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Internal Market Act 2020 and the Protocol on Ireland/ Northern Ireland

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Within the current unsettled context, and from a layperson's perspective, this paper seeks to explain how provisions contained in the Internal Market Act 2020 (the "IMA") and the "Protocol on Ireland/Northern Ireland" appear to relate to each other; while also highlighting their relevance to the work of the Committee for Finance. Throughout, potential issues for consideration are provided, to support the Committee when discharging its advisory and scrutiny roles.

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.

Introduction

This briefing paper was prepared at the request of the Committee for Finance (the “Committee”), to assist the Committee in its scrutiny of the outworking of the Internal Market Act 2020 (the “IMA”)¹ and the Protocol on Ireland/Northern Ireland (the “Protocol”).² From a layperson’s perspective, the paper explains how the IMA and the Protocol relate to each other; and highlights potential implications arising from the implementation of the IMA as a result of the Protocol, in the context of Northern Ireland (NI). For purposes of this paper, it appears that those implications of apparent relevance to the Committee can be categorised as:

1. Implications affecting the flow of goods across the United Kingdom (UK), in particular from NI to Great Britain (GB) and from GB to NI;
2. Implications concerning the continued application of European Union (EU) State Aid regulation in NI; and,
3. Implications regarding other matters.

When relying on the paper, it is important to draw the Committee’s attention to the current unsettled context surrounding the Protocol’s implementation, due to a number of things, including, but not limited to, the ongoing Protocol engagement between the EU and the UK Government and ongoing Protocol related judicial proceedings.³ Both that engagement and those proceedings – to a lesser or greater extent – will impact on the Protocol’s implementation both now and in future. Any developments arising from them could necessitate future changes to this paper.

Nonetheless, for now, to support the Committee this paper is presented using four sections. Section 1 provides a background on both the Protocol and the IMA, to provide an overview of each. Section 2 then focuses on the IMA’s eight substantive parts, setting out the purpose of each and identifying IMA provisions that arise as a result of the Protocol. Section 3 then takes a closer look at the IMA provisions in the context of the Protocol, making use of the above defined categories and highlighting their relevance to the Committee’s work. Thereafter, Section 4 provides concluding remarks, based on findings outlined in the preceding sections.

The paper heavily draws on the IMA and its accompanying Explanatory Memorandum (EM), as well as the Protocol and its supporting documents. Those sources are supplemented by commentary and guidance from both the UK Government and the EU, as well as academia. In this context, it is important to acknowledge there is not a “meeting of the minds” in the EU’s and the UK’s understanding of the Protocol’s

¹ The Internal Market Act 2020 <https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted>

² HM Government, New Protocol on Ireland/Northern Ireland (18 October 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

³ For the IMA see for example <https://gov.wales/written-statement-legal-challenge-uk-internal-market-act-2020>, for the Protocol see for example <https://www.irishlegal.com/article/unionist-legal-challenge-to-ni-protocol-to-be-heard-next-month>

implementation. For that reason, of all three types of sources have been included, to ensure that the Committee is apprised of the spectrum of relevant information. However, the paper does not consider existing case law.

This paper is not offered as legal advice or opinion. Rather, it aims to assist the Committee in further expanding its knowledge and understanding of the IMA and the Protocol and how they relate to one another. That information seeks to facilitate the Committee when exercising its advisory and scrutiny roles both now and in future.

1 Background

For context, this section provides key background information to briefly explain how the contents of the IMA and the Protocol relate to one another.

1.1 Protocol

The Protocol⁴ 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”);⁵ agreed by the UK and the EU on 19 October 2019 and ratified by both parties on 31 January 2020. The Protocol sought to achieve three objectives:

1. The Protocol is to be:

*...without prejudice to the provision of the 1998 Agreement in respect of the constitutional status of Northern Ireland and principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.*⁶

2. The Protocol is to respect:

*...the essential State functions and territorial integrity of the United Kingdom.*⁷

3. The Protocol is to set out the:

⁴ HM Government, New Protocol on Ireland/Northern Ireland (18 October 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

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

⁶ HM Government, New Protocol on Ireland/Northern Ireland (18 October 2019), Article 1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

⁷ *Ibid*

...arrangements necessary to address the unique circumstance on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions⁸.

To those ends, the Protocol provisions left NI in the UK Customs Territory, including in respect to the UK Free Trade Agreements (FTAs). Technically, NI continued to be part of the UK's VAT (Value Added Tax) area. However, NI was 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). In doing so, a single regulatory zone is created on the island of Ireland, to facilitate the free flow of goods on the island. (A fuller summary of the Protocol's provisions is outlined below in Table 1.)

The Withdrawal Agreement and the Protocol were given "domestic legal effect" in the UK via the EU (Withdrawal) Act 2020.⁹ For ease of reference, Table 1 below provides an overview of the Protocol Articles, including the Article provision, its title and its purpose. The Table was compiled by RaISe for purposes of this paper, while relying on a number of sources, listed here at footnote 10:

⁸ *Ibid*

⁹ The EU (Withdrawal) Act 2020, part 2 <https://www.legislation.gov.uk/ukpga/2020/1/part/2/enacted>

Table 1: Summary of Protocol Articles¹⁰

Article	Title	Key purpose of Article
1	Objectives of the Protocol	<ul style="list-style-type: none"> Set out the above stated objectives.
2	Rights of individuals	<ul style="list-style-type: none"> United Kingdom (UK) shall ensure no diminution of rights as set out in Belfast/Good Friday Agreement 1998.
3	Common Travel Area (CTA)	<ul style="list-style-type: none"> UK and Ireland may continue to make arrangements in relation to the CTA; UK to ensure the CTA will continue without affecting the obligations of the Republic of Ireland (RoI) under European Union (EU) law.
4	Customs Territory of the UK	<ul style="list-style-type: none"> Northern Ireland (NI) remains in the Customs Territory; will be included in UK Free Trade Agreements, and UK's World Trade Organisation schedule.
5	Customs and the Movement of Goods	<ul style="list-style-type: none"> No customs duties payable on goods moving from Great Britain (GB) to NI, unless "at risk" of subsequently being moved into the EU. Goods from outside the UK and EU will pay UK tariff unless "at risk" of being moved into EU. Sets out preliminary definition of "at risk" goods The UK in respect to NI remains aligned to EU Customs Code, a range of EU laws on product standards set out in Annex 2, and Articles 30 and 110 of the Treaty on the Functioning of the EU (TFEU). The UK may reimburse duties, provide for waivers of customs debts; provide for circumstances of reimbursement and compensate undertakings.
6	Protection of the UK Internal Market	<ul style="list-style-type: none"> Nothing in the Protocol will prevent the UK from ensuring unfettered market access for goods moving from NI to other parts of UK's Internal Market. EU law which restricts the export of goods only applies to trade between NI and the UK to the extent required by international obligations of the EU. The Protocol does not prevent NI goods from being marked as UK goods when sold in GB, or prevent UK from regulating their sale in GB markets. UK will ensure protection under international commitments on exportation of goods from the EU to third countries set out in EU law. Having regard for NI's "integral place" in the UK internal market the EU/UK shall use best endeavours to facilitate trade between NI and the rest of the UK. The Joint Committee (JC) will keep the facilitation of trade under review.

¹⁰ Compiled by the NI Assembly Research and Information Service, while relying on: the UK Government publication entitled "New Protocol on Ireland/Northern Ireland" (dated 18 October 2019), at Articles 1-19 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf; the Institute for Government's "Protocol Explainer (dated 5 February 2020) <https://www.instituteforgovernment.org.uk/explainers/brexit-deal-northern-ireland-protocol>; and, previous RaISe research paper series on the Protocol, in particular the paper on Customs and Trade (dated 21 May 2020) <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2020/economy/2620.pdf> and VAT and Excise (dated 21 May 2020) <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2020/economy/2720.pdf>

Article	Title	Key purpose of Article
7	Technical regulations, assessments, registrations, certificates, approvals and authorisations	<ul style="list-style-type: none"> • Lawfulness of UK goods on NI market governed by UK law. EU goods imported into NI are covered by TFEU Article 34, which prohibits quantitative restrictions (in other words, quotas) on goods imports between Member States, and Article 36 which allows quantitative restrictions in certain circumstance, such as public security. • Introduced new labelling requirements with respect to EU law on product standards applicable in NI <i>via</i> Protocol. Including a UK/NI designation to be used when such law requires require goods to carry an indication of Member State in abbreviated form. • Sets out the processes by which conformity checks relating to EU law set out in the Protocol will be carried out with respect to NI. • UK in respect of NI may not initiate procedures under Union law made applicable by the Protocol, insofar as those procedures deal with technical regulations, standards, assessments etc., issued by authorities in EU Member States.
8	VAT and Excise	<ul style="list-style-type: none"> • EU Law listed in Annex 3 will apply to UK in respect to NI. • UK authorities are responsible for the implementation of law outlined in Annex 3. • Enables VAT (Value Added Tax) exemptions and reduced rates applicable in RoI to be applied in NI if specified conditions – to be established by the JC - are met. • The JC may review the application of this Article.
9	Single Electricity Market	<ul style="list-style-type: none"> • EU Law set out in Annex 4 of the Protocol shall apply to the UK in respect to NI.
10	State Aid	<ul style="list-style-type: none"> • Annex 5 shall apply to the UK in respect of measures which affect trade between NI and EU, which is subject to the Protocol, except up to a maximum level of support directed to agriculture. • Where the European Commission (EC) receives information that measures undertaken by the UK may constitute unlawful aid under prevailing EU law, the EC shall ensure that the UK is fully informed.
11	Other areas of North-South Cooperation	<ul style="list-style-type: none"> • Articles 5 to 10 of the Protocol shall be implemented and applied so as to maintain the necessary conditions for North-South Cooperation. • The UK and RoI may continue to make new arrangements that build on Belfast/Good Friday Agreement 1998. • The JC is to keep the extent to which the Protocol maintains North-South cooperation on the island of Ireland under constant review. • The JC may make recommendations to the EU and the UK in respect of North-South cooperation, including on a recommendation from the Specialised Committee.

