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The Ireland / Northern Ireland Protocol: EU Response to 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.
- Since the previous paper provided to the Committee, the UK has elaborated on its concerns about the role of the CJEU and the EU has responded formally to the UK's Command Paper by publishing proposals which are, at the time of writing, under negotiation.
- The UK Government takes the view that the Protocol must be rebalanced and the role of the CJEU must be addressed. The EU has stated it will not renegotiate the Protocol and has instead issued a series of non-papers which address SPS, customs, facilitating engagement with Northern Ireland, and medicines.

1 Introduction

This briefing paper addresses a query from the Committee for the Executive Office. It is the second of two papers¹ which provide an overview of developments around the Ireland / Northern Ireland Protocol (the Protocol)² in 2021, since the issue of the UK Government Command Paper, "The Northern Ireland Protocol: the way forward".³ The paper provides an overview of events in the autumn, before summarising the EU's new set of proposals, which are in addition to the non-papers published in June. The paper concludes by briefly considering the role of the CJEU, State Aid and the Parliamentary Partnership Assembly (PPA).

2 The Ireland / Northern Ireland Protocol – Developments

This section briefly reviews events since the last paper was provided to the Committee. It should also be noted that, during this time, the appeal in the decision of *Allister and Ors*⁴ has been scheduled for hearing.

¹ E. Dellow-Perry [The Ireland / Northern Ireland Protocol – UK Government Command Paper](#) 16 September 2021 NIAR 194-2021

² [Revised Protocol to the Withdrawal Agreement.pdf \(publishing.service.gov.uk\)](#)

³ Secretary of State for Northern Ireland [The Northern Ireland Protocol: the way forward](#) 2021 CP 502

⁴ *In re Allister and Ors* [\[2021\] NIQB 64](#)

2.1 The UK Government

On 13 September the House of Lords debated⁵ the report which had been issued by the Sub Committee on the Ireland/Northern Ireland Protocol.⁶ In responding to the report on behalf of the Government, Lord Frost adhered to the position as laid out in the Command Paper, but also stated, with respect to the EU's anticipated response:

*A real renegotiation 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.*⁷

Subsequently, Lord Frost gave a statement to the House of Lords on 16 September which detailed the opportunities to be derived from Brexit.⁸ He laid out plans to conduct a review of EU law incorporated into UK statute by virtue of the Withdrawal Act. This is designed to address “the special status of retained EU law” and ensure that courts have “full ability to depart from EU case law”. A similar goal is to review the substantive content, with the eventual intention to “amend, to replace or to repeal all that retained EU law that is not right for the UK”. A tailored mechanism to replace such laws is under consideration.

Lord Frost gave examples of planned reforms to inherited legislation, taking note of the Taskforce on Innovation, Growth and Regulatory Reform (TIGRR) report. This involves regulation of personal data, clinical trials, vehicle standards and port services. Further reform will focus on the frequency of regulations, including a one-in two-out system which, Lord Frost argued, has been shown to “make a significant difference to how regulation recedes”. The speech also announced the creation of a new standing commission to receive ideas from any British citizen on how to repeal or improve regulation. The commission will only be able to recommend the reduction of regulatory burdens.

On 1 October 2021, the Cabinet Office and the Department for International Trade launched a dedicated hotline, established to help more British businesses to export to Europe.⁹

2.2 UK Government's Formal Response to the Sub-Committee's Report

The Government responded to the recommendations in the Committee's report on 28 September.¹⁰ It detailed the work done to implement the Protocol, agreed with the

⁵ HL Deb 13 September 2021 [Vol 814 Col 242GC](#)

⁶ House of Lords European Union Committee [The Protocol on Ireland / Northern Ireland](#) 9th Report, Session 2019–21, HL Paper 66 – see paper [NIAR 194-2021](#) 16 September 2021

⁷ As above, fn4.

⁸ HL Deb 16 September 2021 [Vol 814 Col 1533](#)

⁹ <https://www.gov.uk/government/news/dedicated-hotline-and-online-service-launched-for-uk-exporters> - last accessed on 5 November 2021

¹⁰ Government response to the Protocol on Ireland/Northern Ireland Sub-Committee's introductory report.

28 September 2021 <https://committees.parliament.uk/publications/7459/documents/78392/default/> last accessed on 5 November 2021

Committee's views in respect of checks between GB and NI, but preferred to address those issues through the structures set out in the Command Paper which, it noted, must be underpinned by an amended governance framework which removed the policing role of the EU institutions and CJEU. The Government also pointed to its unilateral action on grace periods as being helpful in terms of providing businesses with more certainty.¹¹ In terms of the Committee's conclusions around the opportunities of the Protocol, the response reiterated the Government's view that access to the Single Market does not compensate for the disruption to movements of goods between Great Britain and Northern Ireland, as many businesses depend on the UK for component parts and the trade between NI and GB is "significantly higher in value terms than trade between Northern Ireland and Ireland".¹²

In response to the Committee's recommendations on community relations within Northern Ireland, the Government reiterated its commitment to the Good Friday/Belfast Agreement (1998) (the 1998 Agreement) and to engaging with stakeholders. It argued that the Protocol had had a destabilising influence in Northern Ireland and that there was a need to find a balance in the arrangements which could provide more support.¹³

The Government agreed with the finding that a sense of democratic deficit had been established in Northern Ireland because of the way the legislation in the Protocol is applied. It argues that the way to address this is by improving the operation of the Joint Consultative Working Group and removing the role of the EU institutions, including the CJEU. However, the Government was not in favour of increased representation for Northern Ireland in the institutions of the EU.¹⁴

The Sub-Committee listed over 20 specific recommendations, ranging from granting EU access to UK customs IT systems and databases, to eliminating duties on unprocessed goods moving from the EU to GB and then on to NI. The Government said it had considered and suggested some of these proposals, but that the experience of implementing reform on those and similar issues had led it to propose more fundamental reform.¹⁵

The Sub-Committee recommended the UK and EU intensify their search for an agreed SPS solution, noting the difference between the parties when it came to the New Zealand/Swiss models.¹⁶ The Government referred to its proposals and willingness to enter into an additional SPS deal, and emphasised its refusal to commit to dynamic alignment, on either a temporary or permanent basis. A permanent basis because alignment is not an appealing proposal "as a matter of substantive policy", and

¹¹ As above, pg 4.

