



Northern Ireland  
Assembly

## Research and Information Service Briefing Paper

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# The Ireland/Northern Ireland Protocol – overview and potential issues

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## 1 Introduction

This briefing paper provides an overview of some of the main features of the Ireland/Northern Ireland Protocol as they relate to the role and responsibilities of the AERA Committee and also identifies outstanding questions/issues around its implementation and operation moving forward.

This paper is not intended as a forensic examination of the Protocol in terms of its content or its implementation, as at the time of writing there are elements of the Protocol which are still effectively ‘work in progress’ between the UK and EU.

Rather, the intended purpose of this paper is to provide an accessible ‘first taste’ of the Protocol.

Section 2 provides some background to the ‘Brexit’ process and the transition period so far. Section 3 then describes in outline terms the nature of the Protocol and its intended purpose, including a summary of most of the key articles. Section 4 then considers the annexes to the Protocol, and particularly the importance of Annex 2. Section 5

discusses the operation and 'architecture' of the Protocol, including the function and make-up of the Joint Committee. The paper ends with a set of observations and questions on issues such as the impacts of the Protocol on Northern Ireland in the future, the potential for its scope and nature to evolve, and the ways in which the NI Executive may play a role in its operation in the future

Members may also wish to note that the Finance and Economics research team within RaISe recently published a series of six papers on the Ireland/Northern Ireland Protocol with a particular emphasis on trade and the economy. These papers can be accessed through the Research Publications section of the Assembly website. In addition the Assembly Library has produced a new 'Brexit' transition reading list which can be accessed through the following hyperlink

<http://www.niassembly.gov.uk/assembly-business/research-and-information-service-raise/brexit-and-ni/brexit-related-publications/>

The contents of this paper do not constitute legal advice on either the content or operation of the Ireland/Northern Ireland Protocol and should not be utilised as such.

## 2 Background

Since the UK's decision to leave the EU in June 2016, and its triggering of Article 50 within the Treaty on European Union on Wednesday 29 March 2017<sup>1</sup>, the UK and EU had sought to negotiate a Withdrawal Agreement. This Withdrawal Agreement would effectively define the terms under which the UK would leave as well as setting the broad parameters for the UK-EU future relationship. The pursuit of an acceptable Agreement proved to be protracted.

With the advent of the UK General Election in December 2019, which secured an 80 seat majority for the Conservative Party<sup>2</sup>, Prime Minister Boris Johnson and the EU concluded a 'new' Withdrawal Agreement, which was endorsed by the UK<sup>3</sup> and EU<sup>4</sup> parliaments.

The Ireland/Northern Ireland Protocol is a key component of the said Withdrawal Agreement negotiated between the UK and EU in October 2019. In effect, the Ireland/Northern Ireland Protocol is the means by which the free movement of goods on the island of Ireland is intended to be secured regardless of whether the UK and EU successfully negotiate a free trade deal. It is worth noting the Northern Ireland

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<sup>1</sup> [Brexit: The UK's letter triggering Article 50, BBC news webpage, 29 March 2017](#)

<sup>2</sup> [Conservatives Win Whopping Majority Of 80 As St Ives Election Result Declared, HuffingtonPost website, 13 December 2019](#)

<sup>3</sup> [Brexit: MPs give final backing to Withdrawal Agreement Bill, BBC news website, 9 January 2020](#)

<sup>4</sup> [Brexit deal approved by the European Parliament, Press release, European Parliament, 29 January 2020](#)

Assembly voted not to give legislative consent to the UK Withdrawal Act on 20<sup>th</sup> January 2020<sup>5</sup>, a move that was matched by the Scottish<sup>6</sup> and Welsh<sup>7</sup> Parliaments

The UK entered a so-called transition/implementation period in its relationship with the EU from 11:01pm on 31st January 2020<sup>8</sup>. During the transition/implementation period, which expires on 31st December 2020, the UK as a whole is required to continue to adhere to existing EU law in addition to continuing to make EU budget contributions. The UK also remains within the Single Market and the EU Customs Union during transition, and freedom of movement for EU and UK citizens within each other's territory continues unhindered. The UK will also continue to be subject to the rulings of the European Court of Justice.

The UK will not, however, have representation on any of the EU's decision making structures during this period, with MEPs having vacated their seats, the UK Commissioner having resigned, and the UK being able to observe but not contribute to EU Council meetings or decisions. The transition/implementation period can theoretically be extended if the UK or EU feels that the negotiation of a UK/EU trade deal and future security co-operation arrangements will take longer than the end of 2020.

It should, however, be noted that as things stand, the UK has formally notified the EU that it will not request an extension<sup>9</sup>, and as the next scheduled UK-EU Joint Committee meeting is scheduled for the 2<sup>nd</sup> July, which is beyond the deadline for agreeing an extension, this is no longer possible. On this basis the transition/implementation period ends on 31st December 2020 and the Ireland/Northern Ireland Protocol comes into force on 1<sup>st</sup> January 2021.

Furthermore, the following 'givens' should be noted around the whole 'Brexit' process since the conclusion and parliamentary endorsement of the Withdrawal Agreement:

- The Withdrawal Agreement commits the UK and EU to negotiations on a future relationship;
- The terms of those negotiations are set out in the political declaration and that a Free Trade Agreement is the desired outcome;
- The Ireland/Northern Ireland Protocol stands, no matter what, though its application will be impacted by the outcome of negotiations.

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<sup>5</sup> [Brexit: NI Assembly votes to withhold Brexit bill consent, BBC news website, 20 January 2020](#)

<sup>6</sup> [MSPs vote to reject UK Brexit legislation, BBC news webpage, 8 January 2020](#)

<sup>7</sup> [Brexit: Welsh Assembly joins Holyrood and Stormont in rejecting bill, BBC news webpage, 21 January 2020](#)

<sup>8</sup> [Brexit: What is the transition period?, BBC news webpage, 31 January 2020](#)

<sup>9</sup> [Brexit: UK 'formally confirms' to EU that it won't extend transition period, Sky News webpage, 12 June 2020](#)

### 3 The Ireland/Northern Protocol – contents and provisions

Covering a total of 63 pages, the Protocol<sup>10</sup> is made up of 19 Articles and seven Annexes.

Table 1 below provides a basic overview of the main features of some of the key Articles within the Protocol and also incorporates potential questions and issues requiring clarification at this time. The emphasis within table 1 is on those Articles within the Protocol which would appear to have the greatest potential impact on areas in which the AERA Committee has an active interest/responsibility. As such, this assessment is a subjective one and as things develop there may be further need or interest in exploring additional Articles.

On this basis, the emphasis in table 1 is on articles 3, 4, 5,6,7,8,9,10 and 13. Later sections in this paper touch upon issues contained in other Articles of the Protocol such as the role and operation of the Specialised Committee and Joint Consultative Working Group.

It should be noted that table 1 is not a comprehensive analysis or assessment of the Ireland/Northern Ireland Protocol and its impacts. Rather it is included within this paper to give Members a sense of the Protocol as a whole, and more particularly those areas with the potential to impact on the areas for which the AERA Committee has a role and associated responsibilities.

It should further be noted that whilst the Protocol is a published and agreed document there are issues that will impact upon its implementation which are currently the subject of ongoing negotiation such as the UK and EU efforts to secure a Free Trade Agreement.

With all of this being said, there are a number of ‘givens’ with regard to the Ireland/Northern Ireland Protocol as follows:

- The Protocol and the provisions within it will come into force on 1<sup>st</sup> January 2021;
- The Protocol remains in place until such time as the Northern Ireland Assembly may vote to rescind it<sup>11</sup>. In such circumstances this power would only extend to the provisions within Articles 5 to 10;
- The UK-EU Joint Committee has a key and ongoing role in the development, management and review of many of the provisions within the Protocol.

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<sup>10</sup> [New Protocol on Ireland/Northern Ireland and Political Declaration as presented at the October European Council, 17 October 2019](#)

<sup>11</sup> Article 18 of the Protocol deals with Democratic Consent in Northern Ireland. Whilst this Article is not explored within this specific paper an overview of the process is included on page 19 of [Implementing Brexit: The Northern Ireland Protocol, Institute for Government, 24 May 2020](#)

Table 1: Overview of selected Ireland/Ireland Protocol Articles – key features and potential consideration points<sup>12</sup>

Article	Main Provisions	Potential consideration points
3 – Common Travel Area	<ul style="list-style-type: none"> <li>Affirms that the UK and Ireland can continue to operate the Common Travel Area enabling movement of persons between themselves while fully respecting the rights of natural persons conferred by Union Law</li> </ul>	<ul style="list-style-type: none"> <li>The Common Travel Area is a bilateral arrangement between the UK and Ireland which operated in advance of either nations' EU membership.</li> <li>Does the enablement of this bilateral arrangement set a precedent for the utilisation of other bilateral arrangements between the two nations?</li> <li>In particular, could this precedent enable the continuation of the Vosinage Agreement on fisheries, particularly in circumstances where the UK and EU fail to negotiate either a fisheries deal or wider trade deal?</li> </ul>
4 – Customs territory of the UK	<ul style="list-style-type: none"> <li>Affirms that Northern Ireland is part of the UK customs territory – in theory this should facilitate the movement of goods within the UK</li> <li>As a result Northern Ireland will be able to benefit from any trade deals the UK secures with third countries – providing any such trade agreements do not prejudice the application of the Protocol</li> <li>Confirms that Northern Ireland can be included in the UK's World Trade Organisation (WTO) tariff schedule</li> </ul>	<ul style="list-style-type: none"> <li>Whilst Northern Ireland is stated as being part of UK customs territory, it will be treated differently to other parts of the UK in that the EU's Union Customs Code will apply to the movement of goods between GB and NI. This suggests that the statement of NI being within the UK's customs territory is technically correct but doesn't tell the full picture</li> <li>Will Northern Ireland actually be able to benefit from <b>all</b> or <b>some</b> UK trade deals with third countries?</li> <li>More specifically, will Northern Ireland be able to benefit from UK trade deals with third countries which do not have trade deals with the EU? Could this jeopardise an entire UK trade deal with any such third country or would Northern Ireland be the only casualty in any trading arrangement?</li> <li>Under what circumstances could a UK trade deal with a third country potentially prejudice the application of the Protocol? In such instances would the entire UK third country trade deal be impossible or would the solution be to exclude Northern Ireland from the Agreement?</li> <li>Are there any examples of countries having trade deals with each other where one part of a nation is operating to different rules and regulations?</li> <li>Can Northern Ireland continue to avail of current EU Free Trade Deals with third countries? What about future EU FTAs?</li> </ul>

<sup>12</sup> Main sources for the data in this table –

[Implementing Brexit: The Northern Ireland Protocol, Institute for Government, 24 May 2020](#) ,

[The Protocol on Ireland/Northern Ireland, European Union Committee, House of Lords, 9th Report of Session 2019–21, 1 June 2020](#)

[Technical note on the implementation of the Protocol on Ireland/Northern Ireland, European Commission, Task Force for Relations with the United Kingdom, 30 April 2020](#)

