House of Commons

European Scrutiny Committee

# Northern Ireland Protocol: Withdrawal Agreement Joint Committee Decisions and declarations of 17 December 2020

## Forty-First Report of Session 2019–21

*Report, together with formal minutes relating to the report*

*Ordered by the House of Commons to be printed 24 March 2021*

**HC 1343**
Published on 9 April 2021
by authority of the House of Commons

## 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. 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/.

### Staff

The current staff of the Committee are Ravi Abhayaratne (Committee Operations Assistant), Joanne Dee (Deputy Counsel for European and International Law), Alistair Dillon and Leigh Gibson (Senior Committee Specialists), Nat Ireton and Apostolos Kostoulas (Committee Operations Officers), Luanne Middleton (Second Clerk), Daniel Moeller (Committee Operations Manager), Jessica Mulley (Clerk), Foeke Noppert (Senior Committee Specialist), Indira Rao (Counsel for European and International Law), Paula Saunderson (Committee Operations Assistant), Emily Unwin (Deputy Counsel for European and International Law), Dr George Wilson (Second Clerk), Beatrice Woods (Committee Operations Officer).

### Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is (020) 7219 3292/5467. The Committee's email address is escom@parliament.uk.

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# 1 Introduction

## Background

1. The UK/EU Withdrawal Agreement set the terms of the UK's exit from the EU. It established a 'Joint Committee' to oversee the implementation, application and interpretation of the Withdrawal Agreement. Governance arrangements of this kind are common in international relations. The political significance of the issues covered by the Joint Committee, including the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement, are, however, considerable.[1]

2. The Joint Committee is co-chaired by the UK and EU. The UK's co-chair was initially the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP), however, on 1 March 2021, Lord Frost replaced Mr Gove. The EU's co-chair is European Commission Vice-President Maroš Šefčovič. The Joint Committee first met on 30 March 2020 and has met at semi-regular intervals since.

3. Six 'Specialised Committees' sit below the Joint Committee and serve as consultative bodies. Unlike the Joint Committee, they do not have the ability to make binding decisions, however, they do prepare its work. The Specialised Committees cover: citizens' rights; other separation provisions; the Protocol on Ireland/Northern Ireland; the Protocol on Sovereign Base Areas in Cyprus; the Protocol on Gibraltar; and the Brexit financial settlement.

4. The Joint Committee has the power to amend the Withdrawal Agreement, for example, to correct errors and omissions,[2] and to adopt measures to ensure that it operates effectively. Importantly, the Joint Committee is tasked with taking specific decisions in relation to the Northern Ireland Protocol and how it is implemented.[3] Decisions on such changes and new measures cannot be made unilaterally by the UK or EU and the Joint Committee is the body in which both meet to discuss and formally agree to their adoption.

## Purpose of the Report

5. This Report stems from our scrutiny of a series of Joint Committee Decisions and supplementary unilateral declarations which mainly concern the operation of the Northern Ireland Protocol and were announced by the UK and EU in December 2020. In the sections that follow, we cover the following Decisions and declarations in detail:

- the maximum annual level of agricultural subsidies for Northern Irish farmers;

1 Under the Ireland/Northern Ireland Protocol to the Withdrawal Agreement, Northern Ireland remains part of the UK's customs territory, however, to prevent a 'hard border' with the Republic of Ireland, it must apply the EU's customs code. Certain EU Single Market rules also apply to Northern Ireland.

2 Examples of these types of changes include the addition of administrative decisions on the coordination of social security systems. We received a Government Explanatory Memorandum on an EU document concerning a related Joint Committee Decision on 10 December 2020. It covered the 'triangulation' of social security systems across the EU and ETFA states for individuals covered by the UK/EU Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement. It is not reported here as it is not considered to be legally and/or politically important.

3 'At risk goods' are goods moved into Northern Ireland from outside the EU, including from Great Britain, that are considered by the EU to be 'at risk' of ending up in the EU and therefore attract a payable EU tariff. Section 4 of this Report considers 'at risk goods'—and a related Joint Committee Decision—in detail.

- the inclusion of some additional EU laws in the Protocol—which therefore continue to apply in Northern Ireland—and the insertion of a number of explanatory notes on how EU trade defence regulations will apply to Northern Ireland;
- the system for determining whether goods moved into Northern Ireland from outside the EU, including from Great Britain, are 'at risk' of ending up in the EU and therefore attract the payable EU tariff;
- practical working arrangements for EU representatives exercising rights to monitor UK activities relating to the Protocol;
- the appointment of members to the Withdrawal Agreement arbitration panel;
- the extent to which EU State aid law continues to apply in the rest of the UK under the Protocol; and
- an alternative system for the submission of export data to the UK Government for goods moved from Northern Ireland to Great Britain.

6. We have considered these Decisions and declarations together to highlight the significant legal and political importance of the Joint Committee and allow for the presentation of common themes relating to the Government's approach to, and understanding of, the operation of the Joint Committee and the Northern Ireland Protocol.

7. The Government's recent unilateral extension of the grace periods set out in the UK and EU declarations of 17 December 2020 is not covered in this Report.[4] We will return to consider this specific issue when the rapidly changing political and legal context surrounding the Government's announcement has settled.

8. The Joint Committee Decisions covered in this Report were adopted by the UK and EU on 17 December 2020. In the absence of expected Explanatory Memoranda on the Decisions, we wrote to the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP) on 16 December requesting urgent information on the Government's view of their content and its position on their adoption.[5] We did not receive the Chancellor's response until 8 February 2021.[6] When we did receive Explanatory Memoranda on the Decisions (in January 2021), the information provided was incomplete and failed to adequately address the legal and policy implications of the Decisions and, importantly, their potential practical impact on businesses and consumers in Northern Ireland. It is also worth noting that the Written Ministerial Statements that have been made ahead of Joint Committee meetings have commonly included only an outline agenda and no new substantive information i.e. that which has not already been available publicly.[7]

9. This situation speaks to the urgent need for transparency from the Government in terms of its activities in the Joint Committee and, more specifically, relating to the

4 Viscount Younger of Leckie, 'Northern Ireland Update' UIN HLWS811 (3 March 2021). The Government's announcement relates to postponing the need for official certifications in the application of EU food safety and animal health law in Northern Ireland and steps intended to ease the movement of other goods from Great Britain to Northern Ireland, in particular, parcels and plants and plant products.

5 Letter from Sir William Cash MP to the Rt Hon. Michael Gove MP, 16 December 2020

6 Letter from the Rt Hon. Michael Gove MP to Sir William Cash MP, 8 February 2021

7 For example, see The Rt Hon. Michael Gove MP, 'Written statement to Parliament: Agenda of the meeting of the Withdrawal Agreement Joint Committee: 28 September 2020' (23 September 2020)

adoption of Decisions such as those considered in this Report. Explanatory Memoranda relating to Decisions that fall within the scope of the Northern Ireland Protocol should be provided in good time ahead of the Joint Committee meeting at which they are to be considered. **We repeat our previous calls for greater clarity on proceedings in the Joint Committee e.g. sight of detailed agendas in good time ahead of scheduled meetings and the publication of meeting minutes.**[8] **We also ask that Explanatory Memoranda on EU documents—that fall within the scope of the Northern Ireland Protocol—are submitted in sufficient time and with adequate detail for us to consider before any decisions are taken in the Joint Committee.**

10. The Government's statements to us—and to the House—on the importance of parliamentary scrutiny of the UK's new relationship with the EU are welcome. Without providing the attendant information that is necessary to facilitate meaningful engagement they are, however, at risk of ringing hollow. **As the analysis in the sections that follow shows, there is significantly more that the Government could have done –and *should* be doing—to facilitate scrutiny of the Joint Committee. This is vital given its importance: especially for the people and businesses of Northern Ireland.**

11. **Given the unique nature of the UK's relationship with the EU, the UK/EU Withdrawal Agreement Joint Committee is of significant legal and political importance. This necessitates robust mechanisms for transparency and parliamentary scrutiny.**

12. The Joint Committee will serve as the main forum for the management of the Withdrawal Agreement and the operation of the Northern Ireland Protocol. The issues raised in the Joint Committee—and the Decisions that it is empowered to take—cover a significant number of areas and directly concern the people and businesses of the UK. As illustrated by this Report, they have so far ranged from Decisions on subsidies for farmers to the appointment of arbitrators.

13. **We urge the Government to look again at how it can better inform us—and the House—of upcoming Joint Committee business and facilitate our scrutiny of binding Decisions before they are adopted. The information that the Government has provided, to date, on the activities of the Joint Committee—and its assessment of their importance—has been incomplete and made available too late to allow for the meaningful engagement of the House and affected stakeholders.**

8 We are disappointed that this latter request was recently rejected by the Chancellor of the Duchy of Lancaster. See Letter from Rt Hon. Michael Gove MP to Sir William Cash MP, 12 March 2021

# 2 Agricultural subsidies[9]

## Overview

14. As required by the Withdrawal Agreement, the Joint Committee governing the operation of the Ireland/Northern Ireland Protocol agreed on the maximum level of agricultural subsidies that may be provided to farmers, and the minimum percentage of that which must be classed as 'Green Box' (environmentally sustainable) support under world trade rules.[10] The Joint Committee also agreed an amount of fisheries support to be exempted from EU state aid rules.[11]

15. Annex 6 of the Protocol sets out how the total level of support, and the Green Box proportion, should be calculated. This is based on recent Northern Irish receipts under the Common Agricultural Policy (CAP), as well as the current Green Box proportion in the CAP. There is provision for the amounts to be re-calculated in the future as changes are made to both EU and UK farming policy.

16. The Decision under consideration provides for a baseline of £382.2m of annual agricultural support to farmers in Northern Ireland to be exempt from EU state aid rules. There is also provision for up to £25.03m of unspent allocation in any given year to be rolled forward to the subsequent year. In addition, an extra £6.8m of further support is able to be deployed in any year where crisis conditions are met. These are set out in the Decision, such as a situation of serious market disturbance directly attributable to a loss in consumer confidence due to public, animal or plant health and disease risks. The Decision provides that at least 83% of the support must be classed as 'Green Box' expenditure.

17. Finally, the agreement provides for an exemption for nearly £16.93m of fisheries spending from EU state aid rules across each five-year period, with a maximum spend of £4.01m in any given year.

18. In his Explanatory Memorandum, the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office (Rt Hon. Michael Gove MP) notes that the agreement on fisheries spending corrects an anomaly because the Protocol as it stands did not carve fisheries spending out of EU state aid rules. The Decision, he notes, outlines categories of spend in this regard which are not eligible to be caught within the new cap, including the construction of new fishing vessels or the importation of fishing vessels or the permanent cessation of fishing activities.

## Conclusions

19. As is the case with the other Decisions adopted by the Joint Committee, we are gravely concerned that the Government afforded Parliament no opportunity to scrutinise its approach to this Decision before it was agreed. We are raising those matters elsewhere in this Report and have no specific issues to raise concerning the content of this Decision.

9 Council number: 13910/20; ELC number: 41737

10 Annex 2 of the WTO Agreement on Agriculture

11 DECISION No 5/2020 OF THE JOINT COMMITTEE ESTABLISHED BY 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 of 17 December 2020determining the initial maximum exempted overall annual level of support and the initial minimum percentage referred to in Article 10(2) of the Protocol on Ireland/Northern Ireland to 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

# 3 Errors and omissions[12]

## Overview

20. To ensure the smooth trade of goods between Northern Ireland and Ireland, Northern Ireland must remain aligned with a number of EU laws, which are set out in Annex 2 of the Ireland/Northern Ireland Protocol annexed to the Withdrawal Agreement. At its meeting of 17 December 2020, the Joint Committee (JC) established by the Withdrawal Agreement agreed a Decision[13] addressing a number of "errors and omissions" in the Protocol. The JC decided to add eight EU laws to Annex 2, in addition to three explanatory notes providing clarification on the scope of existing laws in Annex 2. It also agreed to remove two laws from Annex 2.

21. In June 2020, we scrutinised an earlier draft EU Council Decision proposing that the EU support a number of changes to the Withdrawal Agreement, including the Protocol. On 12 June, the Government agreed to some of the EU's proposed amendments at a meeting of the UK-EU Joint Committee, with the notable exception of those relating to the Protocol on Ireland/Northern Ireland. The suggested changes were not agreed at that stage. In our scrutiny,[14] we expressed grave concern about the degree of information provided by the Government[15] as it neither clarified the implications for the UK (and Northern Ireland in particular) of accepting or rejecting the EU's proposals, nor confirmed the Government's intentions when they were to be put to the Joint Committee for approval on 12 June.

22. Even now, following adoption of the JC Decision on errors and omissions, we do not know what the Government's approach was as the Explanatory Memorandum from the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office (Rt Hon. Michael Gove MP) does little more than describe the final outcome. His comments are included in the summary of the Decision that follows.

## The Joint Committee Decision

### *Addition of new EU legal acts to Annex 2 of the Protocol*

23. The JC agreed to add eight EU acts to Annex 2, as set out below.

### *Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment (Single-Use Plastics Directive')*

24. The Single-Use Plastics Directive aims to prevent and reduce the impact of certain single-use plastic products and fishing gear containing plastic on the environment, and to progress towards a circular lifecycle for plastics. It includes measures to restrict placing

12 Council number: 13914/20; ELC number: 41739

13 DECISION NO 3/2020 OF THE JOINT COMMITTEE ESTABLISHED BY 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 of 17 of December 2020 amending the Protocol on Ireland and Northern Ireland to 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

14 Twelfth Report HC 465 (2019–21) "UK-EU Joint Committee: Decision of 12 June 2020 amending the Withdrawal Agreement" (18 June 2020).

15 Explanatory Memorandum dated 3 June 2020 from Rt Hon Michael Gove MP (Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office)

certain items on the market, introducing new product design and labelling requirements, and extended producer responsibility schemes.

25. Only those parts of the Directive that are required to allow a proper functioning of goods movements between Northern Ireland and Ireland/the European Union have been added to Annex 2. The main requirements are therefore:

- consumption reduction measures for cups for beverages and food containers;
- the requirement to restrict the placing on the market of certain single use plastic goods, such as plastic cutlery; and
- product specific requirements largely related to plastic beverage bottles, and new labelling requirements on a subset of plastic products.

26. The date for the Directive to be transposed in Northern Ireland has been extended to an earliest date of 1 January 2022 compared to the earlier 1 July 2021 date applied to EU Member States.

27. The Minister describes the approach as providing "a pragmatic way forward overall." On the one hand, he says, it ensures there would not be market access barriers for products with plastics sent from Northern Ireland to the EU. On the other hand, it ensures that Northern Ireland is not constrained by any EU rules on issues not directly connected to the movement of goods. The Minister emphasises that the Government and Northern Ireland Executive are both strongly committed to reducing single use plastics as a matter of policy.

### *Directive 2011/91/EU on indications or marks identifying the lot to which a foodstuff belongs*

28. The Directive sets the conditions for markings on foodstuffs to identify the lot they belong to. The Directive complements other EU foodstuff measures in Annex 2 of the Protocol and focuses on ensuring the easy traceability of foodstuff from production, thereby enabling removal from the market if necessary due to safety issues or a dispute.

### *Council Directive 66/401/EEC of 14 June 1966 on the marketing of fodder plant seed*

29. The Directive sets out rules concerning the marketing of fodder plant seed within the Union. It includes requirements concerning the identity, health and quality, as well as certification requirements of those seeds, pursuant to which they may be freely marketed in the European Union or Northern Ireland.

### *Council Directive 98/56/EC of 20 July 1998 on the marketing of propagating material of ornamental plants*

30. The Directive sets out rules concerning the marketing of propagating material of ornamental plants in the European Union. It includes requirements concerning the quality and health of that material, pursuant to which it may be freely marketed in the European Union or Northern Ireland.

### *Council Directive 2008/72/EC of 15 July 2008 on the marketing of vegetable propagating and planting material, other than seed*

31. The Directive sets out rules concerning the marketing of vegetable propagating and planting material in the European Union. It includes requirements concerning the identity, health, and quality, as well as control measure of that material, pursuant to which it may be freely marketed within the European Union or Northern Ireland.

### *Council Regulation (EC) No 111/2005 laying down rules for the monitoring of trade between the Union and third countries in drug precursors*

32. Regulation (EC) 111/2005 establishes rules for monitoring trade in drug precursors between the EU and third countries. Drug precursors are chemical substances which have legitimate uses, for example in the production of pharmaceuticals and cosmetics, but which can also be used in the illicit manufacture of narcotic drugs and psychotropic substances. The EU rules implement the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 and are intended to prevent drug precursors being diverted into illicit drug production. Licensing requirements apply for operators within the EU who import or export scheduled substances listed in an Annex to the Regulation.

33. The Minister says that the inclusion of the Regulation in Annex 2 of the Protocol means that Northern Ireland will "continue to enjoy access to the EU's drug precursor markets, and Northern Ireland businesses will not be required to impose any additional licensing beyond what is currently required for intra-EU trade in drug precursor chemicals". There will, however, be new licensing requirements for trade in drug precursors between Great Britain and Northern Ireland "in order to maintain the integrity of the UK and EU regulatory regimes". We understand this to mean that UK laws governing trade in drug precursors will only apply in Great Britain (GB), with Northern Ireland remaining bound by EU law in this area.

