### State aid (Article 10)

50. Article 10 and Annex 5 of the Protocol apply EU State aid rules to the United Kingdom in respect of Northern Ireland. Article 5(6) places a requirement on the Commission, in taking decisions under Article 10, to take the circumstances in Northern Ireland into account as appropriate. It will therefore be for the Commission to show sufficient flexibility in its application of State aid rules to ensure that reasonable measures to support the Northern Ireland economy can be taken. (Paragraph 193)

51. The effect of Article 10 and Annex 5 is also to apply EU State aid rules to the UK in any instance in which the support at issue affects trade in goods between Northern Ireland and the EU27. Our expert witnesses agree that this could mean that a UK State aid provision applying to the UK in general, which is above the minimum threshold provided by EU law, would be subject to the application of EU State aid rules under the Protocol, and potentially to EU intervention and judicial review. (Paragraph 194)

52. The only certain way for the UK to avoid EU intervention in its State aid decisions would be to ensure that its independent State aid policy does not allow for the level of support available to industry to exceed that available under the EU regime. This may be implied in the Chancellor of the Duchy of Lancaster's acceptance that the UK will maintain a State aid regime "that the EU will recognise as a robust system". We therefore invite the Government to clarify the implications of Article 10 for the UK's independent State aid regime, and the extent to which it will require the UK to adopt a model of support not exceeding the EU's approach. (Paragraph 195)

53. We welcome Article 10(2), which provides an exemption from EU State aid provisions for measures taken to support the agricultural sector in Northern Ireland. We note, however, that the Joint Committee will determine the initial level and percentage of support, and that, if it fails to do so, the exemption will be suspended until a determination is made. (Paragraph 200)

54. We welcome the fact that Annex 5 to the Protocol allows the UK to continue to designate Northern Ireland as an Assisted Area in line with EU law,

thereby allowing it to continue to benefit from regional aid. We invite the Government to confirm that it will take up this option. (Paragraph 202)

55. We note that the provisions of Article 10 do not cover services, and we invite the Government to provide clarity on the operation of the future State aid regime for services in Northern Ireland. (Paragraph 204)

### **The Single Electricity Market and other areas of North-South cooperation**

56. We welcome the commitment in Article 9 and Annex 4 of the Protocol to the continuation of the Single Electricity Market on the island of Ireland. This will benefit Northern Ireland and Ireland in terms of energy security, decarbonisation and energy prices. (Paragraph 208)
57. We welcome the commitment in Article 11 that the Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation on the island of Ireland. (Paragraph 218)
58. Nevertheless, we recognise that effective North-South cooperation is dependent on a wider framework than that contained in the Protocol, including effective cooperation in services. North-South cooperation across a range of sectors will depend heavily on the UK and the EU reaching agreement on trade in services, including a data adequacy decision governing the flow of data, movement of people to deliver services, and the recognition of professional qualifications. (Paragraph 219)
59. We also acknowledge the concerns of Northern Ireland businesses about the potentially disruptive impact of any divergence of immigration policies in Ireland and Northern Ireland, including the risk of labour exploitation and competitive disadvantage for Northern Ireland businesses. We urge the Government to set out the steps it will take to mitigate any negative consequences of its post-Brexit immigration policy for Northern Ireland businesses. (Paragraph 220)
60. Article 11 provides for the Joint Committee to keep under review and make recommendations to the UK and the EU on the impact of the Protocol on North-South cooperation. However, we note that Section 21 of the European Union (Withdrawal Agreement) Act 2020 prohibits a UK Minister from agreeing to the Joint Committee making any recommendation to alter the arrangements for North-South cooperation as provided for by the Belfast/Good Friday Agreement. We underline that any future changes to arrangements for North-South cooperation should be based on the principle of consent. (Paragraph 221)
61. In this context, we note that the Council of the European Union may authorise Ireland to conclude bilateral arrangements with the UK in areas of exclusive EU competence to ensure that the Protocol can be implemented effectively. Such bilateral arrangements may in particular be necessary to maintain effective transport arrangements, including cabotage rights, on the island of Ireland. We invite the Government to explain in what areas of exclusive EU competence such bilateral agreements may be necessary or desirable. (Paragraph 222)

