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UK Exit from the EU Briefing Paper Series Withdrawal Agreement, Protocol and Political Declaration - Potential Implications for Customs and Trade in Northern Ireland

Paper 2 of 6

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This is paper 2 of a 6-part series, which explores key potential implications arising from the Withdrawal Agreement, the “Protocol on Ireland and Northern Ireland” and the Political Declaration in relation to customs and trade in Northern Ireland.

This information is provided to Assembly Members in support of their duties, and 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). The agreed terms of its withdrawal from the EU were set out in 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* (the Withdrawal Agreement).

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 second in a series of six papers on the Protocol. It focuses on the Protocol provisions that will govern trade and customs arrangements, namely:

- Article 4 concerns the “Customs territory of the United Kingdom”. It ensures the NI remains part of the UK Customs Territory, and is to be party to UK FTAs. This is likely to open up new trade opportunities for NI. It is, however, unclear how NI could influence the direction of future UK trade policy.
- Article 5 concerns “Customs and the movement of goods”. It ensures no tariffs will be paid on goods entering NI from Great Britain (NI into GB). It states that the UK tariff will be paid on goods entering NI from outside of the EU and the UK, unless those goods are “*at risk*” of subsequently moving into the EU. NI also will be required to both apply the EU customs code, and align to a EU range of law on products. The definition of “*at risk*” has not been agreed at the time of writing this paper.
- Also of note in relation to Article 5 are its potential outworkings when implemented, it could result in tariff and regulatory checks on goods moving from GB to NI. This is significant in that £10.5bn or 63% of all NI goods purchases from outside of NI, are from GB; and they are primarily in the wholesale and retail sectors. The regulatory alignment provisions of Article 5 are to enable the free movement of goods across the island of Ireland. In 2019, NI exported goods valued at £3.2bn to the Republic of Ireland (RoI), and imported goods valued at £2.2bn from the RoI into NI.

- The UK Government set out its view on the implementation of the provisions contained in Article 5 on 20 May 2020. It stated that industrial goods moving from GB to NI would be subject to “administrative processes”, but argued that these processes would be carried out electronically, and would require no additional border infrastructure. It stated also that the Protocol would necessitate enhanced checks for the purpose of agri-food checks and assurance.
- Article 6 concerns “Protection of the UK internal market” (subsection 2.3 of this paper). It provides that NI will have “unfettered access” to the UK’s internal market. NI goods sales to GB were £7.6bn in 2017. 69% of NI business that sold goods and services to GB were classified as micro businesses. The majority of NI goods sales to GB came from the manufacturing sector. Evidence heard by the House of Lords Committee on the EU in February 2020, argued that the application of EU law in NI, i.e. the Customs Code and the product regulation, could result in some checks on goods moving from NI to GB.
- The UK Government set out its view on the implementation of Article 6. In doing so, it made a commitment to pass legislation to guarantee unfettered access, and ensure that legislation was in force, before 1 January 2020.
- Article 7 concerns “Technical regulations, assessments, registrations, certificates approvals and authorisations”. It places NI within two separate regulatory regimes for placing goods on the NI market. It introduces new labelling requirements for NI, to ensure NI’s ongoing compliance with certain EU directives. It also changes the way NI conformity checks are carried out, and to the mutual recognition of non-harmonised standards. These changes have the potential to increase costs on businesses in NI.

In sum, this paper raises a number of questions regarding the implementation of the noted Protocol provisions in NI. The outcome of ongoing negotiations between the UK and the EU on the future relationship between the two jurisdictions – whatever that will be – will impact the Protocol’s application in NI. For example, a FTA agreed between the two could alleviate the need for some goods checks when entering and leaving NI.

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Introduction

This briefing paper is prepared for the Committee for the Economy (the Committee), as the United Kingdom (UK) transitions 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”.¹

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),² 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, including the avoidance of a hard border on the island of Ireland.
- The “Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom” (Political Declaration), that was agreed and published alongside the Withdrawal Agreement.³ 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 Political Declaration then specifies that such negotiation is to be based upon the framework set out in the Political Declaration.⁴

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, which is due to end on 31 December 2020. It is anticipated that any agreement reached during negotiations also will be ratified before the end of the transition period.⁵

It is important to note that a number of outstanding matters arising under the Withdrawal Agreement, the Protocol and the Political Declaration still require

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) paragraph 3

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

⁴ 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

⁵ 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/>

agreement between the UK and the EU, before the end of the transition period, including those relating to the “UK-EU Joint Committee”. That Committee was established under Articles 164-166, Part Six, of the Withdrawal Agreement, has representation from both the UK and the EU.⁶ It is one of three bodies with oversight functions when implementing the above-noted Protocol. Of particular relevance to NI is that the Joint Committee must establish all of the following, prior to the end of the current transition period, which is scheduled for 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.
- The conditions to establish fisheries and aquaculture products landed by NI vessels that will be exempt from EU duties.
- The initial maximum level for agricultural support for NI farmers, noting any additional help would be subject to EU subsidy control.⁷

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.
- 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.⁸

As the above highlights, the Withdrawal Agreement, the Protocol and the Political Declaration all inter-relate. 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 Agreement⁹ and specified in the

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 (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

⁷ Institute for Government, Implementing Brexit the Role of the Joint Committee (March 2020)

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

⁸ *Ibid*

⁹ 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

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. For example, 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. This is explored in Section 2 of this paper. 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.¹⁰

In light of the above, the Committee is interested in noted outstanding matters relating to the Protocol and the Declaration; in particular, those that are relevant to the Committee's portfolio, and inevitably will have implications for NI post transition.

To support the Committee in these areas, this paper - the second in a six-part series – 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.

Rather, in line with the overarching purpose of the series, this paper addresses Protocol provisions relating to customs and trade. It also considers how these could be impacted by the outcome of ongoing negotiations under the Political Declaration regarding the future relationship between the UK and the EU. Throughout, the paper focuses on trade in industrial goods; although it should be noted that data on the value of that trade includes all goods trade. This approach accords with the Committee's ongoing work relating to the UK's exit from the EU. As a result, this paper does not, e.g., consider potential Protocol and related Political Declaration implications relating to agriculture.

For context, Section 1 of the paper provides brief background information on the Protocol, including what it entails and its inter-relationship with the Political Declaration. Thereafter, Section 2 examines four Protocol articles relating to future NI customs and trade arrangements. After outlining each article's purpose, Section 2 then considers their potential impact on NI.

In closing, Section 3 sets out some concluding remarks, drawing on the earlier sections. Potential scrutiny points are highlighted in blue boxes throughout the paper, aiming to support the Committee in its scrutiny role. In addition, for the Committee's ease of reference, Table 1 below provides a summary of key points arising from the paper.

¹⁰ 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

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

- Paper 1 – Overview of Governance Arrangements.
- Paper 3 – Tax and Excise Duties;
- Paper 4 – Employment;
- Paper 5 – State Aid; and,
- Paper 6 – Single Electricity Market.

Table 1: “Protocol on Ireland and Northern Ireland” - Key Observations and Scrutiny Points for the Committee for the Economy

Protocol Article	NI position given Withdrawal Agreement, Protocol and Political Declaration	Key potential NI implications from Withdrawal Agreement, Protocol and Political Declaration	Key potential scrutiny points
<p>Article 4: Customs territory of the United Kingdom (UK) (see subsection 2.1 of this briefing paper)</p>	<ul style="list-style-type: none"> ▪ Northern Ireland (NI) is included in: the UK’s custom territory; and, ▪ NI is included in the UK’s World Trade Organisation (WTO) tariff schedule. ▪ NI will be included in UK Free Trade Agreements (FTA), along with Great Britain (GB) 	<ul style="list-style-type: none"> ▪ NI could benefit from opportunities presented by UK’s new trade policy; ▪ NI will be included in any UK FTAs; and, ▪ NI will have a new set of tools to maximise benefits of new FTAs, due to commitments made in the “New Decade, New Approach” deal. 	<ul style="list-style-type: none"> ▪ Has the DfE given any consideration as to how NI could influence future UK trade policy? ▪ What role could the Assembly play in scrutinising future UK trade policy? ▪ How could the NI Executive utilise the new trade tools outlined in the <i>New Decade, New Approach</i> deal? ▪ How much would these new tools cost; and how would they be funded? ▪ How would the NI Executive’s new economic strategy seek to maximise the benefits of the UK’s new trade policy? ▪ What trade related targets would be included in the NI Executive’s new economic strategy? How would these be reflected in the draft Programme for Government and related Outcomes Delivery Plan? ▪ How could the current global downturn impact UK and NI ambitions to maximise trade?

Protocol Article	NI position given Withdrawal Agreement, Protocol and Political Declaration	Key potential NI implications from Withdrawal Agreement, Protocol and Political Declaration	Key potential scrutiny points
<p>Article 5: Customs and the movement of goods (see subsection 2.2 of this briefing paper)</p>	<ul style="list-style-type: none"> ▪ No tariffs will be payable on goods entering into NI from GB unless they are “at risk” of subsequently being moved in to the European Union (EU). In such cases the EU tariff will apply; ▪ UK tariffs will be applicable on goods entering into NI from non-EU and non-GB, unless they are “at risk” of subsequent movement into the EU. In such cases, EU tariff will apply; ▪ “At risk” is to be defined by Joint Committee; ▪ NI is obliged to align to product regulation in relation to a range of goods; ▪ Amendments and replacements of this legislation will be automatically added to the Protocol; ▪ Joint Committee is to decide on whether new EU Directives that impact the Protocol will be added; ▪ UK must apply the EU customs code, with respect to NI, exceptions to be developed by the Joint Committee for fishery and aquaculture products. ▪ UK has the power to reimburse tariffs charged on at risk goods that can be shown to have remained in NI. 	<ul style="list-style-type: none"> ▪ In 2017 NI purchased goods valued at £10.5 billion (bn) from GB (63% of NI’s total goods purchases). 65% of all goods purchased by NI in 2017 from GB were in the wholesale and retail sector. ▪ Goods flowing from GB to NI may be subject to checks to ensure that correct tariff is applied; ▪ Goods flowing from GB to NI may be subject to regulatory checks; ▪ The Protocol places obligation on importers of goods to demonstrate that goods are not “at risk” of entering the EU; ▪ It currently is unclear what the full definition of ‘at risk’ will be; ▪ Increased checks may increase costs for businesses and consumers. Likely to be felt more in the wholesale and retail sector as the make up the majority of NI purchases from GB; ▪ Checks may be minimised through ‘alternative arrangements’, including electronic submissions, and trusted trader schemes; ▪ In setting out its position on the implementation of Article 5 (20 May 2020), the UK Government stated the in its view, the provision would necessitate “administrative processes” on industrial goods, but would not necessitate additionally infrastructure. Additionally, it is the UK Government’s view that Article 5 will result in enhanced checks for agri-food goods, and additional infrastructure to facilitate those checks. ▪ NI traders may be reimbursed tariffs charged on goods from GB and elsewhere, if it is demonstrated that good did not enter EU. No certainty is provided as to how such a rebate scheme might operate in principle; ▪ It currently is unclear what the conditions will be established in respect to fishery and aquaculture products; ▪ Arrangements for the monitoring of developments in EU law and NI’s compliance with EU law at UK/NI levels currently are unclear. 	<ul style="list-style-type: none"> ▪ Has the DfE any indication of how will “at risk” be defined and what happens if the definition of “at risk” is not agreed by the end of the transition period? ▪ Has the DfE given any consideration as to what proportion of NI purchases will be deemed “at risk”? ▪ Has the DfE given any consideration as to how will the burden of proving goods not “at risk” impact business and consumer prices? ▪ Has the DfE conducted any estimate of what proportion of goods entering NI from GB will be subject to tariff and regulatory checks? ▪ Has the DfE conducted an assessment of the impact tariff and regulatory checks on business and consumer prices, particularly in the wholesale and retail sectors? ▪ Has the DfE or the UK Government given any consideration to what additional infrastructure, staff and/or processes will be required to ensure all necessary checks are carried out? What will the cost be, and how will it be funded? What discussion has there been in the Executive about the issue of funding in this area? Has the Minister brought this to the Executive’s attention? If so, when, and what was discussed? If not, what has it not yet been raised; and when will it be? ▪ How will the UK Government minimise checks on GB to NI goods? ▪ What conditions will the Joint Committee establish to ensure fisheries and aquaculture products are not subject to tariffs? ▪ What happens if these conditions are not agreed by the end of the transition period? ▪ What processes will the UK Government put into place to enable businesses to secure reimbursement of tariff duties; and what time frames will be put in place?

