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The October 2019 EU-UK Withdrawal Agreement

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After a period of intense negotiation, the EU and UK have reached a new settlement formed of an updated Withdrawal Agreement (WA) and Political Declaration (PD). These were published on 17 October 2019.

This paper focuses on the new WA, and in particular what areas of the WA have changed.

Theresa May's Government finished negotiating a Withdrawal Agreement and an accompanying Political Declaration on the framework for the future relationship with the EU in November 2018. However, it was not able to obtain Parliamentary support for this package.

When Boris Johnson became Prime Minister in July 2019, he said that there would be no further delays to Brexit, and that the UK would leave on 31 October. His preference would be to leave with a deal, but only if this was on the basis of a renegotiated WA amending the provisions of the WA Protocol on Ireland/Northern Ireland, also known as the 'backstop', which the Prime Minister said had to be abolished.

The Government initially proposed changes that would keep Northern Ireland to be in the UK customs' territory and out of the EU's VAT area, and would enable Northern Ireland's democratic institutions to consent to entering into the Protocol and continuing to adhere to it.

These were rejected by the EU. It reiterated its position that the border between Ireland and Northern Ireland should remain open, without infrastructure. It also expressed concern that the Government's proposals would risk the integrity of the EU's Single Market and its legal order.

Ratification

If the UK is to leave the EU with an agreement on 31 October, the Withdrawal Agreement will need to be ratified by both the UK and the EU. Ratification by the UK requires approval of both the WA and PD by the House of Commons and the passage of legislation implementing the WA in UK law. Ratification by the EU requires approval of the WA in a Consent motion by the European Parliament, and final approval by the Council of the EU by a super-qualified majority.

The main Withdrawal Agreement text

Only two Articles in the main Withdrawal Agreement have changed from the November 2018 text, and the changes are minor.

This means that the rest of the Agreement remains the same. This covers the following areas:

- **Common Provisions.** These set out the WA's territorial scope, key definitions, and how it (and particularly, its EU law content) is to be given effect in the UK after exit day.
- **Citizens' rights.** Free movement will continue until the end of the transition (or implementation) period enabling EU and UK nationals to move between the UK and EU Member States as is currently permitted by EU law. EU citizens living in their host state before the end of transition will have permanent residence rights under the withdrawal agreement, subject to certain requirements. The UK and the EU27 have discretion under the agreement to require EU or UK nationals to apply for a new residency status.

- **Separation provisions.** These are intended to create an orderly exit from the EU. Ongoing processes and arrangements will be allowed to come to an end under current rules following the end of transition.
- **Transition.** The transition period, also described as the 'implementation period' is meant to bridge the period between the date of the UK's exit from the EU and the entry into force of the new, yet to be negotiated, UK-EU partnership arrangements. The transition will run until the end of December 2020, with the possibility of extension for up to two years. The extension of Article 50 to 31 October means the transition period is now shorter. A decision on extending the transition period must be taken by 1 July 2020.

  The UK will continue to apply EU law during the transition period, with a few exceptions, as if it were a Member State. But the UK will have no institutional representation and no role in decision-making. The EU institutions, including the Court of Justice of the EU, and other bodies, offices and agencies will continue to exercise their powers under EU law in relation to the UK.
- **Financial Settlement.** After the first round of withdrawal negotiations, the UK and EU set out an agreed approach to the financial settlement in the December 2017 Joint Report. The settlement sets out the financial commitments that will be covered, the methodology for calculating the UK's share and the payment schedule. Although these provisions remain unchanged, estimates of the total financial settlement are now less than previously envisaged as the original calculations were based on the UK leaving the EU on 29 March 2019 and provided that the UK would continue to pay previously agreed budget contributions until the end of 2020. The UK has continued to make budget contributions as an EU Member State since then and the amount it will need to pay until the end of the current financial framework period (2014 to 2020) is therefore now less.
- **Institutional and Final Provisions.** This sets out the institutional arrangements underpinning the Agreement, and how disputes about the WA are to be resolved.
- **The Protocol on Sovereign Base Areas in Cyprus**.
- **The Protocol on Gibraltar.**

Changes to the Protocol on Ireland/Northern Ireland

The most significant over-arching difference between the October 2019 proposals and those set out in the November 2018 WA is that the previous 'backstop' maintained a much more complete and encompassing set of relations on trade in goods between the EU and the UK through an envisaged UK-EU customs territory (although this would not have prevented other barriers for economic relations as it did not cover trade in services, movement of people/workers, movement of capital, transport services etc).

The potential relationship under the previous 'backstop' also came with much more alignment with EU law and standards, and therefore potentially restricted the UK's ability to diverge from such standards and pursue an independent trade policy should it wish to.

Under the revised October 2019 Protocol if the UK and EU are unable to conclude a new future relationship agreement by the end of the transition period, an open border will be maintained between Northern Ireland and Ireland.

However, in this scenario there would be a much steeper cliff edge for trade in goods between the rest of the UK and the EU. There would also be new trade barriers for goods moving from Great Britain into Northern Ireland. This because without a trade agreement the UK would revert to 'WTO' trading terms with the EU, as this Protocol does not include substantive arrangements for trade in goods between the EU and the UK, other than for

Northern Ireland. The previous 'backstop' did, and that 'backstop' could not be exited without the agreement of both the EU and the UK.

That notwithstanding, the EU and UK are committed to reaching a future trade agreement, and the transition period can be extended for up to a further two years (if it is extended for two years it would end in December 2022).

The focus for the revised Protocol is much more firmly on gaining the greatest possible freedom for the UK to manage its economic relations, while still maintaining as far as possible an open border on the island of Ireland. It is less concerned with maintaining frictionless trade with the EU for the rest of the UK.

Other than the wider picture of a looser relationship between the UK and the EU post-transition, the most significant changes to the Protocol are in four main areas:

- Customs
- VAT
- Democratic consent
- The level playing field

There were less significant revisions to the rules on state aid. The EU's state aid rules will apply to Northern Ireland only, rather than the whole UK, and will be enforced by the European Commission.

Customs

While the previous 'backstop' kept the UK in a customs union with the EU, the new WA sees the whole of the UK (including Northern Ireland) leave the EU Customs Union. In legal terms, Northern Ireland remains part of the UK customs territory. Northern Ireland will be included in UK free trade agreements.

In practice, however, Northern Ireland will apply many EU customs rules and there will effectively be a customs and regulatory border between Great Britain and Northern Ireland in the Irish Sea.

The new arrangements are permanent, provided consent is given. They are no longer a 'backstop' – i.e. an insurance policy which will only come in effect if other measures fail to keep the Irish border open.

VAT

Initially the Government proposed that Northern Ireland would be treated as part of the UK for VAT purposes, entirely outside the scope of EU VAT law. It is now anticipated that EU VAT rules for goods would apply in Northern Ireland to avoid the creation of a hard border, although the UK would continue to collect receipts from both VAT and excise duty. In addition, it is proposed that the VAT base and VAT rates in Northern Ireland could be amended, to be aligned with the VAT system in Ireland. This would maintain a level playing field.

Democratic consent

The revised Protocol allows the Northern Ireland Assembly to provide "consent" for certain EU regulations continuing in Northern Ireland. The first vote would take place four years after the end of the transition period, and every four years thereafter if passed by a simple majority. If endorsed on a cross-community basis, then the period would be every eight years. If rejected, then the regulations will cease to apply after two years.

The level playing field

Annex 4 of the previous Protocol has now been removed. It contained references to EU laws and international conventions that would apply to the whole UK in what were called 'level playing field' commitments. The EU wanted these in the Protocol in order to limit the UK's capacity to gain what it would see as an unfair advantage by lowering standards. This was of particular concern due to the UK's close geographical proximity to the EU, but also because in the previous 'backstop' the UK would have been in a Single Customs Territory with the EU, meaning tariff free trade. The EU would therefore not have been able to use tariffs to compensate for any competitive advantage gained by the UK through lowering standards of regulation.

The level playing field provisions were in the areas of taxation, environmental protection, labour standards, state aid and competition. These have now been replaced by less specific and non-binding commitments in the Political Declaration to uphold such principles in any future trade agreement between the EU and the UK.

The 'backstop', however, may never have come into force, and the issue of what level playing field provisions, if any, would apply to the UK in the long-term, would also have been dealt with in the negotiations on the future relationship, as they will be now.

Areas that remain the same in the Protocol

Provisions on areas like individual rights, the Common Travel Area, North-South cooperation, the Single Electricity Market, the governance arrangements, and safeguarding measures, remain the same as under the November 2018 Withdrawal Agreement Protocol.

1. The path to this Agreement

1.1 The November 2018 Withdrawal Agreement

A Withdrawal agreement (WA) and an accompanying Political Declaration (PD) on the framework for the future UK-EU relationship was agreed by the UK Government and EU in November 2018. These were together rejected twice by the House of Commons, on 15 January and 12 March 2019.

The second defeat came after the Government had agreed new supplementary texts with the EU relating to the most contentious part of the WA, the Northern Ireland 'backstop'[1], giving assurances over the EU's commitment to negotiate a future agreement to replace the arrangement and confirming that the UK would be able to seek arbitration if the EU does not act in good faith in the negotiations.[2]

The European Council stated at the December 2018 European Council, and EU leaders continued to reiterate the position, that the WA was "not open for renegotiation". Following the approval of the supplementary texts on 11 March European Commission President Jean-Claude Juncker said: "There will be no further interpretations of the interpretations; and no further assurances of the re-assurances".

The Government sought approval of the WA for a third time (this time without the PD) on 29 March but it was rejected by the House of Commons again. This meant that the UK was unable to leave the EU with a deal on the originally envisaged date of 29 March 2019. Following a European Council agreement to extend the Article 50 period for the first time on 21 March, there was a second agreement to delay Brexit on 10 April. The second Article 50 extension provided for a default Brexit date of 31 October unless the WA was ratified earlier.

On 21 May, the then Prime Minister Theresa May made a statement announcing her plan to introduce the Withdrawal Agreement Bill, in order to implement the WA. This followed the end of talks with the Labour party which failed to reach agreement on a way forward. Mrs May said that there would be votes during the passage of the Bill on compromise options of a temporary customs union with the EU, and on whether to put the WA to a confirmatory referendum. Following opposition from within the Government and among Conservative MPs to this plan, Mrs May announced on 24 May that she would be resigning as leader of the Conservative party and stepping down as Prime Minister.

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1 For further details on what the 'backstop' entails see House of Commons Library Insight, The backstop explained, 12 December 2018. See House of Commons Library Insight, A 'Plan B' considered and two instructions given: Where next for Parliament and Brexit?,30 January 2019.

2 See House of Commons Library Briefing Paper CBP8525 The 'Strasbourg package', 13 March 2019.

1.2 The Johnson Government

In his statement on 25 July on 'Priorities for Government', the new Prime Minister Boris Johnson pledged that the UK would leave the EU by 31 October. He said that his preference would be to leave the EU with a deal, and that he would "work flat out to make it happen". However, he said that it was clear that this could not be on the basis of the withdrawal agreement negotiated by Theresa May's Government, and in particular the provisions of the WA protocol on Ireland/Northern Ireland (the 'backstop'). Mr Johnson said:

> If an agreement is to be reached, it must be clearly understood that the way to the deal goes by way of the abolition of the backstop.

Mr Johnson said that the UK would be ready to ready to negotiate an alternative "with provisions to ensure that the Irish border issues are dealt with where they should always have been: in the negotiations on the future agreement between the UK and the EU".

Mr Johnson said that he hoped that the EU would "rethink its current refusal to make any changes to the withdrawal agreement". But if it did not "we will of course have to leave the EU without an agreement under article 50". He said that the Government would "turbo-charge our preparations" to leave the EU with "as little disruption as possible".

In a telephone call with European Commission President Jean-Claude Juncker on 25 July, the Prime Minister reiterated that he wanted a deal, and would be "energetic in pursuit of finding a way forward". But he said that the WA had been rejected three times by the UK Parliament "and will not pass in its current form".

EU response

The EU's Chief Brexit negotiator Michel Barnier was reported to have told EU27 representatives that Mr Johnson's demands on the Irish 'backstop' were "unacceptable and not within the mandate of the European Council". In his telephone call with the Prime Minister on 25 July, European Commission President Juncker reiterated the EU's position that "the withdrawal agreement is the best and only agreement possible — in line with the European Council guidelines".[3]

1.3 Talks resume with the EU

Mr Johnson met with German Chancellor Angela Merkel on 21 August. In a joint press conference following their meeting, Mrs. Merkel said that while it had been envisaged that an alternative to the backstop could be found "in the next two years", it might also be possible to find it "in the next 30 days to come".[4] In a telephone call with Jean-Claude

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[3] *Deutsche Welle*, EU negotiator Michel Barnier calls Boris Johnson's Brexit stance 'unacceptable', 25 July 2019; *Politics Home*, Michel Barnier blasts Boris Johnson's 'unacceptable' demand to ditch Irish backstop, 25 July 2019; *Spectator* Coffee House blog, Can Boris Johnson overcome Jean-Claude Juncker? 25 July 2019.

[4] This was interpreted in the press as a 30-day deadline for the UK to find a solution, although the Chancellor later clarified that she was simply referring to the possibility

Juncker on 27 August, the Prime Minister said that "unless the Withdrawal Agreement is reopened and the backstop abolished there is no prospect of that deal". President Juncker restated his willingness to "work constructively with Mr Johnson and to look at any concrete proposals he may have, as long as they are compatible with the withdrawal agreement". On 29 August the Prime Minister said Brexit talks between the UK and the EU would take place twice a week during September.[5]

On 4 September, Michel Barnier was reported to have told EU27 representatives that Brexit talks were stuck in "paralysis" as the UK had not provided any suggestions as to how the UK could replace the Irish 'backstop' while maintaining an open border in Ireland. It was also reported that the Prime Minister's Brexit negotiator David Frost had called for a trade agreement that would allow the UK to diverge from EU regulations in areas such as social and environmental standards. This was a break from the commitment by Theresa May's government to a level playing field in certain areas.