### *Regulation 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods*

34. The Regulation sets out the conditions for the introduction of cultural goods into the EU and the conditions and procedures for the import of cultural goods for the purpose of safeguarding humanity's cultural heritage and preventing the illicit trade in cultural goods, in particular where such illicit trade could contribute to terrorist financing. It does not apply to cultural goods which were either created or discovered in the customs territory of the EU.

35. The Minister considers that the policy implications of this Regulation being included in Annex 2 of the Protocol are, in practice, minimal, given that there are very few imports of cultural goods from the rest of the world into Northern Ireland, and those imports from non-EU countries that do take place are likely to be covered by exemptions within the Regulation. The Regulation will have no effect on cultural goods moving from Northern Ireland to Great Britain.

### *Regulation (EU) 2019/287 of the European Parliament and of the Council implementing bilateral safeguard clauses and other mechanisms allowing for the temporary withdrawal of preferences in certain trade agreements concluded between the European Union and third countries*

36. Regulation (EU) 2019/287 establishes a set of principles and procedures for implementing safeguard clauses in the EU's trade agreements with countries listed in the Annex to the Regulation (currently Japan, Vietnam and Singapore, with the expectation that further countries will be added as the EU negotiates new agreements). Safeguard clauses operate as a safety valve, allowing one party temporarily to withdraw preferences if they are causing serious injury to their domestic industry, giving it more time to adapt to new trading conditions.

37. As the Minister notes, the Regulations already listed under heading six of Annex 2 to the Protocol concern the implementation of bilateral safeguard measures under a range of EU/third country trade agreements. In future, the EU is expected simply to amend the Annex to Regulation (EU) 2019/287 rather than adopting separate implementing Regulations for each new agreement.

### *Deletion of two EU acts from Annex 2*

38. The JC also agreed that two EU acts be removed from Annex 2.

### *Regulation (EC) No 443/2009 of the European Parliament and of the Council of 23 April 2009 setting emissions performance standards for new passenger cars as part of the Community's integrated approach to reduce $CO_2$ emissions from light-duty vehicles*

39. Regulation 443/2009 set $CO_2$ emission performance standards for new passenger cars by setting average $CO_2$ emission targets for manufacturers and monitoring and reporting responsibilities for Member States. The Minister says that the Government did not consider this Regulation to be relevant to the movement of goods and therefore supported its removal from Annex 2. The policy implications of removing this legislation from Annex 2 are to ensure that Northern Ireland vehicle $CO_2$ emissions may count towards UK rather than EU targets.

### *Regulation (EU) No 510/2011 of the European Parliament and of the Council of 11 May 2011 setting emission performance standards for new light commercial vehicles as part of the Union's integrated approach to reduce $CO_2$ emissions from light-duty vehicles*

40. Regulation 510/2011 operated in the same way as 443/2009, but its scope covered new light commercial vehicles. The UK Government did not consider this Regulation to be relevant to the movement of goods and therefore supported its removal. As with 443/2009, its removal from Annex 2 will ensure that Northern Ireland $CO_2$ emissions may count towards UK rather than EU targets.

41. The Minister notes that both of these Regulations were repealed and replaced by Regulation (EU) 2019/631 on 1 January 2020, though their successor Regulations would have remained in scope of the Protocol. Removing this from scope will therefore ensure

that vehicles in Northern Ireland will not count toward EU manufacturer $CO_2$ targets, and may count toward UK manufacturer $CO_2$ targets instead. This clarifies Northern Ireland's place in the UK internal market.

*Explanatory Notes on the application of EU trade-related measures in Northern Ireland*

42. The JC agreed three explanatory notes which seek to clarify how various EU trade-related Regulations listed in headings four, five and six of Annex 2 will apply in respect of Northern Ireland. According to the Minister, these explanatory notes do no more than clarify Northern Ireland's place in the UK's international trade regime.

43. The first of the three explanatory notes concerns Regulation (EU) 978/2012 which establishes the EU's scheme of generalised tariff preferences (GSP) for developing countries. It identifies specific provisions of the Regulation which "shall not be read as including" (variously) Northern Ireland, the Northern Ireland market, and Northern Ireland producers or industry. The effect of reading the provisions in this way is to preclude the UK Government (acting on behalf of Northern Ireland) and Northern Ireland producers from requesting an investigation to establish whether goods imported at a preferential tariff from developing countries are causing (or threaten to cause) serious difficulties which may damage their economic or financial position. Moreover, the interests of Northern Ireland producers would not be considered in any investigation undertaken by the Commission at the request of an EU Member State or producers elsewhere in the EU. If an investigation leads to the introduction of safeguard measures Northern Ireland would nonetheless be required to apply the standard duty applicable under the EU's Common Customs Tariff, rather than the preferential GSP tariff.

44. The second explanatory note concerns EU trade defence instruments dealing with anti-dumping measures (Regulation (EU) 2016/1036), countervailing duties (Regulation (EU) 2016/1037) and surveillance and safeguard measures on goods imported into the EU which cause (or threaten to cause) serious injury to EU producers (Regulation (EU) 2015/755). The explanatory note says that references to "Member States" or to the "Union" in these Regulations "shall not be read as including the United Kingdom in respect of Northern Ireland". While Northern Ireland will therefore be bound to apply any anti-dumping duties, countervailing duties (to offset unfair subsidies on imported goods), surveillance or safeguard measures agreed on by the EU, the Northern Ireland market (and the interests of Northern Ireland industry and consumers) will not be taken into account by the EU in determining whether duties or other trade defence measures are necessary. According to the Minister, the effect of the explanatory note is to "exclude Northern Ireland industries from the EU's calculations for the purposes of trade remedies investigations and Northern Ireland importers from being able to seek refunds of duties from the Commission". A European Commission Notice published on 18 January 2021 makes clear that all EU anti-dumping and anti-subsidy measures in force on 1 January 2021 only apply to goods imported by the EU27 (not the UK), but adds that "aspects of EU trade defence in relation to Part 3 of the Withdrawal Agreement and the Ireland/Northern Ireland Protocol will be the subject of a separate notice".

45. The third explanatory note concerns all the Regulations on bilateral safeguards listed under heading 6 of Annex 2. Bilateral safeguard measures may be necessary when preferential market access results in a surge in imports of certain goods which causes (or threatens to cause) serious injury to industry in the EU. While making clear that bilateral

safeguard measures taken by the EU (such as increased duties) will apply in Northern Ireland, the explanatory note specifies that the Regulations "shall not be read as including the United Kingdom in respect of Northern Ireland". The UK Government (acting on behalf of Northern Ireland) and Northern Ireland producers cannot therefore request an investigation to determine whether safeguard measures are necessary, nor can the interests of Northern Ireland producers be taken into account in any investigation requested by an EU Member State or by producers elsewhere in the EU.

## Conclusions and questions

46. We take note of the outcome of the Joint Committee's deliberations on 'errors and omissions'.

47. The Explanatory Memorandum largely summarises the content of the Decision without explaining how the Government approached the negotiations in the Joint Committee or how the outcome agreed will affect businesses trading in or with Northern Ireland. We note that the only differences between the Commission's proposal of 15 May 2020 and the final outcome are the following: partial (rather than full) inclusion of the Single-Use Plastics Directive; and the removal of two EU laws from Annex 2.

48. We assume that the Government largely agreed with the proposals put forward by the Commission, but that it negotiated the two changes highlighted above. If that is the case, we further assume that the Government undertook some analysis before reaching its position.

49. **We therefore seek from the Government:**

- **confirmation of the position that the Government took in negotiations within the JC and the changes that it secured; and**
- **the rationale for its position.**

### *Drug precursors*

50. We note that the inclusion in Annex 2 to the Protocol of Regulation (EC) 111/2015 on trade in drug precursors means that new licensing requirements apply to trade in these substances between Northern Ireland and Great Britain, as set out in Government guidance on precursor chemical licensing. Depending on the substances being traded, importers and exporters may need to apply separately to the Home Office Drug and Firearms Licensing Unit for an import and an export licence.

51. The Minister states in his Explanatory Memorandum that the new licensing requirements are necessary "to maintain the integrity of the UK and EU regulatory regime". He does not explain what impact they have had on the costs for businesses in NI and GB trading in substances covered by the EU Regulation or on the continued viability of NI to GB and GB to NI supply chains.

52. **We therefore ask the Government to provide further information on the following matters:**

- **the additional costs that NI and GB businesses will incur in complying with**

**the new licensing requirements following their introduction on 1 January 2021;**

- **the impact that these additional costs have had so far (or are anticipated to have in the future) on the volume of NI/GB trade in drug precursors; and**
- **any evidence gathered on the effect that the new licensing requirements and associated costs have had (or are anticipated to have) on NI/GB supply chains operating in both directions before 1 January 2021.**

53. **We understand that the regulatory regimes applicable in GB and NI are, for the time being, the same. We also ask the Government what factors it would expect to take into account in deciding whether to use its regulatory autonomy to diverge from EU rules on drug precursors or to remain in alignment.**

### *Trade-related instruments*

54. Turning to the explanatory notes which are to be inserted under headings four, five and six of Annex 2 to the Protocol, the Minister states only that they "clarify Northern Ireland's place in the UK's international trade regime". We are disappointed that the Minister did not explain what their practical effect would be or how their application might be affected by Joint Committee Decision No 4/2020 on the determination of goods not at risk. That Decision provides that all goods entering Northern Ireland which are subject to EU trade defence measures are to be considered at risk of subsequently being moved into the EU market and subject to the payment of any applicable EU tariff. As far as we can tell, the main effect of the Explanatory Notes and the Joint Committee Decision on at risk goods is that the interests of Northern Ireland industries and consumers will not be taken into account by the EU in determining whether to introduce trade defence measures, yet these measures (in many cases, an increased tariff on imports) will apply in Northern Ireland.

55. **We ask the Government whether this is indeed the case and what system the Government has put in place to reimburse duties paid by Northern Ireland importers.**

# 4 'At risk goods'

## Introduction

56. The Protocol on Ireland/Northern Ireland in the Withdrawal Agreement aims to avoid the need for any customs or regulatory infrastructure related to trade in goods between Northern Ireland and Ireland. It does so by keeping the former bound by a wide range of EU legislation relating to goods, even while the rest of the UK is no longer under a legal obligation to follow EU rules in those areas following the end of the post-Brexit transition period on 31 December 2020.

57. The Protocol formally states that Northern Ireland is part of the UK's customs territory and underlines the "importance of maintaining [its] place in the United Kingdom's internal market".[16] However, in practice, it effectively keeps aligned with a range of EU laws related to the EU's Customs Union and Single Market for goods.[17] As of 1 January 2021, this has notably led to the application of regulatory formalities at entry points into Northern Ireland for goods coming in from Great Britain (and from other non-EU jurisdictions), such as food safety checks. Such trades now also require customs formalities, like import declarations, under the EU's Customs Code.[18] Generally speaking, these formalities were of course not applicable to trade between Northern Ireland and Great Britain trade previously.[19]

58. The continued application of the EU Customs Code in Northern Ireland in certain cases also means the UK may have to collect EU tariffs on goods brought into Northern Ireland from outside the EU, including from Great Britain.[20] This is the case where such duties would have been applicable under EU law if the goods had been brought directly into the EU Customs Union *and* they are deemed "at risk" of being moved into the EU from Northern Ireland.[21] Goods are deemed to be "at risk" unless they meet the criteria established for determining that they are "not at risk". For example, when raw materials, like steel, are imported to be commercially processed into other products, they will be "at risk" unless an exemption is available. The aim is to stop businesses from avoiding paying EU customs duties by moving goods—or products manufactured in Northern Ireland with non-EU materials—across the land border with Ireland, which as noted will remain free of customs controls. In certain cases, this arrangement also creates a customs duty liability for domestic trade between Great Britain and Northern Ireland, with any revenue

16 Recitals and Article 4 of the Protocol

17 The Protocol does not cover trade in services, where the UK – including the devolved authorities – are now free to regulate without being constrained by EU law.

18 There are also a more limited number of formalities that will need to be applied to goods sent from Northern Ireland to non-EU destinations, including Great Britain. We explore this in more detail in section 8 of this Report on exit formalities under the Protocol.

19 In particular, as the Government noted in 2017, while the UK was still an EU Member State, "North-South cooperation on agriculture […] enabled the island of Ireland to be treated in policy and operational terms as a single epidemiological unit for the purposes of animal health and welfare".

20 The Protocol allocates responsibility for "implementing and applying the provisions of [EU] law made applicable by this Protocol" to the UK itself. As such, ensuring compliance with the Customs Code at Northern Irish ports and collection of any customs duties, subject to the exemptions foreseen by Article 5, is the responsibility of HM Revenue & Customs, subject to oversight by European Commission officials. Any revenue from import duty raised from goods entering Northern Ireland also accrues only to the UK Exchequer. Under Article 12(4) of the Protocol, the UK remains subject to potential infringement procedures before the EU Court of Justice for incorrect application of EU law as it applies under the Protocol.

21 Conversely, no customs duties will be payable on any goods moved from the EU into Northern Ireland or vice versa.

accruing to the UK Exchequer.[22]

59. This element of the Protocol should also be seen in the context of the new UK/EU Trade & Cooperation Agreement (TCA). The amount of any EU duty payable on imports into Northern Ireland takes into account the EU's preferential tariffs under relevant trade agreements.[23] Because of the Protocol, the elements of the TCA relating to trade in goods essentially apply to Northern Ireland as if it were in the EU, not the UK. As that Agreement in principle provides for tariff-free trade in all goods between the UK and the EU, this is therefore also the case for goods moved into Northern Ireland from Great Britain under the Protocol. However, eligibility for tariff-free treatment under the TCA requires traders to demonstrate compliance with the Agreement's "rules of origin" for the product in question. There are indications that doing so is sufficiently onerous that some businesses importing goods into Northern Ireland from Great Britain, like those importing British goods into the EU, are struggling to qualify for the tariff-free treatment foreseen by the TCA.[24]

## Application of EU tariffs to trade between Great Britain and Northern Ireland

60. The substance of the UK/EU TCA therefore reduces, but does not remove, the possibility of EU tariffs being imposed on "at risk" goods shipped from Great Britain—and other non-EU countries—to Northern Ireland. This of course creates difficulties for Northern Ireland's place within the UK internal market. In recognition of this, the Protocol contains a number of specific provisions to limit the circumstances in which EU tariffs would be payable on goods entering Northern Ireland from outside the European Union.

61. First, as noted, an EU customs duty liability under the Protocol only exists for goods which are "at risk of subsequently being moved into the [EU], whether by themselves or forming part of another good following processing". Consequently, whether such a "risk" applies to a particular consignment entering Northern Ireland from outside the EU is made on the basis of two separate determinations:

- a "commercial processing" test, namely whether the goods are to be subject in Northern Ireland to "any alteration" or "transformation"; and
- a general "at risk" test, to determine whether a good brought into Northern Ireland from outside the EU – whether subject to commercial processing or not- "is […] at risk of subsequently being moved into the EU".

62. These tests are independent, not cumulative. In other words, if a good is deemed to meet the conditions for only one of them, it will be formally "at risk" and therefore attract any payable EU tariff.

22 In autumn 2020, the Government implied that it would seek powers under UK domestic law to unilaterally dis-apply any requirements under the Protocol to charge customs duties on intra-UK if the EU "insist[ed] that GB-NI tariffs […] should be charged in ways that are not related to the real risk of goods entering the EU single market". Ultimately, Ministers did not seek a statutory power to unilaterally dis-apply this aspect of the Protocol.

23 Similarly, the applicable customs duties would take into account the EU's unilateral tariff reductions or waivers for developing countries under its "Generalised System of Preferences" (GSP).

24 Northern Ireland Affairs Committee, Oral evidence: Brexit and the Northern Ireland protocol, HC 767 (6 January 2021)

63. The Protocol empowers the Joint Committee established by the Withdrawal Agreement to set out detailed criteria for both "at risk" tests. In December 2020, the Government and EU struck an agreement on this matter, set out formally in Joint Committee Decision 4/2020. With respect to the "commercial processing test", this Decision notably exempts goods brought in by small businesses and various consumer goods, as well as other goods brought into Northern Ireland for construction and healthcare, from being formally considered to be subject to "commercial processing" under the Protocol.[25] All other goods moved into Northern Ireland from outside the EU are automatically deemed to be subject to such processing, meaning they are "at risk" under the Protocol and therefore attract the applicable EU tariff.

64. Goods brought into Northern Ireland from outside the EU which are exempt from the "commercial processing" test are still not automatically free from EU tariffs. As noted, they must also 'pass' the general "at risk" test. In this context, the UK and EU in the Joint Committee decided that goods are not at risk of being moved into the EU via Northern Ireland where they are brought in from Great Britain and there is no tariff applicable under the UK/EU TCA (which may require demonstrating compliance with rules of origin). Similarly, where they are imported from elsewhere in the world, they are not considered "at risk" if the applicable UK tariff is equal to, or higher than, the EU's.

65. The Joint Committee also established a new 'trusted trader' scheme allowing UK businesses with a specific authorisation to that effect to bring certain products—mostly finished consumer goods—into Northern Ireland tariff-free that would otherwise be "at risk", without having to prove any "rules of origin".[26] Businesses that want to make use of this optional "UK Trader Scheme" have to meet a number of requirements, notably a "high level of control of their operations and of the flow of goods" so that the authorities can evaluate what goods they are bringing into Northern Ireland. While authorisations for the scheme were issued on the basis of self-certification for the first two months of 2021, these will expire after four months. All traders wanting to make use of the scheme will therefore still need to get full authorisation, and from 1 March 2021 HM Revenue & Customs will need to monitor applications more closely.

