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UK Exit from the EU Briefing Paper Series Withdrawal Agreement, Protocol and Political Declaration - Overview of Governance Arrangements

Paper 1 of 6

Finance and Economics Team

This is paper 1 of a 6-part series. It provides a brief overview of the governance arrangements set out under the Withdrawal Agreement, the Protocol and the Political Declaration, for the limited purpose of providing context for subsequent paper in the series. It is not intended to be exhaustive. Throughout it includes potential scrutiny points.

This information is provided to Members of the Legislative Assembly (MLAs) in support of its duties. It is not intended to address the specific circumstances of any particular individual. It should not be relied upon as professional legal advice, or as a substitute for it.

Key points

The United Kingdom (UK) has left the European Union (EU) following the Withdrawal Agreement, formally entitled *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*.

The Withdrawal Agreement, which was ratified and entered into force on 31 January 2020, consists of two main documents:

- The Withdrawal Agreement itself, including the “Protocol on Ireland and Northern Ireland” (the Protocol), which sets out various provisions that will inform how Northern Ireland (NI) is to be governed post-transition period, including the avoidance of a hard border on the island of Ireland; and,
- A Political Declaration setting out the framework for the negotiations on the future relationship between the UK and the EU, including the need to negotiate and agree a Free Trade Agreement (FTA), which will set out the future trading relationship between the two jurisdictions, i.e. the UK and the EU.

Although the UK now has formally left the EU, it is currently in a transition period, which is due to end on 31 December 2020.

This paper is the first in a series of six papers addressing potential implications for Northern Ireland (NI), arising from the Withdrawal Agreement, the Protocol and the Political Declaration. It focuses on provisions relating to the governance arrangements for the limited purpose of providing context for subsequent papers in the series. It is not intended to be exhaustive. The noted Protocol concerns:

- The Joint Committee is established under the Withdrawal Agreement. It is the main forum for UK–EU consultation on the Withdrawal Agreement. One of its key responsibilities is its role in resolving disputes about the interpretation and application of the Withdrawal Agreement. Articles 167-181 of the Withdrawal Agreement specify the role of the Joint Committee in this regard.
- The NI Specialised Committee is established under the Protocol. It is to examine proposals concerning implementation and application of the Protocol, including those from the North-South Ministerial Council and the North-South Implementation bodies, which were set up under the 1998 *Good Friday/Belfast Agreement*, and later codified in the Northern Ireland Act 1998.
- In addition, this Committee is tasked to consider any matter of relevance to Article 2 of the Protocol, brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for NI, and the Joint Committee of representatives from the Human Rights Commissions of Northern Ireland and Ireland.
- The Joint Consultative Working Group established under the Protocol, which is to report to the Joint Committee and the NI Specialised Committee. It is to meet once a

month. It cannot make any binding decisions on matters before it. Those issues are to be escalated to the NI Specialised Committee and the Joint Committee.

- A Democratic Consent mechanism is provided in the Protocol. It addresses whether NI should have continued application of the Protocol provisions relating to customs and the movement of goods, VAT (Value Added Tax) and excise, the Single Electricity Market and State Aid (Articles 5-10).
- The UK Government set out proposals on the workings of the Democratic Consent mechanism in a Unilateral Declaration. The consent motion is to be proposed jointly by the First Minister and the Deputy First Minister and should be considered by the Assembly's Committee for the Executive Office.

Introduction

To support the Committee for the Economy (the Committee) in its consideration in the above areas, this paper is part of a six-part series that has been compiled to address various themes of apparent relevance to the Committee. Note that none of the papers in the series is intended to provide a comprehensive assessment of the noted outstanding matters, as that is beyond the scope of the series

This briefing paper is the first in the series to assist the Committee, as the United Kingdom (UK) transitions after its formal departure from the European Union (EU) on 31 January 2020. The Withdrawal Agreement,¹ the Protocol² and the Political Declaration³ all interrelate, to guide the UK's transition.

Collectively, those instruments will serve to define the future relationship between the UK and the EU, defining how NI will be governed in a number of important areas. Additionally, the outcome of the ongoing negotiations mandated by the Withdrawal Agreement⁴ and specified in the Political Declaration, will define further outstanding issues relating to the future relationship between the UK and the EU, which will determine the application of the Protocol under the Withdrawal Agreement following transition.

In line with the overarching purpose of the series, this paper provides an overview of the governance arrangements set out under the Protocol of the Withdrawal Agreement. Its limited purpose is to provide context for subsequent papers in the series. It is not intended to be exhaustive. On that basis, this paper also considers how the governance arrangements could be impacted by the outcome of ongoing negotiations under the Political Declaration about the future relationship between the UK and the EU.