Article	Main Provisions	Potential consideration points
<p>5 - Customs, movement of goods</p>	<ul style="list-style-type: none"> <li>• Affirms that goods entering Northern Ireland from another part of the UK by direct transport will not be subject to customs duties/tariffs – unless the goods are ‘at risk’ of entering the EU single market</li> <li>• Goods entering Northern Ireland from locations other than the EU or GB will be subject to UK tariffs, unless they are ‘at risk’ of subsequently entering the EU single market. In instances where this occurs the EU rather than UK tariff will apply</li> <li>• The Joint Committee will have responsibility for defining ‘at risk’ in relation to goods and may amend its decisions at any time</li> <li>• Establishes the requirement for Northern Ireland to adhere/align to a set of product standards/regulations as set out in Annex 2 of the Protocol – including Sanitary and Phytosanitary (SPS) requirements for all domestic production and animals, plants, and their products entering Northern Ireland from either a third country or Great Britain</li> <li>• Goods flowing from GB to NI may be subject to regulatory checks</li> <li>• Goods flowing from GB to NI may be subject to checks to ensure that the correct tariff is applied</li> <li>• UK must apply the EU customs code, with respect to NI, exceptions to be developed by the Joint Committee for fishery and aquaculture products – more specifically, around how fishery and aquaculture products brought into</li> </ul>	<ul style="list-style-type: none"> <li>• The role of the Joint Committee is critical in determining which goods entering Northern Ireland are ‘at risk’ of entering the EU single market and therefore potentially subject to duties/tariffs. What process will the Joint Committee use to determine ‘at risk’?</li> <li>• If agreement cannot be reached on the ‘at risk’ status of a good/goods category at the Joint Committee, it would appear that such decisions would then be the remit of the Arbitration Panel or Permanent Court of Arbitration. What will the actual process be here?</li> <li>• Are the UK and EU starting from the same place with regards to the definition of ‘at risk’ goods? It would appear that the EU’s default position is for all goods to be ‘at risk’ unless proved otherwise whilst the UK Government position is that tariffs should only be applied where there is a ‘genuine and substantial risk’<sup>13</sup>. Are there grounds for optimism on a successful resolution of these issues to minimise the impacts on local businesses?</li> <li>• Paragraph 27 of the UK Government’ Command Paper outlining The UK’s approach to the Northern Ireland Protocol makes it clear that ‘...the Government will make full use of the provisions in the Protocol giving us the powers to waive and/or reimburse tariffs on goods moving from Great Britain to Northern Ireland, even where they are classified as ‘at risk’ of entering the EU market’<sup>14</sup>. How will the UK Government administer this system?</li> <li>• What proportion of goods entering Northern Ireland from GB are likely to be subject to regulatory and tariff checks? Has any assessment been made of the costs that regulatory checks on goods will bring to local agri-food businesses?</li> <li>• With regards to ongoing adherence to the EU Directives/Regulations identified in Annex 2 of the Protocol what does this mean for UK common frameworks in areas like agricultural policy? Is Northern Ireland excluded by the fact that to all intents and purposes it is aligned with the EU framework in many areas? Or will Northern Ireland’s obligations drive the shape of the UK common frameworks?</li> <li>• The exceptions for fishery and aquaculture products to avoid customs duties for UK flagged, NI registered vessels raise questions around how this will actually work. Will any such exceptions only apply to landings by NI registered and UK flagged vessels into Northern Irish ports? Would it cover landings either current or future by UK flagged and NI registered vessels in Ireland or other EU countries? Would any such arrangements potentially limit Northern Irish vessels to landing their catch in their home ports? Do these home ports have the processing capacity to handle or process all of the catch? How would any such exceptions be implemented and enforced?</li> </ul>

<sup>13</sup> [The UK’s Approach to the Northern Ireland Protocol, Cabinet Office, May 2020, page 11](#)

<sup>14</sup> [The UK’s Approach to the Northern Ireland Protocol, Cabinet Office, May 2020, page 12](#)

Article	Main Provisions	Potential consideration points
	<p>EU customs territory by UK flagged vessels registered to ports in Northern Ireland are exempted from customs duties.</p> <ul style="list-style-type: none"> <li>• Affirms that the UK has the power to reimburse tariffs charged on 'at risk' goods that can be shown to have remained in NI.</li> </ul>	
6 - Protection of the UK Internal Market	<ul style="list-style-type: none"> <li>• Affirms that nothing in the Protocol stops the UK from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the UK</li> <li>• Establishes a role for the Joint Committee in facilitating trade between Northern Ireland and the rest of the UK – key aim of avoiding controls at the ports and airports of Northern Ireland to the extent possible</li> <li>• Affirms that nothing in the Protocol stops products originating in Northern Ireland from being presented on the market as originating in the UK when placed on GB market</li> <li>• Affirms that nothing in the Protocol stops the UK from regulating products originating in Northern Ireland placed on the market in other parts of the UK that comply with EU regulations/directives as set out in Annex 2</li> </ul>	<ul style="list-style-type: none"> <li>• Does the claim that nothing within the Protocol will stop the UK from ensuring 'unfettered access' for goods moving from Northern Ireland to other parts of the UK, actually stand up to scrutiny?</li> <li>• The EU's stated position is that goods leaving NI for GB will require the completion of an exit summary declaration although the UK Government believes that there should be no such requirements for goods that will remain in the UK<sup>15</sup>. Which of these positions represents the most likely outcome and will the Joint Committee be able to reach a consensus on this issue?</li> <li>• Has any assessment been made of the potential costs for the local agri-food sector if exit summary declarations become a requirement for goods headed to GB. HMRC evidence submitted to the House of Lords EU Committee suggested that the cost of each declaration could be between £15 and £56 depending on the complexity of the declaration.</li> <li>• If exit summary declarations end up as a requirement for agri-food products leaving Northern Ireland for GB will there be any UK Government financial assistance to reduce or offset these costs?</li> <li>• The UK Government has given assurances to legislate for unfettered access to the GB market for NI goods as set out in both the <a href="#">New Decade New Approach document (NDNA)</a> and the UK's Approach to the Northern Ireland Protocol document. Would any such legislation mitigate risks presented by potential regulatory divergence between NI and GB moving forward? When will we get sight of this legislation given that NDNA references it coming into force by 1<sup>st</sup> January 2021?</li> </ul>
7- Technical regulations, assessments, registrations, certificates,	<ul style="list-style-type: none"> <li>• Places Northern Ireland within two separate regulatory regimes for placing goods on the market in Northern Ireland – namely the UK and EU</li> </ul>	<ul style="list-style-type: none"> <li>• Has any detailed assessment been made by Government, either local or national, of the potential impacts on local businesses resulting from the provisions in Article 7?</li> <li>• Have DAERA made any assessment as to the proportion/value of local agri-food produce that will require new labelling and the potential costs of implementation?</li> </ul>

<sup>15</sup> [The UK's Approach to the Northern Ireland Protocol, Cabinet Office, May 2020, page 10](#)

Article	Main Provisions	Potential consideration points
<p>approvals and authorisations</p>	<ul style="list-style-type: none"> <li>Creates a new label, namely 'UK(NI)' with respect to certain EU Directives outlined in the Protocol</li> <li>Makes changes to the way Northern Ireland conformity checks will be carried out – more specifically goods being sold outside Northern Ireland, as these will need to gain product approvals from EU Authorities and bodies outside Northern Ireland if they are destined for the EU Single Market.</li> <li>Makes changes to the mutual recognition of non-harmonised standards – in effect and according to additional information from the European Commission, <i>'...in the non-harmonised area, the fact that a food is legally placed on the market of Northern Ireland cannot be invoked when the food is placed on the market in the EU'</i><sup>16</sup></li> </ul>	<ul style="list-style-type: none"> <li>Has any assessment been made as to how locally produced agri-food products will be able to secure conformity check approvals to enable them to be marketed in the EU single market? Can any such checks be done by authorities/bodies based in Ireland? What will be the costs and how often would such checks be required? Is approval a one off or ongoing process? Would such approvals be needed for agri-food products being processed in Ireland before returning to Northern Ireland? Would/could an EU office in Belfast be able to facilitate such conformity checks or could these be done remotely?</li> <li>The UK Government Command Paper on the UK's approach to the Protocol states that the UK will recognise EU product approvals and certifications gained by Northern Ireland traders for placing products on the Northern Ireland market. This recognition will enable the placing of those goods on the GB market. Will the Government similarly recognise approvals and certifications gained by Northern Ireland traders for products destined for the EU single market?</li> <li>Will the UK Government's commitment to recognition detailed here feature in the proposed UK legislation securing unfettered access for Northern Ireland businesses to the whole of the UK internal market?</li> <li>Does potential regulatory divergence between the UK and EU present a threat to the concept of recognition of product approvals and certifications moving forward? Could any such divergence make it harder for Northern Ireland goods to be recognised by the UK Government and allowed access to the GB market?</li> <li>Does the European Commission's assessment that the lawful placing of a food product, in a non-harmonised area, on the market of Northern Ireland cannot be invoked when the product is placed on the market in the EU really create a basis for the free movement of goods from Northern Ireland to Ireland? Does this not run contrary to the supposed rationale for the Protocol?</li> </ul>
<p>8 – VAT and excise</p>	<ul style="list-style-type: none"> <li>Applies certain EU rules on VAT and excise to Northern Ireland as detailed in Annex 3 of the Protocol – these apply to goods only – services will continue to align to UK VAT rules</li> <li>European Commission technical note on the Protocol states that EU VAT and excise rules applicable to imports into and exports out of the EU must be applied to goods entering or</li> </ul>	<ul style="list-style-type: none"> <li>Has any assessment been made of the potential impacts on the local agri-food sector in relation to the impacts of Northern Ireland continuing to operate EU VAT and excise in relation to goods? Will costs for local businesses be higher as a result of the potentially complex VAT and excise system that will be operating an EU system for goods and a UK one for services?</li> <li>Is the UK government's confidence in being able to use the 'flexibilities available' to implement the requirements in Article 8 in a way which minimises new costs and burdens on businesses in Northern Ireland well founded? If the UK moving forward radically alters</li> </ul>

<sup>16</sup> [Notice to Stakeholders, Withdrawal of the UK and EU Food Law, European Commission, 13 March 2020](#)