66. The UK Trader Scheme has its limitations however. The scheme does not remove the "at risk" classification of most raw materials imported into Northern Ireland which are deemed to be likely "at risk" of commercial processing, which would therefore still face any applicable EU tariff. For goods brought into Northern Ireland from a non-EU country other than the UK, it can only be used where "the difference between the duty payable [under EU law] and the duty payable according to the customs tariff of the United Kingdom is lower than 3% of the customs value of the good".

67. The Joint Committee Decision also makes special provision for goods subject to EU trade defence measures like anti-dumping duties. Such goods are wholly ineligible to be moved into Northern Ireland under the UK Trader Scheme. This means that goods

25 Goods brought into Northern Ireland for further processing would not automatically be at risk if they are a) brought in by small traders whose annual turnover is £500,000 or less or b) were imported for the "sole purpose" of sale of food to end-consumers; the construction of buildings in Northern Ireland; direct provision of health or care services to people in Northern Ireland by the importer; not-for-profit activities in Northern Ireland; the production of animal feed for final use on premises located in Northern Ireland.

26 Goods that are subject to further processing and not specifically exempted (see above) are formally "at risk" and therefore not eligible to be brought into Northern Ireland free from any applicable EU tariff under the UK Trader Scheme.

subject to EU trade defence measures would almost always be liable for the EU tariff. The one exception is where such goods are brought into Northern Ireland from outside the EU and the UK, and the UK's own tariff on the good in question was equal to or higher than the EU tariff. Where the EU maintains trade defence measures against specific goods from Great Britain, by definition the EU tariff would be higher than the UK tariff (which does not exist for intra-UK trade), and would therefore be "at risk".

68. A specific issue has already arisen in relation to Northern Irish imports of steel in this regard. They are subject to EU safeguard tariffs to prevent dumping, with Tariff Rate Quotas (TRQs) establishing a permitted level of imports from third countries that can benefit from zero tariffs. However, EU law excludes imports to Northern Ireland from benefiting from the EU's zero "in-quota" tariff under its TRQ[27] for this product.[28] As such imports into Northern Ireland from the UK and the rest of the world are "at risk" under the Protocol, they therefore attract a 25% EU tariff.

69. Goods moved into Northern Ireland from the rest of the UK which 'pass' both tests as set out above are formally deemed not "at risk" under the Protocol. These would not attract EU customs duties, even if they do not qualify for tariff-free treatment under the rules of origin in the UK/EU TCA. Moreover, even where ultimately the EU tariff does have to be paid on goods brought into Northern Ireland from outside the EU, including from Great Britain, the Protocol allows the UK Government to waive the cost to individual businesses, albeit only within the restrictions on subsidies to companies as set out in EU State aid law.[29] This means that, typically, businesses could only receive a maximum waiver of €200,000 (£177,000) of payable tariffs over each three-year period unless the UK receives European Commission permission for a more generous arrangement.[30] The Government has established an import duty waiver scheme for businesses affected by the Protocol but its scope is, at present, limited (as it does not cover, for example, goods brought into Northern Ireland from outside the UK and EU).[31] At this stage, it is unclear what proportion of goods sent to Northern Ireland will attract EU tariffs under the Protocol, and therefore the likelihood that companies may exceed the "de minimis" limit and have to pay any EU customs duty at their own expense.

70. More generally, while Joint Committee Decision 4/2020 requires the Government to submit information to the EU on the flow of goods into Northern Ireland under the Protocol on a monthly basis, it is unclear if this data—at least in aggregate form—will be made available for parliamentary and public scrutiny.[32] Data collected by the Government could underpin a review of the Joint Committee Decision, subject to a formal request to that effect by either the UK or the EU by August 2023 because of concerns around

27 Tariff Rate Quotas (TRQs) allow certain quantities of a good to be imported into the EU at a lower or zero tariff, with any excess imports above the quota incurring a higher customs duty. It is used, for example, as a safeguard measure to deter the dumping of steel products onto the EU market after the US introduced restrictions on steel imports in 2018.

28 In December 2020, the EU passed legislation to make it explicit that EU tariff rate quotas should only be available for goods that clear customs in one of the 27 Member States, but not Northern Ireland. In essence, to protect the EU's Single Market, this law means the higher EU tariff for TRQ goods will always be applicable to such goods brought into Northern Ireland where they are considered "at risk" of ending up in the EU under the Protocol (see above).

29 EU State aid rules will continue to apply in the UK under the Northern Ireland Protocol, subject to certain limitations. This is explored further in section 7 of this Report.

30 This "de minimis" limit also covers other government subsidies that a company may be in receipt of.

31 The waiver scheme currently does not cover EU tariffs on goods brought into Northern Ireland from outside the UK or EU, and it does not cover primary agricultural and fishery products.

32 Article 8 of Joint Committee Decision 4/2020.

"significant diversion of trade, or fraud or other illegal activities". The launch of such a review would by default lead to termination of the 'trusted trader' scheme for businesses to bring goods into Northern Ireland free from EU tariffs from 1 August 2024, unless the two sides formally agree otherwise (whether or not the concerns that led to the review were addressed in a "mutually satisfactory" way). If no review is requested by August 2023, the trusted trader scheme will remain in place unless and until the Northern Ireland Assembly votes to end the provisions of the Protocol requiring alignment with EU law.

71. Because of the numerous uncertainties surrounding the application of EU tariffs to goods entering Northern Ireland from Great Britain and other non-EU jurisdictions, we wrote to the Chancellor of the Duchy of Lancaster on 16 December 2020 with a number of questions. These concerned, notably, how the Government would seek to ensure that it would be more cost-effective for businesses to comply with the requirements of the UK Trader Scheme rather than incurring an EU tariff, reconcile the commitment it gave in its Command Paper on the Northern Ireland Protocol that EU tariffs would not generally be paid on internal UK trade with the obligation to pay EU tariffs on goods subject to EU trade defence measures (such as the EU's steel safeguard measures), and, in the interests of transparency, publish the data collected by the Government on the proportion of trade from Great Britain to Northern Ireland that is subject to "at risk" EU tariffs, even if these are waived by the Government within EU State aid limits.

72. In his reply, dated 5 February 2021, the Minister reiterated that the Government believes a "very significant majority" of internal UK trade would remain free of tariffs under the Protocol, but refused to commit to transparency by publishing aggregate data on the proportion of goods shipped from Great Britain to Northern Ireland considered "at risk" and "not at risk" respectively.[33] He added that over 1,500 businesses had applied for provisional authorisation under the UK Trader Scheme between 14 December and 5 February, but conceded that the reimbursement arrangements for businesses which have had to pay EU tariffs are not yet fully operational. In particular, the Government "will establish a reimbursement scheme for goods that attract a [EU] tariff, but which can subsequently be shown to have remained in the UK customs territory", for cases where traders were unable to claim the duty waiver at the point of bringing the goods into Northern Ireland. He refers to the EU's State aid "de minimis" ceilings, suggesting the Government is not considering asking for European Commission approval for a reimbursement scheme that would be more generous. The Minister also explained that, even if the review process under Joint Committee Decision 4/2020 resulted in the termination of the UK Trader Scheme, goods sent to Northern Ireland from Great Britain could still be deemed not "at risk" if they are not considered subject to commercial processing and they qualify for tariff-free treatment under the UK/EU TCA. That would, of course, require businesses to demonstrate compliance with the applicable rules of origin.

73. As such, there are still uncertainties around the nature and scope of the reimbursement scheme for any EU tariffs companies might have to pay to bring goods into Northern Ireland from Great Britain, and—given the Government's apparent reluctance to publish data on the proportion of goods on that trade route that are "at risk" under Article 5—on the extent to which EU tariffs are, or may become, applicable to intra-UK trade while the Protocol is in effect.

33 In his reply, the Minister notes only that neither the Protocol nor Joint Committee Decision 4/2020 require publication of this data.

## Other easements or waivers for goods not "at risk"

74. In previous correspondence with us, Ministers had also implied that goods considered not "at risk" under the Protocol would also benefit from wider facilitations beyond the absence of being subject to any applicable EU customs duty.

75. A specific example would be the application of EU import VAT to goods entering Northern Ireland from Great Britain, which is administratively different to VAT on domestic transactions and a separate fiscal charge from customs duty. It must be applied to such goods because Article 8 of the Protocol requires Northern Ireland to continue applying EU VAT law "concerning goods", which establishes such a requirement for goods entering the Single Market from non-EU countries. There is no explicit link between this obligation under Article 8 and the determination of whether a good is "at risk" under Article 5(2). Nevertheless, in September 2020, the Government implied that EU import VAT should also be waived for goods brought into Northern Ireland not "at risk" of ending up in the EU.[34]

76. Similarly, in November 2020, the Department for International Trade suggested that the question of which goods were "at risk" under Article 5(2) of the Protocol was "a policy under consideration by the […] Joint Committee, as part of work implementing […] Article 5(1), 5(2), 5(3), 5(4) and Annex 2". We recall that Articles 5(1) and 5(2) establish the principle that no EU tariffs are payable on goods entering Northern Ireland unless they are "at risk", while Article 5(3) more broadly requires the application of EU customs rules in Northern Ireland, including when tariffs are payable. Those provisions therefore all relate to the question of when EU customs rules apply to goods entering Northern Ireland. Separately, Article 5(4) and Annex 2 of the Protocol apply specified EU legislation related to goods to Northern Ireland, but do not reference the "at risk" categorisation. These EU laws remain in effect in Northern Ireland, such as the Official Controls Regulation on inspection of food, animals and plants entering the EU (and, therefore, Northern Ireland) from non-EU countries. The implication of the Government's correspondence appeared to be that some of these formalities would also be waived for goods not "at risk", although the Government has not, to our knowledge, stated so explicitly.[35]

77. The Joint Committee Decision of December 2020 does not refer to any such wider derogations, and it is unclear if the Government is applying any unilaterally or seeking agreement for them within the Joint Committee.

## Conclusions and questions

78. **The provisions of the Protocol relating to the potential applicability of EU tariffs on goods entering Northern Ireland, including from Great Britain, are complex, controversial and have given rise to various practical difficulties. These difficulties are also of great constitutional significance.**

34 In its policy paper on the "notwithstanding" clauses of the Internal Market Bill, which would have allowed the Government to unilaterally dis-apply parts of the Protocol under domestic law, the Government said that it would consider using these powers if the EU "insiste[d] that GB-NI tariffs and related provision such as import VAT should be charged in ways that are not related to the real risk of goods entering the EU single market" (emphasis added). In November 2020, the Treasury conflated the issue of EU tariffs and import VAT under the Protocol in a letter on the import of Covid-related medical goods, but without explicitly stating that goods not "at risk" would not be subject to EU import VAT rules.

35 The European Commission did allege, in early February 2021, that the UK was not properly applying the "official controls" on animals, plants and food products entering Northern Ireland from Great Britain as mandated by EU law under the Protocol.

79. **These issues include, in particular, the very restrictive definition of what goods are formally deemed "not at risk" of ending up in the EU Single Market as set out in Joint Committee Decision 4/2020, which means EU tariffs are now potentially applicable to an indeterminate number of imports into Northern Ireland from Great Britain, especially where the rules of origin of the new UK/EU Trade & Cooperation Agreement are not met. This is compounded by the lack of Northern Irish access to lower-duty imports under the EU's Tariff Rate Quotas, (including for steel products), and the lack of a comprehensive UK Government duty waiver or reimbursement scheme for all types of imports into Northern Ireland which might face EU tariffs under the Protocol. We note that discussions are on-going between the Government and the European Commission to address the application of high EU tariffs to steel products entering Northern Ireland.**

80. **The Minister's letter of 5 February 2021, in response to our initial consideration of Joint Committee Decision 4/2020, provided some additional information, but notably falls short with respect to the planned transparency—if any—of Government data on what proportion of goods moved from Great Britain into Northern Ireland will face EU tariffs under the Protocol (even if reimbursed).**

81. **Details are also still lacking about the Government's precise plans to waive any applicable EU tariff for "at risk" goods under the Protocol. The existing waiver scheme is limited in scope. We note that the Government intends to create a "reimbursement scheme for goods that attract a [EU] tariff, but which can subsequently be shown to have remained in the UK customs territory". Depending on the details of this scheme, this could potentially have wider relevance for the Protocol: if the Government can devise a robust way of determining that a good had not been moved into the EU via Northern Ireland, including by being transported across the land border with Ireland, in theory this could in the future inform negotiations between the UK and EU to reduce Northern Ireland's level of alignment with EU rules. However, there are no details for this arrangement at present, and given the EU's resistance to "alternative arrangements" in the past this is only ever likely to be a long-term solution to the tensions inherent in keeping the Irish land border free of customs infrastructure and the UK as a whole leaving the Single Market and Customs Union.**

82. **It is also unclear if the Government is still seeking further easements from the trade formalities now applicable to trade from Great Britain to Northern Ireland for goods not considered "at risk" of ending up in the EU under Joint Committee Decision 4/2020, as Ministers had implied at various points in 2020. We consider that there is a strong case for the Government to pursue the principle of so-called "mutual enforcement" in further negotiations with the EU to replace the provisions of the Protocol requiring continued regulatory alignment with EU law in Northern Ireland as discussed elsewhere.[36]**

83. **In light of our assessment of the Joint Committee Decision and the wider relevance of the Protocol for the application of EU tariffs to goods entering Northern Ireland, we ask the Government the following questions.**

36 See, in particular, the principle as expounded by Sir Jonathan Faull KCMG (former Director-General at the European Commission) in Joseph H.H. Weiler, Daniel Sarmiento and Jonathan Faull, 'An Offer the EU and UK Cannot Refuse: A Proposal on How to Avoid a No-Deal Brexit' (Verfassungsblog: On matters constitutional) 22 August 2019. See also Centre for Brexit Policy, 'Correcting the damage caused by the Northern Ireland Protocol: How mutual enforcement can solve the Northern Ireland border problem' (February 2021)

### *Transparency of the impact of Articles 5(1) and (2) of the Protocol on internal UK Trade*

84. **What estimate has the Government made of the total amount of EU tariffs that are likely to be payable on "at risk" goods brought into Northern Ireland from Great Britain, and what proportion does it expect to waive or reimburse under Article 5(6) of the Protocol, for example on an annual basis?**

85. **Transparency of the proportion in which goods entering Northern Ireland are categorised under the Protocol as being "at risk" or not, and use of the new UK Trader Scheme, are crucial to Parliament and public understanding of the impact of the Protocol, not least on intra-UK trade. Can the Government commit to publication of the aggregate data on the proportion of goods deemed "at risk" and the amount of EU tariffs waived or reimbursed?**

### *UK Trader Scheme under Article 3 of Joint Committee Decision 4/2020*

86. **The Government has noted that "there are a number of options available to avoid paying any tariffs when moving goods into Northern Ireland from Great Britain". What assessment has the Government made of the likely uptake of the UK Trader Scheme to avoid such tariffs, compared to the option of seeking tariff-free treatment of goods moved into Northern Ireland from Great Britain under the UK/EU Trade & Cooperation Agreement subject to rules of origin requirements?**

### *Duty waiver and reimbursement schemes under Article 5(6) of the Protocol*

87. **HM Revenue & Customs current guidance on the duty waiver scheme for businesses which have to pay EU tariffs on "at risk" goods brought into Northern Ireland excludes goods imported from outside the EU or UK, and agricultural and fisheries products. Why are they not currently covered, and when does the Government envisage the duty waiver scheme will be available for these goods?**

88. **Does the Government envisage that it will need European Commission approval for any of its plans to fully implement Article 5(6) of the Protocol under State aid rules to the extent that they are applicable under Article 10 of the Protocol? In particular, is it planning any schemes that would allow businesses to seek waivers for EU customs duties under the Protocol in excess of the EU "de minimis" subsidy limit, if necessary?**

89. **What assessment has the Government made of the likelihood that larger companies in particular will breach the "de minimis" limit on their ability to seek a waiver on any EU customs duties incurred because of the Protocol, and the implications for prices of imported goods in Northern Ireland?**

90. **How does the Government envisage that its planned reimbursement scheme for goods that attract an EU tariff, but which "can subsequently be shown to have remained in the UK customs territory" will work in practice, in particular with respect to determining that a good had not crossed the border with Ireland?**

### *Further easements of goods not considered 'at risk' under Article 5(1) and (2)*

91. **Last year, the Government suggested that the question of whether goods were deemed "at risk" of being moved into the EU was also linked to other trade formalities under the Protocol, for example with respect to the need to apply import VAT. Is that still the Government's position? If so, what other easements, derogations or exemptions in addition to not applying the EU customs tariff is the Government applying to goods not "at risk", or discussing with the EU via the Joint Committee?**

# 5 Practical working arrangements[37]

## Overview

92. Article 12(2) of the Ireland/Northern Ireland Protocol gives EU representatives the right to be present during activities carried out by UK authorities which relate to the implementation and application of:

(a) EU law provisions which apply by virtue of the Protocol; and

(b) provisions of the Protocol on customs and free movement of goods.

93. Article 12(3) of the Protocol says that the Joint Committee will determine the practical working arrangements.

94. The Joint Committee adopted the necessary decision on 17 December 2020.[38] The Decision sets out the rights and obligations of EU representatives. For example, EU representatives have the right to be present at places where goods or animals enter or exit Northern Ireland though ports or airports. They are under an obligation to carry photo identification cards when exercising rights under Article 12(2) of the Protocol.