Protocol Article	NI position given Withdrawal Agreement, Protocol and Political Declaration	Key potential NI implications from Withdrawal Agreement, Protocol and Political Declaration	Key potential scrutiny points
<p>Article 5: Customs and the movement of goods (continued from overleaf)</p>		<ul style="list-style-type: none"> ▪ NI will remain aligned to considerable amount of EU law in respect to goods, creating a single regulatory zone on the island of Ireland, and facilitating the free movement of goods across the Island. ▪ NI goods exports to RoI were valued at £3.2bn, and imports from the RoI were valued at £2.3bn in 2019. ▪ NI also will have to implement any amendments and replacements to this law, and potentially new laws will be enacted, if the Joint Committee includes these in the Protocol. 	<ul style="list-style-type: none"> ▪ In anticipation of future implementation, has the DfE discussed this matter with the NI Department of Finance? ▪ If so, has it also been raised at the Executive? And if so, has the Finance Minister raised it with Treasury and the HMRC? ▪ If none of the above has taken place in relation to the above two issues, then what planning has been undertaken to ensure such matters are addressed by all relevant ministers and the Executive, given implications are foreseeable for NI businesses? ▪ What criteria will be put in place by the UK Government to determine whether a customs debt is waived? ▪ Have the DfE been given any insight into the anticipated processes by which the UK Government will deliver tariff reimbursements, or customs debt waivers? ▪ How will DfE communicate these schemes to businesses in NI? ▪ Will NI be included in EU FTA agreements post-transition? If it is not, will it be able to benefit from these indirectly via the movement of goods on the island of Ireland? ▪ What structures will be put in place in the NI Assembly and at Westminster, to enable the scrutiny of EU law with respect to NI? ▪ How will the NI Executive and the UK Government assist business to keep up-to-date with changes to EU law? ▪ How will NI voices influence EU law post-transition? ▪ What structures will be put in place at the NI Executive and the UK Government levels, to monitor the implementation of EU law in respect to NI?

Protocol Article	NI position given Withdrawal Agreement, Protocol and Political Declaration	Key potential NI implications from Withdrawal Agreement, Protocol and Political Declaration	Key potential scrutiny points
<p>Article 6: The protection of the UK internal market (see subsection 2.3 of this briefing paper)</p>	<ul style="list-style-type: none"> ▪ NI will have “<i>unfettered access</i>” to the UK’s internal market; ▪ The Joint Committee will use its “<i>best endeavours</i>” to facilitate NI to GB trade; ▪ The Joint Committee will review NI to GB trade, and will adopt appropriate recommendations to avoid controls; ▪ Nothing in the Protocol will prevent NI goods that meet EU law being placed on the UK market. 	<ul style="list-style-type: none"> ▪ NI good sales to GB were £7.6bn in 2017. 69% of NI business that sold goods and services to GB were classified as micro businesses. The majority of NI good sales to GB came from the manufacturing sector. ▪ The application in of the EU Customs Code in respect to NI may to require Exit Summary Declarations in respect to NI to GB trade. This could result in costs to businesses in the UK, including NI. In outlining its plans implementing the Protocol, the UK Government Stated the Exit Summary Declarations would not be required. No response for the EU was available at the time of wiring. ▪ Goods sold from NI to GB may need to undergo regulatory checks, particularly if the UK introduced higher regulations than the EU. ▪ There is the potential that “<i>unfettered access</i>” could be used to subvert UK customs controls by traders. NI could become a route to avoid paying the UK tariff. ▪ In 2020, the Centre for Customs and Excise Studies has argued that NI to GB checks could be minimised using electronic lodgement of information and trusted trader schemes. 	<ul style="list-style-type: none"> ▪ To what extent will checks be required on goods moving from NI to GB? ▪ Has the DfE carried out any assessment on the impact of these checks on NI businesses and consumers? ▪ What additional infrastructure, staff and/or processes will be required to ensure all necessary checks are carried out? ▪ Has the UK Government carried out any assessment on the cost be of the above, and how will it be funded? ▪ How will the UK Government ensure that the impact of any checks on NI businesses, particularly microbusinesses and the manufacturing sector, is minimised? ▪ Has the DfE received any insight as to what the UK’s future policy will be on product regulation; will it seek to match EU standards; will it seek to introduce what could be considered by the EU to be “<i>lower</i>” standards; or will it seek to exceed EU standards? ▪ What role will the NI Executive play in monitoring standard divergence between the UK and the EU, and assisting businesses to navigate this divergent landscape? ▪ How will the UK Government mitigate the potential risks of NI becoming a back door to the UK for goods?

Protocol Article	NI position given Withdrawal Agreement, Protocol and Political Declaration	Key potential NI implications from Withdrawal Agreement, Protocol and Political Declaration	Key potential scrutiny points
<p>Article 7: Technical regulations, assessments, registrations, certificates approvals and authorisations (see subsection 2.4 of this briefing paper)</p>	<ul style="list-style-type: none"> ▪ Places NI within two separate regulatory regimes for placing goods on the NI market; ▪ Introduces new labelling procedures (UK:NI), with respect to certain EU directives; ▪ Makes changes to the way NI conformity checks are carried out, and to the mutual recognition of non-harmonised standards. 	<ul style="list-style-type: none"> ▪ Post transition, NI businesses will operate in two regulatory “zones”. Businesses may benefit on guidance to how these operate and interact. ▪ New labelling requirements are to introduced. This may result in additional cost to businesses. ▪ According to the European Commission, and with respect to industrial products, NI Notified Bodies can still certify NI products when required, but their certifications are only valid in NI, not the EU. NI businesses may have to apply for new certifications from EU Notified Bodies, or find alternative ways to meet the requirements set out in EU product legislation. ▪ According to the European Commission, and with respect to industrial products, the principle of mutual recognition with respect to non-harmonised products standards will no longer apply to NI goods: <i>“This means that the lawful placing of a product on the market of Northern Ireland cannot be invoked when that product is placed on the market in the EU”</i>. It is unclear as to how NI products can be lawfully marketed in the EU. 	<ul style="list-style-type: none"> ▪ There is a scarcity of analysis in relation to Article 7. What consideration has the DfE has given to the meaning and implications of Article 7, with respect to NI? ▪ What guidance can the DfE provide to businesses to ensure they are fully aware of their regulatory obligations? ▪ Has the DfE carried out any assessment of the proportion of NI goods will be required to meet new labelling requirements? ▪ Has the DfE carried out any assessment of the additional cost to business be of meeting these requirements? ▪ What assistance can the NI Executive and the UK Government provide to businesses to familiarise them with the new labelling requirements? ▪ Has the DfE given any consideration to how NI businesses will demonstrate compliance with EU product regulation, where the associated standard requires Notified Body certification? ▪ Has the DfE carried out an assessment of costs to businesses of the above? ▪ What assistance can be provided by the NI Executive and UK Government to inform businesses of potential changes as to how products are certified post-transition? ▪ Has the DfE carried out any assessment of the capacity of small and micro-businesses to monitor and to adapt quickly to changes in the certification process? ▪ Has the DfE carried out any assessment of the cost associated with this familiarisation process? ▪ Has the DfE given consideration of the following: in the absence of mutual recognition; and, how can NI businesses lawfully market their products on the Single Market? ▪ Has the DfE given any consideration to the implications of this for the free flow of goods from NI to the RoI?

Source: RaiSe (2020).

1 Brief Background on the Protocol

This section summarises background information on the Protocol, which is an integral part of 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*” (the Withdrawal Agreement);¹¹ agreed by the UK and the EU on 19 October 2019 and ratified on 31 January 2020. Subsection 1.1 looks at why the Protocol was created, while subsection 1.2 looks at the interrelated nature of the Protocol and, the ongoing negotiations under the Political Declaration regarding the future relationship between the UK and the EU.

1.1 What is the Protocol?

The Protocol has its roots in the Joint UK-EU Report dated 8 December 2017.¹² 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;
- 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 will also, technically be 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. These aspects of the Protocol are considered in greater detail below.

1.2 The interaction between the Protocol, the Political Declaration and the negotiations on the future relationship between the UK and the EU

Before doing so, it is important to note that the Protocol interrelates with another part of the Withdrawal Agreement, i.e. the Political Declaration. The Political Declaration was agreed and published alongside the Withdrawal Agreement. It sets out a framework for negotiations on the future relationship between the UK and the EU.¹³ Article 184 of the

¹¹ 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

¹² 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

¹³ *Ibid*

Withdrawal Agreement commits the UK and the EU to undertake negotiation on their future relationship, based on the framework agreed in the Political Declaration.¹⁴

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.*¹⁵

Since 2 March 2020, there have been on-going political negotiations to define the future relationship between the UK and the EU. The negotiations are due to conclude before 31 December 2020, to allow sufficient time to allow for ratification.¹⁶

There is a broad range of possibilities that could emerge from the negotiations; but, as the above quote makes clear, a Free Trade Agreement (FTA) between the UK and the EU is the preferred option. Alternatively, in circumstance where the parties cannot agree a FTA, the UK relationship with the EU would be governed by World Trade Organisation (WTO) rules.¹⁷ However, in such a scenario, the UK Government has made clear that the Protocol is:

*...designed to operate without a Free Trade Agreement between the United Kingdom and the EU in place.*¹⁸

Whatever is or is not agreed by 31 December 2020, the end of the transition period, the future relationship between the UK and the EU is expected to impact NI. Most notably, for example, the future relationship may include an agreement on services, which are outside what is agreed in the Protocol. The interconnection between the future relationship and the potential effects of the Protocol is explored throughout this paper.

¹⁴ 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

¹⁵ 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

¹⁶ 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/>

¹⁷ 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

¹⁸ 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

2 Customs and trade arrangements under the Protocol

In terms of understanding the customs and trade arrangements under the Protocol, it first is helpful to set out the four Protocol articles that relate directly to customs and trade:

- Article 4, “Customs territory of the United Kingdom” (subsection 2.1 of this paper);
- Article 5, “Customs and the movement of goods” (subsection 2.2.);
- Article 6, “Protection of the UK internal market” (subsection 2.3); and,
- Article 7, “Technical regulations, assessments, registrations, certificates approvals and authorisations” (subsection 2.4).

Note that these provisions will be implemented at the end of the transition period, which is due to end on 31 December 2020.

2.1 Article 4: Customs territory of the UK

Article 4 of the Protocol concerns “*the Customs territory of the UK*”. The subsection first provides an overview of Article 4 (at subsection 2.2.1), followed by an analysis of key potential implications arising from the Article, when implemented.

