House of Commons

European Scrutiny Committee

Northern Ireland Protocol: Withdrawal Agreement Joint Committee Decisions and declarations of 17 December 2020: Government's response to the Committee's Forty-first report of Session 2019–21

Second Special Report of Session 2021–22

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European Scrutiny Committee

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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), Daniel Moeller (Committee Operations Manager), Foeke Noppert (Senior Committee Specialist), Indira Rao MBE (Counsel for European and International Law), Paula Saunderson (Committee Operations Assistant), Emily Unwin (Deputy Counsel for European and International Law), Dr George Wilson (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 3292/8185. The Committee's email address is escom@parliament.uk.

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Second Special Report

The European Scrutiny Committee published its Forty-first Report of Session 2019–21, *Northern Ireland Protocol: Withdrawal Agreement Joint Committee Decisions and declarations of 17 December 2020* (HC 1343), on 9 April 2021. The Government response was received from Lord Frost (Minister of State at the Cabinet Office) on 11 June 2021 and is appended below. We also wrote separately on 9 April to Lord Frost and Rt Hon. Dominic Raab MP (First Secretary of State and Secretary of State for Foreign, Commonwealth and Development Affairs) on the linked issue of the appointment of arbitration panel members under the UK/EU Withdrawal Agreement and the UK/EU Trade and Cooperation Agreement. Their response was received on 19 May and is also appended below. We will return to the issues covered in our Report of 9 April during our ongoing scrutiny of the Withdrawal Agreement Joint Committee, the Northern Ireland Protocol and the UK's new relationship with the EU.

Appendix: Government Response

1. Thank you for your report of 9 April on the Protocol on Ireland/Northern Ireland. I will turn to each of the issues and questions you raise, grouping them as appropriate.

Responses to Committee conclusions and questions

Introduction (paragraphs 9, 10, 11 and 13 of the Committee's Report):

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)

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)

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)

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)

2. The Government agrees that the UK/EU Withdrawal Agreement Joint Committee is of significant legal and political importance, and that this necessitates robust mechanisms for transparency and parliamentary scrutiny. We are looking to build a collaborative approach to scrutiny of Joint Committee activity with Parliament, and welcome advice and experience from European Scrutiny Committee members in particular.

3. The Government has always been and remains committed to working transparently with Parliament, as borne out by all our exchanges in 2020. Now that Trade and Cooperation Agreement negotiations have ended, we very much hope we can work even more collaboratively.

4. From the start of the transition period, Written Ministerial Statements (WMS) have been issued before and after Joint Committee meetings. The Chancellor of the Duchy of Lancaster, Rt. Hon Michael Gove MP (CDL) gave evidence to the Future Relationship with the European Union Committee five times (on 11 March, 27 April, 27 May, 7 October, and 17 December 2020). He also appeared before the Lords EU Committee five times (on 5 May, 28 May, 7 October, 17 December 2020 and 9 February 2021). Additionally he appeared before the Public Administration and Constitutional Affairs Committee three times (on 29 April, 10 September, and 10 December 2020) and the European Scrutiny Committee on 8 February 2021. Finally, CDL also made an oral statement to the House on 19 October 2020. The Paymaster General, Rt. Hon Penny Mordaunt MP also appeared before the European Scrutiny Committee, on 5 October 2020. We issued letters to Committee chairs in the event Parliament was not sitting; and officials met with Committee clerks to provide background information.

5. CDL stated to your Committee in February 2021 that, wherever possible, the Government will share provisional meeting agendas at least seven days in advance of any meeting. We are committed to meeting this target from now on.

6. Parliament will recognise that the Joint Committee meetings are sometimes agreed at short notice meaning it may not always prove possible to share information with adequate notice. We will seek to avoid this and use our best endeavours to provide notice and information where we can.