95. The Decision says that the UK must provide the EU with a list of authorities responsible for activities within the scope of Article 12(2) of the Protocol, together with contact points.

96. The Decision deals with methods of requesting information. For example, the UK is required to respond expeditiously to requests for information from the EU.

97. The Decision also covers the arrangements for granting the EU access to UK information systems, databases and networks, such as the Goods Vehicle Movement System.

98. The Decision says that the EU may request control measures which the UK is required to carry out expeditiously. Neither the Decision nor the Protocol specifies what exactly is meant by the term "control measure".

99. The Decision is to be reviewed no later than three years after it comes into force.

100. In his Explanatory Memorandum, the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office (Rt Hon. Michael Gove MP) considers that the working arrangements are proportionate. He describes the system as unique and with no broader policy implications. He notes that it upholds the UK's position that there should be no EU embassy or mission in Northern Ireland.

37 Council number: 13917/20; ELC number: 41740

38 DECISION No 6/2020 OF THE JOINT COMMITTEE ESTABLISHED BY 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 of 17 December 2020providing for the practical working arrangements relating to the exercise of the rights of Union representatives referred to in Article 12(2) of the Protocol on Ireland/Northern Ireland

## Conclusions

101. As is the case with the other Decisions adopted by the Joint Committee, we are gravely concerned that the Government afforded Parliament no opportunity to scrutinise its approach to this Decision before it was agreed. We are raising those matters elsewhere in this Report and have no specific issues to raise concerning this Decision.

# 6 UK/EU Withdrawal Agreement: Members of the arbitration panel[39]

## Overview

102. Under the dispute settlement system of the Withdrawal Agreement (Articles 167–169), the UK and the EU must first seek to resolve any disputes arising from the agreement through cooperation and entering consultations in the Joint Committee in good faith. Both parties should aim to reach a mutually satisfactory solution.

103. If a resolution is not reached in the Joint Committee, parties can request the establishment of an arbitration panel which will comprise four members of a panel and one chairperson.[40]

104. Article 171(1) of the UK/EU Withdrawal Agreement (WA) provides that before the end of the transition period, the Joint Committee should establish a list of no fewer than 25 persons to serve as members of arbitration panels whenever they are convened under the dispute settlement provisions.

105. The document under scrutiny is a proposed Decision of the EU Council setting out its agreement to a proposed Decision of the Joint Committee of the WA[41] adopting a list of 25 members to serve on the arbitration panel. The document was deposited with us on 16 December 2020, just prior to the Joint Committee meeting of 17 December and to the formal adoption of both the EU Decision and the Joint Committee Decision. The listing applies from 1 January 2021. There was no prior communication with Parliament on the proposed UK nominees for the panel[42] and the Government's Explanatory Memorandum was not received by us until 4 January 2021 (see paragraph 119 onwards). We note the observations of the Lords EU Committee in their letter of 10 February on this lack of transparency[43] and we make further reference to this issue in the letter to the Government set out in the annex to this Report.

106. In accordance with Article 171(1) WA, the EU and the UK each proposed ten persons:

- In the UK's case, the individuals proposed were Sir Gerald Barling, Sir Christopher Bellamy, Mr Zachary Douglas, Sir Patrick Elias, Dame Elizabeth Gloster, Sir Peter Gross, Mr Toby Landau QC, Mr Dan Sarooshi QC, Ms Jemima Stratford QC and Sir Michael Wood.
- In the case of EU, Mr Hubert Legal, Ms Helena Jäderblom, Ms Ursula Kriebaum, Mr Jan Wouters, Mr Christoph Walter Hermann, Mr Javier Diez-Hochleitner, Ms Alice Guimaraes-Purokoski, Mr Barry Doherty, Ms Tamara Capeta and Mr Nico Schrijver.

39 Council number: 13919/20; ELC number: 41741

40 There are some further rules about what happens if there is a failure to establish an arbitration panel within three months of the date of request (Article 171(9)) and where panel members are unable to choose a chairperson (Article 171(5) and (6)).

41 Based on Article 171 of the Withdrawal Agreement, Title iii, Part Six

42 We have found a call for arbitrators for FTAS between the UK and non-EU countries which was published on 6 November 2020 but have not found anything equivalent for the WA or TCA.

43 On the question of transparency, we note that interesting comparisons could be made with the process for selecting CJEU judges under Article 255 TFEU or with the workings of the UK Judicial Appointments Commission.

107. The EU and the UK also jointly proposed five persons to act as chairperson of the arbitration panel: Ms Corinna Wissels, Ms Angelika Helene Anna Nussberger, Mr Jan Klucka, Sir Daniel Bethlehem and Ms Gabrielle Kaufmann-Kohler.

108. Article 171(2) WA requires that those listed must:

- be independent,[44] including not being members, officials or other servants of the EU institutions, of the government of a Member State, or of the government of the UK;
- possess the qualifications required for appointment to the highest judicial office in their respective countries or be jurisconsults of recognised competence; and
- possess specialised knowledge or experience of EU law and public international law.

## Our assessment

109. Although the document relates only to the agreement of the parties to a list of potential panel members under the WA, it provides us with the opportunity to:

- inform Parliament, the public and other stakeholders as to how the listing is made and how that fits into the dispute settlement system of the WA;
- highlight some specific points of comparison, contrast and observation about the operation of independent arbitration under the WA and the EU-UK Trade and Cooperation Agreement (TCA) (provisionally applied from 1 January).

110. We do not set out however to provide here a detailed or exhaustive account of the respective processes or the potential consequences of non-compliance with panel rulings.

## Select observations

111. Our first observation is that the Partnership Council of the TCA has yet to adopt its list of 15 potential members for its arbitration panel. It must do so within 180 days from the TCA's entry into force.[45]

112. Compared with the five-member panel under the WA, under the TCA the panel will be composed of three members (two ordinary members and a Chair), all subject to similar requirements to the WA in terms of independence and expertise, though expertise of EU law is not required. Under both agreements, panel rulings should ordinarily be by consensus, but failing that by majority vote. Both are binding on the parties[46] The arbitration panel has up to 12 months to issue its ruling in the case of the WA, but only up to 160 days (ideally before 130 days) under the TCA.

113. The respective arbitration panels can only adjudicate on matters falling within the scope of the dispute settlement provisions. In summary:

44 Additionally, Article 181 requires members nominated to panel to be independent, to serve in their individual capacity and to not take instructions from any organisation or government and to comply with the Code of Conduct annexed to the Agreement.

45 Article.INST.27

46 Article 175 of the Withdrawal Agreement and Article INST.29(2) TCA

114. In the WA, following the end of the transition period the main dispute settlement regime applies to all provisions of the agreement and there are no exceptions to this. This should not be confused with the specific instances where the Commission has supervisory and enforcement powers and/or the Court of Justice has jurisdiction, particularly in relation to areas of EU law applying under the Agreement. For example (and not limited to) in relation to Part 2 Citizens Rights or with respect to the Northern Ireland Protocol (Article 12(4) of the Protocol).

115. In the TCA, the main dispute settlement regime applies to most but not all Parts and provisions of the TCA. Notable but complex exceptions[47] include aspects of the Level Playing Field (competition policy, aspects of state aid/subsidy control, taxation), law enforcement/judicial cooperation in criminal matters ("law enforcement cooperation"), fisheries and the transitional legal basis for data flows from the EU to the UK. In the case of most of those exceptions, either temporary trade remedies or rebalancing measures are available[48] and more of a political, specific dispute settlement mechanism for law enforcement cooperation.

116. In the case of the WA only, the system will also involve the Court of Justice of the EU (CJEU) where EU law issues are involved in any dispute (Article 174 WA).[49] Despite the limited nature of this indirect jurisdiction, there is considerable potential for the CJEU to have a role in disputes given the extent to which EU law or concepts apply as a matter of international law under the WA.

117. There is no jurisdiction for the CJEU in the main dispute resolution system applied by the TCA. However, it is notable that there is the potential for arbitration rulings under the WA to have consequences under the TCA. This includes arbitration rulings which have been reached after the panel referred a point of EU law to the CJEU. Article.INST.24.4 TCA[50] provides that persistent non-compliance with the ruling of an arbitration panel of an "earlier agreement" between the parties (i.e. the WA) can be a ground for suspending those parts of the TCA within scope.[51] This is a separate, additional ground to suspension based on non-compliance with rulings issued by the TCA's own arbitration panel.[52] It is certainly the case that Article 178(2) WA laid the ground, by providing that persistent non-compliance with an arbitration ruling[53] could either lead to suspension of parts of

47 See Article INST.10. TCA "Scope" for the full list of exceptions: additionally, return of cultural property, regulatory co-operation, SMEs.

48 In some cases, the specific provisions of the excepted chapters may set out bespoke provisions and process for resolving disputes which may involve a referral to an arbitration panel.

49 Article 174(1) WA "Disputes raising questions of Union law " provides: "Where a dispute submitted to arbitration in accordance with this Title raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2), the arbitration panel shall not decide on any such question. In such case, it shall request the Court of Justice of the European Union to give a ruling on the question. The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration panel".

50 Where a Party persists in not complying with a ruling of an arbitration panel established under an earlier agreement concluded between the Parties, the other Party may suspend obligations under the covered provisions referred to in Article INST.10 [Scope]. With the exception of the rule in point (a) of paragraph 3, all rules relating to temporary remedies in case of non-compliance and to review of any such measures shall be governed by the earlier agreement.

51 For scope, see Article INST.10 SCOPE.

52 See Article.INST.24 (2), (3) and (6)-(13)

53 Persistent non-compliance is framed as follows in Article 178 "If, 1 month after the arbitration panel ruling referred to in paragraph 1, the respondent has failed to pay any lump sum or penalty payment imposed on it, or if, 6 months after the arbitration panel ruling referred to in Article 177(2)".

the WA[54] or "parts of any other agreement between the Union and the United Kingdom under the conditions set out in that agreement". But since it amounts to cross-retaliation from a separation agreement (WA) to parts of the agreement where trade between the EU and UK is at stake (TCA), the Government's view of that provision both during its negotiation and now is of interest to us. It was not covered in the Government's Summary Explainer of the TCA.

118. We also highlight the inconsistency in terms of Parliamentary scrutiny of disputes arising under the WA and TCA. Section 13B EU (Withdrawal Act) 2018[55] imposes reporting obligations in respect of the WA, there is no equivalent provision in the EU (Future Relationship) Act 2020 relating to the TCA.

## Government's view and questions

119. In an Explanatory Memorandum of 4 January 2021, the Minister of State for Asia (Nigel Adams MP) at the Foreign, Commonwealth and Development Office provides some of the background mentioned above and additionally comments that:

- the UK agreed with the proposed list of arbitrators; and
- the UK and the EU will publish their respective lists of reserve arbitrators **separately.**[56]

120. **We ask the Government the following questions about the listing of arbitrators and independent arbitration under both the WA and the TCA:**

- **whether the transparency of the process for nominating arbitrators from the UK side could be improved and whether the UK is considering appointing arbitrators for the TCA who have been already been listed for the WA;**
- **its view of Article. INST.24.4 TCA and the potential for cross-retaliation between the WA and the TCA; and**
- **whether it would be prepared as a matter of goodwill and transparency to undertake to provide the similar information to Parliament about disputes under the TCA as they are obliged by statute to do for those arising under the WA.**

121. **We include the text of a letter to the Foreign Secretary (Rt Hon. Dominic Raab MP) and Minister of State at the Cabinet Office (Lord Frost) in the Annex to this Report. This letter is based on the above requests for further information and has been sent separately to both Ministers.**

54 Other than Part 2 Citizens' Rights
55 As amended by Section 30 EU (Withdrawal Agreement) Act 2020
56 Recital 5 of the Joint Committee decision refers to this from the EU side

# 7 Unilateral EU declaration on EU state aid rules under the Protocol

## Overview

122. One of the key provisions of the Northern Ireland Protocol is to keep the UK subject, to a limited extent, to the EU's so-called "State aid" rules. These set out under which conditions public authorities in EU Member States can grant public subsidies to private companies. In particular, Article 10 means that EU State aid law as listed in an Annex[57] continues to apply in the UK where subsidies "affect" trade covered by the Protocol, namely trade in goods and electricity between Northern Ireland and the EU.[58] On 17 December 2020, the EU issued a unilateral declaration purporting to 'clarify' "the application of State aid under the terms of the Protocol", following concerns expressed by the Government that the EU intended to apply Article 10 to UK subsidies benefitting companies in Great Britain with no material link to Northern Ireland.

123. In this section, we have examined the scope of Article 10, the impact of the EU's unilateral declaration, and the implications for the extent to which EU State aid rules will continue to apply in the UK.

124. As noted, Article 10 of the Protocol requires the UK to continue abiding by EU State aid law with respect to subsidies that "affect" trade in goods between Northern Ireland and the EU, with the exception of subsidies for the agriculture and fisheries industries (as discussed further in section 2 of this Report). The EU's extensive rulebook in this field requires that subsidies which formally qualify as "State aid" must normally be approved in advance by the European Commission, which can therefore block subsidies or require modifications to schemes that it considers are not compatible with EU rules. State aid that has already been granted but retrospectively found to be in breach of EU rules may need to be repaid by the recipient, with interest added. However, in practice, a large proportion of subsidies granted by EU countries are exempt from this type of oversight, primarily because they involve relatively small amounts[59] or because they are awarded for a specific public policy purpose under the so-called "Block Exemption" Regulations.[60] Private undertakings can also bring claims before national courts in the EU challenging alleged unlawful State aid to a competitor.

125. Where applicable under the Protocol, these EU rules will still have direct effect in the UK and supersede any domestic law to the contrary.[61] In practice, this means that the Government is still required to continue seeking European Commission approval

57 See Annex 5 to the Protocol

58 As set out in more detail in section 2 of this Report, subsidies for Northern Irish farmers are exempt from Article 10 provided they stay below a "maximum overall annual level of support" as agreed between the Government and the EU.

59 There is an EU De Minimis Regulation, which generally exempts subsidies to businesses which cumulatively stay below a threshold of €200,000 (£181,000) over a three-year period from constituting State aid. Different, lower thresholds apply for the agriculture, fisheries and transport sectors.

60 In particular, the Block General Exemption Regulation (GBER) exempts subsidies that would otherwise qualify as State aid from needing EU approval where they are used for specific public policy purposes, such as roll-out of rural broadband or supporting cultural institutions. However, larger schemes must still be submitted to the Commission for an evaluation. Specific "block exemptions" apply for the agriculture and fisheries sectors.

61 Article 12 of the Protocol as implemented by section 7a of the European Union (Withdrawal Agreement) Act 2018.

for subsidies to businesses that fall within the scope of Article 10, insofar as they are not exempt from requiring such approval under EU law. For 'in-scope' subsidies, the Commission will have the same powers that it enjoys within the EU to block them or require changes, ultimately subject to the jurisdiction of the EU Court of Justice.[62] We note particularly Section 38 of the Withdrawal Agreement Act 2020 and in particular subsection 2b, by which the United Kingdom Parliament has specifically provided for its own provisions in domestic law to override direct effect.[63]

126. As is the case for the other provisions of the Protocol requiring continued alignment with EU rules, the substance of the EU State aid rules that will apply in the UK under Article 10 is *dynamic*. References to the specific EU State aid rules included in the Annex to the Protocol are required to be read as referring to them "as amended or replaced" in the future.[64] This means that EU subsidy control rules as they apply under the Protocol will automatically evolve in line with the rules applicable within the EU itself, which are now made without formal Government input and without the need for UK consent. It is particularly relevant in this respect that the European Commission is currently undertaking a wide-ranging revision process of EU State aid laws, and any changes it makes as a result of this will therefore also automatically take effect under the Protocol as well.[65]

## The scope of Article 10 of the Protocol

127. It is not in dispute that Article 10 of the Protocol means that EU State aid law continues to apply in and to the UK to a limited extent even though it is no longer a Member State. However, the precise *scope* of Article 10, namely the range of UK subsidies to which EU State aid law will continue to apply under the Protocol, is not straightforward to determine. Paragraph 1 of the Article reads:

> The provisions of Union [State aid] law listed in […] this Protocol shall apply to the United Kingdom […] in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol.[66]

128. This phrasing is somewhat evasive, but the effect is that the Protocol does not explicitly limit the continued application of EU State aid rules only to UK subsidies that directly benefit a Northern Ireland-based company with activities relevant to trade in goods with the EU. Over the course of 2020, it became clear that this is at the heart of a serious divergence in the legal interpretation between the EU and the UK Government as regards the scope of Article 10.

129. More specifically, the European Commission takes the position that Article 10 gives the EU wide-ranging powers to intervene in UK subsidy policy, well beyond only

62 This is the case, for example, for the UK Government schemes to reimburse businesses for EU tariffs they incur on goods brought into Northern Ireland from Great Britain under the Protocol as discussed more extensively in section 4 of this Report.

63 Consideration should also be given in this regard to Article 46 of the Vienna Convention on the Law of the Treaties.

64 Article 13(3) of the Protocol

65 The process of reform of EU State aid rules is being carried out by the Commission on a sector-by-sector basis, as set out in it Staff Working Document SWD(2020) 257, with various changes to be made in 2021 and beyond.