On 16 September, the Prime Minister had a working lunch with Commission President Juncker in order to take stock of the ongoing "technical talks" between the EU and the UK. According to a Commission statement, President Juncker recalled that "it is the UK's responsibility to come forward with legally operational solutions that are compatible with the Withdrawal Agreement". He underlined the Commission's continued willingness and openness to examine whether such proposals met the objectives of the 'backstop'. The Commission remain "available to work 24/7". No proposals had yet been made.

On 19 September, the Government said it had shared confidential documents (referred to as "non-papers") with the EU reflecting its ideas on the way forward. These involved an all-Ireland agri-food zone. The proposals were not viewed as viable by the EU as they did not cover alignment on customs and industrial goods and included exemptions on agri-food, and would therefore still mean that regulatory and customs checks would be needed on the island of Ireland.

1.4 The Government publishes new proposals for an amended Ireland/Northern Ireland protocol

The Prime Minister's proposals for an amended Ireland/Northern Ireland protocol were set out in a letter of 2 October 2019 to Jean-Claude Juncker, President of the European Commission, and an accompanying Explanatory Note. The Prime Minister also made a statement to the House of Commons.[6]

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of finding a solution in a short period of time. See *Politico*, Merkel: I didn't mean 30 days as a fixed Brexit deadline, 22 August 2019

5 Reported as a Downing Street 'statement' in e.g. *Independent*, *EurActiv*, *Politico*.

6 HC Deb 3 October 2019 cc1383-1414

The Prime Minister's letter reiterated the Government's objections to the 'backstop'. The 'backstop' was a bridge to a close future relationship which would see the UK closely integrated with the EU. The letter said:

> That proposed future relationship is not the goal of the current UK Government. The Government intends that the future relationship should be based on a Free Trade Agreement in which the UK takes control of its own regulatory affairs and trade policy.

The proposal involved the following elements:

- A single regulatory zone for goods (including agri-food) on the island of Ireland. This would eliminate the need for regulatory checks at the Irish border. There would be regulatory checks between Great Britain and Northern Ireland.
- Consent: The Northern Ireland Assembly and Executive to agree to the single regulatory zone before it comes into effect and every four years after that.
- Customs: The whole UK would leave the EU Customs Union at the end of the transition period. Northern Ireland would be part of the UK customs territory. The UK and EU would be distinct customs territories. While this would mean the Irish border becoming a customs border, customs checks would take place away from the border.

The proposals were rejected by Michel Barnier as not providing a legally operable solution, as it required an untested system of dispersed checks and risked the integrity of the Single Market. The European Parliament's Brexit Steering Group said that the EP would not give consent to such an arrangement.

Prospects for an agreement at this point looked slim. However, Mr Johnson met the Irish Taoiseach Leo Varadkar on 10 October, after which Mr Varadkar said he saw a pathway to a deal. Following this meeting, the UK and the EU then agreed to intensify discussions about a possible compromise solution. This would involve movement on the UK positions on both consent and customs.

According to the Government, these proposals would preserve an open border, allow an independent UK trade policy and give Northern Ireland control over the regulations which apply there.

2. Ratification in the UK and EU

If the UK is to leave the EU with an agreement on 31 October, the Withdrawal Agreement will need to be ratified by both the UK and the EU. Ratification by the UK requires approval of both the WA and PD by the House of Commons and the passage of legislation implementing the WA in UK law. Ratification by the EU requires approval of the WA in a Consent motion by the European Parliament, and final approval by the Council of the EU.

2.1 Overview of Parliamentary approval in the UK

For the Withdrawal Agreement to take effect in UK law, it will need to be implemented through the proposed *European Union (Withdrawal Agreement) Bill* (*WA Bill*). This section highlights some, but by no means all, constitutionally significant matters arising from commitments the Government has made in the WA and PD texts.

The UK Parliament will need to undertake two approval processes before the UK can ratify the WA. Both the *EU (Withdrawal) Act 2018* and the *Constitutional Reform and Governance Act 2010* (*CRAG*) impose procedural hurdles on the capacity of the UK to ratify what has been negotiated. The *EU (Withdrawal) Act* also provides for a Parliamentary process if a deal is rejected by the Commons, or if no negotiated agreement is ever put to it.

The Library's October 2018 paper A User's Guide to the Meaningful Vote covers in detail Parliament's role in approving the WA.[7] It also addresses Parliament's formal role in the event that it rejects a deal or no deal is reached.

Preconditions for ratification

Two statutes give Parliament a role in the ratification of the WA. The *CRAG Act* applies to treaties generally. The *EU (Withdrawal) Act 2018* applies specifically to the Withdrawal Agreement.

***European Union (Withdrawal) Act 2018* (the 'Withdrawal Act')**
Section 13 of the *European Union (Withdrawal) Act 2018* provides a role for MPs in the approval of a withdrawal agreement. It outlines an "affirmative approval" process in two steps.

Unless the following two conditions are met then the UK legally cannot ratify the Withdrawal Agreement:

- the Commons approves a resolution approving both the negotiated withdrawal agreement **and** the framework for the future relationship; and
- Parliament passes the *European Union (Withdrawal Agreement) Bill* to implement the WA in domestic law.

[7] Commons Library Briefing Paper 8424, A User's Guide to the Meaningful Vote, 25 October 2018

The first of these two requirements has come to be known as 'the meaningful vote'.

Constitutional Reform and Governance (CRAG) Act 2010

Parliament has a right to object to the UK being bound by most international treaties under part 2 of the *Constitutional Reform and Governance Act 2010*. If either House objects to ratification within 21 sitting days of the Government laying a copy of a signed treaty before Parliament, the Government must explain why it nevertheless intends to ratify. The Commons could then theoretically use repeated resolutions to block ratification indefinitely.

However, there is no guarantee under the *CRAG Act* that either House will debate or vote on any given treaty. It is a 'negative approval' process: if Parliament does nothing, a Government can proceed to ratification.[8]

Neither House has ever debated or voted on, let alone passed, a motion that a treaty should not be ratified under the provisions of this Act.

The procedure under the *CRAG Act* is supplemented, rather than replaced, by the requirements of the *Withdrawal Act* with regard to the Withdrawal Agreement.[9]

Box 1: Two statutory provisions affecting ratification of a Withdrawal Agreement

Section 13(1) European Union (Withdrawal) Act 2018

The withdrawal agreement may be ratified only if—

(a) Minister of the Crown has laid before each House of Parliament—

a) a statement that political agreement has been reached,

b) a copy of the negotiated withdrawal agreement, and

c) a copy of the framework for the future relationship,

(b) the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown,

(c) a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and—

d) the House of Lords has debated the motion, or

e) the House of Lords has not concluded a debate on the motion before the end of the period of five Lords sitting days beginning with the first Lords sitting day after the day on which the House of Commons passes the resolution mentioned in paragraph (b), and

(d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

Section 20 *Constitutional Reform and Governance Act 2010*

(1) Subject to what follows, a treaty is not to be ratified unless—

(a) a Minister of the Crown has laid before Parliament a copy of the treaty,

(b) the treaty has been published in a way that a Minister of the Crown thinks appropriate, and

(c) period A has expired without either House having resolved, within period A, that the treaty should not be ratified.

8 For more information on the CRAG process, see Commons Library Briefing Paper, Parliament's role in ratifying treaties, 17/5855, 17 February 2018.

9 Section 13(14) of the *Withdrawal Act* provides that: "This section does not affect the operation of Part 2 of the Constitutional Reform and Governance Act 2010 (ratification of treaties) in relation to the withdrawal agreement".

(2) Period A is the period of 21 sitting days beginning with the first sitting day after the date on which the requirement in subsection (1)(a) is met.
(3) Subsections (4) to (6) apply if the House of Commons resolved as mentioned in subsection (1)(c) (whether or not the House of Lords also did so).
(4) The treaty may be ratified if—
(a) a Minister of the Crown has laid before Parliament a statement indicating that the Minister is of the opinion that the treaty should nevertheless be ratified and explaining why, and
(b) period B has expired without the House of Commons having resolved, within period B, that the treaty should not be ratified.
(5) Period B is the period of 21 sitting days beginning with the first sitting day after the date on which the requirement in subsection (4)(a) is met.
(6) A statement may be laid under subsection (4)(a) in relation to the treaty on more than one occasion.
(7) Subsection (8) applies if—
(a) the House of Lords resolved as mentioned in subsection (1)(c), but
(b) the House of Commons did not.
(8) The treaty may be ratified if a Minister of the Crown has laid before Parliament a statement indicating that the Minister is of the opinion that the treaty should nevertheless be ratified and explaining why.
(9) "Sitting day" means a day on which both Houses of Parliament sit.

2.2 The 'meaningful vote'

There are three key stages to the 'meaningful vote' process:

- the laying of documents before Parliament;
- the approval motion to be moved by a Minister; and
- the decision on the approval motion (and any amendments that may have been tabled in relation to it).

There have been two attempts to pass a 'meaningful vote'. The first attempt took place on 15 January 2019. The Government motion was rejected by a margin of 432 to 202.

The second attempt to pass a 'meaningful vote' took place on 12 March 2019. The Government motion was again defeated, that time by a margin of 391 to 242.

A third attempt to approve only the Withdrawal Agreement, but not the Political Declaration, failed on 29 March 2019, by a margin of 344 to 286 votes

Laying of documents

Section 13(1)(a) of the *Withdrawal Act* provides the starting point for the process of Parliamentary approval for a 'deal'. It requires a Minister of the Crown to lay three documents before Parliament:

- a statement that political agreement has been reached;
- a copy of the negotiated withdrawal agreement; and
- a copy of the framework for the future relationship.

Motions to be moved for debate

Both Houses of Parliament have the opportunity to debate the WA and the text of the Political Declaration on the future relationship. Ministers of the Crown must move 'a motion' in each House.

- The Commons motion(s) must "approve" the WA and PD;
- The Lords motion(s) must "take note" of the two texts.[10]

Possible outcomes of the section 13 motion and division

There are three possible outcomes (procedurally speaking) with any 'meaningful vote':

- the Commons unconditionally agrees the motion to approve the negotiated WA and the PD;
- the Commons approves an amended motion in different terms from those in the motion originally moved by a Minister of the Crown; or
- the Commons rejects the motion to approve the agreements.

In the first scenario the Government would then be expected to bring forward the *European Union (Withdrawal Agreement) Bill* (see below).

In the second scenario the Government must take a view on whether the resolution adopted was compatible with discharging the requirements of s.13(1)(b) of the *Withdrawal Act*. The Procedure Committee pointed out that not all amendments would raise the same legal risk in this regard.[11]

In the third scenario the Government would not be expected to bring forward a Bill and would have to make a statement within 21 days (on which see 'No Deal Scenarios' below).

On both 15 January and 12 March, the House of Commons rejected the Government motions proposing to approve the Prime Minister's 'deal'.

2.3 The EU (Withdrawal Agreement) Bill

The *European Union (Withdrawal) Act* requires primary legislation to implement a withdrawal agreement. However, some of the provisions of the WA require domestic legislation for implementation in any case.

The White Paper, Legislating for the Withdrawal Agreement between the United Kingdom and the European Union, acknowledges the need for primary legislation to deliver domestically, among other things, the anticipated transition period and the provisions on citizens' rights thereafter.[12] The *Withdrawal Act* does not accommodate this possibility and would need to be amended. Primary legislation may also be

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10 The Lords motion does not have to be approved. The Government need only move the motion and allow at least five Lords sitting days for it to be debated.

11 Procedure Committee, Motions under section 13(1) of the European Union (Withdrawal) Act 2018, HC1664, 16 November 2018, paras 25-28.

12 Legislating for the Withdrawal Agreement between the United Kingdom and the European Union, Cm 9674, 24 July 2018, Chapters 2 and 3

required in respect of arrangements agreed to in respect of Northern Ireland.

There are, however, two further constitutional reasons why the UK Government requires this Bill.

Constitutional requirement for a Bill

Firstly, Government Ministers cannot exercise their delegated powers under section 9 of the *Withdrawal Act* to:

> make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day

unless Parliament has first enacted:

> a statute … approving the final terms of withdrawal of the United Kingdom from the EU.

No ratification without primary legislation

Secondly, section 13(1)(d) of the *Withdrawal Act* provides that the WA cannot in any case be ratified unless:

> an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

How is the Bill different from the motions?

There are three key differences between the 'motion' stage of the approval process and the 'Bill' stage:

- the Bill is principally concerned with domestic implementation, rather than just the principle of whether the deal should be approved; [13]
- the Bill gets line-by-line scrutiny and requires the consent of the House of Lords, which cannot be overridden under the *Parliament Act 1911* because exit day is less than a year away;[14] and
- there is no specific statutory duty for the Government to set out how it proposes to proceed if the Bill does not pass, unlike rejection at the motion phase.

2.4 Parliament's role in a 'no-deal' scenario

If the Commons is taken not to have approved the WA and the PD, the 2018 Act provides that the Government then has **21 calendar days** in which to set out in a statement on how it:

> proposes to proceed in relation to negotiations for the United Kingdom's withdrawal from the EU under Article 50(2) of the Treaty on European Union.[15]

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13 However, rejection of the Bill would also prevent the ratification of the WA in the same way as the failure to pass the necessary approval motion.

14 s. 2 *Parliament Act 1911* gives the House of Lords a 'power of delay' over a Public Bill of one year from the point it first completes its Commons Second Reading.

15 s. 13(4) *EU (Withdrawal) Act 2018*

The content of such a statement is a matter for the Government itself, but might plausibly include proposals connected to:

- the negotiated texts themselves;
- the negotiating timetable; and/or
- the Government's domestic contingency plans in the absence of a ratified withdrawal agreement.

Once the Government has made a statement, a Minister of the Crown then has **seven sitting days** within which to move "a motion in neutral terms" to the effect that the Commons has considered the matter of the Government statement.