Article	Main Provisions	Potential consideration points
	<p>leaving Northern Ireland either from or to a third country or Great Britain.</p> <ul style="list-style-type: none"> <li>• Responsibility for implementation of the rules detailed in Annex 3 as they apply in Northern Ireland lies with the UK authorities – this includes collection of VAT and excise duties although any revenues collected will not be passed to the EU</li> <li>• Establishes that the UK Government will be able to apply VAT exemptions and reductions, including zero ratings in Northern Ireland to match provisions in Ireland</li> <li>• Responsibility for reviewing the implementation of the provisions within Article 8 lies with the Joint Committee who can ‘where appropriate’ adopt measures for the proper application of these rules</li> </ul>	<p>some of its VAT ratings, and Northern Ireland remains tied to differing EU rates, is this not likely to make Northern Ireland businesses less competitive than their GB counterparts are?</p> <ul style="list-style-type: none"> <li>• Will trade from Northern Ireland to GB be zero rated for export for VAT purposes? If this is the case will the UK Government guarantee this approach moving forward? Could such a provision be legislated for?</li> <li>• How will goods and services be differentiated and who will have responsibility here? Is this a decision for HMRC alone or will the Joint Committee have a role? Will it be easy to differentiate goods and services across the agri-food sector? Does DAERA have any particular concerns here?</li> <li>• Whilst the UK Government will have the power to vary VAT rates in Northern Ireland to match those in Ireland, how often is this likely to occur? What will the process be for any development – can the UK Government be petitioned by local stakeholders including the Assembly on this issue? Will the UK only undertake this action in instances where there is a disadvantage to Northern Irish businesses with existing rates payable here? Has any assessment been made as to the impacts on the agri-food sector here as a result of such an intervention? Will the UK Government be able to act unilaterally in this area – will the Joint Committee have a say or a veto on any such changes?</li> </ul>
<p>10 – State Aid</p>	<ul style="list-style-type: none"> <li>• EU state aid requirements will continue to apply in Northern Ireland as they relate to EU laws identified in Annex 5 of the Protocol – it should be noted that these requirements apply to goods but not services</li> <li>• Agricultural goods are exempt from the application of EU state aid rules as set out in Annex 5 but the level in terms of maximum ceiling of support for agricultural production and trade will be subject to approval by the UK-EU Joint Committee. This process is set out in Annex 6 of the Protocol.</li> </ul>	<ul style="list-style-type: none"> <li>• Both the House of Lords EU Committee Report on the Protocol and the IFG explainer on Implementing Brexit – The NI Protocol reference the concern that the state aid provisions within the Protocol have implications for the entire UK in terms of state aid. The key concern in summary being that aid provided to a business in GB, which traded a good to Northern Ireland, which then ended up in the single market would by definition affect trade between Northern Ireland and the EU. In such instances, GB state aid could theoretically be subject to EU judicial intervention.</li> <li>• In the circumstances highlighted previously, would the threat of EU intervention mean that the UK is unlikely to follow a particularly ambitious and generous state aid regime for fear of EU intervention? Could this provide some protection for Northern Ireland businesses adhering to EU state aid rules with GB based competitors?</li> <li>• The role that the Joint Committee will play in setting a ceiling for agricultural support here raises serious questions around how competitive local farmers will be – particularly if the Joint Committee limits the scale of support available here as compared to that available in</li> </ul>

Article	Main Provisions	Potential consideration points
		<p>either GB or Ireland. Direct payments to farmers are currently critical to the short-term viability, never mind potential growth of many farm businesses here.</p> <ul style="list-style-type: none"> <li>• The UK Government’s paper on their approach to the Northern Ireland Protocol makes it clear that the Government supports maintaining ‘...the current allocation for supporting the agriculture and fishing industries in Northern Ireland, whilst also providing suitable flexibility to respond to any market uncertainty and disruption’. It should, however, be noted that the Government is not in a position to deliver this – it is subject to Joint Committee approval. Whilst the UK Government are part of the Joint Committee, any decision requires consensus between them and their EU counterparts on the Committee. In that context, how likely is the UK Government to deliver on their aspiration?</li> <li>• Annex 6 of the Protocol, which is meant to set out how the Joint Committee will set the maximum ceiling for agricultural support here, does not clarify how often the Joint Committee will perform this function. Will it be at the commencement of a support programme period such as the current 2014-20 CAP envelope, or will interventions be more regular?</li> <li>• Annex 6 also makes clear that if the Joint Committee fails to determine the initial level of agricultural support that will be allowed here by either the end of the transition period, or within 1 year of the entry into force of a future EU Multiannual Financial Framework, the exemption for agricultural production and trade from state aid rules would be suspended, until agreement was reached. What would this actually mean for farmers here if this circumstance occurred?</li> </ul>
13 - Common Provisions	<ul style="list-style-type: none"> <li>• Article 13 confirms that EU legislation which is already within the existing Annexes in the Protocol and which is amended or replaced does not require agreement by the Joint Committee – happens by default – process of dynamic alignment. Can only be reversed by removal of democratic consent by the Assembly.</li> <li>• Establishes the process for addition, or otherwise, of new EU legislation which falls within the scope of the Protocol but doesn’t</li> </ul>	<ul style="list-style-type: none"> <li>• Given that EU existing legislation within Annex 2 of the Protocol is automatically amended or replaced without scrutiny, has any assessment been made by DAERA with regards to what potential risks this poses to the agri-food sector here?</li> <li>• More specifically, has any assessment been made in relation to derogations from existing EU legislation within Annex 2 of the Protocol that the agri-food sector here benefits from? Going forward what means, if any, can be utilised to secure the continuation of these derogations if legislation is either amended or replaced?</li> <li>• The process for the addition of new EU legislation to the Protocol makes clear that the Joint Committee has a key role to play. How then will the specific needs of Northern Ireland be recognised and secured in any future EU legislation that may be destined for inclusion within the Annexes of the Protocol?</li> </ul>

Article	Main Provisions	Potential consideration points
	<p>amend or replace EU legislation identified in the Annexes to the Protocol as follows:</p> <ul style="list-style-type: none"> <li>➤ EU informs UK of adoption of new legislation in Joint Committee</li> <li>➤ Upon request of EU or UK Joint Committee the Joint Committee can hold an exchange of views on the implications of the newly adopted legislation for the proper functioning of the Protocol – has to happen within 6 weeks after request.</li> <li>• Joint Committee has two options for dealing with new EU legislation as follows: <ul style="list-style-type: none"> <li>➤ Adopt it – adding it to the relevant Annex of the Protocol</li> <li>➤ Where agreement on adding the new EU legislation cannot be reached, examine all further possibilities to maintain the ‘good functioning’ of the Protocol and take ‘any decision necessary’ to this effect.</li> <li>➤ In circumstances where neither of the previous two options prove possible, after a reasonable time, the EU is entitled, after giving the UK notice, to take ‘appropriate remedial measures’.</li> </ul> </li> <li>• Establishes that UK authorities shall not act as leading authority for risk assessments, examinations, approvals and authorisation procedures required in the EU law contained within the Protocol</li> <li>• Establishes the principle that either parts or all of the Protocol will not apply if the UK and</li> </ul>	<ul style="list-style-type: none"> <li>• The New Decade New Approach document which secured the restoration of the Executive and Assembly includes a pledge by the UK Government to ‘...ensure that representatives from the Northern Ireland Executive are invited to be part of the UK delegation in any meetings of the UK-EU Specialised or Joint Committees discussing Northern Ireland specific matters which are also being attended by the Irish Government as part of the European Union’s delegation<sup>17</sup>’. This commitment is also reiterated in the UK Government’s command paper, The UK’s Approach to the Northern Ireland Protocol<sup>18</sup>.</li> <li>• Despite these commitments there are a number of key questions as follows: <ul style="list-style-type: none"> <li>➤ Does all new proposed EU legislation that may be adopted in the Protocol qualify as being a ‘Northern Ireland specific matter’? If not why not? In other words will the UK Government make a commitment to include representatives from the Executive whenever potential new legislation for inclusion in the Protocol is being discussed at either the Specialised or Joint Committee level?</li> <li>➤ The previous point is caveated on the recognition that Executive representation will be denied to these fora if there is not Irish Government attendance as part of the EU delegation. On this basis who will decide on delegation membership make up on both the UK and EU sides? Is there a case to be made for the drawing up of objective and transparent criteria to ensure appropriate Irish Government and Executive representation on these delegations? If these do not exist is there not a risk that individual subjective assessments could see Executive representatives potentially excluded from discussions on issues that directly affect Northern Ireland? Is this an issue that could be taken forward in the Specialised or Joint Committee? Has the Executive been lobbying for any such development?</li> </ul> </li> <li>• In areas where agreement cannot be reached at Joint Committee level on the addition of new EU legislation to the Protocol what is meant by the Joint Committee taking ‘any decision necessary’ to maintain the ‘good functioning’ of the Protocol? Have either the UK or EU provided any clarification here and is this an issue on which sides are on the same page? Is this simply an oblique reference the Arbitration process that supports the Joint Committee?</li> <li>• What precisely constitute ‘appropriate remedial issues’ that the EU is entitled to take in circumstances where new legislation is not adopted into the Protocol? Does this imply</li> </ul>

<sup>17</sup> [The New Decade, New Approach Deal, British And Irish Government Document, January 2020, page 47](#)

<sup>18</sup> [The UK’s Approach to the Northern Ireland Protocol, Cabinet Office, May 2020, pages 6-7](#)

Article	Main Provisions	Potential consideration points
	EU successfully conclude a trading agreement which supersedes it.	legal action by the CJEU? Or is this an oblique reference to role of the Arbitration Panel as outlined in table 3 of this paper? What could the possible consequences be for Northern Ireland from such action? Would any potential financial penalties arising from such circumstances be the responsibility of the UK Government?

## 4 The Protocol - The Annexes

The Ireland/Northern Ireland [Protocol](#) is a key component of the [Withdrawal Agreement](#) negotiated between the UK and EU in October 2019. In effect, the Ireland/Northern Ireland Protocol is the means by which the free movement of goods on the island of Ireland has been secured regardless of whether the UK and EU successfully negotiate a free trade deal.

Amongst other things, the Protocol effectively binds Northern Ireland to a series of EU regulations as they relate to a range of standards including human rights, movement of people and goods and trade etc. Adherence to these regulations is how Northern Ireland will be able to access the EU single market. For the purpose of this paper and the remit of the AERA Committee, the focus of this section is on the Annexes of the Protocol where agricultural and environmental requirements and standards have been identified.

### 4.1 Annex 1

Annex 1 lists legislation with respect to “Rights of individuals” under Article 2 (1) of the Protocol. The six Directives listed implement the EU’s principle of equal treatment between men and women (including access to the supply of goods and services, employment, social security) and persons irrespective of racial or ethnic origin.<sup>19</sup>

### 4.2 Annex 2

Annex 2 of the Protocol, which is substantial, lists all of the required pieces of EU legislation that will still apply to NI to keep it aligned with EU product/technical standards post transition. It is useful to note here that Northern Ireland is also required to automatically adopt any changes to the EU regulations listed in Annex 2. The legislation covered under Annex 2 that may be of interest to the AERA Committee and its remit are presented in Table 2.