For context, Section 1 of the paper provides a broad overview of the interrelationships between the Withdrawal Agreement, the Protocol and the Political Declaration, which

¹ UK Government, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (17 October 2019)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

² UK Government, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Protocol on Ireland/Northern Ireland (19 October 2019)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

³ UK Government, Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (17 October 2019)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840231/Revised_Political_Declaration.pdf

⁴ UK Government, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (17 October 2019) Articles 184

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

establish the governance arrangements for the UK's exit from the EU. Thereafter, Sections 2-4 summarise the roles and responsibilities of: the Joint Committee; the NI Specialised Committee; and, the Joint Consultative Working Group. Section 5 discusses the Democratic Consent mechanism, including the UK's Universal Declaration. In closing, Section 6 presents some key concluding remarks, drawing on the previous sections. To facilitate the Committee's consideration, key questions are highlighted throughout the paper in blue boxes.

To consider other Protocol proposals and related potential NI implications, the following papers in this six-part series are available, namely:

- Paper 2 – Customs and Trade.
- Paper 3 – Tax and Excise Duties;
- Paper 4 – Employment;
- Paper 5 – State Aid; and,
- Paper 6 – Single Electricity Market

1 Broad overview

The United Kingdom (UK) is currently transitioning after its formal departure from the European Union (EU) on 31 January 2020. This follows on from the *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* – commonly called “the Withdrawal Agreement”.⁵ Throughout the UK's transition period, the Committee continues to maintain a watching brief on how the UK will address a number of matters relating to:

- The “Protocol on Ireland and Northern Ireland” (the Protocol),⁶ an integral part of the Withdrawal Agreement, which sets out various provisions that will inform how Northern Ireland (NI) is to be governed post-transition period.

The Protocol has its roots in the Joint UK-EU Report dated 8 December 2017.⁷ It specifies the terms of the UK's withdrawal from the EU, including the UK and EU's commitments to:

- Avoiding a hard border on the island of Ireland;

⁵ UK Government, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (17 October 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

⁶ UK Government, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Protocol on Ireland/Northern Ireland (19 October 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

⁷ The European Commission, the EU-UK Withdrawal Agreement (accessed 28 April 2020) https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en

- Protecting north-south cooperation; and,
- Upholding the *Good Friday/Belfast Agreement*.

As agreed, the Protocol leaves NI in the UK customs territory, including in respect to UK free trade agreements (FTAs). NI also will be technically part of the UK's VAT (Value Added Tax) area. However, NI is required both to implement the EU's Custom Code and to remain aligned to EU regulation on goods (including certain laws for VAT on goods). The Protocol therefore creates a single regulatory zone on the island of Ireland, facilitating the free flow of goods on the island.

The "Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom" (Political Declaration), was agreed and published alongside the Withdrawal Agreement.⁸ This Political Declaration is referenced in the Withdrawal Agreement, where it explains that the UK and the EU will negotiate an agreement governing their future relationship. The Withdrawal Agreement then specifies that such negotiation is to be based upon the framework set out in the Political Declaration.⁹

The Political Declaration makes clear that this relationship will be based upon:

*....an ambitious, broad, deep and flexible, partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation.*¹⁰

Ongoing negotiations under the Political Declaration between the UK and the EU about their future relationship commenced in March 2020. At the time of writing this paper, they are due to conclude before the end of the transition period on 31 December 2020. It is anticipated that any agreement reached during negotiations will also be ratified before the end of the transition period.¹¹

A number of outstanding matters arising under the Withdrawal Agreement, the Protocol and the Political Declaration **still** require agreement between the UK and the EU, before the end of the transition period. These include those relating to the "UK-EU Joint Committee" (the Joint Committee). That Committee established under Articles 164-166, Part Six, of the Withdrawal Agreement, has representation from both the UK

⁸ UK Government, Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (17 October 2019) paragraph 3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840231/Revised_Political_Declaration.pdf

⁹ The European Commission, the EU-UK Withdrawal Agreement (accessed 28 April 2020) https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en

¹⁰ UK Government, Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (17 October 2019) paragraph 3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840231/Revised_Political_Declaration.pdf

¹¹ ¹¹ The House of Commons Library, What is happening in the UK-EU future relationship negotiations? (07 April 2020) <https://commonslibrary.parliament.uk/brexit/the-eu/what-is-happening-in-the-uk-eu-future-relationship-negotiations/>

and the EU.¹² It is one of three bodies with oversight functions when implementing the above-noted Protocol.

There is a broad range of possibilities that could emerge from the noted negotiations. However, as the above quote concerning the Political Declaration makes clear, a Free Trade Agreement (FTA) between the UK and the EU appears to be the preferred option. But in circumstances where the parties cannot agree a FTA, the UK relationship with the EU would be governed by World Trade Organisation (WTO) rules.¹³ However, in such a scenario, the UK Government has made clear that in its view the Protocol is:

*...designed to operate without a Free Trade Agreement between the United Kingdom and the EU in place.*¹⁴

In addition, if the UK and the EU agree a FTA that removes tariffs on trade between the two jurisdictions, this will have NI implications for the practical application of Articles 5 and 6 of the Protocol. Equally, it is important to note that the Protocol is intended to apply no matter what the outcome of the future relationship negotiations under the Political Declaration.¹⁵

Finally, it also is worth noting that the Withdrawal Agreement Act¹⁶ includes powers for NI Ministers to make regulations that will implement the Protocol.¹⁷ In addition, it includes provisions empowering the UK Government in areas of devolved competence.¹⁸ However, in January 2020, prior to Westminster's enactment of the Withdrawal Agreement Act, the NI Assembly passed a motion withholding its consent