This motion legally need not pass and it has no direct legal effects even if it does. A political 'rejection' of the Government's proposed next steps, for instance, could not by itself have the effect of cancelling or postponing the Article 50 process.[16]

The legal position would remain that the UK leaves the EU on exit day with or without a ratified withdrawal agreement. Under Article 50(3) a later date for exit may only be set by either:

- the date the WA comes into force; or
- unanimous agreement by the EU27 and the UK to extend the negotiations.

The UK has now been granted two extensions to Article 50. Exit day is now 31 October at the latest.

2.5 Approval in the EU

Council of EU27

The special meeting of the European Council on 17 October 2019 (meeting in the Article 50 format, i.e. without the UK) issued a statement endorsing the revised WA published that day. On this basis it said:

> the European Council invites the Commission, the European Parliament and the Council to take the necessary steps to ensure that the agreement can enter into force on 1st November 2019, so as to provide for an orderly withdrawal.

The procedure for EU approval of the WA is set out in Article 50 TEU. This states that following notification by a Member State of its intention to withdrew from the EU, the EU "shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union".

Once agreement is reached, it "shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament".

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[16] Neither too could any amendment to a motion moved under section 13(1)(b) of the *Withdrawal Act*, or any provision in or amendment to the forthcoming *EU (Withdrawal Agreement) Bill*, on its own, postpone the Article 50 process.

For decisions related to the negotiation and the conclusion of the agreement, the withdrawing Member State "shall not participate in the discussions of the European Council or Council or in decisions concerning it".

The Council vote of approval will require a "super-qualified majority", defined as at least 72% of the members of the Council representing Member States comprising at least 65% of the population of the EU27.[17] This means at least 20 Member States must approve the WA.

European Parliament

The EP has not been involved in the negotiating process itself, but has adopted resolutions on the negotiations, prepared by its Brexit Steering Group (BSG). The BSG is co-ordinated by former Belgian Prime Minister, Guy Verhofstadt, and includes representatives of the leading political groups in the EP. The Steering Group has had regular meetings with Michel Barnier on the progress of the negotiations.

Ratification procedure

Under the Article 50 procedure, the EP must give its consent to the WA before it can be "concluded on behalf of the Union" by the Council, so its views have been important to the negotiators on both sides.

The EP will need to endorse the WA by a simple majority and UK MEPs will be able to participate in the vote.

The Council must authorise the signature of the Withdrawal Agreement, before sending it to the EP for its consent.

The President of the EP then refers the WA for scrutiny by the EP Committee on Constitutional Affairs (AFCO). The Committee has responsibility for drafting a report and motion on the WA, on the basis of which a plenary session of the EP will vote or not for consent. AFCO's role is separate from the BSG, although the AFCO chair is a member of the BSG and Mr Verhofstadt is a member of AFCO. A Brexit Consent Group has been established within AFCO. This includes Mr Verhofstadt who will act as rapporteur for the Committee's Brexit consent report and motion.

The European Parliament will sit in plenary session from 21 to 24 October, and is not scheduled to sit again after this until 13 November. AFCO is not scheduled to meet again until 12 November. However, a special meeting of AFCO could be arranged early in the week of 21-24 October in order to approve the consent report and motion, and to enable the Consent vote to be held in the EP plenary on 23 or 24 October.

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[17] This is a higher threshold than the normal Council qualified majority voting (QMV) threshold of at least 55% of participating Member States comprising at least 65% of the population of these States. The Article 50 requirement is based on Article 238(3)(b) TFEU, which states that "when the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72% of the members of the Council representing Member States comprising at least 65% of the population of these States".

The President of the European Parliament David Sassoli attended the European Council meeting on 17 October. He said:

> We welcome the agreement reached with the government of the United Kingdom. The European Parliament will examine closely the terms and substance of the agreement to verify that it is consistent with the interests of the European Union and its citizens. Parliament will continue to act with the sense of responsibility that we have shown to date.

Parliament 'red lines' on Withdrawal Agreement

The EP resolution on the Brexit negotiations adopted in April 2017 stated that a priority in the Withdrawal Agreement should be respect for the rights of EU27 citizens in the UK and UK citizens in the EU27. The WA should also be in conformity with the EU Treaties and the EU's Charter of Fundamental Rights. Other EP priorities are:

- the UK should settle its financial commitments to the EU;
- the Northern Ireland peace process is protected and a hard border on the island of Ireland is avoided;
- the integrity of the Single Market, including its four freedoms is protected;
- there should be no trade-off between the economic relationship and security co-operation.

The vote of approval in the Council (EU ratification) will take place once the EP has given its consent. Ratification in the individual Member States is not required for the WA, although it will most likely be required for agreement(s) on the future relationship.[18]

[18] Approval or ratification by Member State according to their own constitutional provisions will be necessary for the future relationship agreement if, as is likely, it covers areas that go beyond the exclusive competences of the EU. Where competence is shared between the EU and its Member States, international agreements are concluded both by the EU and by the EU Member States. These are known as mixed agreements, to which EU Member States must give their consent. The EU's chief Brexit negotiator Michel Barnier has said that the any agreement on UK-EU future relations will be a mixed agreement "requiring the ratification by unanimity not only by the EU institutions but by ... national parliaments" and "even regional parliaments" (for example in the case of Belgium where ratification of international treaties is also subject to ratification in its regional parliaments).

3. Changes to the Withdrawal Agreement main text

3.1 Continuity from the November 2018 Withdrawal Agreement

Only two Articles in the main Withdrawal Agreement have changed from the November 2018 text.

This means that the rest of the Agreement remains the same. This covers the following areas:

- **Part One: Common Provisions.** These set out the WA's territorial scope, key definitions, and how it (and particularly, its EU law content) is to be given effect in the UK after exit day. Article 4 makes clear that the entire Agreement is intended to be directly effective in the UK where its provisions are clear, precise and unconditional.

  Part Two: Citizens' rights. Free movement will continue until the end of the transition (or implementation) period and EU and UK nationals will be able to move to the UK or Member States as is currently permitted by EU law. EU citizens living in their host state before the end of transition will have permanent residence rights under the withdrawal agreement, subject to certain requirements. The UK and the EU27 have discretion under the agreement to require EU or UK nationals to apply for a new residency status.

- **Part Three: Separation provisions.** These are intended to create an orderly exit from the EU. Ongoing processes and arrangements will be allowed to come to an end under current rules following the end of transition. It contains provisions on market access for goods, ongoing customs, VAT and excise matters, intellectual property, ongoing police and judicial cooperation in both criminal and civil/commercial matters, the protection of data obtained before the end of transition, ongoing public procurement procedures, Euratom issues, ongoing EU judicial/administrative processes, privileges and immunities, and a few provisions relating to the functioning of the EU institutions.

- **Part Four: Transition.** The transition period, also described as the 'implementation period' is meant to bridge the period between the date of the UK's exit from the EU and the entry into force of the new, yet to be negotiated, UK-EU partnership arrangements. The transition will run until the end of December 2020, with the possibility of extension for up to two years. The extension of Article 50 to 31 October means the transition period is now shorter. A decision on extending the transition period must be taken by 1 July 2020.

  The UK will continue to apply EU law during the transition period, with a few exceptions, as if it were a Member State. But the UK will have no institutional representation and no role in decision-making. The EU institutions and other bodies, offices and agencies will continue to exercise their powers under EU law in relation to

the UK. The CJEU will have jurisdiction in relation to the UK and to the interpretation and application of the Withdrawal Agreement.

- **Part Five: Financial Settlement.** After the first round of withdrawal negotiations, the UK and EU set out an agreed approach to the financial settlement in the December 2017 Joint Report. The settlement sets out the financial commitments that will be covered, the methodology for calculating the UK's share and the payment schedule. The withdrawal agreement turns the approach set out in this Report into legal text and provides for further negotiations on UK contributions to the EU budget if there is an extension of the transition period. Any extension would not impact on the financial settlement, which would continue as agreed.
- **Part Six: Institutional and Final Provisions** (except Articles 184 and 185). Part six sets out the institutional arrangements underpinning the Agreement, and how disputes about the WA are to be resolved. In an earlier draft in March 2018, the Commission had originally proposed that disputes regarding the agreement should be resolved by the CJEU if it could not be resolved in the Joint Committee. The November 2018 WA instead proposes in Article 170 that any disputes not resolved in the Joint Committee are taken to an independent arbitral tribunal, which will issue a binding decision regarding the dispute. However, where the dispute requires the interpretation of concepts or provisions of EU law, under Article 174 the tribunal is obliged to refer those to the CJEU for a binding interpretation of those concepts or provisions which the tribunal must then apply.
- **Protocol on Sovereign Base Areas in Cyprus**. This aims to protect the interests of Cypriots who live and work in the Sovereign Base Areas (SBAs) after Brexit and to ensure that EU law, in the areas stipulated in Protocol 3 to the Cyprus Act of Accession, continues to apply in the SBAs, with no loss of rights, especially for Cypriot civilians living and working in the SBA areas. This applies to policy areas such as taxation, goods, agriculture, fisheries and veterinary and phytosanitary rules. The arrangements aim to ensure that the laws applicable to Cypriots in the SBAs are the same as the laws of the Republic of Cyprus. The Protocol confers responsibility on Cyprus for the implementation and enforcement of EU law in relation to most of the areas covered, except for security and military affairs.
- **Protocol on Gibraltar.** This will apply to the end of the transition period, except for provisions on citizens' rights, which will continue beyond. The Protocol covers preparation for the application of the Citizens' Rights part of the WA, allows EU law to be applied to Gibraltar Airport if the UK and Spain reach agreement on it; establishes cooperation between Spain and the UK on fiscal matters, environmental protection and fishing, and police and customs matters. Memoranda of Understanding between the UK and Spain facilitate working-level collaboration between competent authorities in Gibraltar and Spain, including through the use of joint committees, on citizens' rights, the environment, police and customs and tobacco.

Analysis of these parts of the WA can be found in the Commons Library Briefing Paper 8453 The UK's EU Withdrawal Agreement (see chapters 2 to 7 and chapter 9).

Although the text of Part Four on Transition and Part Five on the Financial Settlement are unchanged from the November 2018 WA, these provisions have been affected by the delay in the scheduled Brexit date from the originally scheduled date of 29 March 2019 to 31 October 2019. The removal of 'backstop' provisions from the Ireland/Northern Ireland protocol also has implications for the end of the transition period.

3.2 The Financial Settlement

The original Withdrawal Agreement – negotiated between Theresa May's government and the EU – sets out how the UK and EU will settle their outstanding financial obligations to each other. No changes were made to the settlement in the agreement reached between Boris Johnson's government and the EU.

The negotiated financial settlement includes the components of the settlement, the methodology for calculating the UK's share and the payment schedule.

The financial settlement is often labelled the UK's 'exit bill' or 'divorce bill'. It is estimated that the settlement will cost the UK £33 billion by the time its final payment has been made, potentially in the mid-2060s. Any estimates of the cost are uncertain. The Library briefing Brexit: the financial settlement provides further details about what has been agreed and how the negotiations proceeded.

Underlying principles

The principles underlying the agreed methodology for the settlement are that:[19]

- no EU Member State should pay more or receive less because of the UK's withdrawal from the EU;
- the UK should pay its share of the commitments taken during its membership; and
- the UK should neither pay more nor earlier than if it had remained a Member State. This means that the UK will make payments based on the outturns of EU budget.

What is included in the settlement?

Broadly speaking, the settlement can be split into three components:

- **During the transition period**, until 2020, **the UK will pay into the EU budget** almost as if it were a Member State. The UK will also **receive funding from EU programmes** – such as structural funding – as if it were a Member State.

[19] These principles are laid out in the communication from the Commission to the Council on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union, 8 December 2017

- EU annual budgets commit to some future spending without making payments to recipients at the time. The commitments will become payments in the future. **The UK will contribute towards the EU's outstanding commitments** as at 31 December 2020. Recipients in the UK will also receive funding for outstanding commitments made to them.
- The UK will **share the financing of some EU liabilities** as at the end of 2020, and any materialising contingent liabilities, **and will receive back a share of some assets**. The pensions of EU staff are likely to be the most significant liabilities for the UK, while the most significant item being returned to the UK is the capital it paid into the European Investment Bank (EIB).

Not everything in the settlement fits neatly into these three components. For instance, the UK has agreed to continue to contribute to the EU's main overseas aid programme – the European Development Fund – until the current programme ends. This programme is funded directly by Member States, rather than through the EU budget. The UK's contribution counts towards its commitment to spend 0.7% of national income on overseas aid.

Estimates of the financial settlement's cost

If the UK leaves the EU on 31 October 2019, it is estimated that the financial settlement will cost the UK around £33 billion.[20] This is lower than previous estimates produced by the Treasury and Office for Budget Responsibility (OBR), which put the cost at around £39 billion.[21] These older estimates assumed that the UK would leave the EU on 29 March 2019. The delay in the UK's exit from the EU – through extensions to Article 50 – is the main reason that the latest estimate, of £33 billion, is lower.

The UK has remained a Member State during the extended Article 50 period and, as such, has continued to contribute to the EU Budget on a monthly basis. These contributions are payments that would have been made through the financial settlement (during the transition period) had the UK left with a deal on 29 March 2019. The UK's extended EU membership has therefore lowered the estimated cost of the financial settlement but has meant that the UK has contributed more as a Member State.

Ultimately, the EU will still receive the same total amount from the UK (so long as the UK leaves with a withdrawal agreement). However, the delay to Brexit changes how the UK's total contribution since 29 March 2019 splits between payments made as a Member State and payments made through the financial settlement afterwards.[22]

There is further information in the Library Insight How does extending Article 50 affect the UK's financial settlement with the EU?

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20 OBR. Fiscal risks report – July 2019, para 5.139
21 HC Deb 11 Dec 2017:c25; OBR. Economic and fiscal outlook – March 2019
22 There is more in the Library Insight How does extending Article 50 affect the UK's financial settlement with the EU?

