



Northern Ireland  
Assembly

## Research and Information Service Briefing Paper

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Paper 000/00

16<sup>th</sup> September 2021

NIAR 194-2021

# The Ireland / Northern Ireland Protocol – UK Government Command Paper

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## Key Points

- The UK Government has issued a Command Paper which seeks to rebalance the Protocol, including through fundamental changes to the customs arrangements, SPS arrangements and governance agreed with the EU.
- The EU takes the view that the Protocol is the solution which was agreed between the EU and the UK, and focus needs to be on implementation, dealing with problems on a case by case basis.
- Both sides have commented on the lack of trust between the EU and the UK, and the importance of trust in conducting negotiations.
- There is little consensus to be found on the root cause of the problems with the Protocol. For example, the UK argues that customs and SPS checks are too onerous, to which the EU responds that the UK has failed to create necessary infrastructure (such as Border Control Posts) or share necessary data.
- A significant amount of parliamentary time, in Westminster, the NI Assembly and the Oireachtas has been spent on the Protocol. During these evidence sessions witnesses from manufacturing, retail and business sectors have repeatedly called for stability and clarity. Other witnesses have highlighted a perceived threat to unionist identity and a democratic deficit – that the EU makes laws which impact NI, but NI has no elected representatives in the EU.
- The UK Government takes the view that the Protocol must be rebalanced. The EU has stated it will not renegotiate the Protocol. At the time of writing, although both sides have restated their position after summer recess, there is no clear indication of areas where compromise might be possible.

# 1 Introduction

This briefing paper addresses a query from the Committee for the Executive Office. It provides an overview of developments around the Ireland / Northern Ireland Protocol (the Protocol)<sup>1</sup> in 2021, which preceded the issue of the UK Government Command Paper “The Northern Ireland Protocol: the way forward”.<sup>2</sup> The paper then considers the command paper and the proposals it contains, together with the EU’s present position and response to the paper.

## 2 The Ireland / Northern Ireland Protocol - Developments

This section briefly reviews events in the seven months preceding the UK’s command paper. It is not intended to be a comprehensive account, rather it is a brief summary to provide context.

### 2.1 January 2021

The Protocol fully came into force on 1<sup>st</sup> January 2021,<sup>3</sup> although various temporary grace periods and mitigations had been agreed (for example, on meats, medicines and certificates). The European Commission (EC) announced that it would invoke Article 16 of the Protocol in relation to vaccine supply. This announcement provoked widespread criticism and protests from the UK and Irish Governments, and was swiftly withdrawn.

### 2.2 February 2021

In correspondence between the co-chairs of the Joint Committee (Rt. Hon Michael Gove MP and Commission Vice President Maroš Šefčovič),<sup>4</sup> the UK requested extension of grace periods and other mitigations. These were refused and the UK was advised (in respect of pet travel and plant products) that “any flexibility would entail the United Kingdom committing to align with the relevant EU rules”.<sup>5</sup>

### 2.3 March 2021

Lord Frost was appointed as a Minister of State at the Cabinet Office. He took on responsibility for matters around the UK’s exit from the EU, including implementation of the Protocol and co-chairing the Joint Committee.<sup>6</sup> The UK took unilateral action by extending grace periods until 1<sup>st</sup> October 2021 and phasing in other requirements.<sup>7</sup> The

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<sup>1</sup> [Revised Protocol to the Withdrawal Agreement.pdf \(publishing.service.gov.uk\)](#)

<sup>2</sup> Secretary of State for Northern Ireland *The Northern Ireland Protocol: the way forward* (CP 502, 2021)

<sup>3</sup> BBC News [Brexit: What’s the Northern Ireland Protocol? - BBC News](#) 21<sup>st</sup> July 2021, last accessed 6th September 2021

<sup>4</sup> [2020\\_02\\_02 - Letter from CDL to VP Šefčovič.pdf \(publishing.service.gov.uk\)](#)

<sup>5</sup> [Letter from Vice-President Maroš Šefčovič to the UK Chancellor of the Duchy of Lancaster, the Rt Hon Michael Gove, 10 February 2021 | European Commission \(europa.eu\)](#)

<sup>6</sup> Minister of State the Rt. Hon. Lord Frost CMG: Biography <https://www.gov.uk/government/people/lord-frost-of-allenton> last accessed 8th September 2021

<sup>7</sup> Secretary of State for Northern Ireland *Northern Ireland Update* 3<sup>rd</sup> March 2021 Statement UIN HCWS819 <https://questions-statements.parliament.uk/written-statements/detail/2021-03-03/hcws819> last accessed 8th September 2021.

EU sent a letter of formal notice, beginning infringement proceedings against the UK.<sup>8</sup> There were disturbances in Northern Ireland as loyalist communities protest the Protocol.<sup>9</sup>

## 2.4 April- May 2021

There was further political instability in Northern Ireland as the leadership of the Democratic Unionist Party and Ulster Unionist Party changed, and protests continued.<sup>10</sup> Technical discussions were held in the Joint Committee and in the Specialised Committee on the Ireland/Northern Ireland Protocol.

## 2.5 June 2021

The Joint Committee met on 9<sup>th</sup> June and the parties published separate statements.<sup>11</sup> The UK Government requested a further extension of the grace period on chilled meats.<sup>12</sup> Vice President Maroš Šefčovič appeared before the Executive Office Committee of the NI Assembly<sup>13</sup> and this was followed by the extensions of grace periods in respect of meats,<sup>14</sup> and indications that proposals for medicines, guide dogs and animal tagging were under consideration.<sup>15</sup> In return, the UK Government agreed not to amend the rules applicable to meat products which were already in force in the UK. Two judicial review applications, which challenged the EU Withdrawal Protocol and the Withdrawal Acts and regulations, were dismissed.<sup>16</sup>

## 2.6 July 2021

Lord Frost appeared in front of the NI Assembly's Committee for the Executive Office. The UK Government publishes its Command Paper CP 502 Northern Ireland protocol: The Way Forward (see below). The EU published steps it was prepared to take and had taken on the Protocol.<sup>17</sup>

<sup>8</sup> European Commission [Letter of Formal Notice to the United Kingdom](#) 15<sup>th</sup> March 2021 last accessed 8th September 2021

<sup>9</sup> House of Lords European Affairs Committee, Sub-Committee on the Protocol on Ireland / Northern Ireland [Introductory Report](#) HL Paper 55 para 144, last accessed 8th September 2021.

<sup>10</sup> As above, fn 9 Chapter 2.

<sup>11</sup> European Commission [Statement by the European Commission following the eighth meeting of the EU-UK Withdrawal Agreement Joint Committee](#) 9<sup>th</sup> June 2021; Cabinet Office [UK Statement on the meeting of the Withdrawal Agreement Joint Committee](#) 9<sup>th</sup> June 2021; last accessed 8th September 2021

<sup>12</sup> Cabinet Office [Declaration by the United Kingdom on Meat Products](#) 30<sup>th</sup> June 2021 last accessed 8th September 2021.

<sup>13</sup> Committee for the Executive Office [Protocol on Ireland/Northern Ireland: European Commission](#) NIA OR 28<sup>th</sup> June 2021 last accessed 8th September 2021.

<sup>14</sup> European Union Unilateral Declaration [Application of Union Law related to meat products in Northern Ireland after the end of the Transition Period](#) Ref. Ares (2021) 4255051 30<sup>th</sup> June 2021 last accessed 8th September 2021

<sup>15</sup> European Commission [EU-UK relations: solutions found to help implementation of the Protocol on Ireland and Northern Ireland](#) and [Press statement by Vice President Maroš Šefčovič \(europa.eu\)](#) 30<sup>th</sup> June 2021 last accessed 8<sup>th</sup> September 2021

<sup>16</sup> *Allister (James Hugh) et al's Application AND in the matter of the Protocol NI* [\[2021\] NIQB 64](#) last accessed 8<sup>th</sup> September 2021.

<sup>17</sup> European Commission [Examples of flexibilities identified by the European Commission in an effort to ensure the full implementation of the Protocol on Ireland/Northern Ireland | European Commission \(europa.eu\)](#) 27<sup>th</sup> July 2021, last accessed 8<sup>th</sup> September 2021.

### 3 The Command Paper Sections 1-4

The Command Paper is divided into six sections. The first details the process of agreeing the Protocol and the UK's challenges and objectives during the negotiating process. Section 2 addresses the current operation of the Protocol and Section 3 the arguments for invoking Article 16. Section 4 and 5 consider and detail the UK's proposed "new balance" of the Protocol, and Section 6 identifies next steps.

Shortly after the Command Paper was published, Vice President Maroš Šefčovič issued a press release.<sup>18</sup> This was followed by an announcement that the EU would halt legal action against the UK (taken in respect of the UK's unilateral decision to extend grace periods).<sup>19</sup> At the same time, the EC issued a paper entitled "Examples of flexibilities identified by the European Commission in an effort to facilitate the full implementation of the Protocol on Ireland/Northern Ireland",<sup>20</sup> together with some reissued "non-papers" on medicines and sanitary and phytosanitary (SPS) measures.<sup>21</sup> These papers were examples of flexibilities found to date, and in response to the issues raised in the Command Paper.

This paper summarises each section, and outlines any response (or recent statement of position) from the EU, together with some further commentary from parliamentary committees or other stakeholders. Sections 1-4 are taken together, and then Section 5-6 are considered.

#### 3.1 Section One: How we got here: the process of agreeing the Protocol

In Section One<sup>23</sup> the UK Government lays out its perspective on negotiations between the UK and the EU. It argues that, as an incoming government, it faced a situation where the shape of the negotiations had been set, with certain assumptions already baked in. Taking the view that the Protocol was "predicated upon a recognition that it would require a nuanced and sensitive approach to its administration",<sup>24</sup> and reiterating UK Government's commitment to the Good Friday/Belfast Agreement, the paper dismisses the idea that the Protocol is the only way of protecting this "delicate and interwoven balance". It argues that the Protocol respects the fundamental requirements of the 1998 Agreement, but places insufficient weight on the East/West relationship. Similarly, the implementation of the Protocol, and the issues that were left to be resolved (for example, the definition of goods at risk) have caused unforeseen difficulties.