¹² UK Government, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (17 October 2019) Articles 164-166

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

¹³ The European Commission, Future EU-UK Partnership: Question and Answers on the negotiating directives (February 2020)

https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_326

¹⁴ UK Government, Explainer for the new Ireland/Northern Ireland Protocol and the Political Declaration on the Future Relationship (18 October 2019)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840653/EXPLAINER_FOR_THE_NEW_IRELAND_NORTHERN_IRELAND_PROTOCOL_AND_THE_POLITICAL_DECLARATION_ON_THE_FUTURE_RELATIONSHIP.pdf

¹⁵ UK Government, Explainer for the new Ireland/Northern Ireland Protocol and the Political Declaration on the Future Relationship (18 October 2019)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840653/EXPLAINER_FOR_THE_NEW_IRELAND_NORTHERN_IRELAND_PROTOCOL_AND_THE_POLITICAL_DECLARATION_ON_THE_FUTURE_RELATIONSHIP.pdf

¹⁶ The Withdrawal Agreement Act – formally entitled the European Union (Withdrawal Agreement) Act 2020 – transposes and implements the provisions contained in the Withdrawal Agreement.

¹⁷ At paragraph 55 of the Explanatory Notes for the Withdrawal Agreement Bill, it stated:

...The Act...includes a...power for the devolved authorities to take appropriate steps to give effect to the Protocol in areas that fall within their legislative competences.

<http://www.legislation.gov.uk/ukpga/2020/1/notes/division/14/index.htm>

¹⁸ Paragraph 55 of the Explanatory Notes for the Withdrawal Agreement Bill states that the Bill includes:

...provision to enable the Government to implement the arrangements necessary to comply with the Protocol... This will be done via a power exercisable by a Minister of the Crown. The Government can use this power in areas of devolved competence, but will not normally do so without the agreement of the relevant devolved administration.

<http://www.legislation.gov.uk/ukpga/2020/1/notes/division/14/index.htm>

for the provisions impacting its competence.¹⁹ Questions now exist on the outworking of the Act. Recently, academics stated:²⁰

The position that Northern Ireland will be in after Brexit (i.e. under regulations coming from the UK and from the EU) raises unique challenges for its devolved institutions. This poses a need for Northern Ireland's representation within the UK to be enhanced and effective.

The NI Assembly withheld its legislative consent to the powers taken by the UK government in the Withdrawal Agreement Act (2020) in order for it to be able to legislate in areas within devolved competence through the use of statutory instruments. This means that there will be virtually no chance of NI MPs shaping the legislation that affects Northern Ireland vis-à-vis the implementation of the Protocol, let alone being able to annul that legislation if they object to it.

In sum, as the broad overview outlined in this section highlights, the Withdrawal Agreement, the Protocol and the Political Declaration all interrelate. Collectively, the Withdrawal Agreement and the Protocol will serve to define the future relationship between the UK and the EU, defining how NI will be governed in a number of important areas. Additionally, the outcome of the ongoing negotiations mandated by the Withdrawal Agreement²¹ and specified in the Political Declaration, will define further outstanding issues relating to the future relationship between the UK and the EU, which will determine the application of the Protocol under the Withdrawal Agreement following transition.

2 Joint Committee

Article 164 of the Withdrawal Agreement establishes the UK-EU Joint Committee (the Joint Committee), which is to be co-chaired by representatives of the UK and the EU. Of particular relevance to NI is that the Joint Committee must establish all of the following, before 31 December 2020:

- The criteria according to which goods moving from 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;

¹⁹ In January 2020, the First Minister moved a motion in the Assembly proposing:

That the Assembly notes the request from the Secretary of State for Exiting the European Union for the consent of the Assembly for the provisions of the European Union (Withdrawal Agreement) Bill which affect its competence; and affirms that the Assembly does not agree to give its consent.

<http://www.niassembly.gov.uk/assembly-business/minutes-of-proceedings/session-2019-20/monday-20-january-2020/>

²⁰ Hayward, K et al (2020) *Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit*: <https://ukandeu.ac.uk/wp-content/uploads/2020/05/UKICE-Post-Brexit-Gov-NI-Report.pdf>

²¹ UK Government, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (17 October 2019) Articles 184

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

- The conditions to establish fisheries and aquaculture products landed by NI vessels that will be exempt from EU duties; and,
- The initial maximum level for agricultural support for NI farmers, noting any additional help would be subject to EU subsidy control.²²

In regard to the Joint Committee, it should be noted that on an ongoing basis, it will be responsible for:

- Deciding whether new EU law in areas covered by the Protocol should be added to it.;
- Determining the practical arrangements for EU supervision of UK implementation and enforcement of specific aspects of the Protocol;
- Reviewing the Protocol implications for the UK internal market, and north–south co-operation on the island of Ireland; and,
- Making recommendations to the UK and the EU in the event that NI institutions reject Protocol provisions regarding areas such as trade in goods and single electricity market.²³

Table 1 summarises the Joint Committee’s role and responsibilities under the Protocol:²⁴

Table 1: Joint Committee’s Role and Responsibilities

Joint Committee’s Responsibilities
Determining the criteria according to which goods moving from 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.
Establishing the conditions under which fisheries and aquaculture products landed by NI vessels will be exempt from EU duties.
Determining the initial maximum level of agricultural support for NI farmers – any additional help would be subject to EU subsidy control.
Deciding whether new EU law in areas covered by the Protocol should be added to it.
Determining the practical arrangements for EU supervision of UK implementation and enforcement of specific aspects of the protocol.
Reviewing the implications of the protocol for the UK internal market, and north–south co-operation.
Making recommendations to the UK and the EU in the event that NI institutions reject the provisions in the protocol covering issues such as trade in goods and single electricity market.