Errors and omissions (paragraphs 49, 52, 53 and 55):

The Joint Committee Decision

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)

7. In discussing minor amendments to the Withdrawal Agreement in June 2020 (permitted by WA Article 164(5)(d)), the Government took the position to distinguish between changes to dates, and adding to the list of relevant laws in the Annex to the Northern Ireland Protocol. This ensured that all discussions on the Northern Ireland

Protocol could be considered as a package. The Joint Committee referred those discussions back to the Specialised Committee on the Northern Ireland Protocol, and took Decision 1/2020 on the (other) minor amendments.

8. Joint Committee Decision 1/2020 amended some dates in the Withdrawal Agreement, updating the text from its initial drafting reflecting a March, then October 2019 Exit date to more accurately read January 2020. This amendment provided legal certainty for the operation of current contracts in the UK and ensured that the EU honoured its existing financial commitments to the UK in relation to those specific grants.

9. Joint Committee Decision 1/2020 also amended the Part I of Annex I to Part Two of the Withdrawal Agreement (citizens' rights) by adding two Administrative Commission on Social Security Coordination (AdminComm) decisions to the list already there. These AdminComm decisions had been taken in 2019 and 2018 respectively whilst the UK was still an EU Member State and had simply been omitted from the list by error when the Withdrawal Agreement was initially drafted.

10. The proposed amendments to the Annex of the Northern Ireland Protocol were then later agreed as Joint Committee Decision 3/2020 in December 2020, when other Decisions on the Northern Ireland Protocol were also taken. As to the changes secured in that process, the Government's position was that proposals should be caught only where there was a case that they could properly be argued to fall within the scope of the Protocol. That is to say that inclusion of any element of EU law was to be proposed only if it could be said that was strictly necessary in order to meet the Protocol's objectives. As such, in discussions the UK did not consider that the two proposals contained in Annex 2 should remain and it was agreed they should be removed. Full application of the Single-Use Plastics Directive was not considered strictly necessary, and as such it was applied only partially. The Government will continue to scrutinise carefully, in line with the provisions of the Protocol, any future proposals on this basis.

Drug precursors

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)

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)

11. With regards to cost, there should not be any additional costs associated with complying with the regulations as the baseline standards should have been complied with before 1 January 2021. The only additional cost should therefore be the cost of a licence (£24). The Government has exercised considerable discretion in their processing, issuing each on the next working day at the latest, with 10 licences issued since 1 January 2021.

12. The Home Office has seen no evidence that the cost of a licence has influenced behaviours, encouraged unlawful activity or resulted in people looking to get drug precursors elsewhere. Indeed, those requiring licenses have got one. Indeed, there is no evidence that the cost of a licence has had any consequential impact on supply chains.

13. In leaving the EU, the UK has regained its regulatory autonomy and is committed to regulating in the best interests of the medicines sector. The Government will consider a range of factors when considering whether to diverge from existing rules on drug precursors to ensure businesses can thrive whilst balancing the need to facilitate legitimate trade with preventing the illicit manufacture of drugs.

Trade-related instruments

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)

14. First, it is important to note that goods subject to EU trade defence measures are not automatically considered "at risk" when moved into Northern Ireland. If goods are subject to EU trade defence measures, they cannot be declared "not at risk" on the basis that they are for sale to, or final use by end-consumers in the UK. However, goods are still "not at risk" if they will not be subject to commercial processing in Northern Ireland, and if the applicable UK duty rate is equal to or higher than the applicable UK duty rate, which would be the case if the UK applies a higher trade remedy. The interests of Northern Ireland industries and consumers are taken into account by the Government in determining trade defence measures, and these will apply in Northern Ireland subject to the provisions of the Protocol.

15. With that said, we recognise the potential for tariffs to be incurred where EU trade defence measures are in force, even where goods remain in the UK's customs territory, in cases where the UK duty is less than the relevant measure. That is why, as we have already made clear, we will establish a reimbursement scheme for goods that attract a tariff, but which can subsequently be shown to have remained in the UK customs territory. This scheme is still under development and further details will be announced in due course, though once in force it will enable reimbursement for any applicable movements from the end of the transition period.