¹² As above, pg 6.

¹³ As above, pg 8.

¹⁴ As above, pg 10.

¹⁵ As above, pg 12.

¹⁶ As above, pg 13.

temporary because if the rules were displaced by a trade deal there would be no agreement ready to take its place.¹⁷

In terms of maximising Northern Ireland's influence, the Government identified the representation of Northern Ireland on the Common Frameworks programme, which should allow for managing regulatory divergence within the context of devolved competence. The Government reiterated its commitments around NI representatives attending meetings of the various institutions established under the Protocol.¹⁸ It rejected a permanent NI Office in Brussels as unnecessary.

In response to points raised about the use of Article 16, the Government expressed its preference to proceed by way of Article 13(8) of the Protocol, which allows the replacement or supplementation of the Protocol with further agreements between the parties. The Government referred to the need for the Protocol to be acceptable to both sides of the community in Northern Ireland, and cited the 28th September letter signed by the four unionist leaders in NI. It noted that:

*...however events develop this autumn, the continuance of any arrangements after 2024 must continue to be in the hands of the Northern Ireland institutions and it therefore makes sense for there to be a continuing debate about alternatives. We do not agree with the EU that the current Protocol is the only possible solution to the issues presented in Northern Ireland.*¹⁹

When discussing the proposals which the EU had made in June, in the context of further flexibilities in the Protocol, the Government said that the proposals “only dealt partially with some limited and specific issues” and more significant solutions were needed. It took a similar view of the non-papers issued by the EU, using the example of the derogation on guide dogs which “may not be practically possible to implement, and would leave significant barriers for those taking pets and assistance dogs to Northern Ireland”. Similarly, on medicines, the EU proposal is described as “complex to operate, onerous, and would not deal at all with the issues that stakeholders have raised”.²⁰

2.3 Lord Frost's Speech: Lisbon

In advance of the notified date of the EU's publication of the non-papers, Lord Frost made a speech in Lisbon, which discussed the “significant problem” of Northern Ireland, the Northern Ireland Protocol and the UK's future outside of the EU.²¹

In discussing how European relationships will change, Lord Frost pointed out that the internal power struggles of the EU were no longer a concern of the UK, and this would have an impact on how the UK perceived international relations. Countries with which

¹⁷ As above, pg 14.

¹⁸ As above, pg 14.

¹⁹ As above, pg 17.

²⁰ As above, pg 13.

²¹ Lord Frost [Observations on the present state of the nation](#) 12 October 2021 last accessed 5 November.

the UK has direct, maritime trade are likely to be of most importance. In terms of geopolitics, Lord Frost said that the UK would work with transatlantic countries but also with Central and Eastern Europe.

Lord Frost also referred to the UK's exit from the EU as promoting healthy competition, pointing to the UK's moves to reform state aid and work already carried out around deregulation. Arguing that populism was not necessarily a negative, the speech referred to policy areas in which UK citizens would now have more influence – including trade, industrial and migration policy.

Lord Frost pointed to ways the UK and the EU had worked well together in the past, and that competition between the two could be a healthy thing. He put forward the UK's perspective on the EU's actions, criticising tensions over the vaccine ban, blocking the UK's entry to Horizon and Galileo space programmes, threats to energy supplies, bans on the import of UK shellfish and resorting to legal action over the Northern Ireland Protocol. Lord Frost also stated the UK's desire for friendly relations between the two.

The speech then focused on the Northern Ireland Protocol. Lord Frost referred to “widespread feeling” in the UK that the EU had used NI to keep the UK partially aligned to the bloc, and that it was possible to return to an international agreement and renegotiate it. Arguing that the Protocol is not working and has lost the consent of one community, Lord Frost said it was threatening the 1998 Agreement and therefore had to change.

The speech continued to state that balance was essential to the 1998 Agreement. Lord Frost said:

That balance is being shredded by the way this Protocol is working. The fundamental difficulty is that we are being asked to run a full-scale external boundary of the EU through the centre of our country, to apply EU law without consent in part of it, and to have any dispute on these arrangements settled in the court of one of the parties. The way this is happening is disrupting ordinary lives, damaging large and small businesses, and causing serious turbulence to the institutions of the Belfast (Good Friday) Agreement within Northern Ireland.²²

Lord Frost went on to state that the proposals put forward in July are compromise measures that “work with the grain” of the Protocol, and a new legal text of the Protocol, reflecting the proposals in the Command Paper, had been shared with the Commission. Some details were provided, as follows:

- The Protocol was drafted before relations between the UK and EU had agreed their future relationship. A new Protocol could be drafted to be brought in line with those arrangements.

²² As above, fn 20

- Governance disputes will be referred to international arbitration rather than the European Court of Justice. Lord Frost also mentioned concerns about EU legislation being passed for NI, but did not provide detail on how that would be addressed.