Source: Institute for Government, 2020.

²² Institute for Government, Implementing Brexit the Role of the Joint Committee (March 2020)

https://www.instituteforgovernment.org.uk/sites/default/files/publications/implementing-brexit-role-joint-committee_0.pdf

²³ *Ibid*

²⁴ https://www.instituteforgovernment.org.uk/sites/default/files/publications/implementing-brexit-role-joint-committee_0.pdf

2.1 Joint Committee's Dispute Resolution Role

One of the key responsibilities of the Joint Committee is its role in resolving disputes about the interpretation and application of the Withdrawal Agreement. Articles 167-181 of the Withdrawal Agreement set out the role of the Joint Committee in this regard.

First, the Joint Committee must try to resolve a dispute by mutual agreement. If this cannot be achieved, it can defer the decision to an arbitration panel. By the end of the transition period, the Joint Committee must establish a list of twenty-five people who can take part in an arbitration panel. Included amongst them must be ten people from each jurisdiction with specialised knowledge of EU law and public international law, and five people to sit on the arbitration panel.

The arbitration panel has twelve months to deliver each of its ruling. However, if the case is urgent, either side can ask the panel to deliver a decision within six months. When a dispute concerns a matter of EU law, the panel must refer the dispute to the European Court of Justice (ECJ). This could include issues relating to the rights of EU citizens living in or moving to the UK before the end of the transition period (and vice-versa). **The ECJ then will deliver a binding ruling on the question of EU law.**²⁵

If either party feels the other has failed to comply with the ruling, the arbitrators can apply temporary remedies, including penalty payments. If no payment is received within six months, the claimant can suspend part of the withdrawal agreement (apart from Part 2, on citizens' rights). Any suspension must be proportionate and temporary.²⁶

A flowchart of the arbitration process is presented at Annex 1 of this briefing paper.

2.4 Joint Committee Meetings

The Joint Committee met for the first time on 30 March 2020. The EU and the UK published the agenda for the meeting on the 25 March. The agenda included the following items:²⁷

- Introduction and opening remarks from co-chairs;
- UK/EU Updates on implementation of the Withdrawal Agreement; and,
- Tasks and responsibilities of the Specialised Committees.

²⁵ Institute for Government (2020) Implementing Brexit The role of the joint committee:

https://www.instituteforgovernment.org.uk/sites/default/files/publications/implementing-brexite-role-joint-committee_0.pdf
(page 9)

²⁶ Ibid.

²⁷ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-03-25/HCWS190/>

The NI Executive was represented at the meeting by two Junior Ministers. Prior to the meeting, the extent of NI Executive involvement in the Joint Committee was unclear. However, the *New Decade New Approach* document stated:²⁸

The Government will ensure that representatives from the Northern Ireland Executive are invited to 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.

On 13 May 2020, both Juniors Ministers gave oral evidence to the NI Committee for the Executive Office detailing their participation in the Joint Committee meeting of 30 March 2020.

The EU issued a statement after the March 2020 Joint Committee meeting, which included reference to the Protocol, stating:²⁹

The Commission committed to working with the UK to implement the Protocol. There is an urgent need to present a detailed timetable and proceed with the necessary measures, such as preparing for the introduction of customs procedures for goods entering Northern Ireland from Great Britain, and ensuring that all necessary sanitary and phytosanitary controls as well as other regulatory checks can be carried out in respect of goods entering Northern Ireland from outside the EU.

Could the Department for the Economy (DfE) advise in relation to the following?

1. What deadlines have been set for key decisions of the Joint Committee?
2. How will the DfE seek to inform the UK Government's representations to the Joint Committee and the Specialised Committees, to ensure the NI perspective is well represented?
3. Will the proceedings of the Joint Committee and the Specialised Committees be recorded/published?

The UK Government did not publish a statement after the 30 March meeting. However, the UK Cabinet Office published a summary of the proceedings, which stated that the meeting was:³⁰

*...attended by a small delegation including Member State representatives and ministers from the **Northern Ireland Executive**.* [emphasis added]

And that:³¹

²⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf

²⁹ https://ec.europa.eu/commission/presscorner/detail/en/statement_20_565

³⁰ <https://www.gov.uk/government/news/first-meeting-of-the-withdrawal-agreement-joint-committee>

³¹ <https://www.gov.uk/government/news/first-meeting-of-the-withdrawal-agreement-joint-committee>

The UK and EU updated the Joint Committee on progress to implement the Withdrawal Agreement. The UK reiterated our commitment to protecting the Belfast/Good Friday Agreement in all respects, and to upholding our obligations under the Northern Ireland Protocol. The UK emphasised our commitment to EU citizens in the UK and ensuring that UK nationals in the EU have their rights protected consistent with the Withdrawal Agreement.