**Implementation, application, supervision and enforcement, and other provisions (Articles 12, 13, 16, 17 and 19)**

62. Article 13(3) provides for Northern Ireland to remain subject to EU law in the Annexes to the Protocol on a dynamic basis, as they are amended or replaced. Under Articles 15(3)(b) and 13(4), the EU is also obliged to inform the UK of planned or adopted EU law that falls within the scope of the Protocol, but which neither amends nor replaces an EU act listed in the Annexes to the Protocol. Article 13(4) sets out a structured process by which the Joint Committee shall consider whether such laws should be added to the relevant Annex to the Protocol and thereby be applied to Northern Ireland. (Paragraph 230)
63. While the UK is obliged to apply in Northern Ireland EU law which amends or replaces EU acts listed in the Annexes to the Protocol, it has no obligation in relation to new legislation that falls within the Protocol's scope but does not amend or replace the EU law listed in the Annexes. However, should it fail to agree to the addition of such acts to the relevant Annex to the Protocol, the EU is entitled to take "appropriate", but otherwise unspecified, remedial action. (Paragraph 231)
64. We recommend that the Government establish a clear process to share any information it receives on planned and adopted EU law within the scope of the Protocol with the Northern Ireland Executive, Parliament, and, where relevant, the other devolved administrations. (Paragraph 232)
65. Sections 21 and 22 of the European Union (Withdrawal Agreement) Act 2020 provide for UK Ministers or the Northern Ireland Executive (and other devolved authorities) to make regulations to implement the Protocol, either alone, or together. (Paragraph 241)
66. We invite the Government to set out the likely scale of the regulations required before 1 January 2021 to give effect to the obligations contained in the Protocol that it intends a) to make alone, b) to invite the Northern Ireland Executive (or other devolved authorities) to make, and c) to make jointly with the Northern Ireland Executive (or other devolved authorities). We also invite the Government to set out its criteria for deciding which of these approaches will be adopted. In particular, the Government should explain the rationale for making regulations jointly with the Northern Ireland Executive (and other devolved authorities), and the principles underpinning the emerging concept of shared competence in the context of the Protocol. (Paragraph 242)
67. We call on the Government to set out the process by which it will consult and notify the Northern Ireland Executive and other devolved authorities on its proposed approach to making domestic regulations required under the Protocol. We also invite the Government to set out what action it will take if Northern Ireland Executive Ministers (or other devolved authorities) are unwilling or unable to make regulations necessary to implement the Protocol. (Paragraph 243)
68. We note concern that the Agriculture Bill, the Environment Bill and the Fisheries Bill will lead to regulatory divergence between Northern Ireland and the rest of the UK in these areas. We therefore call on the Government to explain the interaction between these bills and the Protocol, and to set out whether, and if so how, these bills are compliant with the terms of

the Protocol. We also invite the Government to confirm whether or not it anticipates issues of compliance with the Protocol arising in relation to any other current or planned primary legislation. (Paragraph 245)

69. Article 12(2) of the Protocol gives EU representatives the right to be present during relevant activities of the authorities of the UK, and obliges the UK to facilitate this presence, provide all relevant information, and to carry out control measures in individual cases for duly stated reasons. While the scale of the EU's supervisory activity remains to be seen, its potential scope is broad, particularly given the emphasis placed by the EU and its Member States on the need to protect the integrity of the EU Single Market. (Paragraph 250)
70. We call on the Government to confirm whether the EU is able to exercise such rights only within Northern Ireland, or also within Great Britain in relation to measures taken under the Protocol. (Paragraph 251)
71. We note the EU's request to open a Belfast office of the EU Delegation to the UK to allow EU officials to undertake the tasks envisaged under Article 12(2) of the Protocol, and the Government's response. The disagreement on this issue is indicative of the lack of trust between the two sides. Yet the central issue is one of modalities, not principle: what matters is that EU technical staff can do their jobs so as to minimise delay and disruption. It is incumbent on the Joint Committee to find an early solution, satisfactory to all communities in Northern Ireland. (Paragraph 255)
72. Northern Ireland's compliance with EU rules in relation to customs and movement of goods, technical regulations, VAT and excise, the Single Electricity Market and State aid will be policed and enforced by the European Commission, the EU's executive agencies and the CJEU, including the possibility of infringement proceedings and the imposition of fines for State liability. Save for the UK's right to participate in Northern Ireland-based CJEU proceedings, this enforcement will take place without the additional privileges inherent in EU membership, such as membership of and full participation in the EU's institutions and agencies. (Paragraph 258)