66 The Article goes on to exempt UK subsidies for the agricultural and fisheries industries from being subject to EU State aid law under Article 10, provided the UK and EU have an agreement in place on the maximum subsidies for those industries. This is discussed further elsewhere in this Report.

those measures that *directly* benefit businesses in Northern Ireland involved in the production or sale of goods or electricity. In a "notice to stakeholders" published on 18 January 2021, it articulates the view that Article 10 could also 'bite' on a UK subsidy if the beneficiary "trades with Northern Ireland as the aid might reduce the possibilities of [EU] competitors to be active in that market".[67] Overall, it concludes that for Article 10 to apply to a particular subsidy, "the beneficiary does not necessarily need to be located in [...] Northern Ireland, nor does the beneficiary necessarily need to be directly involved in trade between Northern Ireland and the [EU]". As such, the Commission argues:

> the EU's State aid rules under Article 10 could also, depending on the circumstances, apply to UK subsidies granted to businesses in Great Britain (and not just Northern Ireland). The Commission gives the example of "aid to a manufacturer in difficulty if its goods are available for sale in Northern Ireland" or "a tax scheme granting a direct or indirect benefit to any firm trading with Northern Ireland"; and
>
> in addition, the Commission also does not view the scope of Article 10 as being limited to trade in goods only. The stakeholder notice argues that EU State aid law can also still apply to UK subsidies for businesses that supply *services*, again including those in Great Britain, if there is an indirect effect on trade in goods between Northern Ireland and the EU. The Commission cites the example of "incentives to the financial services industry that would allow manufacturers or electricity companies engaged in trade between Northern Ireland and the [EU] to access cheaper credit".[68]

130. To support this very broad interpretation of the scope of Article 10, the Commission relies on the EU's current legal definition of whether a subsidy has an 'effect on trade' (in this case between Northern Ireland and the EU). This concept is a key part of the EU legal framework in this field: under Article 107 TFEU, a subsidy must "affect trade between Member States" for it to a formally qualify as "State aid" under EU rules. This acts as a trigger for the European Commission's powers as set out above, if the other conditions under Article 107 TFEU are also met.[69] However, based on the case law of the EU courts, the 'effect on trade' of a subsidy is very easily established.[70] The Commission's stakeholder notice is explicit about this, stating that the purported impact of a subsidy on cross-border trade "does not need to meet any significance test". As such, it says "even a very small, or indeed, even merely potential effect on trade suffices" to meet the definition of State aid under Article 107 TFEU.

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67 In other words, a subsidy could be caught by Article 10 because it gives a direct or indirect benefit to a company in Northern Ireland which makes it more difficult for its competitors based elsewhere in the EU's Single Market for goods to compete on the Northern Irish market.

68 The fact that Article 10 would have some application in relation to businesses supplying services could also be inferred from the fact that the Annex to the Protocol listing the specific EU State aid rules applicable where a UK government support measure is in scope of Article 10 also includes the Commission's specific guidelines on State aid for certain services, such as transport, postal and audiovisual services.

69 The other three tests that a subsidy must meet to qualify as State aid under EU rules is that there must be a) a subsidy that is not exempt from EU State aid scrutiny, which b) is granted on a selective basis (i.e. not available to all businesses) and therefore c) is liable to distort competition, which is taken to be the case when a company in a liberalised sector receives selective taxpayer-funded support.

70 George Peretz QC, who specialises in State aid law, told the House of Lords EU Committee that "the 'effect on trade' criteri[on] [...] in state aid is notoriously low". Similarly, Professor Stephen Weatherill of Somerville College, Oxford, has said that it is "relatively easy to find that aid affects inter-State trade, relatively rare to find something so small and localised that it does not".

131. In the context of Article 10, the Commission argues that the phrase "affect that trade between Northern Ireland and the EU which is subject to this Protocol" must be interpreted in the same way as the "effect on trade between Member States" test under Article 107 TFEU.[71] This would mean that any UK subsidy which has "a very small, or indeed, even merely potential effect on trade" in goods and electricity between Northern Ireland and the EU would meet the jurisdictional threshold for the Commission's powers under EU State aid law to be engaged.[72] This underpins the Commission's assertion that the granting of a subsidy to a business *anywhere in the UK*—i.e. not just those in Northern Ireland—"may also fall under Article 10", because, using the example of a subsidy for a bank in London, this could give a manufacturer in Northern Ireland opportunity to "access cheaper credit" and with "an advantage over their trading partners" in the EU.

132. The UK Government, by contrast, takes a much narrower view of when a UK subsidy could be said to affect "trade between Northern Ireland and the [EU] which is subject to [the] Protocol". Brendan Threlfall, the UK Government's representative to the UK/EU Specialised Committee on the Northern Ireland Protocol, told us in October 2020 that since "Article 10 solely relates to 'goods trade and electricity markets in Northern Ireland', it "should not start reaching substantively into Northern Ireland's services or technology centres because it is about trade in goods" and "there should not be substantive reach back into [Great Britain] as a result of the Protocol". That is almost diametrically opposed to the Commission's legal interpretation of the scope for EU intervention in UK subsidy policy.

## The EU's unilateral declaration on Article 10

133. The UK Government has not published anything similar to the Commission's stakeholder notice to demonstrate the reasoning underpinning its own, more restrictive interpretation of Article 10. However, in September 2020 it said the UK could not accept "any scenario in which there was insistence that the EU's state aid provisions should apply in [Great Britain] in circumstances when there is no link or only a trivial one to commercial operations taking place in [Northern Ireland]". At the same time, Ministers also controversially included certain clauses in the Internal Market Bill that would allow them to make regulations unilaterally with the aim of "dis-applying, or modifying [the] effect" of Article 10 as it applies within the UK legal order.

134. The Government agreed to remove the clauses from the Bill in December 2020, after the Prime Minister secured a unilateral declaration by the EU that purports to clarify the application of Article 10. It reads:

> When applying Art. 107 TFEU[73] to situations referred to in Art. 10(1) of the Protocol, the European Commission will have due regard to Northern Ireland's integral place in the United Kingdom's internal market. The European Union underlines that, in any event, an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland. It must be established why the measure is liable to have

71 The Commission stakeholder notice states: "For the purposes of applying Article 10 […], the notion of "effect on trade" in that provision has to be read in light of the same notion in Article 107(1) TFEU".

72 It does not necessarily imply that the subsidy itself is unlawful under EU State aid rules.

73 As noted, Article 107 TFEU defines when a subsidy constitutes State aid under EU law and is therefore, in principle, unlawful unless approved by the European Commission.

such an effect on trade between Northern Ireland and the Union, based on the real foreseeable effects of the measure.

135. The wording of the declaration appears to come from the "Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union". The notice was published in the Official Journal in 2016 in the context of the EU's "State aid modernisation" reform process, to provide clarification on key State aid concepts with a view to contributing to a more consistent application of the rules across the EU. Paragraph 195 of that notice says: "[A]n effect on trade between Member States cannot be merely hypothetical or presumed. It must be established why the measure distorts or threatens to distort competition and is liable to have an effect on trade between Member States, based on the foreseeable effects of the measure."[74]

136. After the EU issued its unilateral declaration, the Government said that this had "addressed" its "concern" about the EU's wider interpretation of Article 10.[75] However, we raised some immediate questions with the Government about the practical impact of the EU's unilateral declaration. On 16 December 2020, we asked the Cabinet Office to clarify how the declaration "circumscribe[s] the European Commission's oversight of UK subsidies under the Protocol more tightly" than would have been the case under existing EU case law.

137. When the Chancellor of the Duchy of Lancaster responded to our questions by letter dated 5 February 2021, he reiterated that the EU's unilateral declaration "will have legal force in interpreting the Protocol" by limiting the scope of Article 10 to those UK subsidies "with a genuine and direct link to Northern Ireland". Separately, official Government guidance on how public authorities can comply with the UK's obligations under the Protocol when granting subsidies, published on 31 December, also ascribes to the EU's unilateral declaration the effect that "subsidies granted in Great Britain are only in scope of Article 10 where there is a clear benefit from and a genuine, direct link between the subsidy and companies in Northern Ireland". When the Minister subsequently gave evidence to us on 8 February 2021, he went a step further and stated that the EU's unilateral declaration meant that the "EU would have to demonstrate a real and material impact of any action that we took to provide state aid to companies operating in Great Britain".[76] This implies that, in the Government's view, a UK subsidy granted to a business outside of Northern Ireland must have a "real and material impact" on trade in goods between Northern Ireland and the EU before it could come within the scope of Article 10 of the Protocol.

138. It is not immediately apparent how the interpretation of the EU's declaration set out in the Government's guidance, and by the Minister on 8 February, can be readily derived from the text of the Protocol and of the declaration itself.

74 A footnote then refers to "Judgment of the General Court of 6 July 1995, AITEC and others v Commission, Joined Cases T-447/93, T-448/93 and T-449/93, ECLI: EU:T:1995:130, paragraph 141".

75 In guidance published on 31 December 2020, the Government ascribes to the EU's unilateral declaration the effect that "subsidies granted in Great Britain are only in scope of Article 10 where there is a clear benefit from and a genuine, direct link between the subsidy and companies in Northern Ireland". However, as George Peretz QC has noted, neither the Protocol nor the declaration make any reference to the concept of a "clear benefit", which the guidance does not define further. Perhaps more importantly, in the EU's declaration, the phrase "a genuine and direct link" qualifies the concept of "effect on trade" and not, as in the Government's guidance, the nature of the link between a subsidy and specific "companies in Northern Ireland".

76 European Scrutiny Committee, Oral evidence: "The UK's new relationship with the EU", HC 1197, Q49

139. First, in the EU's declaration, the words "genuine and direct link" appear to relate to whether a particular UK subsidy affects EU-Northern Ireland trade (potentially indirectly via a company in Great Britain), and not—as the Government's guidance implies—whether a subsidy links directly to a company in Northern Ireland.[77] Second, neither the Protocol nor the declaration make any reference to the concept of a subsidy needing to have a "clear benefit"—as stated in the guidance—before coming within the scope of Article 10. We also note the guidance does not define this concept further. Similarly, the Minister implied on 8 February that, even where a particular subsidy to a company in Great Britain has such a "genuine and direct link" to Northern Ireland, the EU's powers to intervene under Article 10 would only be triggered if the subsidy also has a "real and material impact" on trade in goods with the EU. Neither the Protocol nor the EU's declaration contains that phrase. Instead, the declaration states that—for Article 10 to apply—a measure must be "liable" to have a "foreseeable" effect on such trade, which suggests the Commission could be entitled to formally assess the compliance of subsidy with EU State aid rules under the Protocol before any impact on cross-border trade has materialised.[78]

In any event, the European Commission's stakeholder notice of January 2021 also directly contradicts the Government's position. In it, the Commission states that the words "genuine and direct link" in the declaration merely confirm that "an effect on trade" arising from a UK subsidy "needs to extend to the relevant trade", namely that in goods and electricity between the EU and Northern Ireland (rather than referring to the link between a subsidy and a specific company in Northern Ireland, which appears to be the Government's view). Similarly, it argues that the reference in the declaration to the fact that an effect on such trade "cannot be merely hypothetical or presumed" should be interpreted in the same way as it is under general EU State aid law.[79] Taken together, the Commission's position is that for there to be a "genuine and direct link" between a subsidy and EU-Northern Ireland trade in goods, it only has to have "a very small, or indeed, even merely potential effect on [such] trade". If that condition is met, EU State aid rules would apply via the Protocol. This is how the Commission justifies its interpretation that Article 10 could also 'catch' aid to a manufacturer in Great Britain "if its goods are available for sale in Northern Ireland". As such, the declaration—in the EU's view—does not appear to prevent Article 10 from applying to what the Government calls subsidies that have "no link or only a trivial one to commercial operations" in Northern Ireland, despite Ministers' assurance to the contrary.

140. Neither in his letter of 5 February, nor in his oral evidence of 8 February, did the Minister acknowledge the fact that the Commission's stakeholder notice—which had been in the public domain for more than two weeks by that point—directly contradicts the Government's interpretation.

77 The declaration, after all, reads: "An effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be [...] without a genuine and direct link to Northern Ireland".

78 The wording of the declaration is consistent in this respect with the general logic underpinning the EU's system of State aid law, where subsidies - unless legally exempt - must be notified and assessed by the Commission in advance precisely to avoid anti-competitive impacts on cross-border trade, rather than ex-post when any "effect on trade" may already have materialised.

79 The Commission's stakeholder notice concludes: "The [EU] declaration therefore clarifies, but does not alter, the notion of 'effect on trade' as interpreted by the [EU] Courts".

## Possibility of litigation under Article 10 of the Protocol

141. Between the evidence given to us by Ministers and the European Commission's stakeholder notice, there appears to be a persistent, and fundamental, divergence of views between the EU and the UK with respect to the scope of Article 10 of the Protocol, unresolved by the EU's unilateral declaration in December 2020.

142. As a result, the boundaries of Article 10 are likely to only become clearer through practice and, most likely, legal challenges. These could, first, take the form of private litigation, because undertakings can challenge a UK subsidy which they believe constitutes impermissible State aid under the Protocol in the UK courts.[80] Second, the Protocol allows the European Commission to initiate an infringement procedure against the UK directly if it refuses to seek approval for a contested subsidy.[81] Third, either the EU or UK could request an arbitration panel under the Withdrawal Agreement to adjudicate on a dispute about the scope of Article 10. However, in all three cases, the matter may ultimately end up before the Court of Justice of the EU (CJEU), which retains jurisdiction to rule on the interpretation and scope of EU State aid law as it applies under the Protocol.

143. The lack of legal certainty around the scope of EU State aid law under the Protocol could have a direct, practical impact on the granting of subsidies by UK public authorities. Any retrospective finding by the UK or EU courts that a subsidy fell within the scope of Article 10 means that the beneficiary could have to pay back the subsidy, with interest, if it is then also found to be unlawful under EU State aid rules. This may make companies think twice before accepting a subsidy from the Government until there is clarity about the scope of Article 10. It is unclear how the EU's unilateral declaration of December 2020 might affect the deliberations of any UK or European court, or indeed an arbitration panel under the Withdrawal Agreement, asked to assess the scope of Article 10 in a particular case.

144. We also note that the Government is still consulting on the UK's new domestic subsidy control regime that will apply to subsidies where Article 10 is not engaged, in part to implement the commitments on a "Level Playing Field" which the Government has made under the UK/EU Trade & Cooperation Agreement. This further increases the lack of clarity around the legal rules applicable to subsidies handed out by UK public authorities at present.

## Conclusions and questions

145. **The continued application of EU State aid rules under the Protocol on Northern Ireland was always likely to be controversial. However, it is worrying that the extent to which such rules will continue to be binding on the UK under Article 10 of the Protocol are still interpreted very differently by the Government and the European Commission.**

80 Section 7A of the European Union (Withdrawal) Act 2018 allows undertakings to challenge a UK subsidy which they believe constitutes impermissible State aid under the Protocol in the UK courts. As the Act gives direct effect to the rights and obligations created by the Withdrawal Agreement, including Article 10 of the Protocol, the court would be able to quash the support measure on that basis. It may also result in a referral to the Court of Justice of the EU under Article 267 TFEU, whose judgement would be binding on UK courts.

81 The Protocol is not entirely clear about the interaction between an arbitration procedure under the WA and infringement procedures before the CJEU in relation to the same subject matter.