Could the Department for the Economy (DfE) advise in relation to the following?

1. How will the work of the Joint Committee be scrutinised?
2. What role (if any) will there be for the UK Parliament in scrutinising the Joint Committee?
3. What role (if any) will there be for the NI Assembly in scrutinising the work of the Joint Committee?

3 Specialised Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland

Article 14 of the Protocol sets out the role of a Specialised Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland (the Specialised Committee). This NI Specialised Committee is in fact, one of six such committees, established under Article 165 of the Withdrawal Agreement. The other five Committees concern the following areas:

- Citizens' rights;
- Other separation provisions;
- Implementation of the Protocol relating to the Sovereign Base Areas in Cyprus;
- Implementation of the Protocol on Gibraltar; and,
- Financial provisions.

3.1 NI Specialised Committee - primary role and responsibilities

The NI Specialised Committee's primary role is to act as a forum for the exchange of information and mutual consultation.³² Its roles are specified under Article 14 of the Protocol. These are presented below in Table 2:

³² Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (17 October 2019) Article 15(1)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

Table 2: Roles of the NI Specialised Committee

Roles of the NI Specialised Committee under Article 14 of the Protocol
To facilitate the implementation and application of this Protocol.
To examine proposals concerning the implementation and application of this Protocol from the North-South Ministerial Council and North-South Implementation bodies set up under the 1998 Agreement.
To consider any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland. (See Paper 4 of this series for more information on Article 2 of the Protocol).
To discuss any point raised by the Union or the United Kingdom that is of relevance to this Protocol and gives rise to a difficulty.
To make recommendations to the Joint Committee as regards the functioning of this Protocol.

Source: Article 14 of the Protocol.

The NI Specialised Committee has a specific responsibility to examine proposals raised by the North–South Ministerial Council and its six implementation bodies, as well as any issues raised by human rights and equality bodies established by the 1998 *Belfast/Good Friday Agreement*. It must submit any recommendations to the Joint Committee for a binding decision.

Could the Department for the Economy (DfE) advise in relation to the following?

1. What tasks have the Joint Committee put in place for the Specialised Committees?
2. How will the Joint Committee convey these tasks to the Specialised Committees?
3. Will the interactions between the Joint Committee and the Specialised Committees be recorded/published?
4. Has the NI Specialised Committee received any proposals from the North South Bodies, the NI Human Rights Commission and or the Equality Commission for NI?
5. If so, will these proposals be published?
6. What role (if any) will there be for the NI Assembly in scrutinising proposals to the NI Specialised Committee?

3.2 NI Specialised Committee Meetings

The first meeting of the NI Specialised Committee was held *via* video conference on 30 April 2020. It was co-chaired by officials from the UK Government and the EU. The current Director General of for Industrial Relations represented the NI Executive as part of the UK delegation, in line with the commitment made in the *New Decade, New Approach* deal.³³

³³ Cabinet Office (2020) *Ireland/Northern Ireland Specialised Committee 30 April 2020 - UK post-meeting statement*. <https://www.gov.uk/government/news/irelandnorthern-ireland-specialised-committee-30-april-2020-uk-post-meeting-statement>

The UK Government issued the following statement after the meeting:

The UK and the EU exchanged updates on the implementation of the Protocol and discussed the preparatory work for future decisions to be taken by the Joint Committee.

The UK was clear that our approach at all times will be focused on protecting the Belfast/Good Friday Agreement and gains of the peace process, and on preserving Northern Ireland's place in the UK.

UK officials reaffirmed our commitment to complying with our legal obligations under the Protocol, just as we expect the EU to comply with theirs.

The two sides agreed to convene the Joint Consultative Working Group established under the Protocol which will be a further forum for discussion in relation to the Protocol.

Could the Department for the Economy (DfE) advise in relation to the following?

1. How will the work of the Ireland/Northern Ireland Specialised Committee be scrutinised?
2. What role (if any) will there be for the UK Parliament in this scrutiny?
3. Has the NI Assembly a role in scrutinising the work of the NI Specialised Committee?
4. Has the NI representative of the Executive briefed the NI Assembly of the issues discussed in the meeting?
5. Is an agreed meeting timetable in place for the proposed meeting of the Joint Consultative Working Group?

4 Joint Consultative Working Group

The Joint Consultative Working Group (the Working Group) is effectively the third tier of governance. The Working Group's main function will be as a forum for sharing information and mutual consultation. Article 15 of the Protocol sets out the role of the Working Group.

It reports to the Joint Committee and the NI Specialised Committee. The Withdrawal Agreement provides for the Working Group to meet once a month. The Working Group can make no binding decisions on matters before it; these will have to be escalated to the NI Specialised Committee and the Joint Committee.