### **The Joint Committee, Specialised Committee and Joint Consultative Working Group (Articles 14 and 15)**

73. The Withdrawal Agreement Joint Committee will play a vital (and, under the revised text, substantially enhanced) role in the operation and application of the Protocol on Ireland/Northern Ireland. The Joint Committee will review, adopt recommendations or make decisions on issues key to the functioning of the Protocol, including:
  - in relation to the movement of goods from Great Britain to Northern Ireland, the definition of processing and goods 'at risk' of moving into the EU, and the potential duties payable on fisheries and aquaculture products;
  - the impact of the Protocol on trade between Northern Ireland and Great Britain;
  - the operation of the Protocol's VAT and excise provisions;
  - exemptions from State aid rules for Northern Ireland's agricultural sector;

- the impact of the Protocol on North-South cooperation on the island of Ireland;
  - the rights of EU representatives to be present at activities related to the implementation and application of EU law under the Protocol;
  - the adoption of new EU law falling within the scope of the Protocol; and
  - recommending necessary measures in the event that the Northern Ireland Assembly decides not to support the continued application of Articles 5–10 of the Protocol. (Paragraph 271)
74. In view of the significance of its work, we welcome the Government's commitment to ensure that representatives of the Northern Ireland Executive participate in meetings of the Joint Committee where the Protocol is under discussion. We note that the Northern Ireland Executive participated in the first meeting of the Joint Committee on 30 March. (Paragraph 272)
75. The Joint Committee's functions under the Protocol fall into two broad categories: powers of decision; and powers of review and to adopt recommendations. The scope, timeframe and remedies available in the event of non-agreement are all more specific in the case of the Joint Committee's powers of decision, compared to the open-ended provisions in relation to the powers of review and to adopt recommendations. The ability of the Joint Committee to adjust the operation of the Protocol in a way the UK would wish may therefore be more constrained than the Government allows for. (Paragraph 273)
76. The remedies available in the event that the Joint Committee is not able to reach agreement are undefined in a number of areas. This is particularly so in relation to the provisions in Article 5 on customs and the movement of goods, including the definition of goods 'at risk'. In the event of a failure to reach agreement in these areas, arbitration under the terms of the Withdrawal Agreement will be the outcome. (Paragraph 274)
77. The Ireland/Northern Ireland Specialised Committee has a number of strategic functions set out in Articles 11(2), 12(3) and 14 of the Protocol. In particular, it has a valuable role as a conduit for dialogue with the Northern Ireland Executive (which will be present at its meetings), the North-South Ministerial Council, the North-South Implementation bodies set up under the Belfast/Good Friday Agreement, and the Equality and Human Rights Commissions operating in Ireland and Northern Ireland. We invite the Government to clarify how the Specialised Committee will engage with these bodies. (Paragraph 281)
78. The Joint Consultative Working Group, as established by Article 15 of the Protocol, is a unique concept in EU external relations. While it does not have decision-making powers, it will play an important function as the means by which the UK and the EU will exchange information about the implementation of the Protocol, planned EU acts within the scope of the Protocol, and the fulfilment of mutual obligations. Given its less formal mandate, and given the requirement on it to meet at least once a month, it has the potential to act as a productive and intensive facilitator of dialogue, not only between the UK and the EU, but also with stakeholders in Northern

Ireland. It will also be in a position to anticipate, and assist in avoiding, potential problems. (Paragraph 286)

79. We therefore regret the delay in convening the Joint Consultative Working Group. We urge both the EU and the UK Government to ensure that this embryonic body is developed to the full, as a means for both sides together to engage with and take account of the concerns of businesses, communities, and civil society in Northern Ireland. We call on the Government to set out more details of how the Working Group will operate, including its schedule of meetings, how it will engage with stakeholders, and how transparency and visibility of its work will be ensured, as well as the steps the Government proposes to take to ensure that the Working Group's full potential is realised. (Paragraph 287)

