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UK Exit from the EU Briefing Paper Series Withdrawal Agreement, Protocol and Political Declaration – Potential implications for state aid in Northern Ireland

Paper 5 of 6

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This is paper 5 of a 6-part series. It explores key potential implications arising from the Withdrawal Agreement, the Protocol and the Political Declaration for state aid. Throughout, the paper provides potential scrutiny points.

This information is provided to Members of the Legislative Assembly (MLAs) 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

- This paper is the fifth in a series of six papers on the Withdrawal Agreement, the Protocol and the Political Declaration. It largely focuses on the key potential NI implications under Article 10 of the Protocol, which concerns state aid in the United Kingdom (UK), following the current transition period, which is due to end on 31 December 2021
- Under the Protocol the UK will remain subject to the European Union's (EU) state aid rules. These rules limit or prohibit state subsidies to companies, with the aim of preventing distortions to competition within the EU Single Market.
- The UK will be responsible for ensuring compliance with those rules. The UK will however, still be subject to the jurisdiction of the European Court of Justice in this area despite its withdrawal from the EU.
- The UK Government has not made clear its intended policy in relation to implementation of the Protocol. In a recent Command Paper, the UK Government committed to bringing forward its state proposals before the end of the transition period but provided no detail.
- Several issues therefore remain to be resolved, e.g. tariff compensation, which may well impact on NI businesses, and also on businesses based in Great Britain which trade with or in NI.

Introduction

This briefing paper is the fifth in a six-part series to support 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. The Withdrawal Agreement,¹ the Protocol² and the Political Declaration³ all interrelate, to guide the UK's transition. Detail on each instrument can be found in papers 1 and 2 of this briefing paper series.

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

In light of the above, the Committee is interested in outstanding matters relating to the Protocol and the Political 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 its consideration, this paper is part of a six-part series, which 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.

In line with the overarching purpose of the series, this paper addresses state aid-related matters under the Withdrawal Agreement, the Protocol and the Political Declaration, to highlight some potential implications for NI. The EU state aid rules aim

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

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

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

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

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

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

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

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

to limit or prohibit the subsidies or other supports that Member States seek to give to businesses because such subsidies distort competition.

Section 1 explains in summary the purpose of the state aid rules.

Section 2 outlines Article 10 of the Protocol that concerns state aid. It includes relevant observations that facilitate consideration of this Protocol provision, including the associated Annexes to the Protocol.

Thereafter, Section 3 sets out Article 12(2) of the Protocol, which specifies the role of the European Court of Justice (ECJ) in relation to its ongoing oversight of the UK's compliance with state aid requirements.

Section 4 provides concluding remarks, drawing on the earlier sections. Potential scrutiny points are highlighted in blue boxes throughout the paper, aiming to support the Committee for the Economy in its scrutiny role.

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

- Paper 1 – Overview of Governance Arrangements;
- Paper 2 – Customs and Trade;
- Paper 3 – Tax and Excise;
- Paper 4 – Employment; and,
- Paper 6 – Single Electricity Market.

1. The purpose of state aid regulation

Before proceeding to investigate Article 10, it is helpful to recap on why there is a considerable volume of EU regulation in the area of state aid. This section briefly explains the over-arching purpose behind such provisions. Simply put, the EU's **state aid rules are very important to the functioning of the internal market**. In the words of one practitioner in the field of competition law:

The European Union state aid rules are a keystone of the EU single market: by setting limits, enforced by the Commission, on the ability to subsidise domestic industries, they make it possible for member states fully to open their markets to each other's goods and services, confident that their own producers will not face unfairly subsidised competition from producers elsewhere in the EU.⁵

The purpose of EU state aid rules is to prevent unfair subsidy within the single market. Given the ongoing relationship of NI with the single market following the end of the transition period, it is clear that the EU will have a continuing interest in potential future subsidies that governments (both at UK and at devolved levels) may seek to provide to NI producers.

Therefore, EU state aid law will continue to apply to NI under the Protocol in order to prevent undue distortion of competition and trade. State aid controls will apply to business support measures that can potentially affect trade between NI and the EU, as described in the following section. The possible significance of this and other potential considerations are discussed subsequently.

2. Article 10: state aid

This section provides an overview of the three paragraphs of Article 10. As noted above, the Article provides for ongoing subsidy controls (i.e. the restriction of state aid) in the UK.