Article	Title	Key purpose of Article
12	Implementation, application, supervision and enforcement	<ul style="list-style-type: none"> • The UK is responsible for implementing into UK law and applying the EU law that is applicable to the UK in respect to NI <i>via</i> the Protocol. • EU representatives can be present during activities of UK authorities related to the implementation of the Protocol. • On a monthly basis, the UK and EU shall exchange information on the application of Article 5(1) and 5(2) of the Protocol. • The JC shall determine the practical working arrangements relating to the exercise of the rights of EU representatives, as mentioned above, upon a proposal from the Specialised Committee. • Paragraph 4 of article 12 states that the EU institutions shall have the powers conferred upon them in EU law applicable to the UK in respect to NI <i>via</i> the Protocol in relation to the UK and natural and legal persons residing / established within the UK. • Paragraph 4 of article 12 also states that the second and third paragraphs of the TFEU Article 267¹¹ shall apply to the UK with respect to EU law that continues to be applicable in the UK with respect to NI as a consequence of the Protocol. • Acts taken thereunder by EU “bodies, offices and agencies” adopted in accordance with Paragraph 4 as outlined above, shall have the same legal effect in the UK as in the EU and its Member States. • Where cases are brought before the Court of Justice of the European Union (CJEU) in relation to the above, the UK may participate in the same way as an EU Member State.
13	Common Provisions	<ul style="list-style-type: none"> • For the purposes of this Protocol, any reference to the UK in the applicable provisions of the Withdrawal Agreement shall be read as referring to “the UK or to the UK in respect of NI”. • Provisions in the Protocol referring to EU law are to be interpreted in accordance with the case law of the CJEU. • Reference to any EU Act should be read as referring to the Act as amended or replaced. • If the EU adopts a new Act that falls within the scope of the Protocol, but is not an update/replacement of an Act already in it, the EU shall inform the UK <i>via</i> the JC. Upon request of the UK / EU, the JC shall hold an exchange of views on the implications of that act on the “proper functioning” of the Protocol within 6 weeks. The JC will then either agree to implement the new legislation, or if not agreed, the JC will “examine further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect”. When the JC is unable to reach such a decision, the EU will be entitled, after giving notice, to take remedial measures. • The UK and the UK in respect of NI will not have access to any network, information system or database established under EU law, unless the EU considers that the UK cannot meet its Protocol obligation without such access. • UK authorities shall not act as leading authorities for risk assessments, approvals and authorisations required by the Protocol. • Articles 346¹² and 347¹³ TFEU apply to this Protocol as regards measures taken by a Member State or by the UK in respect of NI. • Future agreements may amend the Protocol, but such agreements must indicate the part of the Protocol that is superseded.

¹¹ Article 267: is available <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E267:en:HTML>

¹² TFEU Article 346 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E346>

¹³ TFEU Article 347 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E347>

Article	Title	Key purpose of Article
14	Specialised Committee (SC)	<p>The SC shall:</p> <ul style="list-style-type: none"> • Facilitate the implementation of the Protocol. • Examine proposals concerning Protocol implementation and application from both North-South Ministerial Council and North-South Implementation bodies. • Consider any matter of relevance to Article 2 of the Protocol brought by the NI Human Rights Commission, Equality Commission of NI and the Joint Committee of Human Rights Commissions of Northern Ireland and Ireland. • Discuss any point raised by the EU/UK relevant to the Protocol and giving rise to a difficulty. • Make recommendations to the JC as regards the functioning of the Protocol.
15	Joint Consultative Working Group (JCWG)	<ul style="list-style-type: none"> • A JCWG on the implementation of the Protocol is established to serve as a forum for the exchange of information and consultation. • It is composed of representatives of the UK and EU; and supervised by the SC; but has no power to adopt binding decisions (other than rules of procedure). • The UK and the EU shall exchange information about implementation measures in relation to EU law listed in Protocol Annexes <i>via</i> the JCWG. • Within the JCWG, the EU will inform the UK about planned EU law within the scope the Protocol, the EU will provide “relevant” information to the UK to enable the UK’s compliance with the protocol, and the UK will provide the EU all information required by Acts listed in Annexes to Protocol. • The JCWG is to be jointly chaired by the UK and the EU; meeting once a month, unless otherwise agreed. • Information provided by the UK <i>via</i> the JCWG will be communicated by the EU to relevant bodies of EU without delay.
16	Safeguards	<ul style="list-style-type: none"> • If the application of the Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, either the UK or the EU may take unilateral safeguard measures that are strictly necessary, to remedy the situation. • Priority shall be given to such measures that least disturb the functioning of the Protocol. • The UK and the EU may take proportionate rebalancing measures if unilateral safeguarding action creates an imbalance in the rights and obligations under the Protocol. • Safeguarding / rebalancing measures shall be governed by procedures set out in Annex 7 of the Protocol.
17	Protection of Financial Interests	<ul style="list-style-type: none"> • The UK and EU shall counter fraud and other illegal activities affecting their financial interests.

Article	Title	Key purpose of Article
18	Democratic consent in NI	<ul style="list-style-type: none"> • Within 2 months of the end of the initial period (4 years) and any subsequent period (4 years later on simple majority, 8 years if cross community support), the UK shall provide the opportunity for democratic consent in NI for the continued application of Articles 5-10 of the Protocol. • The process of obtaining democratic consent shall be in accordance with the Belfast/Good Friday Agreement 1998. • The UK is to notify the EU of the outcome before the end of the relevant period. • If democratic consent is refused, Articles 5-10 of the Protocol will cease to apply two years after the relevant period. The JC will make recommendations to the UK and the EU on how to protect the Belfast/Good Friday Agreement 1998.
19	Annexes	<ul style="list-style-type: none"> • Annexes 1-7 shall form an integral part of the Protocol

1.2 IMA (Internal Market Act 2020)

The IMA became law on 17 December 2020. According to the IMA's Explanatory Memorandum (EM), compiled by the UK Government, the Bill's purpose was to:

*...preserve the United Kingdom's internal market as powers previously exercised at European Level return to the UK, providing continued certainty for people and business that they can work and trade freely across the whole of the UK.*¹⁴

The IMA's provisions were first outlined in the UK Internal Market White Paper (White Paper), which was published by the UK Government on 16 July 2020.¹⁵ That White Paper set out its proposed policy objectives to legislate for the UK Internal Market. Those objectives were cited by the UK Government as:

- to “secure economic opportunities across the UK”;
- to “increase competitiveness and enable citizens across the UK to be in an environment that is the best place in the world to do business”; and,
- to “provide for the general welfare, prosperity and economic security of all UK citizens”.¹⁶

The White Paper was supplemented by a consultation on its proposals between 16 July and 13 August 2020. According to the UK Government, business respondents “showed support for the measures in order to avoid trade barriers and provide certainty for firms”.¹⁷ It also reported that respondents:

*...raised concerns on the need to: protect regulatory autonomy; protect Northern Ireland's place in the UK internal market; and provide an independent insight in the UK internal market's functioning.*¹⁸

Thereafter, the Internal Market Bill was first introduced into the House of Commons in September 2020. The Bill's passage was somewhat controversial for two main reasons. First, the Bill, as introduced, contained provisions which would give UK Ministers the power to “unilaterally interpret, modify the application of or disapply parts of the [Protocol]”.¹⁹ Those provisions specifically sought to enable UK Ministers to do that in relation to:

¹⁴ The Internal Market Act 2020, Explanatory Memorandum, Overview of the Act (2020)

<https://www.legislation.gov.uk/ukpga/2020/27/notes/division/2/index.htm>

¹⁵ Department for Business, Energy and Industrial Strategy, UK Internal Market White Paper (16 July 2020)

<https://www.gov.uk/government/publications/uk-internal-market/uk-internal-market>

¹⁶ *Ibid*

¹⁷ The Internal Market Act 2020, Explanatory Memorandum,

<https://www.legislation.gov.uk/ukpga/2020/27/notes/division/3/index.htm>

¹⁸ *Ibid*

¹⁹ House of Lords Library, United Kingdom Internal Market Bill: Briefing for Lords Stages (09 October 2020)

<https://researchbriefings.files.parliament.uk/documents/LLN-2020-0123/LLN-2020-0123.pdf>

- Export declarations for goods travelling from NI to GB; and,
- The application of EU State Aid Rules to measures affecting trade between NI and the EU, as covered by the Protocol.²⁰

The above provisions were removed from the Bill, following agreement at the JC on “outstanding issues relating to the implementation of the Withdrawal Agreement”, reached on 8 December 2020. That noted agreement included, amongst other things, that in respect to goods movements from NI to GB:

*...proposed declarations in the Joint Committee with legal standing will confirm that the Protocol does not require export of exit declarations for those internal market movements.*²¹

Subsequently, on 17 December 2020, the UK Government made a “Unilateral declaration” in the JC to this effect, which was noted by the EU.²²

Similarly, on 8 December 2020, the JC reached agreement in principle to address the UK Government’s concerns on State Aid – namely that EU State Aid principles should not continue to apply in GB “in circumstances when there is no link or only a trivial one to commercial operations taking place in NI”. This led to the publication of a “Unilateral declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10(1) of the Protocol” on 17 December 2020. In that unilateral document, the EU stated with regard to the application of State Aid that:

*...an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland. It must be established why the measure is liable to have such an effect on trade between Northern Ireland and the Union, based on the real foreseeable effects of the measure.*²³

The above EU declaration was “noted” by the UK.