The speech concluded with a call to “agree agreements which we will both implement and which can in fact be implemented, because they command acceptance and respect across Northern Ireland”.²³

At the time of writing, the legal text referred to has not been published. When asked about the possibility of publication Lord Frost responded that the legal text would be published if it is useful “to the negotiating process between us and the European Union”.²⁴

3 The EU Non-Papers

On 13 October the EU published four non-papers²⁵ which contained proposals for “bespoke” arrangements intended to respond to the difficulties faced in Northern Ireland by “further facilitating the movement of goods”. These papers were followed by engagement between the EU and UK, as well as a visit from Maroš Šefčovič to NI. The measures were in addition to the packages put forward in June. The non-papers have been numbered for the purposes of this paper, but no particular order is implied. The Commission also released several factsheets which detailed examples of flexibilities already identified and examples of how the mechanisms in NP1-4 would work.

3.1 Non-Paper: Engagement with Northern Ireland Stakeholders and Authorities

This non-paper (NP1)²⁶ addresses the UK’s request to normalise the governance of the Protocol, which “implied the renegotiation of several provisions of the Protocol”. It notes that, as part of the request, the UK was looking for ways to engage NI stakeholders in shaping legislation which would apply to NI. Taking the view that it is primarily the role of the UK Government to engage NI authorities in the Withdrawal Agreement/Protocol bodies and any solution should be in line with the UK’s constitutional order; the EU put forward ways of engaging with stakeholders and authorities within the framework of the Protocol, based on discussions with NI civic society and business, which are aimed to

²³ As above, fn 20.

²⁴ HL Deb [21 October 2021](#) Vol 815 Col 272

²⁵ A non-paper is an informal document, usually without explicit attribution, put forward in closed negotiations within EU institutions, notably the Council of Ministers, in order to seek agreement on some contentious procedural or policy issue. Often circulated by the presidency of the Council, an individual member state or the European Commission, non-papers seek to test the reaction of other parties to possible solutions, without necessarily committing the proposer or reflecting his or her public position up to that point.” A. Teasdale, T Bainbridge [The Penguin Companion to the European Union](#) last accessed 5 November 2021.

²⁶ European Commission Non Paper [Protocol on Ireland and Northern Ireland - Non-Paper - Engagement with Northern Ireland stakeholders and authorities](#) 13 October 2021, last accessed 5th November 2021

ensure greater transparency and that Union measures take account of implications for Northern Ireland. There are six strands:

- **Increasing transparency**

- The Commission is establishing a website which will show EU legislation applicable in Northern Ireland;
- NI stakeholders can express views in public consultations held by the Commission, information about these can be included on the website.

- **The work of the Joint Consultative Working Group (JCWG)**

- With the agreement of the UK, setting up structured groups to discuss aspects of EU law which are important for the implementation of the Protocol.
- Lifting confidentiality requirements for meetings of the JCWG where, e.g. certain legislative measures are under discussion or expert evidence is being given.
- Also notes the UK Government “needs to play a crucial role”.

- **Fora for structured dialogue with Northern Ireland stakeholders**

- Proposed structured dialogue between NI stakeholders, Union experts and their UK counterparts, including NI authorities, to establish a dedicated space for the exchange of views.
- This exchange will have the aim of improving understanding of the rules made applicable by the Protocol, and of their impact on Northern Ireland.

- **Structured dialogue between stakeholders and co-chairs of the Joint Committee**

- NP1 states that this dialogue already takes place, but if organised in a more structured way this would benefit stakeholders in having their voice heard.

- **Participation of the stakeholders at the Specialised Committee**

- The Specialised Committee could be used as a platform to engage with wider NI civic society and business.

- **Stronger link between the Northern Ireland Assembly and the EU-UK Parliamentary Partnership Assembly.**

- NP1 identifies the possibility of a Northern Ireland substructure in the Parliamentary Partnership Assembly, established under the Withdrawal Agreement.

3.2 Non-Paper: Customs

This non-paper (NP2)²⁷ addresses customs procedures and requirements which apply to GB-NI trade and create administrative burdens and compliance costs. NP2 refers to the definition of goods at risk and the various flexibilities around goods subject to commercial processing, authorised trader schemes and goods which are not subject to commercial processing.

NP2 notes that effective control of the arrangements in the Irish Sea is of the utmost importance to the EU. Accordingly, it proposes certain adjustments to the current framework which are predicated on certain conditions and guarantees being met by the UK.

- **Conditions**

- Demonstrate that the existing flexibilities have been fully implemented and have not addressed the issues faced by traders.
- The solutions should not require a renegotiation of the Protocol, and should ensure stability, predictability and legal certainty.
- The solutions should reduce checks and controls without threatening the integrity of the Single Market.
- The UK should implement what has been agreed, the main open issues include:
 - Implementation of the EU's prohibitions and restrictions on export of goods from NI to GB (including dual-use items, cultural goods and waste shipment).
 - Implementation of customs legislation and the unilateral declaration on unfettered access for goods from NI to GB.
 - Correct implementation of customs legislation applying to business-to-business parcels.
 - Full and real-time access for EU representatives to UK IT systems to carry out their monitoring duties as laid out in the Joint Committee Decision 6/2020 of 17 December 2020.
- The UK should commit to implementing appropriate monitoring and enforcement measures for adjustments, and to sharing that additional data with EU representatives.

²⁷ European Commission Non Paper [Protocol on Ireland and Northern Ireland – Non Paper – Customs](#) 13 October 2021 last accessed 5 November 2021.

- The UK should also commit to continue support provided to business, especially the Trader Support Service.
- **Possible Solutions**
- Development of the goods not at risk concept, to cover more products and accompanied by additional facilitation.
 - The scope of the scheme could be informed using criteria around the status of the parties to a transaction and the nature of the good involved.
 - The scheme should be sufficiently robust to ensure that goods moved to NI under it would be subject to final consumption in NI. EU representatives and market surveillance authorities should play an active role in monitoring the scheme.
 - This may involve amending EU legislation or Joint Committee Decisions, and would require a review clause and a termination clause in case of non-compliance, as well as full use of the relevant alert mechanisms.