<sup>18</sup> European Commission [Statement by V-P Šefčovič on UK government announcement](#) 21<sup>st</sup> July 2021 last accessed 8th September 2021

<sup>19</sup> BBC news [Brexit: EU pauses legal action against UK over NI Protocol 'breaches'](#) 27<sup>th</sup> July 2021 last accessed 8th September 2021

<sup>20</sup> As above, fn 17

<sup>21</sup> European Commission [Non Papers on Sanitary and Phytosanitary Measures](#) and [Non paper- Medicines and the implementation of the Protocol on Ireland and Northern Ireland](#) 26th July, last accessed 8<sup>th</sup> September

<sup>23</sup> As above, fn2 pg 7-10

<sup>24</sup> As above fn 2 at para 2.

### 3.1.1 Section One: The EU's Response

The EU did not review the history of negotiations in the same detail, but adhered to its previous commentary by stating (in the examples of flexibilities document<sup>25</sup>):

After extensive negotiations, the EU and the UK agreed, signed and ratified the Protocol on Ireland / Northern Ireland. The Protocol is a unique solution to the type of Brexit chosen by the UK government... If the Protocol is now to achieve its goals, then it needs to be implemented fully and effectively. This is a shared responsibility.

The statement also considered that the EU had already been flexible, and the UK had not lived up to its commitments:

Given that the UK has not been ready or identified challenges to implement the Protocol, the European Commission has engaged thoroughly in finding flexibilities and technical solutions to ensure its full and effective implementation with permanent solutions.

The EU has also commented on the importance of trust between the parties.<sup>26</sup>

### 3.1.2 Section 1: Further Commentary

In its report summary,<sup>27</sup> the House of Lords Sub Committee on the Protocol observed that:

...the search for solutions has been hampered by fundamental flaws in the UK and EU's approach, lack of clarity, transparency and readiness on the part of the UK; lack of balance, understanding and flexibility on the part of the EU. These are exacerbated by a corrosive and mutual lack of trust... Unless urgent steps are taken to correct this, Northern Ireland and its people will become permanent casualties in the post-Brexit landscape. <sup>28</sup>

In evidence to the Sub Committee shortly before it issued its report, Lord Frost has said, in response to a question about addressing concerns about the constitutional implications of the Protocol<sup>29</sup>

... we were trying to find, to coin a phrase, a balance in which certain things were painful but acceptable in the broader interest, and trying to respect the different strands of the Good Friday agreement and the delicate balance in Northern Ireland. Clearly, we did not quite find that. We know that from experience now, even if we thought it at the time.

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<sup>25</sup> As above, fn 17

<sup>26</sup> European Commission [Press statement by Vice-President Maroš Šefčovič following today's Joint Committee and Partnership Council meetings](#), 9<sup>th</sup> June 2021, last accessed 8<sup>th</sup> September 2021

<sup>27</sup> As above, fn 9

<sup>28</sup> As above, fn 9 pg 5

<sup>29</sup> House of Lords European Affairs Committee Sub Committee [Introductory Inquiry on the operation of the Protocol on Ireland/Northern Ireland](#) Q74 HL Com 14<sup>th</sup> July 2021 last accessed 8<sup>th</sup> September 2021.

Lord Frost and the Prime Minister have both expressed the view that issues around the Protocol are impacting the wider relationship with the EU. In his Foreword to the Command Paper, the Prime Minister has said “it (the Protocol) has served as a drag on the new partnership between the UK and the EU.”<sup>30</sup> Lord Frost, when presenting the Command Paper to the House of Lords, stated “where there are trust problems between us and the European Union, they stem ultimately from the issues that we have on the Protocol.”<sup>31</sup>

The Northern Ireland Affairs Committee is currently conducting an inquiry into the operation of the Protocol, with its last report, “Unfettered Access: Customs Arrangements in Northern Ireland after Brexit” published in July 2020. In June 2021 Lord Frost gave evidence to the Committee and the Chair summarised what he called “the message of business, whether that is business in NI or business in GB... ‘We don’t really care what the rules and regulations are as long as they are clear and deliverable, and we know that those rules are going to be there for a period of time’”.<sup>32</sup> Lord Frost responded by emphasising the work the government had done to build “stability and confidence among business” but that the impact of the Protocol on supply chains was an issue of concern in the consultations he had had with businesses. On the constitutional issue Lord Frost confirmed the position of the UK Government that the Protocol does not change the “territorial integrity or the state responsibilities of the UK”.<sup>33</sup>

### 3.2 Section Two: “How the Protocol is Working”

This section of the Command Paper<sup>34</sup> describes the government’s efforts to deliver the underpinning arrangements for the Protocol and how it is operating in practice.

The paper details the work carried out as follows:

- Four major IT systems, including declaration, transit, safety and security, and goods movement systems;
- Put in place extensive support schemes costing over £500 million for business
  - o Trader Support Service (£360 million, 40,000 registered traders, three-quarters of a million consignments supported).
  - o Movement Assistance Scheme (in place until 2023, supported over 140 businesses with certificates and inspection hours).
  - o A further £150 million promised for a Digital Assistance Scheme.

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<sup>30</sup> As above, fn 2 pg 2.

<sup>31</sup> HC Deb 21<sup>st</sup> July 2021 [Col. 269](#) last accessed 8<sup>th</sup> September

<sup>32</sup> Northern Ireland Affairs Committee [Oral evidence: Brexit and the Northern Ireland Protocol](#) HC 157 Q948 last accessed 8<sup>th</sup> September 2021

<sup>33</sup> As above, fn 32 at Q953 & Q954.

<sup>34</sup> As above fn2 pg 10-13

- Work carried out to explain the Protocol, engaging with business, industry etc., including Government-led forums such as the Brexit Business Taskforce.
- Funding for the development of points of entry for agri-food goods in Northern Ireland (£50 million in investment, together with £20 million in funding)
- Increased capacity for veterinary checks, doubling the number of veterinarians qualified to sign Export Health Checks
- Granted EU access to UK customs systems.

The paper notes that the checks carried out on GB-NI trade equal 20% of the total checks carried out by the EU, and argues this is disproportionate. It identifies supply chain disruption, changes to longstanding trade flows between GB and NI and social and political impacts. Arguing that an issue-by-issue approach to negotiation has failed to fix problems with the Protocol, the paper highlights that these difficulties are arising even though mitigations and grace periods are still in place. The section concludes that this demonstrates a need to address fundamental problems with the Protocol itself, i.e. by a holistic approach, rather than incremental, responsive change.

### 3.2.1 Section Two: The EU response

The July publications list examples of flexibilities which the EU has already identified (considered below) and alleges the UK has not “adopted a similar constructive attitude”<sup>35</sup> but rather:

- has halted work on permanent Border Control Posts;<sup>36</sup>
- the temporary facilities in Northern Ireland “do not work to their full capacity and have acute human resource problems”
- the traceability requirements “agreed as part of the grace periods in December 2020 to ensure that the food products concerned are only sold to consumers in supermarkets in Northern Ireland are not complied with”.<sup>37</sup>

### 3.2.2 Section Two: Further Commentary

There have been a number of reports and evidence-gathering sessions on the operation of the Protocol, and it is beyond the scope of this paper to review them all in depth. In its recent report, the House of Lords Sub Committee on the Protocol considered a wide range of evidence on the economic impact of the Protocol and drew the following conclusions:

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<sup>35</sup> As above, fn 17 pg 2

<sup>36</sup> Some of the difficulties around border control posts in Northern Ireland are documented in this [report](#) from the Committee for Agriculture, Environment and Rural Affairs, published in July 2021, last accessed on 8<sup>th</sup> September 2021.

<sup>37</sup> As above fn17

- The disruption to supply chains in early 2021 was caused by a number of issues, including the COVID-19 pandemic.
- Businesses were hindered in their response to the changes brought about by the Protocol by “the lack of clarity, and the late provision of guidance”.<sup>38</sup>
- The long-term impact of Brexit and the Protocol on trade flows remains uncertain.
- New administrative requirements “have had the biggest impact on businesses” with firms complaining about “burdensome, repetitive and disproportionate requirements for completion of Supplementary Customs Declarations”. The report also notes the relatively small risk to the EU from GB-NI trade.

The report highlighted the impact on east-west supply chains, especially in terms of agrifood, medicines and administrative requirements for the motor industry. This, the report argues, points to a wider problem in “the lack of preparedness of businesses in Great Britain for the changes in trading arrangements with Northern Ireland”. The report also identified potential economic gains from the Protocol in terms of investment and access to two markets, but emphasised that these gains are unlikely to manifest without stability.

In giving evidence to the Sub Committee on the Protocol, Lord Frost identified a number of issues with the operation of the Protocol. He pointed out that the Government had invested in creating systems which would facilitate the Protocol, but that “you can’t reach everybody”.<sup>39</sup> He agreed that a lot of this money was being spent on procurement of IT systems and other mechanisms, and stated that he found it frustrating when the government was accused of not implementing the Protocol, because “very large sums are being spent”.<sup>40</sup> Lord Frost also agreed that a lot of this expenditure was not “touching down in Northern Ireland in any way”,<sup>41</sup> saying that “a lot of it is being spent on procurement of IT systems—you are right—and simply running the processes. That is the cost of the Protocol”.<sup>42</sup>

### 3.3 Section Three and Four – Article 16 and an alternative way forward

#### 3.3.1 Section 3 – Article 16

In this section<sup>43</sup> the UK Government considers whether the circumstances justify the invocation of Article 16. The paper points to the disruption to longstanding trade flows, perceptions of threat to identity and political instability, as well as higher costs to consumers, and argues that the combination of these factors justifies a serious

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<sup>38</sup> As above, fn 9 at para. 132.