In an oral evidence session to the Lord's Select Committee in February 2020, an academic suggested the Working Group might provide an opportunity for NI's voice to be heard in the negotiations. The witness stated:³⁴

It [the working group] provides for an exchange of information between the UK and the EU in respect of the protocol. There are probably opportunities there to ensure that the Northern Ireland voice is heard, so that when it comes to some of the technical issues around changes to pieces of legislation, the implications for Northern Ireland can be fed into the EU policy-making process through that route.

Another academic reiterated the potential importance of the Working Group:³⁵

[the Working Group] should be considered as much more than an opaque addition to the EU bureaucratic machinery. It will be an important body for ensuring the interests of Northern Ireland (and those in common with Ireland) can be reported into EU decision-making fora – a space it has now been 'Brexitied'.

And:

This will be of particular importance because neither Northern Ireland nor the UK in respect of Northern Ireland has been granted formalised decision-shaping opportunities similar to those of other non-member states implementing EU law.

Could the Department for the Economy (DfE) advise in relation to the following?

1. How can the interests of NI be best represented *via* the Working Group?
2. Who will represent the interests of NI on the Working Group?
3. Will the NI representative routinely inform the NI Assembly of the issues discussed in the meetings of the Working Group? If so, how?
4. Are there opportunities for the NI Assembly to routinely make suggestions to the Working Group in advance of any meetings?
5. What role should the NI Assembly have in scrutinising the outputs of the Working Group?
6. Is an agreed meeting timetable in place for the Working Group??

³⁴ House of Lords Select on the European Union (2020) *Oral Evidence: the Protocol on Ireland/Northern Ireland*: <https://committees.parliament.uk/oralevidence/77/pdf/>

³⁵ Hayward, Katy (2020) *The UK-EU Joint Consultative Working Group: What it is and what it could be*: <http://qpol.qub.ac.uk/the-uk-eu-joint-consultative-working-group-what-it-is-and-what-it-could-be/>

5 Democratic Consent

The preamble to the Protocol addresses the issue of “democratic consent”, stating:

EMPHASISING that in order to ensure democratic legitimacy, there should be a process to ensure democratic consent in Northern Ireland to the application of Union law under this Protocol.

As mentioned above, at the end of the transition period (now scheduled for 31 December 2020), the Protocol automatically enters into force. However, four years after the Protocol has been implemented, the NI Assembly is empowered under the Protocol to vote and decide on the continued future operation of certain Protocol provisions, as provided at Article 18 of the Protocol. This is known as the “democratic consent” provision, which states:

Within 2 months before the end of both the initial period and any subsequent period, the United Kingdom shall provide the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5 to 10.

It is important to note that the above vote will address whether there will be continued application in NI of the provisions on customs and the movement of goods, VAT and excise, the single electricity market and State Aid (Articles 5-10). **That vote will include all these Articles, collectively, not individually.** At the time of writing, assuming there is no extension to the current end date for the transition period, i.e. 31 December 2020, this vote could take place in November or December 2024.

Article 18 specifies the voted result required, providing as follows:

- If the vote passes by a simple majority, then consent is given, and will be required again in four years’ time; and then,
- If the vote passes at that future time by a “cross-community support” majority, then consent will be required in the next eight years’ time.

“Cross-community support” is defined under Article 18 as follows:

...a majority of those Members of the Legislative Assembly present and voting, including a majority of the unionist and nationalist designations present and voting; or

(b)

a weighted majority (60 %) of Members of the Legislative Assembly present and voting, including at least 40 % of each of the nationalist and unionist designations present and voting.

Figure 1 below illustrates the democratic consent majorities:

Figure 1: Democratic Consent Majorities

Democratic Consent Majorities in the Protocol on Ireland/Northern Ireland		
Majority	Threshold	Next vote
Simple	a simple majority (50%+1) of MLAs present and voting	4 years later
Cross-community (a)	a simple majority (50%+1) of MLAs present and voting 'including a majority of the unionist and nationalist designations present and voting'	8 years later
Cross-community (b)	a 60 % majority of MLAs present and voting 'including at least 40% of each of the nationalist and unionist designations present and voting'	8 years later

Source: Professor David Phinnemore, QUB, 2020.

However, Article 18 further provides that if the above vote does not pass, consent is not given to the continuance of Articles 5-10 of the Protocol. Under this circumstance, Articles 5-10 of the Protocol will cease to apply after two years. In addition, the Joint Committee will make recommendations to the UK and the EU on alternative arrangements.

In relation to the NI Assembly not giving consent, an academic on the Withdrawal Agreement and the Protocol, has stated:³⁶

Depending on the nature and scope of the UK-EU relationship, disapplying Articles 5-10 could – and currently given UK government policy indeed would – result in the re-imposition of checks and controls on the movement of goods across the land border on the island of Ireland. There would be a hardening of that border, exactly what the Protocol was designed to avoid.