²⁰ *Ibid*

²¹ Cabinet Office Command Paper, The Northern Ireland Protocol (December 2020)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950601/Northern_Ireland_Protocol_-_Command_Paper.pdf

²² Unilateral declaration by the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Export Declarations

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946660/Unilateral_declarations_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_European_Union_in_the_Withdrawal_Agreement_Joint_Committee_on_export_declarations.pdf

²³ Unilateral declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10(1) of the Protocol

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946286/Unilateral_declarations_by_the_European_Union_and_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_in_the_Withdrawal_Agreement_Joint_Committee_on_Article_10_1_of_the_Protocol.pdf

The 17 December 2020 also saw the publication of JC Decisions and additional Unilateral Declarations²⁴ on:

- Agricultural subsidies (Decision);
- Determination of goods not “at risk” (Decision);
- Errors and omission (Decision);
- Article 12(2) of the Protocol which concerns EU presence in NI (Decision);
- Meat products (UK Unilateral Declaration);
- Official Certification (UK Unilateral Declaration); and,
- Human and veterinary medicines (EU Unilateral Declaration).²⁵

From a devolution perspective, it is important to reflect points made about the Internal Market Bill. Amongst other things, the devolved legislatures complained about the Internal Market Bill’s proposed market access principles.²⁶ They jointly argued that those principles would constrain their ability to utilise the new powers gained from the EU, following the end of the transition period. The Scottish Government further argued that the Bill also undermines “the agreed process of negotiating and agreeing common UK frameworks where these are required to replace [previous] EU structures”.²⁷

Both the Scottish and Welsh Parliaments refused to provide consent to the Internal Market Bill.²⁸ On 19 January 2021, the Welsh Government issued a legal challenge to the IMA on the basis that the Act limited “the scope of the devolved powers of the Senedd and Welsh Government”.²⁹ For purposes of compiling this paper, the most recent update on that case is that of the Counsel General of Wales, dated 23 March 2021, which noted such proceedings were ongoing.³⁰

²⁴ Joint Committee Decisions are, as the name suggests, decisions reached by the Joint Committee in areas where the Committee are empowered to make such decisions by virtue of the Protocol. For example, on the “At risk goods” or “agricultural subsidy”. Unilateral Declarations are made by one party in areas where they are not empowered to make decisions as per the Protocol, but where easements or reinterpretations are sought – for example on export declarations. Unilateral declarations are not legally binding but can be used to help treaties. For further details see <https://commonslibrary.parliament.uk/research-briefings/cbp-9102/>

²⁵ Cabinet Office the Northern Ireland Protocol, Details of the agreement reached by Withdrawal Agreement Joint Committee regarding the implementation of the Northern Ireland Protocol (10 December 2020) <https://www.gov.uk/government/publications/the-northern-ireland-protocol>

²⁶ The principles of mutual recognition and the principle on discrimination with respect to the flow of goods and services across the UK

²⁷ [The UK Internal Market Bill – The Devolved Administrations Responses – SPICe Spotlight | Solas air SPICe \(spice-spotlight.scot\)](https://www.scotland.gov.uk/Information/Statistics/2021/01/21/10119%20Counsel%20General%20for%20Wales%20v%20Secretary%20of%20State%20for%20Business%20-%20grounds%20for%20judicial%20review.pdf)

²⁸ The Institute for Government, Explainers the Internal Market Act (22 December 2020) <https://www.instituteforgovernment.org.uk/explainers/internal-market-act>

²⁹ Counsel General for Wales v Secretary of State for Business – ground for legal review (19 January 2021) <https://gov.wales/sites/default/files/inline-documents/2021-01/210119%20Counsel%20General%20for%20Wales%20v%20Secretary%20of%20State%20for%20Business%20-%20grounds%20for%20judicial%20review.pdf>

³⁰ Welsh Government Written Statement: The European Union (Withdrawal) Act and Common Frameworks <https://gov.wales/written-statement-european-union-withdrawal-act-and-common-frameworks-8>

1.3 Relationship between the IMA and the Protocol

As noted above, the IMA's aim was to create the conditions to enable the continued functioning of the UK Internal Market in a post-EU context. The IMA also sought to avoid trade barriers within the UK Internal Market, despite the Protocol.

Whereas, the Protocol sought to avoid a border on the island of Ireland; whilst respecting the state functions and territorial integrity of the UK, as well as the constitutional status of NI and the principle of consent, as per the 1998 Belfast/Good Friday Agreement. To achieve the first of these points, the Protocol ensured that the UK Government would continue to apply certain aspects of EU law with respect to NI, and in particular, for the purposes of this paper, with respect to trade in goods. Those same aspects of EU law are no longer applicable to the rest of the UK, i.e. GB.

The effect of the noted Protocol provisions is to create different regulatory regimes within the UK Internal Market. Such variance in regulatory regimes has created barriers within the UK Internal Market.³¹ The IMA contains provisions to prevent or minimise such barriers. It does so by: seeking to streamline goods trade from GB to NI; securing unfettered access for goods moving from NI to GB; and, modifying the UK Market Access Principles for goods with respect to NI, as a consequence of the Protocol. These IMA provisions are explored in greater detail in the subsections that follow - see in particular subsections 2.1, 2.5 and 3.1.

2 IMA provisions as a result of the Protocol

The IMA contains eight parts. Only some of the IMA provisions arise as a result of the Protocol. The subsections that follow here outline the purpose of each of those eight parts of the IMA; and identifies IMA provisions that arise due to the Protocol. This section forms the basis of the commentary that follows in Section 3 below.

2.1 IMA Part 1: UK market access principles: goods

Sections 1 to 16 of the IMA³² established UK market access principles with respect to goods. The IMA introduced two such principles:

- 1) The **mutual recognition principle**, which holds that any good lawfully sold in one part of the UK is automatically lawfully for sale in all other parts of the UK.³³
- 2) The **non-discrimination principle**, which holds that statutory rules or regulations in one part of the UK should not prevent goods from another part of the UK being sold.³⁴ These provisions defined two types of discrimination. First, they defined

³¹ UK in a changing Europe, what happened when the UK Internal Market Bill met the Northern Ireland/Ireland Protocol (10 September 2020) <https://ukandeu.ac.uk/what-happened-when-the-uk-internal-market-bill-met-the-ni-irl-protocol/>

³² The Internal Market Act 2020, Part 1 UK market access: good <https://www.legislation.gov.uk/ukpga/2020/27/part/1/enacted>

³³ *Ibid* s2-4

³⁴ *Ibid* 5-9

direct discrimination as occurring when an incoming good is disadvantaged to a local good because it comes from another part of a UK. Second, they defined indirect discrimination as occurring when an incoming good is “not directly discriminated against, but where regulation disadvantages incoming goods and has an adverse market effect”.³⁵

There are number of exceptions to the two above principles, as outlined in Table 2 below, using information provided at Sections 4, 9, and 10 of the IMA. Such exceptions include measures to prevent the spread of disease or reduce the movement of unsafe foodstuff. Additionally, further exclusions to these principles may be added in areas where a Common Framework (CF) exists:

Table 2: Exceptions to the IMA’s market access principles for goods³⁶

Exceptions to the mutual recognition principle	Exceptions to the non-discrimination principle
The following are excluded from both principles: - a sale made for the purpose of performing a function of a public nature; - existing divergence; - legislation to prevent the spread of pests and disease; - legislation to reduce the moment of unsafe food and feed; - the authorisation of certain chemicals; - certain regulations of fertilizers and pesticides; and - taxation.	

Source: IMA 2020

Section 11³⁷ of the IMA states that:

*The United Kingdom market access principles for goods apply, in relation to the sale of goods in the United Kingdom **other than Northern Ireland**...*
 [emphasis added]

Adding that the provisions “affecting the application of those [market access] principles in relation to the sale of goods in Northern Ireland” include:

- The provisions outlined in the Protocol; and,
- Sections 7A³⁸, 7C³⁹ and 8C⁴⁰ of the European Union (Withdrawal Act) 2018.⁴¹

³⁵ The Internal Market Act 2020, Explanatory Memorandum, <https://www.legislation.gov.uk/ukpga/2020/27/notes/division/3/index.htm>

³⁶ *Ibid*

³⁷ *Ibid* s11

³⁸ Section 7A ensures that all rights, powers, liabilities, obligations, restrictions, remedies and procedures the result from the Withdrawal Agreement – of which the NI Protocol is an integral part – are to given legal effect in the UK without further enactment <https://www.legislation.gov.uk/ukpga/2018/16/section/7A>

³⁹ Section 7C sets out details on the Interpretation of relevant separation agreement law. Specifically, the Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss Citizen’s Rights Agreement. The Section seeks to ensure consistent application in UK law of corresponding provisions made in those agreements <https://www.legislation.gov.uk/ukpga/2018/16/section/7C>

⁴⁰ Section 8C provided Ministers of the Crown with the power introduce regulation to implement the NI Protocol or to support the effect of Section 7A of the European Union (Withdrawal) Act 2018 <https://www.legislation.gov.uk/ukpga/2018/16/section/8C>

⁴¹ The Internal Market Act s11 <https://www.legislation.gov.uk/ukpga/2020/27/section/11/enacted>

Potential Issue for Consideration:

- 1) The Committee may wish to seek a legal interpretation as to how these specific Protocol and European (Withdrawal) Act 2018 provisions – i.e. 7A, &C and 8C - may affect the application of the market access principles in relation to the sale of goods in NI.