At risk goods (paragraphs 78–82, 84–91):

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. (Paragraph 78)

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)

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)

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)

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. (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

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)

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)

16. The NI Protocol is clear that NI remains fully part of the UK customs territory. The Withdrawal Agreement Joint Committee Decision means goods which can be shown to remain in Northern Ireland and the UK's customs territory will not be subject to EU tariffs. It will only be goods destined for the EU, or where there is uncertainty or genuine risk of onward movement, where EU tariffs will be charged. This is given effect through the UK Trader Scheme which is now fully in force. Alongside that no duty is due where the value of goods is below £135, or where the applicable EU tariff is zero. This includes goods moving between the UK and EU that meet rules of origin requirements under the Trade & Cooperation Agreement. Furthermore goods moved are also eligible to claim a waiver under the new Customs Duty Waiver Scheme, subject to de minimis State Aid limits. Taken together, these range of facilitations mean we expect any tariff revenue collected on GB-NI trade to be minimal.

17. As with other customs and duty data more broadly, the Government does not propose to publish data on duties collected or on the volume of movements under the different facilitations available. This is something that we will keep under review in the light of the points you raise.

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

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)

18. As of 4 May 2021, HM Revenue and Customs (HMRC) has received 3,218 applications for the UK Trader Scheme. As to the comparative use of the UKTS compared with other options, the Government continues to work with business representative organisations and individual traders in both Great Britain and Northern Ireland in reaching the correct tariff outcomes for their specific circumstances. As part of this effort, the Government procured Trader Support Service ("TSS"), which provides comprehensive education on all new customs processes under the Northern Ireland Protocol, is providing extensive seminars and learning for traders on this issue. The TSS can also complete customs and

safety and security declarations on traders' behalf where these are required for movements between Great Britain and Northern Ireland so they do not have to access HMRC systems directly. Functionality within the TSS platform helps traders using it to make their declarations to declare the appropriate tariff option.

19. The Government has also published detailed guidance on GOV.UK – the Government has kept this guidance under regular review, working closely with traders and trade associations to answer traders' queries and set out the options available. The Government is also developing an online service on GOV.UK to assist traders through the process of determining which of the options available may be most suitable depending on the specific business's circumstances. We will also continue to actively engage with the Trader Support Service and representative organisations in providing learning products and seminars for industry.

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

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)

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)

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)

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)

20. The Government has introduced a Customs Duty Waiver Scheme for traders moving goods from Great Britain to Northern Ireland, which may otherwise incur 'at risk' tariffs. This scheme has been operational from 1 January 2021 and allows traders to waive duty up to the applicable de minimis State aid limits. Published data from the Northern Ireland Statistics and Research Agency (NISRA) states that 93% of businesses in Northern Ireland that purchase goods from Great Britain are defined as small or micro, and these smaller businesses may benefit from the waiver, but the uptake of each option will depend on the individual circumstances of each trader.

21. HMRC is working at pace to provide the use of the Customs Duty Waiver Scheme for businesses which operate in the primary agricultural sectors and fishery/aquaculture sector and for businesses which bring goods into Northern Ireland from countries outside the EU or UK.

22. HMRC will provide further guidance on the use of the Customs Duty Waiver Scheme for these scenarios in due course.

23. The Government also recognises that this will not be the best option for all businesses, which is why several other options are available to move goods without duties being payable, as set out above.

24. As set out in the Command Paper 'The UK's Approach to the Northern Ireland Protocol' in May 2020, the Government will also establish a reimbursement scheme for goods that attract a tariff, but which can subsequently be shown to have remained in the UK customs territory. This scheme remains under development and further details will be announced in due course. Recognising the Committee's interest, we will update you as soon as that work has concluded in order to support further discussions on the points raised.