Any estimates are uncertain

It is very difficult to put definitive figures to the settlement as it depends on future events, potentially stretching out to the 2060s, including:[23] [24]

- the UK's economic performance relative to EU Member States, which will determine the UK's contribution to the EU Budget in 2019 and 2020
- whether the UK continues to receive EU receipts at the same rate
- the impact of future events on the EU's pension liabilities
- future exchange rates
- the outturn of actual EU budgets
- the rate at which outstanding commitments are either paid or decommitted

3.3 The Transition Period

If the UK leaves the EU on 31 October 2019 following UK and EU ratification of the revised WA, then the length of the envisaged transition or implementation period (during which EU rules will continue to apply but without UK representation in the EU institutions) will be shorter than originally envisaged. The WA provides for a transition ending on 31 December 2020, with a possibility of extending the transition for another one or two years. This formulation has remained unchanged from the November 2018 agreement to the revised October 2019 text.

The WA provides that any decision on extending the transition should be taken by 1 July 2020.[25] If the UK leaves the EU on 31 October 2019, the transition period will therefore last for 14 months, unless an extension to the transition is agreed with the EU. Extension to the transition period will need to be agreed within eight months.

The transition period has been presented by the Government and the EU as providing a bridging or implementing period between the UK's exit from the EU and the commencement of a new framework governing the future UK-EU relationship, also providing time to negotiate that new relationship.

The EU insists that negotiations on the future EU-UK relationship cannot begin until the UK is a third country, i.e. it has left the EU. This is in line with Article 218 TFEU (on agreements between the EU and third countries or international organisations), in spite of initial UK hopes that the withdrawal agreement and the future relations agreement could be discussed in parallel. The EU and UK agreed a Political Declaration on the framework for the future EU-UK relationship in November 2018 which was also revised in October 2019, but this is not legally binding. Both versions of the PD provide that the UK and EU will agree on a

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23 European Scrutiny Committee, Oral evidence: EU withdrawal, HC 763, Q185
24 NAO. Exiting the EU: The financial settlement, paras 11-22
25 See section 5 of House of Commons Library Briefing Paper 8453 The UK's EU Withdrawal Agreement, updated 11 April 2019

programme for negotiations immediately after the UK's withdrawal from the EU.

The shortened duration of the transition, however, will leave less time to negotiate the new framework in time for the end of the transition period. The November 2018 WA provided that at the end of the transition period, if a new relationship framework preventing a hard border on the island of Ireland was not ready for implementation, then the 'backstop' Ireland/Northern Ireland protocol provisions would kick in. This would have involved the UK continuing to remain in a single customs territory with the EU.[26] This would have meant that tariff free trade would have been maintained between the UK and EU (alongside certain 'level playing field' provisions requiring some UK regulatory alignment with the EU) irrespective of whether a future UK-EU relationship agreement had been agreed. With the elimination of these 'backstop' provisions from the October 2019 WA, the end of the transition period will become a no deal 'cliff edge' if there is no agreement between the UK and EU on a future relationship. Arrangements regulating the UK-EU relationship could then cease to apply at this point and trade between the UK and EU would fall back to World Trade Organisation (WTO) rules.

The Joint Committee during the transition period

While the majority of the Protocol on Ireland/Northern Ireland, discussed in Section 4 below, will not enter into force until the end of the 'transition' period, it sets out several tasks for the Joint Committee to carry out *before* the end of the transition period.

As such, Article 5(2) of the Protocol requires the Joint Committee to agree to a number of different definitions and criteria that will apply to customs processing in Northern Ireland under the Protocol:

> Before the end of the transition period, the Joint Committee shall by decision establish the conditions under which processing is to be considered [as 'subject to commercial processing in Northern Ireland'], taking into account in particular the nature, scale and result of the processing.
>
> Before the end of the transition period, the Joint Committee shall by decision establish the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently being moved into the Union. The Joint Committee shall take into consideration, *inter alia*:
>
> a) the final destination and use of the good;
>
> b) the nature and value of the good;
>
> c) the nature of the movement; and
>
> d) the incentive for undeclared onward-movement into the Union, in particular incentives resulting from the duties payable [under the new customs arrangements].

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[26] See section 8 of House of Commons Library Briefing Paper 8453. See also House of Commons Library Insight, The backstop explained, 12 December 2018.

> The Joint Committee may amend at any time its decisions adopted pursuant to this paragraph.
>
> In taking any decision pursuant to this paragraph, the Joint Committee shall have regard to the specific circumstances in Northern Ireland.

This is the only explicit mention of the Joint Committee being obliged to exercise its decision-making powers regarding the Protocol *before* the transition period is over, though other provisions suggest that it will also be taking decisions on other aspects of the customs operations under the Protocol. As such, Article 5(3) notes that the Joint Committee will establish the conditions under which certain 'fishery and aquaculture products' are exempt from customs duties. Those conditions presumably must be set before the Protocol becomes active.

A further example of implied Joint Committee powers is found in **Article 8** of the Protocol on VAT and excise. This article states that the Joint Committee is to regularly 'discuss the implementation' of the Protocol's VAT and Excise provisions (discussed in Section 4 below), 'taking into account Northern Ireland's integral place in the United Kingdom's internal market'. Again, such a review role suggests that the Joint Committee will oversee implementation of the new VAT and excise regime before the transition period ends *as well as* afterwards.

The decision-making powers placed with the Joint Committee regarding the operation of the customs and VAT/excise provisions are potentially far-reaching, as **Articles 5** and **8** of the Protocol only set out a broad framework for how customs and VAT/excise are to work under the Protocol. Indeed, both articles appear to anticipate regular amendment of the customs and VAT/excise processes as initially designed.

3.4 Articles 184 & 185

The only changes to the main body of the Withdrawal Agreement (not including the protocol on Ireland/Northern Ireland) are to Articles 184 and 185.

Article 184 refers to negotiations on the future relationship, stating that the UK and the EU will use their best endeavours to negotiate expeditiously agreements governing their future relationship referred to in the Political Declaration. The only change to the November 2018 text is that the date of the Political Declaration is changed to that of October 2019.

Article 185 relates to the entry into force of the agreement. The November 2018 version stated that it would come into force on 30 March 2019 (the day after the originally scheduled Brexit date). The revised version does not specify a date on which the WA would come into force. Instead it identifies two possibilities. The WA will come into force on whichever of the following occurs earliest:

a. The day following the end of the Article 50 period, as extended by the European Council in agreement with the UK, provided that both the EU and the UK have completed their respective ratification procedures and notified the

depositary of the Agreement (the Secretary General of the Council) that these procedures have been completed;

b. The first day of the month following ratification of the WA by both the EU and UK and receipt of notification of ratification by the depositary.

Additional new wording states that if notification of ratification has not occurred by the end of the Article 50 period (as extended) then the Agreement will not enter into force.

The new wording of Article 185 provides more flexibility over the date of entry into force of the WA than the November 2018 wording. It also decouples the possible entry into force date from the default date of the ending of the Article 50 period. Article 50 (3) TEU itself also set out a possible distinction between these two dates. It states that the EU treaties will cease to apply to the withdrawing Member State "from the date of entry into force of the withdrawal agreement or, failing that" two years after the initial Article 50 notification or the end of any extended Article 50 period agreed by the EU and UK.

Article 185 also sets out the provisions which will not apply until the end of the transition period. These include most of the provisions on citizens' rights (part two), most of the separation provisions (part three) and elements of other parts of the treaty relating to CJEU jurisdiction, dispute resolution and the protocol on Gibraltar. In the November 2018 WA, Article 185 stated that the protocol on Ireland/Northern Ireland would also come into force at the end of the transition period but listed a set of provisions in the protocol which would apply when the agreement entered into force, rather than at the end of the transition. The October 2019 set out a revised list of these exceptions to the protocol which would apply when the agreement entered into force rather than the end of the transition period.

4. Changes to the Protocol on Ireland/Northern Ireland: the 'backstop'

4.1 Entry into force

The Protocol on Ireland/Northern Ireland, is the part of the Withdrawal Agreement (WA) that sets out the arrangements to maintain an open border on the island of Ireland after the end of the transition period. The Protocol of the November 2018 WA was most commonly referred to as the 'backstop'.

The Protocol will come into force at the end of the transition period as set out by Article 185 of the October 2019 WA (this feature is unchanged from the last Agreement).

Article 185 states that the Protocol "shall apply as from the end of the transition period" (i.e. until 31 December 2020, unless it is extended). The Protocol is an integral part of the WA and will therefore enter into force automatically – there is no active process that 'triggers' the Protocol.

However, some sections of the Protocol will come into force along with the main body of the WA on exit day and not, like the rest of the Protocol, after the end of the transition period. These sections principally provide powers/direction to the Governance bodies such as the Joint Committee/Specialised Committee to plan for the Protocol to ensure it can operate from day one.

4.2 The previous Protocol or 'backstop'

Under the November 2018 Withdrawal Agreement, the Protocol or 'backstop', if it had come into force, would have seen the UK form a customs union with the EU (except for trade in fisheries and aquaculture products).

The UK would have conformed to specific EU legislation on customs, including with respect to third countries, and some harmonisation of law would continue on taxation, the environment, labour law, state aid, competition and public companies/monopolies, but with no obligation to keep up with new EU legislation and CJEU case law.

To provide a 'level playing field' the UK committed to non-regression on EU environmental protection, labour and social standards, state aid and competition, and state-owned undertakings in respect of administration of tax.

The UK would have been able to conclude trade agreements with third countries; however, the customs union would have substantially limited the UK's ability to have significantly different trade relationships with them, particularly in relation to goods. There would have been greater scope for the UK to offer different terms on trade in services and areas such as procurement.

EU law on free movement of persons, services and capital, and contributions to the EU budget, would not have applied. But there would have been free movement for goods moving from NI to the rest of the UK and the EU. The EU and the UK said they would seek to facilitate trade between Britain and NI with a view to avoiding controls at NI ports and airports.

In Northern Ireland only, specific additional EU legislation would have continued to apply in areas such as VAT and excise, product standards for goods, agriculture (including state aid), the environment, and electricity markets, certain technical standards relating to goods and the EU's Customs Code.

UK authorities are responsible for implementing and applying EU law applicable under the Protocol but also, where EU law continued to apply to the UK in respect of NI, the EU institutions and bodies would have had the same powers as they have under the EU Treaties. EU bodies including the CJEU would have applied and interpreted Protocol provisions specific to Northern Ireland.

4.3 Summary of changes to the Protocol

The most significant over-arching difference between the October 2019 proposals and those set out in the November 2018 WA is that the previous 'backstop' maintained a much more complete and encompassing set of relations on goods between the EU & the UK (although it also would have raised barriers for economic relations as it did not cover trade in services, movement of people/workers, movement of capital, transport services etc).

However, that potential relationship also came with much more alignment with EU law and standards, and therefore potentially restricted the UK's ability to diverge from such standards and pursue an independent trade policy should it wish to.

Under this new Protocol if the UK and EU are unable to conclude a new future relationship agreement by the end of the transition period, an open border will be able to be maintained between Northern Ireland and Ireland.

However, in this scenario there would be a much steeper cliff edge, for trade in goods between the rest of the UK and the EU. There would also be new trade barriers for goods moving from Great Britain into Northern Ireland. This because without a trade agreement the UK would revert to 'WTO' trading terms with the EU, as this Protocol does not include substantive arrangements for trade in goods between the EU and the UK, other than for Northern Ireland. The previous 'backstop' did, and that 'backstop' could not be exited without the agreement of both the EU and the UK.

That notwithstanding, the EU & UK are committed to reaching a future trade agreement, and the transition period can be extended for up to a further two years (if it is extended for two years it would end in December 2022).

The focus for this Protocol is much more firmly on gaining the greatest possible freedom for the UK to manage its economic relations, while still maintaining as far as possible an open border on the island of Ireland, and is less concerned with maintaining frictionless trade for the rest of the UK with the EU.

Other than the wider picture of a looser relationship between the UK and the EU post-transition, the most significant changes to the Protocol are in four main areas:

- Customs
- VAT
- Democratic consent
- The level playing field

Customs

The revised Withdrawal Agreement replaces the 'backstop' provisions of the previous WA with a new customs arrangement for Northern Ireland. While the previous 'backstop' kept the UK in a customs union with the EU, the new WA sees the whole of the UK (including Northern Ireland) leave the EU Customs Union. In legal terms, Northern Ireland remains part of the UK customs territory. Northern Ireland will be included in UK free trade agreements.

In practice, however, Northern Ireland will apply many EU customs rules and there will effectively be a customs and regulatory border between Great Britain and Northern Ireland in the Irish Sea.[27]

The new arrangements are permanent, provided consent is given. They are no longer a 'backstop' – i.e. an insurance policy which will only come in effect if other measures fail to keep the Irish border open.[28]

VAT

Provision in the Protocol regarding VAT and excise (initially Article 9) has also been amended (now Article 8). Initially it was proposed that Northern Ireland would be treated as part of the UK for VAT purposes, entirely outside the scope of EU VAT law. It is now anticipated that EU VAT rules for goods would apply in Northern Ireland to avoid the creation of a hard border, although the UK would continue to collect receipts from both VAT and excise duty. In addition, it is proposed that the VAT base and VAT rates in Northern Ireland could be amended, to be aligned with the VAT system in Ireland. This would maintain a level playing field.

Democratic consent

The revised Protocol allows the Northern Ireland Assembly to provide "consent" for certain EU regulations continuing in Northern Ireland. The first vote would take place four years after the end of the transition period, and every four years thereafter if passed by a simple majority. If endorsed on a cross-community basis, then the period would be every

[27] How No 10 made concessions in race to break deadlock, Financial Times, 18 October 2019

[28] Raoul Ruparel, Twitter, 17 October 2019

eight years. If rejected, then the regulations will cease to apply after two years.

The level playing field

Annex 4 of the previous Protocol has now been removed. It contained references to EU laws and international conventions that would apply to the whole UK in what were called 'level playing field' commitments. These were put in by the EU to limit the UK's capacity to gain what it would see as an unfair advantage by lowering standards. This was of particular concern due to the UK's close geographical proximity to the EU, but also in the previous 'backstop' the UK would have been in a Single Customs Territory with the EU, and so the EU wouldn't be able to use tariffs to compensate for competitive advantage.