146. **We do not take a position here on the legal soundness of the respective interpretations of Article 10 and the EU's declaration made by the Government and by the Commission. This is a matter for the relevant courts, unless and until the text of Article 10 of Protocol is changed or it ceases to have effect. However, we are concerned the lack of clarity may impact on the willingness of companies to accept subsidies, or of public authorities to grant them, while this uncertainty—and the risk of the money having to be repaid—persists.**

147. **Nevertheless, we are concerned by the significant political ramifications inherent in the Commission's interpretation. The purported wide-ranging 'reach-back' of Article 10 into subsidies granted to businesses in Great Britain, including to the UK services industry, could in theory result in the EU assuming competence to intervene directly with respect to UK subsidies that only have a limited link to Northern Ireland and, potentially, minimal impact on the trade between Northern Ireland and the EU. Any unnecessary engagement by the Commission in UK subsidies that are not demonstrably relevant to Northern Ireland's trade in goods with the EU may also undermine the legitimacy of the Protocol more generally.**

148. **In any event, while the Government clearly does not agree with the Commission's approach to the scope of Article 10, we are not convinced of the success of Ministers' efforts to date to address the issue with the EU bilaterally, and in doing so avoid litigation before the UK or EU courts that could result in judgements that favour the Commission's more problematic legal interpretation.**

149. **First, the Government has said that the EU's unilateral declaration in December 2020 'addressed' its concerns about the scope of Article 10 to avoid it being applied to subsidies "when there is no link or only a trivial one to commercial operations taking place in Northern Ireland". We cannot agree: based on the evidence before us, the declaration does not in practice bridge the gap between positions of the Commission and the UK, respectively, to anything which might be described as mutually compatible interpretations to that effect. The Commission's stakeholder notice, issued after the declaration, maintains in no uncertain terms that it believes the EU's existing low threshold for determining the "effect on trade" of a UK subsidy, and with it a wide scope for the Commission to intervene with respect to aid granted to businesses in Great Britain, still applies under Article 10. Under this interpretation, EU State aid rules could be enforced against UK subsidies even where there is only "a very small, or indeed, even merely potential effect on trade" in goods between the EU and Northern Ireland. That, in our view, amounts to Article 10 applying to subsidies with "no link or only a trivial one" to Northern Ireland.**

150. **Second, the Government had the opportunity to remove Article 10 of the Protocol, or at least reduce the scope for ambiguity about its interpretation, as part of the trade negotiations with the EU. Article 13(8) of the Protocol explicitly provides for the possibility that "any [future] agreement between the [EU] and the United Kingdom" could "indicate the parts of this Protocol which it supersedes". The Government could therefore have used the trade negotiations with the EU in 2020 to replace or amend Article 10. However, while the new UK/EU Trade & Cooperation Agreement (TCA) does contain provisions on subsidy control, it does not explicitly or implicitly make any changes to Article 10.[82] Instead, the provisions of the TCA as implemented under UK**

82 A detailed examination of the subsidy control provisions of the TCA is beyond the scope of this Report.

**domestic law[83] will apply in parallel to Article 10, in relation to subsidies that are not in scope of the latter (which, of course, is disputed). It is not clear if the Government sought to change Article 10 but could not secure the EU's agreement, or if such an approach was never taken in the negotiations.[84]**

151. **Beyond the question around the precise scope of Article 10, it is clear that, subject to Section 38 of the Withdrawal Agreement Act 2020,[85] the Protocol means EU State aid law will continue to play a role in the UK legal order for as long as it remains in force. It is important in this respect that the substance of the rules as they apply under the Protocol will evolve automatically as the EU updates its State aid rulebook, a process in which the UK is now no longer formally involved. Substantive changes to various EU Regulations and guidelines which apply to the UK under Article 10 of the Protocol are due over the course of 2021 and beyond.[86]**

152. **Proper parliamentary scrutiny of the implications of any future changes in EU State aid law for the UK under the Protocol will also require Government to be candid in its assessment of their implications. The Government has undertaken to continue to deposit "EU Acts" relating to the Northern Ireland Protocol and to prepare Explanatory Memoranda covering their potential implications. Discussions on the House's wider scrutiny arrangements of EU-related matters are ongoing. We therefore seek clarity on whether "Acts" in this respect will also extend to Communications of the European Commission, in which many aspects of EU State aid rules are traditionally set out and many of which are listed in the Protocol.**

153. **We will continue to monitor for any relevant developments in this respect and draw these to the attention of the House and of other Select Committees as appropriate. In light of our assessment of the Joint Committee Decision, we ask the Government the following questions.**

154. **What is the Government's view of the European Commission's notice to stakeholders of 18 January 2021 on the application of EU State aid law under Article 10? In particular, does the Government still believe that the EU's unilateral declaration, read in the light of that stakeholder notice, addresses its concerns that Article 10 cannot be used to apply EU State aid "in Great Britain in circumstances when there is no link or only a trivial one to commercial operations taking place in Northern Ireland"?**

155. **More specifically, in the official Government guidance on compliance with the UK's obligations under Article 10, it is stated that "subsidies granted in Great Britain are only in scope of Article 10 where there is [...] a genuine, direct link between the subsidy and companies in Northern Ireland". The Government added on 8 February**

83 As of February 2021, the Government has not yet introduced specific primary or secondary legislation to give effect to the subsidy control provisions of the TCA. Instead, for the time being, under section 29 of the European Union (Future Relationship) Act 2020 "existing domestic law has effect […] with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement". It launched a consultation on a new domestic subsidy control regime on 3 February 2021.

84 Neither the Prime Minister's February 2020 negotiating objectives for a deal with the EU, nor the draft text of the UK/EU trade agreement published by the UK the following month, refer to Article 10 (or, indeed, the Protocol more generally).

85 Consideration should also be given in this regard to Article 46 of the Vienna Convention on the Law of the Treaties.

86 In particular, the European Commission is currently conducting an evaluation of many EU State aid rules, on which we published an initial Report in December 2020.

**that for such subsidies the Commission would have to prove a "real and material impact" on EU-Northern Ireland trade in goods. The Commission's stakeholder notice, by contrast, states that for Article 10 to apply "the beneficiary does not necessarily need to be located in [...] Northern Ireland, nor does [it] necessarily need to be directly involved in trade between Northern Ireland and the [EU]" and that the subsidy's effect on such trade can be "very small, or indeed, even merely potential". What is the explanation for this discrepancy in the interpretation between the Government and the Commission of the concept of a "genuine and direct link" between a subsidy and Northern Ireland, and what implications does the Government think this will have?**

156. **What efforts did the Government make to amend or replace Article 10, to circumscribe and limit the EU's power to intervene in UK subsidy policy under the Protocol more clearly, through the new subsidy control provisions of the UK/EU Trade & Cooperation Agreement?**

157. **The Government has committed, at a minimum, to continue depositing "EU Acts within the scope of the Protocol" in Parliament for scrutiny by us, pending further discussions about the scope of the House of Commons' scrutiny system for EU affairs. Given the unique nature of EU State aid rules, which are often set out in Communications of the European Commission rather than formal legislation, can the Government confirm that any new Communications relevant to or under Article 10 will also be deposited for scrutiny?**

158. **Given the constitutional implications of the Protocol for the United Kingdom, including the territorial status of Northern Ireland and the political and practical implications of the Protocol, we urge the Government to give serious consideration to the attitudes adopted by the European Union and to assert the United Kingdom's national interests in relation to the Protocol.**

# 8 UK unilateral declaration on exit formalities on trade from Northern Ireland to Great Britain

159. Following the UK's withdrawal from the EU's Customs Union and Single Market on 31 December 2020 at the end of the post-Brexit transition period, customs formalities have begun to apply to UK trade with the EU that did not apply previously. While the new UK/EU Trade & Cooperation Agreement (TCA) contains some measures to streamline customs formalities on trade between the UK and the EU, it does not remove them.

160. Among other things, this means that the EU Customs Code now requires goods traded between the two to be accompanied by customs declarations on imports and exports, as well as so-called "safety & security certificates" ahead of the cargo entering or leaving the EU. These latter give customs authorities on the EU side advance access to basic data such as the type of goods, and the identity of the traders involved, to "allow EU customs authorities to better identify high-risk consignments" before they enter or leave the Customs Union. For imports into the EU, these are known as an "entry summary declaration", while for exports it is a "pre-departure declaration" (and usually included in the export declaration).[87] Although the EU has agreements in place with both Switzerland and Norway that waive the requirement for safety & security documentation (but not customs declarations), the Government in its trade negotiation with the EU chose not to pursue this option.[88] The UK is by and large requiring the same customs documentation for trade with the EU in both directions, but is phasing some formalities in over the course of 2021.[89]

161. While this means that EU law now requires customs and security declarations for trade in goods between *Great Britain* and the EU since 1 January 2021,[90] the position of Northern Ireland under the Protocol is different.

87 Where the pre-departure data for exports is not already included in a full customs export declaration, it is contained in an "exit summary declaration".

88 This reluctance appears to have been driven by the fact that the EU's existing agreements in effect expect the Norwegian and Swiss Governments to remain aligned with relevant EU customs security legislation as it evolves. For example, the EU-Switzerland agreement on customs security states "amendments to Chapter III [on customs security measures] needed to take account of the development of [EU] legislation relevant to the matters covered by that Chapter shall be decided as soon as possible so that they can be implemented at the same time as the amendments to the [EU] legislation, in compliance with the internal procedures of the Contracting Parties". That may have breached the Government's objective in its trade negotiations of avoiding "any obligations for [UK] laws to be aligned with the EU's".

89 The Customs Safety, Security and Economic Operators Registration and Identification (Amendment etc.) (EU Exit) Regulations 2020 also make certain amendments to the requirements around Entry and Exit Summary Declarations as they will apply under UK law following the end of the transition period. Notably, goods moved to the UK by sea from Greenland, Morocco, and ports on the Black Sea and Mediterranean Sea will need to be subject of an entry summary declaration four or twenty-four hours in advance of the goods arriving depending on whether cargo is containerized or not (compared to two hours either way currently).

90 The cumulative impact of these formalities on the flow of trade with the EU is unclear, although the haulage industry has warned it could cause delays at ports. In particular, carriers may struggle to meet the EU's requirements for goods shipped across the Channel, because of the brevity of the crossing and the preponderance of mixed load containers (with each consignment in a lorry needing its own safety and security certificate). Where these formalities are not complied with, this could result in delays in the goods clearing customs on entry into or exit from the EU, and potential financial penalties for the carrier or traders. Certain facilitations in relation to safety & security certificates are available to companies that are signed up to the UK and EU's "Authorised Economic Operator" schemes, which are mutually recognised under the terms of the TCA.

162. As the Protocol means Northern Ireland is still treated as if it were inside the EU's Single Market for goods, no customs declarations or safety & security certificates are required for goods moved directly between Northern Ireland and any EU country (including across the land border with Ireland). Instead, the Protocol effectively requires the UK to continue applying EU customs formalities on goods entering or leaving Northern Ireland in trade with non-EU jurisdictions, including with Great Britain. Therefore, in principle, businesses have to submit such documentation for goods moved from Great Britain into Northern Ireland and vice versa to HM Revenue & Customs. For example, in November 2020 the European Commission introduced EU legislation to specify that safety and security declarations on trade by sea between Great Britain and the EU or Northern Ireland will need to be submitted no later than two hours before the consignments enter or leave the latter.[91]

163. To preserve Northern Ireland's place in the UK's internal market, this requirement is not reciprocal. The Government's policy is that goods entering Great Britain from Northern Ireland do not require export declarations or safety & security certificates (or are subject to import tariffs), provided they are "NI qualifying goods". At present, that criterion is met if the goods are in free circulation in Northern Ireland, meaning not subject to a customs procedure like transit, and are not being moved into Great Britain through Northern Ireland from somewhere else in the world with the specific purpose of avoiding UK tariffs applicable to foreign imports. As such, goods moved into Northern Ireland from anywhere in the EU—which does not require customs formalities under the Protocol—can subsequently enter Great Britain tariff-free even if they do not meet the rules of origin requirements under the UK/EU TCA. The Government intends to put in place a "longer-term qualifying regime" under which "only businesses established in Northern Ireland benefit […] from unfettered access" in the second half of 2021.

164. With respect to the new customs formalities on trade between Northern Ireland and the rest of the UK required under the Protocol, Ministers appear to have accepted the need for entry summary declarations and import declarations where goods are shipped from Great Britain to Northern Ireland. However, they have resisted the imposition of export declarations and safety & security certificates on goods moved from Northern Ireland to the rest of the UK, since Article 6 of the Protocol allows the Government to ensure "unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market".[92] In particular, in May 2020—recognising that this would require the EU's agreement—Ministers announced they would seek a "sensible" and "pragmatic approach" in the UK/EU Joint Committee to ensure that there would be "no requirement to submit export or [pre-departure] declarations for goods leaving

91 For different modes of transport, like rail, air and road, the time limits are already specifically established under the Customs Code and therefore no amending legislation was necessary to prepare for the UK's exit from the Single Market and Customs Union. For example, for goods carried by short-haul flights of less than four hours – which, in practice will cover virtually all direct flights from the UK to the EU - the safety and security certificate for imports into the EU must be received by the customs authorities in the Member State of entry no later than the time the aircraft takes off. For cargo relayed by train, which will include transports via the Channel Tunnel, it is two hours.

92 The Government's messaging on this point has been mixed. In late 2019, the then-Secretary of State for Exiting the EU (Steve Barclay MP) said that NI-GB trade would be "frictionless", before adding that "exit summary declarations" – the safety and security certificate required by the EU Customs Code if the information is not already included in a full export declaration - will be required in terms of Northern Ireland to GB". By May 2020, the Government had taken a different view, arguing that there should be "no requirement to submit export or exit summary declarations for goods leaving Northern Ireland for the rest of the UK". It has stated, separately, that "this approach will require formal agreement between the UK and the EU via the UK-EU Joint Committee".

Northern Ireland for the rest of the UK".[93]

165. Whether the Government achieved this remains an open question.

166. On 8 December 2020, the UK and EU announced an agreement on the implementation of the requirement under the Protocol with respect to "exit formalities" under EU law on trade in goods between Northern Ireland and the rest of the UK. This took the form of a unilateral declaration by the Government—with the EU's tacit acceptance—that the UK will "give effect" to the usual requirement under the EU Customs Code for "pre-departure and/or export declaration" for goods shipped from Northern Ireland to Great Britain[94] "by deeming [such] declaration[s] to have been made where equivalence regarding the content and timeliness of information provided to [HM Revenue & Customs] is ensured by other means and by using appropriate electronic data-processing techniques".[95] Any information received in this manner has to be shared with the EU, as data contained in export and pre-departure declarations would have been.

167. In light of the unilateral declaration, an overview of the primary types of customs documentation required under the UK/EU TCA and the Protocol is shown in the table below. For simplification, the UK's gradual phasing in of formalities for trade with the EU is not shown.

| Movement of goods | UK law | EU law |
|---|---|---|
| GB-NI | No customs formalities | Import declarations and entry summary declarations |
| NI-GB | No customs formalities for "NI qualifying goods" | No export declarations or pre-departure declarations, with limited exceptions<br><br>Generally, equivalent information to the above to be submitted by carriers from e.g. shipping manifests |
| GB-EU | Export declarations and pre-departure declarations | Import declarations and entry summary declarations |
| EU-GB | Import declarations and entry summary declarations | Export declarations and pre-departure declarations |
| NI-EU | No customs formalities | No customs formalities |
| EU-NI | No customs formalities | No customs formalities |

93 HM Government Command Paper, "The UK's Approach to the Northern Ireland Protocol" (May 2020), p. 10

94 As part of this agreement, the Government also agreed to remove the clauses from the Internal Market Bill that would have allowed it to 'dis-apply or modify' the application of an "exit procedure" on NI-GB trade, where required under the Protocol, unilaterally by means of regulations if necessary. The Bill defined an "exit procedure" as "a procedure or other formality […] applicable to goods moving from Northern Ireland". This would therefore include both export customs declarations and safety & security certificates in the form pre-departure declarations such as an Exit Summary Declaration.

95 The de facto derogation from the usual application of EU customs formalities on exports for goods moved from Northern Ireland to Great Britain will not apply where specific special customs procedures are used, including transit, storage in free ports, or outward processing.

168. In a Command Paper in December 2020, Ministers described the arrangement set out in the UK unilateral declaration as "eliminating any risk of Northern Ireland to Great Britain export declarations". Nevertheless, the UK declaration contains certain limited exceptions to the application of this 'equivalent' alternative export process, in which case formal export and pre-departure declarations will still be required.[96] It is unclear if the Government's planned "longer-term" arrangement for "NI qualifying goods" may extend the range of goods moved from Northern Ireland to Great Britain that will be subject to formal export documentation, to allow HMRC to identify those goods that qualify for "unfettered access" because they are being moved by "businesses established in Northern Ireland", and apply the UK tariff to other goods being moved into Great Britain via Northern Ireland.

169. For those goods for which export and safety declarations are to be replaced by the 'equivalent' arrangement pursuant to the December 2020 agreement, the Government stated the "other means" of collecting customs and safety data on shipments between Northern Ireland and Great Britain would draw "on data sources such as shipping manifests". However, there does not appear to be any public information on how exactly the 'equivalent' information is collected by HMRC, or which other "data sources" are being used. When we considered the UK's unilateral declaration at the end of last year, it considered that it was unclear to what extent the need for carriers or traders to still supply information to HMRC on intra-UK trade "by other means" would be substantively different from the obligations they would have had if normal export procedures under the EU's Customs Code had applied. We therefore wrote to the Chancellor of the Duchy of Lancaster on 16 December 2020 to ask "what obligations [this] will […] entail for carriers and traders when moving goods from Northern Ireland to the rest of the UK, and to what extent will the administrative burden on them be reduced compared to the situation if the EU Customs Code was applied".

170. In his reply, dated 5 February 2021, the Minister did not provide any further meaningful information. Instead, he simply repeated that "the other means by which information will be provided includes the use of existing data sources such as shipping manifests. This allows for the seamless flow of goods while maintaining our capacity for effective enforcement and tackling smuggling".

171. The Minister's reply came at a time of controversy around the implementation of the Protocol, ignited by the European Commission's abandoned proposal to invoke safeguard measures to apply EU export restrictions on covid-19 vaccines to Northern Ireland, and ahead of the expiry of certain grace periods before movements of meat products from Great Britain into Northern Ireland would become subject to full EU regulatory controls. At that point, in rebuffing an attempt by the Government to secure extensions of these grace periods, the Commission announced that it was not satisfied that the Government was in fact collecting, and sharing, data on shipments from Northern Ireland to Great Britain from sources like shipping manifests. This was first reported in the Irish press on 3 February,[97] and subsequently raised in a formal letter from Commissioner Maroš Šefčovič

96 This applies, in particular, where goods shipped from Northern Ireland to the rest of the UK are being moved under a customs procedure like transit, or are subject to specific international export restrictions (for example endangered species, hazardous chemicals or uncut diamonds). The Government has said there are only "14 areas" where export declarations will still be required, concerning "only very limited categories of trade" that 'will have negligible implications for trade as a whole".