5.1 Unilateral Declaration of the UK Government

Article 18 does not state how NI should “give consent” in terms of parliamentary procedure. The “consent vote” is on a matter which is usually in the competence of the

³⁶ Professor David Phinnemore (2020) *Democratic Consent and the Protocol on Ireland/Northern Ireland*: <http://qpol.qub.ac.uk/democratic-consent-and-the-protocol-on-ireland-northern-ireland/>

UK Government, not a devolved matter. Consequently, the UK Government has said normal NI Assembly procedures will not apply.³⁷

In October 2019, to bring clarity in the UK in relation to future votes on the issue, the UK Government set out its proposals for the consent mechanism in a “Unilateral Declaration”.³⁸ The Unilateral Declaration qualifies the Protocol, stating that the consent motion should be proposed jointly by the First Minister (FM) and the Deputy first Minister (dFM), and should be considered by the Assembly’s Committee for the Executive Office. However, it further states that if the FM/dFM fail to agree on the wording of the motion, within one month, another Assembly Member (MLA) can table the motion instead.

The Unilateral Declaration also contains two further proposals: the first is for public consultation in advance of each democratic consent vote; and, the second is an independent review. Each are explained below.

³⁷ <https://www.instituteforgovernment.org.uk/explainers/northern-ireland-protocol-consent-mechanism>
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf

³⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840657/Declaration_by_Her_Majesty_s_Government_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_concerning_the_operation_of_the_Democratic_consultation_in_Northern_Ireland_provision_of_the_Protocol_on_Ireland_Northern_Ireland.pdf

5.1.1 Public Consultation

The Unilateral Declaration states:

The United Kingdom affirms that the objective of the democratic consent process set out below should be to seek to achieve agreement that is as broad as possible in Northern Ireland and, where possible, through a process taken forward and supported by a power sharing Northern Ireland Executive which has conducted a thorough process of public consultation. This should include cross-community consultation, upholding the delicate balance of the 1998 Agreement, with the aim of achieving broad consensus across all communities to the extent possible.

It goes on to specify that the UK Government will provide support to the NI Executive in consulting with “*businesses, civil society groups, representative organisations (including of the agricultural community) and trade unions*”. It also stipulates that the North South Ministerial Council and British-Irish Intergovernmental Conference should be involved in any consultation process.

Could the Department for the Economy (DfE) advise in relation to the following?

1. Has the NI Executive given any consideration of how such consultations with the groups mentioned above may be undertaken?
2. Is there likely to be a role for NI Assembly Committees to facilitate such consultation?
3. How will the UK Government support the consultation process?
4. Will the UK Government enforce this consultation process? If so, how?

5.1.2 Independent Review

The Unilateral Declaration proposes an independent review if a consent vote is passed by a simple majority of MLAs, rather than with cross-community support. The review will assess the “*functioning of the Protocol and the implications of any decision to continue or terminate alignment on social, economic, and political life in NI*”.³⁹

The independent review will make recommendations to the UK Government **within two years of the vote**, “*including with regard to any new arrangements it believes could command cross-community support*”. The review will include “close consultation” with the NI political parties, businesses, civil society groups, representative organisations (including of the agricultural sector) and trade unions.

³⁹ Ibid.

Could the Department for the Economy (DfE) advise in relation to the following?

1. Who will sit on the independent review?
2. Will the NI Executive have a role in selecting members to the review?
3. What methodology will the UK Government use to assess the “functioning of the Protocol”?
4. What methodology will the UK Government use to assess “the implications of any decision to continue or terminate alignment on social, economic, and political life in NI”?

6 Concluding Remarks

With the ratification of the Withdrawal Agreement, the UK exited the EU on 31 January 2020, and is currently in a transition period, which is due to end on 31 December 2020. At the time of writing, an extension of this transition period is still possible. However, an agreement for such an extension would need to be reached by 1 July 2020, to have effect under the Withdrawal Agreement. At the end of the transition period, the Protocol provisions under the Withdrawal Agreement, along with those arising out of the Political Declaration which currently are still to be agreed, will automatically enter into force.

Regardless of what happens with the transition period, under the terms of the Protocol, NI remains part of the UK customs territory. NI therefore is required to implement EU’s Customs Code, and to remain aligned to EU regulation on goods. The Protocol also creates a single regulatory zone on the island of Ireland, facilitating the free flow of goods on the island.

The Protocol under the Withdrawal Agreement, along with the Political Declaration and the Universal Declaration, collectively provide for governance arrangements to facilitate the negotiations and address the specific issues proposed under the Protocol. These include a Joint Committee, a NI Specialised Committee, and a Joint Consultative Working Group. The Joint Committee is chaired jointly by the UK and EU and sits at the head of the governance structure. The NI Specialised Committee and the Joint Working Group both report to the Joint Committee.

For NI, among the most important issues about the UK exit are those addressing how the Executive can influence the ongoing discussions on outstanding matters and how it should be accountable to the NI Assembly. Questions also exist in relation to how the NI Assembly can influence legislation directly affecting it.

The UK Government has given a commitment in the *New Decade, New Approach* deal that the NI Executive’s voice would be heard. However, the extent of the NI Executive’s ability to contribute to the work of the Joint Committee and the other structures remains

unclear. Moreover, the extent to which the NI Assembly will be able to scrutinise any decision made by these committees is also unclear.