<sup>39</sup> As above, fn 29 Q66

<sup>40</sup> As above, fn 29 Q66

<sup>41</sup> As above, fn 29 Q67

<sup>42</sup> As above, fn 29 Q67

<sup>43</sup> As above, fn 2 pg 13

response. The paper goes on to note that the scope of Article 16 is both limited and temporary in nature, with an untested dispute resolution procedure; and, while the circumstances exist to justify the use of safeguarding measures, the UK Government would prefer not to do so.

### **3.3.2 Section Four – An alternative way forward: finding an agreed new balance.**

This section<sup>44</sup> notes the concessions made by the EU to date but calls for urgent talks to find a consensual path “rather than use Article 16”. It states that not all aspects of the Protocol are controversial and, in particular, identifies the following areas which it is not necessary to revisit:

- Rights of individuals (Article 2)
- The Common Travel Area (Article 3)
- The Single Electricity Market (Article 9)

Instead, the paper focuses on three sets of fundamental concerns:

- Remove burdens on trade in goods
- Ensure normal access to goods from the rest of the UK in NI
- Normalise the governance basis of the Protocol.

This section notes that the UK is willing to look at “exceptional arrangements for data sharing on trade and bring forward legislation to deter people in NI from exporting goods which do not meet EU standards”. It reiterates commitments to no infrastructure or checks at the Northern Ireland / Ireland border.

### **3.3.3 Section 3 and 4: The EU’s response**

The EU’s response did not refer to Article 16 directly, but did emphasise that the Protocol was “the solution” that had been jointly agreed, and expressed its preference for working through the Protocol’s institutions to find a solution:

We are ready to continue to seek creative solutions, within the framework of the Protocol, in the interest of all communities in Northern Ireland. However, we will not agree to a renegotiation of the Protocol.

Joint action in the joint bodies established by the Withdrawal Agreement will be of paramount importance over the coming months. We must prioritise stability and predictability in Northern Ireland.<sup>45</sup>

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<sup>44</sup> As above, fn 2 pg 15

<sup>45</sup> As above, fn 18.

### 3.3.4 Section 3 and 4: Further Commentary

The decision whether to invoke Article 16 is a matter entirely reserved to the signatories of the Protocol. A review of the Protocol related evidence sessions of the Northern Ireland Affairs Committee since December 2020<sup>46</sup> shows that few witnesses were in favour of invoking Article 16. Excluding evidence given by the Secretary of State for Northern Ireland and Lord Frost, Article 16 was mentioned by witnesses on 4 out of 19 evidence sessions. On three occasions, witnesses were opposed to invoking Article 16, either because of the resulting impact on industry<sup>47</sup> or because the witness took the view that trade dispute mechanisms were there “not to be used”. One witness did consider that Article 16 could be invoked collectively, to allow a renegotiation of the Protocol.<sup>48</sup>

Similarly, the House of Lords Sub-Committee noted “the strong views of some of our witnesses” that the circumstances exist to justify invoking Article 16, but also the views of other witnesses that “any unilateral action by either side, including triggering Article 16, has destabilising political and economic consequences”.<sup>49</sup> The Lords Sub Committee also emphasised that the use of measures according to the process laid out in Article 16 should be distinguished from “unilateral action outside the scope of the Protocol and the Withdrawal Agreement, which would constitute a breach of either side’s legal obligations”.<sup>50</sup>

## 4 The Command Paper – Sections 5 and 6.

In sections 1-4, the Command Paper describes how the Protocol was agreed upon, what the current operation is like, and the options available. The next sections relate to the ways in which the “new balance” can be reached.

### 4.1 Section 5: Establishing this new balance

This section begins by stating that the UK is not over-prescriptive as to the solutions which are found, and accepts they are likely to sit within the broad contours of the current protocol. It notes that the solution it provides stops short of others, like mutual enforcement.<sup>51</sup>

<sup>46</sup> Northern Ireland Affairs Committee – [Evidence Sessions](#) last accessed 9<sup>th</sup> September 2021

<sup>47</sup> Northern Ireland Affairs Committee [Oral evidence: Brexit and the Northern Ireland Protocol](#), HC 157 Thursday 15 July 2021 last accessed 9<sup>th</sup> September 2021

<sup>48</sup> Northern Ireland Affairs Committee [Oral evidence: Brexit and the Northern Ireland Protocol](#), HC 157 Wednesday 19 May 2021

<sup>49</sup> As above, fn 9 at para 293

<sup>50</sup> As above, fn 9 at para 292

<sup>51</sup> A summary of mutual enforcement is provided at Annex 1.

### 4.1.1 Customs

The command paper argues that Northern Ireland's status as part of the UK's customs territory is not being recognised, and points to the tariff rate quotas on steel.<sup>52</sup> The paper takes the view that, as NI is a small market, there is limited risk to the EU Single Market. Accordingly, customs can be managed by building on the "at risk" concept in the Protocol to apply more widely to goods crossing in to Northern Ireland. At present, goods need only be declared at risk if (broadly speaking) the difference between the EU and UK duty is over 3% or if they are subject to commercial processing (other than for food, construction, health, non-profit activities or the final use of animal feed).<sup>53</sup>

The proposed solution is for GB traders who move goods to NI to declare whether their goods are ultimately bound for Ireland. If so, customs would be required. There would be a requirement for all such traders to register in a light touch scheme with complete transparency of supply chains, shipment and controls. These arrangements would also apply to traders bringing in goods to Northern Ireland from elsewhere in the world and would allow goods approved in GB to circulate freely in NI. This has come to be described as the "honesty box" proposal.

### 4.1.2 Sanitary and Phytosanitary (SPS) Measures

For SPS measures, the "honesty box" arrangements above would apply. These would be adapted- for example, in agrifood, shipments which are ultimately bound for Ireland would use the same process as outlined for customs, but for SPS checks. For live animals, the UK proposes to use the rules which were the UK national model before the UK left the EU. In respect of plant and plant products, the UK seeks an "appropriate regime" which does not obstruct plants and seeds for garden centres and personal use. Pets would be able to travel freely if they met existing UK legal requirements.

The paper suggests a further agreement, which identifies areas of significant difference where controls might need to be higher, could provide additional confidence in the arrangements.

### 4.1.3 VAT and Excise

Despite best efforts, there are still problems in some areas, such as the VAT second hand margin scheme. The government here seeks a more flexible settlement, with greater freedom to set VAT and excise rates in Northern Ireland, but with safeguards and consultative measures to deal with the "risks of distortion on the island of Ireland, double taxation and significant divergence within the UK".

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<sup>52</sup> Tariff Rate Quotas allow for the importation of certain goods at a reduced rate of customs. The UK has [passed legislation](#) to allow NI to take advantage of UK TRQs, but the Command Paper still refers to problems in this area.

<sup>53</sup> HM Revenue and Customs [Guidance 'Declaring goods you bring into Northern Ireland 'not at risk' of moving to the EU'](#) last accessed 10th September 2021.

#### **4.1.4 Enforcement**

In this section the government identifies effective monitoring and enforcement as crucial to the areas above. It proposes strong, reciprocal data sharing and law enforcement cooperation arrangements to underpin the agreement. On SPS goods, there is a need for supply chain visibility, labelling requirements and increased market surveillance, with penalties for non-compliance.

#### **4.1.5 Unfettered Access**

The paper argues that the agreement not to require export declarations for goods moving from NI to GB depends on burdensome data collection arrangements. Accordingly, the requirement for export declarations should be dispensed with altogether, except in the narrow cases of specifically controlled goods.

#### **4.1.6 Circulation of goods within Northern Ireland**

The current requirements of the Protocol allow goods approved by UK bodies to EU standards to circulate if they are marked as only for sale in NI and GB. This, the Command Paper argues, demonstrates the principle that there can be parallel arrangements for different goods, underpinned by regulatory checks. A full dual regulatory regime is thus proposed, where goods can circulate in Northern Ireland as long as they meet either UK or EU rules, and those goods which are sold to the EU meet the customs processes outlined above.

#### **4.1.7 Medical Products**

The paper also proposes removing medicines from the scope of the Protocol, given their importance and the relatively small risk from a market the size of Northern Ireland. It welcomes the EU proposals which were made in June, but states these are potentially complex to operate and do not deal with certain medicines satisfactorily.

#### **4.1.8 Subsidy Control**

The UK Government argues that, because the Protocol was signed in advance of the Trade and Co-Operation Agreement (TCA), there wasn't an opportunity to consider the provisions of the former in the context of the latter. In short, the robust commitments around subsidy control in the TCA, further strengthened by the UK Subsidy Control Bill, make the provisions of Article 10 of the Protocol redundant. In recognition of the access Northern Ireland producers have to the Single Market, the UK proposes referral powers or consultation procedures on subsidy would be established.

#### 4.1.9 Governance

The UK argues that the governance institutions of the Protocol put matters too quickly in an adversarial setting. It objects to the “highly unusual” provisions in Art 12(4)-(7) of the Protocol, which gives EU institutions enforcement rights. The UK seeks to return to a “normal” treaty framework, something akin to that in the TCA.

#### 4.1.10 Consultation and Legislative Processes

The paper notes that more account of Northern Ireland should be taken where EU law will apply to it, and that as long as legislation affecting NI is made outside of it, the consent mechanism will continue to apply.

### 4.2 The EU Perspective and Further Commentary

#### 4.2.1 The EU Perspective on Customs

The EU has not yet formally published its views on the mechanisms outlined in the command paper. In a speech in Queen’s University Belfast, Maroš Šefčovič stated that “we have been engaging constructively with our UK partners on what can be done to limit the impact of the Protocol on everyday life in Northern Ireland, while maintaining its access to the EU’s single market”.<sup>55</sup>

The EU did specifically address the issue of tariff rate quotas (TRQs) which, the UK argue, mean that the cost of importing certain products into NI can be higher than it is in the EU or the UK. The EU noted that it took time for the UK to identify the issue, and further evidence of the alleged problems will be required.<sup>56</sup> In giving evidence to the Sub Committee, Lord Frost stated that the EU had changed legislation on TRQs in December, and that was causing the problems which the UK is now trying to deal with.<sup>57</sup>

#### 4.2.2 Further Commentary on Customs

Initial responses from academics and commentators to the Command Paper ranged from the sceptical<sup>58</sup> to the enthusiastic<sup>59</sup>. Some have highlighted that the absence of

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<sup>55</sup> [Speech by Vice-President Maroš Šefčovič at the Queen's University, Belfast](#) 10<sup>th</sup> September, last accessed 13<sup>th</sup> September 2021.