97 In particular, RTÉ journalist Tony Connelly reported that, according to the EU, "the UK ha[d] yet to make use of other flexibilities, such as data generated when goods are shipped by ferry from Northern Ireland to Great Britain".

to the Government on 10 February 2021.[98]

172. In this letter, the Commissioner questioned the extent to which the UK had in fact implemented the arrangements set out in several areas of agreement on the Protocol reached in December 2020, including with respect to the alternative way of collecting data equivalent to export and safety declarations for goods sent from Northern Ireland to Great Britain. In particular, the Commissioner said the Government had "issued official guidance suggesting that traders moving goods from Northern Ireland to Great Britain outside standard procedures"—i.e. exempt from formal export declarations and safety & security certificates—"do not have to submit 'equivalent information' to customs authorities, contrary to the commitment taken by the United Kingdom in its unilateral declaration on flexibilities for export procedures of 17 December 2020".

173. The implication was that, by early February 2021, the UK was not systematically collecting the data "equivalent" to export and safety declaration, for example by collation from shipping manifests, on movements of goods from Northern Ireland to Great Britain. We are seeking further clarification from the Minister about the operation of this arrangement, and to what extent it has been implemented on the ground.

174. In any event, the UK's approach to exit formalities under the Protocol—and how it has been implemented in practice—does not affect the requirement for import and entry summary declarations for goods shipped from Great Britain to Northern Ireland. These still need to be submitted to HM Revenue & Customs two hours in advance of the cargo arriving at the ports of Larne or Belfast (see above).[99] Should there be a future customs security arrangement with the EU that would obviate the need for safety & security certificates on UK/EU trade in goods, like the EU's deals with Norway and Switzerland, this would also automatically remove the imposition of entry summary declarations on goods moved into Northern Ireland from Great Britain under the Protocol.[100] However, even in such a scenario, customs declarations would remain required on such trade, and the equivalent to export declarations under the UK's unilateral declaration of December 2020 on trade in the other direction.

## Conclusions and questions

175. **The position of Northern Ireland within the UK's internal market is of paramount importance, and any measures that reduce or remove the friction in trade between Northern Ireland and Great Britain created by the Protocol are to be welcomed. We**

98 The European Commissioner also noted that the EU had reportedly not, at that stage, been given access to the UK's customs IT system where, among other things, any data collected from shipping manifests should be used to create a "real time [...] flow of goods across the Irish Sea". A formal Decision of the UK/EU Joint Committee adopted on 17 December 2020 requires the Government to give EU officials "ongoing and continuous electronic access on a real-time basis to relevant information contained" in UK customs systems relevant to the Protocol. These include, in particular, including the Customs Declarations Service (CDS), the Goods Vehicle Movement Service (GVMS), the Freight Targeting System and parts of the Import Control System.

99 While the Government has said that the Protocol requires the submission of "digital safety and security information" for such trade, it has also hinted in correspondence with us that the question of whether EU customs formalities – like entry summary declarations - must be applied under the Protocol depends on whether the goods are considered "at risk" of ending up in the European Union. However, the Decision of the UK-EU Joint Committee specifying when goods should be considered "at risk" in that way does not make any provision relating to customs security procedures, relating solely to the issue of whether tariffs are payable. As such, we can only presume entry summary declarations will be required on GB-NI trade without further exception.

100 This would be the case because Northern Ireland remains bound by EU customs legislation and relevant international agreements concluded by the EU in that field.

**are therefore supportive of the Government's efforts that secured the EU's—tacit—agreement in December last year to largely remove the need for formal export and pre-departure declarations on intra-UK trade.**

176. **However, the practical implications of the arrangement set out in the UK's unilateral declaration—and indeed the extent to which it has been implemented on the ground—remain unclear. The European Commission in early February cast doubt on whether the Government was, in fact, systematically collecting such 'equivalent' data on trade from Northern Ireland to the rest of the UK, and sharing it with the EU.**

177. **The Government is still preparing a longer-term arrangement to define which goods shipped into Great Britain from Northern Ireland 'qualify' for "unfettered access", to prevent that route from being abused by those seeking to avoid UK customs tariffs on foreign imports, including from the EU where the Rules of Origin of the Trade & Cooperation Agreement are not met. We note that information to be supplied by carriers to HMRC on movements of goods from Northern Ireland into the UK could also assist the Government in determining which "qualifying goods" produced or processed in Northern Ireland should have "unfettered access" into the UK market, while enabling customs formalities to be applied to non-qualifying cargo entering Great Britain from Northern Ireland (such as goods driven into Northern Ireland from Ireland or elsewhere in the EU, and then moved into Great Britain).**[101]

178. **The European Commission alleged in early February 2021 that Government guidance to businesses suggested they did not have to provide HMRC with data equivalent to export and pre-departure declarations on goods moved from Northern Ireland to Great Britain, "contrary to the commitment" made by the UK in its unilateral declaration of December 2020. Has the Government systematically been collecting data on such intra-UK trade since 1 January 2021 as set out in the declaration, and which sources other than shipping manifests are being used for this purpose? Has the EU been given access to this data in the relevant IT systems as operated by HMRC?**

179. **During the negotiations on the new UK/EU Trade & Cooperation Agreement, what consideration did the Government give to seeking a customs security arrangement with the EU similar to the latter's agreements with Norway and Switzerland, under which the need for safety & security certificates is waived, given that this would also have obviated the need for any such documentation on trade between Great Britain and Northern Ireland under the Protocol? Why was such an arrangement not agreed? More generally, the customs arrangements under the Protocol appear to have resulted not only in disruption of trade between Great Britain and Northern Ireland but also diversion of trade. Diversion of trade is a ground stipulated in Article 16 of the Northern Ireland Protocol that entitles either party to take temporary safeguard measures unilaterally. What consideration has the Government given to invoking Article 16 to address any disruption caused by the Protocol?**

180. **In light of the above, we urge the Government to give serious consideration to keeping the Protocol under constant review, in particular, with regard to the provisions that impose formalities on trade in good between Northern Ireland and Great Britain.**

101 It is noteworthy in this respect that the Internal Market Bill originally contained a clause specifying that it "does not prevent the exercise of a function if the exercise […] is necessary for the administration of arrangements which have the purpose of facilitating access for qualifying Northern Ireland goods to the internal market in the United Kingdom".

# Conclusions and questions

## Introduction

1. We repeat our previous calls for greater clarity on proceedings in the Joint Committee e.g. sight of detailed agendas in good time ahead of scheduled meetings and the publication of meeting minutes. We also ask that Explanatory Memoranda on EU documents—that fall within the scope of the Northern Ireland Protocol—are submitted in sufficient time and with adequate detail for us to consider them before any decisions are taken in the Joint Committee. (Paragraph 9)

2. As the analysis in this Report shows, there is significantly more that the Government could have done –and *should* be doing—to facilitate scrutiny of the Joint Committee. This is vital given its importance: especially for the people and businesses of Northern Ireland. (Paragraph 10)

3. Given the unique nature of the UK's relationship with the EU, the UK/EU Withdrawal Agreement Joint Committee is of significant legal and political importance. This necessitates robust mechanisms for transparency and parliamentary scrutiny. (Paragraph 11)

4. We urge the Government to look again at how it can better inform us—and the House—of upcoming Joint Committee business and facilitate our scrutiny of binding Decisions before they are adopted. The information that the Government has provided, to date, on the activities of the Joint Committee—and its assessment of their importance—has been incomplete and made available too late to allow for the meaningful engagement of the House and affected stakeholders. (Paragraph 13)

## Errors and omissions

### *The Joint Committee Decision*

5. We seek from the Government:

   - confirmation of the position that the Government took in negotiations within the JC and the changes that it secured; and
   - the rationale for its position. (Paragraph 49)

### *Drug Precursors*

6. We ask the Government to provide further information on the following matters:

   - the additional costs that NI and GB businesses will incur in complying with the new licensing requirements following their introduction on 1 January 2021;
   - the impact that these additional costs have had so far (or are anticipated to have in the future) on the volume of NI/GB trade in drug precursors; and

- any evidence gathered on the effect that the new licensing requirements and associated costs have had (or are anticipated to have) on NI/GB supply chains operating in both directions before 1 January 2021. (Paragraph 52)

7. We understand that the regulatory regimes applicable in GB and NI are, for the time being, the same. We also ask the Government what factors it would expect to take into account in deciding whether to use its regulatory autonomy to diverge from EU rules on drug precursors or to remain in alignment. (Paragraph 53)

### *Trade-related instruments*

8. We ask the Government whether this is indeed the case and what system the Government has put in place to reimburse duties paid by Northern Ireland importers. (Paragraph 55)

## At risk goods

9. The provisions of the Protocol relating to the potential applicability of EU tariffs on goods entering Northern Ireland, including from Great Britain, are complex, controversial and have given rise to various practical difficulties. These issues are of significant constitutional significance. (Paragraph 78)

10. These issues include, in particular, the very restrictive definition of what goods are formally deemed "not at risk" of ending up in the EU Single Market as set out in Joint Committee Decision 4/2020, which means EU tariffs are now potentially applicable to an indeterminate number of imports into Northern Ireland from Great Britain, especially where the rules of origin of the new UK/EU Trade & Cooperation Agreement are not met. This is compounded by the lack of Northern Irish access to lower-duty imports under the EU's Tariff Rate Quotas, (including for steel products), and the lack of a comprehensive UK Government duty waiver or reimbursement scheme for all types of imports into Northern Ireland which might face EU tariffs under the Protocol. We note that discussions are on-going between the Government and the European Commission to address the application of high EU tariffs to steel products entering Northern Ireland. (Paragraph 79)

11. The Minister's letter of 5 February 2021, in response to our initial consideration of Joint Committee Decision 4/2020, provided some additional information, but notably falls short with respect to the planned transparency—if any—of Government data on what proportion of goods moved from Great Britain into Northern Ireland will face EU tariffs under the Protocol (even if reimbursed). (Paragraph 80)

12. Details are also still lacking about the Government's precise plans to waive any applicable EU tariff for "at risk" goods under the Protocol. The existing waiver scheme is limited in scope. We note that the Government intends to create a "reimbursement scheme for goods that attract a [EU] tariff, but which can subsequently be shown to have remained in the UK customs territory". Depending on the details of this scheme, this could potentially have wider relevance for the Protocol: if the Government can devise a robust way of determining that a good had not been moved into the EU via Northern Ireland, including by being transported across the land border with Ireland, in theory this could in the future inform negotiations

between the UK and EU to reduce Northern Ireland's level of alignment with EU rules. However, there are no details for this arrangement at present, and given the EU's resistance to "alternative arrangements" in the past this is only ever likely to be a long-term solution to the tensions inherent in keeping the Irish land border free of customs infrastructure and the UK as a whole leaving the Single Market and Customs Union. (Paragraph 81)

13. It is also unclear if the Government is still seeking further easements from the trade formalities now applicable to trade from Great Britain to Northern Ireland for goods not considered "at risk" of ending up in the EU under Joint Committee Decision 4/2020, as Ministers had implied at various points in 2020. We consider that there is a strong case for the Government to pursue the principle of so-called "mutual enforcement" in further negotiations with the EU to replace the provisions of the Protocol requiring continued regulatory alignment with EU law in Northern Ireland as discussed elsewhere.[102] (Paragraph 82)

## In light of our assessment of the Joint Committee Decision and the wider relevance of the Protocol for the application of EU tariffs to goods entering Northern Ireland, we ask the Government the following questions.

### *Transparency of the impact of Articles 5(1) and (2) of the Protocol on internal UK Trade*

14. What estimate has the Government made of the total amount of EU tariffs that are likely to be payable on "at risk" goods brought into Northern Ireland from Great Britain, and what proportion does it expect to waive or reimburse under Article 5(6) of the Protocol, for example on an annual basis? (Paragraph 84)

15. Transparency of the proportion in which goods entering Northern Ireland are categorised under the Protocol as being "at risk" or not, and use of the new UK Trader Scheme, are crucial to Parliament and public understanding of the impact of the Protocol, not least on intra-UK trade. Can the Government commit to publication of the aggregate data on the proportion of goods deemed "at risk" and the amount of EU tariffs waived or reimbursed? (Paragraph 85)

### *UK Trader Scheme under Article 3 of Joint Committee Decision 4/2020*

16. The Government has noted that "there are a number of options available to avoid paying any tariffs when moving goods into Northern Ireland from Great Britain". What assessment has the Government made of the likely uptake of the UK Trader Scheme to avoid such tariffs, compared to the option of seeking tariff-free treatment of goods moved into Northern Ireland from Great Britain under the UK/EU Trade & Cooperation Agreement subject to rules of origin requirements? (Paragraph 86)

102 See, in particular, the principle as expounded by Sir Jonathan Faull KCMG (former Director-General at the European Commission) in Joseph H.H. Weiler, Daniel Sarmiento and Jonathan Faull, 'And Offer the EU and UK Cannot Refuse: A Proposal on How to Avoid a No-Deal Brexit' (Verfassungsblog: On matters constitutional) 22 August 2019. See also Centre for Brexit Policy, 'Correcting the damage caused by the Northern Ireland Protocol: How mutual enforcement can solve the Northern Ireland border problem' (February 2021)

### *Duty waiver and reimbursement schemes under Article 5(6) of the Protocol*

17. HM Revenue & Customs current guidance on the duty waiver scheme for businesses which have to pay EU tariffs on "at risk" goods brought into Northern Ireland excludes goods imported from outside the EU or UK, and agricultural and fisheries products. Why are they not currently covered, and when does the Government envisage the duty waiver scheme will be available for these goods? (Paragraph 87)

18. Does the Government envisage that it will need European Commission approval for any of its plans to fully implement Article 5(6) of the Protocol under State aid rules to the extent that they are applicable under Article 10 of the Protocol? In particular, is it planning any schemes that would allow businesses to seek waivers for EU customs duties under the Protocol in excess of the EU "de minimis" subsidy limit, if necessary? (Paragraph 88)

19. What assessment has the Government made of the likelihood that larger companies in particular will breach the "de minimis" limit on their ability to seek a waiver on any EU customs duties incurred because of the Protocol, and the implications for prices of imported goods in Northern Ireland? (Paragraph 89)

20. How does the Government envisage that its planned reimbursement scheme for goods that attract an EU tariff, but which "can subsequently be shown to have remained in the UK customs territory" will work in practice, in particular with respect to determining that a good had not crossed the border with Ireland? (Paragraph 90)

### *Further easements of goods not considered 'at risk' under Article 5(1) and (2)*

21. Last year, the Government suggested that the question of whether goods were deemed "at risk" of being moved into the EU was also linked to other trade formalities under the Protocol, for example with respect to the need to apply import VAT. Is that still the Government's position? If so, what other easements, derogations or exemptions in addition to not applying the EU customs tariff is the Government applying to goods not "at risk", or discussing with the EU via the Joint Committee? (Paragraph 91)

## UK/EU Withdrawal Agreement: Members of the arbitration panel

22. We ask the Government the following questions about the listing of arbitrators and independent arbitration under both the WA and the TCA:

- whether the transparency of the process for nominating arbitrators from the UK side could be improved and whether the UK is considering appointing arbitrators for the TCA who have been already been listed for the WA;
- its view of Article. INST.24.4 TCA and the potential for cross-retaliation between the WA and the TCA; and

- whether it would be prepared as a matter of goodwill and transparency to undertake to provide the similar information to Parliament about disputes under the TCA as they are obliged by statute to do for those arising under the WA. (Paragraph 120)

23. These questions are addressed to the Minister of State at the Cabinet Office (Lord Frost) and the Foreign Secretary (Rt Hon. Dominic Raab MP) and are included in the letter Annex to this Report.