### **Democratic consent (Article 18)**

80. Given the sensitivity of the Protocol, we welcome the inclusion of a mechanism for members of the Northern Ireland Assembly to express democratic consent to the continued application of Articles 5–10 of the Protocol. (Paragraph 300)
81. We note, however, that the democratic consent mechanism could exacerbate political division in the lead-up to each vote. It guarantees that the Assembly will be required repeatedly to debate the arrangements for trade within the UK and across the island of Ireland. The mechanism also creates the potential for significant economic instability and dislocation every four or eight years. (Paragraph 301)
82. It is therefore incumbent upon the UK Government, the EU, the Irish Government, and the political parties in Northern Ireland to handle this process with care, taking full account of the political, economic and societal impact of the Protocol upon Northern Ireland. To that end, we welcome the provisions in the Government's unilateral declaration to facilitate consultation with Northern Ireland businesses and civil society in the lead-up to each vote. (Paragraph 302)
83. There has been an assumption that, given the uncertainties that would result from a vote against continuation of Articles 5-10, the Assembly is almost certain to vote for their continued operation. But much depends on the implementation and operation of the Protocol, underlining how important it is that the UK and the EU, through their discussions in the Joint Committee, ensure that the Protocol is implemented in a proportionate way that protects, rather than damages, the Northern Ireland economy. (Paragraph 303)

### **Parliamentary scrutiny and inter-parliamentary engagement**

84. A significant body of EU law will continue to apply on a dynamic basis to Northern Ireland after the end of the transition period. Parliament will thus need to reflect on the mechanisms for scrutiny of draft EU legislation within the scope of the Protocol, and in particular on the balance between scrutiny in Westminster, the Northern Ireland Assembly, or both. Given the provisions of Article 13(4), this scrutiny should cover any new draft legislation that falls within the scope of the Protocol, whether or not it amends or replaces EU law listed in the Annexes to the Protocol. (Paragraph 308)
85. The Government in turn has an obligation to facilitate such scrutiny. We therefore call on the Government to establish formal mechanisms for prompt

communication to Parliament of information received from the EU in the Joint Committee and Joint Consultative Working Group on planned or adopted EU legislation falling within the scope of the Protocol. (Paragraph 309)

86. The mechanisms to ensure transparency of the Withdrawal Agreement Joint Committee, the Ireland/Northern Ireland Specialised Committee and the Joint Consultative Working Group are extremely limited, and the Government's commitments thus far do not go far enough. In particular, we repeat our call for meeting schedules, agendas, decisions and recommendations of the Ireland/Northern Ireland Specialised Committee and the Joint Consultative Working Group to be published. We also call for full and informative Written Ministerial Statements at appropriate points. (Paragraph 315)
87. The provision of such information on the work of these bodies is not only necessary to provide transparency and accountability, but also to provide Parliament, the Northern Ireland Assembly, and other stakeholders in Northern Ireland, with a means to engage with their work. (Paragraph 316)
88. In view of the UK Government's overall legal responsibility, the UK Parliament has a vital role to play in scrutinising the implementation and operation of the Protocol, and in holding the Government to account for its actions. It is in that spirit that we make this report. (Paragraph 323)
89. Given our mutual interest in effective scrutiny, there is also a need and an opportunity for enhanced inter-parliamentary engagement between Westminster and the Northern Ireland Assembly. We were pleased in the context of our visit to Belfast in February 2020 to meet the Chairpersons and Deputy Chairpersons of various Committees of the Northern Ireland Assembly, representing parties from across the political spectrum in Northern Ireland. We look forward to strengthening this dialogue and cooperation in the months ahead. (Paragraph 324)
90. Scrutiny of the Protocol is also a high priority for Committees in the House of Commons, and, given the intensity of their trade, transport and cultural ties with Ireland and Northern Ireland, for the Scottish and Welsh Parliaments. We will seek to maintain our engagement with them, including through the work of the Inter-parliamentary Forum on Brexit. (Paragraph 325)
91. On the EU side, the Irish Oireachtas and the European Parliament also have particular interests in scrutinising the Protocol's operation. We will seek to intensify UK-Irish interparliamentary dialogue, including through our bilateral engagement with equivalent Committees in the Oireachtas, and building on the work of the British-Irish Parliamentary Assembly. (Paragraph 326)
92. This Committee has consistently endorsed close and structured dialogue between the UK and European Parliaments. We note the EU's proposal for a 'Parliamentary Partnership Assembly', and while we have not within the terms of this inquiry considered the detail of that proposal, we welcome the principle underlying it. We shall return to this issue in coming months. (Paragraph 327)