Section 11 of the IMA explicitly “modifies” the above market access principles to enable the “unfettered access” of qualifying goods from NI to GB. The modifications put in place by the Section 11 affect only the movement of goods from NI to GB: they do not impact the movement of goods in the other direction, from GB to NI.

Section 11 of the IMA introduced the following provisions:

- That the mutual recognition applies to all “qualifying NI goods” produced in or imported into NI, it does not apply to non-qualifying NI goods, unless those non-qualifying goods go through the same importation processes as other goods entering GB from outside of the UK.
- The non-discrimination principle does apply to non-qualifying NI goods.⁴²

The definition of a “qualifying good”, as used in the IMA, was introduced *via* the “European Union (Withdrawal) Act 2018”,⁴³ and outlined in the “Definition of Qualifying Northern Ireland Goods (EU Exit) Regulations 2020” (the “2020 Regulations”).⁴⁴ Article 3 of the 2020 Regulations provides two possible definitions of a qualifying NI goods. The first possible definition is that goods meet the following condition:

*...that the goods are present in Northern Ireland and are not subject to any customs supervision, restriction or control which does not arise from the goods being taken out of the territory of the Northern Ireland or the European Union.*⁴⁵

The second possible definition is that the good is a “NI processed product”. A “NI processed product” is further defined as goods which:

*...have undergone processing operations carried out in Northern Ireland only.*⁴⁶

In addition, NI processed products must incorporate only components that were not subject to any form of “customs supervision, restriction or control”, or which “have been domestic goods, within the meaning of section 33 of the Taxation (Cross-border Trade) Act 2018”.⁴⁷ Section 33 of the Taxation (Cross-border Trade) Act 2018 defines

⁴² *Ibid*

⁴³ European Union (Withdrawal) Act 2018 8C(6) <https://www.legislation.gov.uk/ukpga/2018/16/section/8C>

⁴⁴ The Definition of Qualifying Northern Ireland Goods (EU Exit) Regulations 2020 <https://www.legislation.gov.uk/uksi/2020/1454/regulation/3/made>

⁴⁵ *Ibid*

⁴⁶ *Ibid*

⁴⁷ *Ibid*

domestic goods as goods, which are “wholly obtained in the United Kingdom” or have “been subject to a chargeable Customs procedure”.⁴⁸

The EM to the 2020 Regulations explains that the first definition of “qualifying NI goods” applies to goods that are:

...lawfully present in Northern Ireland and are not subject to customs control (other than customs procedures arising from export).⁴⁹

It adds that the second possible definition, i.e. to “NI processed products”:

...seeks to ensure that goods that have undergone processing in Northern Ireland can qualify for the definition even where they have been moved under customs control.⁵⁰

In a letter to the NI Affairs Committee dated 7 October 2020, the Secretary of State for NI further expanded on the second definition, stating it applied to:

...any good that has undergone processing operations in Northern Ireland incorporating either domestic goods or goods not under customs supervision, restriction or control at the time of processing.⁵¹

The EM to the 2020 Regulations noted that the qualifying NI goods definition was “broad” and that that:

...best ensues continuity and avoids any disruption at the end of the transition period, in line with the broader approach being taken for goods arriving into Great Britain from the EU for first half of next year.⁵²

It is worth noting that the UK Government further indicated that it could amend the definition of qualifying NI goods. On 7 October 2020, the Secretary of State for NI stated that the current definition is:

...only intended to be a bridge to a longer-lasting regime, to be developed in discussions with Northern Ireland businesses, which will follow during the course of 2021.⁵³

⁴⁸ <https://www.legislation.gov.uk/ukpga/2018/22/section/33>

⁴⁹ The Definition of Qualifying Northern Ireland Goods (EU Exit) Regulations 2020, Explanatory Memorandum https://www.legislation.gov.uk/uksi/2020/1454/pdfs/ukxiem_20201454_en.pdf

⁵⁰ *Ibid*

⁵¹ Letter from the Secretary of State for NI to Chair of the NI Affairs Committee 7 October 2020 <https://committees.parliament.uk/publications/2895/documents/32430/default/>

⁵² The Definition of Qualifying Northern Ireland Goods (EU Exit) Regulations 2020, Explanatory Memorandum https://www.legislation.gov.uk/uksi/2020/1454/pdfs/ukxiem_20201454_en.pdf

⁵³ Letter from the Secretary of State for NI to Chair of the NI Affairs Committee 7 October 2020 <https://committees.parliament.uk/publications/2895/documents/32430/default/>

Potential Issues for Consideration:

- 2) Has the NI Executive received any indication of the UK Government's plans with regard to this "longer-lasting" regime and how that regime will impact the definition of "qualifying NI goods" in the future?
- 3) If yes, please specify what the UK Government is proposing, including explanation of which businesses the UK Government has engaged with to develop those proposals? In particular, which businesses in NI?

2.2 IMA Part 2: Market access principles - services

Sections 17 to 23 and Schedule 2 of the IMA similarly establish the UK market access principles with respect to services.⁵⁴ Again, there are two principles:

- 1) The **mutual recognition principle for services** provision, which holds that a service provider that is authorised to operate in one part of the UK is deemed authorised to offer that service in the rest of the UK, without having to secure additional authorisation.⁵⁵
- 2) The **non-discrimination principle for services** provision, which holds that any statutory rules or regulations in one part of the UK should not discriminate against providers from another part of the UK.⁵⁶ As is the case with the Market Access Principles for goods, the non-discrimination principle for services applies to direct and indirect discrimination.⁵⁷

As is the case with the market access principles for goods, there are exclusions to the market access principles for services.⁵⁸ These are more specified for services than they are for goods, with specific service sectors excluded from the market access principles. Table 3 provides a summary of these sectors. Again, it must be noted by the Committee that the IMA provides that the Secretary of State for NI may use secondary legislation to exclude additional areas from the service market access principles, where that area is covered by a CF:

⁵⁴ The Internal Market Act 2020, Part 2 UK Market Access: services
<https://www.legislation.gov.uk/ukpga/2020/27/part/2/enacted>

⁵⁵ *Ibid* 19

⁵⁶ *Ibid* 20-21

⁵⁷ The Internal Market Act 2020, Explanatory Memorandum,
<https://www.legislation.gov.uk/ukpga/2020/27/notes/division/3/index.htm>

⁵⁸ The Internal Market Act 2020, Part 2 UK Market Access: services
<https://www.legislation.gov.uk/ukpga/2020/27/part/2/enacted>

Table 3: Sector exclusions from Market Access Principle - services⁵⁹

Mutual recognition exclusions	Non-discrimination exclusions
<p>The following sectors are excluded:</p> <ul style="list-style-type: none"> - audio-visual services; - debt collection; - electronic communication; - financial services; - gambling services; - health care services; - legal services; - notarial services; - private security services; - service of temporary work agencies; - services provided by a person exercising functions of a public nature; - social services; - transport services; and, - taxation. 	<p>Subject to the same exclusions as the mutual recognition for services provisions, except legal services and with the addition of the following sectoral exclusions:</p> <ul style="list-style-type: none"> - postal services; - services connected to natural gas production; - services connected to electricity production or supply; - waste services; and, - water supply and sewerage.

Source: IMA 2020

Unlike the market access principles for goods, the IMA does not include any provisions that modify the market access principles for services to accommodate the Protocol. The Protocol does not cover service trade.

2.3 IMA Part 3: UK Market access principles - professional qualifications and regulation

Sections 24 to 29 of the IMA create systems to enable the recognition of professional qualifications across the UK.⁶⁰ They allow professionals qualified in one part of the UK access to the same profession in another part of the UK, without having to requalify. The provisions concern only those professions that are “regulated in law”. In other words:

...where access to a profession, including undertaking certain activities or using a specific professional title, is limited by legislation to individuals who hold specific qualifications or experience.⁶¹

Within the context of this part of the IMA, only qualifications and experience obtained “mainly” in the UK may be relied upon.^{62,63}

⁵⁹ *Ibid*

⁶⁰ The Internal Market Act Part 3, UK Market access professional qualifications and regulation <https://www.legislation.gov.uk/ukpga/2020/27/part/3/enacted>

⁶¹ The Internal Market Act 2020, Explanatory Memorandum, <https://www.legislation.gov.uk/ukpga/2020/27/notes/division/3/index.htm>

⁶² Internal Market Act 2020 s25(7)(a) <https://www.legislation.gov.uk/ukpga/2020/27/section/25/enacted>

⁶³ Details of post EU Exit arrangement for the recognition of qualifications in the UK EU, EEA and Swiss professionals can be found <https://www.gov.uk/government/publications/recognition-of-professional-qualifications-technical-guidance-for-regulatory-bodies/recognition-of-professional-qualifications-guidance-for-regulatory-bodies>

There are certain exceptions to the recognition of qualifications across the UK, for example, certain “legal professions”, school teaching and ongoing professional requirements.⁶⁴

2.4 IMA Part 4: Independent advice on and monitoring of the UK Internal Market

Sections 30 to 45 of the IMA established the Office of the Internal Market (OIM), as an office of the Competition Markets Authority (CMA).⁶⁵ The OIM is to serve three functions:

- Providing advice to all four administrations;
- Monitoring the internal market; and,
- Reporting on the function of the internal market.

It is required to report to the UK Parliament and the devolved legislatures from 31 March 2023. The UK Government and devolved administrations may also request advice on specific Internal Market regulatory provisions.