3.3 Non Paper on Sanitary and Phytosanitary (SPS) Issues

The Non Paper (NP3)²⁸ states that the implementation of the Protocol in respect of SPS measures has been unsatisfactory. The EU SPS laws have either been incorrectly applied or not applied at all, and the UK Government and NI stakeholders have identified disproportionately high administrative burdens between GB-NI.

- **Possible Solution**
- Simplified access, which would reduce (but not eliminate) certification and checks, is subject to a number of pre conditions (see below). It entails:
 - A simplified certificate for mixed retail lorry loads (unless otherwise restricted);
 - Reduced physical checks as part of an overall risk management system;
- **Conditions**
 - If the bespoke solution would include meat products subject to restrictions, basic production requirements in GB would need to remain aligned with the EU;
 - Products should be effectively labelled, e.g. “for sale only in the United Kingdom”;

²⁸ European Commission Non Paper [Non Papers on Sanitary and Phytosanitary \(SPS\) Issues](#) 13 October 2021

- These facilitations would apply only to retail goods produced from primary products from the UK in accordance with the Trade and Cooperation Agreement and, similarly, only available to authorised traders.
- A channelling procedure, with special monitoring, will apply.
- Double listing of points of departure and points of destination, with means of verification and a withdrawal procedure, will be necessary.

NP3 also lays out structural safeguards, which include a review clause, a rapid reaction mechanism and the opportunity for the EU to take unilateral action, such as suspending the facilitation for certain products. Market surveillance and a compliance verification mechanism would also be required.

NP3 also includes a copy of the flexibilities put forward in March, discussed in the previous Briefing Paper.

3.4 Non-Paper: Medicines

The Non-Paper on medicines (NP4)²⁹ updates and replaces the previous non-paper put forward in June and focuses on a long term solution for the supply of medicines from or through Great Britain to Northern Ireland. It addresses the issue of UK authorisations, which allow medicine approved in the UK to be sold in the EU (specifically, Ireland, Cyprus and Malta) and have been the subject of previous grace periods.

- **Solutions – Localisation of Regulatory Compliance Functions for Northern Ireland only medicines**

- Permanent derogation from the relevant provisions of the framework directive which would allow compliance functions for the supply of medicines to Northern Ireland only to be based in GB.
- If batch testing has been carried out in the EU, it is not necessary to repeat it if it is exported to GB to then be sold in Northern Ireland, as long as medicines have undergone the necessary testing and have the appropriate paperwork.

- **Conditions**

- The UK fully applies relevant EU law on medicines when issuing national marketing authorisations for Northern Ireland, and the marketing authorisation should contain a legal prohibition of (re)sale outside NI.
- Safety features required under EU law should be placed on each pack;

²⁹ European Commission Non Paper [Protocol On Ireland and Northern Ireland Non-Paper Medicines](#) 13 Oct 2021 last accessed 5th November 2021

- UK should ensure and demonstrate implementation of the Falsified Medicines Directive in NI.
 - Persons importing medicine into NI should hold a wholesale distribution authorisation issued in accordance with EU law. The normal checks should be performed either in the EU / GB.
 - Enforcement and supervision by UK authorities should be carried out in accordance with applicable EU law.
 - Enhanced enforcement by UK authorities to ensure that the medicines remain in NI and are not further distributed in the EU, including notification of medicines covered by the authorisations, supervision of wholesalers and operators.
 - The Commission will carry out inspections to verify compliance.
- **Solutions – Operation of the MRP/DCP in respect of Northern Ireland**
- The MRP/DCP is the authorisation process for medicines sold in Northern Ireland and the EU. Stakeholder feedback has focussed on the need to provide a single medicine pack and information leaflet which will comply with both UK and EU requirements.
 - Changes to marketing authorisation are processed through the EU Reference Member State. The UK should recognise those assessments and update its national authorisation for Northern Ireland accordingly. EU and UK authorities should work together to ensure consistency.
- **Solutions – Investigational Medicinal Products**
- A derogation from import requirements would allow clinical trial sites or sponsors in NI to continue to use investigational medicinal products supplied from or through GB.
 - These solutions are conditional upon the same requirements as laid out in respect of compliance functions (above).
- **Solutions – Requirements relating to the safety features for medicinal products for human use.**
- Safety features (anti-tampering and unique identifier) are mandatory for medicines covered by EU law. There is a requirement to deactivate the unique identifier for medicines going EU-UK. The proposed solution is to continue the derogation from this requirement for a further three years.
 - The EU repository system should be adapted to ensure that an alert is generated when the medicine is verified for sale outside NI, Cyprus, Malta or Ireland.

The Commission also stated its willingness to continue discussions around solutions for veterinary medicines.

Implementation would be through amendment of EU legislation. EU acts implementing the solutions would be made applicable to the UK (in respect of NI) by including them in Annex 2 to the Protocol, and notes the need for certainty given the expiry date of the relevant grace period.

4 Comparing the Proposals

The table overleaf outlines the EU's NP1-4 against the UK's Command Paper and the proposals the EU had issued or republished in July.