The level playing field provisions were in the areas of taxation, environmental protection, labour standards, state aid and competition. These have now been replaced by less specific and non-binding commitments in the Political Declaration to uphold such principles in any future trade agreement between the EU and the UK.

Other changes

State aid

In order to prevent undue distortion of competition and trade, EU state aid law will continue to apply to Northern Ireland under the revised Withdrawal Agreement. State aid controls will apply to business support measures which can potentially affect trade between Northern Ireland and the EU. Aid to production of and trade in agricultural goods in Northern Ireland would be exempted from state aid controls up to a level set by the Joint Committee. State aid regulations affecting Northern Ireland trade with the EU would be enforced by the Commission, but the UK would be kept duly informed. This is a step away from the previous Withdrawal Agreement which essentially set out how EU state aid rules would apply to the UK as a whole.

4.4 In detail: Customs & the movement of goods

Customs

Articles 4 and 5 of the revised Withdrawal Agreement which replace Article 6 of the previous Agreement, relate to customs. These are substantially different to those in the previous agreement. There are major changes to the customs provisions. The previous Withdrawal Agreement created a customs union ("single customs territory") between the UK and the EU. This has been removed from the agreement.

Article 4 of the revised agreement states "Northern Ireland is part of the customs territory of the United Kingdom". Section 55 of the *Taxation (Cross-border Trade) Act 2018* says:

> (1) It shall be unlawful for Her Majesty's Government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain.

> (2) For the purposes of this section "customs territory" shall have the same meaning as in the General Agreement on Tariffs and Trade 1947 as amended.

Article 4 also ensures that Northern Ireland will be able to benefit from future UK free trade agreements (FTAs). The European Commission's Q&A on the agreement says:

> Northern Ireland will remain part of the customs territory of the United Kingdom. Nothing in the revised Protocol on Ireland / Northern Ireland prevents the UK from including Northern Ireland in the territorial scope of any of its possible future Free Trade Agreements, provided that those agreements do not prejudice the application of the Protocol.
>
> This means that Northern Ireland would continue to be able to benefit from future UK FTAs in, for example, services and investment but also the export of its goods. Northern Ireland will be able to benefit from the import of goods that are not at risk of entering the EU's Single Market either as goods by themselves or after having been subject to commercial processing.

Article 5 is on the payment of customs duties. A distinction is drawn between those goods entering Northern Ireland which are at risk of entering the EU Single Market and those which are not. EU customs duties will apply to goods entering Northern Ireland from Great Britain or from outside the EU where there is a risk than they may subsequently enter the Single Market.

Under Article 5(2), goods will be assumed to be at such risk unless they pass both parts of a two-part test:

(a) they are not subject to commercial processing in Northern Ireland

(b) they meet criteria established by the Joint Committee

The Joint Committee will decide on criteria for these risk assessments by the end of the transition period. Goods entering Northern Ireland from Great Britain which are deemed to be at risk of entering the EU Single Market will be liable to tariffs. Article 5(1) says:

> No customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing.

EU's customs rules (Union Customs Code - UCC) will apply to all goods entering Northern Ireland thereby avoiding customs controls/checks on the islands of Island.

The Commission's Q and A says:

> The Union's Customs Code will apply to all goods entering Northern Ireland. This avoids any customs checks and controls on the island of Ireland.
>
> As far as customs duties are concerned, EU customs duties will apply to goods entering Northern Ireland if those goods risk entering the EU's Single Market. No customs duties will be payable, however, if goods entering Northern Ireland from the rest of the UK are not at risk of entering the EU's Single Market.

> This applies to all goods that are not subject to further processing and that meet the criteria that the Joint Committee will establish in order to determine the risk of the onward movement of that good, taking into account the specific circumstances in Northern Ireland. For goods from third countries not considered to be at this risk, the customs duties applicable in Northern Ireland will be the same as in the other parts of the UK.
>
> The Joint Committee will establish, by the end of the transition period, the criteria for the above risk assessments and may amend the criteria during their application. Such criteria shall take into consideration issues such as the final destination of goods and value or risks of smuggling.
>
> The UK may reimburse duties levied according to Union law in case the UK duty is lower, subject to appropriate safeguards on the correct application of EU state aid rules.

There will be a system of rebates for goods which can be shown not to have entered the EU.[29] The UK may also compensate or waive other costs for traders which they would face because of having to apply the Union Customs Code. Such UK government schemes of tariff duty reimbursements and compensation for other customs-related costs would be subject to EU state aid rules set out in Article 10. These state aid measures would be assessed by the European Commission.

There is also an exemption in Article 5(7) for "consignments of negligible value, on consignments sent by one individual to another or on goods contained in travellers' personal baggage".[30]

The Times explained the changes as follows:

> In legal terms Northern Ireland will remain inside the UK's customs territory - but in all practical aspects it will follow EU customs rules. Goods crossing from Britain to Northern Ireland will pay any applicable EU tariffs although there will be a mechanism to claim them back if they end up on the Northern Ireland market.[31]

The system introduces extra paperwork for goods imported into Northern Ireland. Customs expert Anna Jerzewska tweeted:

> in order to import anything from FTA [free trade agreement] partner into NI, you'll need to pay EU tariffs first and then get a rebate (unless goods exempt). That's a lot of paperwork for a tariff-free import[32]

UK internal market

Article 6 is on the protection of the UK internal market. Article 7 was the equivalent article of the previous Agreement.

Article 6(1) provides that the protocol shall not prevent "unfettered market access for goods" moving from Northern Ireland to Great Britain. There was a similar provision in the previous agreement.

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29 Open Europe, What's new about the Brexit deal? An Explainer, 17 October 2019
30 Subject to Article 5(3).
31 What is the new Brexit deal and how is it different to May's agreement, The Times, 17 October 2019
32 Anna Jerzewska Twitter, 18 October 2019

Regulatory alignment between Northern Ireland and EU

Article 7, on technical regulations, assessments, registrations, certificates, approvals and authorisations, is largely unchanged from Article 8 of the previous draft.

Northern Ireland will remain aligned to a range of EU single market rules, including rules relating to goods, sanitary rules for veterinary controls, rules on agricultural production/marketing, VAT and excise for goods and state aid. This is to avoid a hard border.

The European Commission's Q and A says:

> Northern Ireland will continue to apply the Union's Customs Code and will remain aligned to those rules of the Single Market in order to avoid a hard border on the island of Ireland.
>
> The necessary checks and controls will take place on goods entering Northern Ireland from the rest of the UK, including for example, Border Inspection Posts to ensure that the necessary sanitary and phyto-sanitary ("SPS") controls are carried out.
>
> UK authorities will implement and apply the provisions of Union law that the Protocol makes applicable in the UK in respect of Northern Ireland. Therefore, all checks will be carried out by UK authorities with appropriate supervisory and enforcement mechanisms for the EU.

4.5 In detail: VAT and excise

The provision made in the revised Protocol with regard to VAT and excise is one of the areas of the agreement that has been amended.

Article 9 of the Protocol, as initially agreed, provided that certain EU VAT and excise rules would apply in Northern Ireland with respect to the movement of cross-border trade in goods. As the Government's Explainer on the WA stated:

> Northern Ireland will remain part of the UK's VAT area, with HMRC continuing to be responsible for the operation and collection of VAT, and Parliament for the setting of VAT rates, across the UK in line with the *Northern Ireland Act 1998*. Specifically, the UK will ensure that no registered business is required to pay VAT upfront when moving goods between Great Britain and Northern Ireland, and that accounting for VAT can continue to be done through postponed accounting and UK VAT returns.[33]

Article 8 of the revised Protocol stipulates that the EU's VAT rules for goods "shall apply to and in the United Kingdom in respect of Northern Ireland." The UK authorities will be "responsible for the application and the implementation" of these rules, "including the collection of VAT and excise duties" while "revenues resulting from transactions taxable in Northern Ireland shall not be remitted to the Union." In addition the

[33] HMG, *Withdrawal Agreement explainer and Technical Explanatory note on Articles 6-8 on the Northern Ireland Protocol*, November 2018 p47. See also "Will Northern Ireland remain part of the UK's VAT area?" in EC, *Protocol on Ireland and Northern Ireland – Fact Sheet*, 14 November 2018

UK "may apply to supplies of goods taxable in Northern Ireland VAT exemptions and reduced rates that are applicable in Ireland."

The European Commission's explanation of this provision, in their FAQ document on the agreement, is as follows:

> **What about VAT?**
>
> Northern Ireland will remain part of the UK's VAT area, with HMRC remaining responsible for applying VAT legislation, including the collection of VAT, and the setting of VAT rates. UK will keep revenues accruing from this tax. In order to avoid a hard border on the island of Ireland, while protecting the integrity of the Single Market, the EU's VAT rules for goods will continue to apply in Northern Ireland. In addition, VAT exemptions and reduced rates applied in Ireland may also be applied in Northern Ireland in order to avoid distorting the level playing field on the island. Northern Ireland continues to be able to operate the EU's VIES system (VAT Information Exchange System) and to share data with Ireland and other Member States.[34]

To date it is hard to say what the detailed implications of these arrangements might be, but it would appear that under the terms of the agreement the VAT base and the rates of VAT charged on individual goods and services in Northern Ireland could diverge from the VAT system applying across the rest of the UK.[35]

In its press notice on the agreement the Commission noted that ensuring that Northern Ireland remained aligned to "a limited set of rules related to the EU's Single Market", including "VAT and excise in respect of goods" would "avoid a hard border."[36] In this context it is worth highlighting some of the debate there has been as to the possibility that the UK's departure from the EU, and specifically its exit from the EU's VAT system, could risk creating a hard border.

In a report published in September 2018, the European Scrutiny Committee gives an overview of the way that EU VAT Area works in practice …

> Value added tax (VAT) is one of the main areas of EU legislation on taxation, because it relates to trade in goods and services and therefore has the potential to impact on the EU's internal market. Normally, for goods entering a country that operates VAT, customs officials check the tax liability before they are released for free circulation. Similarly, goods are checked on export to ensure they have actually left a country's tax jurisdiction (since VAT is ultimately payable in the country of import, and therefore any input VAT is refunded to the exporter by the tax authorities of the country of export).[37]

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34 European Commission, *Brexit: What did you agree with the UK today?: Questions and answers*, 17 October 2019

35 Details of the VAT rates applied on different goods and services in the UK, Ireland and other Member States are set out in, European Commission, *VAT rates applied in the Member States of the European Community*, January 2019.

36 European Commission press notice IP/19/6120, 17 October 2019

37 VAT, though payment is fractioned throughout the supply chain, is ultimately only payable by the final consumer. Therefore, a business that exports a good to another

> Not to operate such border controls would ordinarily risk significant revenue losses, because incoming goods may not be taxed, and fraudsters could falsely—and repeatedly—claim VAT refunds on 'exported' goods that never left the country. However, as part of the Single Market, EU law has completely removed the requirement for border-related formalities for trade between EU Member States. Instead, the VAT Directive (Directive 2006/112/EC) contains a unique system where cross-border supplies between businesses in different Member States are zero-rated for the purposes of VAT, so that the vendor does not have to account for the tax in the Member State of destination.[38]
>
> Instead, a reverse charge mechanism[39] applies: the purchasing businesses must record a second transaction—a so-called intra-Community acquisition—for the same supply, charging the VAT to themselves and paying it to their national tax authority. This is to avoid a situation where an EU business would have to register for VAT, and comply with the locally applicable tax legislation, in every EU country to which they supply goods or services. For goods sold into the EU from outside the Customs Union, VAT liability is still checked at the border.
>
> To compensate for the lack of physical controls at intra-EU borders, business-to-business supplies between Member States are tracked using a database. This VAT Information Exchange System (VIES) records all cross-border B2B purchases and sales using information submitted by VAT-registered businesses in the European Union. This intra-EU VAT system was introduced on a supposed 'transitional' basis in 1992, and by allowing a cross-border supply to be made free of VAT has led to widespread 'missing trader' fraud, estimated to cost the EU £44 billion per year.[40]

… and mentions the Government's proposal for 'postponed accounting' for import VAT on all goods, to mitigate the impact on UK businesses from leaving the EU without a deal by allowing them to account for input VAT *after* goods have come into the UK:

> … When the UK ceases to be bound by EU VAT law, VAT will by default become an import (border) tax on goods moving between the UK and the EU-27. To ensure revenue is protected, both the UK and EU will either need to impose customs controls on goods entering, or agree for the UK to remain part of the VAT

country should not accrue any VAT liability in their home jurisdiction, and as such is entitled to a refund of input VAT paid on their supplies.

38 Different rules apply for business-to-consumer sales. For purchases made by the consumer while in a different Member State, VAT is accounted for by the supplier to their national tax authority. For distance sales within the EU, VAT must be accounted for in either the country of origin or the country of consumption, depending on the circumstances. We discussed this aspect of EU VAT law in more detail in our Report of 24 January 2018 (paragraph 12.28).

39 Reverse charge refers to the fact that it is the business making the purchase, not the supplier, who has to account for the VAT.

40 Intra-EU missing trader VAT fraud takes place when the company buys goods from another Member State, because purchasing the goods is VAT-free. When selling the goods domestically, the company receives the entire amount of VAT, which it pockets rather than transferring it to the Treasury. Because the company disappears, this type of fraud is called missing trader fraud. Carousel fraud takes this a step further: the same goods are bought and resold by the fraudster several times via middlemen, and each time the amount of collected VAT increases and the company either disappears or becomes insolvent before the tax authority can collect the accumulated VAT.