Table 2: Areas of EU legislation listed under Annex 2

Agri-food areas	Environmental areas
<ul style="list-style-type: none"> <li>- motor vehicles, including tractors;</li> <li>- motor vehicles, including tractors;</li> <li>- pesticides and biocides;</li> <li>- food - general, hygiene, ingredients, contact material, and, other matters;</li> <li>- animal feeds – products and hygiene;</li> </ul>	<ul style="list-style-type: none"> <li>- Chemicals (REACH);</li> <li>- Waste (shipments of waste, packaging);</li> <li>- Environment (alien invasive species, protection of flora and fauna through trade, GHG and ozone layer);</li> <li>- energy efficiency (eco-labelling, fuel); and</li> </ul>

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

<ul style="list-style-type: none"> <li>- Genetically Modified Organisms;</li> <li>- Live animals, germinal products and products of animal origin;</li> <li>- Animal disease and zoonosis control;</li> <li>- Animal identification;</li> <li>- Animal breeding;</li> <li>- Animal welfare;</li> <li>- Plant health;</li> <li>- Plant reproductive material;</li> <li>- Official controls and veterinary checks;</li> <li>- Sanitary and phytosanitary standards;</li> <li>- Fisheries and aquaculture</li> <li>- general customs, trade related aspects</li> </ul>	<ul style="list-style-type: none"> <li>- Marine equipment;</li> </ul>
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Source: [Withdrawal Agreement](#) (19 October 2019), Annex 2 to the Protocol on Ireland/Northern Ireland

### 4.3 Update to Annex 2

As of the 15 May 2020, the European Commission published a [proposed Council decision](#) which suggests the following additions to Annex 2 of the Ireland/Northern Ireland Protocol:

- Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment;
- Directive 2011/91/EU on indications or marks identifying the lot to which a foodstuff belongs;
- Council Directive 66/401/EEC of 14 June 1966 on the marketing of fodder plant seed;
- Council Directive 98/56/EC of 20 July 1998 on the marketing of propagating material of ornamental plants; and
- Council Directive 2008/72/EC of 15 July 2008 on the marketing of vegetable propagating and planting material, other than seed.

### 4.4 Annex 4

Annex 4 applies to the generation, transmission, distribution and supply and trading of electricity, particularly in relation to the single wholesale electricity market in Ireland and NI. Legislation listed that may be of interest to the Committee may include:

- IPPC - Integrated Pollution Prevention and Control requirements. IPPC is a regulatory system to control the environmental impacts of certain industries. Further information can be found at [DAERA](#).
- ETS - The EU's Emission Trading Scheme establishes a scheme for greenhouse gas emission allowance trading within the EU (the [EU ETS](#)). The inclusion of this in

the Protocol allows power generators in NI to participate in the EU ETS post transition.

## 4.5 Changes /amendments

NI is subject to the Directives and regulations listed in the Protocol's Annexes in perpetuity (unless consent is withdrawn by the NI Assembly every 4 years or 8 years depending on the circumstances). However, any changes and amendments to law listed, or new additions, may be made to the Protocol Annexes through agreement by the Joint Committee. Article 13 of the Protocol states:

*Where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or repealed.*

*Where the Union adopts a new act that falls within the scope of this Protocol [...] the Union shall inform the United Kingdom of the adoption of that act in the Joint Committee [...] the Joint Committee shall hold an exchange of views on the implications of the newly adopted act for the proper functioning of the Protocol, within 6 weeks after the request.<sup>20</sup>*

The Joint Committee's primary focus is to manage the agreed EU-UK bilateral relationship. While it may provide a vehicle through which changes to the Protocol may be discussed, it is unclear whether NI will have any say in future changes made to the legislation listed in the Protocol. For instance, will NI be able to engage in the normal EU legislative process in relation to areas it is bound to under the Protocol? And if so, how and when?

For some non-EU countries (third countries), the engagement process begins very early. According to the Institute for Government (IfG), Canada, Norway and Switzerland proactively engage with Member States holding the EU presidency six months to a year in advance. For example, Norway's prime minister and/or foreign minister will typically travel to the said Member State before the presidency begins.<sup>21</sup>

It appears to be unclear exactly where a NI voice could be heard in the process to ensure new additions to the Annexes are vetted/influenced to minimise negative impacts on NI. Due to differing interpretations of the role of the Joint Committee (discussed in more detail in section 5 of this paper) its role is therefore not clear in this regard. Therefore, further clarification is needed on whether NI will have to proactively engage in the formulation process of EU legislation in its own right as a third country, or whether the Joint Committee can provide the access point to give NI a say in potential legislative development or changes under the areas of the Protocol.

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<sup>20</sup> Article 13 of the Ireland/Northern Ireland Protocol.

<sup>21</sup> Institute for Government (2020) Influencing the EU after Brexit (p.45). Available at <https://www.instituteforgovernment.org.uk/publications/influencing-eu-after-brexit>

The IfG has calculated that around a third of the EU Acts listed in the Annexes of the Protocol have been updated or amended since their introduction. In fact, most new Acts or updates have been made in the last two decades with around 40% of those listed in the Protocol made in the 2010s.<sup>22</sup>

In light of this, it may become even more important for NI to understand how to engage directly in EU policy development. Figures 1 and 2 are from the IfG<sup>23</sup> and provide an overview of the current EU legislative process, illustrating its complex nature and possible areas for early intervention/engagement at the formulation stage.

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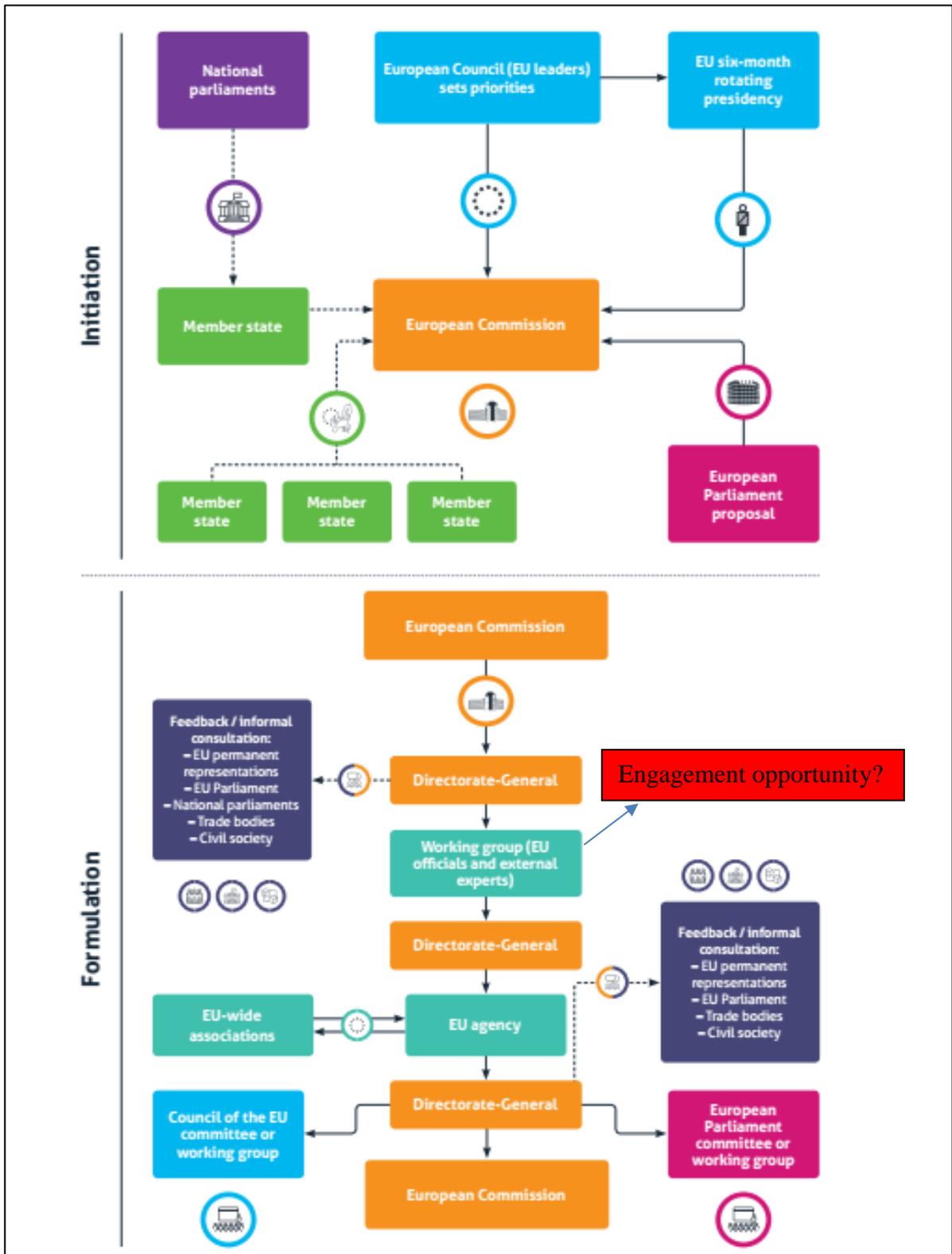
<sup>22</sup> IfG (May 2020) Implementing Brexit- The Northern Ireland Protocol (p.49/50). Available

<https://www.instituteforgovernment.org.uk/publications/implementing-brexit-northern-ireland-protocol>

<sup>23</sup> IfG (Jan 2020) Influencing the EU post Brexit (p24/25). Available

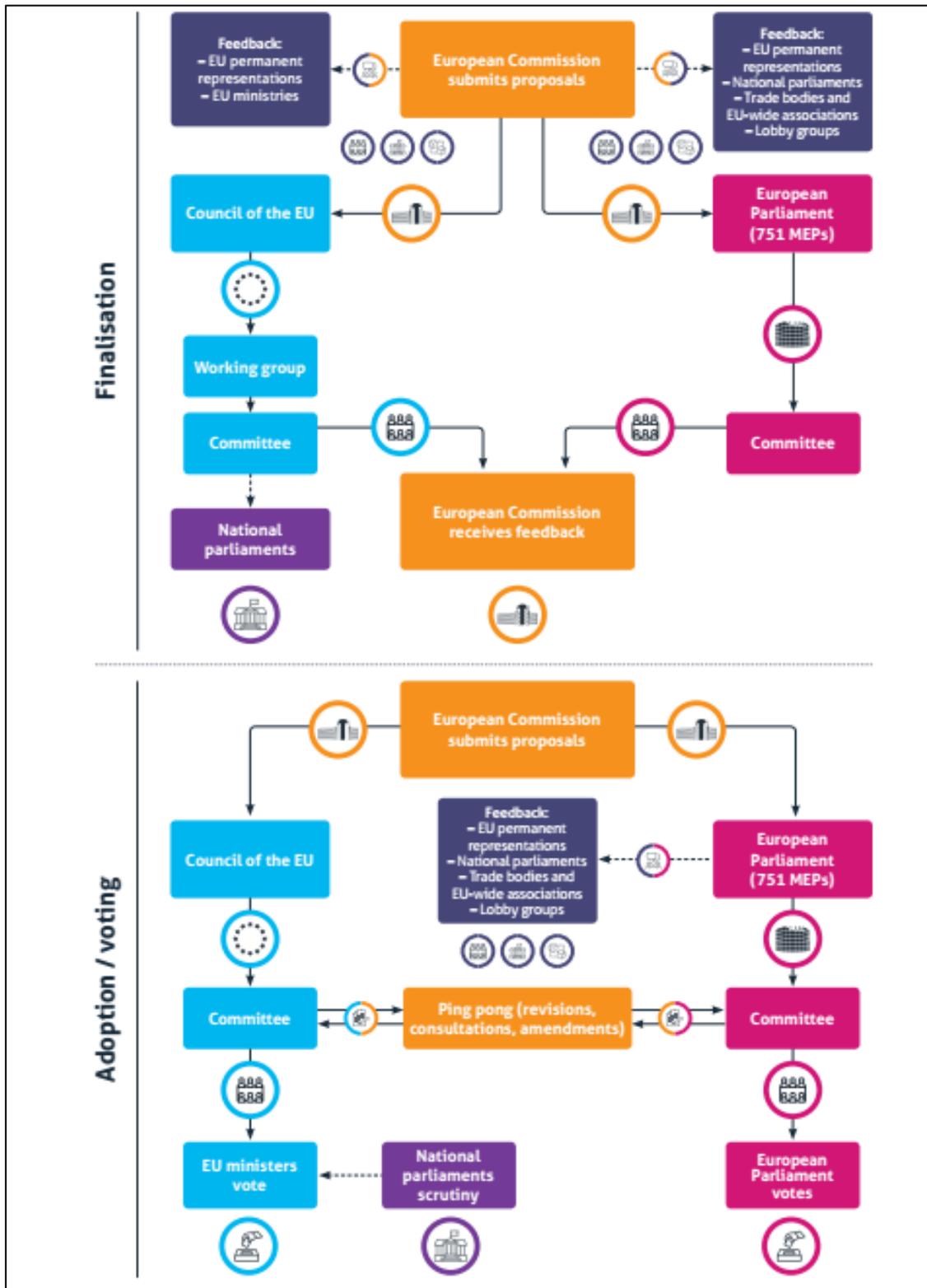
<https://www.instituteforgovernment.org.uk/publications/influencing-eu-after-brexit>

Figure 1: The EU Policy making process (Part 1)



Source: IfG (Jan 2020) [Influencing the EU post Brexit](#) (p24/25).