The OIM’s remit includes any rules or requirements that fall within the scope of the IMAs market access principles. Its remit does not include the provisions of the IMA that give effect to the Protocol.

The IMA also gives the CMA powers to issue financial penalties to individuals, businesses or public authorities for non-compliance with its “reporting, advisory and monitoring functions”, as set out in IMA Sections 33 to 36.⁶⁶

2.5 IMA Part 5: NI Protocol

Sections 46 to 49 of the IMA deal explicitly with the Protocol. The provisions set out in those articles focus on intra-UK trade and State Aid in NI.⁶⁷

Section 46 concerns **NI’s place in the UK Internal Market and the Customs Territory**.⁶⁸ The Protocol provided that certain EU customs legislation continues to apply “to and in the UK in respect of Northern Ireland”. This application of EU customs law includes administrative requirements in relation to the movement of goods between GB and NI.⁶⁹

⁶⁴ Internal Market Act 2020 s27 <https://www.legislation.gov.uk/ukpga/2020/27/section/25/enacted>

⁶⁵ The Internal Market Act 2020 Part 4 Independent advice on and monitoring of UK Internal Market <https://www.legislation.gov.uk/ukpga/2020/27/part/4/enacted>

⁶⁶ *Ibid* s42-43

⁶⁷ *Ibid* Part 5 Internal Market Act <https://www.legislation.gov.uk/ukpga/2020/27/part/5/enacted>

⁶⁸ *Ibid* s46

⁶⁹ The Internal Market Act 2020, Explanatory Memorandum, <https://www.legislation.gov.uk/ukpga/2020/27/notes/division/3/index.htm>

According to the IMA's EM, Section 46 was introduced to streamline “the movement of goods” between GB and NI.⁷⁰ The purpose of Section 46 was to support transposition and implementation of Article 6(2) of the Protocol, which states:

Having regard to Northern Ireland's integral place in the UK's internal market, the Union and the UK shall use their best endeavours to facilitate trade between Northern Ireland and other parts of the UK, in accordance with the applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof.⁷¹

To this end, Section 46 of the IMA provides that “appropriate authorities” – meaning “Ministers of the Crown, Scottish Ministers, Welsh Ministers and NI Ministers or Departments”, or “any other person who exercises a function of a public nature” – should have “special regard for” the need to do the following, when exercising a function for a relevant purpose:

- maintain NI's integral place in the UK's Internal Market;
- respect NI's place as part of the UK Customs Territory; and,
- facilitate the free flow of goods between GB and NI, with the aim of streamlining trade between GB and NI and “maintaining and strengthening the integrity and smooth operation” of the UK Internal Market.⁷²

Within this context, a “**relevant purpose**” is defined as:

- implementing, or otherwise dealing with, matters arising out of the Protocol;
- enabling or facilitating the implementation of the Protocol; or,
- relating to the movement of goods within the UK.⁷³

Potential issues for considerations:

- 4) The Committee may wish to seek legal advice to gain greater understanding as to what “special regard” could mean when interpreting that concept in the context of goods flows between GB and NI.
- 5) Thereafter, the Committee may wish to ask for The Executive Office (TEO), the Department for Finance and the Department for the Economy for their views on how it understands the concept of “special regard” could be/is interpreted in the context of goods flows between GB and NI.
- 6) The Committee may wish to ask TEO, the Department for Finance and the Department for the Economy if they have made any representations to the UK

⁷⁰ *Ibid*

⁷¹ The Protocol on Ireland and Northern Ireland Article 6(2)

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

⁷² Internal Market Act 2020 s46 <https://www.legislation.gov.uk/ukpga/2020/27/part/5/enacted>

⁷³ *Ibid*

Government or other regarding the concept of “special regard”; and if they have, to specify for the Committee what those representations included.

- 7) The Committee may wish to ask TEO, the Department of Finance and the Department for the Economy if they are aware of the concept of “special regard” having been interpreted and applied within the context of any “relevant purposes” to date. Please specify when.
- 8) If any reply yes to the above (7), the Committee may wish to ask each to provide details of that application.

Section 47 is intended to ensure **unfettered access to the UK Internal Market for NI goods**. To this end, that Section states that “appropriate authorities”⁷⁴ should not exercise their functions in a way that introduces a new check, control or administrative process on qualifying NI goods moving from NI to GB. Additionally, it states that appropriate authorities should not carry out their functions in a way that results in an existing check, control or administrative process being used for the first time, or for a new purpose/extent on qualifying NI goods.⁷⁵ The meaning of qualifying NI goods is the same as that set out in Section 11 of the IMA, as outlined in subsection 2.1 of this paper. The unfettered access provisions set out in Section 47 of the IMA apply to the movement of goods from NI to GB only, they do not apply to the movement of goods from GB to NI.⁷⁶

The inclusion of these “unfettered access” provisions is in line with the “New Decade, New Approach”⁷⁷ political agreement and at Article 6(1) of the Protocol.⁷⁸

Sections 48⁷⁹ and 49⁸⁰ of the IMA concern **State Aid** in the context of the Protocol. Those legislative provisions are rooted in Article 10 of the Protocol, which provides that EU State Aid rules will apply in relation to trade in goods and electricity between NI and the EU.⁸¹ EU State Aid law applies in the UK in respect to NI *via* Section 7A of the European Union (Withdrawal) Act 2018, which holds that “all rights, powers, liabilities, obligations and restrictions” and “remedies and procedures” created by, arising from, or provided for by the Withdrawal Agreement are “without further enactment to be given legal effect or used in the United Kingdom”. To this end, such “rights, powers, liabilities,

⁷⁴ In this context “appropriate authorities” has the same meaning as in Section 46.

⁷⁵ The Internal Market Act 2020 s47 <https://www.legislation.gov.uk/ukpga/2020/27/part/5/enacted>

⁷⁶ *Ibid* s47(8(a))

⁷⁷ 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

⁷⁸ Article 6(1) states that “Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom’s internal market.”

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

⁷⁹ *Ibid* s48

⁸⁰ *Ibid* s49

⁸¹ The Protocol on Ireland and Northern Ireland Article 10

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

obligations, restrictions, remedies and procedures” are to be “recognised and available in domestic law” and “enforced, allowed and followed accordingly”.⁸²

Against this backdrop, Section 48 of the IMA provided that the Secretary of State of NI must publish guidance on the practical application of the Protocol’s Article 10.⁸³ That guidance was published on 31 December 2020, as part of the broader publication “Technical guidance on the UK’s international control commitments” (the “Guidance”). Part 7 of the Guidance focuses on State Aid and was published with the express purpose of complying with Section 48 of the IMA.⁸⁴ A brief overview of what that Guidance states with respect to practical application of the State Aid provisions in Article 10 of the Protocol is outlined below in Annex 1 to this paper.

Section 48 of the IMA also holds that public authorities are required to “have regard” to the Guidance.⁸⁵ According to the IMA’s EM, such regard will “ensure a consistent and uniform application of Article 10”.⁸⁶

Potential issue for consideration:

9) Was the Department of Finance, the Department for the Economy or The Executive Office consulted by the UK Government in respect to the drafting of the Guidance? If yes, can each Department please specify what it provided to the Government in its reply.

In addition to the above requirement to issue guidance on Article 10 of the Protocol, Section 49 of the IMA states:

*No public authority apart from the Secretary of State may comply with a requirement of a provision of EU law applied to the United Kingdom by Article 10 of the Northern Ireland Protocol (state aid) to give the European Commission a notification or information relating to aid.*⁸⁷

2.6 IMA Part 6: Financial Assistance

Sections 50 and 51 of the IMA provide UK Ministers with the power to provide financial assistance across the UK.⁸⁸ That includes financial assistance for the purposes of:

- promoting economic development in the UK;
- providing infrastructure at places in the UK;

⁸² The European Union (Withdrawal Act) 2018 s7(a) <https://www.legislation.gov.uk/ukpga/2018/16/section/7A>

⁸³ Internal Market Act 2020 s48 <https://www.legislation.gov.uk/ukpga/2020/27/part/5/enacted>

⁸⁴ Department for Business, Energy and Industrial Strategy, Technical guidance on the UK’s international control commitments (31 December 2020) <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments>

⁸⁵ Internal Market Act 2020 s48 <https://www.legislation.gov.uk/ukpga/2020/27/part/5/enacted>

⁸⁶ The Internal Market Act 2020, Explanatory Memorandum, <https://www.legislation.gov.uk/ukpga/2020/27/notes/division/3/index.htm>

⁸⁷ Internal Market Act 2020 s49 <https://www.legislation.gov.uk/ukpga/2020/27/part/5/enacted>

⁸⁸ Internal Market Act Part 6: Financial Assistance <https://www.legislation.gov.uk/ukpga/2020/27/part/6/enacted>

- supporting cultural activities, projects and events that directly or indirectly benefit the UK or particular areas of the UK;
- supporting activities, projects and events that directly or indirectly benefit the UK or particular areas of the UK;
- supporting international educational and training activities and exchanges; and,
- supporting educational and training activities and exchanges within the UK.⁸⁹

The financial assistance provisions in the IMA allow UK Government ministers to spend money directly in devolved areas. In doing so, they facilitate the “UK Shared Prosperity Fund”,⁹⁰ which is the UK Government’s replacement for the EU Structural Funds.⁹¹

Given the focus on financial assistance, it is possible that future application of the noted provisions may have implications when applying the Protocol, particularly in relation to Article 10 of the Protocol, which ensures the continued application of EU State Aid rules in NI, with respect to trade in goods and wholesale electricity.