	EU Proposals - June	Command Paper	EU Proposals - October
Customs	Addressing issues UK had raised on Tariff Rate Quotas, the EU said that further evidence of the problem was required, as it had only been recently raised by the UK.	Customs to be managed by building on the "at risk" concept in the Protocol to apply more widely to goods crossing in to Northern Ireland, GB traders who move goods to NI to declare whether their goods are ultimately bound for Ireland - "honesty box" proposals.	Customs to be managed by expanding the definition of "goods not at risk" and simplifying criteria which, taken together with market surveillance measures, would ensure goods consumed in Northern Ireland would fall within the "not at risk" criteria.
Sanitary and Phytosanitary Issues (SPS)	Issued non-papers dealing with assistance dogs, the identification and transport of animals and products of animal origin.	The "honesty box" arrangements apply. EG in agrifood, shipments which are ultimately bound for Ireland would use the same process as outlined for customs, but for SPS checks, an "appropriate regime sought for plants and seeds".	A bespoke solution for GB-NI retail goods which allows simplified access, with preconditions around e.g. data sharing and staffing Border Control Posts. It is conditional on a number of criteria including, e.g. alignment on production regulations if chilled meats fall into the category of goods granted simplified access.
Medicines	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.	Proposed that medicines be removed from the Protocol altogether and notes that June EU proposals did not solve the issues.	Compliance functions for NI medicines can be based in GB. Medicines can be brought from EU to NI through GB without additional manufacturing import authorisation. Addresses safety features and use of investigational medical products.
Engagement with Northern Ireland Stakeholders and Authorities	No comment made on this point, in previous commentary the EU has suggested the UK rely on internal procedures to disseminate information from the Joint Committee etc.	Argued that more account should be taken of Northern Ireland.	Commission to establish a website showing EU legislation applicable in NI, and any consultations on relevant proposals. <ul style="list-style-type: none"> - JCWG should have sub-groups to discuss technical issues, and more information on the meetings should be published. - Formalised fora to allow structured dialogue between NI stakeholders, Union bodies and their UK counterparts. - Participation by NI stakeholders at Specialised Committee. - Specific Northern Ireland sub-structure in the Parliamentary Partnership Assembly.

Other issues raised in the Command Paper

The Command Paper published by the UK Government in July raised issues around several points which were not explicitly addressed in the Non-Papers from the Commission. The most obvious absence is commentary on the role of the CJEU, but NP 1-4 also did not address points raised in the Command Paper about, for example, burdensome data collection on export declarations for goods travelling from GB to NI.³⁰ The dual regulatory scheme was not directly discussed, and neither was subsidy control (i.e state aid) or the EU's view of the "honesty box" proposals. Some responses can be implied where alternative arrangements have been proposed, but it cannot be said that the non-papers addressed the Command Paper line-for-line.

UK Government Response to NP 1-4

At the time of writing, the UK Government has not issued a formal response to the proposals. Negotiations have been taking place at an official level, with meetings between Lord Frost and Maroš Šefčovič.³¹ Although no formal timetable has been published, the UK Government has called for solutions to be developed rapidly.

Lord Frost answered questions in the House of Lords on 21 October.³² When asked about his recent description of himself as "keeping the other side on the hop, cultivating uncertainty with how we are going to react" he replied:

My Lords, I did indeed say that, because it is my job to get the best outcome for this country in the negotiations that I am charged with conducting. That is what we did over the previous 18 months and that is what I intend to do now. I do not think it would be particularly good tactics to reveal to the other side exactly what we are going to do or how we are going to go about it.

Lord Frost also commented on trade between NI and Ireland, as well as trade between GB and NI. He quoted figures from the Irish Central Statistics Office showing exports from Ireland to NI had increased 35%, and had increased 50% from NI to Ireland.³³ Responses to questions also confirmed that NI representatives had been consulted when preparing the Command Paper, but not in reference to the legal text, because that was merely putting the proposals in the Command Paper into "legal form".

On questions which focused on the EU non-papers, Lord Frost confirmed his team was working with the Commission to understand the detail behind the proposals. He welcomed the EU's proposals to change its own laws to acknowledge the special

³⁰ [Northern Ireland Protocol: the way forward \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

³¹ [Lord Frost meeting with Vice President Šefčovič: Friday 15 October - GOV.UK \(www.gov.uk\)](https://www.gov.uk), last accessed 5 November

³² HL Deb [21 October 2021](#), Vol 815 Col 264

³³ Central Statistics Office [Goods Exports and Imports August 2021 - CSO - Central Statistics Office](#), last accessed 5 November 2021 the figures quoted by Lord Frost appear to slightly underestimate the increase as laid out in the release. Exports from Ireland to NI rose by 47%, and increased 61% from NI to Ireland.

circumstances in NI – something which had been previously considered impossible. He repeated the UK's reluctance to use Article 16.

Subsequently, Lord Frost appeared before the European Scrutiny Committee to discuss the Protocol. He stated that the proposals from the EU did not go far enough, and both parties were engaged in negotiations to try and reach agreement. Lord Frost stated that “they do not deal with the fundamental parameters of how the system works, our view is you have got to deal with those parameters, or you will not get something that's going to last.”³⁴

During the first week of November, Lord Frost and Maroš Šefčovič met for further discussions on the Protocol. Progress was limited, and the possibility that the UK would invoke Article 16 was raised again.³⁵

4 The Protocol, State Aid and Governance

During the summer and autumn months, key issues have emerged which may be of interest to the Committee, and more detail on these has been provided below.

4.1 The Role of the CJEU in the Protocol

The role of the Court of Justice of the European Union (“CJEU”) in the Protocol is two-fold. Article 12(4) of the Protocol provides that the institutions of the EU will have the powers conferred on them by Union law. This specifically includes the CJEU, which “shall have the jurisdiction provided for in the Treaties”. These powers apply in terms of

- The right to be present during activities related to the implementation of the Protocol (Art 12(2));
- Customs and movement of goods (Article 5);
- Technical regulations, assessments, registrations, certificates, approvals and authorisations (Article 7);
- VAT and excise (Article 8);
- Single Electricity Market (Article 9);
- State Aid (Article 10).