Figure 2: The EU Policy making process (Part 2)



Source: IfG (Jan 2020) [Influencing the EU post Brexit](#) (p24/25).

### Consideration points

- **What level of input did NI have in the discussions on the proposed additions to the Protocol?**
- **Is the Department aware of:**
  - **the UK's overarching priorities for influencing the EU?**
  - **whether the UK has developed a new approach to co-ordinate EU policy?**
  - **whether the UK has developed a strategy for influencing the EU's internal decision making from the outside?**
- **Do these take account/represent NI's unique circumstances under the Protocol?**
- **Can NI influence the development/changes to legislation affecting it under the Protocol? When and how? Will this purely be a proactive process?**
- **Will the Joint Committee have any role in legislative development of the areas under the Protocol? It is unclear whether the Joint Committee will have such a role at this stage (discussed in more detail in section 4 of this paper).**
- **If so, where will the Joint Committee sit in the legislative process, e.g. at the Working group EU Official and external experts stage in Formulation (see red box in diagram Part 1)**

## 5 The Protocol: - operation and architecture

A number of mechanisms have been mentioned in the Withdrawal Agreement for the operation of the Protocol. Table 3 explores these bodies and gives an overview of their roles and responsibilities and level of representation. Where possible, it highlights some outstanding questions/issues for consideration. Figure 3 provides an illustration of the structure of the different bodies involved. Figure 4 provides the dispute resolution process. Both figures should be referred to with Table 3.

Table 3: Protocol Implementation Bodies

Mechanism	Role/ Responsibility	Representation	Consideration points
Joint Committee	<p>The Withdrawal Agreement and the Protocol specify the need for a Joint Committee to oversee the application of the Protocol (See Figure 2). The Protocol gives the Joint Committee responsibility for:</p> <ul style="list-style-type: none"> <li>- developing the criteria for determining whether goods moving from Great Britain (GB) to NI will be considered not “at risk” of subsequently moving into the EU, and therefore will not be subject to EU customs duties. (Article 5 (2)).</li> <li>- establishing the conditions under which fisheries and aquaculture products landed by NI vessels will be exempt from EU duties (Article 5(3)).</li> <li>- reviewing the implications of the protocol for the UK internal market and making recommendations to avoid controls at Ports and airports of NI (Article 6), and north–south co-operation (Article 11).</li> <li>- overseeing the implementation of VAT collection arrangements (Article 8)</li> <li>- determining the initial maximum level of agricultural support for NI farmers (Article 10(2) and Annex 6). Agreed subsidies will be exempt from EU state aid rules.</li> <li>- determining the practical arrangements for EU supervision (including presence of Union representatives) of UK implementation and enforcement of the Protocol (Article 12)</li> <li>- deciding whether new EU law in areas covered by the protocol should be added to it (Article 13 (4))</li> </ul>	<p>Under Annex VIII of the <a href="#">Withdrawal Agreement</a>, the Joint Committee will be co-chaired: a Minister from the UK (Michael Gove will chair on behalf of the UK) and a Member from the European Commission (Maroš Šefčovič, the Slovakian vice-president of the EU Commission for Interinstitutional Relations and Foresight) will chair on behalf of the EU.</p> <p>The Withdrawal Agreement (Annex VIII) allows for the role of co-chair to be carried out by a senior official in the absence of a minister. However, the UK, under its <a href="#">Withdrawal Act 2018</a> (as amended), only allows for ministers to fulfil this role.</p> <p>The Secretariat is to be composed of a European Commission Official and a UK Official. Experts and others not members of the delegations may be invited by the co-chairs to provide information. Meetings are to be held alternately in Brussels or London.</p> <p>According to the IfG, six to ten senior officials are expected to accompany each chair. The Cabinet Office will co-ordinate the work of the Joint committee on behalf of the UK government, with input from other departments where relevant. It will also work with the Northern Ireland Office and the Northern Ireland Executive on issues relating to the Protocol. The EU Commission’s UK Task Force will co-ordinate the EU’s joint committee work, also with input from other departments and institutions.<sup>25</sup></p>	<p>What level of representation will NI have on the Joint Committee?</p> <p>What level of political representation will delegations have?</p> <p>Will NI representatives be able to voice specific concerns/opinions, or will they have to reflect the line of the UK Government?</p> <p>What happens if there is disagreement between the UK and NI on an issue?</p> <p>Is being invited to attend when the Irish Government attends adequate? There may be other issues more specific to NI than those that also affect the Republic of Ireland.</p> <p>Will NI have to request to be sent as part of the UK delegation by demonstrating that an area of discussion is of direct interest to NI? Or will NI always have representation on the UK delegation?</p> <p>Meetings of the Joint Committee are confidential Will this make the scrutiny of decisions difficult?, Will NI get access to</p>

<sup>25</sup> IfG (March 2020) Implementing Brexit-role of the Joint Committee (p.4). Available <https://www.instituteforgovernment.org.uk/publications/implementing-brexit-joint-committee>

Mechanism	Role/ Responsibility	Representation	Consideration points
	<ul style="list-style-type: none"> <li>- Consulting and discussing safeguard measures suggested for remedying any negative impacts of the Protocol (Article 16 (3) and Annex 7).</li> <li>- making recommendations to the UK and the EU in the event that NI institutions reject the provisions in the protocol covering issues covered in Articles 5-10, such as trade in goods and single electricity market (Article 18).</li> <li>- Handling disputes on interpretation of the Agreement. If no solution is found, issues are to be handled by an arbitration panel (Arbitration Panel and CJEU below).<sup>24</sup></li> <li>- Overseeing the work of the Specialised Committee on the Protocol (see below)</li> </ul> <p>Under Article 166 of the Withdrawal Agreement, decisions of the Joint Committee are binding on the Union and the UK.</p>	<p><b>NI Representation:</b></p> <p>There is no detail in the Protocol with regards to NI representation on these implementation bodies. It is up to the UK to decide the members of their delegation<sup>26</sup>.</p> <p>However, according to the Cabinet Office, the New Decade, New Approach agreement, guarantees that the NI Executive will be invited to attend any Withdrawal Agreement Joint Committee or Specialised Committee meetings where NI is being discussed and when the Irish Government are in attendance.<sup>27</sup></p> <p>Unless otherwise decided by the co-chairs, meetings of the Joint Committee are confidential. It's up to the Union and the UK to decide whether to publish recommendations or decisions made by the Joint Committee (Rules of Procedure Annex VIII (Rule 10) of the Withdrawal Agreement).</p> <p>The first meeting of the Committee was held 30 March 2020- further detail is available <a href="#">here</a></p>	<p>information discussed and recommendations made? Or will it have to rely on any reports published at the EU's discretion?</p> <p>Will the confidential aspect of the Joint Committee make scrutiny of decisions difficult for the legislatures within the UK and NI? Will NI have to rely on any reports published at the EU's discretion? This issue was raised by House of Lords Committee in relation to the lack of information provided after the last Joint Committee meeting.</p> <p>Post meetings, will UK representatives of both the Joint Committee and Specialised Committee be required to make statements to relevant Committees in both the UK Houses of Parliament and NI Assembly?</p> <p>Should the NI Assembly have a scrutiny role here?</p>
Specialised Committee	The Withdrawal Agreement (Article 165) provides for the establishment of a 'Specialised Committee' on issues related to the implementation of the Protocol.	Under the Withdrawal Agreement (Annex IX), the same rules that apply to the Joint Committee, also apply to Specialised Committees.	Does NI have any say in the deadline for decisions to be made by the Committee? For example, with any decisions that may

<sup>24</sup> [https://ec.europa.eu/ireland/news/key-eu-policy-areas/brexit\\_en](https://ec.europa.eu/ireland/news/key-eu-policy-areas/brexit_en)

<sup>26</sup> Institute for Government (May,2020) Implementing Brexit- The Northern Ireland Protocol (p.18). Available <https://www.instituteforgovernment.org.uk/publications/implementing-brexit-northern-ireland-protocol>

<sup>27</sup> Cabinet Office (2020) The UK's Approach to the Northern Ireland Protocol (p.11). Available <https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol>

Mechanism	Role/ Responsibility	Representation	Consideration points
	<p>The Protocol (Article14) provides the Specialised Committee with the following responsibilities:</p> <ul style="list-style-type: none"> <li>- Facilitating the implementation and application of the Protocol.</li> <li>- Examining proposals concerning the implementation and application of the Protocol from the North-South Ministerial Council and North-South Implementation bodies set up under the 1998 Agreement (see Figure 2).</li> <li>- Considering issues presented by the NI Human Rights Commissions, the Equality Commission for NI, the Joint Committee of representatives of the Human Rights Commissions of NI, related to Article 2 of the Protocol.</li> <li>- Discussing any point raised by the Union or the UK related to the Protocol and gives rise to a difficulty.</li> <li>- Making recommendations to the Joint Committee regarding the functioning of the Protocol, including maintaining North-south cooperation (Article 11).</li> <li>- Under the Withdrawal Agreement (Annex IX), the Specialised Committee must submit any of its reports to the Joint Committee.</li> </ul> <p>At the <a href="#">Joint Committee's first meeting</a> , on 30th March 2020, it was agreed that the Specialised Committee should engage in discussing and preparing the decisions to be taken before the transition period by the Joint Committee on the Protocol.</p>	<p>However, the Specialised Committee is to be co-chaired by representatives designated by the European Commission and the UK government- there is no Ministerial requirement here.</p> <p>The Ireland/Northern Ireland Specialised Committee held its first meeting 30 April 2020. Further details can be found <a href="#">here</a>.</p>	<p>need to be made earlier than planned to be reflected in the practical preparations for the UK-NI sea border before transition.<sup>29</sup></p> <p>A number of North-South Implementation bodies were set up under the 1998 Agreement (including the N/S Ministerial Council, the British Irish Inter-governmental Conference (BIIC) and the British Irish Council (BIC)). However, according to the IfG the BIIC did not meet between 2008 and 2017 and has only met three times since the collapse of the power-sharing institutions<sup>30</sup>. Will there now be an increase in activity from some of these bodies to ensure engagement between them and the Specialised Committee is utilised fully?</p>