### **Conclusion**

93. In our December 2016 report on *Brexit: UK-Irish relations*, we concluded that closer UK-Irish relations and stability in Northern Ireland were too

important to be put at risk as collateral damage of the Brexit decision. The process of UK withdrawal from the EU, and the negotiations leading to the agreement of the revised Protocol on Ireland/Northern Ireland, have regrettably placed these relations and that stability under considerable strain, with a concomitant diminution of trust on all sides. (Paragraph 328)

94. However, the agreement of the Protocol does not mean these tensions have been removed. On the contrary, with implementation and the practical operation of the Protocol still to come, significant challenges lie ahead. There are now seven months to go until the Protocol becomes operational on 1 January 2021. Clarity on the practical measures that will be necessary to implement the Protocol, and the steps that businesses based in or trading with Northern Ireland need to take to prepare, is now required as a matter of acute urgency if damage to the Northern Ireland economy is to be avoided. (Paragraph 329)
95. More than ever, it is incumbent on all parties, including the UK Government, the EU, the Irish Government, and the political parties in Northern Ireland, after the divisions of the past four years, to work in a common endeavour to prioritise and urgently address the interests, stability and prosperity of the people and communities of Northern Ireland. As we concluded in our 2016 report, anything less would diminish the efforts of all those who have worked so hard for peace and good relations across these islands. (Paragraph 330)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members of the European Union Select Committee

The Earl of Kinnoull (Chair)  
 Baroness Brown of Cambridge  
 Lord Cavendish of Furness  
 Baroness Couttie  
 Baroness Donaghy  
 Lord Faulkner of Worcester  
 Baroness Hamwee  
 Lord Jay of Ewelme (until 31 March 2020)  
 Lord Kerr of Kinlochard  
 Lord Lamont of Lerwick  
 Lord Morris of Aberavon  
 Baroness Neville-Rolfe  
 Lord Oates  
 Baroness Primarolo  
 Lord Ricketts  
 Lord Sharkey  
 Lord Teverson  
 Baroness Verma  
 Lord Wood of Anfield

### Declarations of interest

The Earl of Kinnoull (Chair)  
*Farming interests as principal and as charitable trustee, in receipt of agricultural subsidy*  
*Chairman, Culture Perth and Kinross, in receipt of governmental subsidy*  
*Chairman, United Kingdom Squirrel Accord, in receipt of governmental monies*  
*Shareholdings as set out in the register*

Baroness Brown of Cambridge  
*Vice Chair of the Committee on Climate Change*  
*Chair of the Adaptation Sub-Committee of the Committee on Climate Change*  
*Chair of the Henry Royce Institute for Advanced Materials*  
*Chair of STEM Learning Ltd*  
*Non-Executive Director of the Offshore Renewable Energy Catapult*  
*Chair of The Carbon Trust*  
*Council member of Innovate UK*

Lord Cavendish of Furness  
*Director, Burlington Slate Limited*  
*Shareholder, Holker Holdings Limited*  
*Shareholder, Cartmel Steeplechases (Holker) Limited*  
*Shareholder, Holker Estates Co Limited*  
*Shareholder, Holker Homes Limited*  
*Shareholder, Burlington Slate Limited*  
*Roose and Walney Sand and Gravel Company Limited (The) (Dormant)*  
*Holker Estates Co Limited*

*Holker Holdings Limited*

*Cartmel Steeplechases (Holker) Limited*

*Corrie and Co Limited*

*Guides over the Kent and Levens Sands Limited*

*Beneficiary of a Family Trust which owns land in South Cumbria, including residential and business property*