<sup>56</sup> As above, fn 17.

<sup>57</sup> As above, at fn 29, Q61

<sup>58</sup> Michael Gasiorek, L Alan Winters, [Honesty is such a lonely word](#) UK Trade Policy Observatory 22 July 2021, last accessed 13<sup>th</sup> September 2021

<sup>59</sup> Graham Gudgin [David Frost Rewrites the Northern Ireland Protocol](#) Briefings for Britain 24<sup>th</sup> July 2021, last accessed 13<sup>th</sup> September 2021

detail makes it difficult to engage meaningfully with the proposal,<sup>60</sup> which in itself is described as “one possible alternative” in the Command Paper.<sup>61</sup>

The UK Trade Policy Observatory acknowledged that the Protocol “is not working (at least for the UK)” but considers the “previously unheard of” solution proposed by the Government is unlikely to be acceptable to the EU. This article argues that, as 80% of checks are SPS based, and the UK Government is unwilling to sign up to a Swiss-style agreement, they should pursue an arrangement whereby goods destined for sale in Northern Ireland are considered as equivalent with EU standards, but some limited checks are applied.<sup>62</sup>

In an article published on Briefings for Britain, one commentator welcomed the proposals, and identified that they were similar to proposals on mutual enforcement<sup>63</sup> (which is discussed in more detail in Annex 1 below). During an evidence session before the Northern Ireland Affairs Committee, shortly before the publication of the command paper, witnesses referred to mitigations they wished to see around customs, for example, an expansion of the trusted trader scheme, more education of GB suppliers and clarity to enable planning.<sup>65</sup> One witness expressed the view that the customs activity was manageable but driving up costs,<sup>66</sup> and another pointed out that where a good that had gone through customs was remaining in NI, the checks applied had no benefit.<sup>67</sup> Another witness stated that other regulations passed by the EU were driving up costs, which would distort competitiveness regardless of the UK’s customs arrangements,<sup>68</sup> but that expanding the definition of “dead end hosts” could help.<sup>69</sup>

When appearing before the House of Lords Sub Committee on the Protocol, Lord Frost repeated what he saw as a tension between Article 5 and Article 6 of the Protocol, namely that the EU customs code applies to Northern Ireland but Article 6 calls for minimising checks.<sup>70</sup> Evidence given before the Sub Committee<sup>71</sup> on another occasion emphasised that, although the majority of checks are SPS based, checks will remain even with an agreement on SPS.

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<sup>60</sup> Dr Clare Rice, Colin [Murray Northern Ireland Protocol: the UK's updated approach](#) UK in a Changing Europe, 4<sup>th</sup> August 2021, last accessed 10<sup>th</sup> September.

<sup>61</sup> As above, fn 2, para 48

<sup>62</sup> As above, fn 58.

<sup>63</sup> As above, fn 59.

<sup>65</sup> Northern Ireland Affairs Committee [Oral Evidence: Brexit and the Northern Ireland Protocol](#) HC 157; Q1071 Sarah Hards Business Development Manager, AM Nexday

<sup>66</sup> As above, fn 64; Q 1064 – Stephen Kelly Stephen Kelly, CEO, Manufacturing Northern Ireland

<sup>67</sup> As above, fn 64; Q1059 – Aodhan Connolly Director, Northern Ireland Retail Consortium

<sup>68</sup> As above, fn 64; Q1067- Victor Chestnutt Director, Ulster Farmers Union

<sup>69</sup> As above, fn 64; Q1077 - Victor Chestnutt Director, Ulster Farmers Union

<sup>70</sup> As above, fn 29; Q75

<sup>71</sup> House of Lords European Affairs Committee Sub Committee [Introductory Inquiry on the operation of the Protocol on Ireland/Northern Ireland](#) HL Com 9<sup>th</sup> June 2021 (Evidence Session)

### 4.2.3 EU Position on SPS Measures<sup>72</sup>

#### **Assistance Dogs**

The non-paper states that the EU had raised this with the UK early in discussions, at the latest by December 2020, and suggested the UK take steps under Article 32 of Regulation (EU) No 576/2013 on the non-commercial movement of pet animals. On the assumption that GB provides sufficient health guarantees, a derogation is available to allow pets to move across the Irish Sea provided that a permit has been granted and a short period of isolation (as outlined by the permit) is applied. The non-paper states that in technical discussions the UK has confirmed that DAERA would propose an operating procedure for the practical implementation of the Article 32 procedure.

#### **Identification and Re-Identification of Cattle, Sheep and Goats in Northern Ireland**

To comply with EU rules on traceability, some animal species must be marked with a tag with a country / identification code. A new regulation allows Northern Ireland to use a specific code. This allows for new born or recently arrived animals to be identified with the code, while animals already identified in accordance with the new rules do not need to be re-identified.

#### **Re-Entry into the Union (Exhibitions/Events)**

This deals with the attendance of hooved animals (other than racehorses) at shows, and their subsequent re-entry into the EU. In essence, animals moved outside the EU for shows can take advantage of a derogation. This allows them to be moved without fulfilling a 6 month residency requirement.

#### **Products of Animal Origin**

This paper deals with products of animal origin which originate in the EU but move back and forth across the border. It provides a certificate which allows re-entry of such goods into the EU and includes GB in the list of third countries which are authorised to use that certificate.

### 4.2.4 Further Commentary on SPS Measures

The House of Lords Sub Committee addressed SPS / veterinary checks in its report. It concluded that an SPS deal was “one of the most significant single measures to alleviate the regulatory and administrative burden of the Protocol”.<sup>73</sup> Farmers’ Unions stated that they would welcome a long term SPS agreement.<sup>74</sup> One witness reported that US President Biden had stated that such an agreement would not get in the way of a UK-US trade deal.<sup>75</sup> Lord Frost has stated that the UK cannot sign up to the EU’s

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<sup>72</sup> European Commission [Non Papers on Sanitary and Phytosanitary Measures](#) 26<sup>th</sup> July 2021 last accessed 13<sup>th</sup> September

<sup>73</sup> As above, fn 9, Para 245

<sup>74</sup> As above, fn 9, Para 230

<sup>75</sup> As above, fn 9 Para 232

proposal for a Swiss-style agreement, preferring an agreement similar to those with New Zealand and Canada.<sup>76</sup> The Sub Committee urged the UK and the EU to come to an agreement on this issue.

On 15th July representatives from farming, retail, logistics and manufacturing gave evidence to the Northern Ireland Affairs Committee, together with representatives from P&O Ferries and the Port of Larne. Witnesses detailed preparations they were making in respect of changes due in October. Another observed that SPS costs were rising and that “some sort of recognition of each other’s standards and the SPS would help”.<sup>77</sup> It was emphasised that the need “for a trusted trader scheme and/or a veterinary agreement” was urgent, as well as movement on SPS.

The Confederation of British Industry has also called for a veterinary agreement to remove the majority of SPS checks.<sup>78</sup>

Officials from the Department for Agriculture, Environment and Rural Affairs (DAERA) gave evidence to the NI Assembly’s Agriculture, Environment and Rural Affairs Committee in March 2021, noting that the SPS checks carried out in Northern Ireland represented 20% of those carried out in the EU. That official went on to say that this “reflects the fact that we are dealing with a domestic food distribution system, and not bulk movements of international trade commodities”.<sup>79</sup> Annex Three to this briefing is a table from the EU which details the difference between three SPS arrangements in terms of, e.g. % of items checked, the levels of checks which are carried out and so on, based on the SPS model adopted by the third country in question.

#### **4.2.5 The EU position on VAT**

With regard to the VAT second-hand margin scheme (which would otherwise enable suppliers of second hand cars to apply VAT only on their profit) the EU states that the Commission is currently exploring options to allow this to apply to car sales GB-NI. It seeks detail on how the solution proposed by the UK would work in practice, before appropriate solutions can be identified.

#### **4.2.6 Further Commentary on VAT**

Further commentary on VAT as a standalone issue has been relatively limited and refers mostly to the second hand margin scheme.<sup>80</sup>

#### **4.2.7 Enforcement, Unfettered Access and Circulation of Goods**

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<sup>76</sup> As above, fn 9 Para 235

<sup>77</sup> As above, fn 64; Q 1056 – - Victor Chestnutt Director, Ulster Farmers Union

<sup>78</sup> Confederation of British Industry [UK/EU Veterinary Agreement Paper](#) last accessed 13<sup>th</sup> September 2021.

<sup>79</sup> Northern Ireland Assembly, Committee for Agriculture, Environment and Rural Affairs, [meeting](#) on Thursday, 4 March 2021, last accessed 10<sup>th</sup> September 2021

<sup>80</sup> As above fn9 at pg 58.

The EU's publications at the end of July made no specific response to these issues. Proposals for data sharing arrangements and law enforcement cooperation to “underpin” the agreement are a relatively new development and depend on other aspects of the command paper being agreed. Similarly, a proposal to dispense with data collection arrangements on export declarations and a dual regulatory regime require other aspects of the command paper to be agreed, including the “honesty box” proposal and the type of enforcement which will apply.

#### 4.2.8 The EU Position on Medicines

The Non Paper on Medicines and the Implementation of the Protocol on Ireland and Northern Ireland<sup>81</sup> was published before the Command Paper and reissued on 29th July.<sup>82</sup>

Under the Protocol, medicines placed on the market in Northern Ireland must be covered by a valid marketing authorisation issued by the Commission or the UK (for NI only or if granted through certain procedures<sup>83</sup>). Implementation issues concern the medicines covered by UK authorisations. The Commission notes it is too costly for certain operations based in GB to move compliance functions to NI or the EU in respect of these medicinal products.