2.1.1 What is the purpose of Article 4?

Article 4 of the Protocol states:

*Northern Ireland is part of the customs territory of the United Kingdom.*¹⁹

And:

...nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries, provided those agreements do not prejudice the application of this Protocol.

*In particular, nothing in this Protocol shall prevent the United Kingdom from concluding agreements with a third country that grant goods produced in Northern Ireland preferential access to that country’s market on the same terms as goods produced in other parts of the United Kingdom.*²⁰

The Protocol also states that NI will be included in the UK’s WTO tariff schedules.

¹⁹ 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) Article 4(1)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

²⁰ *Ibid*

2.1.2 What are the implications for NI of Article 4?

Effectively, Article 4 provides that following 31 December 2020, NI will:

- Remain in the UK's customs territory;
- Be included in future UK FTAs with third countries; and,
- Be included in the UK's WTO tariff schedules.

Article 4 provisions ensure NI businesses are to benefit from any future trade deals that the UK signs with third countries. It has long been a goal of the NI Executive to increase exports and external sales. For example, the 2016 strategy document "*Export Matters*", published by the then Department of Enterprise, Trade and Investment, included a target to increase sales outside of NI by 33% by 2020 and by 80% by 2025 (against a 2014 baseline).²¹

FTAs tend to liberalise trading relationships between countries (or blocs of countries) by relaxing, or removing, tariff and non-tariff barriers to trade. NI's inclusion in future UK FTAs opens up the potential for NI companies to benefit from any resulting trade liberalisation. As of 4 May 2020, the UK Government had signed FTAs with a range of countries/blocs: these will come into effect on 1 January 2021, immediately following the transition period. It also is negotiating additional FTAs with other countries/blocs, as highlighted below in Table 2.²² On 5 May 2020, the UK Government announced the start of its trade negotiations with the United States (US).²³

²¹ Department for the Economy, *Export Matters* (07 March 2016) <https://www.economy-ni.gov.uk/publications/export-matters>

²² Department for International Trade, *Existing UK trade agreements with non-EU countries* (updated 4 May 2020) <https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries>

²³ The UK Government, *UK and US start trade negotiations* (05 May 2020) <https://www.gov.uk/government/news/uk-and-us-start-trade-negotiations>

Table 2: UK and non-EU country FTA agreements and ongoing negotiations (as of 4 May 2020)²⁴

Signed FTAs	Ongoing FTA negotiations
Andean Countries	Albania
CARIFORUM trade bloc	Algeria
Central America	Bosnia and Herzegovina
Chile	Cameroon
Eastern and Southern Africa trade bloc	Canada
Faroe Islands	Cote d'Ivoire
Georgia	Ease African Community
Iceland and Norway	Egypt
Israel	Ghana
Kosovo	Mexico
Lebanon	Moldova
Liechtenstein	Montenegro
Morocco	North Macedonia
Pacific States	Serbia
Palestinian Authority	Singapore
South Korea	Ukraine
South Africa Customs union and Mozambique trade bloc	
Switzerland	
Tunisia	

Source: DIT (2020)

Commenting on the future of UK global trade in her written statement to the House of Commons in February 2020, the UK Secretary of State for International Trade stated:

A key priority is to deepen trade and investment relationships with like-minded partners, starting with the USA, Japan, Australia and New Zealand. These bilateral negotiations will also be a potential stepping-stone to joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.²⁵

And:

In its negotiations, the Government will be acting on behalf of the whole UK family and our overall principle is to ensure all parts of the UK benefit from

²⁴ *Ibid*

²⁵ UK Parliament, Written Statement from the Secretary of State for International Trade to the House of Commons, Free Trade Agreements with the Rest of the World: HCWS96 (06 February 2020) <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-02-06/HCWS96/>

*any deal. In addition, nothing in any agreement will undermine the Government's commitment to tackling climate change.*²⁶

It is clear from her statement that the UK Government plans to negotiate on behalf of all UK regions. This is unsurprising, as trade policy is a reserved matter under all three devolution settlements.²⁷ It is unclear, however, what influence, if any, devolved regions can have on the UK's negotiating position.

From the NI Executive's perspective, the UK Government has made the following commitments on future NI trade in the *New Decade, New Approach* deal (NDNA), dated January 2020. That deal states:

*Enhance the assistance from business-supporting UK Government departments in NI including DIT [the Department for International Trade], working in partnership with Northern Ireland agencies, including Invest NI. This will include supporting the delivery of the Northern Ireland International Trade plan, establishing a new Trade Advisory Board, appoint of Northern Ireland Trade Ambassadors, and developing a Trade Accelerator Plan and a 'Made in NI' campaign.*²⁸

UK post-EU trade policy therefore could present NI with a new range of tools to secure new opportunities. **The Committee may wish to consider how it might best scrutinise NI international trade performance, particularly in the context of the UK's new trade policy and the commitments made by the UK Government to NI.**

Overall, Article 4 cannot be read in isolation. It is affected by other elements of the Protocol. This is explored in the subsections below. Notably, as outlined in the UK Government's "Explainer for the new Ireland/Northern Ireland Protocol and the Political Declaration on the Future Relationship" (the UK Explainer), the "conditions" for Article 4 are set out in Article 5 of the Protocol.²⁹

Moreover, since the Protocol was published, the prospects for global economic growth have been significantly revised downward due to ongoing Covid-19 policy interventions impacting economies in the UK and the EU. It is reasonable to anticipate that depressed global economic activity will influence future UK trade ambitions, including those of NI, and of the RoI, all of which will have impact in relation to NI.

²⁶ *Ibid*

²⁷ UK Civil Service, Devolution Factsheet (accessed 05 May 2020)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770709/DevolutionFactsheet.pdf

²⁸ UK Government, *New Decade, New Approach* (January 2020)
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 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

Key potential scrutiny points:

1. Would the Department for the Economy (DfE) share its view with the Committee, as to what influence, if any, it believes it could have in shaping the direction of UK trade policy at present and in future?
2. In that regard, how does the DfE believe it can most effectively engage with the UK Government on this issue, to ensure that NI views are best represented?
3. How will the Executive utilise the new tools outlined in the *New Decade, New Approach* deal (NDNA), which seeks to maximise opportunities arising from new UK FTAs, such as those arising from reduced tariff access to non-EU markets?
4. Have these new tools been costed by the DfE or others? If so, please explain who, how and the cost findings.
5. Would the DfE detail how the NDNA new tools will be funded?
6. Would the DfE please explain how the NI Executive's forthcoming economic strategy for NI seeks to maximise opportunities presented by the UK Government's new trade policy?
7. When is that strategy to be published?
8. What trade related targets will the forthcoming economic strategy include?
9. How will this be reflected in the draft Programme for Government and related Outcomes Delivery Plan?
10. In the DfE's current view, what effect will the present global downturn have on UK and NI ambitions to grow their international trade, together and individually?

2.2 Article 5: Customs and the movement of goods

The following subsection examines Article 5 of the Protocol, which includes provisions concerning “*customs*” and the “*movement of goods*”. The subsection begins by outlining the purpose of Article 5. It then goes on to examine some of the potential implications arising out of Article 5. This analysis is based on a range of sources, including the UK Government and the European Commission, as well as a range of academic and stakeholder commentary. Data from Her Majesty's Revenue and Customs (HMRC) and the Northern Ireland Statistics Research Agency (NISRA) also is used throughout this subsection.

Specifically, the analysis included here looks at the potential implications of Article 5, with respect to:

- Potential trade frictions on goods moving from Great Britain (GB) to NI (subsection 2.2.2a);
- Exceptions to customs tariffs (subsection 2.2.2b); and,
- Regulatory alignment (subsection 2.2.2c).

The intention of this subsection is to provide an introduction to Article 5 of the Protocol, and NI implications arising from it.

2.2.1 What is the purpose of Article 5?

Article 5 (1) sets out rules concerning the movement of goods from GB and outside of the EU to NI. The Protocol states: “*no customs duties*” will be payable on goods moving from GB, “*unless*’ the good *‘is at risk of subsequently being moved’* into the EU either “*by itself or forming part of another good*”.³⁰

Goods moving to NI from outside of the EU and GB will pay the relevant UK duty, “*unless*” that good “*is at risk of subsequently being moved*” into the EU either “*by itself or forming part of another good*”.

The Protocol only partially defines “*at risk*” (contained in Article 5 (2)³¹). It states that good will be considered “*at risk of subsequently being moved*” into the EU “*unless it can be established that that good*”:

*...will not be subject to commercial processing in Northern Ireland.*³²

Additionally, as noted earlier in the paper, the “*at risk*” criteria are to be determined by the Joint Committee, before the end of the transition period. In establishing these criteria, the Joint Committee is required to take into account the following:

- The final destination and use of the good;
- The nature and value of the good;
- The nature of the movement; and,
- The incentive for undeclared onward-movement into the Union, in particular incentives resulting from the duties payable pursuant to paragraph 1 (at set out above).³³

The final point was interpreted by the Lords Select Committee on the EU on 19 October 2019 as:

*... a general catch-all covering potential criminal activity such as smuggling.*³⁴

³⁰ 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) Article 5(1)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

³¹ *Ibid* Article 5(2)

³² *Ibid*

³³ *Ibid*

³⁴ House of Lords Select Committee on the European Union, Brexit: the revised Withdrawal Agreement and Political Declaration, 1st Report of Session 2019-20 (10 January 2020), Chapter 4: Protocol on Ireland and Northern Ireland
https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/4/407.htm#_idTextAnchor058

Under the Protocol, the Joint Committee also is required to “*have regard to the specific circumstances in Northern Ireland*”. Additionally, the Protocol gives the Joint Committee the power to amend decisions on “*at risk*” criteria at any time.³⁵

Article 5(3) of the Protocol places an obligation on “*UK in respect of Northern Ireland*”, to apply the EU Customs Code, as set out in Article 5(2) of “*Regulation 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code*”. Article 5(2) of that regulation defines EU customs regulation, specifying:

- The Code and the provisions supplementing or implementing it adopted at EU or national level;
- The Common Customs Tariff;
- The legislation setting up an EU systems of reliefs from customs duty; and,
- International agreements contain customs provisions, insofar as they are applicable in the Union.³⁶

Article 5(3) also states that the Joint Committee will:

*...establish the conditions, including in quantitative terms, under which certain fishery and aquaculture products, as set out in Annex 1 to Regulation (EU) 1379/2013 of the European Parliament and of the Council, brought into the customs territory of the Union defined in Article of Regulation (EU) No952/2013 by vessels flying the flag of the United Kingdom and having their port of registration in Northern Ireland are exempted from duties.*³⁷

Additionally, the Protocol also states that duties levied by the UK with respect to Article5(3), will not be remitted to the EU. Rather, the UK may:

- Reimburse duties levied on goods brought into NI;
- Waive customs debt in respect of goods brought into NI;
- Reimburse duties in respect of goods that can be show not to have entered the EU; and,
- Compensate undertakings to offset the impact of the application of Article 5(3).³⁸

³⁵ 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) Article 5(2)

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

³⁶ Eur-lex Regulation 952/2013 of the European Parliament and of the Council of 9 October 2013 Article 5(2) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0952>

³⁷ 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) Article 5(3) 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

³⁸ *Ibid*

Article 5(4) of the Protocol obliges NI to align with specific EU rules. In particular, it will be required to align to EU Single Market rules regarding the regulation, assessment, registration, certificate approval and authorisation of goods.³⁹

The specific regulations are set out in Annex 2 of the Protocol.⁴⁰ There are approximately 300 individual pieces of EU law, which NI is expected to remain aligned to, i.e. areas summarised in Table 3:

Table 3: Summary of areas of EU law included in Annex 2 of the Protocol⁴¹

Areas in which NI will be aligned to EU product and technical standards	
General customs	Chemicals
Protection of the EU's financial interests	Pesticides and biocides
Trade statistics	Waste
Regulations on bilateral safeguards	Environment and energy efficiency
Licensing of pharmaceutical products	Marine equipment
Goods – general provisions	Rail transport
Motor vehicles, including tractors	Food – general hygiene, ingredients, contact material and other matters
Lifting appliances	Animal feed – products and hygiene
Gas appliances	Genetically Modified Organisms
Pressure vessels	Live animals, germinal products and products of animal origin
Measuring instruments	Animal disease and zoonosis control
Construction products and machinery	Animal identification
Electrical and radio equipment	Animal breeding
Textiles and footwear	Animal Welfare
Cosmetics and toys	Plant reproductive material
Recreational craft	Official controls and veterinary checks
Explosives and pyrotechnics	Sanitary and phytosanitary
Medicinal products	Intellectual property
Medical devices	Fisheries and aquaculture
Substances of human origin	Others including provisions relating to crude oil, tobacco, cultural goods, medals and coins, crystal glass, weapons, rough diamonds, and goods used for capital punishment, torture or cruel and inhuman or degrading treatment

Source: Withdrawal Agreement (19 October 2019), including Annex 2 to the Protocol on Ireland/Northern Ireland.

