



House of Commons  
European Scrutiny Committee

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# Twenty-seventh Report of Session 2019–21

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Documents considered by the Committee on 4 November 2020

*Report, together with formal minutes*

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## Notes

### Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

### Abbreviations used in the headnotes and footnotes

AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECA	European Court of Auditors
ECB	European Central Bank
EEAS	European External Action Service
EM	Explanatory Memorandum (submitted by the Government to the Committee) *
EP	European Parliament
EU	European Union
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
SEM	Supplementary Explanatory Memorandum
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

### Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

### Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the [parliamentary website](#). Documents awaiting consideration by the Committee are listed in "Remaining Business": [www.parliament.uk/escom](http://www.parliament.uk/escom). The website also contains the Committee's Reports.

\*Explanatory Memoranda (EMs) and letters issued by the Ministers can be downloaded from the Cabinet Office website: <http://europeanmemoranda.cabinetoffice.gov.uk/>.

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# 1 Northern Ireland Protocol: Joint Consultative Working Group<sup>1</sup>

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**This EU document is politically important because:**

- it concerns how the EU will inform the UK about planned EU laws affecting Northern Ireland in the future and how the EU and UK will discuss the implementation of EU laws within the scope of the Ireland/Northern Ireland Protocol; and
- the Government commits to engaging with Parliament and the Northern Ireland Executive and Parliament on future arrangements for governance of the Withdrawal Agreement and the Protocol.

**Action**

- Write to the Chancellor of the Duchy of Lancaster.
- Draw to the attention of the Committee on the Future Relationship with the EU and the Northern Ireland Affairs Committee.

## Overview

1.1 The Agreement on the UK’s withdrawal from the EU requires that Northern Ireland continue to apply a number of EU laws relating largely to the movement of goods, including any future changes and additions to those laws. As the UK is no longer part of internal EU discussions on draft EU laws, nor has a vote on them, the Withdrawal Agreement establishes a Joint Consultative Working Group (JCWG) to ensure that there is a channel of communication between the EU and UK on draft EU laws relevant to Northern Ireland.

1.2 The JCWG has no decision-making powers, other than adoption of its own Rules of Procedure, and it reports to the Specialised Committee on Northern Ireland, which sits under the UK/EU Joint Committee which oversees the overall application and implementation of the Withdrawal Agreement. The tasks of the JCWG, as set out in Article 15 of the Ireland/Northern Ireland Protocol annexed to the Agreement, include:

- exchanging information about “planned, ongoing and final relevant implementation measures” in relation to the EU laws applicable to Northern Ireland under the Protocol; and
- providing the forum in which the EU informs the UK about planned EU acts within the scope of the Protocol—this includes EU acts amending or replacing those listed in the Annexes to the Protocol and new EU acts.

1.3 The Working Group will also be the initial forum for discussions on *new* EU legal acts which the EU considers fall within the scope of the Protocol, but which do not

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<sup>1</sup> Proposal for a Council Decision on the position to be taken on behalf of the EU in the Joint Consultative Working Group established by the Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community as regards the adoption of its rules of procedure; [11643/20](#), COM(20) 636; Legal base: Art 50(2) TFEU and Article 218(9) TFEU, QMV; Department: Cabinet Office; Devolved Administrations; ESC number: 41569.

amend or replace legislation already listed. While it would be for the UK Government to decide whether to accept further expansion of the body of EU rules that applies under the Protocol,<sup>2</sup> the EU can take remedial measures if the UK does not accept the application of the new rules (Article 13(5) of the Protocol).

1.4 In recent correspondence with us,<sup>3</sup> the Government has highlighted the relevance of the JCWG as a forum for discussing new or amending EU laws which fall within scope of the Protocol.

1.5 The JCWG requires a set of Rules of Procedure, which are to be adopted at its first meeting. In its document, the Commission proposes that the Union should support the adoption of the Rules of Procedure by the JCWG. The draft Rules of Procedure cover arrangements such as: the chairing of meetings (to be co-chaired by the EU and UK); participation; agendas; minutes; and confidentiality. There is no limit on the numbers from each side who may participate in the meetings. Furthermore, there is provision for “experts or other persons who are not members of delegations” to attend meetings in order to provide information on a particular subject.

1.6 In terms of confidentiality, there is no provision to make agendas public and it is only provided that the summaries of minutes may be made public. As a general rule, the meetings themselves will be confidential.

1.7 In his [Explanatory Memorandum](#) (EM), the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP) signals the UK’s support for the Rules of Procedure, which he describes as “proportionate” and in line with those for the Joint Committee and the Ireland/Northern Ireland Specialised Committee. The Minister observes that, for the most part, the Rules focus on the mechanics of the meetings of the JCWG but the Minister highlights the obligation on the Secretariat to produce an annual report on the work of the JCWG to be sent to the Ireland/Northern Specialised Committee.

1.8 The Minister notes that the JCWG will have an important role to play in being the body through which the EU informs the UK about amendments and replacements to Union law listed in the Annexes to the Protocol, and through which the UK, says the Minister, has a formal opportunity to influence the development of EU law where it is relevant to the UK in this context.

1.9 As far as composition of the UK delegation is concerned, the Minister says that the Government has committed to inviting officials from the Northern Ireland Executive, in line with the commitments made in New Decade, New Approach for the Withdrawal Agreement Joint Committee and the Ireland/Northern Ireland Specialised Committee.

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2 The EU has already proposed a list of additions to the EU legislation which will remain applicable in Northern Ireland under the Protocol, but argues that these should have been included when the Protocol was drafted. They are therefore being considered under a special procedure to correct “errors and omissions” in the Protocol. The Government has not so far accepted the proposed additions. See for more information our [Report on Decision 1/2020 of the UK-EU Joint Committee](#) (HC465, 17 June 2020).

3 Such as [Letter](#) from Rebecca Pow MP to Sir William Cash MP concerning the phase-out of dental amalgam containing mercury, and [Letter](#) from Victoria Prentis MP to Sir William Cash MP concerning the Farm to Fork Strategy.

1.10 In conclusion, the Minister confirms that officials “will continue to work with the Parliamentary scrutiny committees and the Northern Ireland Executive and Assembly as we design the overall governance process for the Withdrawal Agreement and Protocol post-transition period”.

1.11 The Minister [wrote](#) separately to us to draw attention to the EM and to re-iterate the commitment to working with us and others to design the overall governance process for the Withdrawal Agreement and Protocol post-Transition.

## Our assessment

1.12 We welcome the confirmation that officials from the Northern Ireland Executive will be invited to participate in the JCWG.

1.13 We consider that the JCWG should have an important role to play in providing information and advice to the Specialised Committee on the Northern Ireland Protocol and in discussing EU laws which fall within the scope of the Protocol or new laws which may need to be added to the list of EU laws applicable to Northern Ireland. Whether it will do so depends on two important aspects.

1.14 The first of those is what the respective parties (the UK and the EU) consider a “planned EU act” to be. An EU act can be “planned” at any stage from its original inception within a non-legislative policy paper through to the point after its political agreement but before formal adoption of the final text. We will ask the Minister at what stage of a planned EU act the UK would expect to be informed and whether the UK would expect to receive information regularly during the legislative process.

1.15 The second aspect is the extent to which the JCWG is expected to be a forum of debate on planned EU acts relevant to Northern Ireland. As the Protocol itself does not explicitly provide for debate on planned EU laws relevant to the Protocol, we will seek clarity from the Minister on the basis for his assertion that the JCWG will give the UK a “formal opportunity to influence the development of EU law”.

1.16 We welcome the Minister’s commitment to engaging with us and others—including other Select Committees, the Northern Ireland Assembly and the Northern Ireland Executive—to design “governance arrangements” for the Withdrawal Agreement and the Protocol. As such arrangements are already provided for in the Withdrawal Agreement, we assume that the Minister is referring to parliamentary scrutiny arrangements, but we will invite him to confirm our interpretation.