Potential issues for consideration:

- 10) Has the Department of Finance, Department for the Economy or The Executive Office received any updates on how plans and implementation of the UK Shared Prosperity Fund are progressing?
- 11) If any Department has, please share copies of those update(s) with the Committee, or at the very least, brief the Committee on the contents of the update(s)?
- 12) Is the Department of Finance, the Department for the Economy or The Executive Office concerned in any way about the implementation of the UK Shared Prosperity Fund in future, in particular its impact on the Executive’s ability to deliver devolved governance in NI?
- 13) In the views of the Department of Finance, the Department for the Economy and The Executive Office, is it possible that the implementation of the UK Shared Prosperity Fund – in effect - could usurp devolved governance in NI in any way? Please detail how and why.

2.7 IMA Part 7: Subsidy Control

Sections 52 and 53⁹² of the IMA deal with subsidy control. Section 52 inserts provisions into each of the devolution statutes (as amended) in the UK, namely the NI Act 1998, the Scotland Act 1998 and the Government of Wales Act 2006. That Section provides the UK Government with reserved powers to regulate the provision of subsidies by a

⁸⁹ *Ibid* s50(1)

⁹⁰ For further details on the “UK Shared Prosperity Fund” please see the following House of Commons Library Briefing from 29 January 2021 <https://researchbriefings.files.parliament.uk/documents/CBP-8527/CBP-8527.pdf>

⁹¹ Institute for Government, Explainers, Internal Market Act (22 December 2020) <https://www.instituteforgovernment.org.uk/explainers/internal-market-act>

⁹² Internal Market Act Part 7: Subsidy Control <https://www.legislation.gov.uk/ukpga/2020/27/part/7/enacted>

public authority which are or may be distortive or harmful to persons supplying goods or services in the course of a business.

Section 53 commits the Secretary of State to providing a draft of the UK Government's proposed response of its "UK Subsidy control consultation" to each devolved authority; and invites the devolved authorities to "make representations" on that proposed response.⁹³

Potential issues for consideration:

14) Has the Department of Finance or The Executive Office received a copy of the UK Government's draft response to its "UK Subsidy control consultation"?

15) If either Department has, can it share a copy of that draft response with the Committee, or at the very least, brief the Committee on the draft's contents?

16) If the draft response was shared, did either Department provide a view about its contents? If so, please specify the view expressed by the Department.

Given the focus on subsidy control, it is possible that future application of the noted provisions may have Protocol implementation implications, particularly in relation to Article 10 of the Protocol, which ensures the continued application of EU State Aid rules in NI, with respect to trade in goods and wholesale electricity.

2.8 IMA Part 8: Final provisions

Sections 54 and 55⁹⁴ of the IMA include final provisions. Of these, Section 55 includes a provision that relates to the Protocol. It states that certain sections of the IMA (Section 11 modifications of Internal Market access principles and Part 5 on the Protocol) and the EU (Withdrawal) Act 2018 (Section 8C(5A)) will cease to have effect, if Articles 5 to 10 of the Protocol cease to apply. It also states that nothing in the IMA limits the power to make provision under Section 8C of the European Union (Withdrawal) Act 2018, or the effect of such regulations, except for regulations under Section 8C(1), which modify the operation of Section 47, subject to some exceptions.⁹⁵

3 Commentary on IMA-Protocol interactions

Based on the analysis in Section 2 of this paper, this section identifies three categories of IMA-Protocol interactions, namely those:

1. Implications affecting the flow of goods across the United Kingdom (UK), in particular from NI to Great Britain (GB) and from GB to NI;

⁹³ *Ibid* s53

⁹⁴ Internal Market Act Part 8: Final Provisions <https://www.legislation.gov.uk/ukpga/2020/27/part/8/enacted>

⁹⁵ *Ibid* s55

2. Implications concerning the continued application of European Union (EU) State Aid regulation in NI; and,
3. Implications regarding other matters.

The subsections below examine in greater detail the IMA provisions falling within each noted category noted above, to further explore the implications of each provision. This analysis is based on the IMA and its EM, as well as the Protocol and additional secondary sources, where appropriate, which are referenced throughout this section.

When relying on the contents of this section of the paper, it should be noted that they are not offered as legal advice or opinion. Rather, they are compiled from a layperson's perspective. They aim to assist the Committee in further expanding its knowledge and understanding of the IMA and the Protocol and how they relate to one another. That information seeks to facilitate the Committee when exercising its advisory and scrutiny roles both now and in future.

3.1 Sections affecting the flow of goods across the UK, in particular from NI to GB and from GB to NI: IMA Sections 11, 47 and 48

As noted in section 2 of this paper, Section 11 and Sections 46 to 47 of the IMA concern the free flow of goods within the UK Internal Market. They are focussed in particular on the flow of goods from NI to GB and from GB to NI. There is some value in looking at these Sections in more detail, in order to highlight some indication of their potential implications from a NI perspective.

3.1.1 IMA: Section 11

As noted, Section 11's purpose is to adapt the IMA's market access principles for goods to NI's unique circumstances, arising as a result of the Protocol. Before those modifications are introduced, however, Section 11(1) of the IMA notes that the Protocol and those sections of the European Union (Withdrawal) Act 2018, which give effect to the Protocol, "affect" the market access principles with respect to the sale of GB goods in NI.⁹⁶

Commenting on these "affects", the Institute for Government has commented:

Certain modifications are made to the [market access principles] to accommodate the Northern Ireland Protocol. To avoid a hard border on the island of Ireland, the protocol requires Northern Ireland to apply EU law in certain areas such as customs and product requirements, including medicines, animal and plant health, food safety and farming standards.

Any goods entering Northern Ireland must comply with EU standards in these areas and so the [market access principles] cannot apply to all goods

⁹⁶ *Ibid* s11(1)

*from Great Britain. Goods from England, Scotland or Wales will not automatically apply be acceptable for sale on the Northern Ireland market; compliance checks and paper work will therefore be necessary in some areas.*⁹⁷

Sections 11(2) to 11(8)⁹⁸ then set out a series of modifications, which seek to ensure the application of the UK market access principles on goods moving from NI to GB.

To this end Section 11(2) to 11(8) introduce the concept of “qualifying NI goods” and set out that the two UK market access principles – namely mutual recognition and non-discrimination – apply to such goods. Simply stated, it appears “qualifying NI goods” are defined as goods that are either present in NI, and not subject to customs procedures, or goods that have undergone processing in NI, and which are made up of components that are not subject to customs procedures, or which have successfully completed customs procedures. This is discussed in more detail in subsection 2.1. It should be noted that the UK market access principles do not apply to goods falling outside of this definition, as specified in Section 11(3) and 11(5) of the IMA.⁹⁹

Moreover, two key things to note about the provisions contained in Section 11 of the IMA are:

1. The provisions modifying the IMA’s market access principles for goods apply to goods moving from NI to GB; they do not to apply to goods moving from GB to NI.
2. As noted in subsection 2.1 of this paper, the current definition of a qualifying NI good is subject to change. The UK Government views the current definition as a “bridge to a longer-lasting regime”, and is seeking to develop a new definition in “discussion with” NI businesses during 2021.¹⁰⁰

3.1.2 IMA: Section 46

Section 46 of the IMA sets out provisions that concern NI’s place within the UK Internal Market and Customs Union. As noted in subsection 2.5 of this paper, the IMA’s EM states that the intention of these provisions is to “support” Article 6(2) of the Protocol, which states that:

Having regard to Northern Ireland’s integral place in the UK’s internal market, the Union and the UK shall use their best endeavours to facilitate trade between Northern Ireland and other parts of the UK, in accordance

⁹⁷ Institute for Government, the United Kingdom Internal Market Act 2020 (February 2021)

<https://www.instituteforgovernment.org.uk/sites/default/files/publications/internal-market-act.pdf>

⁹⁸ *Ibid* s11(2) to 11(8)

⁹⁹ *Ibid* s11(3) and 11(5)

¹⁰⁰ Letter from the Secretary of State for NI to Chair of the NI Affairs Committee 7 October 2020

<https://committees.parliament.uk/publications/2895/documents/32430/default/>

*with the applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof.*¹⁰¹

The focus of Section 46 is on the “free flow of goods” from GB to NI. It states any authority exercising a function that implements or facilitates the implementation of the Protocol must do so in a way that has “special regard” for NI’s place in the UK Internal Market and Customs Union, and which “facilitate[s] the free flow of goods between” GB and NI.¹⁰² This is further explored in the IMA’s EM, which states:

*Section 46 will streamline the movement of goods between Great Britain and Northern Ireland by placing a duty on all UK authorities, including relevant devolved authorities, administering the Protocol to have the **highest possible regard to:** (i) Northern Ireland’s integral place in the UK’s internal market as set out in Article 6(2) of the Protocol; (ii) Northern Ireland’s place in the UK customs territory; and (iii) the need to facilitate the free flow of goods between Great Britain and Northern Ireland. It thus seeks to support the streamlining of trade in line with the obligations set out in the Protocol.*¹⁰³ [Emphasis added]

Three notable observations about the provisions contained in Section 46 of the IMA appear to be:

1. The focus of the provisions is only on “free flow” of goods from GB to NI, rather than NI to GB. The IMA addresses NI to GB goods flows in other sections, particularly in Section 11 (which is addressed above) and Section 47 (addressed below).
2. The provisions state that the appropriate authorities must have “special regard” for NI’s place in the Customs Union, Internal Market and the need to facilitate the movement of goods from GB to NI. That “special regard” requirement appears to be less prescriptive than the requirements set out in Section 47 of the IMA in respect to goods flowing from NI to GB. As outlined in subsection 2.5 of this paper, and explored further below, Section 47 explicitly prohibits the introduction of new checks on goods moving from NI to GB; while Section 46 contains no such prohibition on checks moving from GB to NI.
3. As outlined in the IMA’s EM, Section 46 should be read in the context of Article 6(2) of the Protocol, as quoted above. That Article states both the UK and EU is to use their “best endeavours” to facilitate trade between NI and GB, and such endeavours are to take place within the context of “applicable legislation” and “regulatory regimes”, with regard to the UK in respect of NI. As a result, the

¹⁰¹ The Protocol on Ireland and Northern Ireland Article 6(2)

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

¹⁰² The Internal Market Act 2020, s46 <https://www.legislation.gov.uk/ukpga/2020/27/section/46/enacted>

¹⁰³ The Internal Market Act 2020, Explanatory Memorandum, <https://www.legislation.gov.uk/ukpga/2020/27/notes/division/3/index.htm>

applicable legislative and regulatory regime continues to include the legislation included in the Annexes to the Protocol.