The proposed solution is to permit the compliance functions to be located in GB, subject to the UK applying EU legislation in respect of goods to be marketed in Northern Ireland, and that medicines stamped UK(NI) cannot be sold in the EU. Where medicines are also for sale in the EU, they must be authorised appropriately and the UK will recognise the assessment of the Reference Member State and adapt national authorisations accordingly. The Commission intends to introduce legislation in the autumn to facilitate these proposals.

#### 4.2.9 Further Commentary on Medicines

In terms of measures to deal with medicines and medical products, all the witnesses who gave evidence to the House of Lords Sub-Committee called for “a Mutual Recognition Agreement on medicines standards, allowing UK/GB licensed products to be supplied to pharmacies and hospitals in Northern Ireland”. One witness also argued

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<sup>81</sup> European Commission [Non Paper on Medicines and the implementation of the Protocol on Ireland and Northern Ireland](#). 26<sup>th</sup> July 2021 last accessed 8th September 2021.

<sup>82</sup> As above, fn 80

<sup>83</sup> The EU non-paper on medicines states “There are two possible UK national authorisation routes: purely UK national authorisations (“NI-only authorisations”), which concern medicines that are made available in NI only, and UK national authorisations granted via the Mutual Recognition or Decentralised Procedures (MRP/DCP)...Under these (MRP/DCP) procedures, a Member State takes the lead in the assessment (“Reference Member State”) and issues the first authorisation, on the basis of which identical national authorisations are then issued by the other Concerned Member States. Pursuant to the Protocol, NI participates in these two procedures but the UK cannot have the leading role.” As above, fn 80

that a UK entity should be allowed to act as an authorisation holder for Northern Ireland.<sup>84</sup>

In evidence to the Sub Committee, Lord Frost said “On medicines, the potential solution was trailed in the press a month before we received it. We received it a week or so, maybe a little longer, ago. It is quite complicated, and we are working through it. It is a valiant effort, I suppose, to deal with the problems. We are not convinced that it deals with absolutely all the difficulties, so we need to talk to the EU about that. We already have, and we are again shortly.”<sup>85</sup> The solution proposed by the EU which Lord Frost mentions here is understood to be the solution outlined above.<sup>86</sup>

Evidence given before the NI Assembly Committee for Health by Departmental officials<sup>87</sup> described the circumstances which are currently operating in NI. Members were advised that supply of medical products had historically relied upon free movement of supplies from GB into Northern Ireland for about 98% of medicines. Under the protocol, “medicines moving from GB into Northern Ireland will be handled as goods entering the EU from a third country” which means they are subject to additional testing. Prescription-only medicines have to have packaging that complies with EU rules. The grace period expires on 31st December 2021, and unless no further changes are agreed there would be a “major impact on medicine supplies” and “industry would have to make significant changes to medicine supply routes”. The pharmaceutical industry “has begun to consider the changes that it may need to make to its supply chains and that it has been awaiting further information from the Department of Health and Social Care (DHSC)”.

According to the briefing, pharmaceutical companies are “having to consider their options with regard to continuity of supply routes ... They are also looking at joint packaging with ROI (and)...They have also advised me that there is a risk of discontinuations.” Pharmaceutical companies must give six months’ notice of discontinuation to the DHSC, making the end of June a “critical point” for those medicines impacted by the end of the grace period. A “relatively small number of notifications of discontinuations of products” have been received, but the detail is commercially sensitive and could not be shared at the time. Since then, there has been media coverage of the medicines affected, and the NI Minister for Health has issued a briefing paper, reported on by the BBC, to the effect that 910 medicines are due to be withdrawn, and a further 2400 are at risk.<sup>88</sup>

In terms of licensing of medicines, the UK’s Medicines and Healthcare products Regulatory Agency (MHRA) can authorise variations to central authorisations approved

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<sup>84</sup> As above, fn 9, para 226

<sup>85</sup> As above, fn 29 Q63

<sup>86</sup> H.V. Der Burchard [UK rejects EU's Northern Ireland 'solutions'](#) Politico 26<sup>th</sup> July 2021; see also NI Assembly Committee for Health [Evidence Session](#)., last accessed 13<sup>th</sup> September 2021.

<sup>87</sup> As above, fn 85, NI Assembly Committee for Health Thursday, 1 July 2021

<sup>88</sup> J Campbell ['Patients at risk' if medicines withdrawn due to NI Protocol - BBC News](#) 3<sup>rd</sup> September 2021; last accessed 13<sup>th</sup> September 2021.

by the EU Medicines Authority for GB, but not for NI. That can lead to differences in the times certain drugs will be available on either side of the Irish Sea, approvals for certain age groups, storage conditions etc. Another issue raised relates to the location of specific testing functions, which was under negotiation in late June.<sup>89</sup>

#### 4.2.10 EU Perspective on State Aid

The EU did not publish an update or review of its position on state aid. It has previously published a unilateral declaration on the subject in January 2021. This states that, in the application of state aid rules, the EU would have due regard to Northern Ireland's integral place in the UK's internal market. Underlining that the effect on trade which is subject to the Protocol "cannot be merely hypothetical, presumed or without a genuine and direct link to Northern Ireland". It underlined that any measure which would be subject to the state aid rules in the Protocol must have a foreseeable effect on trade between NI and the EU.<sup>90</sup>

In 2020, in the context of discussions around the (then) Internal Market Bill, all witnesses agreed that a clear free trade agreement between the UK and the EU would ensure that any issues with state aid, in terms of EU reach back, would be limited.<sup>91</sup>

When giving evidence to the Committee for the Executive Office, Lord Frost said, in respect of state aid, that:

We reached an agreement with the EU in December that the provisions of the protocol would be applied to companies only where there was a clear connection with Northern Ireland and not a trivial one. The EU put out guidance in January that did not seem consistent with that, and we have challenged that, but it is still out there<sup>92</sup>

#### 4.2.11 Further Commentary on State Aid

State aid was discussed during a session of the Finance Committee of the NI Assembly. One witness stated that the concern around state aid was that, unlike elsewhere in the Protocol, there was no limitation on the application to the UK (i.e. in respect of Northern Ireland). The only limitation on the scope of EU state aid rules is "functional rather than by reference to geography...it is whether the aid will affect trade under the Protocol".<sup>93</sup> Thus, the threshold on such matters is low, the example given was subsidising a car factory which exports goods to Northern Ireland could impact on the sale of competing cars from Germany, which would fall within the ambit of state aid.

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<sup>89</sup> As above, fn 85, NI Assembly Committee for Health Thursday, 1 July 2021

<sup>90</sup> [Unilateral Declaration by the European Union in the Joint Committee](#) last accessed 13th September 2021.

<sup>91</sup> Northern Ireland Affairs Committee Oral evidence: [Brexit and the Northern Ireland protocol](#), HC 767 Wednesday 23 September 2020 Q156

<sup>92</sup> NI Assembly Committee for the Executive Office [Protocol on Ireland/Northern Ireland: European Commission](#) NIA OR 28<sup>th</sup> June 2021 last accessed 8th September 2021.

<sup>93</sup> NI Assembly Committee for Finance [Protocol on Ireland/Northern Ireland](#) OR NIA 30<sup>th</sup> June 2021

This issue was also considered in an earlier report by the House of Lords European Affairs Committee<sup>94</sup> which observed the potential for EU reach back and concluded it would be for the Commission to show flexibility.<sup>95</sup> It also pointed out that NI could be designated an Assisted Area and receive regional aid, and that agriculture up to a certain level and services were not affected by the provisions in the Protocol. A further report from the Commons' European Scrutiny Committee had identified some issues with the UK approach to Article 10 and ambiguities in the statement published by the EU,<sup>96</sup> arguing that the UK's (then) acceptance of the EU's unilateral declaration meant that the EU could potentially challenge state aid decisions with a limited impact on trade.<sup>97</sup>

State aid was rarely mentioned in the course of the NI Affairs Committee evidence sessions mentioned above (i.e. after the Protocol had come into force) and not raised as an independent issue. If mentioned at all, it is mentioned in the context of tariff relief (where it acts as an upper limit on the amount of relief available). The NI Secretary of State made some remarks when discussing state aid in the context of the Protocol and the Internal Market Bill, when he said:

...the state aid rules in the Protocol are focused on aid that affects trade between Northern Ireland and the EU, so it should not affect aid where the company has only the most peripheral connection to Northern Ireland.<sup>98</sup>

#### 4.2.12 Commentary on Governance – The TCA Solution

The EU did not specifically address the issue of governance in its publications following the issue of the Command Paper. It has repeatedly referred to its preference for working through the existing institutions of the Protocol.

In the Command Paper, the Government made reference to the dispute resolution process under the TCA.<sup>99</sup> There are a number of dispute resolution mechanisms which exist under the TCA, it is unstated which of the mechanisms seems most suitable to the UK Government as alternatives to that already in the Protocol. Therefore, this paper makes the assumption that the envisaged reform is to apply the principal dispute resolution process from the TCA to the NI Protocol, as that has most in common with the more familiar WTO approach. The governance and dispute resolution procedure of the TCA is summarised below.

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<sup>94</sup> European Union Committee [The Protocol on Ireland/Northern Ireland](#) Ninth Report of Session 2019-21 - published 1 June 2020 - HL Paper 66

<sup>95</sup> As above, fn 93 at para 193

<sup>96</sup> House of Commons, European Scrutiny Committee [Northern Ireland Protocol: Withdrawal Agreement Joint Committee Decisions and declarations of 17 December](#) HC 533 Ch. 7.

<sup>97</sup> As above, fn 95 at para 149

<sup>98</sup> Northern Ireland Affairs Committee Oral evidence: [Brexit and the Northern Ireland protocol](#), HC 767 16<sup>th</sup> September 2020, Q86

<sup>99</sup> As above, fn 2.