1.17 We are clear that some oversight of the work of the JCWG will be an important part of future parliamentary scrutiny arrangements. We therefore note with interest the proposed rules on transparency of the JCWG. We understand the rule that the proceedings should be confidential, but it is important that information is available about what is being discussed by this Group, given its important role in exchanging information on planned EU laws relevant to Northern Ireland. We note that there is no provision to make the agendas public in advance of meetings, nor for consistent publication of the minutes, or even of any outcome of the meetings. The draft Rules of Procedure provide only that a summary of the minutes may be published.

1.18 We will therefore seek a commitment from the Minister to work with the Commission to ensure that agendas are made public in advance of meetings and to ensure that minutes of the meetings are consistently published.

1.19 Arrangements for scrutiny—by the Northern Ireland Assembly and by Parliament—of implementation of the Withdrawal Agreement and the Protocol, including EU laws falling within the scope of the Protocol are an important and urgent matter. Core to any arrangements will be the timely sharing of information with all of the relevant interlocutors.

1.20 Finally, the JCWG will be an important channel through which the EU can inform the UK of relevant planned EU acts, but we expect the Government to apply its own autonomous mechanisms to monitor EU law so that it is not reliant on information from the EU. We will ask the Government for detail on those mechanisms.

## Action

1.21 We have written to the Minister as set out below, raising the queries that we identified in our Assessment.

1.22 We are drawing this document and our letter to the attention of the Committee on the Future Relationship with the EU and the Northern Ireland Affairs Committee.

### ***Letter from the Chair to the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP)***

We have considered your Explanatory Memorandum on the above EU document.

We agree that the Joint Consultative Working Group (JCWG) should have an important role to play in providing information and advice to the Specialised Committee on the Northern Ireland Protocol and in discussing EU laws which fall within scope of the Protocol, including new laws which the EU considers should be added to the list of EU laws applicable to Northern Ireland.

We consider that the relevance of the JCWG depends on what the UK and EU consider a “planned EU act” to be and the extent to which the JCWG becomes a forum for debate. We therefore ask:

- At what stage of the planning of an EU act would the UK expect to be informed, and would you expect to receive information regularly during the legislative process?
- As Article 15 of the Protocol itself does not explicitly provide for debate on planned EU laws relevant to the Protocol, what is the basis for your assertion that the JCWG will give the UK a “formal opportunity to influence the development of EU law”?

We welcome your commitment to engaging with us and others to design “governance arrangements” for the Withdrawal Agreement and the Protocol. As the Agreement already provides for such arrangements, we ask that you confirm that this commitment relates to arrangements for the domestic parliamentary scrutiny of the Withdrawal Agreement and

Protocol. We are clear that some oversight of the work of the JCWG will be an important part of any such arrangements. On that matter, we note with interest the proposed rules on transparency of the JCWG. We understand the rule that the proceedings should be confidential, but it is important that information is available about what is being discussed by this Group, given its important role as a channel of communication concerning planned EU laws relevant to Northern Ireland. We ask that you commit to working with the Commission to ensure that agendas are made public in advance of meetings and to ensure that minutes of the meetings are consistently published.

Arrangements for scrutiny—by the Northern Ireland Assembly and by Parliament—of implementation of the Withdrawal Agreement and the Protocol, including EU laws falling within the scope of the Protocol are an important and urgent matter. That must include both draft laws amending or replacing laws already included in the Annexes to the Protocol and proposals for new laws which the EU might consider fall within the scope of the Protocol. We therefore look forward to the discussions that you mention with officials concerning “governance”, which we assume to mean parliamentary scrutiny. Core to any arrangements will be the timely sharing of information with all of the relevant interlocutors.

Finally, the JCWG will be an important channel through which the EU can inform the UK of relevant planned EU acts, but we expect the Government to apply its own autonomous mechanisms to monitor EU law so that it is not reliant on information from the EU. We would welcome detail from you on the mechanisms that are in place across Government to monitor ongoing EU law developments.

We ask that you respond within ten working days.

## 2 Northern Ireland Protocol: Phase-out of dental amalgam<sup>4</sup>

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### This EU document is politically important because:

- the Commission signals an intention to propose that the use of dental amalgam be phased out, likely through an amendment to the EU Mercury Regulation which will continue to apply in Northern Ireland after the Transition Period; and
- the Minister has taken this opportunity to explain how the Government will engage with the EU on future legislative initiatives applicable in Northern Ireland under the Protocol.

### Action

- Report to the House.
- Draw to the attention of the: Environmental Audit Committee; Environment, Food and Rural Affairs Committee; Committee on the Future Relationship with the EU; Health and Social Care Committee; and the Northern Ireland Affairs Committee.

### Overview

2.1 Dental amalgam—used to fill cavities caused by tooth decay and to repair tooth surfaces—is an alloy of mercury and other metals. In 2018, it was used for around 25% of dental fillings in the UK. Mercury, though, is a toxic element and is recognised as a substance of global concern, with environmental and public health implications.

2.2 The European Commission concluded that the phase-out of dental amalgam is technically and economically feasible before 2030 and the Commission will therefore commence preparatory work before presenting a legislative proposal in 2022 to phase out the use of dental amalgam. This might be achieved through an amendment to the Mercury Regulation,<sup>5</sup> which is included in Annex 2 of the Ireland/Northern Ireland Protocol. For as long as the Protocol applies, Northern Ireland would be obliged to maintain alignment with the Regulation, including any amendments.

2.3 Noting the possible implications for Northern Ireland, we [wrote](#) to the Parliamentary Under Secretary of State (Rebecca Pow MP) on 1 October 2020, seeking clarity on whether the Government intended to engage with the Commission on behalf of Northern Ireland.

2.4 In [response](#), the Minister has told us that, as with all policy matters where future EU legislation will be applicable in Northern Ireland under the Protocol, the UK will engage with the EU both through the Withdrawal Agreement structures and normal third country channels.

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4 Commission Report on the reviews required under Article 19 (1) of Regulation 2017/852 on the use of mercury in dental amalgam and products; [COM \(20\) 378](#); Legal base:—; Department: Environment, Food and Rural Affairs; Devolved Administrations: Consulted; ESC number: 41472.

5 Regulation (EU) 2017/852 on mercury.

2.5 In particular, she says, the Joint Consultative Working Group (JCWG), established under the Northern Ireland Protocol, is a forum for information sharing and consultation on the application and implementation of the Protocol. Specifically, Article 15(3) of the Protocol obliges the European Union to inform the UK about plans to amend or replace legislation within the scope of the Protocol and Article 15(7) stipulates that the European Union must ensure all views expressed by the UK are communicated to relevant EU institutions, bodies, offices and agencies without undue delay. The Minister explains that the JCWG will meet once the Rules of Procedure have been agreed.

### **Action**

2.6 We have no further queries. We report the Minister's response to the House and draw it to the attention of the Environmental Audit Committee; Environment, Food and Rural Affairs Committee; Committee on the Future Relationship with the EU; Health and Social Care Committee; and the Northern Ireland Affairs Committee.

### 3 Control of exports on ‘dual-use’ items (including Northern Ireland Protocol implications)<sup>6</sup>

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**This EU document is legally/politically important because:**

- it raises questions regarding the Government’s plans for the operation of the UK’s dual-use export regime at the end of the transition period; and
- the current iteration of the Dual-Use Regulation—Council Regulation (EC) No 428/2009—is listed in Annex 2 of the Protocol on Ireland/Northern Ireland to the UK/EU Withdrawal Agreement and will continue to apply in Northern Ireland after the end of the transition period. The proposal under scrutiny—a major update of this Regulation—will, once adopted, replace Council Regulation (EC) No 428/2009 and apply in Northern Ireland.

#### **Action**

- Write to the Minister—Greg Hands MP—requesting further information on:
  - the Government’s plans for the operation of the UK’s dual-use regime after the end of the transition period; and
  - how it will manage divergence on dual-use rules between Northern Ireland and Great Britain when the proposal is adopted.
- Draw to the attention of the International Trade Committee, the Joint Committee on Human Rights, the Northern Ireland Affairs Committee, and the Committees on Arms Export Controls.