The Protocol formally provides the various NI and North/South bodies an opportunity to contribute into the work of the NI Specialised Committee by making recommendations. However, the ability of the NI Assembly to scrutinise these decisions is limited at best.

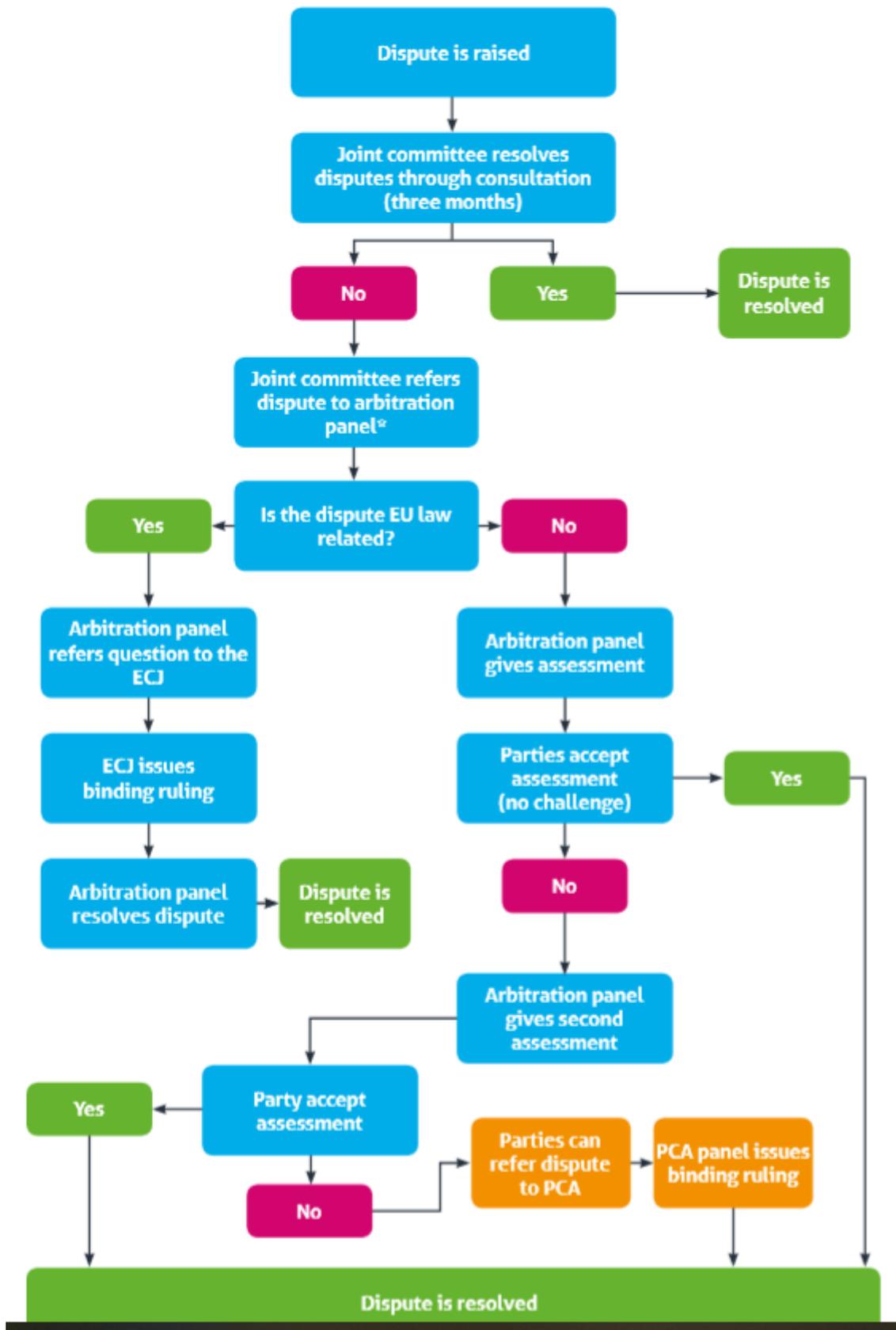
In addition, the Protocol contains a Democratic Consent mechanism at Article 18, empowering the NI Assembly to decide whether to retain Articles 5-10 of the Protocol. This requires the Assembly to vote on Articles 5-10 collectively, i.e. the provisions on customs and the movement of goods, VAT and excise, the single electricity market and State Aid. In this regard, an academic has suggested that:⁴⁰

...given the prospect that voting against the continued application of Article 5-10 would certainly result in a harder land border, MLAs opposed to the Protocol are likely to struggle to convince a majority of their fellow MLAs to oppose consent. At present, there appears to be little expectation in Brussels that consent will be withheld

Perhaps the key question is how can the NI Executive best ensure that NI's voice is heard in the governance arrangements outlined throughout this paper?

⁴⁰ David Phinnemore (2020) *Democratic Consent and the Protocol on Ireland/Northern Ireland*: <http://qpol.qub.ac.uk/democratic-consent-and-the-protocol-on-ireland-northern-ireland/>

Annex 1: Joint Committee Dispute Resolution



Source: Institute for Government, 2020.