Where parts of the NI Protocol require that they are interpreted in accordance with EU law, with the CJEU being the final arbiter on issues of EU law, the TCA is different. Domestic laws must be aligned to the TCA, but those laws cannot be used to interpret its requirements.<sup>100</sup> Similarly, the TCA cannot be invoked in domestic courts. The Partnership Council supervises and facilitates the implementation of the TCA and can adopt provisions (where the agreement so provides), make recommendation to the parties in respect of the Agreement's implementation and establish or delegate power to committees.<sup>101</sup> Decisions of the Partnership Council are taken by mutual consent and are binding, including on arbitration tribunals established to deal with disputes under the TCA. A Parliamentary Partnership Assembly is in the process of being established, which will provide a forum for the exchange of views and discussion of the issues by MEPs and MPs.<sup>102</sup>

The principal dispute resolution procedure is modelled on WTO mechanisms and similar to a number of international trade agreements, but there is no appellate body and the CJEU is not involved. In essence, tribunals are convened to deal with disputes on a case by case basis, with lists of arbitrators provided or agreed in advance. The tribunal structure only deals with trade, transport, fisheries and participation in EU programmes. It does not deal with law enforcement or thematic cooperation. There is a duty to consult in good faith before an arbitration panel is established.<sup>103</sup>

There are exceptions to this process, which include some aspects of trade remedies, cultural property, trade in goods, medicines, regulatory cooperation, labour, social standards, environment, climate, personal data, subsidy control and taxation. Some of these issues have bespoke arbitration processes, including level playing field provisions and measures taken in respect of fisheries and subsidy control.

#### **4.2.13 The EU Position on Consultation and Legislative Processes**

The EU's July publications made no remarks in relation to taking more account of Northern Ireland in the EU legislative process. In previous communication with the Northern Ireland Affairs Committee, Vice President Šefčovič addressed a proposal from the Committee on informing the NI Executive on changes to EU law within the scope of the Protocol (see further commentary at 4.2.14 below).

#### **4.2.14 Further Commentary on Consultative / Legislative Processes**

NIAC wrote to Vice President Šefčovič to seek information be made publically available on EU legislation likely to impact Northern Ireland. The proposal was

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<sup>100</sup> S. Fella [The UK-EU Trade and Cooperation Agreement: governance and dispute settlement](#) House of Commons Library 3<sup>rd</sup> August 2021 No. 09139 pg 20.

<sup>101</sup> As above, fn 99 pg 23.

<sup>102</sup> As above, fn 99 pg 8.

<sup>103</sup> As above, fn 99 pg 33.

- each proposed EU legal act include a recital stating whether it engages the UK's obligations under the Protocol: and
- the explanatory memorandum accompanying the proposed an act set out the basis on which the European Commission considers that it should apply in Northern Ireland.<sup>104</sup>

Vice President Šefčovič responded that, while he appreciated the direct exchange with and insight from the Committee, he was unable to agree to the request. The EU wished to rely on existing procedures including the Joint Consultative Working Group.

We trust that the UK can ensure, through its internal procedures, that relevant information shared with the UK in the Joint Consultative Working Group is passed on to relevant authorities in Northern Ireland which can inform stakeholders and the general public.<sup>105</sup>

This suggests a desire to work through the institutions of the Protocol which is reflected elsewhere in the EU's communications on the subject. The UK has undertaken to allow NI Officials to attend meetings of the JCWG,<sup>106</sup> which is the forum for exchange on information on new legislation which falls within the ambit of the Protocol. When there is a debate over whether legislation should apply to Northern Ireland, the matter is referred to the Joint Committee for a decision.<sup>107</sup> The NI Executive is represented on the Joint Committee when its discussions relate to Northern Ireland.<sup>108</sup>

## 4.3 Section Six: Next Steps

### 4.3.1 The Command Paper

The paper reiterates the UK Government's commitment to the Good Friday/Belfast Agreement and supporting the peace process. It argues that the best way to do this is by "finding new and durable arrangements...(that will) provide the strongest platform for the productive long term relationship between the UK and EU". To provide space for these discussions, the Government asks the EU to agree a standstill on existing arrangements, including grace periods and a freeze on legal action, to "ensure room to negotiate".

<sup>104</sup> Northern Ireland Affairs Committee [Chair to Maros Sefcovic, re EU law and the Protocol, 7 June 2021 \(parliament.uk\)](#) last accessed 13<sup>th</sup> September 2021

<sup>105</sup> Northern Ireland Affairs Committee [Maros Sefcovic to Chair, re EU law and the Protocol, 12<sup>th</sup> July 2021](#) last accessed 13<sup>th</sup> September 2021

<sup>106</sup> As well as the specialised committee on the implementation of the Protocol [2020-01-08 a new decade a new approach.pdf \(publishing.service.gov.uk\)](#) Annex A para 9. See also correspondence from Lord Frost to the Committee [response-from-lord-frost-minister-of-state---joint-consultative-working-group.pdf \(niassembly.gov.uk\)](#)

<sup>107</sup> [UK Exit from the EU Briefing Paper Series: Withdrawal Agreement, Protocol and Political Declaration - Overview of Governance Arrangements \(niassembly.gov.uk\)](#)

<sup>108</sup> As above, n105.

The Command Paper was presented to the House of Commons by the Secretary of State for Northern Ireland,<sup>109</sup> and to the House of Lords by Lord Frost.<sup>110</sup> As it was published towards the end of the parliamentary term, there has not been extensive scrutiny by parliamentary committees. Discussion in Parliament was necessarily reactive and, although both Lord Frost and the Secretary of State answered questions, neither provided much detail beyond what was already in the Command Paper.

#### 4.3.2 The EU's position on Next Steps

As previously set out, the EU's preference is "to seek creative solutions, within the framework of the Protocol". The press statement confirmed that the EU would not agree to a renegotiation of the Protocol.

#### 4.3.3. Further Commentary on Next Steps

The House of Lords Sub-Committee's report<sup>111</sup> on the Protocol on 29th July 2021 (having been finalised for printing on 21st July, the same day the Command Paper was issued) acknowledges that it does not take account of the Command Paper, but nonetheless considers the economic, social and political impact of the Protocol, together with an analysis of the current position and proposed solutions.

The conclusions and recommendations section of the report provides a number of actions which could be taken, within the current structure of the Protocol, under the heading "Mitigations and Solutions".<sup>112</sup> The Sub Committee noted that these measures had already been identified in evidence by witnesses, and/or discussed in the Withdrawal Agreement Joint Committee. These include:

- An enhanced Trusted Trader Scheme;
- Adjustment of rules on notice for food supply;
- Broadening the definition of goods 'not at risk';
- Extending the UK Trader Scheme easement for businesses with no fixed place of business in Northern Ireland;
- Simplification of rules of origin requirements;
- Simplifying or eliminating the Supplementary Declaration requirement;
- Continued improvement in the platforms for submitting data;
- Introducing automated identity checks of trailers and seals;
- Simplification or elimination of declarations for business to consumer parcels;
- Urgent delivery of the promised rebate scheme for goods at risk;
- The establishment of a Business Consultative Group with the UK and EU;

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<sup>109</sup> House of Commons Deb Vol 699 Col 978 [Northern Ireland Protocol - Wednesday 21 July 2021 - Hansard - UK Parliament](#)

<sup>110</sup> House of Lords Deb Vol 814 Col 259 [Northern Ireland Protocol - Wednesday 21 July 2021 - Hansard - UK Parliament](#)

<sup>111</sup> As above, fn 9

<sup>112</sup> As above, fn 9 pgs 79-84

- Permitting UK licensed medicines and medical devices to be supplied to Northern Ireland, and an entity established anywhere in the UK to act as a Market Authorisation Holder in Northern Ireland;
- Easements for pet travel (including assistance dogs) between Great Britain and Northern Ireland;
- Granting EU access to UK customs IT systems and databases;
- Simplifying the allocation of “XI” Economic Operator Registration and Identification numbers (EORI) for those trading in Northern Ireland;
- Extending the VAT margin scheme for second-hand vehicles brought in from Great Britain;
- Implementation of the Export and Transit Trans-European Systems in Northern Ireland;
- Addressing approval processes for high-risk plants brought into Northern Ireland intended for export to the EU;
- Easements for livestock movements between Great Britain and Northern Ireland;
- Addressing the prohibition on imports of fresh minced meat and seed potatoes;
- Addressing the application of tariff rate quotas (TRQs) for goods entering Northern Ireland, including on steel; and
- Eliminating duties on unprocessed goods moving from the EU to Great Britain and then on to Northern Ireland.

The Sub Committee also recommends that the EU should be more flexible and pragmatic in its implementation of the Protocol,<sup>114</sup> especially given the value of trade across the Irish Sea in comparison to the EU’s GDP. It also states that the UK Government’s actions have been viewed by the EU as provocative, and the need to rebuild trust required meeting commitments and constructive engagement.<sup>115</sup>

Given the dates of publication of both the Command Paper and the report, the Sub-Committee has not, as yet,<sup>116</sup> issued a press release or direct comment on the Command Paper, other than to acknowledge its publication in the report itself.

## 5 Conclusion

This paper has reviewed the UK Government Command Paper and the immediate response from the EU. At the time of writing, the UK Government has announced that it intends to unilaterally extend grace periods further. The EU has taken note of the extension of grace periods, reserving its right to continue with infringement proceedings

<sup>114</sup> As above fn 9 , para 217

<sup>115</sup> As above fn9, para 223

<sup>116</sup> <https://committees.parliament.uk/committee/520/protocol-on-irelandnorthern-ireland-subcommittee/publications/>

and reiterating its stance that “we will not agree to a renegotiation of the Protocol”.<sup>117</sup> A further statement from the UK Government clarified that the unilateral extension of grace periods was indefinite.<sup>118</sup>

Given the swiftly changing landscape, and in anticipation of a full response from the EU to the Command Paper, this paper has been divided into two parts, of which this briefing is the first. It summarises events around the Command Paper and attempts to provide detail on the points raised therein. The next paper will consider the EU’s response and its reception, together with potential themes of inquiry which may be of interest to the Committee. Below are some emerging themes which may bear further consideration.