#### **Overview**

3.1 The [proposal under scrutiny](#) was considered by the Committee’s predecessor in its Seventy-third Report of Session 2017–19.<sup>7</sup>

3.2 The proposed (recast) Dual-Use Regulation would update the EU’s export control regime, specifically, that which pertains to ‘dual-use’ items.<sup>8</sup> Dual-use items are goods and technologies that can have legitimate civilian applications but can also be used for the development and deployment of weapons of mass destruction, the perpetration of terrorist acts and human rights violations. Special procedures—including authorisation requirements—apply to the export of dual-use items outside of the EU.

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6 Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast); Council and COM number: 12785/16 and COM(16) 616; Legal base: Article 207(2) TFEU, ordinary legislative procedure, QMV; Department: International Trade; Devolved Administrations: Consulted; ESC number: 38114.

7 Seventy-third Report HC 301–lxxi (2017–19), [Chapter 4](#) (4 September 2019)

8 [Council Regulation \(EC\) No 428/2009](#) of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (Recast).

3.3 The Commission’s proposal places greater emphasis on the protection of human rights and fundamental freedoms versus the current regime’s focus on military and state security-focussed concerns, and seeks to update the EU’s rule book in light of recent high-profile controversies involving EU-based operators.<sup>9</sup>

3.4 Notable aspects of the proposal include: the addition of a new category of items—i.e. cyber surveillance technologies—that would be subject to dual-use controls; a ‘catch-all’ human rights clause that would act as a residual mechanism to allow authorities to exert export control over items not specifically listed; and greater transparency requirements for operators. A full background to the proposal can be found in our predecessor’s Twenty-sixth Report of Session 2016–17.<sup>10</sup>

### Current state of play

3.5 Progress on the proposal at EU-level has been slow, however, its importance to the incoming Commission was underlined when it was carried over to the 2019–24 legislative period. Under the current stewardship of the German Presidency, there are signs that a final text will be agreed, at interinstitutional negotiations, before the end of the year.

3.6 On the back of our predecessors’ last Report chapter, Minister of State at the Department for International Trade, Rt Hon. Greg Hands MP, wrote with an update on the progress of negotiations on the proposal on 16 March 2020.<sup>11</sup>

3.7 The Minister details amendments made to the Council mandate in light of trilogue discussions. These are somewhat minimal and over progressive rounds appear to have focussed on tweaking the procedures and practices that would apply to the assessment and granting of export authorisations. Examples cited by the Minister include changes to the Recitals to include mention of the importance of company internal human rights compliance programmes, strengthening cooperation and information exchange mechanisms between Member State competent authorities, and clarifications surrounding residency and establishment rules for the purposes of licencing i.e. which national authority companies must apply to for authorisations.

3.8 In response to our predecessors’ requests, the Minister explains that the Government abstained from the last vote in Council—taken at the end of 2019—and now, as the UK is no longer permitted to attend such meetings, he does not have any further information on the current state of negotiations.<sup>12</sup>

3.9 It therefore remains unclear how much progress has been made on the headline issues of the addition of cyber surveillance technologies to EU dual-use controls, the inclusion of a catch-all human rights clause, and more stringent transparency requirements for

9 This includes the sale from the EU of surveillance equipment to Middle Eastern and North African governments during the ‘Arab Spring’ of 2010–12.

10 Twenty-sixth Report HC 71–xxiv (2016–17), [Chapter 5](#) (18 January 2017).

11 [Letter from Greg Hands to Sir William Cash MP](#), 16 March 2020.

12 During the transition period, as per the UK/EU Withdrawal Agreement, the UK is not permitted to attend EU decision-making fora.

operators. Indeed, the most recent public available Council mandate shows these areas in square brackets (indicating that there is yet to be formal agreement on specific parts of the Regulation amongst Member States).<sup>13</sup>

### *Future alignment with EU dual-export rules*

3.10 At the time of our predecessor's last consideration of the proposal, the UK/EU Withdrawal Agreement had not been agreed and the potential implications of its terms for future UK/EU alignment on dual-export rules had not been fully considered. Nonetheless, in his letter of 16 March 2020, the Minister provides helpful information on the Government's plans for the retention and operation of the current Regulation at the end of the transition period (presently 31 December 2020).

3.11 As per the terms of the European Union (Withdrawal) Act 2018, whichever version of the Dual-Use Regulation is in force at the end of the transition period will be copied over onto the UK statute book and amended, where deemed necessary, to ensure that it operates effectivity (taking account of the UK's status as a third country). Given that agreement is yet to be reached on the proposal (and the time involved in the adoption of legislation at EU-level), it is likely that the current version will still be in force at the end of the transition period and subsequently retained in UK law.

3.12 The Minister explains that the current list of controlled items and goods set-out in Annex I of the Dual-Use Regulation is drawn from various international agreements and is updated by Delegated Act as and when changes are made to these agreements. At the end of the transition period, it will be for the Government to make such changes and the Minister notes that they will be given effect to by Statutory Instrument.

3.13 The Minister explains that UK divergence from EU dual-use rules will depend on: (1) the development by the EU of its autonomous list (those items and goods that are not governed by international agreements);<sup>14</sup> and (2) the UK's interpretation of international rules versus the EU's (this variance exists under the current regime with Member States afforded some discretion when giving domestic effect to control lists).

3.14 The Minister does not, however, mention the Government's longer term plans for the UK's dual-use regime, more specifically, whether it will eventually seek to repeal and replace the retained Dual-Use Regulation or keep it for the foreseeable future and make amendments when necessary. Although not advocating for either approach, further information would be welcome. Various options for a future UK system present themselves and, as with the proposal under scrutiny, could include the mainstreaming of human rights concerns and improvements to the transparency of decision-making.

13 Council of the European Union, [Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items \(recast\) -Mandate for negotiations with the European Parliament](#) (5 June 2019).

14 These main international agreements in this regard are detailed in our predecessor's Seventy-third Report and include: the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies; the Nuclear Suppliers Group for the control of nuclear related technology; the Australia Group for the control of chemical and biological technology that could be weaponised; and the Missile Technology Control Regime for the control of rockets and other aerial vehicles capable of delivering weapons of mass destruction.

## Protocol on Ireland/Northern Ireland

3.15 Council Regulation (EC) No 428/2009—setting out the EU’s current framework for the export of dual-use items—is listed in Annex 2 of the Protocol on Ireland/Northern Ireland to the UK/EU Withdrawal Agreement.

3.16 Article 5(4) of the Protocol states that:

The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland.

In effect, Annex 2 creates a single regulatory zone for goods on the island of Ireland. This means that the EU legislation listed in Annex 2 will apply in Northern Ireland after the end of the transition period. Aside from dual-use items, Annex 2 includes virtually the entirety of the EU *acquis* on product standards.

3.17 The consequences of this listing are twofold. First, shipments of dual-use items from the EU to Northern Ireland, and *vice versa*, will be ‘intra-EU’ transfers for the purposes of Council Regulation (EU) No 428/2009 (meaning that, for the most part, they may be freely sold/transferred/exported between Member States and (now) Northern Ireland without the need for an export licence). Second, shipments from Northern Ireland to a third-country *or* to Great Britain will be exports for the purposes of the Regulation and will require authorisation. Article 7(3) of the Protocol excludes the possibility of the UK invoking measures aimed at the mutual recognition of assessments and authorisations in respect of Northern Ireland.

3.18 Furthermore, a recent Commission notice to stakeholders on dual-use items and the implications of the UK’s withdrawal from the EU makes clear that authorisations issued by UK competent authorities—in respect of Northern Ireland—cannot be invoked for the shipment of dual-use items from a Member State to a third country.<sup>15</sup>

3.19 Importantly, the EU legislative acts listed in Annex 2 are not static and, in accordance with Article 13(3) of the Protocol, will be updated on a dynamic basis as they are amended or replaced at EU-level. The UK is obliged under the Withdrawal Agreement to give effect to these amendments in Northern Ireland. This will include the proposal under scrutiny as a ‘recast’—a technical legal term for a major amendment—of an EU act listed in Annex II of the Protocol.