<sup>29</sup>IfG (May2020) Implementing Brexit- Northern Ireland Protocol (p.10) Available <https://www.instituteforgovernment.org.uk/publications/implementing-brexit-northern-ireland-protocol>

<sup>30</sup> IfG (Jan 2020) Influencing the EU after Brexit (p.44)t. Available <https://www.instituteforgovernment.org.uk/publications/influencing-eu-after-brexit>

Mechanism	Role/ Responsibility	Representation	Consideration points
	<p>According to the IfG, the subcommittee can draft decisions and propose amendments, but the Joint Committee has the final say.<sup>28</sup></p>		
<p>Consultative Working Group</p>	<p>The Protocol provides for the establishment of a Joint Consultative Working Group (JCWG) as an additional forum for exchange of information on the implementation of the Protocol.</p> <p>Under Article 15, the Working Group essentially provides the forum for:</p> <ul style="list-style-type: none"> <li>- The sharing of information between the EU and UK about planned, ongoing and final implementation measures in relation to the law listed in the Protocol's Annexes.</li> <li>- The Union informing the UK about planned Union acts within the scope of the Protocol, including amendments, replacements to those listed in the Annexes.</li> </ul> <p>It has to meet at least once a month and ensure all views and information by the UK (including technical and scientific data) are communicated to the Union and its bodies etc. immediately.</p> <p>It has no power to take binding decisions. It has to be supervised by the Specialised Committee to which it shall report.</p>	<p>The Working Group is to be co-chaired by the Union and UK and composed of representatives of the Union and the UK (Article 15 of the Protocol).</p>	<p>It appears the level of information shared between the Union and the UK is determined by the Union. For example, the Union is to provide all information 'it considers relevant' to allow the UK to comply with the Protocol. In addition, the UK must provide the Union with the same level of information it requires from Member States.</p> <p>Can NI request information from the Union that it considers necessary?</p>

<sup>28</sup> IfG (March 2020) Implementing Brexit- Role of the joint committee. Available <https://www.instituteforgovernment.org.uk/publications/implementing-brexit-joint-committee>

Mechanism	Role/ Responsibility	Representation	Consideration points
	<p>1. The Union is to provide all information it considers relevant to allow the UK to comply with its obligations under the Protocol.</p> <p>2. The UK is to provide the Union with all information that Member States are required to provide in relation to the Union’s Acts under the Protocol.</p> <p>One of the areas already suggested, by the Cabinet Office, for consideration by the Working Group is the ‘no diminution’ commitment of the Protocol.<sup>31</sup></p>		
Arbitration panel	<p>Under Article 170 (and Annex IX) of the Withdrawal Agreement, disputes may be resolved through an Arbitration Panel, at the request of the Union or UK, should a resolution not initially be met by the Joint Committee (after 3 months).</p> <p>Under Article 173, the arbitration panel has 12 months to deliver its ruling, which will become binding on the UK and the EU. If the case is urgent, either side can ask the Panel to deliver a decision within six months.</p> <p>Compliance must be made within ‘a reasonable period of time’ as decided by the respondent.(Article 176). Any disagreement on this between the Union or UK, then the Arbitration Panel must decide the timeframe.</p> <p>If either party feels the other has failed to comply with a ruling, the Arbitration Panel may impose financial penalties (temporary remedies) paid to the claimant (Article 178). If no payment is received within one month, or if the respondent continues to not comply after 6</p>	<p>Under Article 171 of the Withdrawal Agreement, by the end of the transition period, the Joint Committee must establish a list of 25 people to sit on the Panel: 10 suggested by the EU and 10 by the UK; and 5 people they must jointly suggest to act as chairperson. The persons must be independent, be qualified to the highest judicial office in their country and be specialists/experts in Union and public international law.</p> <p>An arbitration panel shall be composed of five members. Within 15 days of a request, the Union and UK must select 2 persons each from the list of 20 to sit on the panel. The chair is selected by the panel from the list of 5 jointly suggested chairs.</p> <p>According to Article 7 of the Protocol, where registrations, certificates, authorisations etc. have been issued by authorities/bodies of Member States, the UK, in respect of NI, may not initiate arbitration procedures for Union law under the Protocol:</p> <p><i>The United Kingdom in respect of Northern Ireland may not initiate objection, safeguard</i></p>	<p>What level of representation will NI have on these panels?</p> <p>What safeguards are in place to ensure the panel is independent and the process is fair?</p> <p>Should NI feel it is not being represented adequately, what grounds does it have to seek adjustment?</p> <p>Will the UK ensure that a certain % of representation on the panel is from NI?</p> <p>If the UK cannot request an arbitration panel on behalf of NI, on certain aspects carried out by Member States or their bodies, who does?</p>

<sup>31</sup> Cabinet Office (2020) The UK’s approach to the Northern Ireland Protocol (p38). Available <https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol>

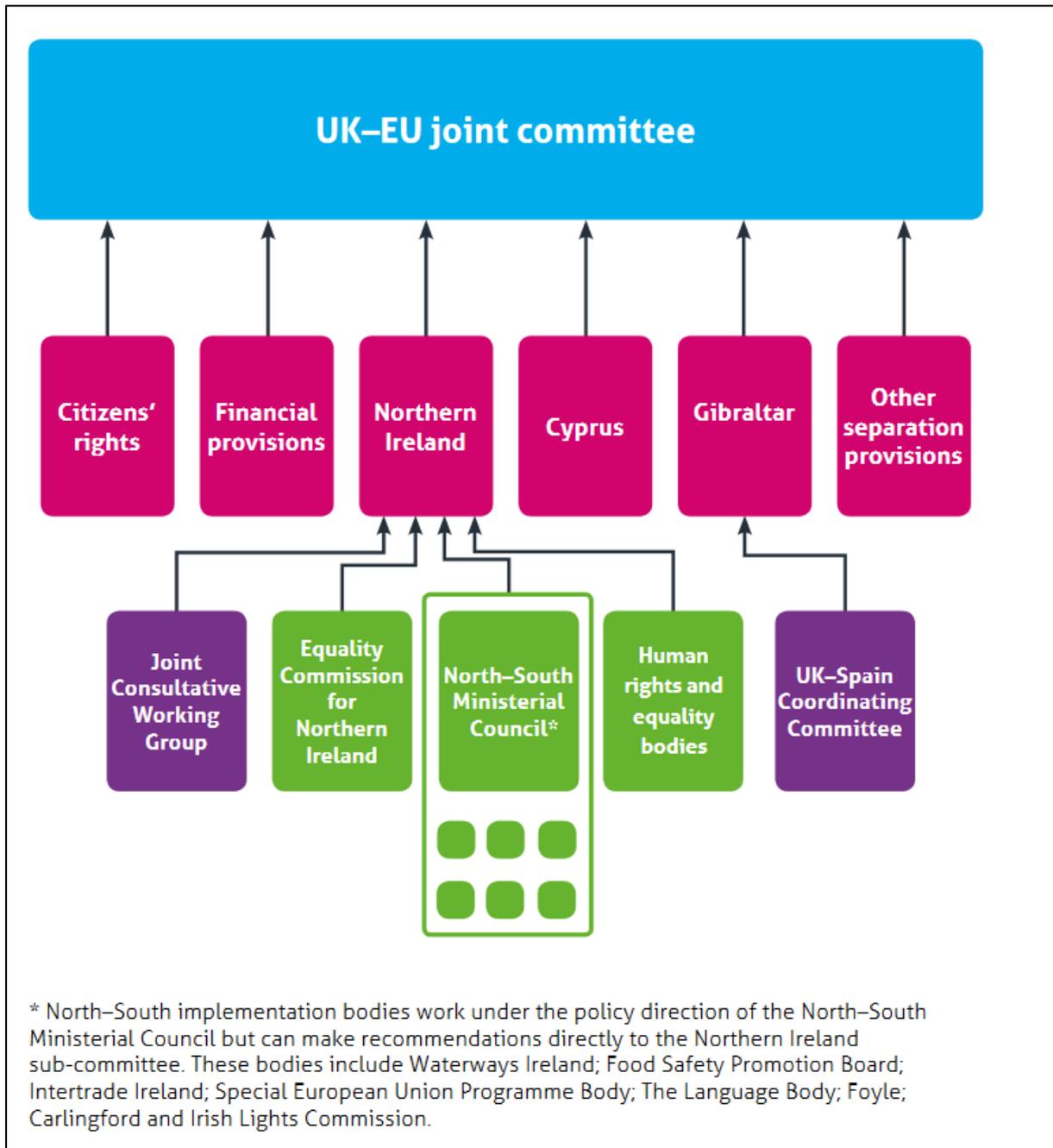
Mechanism	Role/ Responsibility	Representation	Consideration points
	<p>months, the claimant can suspend part of the Withdrawal Agreement (apart from Part 2, on citizens' rights) or parts of other Union/UK agreements. Any suspension must be proportionate and temporary.</p> <p>Refer to Figure 3 for an overview of the arbitration process.</p>	<p><i>or arbitration procedures provided for in provisions of Union law made applicable by this Protocol to the extent that those procedures concern the technical regulations, standards, assessments, registrations, certificates, approvals and authorisations issued or carried out by competent authorities of the Member States or by bodies established in Member States.</i></p>	<p>If a payment is to be made by the UK/NI off the back of an arbitration panel decision due to an NI related issue, who makes it?</p> <p>Is this effectively adding another level of enforcement over and above the UK judicial system and internal NI system?</p>
CJEU	<p>When a dispute concerns a matter of EU law under the Agreement, 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 (Article 174 of the Withdrawal Agreement).</p> <p>See Figure 3 for an overview of the process.</p>	<p>The <a href="#">Court of Justice of the European Union (CJEU)</a>, 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:.</p> <ul style="list-style-type: none"> <li>- The 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));</li> <li>- 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).</li> </ul>	<p>Will NI have a say over who represents it at the CJEU?</p> <p>If the UK may participate in the same way as a Member State, does this effectively bind the whole of the UK (not just NI) to EU rules listed under the Protocol?</p> <p>Does this mean the UK and NI are subject to same enforcement proceedings as a Member State at the CJEU, yet they do not have the same level of representation or say during the development of EU legislation that it could potentially face enforcement against?</p>
Business Engagement Forum	<p>According to the Cabinet Office command paper (2020), the UK Government will also set up a business engagement forum. This will meet regularly to allow NI's businesses to 'put forward proposals and provide feedback on how to maximise the free flow of trade'.<sup>32</sup></p>	<p>According to the Cabinet Office (2020) the NI Executive will also be invited to the forum.<sup>33</sup></p>	<p>This has not been mentioned in the Protocol and appears to be more of UK/NI set up.</p>

<sup>32</sup> Ibid (p.13)

<sup>33</sup> Ibid (p.13)