- **At paragraph 1**, Article 10 specifies that the provisions of EU law listed in Annex 5 to the Protocol will continue to apply to NI. Provisions listed in Annex 5 include:
 - five Articles in the Treaty on the Functioning of the EU;
 - three Acts of the European Commission;
 - eleven block- and sectoral-exemption, and *de minimis* regulations; and,
 - eight so-called procedural rules.⁶

⁵ <https://www.monckton.com/the-governments-new-state-aid-proposals-are-the-worst-of-all-worlds/>

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

In addition to these, Annex 5 also lists 29 other instruments (i.e. various sectoral guidelines and criteria) which are described as ‘compatibility rules’.

Taken together, these provisions listed in Annex 5 represent a considerable body of EU law.

- **At paragraph 2**, Article 10 provides that, notwithstanding paragraph 1, UK authorities may take measures to support agricultural production and trade up to a determined limit. The paragraph also sets certain conditions on that limit, and provides that the method for calculating the relevant limits will be in accordance with Annex 6 to the Protocol. Annex 6 sets out the Joint Committee’s⁷ role in implementing Article 10. In summary, the Joint Committee must determine the permitted level of agricultural support under Article 10, paragraph 2 before the end of the transition period.⁸
- **At paragraph 3**, Article 10 explains that the UK must be kept informed if and when the European Commission is investigating potentially unlawful aid by UK authorities under the provisions of paragraph 1.

Following that Article 10 overview, the subsection below explains briefly the UK Government’s current policy position.

2.2. State aid in future: the UK Government’s position

On 20 May, the UK Government published *The UK’s Approach to the Northern Ireland Protocol*. This did not give much detail on how the UK Government intends to regulate or limit state aids to businesses. Rather it simply stated that it would provide more information before the end of the transition period:

*The Protocol sets out that EU state aid rules will apply in certain cases where this is relevant to trade between Northern Ireland and the EU. This does not mean that state aid rules will apply to Northern Ireland as they do today. State aid provisions apply only to trade ‘subject to the Protocol’. The Protocol is limited in scope to the movement of goods and wholesale electricity markets. Northern Ireland will therefore enjoy new flexibilities with respect to support for its service industries. The Government will provide further information on how these provisions should be operated by public authorities before the end of the transition period.*⁹

⁷ The Protocol’s governance structures including the Joint Committee are considered in Paper 1 of this Briefing Paper series.

⁸ 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 (see Annex 6 paragraph 3)

⁹ UK Government (2020) [The UK’s Approach to the Northern Ireland Protocol](#) (paragraph 40)

Potential scrutiny point: to what extent has the Department for the Economy or other Executive departments engaged in discussions with the UK Government about future state aid controls in NI?

As the above-cited passage shows, the UK Government's position is not known at the time of writing. Therefore, as the Institute for Government put it in a recent report:

It is not clear what implications the state aid provisions will have for Great Britain.¹⁰

Seeking to assist with future discussions, the following subsection seeks to identify key issues arising from Article 10 which may form part of that debate.

2.3. Potential implications of Article 10

This sub-section considers state aid-related issues raised by experts and commentators despite the lack of firm details from the UK Government. These include the fact that - although the Protocol is about the island of Ireland - it has much wider reach and application. The Protocol also raises questions about other issues including trade and tariffs, agricultural goods, and policy responses to the Covid-19 crisis.

2.3.1. Application of the Protocol to the wider UK

In evidence to the House of Lords Select Committee on the EU in February 2020, an expert in EU law explained that **the EU's oversight of subsidies in NI will extend to the wider UK:**

The entire protocol is directed at the UK rather than at Northern Ireland. [...] The EU has guaranteed that EU state aid law will apply to the UK in so far as any state aid that it gives has an effect on trade in goods between Northern Ireland and Ireland or the rest of the EU 27.¹¹

The distinction is worth noting: it is trade in **goods not services** that is subject to the Protocol. The UK Government has subsequently emphasised this point by stating that:

Northern Ireland will therefore enjoy new flexibilities with respect to support for its service industries.¹²

Potential scrutiny point: has the Department, in conjunction with other Executive departments, engaged with the UK Government on what flexibilities might be available for service industries in future?

¹⁰ Institute for Government (2020) [Implementing Brexit: the Northern Ireland Protocol](#) page 16

¹¹ Select Committee on the EU, 11 February 2020, [Uncorrected oral evidence: The Protocol on Ireland/Northern Ireland](#) (page 22)

¹² UK Government (2020) [The UK's Approach to the Northern Ireland Protocol](#) (paragraph 40)

For more information about how Article 12 of the Protocol sets out the future role of the EU in enforcing compliance, see section 3 of this paper.