3.20 The consequences of this listing are significant. It gives rise to the possibility of two separate regimes existing in the UK; one in Great Britain based on the original Council Regulation and the other, in Northern Ireland, based on the proposed recast. Depending on the final text of the recast, this could create major differences between the types of items and goods for export by operators based in Great Britain not subject to new EU licencing and authorisation requirements versus those in Northern Ireland.<sup>16</sup> The possibility of divergence could be removed by the Government replicating the recast Regulation in Great Britain or, as an alternative, copying any changes over into UK law when they are

15 European Commission, ‘[Notice to Stakeholders: Withdrawal of the United Kingdom and EU rules in the field of dual-use export controls](#)’ (16 September 2020).

16 As discussed above, the development by the EU of its autonomous list could give rise to further, more significant, divergence as the amended regime departs from the international agreements on which it is based.

made at EU-level (e.g. when a new item is added to a control list that is specific to the EU and is not provided for by one of the main international agreements). The latter approach would, in focussing specifically on listing, neglect the differences in licencing procedures that could exist between Great Britain and Northern Ireland.

## Action

3.21 We have written to the Minister—Rt Hon. Greg Hands MP—requesting further information on the Government’s plans for the operation of the UK’s dual-use regime after the end of the transition period, and how it will manage divergence on dual-use rules between Northern Ireland and Great Britain when the proposal is adopted (consequent on dual-use rules being listed in Annex 2 of the Protocol on Ireland/Northern Ireland to the UK/EU Withdrawal Agreement).

3.22 We have drawn this Report chapter to the attention of the International Trade Committee, the Joint Committee on Human Rights, the Northern Ireland Affairs Committee, and the Committees on Arms Export Controls.

### ***Letter from the Chair to the Minister of State for Trade Policy (Rt Hon. Greg Hands MP)***

The Committee have asked me to thank you for your letter of 16 March 2020.

As I am sure you will appreciate, the political and legal context surrounding the proposed recast Dual-Use Regulation has changed a great deal since our predecessor Committee reported its assessment of negotiations—and the Government’s position on the dossier—to the House on 4 September 2019.

Your explanation of the Government’s stance on future alignment with EU dual-use rules was welcome. We do, however, have further questions in this regard. First, we request information on the Government’s longer term plans for the UK’s dual-use regime, more specifically, whether it will eventually seek to repeal and replace the Dual-Use Regulation—as saved by the European Union (Withdrawal) Act 2018—or will retain it on the statute book for the foreseeable future and amend it as and when deemed necessary. Second, we seek your view on whether priority should be given in any future UK regime to the mainstreaming of human rights concerns and improvements to the transparency of listing decisions and export authorisations.

We note that the current Dual-Use Regulation—Council Regulation (EC) No 428/2009—is listed in Annex 2 of the Protocol on Ireland/Northern Ireland to the UK/EU Withdrawal Agreement. This listing means that the Dual-Use Regulation will continue to apply in Northern Ireland after the end of the transition period (currently 31 December 2020). Furthermore, as per Article 13(3) of the Protocol, the proposal under scrutiny will, once adopted, replace Council Regulation (EC) No 428/2009.

The consequences of the Dual-Use Regulation being listed in Annex 2 are significant. It gives rise to the possibility of two separate regimes existing in the UK; one in Great Britain based on the original Council Regulation and the other, in Northern Ireland, based on the proposed recast. Depending on the final text of the recast, this could create major differences between the types of items and goods for export by operators based in Great

Britain not subject to new EU licencing and authorisation requirements versus those in Northern Ireland. We therefore request information on how the Government plans to minimise future divergence between the regimes applicable in Great Britain and Northern Ireland, in particular, whether it will mirror—or copy-over—(once adopted), the terms of the recast Regulation on the mainland.

Finally, the inclusion of the Dual-Use Regulation in Annex 2 of the Protocol means that dual-use shipments from Northern Ireland to Great Britain will be classed as exports for the purposes of the Regulation and will require authorisation. We request details of the number of such shipments that have taken place in previous years—between NI and GB—and information on the steps that Government is taking to assist and reduce future administrative burden caused by this change.

We require a response to this letter within ten working days and retain a watching brief over the proposal.

## 4 Northern Ireland Protocol: EU VAT identifier for businesses<sup>17</sup>

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**This EU document is legally and politically important because:**

- it would set a specific geographic VAT identifier code under EU law for businesses in Northern Ireland involved in trade in goods with the EU. The aim is to aid in the identification of such trade, as it will remain subject to EU VAT law on goods beyond the end of the post-Brexit transition period under the terms of the Protocol on Northern Ireland. The Government has expressed reservations about the EU’s proposal, but it has declined to specify or publicly set out an alternative approach.

### Action

- Write to the Financial Secretary to the Treasury (Rt Hon. Jesse Norman MP) requesting more information on the Government’s position on the EU proposal for a VAT identifier for Northern Ireland, and any alternatives it has put forward.
- Draw the EU’s proposal to the attention of the Committee on the Future Relationship with the EU, the Northern Ireland Affairs Committee and the Treasury Committee.

### Overview

4.1 The UK withdrew from the European Union on 31 January 2020. However, the Government has agreed a [special Protocol](#) with the EU to avoid the need for any customs or regulatory infrastructure on the land border with Ireland when the UK also leaves the EU’s Single Market and Customs Union when a post-exit transitional period comes to an end on 31 December 2020. Under [Article 8 of this Protocol](#), EU legislation on Value Added Tax (VAT) “concerning goods”, as well as EU excise duty legislation for alcohol, tobacco and fuel, will remain applicable in Northern Ireland beyond the end of the transition period. By contrast, VAT rules for the provision of services in, to or from Northern Ireland will be set by the UK without being legally constrained by EU tax law.

4.2 On goods arriving at the EU from outside its Customs Union, checks are normally carried out at ports and borders to ensure the importer pays the correct amount of VAT. The ultimate aim of Article 8 is to render unnecessary any such VAT-related formalities on goods being moved across the land border on the island of Ireland. To achieve this, businesses active in Northern Ireland will continue—as businesses in the whole of the UK will do until the end of the transition period—to submit information on cross-border sales and purchases of goods<sup>18</sup> to the EU’s confidential [VAT Information Exchange System](#) (VIES). This information will allow the tax authorities of the EU 27 Member States,

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<sup>17</sup> Proposal for a COUNCIL DIRECTIVE amending Directive 2006/112/EC on the common system of value added tax as regards the identification of taxable persons in Northern Ireland; COM(2020) 360; Legal base: Article 113 TFEU; special legislative procedure; unanimity; Department: HM Treasury; Devolved Administrations: Northern Ireland Executive consulted; ESC number: 41459.

<sup>18</sup> Between Northern Ireland and the EU, not any non-EU territories.

and HM Revenue & Customs, to check if VAT is being accounted for on cross-border transactions of goods involving a company in the EU and a counterparty in Northern Ireland.

4.3 In return for continued compliance with the relevant EU rules, businesses that trade in goods from Northern Ireland are also expected to have continued access to VAT-related facilitations for intra-EU trade available under European law, including an [electronic refund system](#) for business purchases and the ‘One Stop Shop’ mechanism for business-to-consumer sales.<sup>19</sup> Northern Ireland is also expected to remain bound by the EU’s rules on minimum VAT rates for specific goods, although it is permitted to vary them to match those applicable in Ireland.<sup>20</sup>

4.4 By contrast, businesses active only in Great Britain—irrespective of whether they deal in goods or services—will be outside the scope of EU VAT law completely from the end of transition on 31 December. The Government will be free to alter how VAT is charged, rated and administered in the rest of the UK. This also means such companies will no longer have access to the aforementioned facilitations when they buy or sell goods involving a counterparty in the EU, unlike competitors in who carry out such activities from Northern Ireland.<sup>21</sup> They will not have to submit statements to VIES, but instead fiscal controls—documentary and physical—will take place on British exports entering the EU, to ensure VAT is charged correctly. More pressingly, the legal logic of the Protocol dictates that the avoidance of VAT-related customs controls on the land border in Ireland creates the need for such checks on goods arriving in Northern Ireland by sea and air from outside the EU instead, *including from the rest of the UK*.