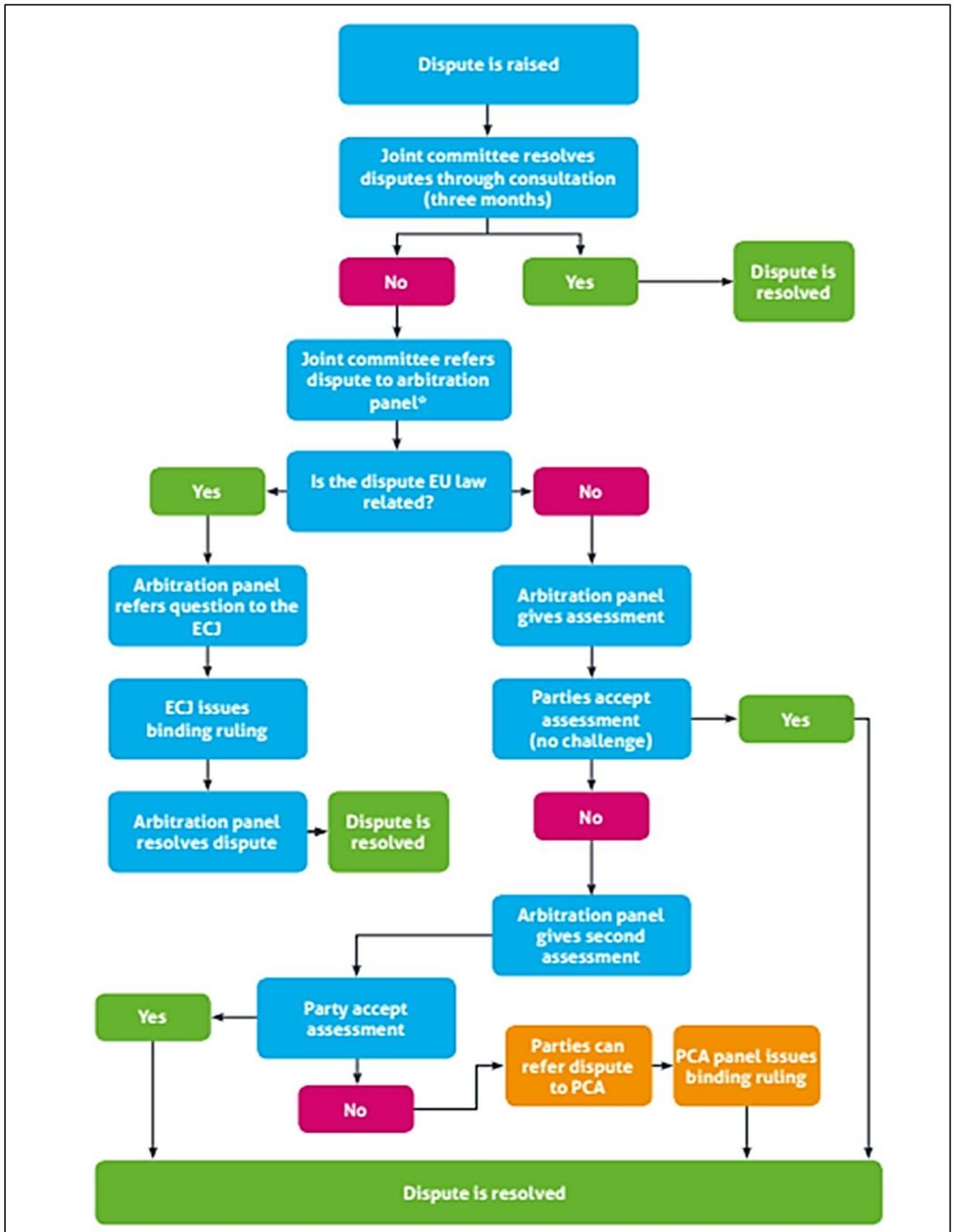
Mechanism	Role/ Responsibility	Representation	Consideration points
			<p>There is very little detail of its operation, attendance, roles etc. other than that NI businesses may 'put forward proposals and provide feedback'. However, this does not guarantee that the views of NI businesses and others affected by the Protocol will be reflected and considered during discussions at the Union level.</p> <p>Has the UK Government made guarantees that the views and opinions discussed in this forum will be represented at meetings of the Specialised Committee and Joint Committee?</p>

Figure 3 : UK-EU Joint Committee and sub-committees



Source: IfG (March 2020) [Implementing Brexit-role of the Joint Committee](#) (p.7).

Figure 4: Dispute settlement under the Withdrawal Agreement



Source: IfG (March 2020) [Implementing Brexit-role of the Joint Committee](#) (p.8).

## 5.1 Difference in operational opinion of the Joint Committee

While the Withdrawal Agreement and the Protocol both set out the operational procedures of the Joint Committee, there appears to be differences in opinion between the UK and EU on the role of the Joint Committee with regards to the Protocol. Table 4 below discusses some of these differences.

Table 4: Differences in operational opinion between UK and EU

UK	EU	Consideration points
<p>Michael Gove told the House of Commons Select Committee on the Future Relationship that the joint committee was an opportunity to “develop” the protocol.<sup>34</sup></p> <p>According to the Institute for Government (IfG), this suggests it could act as a forum for negotiating derogations and additional flexibilities in the application of EU law that might limit checks.<sup>35</sup></p>	<p>The EU has argued that the Joint Committee will only determine how, not if, EU rules will apply. The EU’s technical note on the implementation of the Protocol stated that</p> <p><i>the Protocol on Ireland/Northern Ireland cannot be renegotiated, including in the Joint Committee.</i><sup>36</sup></p> <p>According to the IfG, the EU is of the opinion that the protocol has already been agreed and the UK will be required to implement it to its full extent; the joint committee is not an opportunity to reopen it.<sup>37</sup></p>	<p>It appears agreement to the Protocol was made before a mutual understanding on its level of flexibility was established. Will the UK seek further clarity on this issue?</p> <p>Will NI not be able to seek derogations in areas under the Protocol that it experienced before Brexit?</p>
<p>Disputes have arisen over how the EU will exercise its right to be present where EU law is being applied (under Article 12 of the Protocol). The UK Government has refused the suggestion of permanent EU presence in NI. The UK has argued that this</p>	<p>The EU has argued that such a presence is necessary for officials to exercise their rights to be present where EU law is being applied (under Article 12 of the Protocol).<sup>39</sup></p>	<p>There are clearly different interpretations of Article 12 of the Protocol between the UK and NI. What will happen if agreement is not met on</p>

<sup>34</sup> Gove M, oral evidence, Select Committee on the Future Relationship, House of Commons, 11 March 2020, retrieved 18 May 2020, <https://committees.parliament.uk/work/138/progress-of-the-negotiations-on-the-uk-future-relationship-with-the-eu/publications>

<sup>35</sup> IfG (May 2020) Implementing Brexit- The Northern Ireland Protocol. Available <https://www.instituteforgovernment.org.uk/publications/implementing-brexit-northern-ireland-protocol>

<sup>36</sup> European Commission Task Force for Relations with the United Kingdom (April 2020) Technical note on the implementation of the protocol on Ireland/Northern Ireland. Available [https://ec.europa.eu/info/publications/technical-note-implementation-protocol-ireland-northern-ireland\\_en](https://ec.europa.eu/info/publications/technical-note-implementation-protocol-ireland-northern-ireland_en)

<sup>37</sup> IfG (May 2020) Implementing Brexit- The Northern Ireland Protocol. Available <https://www.instituteforgovernment.org.uk/publications/implementing-brexit-northern-ireland-protocol>

<sup>39</sup> Connelly T, ‘UK refuses EU request for Belfast Office’, *RTÉ*, 1 April 2020, [www.rte.ie/news/ireland/2020/0401/1127912-eu-belfast](http://www.rte.ie/news/ireland/2020/0401/1127912-eu-belfast) as referenced in the IfG (May 2020) Implementing Brexit – the Northern Ireland Protocol (p.24/25). Available <https://www.instituteforgovernment.org.uk/publications/implementing-brexit-northern-ireland-protocol>

<p><i>would risk being perceived as a return to joint controls and would be divisive in political and community terms. It is also unnecessary for the Protocol to work properly.<sup>38</sup></i></p>		<p>this at the Joint Committee? Could it go to arbitration?</p> <p>If so, how will the unique circumstances in NI be represented?</p> <p>There appears to be a split opinion amongst political parties in NI on this issue<sup>40</sup>. Will this be explored further or has a decision been made?</p> <p>If so, what level of involvement did NI have with the decision?</p>
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## 6. Final observations and consideration points

From the information contained in this paper it is clear that the potential impacts of the Ireland/Northern Ireland Protocol could be significant. Taking this into account we would make the following more general observations and highlight a number of associated issues and consideration points as follows.

### 6.1 The impacts of the Protocol here are directly related to the nature of the future UK-EU trading arrangements

There are clear references both within the Protocol (Article 13) itself and much of the commentary around it that the determining factor on the scale and extent of the measures within it that will ultimately be deployed is the status of the UK-EU trading relationship.

As this paper is being written, the UK and EU have just concluded their fourth round of negotiations in their efforts to secure a Free Trade Agreement. It is clear at this time that there remain significant areas of disagreement between both sides and there are indications that the negotiating process for a deal may run close to the deadline. This narrative has been further focussed by the UK's confirmation to the EU at the most recent Joint Committee meeting that they will not be seeking an extension to the

<sup>38</sup> Cabinet Office (2020) The UK's approach to the NI Protocol (p.43). Available

<https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol>

<sup>40</sup> *Belfast Telegraph* (3 May 2020), 'EU bid to keep office in Belfast is criticised by pro-Brexit parties',

[www.belfasttelegraph.co.uk/news/brexit/eu-bid-to-keep-office-in-belfast-is-criticised-by-pro-brexitparties-39177616.html](http://www.belfasttelegraph.co.uk/news/brexit/eu-bid-to-keep-office-in-belfast-is-criticised-by-pro-brexitparties-39177616.html)

transition period beyond 31<sup>st</sup> December, and in these circumstances, the Protocol will come into force on the 1<sup>st</sup> January 2021.

The actual nature of what will come into force here is still very much in play though. If the UK and EU negotiations deliver a Free Trade Agreement that turns out to be comprehensive and based on an ongoing commitment to maintain broadly similar/recognised standards across a range of areas, there may be grounds for elements of the Protocol to either be dropped or significantly watered down. Many of the Protocol elements designed to protect the EU Single Market, whilst enabling free movement of goods on the island of Ireland, would undoubtedly lose their rationale under such circumstances.

Less optimistically, if the UK and EU deliver a less comprehensive trade agreement before the end of 2020, which does not facilitate the easing or removal of elements of the Protocol, there remains the possibility that the act of agreement itself could form the basis for a co-operative and more relaxed application of the Protocol. That could be a potentially significant 'win' for Northern Ireland as it might facilitate the mitigation of some of the more challenging impacts that the operation of the Protocol may have here.

Conversely, in circumstances where no UK-EU trade agreement can be reached by the end of the year, the ability to either remove or dilute the impacts of challenging elements within the Protocol would be severely restricted and potentially impossible, unless they are rejected by the Assembly in 4 years time. Additionally, a break down in UK-EU relations as a result of no trade deal could severely limit goodwill in terms of interpretation of the Protocol and this could make operation of the Joint Committee challenging.