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

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)

25. "At risk" goods are subject to EU customs duties. "Not at risk" goods are subject to UK customs duties or, for movements between Great Britain and Northern Ireland, no customs duties. The "at risk" distinction only applies to customs duties. However it is right to say that the risks posed by specific movements is an important factor that needs to be reflected in the pragmatic and proportionate operation of the Protocol. In ongoing discussions with the Commission on outstanding issues with the operation of the Protocol, we have stressed the need for finding solutions that are practical and reflect the genuine and practical risks faced and how to address them. As part of work through the Withdrawal Agreement structures to find solutions to those outstanding issues, we hope to see this focus on the real risks posed to be reflected. This will require the EU to show more common sense and pragmatism. If they do not, we will continue to consider all our options in meeting our overriding responsibility for sustaining the peace and prosperity of everyone in Northern Ireland.

UK/EU Withdrawal Agreement : Members of the arbitration panel (paragraph 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.** (Paragraph 120)

26. The process for selecting UK nominees for the list of arbitrators under the TCA is ongoing. We are being transparent in our efforts to seek suitably qualified candidates, as demonstrated by our public Expressions of Interest, and we will keep Parliament informed of progress once further decisions around selection are made.

27. Individuals on the published list of 25 arbitrators under the Withdrawal Agreement have the right to apply to the TCA list if they wish to do so.

28. Suspension of specific parts of the Trade and Cooperation Agreement, set out in INST.24.4[Article 749(4)] is a temporary remedy for non-compliance with an arbitration tribunal ruling under the Trade and Cooperation Agreement. Under the Withdrawal Agreement, it is a remedy for persistent non-compliance with an arbitration panel ruling under the Withdrawal Agreement. Our view is that cross-suspension between the Agreements under this provision is very unlikely.

29. Any suspension of the specific parts of the Trade and Cooperation Agreement would need to be proportionate to the breach in question.

30. We will assess the best approach to resolving disagreements with the EU on a case-by-case basis, looking at all the relevant provisions in the agreement in question.

31. The Government is fully committed to facilitating proper parliamentary scrutiny of the Trade and Cooperation Agreement, and will be flexible in responding to the need for scrutiny of different parts of the Agreement, including in the event of a dispute.

Unilateral EU declaration on EU state aid rules under the Protocol (paragraphs 145–52, 154–58, 175–80):

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)

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)

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)

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)

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)

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. Instead, the provisions of the TCA as implemented under UK domestic law 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. (Paragraph 150)

Beyond the question around the precise scope of Article 10, it is clear that, subject to Section 38 of the Withdrawal Agreement Act 2020, 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. (Paragraph 151)

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. (Paragraph 152)

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

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)

32. The Government considers that the Commission's Notice to Stakeholders could be misconstrued. In particular, the focus on where potential distortions of trade might occur, implies that Article 10 has a wide application and that most subsidies given in Great Britain will be within scope of Article 10. The Government disagrees with this broad interpretation of Article 10 which appears to go against the EU's Unilateral Declaration of December 2020.

33. An effect on trade is only one of the criteria for a "state aid" (or subsidy) to exist. Unless a subsidy measure gives a selective advantage to an undertaking in Northern Ireland which distorts or has the potential to distort competition, there will be no aid. There must be a real connection to Northern Ireland. This was made very clear in the EU's Unilateral Declaration of December 2020.

34. The Government's Statutory Guidance on Article 10 reflects the EU's Unilateral Declaration of December 2020. There must be a genuine and direct link to a company in Northern Ireland before a GB measure will be in scope of Article 10. Nothing in the Commission's Notice to Stakeholders alters this.