## 5.1 Emerging themes

### Planning and Stability

- There is all but unanimous agreement among stakeholders in the UK that the implementation of the Protocol was rushed, businesses had to adapt quickly and, while this has been relatively successful, problems have emerged.<sup>119</sup> The Government has stated that the implementation of the Protocol has revealed difficulties which it had not foreseen.<sup>120</sup> Therefore, assuming the negotiations on the Protocol are productive, the question of the timescale for implementation arises.
- Similarly, given the investment referred to by Lord Frost, the majority of which has been into IT systems and other infrastructure, the question arises to what further costs might be incurred, and how those can be mitigated by using existing systems.<sup>121</sup>
- The implementation of any new solution to the Protocol also affects stability, which has been raised as an important issue by the business community.<sup>122</sup>

### EU Legislation and constitutional issues

- Assuming the UK Government’s further negotiations with the EU are productive, a number of issues have been raised which are separate from concerns about implementation. In the first instance, there is the concern around legislation being passed for Northern Ireland in a forum where it has no elected representatives, together with issues around notifying authorities in Northern Ireland of legislative change. The second relates to questions of constitutionality and, as the command paper puts it, “perceived threats” to identity. In its Command Paper, the

<sup>117</sup> [Statement by the European Commission following the UK announcement regarding the operation of the Protocol on Ireland / Northern Ireland](#) 6<sup>th</sup> September 2021 last accessed 13<sup>th</sup> September.

<sup>118</sup> Secretary of State for Northern Ireland [Northern Ireland Update](#) Statement UIN HCWS262 7<sup>th</sup> September 2021

<sup>119</sup> As above, fn 9

<sup>120</sup> As above, fn 2

<sup>121</sup> As above fn 29.

<sup>122</sup> As above fn 47.

Government did not identify a specific solution to either concern, although the cumulative effect of its proposals may be seen as addressing these issues. It remains to be seen whether and to what extent the Government plans to prioritise such matters in the course of any further negotiation, or whether it has plans to manage these issues in the event that it does not receive the hoped-for response from the EU.

### **Planning for the future**

- Assuming the EU agrees to everything in the UK's Command Paper, the question of the vote on consent arises. The current deadline for a vote in the NI Assembly is 2024. Should the proposals in the Command Paper be implemented, they present a significant and "fundamental"<sup>123</sup> change to the operation of the Protocol as it stands. In considering the timelines for negotiation and implementation seen to date, and given the government's ambitions for a vote on consent before the Protocol came into force,<sup>124</sup> it remains to be seen whether, and to what extent, any new arrangements might impact the scheduling of the vote.
- Equally, the question of "alternatives to the Protocol" has been raised in various committee hearings<sup>125</sup>. Should the EU refuse to make any adjustments to the Protocol, or the changes it agrees are insufficient in the eyes of the UK Government, the next steps are unclear. Lord Frost has repeatedly stated that all options remain on the table, but agrees that there will be some form of Protocol. Accordingly, the Committee might take an interest in how implementation of any agreement might avoid unforeseen issues on the ground, including key issues like involvement of NI representatives, information flows and providing a stable environment for business.

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<sup>123</sup> As above, fn 2.

<sup>124</sup> As above, fn 2.

<sup>125</sup> As above fn 2 paras 12 and 13.

## Annex 1: Mutual Enforcement

One of the alternatives to the Protocol which the UK Government mentioned in its command paper is mutual enforcement, noting that its own proposals stopped short of this. Mutual enforcement was proposed by the Centre for Brexit Policy<sup>126</sup> in its paper of February 2021. It works by each side enforcing the “rules of the other with respect (only) to trade across the border”. The obligation to “comply with the importing territory’s rules and pay duties owed is placed on the exporter as a matter of law of the exporting territories”. This removes the need for a border or any type of border infrastructure because the border is “no longer the first opportunity to assert jurisdiction” i.e. the importing territory “has successfully had help in applying its rules beyond its border”.

Jonathan Faull has written of a similar proposal, also known as mutual enforcement or “dual autonomy”. The central idea is the same, EU legislation would be incorporated into UK law but only applied to those who export to the EU, and vice versa. As EU legislation is incorporated into UK law, it becomes justiciable in national courts and enforceable by domestic authorities.<sup>127</sup>

In February 2021 the EU stated it had not discussed mutual enforcement with the UK.<sup>128</sup> It is not clear if there have been discussions on the subject since. It remains to be seen whether such a model is politically and practically viable, given the EU’s repeated view that the Protocol is the solution that has been agreed, and there will be no renegotiation of it.

Mutual enforcement has not been discussed in detail but it has been peripherally referred to in terms of the problem of identifying solutions to checks with a primary focus on a border, at least from the business perspective:

it is also important to remember that, very often, checks, especially when it comes to customs but perhaps slightly differently for SPS issues, are not where the main problem is. The main problem is the work that companies need to do before or after the goods arrive at the border: the formalities, the additional work, the additional compliance and the additional knowledge that companies need to have to be able to get their goods to the border. Many solutions that are proposed to “solve” the border issue focus on mutual enforcement and the removal of checks, but checks are not the only problem. They completely forget how much work is involved in the formalities.<sup>129</sup>

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<sup>126</sup> Millar, Reynolds et al [CORRECTING THE DAMAGE CAUSED BY THE NORTHERN IRELAND PROTOCOL](#)  
[How Mutual Enforcement Can Solve the Northern Ireland Border Problem](#) Centre for Brexit Policy, February 2021

<sup>127</sup> J Faull [A dual autonomy approach would help with the Northern Ireland protocol](#) Financial Times 20<sup>th</sup> July 2021

<sup>128</sup> S McIlkenny [European Commission has had no discussions with UK on ‘mutual enforcement’ plan](#) The Herald, 14<sup>th</sup> February 2021, last accessed 13<sup>th</sup> September 2021.

<sup>129</sup> NI Assembly Committee for Finance [Protocol on Ireland/Northern Ireland: Professor Katy Hayward; Mr David Henig; Mr Martin Howe QC; Dr Anna Jerzewska](#) NIA OR Wednesday, 30 June 2021

## Annex 2: EU SPS Summary

The diagram below<sup>130</sup> is the EU guide to the differences between the SPS models that have been under consideration so far. As above, the EU favours a Swiss style agreement, whereas the UK prefers something close to the Canada / New Zealand style agreement.

EU import requirements, authorisations and prohibitions for animal products: comparison between different categories of third countries

Product	EU-Switzerland style veterinary agreement					EU-New Zealand style veterinary agreement					Other authorized third countries				
	Allowed	Certificate	Frequency of border checks (% according to EU legislation)			Allowed	Certificate	Frequency of border checks (% according to EU legislation)			Allowed	Certificate	Frequency of border checks (% according to EU legislation)		
			Documentary (100%)	Identity (100%)	Physical (15-30%)			Documentary (100%)	Identity (100%)	Physical (15-30%)			Documentary (100%)	Identity (100%)	Physical (15-30%)
Live animals	Yes	Intra-EU	Border checks abolished			Yes	Simplified	100%	100%	100%	Yes	Standard	100%	100%	100%
Red meat	Yes	Not required	Border checks abolished			Yes	Simplified	100%	100%	1-10%	Yes	Standard	100%	100%	15%
Fresh minced red meat	Yes	Not required	Border checks abolished			Banned									
Poultry meat	Yes	Not required	Border checks abolished			Yes	Simplified	100%	100%	1-10%	Yes	Standard	100%	100%	30%
Minced poultry meat	Yes	Not required	Border checks abolished			Banned									
Fishery products	Yes	Not required	Border checks abolished			Yes	Simplified	100%	100%	1-10%	Yes	Standard	100%	100%	15%
Live bivalve molluscs fit for human consumption	Yes	Not required	Border checks abolished			Yes	Simplified	100%	100%	1-10%	Yes	Standard	100%	100%	30%
Live bivalve molluscs for purification	Yes	Not required	Border checks abolished			Banned									
Dairy products	Yes	Not required	Border checks abolished			Yes	Simplified	100%	100%	1-10%	Yes	Standard	100%	100%	30%
Composite products	Yes	Not required	Border checks abolished			Yes	Standard	100%	100%	15%	Yes	Standard	100%	100%	15%
Personal imports	Yes	Not required	Border checks abolished			Banned									
Pets non-commercial	Yes	Pet Passport	Border checks abolished			Yes	Standard	100%	100%	NA	Yes	Standard	100%	100%	NA

### Update on Border Controls and SPS checks.

On 14<sup>th</sup> September 2021 a written statement was laid before the House of Commons which outlined the UK’s plans to delay the introduction of some controls between the EU and UK, namely:

- The requirement for pre-notification of agri-food imports will be introduced on 1 January 2022 as opposed to 1 October 2021.

<sup>130</sup> This diagram was published by the EC and is accessible [here](#) Last accessed 13th September 2021.

- The new requirements for Export Health Certificates, which were due to be introduced on 1 October 2021, will now be introduced on 1 July 2022.
- Phytosanitary Certificates and physical checks on SPS goods at Border Control Posts, due to be introduced on 1 January 2022, will now be introduced on 1 July 2022.
- The requirement for Safety and Security declarations on imports will be introduced as of 1 July 2022 as opposed to 1 January 2022

The timetable for the removal of the current easements in relation to full customs controls and the introduction of customs checks remains unchanged from the planned 1 January 2022.<sup>131</sup>

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<sup>131</sup> [Statement on Border Controls](#) HC Deb Statement UIN HCWS285 14<sup>TH</sup> September 2021.

## Annex 3 – Interim Updates

At the time of writing, both Maroš Šefčovič and Lord Frost have made recent statements in relation to the Protocol. These are summarised below.