3.1.3 IMA: Section 47

Section 47 of the IMA concerns “unfettered access”, specifically the unfettered access of NI goods to GB. To this end, it states that “appropriate authorities” should not exercise their functions in a way that introduces new checks on qualifying NI goods moving from NI to GB, or which causes existing checks to be used in a new way. That statutory prohibition on the new checks is qualified by IMA Sections 47(2) and 47(3). Section 47(2) outlines a circumstance in which functions can be exercised in a way that does introduce checks on NI to GB good movements. In particular, Section 47(2)(b) states that the Section 47 “does not prevent the exercise of a function”, where it is necessary to:

...secure compliance with, or give effect to, any international obligation to which the United Kingdom is a party (whenever the United Kingdom becomes party to it).¹⁰⁴

Section 47(3) states that:

Subsection [47] (2)(b) authorises (in particular) the exercise of a function in relation to a check, control or administrative process if the exercise is necessary to secure compliance with, or to give effect to, Article 6(1) of the Northern Ireland Protocol.¹⁰⁵

Article 6(1) of the Protocol states:

Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market. Provisions 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 Union. The United Kingdom shall ensure full protection under international requirements and commitments that are relevant to the prohibitions and restrictions on the exportation of goods from the Union to third countries as set out in Union law.¹⁰⁶

In addition, Section 47(2)(d) states that Section 47 “does not prevent the exercise of a function”, where it:

¹⁰⁴ The Internal Market Act 2020 s47 <https://www.legislation.gov.uk/ukpga/2020/27/section/47/enacted>

¹⁰⁵ *Ibid*

¹⁰⁶ The Protocol on Ireland and Northern Ireland Article 6(2)

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

*... is necessary for the purposes of VAT or excise duty in consequence of the Northern Ireland Protocol.*¹⁰⁷

This is further caveated by the IMA's Section 47(4), which states that Section 47(4)(d) applies when the function is exercised:

- by the Treasury, Her Majesty's Revenue and Customs (HMRC), or the Director of Border Revenue;
- for the purpose of VAT or excise duty, including preventing double taxation, partial or complete non-taxation, or evasion; and,
- by the authority as a necessary consequence of the Protocol.¹⁰⁸

According to the UK Government's current guidance on goods moving from NI to GB, qualifying NI goods are not subject to:

- Export declarations;
- Exit summary declarations;
- Import declarations on arrival in GB;
- Custom duties;
- VAT on point of arrival; and,
- Changes to how goods arrive in ports in GB.¹⁰⁹

The guidance notes some "limited exceptions" to this. These overlap with exceptions outlined in Section 47 of the IMA. For example, it notes that export declarations may be required for goods moving from GB to NI, where specific conditions apply by virtue of UK or EU international obligations. The guidance notes that specific conditions apply to the movement of goods, such as endangered species, rough diamonds, and ozone depleting substances.¹¹⁰

Given the above, there appear to be two key points to note about Section 47 of the IMA:

1. It introduced a prohibition on new checks on goods moving from NI to GB, and on existing checks used in a new way. It does not prevent checks on goods moving in the other direction, i.e. from GB to NI.
2. Its specified prohibition is not absolute, in that the section allows for checks in certain limited circumstances.

Figure 1 below provides an illustration of the cumulative impact of IMA Sections 11, 46, and 47, flow of goods from NI to GB and from GB to NI.

¹⁰⁷ The Internal Market Act 2020 s47 <https://www.legislation.gov.uk/ukpga/2020/27/section/47/enacted>

¹⁰⁸ *Ibid*

¹⁰⁹ HM Revenue and Customs, Guidance: moving qualifying goods from NI to the rest of the UK

<https://www.gov.uk/guidance/moving-qualifying-goods-from-northern-ireland-to-the-rest-of-the-uk>

¹¹⁰ A full list of these and other exceptions are listed <https://www.gov.uk/guidance/moving-qualifying-goods-from-northern-ireland-to-the-rest-of-the-uk#exceptions>

Figure 1: Summary of IMA provisions impacting the flow of goods within the UK Internal Market¹¹¹



Source: Compiled by RaiSe (2021)

3.2 Sections concerning the continued application of EU State Aid regulations in NI: IMA Sections 48 to 53

The subsections that follow examine those provisions of the IMA that concern the continued application of EU State Aid regulations *via* Article 10 of the Protocol. As noted in subsection 1.1, Article 10 of the Protocol ensures the continued application of EU State Aid regulations in NI with respect to trade between NI and the EU.¹¹²

3.2.1 IMA Section 48: Guidance on Article 10 of the Protocol

Section 48 relates to State Aid and places a requirement on the UK Government to publish guidance on State Aid in NI, with respect to Article 10 of the Protocol.¹¹³ As noted in section 2 of this paper, this requirement was fulfilled with the publication of

¹¹¹ Compiled by Assembly Research and Information Services with reference to IMA 2020 Article 11, 46 and 47

¹¹² The Protocol on Ireland and Northern Ireland Article 10(1)

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

¹¹³ The Internal Market Act 2020 s48 <https://www.legislation.gov.uk/ukpga/2020/27/part/5/crossheading/state-aid/enacted>

“Technical guidance on the UK’s international control commitments”, specifically Part 7 of that guidance, on 31 December 2020.¹¹⁴

3.2.2 IMA Section 49: Notification of State Aid for the purposes of the Protocol

Section 49 of the IMA clarifies the process through which State Aid, or proposed State Aid with respect to NI is notified to the European Commission – i.e. only through the Secretary of State.¹¹⁵ It should be noted that this process “reflects the status quo”: this function has been performed by the Secretary of State for Foreign, Commonwealth and Development Affairs *via* the UK Mission in Brussels, when the UK was a Member of the EU and during the transition period.¹¹⁶

3.2.3 IMA Sections 50 to 53: Financial Assistance and Subsidy Control

In addition to the above IMA provisions, which explicitly address the continued application of EU State Aid in NI *via* Protocol, IMA Sections 50 to 53 also have potential State Aid implications. These sections include provisions focussing on financial assistance and subsidy control, as follows:

- Sections 50 and 51, which provide Ministers of the Crown with the power to provide financial assistance across the UK; and,
- Sections 52 and 53,¹¹⁷ which concern subsidy control. Section 52 inserts provisions into the NI Act 1998, the Scotland Act 1998 and the Government of Wales Act 2006 which prevent the devolved legislatures making any provision for subsidies which are or may be distortive or harmful to persons supplying goods or services in the course of a business. As the IMA’s EM explains, that provision concerns the UK subsidy control system that is required as a result of the UK ceasing to follow EU State Aid rules. The EM also explains the effect of this provision is to reserve power to make provision for such subsidies to the UK Parliament, subject to the particular limitations in Northern Ireland next discussed..¹¹⁸

The IMA’s EM notes in relation to Sections 52 and 53 that any subsidy regime developed by the UK Government is to be subject to Article 10 of the Protocol “whilst it applies to the UK”.¹¹⁹ It does not make similar comments with regard to Section 50 and 51. As noted in subsection 2.6 of this paper, the power to provide financial assistance given to the UK Government *via* Sections 50 and 51 of the IMA, includes the power to do so for the purposes of “promoting economic development in the UK”. It is not clear,

¹¹⁴ Department for Business, Energy and Industrial Strategy, Technical guidance on the UK’s international control commitments (31 December 2020) <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments>

¹¹⁵ The Internal Market Act 2020 s49 <https://www.legislation.gov.uk/ukpga/2020/27/part/5/crossheading/state-aid/enacted>

¹¹⁶ The Internal Market Act 2020, Explanatory Memorandum, <https://www.legislation.gov.uk/ukpga/2020/27/notes/division/3/index.htm>

¹¹⁷ Internal Market Act Part 7: Subsidy Control <https://www.legislation.gov.uk/ukpga/2020/27/part/7/enacted>

¹¹⁸ The Internal Market Act 2020, Explanatory Memorandum, <https://www.legislation.gov.uk/ukpga/2020/27/notes/division/3/index.htm>

¹¹⁹ *Ibid*

however, whether such financial assistance would constitute State Aid, under the EU State Aid regulations that continue to apply in NI *via* the Protocol.