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)

35. The Government's statutory guidance explained that a subsidy measure in GB could be caught by Article 10 if the recipient had a subsidiary in Northern Ireland. It follows, therefore, that a beneficiary does not need to be located in Northern Ireland to be in the scope of Article 10. The key is whether there is a genuine and direct link to a company in Northern Ireland. As per the positions reached at the December Joint Committee, we also consider that trivial or merely hypothetical effects on trade between Northern Ireland and the EU would not be sufficient for Article 10 to be applied. As noted above, we do not consider that the Commission's Notice takes full account of those positions, and this is one of the issues that we have raised as part of ongoing discussions with the EU through the Withdrawal Agreement structures. Our position, and the basis on which we will proceed in terms of operation of the Protocol, is that as set out in our Statutory Guidance

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)

36. The Government negotiated special arrangements for Northern Ireland as part of the Northern Ireland Protocol to the Withdrawal Agreement. This included provisions on state aid, set out in Article 10. There was no agreement for the provisions in Article 10 to be superseded by the Trade and Cooperation Agreement (TCA) and the EU made clear that re-opening the subsidy provisions in the Protocol would not be possible. As such the subsidy control provisions in the TCA do not apply to Northern Ireland.

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)

37. The Government shall of course lay any relevant documents before both Houses for scrutiny. As the Committee correctly points out, many significant points on the interpretation of State aid are often relayed via Commission Communications and these should also be subject to scrutiny.

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)

38. The Government will always uphold the United Kingdom's national interests in relation to the Protocol, including Northern Ireland's integral part of the Union. As we have set out, the Protocol is a unique and delicately balanced solution to a complex set of problems. To be an effective solution - to uphold the Belfast (Good Friday) Agreement in all its dimensions and safeguard Northern Ireland's integral place in the United Kingdom while preventing a hard border on the island of Ireland - it must be operated in the pragmatic and proportionate way intended, so as to minimise its impact on the everyday lives of the whole community in Northern Ireland. This is especially so given its explicit reliance on the consent of the people of Northern Ireland through their institutions. That is reflected in the Statutory Guidance we have published, ensuring that Article 10 is applied only as far as is required by the Protocol. And it is demonstrated in the constructive engagement with the Commission regarding the Regional Aid allocation for Northern Ireland. This enabled regional aid to be granted in the whole of Northern Ireland, in line with the position strongly advocated by the Government and Northern Ireland Executive.

UK unilateral declaration on exit formalities on trade from Northern Ireland to Great Britain (paragraphs 175–180):

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)

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)

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). (Paragraph 177)

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

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)

39. The UK has given effect to the requirements imposed by Article 6(1) through application of those Prohibitions and Restrictions strictly required under international obligations of the EU. These are applied in full to NI-GB movements, with accompanying guidance issued to stakeholders on these requirements, including a list of prohibited and restricted goods. The Trader Support Service has been established to support traders to make export declarations where required.

40. As to the broader provision of "equivalent information" for NI-GB movements, the UK is evaluating delivery arrangements through engagement with operators and traders, including the timelines for any required systems changes. This work is being taken forward as part of the delivery of the UK's ongoing commitment to unfettered access for NI goods to the whole UK market.

41. As to the provision of data, the UK continues to engage with the UK regarding access to the relevant information as per our commitments in the Unilateral Declaration, Article 12 of the Protocol and the associated Joint Committee Decision.

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? (Paragraph 179)

42. The UK/EU Trade and Cooperation Agreement (TCA) does not affect requirements to submit Safety and Security (S&S) declarations, and neither the UK nor the EU offered to waive these requirements in negotiations on the TCA. This reflects the independence of the UK and the EU's customs regimes and the security benefits that these requirements will bring, in line with global customs security standards.