### Maroš Šefčovič

In September, Maroš Šefčovič visited Northern Ireland to hold meetings with the leaders of parties of the NI Assembly. He also delivered a speech at Queen's University Belfast.<sup>132</sup> In the course of the speech, he outlined the EU's continuing commitment to the PEACE+ project, and emphasised that the EU's overarching objective was "to establish a positive and stable relationship with the United Kingdom, based on the two agreements".<sup>133</sup>

Vice President Šefčovič argued that the Agreements between the UK and the EU provide a solid basis for cooperation, and that:

The UK government negotiated, agreed and signed the Protocol on Ireland and Northern Ireland. Its Parliament ratified it. The exercise of sovereign right to enter into international agreements goes hand in hand with the responsibility to respect them once they are concluded.

VP Šefčovič's speech emphasised the detailed nature of the negotiations on the UK's exit from the EU, describing them as "line-by-line negotiations" of which the Protocol was the most challenging part. VP Šefčovič pointed out that the access NI has to the EU Single Market is free – i.e. that NI is not required to contribute to the EU's budget. Ultimately, he argued, "the Protocol is not the problem, On the contrary, it is the only solution we have" and that the focus of effort should be on issues that directly impact people in Northern Ireland, not governance issues like the role of the European Court of Justice as "doing this would effectively mean cutting Northern Ireland off the EU's Single Market and related opportunities".

### Lord Frost

In a debate in the House of Lords, which reviewed the Sub Committee's report (discussed earlier in this paper), Lord Frost responded on behalf of the Government.<sup>134</sup>

He argued that "Much of the problems that we face can be attributed to the EU's rigid focus on protecting the single market over and above other elements of the protocol". Lord Frost stated that the reason the Protocol had been agreed at all was "the consequence of the then Parliament's decision to undermine the Government's

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<sup>132</sup> Speech by [Vice-President Maroš Šefčovič at the Queen's University](#), Belfast, 10<sup>th</sup> September 2021, last accessed 14<sup>th</sup> September 2021

<sup>133</sup> As above, fn 131.

<sup>134</sup> [Northern Ireland Protocol](#) 13th September 2021 HL Deb Vol 814 At the same time, Lord Frost signalled that the Government would formally respond later in September.

negotiating hand at a critical moment in these talks”.<sup>135</sup> He also took the view that “access to the single market does not, in our view, compensate for the disruption of those links (*with GB*)”; and that the Protocol does not protect the UK single market.<sup>136</sup>

Lord Frost said “If there is relative calm at the moment, it is because the proposals in our Command Paper are recognised as serious and enjoy a lot of support” and reiterated the view expressed in the Command Paper that the role of the European Court of Justice and other EU institutions must be removed by negotiation, if possible. In terms of NI representation in EU institutions to manage the democratic deficit referred to above, Lord Frost disagreed with proposals to include NI in these institutions. When pressed on how the democratic deficit would then be managed, he stated that

We are proposing a reordering of the governance arrangements so that the consent, if it exists in Northern Ireland for such measures, can be more real, meaningful and based on genuine debate. There are a number of ways of achieving that if the EU wants to go down that road and that is a pre-eminently political question for people in Northern Ireland, as well as one for the UK Government. That is why we have set out the issue without proposing a specific way forward.<sup>137</sup>

Lord Frost’s final remarks in the debate are worth reporting at length, as they represent the most up to date statement of the UK Government’s approach to further negotiations, given the remarks made by Maroš Šefčovič reported above:

We have had a series of technical discussions with the EU and continue to do so. These have been quite helpful, but they are nevertheless talks about talks; they are not yet a process that gets to the fundamentals...

...A real negotiation does not mean the EU coming up with its own plans for solutions within the framework of the existing protocol and presenting them to us, take it or leave it. To be honest, I have been a bit concerned by a couple of the comments I have heard from Commission representatives in recent days, which seem to suggest they might be considering that way forward. The noble Lord, Lord Kerr, picked up the comment by Maroš Šefčovič the other day, when he said:

“A renegotiation of the protocol ... would mean instability, uncertainty and unpredictability in Northern Ireland.”

Unfortunately, we already have all those things in Northern Ireland. The question is: how do we move on from them? I do not take Commissioner Šefčovič’s words as a dismissal of our position. I take them as acknowledgement of it, but also as a fairly clear indication that there is more to be done. I urge the EU to think again on that

<sup>135</sup> As above, fn 133 at Col. 283GC

<sup>136</sup> As above, fn 134

<sup>137</sup> As above, fn 133 at Col. 286GC

point and consider working to reach genuine agreement with us so that we can put in place something that will last.<sup>138</sup>

## Article 16

In the course of the debate, Lord Frost reiterated the position in the Command Paper that, in the view of the UK Government, the tests for invoking Article 16 have been met. He put forward the view that it would be a mistake on the part of the EU to think that the UK was “not ready to use Article 16 safeguards if that were the only apparent way forward to deal with the situation in front of us”. This has been reported in the media<sup>139</sup> as a fresh threat to invoke Article 16 in the sense of walking away from the Protocol, despite the Sub Committee’s report which emphasises that:

...the Article 16 mechanism is not designed as a means to abrogate the Protocol, but rather as a carefully calibrated mechanism of proportionate measure and counter-measure, underpinned by obligations to continue dialogue to resolve the issues of concern.<sup>140</sup>

Indeed, the Command Paper states clearly that the UK Government does not wish to invoke Article 16 because it is an untested dispute resolution mechanism, which is limited to the specific difficulties faced.<sup>141</sup>

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<sup>138</sup> As above, fn 133 at Col 287 and 288GC

<sup>139</sup> L Carroll [UK government threatens to suspend Northern Ireland protocol](#) The Guardian, 13<sup>th</sup> September 2021 last accessed 14<sup>th</sup> September 2021. F Edwards [Brexit Debate: This is serious! Frost threatens to trigger Article 16 – EU row erupts](#) The Express 13<sup>th</sup> September 2021 last accessed 14<sup>th</sup> September 2021.

<sup>140</sup> As above, fn 9 at para 293.

<sup>141</sup> As above, fn 2 at para 33

## Annex 4: Governance Structures of the Protocol

# Joint Committee

Set up under Part 6 of the Withdrawal Agreement, it makes decisions on the Agreement, including the Protocol, as well as being a forum for resolving disputes. The Joint Committee -

- **oversees** the work of six Specialised Committees, including one on the Ireland/Northern Ireland Protocol.
- is **chaired by** the EU and the UK and **meets** at least once a year.
- will **make binding decisions** on specific issues, including “at risk” goods, fisheries, enforcement and others.
- will **make recommendations** if democratic consent is withheld under the Protocol.
- will receive notification of **safeguarding measures**
- **publishes** an agreed statement after meetings, but otherwise meetings are **confidential**.
- both representatives are **accountable** to their respective Parliaments.



# Specialised Committee

The **Specialised Committee on the Ireland / Northern Ireland Protocol** is one of six established under Part 6 of the Withdrawal Agreement. It is intended to facilitate the implementation and application of the Protocol. The Specialised Committee -

- **makes recommendations and provides reports** to the Joint Committee on the functioning of the Protocol
- **examines proposals** on the Protocol from the North-South Ministerial Council; North/South bodies set up under the 1998 Agreement; and rights bodies such as the NIHRC, Equality Commission etc on Article 2 (rights) issues.
- **meets at least once a year**, and **acts as a forum** for discussion between EU and UK on difficulties with the Protocol
- is **co-chaired** by the UK and EU officials, and **drafts decisions** for adoption by the Joint Committee.
- follows similar **rules of procedure** to the Joint Committee (Annex VIII of the Withdrawal Agreement).



# Joint Consultative Working Group

The Joint Consultative Working Group was established under Article 15 of the Protocol - it serves as a forum for consultation and the exchange of information, and is supervised by the Specialised Committee. The Working Group -

- allows **information sharing** between the UK and the EU about implementation measures and data required under the Protocol.
- facilitates the **communication of changes** to EU legislation within the scope of the Protocol.
- holds **meetings on a monthly basis**, co-chaired by the EU and UK.
- has **no power to adopt binding decisions** (other than its own rules of procedure).
- **reports to** the Specialised Committee



# Arbitration Panel

Under the Withdrawal Agreement, if a dispute is not resolved through the Joint Committee after 3 months, the UK or the EU may request an Arbitration Panel. The panel

- is **drawn from a list** of experts - 10 nominated by the UK, 10 by the EU, and 5 experts agreed on jointly. Of this list, 5 experts will compose each panel.
- has **12 months** to deliver its ruling. If the case is urgent a decision can be made within 6 months.
- Makes **binding rulings** - the parties must comply with within 'a reasonable period of time' either as agreed or decided on by the Panel.
- **may impose financial penalties** if either party fails to comply with a ruling.
- **does not consider** disputes which involve **EU law**.



# Court of Justice of the European Union

When a dispute concerns a matter of EU law, the Arbitration Panel must refer the issue to the Court of Justice of the European Union (CJEU). The CJEU ruling is binding on the Panel

- The Court of Justice of the European Union (CJEU) has jurisdiction over Union Law. The UK (including UK lawyers) may participate in proceedings brought before the CJEU in the same way as a Member State, in the following areas of the Protocol:
  - rights of Union representatives to be present during any activities regarding the UK's implementation and application of Union Law under the Protocol (Article 12 (4));
  - customs and goods movement (Article 5),
  - certificates/authorisations/registrations etc. (Article 7), VAT (Article 8), single electricity market (Article 9) and state aid (Article 10).



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# North South Ministerial Council & Implementation Bodies

Under the Belfast/Good Friday Agreement (1998) 12 subject areas were identified for co-operation under the North South Ministerial Council (NSMC). It oversees cooperation via existing mechanisms in each jurisdiction separately, and North South Implementation Bodies.

The NSMC meets in Plenary, Sectoral and Institutional formats. **Both the NSMC and Implementation Bodies can make proposals to the Specialised Committee on the implementation and application of the Protocol**

The **North South Implementation Bodies** are

- *Waterways Ireland*
- *Food Safety Promotion Board*
- *InterTrade Ireland*
- *Special European Union Programmes Body*
- *Ulster Scots Agency*
- *Foras na Gaeilge*
- *Foyle, Carlingford and Irish Lights Commission*