4.5 Article 8 of the Protocol more generally raises a number of issues for the VAT system in Northern Ireland and therefore for the UK as a whole. Our predecessors set some of these out in their Reports of [28 March 2018](#) and [30 January 2019](#), and we ourselves reiterated them more recently in our letter to the Treasury of 14 May 2020.

4.6 However, a lack of clarity persists. The European Commission in April 2020 [published a notice](#) on the application of EU VAT rules to UK-EU trade after 31 December this year. This includes a [basic description](#) of how it envisages the operation of the unique arrangements for Northern Ireland, and its implications for its trade with Great Britain. In August 2020, the Commission also tabled a [legislative proposal](#) to introduce a specific geographic identifier to prefix the VAT registration number of businesses with operations in Northern Ireland, to ensure that the rights and obligations under EU VAT law, as made applicable via the Protocol, are applied correctly. We discuss this further below.

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19 VAT is a consumption tax and therefore normally payable in the country where the final consumer of a good or service is located. The EU’s ‘One Stop Shop’ mechanism allows a company in one EU country selling to a consumer in another EU country to pay the VAT at the rate applicable in the latter to their domestic tax authority, which then remits to its counterpart in the Member State of the consumer. This means that the company does not have to register for VAT, with its attendant legal obligations, in every EU country where it has customers. See for more information the European Scrutiny Committee’s [Report of 30 January 2019](#).

20 This is why, for example, the Government could zero-rate VAT on women’s sanitary products from 1 January 2021, since that is the rate applicable in Ireland, thanks to a country-specific derogation, even though the EU VAT Directive generally requires the lower rate of VAT on such products. It is not clear, however, if Northern Ireland will be permitted to maintain the various exemptions from the default minimum rates for goods which the UK negotiated while it was still a Member State.

21 This means, among other things, that a business in Great Britain making a business purchase in an EU country on which they wish to claim an input VAT refund will need to do so by means of a paper-based application, as the electronic VAT refund system for such purposes under EU law is available only to businesses within the scope of EU VAT legislation.

4.7 By contrast, the UK Government as of early November 2020 has been unable to specify publicly which elements of EU VAT law it considers to ‘concern goods’ for the purposes of the Protocol, and will therefore continue to apply to relevant trade involving Northern Ireland. It does appear to interpret the range of EU rules that will continue to apply under Article 8 much more narrowly than the Commission, having hinted for example that areas of EU VAT law that apply equally to the provision of goods *and* services may be outside the scope of the Protocol.<sup>22</sup> We have also repeatedly raised concerns that future divergence between the EU and UK VAT systems could create additional administrative burdens for businesses there, as they will have to comply with elements of both, and potentially hinder their full participation in the UK’s internal market.<sup>23</sup> The UK Government has not yet issued practical guidance on how Article 8 of the Protocol will be implemented in practice, although it has said it is seeking to minimise “new costs and burdens on businesses”.<sup>24</sup>

### ***The EU proposal for a VAT identifier for Northern Ireland***

4.8 In August 2020, the European Commission tabled a [draft Directive](#) to create a specific prefix—XI<sup>25</sup>—for EU VAT numbers for businesses in Northern Ireland engaged in trade in goods with the EU, and who therefore will continue to be subject to EU VAT law and, more specifically, the various mechanisms referred to above for intra-EU trade. It forms part of the EU’s wider preparations for the end of the transition period and the entry into force of the Protocol on 1 January 2021.

4.9 The Commission considers the introduction of a separate VAT identification code for businesses in Northern Ireland engaged in activities covered by Article 8 “essential” for the “EU VAT system to function properly”, by ensuring that such companies “are identified for VAT purposes” in a way “different from any UK VAT identification numbers (starting with GB) which will be granted according to the UK legislation”. As noted, UK businesses which operate exclusively in Great Britain will no longer be covered by EU VAT law at all, and by extension lose access to the various systems established to facilitate accounting for VAT on intra-EU trade without customs controls. By contrast, businesses involved in the trade in goods carried out from Northern Ireland with the EU will remain part of those mechanisms. The identifier would be used to differentiate between the two categories of businesses in the UK in relation to cross-border supplies and acquisitions of goods involving the EU and Northern Ireland.

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22 The Commission appears to interpret Article 8 as meaning that, where EU VAT law applies equally to goods and services, it will apply in Northern Ireland in respect of goods. It has stated, for example, that businesses in Northern Ireland “will be able to request a refund of the VAT paid in the Member States under the refund procedure established by Council Directive 2008/9/EC”—which is used for refunds for purchases of both goods and services—“insofar as the refund relates to VAT which they have paid on acquisitions of goods”. The Government appears to view it as an open question whether it would apply in such cases. This also raises the question, for example, of whether the EU’s minimum VAT threshold for small businesses will continue to apply in Northern Ireland.

23 For example, if VAT-related administrative obligations are reduced by the Government for businesses in Great Britain in a way not permitted for Northern Ireland under the Protocol, businesses in the latter may face higher costs and therefore become less competitive within the UK’s internal market.

24 Cabinet Office Policy Paper, “[Moving goods under the Northern Ireland Protocol section two: moving goods from Great Britain to Northern Ireland](#)” (7 August 2020).

25 As Northern Ireland has no specific identification code under the normal ISO code (3166—alpha 2), the proposal makes use of the option foreseen by ISO to use X-codes for territories that do not have a specific code, and the code XI is therefore a logical choice.

4.10 The Commission has acknowledged the potential administrative burden its proposal entails, in particular because it envisages a “separate EU VAT identification number” for businesses engaged in trade covered by the Protocol, and that this identification may have to be used “in addition to the VAT identification number applied in the UK in case, for example, [of] a business [that] supplies both goods and services in Northern Ireland” (since trade in services is not covered by the Protocol and, consequently, will not be subject to EU VAT law). It notes in this respect that the UK could “opt to limit the identification using the specific [XI] prefix to those traders in Northern Ireland that are effectively engaged in intra-EU trade of goods<sup>26</sup> and exclude [...] those businesses that only supply domestically”.<sup>27</sup> We note in this respect that, while potential use of this *identifier* could be limited in this way, EU VAT law concerning goods *more generally* is in many cases also expected to apply to supplies and acquisitions of goods by Northern Irish businesses that are wholly domestic, for example with respect to the applicable VAT rates on a particular sale or acquisition,<sup>28</sup> and administrative requirements like in-voicing and record-keeping.

4.11 The Directive proposed by the Commission in August would only allocate a geographic identifier for Northern Ireland for the purposes of EU VAT law. It does not appear to impose specific obligations on the Government to actually allocate an expanded VAT registration number to Northern Irish businesses under the Protocol, as the Commission envisages. As we explore further below, this is one of several outstanding areas of discussion between the UK and the EU with respect to Article 8 of the Protocol.

4.12 As of 4 November 2020, the Directive establishing the identifier code for Northern Ireland has not yet been formally adopted by the EU Member States (which must approve it by unanimity). However, this is expected imminently after their Permanent Representatives [endorsed the legal text](#) on 30 September.

### ***The Government’s view on the proposal for a VAT identifier for Northern Ireland***

4.13 It will remain the responsibility of the UK Government, in practice of HM Revenue & Customs, to administer the VAT system of Northern Ireland even after the Protocol takes effect, including the allocation of VAT registration numbers. It has transpired that the Government does not wholeheartedly support the Commission proposal for the specific VAT identifier for Northern Irish businesses involved in the trade in goods, to assist in the implementation of Article 8.