³⁹ *Ibid* Article 5(4)

⁴⁰ *Ibid* Annex 2

⁴¹ 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) Annex 2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

As can be seen from Table 3 above, NI will remain aligned to a broad scope of legislation. It ranges from general product regulation, in the form of the General Product Safety Directive 2001/95/EC (the GPSD), to regulations that address specific product areas. Each specified product regulation places specific responsibilities on manufacturers when placing products on the market. This includes responsibilities such as:

- Carrying out conformity assessment (which may require checks by a third party);
- Drawing up technical documentation;
- Drawing up an EU declaration of conformity;
- Providing safety instructions and safety information with the product;
- Satisfying all traceability criteria;
- Affixing the 'CE' marking and where required other relevant marking onto the product; and,
- Ensuring procedures are put into place to ensure the products continuing conformity; and,
- Certifying, where relevant, the product and/or the quality system.⁴²

The EU law outlined in Table 3 will continue to apply in future, despite amendment or replacement of any of that law; pursuant to Article 13(3) of the Protocol. In addition to aligning to existing regulation in the areas outlined in Table 3, NI may be required to align to future legislation that “falls within the scope of this Protocol” (Protocol, Article 13(4)). Should such legislation arise:

...the [EU] shall inform the United Kingdom of the adoption of that act in the Joint Committee. Upon the request of the [EU] or the United Kingdom, the Joint Committee shall hold an exchange of views on the implications of the newly adopted act for the proper function of this Protocol, within 6 weeks after the request.⁴³

Once the EU has informed the UK about the adoption of new regulation, the Joint Committee will either agree to add the newly adopted act to the relevant Annex of the Protocol, **or**:

...where an agreement on adding the newly adopted act to the relevant Annex to this Protocol cannot be reached, examine all further possibilities

⁴² Official Journal of the European Union, Information from the European Union Institutions, Bodies, Offices and Agencies, European Commission notice, The 'Blue Guide' on the implementation of EU products rules 2016 (2016/C 272/01) p28-32 <http://ec.europa.eu/docsroom/documents/18027/attachments/1/translations/en/renditions/native>

⁴³ 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) Article 13(4) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

*to maintain the good functioning of this Protocol and take any decision necessary to this effect.*⁴⁴

2.2.2 Potential NI implications of Article 5

The following subsection outlines key potential NI implications of Article 5, with respect to:

- Potential trade frictions on goods moving from GB to NI (subsection 2.2.2a);
- Exceptions to customs tariffs (subsection 2.2.2b); and,
- Regulatory alignment (subsection 2.2.2c).

The Committee should note, as mentioned in the introduction, paper is to provide an initial consideration of the Protocol, including potential NI implications relating to customs and trade post transition. It is foreseeable that subsequent queries may arise for the Committee on particular points naturally arising in this area.

2.2.2a Potential trade frictions on goods moving from GB to NI

Article 5 ensures that no tariffs will be payable on goods entering NI from GB, unless the goods are deemed to be at risk of subsequent movement into the EU. Similarly, goods imported from outside of the EU and GB, into NI, will pay the UK tariff, *unless* those goods are deemed to be at risk of later movement into the EU.

According to analysis published in the *Tax Journal* in April 2020:

This drafting might appear to suggest that the imposition of customs duties on goods entering Northern Ireland from elsewhere in the UK will be the exception rather than rule. However, once the full concept of 'at risk' in Article 5(2) is understood, any optimism as regards frictionless trade is liable to be dashed. Here, it transpires, the default position is that goods will be considered at risk of onward movement into the EU, 'unless it is established that the good (a) will not be subject to commercial processing in Northern Ireland; and (b) fulfils the criteria established by the Joint Committee in accordance with the fourth subparagraph...'.⁴⁵

The publication further argued that it will be the “good importer” who will be required to demonstrate that goods are not at risk.

As noted earlier (subsection 2.2.1), the precise definition of what might be considered an “at risk” good is still to be determined by the Joint Committee pursuant to the Protocol. It is equally unclear what will happen if no agreement on the definition of “at

⁴⁴ *Ibid*

⁴⁵ *Tax Journal/2020/Issue 1483, 17 April/Articles/Analysis – Customs and the Northern Ireland Protocol – Tax Journal, Issue 1483, 14*

risk” is reached before the transition period ends. Some commentators argue that this will result in **all** goods entering NI from GB and outside of the EU as “*at risk*”.⁴⁶

The Cabinet Office Command paper “*The UK’s Approach to the NI Protocol*” (Command Paper), published on 20 May 2020, set out the UK’s position on the issue of ‘*at risk*’. It stated that there should be no tariffs on UK internal trade, and that tariffs should only be charged when goods entering NI are destined for the RoI (or EU more broadly), or when there is “*a genuine and substantial risk of them ending up there*”.⁴⁷ Further, the Command Paper stated:

*If a supplier in Great Britain sends goods to a business for sale in Northern Ireland, then that is internal UK trade. Raw produce from Great Britain for agri-food processing in Northern Ireland which is then sent back to Great Britain is another good example of trade which is internal and has no impact on the EU market. A supermarket delivering to its stores in Northern Ireland poses no ‘risk’ to the EU market whatsoever, and no tariffs would be owed for such trade.*⁴⁸

The UK Government also has stated that this principle “*needs to be formalised with the EU*” through the Joint Committee. No formal response from the EU to the UK’s Command Paper was available at the time of writing. Certainty on this issue is of critical importance to businesses which purchase goods from GB. Particularly if they are required to prove the goods they have purchased are not “*at risk*” of entering the EU.⁴⁹

Key potential scrutiny points:

1. In the DfE’s view, how does it believe the Joint Committee will define “*at risk*” in the context of movement of goods into NI?
2. Has the DfE proposed potential definitions to the Joint Committee or other relevant bodies?
3. Can the DfE advise what it believes will happen if the Joint Committee does not agree a definition of “*at risk*” by the end of the *transition* period, now due to end on 31 December 2020?
4. In the DfE’s assessment, what proportion of NI purchases from GB, or imports from outside of the EU and GB, are likely to be deemed “*at risk*” on 1 January 2021?

⁴⁶ House of Lords Select Committee on the European Union, Uncorrected oral evidence: The Protocol on Ireland/Northern Ireland (11 February 2020)
<https://committees.parliament.uk/download/file/?url=%2Foralevidence%2F59%2Fdocuments%2F560%3Fconvertiblefileformat%3Dpdf&slug=uc-transcript-eu-ev-1-110220-henig-et-alpdf>

⁴⁷ The Cabinet Office, The UK’s Approach to the NI Protocol (20 May 2020)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf

⁴⁸ *Ibid*

⁴⁹ *Ibid*

5. Has the DfE given any assessment of the cost implications for importers, who could be required to demonstrate that goods are not “at risk” of entering the EU?
6. Have the DfE carried out any assessment as to the potential impact of the above on consumer prices?

Beyond the uncertainty in this area, there also are potential implications arising from these provisions with respect to the free movement of goods from GB to NI. Evidence presented on 11 February 2020, by the HMRC to the House of Lords Select Committee on the EU (the Lords Committee), noted that for goods categorised as “*at risk*”:

*The UK will [have to] make sure that a tariff equivalent to the EU tariff is applied to such goods.*⁵⁰

And that this requirement will:

*...necessitate declarations being made for good moving from Great Britain to Northern Ireland.*⁵¹

The purpose of such checks will be to ensure the correct tariff is applied. The Lords Committee’s report noted that this will be necessary “*even if that tariff is set a zero*”.⁵²

The Lords Committee also heard evidence that argued a FTA, in which the UK and the EU agreed to no tariffs and quotas on trade, would alleviate these particular trade frictions on goods moving from GB to NI.⁵³

In addition to potential tariff related checks, additional frictions on GB to NI trade may arise from Article 5. Specifically, Article 5(4) obliges NI products to align to EU product regulation in relation to a range of goods. The HMRC’s evidence to the Lords Committee notes that due to these provisions “*any goods going into Northern Ireland from Great Britain will have to comply with EU regulatory standards*”. According to the HMRC, this also could result in checks on goods entering NI from GB “*to ensure that regulatory standards being met*”.⁵⁴

The HMRC evidence to the Lords Committee also noted that despite the need to carry out checks in the relation to EU law, NI would not be considered part of the EU Customs Territory. This is because the necessary checks “*will be carried out by HMRC*”. According to the HMRC evidence, these checks “*will feel like a customs*

⁵⁰ House of Lords Select Committee on the European Union, Brexit: the revised Withdrawal Agreement and Political Declaration, 1st Report of Session 2019-20 (10 January 2020), Chapter 4: Protocol on Ireland and Northern Ireland https://publications.parliament.uk/pa/ld5801/ldselect/lducom/4/407.htm#_idTextAnchor058

⁵¹ *Ibid*

⁵² *Ibid*

⁵³ House of Lords Select Committee on the European Union, Uncorrected oral evidence: The Protocol on Ireland/Northern Ireland (11 February 2020)

<https://committees.parliament.uk/download/file/?url=%2Fforevidence%2F59%2Fdocuments%2F560%3Fconvertiblefileformat%3Dpdf&slug=uc-transcript-eu-ev-1-110220-henig-et-aldpdf>

⁵⁴ *Ibid*

declaration, because they will contain information that is used for regulatory purposes". Additionally, the HMRC noted that physical checks "could be required" in order to "give effect to EU regulatory standards".⁵⁵

It should be noted that the UK, as a whole, is currently aligned with EU law in respect to product regulation, and will remain so during the transition period. Following the transition period, the FTA between the UK and EU will determine the extent to which the UK and the EU will continue to remain aligned in these areas. This will in turn impact the extent to which regulatory checks will be required on goods entering NI from GB. Essentially, the requirement for regulatory checks declines the more closely aligned the UK is to EU regulation. Conversely, the requirement for regulatory checks is likely to increase the more the UK diverges from EU regulation, particularly if the UK chooses to diverge to what is assessed to be a lower standard than the EU.⁵⁶

According to the Northern Ireland Statistics Research Agency (NISRA), in 2017 NI purchased goods to the value of £16.8bn⁵⁷ from outside NI, of this £10.5bn, or 63%, was purchased from GB.⁵⁸ The majority of goods purchased from GB (£6.8bn, or 65% of all GB goods purchases) were in the wholesale and retail sector.⁵⁹ Based on the HMRC evidence outlined above, there is potential that these purchases will now be subject to checks when they enter into NI; when previously no such checks had taken place. A number of potential implications arise from this.