### **Consideration points**

- Is the lack of clarity on the potential outcome of the UK-EU trading arrangements creating operational challenges for DAERA in relation to the potential implementation of the Ireland/Northern Ireland Protocol?
- Is DAERA planning focussed on a potential 'worst case scenario' in the form of the full and rigid implementation of the Protocol in January?
- Has the formal rejection of an extension to the transition period changed DAERA priorities in relation to Protocol implementation?
- Has DAERA had either any input to or sight of the legislation which the UK Government is bringing forward before the end of 2020 to enable 'unfettered access' for Northern Ireland goods to the GB market.

## 6.2 The scope and nature of the Protocol – competing narratives and different starting points

As highlighted in section 5.1 of this paper the UK and EU are already at different starting points in relation to how the Ireland/Northern Ireland Protocol will work. This could be partly explained by the arguably ambiguous and vague language within the Protocol and wider Withdrawal Agreement of which it is a part. This point, as regards the ambiguity and lack of detail of the Protocol, was recently highlighted by the Irish Government's Minister for European Affairs, Helen McEntee TD:

*In terms of the Northern Ireland protocol, I am not saying there has been backsliding on it so far. However, what has been presented so far, is not adequate and does not provide enough information<sup>41</sup>.*

The challenge now, however, is that the ambiguous and vague language which delivered the Protocol, could potentially threaten the ability to deliver it. By way of example, the UK's position on the role of the Joint Committee, as outlined by Michael Gove, as an opportunity to "develop" the Protocol does not reflect the EU's opinion that the Protocol "cannot be renegotiated including in the Joint Committee"<sup>42</sup>

In addition, the EU has argued that an EU office in NI is necessary for officials to exercise their rights to be present where EU law is being applied (under Article 12 of the Protocol).<sup>43</sup> However, the UK is of the opinion that this is unnecessary for the Protocol to work and would risk being perceived as a return to joint controls.<sup>44</sup>

So far, two meetings of the Joint Committee have taken place (30 March and 12 June 2020). Details of the meetings have been provided through press statements by both the UK Cabinet Office ([first meeting](#) and [second meeting](#)) and the [European Commission](#). However, the detail provided, does not appear to suggest that these issues have been resolved.

### Consideration points

- What will happen if agreement is not met on the operation of the Joint Committee as an opportunity to "develop"?
- What will happen if agreement on a permanent EU presence in NI is not met?
- Would non-agreement on these issues result in arbitration?

<sup>41</sup> ITV (11 June 2020) NI protocol vague and lacking in detail on customs and tariffs – Minister <https://www.itv.com/news/2020-06-11/ni-protocol-vague-and-lacking-in-detail-on-customs-and-tariffs-minister/>

<sup>42</sup> European Commission Task Force for Relations with the United Kingdom (April 2020) Technical note on the implementation of the protocol on Ireland/Northern Ireland. Available [https://ec.europa.eu/info/publications/technical-note-implementation-protocol-ireland-northern-ireland\\_en](https://ec.europa.eu/info/publications/technical-note-implementation-protocol-ireland-northern-ireland_en)

<sup>43</sup> Connelly T, 'UK refuses EU request for Belfast Office', *RTÉ*, 1 April 2020, [www.rte.ie/news/ireland/2020/0401/1127912-eu-belfast](http://www.rte.ie/news/ireland/2020/0401/1127912-eu-belfast) as referenced in the IfG (May 2020) Implementing Brexit – the Northern Ireland Protocol (p.24/25). Available <https://www.instituteforgovernment.org.uk/publications/implementing-brexit-northern-ireland-protocol>

<sup>44</sup> Cabinet Office (2020) The UK's approach to the NI Protocol (p.43). Available <https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol>

### 6.3 The critical role of the Joint Committee – securing local access/influence and minimising the potential challenges

As evidenced throughout this paper, much of the detail around operational decisions linked to the Protocol has been left to the Joint Committee. Issues such as the adoption of new EU legislation, the definition of whether goods are ‘at risk’ of entering the EU Single Market and the setting of the ceiling on agricultural support that will be allowed here will have significant impacts. In that context there is a real need to ensure that a Northern Ireland voice is both present, heard, and listened to at Joint Committee level.

It is likely that this is and will be a key local concern with regards to the operation of the Joint Committee and the Protocol in general. As evidenced by the information in table 3, despite the range of bodies created by the Withdrawal Agreement, the Joint Committee is where ultimate decisions will be made in relation to the Protocol, notwithstanding any arbitration action. Whilst it has been encouraging that Executive Ministers have so far participated in the first<sup>45</sup> and second<sup>46</sup> Joint Committee meetings held on 30<sup>th</sup> March and 12<sup>th</sup> June, the fact remains that their presence was by invitation rather than right. Paragraph 9 of the New Decade New Approach deal document which led to the restoration of the Executive and Assembly in January includes the following commitment by the UK Government,

*...the Government will ensure that representatives from the Northern Ireland Executive are invited to be part of the UK delegation in any meetings of the UK-EU Specialised or Joint Committees discussing Northern Ireland specific matters which are also being attended by the Irish Government as part of the European Union’s delegation.*

This commitment is also restated in paragraph 10 of the UK Government’s Command Paper outlining their Approach to the Northern Ireland Protocol published in May 2020.

On first reading, this may appear to be a positive development for Executive involvement in the work of the Joint Committee, but we would once more highlight the potential deficiencies in this arrangement. There could in effect be a potential ‘double lock’ on Executive participation as this can only occur when the following conditions are met:

- Northern Ireland specific matters are being discussed; and
- The Irish Government are attending as part of the EU delegation.

It is realistically too early to assess if the risks here are genuine but clarification on definitions and application here would be useful and would also help to formalise a process that might otherwise appear to be based on trust and subjective assessment.

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<sup>45</sup> [First meeting of the Withdrawal Agreement Joint Committee, Readout, Cabinet Office, 30 March 2020](#)

<sup>46</sup> [Second meeting of the Withdrawal Agreement Joint Committee, Readout, Cabinet Office, 12 June 2020](#)

### Consideration points

- Does DAERA/the Executive have any insight or input into how ‘Northern Ireland specific matters’ is being defined by the UK Government? Is the EU similarly minded in terms of definition?
- Has the Executive been lobbying for the development of objective and transparent criteria to ensure appropriate Irish Government and Executive representation on the UK and EU delegations at Joint Committee meetings? Is this an issue that could be taken forward in the Specialised or Joint Committee?
- Is it DAERA’s understanding/expectation that **all new** proposed EU legislation that may be adopted in the Protocol dealing with issues pertaining to agriculture, fisheries or the environment, and that would be subject to Joint Committee approval, would qualify as being a ‘Northern Ireland specific matter’?
- Do DAERA officials expect to be involved in **all** discussions on **all** proposed EU legislation that may be adopted in the Protocol dealing with issues pertaining to agriculture, fisheries or the environment, at the Specialised Committee level?

## 6.4 The need for enhanced intelligence on EU legislative developments – what role can the NI Executive play?

The Protocol presents significant new challenges for DAERA and the Executive as a whole with regards to the amendment/replacement of existing EU legislation and the addition of new EU legislation, predominantly to Annex 2.

Whilst new EU legislation proposed for inclusion in the Protocol is subject to Joint Committee approval, there is no such process for amendment to or replacement of existing EU legislation within the Protocol, this will be replaced or updated automatically. This process is referred to as ‘dynamic alignment’.

The amendment or replacement of existing EU legislation within the Protocol presents particular concerns if the process results in changes that could have operational impacts on the ground in Northern Ireland. A particular concern here would be the potential that any changes could have on existing derogations (or variations) that we have benefitted from. The lack of EU representation that Northern Ireland will have at both elected and official level going forward raises questions around how any existing derogations could be extended, or new derogations secured.

Combined with a lack of clarity in terms of Executive representation and influence on the Joint Committee with regards to new EU legislation, there may be grounds for considering additional mechanisms to influence the design of both updated and new EU legislation at an ‘upstream’ point in their development. There would appear to be two distinct steps in any process as follows:

- **The collection of intelligence** - identifying what changes may be coming over the horizon and seeking to identify who is likely to be responsible, when and how;

- **Seeking to influence the policy direction** - assessing the impacts of proposed changes and seeking to either minimise negative impacts or maximise potential benefits by engaging with/lobbying the bodies/individuals making the decisions.

As figure 1 within this paper highlights there could well be potential for lobbying activity within the policy formulation stage of the EU's policy making process.

It is worth noting at this stage that a recent press article<sup>47</sup> estimated that there are between 25,000 and 30,000 professional lobbyists active within Brussels seeking to influence decisions made by the EU.

The Northern Ireland Executive has had a Brussels office<sup>48</sup> since 2010, which at present has a total staff of 13 people. The office has three key roles as follows:

- **To assist the Northern Ireland Executive** - furthering the aims of its Programme for Government through supporting Northern Ireland's engagement with the EU. To assist Northern Ireland Departments to contribute to EU policy development and implementation in relation to their core business areas and to increase Departmental engagement with elective European funding programmes.
- **Showcasing Northern Ireland in Europe** - regularly support Northern Ireland stakeholders in showcasing their talent, expertise, products and impact in Europe. Through offering Northern Ireland stakeholders the opportunity to use its premises in Brussels and to assist in the development of their Brussels programme, the office maintains a positive image of Northern Ireland business and engagement in Europe while helping to facilitate valuable and long-lasting connections.
- **EU Competitive Funding** – providing information and support to maximise funding drawdown.

### Consideration points

- Is the Executive giving active consideration to how the Brussels office can provide a means for identifying and influencing the EU legislative process in relation to both existing and potential new provisions within the Protocol?
- Is the Executive committed to maintaining the Brussels office or potentially expanding its role and staffing levels?
- Is the Executive developing a strategy around how best to influence the thinking of EU officials engaged in developing policy that is either in, or may be added to, the Protocol?
- Is the Executive developing a strategy around how best to influence the thinking of MEPs and Member States engaged in developing and scrutinising policy that is either in, or may be added to, the Protocol?

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<sup>47</sup> [EU factcheck website, 18 June 2020](#)

<sup>48</sup> [Northern Ireland Executive Brussels Office website, 18 June 2020](#)

## 6.5 Arbitration Panel and representation

The Joint Committee is responsible for handling disputes on the interpretation of the Withdrawal Agreement and the Protocol. If no solution is found, issues are to be resolved through an Arbitration Panel. A number of areas of conflict in relation to the operation of the Protocol have already surfaced between the EU and UK, as discussed in the previous section above. These areas will greatly affect the implementation of the Protocol in NI; therefore, it is important to consider the representation of NI on the Panel. Yet, the level of detail provided in the Withdrawal Agreement and Protocol itself does not suggest whether NI will have representation. (as discussed in table 3)

### **Consideration points**

- Has DAERA had discussion with the UK Government in relation to NI representation on the panel – including the list of 25 and the final panel of 5? How likely is it that there will be Northern Ireland representation on either the general panel or chairs panel?
- Who bears the cost of arbitration both in terms of process and outcomes - does either come from the NI Block Grant or would the UK Government cover all the costs?