4.14 The Government’s position was not, in fact, immediately clear from the [Explanatory Memorandum](#) on the Commission proposal, which was submitted to Parliament on 24 August 2020. The Financial Secretary to the Treasury (Rt Hon. Jesse Norman MP) in this document stated obliquely that “the UK is carrying out wider technical discussions with the European Commission” on the operationalisation of the VAT provisions of the

26 Intra-EU in this context also including Northern Ireland.

27 The Government has [referred](#) to the XI indicator as potentially being used to prefix the existing UK VAT registration number for “UK registered businesses trading goods in, or with Northern Ireland [...] that fall within scope of the Northern Ireland Protocol”.

28 In other words, it appears from the wording of Article 8 that the EU’s rules on minimum rates of VAT for specific goods will continue to apply where VAT on a particular sale is due in Northern Ireland. For sales of goods from Northern Ireland to Great Britain, the rate applicable in the latter—no longer restricted by EU VAT law—would apply, since VAT is a consumption tax that is normally paid in the country where the purchaser of a good or service is based.

Northern Ireland Protocol, which he said “include discussions regarding the Commission’s proposal [for an identifier] and associated complexities”. However, in a [subsequent letter](#) to our counterparts in the House of Lords on 5 October, the Minister added that the Government “would prefer to avoid [the] expedient” of having to include a Northern Ireland-specific indicator to UK VAT registration numbers for businesses there engaged in trade covered by the Protocol, while recognising the “need to ensure that data shared via the EU VAT IT systems should be limited to transactions that are within scope of the Protocol”.

4.15 This letter also noted that the potential use of the identifier is “subject to technical discussions [...] with Commission”, which “allow the UK and the Commission to explore proposals raised by each party and to discuss their practical implications”. While this clearly implies the Government has tabled ideas for an alternative approach to ensuring only relevant goods transactions involving Northern Ireland make use of the VAT systems and facilitations for intra-EU trade provided for under European law, their substance is not publicly known because the Government feels unable to “provide further detail at this time, in order not to prejudice those discussions”.<sup>29</sup>

4.16 Relevant in this regard is that, on 26 October 2020, HM Revenue & Customs issued [new guidance](#) on “accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021”. With respect to “registering for VAT”, this states:

Northern Ireland is, and remains, part of the UK’s VAT system. There will be no requirement for a new VAT registration for sales of goods in Northern Ireland. If you are already VAT registered, your existing VAT registration will be unaffected and you will not need to get another VAT registration. You will continue to account for VAT on all sales across the UK through your single UK VAT return, which will contain the same boxes as now.

4.17 Because of the wording used, it is unclear from this guidance whether the assurance that “there will be no requirement for a new VAT registration for sales of goods in Northern Ireland” also applies to supplies and acquisitions of goods involving a company in Northern Ireland and another in Ireland or elsewhere in the European Union. If it does, this would seem to pre-empt the Commission’s proposals. If it does not, and “in Northern Ireland” relates solely to sales of goods where both the seller and buyer are in that country, this appears to leave the door open for Northern Irish companies needing “another VAT registration” for intra-EU transactions.

4.18 The talks between the Government and the EU on the implementation of the Article 8 of the Protocol, including the use—if any—of the proposed identifier, appear to be protracted. They have not yet resulted in a formal, jointly-agreed announcement of the administrative and legal requirements for VAT that will apply in Northern Ireland from 1 January 2021.

4.19 Indeed, following the most recent meeting of the UK-EU Joint Committee on 19 October 2020, at which the implementation of the Protocol was discussed, the European Commission [issued a statement](#) to calling on “the UK to substantially accelerate work on all necessary measures ensuring full practical implementation, in particular with regard

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29 We note that the European Commission, unlike the Government, has placed its proposal on identifying relevant businesses for the purposes of EU VAT law on goods under the Protocol in the public domain and has also published the aforementioned [notice](#) on the application of EU VAT rules under the Protocol.

to [...] Value Added Tax and the registration of Northern Irish traders for VAT purposes”. The Government’s [own statement](#) following the meeting did not refer to question of EU VAT rules under the Protocol, and it remains unclear when it expects to issue guidance to businesses in Northern Ireland and the rest of the UK on the implementation of Article 8.<sup>30</sup> As such, the potential impact it may have on trade between Northern Ireland and Great Britain remains difficult to predict.<sup>31</sup>

4.20 As regards the involvement of the Northern Ireland Executive in these discussions, while the Government has confirmed it has drawn the Commission proposal for a VAT identifier to the attention of the Executive, the latter’s input into the UK’s technical negotiations on the implementation of Article 8 and the need, if any, of a such an identifier for Northern Irish businesses appears limited. In his letter to the House of Lords of 5 October 2020, the Minister noted that “VAT is not a devolved matter” and referred to the fact that the Treasury had “notified” the Executive of the proposal, which does not imply consultation.

## Conclusions and action

4.21 As is clear from the above, the implementation of Article 8 of the Protocol, requiring Northern Ireland to remain bound by EU excise and VAT law concerning goods, still raises many questions.

4.22 The Government sees the recent EU proposal for a VAT identifier for businesses whose trade falls within the scope of the Protocol on Northern Ireland as an “expedient” to be avoided if possible, although it acknowledges that “there is a need to ensure that data shared via the EU VAT IT systems should be limited to transactions that are within scope of the Protocol”. It is difficult to assess the reasoning behind these two apparently contradictory positions, because of the complete lack of information from the Government to date on how it envisages Article 8 operating in practice.

4.23 We note in this respect that the Directive proposed by the European Commission would only establish the identifying code for businesses with operations in Northern Ireland, but does not appear in itself to prescribe *how it should be used*. This seems to leave the option open for the UK not to implement the arrangements suggested by the Commission. However, it is unclear what alternative proposition the Government has put forward to enable tax authorities to verify whether transactions entered into the EU’s VAT systems by UK businesses are in fact covered by the Protocol, without prior application of a specific identifier used to differentiate between businesses engaged in trade in goods in Northern Ireland (and therefore subject to EU VAT law under the Protocol) and those that are not.

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30 In August 2020, the Government [published a policy paper](#) on “moving goods from Great Britain to Northern Ireland” which stated that the North’s continued alignment with “administrative processes included within the EU VAT [...] rules for goods”—which would include customs formalities—“this is subject to ongoing consultation and discussion, further guidance will be set out on the application of VAT and excise rules for goods in Northern Ireland in due course”.

31 Although the Government is, controversially, seeking powers under its Internal Market Bill to unilaterally override certain provisions of the Protocol, these do not relate to Article 8. However, Ministers have indicated they may seek powers under future Acts of Parliament to limit the extent of any VAT controls on trade between Great Britain and Northern Ireland to ensure they are strictly necessary to counter “the real risk of goods entering the EU single market”, rather than on all goods entering Northern Ireland from Great Britain.

4.24 The upshot of the above is that there is no clarity about the precise nature of the VAT registration system for Northern Irish businesses as it will apply in less than two months' time. Any method for identifying those companies engaged in trade covered by Article 8, whether by means of the Commission's proposed geographic indicator or some alternative arrangement, will therefore only be announced with very little time left before the Protocol takes effect, which also raises questions about the time required for HMRC to actually work with businesses in Northern Ireland to "ensure that data shared via the EU VAT IT systems [is] limited to transactions that are within scope of the Protocol".

4.25 In light of the above, the Committee has written to the Financial Secretary to the Treasury to request further information on the Government's reluctance to accept the EU's proposed approach for a Northern Ireland-specific VAT identifier, and what alternative arrangements it has put forward instead to ensure that only relevant businesses and transactions in goods are subject to the relevant legal rights and obligations under EU VAT law. A copy of that letter is annexed to this Report.

### ***Other outstanding questions about Article 8 of the Protocol***

4.26 As noted earlier in this Report, there are also various other outstanding issues as regards the practical implementation of Article 8 of the Protocol, beyond the question of a separate VAT identification system for Northern Irish businesses that trade in goods.

4.27 In particular, the Treasury has previously hinted that it does not necessarily consider areas of EU VAT law which apply equally to the provision of goods *and* services to fall within the scope of the Protocol, which raises the question, for example, of whether the EU's minimum VAT threshold for small businesses will continue to apply in Northern Ireland.<sup>32</sup> It does not appear that the EU shares this interpretation, but no further clarity has been provided.<sup>33</sup> The Treasury has, to date, also been unable to confirm whether the UK-specific exemptions with respect to VAT rates, such as the zero-rating for most foodstuffs which the Government negotiated while the UK was still a Member State, will continue to apply in Northern Ireland under the Protocol.