*Owner of a flat in London SW1 from which rental income is received*

*Owner of woodlands based in South Cumbria*

**Baroness Couttie**

*Non-Executive Director, Mitie*

*Commissioner, Guernsey Financial Services Commission*

*Special Advisor, Heyman AI Ltd*

**Baroness Donaghy**

*Former President of the Trades Union Congress*

*Former member European Trades Union Congress*

**Lord Faulkner of Worcester**

*Chairman, Great Western Railway Advisory Board*

*Chairman, Alderney Gambling Control Commission*

*Her Majesty's Government's Trade Envoy to Taiwan*

**Baroness Hamwee**

*Liberal Democrat Lords Spokesperson on Immigration*

**Lord Jay of Ewelme**

*Trustee (Non-Executive Director), Thomson Reuters Founders Share Company*

*Vice Chairman, European Policy Forum Advisory Council*

*Member, Senior European Experts Group*

*Trustee, Magdalen College, Oxford Development Trust*

**Lord Kerr of Kinlochard**

*Chairman, Centre for European Reform*

*Deputy Chairman, Scottish Power PLC*

*Member, Scottish Government's Advisory Standing Council on Europe*

**Lord Lamont of Lerwick**

*Director, Jupiter European Opportunities Trust*

*Director, Compagnie Internationale de Participations Bancaires et Financieres (CIPAF)*

*Director, Chelverton UK Dividend Trust*

*Adviser, Halkin Investments*

*Adviser, Official Monetary and Financial Institutions Forum (OMFIF)*

*Adviser, Meinhardt Engineering Group, Singapore*

*Adviser, Stanhope Capital LLP*

**Lord Morris of Aberavon**

*No relevant interests declared*

**Baroness Neville-Rolfe**

*Former Commercial Secretary, HM Treasury*

*Former Minister of State for Energy and Intellectual Property*

*Chair, Assured Food Standards Ltd*

*Chair, UK ASEAN Business Council*

*Non-Executive Director, Capita Plc*

*Non-Executive Director, Secure Trust Bank*

*Governor, London Business School*

*Shareholdings as set out in the register*

*Trustee (Non-Executive Director), Thomson Reuters Founders Share Company*

Lord Oates

*Director, Centre for Countering Digital Hate*

*Chairman, Advisory Board, Weber Shandwick*

*Director, H&O Communications Ltd.*

Baroness Primarolo

*Non-executive director and chair, Thompson's Solicitors*

*Chair, Remuneration Board, National Assembly for Wales*

Lord Ricketts

*Non-Executive Director, Group Engie, France*

*Strategic Adviser, Lockheed Martin UK*

*Charitable activities as set out in the Register of Interests*

Lord Sharkey

*No relevant interests declared*

Lord Teverson

*Trustee, Regen SW*

*In receipt of a pension from the European Parliament*

Baroness Verma

*No relevant interests declared*

Lord Wood of Anfield

*Chair of the United Nations Association (UNA-UK)*

*Director, Good Law Project*

Lord Goldsmith, as the Chair of the International Agreements Sub-Committee (with effect from 23 April 2020), took part by invitation in Select Committee meetings when the draft report was discussed. He declared no relevant interests.

A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/register-of-lords-interests/>

## APPENDIX 2: LIST OF WITNESSES

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Evidence is published online at <https://committees.parliament.uk/work/9/protocol-on-irelandnorthern-ireland/publications/> and available for inspection at the Parliamentary Archives (020 7219 3074)

Evidence received by the Committee is listed below in chronological order of oral evidence session and alphabetical order. Those witnesses marked with \*\* gave both oral and written evidence. Those marked with \* gave oral evidence and did not submit written evidence. All other witnesses submitted written evidence only

### Oral evidence in chronological order

**	Dr Sylvia de Mars	<a href="#">QQ 1–18</a>
*	Colin Murray	
*	David Henig	
*	Graham Keddie	<a href="#">QQ 19–23</a>
*	Les Stracey	
*	Andrew Kane	
*	Maurice Bullick	
*	Pamela Dennison	
*	Professor David Phinnemore	<a href="#">QQ 24–31</a>
*	Dr Viviane Gravey	

### Alphabetical list of all witnesses

*	Maurice Bullick	
*	Pamela Dennison	
*	Dr Viviane Gravey	
*	David Henig	
*	Andrew Kane	
**	Graham Keddie	
*	Dr Sylvia de Mars	<a href="#">ZPI0001</a>
*	Colin Murray	
*	Professor David Phinnemore	
*	Les Stracey	