43. As to the implications of disruption caused by the Protocol, the Government is engaging through the structures of the Withdrawal Agreement on outstanding issues. The aim of this work is to set out a common work plan which can deliver pragmatic solutions

to the issues identified and ensure that the Protocol, as intended, minimises its impact on the everyday lives of communities in Northern Ireland. If that is not possible, as the Prime Minister has made clear we will continue to consider all our options in meeting our overriding responsibility for sustaining the peace and prosperity of everyone in Northern Ireland

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 goods between Northern Ireland and Great Britain. (Paragraph 180)

44. The Government very much agrees that there should be ongoing review of the operation of the Protocol. Any solution in Northern Ireland can only be lasting if it has democratic support and that is why the Protocol allows the Assembly to vote to either extent or end Northern Ireland alignment with EU law four years after the end of the transition period. While we have worked since the start of the year to give it effect in the pragmatic and proportionate way intended, we recognise the significant - and often disproportionate impacts it has had on many businesses and people in Northern Ireland. We have worked intensively with businesses and other stakeholders to find means to address issues where they have emerged, as has been seen in areas like SPS groupage, or VAT on second-hand cars. We have also not hesitated to take necessary operational steps to avoid disruption to critical goods flows, as we did in extending grace periods in March.

45. With that in mind, we have been in discussions with the Commission to work through a shared list of outstanding concerns with the operation of the Protocol. This is taking place through the structures of the Withdrawal Agreement as noted above. The UK is working hard and in good faith to find solutions - indeed we have provided over a dozen papers with detailed proposals. While there has been progress in some limited areas, such as on database access, VAT on cars and assistance dogs, the EU has been inflexible on key concerns. For example, we have made detailed proposals on medicine supplies and proposed flexible solutions on pet travel, chilled meats and customs processes to avoid burdens we know will further destabilise the situation in NI, but there has been no reciprocity from the EU.

46. We continue to be ready to make progress in discussions but the situation is now urgent, especially as real-world deadlines loom on medicines supplies and on chilled meat flows. If we cannot find solutions, we will consider all options to meet our obligations to support peace, prosperity and stability in Northern Ireland - our actions will always be with those aims in mind. I will, of course, update the committee in the appropriate way as these discussions continue.

Letter from Lord Frost and Rt Hon. Dominic Rabb MP to the Chairman (19 May 2021)

Arbitration panel processes under the Withdrawal Agreement and the Trade and Cooperation Agreement

You asked about the transparency of the process for nominating members to the Withdrawal Agreement list of arbitrators. The Agreement itself does not specify how individuals should be nominated, though it does set out criteria for nomination. We. decided to undertake a rigorous internal nomination process. The process involved assessing domestic and international candidates against the criteria set out in the Withdrawal Agreement. We also took into account candidates' prior experience of arbitration, and we considered the overall diversity of the list - both criteria which were not required by the Withdrawal Agreement. There are no term limits for arbitrators on the list; each remains on the list until their position becomes vacant. The UK and EU have agreed that the full list of 25 will be reviewed every two years.

You will be aware that we have recently announced a public Expression of Interest process to select nominees for the Trade and Cooperation Agreement list of arbitrators. We are considering the process we ran for the Withdrawal Agreement list of arbitrators and are working out the best process for assessing candidates against the criteria set out in the Trade and Cooperation Agreement, ensuring we have appropriate and high-quality nominations.

Those who are currently on the published list of 25 individuals willing and able to sit on an arbitration panel established under the Withdrawal Agreement are within their right to apply for the Expression of Interest for the Trade and Cooperation Agreement list if they wish to do so.

The Government is fully committed to facilitating proper parliamentary scrutiny of, the Trade and Cooperation Agreement, and will be flexible in responding to the need for scrutiny of different parts of the Agreement, including in the event of a dispute. We expect this to be an evolving process.

Finally, you asked about non-compliance with a ruling under another UK-EU agreement and the possibility of suspension of obligations under the Trade and Cooperation Agreement as a temporary remedy. It is important to note that this temporary remedy only applies in 'instances of persistent non-compliance with an arbitration panel ruling. Any suspension of parts of the Trade and Cooperation Agreement would be required to be proportionate to the breach in question. It remains the case that the Court of Justice of the European Union has no role in respect of the resolution of disputes between the UK and the EU as regards the Trade and Cooperation Agreement.