4.28 Given the complexity of EU VAT law, and the unprecedented separation of its application to 'goods' and 'services' that the Protocol requires for Northern Ireland, it is highly likely there are other difficulties and ambiguities that need to be resolved of which we are not yet aware.

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32 Treasury officials have previously indicated to the Committee that there are 'reasonable grounds' to exclude EU VAT law from being applicable in or to Northern Ireland under the Protocol if it covers both types of supply. For example, the Department told our predecessors in November 2019—in relation to the new maximum EU-wide VAT threshold for small businesses, which will be set at €85,000 from 2025—that this could be excluded from being applicable under Article 8 to Northern Irish firms selling goods. The reason offered was that the threshold applies to all supplies made by a business, so both goods and services.

33 In many cases, the EU VAT rules listed in the Protocol appear to apply equally to both goods and services. It is unclear why the EU would have requested (and the UK accepted) their inclusion, if it did not envisage them being applied in Northern Ireland in some form. The European Commission has also explicitly stated that the intra-EU VAT refund process for businesses under Directive 2008/9/EC—which is listed in the Annex to the Protocol and normally applies to refunds on purchases of goods and services for business use equally—will be available to Northern Irish firms "insofar as the refund relates to VAT which they have paid on acquisitions of goods". This suggests that the EU takes the view that, where EU VAT laws listed in the Protocol apply to goods and services equally, they 'concern goods' and will therefore also apply in and to Northern Ireland with respect to any supply of goods.

4.29 In addition, there has of course also been the recent controversy surrounding the divergent interpretations between the Government and the EU of the UK’s legal obligations under the Northern Ireland Protocol more broadly. In particular, the [Internal Market Bill](#)—currently being considered by the House of Lords—contains several clauses that would give Ministers the power to unilaterally dis-apply certain provisions of the Protocol, because of their perceived undesirable effects.

4.30 Although the Protocol-related clauses proposed by the Government in that Bill do not relate directly to Article 8 or the question of EU VAT law in Northern Ireland, the Government has [hinted](#) that it may seek “similar [...] provisions” in future Acts of Parliament, such as the upcoming Finance Bill 2020–21, if the EU insisted that “import VAT should be charged” on trade from Great Britain to Northern Ireland “in ways that are not related to the real risk of goods entering the EU single market”. This indicates a broader concern within Government about the implications of Article 8 of the Protocol for the smooth flow of goods between the different parts of the UK, in which the discussions around a VAT identifier for Northern Ireland have undoubtedly been caught up.

4.31 With respect to these broader unresolved issues, we can only reiterate our earlier requests that the Government should issue further guidance on the practical consequences for the VAT system of Northern Ireland as soon as possible and in light of its discussions with the European Commission on implementation of the Protocol. It is unclear even at this late stage whether—and if so when—the UK-EU Joint Committee, which is given certain tasks by the Withdrawal Agreement to adopt implementing measures for the Protocol, is going to take a formal Decision covering how EU VAT law on goods is to be applied under Article 8.<sup>34</sup>

4.32 Moreover, given the dynamic nature of Article 8, continued vigilance on the part of Parliament will be required with respect to *future* changes to EU VAT legislation that may affect Northern Ireland. In particular, as our predecessors stressed in their Reports of [28 March 2018](#) and [30 January 2019](#), the EU is currently considering various proposals for far-reaching reform of its VAT rulebook—in particular with respect to [minimum rates for specific products](#) and the [VAT treatment of cross-border supplies and purchases of goods](#)—which would also have implications for Northern Ireland under the Protocol. The European Commission has recently announced its intention for further VAT reforms, which we [reported to the House](#) on 1 October 2020.<sup>35</sup>

4.33 Similarly, since Article 8 also envisages the continued application of EU excise duty legislation for alcohol, tobacco and fuel in and to Northern Ireland, we have [recently written](#) to the Exchequer Secretary to the Treasury (Kemi Badenoch MP) about the implications of certain recent amendments to the EU’s Alcohol Duty Structures Directive in this regard. The European Commission has also announced that it intends to table draft legislation on both tobacco and fuel duty in 2021, which will also be relevant for the UK under the terms of the Protocol.

34 Article 8 states the UK-EU Joint Committee will “regularly discuss the implementation of this Article” and “shall where appropriate, adopt measures for its proper application, as necessary”. It also may (not shall), “as necessary [...] adopt appropriate measures” to ‘take into account’ Northern Ireland’s “integral place in the United Kingdom’s internal market”.

35 This Action Plan set out the Commission’s intention, for example, to table draft EU legislation for a single EU-wide VAT identification number, a new dispute resolution mechanism for VAT disputes between governments in the EU, and adapting EU VAT legislation to the digital economy.

4.34 The Committee will continue to monitor future developments in the reform EU VAT and excise law closely, and press the Government for further information on the potential or actual implications for Northern Ireland where necessary.

4.35 In anticipation of the Minister’s reply to our questions about the proposed VAT identifier for Northern Ireland, we draw the EU proposal to the attention of the Committee on the Future Relationship with the EU, the Northern Ireland Affairs Committee and the Treasury Committee.

***Letter from the Chair to the Financial Secretary to the Treasury (Rt Hon. Jesse Norman MP)***

Thank you for your Explanatory Memorandum on the European Commission’s draft Directive to introduce a Northern Ireland-specific geographic indicator to prefix VAT registrations for, in your words, “UK registered businesses trading goods in, or with Northern Ireland that fall within scope of the Northern Ireland Protocol”.<sup>36</sup> This would be used to identify those UK businesses with operations within scope of Article 8 of that Protocol, which requires the continued application of EU VAT law “concerning goods” in and to Northern Ireland from 1 January 2021 onwards.

We note from your subsequent letter to the House of Lords of 5 October 2020 that the Government is seeking to avoid this way of identifying relevant businesses and their activities for VAT purposes under the Protocol, but unlike the EU has not made public its proposals to “ensure that data shared via the EU VAT IT systems should be limited to transactions that are within scope of the Protocol”. It also appears from the legal text of the Directive that it would not, in itself, require the UK to implement the system described by the Commission in its explanatory notes accompanying the draft legislation.

Your letter also referred to your reluctance to “provide further detail at this time, in order not to prejudice [the] discussions” with the European Commission on “exactly how that would operate in practice, and how that data segregation can be implemented with minimal burdens to businesses”. While this may well be true to some extent, it appears incongruous for the Government not to set out publicly its alternative proposition given that the Commission has felt able to publish a formal legislative proposal for the identifier and accompanying explanatory notes. We note furthermore that your Department’s guidance of 26 October 2020 on “Accounting for VAT on goods moving between Great Britain and Northern Ireland” states that “there will be no requirement for a new VAT registration for sales of goods in Northern Ireland”, but it is unclear if this also applies in relation to supplies or acquisitions of goods involving a company in Northern Ireland and another in the EU.<sup>37</sup>

You will also be aware that in April 2020 the Commission issued a notice on the application of EU VAT rules in Northern Ireland under the Protocol, which—however basic—remains the most information available publicly about the purported implementation of Article 8.<sup>38</sup> We are not aware of the Government having publicly accepted the views set out in that notice or issued practical guidance of its own in this context, although we

36 European Commission document COM(2020) 360.

37 HM Revenue & Customs Policy Paper, “Accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021” (26 October 2020).

38 European Commission, [“Notice to Stakeholders: Withdrawal of the United Kingdom and EU rules in the field of Value Added Tax \(VAT\) for goods”](#) (16 April 2020).

have raised with you on several occasions our concerns about an apparent disparity in the Government and EU’s respective interpretations of the UK’s legal obligations under the Article.<sup>39</sup> Indeed, the Government has recently hinted that the EU’s interpretation of the requirements relating to import VAT formalities on GB-NI trade could constitute a “material breach of its duties of good faith”.<sup>40</sup> As such, a complete lack of clarity about the practical implementation of Article 8 persists ahead of its entry into force on 1 January.