First, it is unclear the extent to which additional infrastructure and staff will be required to facilitate the checking of goods entering NI from GB. Note that in evidence to the Executive Office Committee on the 13 May 2020, a Junior Minister in the Executive Office noted that the UK Government had confirmed to the NI Executive that customs infrastructure would be required at NI ports. He stated that the UK Government has:

...confirmed that it will urgently put in place detailed plans with the executive, which does include the physical posts at ports of entry.⁶⁰

Second, additional checks and processes have the potential to place an increased administrative burden on businesses selling into NI from GB. In turn, this may lead to

⁵⁵ *Ibid*

⁵⁶ House of Lords Select Committee on the European Union, Uncorrected oral evidence: The Protocol on Ireland/Northern Ireland (11 February 2020)

<https://committees.parliament.uk/download/file/?url=%2Fforevidence%2F59%2Fdocuments%2F560%3Fconvertiblefileformat%3Dpdf&slug=uc-transcript-eu-ev-1-110220-henig-et-alpdf>

⁵⁷ Total purchases of goods and services were £20.4bn

⁵⁸ Throughout this paper references are made to a number of categories of trade, namely external trade, exports, purchases and imports. For clarity exports refers to trade sales from NI to countries outside the UK. External sales refer to outside of NI and included sales to GB, i.e. external sales are equal to exports plus sales to GB. Imports refer to sales into NI from outside of the UK. Purchase refer to all sales into NI, including those from GB, i.e. imports plus sales from GB to NI.

⁵⁹ NISRA, Overview of NI Trade with GB (October 2019)

https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/NISRA_Overview_of_NI_Trade_with_GB_2017_0.pdf

⁶⁰ BBC News, Brexit UK government to enhance border checks at NI ports (13 May 2020) <https://www.bbc.co.uk/news/uk-northern-ireland-52654166>

an increase in cost for those businesses, which may be passed onto the final customer. This could result in NI businesses and consumers paying more for GB goods.

The impact assessments that accompanied the UK Withdrawal Agreement Bill 2020 drew a number of conclusions on the effects of the Protocol on NI trade. It concluded that costs would result from both import declaration and Entry Summary Declarations due to the application of the Customs Code in NI. This would result in both administrative and familiarisation costs to businesses. Data limitations prevented an accurate estimation of the administrative cost to business.⁶¹ However, the impact assessment noted that:

HMRC has produced estimates of the administrative burden to traders on a per declaration basis, based upon historical UK-RoW [Rest of the World] trade. This ranges from £15 to £56 per declaration, depending on factors such as whether a business outsources the process to a customs agent, but it may not be possible to translate the same estimates to Great Britain to Northern Ireland movements. Small and micro businesses (SMBs) may be more likely to use a customs agent and as such are more likely to face higher costs, though the use of agents could reduce both familiarisation costs and any other burdens associated with the process.⁶²

The Cabinet Office Command Paper, published on 20 May 2020, confirmed that the Protocol's provision will mean that "some new administrative process" to ensure that the "correct tariffs are applied". The Command Paper also outlined the UK's position with regard to the nature and extent of tariff "processes". It stated that these "processes" would be "streamlined" and "electronic". The UK Government also stated its view that these processes will require "no new customs infrastructure". Additionally, the Command Paper set out the UK Government's view that goods moving from GB to NI will be of lower risk than those moving into the UK from third countries. It pointed that currently 4% of goods moving from third countries to the UK were checked through customs declarations, and under the 1% require physical checks.⁶³

The Command Paper did highlight, however, that the situation would, in the UK Government's view, be different for agri-food goods, moving from GB to NI. On this, the Command Paper states:

...Some checks will be needed, supported by relevant electronic processes, in line with the island of Ireland's status as a Single

⁶¹ UK Government, Impact Assessment: the European Union (Withdrawal Agreement) Bill (21 October 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841245/EU_Withdrawal_Agreement_Bill_Impact_Assessment.pdf

⁶² *Ibid*

⁶³ The Cabinet Office, The UK's Approach to the NI Protocol (20 May 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf

*Epidemiological Unit, building on what already happens at ports like Larne and Belfast.*⁶⁴

It adds that “*expanded infrastructure will be needed*” at some points of entry for the purpose of “*agri-food checks and assurance*”. This adds a significant nuance to the evidence heard by the Executive Office Committee on 13 May 2020, with respect to “*physical post at points of entry*”. It appears from the Command Paper that the UK Government’s view is that any additional infrastructure will be required for the purposes of processing agri-food goods, but not for processing other forms of industrial goods.⁶⁵

At the time of writing, the EU has not issued a formal response to the UK’s Command Paper. However, it is worth noting that evidence presented to the House of Commons NI Affairs Committee, an academic previously argued in May 2020 that checks on GB to NI trade are likely to be minimal. The academic further stated that they could be mitigated through trusted trader schemes, explaining:

In this situation. the customs challenge is to determine whether any purported intra-UK transactions will subsequently be moved to one of the 27 EU member states, in which case HMRC will require the completion of UK export formalities in Great Britain and the completion of EU import formalities in Northern Ireland. This risk can be effectively managed by requiring an electronic declaration to be lodged with HMRC for all East-West trade transactions, containing minimal information about:

- *Who is sending and receiving the goods*
- *What the goods are and their value*
- *Where the goods are going and mode of transport*
- *Whether the goods will be subject to commercial processing in Northern Ireland*
*Whether the goods will be moved to one of the 27 EU member states.*⁶⁶

Adding that:

*Many companies engaged in legitimate intra-UK will generally have established trading patterns that can be used by HMRC to support a low-risk assessment of their activities. Furthermore, Authorised Economic Operators (also known as trusted traders) may be allowed to trade without a requirement to submit such ‘intra-UK’ declarations.*⁶⁷

It is also worth noting that in light of the possible frictions on trade between NI and GB, other witnesses to the NI Affairs Committee – on 30 April 2020 – have called for the

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ Written evidence submitted by Professor David Widdowson AM (UNF0017), Supplementary Submission to the Northern Ireland Affairs Committee on Unfettered Access: Northern Ireland and customs arrangements after Brexit (May 2020) <https://committees.parliament.uk/writtenevidence/3837/pdf/>

⁶⁷ *Ibid*

reinstatement of the “Alternative Arrangements Working Group”, to examine options for minimising those frictions.⁶⁸

Key potential scrutiny points:

7. Have the DfE carried out any assessment of the proportion of NI purchases from GB will be subject to tariff and regulatory checks?
8. Has the DfE had sight of any UK Government assessment of what structures, infrastructure and staff need to be in place by the end of the transition period, to ensure these checks can be carried out? Can this be shared with the Committee?
9. What is estimated to be the cost of this?
10. What government funding – both UK and EU – will be made available for this? Where will the funding come from?
11. What discussion has there been in the Executive about the issue of funding in this area? Has the Minister brought this to the Executive’s attention? If so, when, and what was discussed? If not, why has it not yet been raised; and when will it be?
12. What happens if the necessary structures are not in place by the end of the transition period?
13. Have the DfE carried out any assessment on the impact tariff and regulatory checks have might have on the prices paid for UK goods by businesses and consumers, particularly in the wholesale and retail sectors?
14. How will the UK Government seek to minimise checks on goods entering NI from the UK, while also maintaining obligations of EU law in respect to NI?
15. What role will the Alternative Arrangements Working Group, (or the work of that group with respect to the land border between NI and the RoI), have in minimising checks on goods entering NI from GB?

2.2.2b Exceptions to customs tariffs

Article 5(3) provides that the UK must apply the EU Customs Code in respect of NI, including the collection of Common Tariff. There are a number of unresolved issues arising from this provision and the related provisions at Article 5(6).

First, Article 5(3) notes that the Joint Committee will “*establish conditions*” to establish exemptions for fishery and aquaculture products brought into the EU customs territory by vessels flying the UK flag, but registered in NI. The precise terms of this exemption are, as yet, unclear.

⁶⁸ House of Commons NI Affairs Committee, Oral Evidence: Unfettered Access: Northern Ireland Customs Arrangements after Brexit, HC161 (30 April 2020) <https://committees.parliament.uk/oralevidence/332/pdf/>

Second, Article 5(6) states that customs duties levied by the UK are not remitted to the EU, but retained by the UK. The article gives the UK the power to waive customs debts on goods entering the UK subject to State Aid. The exact terms of how and when such waivers will apply are unclear.

Third, Article 5(6) also gives the UK the power to provide for circumstances in which customs duties are reimbursed, both in general, and in respect to goods which are proven to have not entered the EU. Again the precise circumstances remain unclear. They, however, will rest, in part, on the final definition of “as risk” goods, which is itself only partly defined. In addition, questions have been raised by stakeholders over the terms of this reimbursement. Notably, in evidence to the Lords Committee, the NI Retail Consortium (NIRC, raised two questions about the rebate process. It asked:

How will ‘rebates’ be effectively processed to reduce any cash flow or absolute costs to business?

And:

Will there be a timeline for processing rebates for which the UK government will be held to account for?

Key potential scrutiny points:

1. Have the DfE any indication as to what conditions the Joint Committee will establish in respect to fishery and aquaculture products, to ensure these products are exempt from duties?
2. Have the DfE carried out any evaluation of what happens if the Joint Committee does not agree these conditions by the end of the transition period?
3. What processes will the UK Government put into place to enable businesses to secure reimbursement of tariff duties; and what time frames will be put in place?
4. In anticipation of future implementation, has the DfE discussed this matter with the NI Department of Finance?
5. If so, has it also been raised at the Executive? And if so, has the Finance Minister raised it with Treasury and the HMRC?
6. If none of the above has taken place in relation to the above two issues, then what planning has been undertaken to ensure such matters are addressed by all relevant ministers and the Executive, given implications are foreseeable for NI businesses?
7. What criteria will be put in place by the UK Government to determine whether a customs debt is waived?
8. Have the DfE been given any insight into the anticipated processes by which the UK Government will deliver tariff reimbursements, or customs debt waivers?
9. How will DfE communicate these schemes to businesses in NI?

2.2.2c Regulatory alignment

The purpose of Article 5(4), which provides the NI must remain aligned to a significant portion of EU law, is to create a single regulatory zone on the island of Ireland. The intention of the article is to enable the free movement of goods from NI to the Republic of Ireland (RoI) and from the RoI to NI.⁶⁹ The HMRC data shows that the RoI was NI's most important goods export and import partner in 2019. NI exported goods valued at £3.2 billion (bn) (35% of total exports) to the RoI and imported goods valued at £2.3bn from the RoI (29% of total imports), in 2019.^{70 71} In addition, research published by the NISRA on 21 June 2018 found that:

- An estimated 11,100 (or 21% of) NI businesses either exported to or imported from the RoI in 2016;
- NI VAT registered businesses (in non-financial and non-farm sectors) made 758,000 cross export deliveries to the RoI, valued at £3.4bn in 2016;
- Approximately 410,000 import deliveries from the RoI to NI were made in 2015, valued at just below £2.0bn;
- The majority of cross-border trade was carried out by micro and small businesses. Approximately 74% of export deliveries were carried out by small business and 33% were carried out by microbusinesses.
- Two-thirds of cross-border trade involved supply activity (2015-16); and,
- Most NI businesses make low value export deliveries.⁷²

As such, the creation of a single regulatory zone on the island of Ireland, has the potential to protect a significant portion of NI's trade. However, as noted above, the same provisions also have the potential to create regulatory barriers for good entering NI from GB. The value of these goods was estimated to be £10.5bn in 2017.⁷³

Additionally, potential implications arise from the interaction between Article 5(4) and Article 4. As noted in subsection 2.1, Article 4 of the Protocol explicitly states that NI will be able to participate in UK trade deals. It does not provide the same clarity on NI's participation in EU trade deals. As noted already in this section, the provisions of Article 5 enable the free flow of goods on the island of Ireland. In theory, goods entering the RoI from a country with which the EU has signed a tariff free FTA may enter NI freely.