> Information Exchange System that allows both sides to track which goods are entering and leaving their respective territories. The former option is the default scenario, since the latter requires a detailed (and unprecedented) agreement with the EU, negotiations on which have not begun.
>
> On 23 August, as part of its first batch of 'no deal' technical notices, the Government announced that—should the UK leave the EU without a transitional arrangement on VAT—HM Revenue & Customs will not assess VAT liability on any imports (EU and non-EU) at the border. Instead, businesses would account for "import VAT on their VAT return, rather than paying [it] on or soon after the time that the goods arrive at the UK border".[41] The impact of this system of 'payment on account' on overall revenue collection, by significantly increasing the risk of missing trader fraud, has not been publicly quantified.[42]

In a detailed discussion of the challenges to the UK VAT system from Brexit, published in November 2018, Jeremy Cape and Max Schofield argued that, in the longer term, "a hard border is essential to the proper operation of VAT":

> There is an inextricable link between the free movement of goods and services, the EU internal market and the VAT territory of the EU (the EU VAT area), namely, the removal of borders whether: physical; fiscal; or, administrative. Following Brexit, the UK will have to contend with the reintroduction of all three.

This in turn poses a major problem for the parties wishing to ensure that a physical border is not created on the island of Ireland in the event of No Deal:

> A hard border is essential to the proper operation of VAT. Import VAT forms a central base upon which VAT operates throughout the remainder of the value chain in that VAT area, ensuring tax neutrality, the recovery of the correct amount of input VAT, and that the ultimate consumer bears the correct amount VAT on the final purchase. The border also allows a tax authority to collect the VAT at the point of entry. A VAT border is intended to create friction but in normal circumstances, VAT borders are manageable. The abnormal characteristic of Brexit, however, is the commitment to avoid a hard border on the island of Ireland.
>
> There has been remarkably little detail on how the UK envisages the new VAT border would operate, whether on the island of Ireland or between the UK and the rest of the EU. There was, in the original White Paper for the Customs Bill, a suggestion that in order to ensure UK-EU trade remained as frictionless as possible, no UK VAT would arise on any items of any value imported from the EU for personal use.[43] This gives rise to some planning opportunities (e.g. a retailer could set up an outlet just south of the Irish border allowing UK tourists to buy goods free of tax). More importantly, without some form of controls and checks, compounded with the loss of information exchange and

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41 HMRC, *VAT for businesses if there's no Brexit deal*, 23 August 2018

42 "EU VAT reform: implications of Brexit", European Scrutiny Committee, *Thirty-seventh report*, HC 301-xxxvi, 11 September 2018 para 15.1-3, para 15.10. Statutory provision for postponed accounting to be introduced in these circumstances has been made by Order (SI 2019/60).

43 HMG, *Customs Bill: legislating for UK's future customs, VAT and excise regimes*, Cm 9502 October 2017 para 5.41-2

administrative cooperation, the opportunities for smuggling and evasion grow exponentially.[44]

4.6 In detail: Consent of Northern Ireland Institutions

Overview

Article 18 of the revised Protocol on Ireland/Northern Ireland sets out the process by which the Northern Ireland Assembly's 90 members can provide "consent" for Northern Ireland to continue to abide by Articles 5 to 10 of the Protocol; that is, arrangements for Customs and movement of goods (Article 5); Protection of the UK internal market (Article 6); Technical regulations, assessments, registrations, certificates, approvals and authorisations (Article 7); VAT and excise (Article 8); Single electricity market (Article 9); and State aid (Article 10).

These new arrangements – which are envisaged as a permanent state rather than a "backstop", as in the original Withdrawal Agreement – will come into effect automatically at the end of the transition period on 31 December 2020 (unless extended), without any consent vote in the Northern Ireland Assembly. However, the continuation of the arrangements on a longer-term basis is dependent upon consent as tested at specified points.[45]

The first vote – on a motion that Articles 5 to 10 shall continue to apply in Northern Ireland – would take place within two months *before* the end of that "initial period", in other words, in November or December 2024.

There would then be three possible outcomes:

- If a motion is passed by a majority of Members of the Legislative Assembly (MLAs) "present and voting", then Articles 5 to 10 of the Protocol will "continue to apply" for a "subsequent period" of another 4 years. There would also be an independent review of the Protocol (see **Section 1.1** below).
- If, however, a motion is passed with cross-community support, then Articles 5 to 10 will continue to apply for a "subsequent period" of another 8 years.
- If a motion does not achieve majority support then Articles 5 to 10 of the Protocol "shall cease to apply 2 years after the end" of the initial period (so in 2026),[46] allowing time for alternative arrangements to be made. At a press conference introducing the

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[44] Jeremy Cape & Max Schofield, "VAT and Brexit: the Past, Present and Future", *EC Tax Review*, 2018/6, November 2018 p294. On this issue, see also two articles by Chris Giles, *Financial Times* economics editor: "What an Ikea bed tells us about Boris Johnson's Brexit plan", 4 July 2019 & "A leaky border on the island of Ireland suits no one", 10 October 2019.

[45] In his letter to the President of the European Commission dated 2 October 2019, the Prime Minister had proposed that the "Northern Ireland Executive and Assembly should have the opportunity to endorse those arrangements before they enter into force, that is, during the transition period, and every four years afterwards. If consent is not secured, the arrangements will lapse".

[46] European Commission, *Protocol on Ireland/Northern Ireland*, 17 October 2019.

deal, the EU's chief negotiator Michel Barnier described these two years as a "cooling off" period.[47]

Under the revised Protocol, cross-community support is taken to mean:

(a) a majority of MLAs present and voting, including a majority of each of the unionist and nationalist designations present and voting; or

(b) a weighted majority (60%) of MLAs present and voting, including at least 40% of each of the nationalist and unionist designations.[48]

MLAs "designate" themselves "nationalist", "unionist" or "other" at the first meeting of an Assembly following an election and can only change their community designation between elections if they have changed their party-political affiliation.[49]

The democratic consent process set out in the revised Protocol does not require a fully-functioning Northern Ireland Executive and Assembly. If a motion is not jointly proposed by the First Minister and Deputy First Minister (i.e. if a power-sharing Executive does not exist), then a motion can be tabled by any MLA (see **Section 1.1** below). Failing that, then the default would be for Articles 5 to 10 of the Protocol to continue to apply in Northern Ireland.

In early October 2019, the *Belfast Telegraph* quoted Democratic Unionist Party (DUP) leader Arlene Foster as suggesting that "if there is no Assembly, then it will be up to Westminster to give consent through a mechanism such as a grand committee of Northern Ireland MPs".[50] This, however, does not form part of the revised Protocol.[51]

Unilateral Declaration on Consent

A separate Unilateral Declaration on Consent gives further details of how the democratic consent provision of the Protocol would operate.

Public consultation

In this, the UK Government "affirms" that the "objective" of the democratic consent process should "be to seek to achieve agreement that is as broad as possible in Northern Ireland" and, where possible, through a process of cross-community public consultation conducted by a power-sharing Northern Ireland Executive and supported by the UK Government. This would involve businesses, civil society groups, representative organisations (including of the agricultural community) and trade unions.

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[47] Politico, "The Brexit deal explained", 17 October 2019.
[48] European Commission, *Protocol on Ireland/Northern Ireland*. It is not clear how the cross-community basis of a simple-majority vote would be extrapolated.
[49] Commons Library Briefing Paper CBP-8439, *Devolution in Northern Ireland 1998-2018*, 16 November 2018.
[50] Suzanne Breen, "Local MPs could decide Northern Ireland's Brexit fate if there's no Stormont says Arlene Foster", *Belfast Telegraph*, 5 October 2019.
[51] The existing Northern Ireland Grand Committee comprises 18 MPs from Northern Ireland together with up to 25 other Members. It last met in 2013. The DUP currently returns 10 of the 11 Northern Ireland MPs who sit in the Commons. Sinn Féin's seven MPs do not take their seats.

In the absence of an Executive, the UK Government would provide support to MLAs to carry out this consultation, in which the North South Ministerial Council and British-Irish Intergovernmental Conference would also be involved.

The Declaration also affirms that the democratic consent process does:

> not have any bearing on or implications for the constitutional status of Northern Ireland, which is set out in the 1998 [Belfast] Agreement and remains wholly unaffected by the Withdrawal Agreement.

Legislation

The UK Government undertakes "to reflect as necessary in the legislation of the United Kingdom the commitments in respect of the democratic consent mechanism" in advance of the date on which notice is first provided.

In other words, primary legislation would be necessary in order to facilitate Assembly votes every four or eight years. Such provisions could form part of any Withdrawal Agreement Bill presented to Parliament, or take the form of separate legislation later in the process.

Notification process

The UK Government will give two months' written notice to the First Minister and deputy First Minister, the Presiding Officer (or Speaker), and/or the Clerk to the Northern Ireland Assembly of:

> each date on which the United Kingdom will provide notification to the European Union as to whether there is democratic consent in Northern Ireland to the continued application of Articles 5 to 10 of the Protocol.

If a majority of MLAs vote in favour of a motion that Articles 5 to 10 of the Protocol shall continue to apply in Northern Ireland, then the Assembly has to notify the UK Government no fewer than 5 days before the date on which it is due to provide notification of the consent process to the European Union.

If such a motion has not been proposed by the First Minister and Deputy First Minister "acting jointly" within one month of written notice being given by the UK Government, then the motion "can instead be tabled by any Member of the Legislative Assembly".

Alternative consent process

Paragraphs 5 and 6 also refer to an "alternative process", which would take place if it is "not possible to undertake the democratic consent process" outlined above.

Under this, democratic consent could be provided by MLAs "in a vote specifically arranged for this purpose". This appears to suggest the Northern Ireland Assembly would be specially convened for this purpose. The process would also provide for the UK Government "to be notified of the outcome of the consent process".

If consent is not given by the Assembly under the standard or alternative processes, then the Joint Committee will make recommendations to the UK and EU concerning "necessary measures" to be taken. Before

making any recommendations, the Joint Committee might first consult the Northern Ireland Executive and Assembly (assuming they are fully functioning).

Independent review

If a vote in favour of the continued application of Articles 5 to 10 of the Protocol is passed by a simple majority of MLAs rather than with cross-community support, then the UK Government will commission an independent review into the functioning of the Northern Ireland Protocol "and the implications of any decision to continue or terminate alignment on social, economic and political life in Northern Ireland".

The independent review will make recommendations to the UK Government within two years of the vote, "including with regard to any new arrangements it believes could command cross-community support". The review will include "close consultation" with the Northern Ireland political parties, businesses, civil society groups, representative organisations (including of the agricultural sector) and trade unions.[52]

Northern Ireland Assembly

There has been no Northern Ireland Executive since early 2017, and while the Northern Ireland Assembly has not been suspended, as in the past, it has not been fully functioning since March 2017. Talks are ongoing in an attempt to restore the devolved institutions.[53]

The 1998 Belfast/Good Friday Agreement does not require every vote in the Assembly to be taken on a cross-community basis. Strand One of the Agreement refers to cross-community votes operating "where appropriate", and to "ensure key decisions" enjoy either "parallel consent" (a majority of unionist and nationalist designations present and voting) or a "weighted majority" (60% of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting).[54]

Another important aspect of Assembly voting arises from the Petition of Concern. If, in accordance with s42(1) of the *Northern Ireland Act 1998*, 30 MLAs petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, then the vote on that matter shall require cross-community support.

Following the most recent elections in March 2017, no single party in the Assembly has 30 MLAs,[55] so any Petition of Concern would require a cross-party alliance. If the UK Government wished to avoid the

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[52] HM Government, *Declaration…concerning the operation of the 'Democratic consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland*, 17 October 2019.

[53] See Commons Library Briefing Paper CBP-8607, *Northern Ireland (Executive Formation) Bill 2017-19*, 4 July 2019.

[54] "Key decisions" were listed as including the election of a Speaker, standing orders and budget allocations.

[55] See Commons Library Briefing Paper CBP-7920, *Northern Ireland Assembly Elections: 2017*, 9 March 2017.

Petition of Concern procedure, then s42 of the 1998 Act would require amendment or to be disapplied in relation to consent mechanism votes.

DUP position on consent mechanism

A Statement from the Democratic Unionist Party said "some progress" had been made on the issue of consent but added that elected representatives would "have no say on whether Northern Ireland should enter these arrangements". It continued:

> The Government has departed from the principle that these arrangements must be subject to the consent of both unionists and nationalists in Northern Ireland. These arrangements would be subject to a rolling review but again the principles of the Belfast Agreement on consent have been abandoned in favour of majority rule on this single issue alone.
>
> These arrangements will become the settled position in these areas for Northern Ireland. This drives a coach and horses through the professed sanctity of the Belfast Agreement.[56]

Chronology of consent process

- **2020**: Withdrawal Agreement transition period ends (unless extended).[57]
- **2024**: First Assembly motion on continuing Articles 5 to 10 of the Protocol.
- **2028:** Second motion if first passed by a simple majority.
- **2032:** Second motion if first passed with cross-community support, and third if second motion passed by a simple majority (in 2028).
- **2036:** Third motion if second passed by a simple majority.
- **2040:** Third motion if second passed with cross-community support.

4.7 In detail: 'Level playing field' provisions

Level playing field: Labour and social standards

Summary: What has changed?

The Protocol on Ireland / Northern Ireland in the November 2018 Withdrawal Agreement contained detailed provisions on a level playing field (LPF). These were contained in Annex 4 of the Protocol. Part 3 of Annex 4 (Articles 4 to 6) concerned labour and social standards. In addition to the LPF provisions in the Protocol, the November 2018 Political Declaration stated that the future relationship agreement would contain a clause that builds on the LPF arrangements in the Withdrawal Agreement.

The revised Protocol on Ireland / Northern Ireland no longer contains provisions on a LPF. The UK Government called for the removal of Annex 4, stating that it is unnecessary in light of the changes to the customs arrangements between the EU, Northern Ireland and the UK set out in the revised Protocol.

[56] DUP, Statement from the Democratic Unionist Party, 17 October 2019.
[57] The Withdrawal Agreement allows for the transition period to be "extended by up to 1 or 2 years to be decided by 30 June 2020", which would impact upon this chronology.