In light of the specific Commission proposal for a VAT identifier for Northern Ireland, and the difficulties we have encountered previously in soliciting information from you on the wider implications of Article 8, we focus here on that issue. In particular, we are therefore asking you to:

- clarify why the Government would prefer to avoid the geographic VAT identifier as proposed by the European Commission;
- confirm whether the Directive as proposed would legally oblige the Government to apply a specific geographic prefix for relevant businesses in Northern Ireland as suggested by the Commission or, if not, what its practical legal effect would be;
- explain if the HMRC guidance of 26 October 2020, which states that “there will be no requirement for a new VAT registration for sales of goods in Northern Ireland”, also precludes the VAT identification arrangement foreseen by the Commission proposal; and
- explain the Government’s alternative proposition to ensure that “data shared via the EU VAT IT systems should be limited to transactions that are within scope of the Protocol”, or explain why, unlike the EU, it feels unable to make its proposal public.

It goes without saying, given our previous correspondence on Article 8 of the Protocol, that we would also welcome any further information you are able to provide on the Government’s discussions with the Commission more broadly about the implementation this aspect of the Withdrawal Agreement, in particular with respect to the concerns we outlined in our letter to you dated 14 May 2020. In particular, it would be helpful to know if the Government expects there to be a Decision of the UK-EU Joint Committee which makes specific provision relating to the implementation of Article 8 and the continued application of EU VAT and excise legislation in and to Northern Ireland.

We look forward to receiving your reply by 14 November.

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39 See in particular the Letter from Sir William Cash MP to the Financial Secretary to the Treasury dated 14 May 2020.

40 Policy paper, [“Government statement on notwithstanding clauses”](#) (17 September 2020).

## 5 Documents not considered to be legally and/or politically important

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### Department for Business, Energy and Industrial Strategy

(41526) Proposal for a Council Regulation on establishing the European High  
10928/20 Performance Computing Joint Undertaking.

+ ADDs 1–4

COM(20) 569

(41557) Communication from the Commission to the European Parliament,  
11400/20 the Council, the European Economic and Social Committee and the  
Committee of the Regions: A new ERA for Research and Innovation.

+ ADD 1

COM(20) 628

### Department for International Development

(41385) Report from the Commission to the Council on the implementation  
9413/20 of the financial assistance provided to the Overseas Countries and  
Territories under the 11th European Development Fund in 2019.

+ ADD1

COM(20) 286

### Foreign and Commonwealth Office

(41447) Decisions Council Decision (CFSP) 2020/1126 of 30 July 2020 amending  
— Decision (CFSP) 2016/1693 concerning restrictive measures against ISIL  
— (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities  
associated with them.

(41448) Council Implementing Regulation (EU) 2020/1124 of 30 July 2020  
— implementing Regulation (EU) 2016/1686 imposing additional  
— restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and  
natural and legal persons, entities or bodies associated with them.

(41572) Communication from the Committee to the Council—Financial  
11642/20 information on the European Development Fund—European  
Development Fund (EDF): forecasts of commitments, payments and  
COM(20) 638 contributions from Member States for 2020, 2021, 2022 and non-  
binding forecast for the years 2023–24.

(41578) Council Decision (CFSP) 2020/1464 of 12 October 2020 on the promotion of effective arms export controls.

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## HM Treasury

(41334) Draft amending budget No 5 to the general budget for 2020:  
Continuation of the support to refugees and host communities in  
8475/20 response to the Syria crisis in Jordan, Lebanon and Turkey.

COM(20) 421

(41335) Proposal for a Decision of the European Parliament and of the Council  
on the mobilisation of the Contingency Margin in 2020 to continue  
8476/20 humanitarian support to refugees in Turkey.

COM(20) 422

(41362) Report from the Commission to the European Parliament, the Council  
and the Court of Auditors 2019 Annual Management and Performance  
— Report for the EU budget.

COM(20) 265

(41502) Report from the Commission to the European Parliament and the  
Council 31st Annual Report on the protection of the European Union's  
+ADDs 1–6 financial interests—Fight against fraud—2019.

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COM(20) 363

(41527) Report from the Commission to the European Parliament and the  
Council assessing whether Member States have duly identified and  
10993/20 made subject to the obligations of Directive (EU) 2015/849 all trusts  
and similar legal arrangements governed under their laws.

COM(20) 560

## Annex

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### *Documents drawn to the attention of select committees:*

(‘SNC’ indicates that scrutiny (of the document) is not completed; ‘SC’ indicates that scrutiny of the document is completed)

**Committees on Arms Export Controls:** Control of exports on ‘dual-use’ items (including Northern Ireland Protocol implications) [Proposed Regulation (SNC)]

**Environment, Food and Rural Affairs Committee:** Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SC)]

**Environmental Audit Committee:** Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SC)]

**Committee on the Future of the European Union:** Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SC)]; Northern Ireland Protocol: EU VAT identifier for businesses [Proposed Council Directive (SNC)]; Northern Ireland Protocol: Joint Consultative Working Group [Proposed Council Decision (SNC)]

**Health and Social Care Committee:** Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SC)]

**Joint Committee on Human Rights:** Control of exports on ‘dual-use’ items (including Northern Ireland Protocol implications) [Proposed Regulation (SNC)]

**International Trade Committee:** Control of exports on ‘dual-use’ items (including Northern Ireland Protocol implications) [Proposed Regulation (SNC)]

**Northern Ireland Affairs Committee:** Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SC)]; Control of exports on ‘dual-use’ items (including Northern Ireland Protocol implications) [Proposed Regulation (SNC)]; Northern Ireland Protocol: EU VAT identifier for businesses [Proposed Council Directive (SNC)]; Northern Ireland Protocol: Joint Consultative Working Group [Proposed Council Decision (SNC)]

**Treasury Committee:** Northern Ireland Protocol: EU VAT identifier for businesses [Proposed Council Directive (SNC)]

# Formal Minutes

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## Wednesday 4 November 2020

Members present:

Sir William Cash, in the Chair

Jon Cruddas	Mr David Jones
Richard Drax	Anne Marie Morris
Margaret Ferrier	Charlotte Nichols
Mrs Andrea Jenkyns	Greg Smith

Scrutiny Report

Draft Report, proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 5 read and agreed to.

*Resolved*, That the Report be the Twenty-seventh Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

[Adjourned till Wednesday 11 November at 1.45 p.m.]

## Standing Order and membership

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The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression “European Union document” covers—

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee’s powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House’s Standing Orders, which are available at [www.parliament.uk](http://www.parliament.uk).

**Current membership**

[Sir William Cash MP](#) (*Conservative, Stone*) (Chair)

[Tahir Ali MP](#) (*Labour, Birmingham, Hall Green*)

[Jon Cruddas MP](#) (*Labour, Dagenham and Rainham*)

[Allan Dorans MP](#) (*Scottish National Party, Ayr Carrick and Cumnock*)

[Richard Drax MP](#) (*Conservative, South Dorset*)

[Margaret Ferrier MP](#) (*Scottish National Party, Rutherglen and Hamilton West*)

[Mr Marcus Fysh MP](#) (*Conservative, Yeovil*)

[Mrs Andrea Jenkyns MP](#) (*Conservative, Morley and Outwood*)

[Mr David Jones MP](#) (*Conservative, Clwyd West*)

[Stephen Kinnock MP](#) (*Labour, Aberavon*)

[Mr David Lammy MP](#) (*Labour, Tottenham*)

[Marco Longhi MP](#) (*Conservative, Dudley North*)

[Craig Mackinley MP](#) (*Conservative, South Thanet*)

[Ann Marie Morris MP](#) (*Conservative, Newton Abbot*)

[Charlotte Nichols MP](#) (*Labour, Warrington North*)

[Greg Smith MP](#) (*Conservative, Buckingham*)