The CJEU will have full powers under the provisions of the Protocol identified above. This means that it can review the legality of the UK's actions in respect of Northern

³⁴ HC Deb 122 European Scrutiny Committee 25 October 2021 [Q132](#)

³⁵ BBC News Brexit: [‘Serious consequences’ if Article 16 triggered, warns EU](#) 6 November 2021, last accessed 8 November 2021

Ireland, enforce compliance and provide rulings on matters of EU law at the request of national courts.³⁶

Article 13(1) of the Protocol provides that the dispute resolution procedure under the Withdrawal Agreement shall apply to the Protocol. This creates a role for the CJEU in the interpretation of EU law. Where a dispute between the parties focuses on the interpretation of a matter of EU law, the CJEU will be asked to provide a ruling on that point.

The UK position, as expressed in the Command Paper, is that the dispute resolution process should be something similar to that in the EU-UK Trade and Cooperation Agreement (TCA), which is an arbitration process. The EU has made no proposals to address the dispute resolution process, and has said that the role of the CJEU is essential. There is a view that removing the jurisdiction of the CJEU is an unrealistic aim.³⁷ Appearing before the European Union Scrutiny Committee on 25 October 2021, Lord Frost stated:

*We are not interested in arrangements that keep the court in by some other name at one remove or in some other way. It is highly unusual in an international treaty to have disputes settled in the courts of one of the parties, and that is the fundamental principle that we take into this, and the fundamental thing we need to remove from the arrangements going forward.*³⁸

Lord Frost later clarified that the UK wanted:

No role for the Court as the final arbiter of disputes, as the summit of a system that imposes EU law—no role for the direct settlement of disputes between us.

The CJEU has historically been uncomfortable with interpretation of EU legal principles by international tribunals,³⁹ perceiving it as a threat to homogeneous application of the EU legal order. However, such bodies cannot ordinarily make a reference to the Court for a ruling on a point of EU law, as they are not courts of a Member State. This was considered in the very early days of the UK's exit from the EU, as reflected in a Lords' Select Committee 2018 report on Dispute Resolution and Enforcement after Brexit.⁴⁰

In relation to the Court's role in the Withdrawal Agreement dispute resolution process, the report considered that the alternatives could be referrals to the EFTA court, arbitration or a separate, UK court to deal with international issues.⁴¹ This report was

³⁶ Court of Justice of the European Union *The Court of Justice of the European Union – ensuring the protection of EU law August 2021*

³⁷ BM Araujo [Northern Ireland protocol: here's what a compromise between EU and UK could look like](#) theconversation.com last accessed 5th November 2021.

³⁸ As above, fn 33 at Q123

³⁹ M Parish [International Courts and the European Legal Order](#) European Journal of International Law 2012 Vol.23 No.1

⁴⁰ European Union Committee [Dispute resolution and enforcement after Brexit](#) 15th Report of Session 2017-19 - published 3 May 2018 - HL Paper 130

⁴¹ As above, fn 38.

issued against a very different backdrop than exists at present, but does reflect early UK concerns about the role of the CJEU.

4.2 State Aid

Article 10 of the Protocol applies to “measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol” – i.e. measures affecting electricity, trade in goods and agricultural subsidies beyond a certain level. Those measures are subject to the suspension obligation, prior approval by the Commission and supervision by the CJEU, just as they would be for a Member State.⁴²

4.2.1 The Subsidy Control Bill

The Trade and Cooperation Agreement requires both the UK and the EU to have an “effective system of subsidy control and an independent body to oversee it”. The UK Government has passed legislation clarifying that subsidy control is a reserved matter,⁴³ and is in the process of passing the Subsidy Control Bill.⁴⁴ At the same time, there are concerns about EU “reach back” through provisions of the NI Protocol.

The Subsidy Control Bill will replace EU state aid rules in the UK. Essentially, the Bill sets out the principles which apply to subsidies, prohibits those which are not compliant with the UK’s international obligations, and sets out administrative requirements. It excludes some low-risk subsidies from its requirements, and introduces a detailed assessment for high-risk subsidies. The Bill does not target a specific industry, leaving decision making power in the hands of the granting authority. The Government is empowered to issue guidance on the matter, and the Subsidy Advice Unit is established to provide advice on subsidies to granting authorities. The Bill does not apply to subsidies on goods and electricity in Northern Ireland, which are dealt with by Article 10 of the Protocol.

The EU state aid regime, and that proposed in the Subsidy Control Bill, have different approaches. Under the EU system, all state aid “is prohibited unless it can be justified and approved”.⁴⁵ Under the scheme put forward in the Bill, the process would be more permissive, in essence only restraining state aid if it caused harm or broke certain rules.⁴⁶

As a point of interest, the Subsidy Control Bill also imports the Azores principles into UK law. As seen in the context of air passenger duty in Northern Ireland,⁴⁷ these require the Executive to meet the full financial consequences of the decision to devolve

⁴² G. Peretz Q.C. [The UK’s Proposed Revisions to Article 10 of the Northern Ireland Protocol: a Sensible Basis for Negotiation](#) 2 September 2021, UK State Aid Law Association, last accessed 5 November 2021.

⁴³ Internal Market Act (2020) s.52.

⁴⁴ [Subsidy Control Bill](#) last accessed 5 November 2021.

⁴⁵ House of Commons Library [Subsidy Control Bill 2021-22](#) CBP 9270

⁴⁶ As above, fn 44.