⁶⁹ 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

⁷⁰ HMRC, Regional Trade Statistics, UK Trade Statistics Release Q4 2019 (accessed 12 May 2020)

<https://www.uktradeinfo.com/Statistics/RTS/Pages/default.aspx>

⁷¹ HMRC, Regional Trade Statistics, Top partner countries and commodity infographic (Northern Ireland) Q4 2019 (accessed 12 May 2020) <https://www.uktradeinfo.com/Statistics/RTS/Pages/default.aspx>

⁷² NISRA, Cross-Border Supply Chain Report (2015, 2016) (21 June 2018)

https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/SCS_JUNE2018_FINAL.pdf

⁷³ NISRA, Overview of NI Trade with GB (October 2019)

https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/NISRA_Overview_of_NI_Trade_with_GB_2017_0.pdf

Assuming the UK has not signed a FTA with the same country, goods from entering GB directly from that country would be subject to the UK tariff. As such, NI may benefit indirectly from EU FTAs, even it is not directly included. Further clarity on this situation is likely to be beneficial to NI businesses.⁷⁴

Key potential scrutiny points:

1. Have the DfE received any clarification as to whether NI benefit will from EU FTAs post-transition?
2. If not, has the DfE considered how will NI be prevented from benefiting from these FTAs indirectly through the movements of such goods from RoI to NI?
3. If NI is included in EU FTAs post-transition, has the DfE given any consideration as to what happens in circumstances where the UK has a different FTA with the same country? For example, under what terms would NI trade with that country – i.e. under the UK FTA or the EU FTA?

The requirement set out in Article 5 that NI remains aligned with EU regulation in a range of areas, presents potential difficulties, beyond those relating to the movement of goods from GB to NI (as outlined above). First, if the UK relaxes its regulations relative to EU regulations GB producers may be able to produce similar products to NI producers at a lower cost. This could arise as the higher standards NI producers will be obliged to meet are likely to be costlier. This may place NI at a competitive disadvantage in the GB market.⁷⁵

Second, at present NI is aligned with EU law. Issues may arise, however, when that law is amended or replaced, or when new laws are introduced into the Protocol, as enabled by its Article 13. Such issues concern the monitoring and scrutiny of changes to EU law, as well as the implementation of that law. Questions arise over what role Westminster and the NI Assembly will play in scrutinising the evolution of EU law.

There are additional questions as to how NI's voice might be heard in the development of new EU law and the amendment of existing laws. It is often the responsibility of the manufacturer of a good to ensure compliance with EU product regulation. As such, questions arise as to what assistance would importers need to enable them to keep pace with any changes to rules that they would be required to comply with, or the introduction of new rules at later dates in future.

⁷⁴ UK Trade Policy Observatory, The unfinished business of the Northern Ireland Protocol (7 May 2020) <https://blogs.sussex.ac.uk/uktpo/2020/05/07/the-unfinished-business-of-the-northern-ireland-protocol/>

⁷⁵ UK Trade Policy Observatory, The Protocol on Ireland/Northern Ireland: The implications for Wales' external trade (20 January 2020) <https://blogs.sussex.ac.uk/uktpo/publications/the-protocol-on-ireland-northern-ireland-the-implications-for-wales-external-trade/>

Key potential scrutiny points:

4. Have the DfE given any consideration as to how NI voices would be factored into the Joint Committee deliberations on how future new EU law would be reflected under the Protocol?
5. What measures will be put in place to ensure that NI voices are factored into future development of EU law, which aligns to the Protocol?
6. What structures will be put in place at the NI Executive and the UK Government levels to monitor the implementation under the Protocol of existing and future EU law in respect to NI?
7. What structures will be put in place in the NI Assembly and at Westminster to enable the scrutiny of that EU law in respect to NI?
8. How will the NI Executive and the UK Government assist business to keep up-to-date with changes to that EU law?

2.3 Article 6: Protection of the UK internal market

Article 6 of the Protocol includes provisions concerning the “*protection of the UK internal market*”. This subsection outlines the purpose of Article 6. It then goes on to examine key potential NI implications arising from Article 6. The analysis here is based on a range of sources, including the UK Government and the European Commission, as well as a range of academic and stakeholder commentary. Data from NISRA also is used throughout this subsection.

Specifically, the analysis included here looks at potential NI Article 6 implications relating to:

- Potential procedures applying to NI sales to GB (subsection 2.3.2a); and,
- Potential subversion of UK customs control (subsection 2.3.2b).

2.3.1 What is the purpose of Article 6?

Article 6, Paragraph 1, states that nothing in the Protocol shall:

*...prevent the United Kingdom from ensuring unfettered market access for goods from moving from Northern Ireland to other parts of the United Kingdom’s internal market.*⁷⁶

⁷⁶ 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) Article 6(1)

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

This is qualified in the same paragraph, with the following statement:

Provision of Union law made applicable by this Protocol which prohibit or restrict the exportation of goods shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the [European] Union.

Article 6, Paragraph 2, states the EU and the UK “will use their best endeavours” to facilitate trade between NI and GB. It provides the Joint Committee with a role in reviewing trade between NI and GB and states that they “shall adopt appropriate recommendations with a view to avoiding controls at the ports and airports’ of NI ‘to the extent possible’”.⁷⁷

Article 6 also states that nothing in the Protocol will prevent an NI product from “being presented as originating’ from the UK, when placed on the market. Additionally, the Article states that nothing in the Protocol will “affect the law of the United Kingdom regulating the placing on the market” in GB of NI goods that “comply with or benefit” from the range of EU law outlined in Annex 2 of the Protocol (as summarised in Table 3 above).⁷⁸

2.3.2 Potential implications of Article 6 for NI

Potential implications arising from Article 6 relate to:

- Future potential procedures applying to NI sales to GB (subsection 2.3.2a of this paper) ; and,
- Future potential subversion of UK customs control (subsection 2.3.2b).

2.3.2a Potential procedures applying to NI sales to GB

The UK Government notes in its Protocol Explainer that Article 6 ensures:

*... Northern Irish businesses and farmers will continue to have unfettered access to the rest of the UK market, as this Government has guaranteed.*⁷⁹

And that:

*The Government remains committed to protecting Northern Ireland’s position in the United Kingdom’s internal market.*⁸⁰

⁷⁷ *Ibid* Article 6(2)

⁷⁸ *Ibid* Article 6(3 and 4)

⁷⁹ 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

⁸⁰ *Ibid*

The Committee should note the following NISRA data that is relevant to this commitment, i.e. NI goods sales to GB in 2017 were valued at £7.6bn in 2017, equivalent to 48% of all NI goods sold externally in that year. NISRA data also notes that the largest proportion of goods sold to GB by NI business in 2017 (£5.2bn or 68% of total goods sales to GB⁸¹), came from manufacturing business. A total 7,804 NI business sold goods and services to GB, the majority of which were small or microbusinesses (69% of NI business selling to GB were microbusinesses, 23% were classed as small businesses).⁸² As such, protecting NI's "*position in the United Kingdom internal market*" is an important outcome for significant amount of NI sales.

There are a number of potential implications arising from Article 6, particularly in relation to its interaction with Article 5. As noted in subsection 2.1.1 of this paper, Article 5(3) of the Protocol places an obligation on "*UK in respect of Northern Ireland*" to apply the EU Customs Code. The EU Customs Code includes exports procedures, that exporters must follow with respect any goods leaving the EU Customs Area. This includes the completion of an exit declaration form.

Within the context of the flow of goods between NI and GB, the Committee also should note that on 22 October 2019 the Secretary of State for Exiting the EU told the Lords Committee on the EU that:

*The exit summary declarations will be required in terms of NI to GB.*⁸³

In further clarification to the same committee, the HMRC stated, also on 22 October 2019, that the cost of each declaration would be:

*...between £15 and £56...depending on the complexity of the declaration and the nature of the arrangement you use to make it.*⁸⁴

The HMRC stated that it was "*impossible to be definitive*" with regard to the precise impact of these exit declarations until the final procedures were agreed with the EU. The HMRC also stated that it:

*...will be intended to keep the paperwork as light as possible while addressing the obligations that we have agreed with the EU that we will meet in terms of protecting its market.*⁸⁵

The UK Government restated its commitment to unfettered access in the Command Paper, published by the Cabinet Office on 20 May 2020. It stated that post-transition

⁸¹ *Ibid*

⁸² NISRA, Overview of NI Trade with GB (October 2019)

https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/NISRA_Overview_of_NI_Trade_with_GB_2017_0.pdf

⁸³ BBC, Brexit deal: NI firms must declare goods heading to rest of the UK (22 October 2019) <https://www.bbc.co.uk/news/uk-northern-ireland-50137320>

⁸⁴ House of Lords Select Committee on the European Union, Brexit: the revised Withdrawal Agreement and Political Declaration, 1st Report of Session 2019-20 (10 January 2020), Chapter 4: Protocol on Ireland and/Northern Ireland https://publications.parliament.uk/pa/ld5801/ldselect/lducom/4/407.htm#_idTextAnchor058

⁸⁵ *Ibid*

trade from NI to GB should “*take place as it does now*”. In the same paper, the UK Government made a commitment legislate to “*guarantee unfettered access*” and ensure such legislation is in enforce before 1 January 2020. Within the Command Paper, the UK Government set out its view that “unfettered access” would mean:

- No import customs declarations as goods enter the rest of the UK from Northern Ireland;
- No entry summary (‘safety and security’) declaration as goods enter the rest of the UK from Northern Ireland;
- No tariffs applied to Northern Ireland goods entering the rest of the UK in any circumstances;
- No customs checks;
- No new regulatory checks;
- No additional approvals required for placing goods on the market in the rest of the UK; and,
- No requirement to submit export or exit summary declarations for goods leaving Northern Ireland for the rest of the UK.⁸⁶

At the time of writing, the EU has not responded to the UK Government’s Command Paper. However, it is worth noting that the House of Commons NI Affairs Committee heard evidence from an academic in May 2020, which suggested that any checks would be minimal and managed through electronic declaration, risk based assessment and trusted trader schemes. He stated:

The customs challenge is to determine whether any purported intra-UK transactions have been brought into Northern Ireland from one of the 27 EU member states, in which case HMRC will require the completion of EU export formalities in Northern Ireland, and the completion of UK import formalities in Great Britain. This risk can be effectively managed by requiring an electronic declaration to be lodged with HMRC for all West-East trade transactions, containing minimal information about:

- *Who is sending and receiving the goods*
- *What the goods are and their value*
- *Where the goods are going and mode of transport*
- *Whether the goods have been moved from one of the 27 EU member states.*⁸⁷

⁸⁶ The Cabinet Office, The UK’s Approach to the NI Protocol (20 May 2020)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf

⁸⁷ Written evidence submitted by Professor David Widdowson AM (UNF0017), Supplementary Submission to the Northern Ireland Affairs Committee on Unfettered Access: Northern Ireland and customs arrangements after Brexit (May 2020) <https://committees.parliament.uk/writtenevidence/3837/pdf/>

Adding that:

Many companies engaged in legitimate intra-UK trade will generally have established trading patterns that can be used by HMRC to support a low-risk assessment of their activities. Furthermore, Authorised Economic Operators (also known as trusted traders) may be allowed to trade without a requirement to submit such 'intra-UK' declarations.⁸⁸

Additionally, in light of the lack of clarity on potential trade friction between NI and GB, other witnesses to the NI Affairs Committee – on 30 April 2020 - have called for the reinstatement of the “Alternative Arrangements Working Group” to examine options for minimising any potential frictions.⁸⁹

Key potential scrutiny points:

1. Have the DfE carried out any assessment of the extent to which checks be required on goods moving from NI to GB?
2. Have the UK Government provided the DfE with any indication as to what additional infrastructure, staff and/or processes will be required to ensure all necessary checks are carried out?
3. If so, what will the cost be? Has the DfE engaged with the NI Department of Finance, the NI Executive, the UK Government and or the Treasury about how that cost will that cost be funded?
4. Have the UK Government provided the DfE with any indication as to how it will ensure that the impact of any checks on NI businesses is minimised, particularly microbusinesses and the manufacturing sector?