In February 2020, in further evidence to the House of Lords Select Committee on the EU, the expert in EU law explained that the application of Article 10 is broader than it initially appears. She explained – as noted in the earlier papers in this series - that it applies not just goods **made** in NI, but also those **traded** in NI:

*It does not only mean that an entity in Northern Ireland given state aid would be subject to EU rules, which on the basis of the protocol you would expect; it also means **that if, for instance, a car manufacturer in Nottingham got a subsidy and traded its cars in Northern Ireland, that would run into the problem of aid affecting the single market**, because those cars moving from Northern Ireland to the EU market would have an advantage in the sense that they had been subsidised in one way or another.¹³ [emphasis added]*

The point highlighted in bold is potentially important. If goods are traded in NI and then to the single market, that is likely to be viewed as a distortionary effect.

Potential scrutiny point: has the Department for the Economy conducted an analysis of the range of goods, and the volume of goods traded in NI that might be potentially be affected in this way?

2.3.2 Allowances for agricultural production and trade

Having said this, it is also worth recalling the point noted earlier in this paper that there are some exemptions to how the state aid rules will apply to agricultural **goods** in NI under the Protocol:

Aid to production of and trade in agricultural goods in Northern Ireland would be exempted from state aid controls up to a level set by the Joint Committee. State aid regulations affecting Northern Ireland trade with the EU would be enforced by the Commission, but the UK would be kept duly informed. This is a step away from the previous Withdrawal Agreement which essentially set out how EU state aid rules would apply to the UK as a whole.¹⁴

It is noted that the Committee does not have the primary role in scrutinising the future application of the Protocol to agricultural goods, because that will fall to the Committee for Agriculture, Environment and Rural Affairs. Having said that, the respective Executive departments' roles in engaging with the UK Government and/or making representations to the Joint Committee in this area may intersect. For example, there

¹³ Select Committee on the EU, 11 February 2020, [Uncorrected oral evidence: The Protocol on Ireland/Northern Ireland](#) (page 22)

¹⁴ House of Commons Library (2019) [The October 2019 EU-UK Withdrawal Agreement](#) (page 31)

may be future agri-food related developments or products which both departments promote or support.

It is further worth noting that under the procedure in Annex 6, the Joint Committee must decide the level of permissible support before the end of the transition period or the exemptions under Article 10(2) will cease to apply.

Potential scrutiny point: has the Department engaged with the Department for Agriculture, Environment and Rural Affairs and/or other relevant Executive departments to develop a strategy to represent NI's interests concerning state aid?

2.3.3 Tariff compensation

Paper 2 in this series dealt with the future trading relationship for goods moving between the Great Britain and NI, and between NI and the single market. For the purposes of this paper, it is important to note that there are state aid-related considerations in regard to tariffs and Article 5(6) of the Protocol says that any related schemes must comply with Article 10. The Institute for Government notes this may have implications for both business and government:

The Protocol also allows the UK government to institute a tariff compensation scheme for goods travelling from Great Britain to Northern Ireland that do not meet the 'at risk' criteria. There remain a number of unanswered questions about how it will operate that will have significant implications for traders. For example, will traders have to pay the tariff upfront and wait for reimbursement – which could have significant cash-flow implications – or will the UK government allow traders to accrue debt that could be waived?

If the UK government wants to compensate traders above state aid limits, it may need to collect information to prove that goods have not affected Northern Ireland trade with the rest of the EU.¹⁵

The definition of 'at risk' and of what goods may or may not qualify for tariff reimbursements remains to be agreed by the Joint Committee (see Paper 2 in this series.)

Having noted previously that the details of the future UK policy on state aid are unknown, two particular points arise from the quotation above.

Potential scrutiny points:

1. Has the Department discussed with the UK Government any future requirements for the collection of such information?

¹⁵ Institute for Government (2020) [Implementing Brexit: the Northern Ireland Protocol](#) page 30

2. Has the Department undertaken any analysis of potential costs to NI businesses in this regard?

2.3.4. State Aid and Covid-19

Governments around the world have undertaken very significant, and hugely costly, actions attempting to prop up businesses and employment through the course of the pandemic. The UK Government is no exception, with a wide variety of schemes to support businesses and protect employees' jobs and incomes. The Executive, through the provision of rates reliefs and other measures, has supplemented these in NI.

This paper does not seek to assess the effectiveness of these measures. Yet such interventions as rates relief to businesses are clearly government action in the marketplace and so they are noteworthy. The European Commission has introduced temporary measures to allow Member States (and the UK under the transition period) to make additional state aids, stating:

Considering that the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact undertakings, the Commission considers that State aid is justified and can be declared compatible with the internal market.¹⁶

Covid-19-related state aid remains however subject to some restrictions. For example, aid is:

...not open to undertakings that were already in difficulty.¹⁷

Even with the European Commission's relaxation of the rules regarding state aid, a practitioner in the area has noted that there may be future difficulties facing the UK Government:

Given the scale of the Covid-19 measures and their potential impact on all aspects of trade, any similar measures implemented beyond the end of transition will almost certainly also be subject to the EU state aid rules. They will therefore be unlawful unless and until they are approved by the commission.¹⁸

The fluid nature of the ongoing public health crisis is noted. Nevertheless, the above-cited quotation suggests there are things that the Department for the Economy may need to be thinking about.