⁴⁷ NI Assembly [Air Passenger Duty Setting of Rate Bill – Explanatory and Financial Memorandum](#) – last accessed 5 November 2021

the power to set air passenger duty rates. Similarly, if Wales was to lower its corporation tax rate under the Subsidy Control Bill, it would have to bear the impact to the block grant without seeking additional funds.⁴⁸

4.2.2 Reach-back

“Reach-back” refers to concerns that, through its role in the Northern Ireland Protocol, the EU would affect UK plans to implement changes after leaving the EU. It is most typically used in relation to state aid under the current arrangements, because the provisions of Article 10 affect subsidies which are granted in (e.g.) England but impact trade between Northern Ireland and the EU.

Concerns have been expressed about the possibility for EU reach-back through state aid law.⁴⁹ Article 10’s scope includes goods traded in Northern Ireland, which could impact subsidised businesses in GB. It also allows for the possibility that the UK could face legal proceedings if decisions approved by the Commission are challenged by affected parties.⁵⁰

In its notice to stakeholders,⁵¹ published on 18th January 2021, the European Commission expressed its view, stating that Article 10 could apply to subsidy measures “as long as it can be established that the support is liable to affect the relevant trade” (i.e. between NI and the EU). This notice confirmed a previous declaration on the extent of Article 10, that the effect on trade could not be presumed or hypothetical, and was fully in line with EU case law. The Commission went on to clarify its view that aid given to a business in GB which trades with Northern Ireland could fall within Article 10, and that waiving tariff debt, or reimbursing traders who faced issues because of checks between GB and NI, must, if not otherwise exempt, conform to the *de minimis* threshold, or be subject to notification.⁵²

In the Command Paper, the UK Government stated that the state aid provisions in the Protocol had been drawn up in advance of the TCA, and that Northern Ireland should be brought under those arrangements; with an extra element of consultation and/or referral powers in recognition of NI’s access to the Single Market.

⁴⁸ The Azores judgement created uncertainty around the devolution of corporation tax to Northern Ireland.

<https://eurelationslaw.com/blog/the-subsidy-control-bill-and-devolution-a-balanced-regime> AND THAT NIAC INQUIRY

⁴⁹ J Weber [UK’S PROPOSED REVISIONS TO ARTICLE 10 OF NORTHERN IRELAND PROTOCOL – A Sensible Basis for Negotiation](#) 1 September 2021, last accessed 5 November 2021.

⁵⁰ For more detail, please see C. Pidgeon [UK Exit from the EU Briefing Paper Series: Withdrawal Agreement, Protocol and Political Declaration – Potential implications for state aid in Northern Ireland \(niassembly.gov.uk\)](#) NIAR 157-20

⁵¹ European Commission [Notice to Stakeholders: Withdrawal of the United Kingdom and EU rules in the field of State Aid](#). 18 January 2021, last accessed 5 November.

⁵² G. Peretz QC [EU Commission issues “Notice to Stakeholders” on Brexit and State aid](#) UK State Aid Law Association 21 January 2021

4.3 Scrutiny – the Parliamentary Partnership Assembly

The Parliamentary Partnership Assembly (PPA) is a body intended to scrutinise the work of the Partnership Council in implementing the TCA and associated agreements. Once established, the PPA:

- (a) may request relevant information regarding the implementation of this Agreement [the EU-UK Trade and Cooperation Agreement] and any supplementing agreement from the Partnership Council, which shall then supply that Assembly with the requested information;
- (b) shall be informed of the decisions and recommendations of the Partnership Council; and
- (c) may make recommendations to the Partnership Council.⁵³

There is a settled view that the operational details of the PPA are a matter for the parties' respective Parliaments.⁵⁴ The powers of the PPA in calling for information and making recommendations to the Council give it an important role in terms of both influence and scrutiny.

At the time of writing, the European Parliament has named the members of its proposed delegation,⁵⁵ but the UK has yet to do so. All devolved legislatures have expressed a desire to be involved in the PPA. In the Lords, the Government was asked why more progress has not been made in developing the UK side of the PPA, but the Government takes the view that this is a matter for Parliament to move forward, and progress is being made.⁵⁶

Sir Oliver Heald and Lord Kinnoull have been “informally tasked” by the authorities of the House of Commons and Lords, respectively, to develop the position of the UK Parliament on the PPA. Committees from devolved legislatures have written to express their desire to be involved in the PPA. In a written response, Sir Heald and Lord Kinoull confirmed that discussions were ongoing and that “we will...seek to involve the Scottish Parliament, the Northern Ireland Assembly and the Welsh Senedd in the work of the PPA.”⁵⁷

4.3.1 NI engagement with the PPA

Given the EU's proposals, a dedicated sub-structure dealing with the Protocol and its implementation could potentially allow for more effective engagement with the

⁵³ [Trade and Cooperation Agreement](#) Part One Title III Article INST.5 last accessed 5 November 2021.

⁵⁴ This is the view of the Chancellor of the Duchy of Lancaster as laid out in his letter to the Speaker of [14 August 2020](#). See also HL Deb [12th July 2021](#) Vol 813 Col 1545.

⁵⁵ European Parliament Delegations [D-UK](#) last accessed 5 November 2021

⁵⁶ As above, fn 52.

⁵⁷ [Joint response received by the Committee for the Executive Office](#) from Sir Oliver Heald and Lord Kinnoull to a joint letter of devolved committees 25 August 2021 relating to the Parliamentary Partnership Assembly. 21 September 2021; last accessed 5 November 2021.