The interaction between Article 5 and 6 also may give rise to trade friction resulting from divergence of product standards. As noted in Section 2.1 of this paper, the Protocol obliges NI to continue to align with EU law of product standards. At present, the UK is also fully aligned with these same standards. However, the potential remains that the UK may choose to diverge from these standards post-transition; although the extent to which it is able to diverge will depend on the FTA agreed between the UK and the EU, as outlined in subsection 2.1.2 of this paper. This may become an issue with regard to the flow of goods from the NI to GB, particularly if the UK were to implement higher standards than the EU in some areas. Should this occur, this may necessitate checks on goods entering the UK from NI, to ensure that lower standard products do not enter the UK market.

This point was raised during a Lords Committee meeting in 11 February 2020, when it was suggested that this could be avoided, if NI ensured goods are produced to the

⁸⁸ *Ibid*

⁸⁹ House of Commons NI Affairs Committee, Oral Evidence: Unfettered Access: Northern Ireland Customs Arrangements after Brexit, HC161 (30 April 2020) <https://committees.parliament.uk/oralevidence/332/pdf/>

higher standard, be that the UK standard or the EU's. One witness responded to this proposition as follows:

Even if Northern Ireland did that, it would not prevent fetters on trade in the Irish Sea, because anything produced anywhere in the European single market could just go through a back door into Great Britain through Northern Ireland if no fetters were in place. It is not just about the production of, say, buses in Northern Ireland; it is about the whole architecture of Articles 5 and 6 of the protocol. It only works either if the UK is in line with the EU's regulations or if its regulations are in some way lower, as you can then unfetter to allow in higher-regulation goods. As soon as the UK tries to make a commitment to higher regulation on something, unfettered access suddenly becomes unattainable.⁹⁰

The extent to which a product standard divergence will impact on NI to GB trade remains unclear at the time of writing this paper, and will remain so until there is further clarification on the shape of any FTA between the UK and the EU, and the UK's intentions in respect of product standards. However, as noted above, the UK Government has restated its commitment to unfettered access and intention to legislate to guarantee such access in the Command Paper published on 20 May 2020.⁹¹

Overall, it is unclear on the extent to which regulatory checks will be required on goods moving from NI to GB. However, it is clear from the NISRA data outlined above, that where such checks occur, it appears they would disproportionately impact micro businesses and the manufacturing sector.

Key potential scrutiny points:

5. Have the DfE received any insight from UK Government the UK's future policy be on product regulation? If so, can DfE share this with the Committee?
6. Have the DfE carried out any assessment of impact of regulatory divergence on the flow of goods from NI to GB?
7. What role will the NI Executive play in monitoring standard divergence between the UK and the EU, and assisting businesses to navigate this divergent landscape?
8. Have the DfE carried out any assessment of the capacity for NI business to produce products to two product standards, in order to serve both the GB and EU markets, should divergence occur?

⁹⁰ House of Lords Select Committee on the European Union, Uncorrected oral evidence: The Protocol on Ireland/Northern Ireland (11 February 2020)

<https://committees.parliament.uk/download/file/?url=%2Fforevidence%2F59%2Fdocuments%2F560%3Fconvertiblefileformat%3Dpdf&slug=uc-transcript-eu-ev-1-110220-henig-et-aldpdf>

⁹¹ The Cabinet Office, The UK's Approach to the NI Protocol (20 May 2020)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf

2.3.2b Potential of subversion of UK customs control

A number of commentators have identified a further potential issue related to unfettered access as outlined in Article 6. For example, NI may be used as a back door into the UK by traders, which subverts UK customs control. As noted in an article published in the *Tax Journal* on 17 April 2020:

For any good where the UK duty is set at a higher level than the EU equivalent, there would be a strong incentive to smuggle in such goods via the Northern Irish route and avoid paying the UK tariff.⁹²

This issue also was raised in an article published by the UK Trade Policy Observatory in January 2020. The authors argued that “in theory”:

.... without any customs checks on goods sent from NI to GB, there may be a risk of exporters circumventing the UK’s tariffs by shipping goods from RoI to NI, and thence to GB.⁹³

Adding that:

The risk of circumvention would be particularly relevant if no trade agreement is in place between the UK and the EU, in which case there would be an incentive for EU exporters to avoid the UK’s [Most Favoured Nation (MFN)] tariff by shipping their products through NI into GB tariff free. However, even if an FTA is in place between the EU and the UK there may still be a risk of circumvention if the rules of origin requirements are not enforced... the UK is working on the assumption that the UK’s MFN tariffs will always be lower than the EU’s MFN tariffs, and therefore that the latter risk is negligible. However, this cannot be guaranteed – indeed, it is likely to be violated. For example, if a country has a preferential trade agreement with the EU but not with the UK, this country could send its products to RoI duty free, and these products could then be sent through NI to GB, thereby avoiding UK’s MFN tariffs.⁹⁴

It is unclear on the extent to which these risk will manifest in practice; nor is it clear as to what approach the UK will adopt to mitigate these risks.

Key potential scrutiny point:

1. What representations has the DfE made to the UK Government on potential mitigations to reduce the risk of NI becoming a “back door” to the UK for goods, whilst ensuring trade from NI to GB remains “unfettered”?

⁹² Tax Journal/2020/Issue 1483, 17 April/Articles/Analysis – Customs and the Northern Ireland Protocol – Tax Journal, Issue 1483, 14

⁹³ UK Trade Policy Observatory, The Protocol on Ireland/Northern Ireland: The implications for Wales’ external trade (20 January 2020) <https://blogs.sussex.ac.uk/uktpo/publications/the-protocol-on-ireland-northern-ireland-the-implications-for-wales-external-trade/>

⁹⁴ *Ibid*

2.4 Article 7: Technical regulations, assessments, registrations, certificates approvals and authorisations

As with previous subsections, this subsection seeks to: provide an overview of Article 7 of the Protocol (subsection 2.4.1 of this paper); and, deliver an analysis of some of the potential implications arising from the article (subsection 2.4.2).

Unfortunately, the level of commentary and analysis on Article 7 is much less than exists for other parts of the Protocol. Consideration of the potential Article 7 implications here is reliant on information published by the European Commission. Despite efforts⁹⁵ undertaken to locate additional sources on this point, limited other analysis was located to supplement the Commission publication. The UK Government did, however, set out its position on some elements of Article 7 in the Command Paper published on 20 May 2020.⁹⁶

Given the nature of the subject matter at hand, the potential for different interpretations of the Protocol and its provisions, the Committee may wish ask the DfE what consideration it has given to the meaning and implications of Article 7.

2.4.1 What is the purpose of Article 7?

Article 7(1) of the Protocol states that, “*without prejudice*” to the area of EU law NI is required to align to (as outlined in Table 3, above), the “*lawfulness of placing goods on the market*” in NI will be governed by the law of the UK. With regard to goods imported from the EU and placed on the market on the market in NI, this will be governed by the law of the UK *and*:

- Article 34 of the Treaty on the Functioning of the EU (TFEU), which prohibits quantitative restrictions (in other words, quotas) on goods imports between Member State; and,
- Article 36 of the TFEU, which allows quantitative restrictions on goods imports, on the grounds of:

...public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

⁹⁵ This has included extensive searches by Research, the NI Assembly Library, IDOX and communication with QUB academics

⁹⁶ The Cabinet Office, The UK’s Approach to the NI Protocol (20 May 2020)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf

This applies as long as these restrictions are not a means of “*arbitrary discrimination of a disguised restriction on trade*”.⁹⁷⁹⁸

Article 7(2) states that where NI alignment with EU law require goods to carry an indication of Member State in abbreviated form, as “UK(NI)” in respect to NI goods. In addition, the article states that where the EU law requires goods carry a numeric identification code, the UK in respect of NI “*shall be indicated with a distinguishable numeric code*”.

Article 7(3) of the Protocol is to be read in conjunction with Article 13(6), which states that authorities in the UK:

...shall not act as leading authority of risk assessments, examinations, approvals and authorisation procedure provided for in [EU] law made applicable by this Protocol.

Article 7(3) creates an exception to this with respect to NI, whereby assessments are considered valid in certain circumstances, i.e. when carried out in regard to NI’s application of EU law contained in the Protocol, by UK authorities or bodies.

2.4.2 Potential implications of Article 7 for NI

As noted above, limited analysis of Article 7 could be located in the literature and commentary available on the Protocol. This includes the documentation produced by the UK Government, as well as academic and trade organisation commentary. In addition, some information produced by the European Commission is utilised throughout this subsection. However, given the nature of the Protocol and the potential for different interpretations of its provisions, the Committee may wish determine what consideration the DfE has given to the meaning and implications of Article 7.

Key potential scrutiny point:

1. Have the DfE given any consideration to the meaning and implications of Article 7 with respect to NI?

Nonetheless, the following observations can be noted about potential NI Article 7 implications. First, Article 7(1) confirms that NI exists within two regulatory zones, with the placing of goods on the NI market covered by UK law and the EU law outlined in Annex 2 of the Protocol. Additionally, goods imported into NI from the EU, are governed by Articles 34 and 35 of the TFEU (Treaty on the Functioning of the EU).

⁹⁷ Official Journal of the EU, Consolidated Treaty on the Functioning of the EU (2012) Articles 34 and 36 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF>

⁹⁸ 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) Article 7(1) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

Businesses may benefit from guidance on this added complexity, as it may impact business decision going forward.

The EU Commission, outlined its interpretation of Article 7(1) in its “*Notice to stakeholders – industrial products*” document as follows:

The IE/NI Protocol makes certain provisions of EU law applicable also to and in the United Kingdom in respect of Northern Ireland. It also provides that insofar as EU rules apply to and in the United Kingdom in respect of Northern Ireland, the latter is assimilated to a Member State.⁹⁹

Key potential scrutiny points:

2. What guidance can the DfE provide to business to ensure they are fully aware of their regulatory obligations?
3. Have the DfE carried out any assessment of the capacity of small and microbusinesses to carry out the work required to familiarise themselves with the new regulatory environment?
4. What support will the UK Government and the DfE provide to NI small and microbusinesses?

Article 7(2) introduces new labelling requirements that NI goods will need to fulfil post-transition. Meeting these requirements may bring additional cost. Although, the extent to which this could occur is unclear. Labels will be required only in specified circumstances, i.e. when a specific piece of EU law states they are necessary. This is likely to place an extra imperative on businesses to continue to monitor changes to the EU law that they are obliged to comply with, as provided for by Article 5 of the Protocol.