It should be noted that the UK Government's Guidance on Article 10 of the Protocol notes in relation to State Aid and its continued application in NI that public authorities "should take the steps they would have done before 1 January 2021 to comply with State Aid rules". Additionally, the Guidance encouraged the use of support on a no-aid basis, such as "commercial loan guarantees", and notes that "subsidies that have a purely local effect do not constitute State Aid".¹²⁰

Potential issues for consideration:

- 17) Has the Department of Finance, the Department for the Economy or The Executive Office received any information on the UK Government's intentions regarding the application of the financial assistance powers provided to it by the IMA?
- 18) If so, can each Department confirm whether those powers will be applied in a way that constitutes State Aid under the meaning of Article 10 of the Protocol?
- 19) If the application of those powers does constitute State Aid under the meaning of Article 10 of the Protocol, can each Department share any insight how the continued application of EU State Aid Rules within NI impacts on the UK Government's application of its financial assistance powers in NI?

3.3 Implications regarding other matters: IMA Sections 30(9) and 55

The final category – implications regarding other matters – appear to concern IMA provisions arising from the Protocol, which do not fit within the two previous categories discussed in subsection 3.1 and 3.2 above. This last category of implications concerns:

- Section 30(9) of the IMA, which excludes the IMA provisions that give effect to the Protocol from the CMA's Office for the Internal Market remit.¹²¹
- Section 55 of the IMA, which sets out some of the legislative processes that are to occur, if Articles 5 to 10 of the Protocol cease to apply. Those processes include certain provisions of both the IMA (Section 11 modifications of internal market access principles and Part 5 on the Protocol) and the EU (Withdrawal) Act 2018 (Section 8C(5A)) ceasing to have affect, if Articles 5 to 10 of the Protocol cease to apply.¹²²

¹²⁰ *Ibid*

¹²¹ The Internal Market Act 2020 s30 <https://www.legislation.gov.uk/ukpga/2020/27/section/30/enacted>

¹²² The Internal Market Act 2020 s55 <https://www.legislation.gov.uk/ukpga/2020/27/section/55/enacted>

4 Concluding remarks

This paper, at the request of the Committee, explained from a lay person's perspective, how the IMA and the Protocol relate to each other; and highlighted implications that appear to arise from IMA implementation as a result of the Protocol in NI.

As noted in the introduction, the paper has been prepared in an unsettled context surrounding the Protocol's implementation, due to a number of things, including, but not limited to, the ongoing Protocol engagement between the EU and the UK Government and ongoing Protocol related legal proceedings.¹²³ The outcome of that engagement and those proceedings could necessitate future changes to this paper. Additionally, it should be reiterated that this paper is not offered as legal advice or opinion. Rather, it aims to assist the Committee in further expanding its knowledge and understanding of the IMA and the Protocol, when exercising its advisory and scrutiny functions both now and in future.

Section 1 provided background information on both the IMA and the Protocol. It also looked at the relationship between the two. It highlighted how the UK Government's stated purpose of the IMA was to facilitate the UK Internal Market and to prevent trade barriers within that Market.¹²⁴ That stated purpose appears to contradict the effect of the Protocol, which, as explained earlier in the paper, created a single regulatory zone on the island of Ireland and the resulting barriers to trade within the UK Internal Market, arising from different regulatory and customs regimes applying in NI and GB.¹²⁵ Against that background, the IMA subsequently introduced provisions which seek to: streamline goods trade from GB to NI; secure unfettered access for goods moving from NI to GB; and, modify the UK Market Access Principles for goods to NI as a consequence of the Protocol.

Section 2 of the paper provided an overview of the IMA's provisions, setting out the purpose of each part of the Act and identifying those IMA provisions arising as a consequence of the Protocol. Those findings informed Section 3, which identified IMA provisions falling into one of three apparent categories:

1. Implications affecting the flow of goods across the United Kingdom (UK), in particular from NI to Great Britain (GB) and from GB to NI;
2. Implications concerning the continued application of European Union (EU) State Aid regulation in NI; and,
3. Implications regarding other matters.

¹²³ For the IMA see for example <https://gov.wales/written-statement-legal-challenge-uk-internal-market-act-2020>, for the Protocol see for example <https://www.irishlegal.com/article/unionist-legal-challenge-to-ni-protocol-to-be-heard-next-month>

¹²⁴ Institute for Government, the United Kingdom Internal Market Act 2020 (February 2021)

<https://www.instituteforgovernment.org.uk/sites/default/files/publications/internal-market-act.pdf>

¹²⁵ *Ibid*

It seems that provisions falling within the first category are likely to be those with the most significant and immediate effect, as they directly impact on the flow of goods from NI to GB and from GB to NI. What is notable about these provisions is how trade in goods is treated in the IMA according to the direction the trade is flowing. The provisions within the IMA that concern trade from GB to NI recognise that the agreement by the UK and EU in the form of the Protocol has resulted in limitations to the IMA's market access principles for goods (see commentary on Section 11 of the IMA, in subsection 3.1 of this paper for further details). Additionally, the provisions that concern GB to NI trade do seek to streamline that trade. To achieve this, it seems the IMA places a duty on authorities exercising any function that implements the Protocol, to do so in a way that has "special regard" to NI place in the UK Internal Market and Customs Union, and that "facilitate[s] the free flow of goods between" GB and NI (see commentary on Section 46 of the IMA, in subsection 3.1 of the paper for further details).

The treatment of GB to NI goods flows within the IMA is in contrast to the treatment of NI to GB goods flows in the same legislation. With regard to the IMA's market access principles for goods, Section 11 introduced specific modifications to these principles to ensure that they apply to NI goods being placed on the market elsewhere in the UK. This has been achieved by the introduction of a "qualifying NI goods" category of goods. It appears that the effect of those provisions is to ensure that the limitations on market access principles for goods that impact on GB to NI flows, do not apply on NI to GB flows.

This contrast is also evident when Section 46 of the IMA, which applies to GB to NI goods movements, is compared to Section 47, which applies to NI to GB movements. As noted, Section 46 places a duty on authorities to have "special regard" to NI's place in the UK Internal Market. In contrast, Section 47 prohibits the introduction of new checks, or the use of existing checks for a new purpose, on qualifying NI goods moving from NI to GB, with limited exceptions. It should be noted that Section 46 does not explicitly prohibit checks on goods moving from GB to NI.

It also is worth noting again that the definition of a "qualifying NI good" that Sections 11 and 47 of the IMA rely upon is subject to change. The UK Government has stated that the current definition as "bridge to a longer-lasting regime", and is seeking to develop a new definition which is to be developed in "discussion with" NI businesses during 2021.¹²⁶

The IMA provisions falling into the second category concern the continued application of EU State Rules in NI. Those provisions have led to the publication by the UK Government of Guidance on Article 10 State Aid of the Protocol. A summary of that Guidance can be found at Annex 1 to this paper. They also concern the UK Government's power to provide financial assistance and to regulate the provision of

¹²⁶ Letter from the Secretary of State for NI to Chair of the NI Affairs Committee 7 October 2020
<https://committees.parliament.uk/publications/2895/documents/32430/default/>

subsidies across the UK. Both powers were provided to the UK Government through the IMA. The IMA's EM notes that the UK Government's power to regulate subsidies is to be subject to Article 10 of the Protocol "whilst it applies to the UK".¹²⁷ The EM does not make similar comments on the UK Government's power to provide financial assistance. Moreover, it is unclear from the EM as to whether this type of financial assistance envisaged by the UK Government will constitute State Aid under Article 10 of the Protocol.

The final category of implication – implications regarding other matters - are those arising from the Protocol, but which do not fit neatly into the other two categories. Those provisions:

- Clarified that the role of the CMA's Office for the Internal Market does not include the IMA provision that give effect to the Protocol; and
- Set out the UK legislative processes which would take place, should Article 5 to 10 of the Protocol cease apply.

¹²⁷ *Ibid*

Annex1: Summary of Part 7 of “Technical guidance on the UK’s international control commitments”¹²⁸ (the Guidance)

Part 7 of the Guidance concerns Article 10 of the Protocol and was published “for the purposes of the Section 48 of the United Kingdom Internal Market Act”.¹²⁹ Among other things, the Guidance notes the following:

- That the State Aid provisions set out in the Protocol apply primarily apply to aid granted to manufacturers and sellers of goods located in NI that trade with the EU. The provisions may apply to subsidies granted in GB but only where “there is a clear benefit from and genuine, direct link between the subsidies and companies in Northern Ireland”.
- With regard to State Aid for goods the guidance recommends that public authorities “should take the steps they would have done before 1 January 2021 to comply with State aid rules”, encourages the use of support on a no-aid basis, such as “commercial loan guarantees”, and notes that “subsidies that have a purely local effect do not constitute State aid”.
- Notes the continued application of State Aid in respect to wholesale electricity markets.
- Highlights the State Aid exemption for agriculture and fisheries included at Article 10(2) and the Joint Committee’s decision to set the following limits on this exemption:

*...up to a total of £382.2 million per annum for agriculture, and up to a total of £16.93m over 5 years for fisheries, with a maximum spend of £4.01 million annually...*¹³⁰

- Notes that “in principle” grants to service providers “should not be covered” enabling NI “greater flexibilities” under UK domestic subsidy regime than arrangements under State Aid rules. However, it adds:

There may, however, be certain extremely limited circumstances in which subsidies to a services provider could still distort competition or affect trade of a particular good between Northern Ireland and the EU. This may arise where a company provides services that are specifically tailored to the needs of a particular company or a sector that manufactures or trades in goods. This is referred to as the ‘servitisation’ of goods. When designing a subsidy scheme for a service provider, public authorities should examine

¹²⁸ Department for Business, Energy and Industrial Strategy, Technical guidance on the UK’s international control commitments (31 December 2020) <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments>

¹²⁹ *Ibid*

¹³⁰ *Ibid*

*the form of the service provision in order to establish whether it is likely to be in scope of Article 10 of the Protocol.*¹³¹

¹³¹ *Ibid*