## Unilateral EU declaration on EU state aid rules under the Protocol

24. The continued application of EU State aid rules under the Protocol on Northern Ireland was always likely to be controversial. However, it is worrying that the extent to which such rules will continue to be binding on the UK under Article 10 of the Protocol are still interpreted very differently by the Government and the European Commission. (Paragraph 145)

25. We do not take a position here on the legal soundness of the respective interpretations of Article 10 and the EU's declaration made by the Government and by the Commission. This is a matter for the relevant courts, unless and until the text of Article 10 of Protocol is changed or it ceases to have effect. However, we are concerned the lack of clarity may impact on the willingness of companies to accept subsidies, or of public authorities to grant them, while this uncertainty—and the risk of the money having to be repaid—persists. (Paragraph 146)

26. Nevertheless, we are concerned by the significant political ramifications inherent in the Commission's interpretation. The purported wide-ranging 'reach-back' of Article 10 into subsidies granted to businesses in Great Britain, including to the UK services industry, could in theory result in the EU assuming competence to intervene directly with respect to UK subsidies that only have a limited link to Northern Ireland and, potentially, minimal impact on the trade between Northern Ireland and the EU. Any unnecessary engagement by the Commission in UK subsidies that are not demonstrably relevant to Northern Ireland's trade in goods with the EU may also undermine the legitimacy of the Protocol more generally. (Paragraph 147)

27. In any event, while the Government clearly does not agree with the Commission's approach to the scope of Article 10, we are not convinced of the success of Ministers' efforts to date to address the issue with the EU bilaterally, and in doing so avoid litigation before the UK or EU courts that could result in judgements that favour the Commission's more problematic legal interpretation. (Paragraph 148)

28. First, the Government has said that the EU's unilateral declaration in December 2020 'addressed' its concerns about the scope of Article 10 to avoid it being applied to subsidies "when there is no link or only a trivial one to commercial operations taking place in Northern Ireland". We cannot agree: based on the evidence before us, the declaration does not in practice bridge the gap between positions of the Commission and the UK, respectively, to anything which might be described as mutually compatible interpretations to that effect. The Commission's stakeholder notice, issued after the declaration, maintains in no uncertain terms that it believes the EU's existing low threshold for determining the "effect on trade" of a UK

subsidy, and with it a wide scope for the Commission to intervene with respect to aid granted to businesses in Great Britain, still applies under Article 10. Under this interpretation, EU State aid rules could be enforced against UK subsidies even where there is only "a very small, or indeed, even merely potential effect on trade" in goods between the EU and Northern Ireland. That, in our view, amounts to Article 10 applying to subsidies with "no link or only a trivial one" to Northern Ireland. (Paragraph 149)

29. Second, the Government had the opportunity to remove Article 10 of the Protocol, or at least reduce the scope for ambiguity about its interpretation, as part of the trade negotiations with the EU. Article 13(8) of the Protocol explicitly provides for the possibility that "any [future] agreement between the [EU] and the United Kingdom" could "indicate the parts of this Protocol which it supersedes". The Government could therefore have used the trade negotiations with the EU in 2020 to replace or amend Article 10. However, while the new UK/EU Trade & Cooperation Agreement (TCA) does contain provisions on subsidy control, it does not explicitly or implicitly make any changes to Article 10.[103] Instead, the provisions of the TCA as implemented under UK domestic law[104] will apply in parallel to Article 10, in relation to subsidies that are not in scope of the latter (which, of course, is disputed). It is not clear if the Government sought to change Article 10 but could not secure the EU's agreement, or if such an approach was never taken in the negotiations.[105] (Paragraph 150)

30. Beyond the question around the precise scope of Article 10, it is clear that, subject to Section 38 of the Withdrawal Agreement Act,[106] the Protocol means EU State aid law will continue to play a role in the UK legal order for as long as it remains in force. It is important in this respect that the substance of the rules as they apply under the Protocol will evolve automatically as the EU updates its State aid rulebook, a process in which the UK is now no longer formally involved. Substantive changes to various EU Regulations and guidelines which apply to the UK under Article 10 of the Protocol are due over the course of 2021 and beyond.[107] (Paragraph 151)

31. Proper parliamentary scrutiny of the implications of any future changes in EU State aid law for the UK under the Protocol will also require Government to be candid in its assessment of their implications. The Government has undertaken to continue to deposit "EU Acts" relating to the Northern Ireland Protocol and to prepare Explanatory Memoranda covering their potential implications. Discussions on the House's wider scrutiny arrangements of EU-related matters are ongoing. We therefore seek clarity on whether "Acts" in this respect will also extend to Communications of the European Commission, in which many aspects of EU State

103 A detailed examination of the subsidy control provisions of the TCA is beyond the scope of this Report.

104 As of February 2021, the Government has not yet introduced specific primary or secondary legislation to give effect to the subsidy control provisions of the TCA. Instead, for the time being, under section 29 of the European Union (Future Relationship) Act 2020 "existing domestic law has effect […] with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement". It launched a consultation on a new domestic subsidy control regime on 3 February 2021.

105 Neither the Prime Minister's February 2020 negotiating objectives for a deal with the EU, nor the draft text of the UK/EU trade agreement published by the UK the following month, refer to Article 10 (or, indeed, the Protocol more generally).

106 Consideration should also be given in this regard to Article 46 of the Vienna Convention on the Law of the Treaties.

107 In particular, the European Commission is currently conducting an evaluation of many EU State aid rules, on which we published an initial Report in December 2020.

aid rules are traditionally set out and many of which are listed in the Protocol. (Paragraph 152)

### *In light of our assessment of the Joint Committee Decision, we ask the Government the following questions.*

32. What is the Government's view of the European Commission's notice to stakeholders of 18 January 2021 on the application of EU State aid law under Article 10? In particular, does the Government still believe that the EU's unilateral declaration, read in the light of that stakeholder notice, addresses its concerns that Article 10 cannot be used to apply EU State aid "in Great Britain in circumstances when there is no link or only a trivial one to commercial operations taking place in Northern Ireland"? (Paragraph 154)

33. More specifically, in the official Government guidance on compliance with the UK's obligations under Article 10, it is stated that "subsidies granted in Great Britain are only in scope of Article 10 where there is [...] a genuine, direct link between the subsidy and companies in Northern Ireland". The Government added on 8 February that for such subsidies the Commission would have to prove a "real and material impact" on EU-Northern Ireland trade in goods. The Commission's stakeholder notice, by contrast, states that for Article 10 to apply "the beneficiary does not necessarily need to be located in [...] Northern Ireland, nor does [it] necessarily need to be directly involved in trade between Northern Ireland and the [EU]" and that the subsidy's effect on such trade can be "very small, or indeed, even merely potential". What is the explanation for this discrepancy in the interpretation between the Government and the Commission of the concept of a "genuine and direct link" between a subsidy and Northern Ireland, and what implications does the Government think this will have? (Paragraph 155)

34. What efforts did the Government make to amend or replace Article 10, to circumscribe and limit the EU's power to intervene in UK subsidy policy under the Protocol more clearly, through the new subsidy control provisions of the UK/EU Trade & Cooperation Agreement? (Paragraph 156)

35. The Government has committed, at a minimum, to continue depositing "EU Acts within the scope of the Protocol" in Parliament for scrutiny by us, pending further discussions about the scope of the House of Commons' scrutiny system for EU affairs. Given the unique nature of EU State aid rules, which are often set out in Communications of the European Commission rather than formal legislation, can the Government confirm the any new Communications relevant to or under Article 10 will also be deposited for scrutiny? (Paragraph 157)

36. Given the constitutional implications of the Protocol for the United Kingdom, including the territorial status of Northern Ireland and the political and practical implications of the Protocol, we urge the Government to give serious consideration to the attitudes adopted by the European Union and to assert the United Kingdom's national interests in relation to the Protocol. (Paragraph 158)

## UK unilateral declaration on exit formalities on trade from Northern Ireland to Great Britain

37. The position of Northern Ireland within the UK's internal market is of paramount importance, and any measures that reduce or remove the friction in trade between Northern Ireland and Great Britain created by the Protocol are to be welcomed. We are therefore supportive of the Government's efforts that secured the EU's—tacit—agreement in December last year to largely remove the need for formal export and pre-departure declarations on intra-UK trade. (Paragraph 175)

38. However, the practical implications of the arrangement set out in the UK's unilateral declaration—and indeed the extent to which it has been implemented on the ground—remain unclear. The European Commission in early February cast doubt on whether the Government was, in fact, systematically collecting such 'equivalent' data on trade from Northern Ireland to the rest of the UK, and sharing it with the EU. (Paragraph 176)

39. The Government is still preparing a longer-term arrangement to define which goods shipped into Great Britain from Northern Ireland 'qualify' for "unfettered access", to prevent that route from being abused by those seeking to avoid UK customs tariffs on foreign imports, including from the EU where the Rules of Origin of the Trade & Cooperation Agreement are not met. We note that information to be supplied by carriers to HMRC on movements of goods from Northern Ireland into the UK could also assist the Government in determining which "qualifying goods" produced or processed in Northern Ireland should have "unfettered access" into the UK market, while enabling customs formalities to be applied to non-qualifying cargo entering Great Britain from Northern Ireland (such as goods driven into Northern Ireland from Ireland or elsewhere in the EU, and then moved into Great Britain).[108] (Paragraph 177)

### *In light of our assessment of the current situation, we ask the Government the following questions.*

40. The European Commission alleged in early February 2021 that Government guidance to businesses suggested they did not have to provide HMRC with data equivalent to export and pre-departure declarations on goods moved from Northern Ireland to Great Britain, "contrary to the commitment" made by the UK in its unilateral declaration of December 2020. Has the Government systematically been collecting data on such intra-UK trade since 1 January 2021 as set out in the declaration, and which sources other than shipping manifests are being used for this purpose? Has the EU been given access to this data in the relevant IT systems as operated by HMRC? (Paragraph 178)

41. During the negotiations on the new UK/EU Trade & Cooperation Agreement, what consideration did the Government give to seeking a customs security arrangement with the EU similar to the latter's agreements with Norway and Switzerland, under

108 It is noteworthy in this respect that the Internal Market Bill originally contained a clause specifying that it "does not prevent the exercise of a function if the exercise […] is necessary for the administration of arrangements which have the purpose of facilitating access for qualifying Northern Ireland goods to the internal market in the United Kingdom".

which the need for safety & security certificates is waived, given that this would also have obviated the need for any such documentation on trade between Great Britain and Northern Ireland under the Protocol? Why was such an arrangement not agreed? More generally, the customs arrangements under the Protocol appear to have resulted not only in disruption of trade between Great Britain and Northern Ireland but also diversion of trade. Diversion of trade is a ground stipulated in Article 16 of the Northern Ireland Protocol that entitles either party to take temporary safeguard measures unilaterally. What consideration has the Government given to invoking Article 16 to address any disruption caused by the Protocol? (Paragraph 179)

42. In light of the above, we urge the Government to give serious consideration to keeping the Protocol under constant review, in particular, with regard to the provisions that impose formalities on trade in good between Northern Ireland and Great Britain. (Paragraph 180)

# Annex: Letter to the Foreign Secretary (Rt Hon. Dominic Raab MP) and Minister of State at the Cabinet Office (Lord Frost)

I refer to the Explanatory Memorandum of 4 January, signed by the Minister of State for Asia (Nigel Adams MP). This concerns the EU position on the Joint Committee Decision of the Withdrawal Agreement which lists the persons to serve as members of the arbitration panel under that agreement.

I have chosen instead to reply to you both. This is in your respective capacities as Foreign Secretary with responsibility for the Withdrawal Agreement (WA) Arbitration Panel[109] and recently appointed Minister of State at the Cabinet Office with oversight of our future relations with the EU, the latter role including being the UK's Ministerial representative on both the Withdrawal Agreement Joint Committee and the Partnership Council of the Trade and Cooperation Agreement (TCA). This is because the Committee has several questions to ask about the independent arbitration process under both agreements.

First, the Committee has questions about the transparency of the process for nominating members for the WA arbitration panel, which have relevance to the process for nominating panel members for the TCA. We note the comments of the EU Lords Committee on the lack of advance notice to Parliament of proposed UK nominees for the WA panel. We echo those and would hope that a more transparent process could be put in place with respect to the same process for the TCA. We look forward to your views[110] on that and, like the Lords Committee we would also be interested to learn more about the Government's decision-making process in selecting its nominees. In particular, whether the Government intends to appoint UK nominees for the future TCA panel from the list of UK members adopted for the WA panel? If so, what are the potential benefits and disadvantages to that?

We would also like the Government's view on the inconsistency in terms of Parliamentary scrutiny of disputes arising under the WA and TCA, which may end up before an arbitration panel. Section 13B EU (Withdrawal Act) 2018[111] imposes reporting obligations on the Government in respect of the WA, there is no equivalent provision in the EU (Future Relationship) Act 2020 relating to the TCA. In the absence of a statutory obligation, we would be interested to learn whether the Government would be willing to undertake to provide similar information to Parliament about disputes under the TCA.

Finally, the Committee would like me to ask you about a link between non-compliance with an arbitration panel ruling under the WA and the potential suspension of parts of the TCA.

We refer to Article.INST.24.4 of the TCA which states:

> "Where a Party persists in not complying with a ruling of an arbitration panel established under an earlier agreement concluded between the Parties, the other Party may suspend obligations under the covered provisions

109 As stated in your EM at paragraph 7

110 Though we have been copied into the response from the Minister for Europe and the Americas (Wendy Morton MP) to Lord Kinnoull, Chair of Lords EU Committee dated 22 February 2021

111 As amended by Section 30 EU (Withdrawal Agreement) Act 2020

> referred to in Article INST.10 [Scope]. With the exception of the rule in point (a) of paragraph 3, all rules relating to temporary remedies in case of non-compliance and to review of any such measures shall be governed by the earlier agreement".

We are interested in the Government's view of this provision more generally. Although we note that it applies to both parties, we consider that it potentially holds more significance for the UK. This is because it maximises the impact that those arbitration panel rulings based on Court of Justice rulings under the Withdrawal Agreement could have by enabling them to also have an effect under the TCA. It means that CJEU rulings made under the dispute settlement provisions of the Withdrawal Agreement can indirectly lead to the suspension of obligations under the TCA, if the UK persistently refuses to comply with a ruling of the arbitration panel.

We note that Article 178(2) WA foreshadowed this sort of cross-retaliation between parts of the WA and "parts of any other agreement between the Union and the United Kingdom under the conditions set out in that agreement". But we wonder what scope there was for the Government to qualify and mitigate that provision when negotiating the TCA. It does amount to a notable but hopefully limited exception from the Government's assertion in its Summary Explainer that there is no role for the Court of Justice in the TCA. It also compounds the already multiple and complex avenues for the suspension of parts of the TCA, which all potentially undermine the desirable stability of the agreement.

We look forward to a response to this letter within 10 working days.

I am copying this letter to Angus Brendan McNeil MP Chair of the International Trade Committee and Jo Welham, the Clerk of that Committee and the Lord Kinnoull and Christopher Johnson in the Lords; and to Les Saunders, Donald Harris in the Cabinet Office and Adam Nutley in the Foreign Commonwealth and Development Office.

# Formal minutes

## Wednesday 24 March 2021

Members present:

Sir William Cash, in the Chair

| | |
|---|---|
| Jon Cruddas | Mr David Jones |
| Allan Dorans | Marco Longhi |
| Richard Drax | Craig Mackinlay |
| Margaret Ferrier | Anne Marie Morris |
| Mrs Andrea Jenkyns | Greg Smith |

Draft Report (*Northern Ireland Protocol: Withdrawal Agreement Joint Committee Decisions and declarations of 17 December 2020*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 180 read and agreed to.

Annex agreed to.

*Resolved*, That the Report be the Forty-first Report of the Committee to the House.

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

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 14 April at 1.45 p.m.

# Standing Order and membership

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.

**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*)

# List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

## Session 2019–21

| Number | Title | Reference |
|---|---|---|
| None | 30th - Documents considered by the Committee on 25 November 2020 | HC 229-xxvi |
| 1st | The EU's mandate for negotiating a new partnership with the UK | HC 218 |
| 2nd | COVID-19 pandemic: the EU's policy response and its implications for the UK | HC 275 |
| 3rd | Documents considered by the Committee on 26 March 2020 | HC 229-i |
| 4th | Documents considered by the Committee on 23 April 2020 | HC 229-ii |
| 5th | The EU's mandate for negotiating a new partnership with the UK: outcome of Select Committee consultation | HC 333 |
| 6th | Documents considered by the Committee on 30 April 2020 | HC 229-iii |
| 7th | Documents considered by the Committee on 7 May 2020 | HC 229-iv |
| 8th | Documents considered by the Committee on 14 May 2020 | HC 229-v |
| 9th | Documents considered by the Committee on 21 May 2020 | HC 229-vi |
| 10th | Documents considered by the Committee on 4 June 2020 | HC 229-vii |
| 11th | Documents considered by the Committee on 11 June 2020 | HC 229-viii |
| 12th | UK-EU Joint Committee: Decision of 12 June 2020 amending the Withdrawal Agreement | HC 465 |
| 13th | Documents considered by the Committee on 18 June 2020 | HC 229-ix |
| 14th | Documents considered by the Committee on 25 June 2020 | HC 229-x |
| 15th | Documents considered by the Committee on 2 July 2020 | HC 229-xi |
| 16th | Documents considered by the Committee on 9 July 2020 | HC 229-xii |
| 17th | Documents considered by the Committee on 16 July 2020 | HC 229-xiii |
| 18th | Documents considered by the Committee on 23 July 2020 | HC 229-xiv |
| 19th | Documents considered by the Committee on 3 September 2020 | HC 229-xv |
| 20th | Documents considered by the Committee on 10 September 2020 | HC 229-xvi |
| 21st | Documents considered by the Committee on 16 September 2020 | HC 229-xvii |

| Number | Title | Reference |
|---|---|---|
| 22nd | Documents considered by the Committee on 24 September | HC 229-xviii |
| 23rd | Documents considered by the Committee on 1 October 2020 | HC 229-xix |
| 24th | Documents considered by the Committee on 8 October 2020 | HC 229-xx |
| 25th | Documents considered by the Committee on 15 October 2020 | HC 229-xxi |
| 26th | Documents considered by the Committee on 21 October 2020 | HC 229-xxii |
| 27th | Documents considered by the Committee on 4 November 2020 | HC 229-xxiii |
| 28th | Documents considered by the Committee on 11 November 2020 | HC 229xxiv |
| 29th | Documents considered by the Committee on 19 November 2020 | HC 229-xxv |
| 31st | Documents considered by the Committee on 3 December 2020 | HC 229-xxvii |
| 32nd | Documents considered by the Committee on 9 December 2020 | HC 229-xxviii |
| 33rd | Documents considered by the Committee on 16 December 2020 | HC 229-xxix |
| 34th | Documents considered by the Committee on 20 January 2021 | HC 229-xxx |
| 35th | Documents considered by the Committee on 3 February 2021 | HC 229-xxxi |
| 36th | Brexit: The future operation of the Channel Tunnel Fixed Link | HC 1062 |
| 37th | Documents considered by the Committee on 10 February 2021 | HC 229-xxxii |
| 38th | Documents considered by the Committee on 24 February 2021 | HC 229-xxxiii |
| 39th | Documents considered by the Committee on 10 March 2021 | HC 229-xxxiv |
| 40th | Documents considered by the Committee on 17 March 2021 | HC 229-xxxv |