Key potential scrutiny points:

5. Have the DfE carried out any assessment of the proportion of NI goods that will be required to meet the new labelling requirements?
6. Have the DfE carried out any assessment of the additional cost to business of meeting those requirements?
7. What assistance, in the DfE view, should the NI Executive and the UK Government provide to businesses to familiarise them with the new labelling requirements?

Article 7(3) refers to the process by which conformity with EU law can be checked in NI. On the face of it, Article 7(3) seems to suggest conformity checks on NI products carried out by UK bodies will remain valid, in order to meet EU legal requirements, as set out in Annex 2 of the Protocol. It, however, should be noted that the Protocol adds some exceptions to this, stating:

⁹⁹ The European Commission, Notice to Stakeholders – Withdrawal of the United Kingdom and EU rules in the field of industrial products (13 March 2020) https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_industrial_products.pdf

*...shall not apply to registrations, certifications, approvals and authorisations of sites, installations or premises in Northern Ireland issued or carried out by competent authorities of the United Kingdom, where the registration, certification, approval or authorisation may require an inspection of the sites, installations or premises.*¹⁰⁰

And:

*... shall not apply to veterinary certificates or official labels for plant reproductive material that are required by provisions of Union law made applicable by this Protocol.*¹⁰¹

Additionally, in its “Notice to stakeholders – industrial products”, the European Commission outlined its interpretation of Article 7(3). According to this, “certificates issued by a Notified Body” in GB are “**not valid**” in NI. It adds that a “Notified body” in NI **can** “continue to certify products in certain circumstances”. It adds that:

*Bodies established in Northern Ireland may certify products, but certificates issued by Notified Bodies in Northern Ireland are only valid in Northern Ireland. By contrast, these certificates are not valid in the EU.*¹⁰²

This refers to checks for the purposes of demonstrating an EU product standard. EU products standards are a way of demonstrating that a product has met all the legal requirements set out in an EU Directive. There are two significant points to note here. First, Article 5 obliges NI to align with product law in specified areas. Second, it is the responsibility of the manufacturer to ensure all legal requirements¹⁰³ are met **before** a product is placed on the Single Market.¹⁰⁴

Certain EU product standards stipulate that the process of certifying that the standard has been met (the conformity assessment) is carried out by a “Notified Body”. A Notified Body is a conformity assessment body that has:

¹⁰⁰ 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) Article 7(3) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

¹⁰¹ *Ibid*

¹⁰² The European Commission, Notice to Stakeholders – Withdrawal of the United Kingdom and EU rules in the field of industrial products (13 March 2020) https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_industrial_products.pdf

¹⁰³ This applies to all manufacturers who wish to place goods on the Single Market whether they are based within the EU or outside of it.

¹⁰⁴ Official Journal of the European Union, Information from the European Union Institutions, Bodies, Offices and Agencies, European Commission notice, The ‘Blue Guide’ on the implementation of EU products rules 2016 (2016/C 272/01) p29 <http://ec.europa.eu/docsroom/documents/18027/attachments/1/translations/en/renditions/native>

*... been officially designated by their national authority to carry out the procedures for conformity assessment within the meaning of applicable Union harmonisation legislation when a third party is required.*¹⁰⁵

It should be noted that the use of Notified Bodies only applies to Harmonised Standards; they are common standards across the EU, to achieve an EU-wide legislative or policy objective. Essentially the European Commission issues a “mandate” to one of three European Standards Organisations, which then develops an appropriate standard.¹⁰⁶ Additionally, the Notified Bodies requirement is to be used only for carrying out conformity assessment for some EU product standards. Other product standards require the manufacturer only to declare that the standard has been met.

However, in light of the European Commission’s interpretation above, it is unclear as to how NI products that require Notified Body certification, will secure certifications that are valid in the EU. It is worth noting that when third country products are required to meet standards necessitating that the conformity check is carried out by a “Notified Body”, i.e. an EU notified body,¹⁰⁷ which is:

*... free to offer [its] conformity assessment services to any economic operator inside or outside the EU.*¹⁰⁸

And such a body:

*... may carry out these activities on the territory of other EU countries or non-EU countries.*¹⁰⁹

The European Commission has stated that with respect to the UK in general, there will be the option of either applying for a new certificate issued by an EU Notified Body, or transferring a current certificate from a UK Notified Body to an EU Notified Body. These steps must occur before the end of the transition period.¹¹⁰

Additionally, it should be noted that the use of harmonised standards is voluntary. The EU views harmonised standard as **a** way of meeting the legal requirements in respect to product regulation, not **the** way.¹¹¹ Manufacturers can demonstrate compliance with EU legislation by other means. This is likely to mean NI manufactures will have three options with respect product standards that require a Notified Body check:

¹⁰⁵ Official Journal of the European Union, Information from the European Union Institutions, Bodies, Offices and Agencies, European Commission notice, The ‘Blue Guide’ on the implementation of EU products rules 2016 (2016/C 272/01) p75 <http://ec.europa.eu/docsroom/documents/18027/attachments/1/translations/en/renditions/native>

¹⁰⁶ *Ibid*

¹⁰⁷ http://eeas.europa.eu/archives/delegations/australia/documents/eu_australia/cemarkg_en.doc

¹⁰⁸ https://ec.europa.eu/growth/single-market/goods/building-blocks/notified-bodies_en

¹⁰⁹ *Ibid*

¹¹⁰ The European Commission, Notice to Stakeholders – Withdrawal of the United Kingdom and EU rules in the field of industrial products (13 March 2020) https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_industrial_products.pdf

¹¹¹ The European Commission, Harmonised Standards (accessed 14 May 2020) https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards_en

1. Secure a check by an EU notified body.
2. Transfer current certification to an EU notified body.
3. Through other ways.

The UK Government set out its view on the issue of conformity assessment in the Command Paper published on 20 May 2020. It stated that the “*same authorities and bodies operating today*”, whether GB or NI based, will continue to be responsible for approving goods on the NI market and enforcing EU law. Adding that where regulatory checks are required for industrial goods, these can take place through market surveillance authorities at “*business premises or on the market*” and not “*at ports*”. Additionally, the UK Government has made a commitment to recognise product approvals and certifications on NI goods from EU authorities on bodies, when those goods are placed on the GB market. The UK Government also will provide guidance for traders placing “*highly regulated*” goods on the GB market.¹¹²

Given the above businesses may require clarity on this issue, and also may need to assess their existing compliance procedures, to ensure they remain valid in this new context.

Key potential scrutiny points:

8. Have the DfE given any consideration as to how NI businesses will demonstrate compliance with EU product regulation where the associated standard requires Notified Body certification?
9. Have the DfE carried out any assessment of the additional costs this could pose to business?
10. What assistance, in the DfE view, should the NI Executive and the UK Government provide to inform businesses of potential changes as to how products are certified post-transition?
11. Have the DfE carried out any assessment of the capacity of small and microbusinesses to monitor and adapt quickly to changes to the certification process?
12. Have the DfE carried out any assessment of the potential cost associated with this familiarisation process?

Where harmonised standards do not exist, i.e. where there are non-harmonised standards, products are allowed to move freely across the EU single market based on the “mutual recognition” of national standards. “Mutual recognition” in the Single Market is a principle establishing that products lawfully produced in one EU Member State are

¹¹² The Cabinet Office, The UK’s Approach to the NI Protocol (20 May 2020)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886289/2020-05-20_Command_Paper_UK_s_Approach_to_the_Northern_Ireland_Protocol-gov.uk.pdf

deemed marketable in all other Member States.¹¹³ According to the European Commission's "Notice to stakeholders – industrial products":

In the non-harmonised area, the principle of mutual recognition in one Member State of goods lawfully marketed in another Member State pursuant to Articles 34 and 36 of the Treaty on the Functioning of the European Union will not apply in respect of goods lawfully marketed in Northern Ireland. This means that the lawful placing of a product on the market of Northern Ireland cannot be invoked when that product is placed on the market in the EU. However, the lawful marketing of a product in a Member State can be invoked when that product is placed on the market in Northern Ireland.¹¹⁴

Based on the above, it is unclear as to how products produced in NI will be lawfully marketed throughout the EU.

¹¹³ The BSI, European Standards and the UK p15 <https://www.bsigroup.com/LocalFiles/en-GB/EUREF.pdf>

¹¹⁴ The European Commission, Notice to Stakeholders – Withdrawal of the United Kingdom and EU rules in the field of industrial products (13 March 2020) https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_industrial_products.pdf

Key potential scrutiny points:

13. Have the DfE given any consideration as to how can NI businesses lawfully market their products on the Single Market, in the absence of mutual recognition?
14. Have the DfE given any consideration to the implications of this for the free flow of goods from NI to the RoI?
15. What assistance, in the DfE view, should the NI Executive and the UK Government provide to familiarise businesses of potential changes as to how their products are marketed on the Single Market?
16. Have the DfE carried out any assessment on the capacity of small and microbusinesses to monitor and adapt to quickly to any changes to the current process?
17. Have the DfE carried out any assessment of the potential cost associated with any familiarisation process?

3 Concluding remarks

The analysis above suggests that despite the Withdrawal Agreement, the Protocol and the Political Declaration bringing an end to the first stage of negotiations between the EU and the UK, much still remains unclear and undecided. Certain aspects of the Protocol and its operation have been left to be decided by the Joint Committee, along with ongoing negotiations relating to the future relationship between the UK and the EU under the Political Declaration.

Notably, in the context of this paper, those aspects include:

- The full criteria that will be used to determine whether a product from GB, or, from outside the EU and GB, will be ‘*at risk*’ of entering the EU once it had entered NI; and,
- The conditions under which fisheries and aquaculture products will be exempt from customs tariffs.

Beyond these explicit uncertainties, the analysis throughout this paper has given rise to a range of issues that require clarification from the DfE and the UK Government. Those uncertainties include, but are not limited to:

- How could NI maximise the opportunities presented by the UK’s new trade policy?
- How could NI seek to influence the direction of the UK’s trade policy going forward?
- What would happen if the meaning of “*at risk*” is not agreed before the end of the transition period?

- What proportion of NI purchases from GB will be subject to tariff and regulatory checks?
- What structures, infrastructure and staff would need to be in place by the end of the transition period, to ensure these checks could be carried out; what would this cost; and, where would the funding come from?
- What happens if the necessary structures are not implemented by the end of the transition period, despite their inclusion in the agreed Protocol?
- What impact would these potential checks have on the prices NI consumers and businesses pay, particularly in the wholesale and retail sectors?
- How could these check be minimised?
- How would NI businesses avail of the reimbursement of duties and customs debts waivers?
- Would NI benefit from the EU's FTAs post-transition?
- How could NI voices seek to influence the development of the EU law that it would be required to align to?
- What process would be needed at an NI and UK level to ensure the scrutiny and monitoring of developments in EU law and its implementation?
- To what extent would checks be required on goods moving from NI to GB?
- What role would the NI Executive play in monitoring standard divergence between the UK and the EU, and assisting businesses to navigate this divergent landscape?
- What would the additional cost to business be of meeting the various procedures introduced by the Protocol, including customs procedures, conformity checks and labelling requirements?
- In the absence of mutual recognition, how could NI businesses lawfully market their products on the Single Market?

As can be seen from the above, the analysis throughout this paper has led to more questions than answers. It is important to remember that this is a live situation, subject to ongoing negotiations regarding the future relationship between the UK and the EU. It is likely that answers to some of these questions will become available as the situation continues to develop, and the shape of the UK's future relationship with the EU becomes clearer. For this reason, a watching brief is essential, to track what issues are and are not resolved, and the related implications arising therefrom for NI.