¹⁶ EC (2020) [NOTIFICATION TEMPLATE FOR THE TEMPORARY FRAMEWORK FOR STATE AID MEASURES TO SUPPORT THE ECONOMY IN THE CURRENT COVID-19 OUTBREAK](#) page 2

¹⁷ EC (2020) [NOTIFICATION TEMPLATE FOR THE TEMPORARY FRAMEWORK FOR STATE AID MEASURES TO SUPPORT THE ECONOMY IN THE CURRENT COVID-19 OUTBREAK](#) page 3

¹⁸ Peretz, G, in Prospect Magazine, 30 April 2020 [State aid in the time of coronavirus: what help for business is too much?](#)

Potential scrutiny point: has the Department conducted an assessment of any Covid-19 related measures and the likelihood that they may need to be extended beyond the end of the transition period?

Having noted that there are several areas of uncertainty, the following section considers compliance.

3. Article 12(4): state aid and the European Court of Justice

The broad applicability of Article 10 to the UK was noted above. This section highlights the on-going role of the European Court of Justice. As stated earlier in this paper, at paragraph 3, Article 10 explains that the UK must be kept informed if and when the European Commission is investigating potentially unlawful aid by UK authorities under the provisions of paragraph 1. This clearly demonstrates that the Commission will have an ongoing role in monitoring UK compliance with EU state aid controls in respect of NI.

Article 12 explains more about the future role of the European Court of Justice (ECJ). Paper 1 in this briefing series outlined the new governance arrangements following the UK's exit. This subsection briefly explains how Article 12(4) of the Protocol confirms the jurisdiction of the ECJ over the UK's application of EU law in relation to state aid. Put simply, in this area, the UK:

...will remain subject to the European Court of Justice.¹⁹

So, whilst the UK will be responsible for ensuring compliance with the EU's rules, the **European Commission will have a continuing role in investigating alleged breaches or infringements** as it does now. As the Institute for Government explained in its report *Implementing Brexit*:

...any UK public subsidy or other state support for business that affects Northern Ireland goods trade with the rest of the EU may potentially be captured by state aid rules – and could be subject to challenge by the European Commission and the European Court of Justice.²⁰

A further point that may be worthy of note is that, **even when the European Commission has agreed that a measure is allowed under the state aid regime, the UK could still end up facing legal proceedings**. As a practitioner in this field has cautioned:

It is also important to remember that the commission's approval decisions may be challenged by member states or by companies with a particular interest in the matter by way of judicial review in the EU General Court: and that is not at all academic, even in the current crisis (for example, Ryanair

¹⁹ Institute for Government (2019) [Explainer Brexit and the NI Protocol](#), row 5 of the Table

²⁰ Institute for Government (2020) [Implementing Brexit: the Northern Ireland Protocol](#) page 16

*has threatened to seek judicial review of the commission's decision to approve Danish aid to SAS).*²¹

Potential scrutiny point:

Have the Department for the Economy's discussions with the UK Government or its representatives suggested that any element of the enforcement duty could be devolved to NI, which would necessitate amendment of the current devolution arrangements in NI?

4. Concluding remarks

This paper has raised several issues about which there remains uncertainty and which could affect NI in the future. They are all potentially of significance because the Protocol keeps the UK within the EU state aid system. If Member States, or companies, believe the UK does not adequately comply, infringements could therefore end up with litigation in the ECJ.

The biggest single issue is that the UK Government has not actually come forward with its proposals to date. Despite this, there are some points below which have been picked up by various experts and commentators.

Trade and tariff-related issues could be very significant to NI given its small size, its position on the periphery of the European Continent, and its reliance on the cross-border movements of goods.

Also of potential concern is that Covid-19 related measures may become unlawful after the transition period ends. For example, if an NI based firm required longer than the EU permitted period to re-establish viability because perhaps it is in a highly vulnerable sector (e.g. aviation), this might be a concern for NI economic development. A particular firm or industry could be strategically significant to NI, yet be only marginally significant at an EU level.

It is widely expected that the NI economy will be severely weakened by the pandemic. If measures to support it are also constrained by EU state aid rules, difficulties could well be compounded.

²¹ Peretz, G, in Prospect Magazine, 30 April 2020 [State aid in the time of coronavirus: what help for business is too much?](#)