The revised Political Declaration still states that the future relationship agreement should contain LPF arrangements, including on employment standards. The wording of the new Political Declaration differs from the November 2018 Political Declaration insofar as the future relationship agreement can no longer 'build on' the LPF arrangements in the Withdrawal Agreement, as these have been removed.

What are level playing field commitments on labour standards?

EU trade agreements with third countries very often contain level playing field (LPF) provisions on labour standards. One of the primary purposes of LPF provisions is to prevent parties to the trade agreement undercutting labour standards to gain an unfair competitive advantage.[58]

LPF clauses in EU trade agreements usually take the form of a non-regression clause and a commitment to multilateral labour standards (i.e. International Labour Organisation standards).[59] Non-regression clauses typically prevent parties from seeking to encourage trade or investment by weakening or failing to enforce their own domestic labour laws.[60]

The European Council's guidelines for the future agreement with the UK state that it should include "robust guarantees" on LPF.[61] Slides produced by the European Commission in January 2018 stated that a tailored approach could be adopted for the UK-EU agreement, including a commitment not to lower labour standards below pre-Brexit levels (i.e. the common level set by EU employment law).[62]

What did the November 2018 Withdrawal Agreement say?

Annex 4 Part 3 of the Protocol on Ireland / Northern Ireland contained LPF provisions on labour and social standards. Article 4 contained a non-regression clause, Article 5 contained a commitment to ILO standards and cooperative action and Article 6 concerned enforcement.

They key provision was Article 4(1), which stated:

> With the aim of ensuring the proper functioning of the single customs territory, the Union and the United Kingdom shall ensure that the level of protection provided for by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period in the area of labour and social protection and as regards fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level, and restructuring.

The UK Government's legal explainer stated that the effect of this provision was that the UK could not lower labour standards below the

58 Marley Morris, *A level playing field for workers: the future of employment rights post-Brexit*, IPPR, October 2018, p. 13.
59 See e.g. *Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union*, Chapter 23.
60 See e.g. CETA Art. 23.4.
61 European Council, *Guidelines – 23 March 2018*, EUCO XT 20001/18, 23 March 2018, para. 12.
62 European Commission, *Internal EU27 preparatory discussions on the framework for the future relationship: "Level Playing Field"*, TF50 (2018) 27, 31 January 2018, p. 44.

level set by EU employment law as it stood at the end of the transition period.[63] Marley Morris explained the significance of this provision in the following terms:

> [T]ypical non-regression clauses are vaguely worded, often simply referring to "labour laws and standards" rather than specific policy areas. The non-regression clause in the Irish protocol, however, specifies particular areas of labour and social policy where there is a high risk of unfair competition. As well as referring broadly to "the area of labour and social protection" (apparently a catch-all requirement to cover areas not otherwise listed), it refers to specific policy areas such as occupational health and safety, fair working conditions and employment standards, information and consultation rights, and restructuring. **While these references do not delineate specific EU directives, they can clearly be traced to relevant areas of EU legislation. By stipulating a number of policy areas directly, the non-regression clause makes it significantly harder for either party to undermine EU-derived rules in these areas.**[64]

Article 4(2) stated that this non-regression clause was not be subject to the arbitration mechanism under Articles 170 to 181 of the Withdrawal Agreement. Under Article 6, the UK was responsible for the effective enforcement of Article 4(1) in its domestic law, including by maintaining an effective system of labour inspections and by providing for effective remedy.

What does the revised Withdrawal Agreement say?

The revised Protocol on Ireland / Northern Ireland no longer contains LPF provisions. The provisions that made up Annex 4 Part 3 of the November 2018 Protocol have been removed.

The UK Government's explanatory note on the new proposals, published on 2 October 2019, stated:

> The previous Protocol contained, in Annex 4, a list of 'level playing field' measures. The amended Protocol represents a significant change to the customs relationship between the EU, Northern Ireland and the UK more broadly. The proposal set out in this note would see regulatory checks applying between Great Britain and Northern Ireland, whilst Northern Ireland and Ireland would be in separate customs territories with customs controls applied to trade in goods between them. There is therefore no need for the extensive level playing field arrangements envisaged in the previous Protocol. Measures regarding open and fair competition are most appropriately discussed in the context of the UK-EU future relationship.[65]

The effect of this change is that, if and when the Protocol on Ireland / Northern Ireland comes into effect, and in the absence of any other

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63 HM Government, *EU Exit: Legal position on the Withdrawal Agreement*, Cm 9747, December 2018, para. 54.

64 European Policy Centre, *Ensuring a post-Brexit level playing field*, May 2019, p. 109.

65 HM Government, *Explanatory Note: UK Proposals for an amended Protocol on Ireland / Northern Ireland*, 2 October 2019, para. 4.

agreement, the UK will not be prohibited from lowering its labour standards below the level set by EU employment law.[66]

In a debate in the House of Commons on 3 October 2019, the Prime Minister was asked about the effect of removing Annex 4 Part 3:

> **Yvette Cooper (Normanton, Pontefract and Castleford) (Lab)**
>
> Will the Prime Minister agree to give evidence on this to the Liaison Committee before the European Council? Will he also confirm that he is proposing to remove the provisions in article 4 of annex 4 to the protocol, in particular the commitment not to reduce fundamental rights at work—occupational health and safety, fair working conditions and employment standards? Will he confirm that, far from increasing workers' rights and the protection of those rights as many Labour Members have urged him to do, he is in fact proposing to reduce that protection and make it easier for Conservative Governments to do what they have always done, and cut workers' rights?
>
> **The Prime Minister**
>
> The right hon. Lady is in error if she thinks that that is our intention. We will be ensuring that this country has the highest standards for workers' rights and for environmental protections. I should be more than happy to meet her to explain what we are going to do.[67]

If the UK is not bound by any international agreement to maintain labour standards at the level set by EU law, the question for how pre-Brexit EU workers' rights are protected is largely a matter for domestic law. While the UK has ratified many of the key ILO conventions, the enforcement mechanisms for these conventions are weaker than those for EU law and the conventions do not generally form the basis for claims before domestic courts.[68]

In March 2019, the May Government published draft clauses on workers' rights to be included in the *Withdrawal Agreement Bill*.[69] The clauses would have done two things:

1 Require a Minister introducing a Bill to consult with representatives of employers and workers and make a statement, before second reading, that either the Bill does not reduce pre-exit EU workers' rights or that such a statement cannot be made but that the government wishes the House to proceed with the Bill regardless;

2 Require the Secretary of State to regularly lay reports before Parliament setting out any newly adopted EU workers' rights and an assessment of whether such rights are already protected in UK law. If the Secretary of State is unable to state that the rights are already protected in UK law, they must make a statement setting

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66 As the text of the main Withdrawal Agreement remains largely unchanged, the UK *will* be continue to be bound by EU law for the duration of the transition period (Article 127, WA).

67 HC Deb 3 October 2019 c1392.

68 See Marley Morris, *A level playing field for workers: the future of employment rights post-Brexit*, IPPR, October 2018, pp. 17-18.

69 Department for Business, Energy and Industrial Strategy, *Protecting and Enhancing Worker Rights after the UK Withdrawal from the European Union*, CP66, 6 March 2019.

> out whether the government intends to take any action. Parliament would then have an opportunity to vote on a motion approving this statement.

At the time they were published, the draft clauses were criticised by trade unions and others, including on the basis that the clauses could be repealed by a future government. Raphael Hogarth, a Research Associate at the Institute of Government, commented on this issue, stating:

> The Government's critics are right to say that neither clause offers a guarantee against a reduction in workers' rights. However, no UK law can be a cast-iron guarantee, as a future Parliament can always undo laws made by its predecessors. The place to look for tougher constraints, if that is the objective, will be the UK's treaties with the EU.[70]

What about the Political Declaration?

The Political Declaration is a non-binding document which sets out the framework for the future relationship agreement between the UK and the EU.

The November 2018 Political Declaration stated that the future relationship agreement would contain provisions on employment standards that builds on the LPF arrangements in the Withdrawal Agreement (i.e. the provisions in Annex 4 of the Protocol).[71] The revised Political Declaration still contains a statement on LPF arrangements. In particular, it states:

> The Parties should in particular […] maintain environmental, social and employment standards at the current high levels provided by the existing common standards. In so doing, they should rely on appropriate and relevant Union and international standards, and include appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement.[72]

It is important to highlight that this provision is a declaration of intent and is non-binding. Should there be a gap between the end of the transition period and the entry into force of the future relationship agreement (during which time the Protocol would be in effect), the UK would not be prohibited, under international law, from lowering its labour standards below the current levels set by EU law.

Taxation

As mentioned above, the whole of Annex 4 to the previous protocol has been removed. This annex contained level playing field measures on taxation including the following obligations:

- The UK and the EU commit themselves to implementing the principles of good governance in the area of taxation, including global standards on transparency and exchange of information,

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70 Raphael Hogarth, *Workers' rights after Brexit: the limits of legislation*, Institute for Government, 7 March 2019.
71 November 2018 Political Declaration, para. 79.
72 Revised Political Declaration, para. 77.

fair taxation and OECD standards against Base Erosion and Profit Shifting (BEPS).

- The UK will continue to apply its domestic law which transposes EU Directives on the exchange of information on taxation (Directive 2011/16), anti-tax avoidance rules (Directive 2016/1164), and country-by-country-reporting by credit institutions and investment firms (Directive 2013/36).
- The UK reaffirms its commitment to curb harmful tax measures as defined in the EU Code of Conduct for business taxation.

All these specific commitments no longer apply, however, as mentioned in the previous section the Political Declaration states that any future trade agreement should include level playing field commitments including adhering to "the principles of good governance in the area of taxation and to the curbing of harmful tax practices".[73]

Environmental Protection

Annex 4 also contained UK-wide commitments to non-regression in the level of common standards of environmental protection applicable to EU standards on environmental protection during the original Protocol/ 'backstop'.

These included areas such as: air quality, industrial emissions, nature and biodiversity, the protection and preservation of the aquatic environment and the marine environment, waste management and climate change.

It also required that the EU and UK respect the following four environmental principles in their respective environmental legislation:

- the precautionary principle;
- the principle that preventive action should be taken;
- the principle that environmental damage should as a priority be rectified at source;
- the "polluter pays" principle.

The UK will maintain dynamic alignment with all EU law, including those on environmental protection during the transition period.

However, there will be no legal obligations post the transition period to uphold such standards as there were in the previous Protocol. Notwithstanding the fact that the Protocol/backstop may never have come into force.

The Political Declaration expresses the commitment to uphold high environmental and climate change standards post-transition.

The UK Government has just introduced a new Environment Bill 2019-20. The Bill contains clauses to establish a set of environmental principles in domestic law and set up an Office for Environmental Protection to monitor, scrutinise and enforce environmental law after the UK has left the European Union.

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[73] Revised Political Declaration, para. 77.

A Commons Library Bill Paper has more detail on what is in the Environment Bill.

Competition

In line with the Government's Explanatory Note of 2 October, the new Withdrawal Agreement does not include the level playing field arrangements made in Annex 4 of the previous protocol. These were:

> **Annex 4, Part 5**, Competition, commits both parties to continuing to take action against anti-competitive business practices such as cartel agreements (**Article 17**), the abuse of a dominant position (**Article 18**), and mergers and takeovers which threaten to substantially reduce competition (**Article 19)**.
>
> Under **Article 23**, the EU and UK also commit to continued cooperation in matters of policy and enforcement between their respective competition authorities. The authorities are the Competition and Markets Authority (CMA) in the UK and the European Commission (EC) in the EU.

In brief, what this means in practice is that any arrangements for co-operation will need to be negotiated as part of the 'future economic relationship' as previously envisaged.

There is however a global consensus that the three practices described in Articles 17 to 19 are anti-competitive and harmful. In a speech about competition after Brexit, Michael Grenfell, Executive Director of Enforcement at the CMA, explained that the fundamental principles of competition law are the same around the world:

> Certainly, there are advantages in businesses being subject to competition laws that do not differ too radically from each other, particularly in the case of businesses that operate multi-nationally. But that is in any way the case – in most respects, competition law imposes the same requirements on businesses across the globe. Whether under the UK or the EU regime, the US or the Australian, the Russian or the South African, it's unlawful for businesses to collude on price, for example, or to engage in bid-rigging when tendering for contracts.[74]

The Commission factsheet on the Protocol said more on the enforcement of competition laws:

> The EU and the UK commit to ensuring that their respective competition laws effectively enforce these agreed rules. More concretely, the UK commits to ensure that administrative and judicial proceedings are available in order to permit the effective and timely action against violations of competition rules, and provide for effective remedies. In case of disputes about whether the UK complies with these commitments, dispute settlement through arbitration is available.

A recent House of Commons Library briefing paper, The UK competition regime, discusses various options for competition arrangements after Brexit.

[74] Michael Grenfell (CMA), A view from the CMA: Brexit and beyond, 16 May 2018.

In general terms, the Competitions and Markets Authority had been planning to remain aligned with EU case law[75], and Section 60 of the *Competition Act 1998* requires UK regulators and courts to follow EU jurisprudence.[76]

4.8 In detail: State Aid

Article 10 (former Article 12) of the revised Withdrawal Agreement states that EU state aid law shall apply to the United Kingdom "in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol."

Under the previous Withdrawal Agreement (Article 12 in combination with Annex 4), the UK as a whole would stay "dynamically aligned" with EU state aid rules. The European Commission would enforce those rules in Northern Ireland. An independent UK state aid authority would be responsible for the enforcement in the rest of the UK. Annex 4 of the previous Protocol set out how the UK as a whole would apply state aid law to its trade with the EU. It also contained extensive consultation arrangements between the UK state aid authorities and the Commission. Those provisions have gone.

It follows from **Article 10** of this Withdrawal Agreement that EU state aid law will only apply to state aid measures affecting trade between Northern Ireland and the EU. However, it is not immediately clear how broadly this provision will work in practice, and how far measures that affect trade may also include UK support to businesses in Great Britain that sell goods in Northern Ireland.[77]

Article 10 retains powers of the European Commission to enforce state aid rules, but only with respect to NI and EU trade. The Commission will keep the UK "fully and regularly informed" of the progress and outcomes of its assessment procedures.