Parliamentary Partnership Assembly. As there are only 35 places for UK representatives any devolved representation in the UK delegation is likely to be limited. It must further be noted that the wording of the Article does appear to require that representatives be selected from the EU or Westminster Parliament.⁵⁸

The Seanad established a Special Select Committee on the Withdrawal of the United Kingdom from the European Union.⁵⁹ Its interim report, in July 2021, included the following recommendation:

The Committee also agrees that it is essential for Northern Ireland voices to be adequately heard in the dialogue around Brexit and recommends that the establishment of a dedicated structure between the Northern Ireland Assembly and the European Parliament be considered, in addition to any other necessary forum, to facilitate full communication and representation of the voices of those most impacted by Brexit.⁶⁰

The relevance of engagement, representation and scrutiny via the PPA is further highlighted by the governance structure around the TCA. There are 32 governance bodies, 25 of which are committees. These are overseen by the Partnership Council, which, in its turn, is scrutinised by the Parliamentary Partnership Assembly. This sits alongside the governance structures around the Withdrawal Agreement, which deal with the NI Protocol.⁶¹

The UK had not responded formally to the proposals for greater engagement with Northern Ireland but, before the non-papers had been issued, Lord Frost stated:

I think the EU should exercise caution in suggesting that Northern Ireland parties or political opinion should take part in the EU's own institutions and decision-making procedures in this area: I do not think that would be consistent with the sort of arrangement we want in the future. The protocol is a treaty between two parties, the UK and the EU, and supporting arrangements need to be consistent with that.⁶²

In May 2021, Lord Frost wrote to the devolved administrations to explain how representatives from their governments would engage with the Partnership Council. The letter noted that the arrangements (detailed below) “should apply to structures established for the Withdrawal Agreement” although that was not expected to result in changes to current practice.

⁵⁸ See, for example, para 90 of the Lords Select Committee on the European Union report [Beyond Brexit: the institutional framework](#) 22 March 2021 HL Paper 246 *We note with regret that the wording of the relevant Article appears to preclude Members of the devolved legislatures from membership of the PPA. If this is indeed the case, it will be all the more important not only for other forms of direct engagement between the devolved legislatures and the European Parliament to be found, but for the legislatures of the United Kingdom to work together to support coordinated scrutiny of both intra-UK and UK-EU relations, in all their dimensions.*

⁵⁹ [Seanad Special Select Committee on the Withdrawal of the UK from the EU](#)

⁶⁰ The Seanad Special Select Committee on the Withdrawal of the UK from the EU [Interim Report on the Impacts of Brexit](#) July 2021 33/SeanadWUKEU/001 pg 44

⁶¹ As above, fn 56 para 49

⁶² HL Deb [16 September 2021](#) Vol 814 Col 1530

- Where items of devolved competence are on the agenda for the Partnership Council or the Specialised Committee, Devolved Administrations will attend, with a representative at the same level of seniority as the UK Government representative.
- Final discretion on attendance is held by the UK co-chair of the body concerned.
- Preparation for such meetings is coordinated by the relevant UK Government Department. Where the items on the agenda involve areas of devolved competence, these should, as a matter of normal practice, include members of the devolved administrations at the appropriate level.
- Officials in the Cabinet Office's EU Secretariat should regularly discuss strategic and cross-cutting EU issues.
- Lord Frost will meet the responsible devolved administration ministers before Joint Committee and Partnership Council meetings.

The letter continued, "engagement with the EU outside these formal contacts (should be) coordinated to ensure the UK Government can conduct its international affairs effectively".⁶³

5 Emerging themes

The themes detailed below are drawn from this paper and the previous paper,⁶⁴ and are intended to support the Committee in considering future areas of work.

5.1 Implementation 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.⁶⁵ The Government has stated that the implementation of the Protocol has revealed difficulties which it had not foreseen.⁶⁶ 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 as to what further costs might be incurred, and how those can be mitigated by using existing systems.⁶⁷
- The implementation of any new solution to the Protocol also affects stability, which has been raised as an important issue by the business community.⁶⁸ Given the wide-ranging nature of the Protocol, any replacement is likely to result in challenges

⁶³ Letter from Lord Frost to the devolved administrations [27 May 2021](#), last accessed 5 November 2021.

⁶⁴ As above, fn 1.

⁶⁵ As above, fn 9.

⁶⁶ As above, fn 2.

⁶⁷ As above fn 29.

⁶⁸ As above fn 47.

for a variety of stakeholders. There is dispute over the origin of some of the supply issues GB has encountered in recent months but, should significant changes be agreed to the Protocol, there is an opportunity to consider how any disruption might be mitigated.

5.2 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 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 any new arrangements attract cross community support.
- There are a number of proposals for greater NI engagement in EU processes which, if agreed on by the parties, could provide greater transparency and opportunities for scrutiny. The Committee may wish to consider whether or not it would scrutinise the operation of NI engagement with such bodies, including sensitivities around the constitutional issues and the underpinning mechanisms, such as the communication of changes to legislation.
- One example of this is that the Parliamentary Partnership Assembly is composed of representatives from both the Westminster and European Parliament – 35 from each, for a total of 70. In the event that an NI specific sub-structure is established, its role, remit and relationship with other legislatures will be important, as well as scrutiny of the Joint Committee's work on the Protocol, depending on what is ultimately published.

5.3 Planning for the future

- Assuming negotiations result in significant changes to the Protocol, the question of the vote on consent arises. The current deadline for a vote in the NI Assembly is 2024. The UK Government has been consistent in arguing that "fundamental"⁶⁹ change to the operation of the Protocol as it stands is required. 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,⁷⁰ it remains to be seen whether, and to what extent, any new arrangements

⁶⁹ As above, fn 2.

⁷⁰ As above, fn 2.

might impact the scheduling of the vote in 2024, or how the Government might go about achieving consent for the new arrangements.

- Equally, the question of “alternatives to the Protocol” has been raised in various committee hearings⁷¹. 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 new agreement might learn from the experience of the Protocol, including key issues like involvement of NI representatives, information flows and providing a stable environment for business.

⁷¹ As above fn 2 paras 12 and 13.