The applicable EU state aid regulations are listed in Annex 5, and cover effectively the whole body of EU state aid rules.

State aid for agriculture

In a provision largely similar to the previous Withdrawal Agreement, **Article 10** (former Article 12) specifies that EU state aid regulations listed in Annex 5 will apply to "measures supporting the production of and trade in agricultural products" in Northern Ireland, where these measures affect trade between Northern Ireland and the EU.

However, Article 10(2) states that state aid rules will not apply until a certain maximum level of aid is reached. The "maximum exempted overall annual level of support" and the minimum percentage shall be set by the Joint Committee according to procedures described in **Annex 6** (former Article 8 Procedures referred to in Article 7(2)) directly after the entry into force of the WA.

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[75] CMA, Speech by Dr Michael Grenfell, UK Competition Law enforcement: the post-Brexit future, 11 June 2019.

[76]

[77] Matthew Holehouse, State aid, competition, environmental obligations feature in UK's revised exit package, Mlex, 18 October 2019

The Joint Committee will set the initial exempted levels with reference to:

- the United Kingdom's future agricultural support scheme,
- the annual average of the total amount of expenditure in Northern Ireland under the current CAP framework and
- the EU's own CAP expenditure levels in compliance with Annex 2 to the WTO Agreement on Agriculture.

Paragraph 3 of Annex 6 determines that if the Joint Committee fails to set the initial level of support by the end of the transition period or within 1 year of the commencement of the new CAP framework, the state aid exemption for agriculture shall be suspended. In that case state aid controls would apply in full.

5. Parts of the Protocol that are unchanged/have minimal changes

Preamble

Preambles do not contain the same binding commitments as the main body of legal texts, but they are important in interpreting the provisions contained within it.[78]

The majority of the Preamble to the Protocol is unchanged. References to the fact that the original 'backstop' was not meant to come into force, and so the Parties were committed to transition negotiations that would preclude it needing to, as well as references to a future relationship built around a 'Single Customs Territory' have been removed.

The other changes reflect the Johnson Government's priorities for the future relationship. There are now references to a need for a 'democratic consent' to ensure 'democratic legitimacy' of the Protocol, as well as three new paragraphs that underline a firm commitment to no 'customs and regulatory checks or controls and related physical infrastructure' at Irish land border; that Northern Ireland is part of the UK's customs territory and will thus benefit from UK trade policy; and that Northern Ireland has an 'integral place' in the UK internal market.

Individual rights

Article 2 (previously Article 4) is unchanged from the previous Protocol. Individual rights as set out in the Belfast/Good Friday Agreement will remain protected in Northern Ireland.

In particular, six EU directives on relating to equality and discrimination including the Race Equality Directive and the Employment Equality Directive, will continue to apply in Northern Ireland in perpetuity. Northern Ireland will not incorporate new EU directives in this area, so there is the potential for some differences in rights to emerge between Northern Ireland and Ireland.

The UK has pledged to uphold the work of Northern Ireland's human rights bodies that were set up under the Belfast/Good Friday Agreement.

Common Travel Area

Article 3 (previously Article 5) remains unchanged from the previous Protocol, apart from some re-wording that appears not to have changed its legal effect.

The Common Travel Area, a series of bi-lateral agreements between Ireland and the UK that allows for passport and visa-free travel for British and Irish citizens between the two territories, will still operate

[78] The Attorney General's legal advice note on the previous Protocol says it "may have some freestanding legal significance". Attorney General's Office, 'Legal effect of the Protocol on Ireland/Northern Ireland', 13 November 2018.

post-Brexit. Ireland will still be under its obligations to facilitate free movement for EU citizens and their families in its territory.

Protection of the UK Internal Market

Article 6 (formerly Article 7) on 'protection of the UK internal market' remains unchanged. It sets out that there will be no restrictions of any kind on goods moving from Northern Ireland to the remainder of the United Kingdom, and that the UK and the EU will use their 'best endeavours' to 'facilitate' trade from Great Britain to Northern Ireland. UK law as a whole can also regulate the sale of products made in Northern Ireland that are placed on the market in Great Britain.

Technical Regulations, Assessments, Registrations, Certificates, Approvals and Authorisations

Article 7 (formerly Article 8) on technical regulations is effectively unchanged from the previous version of the Protocol. It creates a 'UK(NI)' product branding that identifies products from Northern Ireland as being compliant with EU law for the purposes of movement across the border. It stresses that conformity assessments carried out by UK authorities will no longer be recognised in the EU27 after Brexit. It sets up a specific role for the EU to supervise any conformity assessment processes that must be carried out in Northern Ireland (and so by UK authorities in Northern Ireland – in the case of, slaughterhouses, for example). It also precludes the UK from rejecting, for safeguard reasons, any products approved or authorised in an EU Member State from entering the Northern Ireland market.

Single Electricity Market

Article 9 (previously Article 11) relates to the Single Electricity Market (SEM) that operates across the island of Ireland. The same EU regulations and directives on energy trading that applied in the previous Protocol, will apply to Northern Ireland under this Protocol. These regulations are necessary for the continued operation of the SEM.

However, the Government has said that the UK will leave the EU's Internal Energy Market (IEM - with which the SEM is closely aligned in terms of rules and trading platforms) deal or no deal.[79] This is likely to have implications for future energy trading between the UK and Europe. More information on the SEM and IEM is available in the Library briefing paper on Brexit: Energy and Climate Change.

North-South cooperation

Article 11 (formerly Article 13) on North-South cooperation is unchanged. It stresses that the Protocol will be implemented so as to 'maintain the necessary conditions' for North-South cooperation in the areas identified in the 1998 Agreement, and permits the UK and Ireland to make new North-South arrangements to support the 1998 Agreement insofar as they do not conflict with Union law.

The Joint Committee is given a supervisory role in this regard, ensuring that North-South cooperation actually maintains those conditions, and

[79] HM Government No-Deal Readiness Report, October 2019, Page 59

has the power to make recommendations to the Parties if it has concerns about North-South cooperation.

Implementation, application, supervision and enforcement

Article 12 of the Protocol (formerly Article 14), addressing the implementation, application, supervision and enforcement of the Protocol, is largely unchanged. UK authorities are still responsible for implementing and applying the EU law that is required to operate in Northern Ireland under the Protocol, but EU has the rights to effectively supervise the UK authorities where they deem it necessary, under 'working arrangements' specified by the Joint Committee.

The parties have also agreed that there will be ongoing Court of Justice of the European Union (CJEU) jurisdiction over UK actions with regard to EU law in Northern Ireland, that relevant EU law will have the effects it currently has (e.g. direct effect) in Northern Ireland, and that UK qualified lawyers will continue to be recognised for these purposes before all Member State courts and the CJEU, if their qualifications were recognised before Brexit.

Common provisions

Article 13 (formerly Article 15) has removed all references to the 'single customs territory' that was a part of the original Protocol, but otherwise has only been cosmetically changed.

EU law as applicable to Northern Ireland shall be interpreted in conformity with the case law of the CJEU.

Unless explicitly stated otherwise, the EU law that applies in Northern Ireland under the Protocol will do so on a 'rolling basis,' including amendments and changes.

Where the EU adopts a new act that falls within the scope of the Protocol, but does not replace an existing act listed in the Annexes, the UK and the EU will debate that act in the Joint Committee and within six weeks determine on whether they wish to append that act to the Annexes, or otherwise ensure that the Protocol continues to function. Where neither proves possible, after six months, the EU is entitled to take 'remedial measures'.

The UK remains precluded from access to EU networks, databases or information systems after Brexit, unless the operation of the Protocol proves impossible without such access (in full or in part).

UK authorities cannot take the lead in any risk assessment, examination, approval or authorisation processes listed in the Protocol.

When a new future relationship agreement/agreements are negotiated, the EU and the UK will set out, what parts, if any, supersede the Protocol in whole or part. As this new Protocol is more limited in scope and no longer UK-wide, this provision will be less relevant than in the previous Agreement.

Specialised Committee

Article 14 (previously 16) remains the same as the previous Protocol. It sets out the powers and role of the Specialised Committee.

It is one of six specialised committees established by the Withdrawal Agreement. Their remits are set out in Article 165 of the Agreement. They sit below the Joint Committee, but the UK or the EU can refer matters directly to the Committee.

The Specialised Committee comes into being from exit day, in preparation for the Protocol.

Beyond general powers of "facilitating the implementation and application of the Protocol," discussing matters and making recommendations to the Joint Committee, there are two specific roles the Specialised Committee will oversee:

- examine proposals concerning the implementation and application of this Protocol from the North-South Ministerial Council and North-South Implementation bodies set up under the 1998 Agreement;
- As part of the 'dedicated mechanism' referred to in Article 2 on individual rights: "consider any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland."

Article 14 does not, however, give the Specialised Committee any specific enabling powers to enforce any solutions. It will rely on escalating matters to the Joint Committee for action to be taken.

Joint Consultative Working Group

Article 15 (previously 17) sets out the powers and role of the Joint Consultative Working Group and is unchanged from the previous Protocol.

The Working Group is a third tier of governance sitting under the Specialised Committee, which the Working Group will report to, and the Joint Committee.

The Working Group's main function will be as a forum for sharing information and mutual consultation. The Working Group comes into being on exit day, but the provision that it meets "at least once a month" does not come into force until the Protocol is enacted.

The Working Group can make no binding decisions on matters before it; these will have to be escalated to the other Committees.

Safeguard measures

Article 16 (previously Article 18) is unchanged from the previous Protocol.

It sets out that the EU and the UK will be able to apply safeguard measures if the Protocol leads to "serious economic, societal or environmental difficulties that are liable to persist, or to diversion of

trade." The measures must be proportionate to the difficulties occurring.

Financial Interests

Article 17 (previously Article 19) is unchanged. The EU and UK have reiterated their obligations to "counter fraud and any other illegal activities affecting the financial interests of the Union or the financial interests of the United Kingdom."

Further information

More detailed information on these sections of the Protocol is available in our briefing paper on the previous Withdrawal Agreement: CBP 8453 'The UK's EU Withdrawal Agreement' (see Section 9 on the Protocol on Ireland/Northern Ireland).

5.1 Sections that have been removed/deleted

In the previous Withdrawal Agreement, an Annex to the Protocol (Annex 4) contained a series of level-playing field provisions. The implications of this has been discussed in **Section 4.3**.

'Backstop' review mechanism

Article 20 of the previous Protocol has been removed. It contained a review mechanism where either party in the Joint Committee, could state that the Protocol, or parts of it, were no longer necessary and could be removed/disapplied. Both parties would have to agree.

To a large extent these provisions have been superseded by the new consent mechanism contained in the new Article 18 of the Protocol. See **Section 4.7** for more detail on these arrangements.

With the UK as a whole no longer forming a customs union with the EU, the Government no longer has the objection that it would be 'trapped' in such an arrangement with no unilateral exit.

Subsequent agreement

In the previous Protocol there was a separate Article (Article 2) on 'Subsequent Agreement', formed of two parts.

The first part set out that the EU and the UK would use their "best endeavours" to conclude a future relationship agreement by the end of the transition period. This has now been removed; however, this commitment is still made in Article 184 of the main Withdrawal Agreement.

The second part has now been inserted into new **Article 13** on Common Provisions. It sets out that any future relationship agreements made between the EU and UK will set out what parts of the Protocol it supersedes. As the Political Declaration now envisages a relationship built on a free trade agreement rather than one encompassing regulatory and customs alignment, it seems unlikely that these future agreements will supersede much of what is contained in this new Protocol.

Agriculture and environment

In the previous Protocol a separate Article (then Article 10) on Agriculture and Environment mandated that Northern Ireland would remain aligned to a series of EU legislation relating to these areas that was set out in a separate Annex (then Annex 5).

There is no reference in the main text of the new Protocol to such alignment, but it has been put into a new Annex – **Annex 2**, that also contains EU legislation on customs that will apply to Northern Ireland.

It appears, therefore, that the same alignment to single market rules in the areas of agricultural and environmental goods will continue.

The EU directives listed include areas such as: general trade, motor vehicles, gas appliances and pressure vessels, measuring instruments, electrical and radio equipment, medicinal products and medical devices, chemicals (including REACH), pesticides, biocides, waste, environment, energy efficiency, food, GMOs, live animal transport and slaughter, animal disease control, plant health, veterinary checks, marketing of fisheries and aquaculture products, pet travel, trade in wild animals and plants, and fur products.

The Government Explainer for the previous Withdrawal Agreement stated that these are only the rules that are strictly necessary to avoid a hard border and protect North-South cooperation.[80]

The regulations in **Annex 2** mean that Northern Ireland will continue to adhere to EU SPS rules on imports of animals/animal products from non-EU countries that are in place to protect health and limit the spread of diseases. The Government's Explainer on the previous Withdrawal Agreement noted that this means "products of animal origin or live animals moving between Northern Ireland and Ireland will not have to undergo SPS checks and controls".[81]

Northern Ireland is part of the 'single epidemiological unit' of the island of Ireland, geographically separate from Great Britain, so animals/animal products moving from GB into NI are already subject to some SPS checks.[82] However, these checks will need to be scaled up, reflecting the fact that a different regulatory regime would apply in NI from the rest of the UK.[83] See then NI Secretary of State Karen Bradley's November 2018 oral evidence to the Northern Ireland Affairs Committee.[84]

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80 November 2018 HMG Explainer, para 192-3
81 November 2018 HMG Explainer, para 194
82 Department for Agriculture, Environment and Rural Affairs, NI, online guidance on Importing animals and animal products [accessed 20 November 2018.
83 European Commission, Fact Sheet on Irish Protocol, 14 November 2018
84 Northern Ireland Affairs Committee Oral evidence: Work of the Secretary of State for Northern Ireland, 2017-19, HC 498 Wednesday 21 November 2018

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